The Globalization of Class Actions: An Overview

In less than a decade, the number of countries that permit representative litigation by private actors has multiplied dramatically. A minority of these procedures share all the features of the American class action for money damages. But there is a trend toward permitting private individuals and organizations to come forward on behalf of absent parties to obtain injunctive or declaratory relief or monetary compensation in some or all circumstances. Whether these procedures will spread to other countries or within countries to a wide variety of substantive legal matters and whether in particular private actors will be allowed to claim money damages in many or all instances is uncertain. Currently, the key obstacles to effective implementation of class action procedures are traditional legal funding rules that do not easily accommodate the realities of representative litigation.

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The importance of access to justice, as a fundamental human right which ought to be readily available to all, is clearly a new consideration that stimulates fresh thinking about representative or "grouped" proceedings.[1]

1. Introduction

Around the world, individuals, nongovernmental organizations (NGOs), and public officials are turning to courts for remedies for mass harms: mass injuries caused by defective products or environmental exposure to toxic chemicals, mass financial losses resulting from violations of antitrust (anticompetition) law,

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securities law, consumer protection statutes, and historical and contemporaneous civil rights and human rights abuses. While some of this litigation is brought by public officials on behalf of citizens of their jurisdictions, an increasing fraction of the litigation is initiated by private parties. In some instances, the litigation comprises large numbers of similarly situated individuals or entities whose individual lawsuits have been combined: so-called aggregate litigation. In other instances, the harms are perceived as having been visited on a group of people with shared interests, not all of whom are individually identifiable at the onset of litigation—consumers, workers, women, victims of genocide, or indigenous peoples—and the lawsuit is commenced by a party who claims to represent this group: what is commonly called a *class action*. In the first instance, all of the parties are formally before the court and formally in control of their own lawsuits, although individual claimants may in fact have little control over what transpires in the litigation. In the second instance, all or most of the class members are absent from court and control over the litigation is formally assigned to the class representative(s) and class counsel. Both aggregate and class litigation reflect an escalating trend in private civil litigation: what were once viewed as singular disputes between individuals or between an individual and a corporation, not all of which deserved legal redress, are now viewed increasingly as group struggles against multinational corporations and other global institutions, properly resolvable in court.

In many respects, the United States has led the way in these developments: the 1970s "rights revolution" in the United States created the statutory framework for asserting civil rights, demanding protection from environmental harms, and claiming compensation for losses resulting from anticonsumer business practices;[2] and the adoption of a revised federal class action rule in 1966 (rapidly duplicated by state courts) made it easier for individuals to come forward to claim remedies, including money damages, on behalf of large groups of similarly situated individuals.[3] Public interest lawyers used the procedure to obtain injunctive relief from governments: elimination of racial and other discriminatory practices and education, prison, and welfare reform, among other goals. Private sector lawyers used the procedure to obtain monetary compensation for victims of consumer fraud, violations of security regulations, product-related injuries, and environmental damage. The rise of an entrepreneurial plaintiff's bar (in part a response to the new procedural rule) provided the engine to power class actions for money damages, and a media-centric mass culture created an environment in which such litigation could flourish.[4]

While on the surface the adoption of a class action procedure may appear to be a technical matter of interest only to lawyers, the social, economic, and political consequences of permitting class actions are potentially vast. Because the type of class action procedure adopted by the U.S. federal judiciary in 1966 and elaborated on since empowers individuals with relatively modest claims that would be impractical to litigate individually to join forces and seek redress, its availability within a legal regime dramatically shifts the balance of power between legal "haves" and "have-nots."[5] Because this type of class action procedure permits one

or a few individuals or entities to litigate on behalf of people who may not be aware that they have viable legal claims, its availability within a legal regime has the potential to increase substantially the frequency of litigation. And because the type of class action procedure that the United States adopted permits class representatives to claim monetary damages on behalf of all those who fit the definition of the class as long as the latter do not come forward and decline to participate—that is, opt out—its availability within a legal regime has the potential to increase substantially the breadth of civil litigation as well. Taken together, these consequences have enormous potential to deter institutional and corporate wrongdoing and to shift the balance of power between citizens and their governments, employees and employers, and consumers and manufacturers and service providers. Because private litigation may be widely dispersed—especially in federal and decentralized regimes such as the United States—it can be much more difficult for powerful groups within society to constrain, by comparison with the executive and legislative branches, which are highly susceptible to lobbying by those seeking to protect and extend their own interests.[6]

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At first blush, aggregate litigation comprising large numbers of individual lawsuits arising out of the same harm—personal injury, property damage, financial loss, human rights abuse—does not appear to pose the same challenges to powerful public institutions and private corporations. To secure legal representation, individuals must either have the financial wherewithal to pay lawyers' hourly fees and expenses (and, in a legal regime where losers are liable for winners' expenses, assume the risk of adverse costs) or their claims must have sufficient expected monetary value to secure the services of a contingent fee lawyer (in a regime that permits as such). Hence, aggregate nonclass litigation always involves individual claims of some considerable monetary value. Individuals must believe that they have been harmed, attribute the harm to another's fault, and think that the law affords them redress before they will seek out lawyers to represent them.[7] As a result, the rate of litigation, relative to the extent of harm, is likely to be limited. By definition, all aggregate nonclass litigation is opt in.

Despite these differences between class and nonclass aggregate litigation, nonclass aggregate litigation has proved capable of shifting the balance of power between "haves" and "have-nots" and facilitating expansion of litigation. By agreeing to represent hundreds or thousands of individuals in separate lawsuits and then bundling those lawsuits together during the pretrial development process and during settlement negotiations, plaintiff attorneys have been able to achieve huge economies of scale, which enhances the benefit-risk ratio of this type of litigation to them—and its attractiveness. By consolidating cases for pretrial management using what we term *group litigation procedures* in this volume, judges in pursuit of case processing efficiency have further reduced the cost per lawsuit of aggregate litigation for plaintiff attorneys and increased the risks attendant on defendants should plaintiffs prevail.[8] In a settlement-oriented legal culture such as the United States, consolidation of claims also opens the doors to vast numbers of claims of questionable or small value seeking a free (or at least inexpensive) ride to the settlement fund. As a consequence, aggregate litigation is likely to settle for a substantially larger amount of money in total than would have been expended to settle claims had individual litigation prevailed.

Not surprisingly, the potential consequences of "U.S.-style" class actions have evoked great controversy, both in the United States, where the procedure first took root in modern times,[9] and in countries around the world where the adoption of such a procedure has been debated in recent years. Class litigation may impose costs on economic actors that are larger than any benefit it creates, thereby diminishing social welfare. Placing responsibility for social reform and public policy in appointed judicial decision makers (much less lay jurors) rather than elected legislators may produce outcomes that are not supported by the majority of citizens. Permitting lawyer-entrepreneurs to bring vast lawsuits that enrich themselves more than they benefit any individual class member may bring the legal system into disrepute and ultimately erode the rule of law. To date, no credible analysis of the actual benefit-cost ratio has been conducted in any jurisdiction that has adopted a class action procedure,[10] so the actual consequences are unknown.

