Downsizing Democracy

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Chapter 7

The Jurisprudence
of Personal Democracy

Long before baseball became the national pastime, litigation was practically an American folkway, a popular expedient for resolving private disputes. Americans are still an exceptionally litigious people. Today, however, they resort to lawsuits not merely to settle private differences but to shape public policy, and in this they are aided and abetted by the federal courts themselves.

In the past, judicial self-restraint and a majoritarian political culture deterred unelected judges from substituting their views for those of elected officials.¹ The repeated exercise of judicial activism has eroded such restraint, and the majoritarian spirit of popular democracy has given way to a new personal democracy that exalts the individual citizen’s access to the policy process. It is a regime made to order for government by lawsuit. Federal statutes and judicial rulings now enable individual plaintiffs to raise policy questions for resolution by the courts, and the result is that courts have moved from the outskirts to the heart of the policymaking process, where the president and Congress once reigned supreme. These changes have also contributed to a decline of collective mobilization—a decline that is characteristic of personal democracy—because they enable individual litigants to influence public policy without enlisting a larger public to support their claims. They need only mobilize their attorneys.²

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The Expanding Role of the Courts

In the 1950s and 1960s the expansion of judicial policymaking generally served liberal political objectives—civil rights for racial minorities, civil liberties for individual dissenters. But there is nothing inherently liberal about judicial policymaking. By the end of the 1980s, in fact, federal courts had demonstrated that judicial activism could just as easily serve conservative ends, and in 2000, they demonstrated that it could appoint a conservative president.

The expansion of judicial authority has been championed at times by left, right, and center because litigation, though expensive and uncertain, is far less arduous and risky than the effort to achieve political ends through the mobilization of a popular constituency. In 1988, for example, liberals in Congress supported the Act to Improve the Administration of Justice, which, by limiting the Supreme Court's mandatory jurisdiction to a handful of cases per year, gave the high court almost complete discretion to select cases it deemed important. Environmental groups used the courts to block the construction of highways, dams, and other public projects that threatened not just to damage the environment but to generate material resources that enriched their political rivals. In response to these and other liberal legal offensives, wealthy conservatives and corporations financed organizations like the Pacific Legal Foundation, the National Legal Center for the Public Interest, and the Washington Legal Foundation. These organizations have exploited the litigation option on behalf of crime victims, private property owners who oppose government regulation of land use, and plaintiffs in “reverse discrimination” cases who claim to have suffered as a result of affirmative action programs or legislative redistricting.

But the courts themselves have probably done the most to enhance the political attractiveness of the litigation option. Since the 1960s the Supreme Court has relaxed the rules governing justiciability—the circumstances under which the courts will accept a case for adjudication. The Court, for example, has liberalized the doctrine of standing so that it can hear challenges to the actions of administrative agencies, enable associations to appear as representatives of their members, and permit taxpayers’ suits in which First Amendment issues are involved. It has also amended the Rules of Civil Procedure to facilitate class action suits. The class action is a legal device that permits a court to combine the claims of many individuals and to treat those individuals as a class during a lawsuit. In the past, a class could be almost any aggregation of plaintiffs deemed by a court to share a common interest. Recent rules have nar-
rowed the standards for the certification of classes. In 1996, for example, congressional Republicans enacted a prohibition against class actions brought by advocates for immigrants against the Immigration and Naturalization Service (INS) and by Legal Services lawyers on behalf of indigents. For more privileged classes, however, class litigation remains an important political tool.\(^8\)

While increasing opportunities for class action suits, the Supreme Court has also effectively rescinded the abstention doctrine, under which federal courts declined to hear cases not yet resolved by the state courts. It has relaxed the rules governing determinations of mootness and has in practice abandoned the political questions doctrine, which once kept the courts out of policy disputes. Stretching the legal concept of justiciability has broadened the range of issues subject to judicial settlement and allowed a wider range of litigants access to the courts.

But the courts have also made a wider range of remedies available to those litigants. In the past, for example, a federal court might have ruled that a government agency had violated a plaintiff’s rights and then have ordered the agency to devise appropriate remedies. Today’s federal courts can issue detailed decrees specifying how the agency must conduct its business in the future. Suits challenging conditions in state prisons, for example, have generated an extensive array of court orders detailing the living space, recreational programs, and counseling services that must be provided to all prisoners. Judges have also made use of special masters, under the control of the court, to intervene in the day-to-day operations of institutional defendants such as the Boston school system, the Alabama state prison system, and the Baltimore Housing Authority. In short, the federal judiciary can now offer to private litigants remedies that were once provided to the public at large only through the executive and legislative branches.\(^9\)

The legislative branch itself has encouraged a shift in interest-group politics from lobbying to litigation. In Title II of the 1964 Civil Rights Act, for example, Congress designated the plaintiffs who filed suit under the act as “private attorneys general” because they were contributing to the enforcement of federal law, and the legislation made them eligible to collect attorneys’ fees from defendants if they prevailed at trial. This fee-shifting provision was endorsed by the Supreme Court in 1968.\(^10\) In 1976, Congress passed the Civil Rights Attorneys’ Fee Awards Act, which allowed for the recovery of attorneys’ fees for actions brought under all civil rights laws enacted since 1876. The 1990 Americans with Disabilities Act protects persons with disabilities from discrimination in employment and requires that public services be accessible to them. The legislation created a cause of action that opened the way for extensive litigation by
groups championing the rights of the disabled. Likewise, the 1991 Civil Rights Act, which prohibited job discrimination against women as well as minorities, opened the federal courts to litigants claiming to have been the victims of gender bias.

A number of regulatory statutes enacted during the 1970s contain citizen-suit provisions that gave public interest groups the right to challenge the decisions of executive agencies in environmental and consumer fraud cases. Virtually every federal environmental statute authorizes individual citizens and groups to sue private parties for failure to comply with the provisions of federal statutes and regulations and to collect legal fees and expenses if they succeed. Such citizen enforcers act not so much as injured parties seeking to redress a wrong done to them but as private attorneys general serving a public interest. By the mid-1980s, more than 150 federal statutes contained fee-shifting provisions. The Supreme Court has limited the standing of private attorneys general by ruling that litigants must have a demonstrable stake in the outcome of the case and that the remedy sought must be within the court’s power to grant. Nevertheless, citizen suits continue to be important mechanisms through which public interest groups can simultaneously achieve policy goals and finance their operations.

Their success was noted and imitated by a coalition of small business groups that won the right to collect attorneys’ fees for some cases in which small firms were defending themselves against government regulations. The Equal Access to Justice Act of 1980 allows for the collection of attorneys’ fees when individual citizens or business firms successfully defend themselves against “overreaching government actions.” Though intended to protect small businesses from the ravages of giant regulatory bureaucracies, the act is often used by trade associations representing giant industrial corporations.

In 2001, the Supreme Court placed restrictions on fee shifting in its 5-4 decision in Buckhannon v. West Virginia. The state of West Virginia had voluntarily dropped its opposition to the plaintiff’s case after months of litigation. Buckhannon had therefore prevailed only informally, but not as the result of a court decision. For this reason, according to a majority of the Supreme Court, the plaintiff was not entitled to a fee award covering legal expenses. Although some public interest lawyers asserted that this decision would render fee-shifting statutes meaningless, most believed that plaintiffs’ attorneys could get around Buckhannon by simply demanding damages in addition to equitable relief; by doing so, they prevented their cases from being mooted by the voluntary actions of defendants and, in the process, preserved statutory fee awards, notwithstanding Buckhannon.
Taken together, these statutory and jurisprudential changes have opened the way for groups and even citizens acting alone to use the courts to achieve policy goals that might once have required collective political action, if they could have been achieved at all. Litigation has played a significant role in the development of important public policies regarding employment discrimination and voting rights, consumer and worker protection, women’s rights, protection of the environment, the rights of the disabled, and the exercise of religion freedom. On issues like racial segregation and women’s rights, the federal courts have taken action that we now recognize as essential to democratic fairness but that went far beyond what could have been won at the time in the arena of popular politics. These are victories of principle for which the judiciary is revered.

