

The Regime Politics Origins of Class Action Regulation

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This Article highlights that when procedural rules are legislated and there is substantial coordination between the executive and legislative branches, procedures with potential structural impact are weighted against alternative means of policymaking and implementation. This makes many Continental law countries, parliamentary countries, and countries governed by solid national majorities with substantial control over elected branches, and in general places where power is less fragmented, less likely to encourage American-style class actions. This is manifested in legislative choices of a private enforcement regime for class actions, which, when allowed, is designed to be subordinate to or to piggyback on the enforcement of preexisting bureaucracies. The theory is illustrated with the enactment of class actions in Chile, which is a civil law country that has experimented with class actions since 2004.

INTRODUCTION

Except for a few countries like Israel and some provinces of Canada and Australia,¹ privately enforced class actions have not fared well outside the

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1 See Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 THEORETICAL INQUIRIES L. 151 (2018); Catherine Piché, *Class Action Value*, 19 THEORETICAL INQUIRIES L. 261 (2018); Vince Morabito, *The First Twenty-Five Years of Class Actions in Australia (2017)*, GLOBAL CLASS ACTIONS EXCHANGE 22-26 (2017), http://globalclassactions.stanford.edu/sites/default/files/documents/Morabito_Fifth_Report.pdf; see also Stefaan Voet, “Where the Wild Things Are”: Reflections on the State and Future of European Collective Redress, in WAVES IN CONTRACT AND LIABILITY LAW IN THREE DECADES OF IUS COMMUNE 105, 107-09 (2017).

United States, particularly in Continental law countries.² The reason for this has been a fruitful area of exploration for socio-legal scholars for decades. Commonplace claims are that Continental countries reject the idea of the “private attorney general” and that class actions are incompatible with the role of judges in the Continental legal tradition.³ More unswerving claims are that class actions are too adversarial for the legal landscape of Continental law countries,⁴ or a disruptive tool that is more likely to be used by lawyers to blackmail defendants for a profit.⁵ Anecdotal evidence from legislative debates about class actions is generally congruent with these claims. Key features of the so-called American model of class actions like the liberal standing, the opt-out feature, the monopolization power of the class counsel, the enhanced or punitive damages, the contingent fees, the *cy pres* awards, and various settlement arrangements — all of which make the procedure more plaintiff-friendly and potentially more profitable — are constantly removed from transplanted class actions.⁶

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- 2 See DEBORAH R. HENSLER, CHRISTOPHER HODGES & MAGDALENA TULIBACKA, *THE GLOBALIZATION OF CLASS ACTIONS* (2009); Agustín Barroilhet, *Class Actions in Chile*, 18 *LAW & BUS. REV. AM.* 275 (2012); Filippo Valguarnera, *Legal Tradition as an Obstacle: Europe’s Difficult Journey to Class Action*, 10 *GLOBAL JURIST* 1 (2010); Voet, *supra* note 1, at 121-22 (showing the low numbers of class action litigation in different European jurisdictions).
- 3 See Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 *NORTHWEST. J. INT’L L. & BUS.* 301, 310-16 (2007); Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe — A Preliminary Inquiry*, 6 *TEMPLE INT’L COMP. L.J.* 217 (1992); Valguarnera, *supra* note 2, at 18-20; see also JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 35-38 (3d ed. 2007).
- 4 See Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe*, 62 *VANDERBILT L. REV.* 177 (2009); Robert A. Kagan, *Should Europe Worry About Adversarial Legalism?*, 17 *OXFORD J. LEGAL STUD.* 165 (1997); R. Daniel Kelemen, *The Americanisation of European Law? Adversarial Legalism à La Européenne*, 7 *EUR. POL. SCI.* 32 (2008); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 *VANDERBILT L. REV.* 1 (2009).
- 5 Cappalli & Consolo, *supra* note 3, at 290. *But see* Valguarnera, *supra* note 2 (denouncing how prevalent and mistaken this claim is).
- 6 The combination of some of these elements has been characterized by European scholars and the EU as a “toxic cocktail.” See Deborah R. Hensler, Vince Moravito & Stefaan Voet, *Class Actions Across the Atlantic: From Guarded Interest to European Policy* 4 (2017) (unpublished manuscript) (on file with author). For a short survey of European jurisdictions and their differences with the United

But the picture formed by these enduring claims becomes fuzzy when confronted with the nuances of the jurisdictions receiving class actions. There is by now a substantive amount of literature showing that litigiousness increases with changes in the institutional environment and that the United States' legal culture is not exceptionally adversarial.⁷ There is also a growing literature showing that private litigation can be encouraged easily with legislative incentives regardless of the legal system.⁸ Even claims against the idea of a private attorney general, well grounded in the folklore of the Continental tradition,⁹ are unconvincing if the matter is one of principle; *qui tam* and public suits in the hands of private enforcers exist in many Continental countries and their use is widespread, for example, to litigate environmental damage.¹⁰

States, see Jörg Luther, *The Constitutional Impact of Class Actions in European Legal Systems*, in *THE LAW AND ECONOMICS OF CLASS ACTIONS IN EUROPE: LESSONS FROM AMERICA* 306, 309-14 (Jürgen G. Backhaus, Alberto Cassone & Giovanni Ramello eds., 2012).

7 See, e.g., Charles R. Epp, *The Judge over Your Shoulder: Is Adversarial Legalism Exceptionally American?*, 28 *LAW & SOC. INQUIRY* 743, 752-56 (2003); see also Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 *LEWIS & CLARK L. REV.* 637, 679-81 (2013); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 *AM. J. COMP. L.* 709, 736 (2005).

8 See, e.g., SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* (2010); Pamela H. Bucy, *Private Justice*, 76 *S. CAL. L. REV.* 1 (2002); Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 *J. EMPIRICAL LEGAL STUD.* 1 (2009); Sean Farhang & Douglas M. Spencer, *Legislating Incentives for Attorney Representation in Civil Rights Litigation*, 2 *J.L. & CTS.* 241 (2014). For an incentivized litigation that was later legislatively curtailed in Colombia, a civil law country, see Tribunal Constitucional de Colombia, Sentencia C-630/11, Derogación de normas que establecen un incentivo económico para el actor de acciones populares [Repeals the rules that establish an economic incentive for the plaintiff in popular actions], http://www.corteconstitucional.gov.co/relatoria/2011/c-630-11.htm#_ftnref84.

9 See MERRYMAN & PÉREZ-PERDOMO, *supra* note 3, at 80-85.

10 One common type of public actions disseminated with the French Civil Code but existing in *Las Partidas* is the one that gives public standing (*acciones populares*) to protect public infrastructure, roads and bridges. These actions have been expanded to protect the environment. See José Luis Diez Schwerter, *La aplicación de la acción por daño contingente en Chile, Colombia y Ecuador: del modelo de Bello a nuestros días* [*The Application of the Action for Contingent Damage in Chile, Colombia and Ecuador: From Bello's Model to Our Days*], 30 *REVISITA DE DERECHO PRIVADO* [R.D.P.] 257 (2016) (Colom.).

Similar counterexamples can be found to debunk most of the arguments against class actions based on Continental law's dogmatic principles.¹¹ Not even the rejection of for-profit litigation survives scrutiny. Many Continental countries do allow unsophisticated and small-scale for-profit litigation and contingency fees, one of the alleged hallmarks of American adversarialism, are in fact more common than is acknowledged.¹²

So why, then, are class actions blunted in these so-called Continental countries?¹³ Why are class actions in Europe turned into “beautiful cars without engines”?¹⁴ My invitation to the reader of this Article is to refine political intuitions and to use “regime politics analysis of interbranch relations” as an analytical tool to explore potential answers.¹⁵ Specifically, I propose to conceptualize class actions as devices that can work as a “judicial supporting

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- 11 Antonio Gidi, a Brazilian, has devoted tremendous effort to analyzing Continental dogmatic objections to class actions. His conclusion is that there is nothing inherently incompatible between class actions and the Continental tradition and that the problem is political. See Antonio Gidi, *Class Actions in Brazil — A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003); Antonio Gidi, *Notas Críticas Al Anteproyecto De Código Modelo De Procesos Colectivos Del Instituto Iberoamericano De Derecho Procesal* [*Critical Notes to the Ibero-American Model Code*], in LA TUTELA DE LOS DERECHOS DIFUSOS, COLECTIVOS E INDIVIDUALES HOMOGENEOS [THE PROTECTION OF THE DIFFUSE, COLLECTIVE AND INDIVIDUAL-HOMOGENEOUS RIGHTS] 405 (Antonio Gidi & Eduardo Ferrer eds., 2010). I agree with Gidi that class actions are not inherently incompatible with the Continental law tradition but for different reasons. My claim is that they are compatible because legislators in civil law countries are not sophisticated enough to even consider compatibility and will generally approve or remove whatever is convenient. If there is incompatibility between class actions and the Continental tradition it is based on the hierarchal distribution of power that is also prevalent in many of the countries that belong to the Continental legal tradition. See Valguarnera, *supra* note 2.
- 12 See Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 744-47 (2002).
- 13 Nagareda, *supra* note 4, at 9.
- 14 Valguarnera, *supra* note 2 at 42; see also Burbank, Farhang & Kritzer, *supra* note 7, at 641.
- 15 For a similar approach to exploring procedural rules, see Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014). For an explanation of the regime politics approach to analyzing judicial institutions, see Jeb Barnes, *Bringing the Courts Back in: Interbranch Perspectives on the Role of Courts in American Politics and Policy Making*, 10 ANN. REV. POL. SCI. 25 (2007).

