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Digging for The Missing Link

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BOOK REVIEW

DIGGING FOR THE MISSING LINK.

FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION, BY STEPHEN C. YEAZELL.† New Haven and London: Yale University Press, 1987. Pp. x, 291. $33.50.

*Reviewed by John E. Kennedy**

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I. INTRODUCTION

Around the year 1200, in the ecclesiastical court, Martin, a rector, sued "the parishioners of Nuthamstead."[1] In 1315, in the exchequer court, two individuals sued " 'the rich burgesses' " of Scarborough " 'for themselves and the rest of the middling and poor burgesses' " of that

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I am indebted to my colleagues Alexander McCall-Smith, Joseph McKnight, Matthew Finkin, and Peter Winship for their comments on parts of earlier drafts of this Review.

1. *See infra* note 25.

town.[2] Are there any connections between these examples of medieval group litigation and modern American class actions?

In answering "yes" to this question, Stephen Yeazell has given the legal community a book of substantial significance. By exploring English history from the beginning, he has rediscovered missing links in the ancestral chain of litigation prototypes. Yeazell's discovery is impressive, given that other legal historians have scoured the same ground before but have not seen what Yeazell sees. The analogy comes to mind of early archaeologists screening and sifting the artifacts from village sites. Under new probing by a cultural anthropologist, the artifacts reveal a new dimension of man. Similarly, Yeazell reinterprets the known historical cases involving medieval and later group litigation by using modern scholarship to recreate the economic, political, and social context in which the group litigations arose. More importantly, Yeazell asserts original theories of evolutionary linkage for explaining the anomalies of modern class actions and for attempting to justify them in terms of social organization, community conflict, and peaceful judicial resolution of power struggles in different and evolving cultures.

Yeazell asserts theses in many fields, including constitutional law, procedure, legal history, jurisprudence, and political theory. Some of his theses are valid, some stretched, and some far fetched. Yeazell's implied thesis, however, reduced to simplest terms, is that group representational litigation has been a continuous thread in the Anglo-American legal system for 800 years. In contrast, the prevailing view of adjudication emphasizes individual, adversarial rights, and considers the modern class action as an exception to the norm. Under the conventional view, therefore, the class action requires special jurisprudential justification.

Yeazell, however, does not view the modern class action as a departure from the norm. Rather, he suggests that group representational litigation has been with us from the beginning and, therefore, has a claim of legitimacy equal to that of ordinary litigation involving individual persons or incorporated bodies. This de facto view of history is a major contribution; but more importantly, Yeazell extracts from his exploration into the history of group litigation a normative theory of representation of interests in order to provide the jurisprudential justification.

Although he does not make the claim, Yeazell's book can be viewed as providing the missing foundation for Abram Chayes' seminal article

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2. *Gegge v. Cross* (Ex. 1315), *reprinted in* T. MADOX, "FIRMA BURGI," OR AN HISTORICAL ESSAY CONCERNING THE CITIES, TOWNS, AND BOROUGHS OF ENGLAND, TAKEN FROM RECORDS 96 n. b (London 1726), *cited in* S. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38 (1987).

on the role of the judge in public law litigation.[3] Chayes' article was incomplete because Chayes only described what modern federal courts have been doing in fact, in effect asserting that what is, ought to be.[4] Chayes showed that modern federal courts in fact were engaging in community dispute resolution by traditionally nonjudicial, administrative, and mediative methods in the form of class actions. It did not necessarily follow, however, that these activities were a legitimate function of the courts. Yeazell undertakes the Herculean task of attempting to legitimate the modern class action by systematically invoking historical analogy through different periods of time, and by justifying this history under one overarching normative principle of procedure.

II. YEAZELL'S THESES

Beginning in the present, Yeazell articulates the main features of the modern class action. The central issues in the modern class action are to recognize the class and to decide the question of representation. The modern class action creates an ad hoc litigating entity that binds the class through its representatives. The court's first decision, to recognize a class, grants the group a form of power. Immediately thereafter the court decides whether the persons seeking to represent the class are worthy representatives.[5]

The modern class action appears to be a major exception to the individualistic Anglo-American law ethic. On the other hand, the class action is not really so exceptional given the legal recognition conferred on groups such as labor unions, business corporations, and beneficiaries of administrative agency remedies. Each of these groups, however, finds justification in various legal theories. Similarly, there is a need for a justification for the modern class action. The judicial grant of the right to sue on behalf of group members is the grant of a property right to the group and to its representative.[6] An ad hoc group seeking to bring a class action, therefore, must justify its status to the court.

Yeazell's book has three main components: narrative description, doctrinal analysis, and consideration of political and legal history. The descriptive narrative reports that the modern class action is part of a long history of "group litigation—that is, lawsuits by and against num-

3. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). This article is the lead to an extensive *Developments In the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976), supporting Chayes' descriptive observations.

4. Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) (Chayes here favorably endorses the practices he earlier described in his 1976 article).

5. S. YEAZELL, *supra* note 2, at 2.

6. *Id.* at 3.

bers of individuals seen as a litigative entity."[7] This project involves describing the medieval groups, their social characteristics, their economic roles, and then tracing them through English history. The evolution of early group litigation into private and municipal corporation law cannot be understood without portrayal of the external, substantive societal struggles between villagers and their social superiors. The final aspect of this description is to trace group litigation as it crossed the Atlantic, adapted to the new republic, and accommodated the modern circumstances of a mass society, such as movements for racial and other social equalities.[8]

The second, doctrinal aspect of the book attempts to show how the legal rules governing group litigation have required continuing compromise with rules of procedure that are premised on assumptions of individualism. This tension presents us with the class action anomaly.[9] The modern class action is an anomaly because when viewed as a mere rule of procedure in court, the class action bypasses the normal outside legal and political world that governs representation of individual choice. As an exception to a societal struggle, the class action has the power to transform modern life. The class action is an atavism and thus generates heated controversies of historical significance.[10]

The third component of the book focuses on the concept of representation. On the surface, representation is merely a prerequisite to group litigation. But there are other, less obvious aspects to the concept of representation, such as judicial attitudes toward groups, and the political theory and constitutional thought about representation. An important point about medieval group litigation is that the authority to litigate on behalf of existing organizations existed before, after, and independent of the litigation itself. In contrast, however, the issue of representation in modern class actions is ad hoc, inherent, and intertwined with the question of judicially granting class status to the group. The resulting modern class action provides a microcosmic laboratory in which to examine legal institutions with respect to the opposing claims of individualism and collective organization and their respective justifications.[11]

Yeazell sees two incompatible ideas of representation: individual autonomy versus representation without consent. To describe representative litigation, Yeazell posits the modern consumer class action against a department store. The judicial recognition of the class over-

7. *Id.*
8. *Id.* at 4.
9. *Id.* at 5-6.
10. *Id.* at 8.
11. *Id.* at 6-7.

comes the cost of organizing the consumers and shifts the advantage from the defendant department store to the consumers, so much so that the defendant may choose to settle rather than to take even a small chance of losing at trial. The procedural contest over the propriety of the proceeding matches the principle of individual autonomy against the principle of class representation.[12]

The puzzle concerning the modern class action is to find the missing link between it and other forms of representative litigation. Yeazell suggests that a concept of interest that detaches representation from, and in fact stands as a substitute for, individual initiative and consent can be used to construct this missing link.[13] He asserts that the class action, by representing a group member's interest in the most effective manner, justifies a procedure under which individuals can become legally bound without their consent.[14]

Corporation law serves as one justification for group representation. One theory of the corporation is that the group takes on a permanent fictional legal life by a grant of power from the state. Another competing theory is that the corporation arises from consensual agreement. The two theories of power and consent arrive at the same place, legitimating litigation by a group. On the one hand, corporate litigation can serve as a model to justify the modern class action. Conversely, however, corporate litigation has served more often as an argumentative

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12. *Id.* at 11. Yeazell observes that the principle of individual autonomy dominates most all procedural rules, such as those governing standing, injury, and prohibition against solicitation. These rules are all extensions of concepts of private property. The property rights are justified by various theories of natural law and economic analysis. They project the assumption that the holders of the rights are best equipped to decide whether to bring suit to protect them. This notion of individual autonomy is enshrined in the due process clause and in the principles of notice and res judicata. But there are limits to individual autonomy. For example, legislative power to affect property rights is demonstrated in legislative tax assessment cases. Further, representational agreements are often privately formed through consensual arrangements as, for example, in insurance policies. In contrast, however, the class action procedural device gives rise to nonconsensual representation. True, there are other forms of nonconsensual representation, such as representation of children and incompetent adults, but class actions are substantially unique in providing nonconsensual representation to fully competent adults. *Id.* at 12-15.

13. *Id.* at 15. As Yeazell sees it:

> One way of constructing the missing link is by a concept of interest that detaches representation from consent without requiring us to characterize the class as incompetent or ill served. That concept lies at the heart of the modern class action and constitutes its response to the objections of property and due process.

Id.; *see also infra* note 14.

14. *Id.* Yeazell states that:

> Interest provides the substitute for individual initiative and consent; the class action justifies action that legally binds another without his consent by pointing out that his interest is represented in a situation in which it is inconceivable that he would not wish his interest to be so pursued. Specifying the conditions under which the modern class representative may thus invoke interest to trump individualism is a large task . . . .

