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PROCEDURE, POLICY AND POWER: CLASS ACTIONS AND SOCIAL JUSTICE IN HISTORICAL AND COMPARATIVE PERSPECTIVE

Francisco Valdes*

INTRODUCTION

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device This, of course, is a central concept of Rule 23.

Chief Justice Warren Burger¹

On July 23, 2007, veterans of the United States Military Services filed a lawsuit against the federal government seeking declaratory and injunctive relief for failures in providing medical treatment to troops wounded in Iraq and Afghanistan.² The complaint seeks

* Professor, and Co-Director of Hispanic & Caribbean Legal Studies Center, University of Miami School of Law. I thank the organizers of the symposium that occasioned this Essay, and the editors of the Law Review for their generous and gracious help in its publication. In particular, I thank Cylinda C. Parga, Nancy Rhinehart, and Erin Witcher for their help in improving this Essay. In addition, I am grateful to Professor Colin Crawford for another opportunity to collaborate on a rich and enriching scholarly enterprise. All errors are mine.

1. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 338 n.9 (1980).

2. The complaint states:

This is a class action for declaratory and injunctive relief challenging the constitutionality of provisions in the Veterans Judicial Review Act of 1988, in conjunction with the related, pre-existing statutes and a pattern of illegal policies and practices of the Department of Veteran Affairs. The putative class is comprised of applicants and recipients for service-connected death or disability compensation, including dependency and indemnity compensation (collectively "SCDDC") claims, based upon Post-Traumatic Stress Disorder, and all veterans with PTSD who are eligible for or receive VA Medical Services, as defined below (occasionally collectively referred to as "the Class" or the "Class Members").

certification of a nationwide class numbering from one-third to two-thirds of a million such veterans.³ This case, from one perspective, may be seen as quite the spectacle: wounded troops suing their sovereign for substandard medical treatment of their battle wounds. From another perspective, this case may be seen as a salutary effort to promote systemic and societal efficiency, as well as social justice for individuals and groups in the vindication of rights established by the rules of the sovereign to govern these tragic situations.

This case illustrates the varied reasons why the class action device has been made a lightning rod for procedural controversy—at least in the twentieth century—in every society that has discussed or experimented with this remarkable device. But the class action was not always such a lightning rod. An ancient and venerable fixture of procedure (within Anglo-Saxon legal systems), the class action device has come increasingly under attack—a “holy war”—only in the last half century.⁴ This short Essay explores why.

We begin with the origins and uses of the class action in the Anglo-Saxon, common law context as charted by leading procedural scholars during the past half century or so. With this broad historical context in place, we then turn to the objections that have sprouted in recent decades. Linking the two, we turn to unstated power dynamics that help to explain the “holy war” against class actions in recent times. As we will see, this “holy war” directed specifically against class actions is in fact part of a larger backlash against the legal heritage of the past near-century. This larger backlash, as outlined below, is a decades-long, multi-faceted and determined campaign to roll back civil rights in particular, and liberalism in general. This focus should help to contextualize both the modern class action as well as the efforts to eviscerate it through various “reform” efforts. However, this focus and context should not mistakenly lead to the

Complaint for Declaratory & Injunctive Relief Under United States Constitution & Rehabilitation Act at 9, *Veterans for Common Sense v. Nicholson*, No. C 07-3758 (N.D. Cal. July 23, 2007).

3. *Id.*

4. This apt term is Professor Miller's. See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 664 (1979).

conclusion that all criticism of class actions is necessarily ideological, unprincipled, or pre-textual.⁵ On the contrary, this focus is designed to enable interested observers and reformers to better sift legitimate concerns from “holy war” maneuvers.

With this more current context also in place, we then can see that, although both courts and commentators have long regarded the class action as a vehicle for protecting individual rights, in modern times it has evolved specifically into an antistatutory procedural device. By “antistatutory”⁶ device I mean that, during the past century, the class action has become instrumental in the ongoing struggle for equal justice under law, in a myriad of cultural and economic situations, and it is this evolution that underlies the “holy war” of the past half century against this traditional procedure. Focusing squarely on these social and legal dynamics, we conclude with a consideration of bedrock social and legal values that can help point the way toward a systemic, principled resolution to basic questions of power, policy, and procedure associated with class action controversies.

I. CLASSES AND ACTIONS: ORIGINS, HISTORIES, PURPOSES

The class action has been a freak from birth, a useful—perhaps an essential—bastard, but one whose existence nonetheless makes us question the categories that polite legal society uses to order the world.

- Professor Stephen C. Yeazell⁷

Various scholars have traced the origins of class actions rather meticulously over the past several decades,⁸ notably Stephen

5. See *infra* notes 96–107 and accompanying text (on legitimate concerns, issues or problems under Rule 23).

6. See *infra* notes 69–94 and accompanying text (on antistatutory).

7. Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977) [hereinafter, Yeazell, *Social Context*].

8. See, e.g., David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 914 n.2 (1998) (providing a bibliography of sources); see also William Weiner & Delphine

Yeazell.⁹ As a result, we now know that the earliest uses of the thing now known generally as the class action were in England, and that the actions emerged as that country's social, economic, and political structures and relations were transitioning from feudal arrangements to a more mercantile framework.¹⁰ In the process of that macro-transition in English society, powerful institutions and actors, principally the clergy and the aristocracy, sought to exact from the local population—the commoners—the tithes and similar types of payments based on entrenched feudal traditions.¹¹ The people resisted and the Lords, the powerful, and the clergy turned to the law. But of course, it was difficult, cumbersome, and expensive to go after every little amount due from every single little laborer or parishioner. So the powerful sought to go after the whole class of commoners who owed them something under the legal customs or traditional habits of feudalism. The courts permitted it, and thus established the foundations of the class action.¹²

This innovation originally tended to involve a single plaintiff—the lord of the manor, for instance—with numerous defendants—the workers of the manor, for instance.¹³ Class actions originally tended to operate with the defendants, not plaintiffs, as the collective. The collectivized defendants were the social underdogs, and the class action a convenience for the maintenance and enforcement of

Szyndrowski, *The Class Action, From the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?*, 8 WHITTIER L. REV. 935 (1987).