Today, in the United States, there is vigorous debate about the costs and benefits of class litigation, and efforts have been made at the federal and state level to rein in the litigation, by statute[11] and court decision.[12] But as the tide has turned (perhaps just temporarily) *against* class actions in the United States, class actions and other group litigation procedures have attracted support in other parts of the world. On virtually every continent, one or more nations—including both common law and civil law regimes—have adopted some sort of representative litigation procedure. Some jurisdictions that have rejected representative litigation for now have instituted group litigation procedures to manage aggregate litigation.

Policy debates over the adoption of representative and aggregate litigation procedures frequently reference the U.S. experience, which is often portrayed inaccurately, based on anecdotes that travel quickly over national borders. As more countries adopt procedures for representative and aggregate litigation, more anecdotes and half truths about their experiences are generated, on which

policy makers in other countries then rely as they debate the virtues and demerits of adopting representative or aggregate litigation procedures in their own courts. Until now, there has been no comprehensive source of cross-national information on representative and aggregate litigation legislation and procedural rules. More important, there has been no systematic objective information about how such rules work in practice (i.e., "the law in action" as opposed to "the law on the books"), who are availing themselves of these procedures, and for what ends. A remarkable transformation in national legal regimes is taking place without adequate knowledge about the short- or long-term social, economic, and political consequences of the change.

To begin to fill this gap, in December 2007 Stanford Law School and the Oxford Centre for Socio-Legal Studies, with support from the American Academy of Political and Social Science, organized an international conference on the spread of class actions and group litigation procedures.[13] The immediate conference goal was to bring together scholars, jurists, and practitioners from around the world to discuss and debate the use of class action and aggregate litigation procedures. The longer-term goal was to initiate an empirical research project directed at assembling and disseminating descriptive information about the evolution of class actions and aggregate litigation worldwide. The "country reports" contained in this volume are the first products of this long-term empirical project.

The first challenge Christopher Hodges and I faced as conference organizers was to decide what countries to include in the data collection exercise. Of the two hundred or so national legal jurisdictions in the world, it seems highly likely that only a small fraction have adopted or seriously debated adopting class action or aggregate litigation procedures. These latter countries constituted the study universe, but there was (and is) no extant list of these countries. As a result, our method of identifying jurisdictions for inclusion in the conference project was necessarily ad hoc. We used knowledge gained from informal discussions with colleagues in different parts of the world to identify both countries to include in the empirical study and appropriate individuals (whom we term *country reporters*) to report on the status of class actions and aggregate litigation in those countries. Adopting what is sometimes termed a "snowball sampling" approach, we asked these individuals to suggest other jurisdictions for inclusion and other reporters. As information about our project spread, we received inquiries from scholars and practitioners who volunteered to write about the situation in their countries. Ultimately, we received thirty reports, some of which were prepared after our conference had taken place (and were thus not part of our December summary of the status of class actions worldwide). In a few instances, the reports described why a country has *not* adopted a representative or aggregate litigation procedure or reported on debates under way about *whether* to adopt such procedures. We include these reports in this volume because they shed interesting light on the debate about the perceived attractiveness of representative and aggregate litigation in different sociolegal cultures.

To assemble comparable data on any civil litigation procedure from dozens of different jurisdictions with varying court structures, legal doctrines, and legal practices is a daunting task. To maximize comparability, we asked the country reporters to adhere to a common protocol that included a set of introductory questions about the legal regime—for example, common law or civil law—and court structure, detailed questions about any class or group litigation procedure that was in place or the adoption of which had been seriously debated, and more general questions about the political and social context that shaped consideration of the utility of class or group litigation procedures. We also asked country reporters to provide available statistical information about the number of class actions and group litigation procedures initiated and disposed, the nature of the disputes to which these procedures were applied, and the outcomes of procedures, including which party prevailed and what damages were awarded, if any.

Inevitably, our questions were shaped by our own jurisdictions' (the United States and England) court structure, rules, and practices and by our ignorance of the situation elsewhere. In some instances, country reporters found it challenging to place their jurisdictions' experience in our framework. Despite these limitations, the reporters produced a reasonably comparable set of reports,[14] the first such compilation available in a single language for such a large number of countries. In this article, I draw upon these reports to paint a picture of the landscape of class actions and group litigation toward the end of the first decade of the 2000s. Section 2 summarizes the key features of representative and group litigation in the countries surveyed. Taken together, these features mark out the paths that policy makers have chosen as their countries have encountered the new world of mass harms and litigation. Section 3 describes how policy makers have addressed (or not addressed) the due process issues that representative and aggregate litigation raise. Section 4 discusses how representative and aggregate litigation rules intersect with the rules that regulate the funding of civil litigation. The uneasy fit between new litigation procedures and traditional funding rules illustrates the difficulties that arise when transplanting legal mechanisms from one regime to another. Section 5 discusses the value tensions that underlie policy makers' choices. Section 6 concludes with some thoughts on the future direction of class and aggregate litigation worldwide.

Attempting to summarize the details of so many diverse procedures, many of which are intricately connected to other aspects of procedural and substantive law in their jurisdictions, is challenging. No two of these procedures are identical, and even where procedures in several countries closely resemble each other, they are likely to be different in operation. To categorize procedures, I have elided some differences. I may also have misinterpreted or misunderstood significant aspects of procedures. I believe the discussion below accurately depicts the global class action landscape, but the best sources of information on individual countries are the country reports that follow in this volume.

2. A Profile of Class Actions and Aggregate Litigation Procedures

The idea of representative civil litigation is not new: most jurisdictions grant public officials the right to bring civil lawsuits on behalf of their citizens to enforce laws and regulations. These lawsuits may seek injunctive or declaratory relief and sanctions against defendants, including fines; however, they usually do not seek individual redress for the victims of illegal acts. In addition, in some jurisdictions, such as Germany and Switzerland, private associations have long been able to sue for injunctive relief on behalf of diffuse "social interests," and some jurisdictions permit individuals acting in a nonofficial capacity to sue on behalf of the "public interest."[15] What is exceptional is to allow private actors (individuals and associations) to bring civil lawsuits on behalf of large numbers of identifiable but absent parties: other actors who would have standing to bring their own lawsuits but are not formally present in court. In this article, I call any civil procedure that permits such representation a *class action*. As will become clear, the requirements for and operations of such class actions differ significantly among jurisdictions, and few share all the characteristics of a U.S. class action brought under F.R.C.P. 23.