On the other side, however, opening the courts to organized interests presents at least three major problems. First, litigation allows narrowly defined groups to imprint their interests on national policy without having to create broader coalitions of support or even to defend their positions against the full range of alternative claims that would be more likely to arise in legislative proceedings. Second, litigation often allows advocacy groups to achieve their objectives without mobilizing or even taking account of the needs and preferences of the groups they claim to represent. Third, the expanded importance of litigation as a political tactic has further increased the authority of the judiciary—the least democratic and publicly accountable of America’s governmental institutions. This increase comes at the expense of the legislative branch, which, for all its flaws, is still far more representative and democratic than the judiciary exalted behind its bench.

Litigation and the “Cabals of the Few”

Conflicts fought out and resolved before a judge recall the government of lofty lawgivers that James Madison warned against in *Federalist No. 10*. According to Madison, a polity that relies on “enlightened statesmen” to solve its problems is less likely to achieve the public good than one that makes its decisions through the open clash of a multitude of interests in a representative assembly. In other words, Madison’s cure for the evils of faction was more factionalism. Free and open debate among as many groups as possible would moderate the influence of any one faction and encourage compromise and coalition formation while frustrating the “cabals of the few.”

Courts sometimes permit the few to impose their interests on the public without resorting to the secrecy or machinations of cabals. By
comparison with legislative policymaking, judicial proceedings usually permit the active presentation of only a few viewpoints. Interests that might be powerfully articulated in congressional debates or committee hearings may not even have standing to speak in a courtroom. In court, what might have been a cabal of the few finds a political venue where it can show itself in public without shame and acquire the respectability of legal recognition. Collusion can occur almost anywhere in the political process—as in the famous iron triangles that once dominated policymaking in agriculture, military procurement, and other arenas of interest-group politics. But the narrow scope of judicial decision-making actually lends itself to collusive outcomes. Litigating interests often find some common ground that satisfies their needs at the expense of broader interests not represented at trial. Courts can make collusion constitutional.

**Collusive Settlements: Taxation through Litigation**

Consider, for example, the so-called tobacco settlement among the cigarette manufacturers, most state attorneys general, and a collection of tort lawyers. The settlement appears to satisfy the interests of these participants as well as those of several powerful lobbying groups. The settlement, however, amounts to a new tax upon tobacco, not mandated by any representative body, that will be paid by smokers who had no representation in court. At the same time, the settlement largely ignores and in some respects actually undermines the public’s interest in reducing its exposure to tobacco products.

Although the health risks of cigarettes and other tobacco products were known or suspected as early as the 1920s, no smoker ever filed a successful suit for health damages against any tobacco company until the 1990s. There were many unsuccessful suits. In 1984, a plaintiff finally won a jury verdict against a cigarette manufacturer, the Liggett Group, only to see the verdict overturned on appeal.

The tobacco industry followed a litigation strategy designed to exhaust plaintiffs’ resources and energies and to discourage trial lawyers from even undertaking cases. The companies consistently refused to compromise or settle any case and appealed every adverse decision to the limit of the law. Plaintiffs’ attorneys were compelled to deal with masses of pretrial motions that could have taken years to resolve. The tactic discouraged attorneys from accepting tobacco cases on contingency fees, because they had to face years of legal costs before they could hope to recover anything from a favorable verdict. And a favorable verdict would be followed by years of appeals and retrials, forcing most attorneys to
conclude that the costs of filing suit were not justified by the hope of gain in the remote future. Few if any plaintiffs could afford to initiate and fund such proceedings from their own resources.

Between the 1950s and the 1990s, however, a number of developments eroded the tobacco manufacturers’ legal position. First, whereas the 1964 surgeon general’s report had identified tobacco as a dangerous substance, the 1988 report classified nicotine as an addictive drug. In many instances before 1988, juries had found that plaintiffs knew the risks they ran by smoking but continued to smoke anyway and, therefore, assumed responsibility for the damage that they did themselves. But if nicotine was an addictive drug, then the plaintiffs had been deprived of the power to choose, and the cigarette companies could be held liable for the damages that smokers suffered.23

The legal exposure of the tobacco companies increased in 1994, when a paralegal employee at a Louisville law firm retained by Brown & Williamson secretly copied nearly ten thousand pages of the tobacco company’s internal documents and memoranda relating to the health risks of smoking. The employee, Merrell Williams, mailed the material to Stanton Glantz, a University of California professor active in the campaign against cigarette smoking, and he quickly made the documents public.24 The purloined B & W documents revealed that the company had known since the early 1950s that its product caused cancer and other serious diseases. Moreover, twenty-five years before the surgeon general’s 1988 report labeling nicotine an addictive drug, the industry’s own studies had shown that nicotine was highly addictive. They had also shown that secondhand smoke posed a serious health risk to nonsmokers. Not long afterward, the industry had established a research arm, the Tobacco Industry Research Committee, whose purpose was to prepare nominally scientific studies designed to cast doubt upon publicly available scientific evidence about the hazards of smoking. Knowing that nicotine was an addictive drug, B & W had actually increased nicotine levels in its products in order to make it more difficult for smokers to give up cigarettes.

In the wake of the Williams revelations, a number of prominent plaintiffs’ lawyers pooled their financial resources to counter the tobacco companies’ legal tactics. They filed several new individual and class action suits on behalf of plaintiffs suffering from smoking-related illnesses. Attorneys could now show that at least one manufacturer, knowing its product to be both dangerous and addictive, deliberately deceived and manipulated its customers without regard for their health or for the health of others exposed to their smoke. Confronted with the evidence, juries awarding substantial damages to several of the plaintiffs.25 In the meantime, more than forty state attorneys general filed suit against the
tobacco companies seeking to recover funds the states claimed to have spent on the treatment of tobacco-linked illnesses among their residents. These suits were followed by others filed by municipalities, union health funds, and insurers seeking to recover similar costs.

Initially, the tobacco companies mounted a vigorous defense against these suits. In 1997, however, the Liggett Group, one of the smallest of the tobacco companies, sought to settle with the state attorneys general. Liggett had been financially weakened by a failed takeover attempt and, near bankruptcy, could not afford the continuing cost of the various suits against the industry. The deal negotiated between Liggett required the company to pay the states $25 million and 25 percent of its pretax income for the next twenty-five years, and to cooperate in suits against the other tobacco companies. The states agreed to help protect Liggett against other damage suits. Consistent with its agreement, Liggett turned over documents implicating the entire tobacco industry in the manipulation of nicotine levels to encourage addiction and in the use of cigarette advertising aimed at snaring teenage smokers. The plaintiffs’ attorneys now had a “smoking gun” to use against the industry as a whole.

