Introduction

The modern American class action, as we know it today, is the product of the 1966 Amendments to the Federal Rules of Civil Procedure. Fifty years have passed since their enactment, and the class action procedure still garners fierce debates between its proponents and antagonists. This debate, however, is no longer confined to American jurists. The class action has crossed borders and by now has been implemented in many jurisdictions around the globe. Many legal systems that are struggling with difficult compliance issues in various areas of the law — consumer protection, securities law, civil and human rights, environmental law, and mass torts — have been willing to experiment with some version of the class action mechanism. By allowing numerous individual claims to be aggregated, the class action holds promise for realizing important goals of deterrence, compensation, and access to justice. Nonetheless, serious concerns about abusive litigation, collusive settlements, and excessive enforcement of nuanced regulatory schemes have prevented legislators from fully adopting the class action in its American form. At the same time, in the United States, in a series of recent decisions, the Supreme Court has adopted a restrictive approach toward the use of class actions, and Congress appears to have taken a similar stance. This issue of *Theoretical Inquiries in Law* assembles international experts in the fields of civil procedure, collective litigation, and regulation to explore various class action dilemmas that have emerged since the inception of the modern class action in 1966.

The following articles offer an interdisciplinary glimpse at different facets of class actions, and they do so through four general perspectives: descriptive, normative, comparative, and international. Some articles tackle mainly one of these perspectives, while others address several. The descriptive perspective examines current class action regimes around the globe. Various forms of class and collective actions are explored, with both existing and prospective legislation, legal doctrines, and regulation being addressed. Some articles focus on historical trends, developments, successes and drawbacks of class actions. Others study empirical data and evaluate the performance of collective litigation regimes. From the normative perspective, some articles critically examine alternative ways in which class actions can attain social goals such as efficiency, compensation, and access to courts. Other articles investigate the desirable interrelation between private litigation and public regulation. Both the descriptive and normative perspectives relate to issues that lie at the

heart of the most pressing practical and academic debates, such as third-party funding, class certification requirements, opt-in vs. opt-out mechanisms, and so on.

The comparative and international perspectives address class actions as a global phenomenon. Some articles in this issue focus on the ways in which legal and practical developments in one country impact related changes in other countries. Other articles analyze class action regimes in specific countries, including Australia, Canada, Chile, China, Israel, several EU Member States, and the United States. Some of these articles conduct an explicit comparative analysis and present the similarities and differences between various versions of class action regimes, while others focus mainly on one country. Taken together, the articles in this issue portray a rich, nuanced and detailed picture of the most recent debates on class and collective litigation around the world. This global, comprehensive description can hopefully serve as a springboard for "cross-pollination," i.e., a better understanding and implementation of local class action regimes.

In his keynote speech, Arthur Miller examines the evolution of class action litigation in the United States. The author shows that modern class action procedure was developed in response to rapid industrialization over the course of the twentieth century, when in 1966, Rule 23 was amended to liberalize access to the class action procedure and expand the scope of cases that came within its ambit. Miller examines the successful use of Rule 23 to usher in landmark civil rights reforms, and the ways in which courts have wrestled with various jurisdictional concerns. He acknowledges the unforeseen proliferation of mass litigation following the 1966 revision, yet argues that the response to this trend in the form of restrictive federal legislation and stricter, judicial-made pleading standards constitutes an overcorrection.

Elizabeth Chamblee Burch maintains that privately-funded civil class actions create a public-private challenge. On the one hand, class actions are considered a means to promote adequate public goals. On the other hand, however, in most cases, class action litigation and settlements are powered by the private interests of the parties, attorneys, and funders, rather than by public interests. In this regard, Burch points to judges' lack of substantial information necessary to examine proposed settlements. She further argues that the remedies offered by Rule 23 — particularly those encouraging objectors to object to bad proposed settlements — work only on paper. She therefore suggests alternative "leveling up" solutions, some of which are derived from Israeli and Canadian class actions. Inter alia, Burch advocates for public funding of nonprofit objectors and enhanced access to data on class actions and potential settlements. This, according to Burch, will ensure the promotion of public goals through private class litigation.

Shay Lavie challenges the rigid, binary procedure of class certification that Rule 23 embodies, and suggests a split process that he terms "tiered certification." In essence, this method attempts to bar costly relitigation of denials of certification by preliminary certification, scaled-back notice, and early opportunity to opt-out. In addition, the model attempts to improve representation from the case's inception. The tiered certification proposal, therefore, can serve as a useful tool to balance between the aspiration to avoid relitigation and the need to protect absent plaintiffs. Lavie also suggests that a tiered certification regime can better handle several species of class actions, especially class litigation that entails some — but only meager — social value. Accordingly, instead of the current binary regime, Lavie anticipates a new category of semi-class actions: cases that pass the preliminary certification but fail the second certification.

Brian Fitzpatrick explores a rather new third-party financing mechanism for class actions: claim investing. He examines whether the risk-balancing virtues of third-party financing carry over to class action litigation, taking into account the imbalance between the plaintiff's and defendant's risk tolerance. He contends that in class actions, it is the plaintiff's lawyer who is to benefit from third-party financing, which would also improve the efficacy of class litigation. Although an ethical issue arises due to the splitting of compensation rewards between lawyers and funders, Fitzpatrick proposes several solutions, thus providing preliminary replies to the critiques of third-party funding of class actions. He argues that third-party financing of class actions in the United States needs to be considered seriously, as its benefits may outweigh its disadvantages.