Id.

alternative to class litigation; namely, that the group should remain judicially unrecognized unless it obtains incorporation.[15]

In all organizational litigation, for example, litigation involving corporations, governmental agencies, and unions, the organization redistributes the impact on the individual—like the shareholder in corporate litigation. Similarly, when a "litigative entity" is recognized in a class action, the litigative entity itself is given power to redistribute the impact to the individual. A corollary is that the representative himself then is simultaneously both empowered and burdened.[16]

Although representative litigation through the class action commonly is thought of as an exception, there are indications that some version of it has existed for 800 years. Only by examining the social context exterior to the litigation, however, can the link to the past be explained.[17] To launch his search for explanations based on the social context, Yeazell presents "Four Historiographies." He first analyzes the writings of Zechariah Chafee. Chafee asserted that the class action, as evolved from Court of Chancery bills of peace with multiple parties, began with cases in the seventeenth century.[18] The notions advanced by Chafee represent an American lawyer's conventional view of the matter.

Chafee, however, should have delved deeper into history by turning to Frederic Maitland, the subject of Yeazell's second historiography.[19] Maitland, writing in 1898, describes the development of the class action five centuries earlier than Chafee's proposed seventeenth century origins. Yeazell concludes that English medieval law routinely recognized litigation by groups as long as the group had a real social and economic

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15. *Id.* at 16-17. Yeazell's search in the history of the corporation proved largely fruitless because the writings originally fell into three groups that ignore the question. On the one hand, Sir Edward Coke, for example, severely distorted the evidence of early group litigation by retroactively viewing it as a function of later cases involving corporation concepts. A second group of writers on corporation law history simply assumes the concept of a corporation. A third quite recent approach develops the corporation as a nexus of voluntary contracts among its constituents. None of these three approaches illuminates the relationship to medieval group litigation. The power of this conventional history of corporations thus deceives and distracts. *Id.* at 31-33.

16. *Id.* at 20-21.

17. Yeazell explains that:

> Social context matters. Briefly put, that is half of the argnment of this book—that procedural rules take on different colors in the light of differing social settings. . . . Where villages, parishes, guilds, and other units provided the center of economic and social life, the appearance of these groups in court, litigating through representatives, was no more noteworthy than the court appearance of a corporation would be today. . . . [L]awyers spend virtually no time worrying about the circumstances of litigative representation. . . . There is no explicit medieval theory. . . .

Id. at 21.

18. Z. CHAFEE, SOME PROBLEMS OF EQUITY 163-66, 200-02 (1950), *cited in* S. YEAZELL, *supra* note 2, at 24.

19. F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (reprint 1968) (2d ed. Cambridge 1898), *cited in* S. YEAZELL, *supra* note 2, at 26.

existence; but he argues that Maitland failed to describe the concept of representation because of Maitland's focus on the legal concept of incorporation. This aspect of Maitland's focus was influenced by Henry Maine, the subject of Yeazell's third historiography.[20] Maine based his views on social anthropology, trying to show that early human culture had been communal rather than individualistic.

The fourth historiography chronicles Helen Cam and her theories of the life of the community.[21] She argued that from a very early date the legal system treated vills as de facto communities both in and out of court. Cam stopped at the vill, but could have gone on to examine other medieval groups as well. Yeazell proposes to expand both Maitland's and Cam's work from the perspective of representation of groups. Thus, he proposes to fill in the medieval prehistory and the prologue to seventeenth century Chancery cases.[22]

Finally, Yeazell discovers his own original source for the class action by searching for concepts of representation in political theory. The questions concerning group litigation are analogous to those of political representation in western democracies. In the case of English medieval litigation, therefore, one must analyze the political theory upon which Parliament is based. William Stubbs' controversial *Constitutional History of England in 1876* viewed Parliament as a legislative assembly emerging in 1295.[23] Others attacked Stubbs, viewing early Parliament not as a legislature, but as a court. A third group of scholars has examined Parliament by looking at the practices and theories of representation emerging in the fourteenth century. The modern tradition now focuses on the forms of representation appropriate to Parliament. The question of the nature of parliamentary representation, then, constantly confronts Yeazell in his undertaking to establish a connection between the modern class action and medieval group representative litigation.[24]

III. The Medieval Cases and Social Context

Having outlined the general theses of what he proposes to do, Yeazell begins in 1199 with the case of Martin, the Rector of Barkway, suing the parishioners of a village.[25] Martin sued the parishioners

20. H. Maine, Ancient Law 258-73 (London 1861), *cited in* S. Yeazell, *supra* note 2, at 27.

21. Cam, *The Community of the Vill*, in Medieval Studies Presented to Rose Graham 1-14 (V. Ruffer & A. Taylor ed. 1950), *reprinted in* Law Finders and Law-Makers in Medieval England 83 (1962), *cited in* S. Yeazell, *supra* note 2, at 30.

22. S. Yeazell, *supra* note 2, at 21.

23. W. Stubbs, The Constitutional History of England, Its Origins and Development (1880), *cited in* S. Yeazell, *supra* note 2, at 34.

24. S. Yeazell, *supra* note 2, at 36-37.

25. Martin, Rector of Barkway v. Parishioners of Nuthamstead (1199), in *Select Cases From the Ecclesiastical Courts of the Province of Canterbury, c. 1200-1301*, 95 Seldon Soc. 8 (N. Ad-

"neither as a corporation nor as individuals." The suit instead grouped the defendants as "the parishioners." During the next century, in 1256, three villagers sued on behalf of their community a second community. Yeazell indicates that, though the records are fragmentary, these suits suggest that the courts' concern was not whether the citizens could sue or be sued as a group, but rather the disposition of the action through an examination of the merits of the case.[26]

These two suits make sense only on the premise revealed in a phrase in the pleadings—that the representatives spoke "on behalf of" all members of the group. These cases are baffling unless one considers the social context. Three points should be made. First, the contrast between medieval and modern group litigation must be recognized. The social contexts are so different it would be a mistake to speak of an unbroken and unified eight century tradition. Second, medieval groups pre-existed the litigation to which they were a party. Third, some medieval groups were groups of command; some were groups of consent; and some were mixed. An important aspect of these features is the shifting attitude of the Crown, more often than not mandating, but sometimes challenging the group.[27]

The most extreme and puzzling of medieval group litigations involved "the poor" of a community.[28] To understand how such a characterization and concept could be used and recognized, the history of medieval England must be read in terms of collective organizations. Relationships between the villagers and the lords were highly regulated, with detailed rules governing each group. The manor, for example, operated as a collective economic unit, winning a subsistence from the land. One group was created by the institution of franc pledge, which was rooted in the collective life of the village and required that unfree males over the age of fourteen organize into groups. The members of the group stood responsible for each other's good behavior. A similar urge toward collective responsibility and self-government brought the growth of the borough. The dealings between the lord and the borough were collective, resulting in a degree of autonomy for the group. A similar process also took place in the form of church parishes. Another type of group recognized was the gnild. The most powerful and successful of the earliest groups, however, were the religious communities. The law gave entire deference to the communal existence of the group, recognizing it by deferring to the principle of hierarchy; only the abbot or ab-

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ams & C. Donahue ed. 1985), *cited in* S. YEAZELL, *supra* note 2, at 38.

26. S. YEAZELL, *supra* note 2, at 38-39.

27. *Id.* at 39-40.

28. *Id.* at 40.

bess could sue on its behalf or on behalf of an individual monk or nun.[29]

All these groups operated on the basis of status. For example, because of their status the villeins were obliged to serve their lord, and this service gave rise to or correlated with communal liability. The creation of collective responsibility for each type of group was a way to maintain power throughout the system. The same was true with parishes. Thus, the issues at stake in medieval litigation with vills and parishes involved incidence of status rather than claims of individual right. Group litigation seemed inevitable rather than remarkable. Whereas the function of modern class actions is to overcome organizational transaction costs that are otherwise insuperable, medieval litigations did not change the basic power relationship between the group and its adversary because the groups existed before and after the litigation.[30] Unlike modern class actions, there was already in place a group organization, easy communication in the membership, and recognizable representative authority.

A slightly different type of group than that mandated from above arose from undertaking voluntary obligation and obtaining collective privilege by forming guilds or boroughs. The guilds often sued each other over the privileges granted to them by charters from the King. The two-way relationship between guild or borough and the King arose from the process of winning privilege from the King, who subcontracted governance to the group. The guild or borough received a monopoly and the King in turn got a "farm"[31] from the borough or guild, in other words, a liability for a collective tax. As a result of this relationship, the King brought many suits in Exchequer against both boroughs and guilds. Again, the voluntary associations pre-existed litigation. Thus, the group litigation did not reallocate power between them and the King, other than to decide the question of the merits. Individuals were liable for the collective liability for the group. The group reassigned liability internally. Some suits even ended in money damages. The merits mattered a great deal to everyone, including the King, overshadowing any questions going to the fact of group representation.[32]

The writ of quo warranto shows another variation on group litigation. Ostensibly a challenge to the group authority, the context reveals that these writs were used to obtain revenue for the King. As noted previously, the "farm" was a voluntarily assumed obligation in exchange for privilege; whereas the franc pledge was an involuntary obli-

29. *Id.* at 41-46.
30. *Id.* at 46-57.
31. *Id.* at 63.
32. *Id.* at 58-68.

gation. In none of the early cases involving either involuntary or voluntary groups did the King wish to challenge the right to litigate collectively because it was in his self-interest to impose the liability on a collective body through litigating representatives.[33]

What was the relationship of this early litigation to emerging concepts of the corporation and property? Maitland was technically correct in distinguishing that this early evolution did not involve corporate title to property, but only title to property in individuals. Maitland, however, missed the overarching point that this early dispute resolution provided the medieval equivalent of corporation law, in that there existed community property in the rights and privileges of the group.[34]

These various collective bodies were significant to the development of representative group litigation throughout the first five hundred years, but these years also pose a number of mysteries. The village had survived, but in a new form. The parish endured. Although there was de facto group litigation during this period, as opposed to modern class litigation, the emergence of the formal recognitional representative class suit did not occur until the 1700s. Why so little theory was developed concerning group litigation during the first five hundred years remains a mystery. The King himself sometimes equivocated about groups; during one quo warranto proceeding the King, on the surface at least, appeared to turn against the group. Yet no theory of the representative developed during this period.[35]

Yeazell poses his political theory of medieval group litigation to answer the mystery. Many contemporary scholars now see the state as the

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33. *Id.* at 67-68. Yeazell further explores the grant theory and quo warranto proceedings. The practical and realistic end result of quo warranto proceedings in 1278 and 1294 under Edward I was for the defendants to purchase franchises from the King. Later, in 1388, Richard II employed the same device against the guilds. Yeazell criticizes Coke, who wrote in the seventeenth century, for interpreting these early cases as evidence of the King's hostility to unpermitted corporate activity. The reason for Coke's legal distortion was that Coke was an advocate of the grant theory of incorporation, and thus he failed, or refused, to see the reality that the King's revenue was at stake. But there are two distinctions that Coke should have drawn. One is the right to act as a group. This is separate and distinguishable from the right of the group to exercise particular powers, which was the key issue in these early proceedings. The King was worried about royal income and power, not about the internal structure of the organizations or their right to exist as a group.