This smoking gun induced other tobacco companies to begin negotiations with the state attorneys general. In exchange for a multibillion-dollar payment to the states to reimburse them for the costs of treating smokers’ illnesses through Medicaid, the industry sought state support for federal legislation that would limit their liability to both individual and class damage suits. An agreement to this effect was reached between the companies and the attorneys general in June 1997. It called for more than $300 billion in payments to the states over twenty-five years. Congress, however, refused to enact the legislation that the industry and states requested. Once the struggle between the industry and its antagonists became a congressional matter, a variety of previously unheard interests voiced their grievances. Antismoking groups thought the bill did not go far enough to reduce cigarette sales. Liberal interest groups saw an opportunity to secure new federal funds for social programs through penalties or taxes levied on tobacco. Conservative forces jumped into the fray to block these efforts. The national media subjected the entire matter to intensive scrutiny. A bill introduced by Senator John McCain in 1998 would have settled all state suits, capped the tobacco manufacturers’ civil liability, and compelled the industry to pay more than $500 billion over a twenty-five year period to the federal and state treasuries. Two parties to the original agreement were unhappy with the results of expanding the conflict to take account of broader interests. In particular, the tobacco companies thought the price they were now being asked to pay was too high, whereas trial lawyers representing various plaintiffs in cases against
the industry opposed the proposed cap on civil liability for smoking-related damages. After the trial lawyers succeeded in securing the elimination of the liability caps, a vigorous lobbying campaign by the industry defeated the bill.30

Once the McCain bill had been torpedoed, the industry, the state attorneys general, and the trial lawyers returned to court—an arena where they were far less likely to confront the interests that had unraveled their legislative plans in Congress. A lawsuit against the industry by the state of Washington led to secret talks in November 1998, involving most of the other states. These talks produced a settlement among the industry, the trial lawyers, and the forty-six attorneys general who had cases pending against the tobacco companies. The remaining four states accepted the general settlement several months later. Under its terms, the companies agreed to pay more than $230 billion to the states over the next twenty-five years, with each state’s share determined by formula. The plaintiffs’ attorneys in the case stood to receive fees ranging from 9.3 percent of Massachusetts’s share to an astonishing 35 percent of Mississippi’s, depending upon arbitrators’ rulings.31 The total fees to plaintiffs’ attorneys are likely to total $15 billion over the next twenty-five years.32

The tobacco manufacturers agreed to the settlement for two reasons. First, they regarded the states as their most dangerous adversaries and feared numerous multibillion-dollar judgments that would have to be paid not from future earnings but immediately, thus bankrupting most of the companies.33 In fact, the settlement actually gave the industry’s most dreaded foes a stake—a $240 billion stake—in the tobacco manufacturers’ survival and profitability. The industry calculated that the state governments, the trial lawyers, and others receiving money under the tobacco settlement would now feel compelled to oppose any step that would prevent smokers from buying more cigarettes.34

The new tobacco coalitions helped defeat the Clinton administration’s efforts in June 2000 to impose more-severe financial penalties and restrictions on the industry.35 The next month, a consortium of industry lobbyists, state officials, and plaintiffs’ lawyers rallied to the industry’s defense in response to a Florida jury’s decision to impose $150 billion in punitive damages upon the tobacco companies because they had knowingly caused injury to hundreds of thousands of smokers in the state. The companies immediately appealed the verdict. Appeals were expected to last for years, and most legal experts doubted that the decision would be upheld. But until they were decided, Florida law would have required the tobacco companies to post an appeal bond equal to the $150 billion awarded at trial—except that the industry and its new allies in state government had already pushed a bill through the Florida legislature limit-
ing to $100 million the amount that a defendant in a lawsuit had to post to appeal a verdict. Having become beneficiaries of the tobacco industry, state governments and plaintiffs’ lawyers were eager to keep it alive and profitable.

For the cigarette companies, the tobacco settlement was both protection against bankruptcy and a means for recruiting political reinforcements, for which they had to accept a relatively small price increase for cigarettes, ranging from twenty-five to forty cents per pack. To guard against the possibility that new companies, not part of the settlement, would attempt to undercut this increased price, the settlement required the participating states to enact laws imposing severe tax burdens on cigarette sales by new tobacco companies. A state that fails to levy this taxes can lose its cut of the tobacco windfall.

Despite heavy taxes, a number of off-brand cigarettes such as Smokin’ Joes and Old Smoothies have entered the market and are being sold at prices as little as one-third the cost of the major brands. This development, which threatens tobacco revenues, has upset state governments and led them to look for ways of keeping the upstarts out of the marketplace. “I am disturbed by the proliferation of little companies,” said Oklahoma attorney general W. A. Edmondson. Six states have gone to court to try to compel the small companies to pay tens of millions of dollars into escrow accounts to cover the potential costs of future state claims against them. This requirement would effectively put many of the poorly capitalized small companies out of business.

The 1998 tobacco settlement yielded tangible rewards for the tobacco companies, state governments, and some trial lawyers. Most of its costs fell on smokers, generally members of the lower middle class and the working class whose addiction to nicotine makes them a captive market, a fact now acknowledged by all parties to the agreement. The revenues generated by the tobacco settlement may enable some states to reduce or stabilize tax burdens that fall disproportionately on middle- and upper-middle-class taxpayers. For the next twenty-five years these taxpayers will be subsidized by their tobacco-addicted and generally less prosperous fellow citizens.

The more general public interest in curbing the use of tobacco products also suffers. With the exception of an ill-defined pledge to reduce smoking by young people, the settlement devotes only a few million dollars to antismoking efforts. For the most part, the states are simply adding their settlement windfalls to their general revenues. According to one study, only 5 percent of the tobacco settlement revenues received by the states thus far have been used to fund antismoking programs. Indeed, the amount of tobacco money spent by the states on antismoking pro-
grams barely exceeds the amount that states spend to subsidize tobacco growers. Some of the trial lawyers are using their newfound fortunes to purchase sports teams and, perhaps, to bankroll a future assault on some other industry that endangers the public, and then protect that industry’s profitability to assure that it pays off its court judgments. The states, though they originally filed suit to cover the cost of medical treatment for tobacco-linked illnesses, no longer have any reason to reduce tobacco consumption and every reason to maintain it. They now occupy positions similar to those of national tobacco monopolies in Europe and Asia where governments resist antismoking campaigns.

The tobacco settlement is a case of taxation without representation. It is a narrowly focused and collusive bargain, forged in litigation and validated in court proceedings that were closed to some of the most directly affected interests.

Zones of Interest: Endangered Species versus Endangered Interests

Occasionally, judicial proceedings enable a cabal of the few to dominate not just a particular policy outcome but an entire policy regime. Although Congress is not immune to such manipulation, the courts have an inherent susceptibility to “capture” by a narrow but intensely motivated coalition. Like administrative agencies, but unlike Congress or the presidency, the judiciary lacks a popular political base. Like many bureaucratic agencies, the courts tend to be drawn into long-term alliances with organized groups that can provide them with the political support necessary to enforce their will against the resistance of other institutions, both public and private.

Twenty years of litigation under the Endangered Species Act (ESA) of 1973 illustrate the syndrome. The ESA protects wildlife at risk of extinction. The agency chiefly responsible for administering the act is the U.S. Fish and Wildlife Service (USFWS), which is under the authority of the secretary of the interior, though marine species fall under the authority of the secretary of commerce working through the National Marine Fisheries Service. On behalf of the interior secretary, the USFWS indicates which species are threatened and designates their “critical habitats.” But the ESA requires that economic impacts be taken into account when critical habitats are designated. The secretary of the interior may amend a critical habitat proposal if the economic costs of blocking its development outweigh the benefits, so long as this does not result in a species’ extinction. Once a species and its critical habitat are properly designated, the act requires that federal agencies refrain from undertaking
actions that may have an adverse impact upon them. Any agency that believes its actions might have such an impact is required to seek a written “Biological Opinion” from the USFWS. Agencies are generally prohibited from proceeding with actions likely to jeopardize the species or its habitat. The act also provides for the reintroduction of an endangered species into its historic habitat if it is not currently found there.

The ESA allows for enforcement by citizen suits. “Any person” may ask a federal court to enjoin alleged violations of the act or compel the secretary to perform duties required by the act. Citizen suits have become one of the chief enforcement mechanisms under the ESA. But, in practice, “any person” has not meant individual citizens. The “persons” have usually been environmental interest groups, such as Defenders of Wildlife and the Sierra Club, able to initiate federal suits because they can cover the initial expenses with foundation grants or membership dues. If the action succeeds, they can recover their legal expenses through the fee-shifting provisions of the ESA. Given their commitment to environmental protection, these groups invariably argue in favor of the strictest interpretations of the ESA and generally view the claims of property owners, logging companies, land developers, water users, and even federal agencies whose interests might bring them into conflict with wildlife preservation as secondary if not completely irrelevant. Thus, “any person” has come to mean that judicial enforcement of the ESA is initiated by committed environmental activists.