structure” for “legal mobilization”¹⁶ and then explore the broader political dynamics determining their legislative design. My objective is to show how regime politics and its insights regarding executive-legislative relations in Continental law countries can be used to explain why legislated class actions are watered down or made subordinate to existing institutional arrangements.¹⁷ My claim is that in Continental countries and in countries where power is less fragmented, it will usually be easier for legislative bodies to create weaker bureaucracies *and* also weaker procedural rules. Class actions might be a prominent example of this trend.

The Article proceeds as following. In Part I, I explain what “regime politics” is and what its strengths are as an analytical tool to explain changes in judicial power. I then argue that procedure is a building block of judicial power that can be fruitfully analyzed using regime politics. After establishing the pertinence of regime politics, I elaborate on the compared institutional background in which procedural rules are discussed in the United States and, in general, in Continental law countries. Then, in Part II, I emphasize that procedural lawmakers in the United States and in Continental countries normally face different choices when designing procedural rules because the latter have the alternative of creating or improving competing structures like executive agencies. To develop the argument, I first elaborate on why courts and agencies are competing agents for policymaking and implementation, go on to focus on the relation of procedural lawmakers with these institutions, and then elaborate how procedural lawmakers decide between the two and, thus, how the institutional setting ultimately affects procedural design.¹⁸

16 CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1st ed. 1998); Charles R. Epp, *The Support Structure as a Necessary Condition for Sustained Judicial Attention to Rights: A Response*, 73 J. POL. 406 (2011).

17 My argument takes Valguarnera’s argument regarding the rejection of class actions in Europe based on typologies created by Mirjam Damaška further into the procedural lawmaking process. See Valguarnera, *supra* note 2, at 3, 21; MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

18 This is not a normative analysis of courts versus agencies typical of the “regulation through litigation” literature, but rather an application of recent American-born theories about the connection between the political competition and political dynamics and the growth in judicial power through the legislative regulation of procedural rules. For prominent collections on the “regulation through litigation,” see W. KIP VISCUSI, *REGULATION THROUGH LITIGATION* (2002); and *REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* (Daniel P. Kessler ed., 2011).

In Part III, I apply the framework developed in the previous sections in order to describe the enactment of Chilean class actions. The history of Chilean class actions shows how the existence of competing structures, mainly executive agencies, influenced procedural lawmakers and determined critical aspects of the Chilean class actions' private enforcement regime. This resembles the outcomes in other Continental law countries in Europe that have strong bureaucracies. I conclude with an invitation to use regime politics and its insights regarding legislative-executive relations to analyze the enactment of class actions in other Continental law jurisdictions and to pay attention to the role that traditional bureaucracies may be playing as stakeholders in class action regulation.

I. REGIME POLITICS AS AN ANALYTICAL TOOL TO EXPLAIN PROCEDURE

A. Regime Politics Explained

“Regime politics analysis of interbranch relations” or “regime politics,” for short, is a theoretical framework developed by political scientists in the United States to explain the historical role of the judiciary, particularly the U.S. Supreme Court, in politics and policymaking.¹⁹ Regime politics works under the assumption that courts can be empowered or disempowered strategically in the struggle for political control. Because courts and their procedural machinery form a structure that can be used to advance political goals and for making and implementing policy — so goes the theory — the design of both

19 See David Adamany & Stephen Meinhold, *Robert Dahl: Democracy, Judicial Review, and the Study of Law and Courts*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 361 (2009); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. PUB. L.* 279 (1957); see also Mark A. Graber, *Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 *MD. L. REV.* 1 (2006); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993). For the use of the term “regime politics” to describe the study of the political struggle over the three branches, see Barnes, *supra* note 15, at 28-37. For an extended review of the literature following Dahl analysis for the United States applied to the comparative analysis of courts, today, see Agustin Barroilhet, *The Political Foundations of Procedural Regulation* (Jan. 2017) (unpublished S.J.D. Dissertation, Georgetown University) (on file with author).

will be subject to political contestation.²⁰ This contestation is what Terry Moe called “the politics of the structural choice” that exists in the background to the design of any coercive structure.²¹ In this struggle, temporary holders of public authority seek to create institutions to organize state power to help them impose their goals on the rest of the society.²² The regime politics analysis of the procedural machinery is, therefore, the exploration of how judicial power is encouraged or discouraged through procedure in the broader competition for institutional control.

To understand the basics of regime politics, understanding its methodological compromises is crucial. Regime politics analysis relies heavily on the separation of powers to contour the “judicial branch” or simply the “courts” and distinguish them from their surrounding institutions. The focus on the branches’ institutional separation is a reassertion of the importance of the structure over government functions as traditionally conceptualized. Political competition over the control of coercive institutions within the executive or judicial branches would not make sense if these could only execute the law and resolve conflicts using the statutes enacted by a sovereign legislative branch. However, the struggle can be fruitful if the legislative and executive branches can govern while maintaining the judiciary as a “mere machine,”²³ if the executive can sidestep a nonfunctioning legislature and “govern with judges,”²⁴ or if the legislative and judicial branches can “[empower] litigants and their attorneys to enforce rules at the expense of the executive”²⁵ or use “courts and private litigants to function as substitutes for a more robust administrative apparatus.”²⁶ The creation of procedure can be studied as part of the struggle to empower

20 See Terry M. Moe, *The Politics of the Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul E. Peterson eds., 1989).

21 See FARHANG, *supra* note 8, at 33-35; see also Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 222 (1990).

22 According to Moe, the “politics of the structural choice” is the one “in which the winners use their temporary hold on public authority to design new structures and impose them on the polity as a whole.” Moe, *supra* note 21, at 222.

23 This was the Jeffersonian ideal and the phrase chosen by Anna Harvey to make the case that courts are deferent to the political branches. See ANNA L. HARVEY, *A MERE MACHINE: THE SUPREME COURT, CONGRESS, AND AMERICAN DEMOCRACY* (2013).

24 ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000) (claiming that in Europe, European courts were performing important roles in advancing the union).

25 FARHANG, *supra* note 8, at 45-46.

26 R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* 20 (2011).

or disempower the judicial branch.²⁷ For example, according to political scientist Sean Farhang, the U.S. Congress is more willing to incentivize private litigation and facilitate access to courts when the government is divided and different parties control the legislative and executive branches. In these cases, Congress seeks to put policies on “auto-pilot” mode, thus allowing enforcement independently of the executive branch.²⁸ The takeaway is that Congress might change procedural rules to provide enough private enforcement to supplant the executive branch’s enforcement.

B. The Structural Impact of Procedural Rules

Doctrinal issues surrounding procedural rules have positively blinded, at least Continental lawyers, to the basic fact that procedure is a way to activate or to trigger an atypical form of state action, but a state action nevertheless: the coercive ruling of a judge. The structural impact of this action, however, depends to a great extent on who designs the procedural rules and what her choices are regarding the litigation machinery that opens courts’ doors.²⁹ Procedural rules matter not only because they can give people “a day in court” or — as in the case of class actions — because they can “take care of the smaller guy.”³⁰ From a structural standpoint, procedural rules determine

27 Regime politics originally tried to reconcile the existence of judicial power with majoritarian politics as manifested in coalitional politics and the control of the legislative power. This was the core of Robert Dahl’s seminal work on regime politics. Dahl, *supra* note 19; see Adamany & Meinhold, *supra* note 19. Collaboration between the judiciary and majoritarian coalitions is a common theme in the regime politics literature since Graber’s groundbreaking article. See Graber, *supra* note 19; Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511 (2002).

28 FARHANG, *supra* note 8, at 20.

29 See Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action* Keynote Address, 162 U. PA. L. REV. 1525, 1525-32 (2013). Other legal or non-purely institutional factors besides procedure that might affect the structural impact of judicial rulings are predominant judicial interpretative theories, but those will not be treated here. For more on this subject, see Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2004).