The first corporate charter was made to Coventry in 1345, even though it lacked some of the five legal criteria later used to define corporations. Corporate concepts had not reached a high level of sophistication at this stage. Perpetualness was an incidental, unimportant feature. Medievalists did not fail to see the distinctions; the distinctions did not yet exist. Nor did the King yet see that challenging the internal constitution and the litigating status of the group were separate questions of power related to the King's exclusive grant of particular powers to the group. During his inquiry into guilds in 1388, however, Richard II did examine their internal organization; yet he did not seek to change them. *See id.* discussion at 75-85.

34. *Id.* at 68-69, 74-75.

35. *Id.* at 69-71. The absence of a theory, however, may be less mysterious and more typical of the norm in an age not given to abstraction.

grantor of corporate powers for which the group has petitioned. On the contrary, medieval litigation suggests that the authorities called the group into being for their own purposes. These scholars are now perplexed in answering questions as to the relationship of the member to the organization, for the system was based not in law, but in custom and group autonomy. Yeazell makes three claims regarding the mystery of medieval group litigation. First, no answers were necessary during the first five hundred years because the social context raised no questions. Second, the representative was expected to take the best view rather than the membership's polled view, but representatives in fact did take individual opinion of the group into account. Third, those involved in the beginning of a new legal culture in the seventeenth century began to see the unincorporated group as an extraordinary, rather than as an ordinary, party to litigation.[36]

Yeazell cautions that it is baffling to superimpose our modern ideas on the medieval reality. Two distorted and inaccurate views of the medieval group can arise without considering the historical context. First, it is a tempting deception to believe that medieval law had invented something like the modern class action. Group litigation was simply a fact, not a theory. The other deceptive conclusion is that the village, parish, guild, and borough reflect the modern analogy to the corporation. Yeazell agrees with Maitland's view that it is tempting but erroneous to view medieval groups as corporations.[37]

IV. The Transition of Medieval Groups to the Sixteenth Century

In 1613, in *The Case of Suttons Hospital*,[38] Sir Edward Coke developed the modern theory of corporations as grants of power from the state. Coke's theory badly misdescribed the five hundred years previous in order to fit the past into his theory.[39] The importance of Coke's scheme lay in the future. He had seized for the state a monopoly on the power to recognize groups. This system made anomalous and suspect any group that had not obtained a charter. Coke subsumed all the previous medieval litigation groups into the fiction that they were corporations either by prescription of implied grant or by lost charters. This simply was not in fact the case, either in the past or in the present.

For example, parish litigation groups most clearly did not fit Coke's

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36. *Id.* at 93-99. To illustrate the contrast, Yeazell quotes a remarkable thirteenth century writ recognizing three or four men of the village as representatives of the whole as " 'the law and custom of the realm.' " *Id.* at 98.

37. *Id.* at 100-17.

38. 77 Eng. Rep. 937 (Ex. Ch. 1613), *cited in* S. Yeazell, *supra* note 2, at 109.

39. S. Yeazell, *supra* note 2, at 111-13.

mold. There occurred many vigorous disputes between the priests and the rectors over tithes, and also over maintenance respecting the physical property of the church. Further, when the Tudors destroyed the monasteries as the institutions that cared for the poor and transferred the monastic functions and property to the local churches, the transfer increased the importance and official standing of the parish. Thus, there occurred many litigations by the overseers of the poor to enforce obligations to them. While Coke was creating his theory of corporations, the Tudor state was busy reshaping the parish and applying it to new group tasks.[40]

The transformation of the old groups, guilds and villeins, went on apace. Villeins became free copyholders.[41] Unincorporated guilds became covered by entities that were incorporated. Merchant guilds gave way to boroughs and craft guilds. Trade wars were litigated and incorporation " 'became . . . the recognized method of evading the Statute of Monopolies passed in 1624.' "[42] Incorporation became a method of survival. Capitalism began to emerge.

Religious guilds suffered a slow death. In 1547, the first year of Edward IV, a statute passed that dissolved chanceries, colleges, and free chapels and seized all their possessions. The act that abolished these entities, however, in a savings clause, said that it did not "in any wise extend or be prejudicial or hurtful to the general corporation of any city, borough or town."[43] The statute provided that " 'the King our sovereign lord shall . . . have and . . . enjoy all fraternities, brotherhoods and guilds . . . .' "[44] This language indicates that the conceptual landscape was changing so much that the litigative capacity of informal groups now had to be rethought.[45]

By the fifteenth century the franc pledge was also dying out. The village lasted, but villeinage did not. Economics gradually converted villeins into freeholders. Villeins originally could seek only the protection of the manorial courts. As villeins attained copyhold status, however, they could seek the protection of the royal courts. Gradually, Chancery, in the fifteenth century, began to protect copyholders. The breakdown of the manorial villeinage system decreased the need for group litigation to litigate the obligations of the village. Incorporation began to dis-

40. *Id.* at 117.

41. A copyholder was a tenant by copyhold tenure. Copyhold tenure was a form of estate at the will of the lord that derived its name from the copies of the court rolls, which evidenced the tenant's admittance to a parcel of land belonging to the manor.

42. S. YEAZELL, *supra* note 2, at 118 (footnote omitted) (quoting 3 E. LIPSON, ECONOMIC HISTORY OF ENGLAND 331 (6th ed. 1956)).

43. *Id.* at 120 (quoting An Act for Chantries Collegiate, 1547 1 Edw. 6, ch. 14, § 34).

44. *Id.* at 119-20 (quoting An Act for Chantries Collegiate, *supra* note 43, § 9).

45. *Id.* at 120.

tinguish the fortunate successful group from the unsuccessful group. The need for group representation, however, did not decline entirely. First, a new shared struggle between groups of copyholders and the lord reinforced the need for cohesion. Second, the village survived and generated a need for new organization. Two forms of incorporation were now emerging: the true corporation; and the officially sanctioned quasi-corporations, guilds and parishes, which were mandated, but not officially incorporated.[46]

V. The Seventeenth Century: Star Chamber and Chancery

By the year 1600 group litigation had changed and become isolated. What was left of group litigation had migrated to two courts with specific jurisdiction, the Star Chamber and the Chancery. This migration indicates that group litigation had become specialized. The collapse of the Lancastrian rule and the near chaos that followed had a tremendous effect on the courts. In the face of corruption and anarchy in the common law courts, people sought protection in the Star Chamber and later in the Chancery.

The Court of Star Chamber originally was focused on maintaining order in the land. Starting in the fifteenth century, the Chancellor had begun to protect manorial title and copyholders' rights, which were unenforceable in the courts of common law. The Star Chamber in turn began to deal with groups of manorial tenants who were asking for protection against extortion, oppression, forestalling, regrading, and enclosure, all of which were thought to bring on rural poverty and starvation.[47] Early in the year 1500, tenants complained of numerous "hurtes and wronges"[48] perpetrated by the lords. The tenants were able to win the sympathetic ear of the Star Chamber, one of the most powerful bodies in the land. Other cases show not only rural groups, but, for example, the mayor, the commoners, and aldermen of Newcastle with claims against a monopoly. Parishes also appeared as parties before the Star Chamber. Many other disputes between groups, which looked more like administrative inquiries into the causes of unrest, came before the Star Chamber. If the courts were ineffective, any serious dispute involving groups of people threatened to become general social unrest. As a result, two of the Star Chambers' special concerns were the quelling of unrest and the restoration of the normal course of govern-

46. *Id.* at 120-25.

47. *Id.* at 125-28.

48. *Select Cases before the King's Council in the Star Chamber, Commonly Called the Court of Star Chamber*, 25 Seldon Soc. 6 (I. Leadam 1911), *cited in* S. Yeazell, *supra* note 2, at 128.

ment. The significant point, however, was that jurisdiction over groups had shifted from the courts of the common law to the Star Chamber.[49]

The Star Chamber gradually turned its attention from civil to criminal law matters and then was abolished during the Puritan revolution in the seventeenth century for its hated inquisitorial procedure. Thus, group litigation had no place to go but to the Court of Chancery. Chancery had begun to recognize the rights of rural groups, but now conceived of its jurisdiction as being extraordinary. Meanwhile, the common-law courts developed the view that groups required incorporation. From these strands began to emerge the legal doctrines now known as the rule of necessary parties and the "exception" for class actions.[50]

Two errors have been made in this context. First, one should not view these seventeenth century cases as the beginning of group litigations. Second, one should not assume that the prior 500 years had moved forward unchanged. A number of related misunderstandings are contained in these two basic errors. For example, the seventeenth century group litigation cases were not the first. Rather, their concentration in Chancery was a new development in the seventeenth century. Furthermore, the common view, now retroactively imposed, that efficiency was the guiding force behind these group litigations, is inaccurate. The reality is that these cases involved the group rights of residual medieval collectives.