9. Stephen C. Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1979–80) [hereinafter Yeazell, *Part I*]; Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class and Representation*, 27 UCLA L. REV. 1067 (1979–80) [hereinafter Yeazell, *Part II*].

10. See generally R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* (2d ed. 1988) (outlining historical context of English law and society during the period in which class actions emerged); Yeazell, *Part I*; Yeazell, *Part II*, *supra* note 9. See also *infra* notes 13–20 and accompanying text (sketching the origins).

11. See generally Yeazell, *Part I*; Yeazell, *Part II*, *supra* note 9. See also *infra* notes 13–20 and accompanying text (sketching the origins).

12. See *infra* notes 15–20 and accompanying text (on *Brown v. Vermuden*).

13. “A number of facts strike the modern observer as peculiar. First, instances of group litigation involving defendant (as opposed to plaintiff) ‘classes’ occur regularly. . . . Finally, all involved disputes arising out of manor or parish communities.” Yeazell, *Social Context*, *supra* note 7, at 870–71.

privilege in the name of equity.¹⁴ The class action was invented to aid the powerful in maintaining the social and economic *status quo* vis-à-vis the disempowered. One of the earliest of these instances helps to illustrate these original points.

Brown v. Vermuden involved a parish of lead miners and their parson, Reverend Brown, who asserted customary rights to purchase one-tenth of the ore mined at a set price per unit.¹⁵ Though its procedural and substantive history is long and variegated,¹⁶ the crux of the “legal” problem presented by this litigation was that many individual miners and operators were engaging in varied acts of creative resistance, and successfully escaping payment of the tithe. Under these circumstances, Reverend Brown would be forced to sue each worker individually to enforce each individual obligation to sell at the set price. And if the mine passed hands, the Reverend Brown might well be faced with a claim that the previous decree did not bind the new worker, who after all had not personally been made party to the previous proceedings. This was the predicament of the rich and powerful as the pleasures of feudal life slipped away.

But the poor Reverend Brown was clever, too. He proceeded with an action to bind as a class all of the workers in the parish subject to the tithe. The legally collectivized defendants elected a committee of four representatives to conduct the litigation on behalf of the whole. As a result of those proceedings, “a Decree . . . passed that the Defendants and all the Miners would pay.”¹⁷ By general account, *Vermuden* stands as the first clear example of a “class action” in Western legal history.¹⁸

14. “The allowance of a representative suit in these cases, then, was a matter of convenience.” Hiram H. Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 35 (1937) (outlining the historical roots of class actions in equity).

15. *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676).

16. “The Reverend Brown was in fact attempting to enforce a right that had been decreed as a result of a former suit brought by one Carrier, his predecessor as Vicar. In that action Carrier had claimed the right in question by right of immemorial custom.” Yeazell, *Social Context*, *supra* note 7, at 870.

17. *Id.*

18. “*Brown v. Vermuden* would have been a completely forgotten precedent on an obscure and vanishing point of ecclesiastical law were it not for one small accident of history: scholars have generally recognized the . . . boldly innovative suit as the first reported example of the class action.”

It bears emphasis to note that *Vermuden* is no anomaly. On the contrary, it showcases two of the four key commonalities that Professor Yeazell has identified as hallmarks of the early class actions in seventeenth century England.¹⁹ The first of these early commonalities is that “instances of group litigation involving defendant (as opposed to plaintiff) ‘classes’ occur regularly.” The second is that “all involve disputes arising out of manor or parish communities.”²⁰ Thus, *Vermuden* stands as a vivid exemplar of the differences between original and contemporary class actions—power differences that can help bring into focus the underlying causes for the modern backlash against this ancient legal tradition.

Since *Vermuden*, the history of classed actions, “essentially discontinuous,”²¹ has taken many twists and turns. But we see that the earliest uses, the earliest motivations, the earliest social needs perceived to be satisfied by what we now call the class action, were tailored to the preservation of an entrenched caste system. More specifically, elites and their tribunals invented the class action to aid those in possession of “traditional” prerogatives in their fight to sustain them despite transformative changes in the society and throughout the economy. These origins and uses help to contextualize the present “holy war.” Much has changed in the uses of the class action since then.

II. THE MODERN CLASS ACTION: DRUMMING UP A “HOLY WAR”

A 1966 amendment to the Federal Rules of Civil Procedure gave birth, for all practical purposes, to the modern class action . . .

. . . .

As a result of the 1966 amendment, a new class of private attorneys general was created . . . [T]he public at large, and, in

Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515, 516 (1974).

19. Yeazell, *Social Context*, *supra* note 7, at 871 (outlining four common features).

20. *Id.*

21. *Id.* at 866.

particular, their attorneys, became instruments for the enforcement of important national legislative policy and for the vindication of the rights of, and recompense for the wrongs done to, large segments of the population. At last, every person seemed to have access to the federal courts. And indeed, although several important Supreme Court decisions have operated to limit application of this new tool for the enforcement of public policy, class actions continue to thrive . . . It was inevitable that the relative success of the class action would engender a reaction from the targets of class recoveries, potential and actual, and their advocates.

- Richard M. Meyer, Esq.²²

In the intervening centuries since *Vermuden*, plaintiffs also have availed themselves of this device. Indeed, perhaps most contemporary societies are accustomed to plaintiff classes as the norm.²³ Today, much of the noise about class actions seems focused precisely on this fact: large plaintiff classes pursuing large aggregate claims, too often successfully, it appears.²⁴ But, reflecting their origins, class actions, as codified in the Federal Rules of Civil Procedure, are neither pro-plaintiff nor pro-defendant. Federal Rule 23²⁵ specifies that defendants, as well as plaintiffs, may avail themselves of this device, as they originally did.²⁶ Despite its roots, the class action is neither *per se* pro-establishment nor anti-establishment. Comparing *Vermuden* to today, it becomes plain that litigants and societies have employed class actions for all kinds of ends over time.

