CHAPTER ONE

Introduction: Class Actions, Legal History, and Liberal Democracy

THE NATURE OF THE CLASS ACTION

The modern class action may appropriately be analogized to an iceberg. Just as only a small percentage of an iceberg appears above sea level, so too are most of those whose legal rights are determined in a class action proceeding largely invisible to the naked eye. A small number of active class representatives may litigate on behalf of hundreds, thousands, or even millions of absent class members. Though those absent class members for the most part remain passive throughout much of the legal proceeding, their rights will be determined as much as if they had themselves actively pursued their legal arguments in open court. If the class representatives succeed, absent class members—even if, on occasion, only as a theoretical matter—will share in the spoils of victory. If, however, those representatives fail, the claims of the absent class members will be legally obliterated by the doctrine of res judicata, just as are those of their class representatives.

The potential benefits of the class action, to both litigants and the legal system as a whole, are substantial. By simultaneously adjudicating the claims of large numbers of litigants, the class proceeding may achieve justice without overwhelming the judicial system. By obtaining relief for many plaintiffs whose claims are insufficiently large to economically justify individual litigation, the class proceeding may simultaneously achieve compensation for injured victims and help police widespread governmental or corporate misconduct that could otherwise escape effective legal regulation. But while ice provides a strong metaphor for the class action, in a different way so does fire. Like fire, the modern class action may give rise to as

much harm as good; if not properly controlled it may wreak havoc on the legal system and the values that underlie it. Some have charged that the class proceeding has often been employed as a form of legalized blackmail, by which an unscrupulous group of plaintiffs' attorneys effectively extort money from large companies by threatening their very existence with business-crushing class awards. Others have pointed to the danger of a perverse kind of "race to the bottom," potentially associated with the modern class action, where potential defendants have "sold" their cooperation to the lowest bidding plaintiffs' attorney in the shaping of a class-wide settlement.

For the most part, this debate has taken the form of legal argumentation—that is, by reference to the text of the governing procedural rule and the comparative costs and benefits for both the adjudication of claims and the legal system as a whole. The subject of class actions is taught in civil procedure courses, not in courses in constitutional law or political theory. Law students generally learn that the class action is a complex joinder device that can serve as a powerful check on governmental or corporate excess or illegality. It is unlikely, however, that they are often asked to view the class action device from the broader perspectives of constitutional or political theory.[1] The purpose of this book is to undertake just such an inquiry, and to draw a number of valuable lessons for the structure and viability of the modern class action.

CLASS ACTIONS, DEMOCRATIC THEORY, AND THE COLLECTIVIST-INDIVIDUALIST TENSION

Class action scholars have themselves only rarely acknowledged the political and constitutional implications of the procedure, and when they have done so they have generally either misused, misunderstood, or improperly manipulated the theoretical impact of the process.[2] Yet in important ways the class action implicates many of the most foundational aspects of the nation's constitutional and political structure. This is true when viewed from the perspectives of both the participants in the process (what I call the "micro" perspective) and society as a whole (the "macro" perspective).

From the micro perspective, if misused the class action gives rise to an inherent collectivist-individualist tension. It is important to keep in mind that a lawsuit does not "arise" under Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in the federal courts. The legal rights to be adjudicated, rather, are substantively created by some recog-

nized lawmaking authority—a legislative body, a court, or the Constitution. For the most part, these rights, in their pristine form, are vested by the appropriate lawmaking authority in the individual. The class action collectivizes adjudication of those substantive rights, often revoking—either legally or practically—the individual right holder's ability to control the protection or vindication of his rights through resort to the legal process. Thus, the more freely available the collectivizing impact of the class action, the less opportunity the individual litigant will have to control the vindication of his substantive rights.[3] Though rarely either acknowledged or explored by court or scholar, this inherent tension threatens to undermine both political and constitutional values that place significant weight on preservation and protection of the individual's integrity and autonomy—particularly the autonomy of participation in the democratic processes as a means of protecting his own interests.

From the macro perspective, the class action device could substantially undermine basic notions of democratic accountability by indirectly (and, often, furtively) transforming the essential nature of the substantive rights being enforced. Under the guise of procedure, class actions often effect dramatic alterations in the DNA of the underlying substantive law. The result—whether intended or not—is a form of confusion or even deception of the electorate, which is likely unaware that the essence of the governing substantive law has been altered because the alteration has occurred under the guise of procedural modification. Substantive law is altered, not through resort to traditionally recognized democratic procedures but rather by what is effectively a procedural shell game.[4] Moreover, in certain of its modern manifestations the class action may undermine the traditional restraints that the Constitution imposes on the judicial process, by threatening core elements of the adversary system that are central to the adjudicatory process.[5]