30 Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES L. 1 (2018) (highlighting how important it was for the members of the Judicial Advisory Committee of 1966 who drafted class actions — what Prof. Benjamin Kaplan called “class actions’ historic mission

how extensive the litigation will be,³¹ how frequent,³² how expensive,³³ how profitable,³⁴ and a long list of other factors that can increase or decrease the chances that plaintiffs will end up inviting judges to make and implement judgments that impact the rest of the society.³⁵

From a structural perspective, procedure can become what Charles Epp calls a “judicial supporting structure” for “legal mobilization,”³⁶ or what Stephen Burbank and Sean Farhang call “the highway for litigation.”³⁷ And because such highways are meant to have structural impact, current power-holders will never be neutral towards their creation or improvement. When deciding about them, current power-holders will see either a missed opportunity to increase their influence or a potential threat to their influence. This is why there is likely to be politics involved in the creation of procedural rules with potential structural impact like class actions, and why it makes sense to use a regime politics perspective to analyze them.³⁸ The United States — a country

of taking care of the smaller guy”); see Marvin E. Frankel, *Amended Rule 23 from a Judge’s Point of View*, 32 ANTITRUST L.J. 295, 299 (1966).

31 See generally Koh, *supra* note 29. In the context of class actions, see Richard A. Nagareda, *1938 All Over Again — Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647 (2010).

32 See Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 119-21 (1974).

33 See also Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1196 (2012).

34 See Farhang & Spencer, *supra* note 8.

35 See Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1324 (2006) (citations omitted):

[M]any of the [Rules of Civil Procedure] either (a) give rise to significant political or ideological controversy; (b) have a significant impact on the enforcement of substantive rights; (c) are intended to affect the substantive reallocation of private societal resources; (d) have a significant impact on private prelitigation behavior; (e) directly impact, if not control, subsequent litigation in other forums; or (f) affect the burdens on, expense of, or delays in the federal courts, thereby impacting citizens well beyond the scope of the individual case.

See also Burbank & Farhang, *supra* note 15, at 1583-84.

36 EPP, *supra* note 16.

37 Burbank & Farhang, *supra* note 15, at 1585.

38 See Barnes, *supra* note 15, at 36-37. For approaches incorporating this political element in the analysis of reforms to civil procedural rules, see Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1442 (2008); and Mauro Cappelletti,

with a strong separation of powers where courts have retained substantive power in procedural rulemaking — provides a great starting point for analyzing how the institutional setting determines the struggle over procedural rules.

C. The Institutional Background to Procedural Rulemaking

The American Revolution “was not expressed as an assault on the existing system of law and courts but as an assertion of the legal and constitutional rights of Englishmen against an overbearing Parliament.”³⁹ Because the courts were not targeted by the Revolution, they retained many of their powers, including control over equity procedure and relative control over common law procedure.⁴⁰ This control was challenged several times during the nineteenth century in attempts to rationalize and uniform the practice of courts, but the attempts never tipped the scale in favor of the legislative branch.⁴¹ Experiments with codes to strip judges of their power to make procedural rules proved ineffective.⁴² In fact, the issue regarding which branch of the federal government had authority to regulate procedure was only settled — to the extent it could be — in 1934 with the approval of the Rules Enabling Act, which gave the bulk of the procedural lawmaking power to the judiciary.⁴³ The act was an empowering statute for the judiciary that established the institutional setting

Social and Political Aspects of Civil Procedure: Reforms and Trends in Western and Eastern Europe, 69 MICH. L. REV. 847, 881-86 (1971). See also Redish & Amuluru, *supra* note 35, at 1315 (“The inescapable implication is that how society structures its system of adjudication inevitably has a substantial impact on the protection of substantive rights and the foundations of substantive social policy.”).

39 Martin M. Shapiro, *The United States*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 43, 43 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

40 See Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1842 (2013); see also Shapiro, *supra* note 39, at 43-44; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 928 (1986).

41 See Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 323 (1988).

42 See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986) (attributing the failure to “judicial sabotage”); see also Subrin, *supra* note 40, at 940-42 (describing the problems with the adoption of the Throop Code).

43 28 U.S.C. §§ 2071-2077 (2006); see Stephen B. Burbank, *Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1115 (1981); see also Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and the*

in which procedure evolved. Both the Federal Rules of Civil Procedure of 1938 that introduced modern class actions and the rules of 1966 that amended them were born under the framework established by the Rules Enabling Act. The normal setting is quite different in Continental law countries.⁴⁴

In post-revolutionary France, the magistrates of the *ancien régime* incarnated much of the arbitrariness of the “executive” monarchy and thus were separated from executive functions and bound to the ideals of the Revolution.⁴⁵ Continental law students might still learn the *fact pleading*, the *res judicata* effects, the *relative effects* of the judgment, the *statute of limitations*, and in general the “rules of justiciability,” as highly technical matters with a reputable Roman origin that mostly concern the parties to the litigation.⁴⁶ But these civil procedural doctrines and the rules and codes in which they were crystalized, were — to a great extent — meant to constrain the reach of the judgment and, thus, the power of judges. The revolutionary choice to use strict procedural rules to achieve the separation of functions between recently separated branches was largely successful because of the antipathy to the institutions of the *ancien régime*. Quite deliberately, procedure was employed as a way to exclude unaccountable judges from political deliberation and subject them to the will of the parties bringing their cases to the courts.⁴⁷

Nowhere does this choice remain clearer than in the principle of *nul ne plaide par procureur* (no action by the prosecutor or no action by proxy). The *nul ne plaide* is a civil law principle that is often cited against the American conception of the “private attorney general.”⁴⁸ It is no exaggeration to say

Procedural Efficacy, 87 GEO. L.J. 887, 950-54 (1998) (describing the problems of the procedure-substance distinction in delimiting judicial rulemaking).

44 See Benjamin Kaplan, *Civil Procedure — Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 429-30 (1960) (proposing to consider the implications of the procedural rulemaking power in the comparison of civil procedural law of different countries).

45 See MERRYMAN & PÉREZ-PERDOMO, *supra* note 3, at 36; see also SERIO GALEOTTI, *THE JUDICIAL CONTROL OF PUBLIC AUTHORITIES IN ENGLAND AND ITALY: A COMPARATIVE STUDY* 75 (1954), cited in Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1285 (1961).

46 See Claudio Palavecino Cáceres, *Sistemas procesales e ideologías* [*Systems of Procedure and Ideology*], 17 DERECHO Y HUMANIDADES [LAW & HUMAN.] 13 (2011) (Chile).

47 See Carlo Guarnieri, *Courts and Marginalized Groups: Perspectives from Continental Europe*, 5 INT’L J. CONST. L. 187, 188-89 (2007); see also Valguarnera, *supra* note 2, at 20 n.69.

48 See Diego Corapi, *Class Actions*, in GENERAL REPORTS OF THE XVIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW/RAPPORTS GÉNÉRAUX DU

that principles such as the *nul ne plaide* sought to reinforce the separation of functions between incipient executive and judicial branches.⁴⁹ Underlying such principles was a pre-democratic structural choice to relegate judges to a minor role in politics and policymaking in favor of a supreme legislative branch and its meritocratic bureaucracy. The historical contingency put the power to make procedure in the hands of the legislative branch and in the codes where it has remained since. The history and the influence of the codes was similar in most of Europe and Latin America, where emerging states adopted codes and received the influence and institutions born in the French Revolution.⁵⁰

II. CONTEMPORARY POLITICS OF PROCEDURAL LAWMAKING⁵¹

One issue that comparative commentators usually overlook when comparing American procedural rules to those of Continental countries is the startling difference between how these are normally drafted and approved. As explained above, the core of the procedural lawmaking power in the United States is allocated to the judiciary and this is, indeed, exceptional.⁵² When the American judicial branch designs or reforms its procedural rules, including devices such as the class action, it designs the structures that litigants and judges are going to use to support, compete against, or supplant other power structures that those involved in the process cannot directly control.⁵³ In this setting, judicial

XVIIIÈME CONGRÈS DE L'ACADÉMIE INTERNATIONALE DE DROIT COMPARÉ 191, 192-93 (Karen B. Brown & David V. Snyder eds., 2012), http://link.springer.com/chapter/10.1007/978-94-007-2354-2_9. Corapi's view well reflects assessments over Continental law standing described by Burbank, Farhang & Kritzer, *supra* note 7, at 639 (citing Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 940 (1985)).

49 See MERRYMAN & PÉREZ-PERDOMO, *supra* note 3, at 37.

50 Strikingly, the organizational power of codified procedure proved so effective and convenient in limiting judicial discretion that even the monarchies of the nineteenth century adopted it. See Guarnieri, *supra* note 47, at 187-90; see also Valguarnera *supra* note 2, at 18-20.

