Collective Action and Class Action

Samuel Issacharoff*

* Reiss Professor of Constitutional Law, New York University School of Law. My thanks to David Drew for excellent research assistance.

1– INTRODUCTION

Over the past 25 years, class actions have emerged as a central feature of Canadian law. The conceptual heart of these class actions comes from the Ontario Law Reform Commission's 1982 *Report on Class Actions,* particularly in common law Canada.[1] Drawing on the experiences of the early-adopter provinces of Québec, Ontario and British Columbia, the Report sets out the objectives of the modern class action: judicial economy, access to justice, and behavior modification. Today, each province except Prince Edward Island has enacted comprehensive class proceeding a legislation,[2]—while Prince Edward Island relies on it indirectly, as the Report's logic was nationally enshrined by the Supreme Court in *Western Canadian Shopping Centres, Inc.* v. *Dutton*.[3]

From my personal vantage point in the U.S., it is difficult to argue with the stated premise of the Ontario Report:

> No longer are we faced with only a single individual or small business against whom we have some grievance. Trite as the observation necessarily is, it bears emphasizing that we live in a corporate society, characterized by mass manufacturing, mass promotion, and mass consumption. …
>
> The mass production and sale of an inherently defective product has the potential to touch all consumers of that product. Misleading advertising by a large corporation can have province-

1. ONTARIO LAW REFORM COMMISSION, *Report on Class Actions*, 1982, available at: <https://archive.org/details/reportonclassact01onta> [Hereinafter OLRC Report].
2. See Janet WALKER and Garry D. WATSON, *Class Actions in Canada*, 2014, at 33-34 (outlining differences in provincial adoption of class action legislation, while noting the OLRC Report's influence on all except Quebec).
3. See *Western Canadian Shopping Centres, Inc.* v. *Dutton*, [2001] 2 S.C.R. 534, at 549-550. ("Class actions offer three important advantages over a multiplicity of suits …").

> wide or even national implications. Large scale pollution of rivers or the atmosphere can affect countless persons over a long period of time. Sophisticated securities frauds, discrimination in hiring, illegal strikes, and many other types of unlawful conduct have direct and indirect ramifications for all of society. And in the wake of such misconduct, the individual is very often unable or unwilling to stand alone in meaningful opposition.[4]

Without wishing to compromise my ability to visit Canada again, I cannot let pass one concern. The reasoning in the Ontario Report points to the need for collective redress, as the term is now used in Europe. But as a defense of the class action, there is a fundamental incoherence in relying on the stated premises of efficient use of resources, access to justice, and behavior modification. Accepting that the scale of harm and the lack of individual redress are all reasons requiring collective action, there is nonetheless the question about why any of these insights point to class actions.

The ability to externalize the cost of conduct, as with a polluter or a mass marketer who may realize substantial gains from many small-scale frauds, is the classic problem that explains why private ordering through contract is insufficient to certain unwanted conducts. Policing the integrity of market transactions or preventing environmental depredation are examples of classic public goods, and the problem of the inability to internalize private gains from the creation of public goods is the reason that public good production has to be collectivized. In turn, the need for collective security forms the standard justifications for state-level activity.

Class actions are not merely forms of collective action that overcome the limited ability of individuals to protect their rights through contract or private legal action. Rather, class actions are *private* sources of collective authority, even if formed pursuant to legal rules governing class certification and even if, as in Quebec, they may be eligible for formal public subsidies.[5] The question that requires some explanation is not the need for collective redress, but rather the reliance on private ordering through court-supervised class actions

4. OLRC Report, at 3.
5. See Catherine PICHÉ, "Public Financiers as Overseers of Class Proceedings" (2016) 12 *N.Y.U. J.L. & Bus.* 779 (discussing the role of Quebec's *Fonds d'aide aux actions collectives* in Quebecois class proceedings).

rather than direct regulation by state authorities. Put simply, if it is public goods we seek, why not use public authority to obtain them?

The conceptual limitation is even more pronounced given the lead role of Quebec in the development of class action law, and now in its implementation.[6] Quebec is, after all, not perfectly part of common law Canada and is a significant outlier in the civil law world in its eager reliance on class litigation rather than state decrees to achieve regulatory economies of scale. As a general matter, common law jurisdictions incorporate private collective actions more readily than civil law jurisdictions, largely as a result of greater comfort with judge-made law. Put another way, could not the Ontario Report be the prelude to the creation of a more powerful regulatory body, perhaps akin to the objectives of the Consumer Finance Protection Board in the U.S.? The paradox is not the need for collective enforcement but the choice to use private collective enforcement through the class action rather than through the state regulators.

Nor is the enforcement paradox unique to Canada. All societies already possess an institution designed to overcome collective action barriers to common security and the proper allocation of burdens and resources: the state, in its most basic, Hobbesian functions. The class action offers an alternative form of collective organization to the state—without the elements of popular participation, political consent, and electoral accountability that justify governmental authority in a democracy. That delegation of collective authority to an institution without the democratic pedigree of the state demands some justification.