My examination focuses on the distinction between micro and macro theories. On the micro level, the democratic theory perspective considers the extent to which the focus of liberal democratic thought should be the autonomy and integrity of the individual as a free-willed participant in the governing process. Not all versions of democratic theory are grounded in a belief in the value of the individual. The fact remains, however, that a democratic society is ultimately made up of individuals, and the theory of liberal individualism finds implicit in the commitment to government by the people a fundamental level of respect for and belief in the worth of the individual as an integral whole. The liberal model of democracy, as I

perceive it, is premised on a synthesis of the instrumental value of developing the individual's intellectual and moral capacities to their fullest,[6] and a foundational commitment to the worth of the individual. It values the self-realization of the individual, not just the ability of the community, to self-determine.[7] Our nation's combined constitutional commitment to representative government and a Bill of Rights that preserves a sphere of behavioral autonomy for the individual demonstrates how the two elements of liberal democracy complement each other as a matter of political theory.

To believe in the value of individual autonomy, it must be emphasized, is not necessarily to imply an unbending commitment to individualist libertarianism in all of its conceivable applications. One can quite reasonably draw a dichotomy between *process-based* autonomy and *substantive* autonomy. The former focuses exclusively on the ability of the individual to control her participation in the governing process, while the latter concerns an individual's ability to control most aspects of one's life. It is the former, not the latter, that is central to liberal democratic thought.[8] The democratic process cannot function effectively unless the individual participants in the process have autonomy in making most choices about the nature of their participation in the process—or *meta* decision making, as it might be called. The individual does not necessarily possess complete insulation from the *results* of the democratic process—that is, substantive laws, enacted through the democratic process, that regulate or proscribe specified private behavior. Except in the most compelling circumstances, however, the individual must be able to decide how he will seek to influence the governing process for the purpose of either protecting or fostering his own personal interests or advancing ideological goals he deems important.[9] Resort to the judicial process for the purpose of protecting private interests is appropriately included within the broader category of governmental processes open, in a democracy, to individual participation. No one can doubt that the adjudication in the courts is as much a part of the governing process as are the actions of the legislative or executive branches. When a private individual resorts to the courts as a means of vindicating his legal rights, his meta-autonomy is triggered in much the same manner as when the individual seeks to influence the governing process through exercise of his First Amendment right of free expression. By collectivizing—often forcibly—the litigation process, the class action procedure threatens core notions of the process-based autonomy that is central to liberal democratic thought. The class action, then, gives rise to at least a prima facie tension between legally imposed collectivization and democratic meta decision making autonomy on the part of the individual.

On occasion, the Supreme Court has recognized that the due process clauses of the Fifth Amendment and Fourteenth Amendment[10] impose restrictions on government's ability to employ the class action procedure. However, this concern has focused exclusively on the *paternalistic* concern that those representing absent class members do so fairly and fully.[11] At no point has the Supreme Court provided any meaningful exploration of the autonomy interests of absent class members that are threatened by use of class procedures.

A number of respected commentators appear to have implicitly anticipated the collectivist-individualist tension and attempted to circumvent it by ignoring or transforming the inherently individualist nature of the substantive claims adjudicated in a class proceeding. They have sought to view the class, in most situations, not as an aggregation of distinct, individually held claims but rather as something that, for the most part, it clearly is not: an "entity," which exists as an organism conceptually distinct from the individual claims of the class members.[12] Were this mythical transformation actually to be accomplished, any concern for individual autonomy would be rendered all but non-existent. The individual's interest, after all, would then exist solely as one element within a larger organic and indivisible entity. But in legal reality, the class is generally not an entity at all. It is, rather, a litigation-based amalgamation of numerous individually held claims that procedurally lend themselves to a process of collective adjudication. In their pristine substantive form, the rights being amalgamated are individually held. Indeed, where class member claims exist solely as part of a pre-existing entity, they already receive special procedural treatment under separate provisions of the Federal Rules of Civil Procedure.[13]

THE ORIGINS OF THE CLASS ACTION

A significant part of the problem may derive from confusion over the historical grounding of group litigation practice in general. Even a brief examination of this history reveals that while as a historical matter representative litigation was confined to what are, as a pre-litigation matter, substantively cohesive and interconnected groups, the modern class action did not take on its current structure, in which separately held individual claims are aggregated and simultaneously adjudicated in a representative manner, until the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure. Prior to that dramatic modern alteration in representative litigation, the only representative litigations in which passive and absent

class members could be legally bound by the result were those involving cohesively tied group rights pre-litigation. This dramatic shift can be established by describing three stages in group adjudication prior to the 1966 amendments: (1) medieval and post-medieval English practice; (2) early American practice as evidenced by the writings of Justice Joseph Story and the early Equity Rules, and (3) the 1938 version of Rule 23 of the Federal Rules of Civil Procedure.