51 This Part relies heavily on my doctoral dissertation. See Barroilhet, *supra* note 19.

52 For a general description of procedural lawmaking in Europe and additional sources, see Els Vandensande, *Some Initial Steps Towards a European Debate on Procedural Rulemaking*, in PROCEDURAL SCIENCE AT THE CROSSROADS OF DIFFERENT GENERATIONS 49 (2015).

53 Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHIC. L.J. 369 (2012) (describing how class actions can be used to supplant, help or act

procedural lawmakers may consider the positive and negative externalities that changes in procedural rules are likely to bring about, but they have no immediate incentives to incorporate them in the procedural design. If they are true to their mission, they can rest content if they believe they have done everything at hand regarding procedural rules to “secure the just, speedy, and inexpensive determination of every action.”⁵⁴

On the contrary, when legislative bodies of Continental countries design procedural rules, they create structures with the potential to support, compete against, or supplant other structures over which they exert, formally or informally, substantial control. In the latter countries, the debate about procedural rules is conducted effectively at a higher power-level in which there are more institutional options and more spaces to plan state coercion to avoid undoing with one hand what the other is doing. There, legislative bodies will first choose between different agents for policymaking and implementation in ways that are consistent with the current distribution of power or — on a more naïve view — consistent with the *ex ante* public deliberation, and then design the procedural rules that are congruent with the choice. This means that procedural rules that foreseeably alter, for example, the intensity of private litigation will not necessarily seek the more just or more efficient resolution of conflicts in general, but rather the desired level of private enforcement that is congruent with the whole institutional design.⁵⁵ Put differently, the fact that Continental countries’ legislators have other coercive institutions at hand when they choose procedural rules with potential structural impact makes a world of difference in the politics of the structural choice that procedural rulemaking is likely to involve.

against state authority); *see also* Samuel Issacharoff, *Collective Action and Class Action*, in *THE CLASS ACTION EFFECT: FROM THE LEGISLATOR’S IMAGINATION TO TODAY’S USES AND PRACTICES* (Catherine Piché ed., forthcoming 2018).

54 FED. R. CIV. P. 1.

55 Using slightly different wording, Valguarnera claims that

although all Europeans would agree that enforcement is important, its efficiency is not perceived as something essential for the very existence and development of the legal system. For the same reason, the European legal systems find it hard to consider the judicial process as an arena where crucial social and political issues are debated. If the law, as most Europeans believe, is essentially a product of the legislator, there seems to be no reason to improve public participation in civil litigation.

Valguarnera, *supra* note 2, at 28.

A. Choosing Between Two Competing Agents for Delegating Policymaking and Implementation

Fifty years ago, political scientist Martin Shapiro theorized that courts and agencies could be used for governing and as “alternative and parallel structures for the administration of government programs.”⁵⁶ His portrayal is useful with respect to describing scenarios in which stable political coalitions or a single statute-maker dominates the regime. In these cases, which George Tsebelis called regimes with “single veto players,”⁵⁷ those controlling the regime can easily internalize all the factors in the design of institutions, using their control over the basic statute. This permanent control over the basic statute allows them to maintain administrative legality without providing institutions — judicial or otherwise — with full independence and the full protection of the law.⁵⁸

In his masterful comparative assessment of the politics of the structural choice, Terry Moe advanced the political theory of why single veto players are amenable to choosing bureaucratic solutions. In *Political Institutions: The Neglected Side of the Story*, Moe reflected that precisely because the struggle for control happens at a structural level, the United States, with its separation-of-powers system, would have a hard time creating bureaucracies. The problem of United States’ bureaucracies, Moe argued, is that they need to be constructed to be powerful enough to resist challenges from competing institutions. Conversely, Moe advanced, parliamentary systems, where power is less fragmented, would have an easier time creating bureaucracies, but these would be weaker relative to parliament and other competing institutions. This happens for two reasons: the impossibility of isolating institutions from future dominant parties or coalitions, and the legislative control over the appointment of executive seats, which facilitates informal control over the structures

56 Barroilhet, *supra* note 19, at 72 (citing MARTIN M. SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* 44, 51 (1968)).

57 Tsebelis’s “single veto players” will tend to create less independent bureaucracies or less independent judiciaries, whether controlled informally by political power or formally by detailed procedures, while systems with “multiple veto players” will tend to give bureaucracies and courts a lot of leeway, in order to insulate them from change. See George Tsebelis, *Veto Players and Institutional Analysis*, 13 *GOVERNANCE* 441, 466-67 (2000).

58 This would be the case, for example, of Ramseyer’s modern Japan. See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. LEGAL STUD.* 721 (1994); see also J. Mark Ramseyer & Eric Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 *AM. POL. SCI. REV.* 331 (2001).

created.⁵⁹ Confirming Shapiro's claim, Moe asserted that these easier-to-create bureaucracies would always be at the mercy of the statute-maker.⁶⁰

Following the invitation extended by Sean Farhang to investigate the link between the creation of bureaucratic structures and the legislative instrumental use of private litigation from a comparative perspective, I argue that Moe's rationale for the creation of bureaucratic structures also applies to the judicial structures and, therefore, to the design of procedural rules.⁶¹ My claim is that in Continental law countries and in countries where power is less fragmented, it will usually be easier for legislative bodies to create weaker bureaucracies *and* also weaker procedural rules.⁶² Procedural rules need to be weak to avoid unwittingly displacing the easier-to-create but relatively weaker bureaucracies with independent courts fueled by private litigation. This structural choice is consistent with the more hierarchical distribution of power that Continental law regimes have historically developed.⁶³

59 Moe, *supra* note 21.

60 *Id.* at 248 ("In a parliamentary system, authority is concentrated in the majority party, and it is *so easy* to make law that the law itself *cannot be relied upon* for protection: most of the action surrounds informal and extralegal means of building desirable institutions."); *see also* FARHANG, *supra* note 8, at 56 (reflecting on Moe's assertion).

61 I take Farhang's invitation to be this:

If the evidence bears out these claims about the institutional foundations of private enforcement regimes, it will suggest that the institutional explanations for modest administrative state capacity in the United States, and for the unusually large role of private litigation in public policy implementation, are one and the same. That is, it will suggest that limited administrative state capacity on the one hand, and extensive private litigation in policy implementation on the other, are indeed linked outcomes of the same institutional causes and processes. This would provide potentially fruitful comparative institutional lessons for understanding the role of private litigation, and its relationship to bureaucratic forms of regulatory implementation, in different national regulatory systems.

FARHANG, *supra* note 8, at 58.

62 *See* Barroilhet, *supra* note 19, at 29.

63 This is the core premise of Valguarnera, *supra* note 2. *But cf.* Christopher Hodges, *Consumer Redress: Implementing the Vision*, in THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE RESOLUTION 351, 365-67 (2016) (claiming that the creation of ADR and other bureaucratically-controlled mechanisms of consumer dispute resolution are the result of the less adversarial culture dominating in Europe).

B. Procedural Drafters' Vantage Point

As noted above, the U.S. Congress does not normally draft the federal rules of civil procedure. In practice, most of the rules come from suggestions made by a reporter designated by the Chief Justice. This reporter delivers his report to the Judicial Conference's Committee on Rules of Practice and Procedure, whose six members, the "Band of Experts,"⁶⁴ are also designated by the Chief Justice. After deliberating on the proposed rules, the Committee reports them to the Judicial Conference, which in turn hands its suggestions to the Supreme Court, which can deny, modify or accept them as they are.⁶⁵ If the Supreme Court approves the rules, it reports them to Congress, which can exercise a legislative veto or do nothing, in which case the rules get enacted automatically after a certain period. This is the current procedure built around the short and general provisions of the Rules Enabling Act of 1934.⁶⁶

This is not the place for an extensive analysis of the dynamics generated in this very unique process for approving the federal rules of civil procedure. But two critical points bear emphasis to highlight the contrast with the process in Continental countries. First, the U.S. Congress might appear to actively approve procedural rules like other countries' legislative bodies, but it in fact say nothing about them at all unable to coordinate a response to stop them.⁶⁷ Indeed, deference to the proposed rules was the norm for the first thirty-five years since the enactment of the Rules Enabling Act. Second, in the United States, the rules go through many veto players that have different levels of

64 Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. STATE U. L. REV. 103, 112 (2007).

