# Introduction

Litigation? Is it the most effective response to the sometimes malignant behaviours of corporations, governments, and other large institutions? Or is litigation itself a cancer spreading through, and even beyond, the body politic? Is it an even battleground where David has a reasonable chance of defeating Goliath (Jacobson and White 2004)? Or is it more like the Roman Coliseum where the lion nearly always wins (Galanter 1974)? Is it an effective method for redressing injustices, punishing wrongdoers, and regulating in the public interest (Banzhaf 2004)? Or are attempts to create social and political change through the courts merely pursuing a "hollow hope" (Rosenberg 1991)? On the one hand, we are reminded of small heroes battling behemoth corporations – chemical technician Karen Silkwood (Rashke 2000), paralegal Erin Brockovich (Grant 2002), and attorney Jan Schlichtmann taking on Kerr-McGee, Pacific Gas and Electric, and W.R. Grace and Beatrice Foods, respectively (Harr 1996). While, on the other hand, we shake our heads in dismay over smokers, junk food addicts, and little old ladies who are ignorant to the fact that coffee is, after all, *supposed* to be hot, frustrated as they tie up courts and corporations in endless silly lawsuits.[1] In any event, this public face of litigation – the entertainment – offers a very mixed message.

This book is about the politics of lawsuits – a form of politics that has become more sophisticated and hard-fought over time, as opportunities have developed enabling plaintiffs to attack large powerful entities, attempting to hold them accountable for their increasingly far-reaching actions. To construct a meaningful court-centred strategy requires an institutional context that not only accommodates such an approach but also holds promising impact potential. Procedural rules set the parameters for action and are exploitable by those with sufficient resources (an important prerequisite) on either side of any issue. Although some have been rendered far less accommodating in recent years, the US rules allowing litigation to proceed with flexible structures for setting attorney fees have long met with criticism as making the system too available and encouraging entrepreneurial lawyering.

Comparable rules in the United Kingdom, Australia, and Canada have been considered by some critics as being historically too restrictive, although they are evolving in a more accommodating direction. Moreover, judicial authority in the governing regime is a critical component of the litigation context. The US courts were constitutionally designed as a "co-equal" branch of government. One can certainly argue about the true political significance of their decisions, but they have enjoyed a long tenure as acknowledged centres of constitutional authority with the ability to exercise judicial review and to engage significant policy issues. Such elevation of judicial authority is of more recent vintage in other systems. Yet, as constitutional changes have been enacted, we have witnessed the enhanced profiles of their courts. Indeed, charges of excessive "activism" were lodged against the Supreme Court of Canada after the 1982 *Canadian Charter of Rights and Freedoms,* and a similar scenario played out in Australia after 1986 constitutional reforms gave the High Court more independence (see, for example, Dickson 2007).[2] No doubt, the Supreme Court of the United Kingdom will face like challenges when the new justices take to the bench for the first time in 2009 and begin deciding cases.[3]

Among the most challenging cases, for a variety of reasons that we will explore shortly, are those that aggregate claims of similarly situated parties. Such lawsuits may be instigated by one or a few aggrieved individuals such as, for example, Karen Silkwood's father. With increasing frequency, however, the plaintiffs are large groups or whole classes of individuals such as the residents of Hinkley, California, who were made famous by the film *Erin Brockovich* (2000) or the folks of Woburn, Massachusetts, who were immortalized in *A Civil Action* (Harr 1996). Nor is this simply an American phenomenon. Rolah Ann McCabe met an early death at the age of fifty-one after a lifetime of smoking but not before setting off a virtual windstorm after winning the first Australian tort action against the tobacco industry in 2002. In the intervening years, the headlines have only become bigger, as the McCabe case has moved in fits and starts through the judicial hierarchy. Continued by her surviving family members, it has reverberated with revelations of the intentional destruction of internal documents, which have been confirmed by a tobacco company whistle-blower, and has since moved into class action territory. What is more, the defendants – whether tobacco companies, food giants, or pharmaceutical concerns, to name a few – have seized on (and frequently created) their own institutional opportunities.

We begin with the premise that litigation is both a legal and a political enterprise. In form, of course, it is legal – an activity orchestrated by lawyers, administered by judges, and situated in courthouses. In strategy and outcome, it is frequently quite political – campaigns are conducted, pressure is utilized, and wealth is redistributed. Thus, when carried out on a huge scale, all of the potential benefits and liabilities of both law and politics loom very

large indeed. With this in mind, we focus on several separate, but related, issues. As a legal venture, litigation was designed to address individual claims brought one at a time and judged on the unique facts of a singular human disagreement. The mass tort utterly alters this simple configuration. Hundreds – even thousands – of complaints are conflated, with one individual's story representing all of the others. And justice, rather than being discretely applied to one, is formulaically distributed among many. As an implement of law then, mass litigation stands as a trade-off between traditional notions of individual due process and more recent drives toward group rights.

The emphasis on groups in turn impels litigation increasingly toward the political. Every political regime produces winners and losers. This is as true of litigation politics as it is of legislative wrangling. Thus, we would expect certain resource and structural advantages to accrue to larger, wealthier, more experienced entities with influence in other political realms. Of course, in order to make politics more advantageous, process participants are always well advised to seek allies. Groups thus coalesce to influence legislatures more effectively. With the global expansion of judicial authority, even in traditionally strong parliamentary systems, we would expect the same to occur in the litigation universe, with like-minded litigators sharing costs and resources. As Ran Hirschl (2004, 1) has observed, "[a]round the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries ... An adversarial American-style rights discourse has become a dominant form of political discourse" (also see, for example, Tate and Vallinder 1995; Dickson 2007; Russell and O'Brien 2001).

Finally, we expect (or at least hope) that a political system will produce effective policy, particularly, as the subject matter of this book suggests, regulatory policy. However, such a result is not always the case. Even legislatures, the traditional front-line lawmaking bodies in a republic, sometimes produce bone-headed policies and, not infrequently, due to gridlock or a simple lack of political will, no policy at all. Regulatory bodies, too, can be "captured" by the subjects of regulation, acting more as client agents than as watchdogs. Hence, we consider the effectiveness of collective litigation as a tool for political change, particularly for regulatory change.

## A Definitional Digression

Though not exclusively, this book is primarily concerned with large-scale litigation – litigation encompassing many like claims (Hensler 2001, 181). More particularly, we focus on mass torts, a form of large-scale litigation involving personal injury or property damage and "arising out of product use or exposure" (*ibid.,* 182). Because such torts have a way of becoming unwieldy, several devices or forms may be utilized to make them manageable.

In the United States, for example, they may be consolidated under the aegis of a single federal district court for pretrial proceedings in order "to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary" (Judicial Panel on Multi-District Litigation 2005). Known as multi-district litigations, such mass tort consolidations are generally remanded to their original districts for individualized consideration following the close of pretrial activities.[4] Analogues at the state level include formal consolidation and informal aggregation. In the United Kingdom, aggregation of similar claims, regardless of the usual jurisdictional boundaries, is accomplished with the issuance of a group litigation order. In Canada, cases from disparate venues can be combined as a national class action, and, in Australia, the Federal Court Rules allow judges to consolidate claims within a single jurisdiction that present similar issues.

Perhaps the most well-known and controversial means of managing large-scale litigation is the class action, a form of consolidation in which one individual, or a small group of individuals, sues on behalf of a much larger number of people.[5] Thereafter, all members of the class are bound by the outcome of the litigation, whether at trial or in settlement (Hensler 2001, 182).[6] Such suits, which are far-reaching now, are likely to become even more extensive as the judicialization of politics and economic globalization continue apace. Mattel's recent massive recall of toys made in China with dangerous magnets and coated with lead paint, for example, did not confine itself to worried American parents. Of the 436,000 ill-painted and recalled Sarge cars alone, 186,000 were sitting on store shelves, or being played with in homes, outside the United States. The even larger recall of Polly Pockets, Barbies, and other popular toys containing tiny magnets, included 1.9 million sold in the United Kingdom alone (British Broadcasting Corporation 2007). It does not require great imagination to conjure up notions of litigation on a very broad scale.[7]

Indeed, nowhere is the globalization of risk and retribution more evident than in the rapid rise and fall of Vioxx. In 1998, pharmaceutical giant Merck asked the Food and Drug Administration to approve a new, superior painkiller, one touted as causing fewer stomach problems than existing palliative treatments. Accepting Merck's safety studies, the health watchdog agency approved the drug the following year. Subsequent analyses soon began exhibiting a disturbing link between Vioxx and heart attacks and strokes, some of which were omitted from a report published in the *New England Journal of Medicine,* which later complained of being "hoodwinked" by Merck. Meanwhile, evidence of the problems kept mounting (the journal *Lancet* estimated that 88,000 Americans suffered heart attacks after taking Vioxx, 38,000 of whom died), forcing Merck to recall the drug in 2004 (Prakash and Valentine 2008). The response in the United States was swift and predictable.

The plaintiffs' bar began advertising "on the Internet, the subway, the television, and on city buses encouraging people to join in a class action lawsuit if they had ever taken Vioxx" (Melnick 2008, 762), individuals sued (see, for example, *Merck v. Ernst* 2008),[8] classes formed,[9] and large numbers of cases were consolidated and transferred under a multi-district jurisdiction (*In re: Vioxx Marketing, Sales Practices and Products Liability Litigation* 2007).[10]

Like other "miracle" drugs, however, Vioxx had not merely been marketed in America. By 2005, it had reached a worldwide market estimated at around twenty million users (Deer 2005)! And, with this exposure, came a flurry of litigation. Thus, within days of Merck's decision to withdraw Vioxx from the market, at least ten class actions were filed in four Canadian provinces and in Canada's federal court (Kondro 2004, 1335).[11] In the United Kingdom, a number of law firms recruited clients to bring a claims in England under the country's *Consumer Protection Act* (The Lawyer.com 2005).[12] Other British firms took their cases to US courts, hoping for bigger pay-offs.[13] In Australia, law firms quickly geared up to find clients, some touting alignment "with well-known and leading U.K and American vioxx lawyers" (Vioxx Lawyer Australia 2005). Obviously, the litigation world is getting smaller and smaller.

## Litigation as Law and Politics

### As Law: Individual Fairness Considerations

As we alluded to briefly at the outset, litigation is first and foremost the centrepiece of the legal system. And, in advanced democracies, the centrepiece of litigation is fairness to the individual. This relationship may be expressed in terms of "due process" as the American, British, and Australian systems do or of "fundamental justice" as in the Canadian system, but, at the very least and however expressed, it stands for basic procedural rights that an individual may expect upon engaging the adjudicative process. The word "individual" is key here, and, indeed, both the US Constitution and the *Canadian Bill of Rights,* for example, speak directly to principles of fairness *individually* administered, and it is also constitutionally implied in Australia.[14] In the United Kingdom, the concept was written into law by a 1368 act of Parliament.[15] Thus, in the traditional model of litigation, an individual argues his case in court with the expectation that a set of facts, distinctive to him, will be fully heard and impartially considered by the court.