In what follows, I will trace the development of class action law in the U.S. from the perspective of the relation between the class action and state regulation.[7] I do not take up the particular mechanisms of class creation in Canada, nor the details of the procedural requirements for the class. That task is best left to Canadian observers better versed in Canadian law. Rather, the aim is to show that the relation between private and public ordering is a central theme in the development of class actions thus far. For Europeans, even after numerous EU-level pronouncements on the need for collective

6. Catherine PICHÉ, "Class Action Value", (2018) 19(1) *Theo. Inquiries in L.* 261, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009743> (analyzing the extent and impact of class action rewards in Quebec from 2004 to 2016).
7. A fuller exposition of these themes may be found in Samuel ISSACHAROFF, "Class Actions and State Authority", (2012) 44 *Loy. U. Chi. L.J.* 369.

redress,[8] the ability to license private enforcement, including the need for a profit motive for private conduct, has resulted in efforts that are mostly stillborn.[9] In the U.S., by contrast, the generalized and at times pathological distrust of the state made the turn to private enforcement an easier undertaking.

II– THE CLASS ACTION AS A CHALLENGE TO STATE AUTHORITY

A focus on the class action as a means of obtaining not just collective resolution, but independent collective resolution is critical to understanding the modern American experience. The contemporary class action derives from the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure. As my colleague Arthur Miller recounts, the impetus for and heart of the critical reform effort was Rule 23(b)(2), a provision for common claims for injunctive and declaratory relief,[10] and in turn the "centerpiece was civil rights."[11]

As straightforward and compelling as this account is, it nonetheless raises questions. It is the uniformity of the conduct, as with the segregation of the school system in Topeka, Kansas, that makes class certification both proper under Rule 23(b)(2) and unnecessary. What difference would it have made had *Brown* v. *Board of Education*[12] gone forward as just an individual case brought in the name of either Oliver Brown, the putative lead plaintiff, or his daughter

8. For a history of such pronouncements from the European Commission and member states, see Roger GAMBLE, "Not a Class Act (Yet): Europe Moves Softly Towards Collective Redress", (2016) 37(1) *Eur. Compet. L. Rev.* 14. *Ex ante* consumer protections, including great reliance on information disclosure laws, continue to dominate across the E.U. See Geneviève HELLERINGER and Anne-Lise SIBONY, "European Consumer Protection Through the Behavioral Lens", (2017) 23 *Colum. J. Eur. L.* 607.
9. Samuel ISSACHAROFF and Geoffrey P. MILLER, "Will Aggregate Litigation Come to Europe?", (2009) 62 *Vand. L. Rev.* 179.
10. Rule 23(b)(2) reads: "The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. …" Fed. R. Civ. P. 23(b)(2).
11. See Arthur R. MILLER and Samuel ISSACHAROFF, *An Oral History of Rule 23: An Interview of Professor Arthur R. Miller by Professor Samuel Issacharoff*, Center on Civil Justice Papers 1 (2017), available at: <http://www.law.nyu.edu/sites/default/files/ICCVCJUS17.1-CCJ%20Rule%2023%4050%20Booklet%20Project_RELEASE.pdf>; David MARCUS, "Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action", (2011) 63 *Fla. L. Rev.* 657, 661 (arguing that Rule 23 authors primarily had desegregation suits in mind when they provided for mandatory class treatment under Rule 23(b)(2)).
12. 347 U.S. 483 (1954).

Linda Brown, the actually excluded schoolchild? Any declaration of unconstitutionality, or even more certainly an injunction against the continued operation of the segregated system as to the Brown family, could not possibly have been confined to the Brown family's claims alone.

To some extent, the availability of a class action served to take pressure off the individual plaintiffs in politically or socially charged litigation. For the same reason the NAACP Legal Defense Fund chose to proceed in the name of Oliver Brown rather than his minor daughter, so too the fact of having many named plaintiffs acting on behalf of a veritable army of claimants diminishes the vulnerability of individual plaintiffs precisely because they become largely interchangeable.

Second, and more central to the present inquiry, the anticipated scope of Rule 23(b)(2) class actions puts them on a collision course with the political choices of democratically elected governmental authority. This problem is more specific than the ever-present consternation over countermajoritarian judicial review. Rather, the classic civil rights class action directed at discriminatory state action is characterized precisely by a claim that the majoritarian processes have placed the class at risk of harm by the legislated choices of majoritarian constituencies.

On this view, the certification of a class conforms to the central insight of the renowned *Carolene Products* footnote four.[13] The Rule 23(a) factors, in effect, are a proxy for the discreteness of a cohesive class of plaintiffs, and the Rule 23(b)(2) requirement of being subject to a uniformly applied policy or course of conduct establishes that the class is treated as distinct from the population at large—an operationalization of the footnote's insularity requirement.[14] The key to Rule 23(b)(2) is that the uniformity of treatment across

13. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). In footnote four, the Court set out the basis for modern judicial review by suggesting that certain categories of legislation may be subject to more exacting scrutiny. *Ibid.*, the Court recognized that it might at some point have to apply more searching review to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Ibid.*, In the most famous passage of the footnote, the Court added that stricter scrutiny might also apply when "prejudice against discrete and insular minorities … tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Ibid.*
14. Fed. R. Civ. P. 23(b)(2) (the opposing party's actions or inaction must "apply generally to the class").

the affected population defines the class.[15] In turn, the Rule 23(a) prerequisites for class certification require that the group subject to distinct state conduct be substantial[16] and that the legal claim substantially addresses the asserted harm suffered by the entirety of the class.[17] When combined, the formal criteria of the rules and the resulting class definition set forth the discreteness and insularity of the affected population.