By the time of this writing, at least eighteen countries had adopted some form of class action as defined above: Argentina, Australia, Brazil, Canada, Chile, China, Denmark, Finland, Indonesia, Israel, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Taiwan, and the United States. At least four more—Austria, England, France, and Poland—plus the European Union were said to be debating the adoption of such a procedure.[16] Italy adopted a class action statute in early 2008, but when the government changed hands, the statute was suspended until January 2009; whether it actually will be implemented at that time is uncertain. In addition, some countries that have already adopted one form of class action are debating changing or supplementing this procedure with another that arguably would provide more access to courts for consumers, investors, or other groups of citizens. The diversity of these jurisdictions is remarkable. They include common law and civil law jurisdictions and, among the latter, countries that look to Napoleonic, German, Roman, and American law for their legal doctrine. They include old and new economies, capitalist and communist regimes, long-established and developing democracies, and authoritarian states. Most of these procedures have been adopted within the past few decades, and a substantial fraction have been adopted or implemented within just the last few years. Many of the procedures can be used only by specially designated parties, or in limited circumstances or for limited purposes, but some share the broad applicability of the U.S. class action rule.

In addition to or in some instances instead of representative litigation, at least six countries have adopted aggregated procedures for mass claims: England (and Wales), Finland, Germany,[17] Japan, Switzerland, and the United States,[18] although in Japan and Switzerland, these procedures derive from contractual agreements among parties rather than court rule or judicial orders.

2.1. Standing

Who has legal standing to bring representative litigation differs across jurisdictions and within jurisdictions standing is often conditioned on multiple factors. Standing may be limited to associations that the government has approved for the purpose of bringing representative actions, or to specially designated public officials. When authority to bring representative actions must be sought from the state or is solely granted to a public official, it is reasonable to infer that there will be pressure on the association or official not to pursue actions that are inconsistent with state policies. In at least sixteen jurisdictions, private actors—individual consumers, investors, businesses, or other private entities—have standing to represent a class of similarly situated absent parties in at least some circumstances. In these jurisdictions, no party has a monopoly over representative litigation; although parties who seek to represent a class may need to demonstrate to the judge who presides over the litigation that they can adequately and fairly represent a specific class, they do not need to worry that their decisions to pursue certain causes may offend the government in power.[19]

2.2. Scope and remedies

In about half of the countries that have adopted some form of class action procedure (ten of eighteen), the procedure is "trans-substantive," meaning that it can be used for a variety of substantively different legal claims. In the remaining countries, the use of class actions is limited to securities, antitrust (anticompetition), consumer fraud, or constitutional rights claims or some designated mix thereof. In many of these instances, the substantive statute provides standing to bring a representative action; no separate statute or rule provides for class actions. Where private actors are permitted to bring class actions, the procedure is almost always trans-substantive. Almost all of the countries that permit class actions (sixteen of eighteen) provide for money damages at least in some circumstances when the class prevails, although in some jurisdictions actually obtaining damages requires considerable further litigation.

The formally specified substantive scope of class actions sets the far reach of their applicability. Some jurisdictions impose restrictions that narrow the effective scope of their class action regime within these bounds. For example, although the U.S. class action rule does not spell out substantive restrictions on its application, the 1966 rule-drafters advised federal district court judges that Rule 23(b)(3) (which provides for money damage class actions) would normally not be appropriate for mass accident cases.[20] With the exception of a brief period in the early 1990s, federal judges generally have declined to apply the rule to mass injury cases, including mass product defect cases.[21] Israel's trans-substantive statute provides special albeit limited protection from class litigation for state agencies and "sensitive" economic sectors. It also specifically excludes tort claims. Chile requires that class members' cause of action arise from the defendant's breach of contractual duty. It also denies pain and suffering damages in class actions. (Many

jurisdictions forbid punitive damages, and these restrictions apply to representative and aggregated litigation as well as ordinary civil lawsuits.)

Although after they are adopted the applicability of class action statutes and rules may be restricted by court decisions or informal practice, there is also some evidence in the country reports for the proposition that once adopted, class action regimes may expand their purview. For example, between 1988 and 2005, Israel's parliament included provisions for class actions in statutes regarding environmental hazards, consumer protection, workplace equality, and disability rights, among others. Israel's 2006 trans-substantive class action statute replaced this multistatute regime. Germany's early-twentieth-century association complaint was adapted to permit consumer associations to seek injunctive relief from unfair competition in 1965 and relief from unfair contract terms in 1977. Germany's model case proceeding, a hybrid of aggregative and representative litigation procedure adopted in 2005 to address the challenge of managing thousands of securities fraud claims filed by investors against Deutsche Telecom, has since been used in a few other securities cases. The model case proceeding will come up for reconsideration by the German parliament in 2010, which may then decide to broaden its applicability to other civil litigation. Perhaps the most sensible inference from developments to date in the Untied States and elsewhere is that class actions and aggregate procedures may evolve and be put to use by parties and lawyers in unanticipated fashions.

2.3. Opt in versus opt out

Allowing one or a few parties to come forward and act on behalf of many others who are absent from court is an exceptional practice for most modern legal systems, which subscribe to the notion of individual autonomy and individual control over one's own legal claim. Successful class litigation may vindicate the rights of class members and win redress for past harms. But unsuccessful litigation may extinguish such rights and bar the door to redress forever. And in jurisdictions where a large proportion of legal claims are compromised—as seems increasingly common worldwide—settlements yield remedies for class members that appear inadequate or unfair to those who did not participate in the settlement may negotiation. The possibility that absent parties will lose rights or be bound to accept unsatisfactory remedies drives one of the most significant decisions regarding the design of a representative litigation procedure: whether it should be opt out or opt in. This decision is most significant for jurisdictions that permit private actors to come forward to represent a class without prior government certification.

Opt-out class action regimes require that class members (i.e., all those who satisfy the criteria that define the class) be notified that representative litigation is going forward and have an opportunity to exclude themselves from the litigation—and in so doing, exclude themselves from the reach of any classwide judgment or settlement. Those who opt out are free to litigate individually thereafter. All other class members are bound by the outcomes of the class litigation, win, lose, or draw. In contrast, opt-in class action procedures require that all those who satisfy

the criteria that define the class affirmatively indicate (e.g., by signing up individually) that they wish to be part of the litigation. Only those who opt in will partake of any benefits of the class—or be barred from future litigation if defendants prevail. Some commentators believe that opt-out procedures violate due process because of the possibility that putative class members who do not learn about the class proceeding or do not understand its implications will be bound by its outcome although they might have chosen otherwise had they been better informed. Other commentators believe that opt-in procedures limit the deterrence potential of class litigation because putative class members who are owed redress will not learn about the class proceeding or will be too lazy or disorganized to come forward. The defendants who benefit from this disinterest or lack of information will suffer diminished liability exposure, arguably inadequate to ensure enforcement of legal norms.