22. Richard M. Meyer, *The Social Utility of Class Actions*, 42 BROOK. L. REV. 189, 189, 192-93 (1975).

23. See Shapiro, *supra* note 8 and sources cited therein (on class actions). It certainly is the case in the United States. See, e.g., *infra* note 24 and sources cited therein (on the variety of common class actions in the United States).

24. For a review of these cases, see 7 CHARLES ALAN MILLER, ARTHUR R. WRIGHT & MARY KAY KANE, FED. PRAC. & PROC. § 1776 (on civil rights cases), § 1781 (on anti-trust cases), § 1782 (on consumer and environmental cases), and § 1805 (on products liability cases) (2d ed. 1986).

25. FED. R. CIV. P. 23.

26. See *supra* notes 8-20 and accompanying text (on class action origins).

So, returning to the question of over-heated controversy, one might well ask: With such a venerable heritage, with such catholic politics, why does this traditional procedure today provoke such opposition, as if class actions were the sudden invention of contemporary social justice zealots?²⁷

Many reasons are given of course. They range from the practical to the philosophical. On the practical side, for instance, we're told class actions proliferate the costs of civil litigation and dispute resolution more generally.²⁸ On the philosophical side we're told, for example, that class actions interfere with individual rights.²⁹ Neither suffice. Without dismissing either practical or philosophical concerns out of hand, in practice they perhaps are overblown, and used to obfuscate, rather than to illuminate, the situation.³⁰

When considering objections to the "costs" of class actions, for example, consider as well the comparative costs incurred in achieving the same results through other devices. How much would it cost to prosecute the same claims individually? How much would "traditional" adjudication cost, not only in terms of attorney's fees for defendants, but in judicial system time? Is it "fair" to submit defendants to multiple suits, perhaps conflicting results, and their myriad costs?³¹ Alternatively, how much would it cost for the state itself, and the public treasury, to enforce rights otherwise vindicated through class actions? How many jobs, buildings, machines and systems will the government require in order to create a public

27. See ANGEL R. OQUENDO, *LATIN AMERICAN LAW* 711 (2006).

The class action is an age-old creature of common law. It attained prominence in the United States throughout the twentieth century as a means to compensate mass tort victims and reform public institutions. It faced considerable backlash in the 1970s from opponents of these progressive ends. This conservative challenge, which continues to this day, has led to key modifications in the text and interpretation of the relevant rule.

Id.

28. For a serious treatment of these kinds of issues, see Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43 (1989).

29. For a serious treatment of these and related issues, see Shapiro, *supra* note 8.

30. For illuminating examples, see *supra* notes 7–9 and 28 and sources cited therein (elaborating thoughtful analysis of both practical and philosophical issues).

31. See *infra* note 33 (considering these factors in the case of veteran suits in the wake of the Iraq invasion and Afghan War).

substitute for the “private attorney general” of the class action? As *Vermuden*, Rule 23, and countless other examples testify, the class action came into existence—and has continued to spread in use since that time—precisely because many public and private actors have concluded that it is the more economical and fair device for the enforcement of substantive rights among the available or imaginable procedural alternatives.³² This point is illustrated by the veterans’ suit as well.³³

In addition, consider the social costs that would flow from the systematic failure to enforce law and vindicate rights, which today are accomplished through the class action device. Call them “collateral” costs, and they range a gamut of categories.³⁴ In the case of the July 23, 2007 veterans’ lawsuit, for instance, the allegations aver that a failure to provide injunctive and declaratory relief for those nearly one million veterans would create “a new class of homeless victims of war trauma in the coming years.”³⁵ How does one tally the multiplying costs of that?³⁶

32.

The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise. Plainly there has been a growth of litigation stimulated by contingent-fee agreements and an enlargement of the role of this type of fee arrangement has played in the vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by cost. The prospect of free arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys. For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the “private attorney general” for the vindication of legal rights; obviously this development has been facilitated by Rule 23.

Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 338 (1980).

33. “‘There are ominous signs that veterans’ cases that may require case-by-case adjudication will soon increase, and probably very sharply,’ Federal Appeals Court Judge Paul Michel said June 28. ‘They could swamp our court by year’s end. The Court of Appeals of Veterans Claims just received more filings than in any other two-quarter period in its history. The impact on our court . . . could be catastrophic.’” Aaron Glantz, *U.S.: Veterans Sue Government over Mental Health Services*, INTERPRESS SERVICE, July 23, 2007.

34. “Melissa Kasnitz, an attorney with Disability Rights Advocates [representing plaintiffs in the July 23, 2007 suit], said that, ‘instead of living up to [its] motto, the VA is abandoning disabled veterans and following a path that will lead to broken lives, homelessness and staggering social costs.’” *Id.*

35. “The abandonment by the VA of Iraq and Afghanistan veterans and the failure to promptly and properly treat them is penny-wise and dollar-foolish. If unredressed, these illegal actions and practices

These “collateral” costs, both in human and material terms, are enormous, perhaps incalculable. The veteran plaintiffs call them “staggering.”³⁷ When added to the direct costs of litigation alternatives, it becomes apparent that the abolition, curtailment, or demonization of the class action solves nothing real. The noise is a distraction from underlying realities and agendas. Tales of “outrageous” jury awards or “outrageous” attorneys’ fees in fact represent something real—the lives and situations of real persons, governed by previously-enacted rules of substantive law—and not some silly “horror story” that can be made to go away with a shut-down of traditional procedures for dispensing justice.³⁸