Viewed in this fashion, the Rule 23(b)(2) class action is a claim of political disregard by the majority for the particularized interests of the minority. The final passage of the *Carolene Products* footnote, too often overlooked in favor of the evocative concepts of discreteness and insularity, makes this point clear: "[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[18]

Possibly the Canadian political and legal landscape are not so infused with court-driven social change. Possibly as well, the federal structure has promoted a provincial level responsiveness to threatened social groups, including minorities.[19] But under the *Canadian Charter of Rights and Freedoms* after 1982, claims have moved beyond the provincial level and have done so outside the administrative arena.[20] And, without disparaging Canada, every democratic

15. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 360-61 (2011) (holding that Rule 23(b)(2) applies only when "conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them") (quoting Richard A. NAGAREDA, "Class Certification in the Age of Aggregate Proof", (2009) 84 *N.Y.U. L. Rev.* 97, 132) (internal quotation marks omitted).
16. Fed. R. Civ. P. 23(a)(1).
17. *Dukes*, 564 U.S. at 349-350 (clarifying that the common question "must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke"); NAGAREDA, *supra*, note 15, at 132 (arguing that "[w]hat matters to class certification" under Rule 23 is "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation").
18. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).
19. W.A. BOGART, "Questioning Litigation's Role – Courts and Class Actions in Canada", (1987) 62 *Ind. L.J.* 665, 666.
20. OLRC Report, *supra*, note 1, at 222 (quoting *The Board of Governors of Seneca College of Applied Arts and Technology* v. *Bhadouria* (1981), 37 N.R. 455 (Can.), at 461).

society faces the risk of majoritarian indifference or hostility to subgroups and, one suspects, that Canada is not an exception.

This mechanism has become fully internalized in American law. In *Brown* v. *Plata*,[21] the United States Supreme Court confronted the most significant class action litigation of the past decade, yet one whose procedural contours appear so obvious as to not even register as a "class action case." Indeed, not a single Justice challenged the procedural posture of the case as a class action, although they divided 5-4 on the merits of the claim.

At issue was the persistent overcrowding of California state prisons, the subject of ongoing litigation challenging various manifestations of desperate prison conditions.[22] Despite prior determinations of unconstitutional conditions,[23] California continued to incarcerate—furthered by its punitive sentencing policies,[24] including "three strikes and you're out"[25]—to the point that its inmate population reached over 150,000, housed in prisons built to hold 80,000.[26] As the incarcerated population grew, the basic systems of health and

21. *Brown* v. *Plata*, 563 U.S. 493 (2011).
22. *Ibid.*, at 500 (noting that California's prison conditions had been the subject of "years of litigation").
23. See *Coleman* v. *Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (finding that state officials acted with deliberate indifference toward inmates' mental health needs in violation of the Eighth Amendment); *Plata* v. *Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932243, at *1 (N.D. Cal. May 10, 2005) (appointing a Receiver to supervise the prison system's medical facilities after finding persistent violations of inmates' Eighth Amendment rights).
24. In 1977, California enacted a Determinate Sentencing Law ("DSL"), which limited judicial discretion and mandated higher sentences in a variety of circumstances. 1976 Cal. Stat. 5140 (codified as amended at Cal. Penal Code § 1170(a)). In part as a result of its more stringent sentencing regime, the state's prison population increased more than sevenfold between 1980 and 2007. Joan PETERSILLA, "California's Correctional Paradox of Excess and Deprivation", (2008) 37 *Crime & Just.* 207, 209. The Supreme Court struck down the DSL in *Cunningham* v. *California*, 549 U.S. 270, 293 (2007) (finding that the statute violates defendants' Sixth Amendment rights to a jury trial by permitting "the judge, not the jury, to find the facts permitting an upper term sentence").
25. Three Strikes Law, Cal. Penal Code § 667 (West 2003). The Supreme Court has heretofore rejected Eighth Amendment cruel and unusual punishment challenges to three-strikes laws. See, e.g., *Lockyer* v. *Andrade*, 538 U.S. 63, 66 (2003) (upholding defendant's sentence of two consecutive twenty-five-year terms for shoplifting, his third felony offense). But see *Ramirez* v. *Castro*, 365 F.3d 755, 768 (9th Cir. 2004) (overturning three-strike sentence for a third shoplifting offense as disproportional in violation of the Eighth Amendment).
26. *Plata*, 563 U.S., at 501-502.

security broke down, with alarming incidences of mental illness, violence, and disease.[27]

The need for class treatment in *Brown* v. *Plata* may be readily discerned from the perspective of crafting a remedy. Each member of the class had been duly sentenced and properly subject to incarceration, leaving aside the inevitable individual appeals and habeas proceedings that may have been pending. No prisoner could claim an individual right to release from prison as a consequence of the overcrowding. Damages might be awarded for claims of severe harm, but damage awards to prisoners are notoriously sparing.[28] Whatever the cumulated total of damages awards to individual prisoners, it would remain simply cheaper—economically and politically— for the state to pay off the worst abused prisoners in a dysfunctional system rather than have to confront the structural calamity of the California state prisons. Absent unitary treatment through a class action, no prisoner would have a claim as to the systemic violations caused by overcrowding, but only standing to seek legal redress for his or her individual harms.