Of course, the statutory declaration that any person can file suit under the act might be interpreted as a grant of legal standing to mining companies, loggers, property developers, and other interests affected by the protection of endangered species. But a number of federal courts sympathetic to the environmentalists’ cause—including the Ninth Circuit Court of Appeals, which oversees much of the West—chose to interpret the law differently.44 One of the key legal decisions defining the term “any person” was the Supreme Court’s opinion in TVA v. Hill. The Court ruled that economic interests should not weigh as heavily under the ESA as environmental ones.45 In the Hill case, the Court enjoined the Tennessee Valley Authority from completing a dam upon which it had already spent more than $100 million. A citizen suit brought by an environmental group had charged that the dam would destroy the habitat of a three-inch fish called the snail darter. The Court ruled that the trend toward species extinction must be reversed, “whatever the cost.” In short, the costs that environmental protection imposed on companies and communities were not to be taken into account.

Other federal courts ruled that the citizen-suit provisions of the ESA were available only to environmental groups. These rulings extended the
so-called zones of interest test of prudential standing initially developed by the Supreme Court in a case involving data-processing services. The test requires that plaintiffs seeking judicial review under a statute providing for citizen suits must show that their interests fall within the “zone of interests” protected by the statute.46 In a number of cases, federal district and appellate courts held that claims by purely economic interests asserting that they were suffering harm from enforcement of the ESA did not fall within the zone of interests protected by the act, and the courts therefore denied these interests standing to bring suit under the law.47 This limitation became even more important when the Court extended the scope of the ESA to include the actions of private individuals. Though the act had been aimed at the operations of government agencies, the Court, in response to citizen suits filed by environmental groups, held that ESA’s prohibitions against harming an endangered species also applied to the actions of private persons on private land.48 In this particular case, a group of landowners, loggers, and families dependent upon forest product industries were prevented from developing private lands because of an alleged threat to the critical habitat of the red-cockaded woodpecker and the northern spotted owl.49

Another group of private citizens who ran afoul of the ESA consisted of cattle and sheep ranchers in Idaho, New Mexico, Montana, and Wyoming. In 1995, under pressure from environmental groups to obey the act’s mandate to reintroduce endangered species into their historic habitats, the USFWS began releasing populations of wolves imported from Mexico and Canada into several national parks where they had not existed for many decades.50 The wolves soon began leaving the parks and attacking livestock and dogs on ranches in surrounding areas. Local ranchers discovered they had little or no legal redress. The act’s citizen-suit provisions were not available to them, and under federal law, the government is not liable for the actions of wild animals even when the government itself placed the animals in a position to do harm.51

Ranchers responded with their own “shoot, shovel, and shut up” solution to the wolf problem. They killed the animals and buried the carcasses where they were unlikely to be found by federal authorities. One of the ranchers, however, a Montana man named Chad McKittrick, was caught and sentenced to six months in federal prison for killing a gray wolf in Red Lodge, Montana. The wolf was part of a pack of Canadian wolves that had been brought to Yellowstone National Park by the USFWS. McKittrick’s attorney argued that the gray wolf was certainly not an endangered species in Canada—where the wolves are apparently thriving—and had not even been listed under the ESA as an endangered animal. But the Ninth Circuit Court of Appeals, relying on a novel argu-
ment advanced by attorneys for environmental groups, held that the Canadian gray wolf had become endangered the moment USFWS workers transported it across the border from its home in Canada and that the wolf was therefore protected under the statute.52

Although environmental interests dominated the courts, their influence in Congress was challenged by the various economic and political interests the courts were not willing to hear. After the Supreme Court’s TVA v. Hill decision declaring environmental concerns to have priority “whatever the cost,” Congress amended the ESA to create the Endangered Species Committee, nicknamed the “God Squad,” empowered to grant exemptions from the ESA when a national or regional public interest or economic concern outweighed the need to preserve an endangered species. The God Squad, however, seldom granted such exemptions, and commercial and property interests continued to press for relaxation or even outright elimination of the ESA. A number of bills loosening ESA rules were introduced during the 1990s, and President George Bush called the ESA a “broken law that must not stand.”53

By 1997, the Republican-controlled Congress, responding to a militant new interest—the property-rights movement based in the West—began to draft legislative proposals designed to water down ESA restrictions on private development and land use.54 In July 2000, the USFWS responded to Congressional pressure by proposing rule changes that would allow federal agents, but not ranchers, to kill gray wolves that posed a threat to livestock,55 and the Clinton administration urged the use of procedures that minimized the impact of the ESA upon private landowners. In what might be seen as a parting shot at the ranchers, however, the USFWS proposed returning grizzly bears, a species somewhat more formidable than gray wolves, to a spot along the border between Idaho and Montana.56

The Supreme Court may actually have diminished the congressional threat to the survival of the ESA by issuing a decision unfavorable to environmental groups in 1997. In Bennett v. Spear,57 the Court ruled that commercial and other interests could use the ESA’s citizen-suit provisions to claim that their property rights were being violated by aggressive enforcement of the ESA. In other words, ranchers concerned about the reintroduction of wolves, or developers accused of encroaching upon an endangered bird’s critical habitat, could now bring suit to charge that the act was being overenforced. By including property owners and business firms within the zone of interests covered by the ESA, the Bennett decision may have saved the act from extinction.58

The decision also marked the end of a twenty-year period in which the federal courts seemed to be captives of environmental organizations
determined to protect species at all costs. The courts ruled that economic interests could not be taken into account under the act, applied the ESA to private landowners, and refused to grant property owners standing under the act’s citizen-suit provisions even though the language of the act stated that “any person” was entitled to a day in court. The interests excluded from court found a hearing in Congress, just as Madison would have predicted, and it was Congress whose institutional influence was largely responsible for breaking the judicial monopoly of the environmentalists.

Using Litigation to Settle Scores

In addition to the dangers of collusion and capture, judicial proceedings also suffer from a third institutional shortcoming. An interest too narrowly defined to be confident of success against its rivals in congressional or electoral politics may find that the courts offer a more congenial forum for its purposes. In court, a narrowly defined interest needs only to convince a judge of the virtues of its position. It need not prevail against the opponents and rivals it would have to confront in the free play of American politics. The judiciary can be a great equalizer. It has protected the politically helpless and defended the rights of the weak, but it can also bestow profit on the privileged when they cannot secure it democratically or competitively. One of the more unseemly examples of this phenomenon is what might be called “competitor litigation,” in which firms use the courts to challenge and defeat rivals whom they could not best in competitive markets or democratic politics.

A case in point is the breakup of the American Telephone and Telegraph Company (AT&T), which resulted from the settlement of a Justice Department suit against the company and was completed in January 1984. The outcome was, in large part, the work of MCI and other new firms trying to enter the telecommunications market in the 1960s and 1970s. AT&T’s rivals were not able to defeat it in the marketplace, nor were they successful in persuading Congress to enact legislation favorable to their interests. Having struck out in politics and the market, MCI and the others went to court, alleging that AT&T and its operating companies represented a conspiracy to preserve monopoly power against newcomers in the telecommunications field.

In 1974, MCI was able to convince the Justice Department attorneys, eager to demonstrate the department’s commitment to the then prevailing notions of the public interest, to charge AT&T with a variety of monopolistic practices in violation of the Sherman Act and other federal antimonopoly statutes. During the lengthy trial that ensued, MCI offi-
cials provided hours of testimony and thousands of pages of documents that it had obtained from AT&T during prior litigation, and helped the government to secure the services of expert witnesses against AT&T. Ultimately, AT&T was compelled to accept its own dismemberment. MCI had succeeded through litigation in bringing about a result it had not been able to achieve in more public venues.