The current fanfare over the loss of individual rights in the class action should serve to remind us that this nicety did not prevent the judicial collectivization of the parish miners nearly 400 years ago. Of course, the rights of the individual are at the core of the class action when the class action is the creature of a system accustomed to adoring and idealizing individuation. Similarly, the possibility of abusive class actions cannot be dismissed out of hand.³⁹ But the traditional requirement of individual proceedings was the very obstacle that the class action was originally invented and deployed to circumvent: the cost of effectively prosecuting each worker individually would have frustrated the economic aims of the Reverend Brown, and systemic worries over the rights of the individuals in the defendant class did not seem to cause a storm of concern and controversy. Not by simple coincidence, the preoccupation over the fate of the individual in the class action

will create another generation of indigent and homeless men and women with staggering social costs.” Complaint for Declaratory & Injunctive Relief Under United States Constitution & Rehabilitation Act at 9, *Veterans for Common Sense v. Nicholson*, No. C 07-3758 (N.D. Cal. July 23, 2007).

36. “An estimated 400,000 veterans sleep homeless on the streets of the United States. The VA estimates that 1,000 former service members under its care commit suicide every year.” Glantz, *supra* note 33.

37. See *supra* note 35.

38. The term is Professor Sherman’s. See Sherman, *infra* note 42.

39. See *infra* notes 95–104 and accompanying text (discussing some recent or current legitimate issues from an antisubordination perspective).

mushroomed, as part of the backlash against class actions, alongside the rise of plaintiff classes during the past half-century or so.⁴⁰

This same noise attends to reformatory efforts in other societies experimenting with varying versions of the Anglo-Saxon class action.⁴¹ In civil law traditions, the same themes sounded in the domestic “holy war” help to spread comparative fear:

While other countries display a growing interest in American class action practice for litigation arising from defective products, deceptive trade practices, and environmental conditions, they tend to react negatively to the American litigation landscape. Horror stories about an overly litigious society, entrepreneurial plaintiff attorneys, runaway jury verdicts, abusive class action practices, and legal blackmail through meritless suits that drive up business costs are well-known abroad. Whether or not such stories convey an accurate picture, most other countries view American class actions as a Pandora’s Box that they want to avoid opening. Thus, a good deal of attention is being devoted these days to studying and experimenting with procedures for aggregation of cases that can avoid the perceived excesses of the American experience.⁴²

In addition to “ignorance” and “propaganda,”⁴³ the very weight and force of “tradition” also serve to arrest reform. The negative themes used to undermine class actions in the United States thus reverberate globally, generating fear to inhibit structural access-to-justice reform and constrain class action procedures in other societies or systems.

40. Many commentators pinpoint the rise of the backlash to the 1966 Amendments. *See, e.g.*, Miller, *supra* note 4; OQUENDO, *supra* note 27; *see also* Burbank & Silberman, *infra* note 67.

41. *See, e.g.*, Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003) (detailing the comparative example that, by all accounts, is most serious).

42. Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 403 (2002).

43. Michelle Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT’L L. 405, 414 (2001).

Whether in the United States or beyond, it is of course impossible to catalog and examine fully the numerous reasons given for this modern-day opposition to this rather venerable device.⁴⁴ But as the two examples outlined above indicate, many of the professed reasons are less than persuasive when considered critically. This is not to say that all opposition to class actions as presently designed is groundless or unprincipled, nor is it to suggest that class actions, as presently constructed, are utopic panaceas. Again, this is *not* to say that practical or philosophical critiques are entirely without merit.⁴⁵ This is to say *only* that the litany of reasons most frequently and loudly voiced specifically against the modern class actions within the United States, as part of the “holy war” against them, tends to obscure underlying dynamics that are equally, if not more, important to understanding the noisy controversy and to appreciating the importance of the consequences at stake.

III. CLASSED ACTIONS: RIGHTING WRONGS IN MASSED SOCIETIES

The class action is the greatest, most effective legal engine to remedy mass wrongs.

- David Berger, Esq.⁴⁶

In the United States, this current period of excited controversy may be said to have begun in 1938 with the first national codification of traditional procedural rules, which merged law and equity—including class actions as an *equitable* practice.⁴⁷ That codification effort

44. For a general review, see Sherman, *supra* note 42; see also Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41 (2003); Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 *AM. J. COMP. L.* 861 (1997); Janet Walker, *Crossborder Class Actions: A View from Across the Border*, 2004 *MICH. ST. L. REV.* 755 (2004).

45. On the contrary, for particularly thoughtful engagements of serious issues, see *supra* notes 7–9 and 28 and sources cited therein (on issues and limitations of class actions).

46. Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, *N.Y. TIMES*, Jan. 8, 1988, at B7.

47. “The first federal rule on the subject was Equity Rule 48 of the Rules of 1842 Rule 38 provided: ‘When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or many may sue or defend for the whole.’ . . . In general it was recognized that these rules merely stated formally what was

included class actions together with other well-established practices.⁴⁸ It also coincided with extremely tumultuous times for North American society. It was the time of the Great Depression, and all its social and economic dislocation, not only at the national level, but at the global level. At the domestic level it also was the time of titanic clashes between conservative activism invalidating New Deal legislation and the retaliation of the so-called democratic branches against that sort of judicial activism.⁴⁹ Similarly, it was the time of World War II as the clouds of international armed conflict akin to the First World War gathered and erupted. As in England four centuries earlier, it was a time of transformative macro-transition.

During those key times, the forces of industrialization, mechanization, urbanization, and transportation had brought into being the processes of social “massification” that serve as backdrop for the modern class action:

More and more frequently, because of the “massification” phenomena, human actions and relationships assume a collective, rather than a merely individual, character; they refer to groups, categories, and classes of people, rather than to one or a few individuals alone. Even basic rights and duties are no longer exclusively the individual rights . . . inspired by natural law concepts, but rather meta-individual, collective, “social” rights and duties of associations, communities, and classes. This is not to say that individual rights no longer have a vital place in our societies; rather, it is to suggest that these rights are practically meaningless in today’s setting unless accompanied by

the established equity practice.” Hiram H. Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 36 (1937).