Further, the fact that the class was made up of prisoners highlights the insufficiency of democratic remediation through the political process. California disenfranchises convicted felons during their incarceration or parole, with felons constituting the substantial majority of the population in the state prisons.[29] The inability to vote is really only a formality that confirms the outcast status of the prison population. On the issue of greatest concern to the prison population—the overcrowding and resulting rights violations in the prisons themselves—prisoners are unlikely to compete successfully for scarce state resources against schools, roads, parks,

---

27. The record revealed appalling instances of abuse and neglect due to overcrowding. Suicidal inmates awaiting treatment were at times "held for prolonged periods in telephone-booth sized cages without toilets." *Ibid.*, at 503. Inmates suffering from physical ailments likewise experienced prolonged delays: in one facility, "[a] prisoner with severe abdominal pain died after a five-week delay in referral to a specialist." *Ibid.*, at 505. A doctor testified that "extreme departures from the standard of care were 'widespread.'" *Ibid.*

28. See Margo SCHLANGER, "Inmate Litigation", (2003) 116 *Harv. L. Rev.* 1555, 1626 (noting that even before the 1995 Prison Litigation Reform Act, which raised the bar for recovery, "plaintiffs were successful in only a small minority of inmate cases filed, and even the successful cases usually garnered quite small damages").

29. Ryken GRATTET and Joseph M. HAYES, "California's Changing Prison Population", (2015) *Just the Facts*, available at: <http://www.ppic.org/content/pubs/jtf/JTF_PrisonsJTF.pdf>.

and the services consumed by the un-incarcerated, voting population. Moreover, prisoners face the concentrated and effective political force of the correction workers' union, a powerful force that, through lobbying and extraordinary campaign contributions, has pressed for harsher sentences—a major source of overcrowding.[30]

Ultimately, the Supreme Court upheld a lower court order requiring the immediate reduction of the California prison population by 40,000 inmates, until such time as its prisons hold no more than 137.5 percent of capacity.[31] The question of class certification legitimately placed the Court in a role of public superintendent over the rights of inmates. This, in turn, allowed the extraordinary and controversial remedy of ordering the release of prisoners duly convicted of crimes, in effect putting convicted criminals back on the street.[32] The class action mechanism functioned, as it should have, as a means of harnessing collective action against the collective authority of the state.

III– THE CLASS ACTION AS COMPLEMENT TO STATE AUTHORITY

Although the 1966 reforms aimed centrally to unleash injunctive civil rights actions from their procedural limitations, the greatest innovation came with Rule 23(b)(3) and the creation of an efficiency-based class action for damages.[33] Under conditions of a

30. The California Correctional Peace Officers Association ranked fifth among the top-ten contributors to independent expenditures committees between 2001 and 2006. CAL. FAIR POLITICAL PRACTICES COMM'N, INDEPENDENT EXPENDITURES FOR LEGISLATIVE AND STATEWIDE CANDIDATES 4 (2008), available at: <http://www.fppc.ca.gov/meeting_slides/ 20080214/Present ation-Final.pdf>. Harsher sentencing laws are reflected in an aging prison population, with prisoners aged fifty years or older now comprising nineteen percent of the state's inmates. HAYES, *supra*, note 29, at 1.
31. *Plata*, 563 U.S., at 540-42.
32. A ringing dissent by Justice Scalia described the approved remedy as "the most radical injunction issued by a court in our Nation's history." *Plata*, 563 U.S., at 550 (Scalia, J., dissenting).
33. On the history of Rule 23(b)(3), see Arthur R. MILLER, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'", (1979) 92 *Harv. L. Rev.* 664, 669-70 (arguing that the 1966 revisions to Rule 23(b)(3) were not intended to revolutionize class-action practice, but merely to create "a more effective procedural tool"); William B. RUBENSTEIN, "On What a 'Private Attorney General' Is—and Why It Matters", (2004) 57 *Vand. L. Rev.* 2129, 2146-49 (arguing that Rule 23(b)(3) permits class action plaintiffs to supplement public regulation by acting as "private attorneys general").

predominance of common issues and the ability to manage collective resolution, the (b)(3) class action allowed cases that could stand alone as claims for damages to be prosecuted in aggregate form.

The central justification was that the ability to find redress for smaller value harms was a public good, such that diffuse individual stakes will lead to insufficient investment to secure common benefits.[34] Here again, the class action needs to confront the role of public versus private power. The state, through its common capacity to pool costs and benefits through the taxing and regulatory power, is the prime mechanism to overcome the "tragedy of the commons"[35] that leads to suboptimal societal results.

As the Ontario Report recognizes well, class actions address the public goods dilemma in two ways. First, by pooling the stakes in the case, the class action balances the incentives for investment in litigation between a repeat-play defendant and a host of one-time actors, as with the relation between a mass marketer and an undifferentiated group of individual consumers. To quote Judge Richard Posner, "only a lunatic or a fanatic sues for $30."[36] Indeed, overcoming the "negative value" associated with seeking relief is offered as one of the prime justifications for the small-value class action.[37] Second, pooling claims create a common reservoir of recovery that may induce an agent to take the reins on behalf of the class:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[38]

---

34. See Paul A. SAMUELSON, "The Pure Theory of Public Expenditure", (1954) 36 *Rev. Econ. & Stat.* 387, 388 (explaining the "pure theory of government expenditure" on collective consumption goods).
35. Garrett HARDIN, *The Tragedy of the Commons*, (1968) 162 *Sci.* 1243, 1244-45.
36. *Carnegie* v. *Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).
37. See *Castano* v. *Am. Tobacco Co*., 84 F.3d 734, 748 (5th Cir. 1996) ("The most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit.").
38. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace* v. V*an Ru Credit Corp*., 109 F.3d 338, 344 (7th Cir. 2007)).

The modern form of the class action subsidizes private attorneys in overcoming these collective action barriers.[39] But to return to the central theme, if the state is to subsidize private actors to assume the role of public agents then why should the state not assume the role of public guardian itself?[40] Access to justice is itself a costly public good and the availability of relatively low-cost, private attorney general actions depends on the infrastructure of courts, liberal discovery, and the enforceability of judgments.