The Justice Department’s ongoing antitrust case against the Microsoft Corporation is not substantially different from its action against AT&T. Microsoft is currently appealing a federal court finding that the company engages in illegal monopolistic practices—the basis for U.S. District Judge Thomas Penfield Jackson’s June 2000 order that the company be split into two independent firms. Microsoft founder Bill Gates has frequently asserted that the antitrust case was actually the work of the company’s competitors, and there is evidence that he may be correct.

The Justice Department’s case was initiated after the department received a 222-page report titled “White Paper Regarding the Recent Anti-competitive Practices of the Microsoft Corporation.” The white paper was written in the summer of 1996 by attorneys for Netscape Communications, Microsoft’s chief competitor in the market for Internet browsers. The paper detailed Microsoft’s allegedly illicit business practices. Netscape sent copies of its white paper to the Justice Department and to the attorneys general of a number of states. The company also sought to interest members of Congress in its problems but failed to win significant legislative backing. The Justice Department, however, was interested. The legal and economic theories of the Netscape white paper—even its language—would turn up in the Justice Department brief against Microsoft two years later.

Netscape could not force the Justice Department to take up its cause, but it did introduce ambitious federal prosecutors to a case big enough to make their reputations, along with much of the legal ammunition needed to make it succeed. It was Netscape, not the Justice Department, that first conceived of the idea of an antitrust suit against Microsoft. Former Netscape general counsel Roberta Katz said that prior to Netscape’s intervention, the Justice Department “did not understand the Internet or software” and “had a lot of learning to do.” Katz added, “My whole approach was to get to the point where they really understood what was going on.” In addition to the accusations against Microsoft, the Netscape document contained materials that Netscape had received from other computer companies, materials suggesting that Microsoft had violated a 1996 consent decree in which it promised not to compel users of its Windows software to feature its Explorer browser over Netscape’s Navigator browser.
Netscape also sent copies of its white paper to the heads of a small number of other firms involved in the computer and software businesses in an effort to enlist them in the legal campaign against Microsoft. Subsequently, several of these companies, including Time Warner, Disney, Sabre, Palm, Sun Microsystems, and America Online, provided information and testimony to the Justice Department. Apple Computer and several others produced their own anti-Microsoft white papers, detailing allegations of illegal practices by the software giant.

Microsoft responded to its legal defeat by mounting a huge public relations and lobbying campaign aimed at swaying popular and congressional opinion. Part of this effort involved the common ploy of creating or funding “citizens’ groups” that lobbied on Microsoft’s behalf and sponsored advertisements and press releases criticizing the Justice Department’s case against Microsoft. Judging that Microsoft’s campaign was having some success, rival software companies moved to discredit these groups by publicly revealing their ties to Microsoft. To this end, Microsoft’s rivals engaged in various forms of corporate espionage. For example, laptop computers containing information about Microsoft’s contributions to a group calling itself Citizens for a Sound Economy had been stolen from the group’s offices. This group had inspired pro-Microsoft op-ed pieces in newspapers and urged Congress to block funds for the Justice Department’s antitrust case.62 Subsequently, information obtained from the laptops became the basis for a number of newspaper articles exposing Microsoft’s propaganda campaign. In a similar vein, the Independent Institute, a group that sponsored pro-Microsoft newspaper ads in June 1999, reported that laptop computers were stolen from its offices. The computers contained information indicating that Microsoft had paid for the ads. The information was later given to the New York Times by “a Microsoft adversary associated with the computer industry,” an adversary that the Times refused to name.63

In June 2000, the Wall Street Journal reported that one of Microsoft’s rivals, Oracle Corporation, had hired Washington private investigator Terry Lenzner to collect information about Microsoft and its allies that might be useful to the government’s case.64 Lenzner, a veteran of so-called opposition research, specialized in locating the skeletons in people’s closets—or their garbage. He had previously attracted attention for his efforts to obtain information that might discredit the various women who made allegations of sexual improprieties against President Bill Clinton. One pro-Microsoft lobbying group, the Association for Competitive Technology, charged that after leasing space in its office building, Lenzner’s employees had twice sought to purchase the association’s trash from night cleaning crews—a practice known as “dumpster

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diving.” Lenzner refused to comment, but critics noted that the tactic was remarkably similar to one the detective had characterized in a 1998 magazine profile as a “very creative” means of securing information.

Tough tactics are common in competitive markets, as they are in adversary proceedings at law. But market rivalries have traditionally been resolved through competition, not litigation. Within the narrow confines of the courtroom, Microsoft’s competitors were able to accomplish what they had failed to achieve on the broader playing fields of the Congress and the market. It is by no means clear just how the public interest is served by processes that permit economic rivals to short-circuit the market and use the federal courts to do business on their behalf.65

Mobilization and Representation

Economic, social, and political interests often prefer litigation precisely because by litigating, as legal scholar Stephen Yeazell puts it, they can “dispense with the costs of creating an organization.”66 Litigation, of course, has its limitations. Political scientist Gerald Rosenberg suggests that the courtroom accomplishments of groups battling for civil rights, women’s rights, the environment, and criminal-law reform were relatively ineffective, despite decades of litigation.67 But such assessments overlook two vital considerations. First, they fail to take account of the extent to which litigating groups can prosper even though they make little progress toward their declared social or political objectives. Some advocacy groups flourish when their causes seem most threatened. Others prosper more by litigating than by succeeding. A second and more serious problem is that the advocates are often self-appointed. Those who claim to speak for particular social goals or to serve as the agents of deserving groups speak mainly for themselves.68 “Pseudo-representation” is not unique to the courts, but the judiciary is probably most susceptible to it. Advocacy groups that campaign to elect their friends to public office or lobby to achieve their ends by legislation are usually forced to mobilize large numbers of supporters if they hope to be successful. The existence of an organized body of followers, in turn, operates as a check upon group leaders. Elite venality or departure from the group’s agenda may result in membership disaffection and, ultimately, challenges to the leadership’s authority. The history of the American labor movement, for example, is replete with examples of reformers charging entrenched union leaders with corruption and malfeasance, and campaigning for their dismissal—sometimes successfully.69

In the courts, however, group effectiveness need not be diminished merely because interested parties have not bothered to organize a sub-
stantial following. Most class action and other mass tort attorneys, for example, indicate that they see no particular reason for actually mobilizing the classes they claim to represent. In fact, as we have already seen, one of the attractions of litigation is that it allows narrowly focused groups to take on more broadly based rivals and to do so on roughly equal terms. Having little actual incentive to organize a following, groups that pursue litigation will usually refrain from political mobilization. It would only expose their relative weakness. Some groups have even dispensed with the popular followings they built before deciding to shift their energies from the legislating to litigation. Political organization and mobilization are difficult and costly endeavors that, among other things, may require leaders to share the spoils of victory with their erstwhile supporters. Political and economic interests are typically unwilling to bear these costs if they can achieve their goals without incurring them.

Pseudo-representation becomes an acute problem in the courts because interests that turn to litigation in place of other forms of political action speak—or at least claim to speak—for a constituency that has no tangible existence except, perhaps, as a list of signatures collected by attorneys in the course of class litigation. Citizens who become part of a court-certified class have little actual control over the litigation launched on their behalf. Under some circumstances, in fact, plaintiffs cannot opt out of a class even if they are dissatisfied with the representation they have received. Law professors Jonathan Macey and Geoffrey Miller argue that in most of these cases the plaintiffs are merely names on paper and the attorney is an entrepreneur exercising plenary control over the case. Where the beneficiaries of litigation are presumed rather than formally defined, say breathers of polluted air or victims of school segregation, constituents have even less control over the actions of their self-proclaimed representatives. Lacking any concrete existence, these hypothetical classes also lack any concrete impact upon the conduct of their legal champions.