48. For a contemporary commentary, see James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551 (1937).

49. See *infra* notes 75–90 and accompanying text (including discussion of the 1930s and today).

the social rights necessary to make them effective and really accessible to all.⁵⁰

Although the class action device is ancient, the modern class action is an artifact of modernity itself, shaped by the forces of social, economic, and political modernization: the emergence and consolidation of “mass” societies.

Three years after codification, in 1941, Harry Kalven and Maurice Rosenfield, in their influential article on the class action and its sociolegal functions, focused on the risks and injuries of these processes to Wall Street investors.⁵¹ The 1937 Report of the recently-created Securities and Exchange Commission, issued a year before the Federal Rules of Civil Procedure were codified, began with this observation: “The wide diffusion of securities has created a situation where the single and isolated security holder usually is helpless in protecting his own interest or pleading his cause.”⁵² Thus became linked the conditions of societal massification and the fortunes of class actions.

Kalven and Rosenfield then write:

Modern society seems increasingly to expose men [we might now say people] to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his [or her] rights alone if and when he [or she] can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of

50. Mauro Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution*, 25 BUFF. L. REV. 643, 646 (1976).

51. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

52. *Id.* at 684.

fashioning an effective and inclusive group remedy is thus a major one.⁵³

After examining and analogizing shareholders' derivative suits, they note that "the class suit becomes as effective a procedural form for group redress for the employee, the investor, the ratepayer, the taxpayer, *et al.*"⁵⁴ Pause now for a moment, and think about these classes of people, mentioned by Kalven and Rosenfield, and compare them to the facts and aims surrounding the origins of the class action.

They then summarize:

It is thus seen that the class suit is a vehicle for paying lawyers handsomely to be champions of semi-public rights. It is this quality of the class suit, which gives vitality to the volunteer method of representation and obviates the apathy and general disinclination of the ordinary layman to assert anyone's rights but his own. . . . [T]he suit which might be brought for the original plaintiff alone is legitimately turned into a class suit for all. And more important, the suit which might not be brought at all because of the demands on legal skill and time would be disproportionate to the original client's stake can, when turned into a class suit, be brought and handled in a manner commensurate with its magnitude. Thus the class suit as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private practice.⁵⁵

That was 1941. These passages evoke, in a very concrete way, the societal mindset regarding the modern class action and its functions. Remember that Kalven, a University of Chicago Law Professor, and Rosenfield, an Illinois attorney, were not wild-eyed radicals or purveyors of anarchy. To them, as members of the establishment—as pillars or paragons of the legal system—the codification of the class

53. *Id.* at 686.

54. *Id.* at 692.

55. *Id.* at 717.

action continued the same important societal functions—justice and economy—invoked in England some 400 years ago. Then and now, mainstream actors have conceived the class action as a convenient instrument of economical, or cost-efficient, justice.

Not surprisingly, the same kinds of goals motivate experiments with class action variants in other regions and systems of the world.⁵⁶ Whether in Europe, the Americas, or elsewhere, legal reform efforts that include some elements of collective litigation and adjudication rely on access-to-justice goals to explain and justify proposed reforms.⁵⁷ Thus, in both domestic and comparative terms, the class action is a dispute resolution procedure tailored to bridge the gap between formal rights and substantive justice, even if imperfect.⁵⁸

With this historical and comparative sketch as backdrop, the recent and current situation of the class action can be brought into proper focus. After the 1938 codification, the Federal Rules began their still-unfolding story of periodic amendment, including the provisions of Rule 23, which have been amended in 1966 and, most recently, in 2003.⁵⁹ However, the most excited controversy began after the 1966 Amendments, which immediately afterwards loud voices decried as the root cause for the proliferation of civil litigation in that decade and since.⁶⁰ Consider this account:

56. For an overview of comparative developments and issues, see OSCAR G. CHASE, ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* 390–428 (2007).

57. See generally *supra* notes 41–44 and sources cited therein (on comparative perspectives).

58. Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201 (1999).

Seen at its inception, group litigation—in particular the [modern] class action—was perceived as a device to *empower* individuals in affording them access to justice. In other countries, this feature appears to be a motivating force for the adoption of a class device. . . . More recently, however, aggregation in the United States has had the effect of restraining individuals from commencing their own litigation, in the service (we are often told) of preserving access to justice.

Id. at 201–202; see also *infra* notes 95–107 and accompanying text (outlining some recent or current legitimate issues in the administration of class actions to ensure justice, or anti-subordination values, are vindicated).

59. FED. R. CIV. P. 23 (as amended).

60. For a general background see Miller, *supra* note 4.

Whatever the intention of the 1966 class action amendments, the effect of Federal Rule 23(b)(3) was to facilitate the aggregation of relatively small claims that were not otherwise individually economically viable to pursue into a group claim. As a result, the availability of class action litigation dramatically increased. The growth of these types of “damage” class actions can be attributed in part to entrepreneurial lawyering generated by contingent fees available in the class context where lawyers for a plaintiff class in a massive damage can collect fees from a common fund if successful. Alternatively, the specter of huge damage awards against defendants in a class action suit and the expense of litigating these large suits in a system without cost-shifting frequently led defendants to settle even marginal cases, with the settlement often including substantial attorneys’ fees for the class lawyers. In the immediate period following the 1966 class action amendments, class action suits proliferated. There was much enthusiasm for the class action as a device that could be instrumental in providing access to justice for economically disadvantaged groups, and the new rule was being construed in liberal fashion leading to an abundance of class certifications. Amidst increasing criticism of excessive attorneys’ fees, the burdens of litigating class action suits, and abuse of class certifications, several Supreme Court decisions in the mid-1970s limited the availability of the class action, at least in the federal courts.⁶¹

Those key amendments, like the original codification in 1938, coincided with yet another period of extreme ferment in North American society.