Recent comparative judicial scholarship has observed a general movement in democratic systems toward enhanced constitutionalism and judicial empowerment. In Hirschl's (2004, 2) assessment, the motion "reflects these polities' genuine commitment to entrenched, self-binding protection of basic rights and civil liberties in an attempt to safeguard vulnerable groups

and individuals from the potential tyranny of political majorities." In many cases, this commitment has involved constitutional revision and formal recognition of something like a bill of rights, often accompanied by reform legislation intended to enhance "access to justice" (also see, for example, Tate and Vallinder 1995; Dickson 2007; Russell and O'Brien 2001; Stone Sweet 2000).[16]

It is the essence of mass litigation – the class action, in particular – however, to meld the individual story with that of many others – often many highly disparate others and often where insistence on the individual case model would leave many entirely without recourse. These issues, as succeeding chapters will reveal, have frequently plagued jurists who are appropriately sensitive to individual rights, derailing many potential class actions in the process.[17] Of course, as we explain subsequently, of the many arguments in favour of mass litigation, political expediency is among the most prominent. Mass torts bring the power of collective action to bear against large institutional entities with the resources to crush individual opponents. Thus, what the individual loses in terms of her singular day in court is presumably ameliorated by her newfound muscle. This is the spirit of group politics.

**As Politics**

Politics may be many things, but, in the end, it all boils down to a struggle for power. And, of course, litigation works in the same way – it is the quintessential fight well fought. The two – politics and litigation – both involve competition, which is often over very high stakes. And, in both politics and litigation, there are bound to be winners and losers. Legal scholar Lon Fuller (1978, 364) once said that "the distinguishing characteristic of [law] lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor ... The results that emerge from adjudication are subject ... to a standard of rationality that is different from that imposed on the results of a [political] exchange." Of course, Fuller was speaking of the end result of litigation – the judicial decision.

Litigation, however, is far more than adjudication. The law governs private relationships, designating sets of officially recognized rights and obligations. To possess a right is more desirable and advantageous than to possess an obligation. For this reason, law is a highly conflictual commodity, and courts are the public arenas in which the conflict can be played out. If one feels wronged by another party, it is his or her decision whether to seek redress. The civil suit is only one option on a varied menu of strategies for doing so. A court is one among an array of points of popular access to government. The division of governmental labour, in terms of dealing with personal and

social conflicts and related demands, is a hazy one. Most public agencies are targets for such demands, particularly in the event of serious conflict where the debate is carried from one arena to the next with no true settlement emerging from any. Thus, the more frequently litigation is used as a problem-solving or demand-making instrument, the more openly politicized the courts become. Indeed, much litigation actually represents demand for definition of the current meaning of public policies, calling for remedies such as a reaffirmation or change of community norms, cessation or performance of some government or private activity, redistribution of values and resources, recognition of rights and obligations, or adjustment in established balances of power between competing interests. Litigation is thus inevitably a political exercise, requiring each party to marshal available resources and to manipulate the legal system in order to create strategic advantages and to protect a set of interests *vis-à-vis* the opposition.

The more frequently that courts are involved in problem solving and judges respond with reasoned decisions to such scenarios, the more they will become embroiled in the process of governing and rule making, which is functionally not terribly dissimilar from legislating. This is a role that is familiar to the one played by US judges, but one that their colleagues in most other systems are only recently developing. As Robert Kagan (2001) observes, this scenario augurs well for decentralizing authority and ongoing challenges and opens the door to "adversarial legalism." Moreover, Alec Stone Sweet (2000, 3) theorizes that "the continuous settlement of disputes by a third party dispute resolver will construct, and then manage over time, specific causal linkages between the strategic behavior of individuals and the development of rule systems." Mastery of the rules translates into advantage, and, thus, those with the means to do so will always construct strategies to utilize the process to their benefit (for example, Galanter 1974).

Notwithstanding the soundness of the phrase "the personal is political," group politics inevitably has more force than individual endeavours. Clearly, this is true of legislative and executive politics.[18] And we anticipate the same in the judicial arena. Most probably, Oliver Brown and his young daughter Linda could not have successfully sued the Topeka, Kansas, school district without the strategic and organizational resources of the National Association for the Advancement of Colored People. Indeed, even before *Brown v. Board of Education* (1954), which refers to interest group litigation during the 1940s and 1950s, Justice Jackson asserted that "[t]his is government by lawsuit ... – the stuff of power politics in America" (Jackson 1941, 287).

**Winners and Losers**

Politics produces winners and losers. As the history of the many early cases brought by individual smokers against the tobacco industry suggest, we

would expect this outcome to be magnified within the judicial system (for example, *Cipollone v. Liggett Group* 1992; *Hodgson v. Imperial Tobacco Ltd.* 1998). Where legislative politics can include compromise and conciliation as well as blunting or masking the benefits and liabilities, full-blown litigation looks more like a zero-sum game. Under the adversarial model of justice, any given trial will result in one winner, one loser, and no one in between. Of course, this scenario, though paradigmatic, is a rarity: "The vast majority of all tort cases are disposed through some form of settlement, with only 3 percent of all tort matters resulting in a jury trial" (National Center for State Courts 2004). Thus, as with legislative politics, we would anticipate compromise of some sort in most litigation politics.

The question then becomes "does litigation produce a different configuration of winners and losers than legislative politics?" As E.E. Schattschneider (1960, 34-35) points out in his commentary on pluralism some four decades ago, "[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent." Thus, part of the damning critique of the so-called legislative pressure system is characterized by the old saw that "money talks." Such classic means of political influence peddling, however, are considered unethical – even illegal – when applied to the judiciary. The rules of the judicial process simply prohibit such direct encounters between lobbyists and judges. Thus, if interest groups want to influence the outcomes of legal disputes, they have to find alternative routes of "lobbying" – routes that correspond to the norms of the judiciary. Presumably, these are much more difficult – at least, the rules are far more rigid.

Common wisdom would suggest that these tactics are especially difficult for the most powerful of interests. Hence, those with enormous influence over the overtly political branches of government, political mythology would have it, lose some of their advantages in the courts of law. After all, the mid-century litigation successes of African American interests and the Warren Court era decisions favouring defendants and other disadvantaged groups have fed the notion that courts are particularly amenable to minority interests and unpopular groups. The decision *Mabo v. Queensland (No. 2)* (1992, 42) by the High Court of Australia, which followed a decade of litigation, spoke to different, but similar, political-legal dynamics, finally acknowledging Aboriginal land rights after more than a century of denial (also see Russell 2005). Speaking for the court, Justice Brennan stated firmly that, despite precedent to the contrary, "[a] common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."[19]

Moreover, the media, which devote few resources to covering appellate decision making, tend to focus on the occasional high profile, constitutional case. Such cases frequently involve facially non-economic interests such as

those involving race, censorship, and abortion. Alternatively, the media would suggest that, groups aside, courts are the places where the little guy can win – and win big – in government. The "McDonald's coffee lady," winner of a supposedly huge amount of money from the burger giant is, today, an American household term.[20] Court statistics, however, tell a very different story. If we look overall at groups in the United States that sponsor litigation – excluding government – we find that commercial interests dominate pressure group activity, at least in the Supreme Court of the United States. In fact, commercial interests sponsor more litigation than all other interests combined (Epstein 1991, 354). Moreover, statistical examinations of *amicus* participants – again, excluding government – similarly suggest commercial domination *(ibid.)*. Thus, the same interests that dominate the pressure system in the legislative and executive branches also dominate the judicial system (see, for example, Rosen 2008).

In fact, quite aside from litigation sponsorship and *amici* participation, one might argue that the powerful tend to "come out ahead" not only in such overtly political fora as the legislature and executive but also in the supposedly apolitical judiciary. This is precisely what Marc Galanter (1974) argues in his classic treatise "Why the 'Haves' Come Out Ahead." Of course, collective litigation, involving hundreds or thousands of "little guys" ("one shotters" in Galanter's terminology) might be expected to even the playing field. Mobilized and united, these plaintiffs might appear to assume the advantages of larger, more powerful entities (Galanter's "repeat players"). However, according to Galanter (1999, 56), this is not necessarily the case:

> We might think of lawyers as crudely divisible into two great congregations: On the one side we have a large Party of Facilitation that helps clients do what they want to do and avoid the costs of what they have done. The great majority of the private bar, along with in-house counsel, belong to this party. On the other side are what we might call the Party of Internalization: a much smaller band of plaintiffs lawyers, public interest lawyers, and government lawyers who spend their days trying to make enterprises internalize the costs they are imposing on third parties (injury victims, consumers, neighbors of waste sites, etc.) ...
>
> The course of [much modern class litigation] should temper our optimism about the eventual outcome. It reveals that the limited material and organizational resources of the Party of Internalization show up in a lack of endurance and susceptibility to opportunistic dealing by those who view themselves as champions of the public interest. This is not because the Party of Internalization is manned by bad people, but because it lacks the organizational sinew for sustained and coordinated strategic struggle that is possessed by its opponents.

There are, in other words, repeat players and REPEAT PLAYERS.

**Litigation Coalitions**

Legislative politics revolves around coalition building. Interests seeking voice in legislatures are well advised to band together with like-minded groups in pushing for favourable policies or in pushing back against any law that is perceived as harmful. And, of course, once a bill becomes part of the process, the bargaining and alliance formation continues apace. We would expect litigators to engage in similar behaviours – the classic example being the solicitation of *amici* briefs where the more one can solicit the better. Even in moving toward trial (or pretrial settlement), recruiting friends with similar interests may be expected in order to result in economies of scale and demonstrations of political muscle. After all, these are the premises underlying modern multi-party lawsuits, which are often large coalitions of strangers. They are also the reasons that attorneys, representing both plaintiffs and defendants, might seek alliances for the purposes of information allocation, cost sharing, and the like.

**Regulatory Effectiveness**

A major end of politics is policy, frequently regulatory policy. The *US Code of Federal Regulations* alone contains fifty titles, governing a huge range of activities from homeland security to telecommunications to wildlife and fisheries. The thousands of rules contained within the *US Code* are the result of a complex political process, generally involving legislation, public comment, and executive rule making. Similarly, more than 3,300 statutory orders and regulations, covering an equally comprehensive list of practices, are available for public review at the Department of Justice Canada.[21]

And, then, there is litigation, particularly litigation that is aimed at "forcing ... industr[ies] to take greater responsibility for reducing the amount of damage done by [their] products" (Cook and Ludwig 2002, 68). The question is whether this is an effective, efficient, and cost beneficial means of regulation? Answers to this question vary widely. On the one hand, "[c]onsumer advocates argue that without the threat of such lawsuits, businesses would be free to engage in illegal practices that significantly increase their profits as long as no one individual suffered a substantial loss" (Hensler et al. 2000, 9). Clearly, there is anecdotal evidence to suggest that this possibility may be the case. Thus, upon hearing news of a government warning in March 2004 that "people newly taking antidepressants can become suicidal," one primary care physician reacted by stating: "We're going to continue to use these drugs pretty freely until we start seeing the ads in the newspapers from lawyers saying, 'Have you or your family member been prescribed these drugs? If so, you may have a case.' When the big L word, liability, raises its ugly head, that's when things will really change" (Grady and Harris 2004, A14).

Clearly, not everyone would agree that lawsuits are the best (or even a good) means of regulating. Not surprisingly, the American Tort Reform Association (2002, 14) takes a particularly dim view of the practice, asserting that "[l]egislating public policy in the courtroom violates the 'separation of powers doctrine' – the fundamental rule upon which this country's entire system of government is based." These are strong words indeed! However, even some who would not question the constitutionality of the practice, harbour doubts about its efficacy. Thus, for example, President Bill Clinton's secretary of labor, Robert Reich (1999, 15A), while asserting that "regulating through lawsuits is better than not regulating at all," nonetheless acknowledges that "[r]egulating US industry through lawsuits isn't the most efficient way of doing the job. Judges don't have large expert staffs for research and analyses, which regulatory agencies possess. And when plaintiffs and defendants settle their cases, we can't always be sure the public interest is being served." And Gerald Rosenberg (1991, 343) reminds us that "courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To ask them to produce significant social reform is to forget their history and ignore their constraints."