Policymaking through Litigation: The Class Action

One form of litigation through which a few parties purport to represent the interests of large, unorganized constituencies is the class action suit. Class actions are provided for by Rule 23 of the Federal Rules of Civil Procedure as adopted by the Supreme Court in 1966. Rule 23 allows the common claims of an entire class to be adjudicated in a single proceeding and permits the class to be represented by a common attorney or group of attorneys. From the perspective of the courts, class actions
promote efficiency by allowing the courts to consolidate what might otherwise blossom into hundreds or even thousands of almost identical cases. From the plaintiffs’ perspective, class actions can be desirable because they provide an avenue for making claims that, individually, might be too small to justify the costs of litigation but, in combination with other similar claims, allow them to seek redress for damages they believe they have suffered.

Perhaps most important, say proponents of class action, is the opportunity it offers to reinforce the regulatory efforts of the government by deputizing private parties to orchestrate collective litigation to right social wrongs that the state has failed to address. Class action suits filed against the manufacturers of defective products or dealers in shady securities serve a public interest that public authorities may have overlooked. When the Supreme Court eased class action rules in 1966, for example, many liberals envisioned civil rights attorneys using this instrument to strengthen enforcement of the new civil rights laws. Citizen-initiated class actions have their counterparts in the administrative practices common in early modern Europe by which princes contracted with private tax farmers, bounty hunters, condottieri, and privateers like Sir Francis Drake to compensate for the state’s own inability to collect taxes, bring criminals to justice, and wage war on land or the high seas. Modern states abandoned these practices in favor of state bureaucracies specializing in tax collection, law enforcement, and war making. Private government proved to be inefficient, prone to abuse, and, ultimately, incompatible with popular sovereignty. As economists might say, the agency costs associated with tax farmers, mercenaries, and privateers were too high.

Reliance on private parties to advance the state’s regulatory interests through class litigation turns out to be prone to similar abuses, and it may also be incompatible with popular sovereignty. Class actions rarely arise because some group of citizens recognize a common grievance and join together to seek a legal remedy. Instead, these cases are usually initiated by entrepreneurial attorneys who ferret out potential violations of the law and then track down the potential plaintiffs who may have suffered injury because of these violations.

Such entrepreneurial activity is common throughout politics. Groups protesting abortion or marching against capital punishment or lobbying for more Medicare spending do not arise spontaneously. Entrepreneurial politicians form and sustain interest groups. Unlike the parties to a class action suit, however, the members of an interest group can argue with their leaders or even fire them. In 1965, for example, the membership of the Student Nonviolent Coordinating Committee (SNCC) decided that
one of its founding leaders, John Lewis, was insufficiently radical and deposed him in favor of the more militant Stokely Carmichael, thus changing the course of the civil rights movement. When leaders of organized interest groups get out of step with their followers, they place their jobs at risk.

Class action attorneys need have no such worries. They do not need to mobilize a following, only a lead, or representative, plaintiff and usually, though not always, the formal consent of other members of the supposedly aggrieved group to speak for their interests. The lead plaintiff is often supplied by the law firm itself. For example, John Coffee notes that a Mr. Harry Lewis, who possessed an uncommonly broad securities portfolio, served as the named plaintiff in several hundred securities cases. Some of these quasi-professional lead plaintiffs have financial arrangements with the firm bringing the case. In other words, it is not the client who retains the attorneys, but the attorneys who hire the client.

The other members of the class usually consist of people who have been identified as potential victims of the abuse in question. Attorneys typically solicit these would-be plaintiffs by direct mail or through third parties such as medical clinics. Once the class members sign consent forms giving the law firm permission to represent them in the case, they are unlikely to hear anything further from their advocates until they receive notice of settlement. Not all members of a certified class must give their consent to be represented. For purposes of settlement, a class may include potential future claimants whose injury may not yet have manifested itself. Examples might include smokers or persons exposed to asbestos who have not yet suffered any harm. These prospective plaintiffs may be bound by a settlement to which they have not explicitly consented, and because the defendant, not the nominal client, pays the attorneys’ fees, the plaintiffs have no leverage over the attorneys who claim to represent them.

Since the plaintiffs in class action suits have little or no actual control over the attorneys who represent them, the stage is set for attorneys to pursue their own interests, which may differ not only from those of their clients but also from the interest of the public at large. According to Coffee, for example, collusive or sweetheart deals between attorneys and defendants at the expense of plaintiffs are a serious problem in class litigation. Such deals typically involve an agreement between the plaintiffs’ attorneys and the defendant to a settlement that involves a high fee for the attorneys and a low damage recovery for the plaintiffs. One example is the so-called coupon, or in-kind, settlement, in which the plaintiffs’ attorneys receive cash and the actual plaintiffs receive coupons allowing them a discount on future purchases of the allegedly defective
product. In one such case, each purchaser of an allegedly defective General Motors pickup truck received a coupon worth $1,000 toward the purchase of a similar truck. The attorneys bringing the suit received nearly $10 million in cash. In a similar case, the class plaintiffs in a suit regarding price fixing by domestic airlines received discount coupons on future air travel. The attorneys were paid $14 million. In most coupon settlements, only a small percentage of the coupons were ever used, which further reduces the cost of the settlement to the defendants.

But even these coupon-winning plaintiffs fared better than the nominal victors in a suit alleging that the Ford Bronco II had an unfortunate tendency to roll over. The vehicle’s owners received no pecuniary compensation but were awarded a package of benefits that included a flashlight, a safe-driving video, and a road atlas. Their attorneys accepted $4 million in cash. Even worse were the putative clients of a law firm that built a lucrative practice suing banks over the handling of mortgage escrow accounts on behalf of the mortgagees. In several cases, the firm reached settlements in which the banks agreed to pay the plaintiffs’ lawyers with funds drawn directly from the plaintiffs’ escrow accounts, leaving the nominal beneficiaries of the litigation poorer than they had been before.

According to Coffee, collusion grows out of the very structure of the class action process. Clients have no control over their attorneys. Attorneys’ fees are usually determined by the “lodestar” formula on the basis of the amount of time spent on the case, giving attorneys an incentive to settle quickly once they have reached the maximum number of billable hours a court is likely to allow. Moreover, challenges to settlements are difficult to mount. Although in recent years, courts have refused to allow several clearly collusive settlements, in general, courts have their own incentives to accept settlements at face value and seldom interfere with an agreement that seems to satisfy the plaintiff and the defendant.

Even these settlements might be acceptable if class litigation actually augmented the government’s administrative and regulatory capacities. Though individual plaintiffs may receive little, the cumulative cost of many small awards may add up to serious punishment for the defendant and a deterrent to future misconduct by others. But the relationship between class litigation and the public interest is problematic. Like the tax farmers, condottieri, and bounty hunters who preceded them, the plaintiffs’ attorneys are untrustworthy servants of public authority because they are in a position to substitute their private interests for those of the state and the public. Bounty hunters tended to employ excessive and indiscriminate violence. Mercenaries often displayed insufficient zeal against the enemy, sometimes accepting bribes to leave the
field of battle. Tax farmers squeezed and angered the populace but took such a large share of what they collected that little was left for the public coffers.

In a similar manner, plaintiffs’ attorneys can substitute their private pecuniary interests for the public’s administrative and regulatory interests. Like bounty hunters, class action attorneys tend toward excessive enforcement of certain types of regulations. In particular, they tend to piggyback on the government’s existing law enforcement efforts, using them as a guide to the selection of cases that are easy to win. In antitrust law, for example, plaintiffs’ attorneys are likely to follow in the wake of some earlier proceeding by a government agency, such as the Federal Trade Commission, or a criminal action brought by the Justice Department. Prior governmental action produces a mountain of documentary evidence at no cost to class action attorneys, and if the government’s enforcement efforts succeeded in court, similar private suits are likely to succeed as well. It follows that class action attorneys have an incentive to engage in redundant overenforcement of regulations to which the government is already devoting considerable attention, and the efforts of “private attorneys general” might be directed more usefully elsewhere.