65 The Committee not only has judges and professors, but also includes practitioners. Each committee also relies heavily on the services of its "reporter." The reporters are prominent law professors, who are the leading experts in their respective fields. Each has been appointed by the Chief Justice. The reporters research the relevant law and draft memoranda analyzing suggested rule changes, develop proposed drafts of rules for committee consideration, review and summarize public comments on proposed amendments, and generate the committee notes and other materials documenting the rules committees' work. For a description of the process and members, see *Committee Membership Selection*, U.S. CTS., <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> (last visited June 1, 2017).

66 For a detailed description of how this process occurs and its historical modifications, see Bone, *supra* note 43 at 892-97; see also Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1104-09 (2002).

67 See, for example, the failures of the Republican Congress in the Reagan era in litigation reform, in Burbank & Farhang, *supra* note 15, at 1564-67.

collective action problems that are reflected in different transactional costs. This ultimately gives substantive power over the outcome to those at the beginning of the process: reporter, committee, conference, and the Supreme Court.⁶⁸

To see how this setting might affect the design of procedural rules, the focus should be on these privileged interveners at the beginning of the procedural rulemaking process. An academic or judge, or a practitioner in the Committee, or one of the judges in the Conference, has no power to decide whether to create an agency, or to decide who gets appointed to agencies, or to decide how to allocate budget to public agencies. In general, they have no saying in the creation of state coercive institutions or institutions with structural impact. Yet these procedural lawmakers can bolster procedure — their own judicial supporting structure — if they have a preference for the judiciary and the bar as the institutional solution for whatever ills they see fit. In fact, there is a truism here. Any reform that improves procedure and broadens the highway for litigation is an invitation to use the highway and abandon other roads.⁶⁹ The chance to be able to open courts' doors through the design of procedural rules was the essence of the “power grab” by the judiciary in the Rules Enabling Act.⁷⁰

Unlike in the United States, legislators, parliamentarians and congressmen in Continental countries *do* have at least a fraction of the power to create other structures, and if the government is parliamentary, or semi-presidential, also a fraction of the power to decide who sits in the executive agencies. So, though they might have been removed from the original drafting of procedural rules

68 Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167 (1978). For the refined game of theoretical reasons and its application to real-life cases, see Paul J. Stancil, *Close Enough for Government: The Committee Rulemaking Game*, 96 VA. L. REV. 69 (2010). See also Laurens Walker, *Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 464 (1992) (describing how the discretion of these inferior players has been slightly curtailed after several reforms).

69 In different ways, Charles Clark, Taft, Kaplan, and others provide a good example of this structural preference for the judiciary. For Clark and Taft, see Subrin, *supra* note 40, at 966-69. For Kaplan, see Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 684 n.34 (1997). See also Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem*, 92 HARV. L. REV. 664, 677 (1978).

70 See Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 513 (1996).

— basically proposals for new rules can come from anybody with access to legislators — their choice to create or change procedures will be conditioned to a more basic structural choice. This choice, which the U.S. Congress also faces when creating any regulatory regime, is whether to create an agency with enforcement powers or suffice with “passing laws and allowing the courts to oversee their enforcement.”⁷¹ The choice between courts or agencies is the choice that Continental law countries’ legislative branches always face when deciding about procedural rules that have a foreseeable structural impact.

C. Single Veto Players’ Structural Preference for Bureaucratic Solutions

In contrast to the U.S. case — in which political fragmentation plays an important role in determining whether Congress vetoes procedural rules proposed by the judiciary, or whether it decides to empower the judiciary sometimes at the expense of the executive⁷² — in places where power is less fragmented, there are fewer incentives to empower courts through procedural rules or put policies on autopilot mode. This happens for several reasons that can be easily understood using intuitions as to what is at stake in the legislative delegation.

For a start, courts are less responsive than bureaucracies to legislative commands. They are also slow to respond. They get to be consistent on ambiguous issues and achieve horizontal consistency over lengthy periods of time.⁷³ Also, the judiciary is hard to steer politically because it “is a they, not an it.”⁷⁴ Courts are also less responsive to budget allocations. In the United States, litigious policies are an alternative for implementing statutory policies without spending taxpayers’ dollars.⁷⁵ From a regime politics perspective as regards the struggle over coercive institutions, delegating policymaking and implementation to courts implies a more definitive delegation, which

71 See FARHANG, *supra* note 8; Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 35 (1982); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

72 FARHANG, *supra* note 8, at 19-20.

73 Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005).

74 Vermeule, *supra* note 29, at 559-63.

75 According to Thomas Burke, one of the reasons for the creation of litigious policies in the United States is the cost-shifting incentive that avoids the costs of the bureaucratic solutions. See THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 15-16 (2002).

is undesirable for single veto players following a power-retaining strategy.⁷⁶ Encouraging private litigation by opening the courts' doors or paving the highway for litigation is something that those holding cohesive authority will not be inclined to do without compelling reasons.⁷⁷

As compared to courts, the easier-to-create but weaker bureaucracies present obvious advantages for delegating policymaking and implementation in Continental law countries. Weberian bureaucracies should be, comparatively, more hierarchical and thus more responsive to statutes in a uniform way, and, in general, easier to control, formally or informally. Bureaucracies should also be more responsive to budget allocations, to the power of the purse, which can work as a failsafe mechanism when the statutory delegation was sloppy. Even more, almost all failures in institutional design can be solved in the short term by giving the command of the new institutions to the person with the right political alliances.⁷⁸ Such informal control is easier to exert over officers than over judges and private litigants. And where there is no need or no point to insulate institutions from other power holders, all of this should be achieved relatively easily.⁷⁹ Above all, the delegation to the bureaucracy does not imply a definitive delegation and should be, under normal political conditions, the desired structural choice for a parliament, a governing coalition,

76 See generally David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014) (describing how private enforcement presses the boundaries of the law in ways public enforcement would not).

77 Prominent reasons are to arbitrate disputes among parties or factions within the governing coalition or to introduce price-discrimination in the implementation of policies for which there is not enough consensus to establish a monolithic bureaucracy. For a literature review on the political explanations of judicial empowerment from a comparative perspective, see Barroilhet, *supra* note 19, at 54-65.

78 Besides, and this needs to be studied further, the practice of designing institutions with "governments in opposition" might be a well-established practice in parliamentary democracies that also gives the opposition a saying in the control over executive seats. See David Fontana, *Government in Opposition*, 119 YALE L.J. 548 (2009); Moe, *supra* note 21, at 247.

79 Note that the framework of administrative legality that characterizes European bureaucracies is not meant to protect these from other institutions. They are not performing law's "insulating" role that Moe describes because in parliamentary countries that is not feasible. Moe, *supra* note 21, at 241; see FARHANG, *supra* note 8, at 56.

a one-party system, or any single veto player, following what Mirjan Damaška early characterized as the “the hierarchical ideal.”⁸⁰

III. THE REGIME POLITICS ORIGINS OF CLASS ACTION REGULATION

It is, of course, a gross simplification to say that with the right procedural tools and incentives for private enforcers, agencies can be fully replaced with courts for every regulatory purpose or policy under the sun and that contingent politics will drive, therefore, the design of both kinds of institutions. This view flattens a myriad of arrangements in which institutional dependencies (e.g., on a higher court or a ministry) intertwine and in which adjudicative and executive functions are mixed to check each other at different levels. The discrete choice also ignores the degree of separation between the branches that regime politics analysis tends to flatten to contextualize political competition. But the basic point I’ve made so far in this Article stressing the importance of political competition, the institutional separation and institutional dependencies in the design of procedural rules stands: courts fueled by private litigation and Weberian bureaucracies can be used to advance government programs and to adjudicate disputes, and in cases like the class action, the potential overlap between both can be substantial. This Part explains this potential overlap to provide background to the choice that Continental law countries’ legislators face when they choose whether to create an agency or enact devices such as the class action. The remainder of this Part applies this framework to explaining the main features of Chilean class actions with references to similar developments abroad.

A. The Class Action and the Administrative State

In their famous article *The Contemporary Function of the Class Suit*,⁸¹ Harry Kalven and Maurice Rosenfield foresaw class actions as developing into a

80 MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 18-23 (1986); *see also* Valguarnera, *supra* note 2, at 18-19 (using Damaška’s framework to explain the relation of procedure and state authority); Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 283-87 (2002) (same).