## Organization

This book addresses all of the issues posited earlier. Chapter 1 presents a history of group-based litigation developments. Here we look to the ancient roots of mass tort actions in Europe as well as to American variations on the theme. Alexis de Tocqueville (1969, 270), of course, wrote that in America "[s]carcely any political question arises ... that is not resolved, sooner or later, into a judicial question." Thus, the idea of group-based litigation would find truly fertile soil in the United States. The modern variant is the class action, and Chapter 2 examines this variation as well as other contemporary manifestations of the politics of litigation. It begins with a summary of litigation aimed at private institutional change – a brief survey of modern legal battles against a wide array of corporations. It also looks at the growing counter attack on plaintiff litigation, from legislative efforts at tort reform and industry-specific liability shields to the increasing use of mandatory arbitration clauses and aggressive public relations campaigns.

In the next three chapters, we move from a telescopic to a microscopic perspective, as we examine, in depth, three categories of litigations. Two of those chapters include the latest data and analysis on tobacco and gun litigation, with special emphasis on litigants' strategic choices. Chapter 5 is devoted to a much newer field of strategic multi-party litigation, the battle for healthful food. Having learned often painful lessons from the tobacco and gun wars, coalitions on both sides of the food wars demonstrate more mature, more modest, and frequently more successful tactics. In Chapter 6, we look beyond the United States to consider developments in Australia,

Canada, and the United Kingdom, where multi-party litigation is increasingly taking hold. In each case, the most significant movements have followed the implementation of constitutional change and the enhancement of judicial independence. Finally, Chapter 7 reconsiders our general themes and speculates on future avenues of inquiry.

# 1
# Theoretical, Historical, and Legal Underpinnings

Class action litigation has received considerable political and press attention in recent years because it has produced some notorious outcomes, involving huge sums of money, affecting major sectors of the economy, and having significant public policy implications. Regardless of the outcomes and despite the procedural complexity (which is usually glossed over and simplified), the group-based claim represents a means by which the scales of power can be recalibrated – at least temporarily. Stephen Yeazell (1987, 10), who has written extensively on the early phenomenon and is considered an authority on its historical roots, asserts that it "creates power." Judge Jack Weinstein (1995, 132), who has overseen a number of major class actions and multi-district consolidations in his federal district court in Brooklyn, says that "the class action actually changes the real power and substantive rights of those whose claims are aggregated." Perhaps.

It certainly is a way to challenge the political and economic power of large entities and possibly to hold them accountable for their actions. It is probably the only feasible way to deal seriously with a series of similar small claims that individually are not worth anyone's time or effort and that rise to a level of real significance only when considered collectively. Moreover, bundling like claims shifts the focus to the conflict itself rather than to any of the specific litigants. However, herein lies part of the rub. It means that collective litigation carries regulatory and public policy implications. And, of course, there are those who argue that such activity lies entirely outside the province of judicial authority. It also involves internal conflicts between group leverage and individual due process rights, corporate and government accountability and just compensation to individuals who have been (or likely will be) harmed, as well as institutional and collective efficiency and individual justice. Bundling claims means that in the very institution of government, constructed precisely to address the stories of individuals, few individual stories will be heard. These issues have bedevilled judges facing aggregated claims in the United States from the earliest of cases, and because

we grant such high value to the rights of individuals they are the themes that can be heard in the refrain of the collective litigation song to this day.

We use these themes to organize our analysis. This chapter explores the origins of the group litigation form and traces its development, laying the groundwork for the analysis that follows. The class action is a curious form, often permitting litigation by an ad hoc collection of individuals that is formally recognized as a group only for the purposes of pursuing a common legal complaint against a single powerful defendant or set of defendants.[1] In many cases, the vast majority of individual members are total strangers, and many may be entirely oblivious to the fact that their interests are being represented.

Although the aggregation of activities and effort routinely occurs in our political, economic, and social lives, achieving class status for litigation purposes is clearly something quite different. It represents an exception to the standard model upon which courts generally function, allowing access to individuals who claim an immediate and direct harm (or one that is likely to befall them) – the idea being that it should be each individual's responsibility to decide whether to seek redress and to represent her own interests. Moreover, in a conflict, each participant, in the interest of fairness and justice, must be afforded an opportunity to make an appearance and to interject supporting evidence – to have her "day in court" – an opportunity that is compromised when multiple claims are aggregated into a single one.[2]

These issues, alone, have given pause to any number of serious jurists over the years. And, although as we shall see, good and valid reasons for proceeding in this manner arose very early, providing subsequent courts with precedents that could serve as useful guides in deciding whether to allow litigants to engage the process collectively, a number of related questions continue to arise. What commonalities must be shared by a collection of individuals in order to qualify as a group for the purposes of litigation? Who is acceptable as a representative of the larger collective? In other words, which groupings cross the judicial threshold and which representatives satisfy the presiding judge that they are sufficiently representative? Beyond these questions, issues such as proper notification and the validity of a judgment without proof of notification have long been the subject of judicial consideration.[3] Can the interests of absent parties be represented without their consent and without their input? Should they be allowed to opt out in order to pursue their own individual claims? Must they "opt in" before they can be bound by the outcome, affirmatively allowing others to represent their interests? All of these questions directly relate to our developing conception of due process.

Although not necessarily contradictory, there is a tension that complicates any effort to find solutions to problems that benefit the larger community

without sacrificing the interests of individual members. The "takings clause" of the Fifth Amendment to the US Constitution testifies to the existence of this tension as early as the founding era.[4] In addition, the American political-legal system emphasizes individual rights, while, at the same time, recognizing and accommodating a pull toward collective or group interests. James Madison noted this potential incompatibility before the ratification of the Constitution, at once acknowledging the great value of freedom for individuals to follow their own selfish pursuits and the natural divisions of interests that entice people into "factions" (*Federalist* No. 10). French scholar, Alexis de Tocqueville (1969, 513-14), also observed Americans of the 1830s to be keenly aware of their individual self-interests and worried that full-flowered individualism could draw folks so much into themselves that it might be difficult to create a collectivist spirit necessary to nation building. However, he also found a countervailing tendency: "Americans of all ages, all stations in life, and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types – religious, moral, serious, futile, very general and very limited, immensely large and very minute."

Although individualism and factionalism are long-running political concerns, a consciousness of individual legal rights is a relatively recent phenomenon, generally associated with the judicial development of bill of rights issues in the early twentieth century. Development of civil rights and liberties took off in the 1940s, and the most active era was spearheaded by the Warren Court of the 1960s. Coincidentally, development of individual rights paralleled an official recognition and enhancement of collective litigation during the modern era. The *Federal Rules of Civil Procedure,* and, in particular, *Rule 23,* which specifically delineates the class action, were adopted in 1938, and the 1966 revisions, in effect, allowed for much wider use.[5] Indeed, the 1966 version was produced during an extraordinarily active milieu of civil rights and liberties advocacy, and the panel's deliberations took place with this legal context in full flower and in full view.

Similar coincidental developments have also occurred outside the United States. Indeed, as the movement to adopt principles of the *Universal Declaration of Human Rights* has generated an enhanced focus on individual rights and equality at the national level, constitutional revisions across a range of democratic systems in the late twentieth and early twenty-first centuries have generally empowered courts to enforce them domestically (see Hirschl 2004; Dezalay and Garth 2001).[6] Moreover, such changes seem to presage the easing of restrictions on representative litigation and aggregation of claims. This has certainly been true in Canada, Australia, and the United Kingdom.

The class action form has become easier to invoke. And, while it remains atypical, it has increased in number over the past quarter-century and has been used to engage the courts in a range of highly visible and important legal issues, which has affected a huge swath of the population.[7] Moreover, although virtually all judges are at least familiar with the model, with each petition seeking certification as a class, the courts have had to revisit the questions and somehow rationalize the tension between communally invoked accountability and individually based due process rights. We begin this chapter with some historical background to group-based litigation. We also reflect upon some of the theoretical issues involved in collectivized litigation and then assess a few highly visible examples – tobacco, guns, and food – and extend our analysis to consider recent developments that have formed collectivized litigation in several other political-legal systems, focusing especially on Canada, Australia, and the United Kingdom.

## Individual Rights and Group Power

Law and politics are inseparable. Indeed, developing a system of legal rights has inevitable political implications. As Yeazell (1987, 2) notes, "Anglo-American law has proved to be durably, perhaps excessively, individualistic. In numerous contexts it exalts individual choice. From ancient doctrines of property to recent developments in American constitutional law, one finds expressions of the proposition that the individual is the bedrock unit both of social action and of legal thought." Although we organize ourselves into groups for a range of purposes – corporations, labour unions, cities and townships, religions, political parties, interest groups, civic associations, just to name a few – a great deal of effort has been spent to develop the rights and obligations of individuals in relation to collectivities and to the state, itself.[8] Much time and effort was expended throughout the twentieth century to assert and maintain a system of constitutional rights that is understood to accrue to individuals as individuals without regard to identification or association with any particular cluster of others. Thus, rights extend to all regardless of race, nationality, gender, or marital status.

At the same time that we observe this trend toward the creation of the fully right-equipped individual, the US legal system has also accommodated collectivization for a variety of purposes. Thus, the governing regime has chartered cities and townships and allowed groups of business people to incorporate, labour unions and churches to form, and a full range of voluntary organizations to formalize their status.[9] There is a legal process for each of these activities, but it allows a collective to own property, accrue debt, own and distribute assets, among other things – as if it were an individual person under the law. Formal recognition of the group requires compliance with a formal legal process and also implies individual consent. Indeed, one can move freely from one state or locality to another, generally without

forfeiting citizenship rights or a legal status conferred in the state of origin.[10] People are not coerced into becoming stockholders of a particular company, and religious affiliation is usually considered a voluntary matter (although entry into some religious groups is not so simple, exit is usually understood to be a matter of choice). Although early organizing efforts were met with significant resistance, labour unions exist by collective choice, and individuals often are granted the ability to opt out if they wish, increasingly so by "right to work" laws. Moreover, the basic family unit, a married couple, is sanctioned by the state, with the understanding that each participant has exercised the choice to join free of coercion,[11] and, similarly, exiting (divorce) has progressively become a less onerous strategy across all states. In all of these situations, the notions of "voluntariness" and consent have grown in importance. Given the value of these concepts to the unfolding of constitutional due process, it should not be surprising that they have also played a significant role in the development of the class action or representative litigation form.