Group Litigation and Early English Practice

While the origins of group litigation are to be found in the legal practice in medieval England, the only form of *passive*-collective litigation (i.e., litigation in which wholly passive non-participants are treated as parties) recognized during that period or the period immediately following involved situations in which the substantive rights in question were group held. In other words, in the only situations in which non-participating individual litigants could be bound, the individuals whose rights were at stake in the litigation were those whose rights and interests were intertwined in the form of a recognized group *that existed pre-litigation*. It is important to understand the fundamental differences between litigation involving cohesive and legally recognized groups that exist, in legally recognized form, pre-litigation, and group litigation involving the aggregation of pre-existing individual claims. In the former situation, the substantive rights are vested by the appropriate lawmaking authority in recognized groups at the outset. In the latter situation, in contrast, the lawgiver has created individually held rights, and the collectivization of those rights occurs entirely at the stage of litigation.

Acceptance of representative litigation in medieval England is understandable when placed in the context of the social and political landscape at the time. English society was grounded in notions of collective action.[14] Whether by necessity in agrarian villages or voluntarily in the towns, individuals generally functioned as parts of established groups. In villages, collective organization was a natural consequence of the realities of the culture and obligations of "villeinage."[15] "Villeins" were the primary occupants in villages. They were bound to a manor and its lord. Their work on the manorial farms inured, for the most part, to the lord's benefit, so villeins were forced to labor on the common farmland for their sustenance. To ensure productivity and allocate the work fairly, villages developed complex systems of localized laws, specifying the villeins' duties both to their

lord and to each other. They formed a type of local government to administer the laws. As a result, a form of entity rule emerged. The structure was reinforced by other commonly held obligations, such as membership in a frankpledge group. Members of the group assumed responsibility for each others' behavior.[16] When the interests and obligations of individuals in relation to outside parties flowed exclusively from their membership in a specific group, group members logically stood in identical legal posture with the outside party. Not surprisingly, groups were natural litigation entities. By the seventeenth century, class group litigation was largely confined to rural agrarian settings. Roughly at that point, two new types of litigating groups emerged: joint stock companies and friendly societies. Again, both were defined, legally and socially, outside the litigation process.

Early American Practice

Justice Joseph Story's conception of representative litigation guided American use of the practice roughly until the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure. He noted several instances in which class adjudication was appropriate, including suits by members of a voluntary society or unincorporated body of proprietors on behalf of the entire organization.[17] While he also included several other categories, such as individual rights claimed in commonly held property, all of his categories shared a common theme: a substantive connection, *independent of the litigation,* between the representative party and those represented.

In 1833, the Supreme Court adopted Equity Rule 48. That provision stated:

> Where the parties on either side are very numerous and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all of the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.[18]

While by its terms the rule was not confined to pre-existing group settings, it effectively defeated the purpose of group litigation by prohibiting any res judicata impact of the decision on absent and passive class members. The only "true" form of representative litigation, then, continued to involve those suits involving group-held rights that had been recognized at the prelitigation stage. Thus, through the early part of the twentieth century the

courts confined representative litigation almost exclusively to the situations identified by Justice Story in 1820: cases involving pre-litigation groups and cases involving separate claims into a common fund.

The Original Rule 23

The original version of Rule 23 recognized three categories of class actions: true, hybrid, and spurious. "True" class actions were those in which the substantive rights of the class members were held jointly or *commonly*, as opposed to *severally*. "Hybrid" class actions were those in which the class members held rights severally but adjudication concerned rights in the same property. "Spurious" class proceedings were those in which the rights were held severally where there also existed a common question of law or fact and common relief was sought. In the case of spurious class actions, however, a judgment would have no res judicata effect on the rights of the absent class members. The only legal consequence of an aptly named spurious class action was that absent class members could freely intervene as active parties in the adjudication.[19]

Scholars and jurists readily acknowledged that the supposed distinctions between joint and several rights—the basis on which the class action categories were distinguished—"proved obscure and uncertain."[20] The distinction focused upon "the technical or abstract character of the rights or obligations."[21] Whatever confusion may have plagued the joint-several dichotomy, however, the fact remains that the standard employed by the original Rule 23 to determine the viability of the federal class action referenced a distinction that concerned the nature of the rights in their pre-litigation form, untied to the class action procedure.[22] In other words, the conceptual dichotomy between rights that were joint and those that were several had not been developed originally for the purpose of shaping class adjudication. It had developed, instead, in the context of tort-based and property rights—both concepts that concerned the shaping and regulation of pre-litigation primary behavior, rather than the structure of litigation practice. While hybrid classes, like their predecessors in equity practice, did not turn exclusively on the joint-several dichotomy, they, too, were classified on the basis of the pre-litigation substantive nature of the rights—individually held in rem claims in the same property.