81 Harry Kalven & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1940); *see also* Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603 (2008).

competing method to the “action of an administrative commission” in order to “[afford] group redress.”⁸² More than sixty years afterwards Richard Nagareda revalidated the statement, asking further whether class actions could operate in parallel to the administrative state without “supplanting the institutional boundaries on regulatory power.”⁸³

From the perspective of those designing class actions in Continental law countries, the potential supplantation of traditional centralized regulatory power, which concerned Nagareda in the United States, is a real concern. Creating highways for private litigation can have substantial impact on agencies’ regulatory goals and the potential overlap goes further than just providing for collective redress, as Kalven and Rosenfield envisioned and those proposing regulatory redress in Europe are willing to recognize.⁸⁴ A telecommunications agency that cannot allow cellphone carriers to adjust their prices unilaterally because they risk a class action cannot press the latter to increase coverage to remote locations at the expense of wealthy users in the city; a banking agency has fewer spaces to engage in regulatory dialogs with banks if the latter can be sued in a class action for altering provisions in consumers’ contracts; a housing agency that oversees the construction of social housing has less space to overlook some defects in the construction for the sake of constructing more houses if the matter can be subsequently litigated on a class-wide basis; the adoption of renewable energy technologies may be slower if there is uncertainty about the ownership of the one-way electricity meters and the matter can be disputed in a class action; the regulation of food labeling might draw greater resistance if food companies can be afterwards sued collectively for misstatements, and so forth.⁸⁵ And these are benevolent examples. It is easy to imagine hundreds of examples in which an administrative rule would not survive against a broadly defined but contradicting legal standard of higher legal hierarchy in a courtroom. The existence of effective

82 Kalyen & Rosenfield, *supra* note 81, at 715.

83 Nagareda, *supra* note 81, at 604.

84 One of the problems of limiting the question of whether public or private enforcement is better for collective redress, typically consumer redress, is that it not only ignores the fact that private enforcers will press for interpretative pathways that are different and more aggressive than those of public enforcers, Freeman Engstrom, *supra* note 76, but also the fact that enforcement with systemic impact will also thwart any regulatory balance that might have been set before private enforcement is introduced.

85 I owe many of these examples to my students in the course *Comparative Class Actions*, University of Chile Law School, 2017, jointly taught with Professor Tzankova of the University of Tilburg and Professor Catherine Piché of the University of Montreal.

class actions in the hands of private enforcers would definitively change what agencies can bargain for and what they can aspire to in their rulemaking and adjudication processes.

B. The Regime Politics of a Legislated Class Action

The Chilean class actions provide a great example of how the politics of the structural choice influences the design of procedural rules, and how the preference for bureaucratic solutions over the Chilean judiciary has left them “without the necessary agents of implementation.”⁸⁶ Class actions’ private enforcement regime in Chile was weakened and agencies’ role enhanced in ways that cannot be readily attributed to doctrinal purity or outright capture. The outcome fits the political dynamics I have described well.

Before I begin, some brief notions about the political background. Chile is a middle-income country with a strong version of separation of powers. The president and members of Congress are elected in separate elections by popular vote. However, a divided government has been infrequent. The country was dominated from 1990 to 2010 by a coalition of left and center-left parties, called *Concertación de Partidos por la Democracia* (Alliance of Parties for Democracy), which democratically defeated Pinochet. Though *Concertación* lost the presidency in 2010 and we had a divided government between 2010 and 2014, a new center-left coalition arose in 2014 under the name *Nueva Mayoría*. Both *Concertación* and *Nueva Mayoría* governed with the executive and legislative branches. All the Presidents supported by *Concertación* invariably ruled with prominent party members in the cabinet, much like a parliamentary democracy in Europe would. The only difference is that in Chile there is no strong civil service, so Presidents maintain a good balance of power between the parties of the coalition by designating second- and third-tier bureaucrats as well. This formula provided good coordination between the executive and legislative branches and formed a functional national coalition with internal divisions but substantive control over statute-making and absolute control over the designation of executive seats.⁸⁷

86 Issacharoff & Miller, *supra* note 4, at 181. This Section follows closely my previous works on the topic of Chilean class actions. See Barroilhet, *supra* note 2.

87 The control of the statute was not absolute because of the entrenchment laws that Pinochet left behind and *Concertación* accepted at the beginning of its rule. This acceptance is recognized as one of the most important factors in the successful transition to democracy.

The Chilean class actions bill was drafted by the *Servicio Nacional del Consumidor* (National Consumer Agency) (SERNAC) between the years 2000 and 2002. The project was allegedly based on the experience of the agency in litigating in the consumer area.⁸⁸ The agency won from Congress standing to join individual cases in which the “general interest” was at stake in 1997, but Congress had denied it any rulemaking or adjudicative powers. According to SERNAC, in a country with no binding precedent, litigating the same petty cases over and over again was never going to achieve deterrence. The amounts involved in individual consumer cases were simply too low to discourage industry-wide abusive practices. Class actions, thus, were SERNAC’s attempt to circumvent its lack of traditional regulatory tools.

SERNAC’s class action proposal, like that of the Brazilians in 1995, decoupled the declaration of liability from the determination of damages.⁸⁹ Using American jargon, Chilean class actions were designed as “one-way preclusive issue class actions.”⁹⁰ The envisioned procedure started with a declaratory stage, which sought to establish the liability of the defendant with *erga omnes* effects but with no assessment of the damages and no preclusion if plaintiffs lose. The class procedure ended with a compensatory stage, which could be collective or individual, and in which each affected consumer needed to come forward to obtain redress using the declaration of liability as the basis for his or her claims.⁹¹ Key features of the original design were that SERNAC would have standing, and also consumer associations formed six months prior to the filing, fifty or more consumers litigating together, and any executive agency or administrative entity that dealt with consumer issues.⁹² Other important features of SERNAC’s design were that the compensatory stage would be opt-in; and, somewhat contradicting the latter, that the judge could consider class representative’s proposals for cy pres solutions in cases in which members failed to come forward.

From the outset, the debate in Congress indicated that Kalven and Rosenfield, as well as Nagareda, were on point regarding the potential problems of the

88 See Agustin Barroilhet, *Class Actions in Chile: Update (2015)*, at 1, GLOBAL CLASS ACTIONS EXCHANGE (2015), <http://globalclassactions.stanford.edu/sites/default/files/documents/CHILE.pdf>.

89 Laurel Harbour and Mark Shelley call this the “Declaratory Judgment Model.” See Laurel J. Harbour & Mark E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World*, PRAC. LITIGATOR, July 2007, at 23, 30. France adopted a “declaratory judgment” model very similar to the Chilean one in 2014. See Voet, *supra* note 1, at 110.

90 Barroilhet, *supra* note 88, at 4; see also Gidi, *supra* note 11, at 333.

91 See Barroilhet, *supra* note 2; Barroilhet, *supra* note 88, at 4.

92 See Barroilhet, *supra* note 2, at 282.

contemporary function of class actions.⁹³ The transcripts of the floor debates in the Chamber of Deputies disclose several interventions in which the concern was the judicial encroachment on executive functions and the strict separation between the public and private spheres.⁹⁴ Beyond the rhetoric, the transcripts show that class actions underwent severe changes, many of them with little or no deliberation and discussion, which favored administrative agencies and/or disfavored potential private litigants, in obvious ways. I focus on three of the most salient of these changes.⁹⁵

First, Congress introduced a third stage to the class actions bill called admissibility.⁹⁶ Admissibility was allegedly the functional equivalent to the American class certification, but was completely at odds with SERNAC's proposal. The decoupled model sought to ease the pleading in the declaratory stage by removing the need to demand a specific amount of damages in the class complaint and to ease the proof of liability in the compensatory stage, thus avoiding having to produce evidence of liability in each case. Both were

93 The very starting point of the debate is telling as regards what was believed to be at stake in class actions. Transcripts of the hearings about class actions show that alongside SERNAC, consumer associations and prominent members of trade unions, which were the most obvious stakeholders, also active were the Undersecretary of the Telecommunications Agency, with his staff and lawyers, and Superintendents of various industries, like the ones regulating private health insurance and pensions. See Biblioteca del Congreso Nacional de Chile, Historia de la Ley No. 19955, Modifica la ley No. 19496, Sobre la protección de los Derechos de los Consumidores [History of the Law No. 199555, Which Modifies Law No. 19496, About the Protection of Consumer's Rights] 48-50 (Chile), <https://www.leychile.cl/Navegar?idNorma=61438> (last visited Jan. 9, 2018).

94 One of the most enlightening of these is the one by Deputy Cardemil, from one of the conservative parties:

[Allowing consumer associations to represent collective and diffuse interests of consumers] implies confounding wrongfully and inconveniently public and private spheres In my view this is unconstitutional. Our Constitution is clear. In the public sphere the law is supreme, [statutes] . . . create institutions

[Judgments with erga omnes effects] impinges on what is, according to my view, an institutional foundation and an ancient common understanding of our relation as Chileans: it gives the characteristics of a statute to a judgment.

Biblioteca del Congreso Nacional, *supra* note 93, at 156 (translated by the author).