Most importantly, we must recall the 1960s statutes of Congress that established substantive statutory rights across multiple fields of federal law, spanning from civil rights, voting rights, immigration reform, and consumer rights to antitrust regulation and environmental

61. Silberman, *supra* note 58, at 205.

protection.⁶² Those were the days of the New Frontier, the Great Society. Again, this was a society, much like England 400 years ago, in the process of deep transformation, in the process of organically evolving, or devolving, depending on your point of view. Even then, the “holy war” against Rule 23 as the root of perceived systematic evils served to obscure the underlying causes for the heated opposition to the modern class action, causes tied to social and legal changes.

Arthur Miller, in his famous article of 1978–79 writes, in the wake of the 1966 amendment to Rule 23:

For more than a decade segments of the bench and bar have been waging a holy war over Rule 23 of the Federal Rules of Civil Procedure. In its benign form, the conflict manifests itself as a philosophical, social, and economic debate over the merits and demerits of the class action. In its more virulent state, the controversy occasionally infects the litigation process with courtroom acrimony and invective. Some aspects of the clash have spilled over into the political arena, particularly in the consumer, discrimination, and environmental fields.⁶³

In words that echo Kalven and Rosenfield a quarter of a century earlier, Miller here points, again, to the massification of society, and to substantive federal regulation of the sprawling socioeconomic relations of modernity, as the conditions that enhance the utility of the class action.

“The accepted dogma,” continues Miller in 1978, “is that the 1966 revision of Federal Rule 23 has had a dramatic effect on federal civil litigation. Indeed, some claim that the new provision has done more to change the face of federal practice than any other procedural development of the twentieth century Opinions regarding the

62. See Miller, *supra* note 4, at 670–76 (tracing linkage of these statutes to class actions). See generally MILLER, WRIGHT & KANE, *supra* note 24 and cases summarized therein (reporting cases under these statutes).

63. Miller, *supra* note 4, at 664.

effect of the revision range over an amazing gamut.”⁶⁴ But, he continues further:

It is important in understanding the class action debate to realize that the “big case” phenomenon transcends the class action. The “big case” is an inevitable byproduct of the mass character of contemporary American society and the complexity of today’s substantive regulations. It is a problem that would confront us whether or not rule 23 existed. Indeed, it is becoming increasingly obvious that the traditional notion of civil litigation as merely bilateral private dispute resolution is outmoded.⁶⁵

Miller concludes:

In my judgment, Federal Rule 23 is being used as a convenient scapegoat for grievances against our civil litigation system and trends in our society whose roots lie far deeper than the procedural aspects of practice under that rule. Our preoccupation with the so-called “class action problem” represents a misdirection of attention and energy, which might be better extended recalibrating the structure of litigation in light of contemporary conditions.⁶⁶

Again, I pause to quote these rather extended passages to allow us to better grasp the mind-set behind, and social goals of, the modern class action, and to help us better contextualize contemporary controversies about it.

These historical (and comparative) notes also should help clear the brush for consideration of the hidden, obscured, or simply unstated, reasons for the heated, hysterical opposition to class actions in recent decades. Accepting Kalven and Rosenfield’s account of function, and trying to develop Miller’s insight from 1978, I propose that the class

64. *Id.* at 665.

65. *Id.* at 668.

66. *Id.*

action, over the twentieth century, since 1938, and particularly since 1966, has evolved incrementally, perhaps fitfully, into what we might describe today as an antisubordination device.⁶⁷ And this evolution explains (in great part, at least) the backlash.

IV. CLASS ACTIONS: ANTISUBORDINATION PRACTICE?

[The class suit] affects the bargaining power of the parties, enabling plaintiffs to command more litigation resources by combining their cases and giving them much greater leverage by compounding the defendant's risk of loss. . . . There is recognition that the traditional single-party model of adjudication is not well-suited to situations today when the claims of many individuals arise from the same basic conduct of a defendant. Not only does this involve a waste of judicial resources, but it can also effectively deny legal recourse when the cost of individual litigation would exceed any possible recovery.

- Professor Edward F. Sherman⁶⁸

The antisubordination principle stands for the proposition that the equality commitment of the 14th Amendment requires the law to prevent the establishment of permanent hierarchies or a caste system within the United States.⁶⁹ The antisubordination principle therefore focuses law and policy on the reasons for prohibiting “discrimination” under the Constitution.⁷⁰ In other words, the

67. Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 684 (1997) (“It was not until 1966, when Rule 23 of the Federal Rules of Civil Procedure was amended, that the class action device was given the potential broadly to affect access to court. That appears to have been one of the goals of the 1966 amendments.”).

68. Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 401 (2002) (emphasis added).

69. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154–56 (1976) (finding perpetual subordination a key element of discrimination).

70. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976) (articulating the antidiscrimination principle and reviewing the Supreme Court’s elaboration and application of it).

antisubordination principle makes clear why some particular forms of discrimination, in particular “invidious” forms of discrimination, are constitutionally impermissible whereas other forms of discrimination or differentiation may not be.⁷¹ Simply put, the difference between the two is in the promotion or production of inequality through law or policy. Thus, the antisubordination principle makes plain that the constitutional objection to particular forms of discrimination is in the resulting subordination, or inequality, of those kinds of discrimination: the antisubordination principle makes plain that “discrimination” per se is not the problem; the problem is the resulting effects, or more particularly, the resulting subordinating effects. In short, the antisubordination principle attempts to clarify inequality analysis and equality lawmaking.