At the same time, like Renaissance condottieri, plaintiffs’ attorneys often accept bribes from the nominal enemy to leave the field of battle. As noted above, collusive arrangements are common in the realm of class litigation. Class action attorneys, who have little allegiance to their clients and almost no contact with them, may work out settlements that actually enhance the capacity of defendants to continue the harmful activity in which they were engaged. The tobacco settlement is a case in point. The public’s interest in reducing the damage produced by tobacco use was subordinated to the interests of trial lawyers and others who put themselves in a position to profit from the continuing sale of cigarettes.

Finally, like tax farmers, plaintiffs’ attorneys harass and infuriate taxpayers while keeping for themselves the lion’s share of what they take in. One case in point is the infamous Agent Orange product liability case. The defendants, consisting of various chemical companies, were charged with responsibility for a number of illnesses suffered by Vietnam veterans allegedly exposed to a chemical defoliant known as Agent Orange. The defendants spent more than $100 million preparing for trial before finally agreeing to a settlement. The settlement called for payments of approximately $10 million to the plaintiffs’ attorneys. A large percentage of this fee went to a group of “investor attorneys” who helped finance the suit but performed no actual legal work. And what did these modern-day tax farmers recover for the public? Each plaintiff received a
$12,000 disability benefit and a $3,400 death benefit. The costs of collection and the fees paid to the collectors left little to distribute to the ostensible beneficiaries of the process.

Unlike collective political action, class action litigation sidesteps the costs of mobilizing a popular constituency and shortchanges the constituents. The class is not an organized group but often the invention of entrepreneurial lawyers, and it has little influence over its legal representatives. These pseudo-representatives are, as a result, free to pursue their own interests at the expense of the formally defined but actually nonexistent group for whom they speak in court. The class that benefits most from class action litigation is composed disproportionately of attorneys.

The problems raised by litigation on behalf of court-certified classes can arise when private attorneys general present themselves to the courts as representatives of abstract interests like “the environment” or diffuse groups such as “the poor.” Though the cases are sometimes filed as class actions, the legal representatives of these amorphous claimants scarcely ever ask their supposed clients’ permission to speak for them in court, and as a result these “clients” have even less control over their representation than the unfortunate coupon winners in class action suits. Where attorneys are fighting on behalf of abstract goals, as legal scholar Marshall Breger observes, the cause is the true client, not the human beings who happen to serve as its symbolic embodiment.97

The term “private attorney general” has been applied by the courts to plaintiffs who are given a cause of action by the state not to seek redress for individual injuries but to facilitate the enforcement of public policies.98 The first mention of the term came in the 1943 case of Associated Industries v. Ickes.99 It turned on a challenge to a provision of the 1937 Bituminous Coal Act that authorized “any person aggrieved by an order issued by the Bituminous Coal Commission . . . to seek judicial review of the Commission’s decision.” Judge Jerome Frank of the Federal Circuit Court of Appeals asserted that Congress could enact a statute “conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit . . . even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals [sic].”100

Today, private attorneys general receive statutory recognition in a variety of federal laws including the civil rights acts, the citizen-suit provisions of environmental statutes, and such diverse pieces of legislation as the Federal Election Campaign Act, the Federal Trade Commission Act,
the Natural Gas Act, the Toxic Substances Control Act, the Federal Power Act, the Federal Communications Act, and the Violence against Women Act. An individual or, more often, an advocacy group serving as a private attorney general is conceived to be a principled advocate for a particular public goal. Litigation by a private attorney general is a form of political action aimed at law enforcement and the collective good rather than at the vindication of a particular private claim. In recent years, hundreds of federal court cases have involved advocates claiming to speak for broad public concerns.

In most instances, those undertaking litigation under statutory citizen-suit provisions or similar causes of action are sincere spokespersons for civil rights or environmental quality or some other genuine public concern. Nevertheless, this form of political action through litigation raises a number of concerns. First, those presenting themselves in court as representatives of the poor, women, minorities, and other groups are always self-anointed. Unlike their public counterparts, private attorneys general are neither elected nor appointed by the duly elected representatives of the public they claim to represent. Unlike elected officials, private attorneys general seldom even present survey data showing that the principles they affirm in court are actually supported by members of the groups on whose behalf they are litigating. Discrepancies between the goals sought by advocates and the views of their nominal clients are inevitable. Since the client groups are often large, unorganized, and without clearly articulated interests, these differences are almost always resolved in favor of the advocates.

Harvard law professor Derrick Bell recounts one such case. In 1975, Bell was invited by representatives of black community groups in Boston to meet with them and attorneys for the NAACP Legal Defense Fund, who were planning the next phase of litigation in their effort to desegregate Boston’s public schools. The NAACP lawyers were determined to bring about school desegregation through citywide busing of school children. This effort was opposed in the courts by the city administration and in the streets of Boston by violent protests on the part of whites in the working-class neighborhoods whose schools were to be desegregated. But Bell reports that black community groups did not support the NAACP’s plans either. Black parents were less concerned with desegregation than with educational quality. They wanted to upgrade the quality of schools in black neighborhoods and to minimize busing to working-class white areas. Though the NAACP attorneys listened politely, according to Bell, they were unmoved. The NAACP, whose paramount goal was school desegregation, did not feel bound by
the actual wishes of the black community in Boston, on whose behalf
the fight was being waged.\textsuperscript{104}

Because black parents in Boston were organized, they were able to
communicate their views directly to federal judge W. Arthur Garrity, who
adopted some of their positions despite the NAACP attorneys. In other
instances, however, advocates using the courts to advance political goals
have been able to ignore the wishes—and, perhaps, the real interests—of
their unorganized, sometimes impoverished and voiceless clients. In a
well-documented Pennsylvania case, for example, a small group of par-
ents and guardians brought suit attacking conditions in the Pinehurst
State School and Hospital for retarded children.\textsuperscript{105} The lawyer who han-
dled the case and some of the parents who brought the suit wanted to
force deinstitutionalization of Pinehurst’s patients, and they sought the
closure of the institution and its replacement with community-based
facilities. As the case developed, however, it turned out that the over-
whelming majority of Pinehurst parents wanted to keep the facility open.
Their opposition to deinstitutionalization was based on a variety of fac-
tors. Some parents may have seen Pinehurst as a safe place for severely
retarded children. Others may have wondered whether community-based
 treatment would actually materialize. But the views of these parents were
not taken into account. The lawyer strongly supported the principle of
dehospitalization and took the position that the parents simply
 wished to avoid the embarrassment and difficulty of having their dis-
abled children living at home. Accordingly, he argued successfully that
the parents’ interests were in conflict with those of the children whom
he represented and should be disregarded by the court.\textsuperscript{106}

Even when advocates accurately reflect the views of some members
belonging to a large and diffuse group, they are almost certainly ignoring
and misrepresenting the views of other members. Within any large group
there inevitably exist significant differences of interest and outlook. It is
absurd to claim that all women or all African Americans or all poor
people agree on every significant topic that affects them. Once a group
organizes and establishes agreed upon procedures for collective decision-
making despite internal disagreements, its representatives may have a
mandate to speak for the group. But private attorneys general represent-
ing large and diffuse groups almost never have such a mandate.\textsuperscript{107}

At best, especially where groups are diffuse and issues complicated,
those claiming to represent the interests of a group will reflect the views
of only a fraction of the group’s membership. In the absence of some
accepted formula for aggregating preferences, this form of legal represen-
tation simply ignores the interests and opinions of many of the individu-
als for whose benefit the litigation has nominally been undertaken.
Aggregation of preferences through voting rules and mechanisms of representation is, of course, one of the most complex problems in political life. In the case of private attorneys general, at least, the courts have solved the problem by ignoring it.