95 For a more detailed account, see Barroilhet, *supra* note 88, at 3.

96 See *id.* at 66; Barroilhet, *supra* note 2, at 279.

substantive advantages to circumvent the rigidity of the pleading system and the limitations on the *res judicata* in Continental law systems, which, as mentioned above, historically have kept judicial power at bay.⁹⁷ Yet the admissibility introduced by Congress pointed in the opposite direction by requiring judges at the outset to make findings, among other things, on whether the class action was a necessary and efficient way to solve the case at hand. The structural choice involved was evident in the “compared-to-what?” Instead of opting for something like the superiority requirement of the American certification in a class action for damages, Congress used admissibility to open the door to competing administrative solutions. Specifically, Congress required judges to assess whether “the number of potentially affected consumers justified, in terms of costs and benefits, the economic or procedural necessity to process the claims using the [class action device] for consumers’ rights to be effectively protected.”⁹⁸ This requirement opened the door to administrative redress that could be offered, if necessary, as a swifter and cheaper alternative to class actions. Notably, two of the agencies that most feared class action litigation elaborated their own competing procedures for consumer redress before class actions were approved. Invariably, defendants invoked the existence of these procedures as a defense against class action lawsuits.⁹⁹

The second procedural change that reflected the politics of the structural choice and the preference for bureaucratic solutions was with regard to

97 SERNAC’s reason for separating the determination of liability from the determination of damages was to circumvent the rigidity of the Continental law’s pleading standards for actions for damages. These standards — designed to “frame the conflict” and to limit the jurisdiction of judges two centuries ago — could defeat class actions at the outset, for example, for failing to demand the exact number of affected consumers and the value of their claims. The *erga omnes* declaration of liability also eased the compensatory stage, as the law requires some previous declaration of liability that needs to be established between the two contending parties before awarding damages. There has been little elaboration of how the rigidity of the Continental law’s pleading standards determines some choices regarding class actions. Some exceptions are Gidi, *supra* note 11, at 386, 400; and Garry Watson & P. Lindblom, *Complex Litigation — A Comparative Perspective*, 12 CIV. JUST. Q. 33 (1993).

98 Law No. 19955 art. 52(d), July 14, 2004, DIARIO OFICIAL [D.O.] (Chile) (translated by the author). This requirement anticipated that the conflict would delay cases substantially because it also forced plaintiffs to show damages at the outset. This frustrated the purpose of separating the declaratory stage from the compensatory stage, and delayed cases 2.7 years on average before they entered the declaratory stage. See Barroilhet, *supra* note 88, at 3-6.

99 See Barroilhet, *supra* note 2, at 283-84 n.26.

standing.¹⁰⁰ SERNAC's original drafting gave standing to every agency or public entity. With this phrasing, SERNAC hoped to avoid a backlash and rejection by other agencies or public entities controlled by different parties of *Concertación*. Many deputies in the Chamber agreed that SERNAC could overlap with other agencies' policymaking and enforcement, and thus agreed that each public entity needed to have standing to claim first right to sue when the issue at stake fell within their turf. But the agencies themselves didn't want the standing, particularly if it was to be shared with SERNAC and private enforcers. In a world of no discovery, having standing could imply for agencies less collaboration from those regulated, for example, in passing relevant information. It could also imply costly enforcement and more adversarial relations in aspects unrelated to consumers' interest. Having the power and not using it was also a political liability. Above all, the heightened pressure to bring class-action lawsuits could imply fewer chances of balancing different policy goals, as the abovementioned examples show.¹⁰¹ For many agencies that already had regulatory and adjudication powers, class-action standing implied less discretion and no extra regulatory bargaining power.¹⁰² Therefore, with their acquiescence, a committee in the Senate removed class-action standing for agencies and public entities, leaving SERNAC, the generalist agency with no regulatory or adjudication powers, consumer associations and fifty or more consumers jointly litigating, as the only entities with standing.¹⁰³

100 In the field of class actions, most of the debate on these lines is conducted in terms of the normative convenience of public enforcement versus private enforcement. *See, e.g.*, Voet, *supra* note 2, at 128-29; *see also* Wouter P.J. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, 26 *WORLD COMPETITION* 473 (2003); Wouter P.J. Wils, *The Relationship Between Public Antitrust Enforcement and Private Actions for Damages*, 32 *WORLD COMPETITION* 3 (2009). The problem of this normative approach is that it fails to grasp the politics of the structural choice that at that level should be substantial.

101 *See supra* text accompanying note 85.

102 *See* Deborah R. Hensler, *Can Private Class Actions Enforce Regulation? Do They? Should They?*, in *COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS* 238, 265-66 (Francesca Bignami & David Zaring eds., 2016) (exploring the relation of private class actions to public enforcement and noting that, according to responsive regulation theorists, private enforcers may push for harsher and costlier responses from public enforcers than necessary).

103 *See* Biblioteca del Congreso Nacional, *supra* note 93, at 319; *see also* Barroilhet, *supra* note 2, at 282 n.18, 286 n.35 (elaborating on the several parts of the class action debate). SERNAC's potential invasion of other agencies' turf was partially addressed by limiting class actions' transubstantive nature and by providing that the procedure would not be applicable to areas in which any mechanism

The third and most definitive instance of the structural choice regarding class actions' private enforcement regime was the removal of the moral damages from class actions' scope. Continental law's "moral damages" are roughly the functional equivalent of pain and suffering damages.¹⁰⁴ Courts in Chile and in many other Continental law countries routinely use "moral damages" to punish defendants in individual cases, particularly recurrent defendants.¹⁰⁵ In the case of consumers' litigation, moral damages were the alternative to the exiguous fines of the Chilean consumer protection act. More importantly, they were also the way to enlarge the contingent fees of consumers' attorneys. However, aggregated moral damages could be substantial and Congress couldn't risk this strong incentive for private enforcers in the class action procedure. Even if judges were effective gatekeepers of private enforcement, something that was not expected, moral damages would imply giving private enforcers substantive power to press defendants to settle. Certainly, the mere existence of moral damages would have made administrative alternatives, per se, inferior because these could never adjudicate moral damages.¹⁰⁶ Definitively, the ability to claim moral damages would have made SERNAC considerably more powerful than what other agencies and *Concertación* party members in Congress were willing to allow. Thus, again with no discussion and this time with the collusion of the same SERNAC, moral damages, one of the most important remedies for consumer protection and one of the most important incentives for consumers' attorneys, were removed from class actions in Senate committee.¹⁰⁷

for collective redress existed. See Law No. 19955 art. 2 (bis), Julio 14, 2004, DIARIO OFICIAL [D.O.] (Chile).

104 Moral damages (*daños morales*) are a judicial construction based on a provision of the Chilean Civil Code that says: "Every damage that arises from a negligent or tortious behavior from a third party must be compensated by the latter." CÓDIGO CIVIL (Civil Code) art. 2329 (Chile). Even though the category is comprehensive and includes all damages that are nonpecuniary, for the purposes of this study they can be considered "'mental anguish,' 'mental suffering,' 'humiliation' or 'emotional distress.'" Saul Litvinoff, *Moral Damages*, 38 LA. L. REV. 1, 37 (1977); see also ENRIQUE BARROS, TRATADO DE RESPONSABILIDAD EXTRA CONTRACTUAL [TREATISE ON EXTRA-CONTRACTUAL LIABILITY] 287 (2006); Barroilhet, *supra* note 2, at 278 n.3.

105 See BARROS, *supra* note 104, at 310; Barroilhet, *supra* note 2, at 287-88.

106 The determination of moral damages is one of the few undisputed issues in which judicial judges are not replaceable by agencies.

107 See Biblioteca del Congreso Nacional, *supra* note 93, at 263. It is worth noticing that SERNAC seemed satisfied with this solution, as it facilitated Congress's willingness to grant the agency standing and because the agency was not impacted

The inclusion of the admissibility stage with its efficiency requirement, the restriction of standing and the ban of moral damages were structural choices that effectively preserved the regulatory turf of Chilean executive agencies from private class-action litigation. The procedure's first seven years of existence reflect this in two visible ways. Private litigants tried mostly unsuccessfully to litigate against regulated industries that SERNAC was not prosecuting, and SERNAC, lacking deterrent tools but litigating on a public budget, brought the great majority of cases, not infrequently settling them for coupons.¹⁰⁸

I don't want to overstate that every single feature of the class action was the result of political struggles based on class actions' potential power to disrupt legislative-executive relations and the balance of power between agencies of government. Many of the choices without obvious impact on the potential private enforcement were the result of attempts to adjust the device to the Chilean legal system. In fact, my case might not look too compelling to a Continentally-trained professor of civil procedure determined to discover doctrinal reasons unrelated to the politics, to explain each of the changes I have described. For example, restricting standing helps to avoid conflicts of interest with the agencies and to preserve some vague notion of the public interest, and "moral damages" are damages to moral persons or individuals, which cannot possibly be assessed accurately on an aggregate basis.¹⁰⁹ Some of these arguments appear in the congressional floor debates. Yet, to these objectors I would say that they put too much faith in Congress's willingness to take such subtleties into account and discount too easily the role of existing bureaucracies in shaping the device. I base my case on developments that happened after class actions were approved.