With this understanding of subordination, and more precisely the principle of antisubordination, the historical arc of the class action, from *Vermuden* in 1676 to the very present, comes into better view. By considering the antisubordination principle and the class action in tandem, we are able to observe how the two seem to converge incrementally yet surely during the course of the last third of the past century. With this convergence in focus, we can appreciate how the class action, despite its inauspicious origins, has become an extremely potent device for the promotion of antisubordination goals and values embodied in federal statutes and other sources of positive or substantive law.

Though the words “antisubordination” and “class action” hardly ever appear in the same sentence, or even paragraph, I think and submit that this linkage is precisely the substance of the ideas, goals, and proposals put forward by Kalven, by Yeazell, by Miller, and by many other (mainstream establishment, usually male, usually white) scholars during the past century. Think about the passages from Miller, Kalven, Rosenfield, and from the various writers quoted at the beginning of each section of this Essay:⁷² they do not specify the

71. See generally Jerome McCristal Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435 (2003) (discussing antidiscrimination and antisubordination).

72. See *supra* notes 48–56 and accompanying text (focusing on Miller, Kalven, and Rosenfield).

word “antissubordination” but they emphasize the societal, systematic need to redress wrongs that is served by the modern class action, and that otherwise would be left un-redressed. For each, the goal, consistently, is ready, meaningful justice for the (relatively) disempowered in contemporary, massified societies.

Apart from the work of scholars during modern times, two other key details underscore this linkage of antissubordination values and class actions in modern societies. One involves history at the original point of invention. The other also involves history, but at the modern point of codification. Both historical moments substantiate further this conceptual and operational linkage of class action practices to antissubordination social values in contemporary societies.

First, recall that the origins of the class action in England stem from equity.⁷³ And, of course, equity itself is an invention to accomplish justice despite the technicalities of “law.” Thus, the class action—from inception—was the vehicle for the accomplishment of equity, or justice, *despite* law. When we consider the social status and aims of the litigants in *Vermuden* and similar early cases,⁷⁴ this explicit grounding of class action procedure in notions of equity becomes ironic. Nonetheless, the stated social purpose of the class action, then and today, remains relatively constant at its base despite social context and social change: accomplishing actual justice.

Second, recall the very beginning of the modern regime, under the codification of the Federal Rules of Procedure in 1938, including Rule 23 class actions, with periodic amendments since.⁷⁵ Those Rules begin with Rule 1, which mandates that “[t]hese rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”⁷⁶ The Rule 23 class action thus is to be “construed *and* administered to secure the just, speedy and inexpensive determination of *every*” such action.⁷⁷ This

73. See *supra* notes 7–9 and 47–48 and sources cited therein (on class action origins in equity).

74. See *supra* notes 15–20 and accompanying text (on the *Vermuden* case).

75. See *supra* notes 47–50 and accompanying text (on the codification of procedural rules).

76. FED. R. CIV. P. 1.

77. *Id.* (emphasis added).

Rule 1 mandate calls for the vindication of antisubordination values embodied in substantive sources of law when pursued through Rule 23. The interpretative mandate of Rule 1 directs judges to secure the antisubordination policy goals of substantive rules litigated through the device of the class action.

I thus propose, in turn, that the reaction, the backlash, the “holy war,” against class actions, especially since 1966, is due to the very fact, and meaning, of this convergence, this linkage of Rule 23 and antisubordination practice. I propose that the coincidence of historical timing shared by the development of the modern class action into a powerful form of antisubordination practice and the increasingly reactionary backlash to it is not simple coincidence but a case of cause-and-effect. The “problem” with the modern class action is not the device *per se*, nor the plight of the individual and his/her rights, nor its comparative cost as one form of dispute resolution among many, but rather that rich and powerful interests are feeling the bite of substantive law enforced through this ready device. In short, the class action has enabled more effective and efficient enforcement of individual rights than would otherwise be the case in modern mass societies, and *that’s* the “problem” with the modern class action.

Throughout the zigs and zags of time, the virtue of the class action was and is in the effort to provide access to justice—to deliver justice to those who don’t have access to justice. It is this virtue that motivates and justifies the modern class action specifically. It is this virtue that heated opposition (sometimes) seeks to cast as a vice under cover of practical and philosophical arguments.

Finally, and as noted at the outset of this Essay, let us make clear that the assault on antisubordination values through this “holy war” against class actions and Rule 23 is not an isolated phenomenon. The sustained, determined backlash campaign against Rule 23 that Professor Miller and others have documented or analyzed since the 1960s and 1970s is anything but isolated or idiosyncratic. To make more complete sense of the class action “holy war” we need instead to situate this particular focus of backlash against the larger patterns

of “*kulturkampf*” (or “cultural warfare”) that form the broader sociolegal context of the past half century.

While the term “*kulturkampf*” may refer to various periods in different social and political settings,⁷⁸ in the United States at the turn of the millennium the term had come to signify the national coordination of political efforts to retrench civil rights and New Deal legacies in both social and legal terms.⁷⁹ As with the “holy war” against class actions and Rule 23, the stirrings of today’s “culture wars” go back to the 1970s and 1980s, to the times when the liberal antidiscrimination initiatives of earlier decades were increasingly contested from all sides.⁸⁰ But the moment of its official declaration occurred in 1992, from the podium of the Republican National Convention, when presidential contender Patrick Buchanan declared “cultural war” for the “soul of America.”⁸¹ Since then, the invocation of “cultural war” to explain and motivate political action has taken place repeatedly. By the turn of the century, in the year 2000, the term had been used 1,902 times in the public media, including in the tense context of resolving the November 2000 presidential s/election process.⁸²

78. Culture wars and *kulturkampf* are associated with German politics, both during the Bismarckian struggle to assert secular state authority over Catholic dogma in the form of public policy and during the efforts of the Nazi Party to reform German culture in line with their racist ideology. See generally RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* 118–53 (2003) (focusing on the culture wars waged in Germany as part of the Nazi rise to power).

79. Francisco Valdes, *Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship—Or, Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1427 n.70 (1998) (focusing on the definitions and implications of cultural warfare for sexual orientation scholarship specifically, and for all OutCrit scholars generally).