One form of what could be described as "group" litigation that differed fundamentally from the bulk of class litigation did exist: the so-called "bill of peace," in which numerous individually held in personam claims of disparate claimants were resolved collectively. However, the process employed

in the bill of peace differed dramatically from the classic form of group litigation. Unlike traditional group litigation, which was *representative* in nature, in the bill of peace each claimant's legal interests were represented individually before the court. Thus, while the adjudicatory process was conducted simultaneously for all participants, the interests of passive claimants were not represented by active and participating claimants. Rather, each claimant whose rights were bound by the process was actively and independently involved in the adjudication.[23]

The inherently collective nature of the substantive rights adjudicated in traditional class litigation is far more than a mere historical oddity. Indeed, it has enormous implications for the political and constitutional theory of the modern class action. When the nature of the individual claimant's substantive right that is the subject of group litigation is inherently collective, there can be no legitimate moral or constitutional claim of process-based individual autonomy in choosing how to protect or legally vindicate those rights. The most that either the political guarantee of liberal democracy or the constitutional guarantee of due process can assure in such contexts is that those group members represent the group's interests fully and fairly protect the rights of the absent group members.

When the substantive rights at stake are vested by the appropriate lawmaking authority—legislature, court, or Constitution—in the individual, the political dictates of liberal theory and the constitutional dictates of procedural due process require considerably more than a paternalistic assurance of adequate representation. In a liberal constitutional democracy, the individual is guaranteed the right to protect his or her property from governmental processes designed to abrogate those interests. This is true as a matter of abstract political and constitutional theory, even where the actual value of the property interest involved is relatively minimal.[24] A commitment to process-based individualism requires at least a prima facie assumption of individual autonomy in deciding how and whether to protect the individual's rights by resort to the judicial process. The constitutionally dictated notion of a litigant's "day in court" as a prerequisite to the legal extinction of individual rights has long served as a corollary to the law of res judicata and collateral estoppel.[25] No other result would be consistent with recognition of the individual's autonomy and integrity that is central to the notion of liberal democracy.[26] Once the class action procedure was altered to permit—indeed, on occasion even require—the group adjudication of purely individually held rights, the stakes for both the political theory of liberal democracy and the constitutional theory of procedural due process were correspondingly altered in fundamental ways.

The 1966 Amendment to Rule 23

In 1966, the Federal Rules Advisory Committee dramatically altered the structure, purpose, and rationale of the class action rule. As part of a major revision of many of the multiparty devices, the Committee rejected the formalistic abstractions that had plagued the earlier version of Rule 23 in favor of a far more pragmatically based set of distinctions.[27] While those who amended the rule appeared not to have focused on the point, in rejecting the joint-several dichotomy the Committee effected a dramatic change in the substantive-procedural intersection central to the class action procedure. No longer would the availability of class action treatment turn on a reference to pre-litigation characteristics of the legal relationship among class members. After the amendment, that determination would be grounded purely in considerations affecting either the nature of the relief sought or the fairness or efficiency of the litigation process. Under revised Rule 23, in addition to satisfying requirements concerning the numerosity of the class and the adequacy and representativeness of the named class members,[28] the class must fall within one of four categories of cases. Under Rule 23(b)(1)(A), a class may be certified if individual actions could result in conflicting obligations on the part of the party opposing the class. Under Rule 23(b)(1)(B), a class may be certified if absent class members' interests could be undermined by separate actions. Rule 23(b)(2) authorizes a class action when the party opposing the class has acted in a manner generally applicable to the class as a whole, thereby justifying predominantly injunctive relief. Under Rule 23(b)(3), a class may be certified if common issues predominate and the class is found to be manageable and a superior method of resolution.

Unlike the group litigation of medieval English practice, early American practice, or even the joint-several dichotomy employed in the original Rule 23, none of these alternatives turns in any way on the nature of the pre-litigation intersection of the substantive rights of the individual class members. Rather, the substantive rights asserted in a modern class proceeding are, for the most part, individually held rights that, for reasons of fairness or procedural convenience, have been grouped supposedly for procedural reasons, at the stage of litigation. Most forms of modern group litigation that could be considered analogous to earlier group practice, where the groups existed in substantive, pre-litigation form, are now governed by Federal Rules 23.1 and 23.2. The former concerns derivative actions brought by shareholders, and the latter actions relate to claims brought by unincorporated associations.