In 2010, Chile was hit by a major earthquake that prompted Congress to approve the class actions for the damages caused by faulty construction and buildings.¹¹⁰ These class actions, by direct reference, use the consumer class actions' procedure but with some modifications, among them one that expressly declares: "The compensations [that can be pursued with this procedure] can encompass the loss of profits and the moral damages."¹¹¹ Unlike

by the lack of moral damages in its litigation financing. See Barroilhet, *supra* note 2, at 306-07.

108 See Barroilhet, *supra* note 2, at 304-12, 322.

109 Not all Chilean class actions are opt-in in the compensatory stage. In the particular case in which the defendant can identify the consumers, the court can skip the compensatory stage and order direct redress. This would happen in most of the fees cases, which are by far the most common ones. See Barroilhet, *supra* note 88, at 6-8.

110 See Law No. 20443, Noviembre 23, 2010, DIARIO OFICIAL [D.O.] (Chile).

111 *Id.* unique art. B(4).

the class actions of 2004, the class actions for damages caused by defective construction were approved under a divided government after *Concertación* lost its control of the executive. This could be a confirmation that Farhang's theory about the regime politics origins of private enforcement regimes indeed has comparative repercussions.¹¹² The class actions for damages caused by faulty construction and buildings show an honest Congressional intention to mobilize private enforcers at a time when an ideologically distant executive was busy with public reconstruction.

Then, in 2011, after seven years of unsuccessful litigation, still under a divided government, Congress decided to eliminate the admissibility stage from the consumer class actions, removing the requirement that opened the door to competing administrative procedures.¹¹³ By then it was clear that class actions had no bite and many of these administrative procedures were successfully processing claims. However, the reform stopped short of removing the limitations on "moral damages" or adding the fines that SERNAC, then controlled by the executive and a minority in Congress, proposed. The fear then was that any kind of enhanced damages would empower SERNAC over other existing agencies.

The final development supporting my thesis came about while this Article was being written. In 2014, the parties that formed *Concertación* were able to regain control of the executive under *Nueva Mayoría*. *Nueva Mayoría* is less cohesive than *Concertación* but has a more ambitious battery of reforms, among them the reform of SERNAC and of class actions. The project, sent to Congress in 2014, was approved on October 24, 2017.¹¹⁴ The project originally included several powers for SERNAC that would have put the agency in comparable position to that of the nordic ombudsmans. Many of them, however, were found unconstitutional by the Chilean Constitutional Court in January 2018.¹¹⁵

The reform, after the intervention of the Constitutional Court that removed some of SERNAC stongest powers, reinstates "moral damages" as a valid collective remedy and now the collective compensatory judgment needs to include at least an estimation of the damages of absent members.¹¹⁶ So does

112 See *supra* note 61.

113 See Law No. 20543 unique art. 2, Octubre 11, 2011, DIARIO OFICIAL [D.O.] (Chile).

114 Boletín N° 9369-03, 239, Biblioteca del Congreso Nacional (2017), https://www.camara.cl/pley/pley_detalle.aspx?prmID=9783&prmBoletin=9369-03 (Chile).

115 See Press Release, Chilean Constitutional Court Ruling 4012-17 (Jan. 18, 2018), <http://www.tribunalconstitucional.cl/wp-content/uploads/Comunicado-de-prensa.pdf>.

116 See Boletín N° 9369-03, 239.

any settlement if it is to be approved by a judge to bind absent members. The law also provides for a *cy pres* solution for funds not claimed from the compensatory judgment or the settlement after two years; remaining funds have to be deposited in a public fund to finance consumer associations. On a more technical matter, the new procedure reduces the chances of clashes between enforcers, as it prohibits lawyers from coming on board with a single client and disputing the control of the case to the class counsel. This will certainly reduce clashes between individual private and public enforcers, as has happened in the past.¹¹⁷

From a removed perspective, all the recent changes to class actions in Chile should be great news for private enforcers, as they address some of the problems observed in these twelve years of class-action litigation. Foreseeably, however, they will not be as good as they initially seem. Although the Constitutional Court removed some of the most important powers of SERNAC to mediate claims as Congress expected, the reform strengthens SERNAC's strategic position as the gatekeeper of private enforcement and also increases its power to confront defendants and obtain regulatory redress.¹¹⁸ The agency now also has a more privileged position to detect systemic abuses because it will have hundreds of public servants handling individual consumer claims.

The Chilean example regulating class actions shows in visible ways how existing agencies in the Chilean government and their relation to Congress determined many features of the class action device, among others the admissibility stage, the extent of its transubstantive character, limitations regarding the standing to sue, the remedies available, etc. — all factors that impacted on class actions' private enforcement rates. All these changes were possible because of the closeness between the executive and legislative branches and Congress's substantive control over the relevant agencies. For a foreign scholar looking at the latest reform to Chilean class actions, it would be hard to discern whether the main goal of the reform was to improve the class action device or to enhance SERNAC's powers.

117 See Agustin Barroilhet, *Self-Interested Gatekeeping? Clashes Between Public and Private Enforcers in Two Chilean Class Actions*, in *CLASS ACTIONS IN CONTEXT* 362, 362-86 (Deborah R. Hensler, Christopher Hodges & Ianika Tzankova eds., 2016).

118 SERNAC has already shown itself inclined to reassert its power over private enforcers. *Id.*

CONCLUSION

In this Article, I invite comparative scholars to approach the study of class actions using regime politics. For comparative scholars, regime politics has the advantage that it facilitates a contextual approach to judicial power that can help to refine ideas about how political competition changes the distribution of power between branches of the government. Concretely, regime politics can help to explain several institutions related to the judiciary that increase or decrease judicial power. As applied to class actions in Continental countries, regime politics can help to explain why their design is subject to what Terry Moe called “the politics of the structural choice.” Accepted that class actions can be subject to such political struggle, it follows that the perspective of the one making the structural choice will matter and that other structures within her reach will matter, too. This is the path I have followed in this Article to explore the relation between administrative agencies and class actions’ shape.

Granted, this approach might be difficult for Continental law procedural scholars that reject the instrumental use of the judicial apparatus. Nonetheless, I stand behind the suggestion to explore the origins of procedural rules with systemic impact such as class actions with an eye to the political context in which they arise. This is more promising than explaining them using vague references to legal culture or to hierarchical systems of authority without explaining how the authority is distributed within state institutions.¹¹⁹ Regime politics is promising because it shifts the focus from the rules to their expected impact, and therefore is likely to be more accurate in explaining how conscious decision-makers approach the issue of deciding over procedural rules with structural impact.

Though to the best of my knowledge, nobody has ever written about procedural lawmaking in the Continental tradition in these terms, the regulation of the structural impact of private litigation through procedural rules is innate to many Continental law legislators and an important tool used in balancing all the “ifs” involved in the structural choice between courts or agencies. Moreover, many of the legislators, particularly those standing in committees in charge of drafting procedural rules, are aware of the potential structural impact associated with different civil law doctrines and become cynical about

119 This choice might be reinforced by the bureaucrats themselves, who might act as an interest group in debates about procedural rules. Though not treated in this Article, the size of the bureaucracy in many European countries might play a role here too. Some bureaucracies have turned into relevant stakeholders in the design of procedural rules that can put them on the spot or overlap with their regular mission.

them, incorporating them in private enforcement's regulatory technique. Having procedural lawmaking power forces them to engage over and over again in the dilemma the U.S. Congress faced when creating the Interstate Commerce Commission: should we create an agency or expand the power of an existing one, perhaps using the new seat to forge new alliances; or should we put this policy in "autopilot enforcement"¹²⁰ and use a "radically decentralized intervention by an army of litigants and lawyers licensed by the state and paid bounty by defendants at the state's command"¹²¹

As I hope to have demonstrated in my brief account of the Chilean case, the politics of the structural choice were present in the design of class actions in 2004. In Chile, the influence of a political coalition with substantive control over the executive and legislative branches weakened class actions in order to favor administrative solutions and to avoid potential disruptions in the distribution of power between the institutions it controlled. The result was a weak procedure that failed to mobilize private enforcers and expanded the reach of state intervention through its consumer protection agency in a controlled way.

120 See FARHANG, *supra* note 8, at 5.

121 *Id.* at 214.