To date, countries that provide for representative litigation by private actors have divided almost equally with regard to the this issue: eight have chosen an opt-out regime, four have chosen an opt-in regime, and two have chosen a default opt-in regime with an opt-out variant under certain circumstances.[22] Two countries have adopted a non-opt-out class procedure; in this procedure, if the class does not prevail, individual class members are free subsequently to pursue individual litigation against the defendants, which is presumably the rationale for not affording them an opt-out right or requiring them to opt in.[23]

Because the United States has been the leading model for class action adoption in recent years, its choices with regard to these different class action procedure design features—standing for private actors to represent a class, trans-substantive application of the procedure, availability of money damages, and an opt-out rather than an opt-in procedure for money damage class actions—constitute what has come to be known as a "U.S.-style class action." Of the eighteen countries that reported some form of class action procedure, only six in addition to the United States have such a class action regime: Australia, Canada, Indonesia, Israel, Portugal, and Norway.[24] All of these other than the U.S. rule have been adopted since 1990.

2.4. Aggregate litigation procedures

Some jurisdictions have adopted special procedures for aggregating mass damage claims that are deemed too numerous for traditional joinder. Often these procedures were devised initially by judges for managing complex cases and later formalized by statute or rule. The English Group Litigation Order (GLO) provides for the establishment of a "registry" of individual claims arising out of the same factual circumstances (e.g., mass product defect, nursing home abuse), which are assigned to a single judge for management and disposition. The U.S. Multi-District Litigation (MDL) procedure provides for collecting dispersed federal court claims arising out of the same factual circumstances for pretrial management. The U.S. statute specifies that once the pretrial process (e.g., discovery and motion disposition) has concluded, the mass claims are to be disaggregated

and dispersed to the courts where they were initially filed for final disposition. In practice, in both English and U.S. courts, once mass claims are aggregated, cases are almost always disposed through summary disposition or group settlements.

Because aggregate litigation procedures collect claims filed under traditional court rules, no special questions of standing, scope, or remedies arise. By definition, all aggregate litigation procedures (as defined in this article) are "opt in."

3. Due Process Concerns

Allowing one or a few private parties to litigate on behalf of a large number of similarly situated parties who may know little or nothing about the inception or progress of the litigation but will be bound by its outcomes threatens individual autonomy and arguably impairs the dignitary values that lie at the heart of due process.[25] Allowing associations that have been prevetted by the government to bring injunctive claims that do not wholly determine the outcome of subsequent individual claims for redress seems less threatening to due process—offering one possible explanation for the popularity of laws permitting representative actions for injunctive relief by associations but not suits for money damages brought by individual private actors. On the surface, treating individual claims in aggregate fashion as under the English GLO also may seem less threatening to due process. But in practice, all forms of litigation that treat claimants collectively in some or all stages of the litigation limit individual autonomy and all have the *potential* to impair individual due process.

Perhaps because the threat to due process posed by representative litigation by private actors to whom the state has not predelegated such authority is so clear, such representative litigation procedures tend to tackle due process concerns head-on in ways that other sorts of representative or group litigation do not. In virtually every jurisdiction, the court must grant permission for litigation to proceed in class form. As described above, in many jurisdictions, individual plaintiffs must affirmatively indicate that they wish to be included in the litigation: opt in. In opt-out systems, potential class members must be informed that a class is proceeding so they can exercise their right to exclude themselves. Most jurisdictions provide access to class members to appeal the outcome of the litigation. Perhaps because of its relatively long history of class action litigation, certification, notice, and opt-out doctrine and practice are more elaborate in the United States than elsewhere, and there has been more attention to problems that can arise when cases are resolved through negotiated settlement and more effort to resolve these.

3.1. Class certification

Where representative litigation is seen as an exception to the normal course of litigation, permission to proceed in class form usually must be granted by the court. Under U.S. law, the putative class must be large,[26] the claims must involve common facts and law, the proposed class representatives (the named parties) must have

claims that are typical of class members generally, and the representatives must be able to adequately represent the interests of the class. In addition, if the class seeks money damages, the common characteristics of class members' claims must predominate over differences among claims and a class proceeding must be deemed superior to individual litigation of the instant claims. In other jurisdictions, there are similar requirements, but the number of requirements and their stringency varies considerably. In a few jurisdictions, plaintiffs must only show numerosity; more often, plaintiffs' claims must also share common facts and law. The United States appears to be the exception in requiring that a judge certifying a money damage class make a formal finding that common issues predominate over differences and that class treatment will be superior to individual litigation. By contrast, in Australia, plaintiffs do not even need the permission of the court to begin a class action, but a defendant may challenge the continuance of a class proceeding on the grounds that it does not satisfy the statutory requirements.

Among jurisdictions with formal procedures for aggregating mass claims, the grounds for issuing an aggregation order are much less precise than the grounds for class certification, and a high level of discretion is granted to the decision-making authority. In the United States, aggregation of mass individual claims in a single federal court requires a decision by a specially appointed judicial panel that is charged with considering the costs and benefits of aggregation. In England, a court may issue a GLO to collect dispersed mass claims in a single court. Although by law plaintiffs retain the discretion to choose to join a "registry" of cases covered by the order, in practice, it is difficult for a party to exclude itself from coordinated case management. In Germany, the court decides whether to grant "model case" status to litigation arising out of the same or similar facts. In Finland, Japan, and Switzerland, such consolidations occur by choice of the parties involved.

3.2. Notice

Requirements that class members opt out or opt in imply notifying potential class members that litigation that may affect their interests has begun. In the United States, notice in opt-out class actions has become a multimillion-dollar business, and special purpose firms have emerged to design and manage the notice process.[27] By rule, those who choose to remain in the class must be given an opportunity to object to any proposed settlement, thereby requiring a second notice. In practice, the two notices are often combined. Formally, paying for notice is the responsibility of plaintiff class counsel,[28] but when there is a single combined notice of class action pendency and a proposed settlement, those costs often are absorbed into defendants' settlement costs.[29] In Canada, class action statutes require that class members be notified when a class is certified, and judges generally require notice of impending settlement approval hearings, although such notice is not required by the federal class action statute. As in the United States, the form and content of notices must be approved by the court, and the process has become more sophisticated over time. Notice elsewhere does not yet seem to have become so elaborate. While in the United States and Canada

individual notice is preferred when possible, other jurisdictions' requirements are more relaxed. In some jurisdictions, there seem to be no formal notice requirements at all. Some jurisdictions rely exclusively on mass media, including the Internet. Widespread notice may ensure that only those who want to will be included in class litigation, but it may also have the effect of expanding the number of people who will come forward ultimately to claim compensation. Perhaps mindful of this, France strictly limits notice in its "conjoint action," explicitly prohibiting television and radio advertising and in some circumstances mass mailings to individuals. In most jurisdictions, the class representative bears the cost of notice, but in Sweden, the court covers these costs (although a judge may order the class representative to pay instead). In some jurisdictions, in addition to advertising the pending class litigation to potential class members, the class representative must notify a relevant authority, such as a consumer protection agency.[30]