## Early Developments in Group Litigation in England

In his research of Anglo-American law, Yeazell (1997) reports that unincorporated groups appeared as litigants in as early as medieval times in British courts. In fact, much of medieval life was group based for social, religious, and agricultural reasons, marked less by individual self-reliance than by mutual dependence. Without formal recognition, the law tended to reflect the realities of life – so suits could be filed by a group representative or filed against a representative in the name of the collective, with all members held accountable by the outcome. Among the earliest examples is a late-twelfth-century case involving Father Martin and his local congregants. In 1199 in the court of the Archbishop of Canterbury, Martin, a parish rector, "brought suit against four of his parishioners – as representatives of the rest – asserting his right to certain parochial fees ... Father Martin was in part insisting that his parishioners carry the bodies of their dead several miles to a place where he could bury them for a customary fee; alternatively, he was benevolently prepared to let them bury their deceased in a nearby chapel graveyard – so long as they remitted to Martin the same customary burial fee as he would have earned had he conducted the service himself" (*Martin, Rector of Barkway v. Parishioners of Nuthamstead* 1199; cited in Yeazell 1997, 688).[12]

This case not only reflects the natural groupings and way of life prevalent in medieval England, but it also indicates that the law recognized and endorsed "natural" collectives. No doubt born out of necessity and practicality, representative litigation had clear political implications. To file a claim against each member of his flock individually would certainly have cost Martin far more than he would have seen in return. Moreover, allowing him to sue all of his congregants at once, rather than individually, probably saved

the court considerable time and resources. Presumably, the interests of any un-named (perhaps unaware) parties were considered aptly represented (albeit indirectly) by those who were clearly identified. At the same time, efficiency of process worked to the advantage of the already more powerful rector as well, providing a mechanism whereby he could impose legal sanction (a death tax) on all of his parishioners in a single action. Thus, such a case outcome would also have public policy consequences. After all, death is universal, and payment of a burial tax to Father Martin to administer the passage from this world to the next (even if he did not perform the ceremony himself) applied equally to all within his parish. Finally, it is significant to note that the case involved a defendant class rather than the now familiar plaintiff class. This was not at all unusual for that era: "Medieval group litigation was not a systematic instrument of oppression. It was not a systematic instrument of anything. One can find about equal numbers of plaintiff and defendant groups, and some of the plaintiff groups seem to be using litigation as a weapon in struggles with social superiors" *(ibid.)*.

Raymond Marcin (1974) contends that the first true class action litigation came a century after Father Martin's case. Filed in 1309, *Discart v. Otes* (1914) involved a conflict over payment of royal commissions owed to Sir Otes Grandison, who had been given dominion over the Channel Islands after the Norman Conquest. Since the value of the local currency had fluctuated considerably, Sir Otes demanded payment in the more stable French notes, thereby tripling the tax. A number of his minions filed suit, including Jordan Discart, seeking a judgment that would allow them to pay in the traditional local tender. As there were several cases presenting the same issue, the court consolidated them, in effect creating a plaintiff class, and passed the case to the King's Council for resolution (Marcin 1974, 521-23).[13]

Like its medieval counterpart, the modern class action is based on two distinct efficiency rationales. Indeed, it is a way to overcome a multiple small claim problem for potential plaintiffs. Where an individual claim would not be worth the expense of litigation, plaintiffs can pool their resources and operate with an economy of scale. Likewise, a defendant can consolidate multiple similar claims and cut the costs of legal defence. And, for the court, because each individual claim would present similar legal questions and factual scenarios, it is far more efficient to deal with all of them together rather than individually. Thus, on the one hand, providing a mechanism for consolidating claims encourages litigation that would otherwise likely not go forward, while, on the other hand, it diminishes volume – an interesting contradiction in efficiencies.

Martin and Sir Otes' cases also predate the more modern construction of due process. At some point in the sixteenth century, English judges developed what became known as the "necessary parties" rule, which required that any person with legal interest in a case outcome be included as a named

party, be served notice of the pending litigation, and be afforded the opportunity to make a formal presentation to represent their own individual interests. Indeed, there was no guarantee that anyone (including the "representatives") would promote any interests other than their own: "Several reasons were advanced for the rule: complete justice can only be done by determining the rights of all parties connected with the subject of the suit or the relief to be granted; multiplicity of suits should be prevented; and, assurance should be provided that those persons before the court could safely execute the decree" (Hazard, Gedid, and Sowle 1998, 1858-59; also see Hazard 1961).[14] Among the most troublesome conundrums was the issue of what to do when there simply were too many parties (on either side of a case) to identify and join them all realistically. Should they all be bound by the outcome? One could reason that those who were directly involved effectively represented the others because of the similarity in their interests.[15] One could also reason that a principal party should have the benefit of fair notice of the action and an opportunity to make a presentation during the course of the proceeding – what has since become fundamental to the concept of due process. English courts grappled with these problems over the next two centuries and came to apply the "necessary parties" rule fairly rigidly, which made it quite difficult to move forward with cases in which there were multiple parties.[16] Of course, life in those days was very different from that which we know today. Classes were cohesive. People lived in proximity to each other and knew one another well. They often worked and worshipped together. In collective litigation, they were certainly aware of the legal action and very likely participated in selecting a representative.

Some cases could take decades to resolve. Indeed, Charles Dickens' ninth novel, *Bleak House,* which he published in 1852, was meant to dramatize the problems associated with long, drawn-out litigation. The centrepiece of the story is the fictional case *Jarndyce v. Jarndyce,* which consumes a hapless family and, ultimately, their entire estate. The saga actually worked as a piece of popular fiction. It did not work, however, as a fact of legal reality and called for reform. It ultimately led the courts to consider some representative litigation under the "bill of peace" form, allowing for assignment of a master who would be responsible for notifying all of the relevant parties and bringing matters to a close. This design was most often used in creditor cases to prevent one or a few creditors from gaining unfair advantage over others who happened to be absent or unaware at the time of the original complaint, thus draining a common debtor of all resources before the other creditors had any opportunity to engage the process to demand their fair share (see, for example, Hazard, Gedid, and Sowle 1998).

Moreover, a bill of peace, in its early forms as developed by the English chancery courts, generally allowed a plaintiff to join all of the defendants and whatever series of claims that had been, or would potentially be, filed

into a single action – if there were too many parties for standard practice, if it could be demonstrated that they shared a real interest regarding the question in contention, and if the court were satisfied that the absent group members could be satisfactorily represented by those who had made an appearance (Weinstein 1995, 132; also see Chafee 1932). Unlike the situation today, however, the group had an independent existence that preceded the litigation. As Weinstein (1995, 132) asserts, "the early class action did not empower a scattered mass of individuals who did not know each other and had no bonds except those created by a grievance and the group litigation." In addition, sixteenth- and seventeenth-century group litigation often concerned property issues; generally confirmed existing socio-political status differences; genuinely represented a collective, as opposed to an individual, set of rights such as a death tax or use of a commons area; and usually invoked local norms and customs.

### Early Developments in the United States

The necessary parties principle and the bill of peace eventually found their way across the Atlantic. Justice Joseph Story is credited with exerting the greatest influence over the original construction and later unfolding of the American version of class litigation, even if his understanding of the British experience and precedents was less than complete (see, for example, Yeazell 1987, 216-17; Hazard, Gedid, and Sowle 1998, 1878-80).[17] He viewed the bill of peace as a procedure for minimizing unnecessary litigation (which also introduced unnecessary costs to the courts) as well as for managing situations that would otherwise become unwieldy if multiple actions were filed involving a single party. However, he also felt that the necessary parties rule was important to the concept of justice. While riding his circuit in 1820, Story considered an equity case that set the stage for his subsequent articulation of group litigation provisions in his *Commentaries on Equity Jurisprudence* (Story 1836) and *Pleadings* (Story 1838). The controversy, *West v. Randall* (1820), was brought to federal court under diversity jurisdiction by a resident of Massachusetts who claimed that he had been cheated out of a rightful share of his family estate in Rhode Island. This particular case, however, presented no exceptions that the court should consider, and Justice Story found that all interested parties should be named and included in the proceedings before any legal action could go forward.

Nonetheless, focusing on the "necessary parties" aspects of the litigation, and citing an array of English precedents for authority, Story took the opportunity to deliver his understanding of legal theory, which proved to have long-lasting influence. The general rule should be that "all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be" – the

"necessary parties" principle (*West v. Randall* 1820, 721). However, as Story also states, there will likely be situations where rigid application of the rule will result in true injustice to the parties actually before the court: "[W]here the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested ... the court will proceed to a decree" (*ibid.,* 722).

Not long after *West,* Justice Story had an opportunity to apply this reasoning (*Beatty v. Kurtz* 1829). The conflict arose over a plot of land in what is now in the Georgetown section of Washington, DC. In 1770, two wealthy landowners, Charles Beatty and George F. Hawkins, set aside several pieces of property for public use, deeding three lots for churches (Lutheran, Church of England, and Calvinist Church/Presbyterian) and one for a market house. Soon thereafter, a small group of German Lutherans came together, erecting a small building on their designated plot, which they used intermittently throughout the years as a church and a school, and reserving some of the grounds as a cemetery. The group never incorporated to become an officially sanctioned organization, and the building deteriorated extensively, although they did periodic repairs and had plans to construct something more permanent if they could raise the necessary donations to pay for it. This went on for some fifty years, during which time Georgetown became part of the District of Columbia and demand for property in the nation's new capital city increased. Beatty's son and surviving heir sought to reclaim the parcel, and, under his authorization, a colleague "entered upon the lot and removed some of the tomb stones" and planned to remove all of the graves, to take possession (*ibid.,* 580). A small committee, claiming to represent the interests of all church "members," filed suit in federal court to preserve their rights to the property under the original understanding in the grant, and the court found in their favour (*Kurtz v. Beatty* 1826). Beatty appealed to the Supreme Court of the United States, believing that he had a strong case. After all, a "real" church had never materialized at the designated location, and the loose-knit congregation had used the site for worship only haphazardly. In addition, he challenged the plaintiffs' ability to represent the interests of other unnamed claimants because there never had been an organization of record.

However, the court was not persuaded. Justice Story acknowledged that the church, projected by the elder Beatty's grant, had never gotten fully off the ground, and he observed that

> [t]he Lutherans ... have not been able, therefore, to maintain public worship constantly in the house so erected, during the whole period ... But efforts have been constantly made, as far as practicable to keep together a congregation ... The house, however, in consequence of inevitable decay, fell down some time ago ... The Lutherans in Georgetown ... are not and never have been incorporated as a religious society. The congregation was consisted of a voluntary society, acting in its general arrangement by committees and trustees, chosen from time to time by the Lutherans belonging to it. There do not appear to have been any formal records kept of their proceedings; and there have been periods of considerable intermission in their appointment and action. (*Beatty v. Kurtz* 1829, 581-82)

Despite these facts, the justices were clearly taken aback by the younger Beatty's actions in the cemetery – "not ... a mere private trespass; but a public nuisance" (*ibid.,* 584)[18] – and they were not inclined to find in his favour. Indeed, Justice Story delivered the punch line in no uncertain terms. He explained that the land in question "was originally consecrated for a religious purpose; it has become a depository of the dead; and it cannot now be resumed by the heirs of Charles Beatty" (*ibid.,* 527). Nonetheless, the more important long-term issue related to the competency of the plaintiffs to enter their claim in the first instance, and Justice Story seized the moment to declare that they did:

> The only difficulty is whether the plaintiffs have shown in themselves a sufficient authority, since it is not evidenced by any formal vote or writing. If it were necessary, to decide the case on this point, we should incline to think that under all the circumstances it might be fairly presumed. But it is not necessary to decide the case on this point; because, we think it one of those cases, in which certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society; for purposes common to all, and beneficial to all. (*ibid.,* 585)

Although this opinion has been cited in some 152 subsequent cases across a wide range of courts, most of the references occurred in the nineteenth century, and they have represented conflicting outcomes.[19] Indeed, the understanding of law that Justice Story articulated in *Beatty* was muddled by relevant sections of his text, the *Equity* treatises, which were published in the following decade (Story 1836; 1838). Geoffrey Hazard, John Gedid, and Stephen Sowle (1998, 1880) note that his thoughts on the issues were far from clear. At one point he is arguing that representative litigation could go forward in the absence of some interested parties when their numbers were so large that it was impractical to join them all (as he suggests in *West*),

but, at another point, he is contending, for example, "that a suit to dissolve a voluntary association cannot be maintained by representatives because all members had an 'equal interest to be heard.'" Yeazell (1987, 218) suggests that by the second edition, which appeared two years after the first, "Story seemed even less sure what the question ought to be." Turning his attention to those cases that we would today "describe as group litigation, he did not thus characterize them ... instead of looking for circumstances in which the absentees would be bound, [he] sought ways to proceed without binding or indeed affecting them at all" (*ibid.,* 219).

