

Rather they are more nearly akin to taxpayers whom the late George Wharton Pepper described as "perforce, fellow-travellers and their association is essentially a corporation; but the bond of association between them belongs in the field of political science rather than in that area of voluntary economic or social effort. They have not joined a lodge or joined the church; and, in their capacity as taxpayers, they think of themselves, not as associates, but merely as victims of a common misfortune . . . Where there is a ready-made bond of association, it is relatively easy to apply the principle of volunteer representation. Stockholders are already committed to the representative function of elected directors; it is a short step, in an emergency, to substitute a volunteer. So in the case of a membership corporation—a church, for example, or a fraternal organization . . . The 'process' that is due . . . [taxpayers] may therefore easily be thought to be a much more individual process than otherwise would suffice" (quoted by Arthur John Keefe, Stanley M. Levy, and Richard P. Donovan. *Lee Defeats Ben Hur*. 33 Corn. L. Q. 327 350 (1948)).

In accord are commentators who assert that "some type of association or interaction among members of the class before the institution of the action would prove a greater likelihood that the members consider themselves and have consented to be treated as a class than would be the case when the class arises from the acts involved in the litigation. For example, the court should be less hesitant in binding a class when it is composed of members of a union suing for back pay than when the class is composed of a number of individual shippers suing for the loss of their cargo" (*Multiparty Litigation in the Federal Courts*. 71 Harv. L. Rev. 874, 937 (1958)).

Also militating against HEW's prospects of successfully instituting its contemplated action are a number of due process issues. Included among the latter is the problem of adequate representation. "The question of adequate representation is very important in a class suit; for there . . . a judgment binds all members of the class and adequate representation is essential to due process of law . . . In an action against a defendant class the court should be particularly careful to ascertain that the defendants named by the plaintiff have the necessary interest or the inclination to make a vigorous defense of the suit" (3A *Moore's Federal Practice* (2d ed., 1967) § 23.07 at pp. 3425, 3432); *Federal Class Actions*, 46 Colum. L. Rev. 818, 828-833 (1946)). "The number of representatives and the extent of their interests, if grossly disproportionate to the number in the class, . . . should also be considered by the court in determining whether the representation is adequate. Such determinations are especially important when the class is the defendant because the representatives of the class are probably chosen by the plaintiff with a view to their weakness and lack of incentive to present an adequate defense" (*Multiparty Litigation in the Federal Courts*, op. cit., p. 938; *Peelias v. Caterpillar Tractor Co.*, 113 F. (2d) 629, 632 (1940); *Weeks v. Bareco Oil Co.*, 125 F. (2d) 84, 91-94 (1941)).

Inasmuch as the number of vehicles to be affected by litigation to suspend automotive traffic in a large metropolitan center on a given day is of staggering proportions, and in view of the absence of a common bond of affiliation among the operators of automobiles or of any agency capable of representing or speaking in their behalf, it would appear that the "representative parties" to be joined such as