Although formal aggregation of mass individual claims often leads to a group settlement that sets the outer limits on individual claimant compensation (and often provides for a formula or procedural mechanism for arriving at the amount of individual compensation), there is no requirement in the United States or England that individual claimants be informed that their claims have been aggregated and are being managed collectively by the court and counsel. It is presumed that counsel are keeping clients up to date, but there has been no empirical research on whether claimants know about or understand the likely consequences of aggregation. In the United States, lawyers may petition the judicial panel on multidistrict litigation to release individual cases from consolidated proceedings and such petitions are sometimes granted. In England, once a registry has been established, it is not possible for a claimant to proceed individually with regard to the same matter. In Germany, notice that a court has granted model case status to litigation is published by the court on the Internet, so that those who wish to do so can request to be included in the model case proceeding. But once the case moves forward, these other plaintiffs have no right to be kept informed or to secure case documents, such as the pleadings. The rationale for the lesser concern about informing mass claimants that their claims have been aggregated with others or allowing opt outs from group proceedings is that ultimately each individual claimant will need to agree to any settlement of his or her case. In practice, however, settlement subsequent to aggregation is likely to have been shaped by the fact of aggregation and the course of coordinated proceedings, and individual plaintiffs may feel powerless to object to the proposed outcomes.

3.3. Settlement

Other than the choice between an opt-out and opt-in provision, perhaps no issue has evoked more controversy regarding class actions than settlement of money damage suits. In the United States, plaintiff class counsel and defendants are widely criticized for collusive settlements in which defendants agree not to challenge excessive fee awards for class counsel in exchange for offering only modest redress to class members; in return, defendants obtain *res judicata* (protection

from any future litigation arising out of the same factual circumstances). How widespread such settlements are is unknown, given the lack of systematic information about the implementation of settlement agreements,[31] but a few vivid well-documented examples[32] make it clear that the potential for collusion is real. The perception that class litigation may provoke settlement of nonmeritorious cases or result in unfair outcomes for many class members has been a factor in debates over the adoption of class actions outside the United States.

In the United States, concern about conflicts of interest in class settlement negotiations have led to the unusual requirement that a judge review and approve proposed settlements for fairness, adequacy, and reasonableness. In federal courts, judges must hold public hearings on the settlements and provide an opportunity for class members to object to settlement terms, including as a matter of practice proposed fee awards to plaintiff class counsel. Outside the United States, judicial approval of settlements is the norm in many civil law jurisdictions, so extending such approval to representative litigation is unexceptional. Most jurisdictions require that judges review and approve settlements, but the scope and standards for approval vary. Whether and how class members can object to settlement provisions is not always clear from the country reports. Where the remedies available in class actions are limited to injunctive or declaratory relief, settlement of individual claims usually requires individual action—either subsequent litigation or out-of-court negotiation—so there may not be any perceived need for court oversight.

In the United States, multidistrict litigation almost always ends in settlement.[33] Typically, the settlement terms set a cap on the total amount of money the defendant will pay claimants and specify either a formula for computing individual compensation or a procedure for making case-by-case determinations of compensation (or some combination of the two). The goal of such "global" settlements is to resolve all litigation against the defendant arising out of the instant factual circumstances. But because the aggregated litigation comprises individual lawsuits, settlement requires individual agreements. It has become common in recent years for defendants to require as a condition of settlement that the overwhelming majority of individual claimants agree to the settlement terms. In the past several years, some federal judges, analogizing these aggregate settlements to class action settlements, have declared that they will exercise their inherent powers to review the settlements for fairness, adequacy, and reasonableness. In England, GLO proceedings do not seem to have produced a large enough number of such global settlements to raise questions about a judicial role in reviewing and approving them.

3.4. Res judicata

An oft-offered argument in favor of class actions is their potential to terminate all litigation that might arise from mass harms arising from a single catastrophic event, product defect, or illegal business practice. If a single lawsuit achieves this objective, this can sharply reduce court processing costs (compared to the costs of litigating large numbers of individual lawsuits in multiple courts), contain

defendants' legal expenses, and reduce uncertainty about the defendant's ultimate liability exposure, helping to preserve shareholder value and access to capital markets. As a matter of law, most class action procedures cannot, by themselves, achieve that end. In a class action regime where private actors represent the class, if class members can opt out, individual litigation may follow a classwide adjudication or settlement; if class members need to opt in, those who choose not to join the class may litigate individually.[34] How these individual suits fare will depend, in part, on whether the class litigation resulted in a judgment against the defendant and, if so, whether individual plaintiffs can rely on that judgment in their subsequent litigation. In a class action regime where an association can bring class actions on behalf of absent class members but only for declaratory or injunctive relief, individuals seeking compensation must file their own suits to recover damages. In regimes where associations can only sue on behalf of their members, nonmembers need to bring their own lawsuits but may sometimes be able to rely on the judgment in the previous association case to establish the defendant's liability.

In practice, parties in the United States, with the approval of the courts, have gone to considerable lengths to use class actions to terminate all future litigation arising out of the same facts. Parties have fashioned settlements of opt-out class actions in which final settlement agreement is conditioned on no more than a small fraction of class members opting out, and courts have approved settlements that require class members to opt in so as to allow parties to accurately assess the total damages accruing from the settlement. In consumer class actions where individual losses are small, anyone opting out is unlikely to litigate individually. But extensive litigation has followed the settlement of some class actions in the United States.

In practice, parties in the United States, with the approval of the courts, have gone to considerable lengths to use class actions to terminate all future litigation arising out of the same facts.

Because many private actor class actions outside the United States are quite new, it is not yet clear what their practical consequences will be for subsequent litigation. Moreover, as illustrated by the country reports, in some jurisdictions, the formal effects of classwide judgment are complex or not yet legally determined.

4. Funding

A critical issue for all private civil litigation is how to pay for the litigation. In the United States each party is responsible for paying its own costs, which means that the plaintiff does not incur any direct financial risk as a result of suing beyond paying its own lawyers hourly fees and expenses. In ordinary civil litigation, lawyers are allowed to negotiate representation contracts that specify a fee amount that is contingent on the case outcome; in damage litigation, plaintiff lawyers typically charge one-third to one-half of any damages obtained (depending on whether the case settles or requires a full trial) and nothing if the plaintiff loses. Legal insurance is not widely available in the United States, and legal aid is not available for civil damage lawsuits.

The situation outside the United States is different in virtually every regard. Losing parties must pay their opponents' fees, although often the amount they must pay is determined by the court and may be less than the actual costs. Often, plaintiffs are required to post bond to ensure that they will be able to cover these costs. Conditional or speculative fees (e.g., "no win, no pay") have long been prohibited; although this barrier is beginning to fall, it is still in place in many jurisdictions. Some jurisdictions that permit conditional fees at least in some circumstances specify that the actual amount may *not* be a percentage of damages obtained. The amount of premiums that can be charged on top of hourly charges and expenses (so-called "up-lifts" or "up-charges") may be strictly limited if they are permitted at all. However, in many jurisdictions, legal insurance is more widely available than in the United States, and in some jurisdictions, legal aid is available for civil damage lawsuits under some circumstances.