The seventeenth century village, manor, and parish cases, thought to be exemplary of joinder cases, were, in reality, exclusive examples of residual collectives.[51] By then the approach of the Chancery Courts had completely changed; class litigation was the exception rather than the rule. These village, manor, and parish cases demonstrate how early modern group litigation took shape.

From these historical and social perspectives, Yeazell reinterprets the famous cases of *Howe v. Tenants of Bromsgrove*,[52] which concerned the Lord's dispute with his tenants over the Lord's claim of an exclusive right to kill small game, and *Brown v. Vermuden*,[53] a dispute between the vicar and a parish of lead miners over the tithe from a lead mine. These and other, similar cases pose many puzzles for the modern lawyer looking backward. Several things, however, are clear. First, in-

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49. S. YEAZELL, *supra* note 2, at 128-29.

50. *Id.* at 130-31.

51. Yeazell writes: "*[E]very* sixteenth- and seventeenth-century case of group litigation I have found involves the members of rural agricultural communities." *Id.* at 137 (emphasis in original).

52. 23 Eng. Rep. 277 (Ch. 1681); *see* S. YEAZELL, *supra* note 2, at 133-34.

53. 23 Eng. Rep. 796 (Ch. 1676); *see* S. YEAZELL, *supra* note 2, at 134.

stances of group litigation regularly involved defendant, as well as plaintiff classes. Second, all the cases involved substantive law that was largely a product of local custom. Third, by this time none of the cases involved actions for money damages. Finally, all the disputes arose out of village, manor, or parish communities.

From a different historical perspective, looking forward from the year 1400, there were also many puzzles for the medieval lawyer. Why were there no suits for damages? What had become of group litigation involving groups other than tenants and parishioners? Why was there now a need for explicit justification for representation of the group, as opposed to willing acceptance?[54] Yeazell concludes that group litigation in the seventeenth century resulted from community status rather than the assertion of legal rights.[55]

Chancery began to inquire not only into the representation, but also whether a suit by a representative was even appropriate. The Chancery Court also began to limit the group remedies. The proceedings looked more like political accommodation than adjudication. These litigations formed a shaky bridge between medieval and modern group litigation.[56]

Yeazell then examines village, manor, and parish litigation in the seventeenth century in greater detail to demonstrate his main themes. Yeazell recounts a large range of similar cases. Some litigation reflected collusive action that acknowledged agreed-upon customs and was used as a way to record the customs. In this way the seventeenth century chancellor was replacing the manorial court. The proceedings show vague recognitions of past decrees and flexible willingness to reconsider them. A judicial preference existed for remedies based upon consent. Unlike much modern litigation, these people had to live in continuing relationships with one another, and all contemplated that the relationships would continue. Judicial orders frequently were not carried out; the Chancellor often favored mediation and compromise.[57] One decree ordered that Magdalen College was " 'compelled to an agreement.' "[58] These orders gave considerable leeway to negotiation. The courts frequently reconsidered or changed decrees. In the extraordinary case of *Churchwardens of Northwould v. Scot*[59] a Chancery Court supervised a

54. S. YEAZELL, *supra* note 2, at 135.

55. *Id.* at 136 (stating that, "[s]eventeenth-century group litigation is not about the legal rights of aggregated individuals but about the residual incidents of status flowing from membership in agriculture communities poised at the edge of a market economy").

56. *Id.*

57. *Id.* at 137-43.

58. Prebends & Scholars of Magdalen College v. Hide, 21 Eng. Rep. 138 (Ch. 1612), *cited in* S. YEAZELL, *supra* note 2, at 143.

59. 21 Eng. Rep. 91 (Ch. 1581-82), *cited in* S. YEAZELL, *supra* note 2, at 144.

bargain between the parson and the parishioners concerning the burdens to be shared by each in providing for the parish poor. These inconclusive decrees, what we now call "mediatory" decrees, softened the impact of litigation. Yeazell explains that these decrees were part of the process of equity, which replaced the local customary courts. The economic stakes, however, were large and the parties continued to maintain stubborn positions over time.[60]

Yeazell traces the discovery of the formal concept of representation to the case of *Brown v. Vermuden*.[61] In this case the plaintiff had sued the whole body of tenants, and the defendants were permitted to choose their representatives.[62] The procedure of advance notice and consent becomes explicable in terms of the small cohesive group. The Chancellor became uneasy about who represented the group because of the great social changes that had occurred. In addition, the intellectual climate concerning representation had changed. Representation was no longer a simple matter of necessity by fact and definition. The great parliamentary debates lay a century in the future; nevertheless, parliamentary elections became contentious and the theory emerged that the greater number of votes, rather than the votes of the best people, should determine the outcome. More dramatically, a King had been beheaded because he had failed to understand Parliament's claims to represent those whose consent was required for certain courses of action. The unsolved puzzle remains: Was Lord Nottingham inventing the requirement of explicit authorization or was he codifying what already had long been a custom?[63]

Unlike medieval courts entertaining suits by and against groups, these early modern judicial decrees were restricted to the rendering of declarations. Yeazell found no instance of seventeenth century group litigation in which Chancery decreed the payment of money damages.[64] He concludes that modern scholars are in error in concluding that, because Chancery was preventing a multiplicity of suits at common law, Chancery was aggregating common-law damage actions.[65] In fact, no

60. S. YEAZELL, *supra* note 2, at 144-45.

61. *See supra* note 53.

62. LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGOMENA OF CHANCERY AND EQUITY" 95 (Yale ed. 1965), *cited in* S. YEAZELL, *supra* note 2, at 146. In a journal entry, generally unpublished prior to 1965, Lord Nottingham recorded:

> A bill to settle the customs of a manor wherein a multitude of tenants are concerned may be exhibited by any three in the name of the rest, so as they produce before the Register a sufficient authority to enable them to sue in the name of the rest, and so as they be responsible for the costs.

Id.

63. *See supra* note 62; S. YEAZELL, *supra* note 2, at 147-48.

64. S. YEAZELL, *supra* note 2, at 148.

65. *Id.*

such thing occurred. Rather, the Chancery decrees were in the nature of declaratory judgments. In several cases declarations were followed by proceedings involving those who violated the decrees.

In contrast to prior medieval group litigation, which involved the full range of remedies without special justification, seventeenth century remedies were limited and required special justification. As far as the records show, the seventeenth century chancellors knew nothing of the former medieval group litigation. What the chancellors did understand, however, was that they now were substituting for the manorial court, which generally operated by prospective decree. The opportunity to recover damages now had disappeared, but all members of the group were still interested in the prospective declaration.[66]

The emergence of the requirement that the representative have explicit authorization and the concomitant limitation of remedies began to send this type of litigation into decline. These cases typically raised issues of custom as questions of fact, resulting in disuniformity from case to case and place to place. As the formalizing limits for reasonableness were asserted, however, the process began to transform fact into law. This process, which has become familiar to legal anthropologists, is generally associated with the movement from customary law in a status-based society to a system of codes and decisional law in a society held together by the market. This process contributed to the inflexibility of group litigation and, eventually, to its death as a de facto institution. In the past, parties at first were bound by prior decrees, not based on theories of prior adjudication, but based on necessity. Custom, however, now had become law by virtue of the decree.[67]

The emergence of the doctrine of necessary parties remains a mystery. It is paralleled closely in time with the emergence of the concept of incorporation and the formulation of the "exception" to the necessary parties rule for class actions. According to one Chancery Court, unless litigation by and against the class through representatives was allowed, some suits " 'would be impossible to be ended.' "[68] The Chancellor was speaking of an exception in terms of functional utility. To be sure, this notion, flying in the face of the necessary parties doctrine, would be confined to cases where it was absolutely necessary. The Chancellor was saying, however, that procedure must be accommodated to fit social circumstances as seen in the light of some rather basic goals of the judicial system. During this period political theory was shifting with the Renaissance and began to focus on the individual rather than

66. *Id.* at 149-51.
67. *Id.* at 151-54.
68. *Id.* at 155.

on the group.[69]

VI. The Eighteenth Century: The Industrialization of Group Litigation

Yeazell calls the next stage of evolution "the industrialization of group litigation." This describes an evolution from litigation groups that have de facto social cohesion into a different spectrum, one in which groups simply have a shared interest without any social cohesion. The last case typifying the old medieval model was *Brown v. Howard*,[70] brought by the Tenants of Greystock Manor in 1700. The only real issue was whether the contributing tenants had to be formal parties to the action to avoid the crime of maintenance. The answer was no: " '[i]t is no Maintenance for all the Tenants to contribute, for it is the Case of all . . . .' "[71] One hundred twenty-eight years later, the case of *Hichens v. Congreve*,[72] in Chancery, represented the new model of shared interest without a social cohesion. *Hichens* involved a representative suit on behalf of more than 200 shareholders against the promoters of their company for fraud in not revealing the promoters' fee. The shareholders sought to hold the promoters liable jointly and severally to the company. The promoters' objection, that not all shareholders were joined, was summarily overridden by the Chancellor.

Two aspects of group litigation had changed. First, no longer was there an existing social group; *Hichens* broke the thread from the seventeenth century and medieval group litigation. Second, this and other cases now assessed money remedies for failure to comply with rules of law, and as such differed from the seventeenth century equity cases. Ironically, *Hichens*, a nineteenth century case, now looks more analogous to some of the medieval cases with respect to applying rules of law and granting damages, whereas in seventeenth century cases the courts issued prospective decrees tied to custom. The social context had been transformed. The rural, agricultural society, marked by custom, had evolved into an urban, individualistic, entrepreneurial, capitalistic one. Society had been reconstructed. New groups had emerged.[73]

Friendly societies were attempts by the artisan class to shoulder responsibility for the downtrodden by providing a small measure of assurance against illness and death. These societies provided activities for

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69. *Id.* at 155-59.