The answer in the domain of many economic harms is two-fold. First, in the U.S., there is a strong presumption in favor of innovation and bringing products to market as quickly as possible. As a result, the U.S. relies more heavily on after-the-fact regulatory enforcement than does the EU, for example, which is much more likely to require extensive permitting and licensing before allowing market innovations. The second is that in the U.S., public enforcement is typically underfunded, partially as a result of, and partially causing the alternative availability of private enforcement.[41]

The result is a form of public-private collaboration in which the private class action augments public administration of the laws. Antitrust law provides the best example. The broad channel of antitrust actions begins as public enforcements, either civil or criminal, brought by the Federal Trade Commission and the Department of Justice. Typically, these cases seek injunctive relief, sometimes civil fines or criminal penalties, but almost never restitution or compensation to the victims of unlawful action. Instead, that task is left to private enforcement through the "private attorney general" actions brought by private lawyers challenging the consequences of the anticompetitive activity, and seeking recovery for the class.[42]

---

39. See Judith RESNIK, "Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation", (2000) 148 *U. Pa. L. Rev.* 2119, 2145-47 (arguing that modern class action rules help subsidize private enforcement of public interests).
40. See Catherine PICHÉ, "Public Financiers as Overseers of Class Proceedings", (2016) 12 *N.Y.U. J.L. & Bus.* 779, 803.
41. In fiscal year 2016, the Securities and Exchange Commission spent $1.7 billion on its enforcement and compliance missions. SEC, Agency Fin. Rep. F.Y. 2016, at 121-123, available at: <https://www.sec.gov/about/secpar/secafr2016.pdf>. That same year, over $42 trillion in equity trades alone flowed through U.S. markets. See Stocks Traded, Total Value (Current US$), World Bank Data, available at: <http://data.worldbank.org/indicator/CM.MKT.TRAD.CD?locations=US> (scroll over graph points to view yearly sums).
42. RUBENSTEIN, *supra*, note 33, at 2149-2152 (discussing so-called private "piggyback" cases brought after initial state action).

Canada provides an interesting contrast in terms of the emergence of private enforcement power. The Canadian federal parliament historically lacked capacity to regulate outside of the criminal context under precepts of Canadian Federalism; the *Competition Act*'s mix of civil and criminal enforcement provisions was only affirmed as constitutional in 1989.[43] Given a generally laxer test for class certification,[44] the substantive law developed heavily in the context of class claims arising under the Canadian *Competition Act*.[45]

Although less of a cooperative venture, a similar overlap of private and public enforcement in the United States appears in the securities fraud context. One study by Professor Howell Jackson found that between 2002 and 2004, private class actions accounted for nearly forty percent of all sanctions imposed on securities fraud defendants, despite overlapping jurisdiction between private and public actions.[46]

But the point of comparison is not simply the relative amounts recovered through public or private enforcement. With a powerful regulated industry such as finance, there is the ever-present risk that the regulators become beholden to the regulated. As well summarized by my late Columbia colleague Harvey Goldschmidt, former Commissioner of the SEC: "Private enforcement is a necessary supplement to the work that the [SEC] does. It is also a safety valve against the potential capture of the agency by industry."[47]

Although fraud typically requires individual proof of reliance, the substantive law facilitates private enforcement by relying on a presumption of an efficient market that integrates all material representations, in effect relieving private actions of the transactional

---

43. *General Motors of Canada, Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641.
44. See John BEISNER, Karl THOMPSON, Allison Orr LARSEN, "Canadian Class Action Law: A Flawed Model for European Class Actions", (2008) 9 *Engage: J. Fed. Soc'y Prac. Groups* 123 (documenting and critiquing Canada's permissive certification history).
45. See Michael A. EIZENGA, Dany H. ASSAF, Emrys DAVIS, "Antitrust Class Actions: A Tale of Two Countries", (2011) 5 *SPG-Antitrust* 83 (comparing relevant features of Canadian and American antitrust class actions).
46. See Howell E. JACKSON, "Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications", (2007) 24 *Yale J. On Reg.* 253, 280-81 (graphing U.S. securities regulation enforcement actions in terms of both public and private actions).
47. Stephen LABATON, "Businesses Seek Protection on Legal Front", *N.Y. Times,* Oct. 29, 2006, at A1.

burden of establishing reliance through the costly common law method of individual proof.[48] The substantive law's recognition of the efficiency gains realized by institutional actors in thick capital markets is then matched by a procedural tool that overcomes the collective action barrier to investors seeking redress in parallel efficient fashion. Once relieved of the burden of showing individually specific reliance in each transaction, the purchasers of shares during a fixed period of time become interchangeable parts of a market complex, differentiated not by their individual decision-making, but by the mechanical facts of the prices at which they bought or sold.

As summarized in the 2011 Term by Chief Justice Roberts in *Erica P. John Fund* v. *Halliburton Co.*: "Because the market 'transmits information to the investor in the processed form of a market price,' we can assume … that an investor relies on public misstatements whenever 'he buys or sells stock at the price set by the market.'"[49] In *Halliburton*, the Court permitted investors to organize collectively as an opt-out class without first proving that each individual investor's losses from the decline in stock prices resulted from the defendant's misrepresentations, precisely because such a requirement would have reduced market-based collective claims to a series of individual exchanges.[50] The result overturned an emerging trend in some lower courts that required investors to prove loss causation in order to take advantage of the fraud on the market presumption. The result in *Halliburton* thereby maintains the economic viability of private enforcement actions.