Zachary Clopton points to recent developments in the U.S. class action regime that resulted in a decline of global class actions in the United States. Following those developments, it is harder now for foreigners to file and try class actions in the United States. Consequently, according to Clopton, foreign lawmakers, courts, lawyers, and law enforcers have begun developing alternative tools for regulating and adjudicating collective claims. These tools realize the deterrence and enforcement of rights that were previously attained by U.S. global class actions. The author both provides a description of the developments in the United States and their global consequences, and also highlights, from an institutional perspective, the ways in which legal developments in one country affect legal and regulative developments in other countries.

Alon Klement and Robert Klonoff conduct a thorough comparative analysis of class action history and procedure in the United States and Israel — two countries with a longstanding and robust class action practice. Inter alia, Klement and Klonoff explore each country's rules regarding threshold requirements for

class certification, prevalence of settlements, cy pres awards, and representatives' compensation. They find that while Israel has a higher number of filings per capita, class actions in Israel award remarkably fewer remedies and are less diverse in terms of subject matter. The authors conclude that the differences and similarities of class-action features in the two countries can be explained by the differences and similarities of the Israeli and American legal systems.

Brigitte Haar analyzes collective redress procedures in several EU Member States. She examines the tradeoff between individual rights and regulatory goals and how this tradeoff was taken into account in the design of new collective redress procedures across Europe. Haar shows that while private collective litigation promotes the individual rights of class members, and individual rights and liberties serve as one of the constitutive pillars of the EU, private collective litigation might infringe public policies and regulation. In this regard, she points out that despite recent legal developments in many EU Member States, none of the states have devised a collective redress procedure that realizes an optimal balance between individual rights and public regulatory enforcement. She therefore concludes by advocating for the careful design of collective redress procedures that would realize such a balance.

Fabrizio Cafaggi addresses the relationships among the three pillars of consumer law enforcement in the EU, as set in Aricle 47 of the European Charter of Fundamental Rights: administrative enforcement, judicial enforcement, and alternative dispute resolution (ADR). According to Cafaggi, an optimal interplay between these three pillars within and among EU Member States will result in effective protection of consumers' rights. Analyzing the most current developments in EU consumer law, the author suggests that the optimal relationship between the pillars is as follows: first ADR should be attempted, then administrative enforcement, and lastly judicial enforcement. In any case, Cafaggi argues, ADR should complement the other kinds of enforcement and should not be considered as their replacement. This will provide consumers with the most effective protection and remedial solutions, and it is crucial in particular with regard to collective redress cases, in which individual claims are too minor to stand alone.

Catherine Piché examines through an empirical research how well class actions compensate plaintiffs. Contrary to prevailing criticism, according to which class actions fail to adequately compensate plaintiffs, Piché shows that at least in Quebec, Canada, class actions do compensate the majority of class members in most cases. This conforms with the presumption that class members should be compensated appropriately for the class action to fulfil its main goals: access to justice, deterrence, and compensation. Following her findings, Piché argues in favor of a collective approach to compensation. She also addresses the challenges facing an empirical research on class actions and

highlights the importance of gathering data for deepening the understanding of class actions and their outcomes.

Vicki Waye and Vince Morabito present the Australian method of "closed classes" that was fashioned by the Australian judicial system as an attempt to ensure egalitarian class action processes and prevent free riding. According to this method, in order to be entitled to take part in a collective action, class members have to enter into a binding agreement with the main financier of the class action. However, this method also entails difficulties, as it often results in conflicts of interests and infringement of the rights of nonparticipants. Australian courts have attempted to resolve these problems in a series of cases dealing with collective litigation funding, which are analyzed in the article. The development of the common-fund approach to litigation funding in Australia, Waye and Morabito argue, demonstrates the risks of ad hoc pragmatism.

Robin Hui Huang compares the Chinese approach to securities class actions with U.S.-style class actions, and tackles the prevailing assumption that China should consider adopting and implementing the U.S.-style class action. Huang sheds light on the complex relationship between public and private enforcement of securities law in China and discusses the implications of a unique procedural prerequisite that mandates a criminal or administrative judgement prior to the filing of a civil class action. His empirical study demonstrates that the mandatory judgement requirement improves recovery rates and that the low filing rate of class actions appears to stem from the courts' mishandling of securities civil cases rather than the alleged inadequacy of the Chinese-style class action procedure. After surveying the advantages and flaws of each litigation mechanism, he concludes that the Chinese approach to securities class actions should prevail in China. He also suggests modifying the prior judgment requirement, in order to address some of the current concerns in the Chinese system.

Agustín Barroilhet closes this issue with an article that employs the political science theory of regime politics to account for the procedural lawmaking of class action rules in Continental law countries. He contends that in Continental law countries and in countries where power is less fragmented, it will usually be easier for legislative bodies to create weaker bureaucracies and weaker procedural rules. Barroilhet demonstrates this argument using past and current developments in Chilean class action legislation. He shows how the proximity between the executive and legislative branches in Chile impacted many features of the Chilean regulatory device of class actions, as manifested mainly in the introduction of an admissibility stage, the removal of standing for public entities, and the removal of moral damages from class actions' scope.

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