It has been suggested that the interests of claimants in (b)(1)(A), (b)(1)(B), and (b)(2) classes are, in fact, substantively intertwined, presumably much like those of participants in classic group litigation practice.[29] But while situations could be imagined where this could be the case, surely none of the Rule 23(b) provisions *requires* such a pre-litigation connection among substantive rights, and more than likely there will be none. The only necessary connection among the rights of (b)(1)(A) claimants, for example, is that the relief they demand from the party opposing the class is effectively indivisible: either the defendant is forced to provide the relief, or he is not; there is, as both a physical and legal matter, no alternative. In some of these instances, it is true, the rights of the absent claimants will be substantively tied in some way. In others, however, they will not. And even when those rights have some pre-litigation connection, it does not necessarily follow that they are held in common or substantively shared, rather than individually held.

Much the same is true of the claims of members of (b)(1)(B) classes. It is important to emphasize that these classes are by no means identical to the old "hybrid" classes described in the original version of Rule 23, where the rights, though individually held, were asserted into a common fund or piece of property. In a (b)(1)(B) class action, the substantive rights asserted by class members may well be individually held in personam claims against a defendant for tortious behavior aimed at all of them, when a limited insurance fund is available for compensation purposes. In such situations, individual suits may well threaten the interests of individual plaintiffs, for the simple reason that the earliest suits are likely to exhaust the limited fund, leaving the later plaintiffs effectively remediless. Because these individual suits need not be substantively held in common, the (b)(1)(B) category is in no sense confined to the assertion of commonly held in rem claims in property.

More importantly, there exists absolutely no basis on which to assume some special pre-litigation fiduciary-like relationship among the class members in either of these modern categories. Instead, class members will usually be linked by nothing more than substantive parallelism or procedural fortuity. Indeed, on occasion—as where claims exceed the limited funds available—antagonism among claimants, who are competing for resources that cannot possibly satisfy all of them, may well exist. The key point, for present purposes, is that the categorizations adopted in the revised Rule 23, unlike the prior forms of group litigation existing throughout Anglo American history,[30] were grounded not in some form of substantively

shaped intertwining of rights, but rather on the basis of purely procedural concerns of fairness, efficiency, and convenience.

When Rule 23 was restructured in 1966, it appears that the drafters never fully considered or recognized the political and constitutional implications of their fundamental transformation in the nature of group litigation. While they did seek to satisfy the paternalistic dictates of due process traditionally associated with classic group litigation by inserting the typicality and adequacy of representation requirements of Rule 23(a),[31] and did require notice to absent class members and provide the option to individual class members of removal from the class in (b)(3) classes,[32] they failed to acknowledge even the prima facie compelling interest of individual litigant autonomy in controlling the course of litigation when individually held rights are at stake in the course of the adjudicatory process.

Recognition of the inherent tensions between the collectivist adjudicatory process of the class action and the values of individualism and autonomy that are central to both liberal political theory and procedural due process requires a substantial restructuring—though by no means abandonment—of the modern class action. Except in the relatively rare presence of truly compelling competing interests of procedural fairness, mandatory class actions (which currently include those authorized under (b)(1)(A), (b)(1)(B), and (b)(2)) should be held unconstitutional.[33] Moreover, class action procedure should generally be characterized by a requirement that class members who wish to waive their constitutional right to individualized control of the adjudication of their claims affirmatively *opt into* the class proceeding. In this sense, the class proceeding becomes analogous to a voluntary political association, where free-willed individuals join together to maximize the effectiveness of their individual rights to influence the results of governmental processes.[34] If there are any situations in which a considerably more passive opt-out procedure should be employed, it must be only in those cases in which the individual claims are so small as to make it reasonable to presume, ex ante, that the class members would deem individual pursuit of their claims impractical.[35]

MACRO DEMOCRATIC THEORY AND THE MODERN CLASS ACTION

To this point, I have considered the implications of the modern class action for foundational notions of liberal individualism that are essential to

modern liberal democratic thought. This aspect of democratic theory, as I have noted, may appropriately be referred to as micro democratic theory because it focuses on the importance of the individual and a system of individual rights to the viability of a liberal democratic society. But the class action has also on occasion been employed in a manner that threatens broader based notions of democratic thought, concerning the implicit but essential social contract of accountability that exists in a democratic society between the populace and its government.

While one could conceivably (albeit unwisely and in an important sense illogically, I believe) adopt a form of democracy that lacked foundational respect for the individual's worth, integrity, and autonomy, as a definitional matter a democratic society must possess a commitment to certain governmental forms and processes. Those who make basic normative choices of social and moral policy (at least those choices that have not been preempted by a form of counter-majoritarian constitutionalism) must at some level be representative of and accountable to those whom they govern. Absent compliance with this basic dictate, it is difficult to understand how a governing system could be labeled democratic at all.