70. 21 Eng. Rep. 960 (Ch. 1701), *cited in* S. Yeazell, *supra* note 2, at 162 (involving " 'Tenants of *Greystock* Manor against the Lord, to settle the Customs of the Manor as to Fines Upon Deaths and Alienations' " (emphasis in original)).

71. *Brown*, 21 Eng. Rep. at 960, *cited in* S. Yeazell, *supra* note 2, at 163.

72. 38 Eng. Rep. 917 (Ch. 1828), *cited in* S. Yeazell, *supra* note 2, at 164.

73. S. Yeazell, *supra* note 2, at 164-66.

social purpose, funds for disability, and old age pensions. Not until the passage of the first Friendly Society Acts in 1793,[74] however, did the organizations achieve full legality. Under government encouragement they evolved into insurance companies. Meanwhile, severe tensions arose between the contributors and beneficiaries. These disputes required court attention.

At the other end of the social ladder, joint stock companies emerged. The joint stock companies at first existed in a legal vacuum between individual entrepreneurship and chartered corporations. As a result of wide scale stock frauds, the Bubble Act made " 'the acting or presuming to act as a corporate body . . . illegal and void' " and left a criminal sword hanging over the joint stock companies.[75] The Act was repealed in 1825.[76] Finally, legislation culminated in the Companies Act of 1844.[77]

The legislation governing friendly societies and joint stock companies began to make the members' relationships more legally explicit and more narrow than the generally fluid life of older groups. In addition, the members could now withdraw and the group could dissolve. Thus, many disputes were internal to the group.[78]

The courts now faced a problem of theory in modern group litigation. Two concepts—two justifications—emerged. One was consent, the other interest. Consent was based on ideas of agency. Interest, on the other hand, depended only on congruence. Since 1700 the theory of group litigation has been torn between these two conceptions that legitimate representation of absentees. In seventeenth century cases both consent and congruence of interest were present. In the eighteenth century, gradually only congruence of interest became sufficient.

Chancey v. May[79] illustrates the discovery of a new rationale. In that case the Chancellor overruled an objection claiming that not all the investor-shareholders had joined. Many delicate political questions underlay this ruling because the Chancellor in effect was validating a group even though it had not incorporated. The court casually announced that the other shareholders "were in effect parties." With this announcement, a dramatic shift had taken place—allowance of group action in the absence of actual consent. The court had substituted the strong agency concept of consent representation for the weaker concept

74. 33 Geo. 3, ch. 54 (1793), *cited in* S. YEAZELL, *supra* note 2, at 167; *see* S. YEAZELL, *supra* note 2, at 166-69.

75. 6 Geo. 1, ch. 18 (1719), *cited in* S. YEAZELL, *supra* note 2, at 170.

76. 6 Geo. 4, ch. 91 (1825), *cited in* S. YEAZELL, *supra* note 2, at 173.

77. 7 & 8 Vict., ch. 110 (1844), *cited in* S. YEAZELL, *supra* note 2, at 173.

78. S. YEAZELL, *supra* note 2, at 173-74.

79. 24 Eng. Rep. 265 (Ch. 1722), *cited in* S. YEAZELL, *supra* note 2, at 176.

of interest representation.[80]

Chancery groped around in this theoretical dilemma with uncomprehending confusion and false formulations. As the law encountered a great number of new groups, tracing the doctrinal results became very messy. For example, Lord Chancellor Hardwicke erroneously attempted to formulate a class action by requiring a general customary right and privity.[81] On the other hand, other cases employed the new theory that interest alone was sufficient.[82]

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80. S. YEAZELL, *supra* note 2, at 176-79.

81. The lead case of City of London v. Perkins, 1 Eng. Rep. 1524 (H.L. 1734), *cited in* S. YEAZELL, *supra* note 2, at 179, was decided in the House of Lords and involved the right of the City of London to collect duties on the import of cheese. *Perkins* arose in Exchequer, not Chancery, and the issue was not framed in terms of the necessity of joining absent parties, but rather whether the precedent of a prior decree imposing the duty should be binding on present freemen, including the defendant. *Perkins* thus stands on the border between the formulation of two legal principles, the doctrine of precedent and that of respect for judgments. Later, in Mayor of York v. Pilkington, 26 Eng. Rep. 180 (Ch. 1737), *cited in* S. YEAZELL, *supra* note 2, at 180, Lord Chancellor Hardwicke, nevertheless, viewed *Perkins* as exemplifying meaningless requirements for class actions set out in terms of general right and privity. *See* S. YEAZELL, *supra* note 2, at 181. Later formulations followed this false lead. Lord Chancellor Hardwicke also erroneously implied that group litigation was appropriate only when a customary right was claimed by or against several persons. S. YEAZELL, *supra* note 2, at 182.

82. More in line with modern theory was Leigh v. Thomas, 23 Eng. Rep. 201 (Ch. 1751), *cited in* S. YEAZELL, *supra* note 2, at 182-83, where the plaintiffs were two persons claiming to have been appointed agents in a deed signed by sixty-four of the ship's eighty crew members. The objection was made that not all crew members were represented because not all had signed. The Court's response was for the plaintiffs " 'to bring a bill in behalf of the whole crew.' " *Id.* This again shifted the theory from consent to interest. The rationale emerges that class representation can rest on an entrepreneurial group, the crew, and some prior voluntary association without the specific consent of all. Thus, circumstances of similarity of interest, combined with the difficulty of handling the suit if all were to be joined, would suffice. S. YEAZELL, *supra* note 2, at 183.

In Adair v. New River Company, 32 Eng. Rep. 1153 (Ch. 1805), *cited in* S. YEAZELL, *supra* note 2, at 184, Lord Eldon, while dismissing the case on the merits, revised the understanding of the past and gave the new theory a boost for the future by stating a very liberal rule of convenience for excusing joinder. Lord Eldon first recognized the necessary parties rule but then allowed class actions as an exception. Magically recasting the history of former cases, Lord Eldon transformed them into a justification for the new modern stockholders class suit by basing the justification for both on interest representation. He thus converted the social necessity demonstrated in the past into the power of present judicial discretion. He also made the recognition of the group a threshold question and allowed the judges to use their sense as to which groups deserved recognition. To do this, he chose the principle of representation of members' interests to justify an interest-based class. Lord Eldon's fragile emerging theory quickly ran into the political-legal problems of friendly societies and corporations. Even he was perplexed. *See* S. YEAZELL, *supra* note 2, at 186-87.

In Lloyd v. Loaring, 31 Eng. Rep. 1302 (Ch. 1802), *cited in* S. YEAZELL, *supra* note 2, at 188, a suit involving internal factions of the Caldonian Lodge of Free Masons, Lord Eldon appeared to backtrack and to perceive that the problem was more complicated. Lord Eldon, who was fearful of the Masons, finally recognized the suit, but at the same time denied group standing to others. In a number of other cases involving unincorporated associations that sought corporate status, the dominant question was the substantive law involved. Thus, these suits showed two aspects of group litigation: the groups versus the outside world and the internal relations of the group. In such cases the court is essentially being asked to maximize the utility of all concerned. Lord Eldon

The legislature finally acted to solve the problems facing the courts. Parliament legitimated the friendly societies and helped them limp into the next century when the welfare state took over. Group litigation on behalf of the downtrodden began to disappear. Much to the relief of the judges, substance had displaced procedure. Legislation had the same effect on joint stock companies. In these group litigation cases, Chancery had found it necessary to declare the substantive law that joined the members.

From this part of history, Yeazell concludes that group litigation often may be a temporary phenomenon. It generally involves groups on the edge of power and their temporary ability to get special assistance from the court. Initial court recognition leads either to winning their goals through political power with legislation or fading from view. Thus, similarities exist concerning the questions of representation in court and representation in the legislature.[83]

VII. Burke, Calvert, and the Theory of Interests

By 1850 there had been many class cases in England, and restaters of the law had made a number of attempts at comprehensive formulation. In contrast, in the United States only two cases involving group litigation had been decided by federal courts. Justice Story, the only legal commentator at that time, had written about them without any real comprehension. Then a strange thing happened: an historical paradox began to emerge.[84] In England, where the class action showed great potential, it was on the verge of extinction. But in the United States, where it had been restated in the most restrictive way, the class action evolved and expanded; all without American lawyers having a clear theory of its historical and jurisprudential justifications.

Yeazell's thesis is that representative theory in English political thought provides answers to the essential issues about class actions: recognition of the group and representation of the group. To understand the interplay between group recognition and group representation requires a digression into the development of the theory of political representation.[85]

Group representational litigation is analogous to political representation. Both seek individual autonomy, but allow representation as a

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solved one case by asking the society to make a settlement or else he would appoint a master. When a uniform series of prior decisions supported dismissal for failure to join partners, Lord Eldon finally permitted a representative suit that sought a dissolution of an association to proceed without joinder. S. Yeazell, *supra* note 2, at 188-94.

83. S. Yeazell, *supra* note 2, at 194-96.

84. *Id.* at 197.

85. *Id.* at 198-99.

matter of practical implementation. The justification of group litigation representation, however, moved from consent to interest, while the legitimizing basis of political theory moved in the opposite direction, from interest to consent. Thus, anomalies exist in both the litigation and political arenas. The debates that accompanied the Parliamentary Reform Bill of 1832 contain evidence that there were connections between the political and legal spheres. Edmund Burke borrowed the terminology of " 'virtual representation' " from the law of trusts.[86] At the same time, commentators on equity began to discuss various legal doctrines in terms of representation. The functional problems were similar. The 1832 Reform Bill broadened the electoral franchise and redesigned the geographic and demographic bases of Parliamentary representation. Previously, representation in Parliament had been quite chaotic.