Implicit in civil litigation funding regimes is an assumption that the relationship between lawyer and client is individualized. Fees are set by contract, perhaps subject to some regulation, and in most instances, the lawyer represents only one or a few parties in litigation arising out of any specific set of factual circumstances. Class action and aggregate litigation procedures challenge these assumptions. But most jurisdictions that adopt class action or aggregate litigation procedures do not amend their funding rules to match these new realities.

The United States is an exception to this rule. Like much else, the normal rules of attorney remuneration in the United States do not prevail in class action litigation. Under long-established equitable fee doctrine that evolved in parallel with the evolution of class action procedures, when the litigation creates a "common benefit" all class members who would share the benefit (e.g., receive compensation from a settlement fund) must also share the costs of producing it.[35] This eliminates the possibility of free riders in class actions and ensures that plaintiff class counsel will be paid for their time and expenses when the class prevails. As it would likely be difficult for class members to reach a consensual agreement on how much to pay attorneys, judges award fees, either by reviewing the lawyers' hours and expenses or by awarding a percentage of the fund. In the first instance, courts in most cases have the authority to award a premium to the successful class counsel, by multiplying the product of counsel's approved fee and

hours by a factor greater than one. In the second, courts can calibrate the percentage of the fund awarded in accordance with the total value of the fund, so that class counsel does not receive an amount that is disproportionate to effort—for example, if the fund is in the hundreds of millions of dollars.

Fee calculations are complicated in nonclass aggregate litigation with large numbers of named plaintiffs, each of whom has entered into an individual representation agreement with a lawyer. Although most of these lawyers represent many plaintiffs within the same litigation, typically their representation agreements specify the same contingent fee rate.[36] When mass litigation is aggregated and assigned to a single judge, it is now common for that judge to appoint "lead counsel" or a "plaintiff steering committee" (PSC) to coordinate pretrial activities (and possibly to lead settlement efforts).[37] The judge may also tax other plaintiff counsel to share the expenses of lead counsel. In some instances where plaintiffs prevailed, judges have ordered both plaintiff counsel and plaintiffs to pay a percentage of their fees or compensation to lead counsel. In a few recent instances, judges have claimed authority to restrict individual fees, claiming that that the aggregate litigation before them is a "quasi-class action."[38] Fee issues may lead to ancillary litigation as lawyers challenge judges' fee orders or contest with each other for a larger share of the total fees awarded.

Notwithstanding these differences among class and nonclass aggregate and ordinary litigation, one aspect of the U.S. funding scheme remains the same: in class action litigation, the unsuccessful plaintiff class counsel is paid nothing for her or his time and her or his law firm must cover expenses out of their own funds. By law in the United States, no legal aid is available for class litigation.[39]

In contrast to the United States, most jurisdictions that have adopted class action or aggregate litigation procedures have *not* changed their litigation funding rules to respond to the special features of this litigation. This poses huge challenges for the effective implementation of class actions. In a fee regime that has no mechanism for sharing litigation costs among common fund beneficiaries and shifts costs to losers, the class representative shoulders the entire bill for class counsel representation plus the entire risk of adverse costs (i.e., defense fees and expenses) should the class lose; meanwhile, absent class members get a free ride. Class counsel can offer a conditional fee arrangement to mitigate the risk with regards to its own fee, but if it is prohibited from charging a premium to cover this risk, it may not have much of an incentive to do so.

Without changes in the funding regimes that prevail in most of the world, it would seem unlikely that many individuals would come forward to represent a class—especially in consumer cases, where individual losses typically are small—and unlikely also that many law firms would choose to prosecute class litigation. One might expect that associations would be better able to shoulder the costs and take on the risks associated with representing a class, but the country reports indicate that associations, like individuals, find this prospect daunting. In addition, where associations obtain declaratory relief that individuals can take advantage of in subsequent litigation for financial redress, there is the interesting issue of whether the associations can or should be able to recover at least some of their costs from these individuals.

A few jurisdictions have adopted formal programs or informal practices in an attempt to facilitate class litigation within their traditional fee regimes. Quebec, the first Canadian jurisdiction to adopt a class action procedure, allows contingent fee agreements between class counsel and class members, but losers pay winners' legal fees. To facilitate class actions, the province established a fund that class counsel can draw on for ongoing expenses and that provides a backstop in case the class loses and is required to pay the defendant's cost. If the class prevails, the defendant reimburses the fund for class counsel's fees. The fund is replenished over time by taking a small percentage of each successful class member's compensation and a larger percentage of any unclaimed compensation funds (e.g., when a defendant places a lump sum upon the settlement table, not all of which ultimately is collected by class members). A similar scheme exists in Ontario but is said to be used only rarely.

In Australia, plaintiff class counsel have transformed what was initially intended as an opt-out class action procedure into an opt-in procedure by creating so-called "closed classes." The lawyers contract with individual class members on a "no fee, no pay" basis; if the class prevails each class member pays a percentage of the member's compensation to cover the lawyers' fees. Although initially controversial, the use of closed classes has been authorized by the Federal Court of Australia.[40] Closed classes eliminate the "free-rider" problem. But they do not deal with limitations on class counsel fees that diminish incentives for plaintiff attorneys to bring class actions, nor with class members' risk of adverse costs. To address both these issues, third-party payers—private for-profit firms—have emerged. They provide up-front funding to plaintiff class counsel and assume the risk of adverse costs in exchange for a share of class members' compensation and class counsel's fees, if the class prevails. Because they are not regarded as practicing law, the amount third-party payers can take as a share of class members' compensation is not restricted by law. In 2006, the High Court of Australia endorsed the participation of third-party funders in class litigation.[41] Logically, one might expect the participation of third-party payers to increase the number of class actions filed, because it minimizes the risk to plaintiff class counsel and class members alike. But it is also possible that reliance on third-party payers who approach litigation strictly from an investment perspective would screen out all but the most meritorious cases and have the effect of *limiting* the number of class actions filed.

Whether policy makers in other jurisdictions have failed to adjust funding rules to fit the realities of class action litigation because they do not fully understand the likely consequences of the intersection between their traditional fee regime and class litigation or because they hope these consequences will curtail the use of class action procedures is not clear; discussions at the December 2007 conference suggest that both factors have been at play. In any event, virtually all country reporters pointed to traditional funding rules as barriers to effective implementation of the class action rules, and many attributed low use of class action procedures to date to funding obstacles.