The antitrust and securities cases lie across a spectrum of complementary public-private enforcement actions in which cost-effective class action mechanisms buttress the limited collective resources available to the state. The spectrum includes arrangements whereby the state agency serves as the initial clearinghouse for collective prosecution, permitting private actions only after state authorities have decided not to sue directly, as with the screening role of the Equal Employment Opportunity Commission under Title VII

48. See *Basic Inc.* v. *Levinson*, 485 U.S. 223, 245 (1988) ("Requiring a plaintiff to show … how he would have acted if omitted material information had been disclosed … would [impose] an unnecessarily unrealistic evidentiary burden.")
49. *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 811 (2011) (quoting *Levinson*, 485 U.S., at 244).
50. *Ibid.*, at 807.

in the U.S.[51] Each setting offers a distinct, unique hybrid of public and private enforcement, each organized to overcome the collective action barrier to private individuals seeking redress on their own.[52] The public dimension uses the forced collective action of the state; the private dimension uses the voluntary private aggregation made possible by liberal class action rules.

IV– THE CLASS ACTION AS A SUBSTITUTE FOR DIRECT STATE REGULATION

At the furthest remove from the idea of exclusive state regulatory authority is the use of the class action as a form of regulatory authority designed to be relatively independent of formal state administration. While no private action operates truly independently of the state—the locus is courts and private enforcement of legal norms—what is critical in this domain is that the moving agent regarding any particular claim of harm is a private actor rather than a state regulator or prosecutor. Such private enforcement is particularly alluring in common law systems that depend on ex-post liability to police market activity, as opposed to more rigid regulatory review as a condition of market entry.[53]

Once after-the-fact civil liability becomes a major source of regulatory oversight, there is no necessary reason for the state to be the lead enforcement agent. In responding to discrete injuries, the active agents can easily be private actors representing claimants for alleged misconduct that may emerge as the driving force in both establishing liability and obtaining relief.[54] Indeed, in describing

---

51. A party wishing to file a discrimination claim under Title VII must first file a claim with the EEOC, which conducts an initial investigation. If the EEOC determines that there is "reasonable cause to believe the charge is true," it may file a claim on the party's behalf or issue a right to sue letter permitting the party to pursue her claim in court. 42 U.S.C. § 2000e-5(b)-(f) (2006).
52. It is possible to extend the spectrum beyond the class action mechanism to include *qui tam* actions in which the private recovery of relators allows even individuals to assume collective responsibility for pursuing public harms. See, e.g., *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000) (noting "the long tradition of *qui tam* actions in England and the American Colonies," and affirming relator's standing to bring suit based on injury to the United States).
53. See Samuel ISSACHAROFF, "Regulating after the Fact", (2007) 56 *De Paul L. Rev.* 375, 377-78 (emphasizing the "centrality of ex post regulation" in the American legal system).
54. *Ex-ante* regulation is most effective when potential harms are predictable and precautions easily ascertained. Enforcement through ex-post liability is better suited to circumstances where potential harms are variable or available

the trend in Europe toward greater avenues of aggregate litigation, Fabrizio Cafaggi and Hans Micklitz specifically tie the role of collective litigation to different regulatory strategies: "Shifting enforcement from *ex ante* to *ex post* may permit entry liberalization, leaving pre-market authorization only for specific and riskier products or services."[55]

Thus, the class action in many areas of law is the private alternative to government enforcement; that is, the mechanism that allows the flexibility of the common law to operate instead of more formal command and control regulation. Private enforcement mechanisms play a role in the operation of what may be termed "regulating after the fact," the system of ex-post accountability that is the hallmark of the common law. The expansive role of civil litigation in the U.S., contrasted with greater formal regulation in much of the developed economic world, is part and parcel of a commitment of private regulatory enforcement.[56] In important areas of consumer law and economic damages, as with securities fraud, the private class action overcomes the distinct disabilities of public enforcement: the problem of insufficient resources, the risk of regulatory capture, and the proclivity toward rigidity of formal regulation in markets that require innovation and speed of change.[57]

The difference between a fixed, preexisting consumer organization or other state-licensed enterprise and the flexible use of the class action reflects long-standing divisions in economic organization. Going back one thousand years to the rise of Venice as a major trading power, one sees the importance of single-venture economic organizations to capitalize on entrepreneurial initiative and harness

---

precautions uncertain. See Samuel ISSACHAROFF and Ian SAMUEL, "The Institutional Dimension of Consumer Protection", in *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement*, 47, 50-53 (Fabrizio CAFAGGI and Hans-W. MICKLITZ (eds.), 2009) (proposing a typology to explain the relationship between public and private, and *ex-post* and *ex-ante*, regulation).