The adversaries in the debates over parliamentary representation advanced two competing theories.[87] Utilitarians relied on concepts of agency and consent. More radical utilitarians argued for the complete subjectivity of individual interest. Under this theory, the people judged the utility after the fact of legislative representation through the power of the popular vote.[88]

Against this view stood Edmund Burke, defender of the older order, and his theory of interests. "His argument is important, for it has become the basis of much of modern class action doctrine."[89] Burke's theory was that the representative was to represent interests, not the specific people and their subjective wishes. The representative was not the agent of the electorate, but rather its trustee, positively charged to seek the electorate's best interest by his own means. Thus, each city did not require a specific representative as long as its interests, such as those of the Irish and the Colonies,[90] were adequately watched over by trustees from similar constituencies. Burke distinguished between short-term and long-term interests. He viewed long-term interests as objective and detached from the subjective will of individual people. This objective, abstract interest, therefore, did not depend upon the consent of the ruled.[91]

According to Yeazell, Burke's theory was articulated by Frederick Calvert as a basis for class representative theory in English law.[92] Al-

86. *Id.* at 201.
87. *Id.* at 202.
88. *Id.* at 202-03.
89. *Id.* at 203.
90. *Id.* at 204.
91. *Id.* at 204-07.
92. F. CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY (reprint Philadelphia 1837) (London 1837), *cited in* S. YEAZELL, *supra* note 2, at 207.

though the political debate between Burke and the utilitarians has never been resolved, Frederick Calvert did address and resolve the central question that Rule 23 of the Federal Rules of Civil Procedure, the modern rule regulating class actions, for the most part simply ignores. Calvert's *Parties to Suits in Equity* in 1837 established the general rule that all interested parties be joined.[93] He indicated, however, that it was a rule of convenience, which could be relaxed. In describing the appropriate conditions for a departure from the rule of individualism, Calvert followed the lead of Lord Eldon and created a "Doctrine of Representation," under which the class representative was charged to protect the interest at stake.[94] Calvert distinguished between cases in which persons volunteered to act for others and cases in which they were compelled to act for others in putting forth their own defense. Plaintiffs' class actions, for example, required restraints. In an attempt to impose limits, Calvert said that the plaintiff "shall have an interest not merely in the property in question, but also in the object of the suit."[95]

Yeazell draws the conclusion that Calvert's linking of individual, subjective self-interest to objective, abstract interest created a shaky bridge between the world of utilitarian capitalism and the Burkean vision of representation. By identifying objective group interest with subjective self-interest, Calvert liberated the concept of representation. Calvert praised one court for posing group interest from the circumstances rather than inquiring into the actual motivation of the representation.[96] By linking the self-interest of the active litigant to the interests of the passive ones, Calvert had articulated the theoretical justification for group litigation. Calvert neatly concluded that, "when a large number of persons have a common interest in the entire object of a suit in its nature beneficial to all, one or more of them may sue on behalf of all."[97] Calvert made the common assumption that each person

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93. S. YEAZELL, *supra* note 2, at 207.

94. F. CALVERT, *supra* note 92, at 19-20, *cited in* S. YEAZELL, *supra* note 2, at 208. The Doctrine of Representation states as follows:

> [I]f the general rule requires a person to be present, merely as the owner and protector of a certain interest, then the proceedings may take place with an equal prospect of justice, if that interest receives an effective protection from others. It is the interest which the court is considering, and the owner, merely as the guardian of that interest: if then some other persons are present, who with reference to that interest are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be required; and the court may, without putting any right in jeopardy, take its usual course, and make a complete decree.

Id.

95. *Id.* at 32, *cited in* S. YEAZELL, *supra* note 2, at 208.

96. S. YEAZELL, *supra* note 2, at 209.

97. F. CALVERT, *supra* note 92, at 36, *cited in* S. YEAZELL, *supra* note 2, at 209.

would desire to gain a greater share of the world's goods. Translating individual goods into the collective "Good," Calvert denied that only the individual could know his Good.[98]

Joseph Story did not read Calvert until after Story had written his own equity treatises. Although Story later claimed that he had not overlooked any important authorities, he clearly did not understand Calvert.[99] Further, Calvert was not cited by John Pomeroy and was dismissed by Zechariah Chafee. Professor Geoffrey Hazard,[100] it seems, was the first to recognize Calvert's achievement: "[Calvert's] virtue is that he saw more distinctly than many modern writers that the represented interests are based on social abstractions rather than instructions from or consent of the represented."[101]

In spite of the writings of Calvert, group litigation in England went into hibernation. Group litigation—as it was then known—was overtaken by legislation. The regulation of joint stock companies and friendly societies provided the substantive justification for letting the class action fall out of use.

As a result of the 1875 reform that abolished Chancery as a separate court, the necessary parties rule in equity adjudication returned. Under attack from Charles Dickens' *Bleak House*[102] and Parliament, which was legislating on groups, equity courts were afraid to venture any further. In addition, there seemed to be no stopping point to Calvert's theory, which was frightening if carried to its logical extreme. Thus, group litigation, an historical puzzle, declined in England and instead expanded in the United States.[103]

VIII. The American Experience and Theory Restated

Once Yeazell crosses the Atlantic to the United States, both his description and criticism of class action treatment are more familiar to the American lawyer.[104] Joseph Story made the first error by reading the old cases too narrowly and restating the class action rules as arising from equity exceptions to the joinder of multiple necessary parties in order to prevent a multiplicity of suits.[105] The Supreme Court endorsed

98. S. Yeazell, *supra* note 2, at 209-10.

99. *Id.* at 210.

100. Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum. L. Rev. 1254, 1285-86 (1961), *cited in* S. Yeazell, *supra* note 2, at 210.

101. S. Yeazell, *supra* note 2, at 210.

102. C. Dickens, Bleak House (London 1853), *cited in* S. Yeazell, *supra* note 2, at 211.

103. S. Yeazell, *supra* note 2, at 211-12.

104. What follows in the text of this Review is a very short nutshell. Yeazell's treatment is much more expansive and analytical.

105. S. Yeazell, *supra* note 2, at 216-20 (reviewing J. Story, Commentaries on Equity Jurisprudence (Boston 1836) and J. Story, Commentaries on Equity Pleadings (Boston 1838)).

Story's error with Equity Rule 48,[106] but with good sense ignored Rule 48 and expanded the use of the class action in *Smith v. Swormstedt*.[107]

The American experience moved forward unevenly. Professor Chafee saw that the class action question was one of trial court discretion and convenience, but only dimly perceived other implications.[108] In 1938 the drafters of the Federal Rules of Civil Procedure and Professor James Moore, following the errors of Story, made an heroic but misguided attempt to restate the Rules in terms of substantive rights and res judicata effect.[109] In 1943, in an imaginative new thrust, Harry Kalven, Jr., and Maurice Rosenfield proposed that the function of the modern class action was to authorize private attorney general suits to regulate a market economy.[110] Meanwhile, Congress and the courts recognized labor unions, the Supreme Court, in *Hansberry v. Lee*, imposed due process restraints on interest representation,[111] and the federal courts advanced class actions to enjoin racial discrimination.[112]

Reacting to these changes, in 1966, reformers redrafted the rule governing class actions to rest upon the two warring concepts: representation of interest without consent; and representation based upon consent. The reformers thus failed to address the central question posed and answered by Frederick Calvert a century before. The result is a number of perplexing anomalies under which the rule does not require consent but perhaps should, and under which the rule requires consent but should not.[113]

IX. CRITIQUE

Yeazell is not shy in speculating about what lies beyond the surface appearance of historical cases.[114] His reconstructions are highly sophisticated descriptions of the social context accompanying the cases. He repeatedly cautions, however, against making simple assumptions about transferring the medieval and later English experience to the modern American class action. In spite of his disclaimer that there was no theory upon which medieval group litigation was based, Yeazell risks

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106. S. YEAZELL, *supra* note 2, at 221 (noting language of rule).

107. 57 U.S. (16 How.) 288 (1853), *cited in* S. YEAZELL, *supra* note 2, at 221-22.

108. Z. CHAFEE, *supra* note 18, at 149-98, *cited in* S. YEAZELL, *supra* note 2, at 228-30.

109. S. YEAZELL, *supra* note 2, at 228-32.

110. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941), *cited in* S. YEAZELL, *supra* note 2, at 232-39.

111. 311 U.S. 32 (1940), *cited in* S. YEAZELL, *supra* note 2, at 241.

112. S. YEAZELL, *supra* note 2, at 232-37.

113. S. YEAZELL, *supra* note 2, ch. 9, at 238-66. In this chapter, Yeazell systematically reviews modern class action law under Rule 23 against his thesis. *See supra* note 98.

114. At the same time, he is faithful to the ideal of intellectual integrity, S. YEAZELL, *supra* note 2, at ix-x, and therefore issues frequent caveats against his own speculations.

that his abstract theses will transcend the historical data.[115] Indeed, the very process of summarizing the book[116] tends to focus on Yeazell's major theses and overlooks Yeazell's rich and complex treatment of history and his cultural-legal anthropology. Apart from quibbling about Yeazell's many minor themes,[117] the following observations are made in an attempt to isolate some major points of departure for criticism.