But the problem does not go away. Advocates of bilingual education have pursued their cases despite the opposition of parents who saw proficiency in English as the necessary ticket for their children’s success. Self-proclaimed advocates for people with mental disabilities have used the courts to demand deinstitutionalization over the opposition of some relatives who favored institutionally based treatment. Advocates for the homeless have pressed communities to build shelters, which many of the homeless shun. In these and many other instances, those claiming to litigate on behalf of a needy group are using the courts to assert the interests of one segment of the group against those of others.

Even more problematic are those cases in which the interest being articulated in court is not that of a group but of an ever more diffuse public at large. In such cases, the representative plaintiff is a mere stand-in for everybody in general and nobody in particular, and the attorneys are trying to gain the court’s sanction for a particular conception of the public interest—their own, or the one held by their client-cum-everyman. The advantage of litigating on behalf of the public interest, of course, is that only a judge, and not the more numerous and various representatives of the public at large, needs to be convinced that some particular definition of the public interest deserves to be placed above others.

Advocates for recent interpretations of the public interest have succeeded in convincing judges—though not necessarily their fellow citizens—that protection of an endangered species takes precedence over all economic considerations, that parents have no right to object to the sex education materials presented to their children in the public schools, that power lines should not be allowed to interfere with scenic views, and that all forms of religious expression should be banned from public settings. The environment, education, aesthetics, and religion are important public concerns. But the particular positions taken by advocates in these cases are not the only plausible expressions of the public interest in these matters. These definitions of the public interest were made the government’s definition in deliberations between a self-appointed advocate and a judge.

The absence of a true client for attorneys engaged in public interest litigation leads to still another concern. That absence means that the litigators are responsible only to themselves. Unfortunately, this arrangement sets the stage for conduct whose contribution to the public interest
is highly questionable. One example of such an arrangement is a species of environmental litigation frequently undertaken by advocacy groups under the citizen-suit provisions of the Clean Water Act. \footnote{111} Like most environmental statutes, the Clean Water Act includes complex record-keeping requirements. The Environmental Protection Agency (EPA), which monitors compliance under the act, routinely reviews the records of firms subject to the requirements. Often EPA auditors find technical deficiencies in a firm’s records and order the firm to take remedial action. Where the record-keeping defects are deemed willful or repetitive, the EPA may impose fines or take other actions. But in the case of minor infractions the agency usually declines to take further action.

These minor violations that the government has chosen not to pursue have provided several environmental groups with a steady source of funding for the past twenty years. The groups identify cases from EPA records obtained under the Freedom of Information Act and then bring suit in a federal court under the Clean Water Act to demand the imposition of fines and penalties where the EPA has already determined that these were not warranted. In practice, the penalties are seldom levied, because the advocacy groups agree to drop their suits in return for out-of-court payments that are lower than the potential fines. The money usually goes for the support of some environmental project sponsored by a group allied with the organization bringing the suit. In this case, litigation is little more than a form of extortion masquerading as legal action in the public interest. It is parasitic on the EPA’s existing enforcement actions and so adds nothing to environmental law enforcement. Indeed, the advocacy groups involved are so busy stalking record-keeping violators that they seldom pursue other, more serious breaches of environmental law. All this is possible because in the absence of an actual client, these public interest litigators answer only to themselves. \footnote{112}

In another variation on the same theme, advocacy groups make widely publicized charges of wrongdoing, usually against some prosperous corporation. These charges are usually accompanied by actual or threatened litigation against the supposed malefactor. Negotiations follow, culminating in a settlement generally involving the creation of vague programs designed to correct the alleged abuse along with payments of various sorts to the advocacy group bringing the charges. This group then declares itself satisfied with the outcome, points to the corporation as a model of good citizenship, and begins the search for another case.

In 1999, for example, Reverend Jesse Jackson’s Rainbow/Push Coalition helped mediate the settlement of a class action suit that had been filed against the Boeing Company by several thousand of its African
American workers, who charged that the company showed racial bias in its hiring, pay, and promotion practices. Reverend Jackson initially supported the workers’ claims and widely publicized their cause as another example of racism in American industry. After a period of intense negotiation, however, Jackson announced that a favorable settlement had been reached. Under the terms of the agreement, the Boeing workers were to receive an average of $1,768 each. The attorneys representing the workers collected $3.8 million. The Boeing Company agreed to make a $50,000 contribution to Rainbow/Push and to name a person who happened to be a Rainbow/Push board member to monitor the expenditure of several hundred thousand dollars in new antibias programs the company had agreed to create under the terms of the settlement. Outside the terms of the settlement, the company also directed multimillion-dollar contracts to two businesses connected with Rainbow/Push. Boeing chairman Phil Condit and Reverend Jackson pronounced themselves well satisfied with the agreement. Though such settlements generally go unchallenged, a group of dissatisfied African American workers contested this one, claiming they had been betrayed. Attorneys for the dissidents raised pointed questions about the funds Boeing channeled to Jackson’s organization. Asked directly by a federal judge whether he thought Jackson had engaged in fraudulent and collusive conduct, the attorney for the dissatisfied workers replied, “No Sir. We believe he was misled.”

Interestingly, Reverend Al Sharpton, a one-time Jackson protégé, recently threatened to stage sit-ins and boycotts against the Burger King corporation nominally on behalf of a black franchise holder who was then engaged in a dispute with the company. To Sharpton’s dismay, Burger King called in Jesse Jackson, who urged Sharpton to halt his protests. It was later revealed that Jackson’s organization had received a $500,000 donation from the company. Sharpton told a reporter, “It is very difficult for me—trained by Jesse Jackson to confront the corporate world—to now go in those same corporate suites, and they use the guy that taught me as their protection.”

Politicians who compete in elections or legislative bodies can also be “misled” into believing that their own interests coincide with the public interest. This is one reason for popular concern about the private financing of political campaigns. Large campaign contributions from the wealthy represent incursions of private interest into processes that are supposed to identify the interest of the public at large. The likelihood of self-dealing increases substantially, however, when private interests need not even undergo the formalities of democratic mobilization and consultation. The litigation conducted by private attorneys general and other self-appointed spokespersons is beyond the reach of these constraints.
The litigators need not campaign and have no constituencies. They are not formally accountable to anyone and are seldom compelled to answer to organized adherents or defend their conceptions of the public interest against the multitude of other conceptions likely to emerge in electoral or legislative debate. In the absence of these checks, it is relatively easy to succumb to the comfortable conviction that one’s own interest and the public interest are one.

Judicial Power

The importance of litigation as a political tactic both reflects and reinforces the prominence of the judiciary as a decision-making institution in the United States. For two decades, the assertiveness of the courts has been the topic of considerable scholarly commentary. Though familiar, the central point raised by critics of judicial assertiveness is still worth making. In a democracy, the legitimacy of policymaking by the courts rather than by elected officials is always open to question.

The federal courts are sheltered from public criticism of their policymaking role, not just by their undemocratic nature but by the recognition that they have often served as institutional defenders of individual rights and political equality. In fact, they have occasionally intervened to protect the democratic process itself. We should recall, however, that the courts’ effectiveness as champions of democratic liberty has frequently been enhanced by other public institutions. In the advancement of civil rights, for example, the president and Congress both had roles to play along with the courts, and the principal force in the struggle was an organized, mobilized, and vibrant civil rights movement that fought for its cause in America’s streets as well as its courtrooms—the prime example of mass mobilization in postwar American politics. Litigation accompanied a grassroots campaign of heroic proportions, and this visible evidence of widespread citizen protest lent a democratic legitimacy to the courts’ principled decisions. Litigation in this case was a by-product of democratic mobilization. More recently, however, litigation has become a substitute for democratic politics, whose chief beneficiaries are interests unwilling or unable to compete openly in the larger public forum. When self-appointed advocates attempt to make policy through litigation, personal democracy for the few takes precedence over popular democracy for the many.