55. Fabrizio CAFAGGI and Hans-W. MICKLITZ, "Introduction", in *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement*, *supra*, note 53, at 1, 8.
56. Richard L. MARCUS, "Reform through Rulemaking?", (2002) 80 *Wash. U. L.Q.* 901, 907 ("[T]he American tendency to litigate about topics that are handled without litigation in other societies is not pathological, but rather a logical consequence of the American method of providing activist government without a centralized bureaucracy.").
57. Samuel ISSACHAROFF, "Group Litigation of Consumer Claims: Lessons from the U.S. Experience", (1999) 34 *Tex. Int'l L.J.* 135, 137-42.

active agents to the needs of more passive principals. As told in the compelling account by Daron Acemoglu and James Robinson, Venice pioneered the use of the *commenda*, "a rudimentary type of joint stock company, which formed only for the duration of a single trading mission."[58] A *commenda* "involved two partners, a 'sedentary' one who stayed in Venice and one who traveled. The sedentary partner put capital into the venture, while the traveling partner accompanied the cargo."[59] Acemoglu and Robinson praise the *commenda* for unleashing new uses of investment capital and for preventing the stultifying effects of permanent state monopolies on trade or enterprise.[60]

One can find many parallels between the single-undertaking joint ventures of old and the modern class action as developed in the U.S. Unlike the fixed creation of a government agency, or even the licensing of a single actor such as a designated consumer organization or some other NGO, the class action is transactionally limited. It exists for the limited purpose of pursuing a common set of claims among people who typically have no prior and no subsequent relation to each other. The result is mutually beneficial temporary alliances, as with the *commenda*, but with no institutional permanence beyond the single undertaking.

The class action fits well in American law precisely because of its separation from formal state control. In part, the centrality of class actions in areas such as consumer protection reflects a generalized common law approach to incremental regulation through evolving standards of care, similar to the growth of product liability law in the twentieth century.[61] The class action is a procedural device that responds to two obstacles that may frustrate the proper functioning of common law accountability. First, as already discussed, the prospect of collective prosecution serves as a litigation-inducing

58. Daron ACEMOGLU and James A. ROBINSON, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, 2012, at 152.
59. *Ibid.*, at 152-53.
60. *Ibid.*, at 153. Acemoglu and Robinson attribute the atrophying of Venice in part to the elimination of flexible economic organizations, such as the *commenda*, in favor of fixed state licenses, a process that promoted capture by established economic actors and that in turn led to economic stagnation. *Ibid.*, at 153-56.
61. For a discussion on the evolution of products liability, see Mark A. GEISTFELD, *Principles of Products Liability*, 2006, at 9-26; William POWERS, Jr., "Is There a Doctrinal Answer to the Question of Generic Liability?", (1996) 72 *Chi.-Kent L. Rev.* 169, 172-73 (noting that section 402a of the Restatement of Torts paved the ground for modern products liability law through its case-by-case adoption).

device through the coordination of small-value claims. Not only does it make collective prosecution possible, but it also allows for potential complete resolution of all claims, thereby saving on the transaction costs of repeat litigation and offering the prospect of a "global peace"[62] premium in exchange for a complete release of all claims against defendants.[63] Second, following the 1966 reforms to Rule 23, class actions proved particularly well suited to economic harm claims arising from impersonal markets for mass produced goods and services. In so doing, class actions bridged a critical gap between limited contractual remedies for the mass of affected consumers and the redress available to the subset of claimants whose physical injuries would place them within the reach of tort law, as in pharmaceutical cases.[64] The lower barriers to class certification under Canadian law serve the same objectives of easing the coordination function for low value claims.

But focusing only on the litigation features of the class action would understate the major feature of private litigation in mass markets. What stands out in this form of private action is the introduction of multiple actors into legal enforcement, a form of regulatory pluralism. This role is captured in part by the account of class action plaintiffs as private attorneys general. But the concept of a private attorney general understates the important role of private enforcement. The purpose of the class action is not simply to fill a gap owing to the lack of public resources. Offering a rival actor who can challenge regulatory failure is not simply a response to the benign fact of constrained capacity, but represents a deeper concern about the misdirection of public resources.

---

62. See *Sullivan* v. *DB Invs., Inc.*, 667 F.3d 273, 310 (3d Cir. 2011) ("[W]ere we to mandate that a class include only those alleging 'colorable' claims, we would effectively rule out the ability of a defendant to achieve 'global peace' by obtaining releases from all those who might wish to assert claims, meritorious or not.").
63. In this sense, class action settlements overcome not only the commons problem of public goods, but the negative commons problem arising from the inability to coordinate fractionated interests in a common asset. For an incisive discussion of this element of the "peace premium" in class resolution of common claims, see D. Theodore RAVE, "Governing the Anticommons in Aggregate Litigation", (2013) 66 *Vand. L. Rev.* 1183, 1193 (noting that "defendants are sometimes willing to pay a premium for total peace" to avoid adverse selection effects, reduce uncertainty, and minimize transaction costs).
64. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 2.01 (2010) (noting that class actions may be more effective in addressing "economic injuries from a generally applicable course of conduct" than "personal injuries" where common issues are generally not as prevalent).

Class actions then play a central regulatory role because of their independence from formal state channels. From this perspective, the purpose of the class action is to be a rival to the enforcement powers of state actors so as to serve as a check on the misuse of public authority. Mass markets are prone to the concentrated interests of the repeat actor overwhelming the diffuse interests of small-time actors. The effect is not just a matter of different litigation incentives, but of the disproportionate political pressure that concentrated minorities are likely to exert.[65] On this view, private suit enforcement through a class action is not just a matter of equalizing litigation resources. Rather, the critical issue is having diverse sources of oversight of markets with asymmetric stakes between engaged repeat actors and passive consumers. The greater the number of potential regulatory enforcement agents, the less likely the prospect of the regulator being captured by the superior resources and incentives of the regulated. The trade-off, however, is that there is less public accountability to the form of regulatory enforcement, and that the extent of regulation is largely determined by the economic incentives facing private actors, rather than the formalities of political decision-making.