The most original and important of Yeazell's theories, and therefore the most tenuous, is that the political debates in the nineteenth century, concerning the nature and concepts of parliamentary representation, in fact flowed by osmosis back and forth from Edmund Burke to Frederick Calvert and his book, *Parties to Suits in Equity*. Through the process of constant repetition and argumentation, speculation becomes, by the end of the book, an accepted fact.[118]

The size of this leap, from hunch to asserted thesis, can be appreciated by hypothecating the great-great-grandson of Yeazell, or a writer we might call "Yeazell The Fourth." If 150 years from now, in the year 2138, Yeazell The Fourth were to look back, he would find that *Baker v. Carr*[119] was decided in 1962 and that Federal Rule of Civil Procedure 23, governing class actions, was adopted in 1966.[120] Yeazell The Fourth, therefore, could conclude that there was a substantial connection between the *Baker v. Carr* ruling requiring one-man, one-vote for purposes of political representation, and the concepts of representation

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115. *See, e.g., In re* American Reserve Corp., 840 F.2d 487, 490 n.4 (7th Cir. 1988) (holding that a representative creditor may file class proof of claim form in bankruptcy, and citing Yeazell for the proposition that, "[t]here were earlier representational actions, but it is not necessary to recount them").

116. Chapter ten of the book is a condensed version of the preceding nine chapters and can serve as a substitute for those who want to obtain a synthesis of the book in the most efficient form. By skipping the first nine chapters, however, a reader is deprived of Yeazell's rich scholarship and commentary.

117. One can argue that Yeazell expansively reads each of the historic cases in order to justify his theory of Rule 23, when other explanations are also plausible. *See, e.g.*, Weiner & Szyndrowski, *The Class Action, From the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?*, 8 WHITTIER L. REV. 935 (1987) (reviewing the second half of Yeazell's history under a much less ambitious thesis); *see also* Newberg, Book Review, TRIAL, May 1988, at 97-98. Unlike Yeazell's expansive reading, the total English experience could also be read narrowly as allowing mandatory class actions absent consent in situations analogous to those covered by Rules 23.1, 23.2, 23(b)(1), and 23(b)(2), but not in situations analogous to those covered by Rule 23(b)(3). Thus, Yeazell may be accused of doing what he claims Coke did—reinterpreting history to fit his thesis.

For a thesis even more expansive than Yeazell's, see Sinon, *Visions of Practice and Legal Thought*, 36 STAN. L. REV. 469, 487 (1984) (arguing that the purpose of class litigation is to mobilize the class: "[A] community of interest is something to be created in the course of representation, rather than a premise of representation").

118. *E.g.*, S. YEAZELL, *supra* note 2, at 220.

119. 369 U.S. 186 (1962).

120. 28 U.S.C. § 2072 (1982).

embodied in Rule 23, as adopted in 1966. Such an assertion might be very plausible in the year 2138. Nevertheless, the creativity of this assertion depends upon tapping into underground value flows that few people would recognize immediately on the legal surface of the 1960s.[121]

But suppose there is a connection between Burke's parliamentary theory of interests and class litigation representation. If Burke's theory of legislative representation was never fully accepted, even in Parliament, why does it follow that the theory should be accepted by the courts as a universal principle appropriate for judicial function? Further, if Burke borrowed his political theory from the then-existing legal concept of "virtual" representation by trustees, then should not the lease-back of Burke's theory to the courts be similarly limited? That is, the nineteenth century context of "virtual representation" limited the concept to cases in which the substantive relationship of the trustee to the class dictated that representation of others without consent was an absolute necessity. Yet Yeazell goes on to characterize the modern English experience subsequent to 1850 as curtailing the class action, rather than as merely failing to allow it to grow any further.[122] Yeazell, therefore, subtly assumes that Americans are better off with modern expanded class actions than the English are without them.[123]

A number of conceptual analogies are much closer to the concept of class representation than the concept of political representation. To analyze these other concepts, however, is less exciting and more tedious. For example, the evolution of the law governing guardians of minors and incompetents, trustees, corporations, association and union officers, and bankruptcy representatives seems more directly on point. Simi-

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121. On the other hand, the two concurrent events can he made to fit Yeazell's thesis. *Baker v. Carr*, a bilateral plaintiff-defendant class action, is a grand example of the Court's recognition of a pure "interest" based, judicial class action without consent—a request for judicial relief to order the legislature to change its representation from a Burkean version of interest to a utilitarian one. Thus, in the 1960s, just as in the 1830s, the judiciary moves toward a Burkean view of representation of interest without actual consent, while simultaneously it orders the legislature to implement a view of representation based on individual consent. As Yeazell The Fourth might say in the year 2138: "I have a far less certain sense for the significance of recent events than for those deeper in a past." S. YEAZELL, *supra* note 2, at 239.

122. Yeazell speculates that Equity's embarrassment from *Bleakhouse* stunted the growth of the modern class action in England. Since Yeazell is the first to pose a theory of political representation about class actions, one begins to wonder instead whether the stunted growth was infiuenced by Equity's subconscious reaction to other political theories, such as the class theories of Karl Marx. But that is for another book.

123. For example, one would not assume that whereas England substantially has abandoned the right of trial by jury, American retention of jury trial is a superior policy choice. Yeazell's book and theses, however, may provide historical and jurisprudential support for "reforming the English system to provide for private consumer class actions along with contingent fees and punitive damages." *England Braces for Jolt in Court Awards—Legal Reform May Lift Ante in Liability Cases*, Wall St. J., June 6, 1988 at 7, col. 2.

larly, the substantive law of agency in its contract, tort, and community property forms provides a more direct analogy than the concept of political representation. True, Yeazell in his last chapter does engage in highly perceptive, free-form jurisprudentializing about the nature of representation and refers to most of the substantive law concepts about representation.[124] He makes no attempt, however, to anchor these substantive concepts with cites to their actual legal origins in history. Instead, Yeazell leaves these substantive concepts about representation hanging in midair, like Mohammed's coffin,[125] while he analogizes the concept of group representation to nineteenth century political debates in Parliament.[126]

Apart from substantive law analogies to the concept of representation, Yeazell also bypasses the legal history of the quintessential representative, the attorney. A long evolution from Greek, Roman, and German tribal law gives rise to the concepts of representation implicit in the English barrister and solicitor.[127] These origins, along with the common-law prohibitions against solicitation, maintenance, and barratry would seem to have just as much, if not more, to do with a concept of one person representing another in a class action as the concept of parliamentary representation. Given the contemporary reality that the class lawyers are the true economic class representatives, an inquiry into the lawyers and the financing in Yeazell's historical group litigations might offer some valuable insights and theses about the true social context.[128]

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124. S. YEAZELL, *supra* note 2, at 280-88. By being the first to pose a political theory, Yeazell has stolen the playing field. Perhaps other political scientists will now find theories different from Yeazell's to explain the modern class action. *See, e.g., supra* note 122 and *infra* note 136.

125. I. Evans, BREWER'S DICTIONARY OF PHRASE AND FABLE 746 (rev. ed. 1981) (citing Butler, *Hudibras III*, ii, at 602). I am indebted to my colleagues, William Bridge and Thomas Mayo, for this reference.

126. If, as Yeazell develops it, representation without consent is at base a political principle, then the court must resolve all the policy questions relating to regulation of politics. *See, e.g.*, Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); Zacharias, *Standing of Public Interest Litigating Groups to Sue on Behalf of Their Members*, 39 U. PITT. L. REV. 453 (1978). Yeazell analogizes political representation to obtaining votes and class representation to obtaining financing; in the end, both reduce to the same thing: money. S. YEAZELL, *supra* note 2, at 262.

127. Chroust, *The Legal Profession in Ancient Athens*, 29 NOTRE DAME LAW. 339 (1954); Chroust, *The Legal Profession in Ancient Imperial Rome*, 30 NOTRE DAME LAW. 521 (1955); Chroust, *The Legal Profession During the Middle Ages: The Emergence of the English Lawyer Prior to 1400 (pts. 1 & 2)*, 31 NOTRE DAME LAW. 537 (1956).

128. *See* Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987); Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); *see also* Garth, Nagel & Plager, *The Institution of the Private Attorney General: Perspectives From An Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988); Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385 (1987). *See generally* Symposium, *Class Actions and Private Attorneys-General*, 62 IND. L.J. 497 (1987). The difference between the English and

Yeazell also bases his analysis on the prior, parallel work of Professor Hazard, rethinking the history and nature of indispensable parties.[129] Yeazell thus follows the new wisdom in declaring that prior attempts to link class representation to substantive rights were failures.[130] The present conventional wisdom that class actions are a procedural matter,[131] however, does not make true the proposition that all questions can simply be delegated to the judiciary and that the judiciary should have the power to allow representation of interests without consent.[132] Even if Yeazell intends for his normative principle of repre-

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American rules on attorneys fees may be an important factor in the contrast between modern American and English class actions, but it is not a factor in Yeazell's analysis.

129. S. YEAZELL, *supra* note 2, at 210, 216-24, 238-39. Professor Hazard, *supra* note 100, criticized Justice Story and others for misleading subsequent courts to the conclusion that defining indispensable parties was a matter of substantive law, and that the courts had no jurisdiction without them. Hazard's criticisms were important to the 1966 revision of Rule 19. This revision redefined the issue of indispensable parties as one of discretionary procedure and lent parallel support to the analogous revision of Rule 23. Similarly, Yeazell follows Hazard's path to criticize Lord Hardwicke, Justice Story, and later the Federal Rules of 1938 and Professor Moore for attempting to categorize, to limit, and to legitimate class actions in terms of the types of substantive rights involved and the res judicata impact of the litigation.