If democracy means anything, those who are represented must have some basic notion of what it is that those who represent them are or are not doing as their governors. Otherwise, the ability of the populace to hold its elected representatives accountable at the next election will be rendered hollow indeed. Thus, were government to be able to enact laws in secret, or if legislators' votes on proposed legislation were kept confidential, the ability of the electorate to judge those whom it has elected would be significantly undermined. Probably even more harmful, however, would be governors' ability to adopt deceptive laws—that is, laws that purport to accomplish one result but in reality achieve a result very different from, or even the exact opposite of, what those laws purported to accomplish. Such legislative deception or manipulation surely contravenes core notions of democratic theory, whatever one thinks about the role of individualism as an element of democracy.[36]

There is, of course, nothing *inherently* deceptive about the use of class adjudication as a means of enforcing legislatively created substantive rights. However, in its modern form the procedure is dangerously susceptible to abusive practices that may well obfuscate under a procedural smokescreen a fundamental alteration in the nature of the substantive law sought to be enforced in a class proceeding. All substantive law that restricts citizen behavior necessarily contains two elements: (1) a behavioral proscription

and (2) a remedy and/or punishment for violations of that proscription. The remedial element usually takes the form of criminal penalties (fines or imprisonment), civil or administrative penalties, or private victim compensation. Where the latter is invoked, the remedial element seeks simultaneously to achieve two distinct but mutually reinforcing goals: (1) making the victims whole and (2) punishing and deterring the violators. Where a class proceeding seeks damages for the purpose of enforcing a substantive legislative proscription against an alleged violator, the substantive remedial element being invoked necessarily takes the form of private compensation. However, when a class proceeding *purports* to be brought on behalf of a class of victims seeking compensation, but as a practical matter the individual damages are so small that absent class members are highly unlikely even to participate in a settlement or file a claim to a damage fund once the suit is finally resolved, the nature of the substantive law's remedial element has been fundamentally altered. Instead of compensating victims as dictated by controlling substantive law, the class proceeding effectively imposes an entirely different—and often far more politically controversial—remedial structure, what can best be labeled a "bounty hunter" remedial model. Here private class action plaintiffs' attorneys—individuals who themselves are not victims seeking to be made whole—sue as a type of legal vigilante to enforce substantive behavioral proscriptions against wrongdoers. In such situations the class exists, as a practical matter, solely for purposes of display. In reality, the plaintiffs' attorneys are the real parties in interest; they are the ones who institute and pursue the action and effectively are the only ones who benefit. The so-called class itself is all but comatose. Many class members are likely not even aware that they are plaintiffs in a major legal action, and the overwhelming majority will never even benefit directly from a successful prosecution.

When this situation is viewed from the perspective of macro democratic theory, the traditional response, made by many, that in any event the class action proceeding will have the beneficial effect of enforcing substantive laws and policing illegal behaviors largely misses the point. As already noted, the prohibitionary element of substantive law is only one aspect of the underlying law that is being enforced. Often, the remedial element of the substantive law will be equally controversial. Under the guise of a procedural rule, these "faux" class actions have the inescapable, albeit indirect, impact of transforming substantive law containing a private compensatory remedy into a law that contains a bounty hunter enforcement mechanism. This is a potentially controversial result politically that has presumably never even been considered, much less formally adopted, by

the lawmaking organ that promulgated the applicable substantive law in the first place.

Many today are uneasy about the ethics and legitimacy of class action plaintiff lawyers. Indeed, they have long been one of the focuses of the so-called "tort reform" movement.[37] Were the electorate to comprehend that these attorneys were effectively the *sole* beneficiaries of large damage law suits, and that the victims supposedly protected by the law in reality are often even unaware of the suits and benefit from them virtually not at all, at the very least it is difficult to predict whether a statute formally transforming controlling substantive law in such a manner would succeed politically. Yet faux class actions achieve exactly this result—albeit without any formal alteration in governing law and under the cloak of superficially neutral procedural implementation.

Will the electorate *always* be deceived in such situations? That is a complex empirical question that will be difficult to answer in every context. But surely the threat to the rule of law in such cases is sufficiently great that a democratic system cannot reasonably take such a chance. When the basis of the federal court's subject matter jurisdiction is diversity of citizenship,[38] added problems of judicial and political federalism arise. In such cases, the underlying substantive law is state created, and that law—whether in the form of statute or common law—universally includes a private compensatory remedial model. Were the federal court to authorize a faux class action, where the only participants with any private economic incentive to sue are the plaintiffs' attorneys themselves, the dictates of the famed Supreme Court decision in *Erie R.R. Co. v. Tompkins*,[39] as well as the Rules Enabling Act from which Rule 23 springs,[40] that state substantive law must control in diversity actions would be ignored. It is, then, incorrect to focus exclusively on substantive law's prohibitionary element in determining whether procedure has been faithful to underlying substantive law. Equally as important, for narrow political purposes and as a matter of abstract democratic theory, is the extent to which the remedial element of the substantive law has been fundamentally altered.