Multiple parties can be joined by mutual interest or by consent (even if they have different types of claims). Story was prepared to forego requiring that the parties demonstrate a pre-existing "community of interests" that connected them, but he was more concerned about the issue of consent – "the possibility that someone not a party to litigation would be bound by its results. He recognized that it had happened, but found it difficult to come to terms with. By justifying representative litigation as a device to be resorted to only when repetitive litigation would result – and then solely to prevent some vaguely defined injustice – Story assured that such cases would not expand beyond the narrow bounds of a few recognized categories" (*ibid.,* 220). Clearly, this ambivalence regarding how to deal with absent parties was a problem then, and it has plagued judges and justices ever since. For example, three years before Story's death in 1842, the Supreme Court of the United States adopted *Federal Equity Rule 48,* as part of the governing rules of procedure that would remain in effect until 1912.[20] In language reminiscent of Justice Story's *West* opinion some two decades earlier, *Rule 48* allowed group representative suits to go forward, "where the parties on either side are very numerous" and it would not be practicable, without producing excessive delay, to attempt to bring them all before the court.[21] However, also reflecting Story's reticence regarding such litigation, absent parties would not be bound by the outcome of such litigation.

A short twelve years later, the court reached a conclusion that contradicted its own rule. *Smith v. Swormstedt* (1854) arose from a fracture among Methodist Episcopal preachers over the issue of slavery – in particular, the ownership of slaves by ministers. The church, headquartered in Cincinnati, held property and cash in a common "book concern" valued at about $200,000, which had been generated by contributions from the approximately 1,500 southern and 3,800 northern individual clerics out of proceeds from the sales of religious materials on their house-to-house visitations as they fanned out across a number of states. By establishing a common fund, these travelling preachers were able to provide support and promise a small pension for members who were unable to continue to deal with the rigours of itinerant life. At the general conference in 1844, the northern and southern factions acknowledged their irreconcilable differences on the matter of slavery and

agreed upon principles of separation, whereby each could vote to go its separate way. Shortly thereafter, the southern group voted to break away as the Methodist Episcopal Church South. A small group, claiming to represent all of the other southern colleagues, filed suit against a similar group representing their northern counterparts to obtain what they considered to be their fair share of the common holdings of the previously united church. For their part, the defendants argued for dismissal on the ground that the plaintiffs had failed to join all interested persons as parties.

*Rule 48* notwithstanding, Justice Samuel Nelson, for the court (selectively citing Justice Story as the authority on the question but making no mention whatsoever of *Rule 48*), asserted that "[t]he rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest" (*ibid.,* 302). Furthermore, "[f]or convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court" (*ibid.,* 303). The court then considered the merits of the controversy and found that the division of the church was done according to agreed-upon rules and that both sides had valid claims to the pension fund. Thus, "our conclusion is that the complainants and those they represent are entitled to their share of the property in this Book Concern. And the proper decree will be entered to carry this decision into effect" (*ibid.,* 309).[22]

So, while *Rule 48* indicated that absent parties were not to be bound by outcomes, the *Swormstedt* court indicated precisely the opposite. Moreover, as Hazard, Gedid, and Sowle (1998, 1902) state, "[f]rom that point at least until 1912, when the Equity Rules were further revised, Rule 48 and *Swormstedt* coexisted in peaceful contradiction. The courts progressed case by case, almost never referring to both Rule 48 and *Swormstedt* in the same decision and never confronting the inconsistency." According to our own searches, *Rule 48* was cited in twenty-eight federal court opinions between 1853 and 1912 (including four cases decided by the Supreme Court of the United States), while *Swormstedt* was cited in twelve (including five by the high court).[23] Only one case, decided by a US circuit court, refers to both!

*American Steel and Wire Co. v. Wire Drawers' and Die Makers' Unions* (1898) exemplifies one of the major conflicts of this era – union strikes and the strike-breaking tactics of corporate employers. In this case, the corporation sought an injunction against the striking union members, designating a few leaders as defendant representatives of all of the others, who were left nameless. It posed the question whether all, both named and clearly identified as well as those who were absent but anonymously associated with the specified

defendants, be bound by the court's injunction? In the end, the court found that "the chief officers, for purposes of suits, represent a corporation, generally, and they may so represent a voluntary association ... and by aid of the court ... all absent parties not actually served with process [will be] protected by ... the reservation of equity rule 48" (*ibid.,* 606). Thus, a reasonable judge can be counted upon to protect the interests of undesignated parties, the concern raised by Justice Story and voiced in *Rule 48*. Moreover, in the very next paragraph, the court also found the *Swormstedt* logic persuasive, noting that sufficient care had been taken to make sure that the defendants did in fact represent the interests of the others and that "there are sufficient ... members of the unions to defend this suit, and enough to answer all practical purposes of the orders and decrees that may be asked against them ... and the court can see that those mentioned fairly represent the whole" (*ibid.,* 607). Thus, the court found that the workers, present or not, could be bound for the purposes of this litigation by their common interests. Although *Wire Drawers* was a circuit court opinion, it seems to be indicative of a larger shift in judicial thinking. Indeed, the Supreme Court of the United States, "without acknowledging any great change," was subtly preparing at the turn of the twentieth century to discard "the last vestiges of an organization-based concept of group litigation and to have adopted an interest-based model" (Yeazell 1987, 225).

Thus, establishing that an aggregation of parties could be bound together as a community of interests was deemed to be more important than obtaining the affirmative consent of each and every individual member of the now acknowledged group. Converging upon this solution (although not fully embraced by the courts for several decades) was an important step toward allowing litigation to go forward in cases where there had been no formal association among class members but where there was a similar interest. This would be true, for instance, where there were small shareholders who happened to have purchased stock in the same corporation that was engaged in questionable financial dealings to their detriment or, much later, where there were women who independently received faulty breast implants made by the same manufacturer.

The British High Court also seemed to be converging on this understanding. In a frequently quoted opinion at the turn of the century, Lord Macnaghten opined that "[g]iven a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent" (*Bedford v. Ellis* 1901). However, the spin given to this precedent less than a decade later took an entirely different approach (*Markt and Co. v. Knight Steamship Co.* 1910). Indeed, *Markt* found that interests among a representative group of litigants must be identical, a criterion that few could meet.[24]

### Late Nineteenth and Early Twentieth Centuries

The states have generally followed the lead of the federal courts on questions related to representative litigation, although their rules are often more liberal than those in the federal system. According to Hazard, Gedid, and Sowle (1998) almost all nineteenth-century class litigation in state courts fell into only a few discrete categories – for example, taxpayer suits, creditor litigation, and estate and property transfers.[25] One of the leading cases was *Hale v. Hale* (1893), where the Supreme Court of Illinois was presented with an interesting set of questions. If the court applied the "necessary parties" doctrine, an estate case – such as the one brought by the heirs of Ezekiel Hale, who had died twelve years earlier and whose will divided his vast holdings to a large and growing family in stages over a period of years – could go unresolved indefinitely. Indeed, yet unborn heirs clearly had no opportunity to represent their own interests, but they would nonetheless be bound by the outcome. Taking a common-sense approach, the court reasoned: "Such possible parties can not as a matter of course be brought before the court in person, and it would be highly inconvenient and unjust, that the rights of all parties in being should be required to await the possible birth of new claimants until the possibility of such birth has become extinct. If persons in being are before the court who have the same interest ... and thus give such interests effective protection, the dictates both of convenience and justice require that there should be a complete decree" (*ibid.,* 259).

In taxpayer litigation, the courts generally asked whether there existed a true "community of interests" to decide whether parties should be bound by previously determined outcomes in proceedings to which they had no opportunity to engage (see, for example, *Lightle v. Kirby* [1937] finding that one group of taxpayer claims, antagonistic to a second one, should not be bound by the first outcome). In the most common type of situation, where a single debtor faces claims from multiple creditors, the courts have mandated the consolidation of claims into a single case, based on the theory that the plaintiffs hold an interest in common (for example, *Guffanti v. National Surety Co*. 1909 and, compare, *Schuehle v. Reiman* 1881) (consolidating separate claims against a single debtor filed in different courts). Thus, at the turn of the twentieth century, state judges, like their federal counterparts, were also converging upon a "community of interests" rationale in allowing class litigation to proceed and downplaying the "necessary parties" principle that would present a serious hurdle to such cases.

In 1912, the Supreme Court of the United States issued revised rules of procedure, rewriting *Rule 48* as *Federal Equity Rule 38,* which was essentially the same – except without the language that disallowed binding decrees on absent parties.[26] The ensuing years brought several cases in which the Court substantiated the notion that individuals not bound by incorporation could be considered bound by common interest for the purposes of litigation.[27]

For example, in 1921, in a case involving an internal conflict in a fraternal organization whose leadership had tried to reorganize the group when its financial situation took a downward turn, the Court recognized a collection of litigants as representative of others similarly situated (*Supreme Tribe of Ben-Hur v. Cauble* 1921). Yeazell (1987, 227) reads the *Supreme Tribe of Ben-Hur* opinion as opening the door to a new possibility: "[I]f one took seriously what that case implied about interest representation, then any interest that could find a representative might qualify as a temporary litigative entity."

In the following term, Chief Justice Taft, for the Court in *United Mine Workers v. Coronado Coal* (1922, 385), noted that "at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member."[28] Although not incorporated, the United Mine Workers, which had been sued by Coronado Coal, was well organized with an international membership of 450,000. Taft went on to observe that the union's dues "make a very large annual total, and the obligations assumed in traveling expenses, holding of conventions, and general overhead cost, but most of all in strikes, are so heavy that an extensive financial business is carried on, money is borrowed, notes are given to banks, and in every way the union acts as a business entity, distinct from its members. No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies" (*ibid.*, 385). Moreover, labour unions were recognized by federal and state legislation. Thus, the Court allowed the litigation to go forward. In so doing, as Taft acknowledged, the Court fell in line with recent British precedent in *Taff Vale Co. v. Amalgamated Society of Railway Servants* (1901), a decision that was upheld by the House of Lords.[29] There remained, however, the small issue of paying for legal services. In a class litigation situation, who should pay the legal fees?