Funding rules also pose challenges for nonclass aggregate litigation outside the United States. In England, a small number of solicitor-barrister teams may

represent a larger number of claimants on a GLO registry, which means that each solicitor has entered into individual representation contracts under a conditional fee arrangement ("no win, no pay") with a fairly large number of plaintiffs. These solicitor-barrister teams may have contracted with third-party funders to pay up-front charges, in exchange for a percentage of any fees awarded. To protect against the risk of adverse costs, the plaintiffs may have purchased before-the-event or after-the-event insurance. The GLO judge, having appointed lead plaintiff counsel, may order all the solicitors engaged in the GLO to share lead counsel's expenses. In some instances, the Legal Services Commission may help fund the investigatory phase of the litigation. The result is a complex web of contractual relationships that governs the allocation of fees and expenses among plaintiffs, lawyers, insurers, and third-party payers. In some recent instances, funding consortia, comprising solicitors, insurers, and third-party funders, have emerged in an effort to simplify matters. How these financial arrangements shape the litigation process and outcomes, relationships between solicitors and clients, and litigants' expectations and evaluation of procedural fairness has yet to be investigated, but the effects seem likely to be significant.

5. Values in Tension

Although we asked country reporters to focus on the features of representative and aggregate procedures adopted or debated recently, we also asked them to tell us a bit about the political context of these adoption debates. The reporters' descriptions are virtually identical: U.S.-style class actions are vigorously opposed by business interests everywhere. Multinational corporations with experiences of defending themselves in U.S. courts are often the most vigorous opponents. Consumer and investor advocates often argue strongly for opt-out class actions but propose other procedural features or rules as an antidote to what they see as the excesses of U.S. class action litigation. Often, these class action proponents settle for opt-in class actions or strict limits on the circumstances in which class actions may be prosecuted. Empirical assertions regarding the United States or other jurisdictions with class action experience and the need for additional litigation in the jurisdiction where debate is under way are rife, but empirical evidence to support these assertions is largely absent from these debates.

One inference from these debates is obvious: business interests fear class actions, especially trans-substantive opt-out class actions for money damages, because class action procedures tend to increase the frequency and breadth of litigation against them. Such litigation raises the cost of doing business and makes the legal environment more uncertain; it also has the potential to bring questionable business practices into the media spotlight. In short, the threat of litigation constrains corporations' decision-making freedom.

But in some respects this political analysis of the politics of class action adoption is simplistic. Debates over the adoption of representative procedures implicate fundamental values and often rely on untested empirical assumptions. How

much should a society invest in opening the doors to the courthouse to citizens' desires for redress? Should society afford more or the same access to those with claims of violations of fundamental rights and claims of physical injury, property damage, or financial loss? How best can a society deter violation of legal norms; by ex ante public regulation, ex post public regulatory enforcement accompanied by sanctions, or ex post private litigation? Is there some preferred balance among these three mechanisms for different economic circumstances or different social environments? Is there a way to objectively calculate the trade-off between the benefits of increased access to justice and the costs of increased litigation not just to business but to consumers, investors, and taxpayers?

In some jurisdictions, the debate over class actions implicates a more fundamental debate about the role of the courts in policy making in a representative democracy. To some, providing a representative procedure for myriad claims, particularly when the representative is largely uncontrolled by a democratically selected public official, seems to shift the balance of power between courts and legislatures too far in the wrong direction. To others, the shift of control over litigation from lawyer-adversaries to judges that inevitably seems to accompany the adoption of class action or aggregated litigation procedures is equally if not more disturbing. How the adoption of new representative or aggregated procedures might affect the balance of power between the legislature and the courts and the balance of control over litigation between judges and parties seems to particularly trouble advocates in the formerly Soviet countries of Central and Eastern Europe, who are wary of shifting too much of their newfound freedom back to unelected state actors.

In Western and Northern Europe, criticism of opt-out class actions in particular is frequently grounded on commitments to human rights, as reflected in references to the European Convention on Human Rights. Allowing litigation to determine rights and redress for a group of individuals who have not proactively asserted their desire to be included in such litigation is perceived as a profound violation of individual autonomy; indeed, some perceive even an opt-in representative procedure as such a violation. The practical observation that precluding representative litigation may make it impossible for individuals to secure rights or redress is given short shift in debates framed by principle and political philosophy.

The continuing controversy over class actions in the United States more than forty years after its adoption of a modern class action rule illustrates the power of these concerns and the difficulty of resolving the tensions among the values at stake with any degree of finality.

6. Concluding Thoughts

The conference on the Globalization of Class Actions took place at a key juncture in the evolution of civil procedure to address mass claims. Many of the jurisdictions represented had only recently adopted new procedures; others were in the midst of debate over such adoption. Since then, additional jurisdictions have adopted some form of representative procedure, and others have issued proposals for such adoption.

The trajectory of class action and aggregated litigation procedure adoption around the world is uncertain. Most of the new procedures, including those that were adopted more than just a few years ago, have been used very infrequently. Little is known about the costs or outcomes of pursuing class actions and aggregated litigation in jurisdictions with these procedures; even less is known about litigants' and lawyers' choices to prosecute class actions.

Nor is it entirely clear why so many diverse jurisdictions are turning to representative and aggregated litigation. Is this simply a practical response to an increase in mass harms that is itself a by-product of economic globalization? Is it a response to the erosion of public regulation in an era of resurgent market capitalism? Does enthusiasm for private litigation reflect increased desire for decentralized decision making and dispersed power? Or does this enthusiasm reflect instead the spread of entrepreneurial lawyering across borders, fed at least in part by the U.S. class action bar? To what extent do jurisdictions feel competitive pressure to provide class action or aggregated litigation procedures so that lucrative (and interesting) litigation will not migrate to more attractive public or private venues elsewhere? While it seems likely that the use of class actions and aggregated litigation procedures will continue to spread across the globe, it could also be the case that in a few years the phenomenon will have run its course. We look forward to future collaboration on empirical research to investigate trends and future conferences to debate their consequences.

Notes

1. *Campbells Cash & Carry Pty Ltd v. Fostif Pty Ltd* (2006) HCA 41, per Kirby J at paras 143-145.

2. Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harvard Law Review 664 (1979).

3. Deborah Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000).

4. For a discussion of the causal dynamics of mass tort litigation in the United States, *see* Deborah Hensler & Mark Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brooklyn L. Rev. 961 (1993).

5. Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change***,** 9 Law & Soc'y Rev. 95 (1974).

6. On rent seeking and legislative democracy, see Anthony Downs, *An Economic Theory of Democracy* (1957); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971).

7. On the role of attributions of causation and fault in liability claiming and litigation rates in instances of personal injury, see Deborah Hensler et al., *Costs and Compensation for Accidental Injury in the U.S.* (1991).

8. On the dynamics of nonclass aggregate litigation in the United States, *see* Deborah Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Tort Litigation*, 26 Rev. Litiq. 883 (2007).