It is important to emphasize that acceptance of my democratic critique would in no way signal the end of the compensatory class action. All that I seek is a prophylactic addendum to the certification process to deter the growth of faux class actions. Under my proposal, a certifying court would be directed to inquire whether, on the basis of what is known at the time, it is reasonable to predict that meaningful compensatory relief to individual class members would result from successful prosecution of the class proceeding.[41]

CLASS ACTIONS, DEMOCRATIC THEORY, AND THE RULE-MAKING PROCESS: CONSTITUTIONAL IMPLICATIONS

The problems of macro democratic theory to which the modern class action gives rise extend well beyond the political difficulty caused by faux class actions. Even where class actions do not amount effectively to a fraud on the electorate, no one could reasonably doubt that how the Federal Rules shape the class action rule will inevitably have enormous social, political, moral, and economic consequences for the viability of underlying substantive law, resource redistribution, social compensation, and industrial growth. The economic stakes of the modern class action are often so large that the whole future of a company, if not an entire industry, may be at stake.[42] Yet it is equally true that a revision of Rule 23 significantly restricting the scope and reach of the modern class action would have a correspondingly dramatic impact on the balance of economic and social power in society as a whole. This is true, even though by its terms Rule 23 is "transsubstantive," meaning that it is not tied to adjudication of specific substantive claims, nor designed to alter the impact of substantive law. In short, it is beyond dispute that the substantive stakes in the shaping of the seemingly procedural class action rule are enormous.

Of course, there is nothing especially earth shattering in this revelation. Since relatively early in the Supreme Court's development of the *Erie* doctrine, it has been understood that procedural rules may often have substantial impact on society beyond the four walls of the courthouse.[43] In fact, procedural rules are often promulgated *because of* their impact on society as a whole. While this may be true of many procedural rules, the class action rule presents the most stark illustration. But while there is nothing particularly surprising about recognition of this often inescapable substantive-procedural intersection, it *is* quite surprising that virtually no court or commentator has expressed significant concern over the implications of this intersection for the political and constitutional legitimacy of the rule-making process. The Rules Enabling Act vests in the Supreme Court—the one branch of the federal government whose members are explicitly insulated from any meaningful democratic check[44]—authority to promulgate the Federal Rules of Civil Procedure. Though Congress possesses a potential trumping power through a process of legislative revocation, absent a reversal in legislative inertia the Rules promulgated by the Court stay in force and have full legal

effect. When the dust settles, choices of fundamental social policy that are reflected in the shaping of certain procedural rules are being made legislatively by an unaccountable and unrepresentative governmental body.

Conceivable responses to this democratic critique of the rule-making process are many. It could be argued, for example, that the Court often makes fundamental policy choices in its decisions, and in any event as long as Congress retains ultimate authority to reverse the rules promulgated by the Court, democratic interests should be deemed to be satisfied. But when the Court makes policy choices, it is always in the context of its adjudications of adversary cases or controversies, as dictated by Article III of the Constitution. In no other context does the Court sit as the structural equivalent of a legislature, promulgating freestanding, generally framed legislative choices. Because the Framers chose to shape the judiciary as an unaccountable governmental body, largely insulated from political pressures, its operations were confined to performance of the traditional judicial function of case adjudication.[45]

Although Congress may of course overturn particular rule-making choices of the Court, that fact hardly provides a satisfactory answer to the critique from democracy. The same could be said, for example, of the Court's hypothetical exercise of a power to promulgate "rules of antitrust law," untied to performance of its adjudicatory function: Congress would always retain the legislative power to overturn any or all of those rules. Yet I seriously doubt Congress could constitutionally vest such legislative power in the federal judiciary. The reasons, both formalist and functionalist, are simple: As a formalistic matter, the failure to legislate does not have the legal impact of the affirmative enactment of legislation. Congress must exercise the legislative power in order to formally alter the legal topography, and its failure to overturn a legislative choice made by an unaccountable judiciary does not qualify as compliance with the bicameralism and presentment requirements that the Constitution imposes on legislative enactments.[46] From a more functionalist perspective, the difference in political inertia between the enactment of legislation and a failure to legislate is enormous. The fact that Congress is unable or unwilling to reverse the transformation in the legal topography implemented by a judicially promulgated Federal Rule does not qualify the rule as the equivalent of a legislative enactment, for either formalist or functionalist purposes.