## Legal Fees

In two unrelated cases decided during the late nineteenth century, the Supreme Court of the United States dealt with this important question and, in so doing, developed the common fund doctrine, which addressed the possibility that members of a plaintiff class, through no effort or expense of their own, might be "unjustly enriched" by successful representatives who shouldered all of the financial risks. In *Trustees v. Greenough* (1881), the Court allowed a bond holder to pay his lawyers' fees from a common trust fund that was preserved as a consequence of the litigation, on the rationale that the litigant and/or lawyer who works for the good of the larger group should receive just compensation from the fund and to prevent the other bondholders from receiving "unjust enrichment" at his expense: "[W]here one of many parties having a common interest in a trust fund, at his own

expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts" (*ibid.,* 532). A few years later, in *Central Railroad and Banking Co. v. Pettus* (1885), Justice Harlan, writing for the Court, expanded the *Greenough* logic, finding that the attorneys who had successfully represented a creditor class action against an insolvent corporate debtor should be eligible for an award beyond what the individual client had already paid in fees. Otherwise, the Court reasoned, class members would benefit from the legal action without paying any of the freight – a classic "free rider" problem.[30]

*Greenough* and *Pettus* are now considered benchmarks in American law on the issue of the distribution of legal fees in group litigation cases. Although the logic extends beyond class actions, both cases certainly had implications for legal representation in such litigation, and they clearly have the effect of connecting parties according to their interest in a particular legal proceeding and/or outcome even when they are not formally associated. Indeed, one of the most vexing theoretical and practical issues in the development of group or representative litigation has been the question of how and under what circumstances to compensate legal counsel (see, for example, Fiss 2003, 123-26; Erichson 2000b; Misko, Goodrich, and Conte 1996; Resnik, Curtis, and Hensler 1996).

In 1796, the Supreme Court of the United States first articulated the rule that parties should bear their own legal fees rather than extracting payments from the losing side, stating simply: "The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute" (*Arcambel v. Wiseman* 1796, 306). Some 180 years later, Justice White succinctly summarized the origin and development of the so-called "American rule" regarding the distribution of legal fees in *Alyeska Pipeline Co. v. Wilderness Society* (1975, 247-57).[31] The British system, as Justice White notes, developed as early as the thirteenth century and comprised the opposite rationale – that losers should pay.[32] Indeed, legal precedent in the United States and the United Kingdom have taken divergent paths on this issue, the result being that British lawyers are more reticent about bringing class actions than are their American counterparts, which, by extension, applies across commonwealth jurisdictions such as Canada, New Zealand, and Australia.

### The First Rule 23

In 1938, the procedural rules were revised yet again by an advisory committee appointed by the chief justice. This time, the issue of collective litigation was treated in *Rule 23* of the *Federal Rules of Civil Procedure,* which formally

distinguishes three types of class suits: "true" actions, in which class members are clearly bound together structurally and all absent members would be bound by the outcome; "spurious" class suits where the parties have a common interest with no formal structure and absentee parties must agree to be bound; and "hybrid" cases, such as those subsequently addressed by bankruptcy, in which unnamed parties might (but not necessarily) be bound.[33] In addition, upon initiation of the litigation, the representative parties were to choose a category and present arguments to convince the trial judge to accept the *"Rule 23"* status for the claim.[34]

While the tripartite division of class actions seems to have made sense to one of its chief architects, James W. Moore, the effort was probably tainted by the New Deal experiences and heightened concern during this era with "the question of individual consent and collectivization ... in the context of labor legislation" (Yeazell 1987, 231).[35] Indeed, the "true" class category bound already connected parties, while the "spurious" class anticipated prior agreement to be so bound: "The rule strove to resolve both the political belief in individual autonomy and the dimly perceived possibilities of litigative representation" (*ibid.,* 232; also see Kalven and Rosenfield 1941, 702ff). It also diminished considerably the "community of interests" rationale to which the courts had converged, based upon the *Swormstedt* logic, in the last quarter of the nineteenth and first quarter of the twentieth centuries, making it much more difficult to launch a claim in the interest of individuals otherwise disconnected. Such litigation would fall into the "spurious class" category, and any outcome would not be considered binding on absentees unless they "opted in," thereby giving their affirmative consent. Absentees could also intervene after the fact in order to take advantage of a favourable ruling under the principle of *res judicata* ("the thing has been judged"). As Hazard, Gedid, and Sowle (1998, 1938) note, "[p]roperly speaking, a 'spurious' class suit, then, was not really a class suit at all ... it was really no more than a permissive joinder device."

Two years after the adoption of *Rule 23,* the Court heard *Hansberry v. Lee* (1940), a controversy arising from a racially restrictive residential covenant in Chicago. According to the covenant, 95 percent of all neighbourhood homeowners could agree to exclude a particular buyer and thus block a sale or transfer of property. Instead of applying the recently adopted *Rule 23,* the Court relied upon the due process clause of the Fourteenth Amendment to overturn a decision by the Supreme Court of Illinois that found that all absent members of a previously allowed class should be bound by that decision (*Lee v. Hansberry* 1939). The Illinois high court had been a leader in developing class litigation principles, and its opinion, even if complicated by the issue of race discrimination, was indicative of the disagreement among the state judiciary with the recently promulgated federal rules of procedure, particularly on the question of binding absent parties.

The previously designated class in *Hansberry* (1939) came from an earlier case that was, in all likelihood, fraudulent and collusive. In 1933, Olive Ida Burke filed an action on behalf of herself and all others (several hundred white property owners) in a Chicago residential subdivision against four parties who had allegedly violated the terms of the covenant that restricted black families from buying into the neighbourhood. Burke claimed, without producing evidence, that the 95 percent agreement threshold had been reached, and the defendant offered no rebuttal, thus allowing the 95 percent claim to be stipulated as fact. The court issued a decree in 1934 to enforce the covenant, requiring the black families to vacate (see *Burke v. Kleiman* 1934). Five years later, Anna Lee and a number of white neighbours filed a petition to prevent a property transfer to the Hansberry family, who were black, arguing that all parties were bound by the decree resulting from the earlier litigation. The Hansberrys countered that they had not been parties in the *Burke* case and were, thus, not bound by the decree and that the finding of facts in that case had been based on false claims. Moreover, to disallow their challenge to the covenant would amount to a denial of their rights to due process under the Fourteenth Amendment. The state trial court determined that there was no evidence to support the 95 percent claim (indeed, the court found that only 54 percent of the property owners had signed the covenant) and that the earlier litigation was collusive, but it nonetheless deduced that the validity of the *Burke* agreement was *res judicata* and could not be revisited. The Supreme Court of Illinois substantially agreed (*Lee v. Hansberry* 1939), concluding that, because *Burke* was a class suit and because the current parties should be considered members of the class, they were bound by the outcome).[36] The Supreme Court of the United States overturned. Justice Stone, for the Court, reasoned as follows:

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. (*Hansberry v. Lee* 1940, 44-45)

Thus, the *Hansberry* Court did not help to clarify the recently adopted *Rule 23* that had been drafted to address class litigation issues, especially regarding

the question of when and under what circumstances decisions should be considered binding on all absent parties. While *Rule 23* suggests that a class can be joined on the basis of common interests (a spurious class), the *Hansberry* Court could not in good conscience bind absentees when the result would be a clear denial of due process rights and generally seems to assume divergence of interests among class members. Indeed, the Court stated flatly that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party" (*ibid.*, 40). Moreover, as Hazard, Gedid, and Sowle (1998, 1946) state, "[t]he Court ... announced a rationale for determining when class suits should be given preclusive effect – only upon adequate representation. It provided little guidance, however, concerning the content of that standard. In particular, it did not indicate what types of procedures were appropriate for ensuring, at the outset of litigation and during its course, that representation would be adequate."

*Hansberry* is a prototypical example of the kind of class litigation issues that make the format so interesting, yet so difficult, for the courts to resolve. The legal controversy presents internal conflicts between group leverage and individual due process rights, corporate and government accountability, as well as just compensation to individuals who have been injured, institutional and collective efficiency, and individual justice. Moreover, the case implications clearly superseded the principal litigants. The Court had to understand that any outcome would have a far-reaching public policy impact. It has also had an active afterlife. As of August 2008, *Hansberry* had been cited in 1,079 subsequent decisions, twenty-eight by the Supreme Court of the United States (according to *Shepard's Citations*).

As an interesting historical note, the petitioners in this case included the family of Lorraine Hansberry, who went on to publish "A Raisin in the Sun" in 1959. The Hansberrys were represented by Earl B. Dickerson, the first black graduate of the University of Chicago Law School and one of the founders of the National Association for the Advancement of Colored People's (NAACP) Legal Defense and Education Fund in 1939 (see, for example, Kamp 1987; Vose 1959).[37] Thus, *Hansberry* was a pivotal case on a number of counts, and it occurred at a critical point in US legal history. In 1940, the nation was emerging from the depths of the Great Depression, Franklin D. Roosevelt's New Deal was taking shape and ushering in an unprecedented era of regulatory activity, labour unions were growing, civil rights organizations were beginning to realize some genuine success in the courts, to name a few of the major changes that were occurring. It was in this context that Harry Kalven and Maurice Rosenfield (1941) published a provocative piece in the *University of Chicago Law Review* regarding the potential for class litigation under the recently revised *Rule 23*. Indeed, in their view, "[m]odern society seems increasingly to expose men to such group

injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all ... The problem of fashioning an effective and inclusive group remedy is thus a major one" (*ibid.,* 686).

Their vision perceived class litigation serving a regulatory function similar to the one performed by the newly created executive agencies under the developing administrative law regime, with plaintiff attorneys serving as the equivalent of private attorneys general.[38] Moreover, as they observe, because there were "many fields in which administrative bodies have not made an appearance ... private litigation must still police large areas of modern law and provide the exclusive remedy for many large-scale group injuries" (*ibid.,* 687). They note that the rules, particularly with respect to allowing large numbers of claimants with a similar grievance to join together to seek common relief, had become by 1940 much less onerous than they once were. Nonetheless, this model is based upon the notion that all interested parties will somehow recognize their commonality and take the necessary steps to bind themselves to a group claim at the initial stages of litigation. This vision, however, ignores the realities of the world. Indeed, "such spontaneity cannot arise because the various parties who have the common interest are isolated, scattered, and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints – they may never come" (*ibid.,* 688). Thus, they find great promise in collective litigation as a means for holding powerful entities accountable in an increasingly complex world. They take issue with the "opt in" requirements associated with the "spurious" class category of federal *Rule 23,* offering a forceful argument and rationale for yet further revision. Nonetheless, this revision would not come until 1966.[39]

## More Recent Developments

In 1974, Justice Douglas, in a case presenting questions regarding notification requirements for a plaintiff class, clearly saw the class action as a political tool:

> I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action ... Some of these are consumers whose claims may seem de minimis ... [s]ome may be environmentalists ... [o]r the unnamed individual may be only a ratepayer being excessively

> charged by a utility, or a homeowner whose assessment is slowly rising beyond his ability to pay.
>
> The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth. (*Eisen v. Carlisle and Jacquelin* 1974, 185-86 [Douglas, J., dissenting])

Justice Douglas's view represents a sea change in judicial perspective from that of the earlier periods. Indeed, it is far more in line with the reasoning offered by Kalven and Rosenfield (1941) than with the judicial opinion of their era. Granted, Justice Douglas was inclined to take an expansive view of the legal process – but he was not alone in expressing this particular understanding of the purpose of the class action format. Justices Brennan and Marshall joined him. While these gentlemen were also judicial liberals, the fact that this viewpoint could be unabashedly articulated at the pinnacle of US jurisprudence is indicative of how much the world had changed.[40]

The role, purpose, and scale of collective litigation had evolved into something quite different in 1974 than it had been in 1941. Since its adoption in 1938, *Rule 23* had generated considerable criticism and confusion, particularly surrounding its tripartite division (true, spurious, and hybrid), and expressions of dissatisfaction with its application were ongoing. In 1960, Chief Justice Earl Warren appointed an advisory committee to revisit the rules of civil procedure and, on the basis of their research and recommendations, issued an overhauled version of *Rule 23* in 1966. As we have seen, the NAACP and its affiliate Legal Defense and Education Fund (LDEF) exploited the earlier rule's uncertainty to attack racially restrictive residential covenants, beginning with *Hansberry* (1940), which set the stage for *Shelley v. Kraemer* (1948), and struck down all such restrictions as unconstitutional a decade later. Indeed, the LDEF, under the able leadership of Thurgood Marshall and Charles Houston, among others, developed a legendary strategy to launch a full-scale assault on a wide range of racially discriminatory laws and policies.[41] Although the political branches were largely inaccessible, the civil rights movement did find the federal courts to be comparatively receptive, and a number of important legal breakthroughs were accomplished through the class action form.