130. This wisdom has now become so conventional that it is similar to Americans poking fun at the English for wearing wigs in the courtroom because wigs are silly. The English rejoinder is that legal proceedings are silly and that Americans are naive to think otherwise. In somewhat the same way, Hardwicke, Story, and Moore may not have made the older formulations out of the self-deception that the substantive concepts really decided anything. Rather, these older authors may have had the realistic perception that these concepts expressed consequential conclusions, rather than tests, for expressing the circumstances under which the nature of substantive relationships among the group, and between it and its adversary, required various forms of class representation. Some modern commentators believe Federal Rule of Civil Procedure 23 leaves almost unlimited discretion in the judiciary to determine whether and how actions will proceed as class actions. *E.g.*, Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975). If this is so, then what is the source of law that provides this authority? If the source is procedural, then in light of the discretion in the Rule and its illusory nature, the Rule contains a vast grant of lawmaking power to the federal judiciary.

131. True, it is probably better to take off the wigs, *see supra* note 130, and, as the 1966 Rules revision did, to redraft and redefine both indispensable parties and class actions as matters of procedure rather than substantive law. The easy assumption that Rule 23 and class actions are solely matters of procedure is now well entrenched. *See* Kennedy, *The Supreme Court Meets the Bride of Frankenstein:* Phillips Petroleum Co. v. Shutts *and the State Multistate Class Action*, 34 U. KAN. L. REV. 255 (1985); [hereinafter Kennedy, *The Supreme Court Meets the Bride of Frankenstein*] Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3 (1983). *Compare* Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Kennedy, *Class Actions*] (challenging the now conventional assumption implied in the Federal Rules that procedure rules ought to be transsubstantive) *with* Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Reform of the Class Damage Action*, 80 COLUM. L. REV. 299 (1980) (criticizing hostile rulings under Rule 23(b)(3) as defeating goals of substantive law).

132. However, in seeming contradiction to his own formulation, Yeazell does acknowledge in various places throughout the book that the judicial recognition of groups and their representatives also involves the judicial articulation, if not invention, of group substantive rights and duties involved. *E.g.*, S. YEAZELL, *supra* note 2, at 1, 83, 130-37, 259.

sentational authority to rest upon a shared power to be exercised by the judiciary and the legislature, the essential dilemma remains of choosing criteria to decide whether private judicial representation will or will not require consent.[133]

From this perspective, the problem with Yeazell's formulation of "representation of interest without consent" as a justification for the evolution of medieval group litigation into modern class action is that the concept says both too little and too much.[134] The formulation implies that judicial power to recognize groups and to grant power to represent interests without consent is purely a question of procedure, which is within the inherent power of the judiciary.[135] The assertion ignores the fact that judicial power in each case also is dependent upon grants of constitutional, legislative, or common-law authority to recognize the substantive and remedial rights, and the duties of the group that result from the decision to grant recognition and representation.[136]

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133. For example, The Age Discrimination in Employment Act, 29 U.S.C. § 621 (1982), deliberately provides an old-fashioned "opt-in" form of group remedy not provided for in 1966 Rule 23(b)(3) or 23(c)(2). *See* Woods v. New York Life Ins. Co., 686 F.2d 578, 581 (7th Cir. 1982).

However, the important contemporary value of Yeazell's thesis is that it focuses debate on the criteria for determining whether consent is to be required and the method by which consent will he authenticated. Yeazell's book seems to align him with the Harvard Law Review Developments Note advocating that all class actions be made mandatory, *see Developments in the Law*, *supra* note 3, and with the proposals to collapse Rule 23 categories and to make opt-out notice discretionary with the judge, and not a matter of right. Gruenberger, *Plans for Class-Action Reform*, Nat'l L.J., July 8, 1985, at 32, 33; *see also* Kennedy, *Federal Class Actions: A Need for Legislative Reform*, 32 Sw. L.J. 1209 (1979); Berry, *supra* note 131.

134. In the search for a universal principle linking all the past with the present, the concept of "interests" rises to such a high level of abstraction that it becomes meaningless on the one hand, or infinitely malleable on the other. *See* Yeazell's analysis of Hansberry v. Lee, 311 U.S. 32 (1940), *cited in* S. YEAZELL, *supra* note 2, at 232-37.

135. *Cf.* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Thus, large questions of policy may be hidden by labeling the question "procedural." As an extreme example, one might view the issue in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), as a mere question of "procedure" (*i.e.*, was Scott a citizen for diversity purposes?). In many ways, the decision to grant litigating capacity to a group contains major policy choices analogous to those in *Dred Scott*. *See* J. VINING, LEGAL IDENTITY (1978). Even viewed solely as a matter of procedure, Yeazell's maximum principle focuses solely on the concept of representation (implicitly covered in Rule 23(a)(3) and (4)) and implies that the additional concepts addressed in the Rule are historically and functionally superfluous.

136. One of Yeazell's main themes throughout the book is the valid point that recognition of representation of group interest is dependent upon social context. Nevertheless, modern conventional wisdom requires him to reject any prior attempts to link group representation to substantive law. But if social context is not reflected in substantive law, how else does it enter the judge's decision? Yeazell thus leaves half of his own equation out of his formula. The result is, as Yeazell himself speculates, that the concept of judicial power to grant representation of interests without consent frightens even those who apparently support such a concept, because it appears to place no limits on its own enabling power. *See* S. YEAZELL, *supra* note 2, at 211-12, 256. The only limit then would appear to be the judge's vision of social context as advocated by the class atterney. *See infra* note 138.

The heart of Yeazell's thesis is that "the class action justifies action that legally binds another without his consent by pointing out that his interest is represented in a situation in which it is inconceivable that he would not wish his interest to be so pursued."[137] The assumptions underlying this rationalization are rather startling.[138] It assumes that the named plaintiff will always win something of real value for the class. It ignores the possibility that misguided or faithless plaintiffs will produce class victories that are illusory, or that the defendant will win or will transfer the costs of the outcome back to the class.[139] Most importantly, however, it questions the capacity of individuals to make intelligent choices regarding representation, participation, and pursuit of their own interests. At its core, Yeazell's justification rests upon a judicial paternalism that is paradoxically at odds with individual autonomy and other democratic values.[140] Contrary to Yeazell's formulation, class actions may find their true justification in a more straightforward theory. That is, where necessary, the court imposes on the class member a civic duty to yield individual self-interest to the common good of the group.[141]

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137. S. YEAZELL, *supra* note 2, at 15 (for full quote, see *supra* notes 12 & 14). One wonders how Gary Gilmore would view Yeazell's principle. Gilmore, under a death sentence, opposed with cool, rational outrage attempts by the ACLU and the NAACP to save him from execution. R. COVER, O. FISS & J. RESNICK, PROCEDURE 437-45 (temp. ed. 1988).

138. Yeazell's assumptions and rationalization apply to the named party representative. When these assumptions and rationalization are extrapolated to the class attorney, they are equally startling. For if, as is often the case, the named party is a nominal formality with no real control over the class attorney, then under Yeazell's formulations, the private class attorney, by virtue of a lawyer's license, is empowered to represent abstract social interests. See Yeazell, *Whose Interest Is It, Anyway?*, Nat'l L.J., May 30, 1988, at 13 (using theory to justify the federal special prosecutor statute), *critized in* Letter by C. Selinger, Nat'l L.J., July 18, 1988, at 12.

139. See Justice Jackson's justification for notice in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), that the beneficiaries have an interest in not having frivolous claims made on their behalf and in not having those costs imposed on them. Note also the theory of the dissenters in Fuentes v. Shevin, 407 U.S. 67, 100 (1972), that the cost of victory for the plaintiffs will be transferred by the defendant back to a consumer class.

140. *See* Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 606 n.24 (1987) (referring to sources describing "participatory" and "dignatory" values as they relate to due process).

141. This justification would be analogous to the justifications for union representation by majority rule, *see* Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980); and to justifications for making decisions by complex rules governing majority classes of creditors in bankruptcy proceedings. *See* Coffee, *Rethinking the Class Action*, *supra* note 128, at 656-57. Thus, the essential challenge is not to rationalize a fictional constructive consent, as Yeazell poses, but rather to define the circumstances justifying the power of the judge, the representative, and the lawyer to override the contrary individual choices of individuals and their own lawyers. *See* Kennedy, *Class Actions*, *supra* note 131, at 79-82; Kennedy, *The Supreme Court Meets the Bride of Frankenstein*, *supra* note 131, at 305-08 & 308 n.237.

X. CONCLUSION

Many scholars have dug into history in search of the true meaning of group litigation. Of all the discoveries, Yeazell's are the most creative and significant. His sophisticated reconstructions of medieval, seventeenth, eighteenth, and nineteenth century group proceedings will enlighten anyone who might think that the many apparent novelties[142] in contemporary class actions are anything new under the Anglo sun.[143] His recreations show that the judiciary, from the beginning of English legal history, has taken the power to do substantive justice when the rights of groups are concerned. In the final analysis, Yeazell's unearthing of medieval group litigation and his rediscovery of Calvert's theory of class interest representation are major new finds in the search for the missing links in the evolution of modern American class actions.

142. *See, e.g.*, Marcus, *Apocalypse Now?* (Book Review), 85 MICH. L. REV. 1267 (1987) (reviewing P. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986)); *see also* Stille, *A Sense of Dharma*, Nat'l L.J., Feb. 29, 1988 at 1, col. 1 (reporting on Indian court grant of $270 million interim class relief on behalf of Bhopal, India victims against Union Carbide Co. and the English-derived, Indian Code provision stating that "[n]othing in this code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice," *id.* at 43, col. 2).

143. For example, Yeazell's book presents much new specific historical data on class actions for damages, defendant class actions, and the inherent power of the court to engage in managerial, mediative, and structural decrees to bring about community dispute resolution. Yeazell's reports of medieval group litigations as "the law and custom of the realm," *see supra* note 36, and on behalf of "the poor," *see supra* note 2, provide the most startling direct analogies to contemporary class actions on behalf of welfare recipients, and most recently, "the homeless."