It is true that the Supreme Court may appropriately be presumed to possess a fair amount of expertise in the operation of the judicial process—though one may reasonably wonder whether justices who themselves do

not sit as trial court judges and who may well never have done so qualify as "experts" on the shaping of pre- and post-trial procedure. But the Court's expertise is not the point. Rather, the issue concerns the question of which branch of the federal government, in a constitutional democracy, should be deemed to possess the opportunity to make legislative choices of social policy. Once again, the class action rule serves as the paradigmatic illustration of the constitutionally and politically problematic nature of the current rule-making process. How aggressively one chooses to arm the class action procedure as a weapon for private enforcement of regulatory laws will have potentially dramatic consequences for competing social, political, and economic interests. Who gets to make that choice, in the first instance, should turn not on considerations of expertise (in the case of the federal rule-making process, held far more by the Rules Advisory Committee that shapes the proposals than by the Supreme Court that ultimately promulgates them) but rather on considerations of accountability and compliance with the constitutionally dictated lawmaking process. As currently structured, the rule-making process fails to satisfy those concerns.

To deem the current rule-making process to be inconsistent with both the Constitution and governing American political theory, however, need not significantly alter the nature of the procedural rules that govern federal court litigation. It would mean, simply, that Congress, rather than the Court, would be deemed to possess the exclusive power to promulgate the Federal Rules, in the form of legislation. Indeed, there is no reason that Congress, in making these legislative decisions, could not rely for valuable input and recommendations on the very same Advisory Committee currently relied upon by the Court in promulgating the Federal Rules. The difference, however, would be that citizens who, for whatever reason, wish to influence the shaping of those rules would, in the first instance, seek to influence their elected lawmakers, rather than an unelected, unaccountable Advisory Committee making recommendations to an unelected, unaccountable Supreme Court. Basic dictates of democratic theory, as well as the case-or-controversy requirement of Article III of the Constitution, demand as much.

THE SETTLEMENT CLASS ACTION AND THE CONSTITUTIONAL LIMITS ON ADJUDICATION

To this point, we have seen that in some instances the dictates of constitutional or democratic theory call for alterations in the fundamental struc-

ture of the process of class adjudication. In others—for example, the faux class action[47]—it is only a specific pathological aberration that needs to be extinguished to satisfy the demands of constitutional democracy. Another such pathological aberration is the so-called settlement class action, a device that has, in recent years, become quite popular among plaintiffs' attorneys, defendants, and judges alike as a means of disposing of potentially complex adjudications in a relatively painless manner.

All class actions, like all litigations, may settle prior to final legal resolution. Because representative parties act in a fiduciary capacity on behalf of a class, however, Rule 23 wisely requires court approval of any settlement before it extinguishes the rights of absent class members to sue.[48] But the settlement class action differs fundamentally from a litigated class action that settles prior to final resolution. In the case of a settlement class action, prior to seeking certification or even formally instituting an adversary proceeding, attorneys purporting to represent the class must agree with the defendants to a settlement that will bind the entire class. Once such an agreement has been reached, the parties jointly request certification of the class proceeding from the court, *if and only if the court simultaneously approves the proposed settlement*. The settlement class action, then, is not litigation in the true sense of the word, but simply the *circumvention* of litigation.

There is, in the abstract, nothing inherently harmful about the desire to resolve disputes without the burdens and expense of enduring the litigating process. This is especially true in the case of a complex class action. But when the federal courts, bound by the Constitution to operate only through the adjudication of active, adversary cases or controversies, issue binding legal decrees in proceedings where all sides are in total agreement from the very initiation of the proceeding, serious questions may be raised about the constitutionality of the entire process. The settlement class action undermines both the formalistic dictates of Article III and the important constitutional values underlying the requirement of adversary adjudication.[49] As I will demonstrate in far more detail in a subsequent chapter,[50] the requirement of true adverseness between the parties protects all those who will seek to make similar arguments in future litigation. It simultaneously assures that the federal judiciary will politically be confined to its intended role of dispute resolution.

SUMMARY: VIEWING THE CLASS ACTION FROM THE PERSPECTIVES OF CONSTITUTIONAL AND POLITICAL THEORIES

In this book, I undertake an examination of the modern class action from an intellectual perspective that no scholar has, to date, attempted. I consider the class action from the perspectives of constitutional and democratic theories, and find it seriously wanting on both levels. From a constitutional perspective, the class action—as it is structured in Rule 23 of the Federal Rules of Civil Procedure, as it has been interpreted judicially, and as it has been characterized and rationalized by legal scholars—threatens core constitutional and democratic values.

The two levels of analysis that I employ are by no means identical. The constitutional attacks, if accepted, must of course trump all competing considerations. The arguments grounded purely in political theory, on the other hand, can have only persuasive, rather than legally enforceable, effect. Yet on a number of occasions, the constitutional arguments find a corresponding parallel in the separate universe of political theory. On these occasions, the two levels of analysis complement and strengthen each other. Once one critically examines the modern class action from either perspective, however, one is forced to recognize the substantial need for dramatic alteration in the procedure's underlying theory, modern format, and current doctrinal structure.