Group dynamics, anticipated under our foundational theory of politics and accommodation of group formation within the structure of our governing system have always had considerable political and economic implications.[42] Aggregations of individuals need no special recognition to engage in social, political, or economic action. Indeed, groups can be spurred into action spontaneously without any organizational structure or explanation.

Although such group formation is possible, success is certainly not guaranteed. Many years of interest group research tells us that organizational history and strength are critical political assets (for example, Bentley 1908; Truman 1951; Salisbury 1984; Schlozman and Tierney 1986; Walker 1991; Lowery and Gray 1998), and this seems no less true in the courts than in the other political branches (for example, Galanter 1974; Kritzer and Silbey 2003). As we have seen, obtaining judicial approval to litigate as a class with no prior history or structure has been an uphill battle. Moreover, issues of constitutional due process aside, claiming to represent the interests of total strangers without any prior consultation, agreement, or consent could easily be viewed as quite presumptuous.

Yeazell (1987, 241) observes that "although blacks, because of their exclusion from many parts of society, have often been driven into close association, there are not now nor have there ever been local or national groups that encompassed all black persons." Indeed, not only were they oppressed in every possible sense of the word, changing the laws that confirmed the oppression was a long, hard slog. Resistance was met at every turn, including attempts to prevent black citizens from joining forces in groups and organizations to represent their collective interests. One such instance was made part of the official history of the period by the Supreme Court of the United States. In 1958, Justice Harlan, writing for a unanimous Court, stated: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech ... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny" (*NAACP v. Alabama* 1958, 460-61).[43] In this case, the NAACP was attempting to protect its members from political harassment, but, more generally, the organization engaged in a concerted effort to utilize the courts to promote a social and political agenda that would not have been possible to pursue as unconnected individuals.[44]

The campaign for civil rights is probably the most familiar and perhaps most studied organized litigation effort of the twentieth century, and, as we have noted, much of the legal strategy was centred on the use of the class action formula. *Brown v. Board of Education* (1954), in fact, represented a consolidation of five separate class actions.[45] The legal challenges orchestrated by the NAACP's LDEF built upon the idea that a collection of individuals with no organizational structure could nonetheless engage in litigation as a group because they shared a set of interests *vis-à-vis* a common defendant with superior political and economic firepower. This is very much the image that Justice Douglas was attempting to convey in his *Eisen* dissent noted earlier.

Success breeds emulation.[46] The *Eisen* controversy saw a group of odd-lot stock traders banding together in collective action against powerful Wall Street brokerage houses on behalf of some 200 million identifiable class members, to press claims of antitrust violations and price-fixing of stock values. Initially filed in 1966, it was the *first* "mother of all classes," which, if approved, would have included virtually all citizens of the United States versus the symbolic chiefs of capitalism.[47] Although it was a bit over the top in terms of scope, it involved the type of controversy that Kalven and Rosenfield (1941) had envisioned as prime candidates for class action status. It was also indicative of the politics of the era. Ralph Nader, quintessential and quixotic advocate for the American consumer, published *Unsafe at Any Speed* in 1965, which helped to launch the public interest movement of this era.[48] Coincidentally, at approximately the same time, concerns about the degradation of the environment, such as air quality (as a result of industrial development and auto emissions), water quality (due to extensive use of pesticides and herbicides, agricultural run-off, and toxic waste seepage), increasing numbers of endangered species and diminishing tracts of undeveloped land, among other issues, led to a full-blown environmental movement. The first major legislation *(National Environmental Policy Act)* became law in 1969, and the Environmental Protection Agency came into being in 1970.[49]

Thus, it was within this volatile context of enhanced awareness of the potentials for using litigation as a political instrument and a regulatory tool – especially by civil rights proponents, environmentalists, and consumer advocates – that the advisory committee, empanelled in 1960 by Chief Justice Warren to revise the procedural rules, conducted their review. In 1966, the Civil Rules Advisory Committee issued its revisions, including an amended class action rule – *Rule 23* – acknowledging that unincorporated groups could constitute a class for litigation purposes and laying out criteria for determining representativeness. At least one of the commission members has noted that the effort was influenced by the times. In a statement submitted to a House subcommittee in 1998 regarding the Civil Rules Advisory Committee's deliberations three decades earlier, member John Frank asserted that "[t]he social setting had a most direct bearing on this rule. Rule 23 was a work in direct parallel to the Civil Rights Act of 1964 and the race relations echo of that decade was always in the committee room. If there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation" (quoted in Hensler et al. 2000, 12).

The new *Rule 23* discarded the old and troublesome tripartite division and anticipated several situations where the class action formula would apply.[50] Due process concerns were also addressed (in section c). In cases where money damages were not an issue, where the petitioner was seeking injunctive relief

or equal treatment for all members of the asserted class, commonality of interests could be assumed. Moreover, in cases seeking money damages, reasonable effort was made to notify all individuals identified as class members to alert them to the contours and objectives of the action, the fact that their interests were being represented by someone else, and the fact that they would be bound by any outcome achieved (who should pay the costs associated with such notice was left unaddressed and was one of the primary issues presented in *Eisen*). Under the old rule, class members had to "opt in," a requirement that discouraged class actions. The 1966 version assumed post-notification silence to represent a decision to accept class membership and the self-appointed representation, but it allowed individuals to "opt out" if they wished and to represent their own interests themselves.[51]

The typical kind of money-damage scenario that the advisory committee foresaw found small investors banding together to hold corporate executives accountable, a type of action not likely to move forward at the individual disaggregated level since the costs of litigation would have quickly surpassed any likely award. With regard to torts, the advisory committee specifically counselled that the class action format would not likely be a useful way to proceed: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried."[52]

As US District Judge Jack Weinstein (1995, 135) asserts, "[a]s a judge I have been forced to ignore [my own earlier warning against using class actions] when faced with the practicalities of mass tort litigation. In the earlier 1960s we did not fully understand the implications of mass tort demands on our legal system." While this does seem to have been true, and the advisory committee who revised the class action rules did not anticipate what was to come, there are devices for pursuing large-scale litigation other than the class action, including formal and informal consolidation and multi-district aggregation (which did not exist until 1968, a development discussed further later in this text).[53]

The accepted doctrine for allowing a joinder of similar cases in federal court, which would be the most likely way to combine tort actions against a common defendant, has held since 1939 that claims cannot be aggregated to meet the jurisdictional dollar requirement but that each claim must meet separately the minimum requirement (*Clark v. Paul Gray, Inc*. 1939).[54] In the event of serious disaster, this is not an issue for many victims. However, it runs contradictory to one of the theoretical bases for the class action – that is, to allow small claimants to band together to hold a common defendant accountable. In 1966, when *Rule 23* was issued, the only mass tort actions

that had been filed had resulted from airplane crashes (for example, *Van Dusen v. Barrack* 1964) and major highway accidents (for example, *State Farm Fire and Casualty Co. v. Tashire* [1967], which involved a bus/truck collision).

More generally, tort law theory, particularly that dealing with product liability, was moving in a direction that would eventually be conducive to considering claims under the class action formula. If one can calculate risks associated with a given activity or use of a product, then appropriate degrees of liability can theoretically be assigned. However, as social and economic conditions became more complex and the margin for error was rendered infinitesimally small across a range of activities, where an otherwise insignificant act of negligence or minute flaw somewhere along the chain could lead ultimately to disaster, judges gradually acknowledged that risk was becoming nearly impossible to assess. Some activities, such as rocket launch testing (for example, *Smith v. Lockheed Propulsion Co.* 1967) or crop dusting (for example, *Loe v. Lenhardt* 1961), were recognized to be inherently ultrahazardous or abnormally dangerous, and damages to injured parties (who were largely oblivious to the danger) that arose from such activities should be assessed by a strict liability principle.[55] Indeed, the list of such activities was, by 1970, growing longer, and strict liability had gained considerable purchase as a standard in product liability litigation (see, for example, Sayles and Lamden 2001; Friedman 1987; Lieberman 1981). In general, most rules associated with tort liability were loosening significantly, and, by the mid-1970s, the Supreme Court of the United States had begun to ease restrictions on advertising by practising attorneys (for example, *Bates v. State Bar of Arizona* 1977).[56]

Consolidation of tort claims from multiple jurisdictions into a single proceeding found its roots in the same time period. In 1962, Chief Justice Earl Warren established a Coordinating Committee for Multi-District Litigation for the United States District Courts in response to a nationwide tidal wave of antitrust cases against major electrical equipment manufacturers after they were criminally convicted for violating the *Sherman Antitrust Act*.[57] Indeed, in 1961, some 2,000 cases were filed, representing about 25,000 claims, in thirty-six US district courts. To address this challenge piecemeal would be an unending nightmare for the court system. The charge to the coordinating committee was to consolidate and centralize all pretrial proceedings in the interest of efficiency and fairness. The experiment was subsequently considered to have been a grand success – a mere nine cases moved to trial, and only five of those went the full distance to final decision (see, for example, Cahn 1976; McDermott 1973). In addition, the Judicial Panel on Multi-District Litigation (JPML) was given a more permanent status in 1968, and the *Multi-District Litigation Act* was passed through Congress.[58] Under the provisions of the 1968 act, parties could request that the JPML aggregate suits arising out of the same or similar circumstances that were

filed in different jurisdictions and transfer them to a single court and judge to deal with all pretrial matters. A court that had been assigned multiple cases from other jurisdictions could not retain jurisdiction after resolving the pretrial issues. Instead, the cases must be returned to the districts where they originated for trial (Galanter 2004, 41). As James Wood (1999, 327) reports, "[i]n spite of this legislative limitation, it became a standing practice for pretrial coordinating courts to transfer cases to themselves for trial." This litigation management device ultimately came before the Supreme Court of the United States thirty years later, in *Lexecon Inc. v. Milberg Weiss Bershad Hynes and Lerach* (1998), which held that such self-transferal is improper and that cases must be returned to the court of origin for trial. This problem (in addition to a range of other issues) was addressed by Congress in 2002, and, under current law, a multi-district litigation (MDL) court can retain jurisdiction for the purposes of a trial.[59]

The number of sets of consolidated MDLs has steadily risen since the 1968 provisions went into effect. The panel packaged and transferred 295 case bundles in 2002, compared to 117 in 1972, with the two largest collections of claims being those associated with asbestos (106,069 cases) and breast implants (27,526) (Galanter 2004, 42-23). By comparison, class action torts estimated to have been filed in US district courts in 1978 numbered fewer than 200, and, by 2002, the figure had nearly reached 600, with the most significant increases occurring after 1998. Although not dramatic, the rise is noticeable, particularly given the nature of the issues involved. As Judge Jack Weinstein (1994, 474-75) asserts,

> [m]ass tort cases and public litigations both implicate serious political and sociological issues. Both are restrained by economic imperatives. Both have strong psychological underpinnings. And both affect larger communities than those encompassed by the litigants before the court. Like many of our great public cases, mass torts often embody disquieting uncertainties about modern society and the individual's relation to our institutions. School desegregation cases involve underlying issues of racial and social prejudice, sexual fantasies, and concern about safety, property values, and power. Prison reform cases raise questions about the role of punishment and theological assumptions about the inherent badness or goodness of humanity. Catastrophes such as the Exxon Valdez oil spill or the New York City World Trade Center bombing of 1993 may seriously affect a town, a state, or an entire country. Many constitutional cases dealing with privacy, sexuality, hate, or abortion require analysis in terms of group psychology or psychiatry and sociology.