9. On the early English history of group litigation, see Stephen Yeazell, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

10. For a discussion of the obstacles to conducting such an analysis, *see* Hensler et al., *supra* note 3.

11. Most recently, the *Class Action Fairness Act of 2005* ostensibly proposed to shift multistate class actions to the federal courts; the Act was widely seen by its advocates and opponents as an effort to curb certification of damage class actions. *See* Stephen Burbank, *The Class Action Fairness Act in Historical Perspective: A Preliminary View*, U. Penn. L. Rev., *forthcoming*.

12. See, e.g., *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (U.S. 2007) [holding that SEC regulation provides a shield against antitrust class actions by investors alleging securities law violations with

regard to IPOs]; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (U.S. 2007) [imposing a heightened pleading standard for securities fraud class actions]; *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (U.S. 2008) [protecting "secondary actors" from securities class actions by investors claiming "scheme liability"].

13. The last major international conference on group litigation was held in Geneva, Switzerland, in 2000, before many of the developments cited above had occurred. A handful of conferences have been held since, but the more academically oriented among them have focused on theory and normative issues, rather than generating empirical data, and the more practice-oriented have facilitated sharing of information but produced little in the way of reference documents.

14. The original reports, prepared as background for the 2007 Conference, are available online at www.globalclassactions.law.stanford.edu. Because of space constraints, those reports were abridged by the reporters for this volume. Some reporters also updated their reports to reflect events subsequent to December 2007.

15. See, e.g., *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575 [extending to private individuals standing to challenge on behalf of the public interest the constitutionality of statutes in specified circumstances] and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 [extending such individual standing in specified circumstances to nonconstitutional challenges].

16. There is considerable uncertainty around this number. Where the information provided by a reporter did not offer enough evidence to determine whether a class action procedure exists, I excluded the country from the list, although with more information I might have decided to include it. Other reports described highly specialized representative procedures that are available only in very limited circumstances. I did not include these countries on the list either.

17. Germany's model case proceeding is considered by some to be a form of class action. I consider it a hybrid and, in form if not in practice, more akin to a procedure for consolidating aggregate claims than a true representative action.

18. Virtually all of the legal jurisdictions reported on in this volume include some form of joinder procedure, allowing for a few like cases to be combined (joined) for purposes of litigation. In some recent instances, these traditional procedures have been used for mass litigation. We reserve the category of "group litigation" procedures for procedures designed especially to deal with aggregated mass litigation.

19. In China, it appears that class counsel are "supervised" by public officials, implying some constraint. It is possible also that in a system like the United States, where federal judges have explicit authority to appoint class counsel, past actions may affect designations of counsel, albeit not representative parties. Since class counsel rather than class representatives control class litigation in the United States, attorneys seeking to engage in a class action practice may feel a need to comport themselves in ways that facilitate future appointments as class counsel.

20. Hensler et al., CLASS ACTION DILEMMAS, at 22-25.

21. Hensler, *Has the Fat Lady Sung?* *supra* note 8.

22. In Denmark, the opt-out provision can only be exercised by a public authority.

23. The U.S. federal class action rule also provides for mandatory non-opt-out class actions in F.R.C.P. 23(b)(2) actions for injunctive relief. The rationale for such a non-opt-out design is that the court can only order injunctive relief such as elimination of discriminatory employment practices for all class members or none. In practice, if provisions are made for individual remedies to class members (such as back pay), individual class members who wish to avail themselves of such remedies will need to come forward, in other words, opt in.

24. Norway's regime is generally opt in, but in certain circumstances a judge may order the use of an opt-out procedure.

25. Academic debate about due process in representative litigation focuses on plaintiff class members, but in the public policy arena defendants raise due process concerns as well. In the interests of efficiency, pretrial discovery (a key aspect of civil litigation in the United States that is growing in importance elsewhere as well) is usually limited to the class representatives, meaning defendants do not have an opportunity to test the strength of the claims of the vast majority of class members. When class actions are used to litigate tort claims with varying evidence of causation and liability or contract claims where there is an issue of reliance, this may be a significant concern (and may be the basis for challenging application of a class

procedure to such litigation). When class action lawsuits result in negotiated settlements rather than trial, plaintiff and defense counsel may not distinguish carefully among claims of varying factual and legal strength. As a result, plaintiff class members with strong claims may feel they were disadvantaged by a class settlement, while defendants may feel they were pressured into paying claims that would have had little value had they been pursued individually.

26. F.R.C.P. 23(a) (1) does not specify the actual number of class members required and the extant case law is somewhat ambiguous: classes with less than one hundred members have been certified by some judges and classes larger than that have been deemed not numerous enough by other judges.

27. See, e.g., Notice.com: The Notice Company, information available at http://www.notice.com. Such firms frequently also administer class action settlement programs.

28. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (U.S. 1974).

29. Hensler et al., *supra* note 3 at 448-54.

30. In the United States, since the passage of the *Class Action Fairness Act of 2005*, defendants in federal class actions must notify relevant state and federal officials of a proposed class action settlement.

31. For information on the paucity of data on class action outcomes in the United States, see Nicholas Pace & William Rubenstein, "Shedding Light on Outcomes in Class Actions," UCLA L. Rev. *forthcoming*.

32. See, e.g., Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051 (1996).

33. See Deborah Hensler, *The Role of Multi-districting in Mass Tort Litigation: An Empirical Investigation*, 31 Seton Hall L. Rev. 877 (2001).

34. A special problem is whether and how a class action settlement can include claimants whose losses have not yet materialized—for example, in a mass exposure case where some of those exposed will develop long latency diseases, or a mass product defect case where an implanted device is known to be prone to fail but not all those fitted with the device have yet experienced the failure. The treatment of such future claimants in mass tort class actions has evoked considerable controversy in the United States. *See* Deborah Hensler, *Bringing Shutts into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. Rev. 585 (2006).

35. *Boeing v. Van Gemert*, 444 U.S. 472 (1980).

36. See Judith Resnik, Dennis Curtis & Deborah Hensler, *Individuals within the Aggregate: Relationships, Representations, and Fees*, 71 NYU L. Rev. 296 (1996).

37. Where the number of defendants is large, as in asbestos litigation, judges will also appoint lead defense counsel for the same purpose.

38. See, e.g., *In re Vioxx Litigation*, MDL 1657, August 27, 2008, available at http://vioxx.laed.uscourts.gov/Orders/o&r082708.pdf.

39. *Omnibus Consolidated Rescissions and Appropriations Act of 1996*, Pub. Law. No. 104-134 § 504(a) (7) 110 Stat 1321 (1996).

40. MULTIPLEX FUNDS MANAGEMENT LTD v. P DAWSON NOMINEES PTY LTD 2007 FCAFC 200, 244 A.L.R. 600 (2007).

41. CAMPBELLS CASH AND CARRY PTY LTD v. FOSTIF PTY LTD (No S514/2005), 2006 HCA 41, High Court of Australia, 229 A.L.R. 58 (2006).