This potential for the class action to serve as an enforcement device independent of state authorities is the feature of class action law that is most likely to engender strenuous opposition from institutional actors. Any mass marketer of goods or services would rather face the limited resources and attention of the individual consumer, whether in the limited domain of one-on-one dispute resolution, or even in the political arena. To speak of class actions as "leveling the playing field"[66] or increasing "access to justice" is not only a matter of balancing the strengths of the relative litigation interests but of

65. This is the classic public choice account of why minority factions can extract disproportionate returns from the political process. For an early formulation of public choice theory, see William H. RIKER, *The Theory of Political Coalitions*, 1962. On the superior ability of organized minorities to advance their interests, see Mancur OLSON Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups*, 1965, at 143: ("The multitude of workers, consumers, white-collar workers, farmers, and so on are organized only in special circumstances, but business interests are organized as a general rule."). For an overview of the public choice literature, see Steven CROLEY, "Interest Groups and Public Choice", in *Research Handbook on Public Choice and Public Law* 49, 49-80 (Daniel A. FARBER & Anne Joseph O'CONNELL (eds.), 2010).
66. See Samuel ISSACHAROFF, "Assembling Class Actions", (2013) 90 *Wash. U. L. Rev.* 699, 714.

the deeper concern that absent some form of independent collective redress, wrongdoing will likely go undetected and unchallenged.

Perhaps not surprisingly, many of the most important battles of current class action case law in the U.S. are being waged in the domain where the class action is a primary mechanism of independent challenge to mass-scale wrongdoing. This is the issue of moment in the domain of consumer law, where the asymmetries of scale between mass marketers and individuals allow the former to control standard form contracting. Across a range of services, such as cell phones and credit cards, and increasingly in the employment context, standard form contracts now prohibit the accepting party from seeking redress as part of a class action and force any individual dispute into individual arbitrations,[67] as reflected in the lead case in this area, *AT&T Mobility LLC* v. *Concepcion.*[68]

At present, it is precisely where public enforcement is difficult, compromised, captured, or under-resourced that the flexibility and the entrepreneurial drive behind the class action are most decisive and most significant. And, not surprisingly, it is there that the political economy of resistance by institutional actors is most acute. The most contested arena of class action law is where the private enforcement action substitutes for or displaces public enforcement for reasons that are not difficult to divine. That fact alone speaks to the importance and complexity of private class action law.

Yet, paradoxically, it is precisely in the domain where public enforcement is not present that some of the greatest innovation is occurring. For example, tobacco litigation has historically resisted class treatment in the U.S., in part because of the individual nature of the claims of addiction and the resulting harms, but also in part because of the lack of centralized information about medical

67. Myriam GILLES, "Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action", (2005) 104 *Mich. L. Rev.* 373, 379 (predicting that collective action waivers, if permitted to proliferate, will ultimately result in "the near-total demise of the modern class action."); Jean R. STERNLIGHT, "Creeping Mandatory Arbitration: Is It Just?", (2005) 57 *Stan. L. Rev.* 1631, 1638-39 (noting the ubiquity of mandatory arbitration clauses in contracts of adhesion); Robert H. KLONOFF, "The Decline of Class Actions", (2013) 90 *Wash. U. L. Rev* 729, 815-823 (describing collective action waivers as a substantial impediment to negative value class action suits).

68. 563 U.S. 333, 352 (2011) (holding that the *Federal Arbitration Act* preempts California's common law unconscionability rule barring class action waivers in contracts of adhesion).

conditions—something readily overcome under Canadian single-payer health insurance. Nonetheless, in *Graham* v. *R.J. Reynolds Tobacco Company,*[69] Judge William Pryor allowed an individual damages motion stemming from a tobacco-related death to stand, based upon an earlier finding of negligence in a Florida state class action. The class had been decertified as to damages and other individual considerations, but allowed to stand as a determination of common liability issues, such as the relation between cigarette smoking and cancer. Judge Pryor wrote approvingly that there are,

> [S]everal 'tools to decide individual damages' in a class action, including '(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; [and] (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages'.[70]

Similarly, the Third Circuit took a broad view of common claims in the *NFL Concussion Litigation,*[71] allowing common risk from repeated head traumas among retired football players to be the predicate for collective resolution of injury claims.

V– CONCLUSION

At the heart of the modern class action is the creation of a private form of collective authority standing relatively independent of the state. The independence can yield an effective mechanism to challenge state conduct, to assist the state without swelling the permanent ranks of enforcement administration, and even to police potential misconduct by state actors vested with exclusive enforcement authority. As ably summarized by Judge Scirica of the Third Circuit:

> The class action device and the concept of the private attorney general are powerful instruments of social and economic policy. Despite inherent tensions, they have proven efficacious

69. 857 F.3d 1169 (11th Cir. 2017).
70. *Graham*, 857 F.3d 1169, at 1184 (citing *Brown* v. *Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1239 (11th Cir. 2016)).
71. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3rd Cir. 2016).

> in resolving mass claims when courts have insisted on structural, procedural, and substantive fairness. Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality.[72]

Part of the allure of class actions is that they can often offer these benefits more flexibly and often more efficiently than can the state. That raises the question, particularly as more civil law countries are experimenting with private enforcement, of their relation to the traditional reliance on direct state regulatory authority. The promised benefits correspond to a deeper commitment to regulatory pluralism, one that recognizes not only the gains that might be realized through private enforcement, but the risks associated with excessive reliance on exclusive state regulatory power.

72. *Sullivan* v. *DB Invs., Inc.*, 667 F.3d 273, 340 (3d Cir. 2011) (Scirica, J., concurring).