Indeed, courts have hosted some of the most momentous issues of each decade since class action *Rule 23* was revised in 1966 and multi-districting

became an option in 1968, as judges have faced the tremendous challenge of sorting through the legalities associated with human tragedies on both an individual and social level. As we noted earlier, those who drafted the class action revisions were addressing a legal world dominated by civil rights and consumer issues. And, in fact, civil rights issues far outnumbered all other class actions until the mid-1980s (Galanter 2004, 39). Similarly, those who wrote the MDL provisions thought they were addressing a legal world dominated by corporate-consumer relations. In 1972, antitrust and securities litigation accounted for 48 percent of all MDL consolidations (44 percent in 1977). They could not have known what was on the horizon. Peter Schuck (1986, 945-96), who has written extensively about Agent Orange litigation, places matters nicely within the perspective of the time:

> Imagine that it is the summer of 1969. The term "mass tort" has not yet been coined, although it has been loosely applied to airline crashes, large fires, and other single-event accidents that happen to affect numerous claimants ... Clarence Borel has not yet filed his soon-to-be paradigmatic mass tort action against the manufacturers of asbestos insulation materials. With the blessing of the Food and Drug Administration (FDA), physicians routinely prescribe Diethylstilbestrol (DES) to prevent miscarriages. Agent Orange is widely deemed a miracle defoliant that will save the lives of soldiers and civilians rather than putting them at risk of serious illness or death. The newly-designed Dalkon Shield is being heralded as a safe, effective contraceptive. Bendectin is still considered to be a wonder drug by the FDA and by tens of millions of women suffering from morning sickness. Silicone breast implants have been on the market for only a few years; two decades will elapse before the FDA begins to warn women about them ... Repetitive-strain disorders and electro-magnetic field syndromes are not even a gleam in the eye of the most resourceful and creative plaintiffs' lawyers. Cigarette manufacturers have won the first wave of litigation against them by a "knockout," causing the wave to retreat and discouraging further suits by smokers until the 1980s.

Rules, regulations, laws, and principles have always been adapted by those using the process of litigation to meet the exigencies of their situation and of their era. The rules of procedure regarding collective litigation are no exception. The advisory committee who worked to revise the rules of civil procedure in the mid-1960s, as we have noted, hoped to remedy problems with the old rules and viewed the class action within the contemporary context of civil rights and consumer advocacy. They did not believe, and did not foresee, the class action as an appropriate vehicle for mass torts. They considered the problem presented by "mass accidents" but were careful to build into the rule notification requirements if *Rule 23* were utilized for

a collective tort as well as an "opt out" provision to allow individuals to present their own cases on the assumption that personal injuries would be likely to involve idiosyncratic harm that would be masked by a necessarily generalized class action claim. However, modern mass tort situations often present issues of more general concern that transcend the parochial interests of individual plaintiffs. Indeed, there are far-reaching social interests involved when hundreds of thousands of asbestos workers have their lives shortened by disease and whose final days are predictably horrific. Similarly, millions of patients were treated for obesity with a combination pharmaceutical regimen thought to be a miracle appetite suppression drug only to find out too late that they now faced much elevated risk for a series of cardiovascular diseases. True, use of the drug "Fen-Phen" produced scores and scores of individual stories of pain and tragedy. However, marketing and prescribing the drug on such a scale elevates the issues well beyond the individual level.

Even assuming that system efficiency and logistical problems could be overcome, allowing plaintiffs to proceed individually may well produce a collective outcome that most observers would consider to be undesirable – even irresponsible. Indeed, in these and similar cases, a very large number of individual plaintiffs do have compelling stories. If they are independently compensated in the amounts that they truly deserve, at some point the defendants' ability to pay will be challenged, thus making bankruptcy a real possibility. Some might argue that such an outcome is a rich reward for what they perceive to be corporate greed and disregard for human life. However, what of the other victims left entirely uncompensated if bankruptcy occurs with cases pending (or yet to be filed)? In such cases involving multiple tort claims against one or a few defendants, the larger issues are, indeed, similar to those found in bankruptcy proceedings, where consolidation of petitions is the norm and outcomes are binding upon all involved, including those with potential, yet unfiled, claims. Thus, one's calculations are restricted by the limited fund qualities of defendants' resources as well as by the actions of other similarly situated claimants (see, for example, Cramton 1995, 817). One might easily conclude that to reconcile the social and individual interests involved in such cases would require collectivizing the litigation. Yet, of course, this notion shifts the emphasis away from the parties and their respective presentations and places it upon the conflict and its broader implications.

In addition, torts can be very complex, and proving causation, after a lengthy series of transactions of various types and given the latency effect associated with most toxic exposures, can be quite costly. A case-by-case approach is highly inefficient for all concerned, especially considering the redundant expenses that would be devoted to research, discovery, and expert testimony. A collective approach is often an attractive alternative to plaintiffs

and defendants alike and especially to courts and judges who will nearly always prefer processing one big case as opposed to thousands of separate ones that present the same or very similar issues. And, as we have noted earlier, by sharing the expenses in collective litigation, plaintiffs (and their attorneys) can avoid the "free rider" problem inherent in single actions, where others similarly situated reap all of the benefits of their effort without contributing anything to the costs associated with preparing and conducting a successful assault.

Although aggregating tort claims in certain situations does have unambiguous advantages, there is significant tension between safeguarding individual rights and achieving individual justice, on the one hand, and promoting collective justice, on the other. It is a tension that has plagued those who have considered these questions in the United States from at least the time that Justice Story initially attempted to address them in the 1820s and 1830s. But they do not end here. Once claims are collected into a single action, all of the incentives seem to encourage settlement. Indeed, trial and adjudication adds significantly to the cost for all participants while offering little promise of finality. For claimants, a settlement has the obvious advantage of bringing matters to a close with some financial compensation (although it is often insufficient, given the personal trauma that they have experienced) and with the knowledge that the defendants have paid dearly for their actions. Their attorneys are guaranteed payment for their considerable investment. Judges can put the entire matter finally (and hopefully) to rest. And defendant corporations can convert uncertain liability to a finite, manageable total, while limiting their exposure to future claims arising from the same set of actions. Presumably, they will also take corrective measures to minimize repeating the offending scenario.

This scenario has given impetus to the quite recent phenomenon of settlement classes, cases filed under *Rule 23* explicitly for the purpose of settlement. As part of the deal, all parties, including any potential class members not yet identified, are bound by the resolution. To achieve this result, the presiding judge must officially approve it. Pre-settlement activities in such cases can consume enormous time and resources on the part of all of the major players, and coming to such terms is no small matter. Nonetheless, in addressing the controversy as a social problem and in carving a solution that has larger policy and regulatory implications, problems of individual justice are sacrificed. Moreover, the settlement, if approved by the court, is binding on all without their input and without their consent, which brings forward the age-old problem. Some have observed that this kind of format may solve the "free rider" issues, but it simultaneously creates a "kidnapped rider" problem (see, for example, Garth 1982).[60] This is precisely the issue presented to the Supreme Court of the United States in two relatively recent cases stemming from the massive tide of asbestos litigation, *Amchem Products v.*

*Windsor* (1997) and *Ortiz v. Fibreboard Corporation* (1999) (see further discussion in Chapter 2 in this text).

Although the dimensions of the asbestos litigation are unusually huge and the injuries irreversible and far-reaching, the conflict between individual and collective justice embedded within it is a stubborn reality of group action. Such a scenario is particularly true given the historical and contemporary purchasing power of focus on the individual and individual rights in political and legal debate in the United States. When *Rule 23* was revised in 1966 and openly accepted the class action form, some observers were hoping for justice on behalf of the "small claimant," society's "lowly," who had suffered injuries at the hands of "those who command the status quo ... those liberally endowed with power and wealth" (*Eisen v. Carlisle and Jacquelin* 1974, 186 [Douglas J., dissenting]), much like "white knights in shining armor" who would use the class action as a sword to slay the dragons that preyed on the helpless. Others, however, saw the procedure as a "Frankenstein's monster," which, although created with good intentions, would quickly wreak havoc across the system (Miller 1979). Indeed, investigators have noted the persistent effort of networks of "white knights" who have engaged the system on behalf of the many who need protection (for example, Kluger 1976; Tushnet 1987; Schuck 1986). This view of the process is tempered by the observation that in litigation the "haves" usually come out ahead (Galanter 1974; and see, for example, Kritzer and Silbey 2003), because they have the resources to devote to developing winning strategies and to engage in prolonged, multi-tiered efforts, and still further by research that finds the courts to be institutionally too weak to take a lead in fostering social change (for example, Rosenberg 1991).

Characterizations of group litigation, particularly class actions, in the political process and in the popular media tend to be hyperbolic. Indeed, William Haltom and Michael McCann (2004a) thoroughly document and assess the broad scale effort of the corporate community and their political allies to wage a very successful media campaign to portray the tort law system (especially regarding product liability) as facing crisis because of frivolous claims brought by greedy, undeserving individuals represented by unscrupulous and relentless lawyers.[61] However, given the scope of truly significant issues that have been litigated as class actions, and the far-reaching regulatory and policy implications that flow from them, we should probably expect hyperbole. The list of paramount questions that have been placed before the courts in this form is quite impressive, ranging from civil rights, environmental protection, and asbestos-related injuries, as we have noted, to a long list of problems associated with pharmaceutical drugs, medical products, corporate securities and sales issues, and workplace-related injuries. In each instance, the threshold consists of such problems as representativeness of

the named parties who have come forward on behalf of all others whose interests they claim to signify and whether care has been taken to protect the rights of unidentified group members. In each case, the court is asked to acknowledge the larger policy repercussions of the challenged activity/product/condition as well as the regulatory implications of solution options and to reconcile inherent tension between the greater good and individual rights and compensation. Judges have dealt with them in different ways, but these issues have accompanied group litigation from the earliest of cases. It is this tension and the challenge of confronting it that we trace in the chapters ahead.

We first assess the full flowering of mass tort litigation in the United States, how it has unfolded as a legal phenomenon in the post-*Rule 23* contemporary era, and the strategies crafted and deployed by either side of the conflict. In Chapter 3, we appraise the development of what became wide-band litigation in the United States against the tobacco industry, and, in Chapter 4, we examine the broad court-centred effort against gun manufacturers. Chapter 5 investigates the use of the class action model in response to problems associated with mass production, distribution, and consumption of food products. Although the United States was relatively late in addressing the problems of group litigation, compared to the United Kingdom, and early American jurists looked across the Atlantic for guidance, the US project diverged from others by the late nineteenth century. Chapter 6 assesses recent developments in group litigation beyond the United States, particularly in the United Kingdom, Canada, and Australia, allowing us to put the US experience in a broader perspective. Finally, Chapter 7 re-addresses the central issues in light of our observations.