80. See Francisco Valdes, *Culture, “Kulturkampf” and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 271 (Austin Sarat ed., 2004) (focusing broadly on three theoretical perspectives—backlash jurisprudence, liberal legalisms, and critical outsider jurisprudence—to compare their approaches to equality law and policy).

81. Among the rising foot soldiers of the preceding years was a young speechwriter-staffer from the Nixon years by the name of Patrick J. Buchanan, who later vied for the Republican nomination himself. It was he, in that context, who issued the backslashers’ formal declaration of cultural warfare from the podium of the 1992 Republican National Convention. See Chris Black, *Buchanan Beckons Conservatives to Come “Home,”* BOSTON GLOBE, Aug. 18, 1992, at A12; Paul Galloway, *Divided We Stand: Today’s “Cultural War” Goes Deeper than Political Slogans*, CHI. TRIB., Oct. 28, 1992, at C1.

82. For example, in defending the 2000 nomination of John Ashcroft—a prominent but recently

This *kulturkampf* of backlash is not, however, a simple case of rough-and-tumble politics as usual, wherein self-interested “factions” are expected to jockey for social and economic goods. Rather, this multi-year phenomenon is a concerted and multi-pronged campaign for the “soul” of the nation in which the named and targeted “enemy” consistently has been one or more of the nation’s historically marginalized and now-still-vulnerable social groups: racial and ethnic minorities, women of the “feminist” type, poor persons of all colors, consumers, environmentalists, workers, queer communities and sexual minorities, immigrants from the South and East, including the Middle East, and other Others.⁸³ The overarching pattern of backlash jurisprudence, as part and parcel of these culture wars, has been the pursuit of a self-subscribed “anti-anti-discrimination agenda” under the guise of principled adjudication.⁸⁴ Indeed, backlash activism has

defeated backlash politician from Missouri—to take over the federal Justice Department and become the nation’s chief federal law enforcement officer, a backlash-identified talk show host based in the nation’s capital declared, “This is a culture war—two mutually exclusive world views continue to fight for preeminence in our culture.” James Kuhnhehn & Ron Hutcheson, *Ashcroft is Next Political Flash Point; Partisan Lines are Clearly Drawn*, MIAMI HERALD, Jan. 11, 2001, at 1A.

83. For further exposition of backlash *kulturkampf* by and through law, see Francisco Valdes, *Afterword—Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135 (2005) (focusing on backlash efforts to re-engineer, and contract, substantive due process); Francisco Valdes, *Warts, Anomalies and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341 (2005) (focusing specifically on *Lawrence v. Texas* and generally on liberty-privacy as a central doctrinal terrain of social and legal retrenchment); Francisco Valdes, “*We Are Now of the View*”: *Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407 (2005) (sketching doctrinal capsules of backlash jurisprudence in recent years).

These works, in turn, inform and are informed by related concerns or issues that form part of my larger scholarly agenda. See Francisco Valdes, *Afterword—Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits, and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999); Francisco Valdes, *Identity Maneuvers in Law and Society: Vignettes of a Euro-American Heteropatriarchy*, 71 UMKC L. REV. 377 (2002); Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 LA RAZA L.J. 137 (2001); Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65 (2003); Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831 (2000); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of “Sexual Orientation”*, 48 HASTINGS L.J. 1293 (1997); Francisco Valdes, *Race, Ethnicity and Hispanismo in Triangular Perspective: The “Essential Latina/o” and LatCrit Theory*, 48 UCLA L. REV. 305 (2000); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25 (1995).

84. Jeb Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (evaluating the current judges’ manipulation or disregard of precedent and canons of interpretation in pursuit of their

reached such a “fever pitch” in recent years that the regular updating of a leading treatise on constitutional law has been suspended, for the first time since 1978, “because so many precedents that had once seemed settled now appear at risk of being overruled.”⁸⁵

anti-anti-discrimination political agenda). Many scholars have drawn similar observations in recent years. See, e.g., Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996) (identifying “backlash” as the context for the production of critical legal scholarship in recent times); Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (mapping the doctrinal roll-back of Civil Rights law); Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 5 (1979) (noting that the nation was and is “in the midst of a counterrevolution; not because we are at the verge of a new discovery, but because the discovery of an earlier era is now in jeopardy.”); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991) (elaborating a relatively early analysis of the phenomena now known as backlash kulturkampf and jurisprudence); Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984) (analyzing the contrarian effects of Supreme Court doctrine in sex inequality cases); see also Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (focusing on judicial bias against plaintiffs in employment discrimination cases); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL’Y J. 547 (2003) (focusing on judicial bias against plaintiffs in employment discrimination cases); William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990) (focusing on retrenchment in that key term of the Supreme Court); Charles R. Lawrence, III, “Justice” or “Just Us”: *Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983) (focusing on race and white supremacy); Nancy Levit, *The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing the interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153 (1983) (surveying techniques of judicial manipulation of facts and doctrine); Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (critiquing the heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants). These and similar practices have prompted various scholars to question the principled nature of their opinions. Their basic conclusions were more recently corroborated by a study of the cases argued during the 2002 Supreme Court Term. See Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004) (explaining the highly predictable nature of recent Supreme Court rulings based on known political orientations of judges); see also Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 UCLA L. REV. 217 (2004) (releasing the findings of a recent study, which concluded that “judges seeking the original understanding are largely unconstrained in their ability to mold the historical record to serve instrumental goals”).

85. See Jeffrey Toobin, *Breyer’s Big Idea*, THE NEW YORKER, Oct. 31, 2005, at 36 (reporting the suspension and quoting the treatise editor).

Overall, the backlash bottom line is focused on halting, if not reversing, the “liberal” legal legacies of the New Deal and Civil Rights generations.⁸⁶ These legacies, given shape in the middle decades of the last century, include the 1966 Amendments to Rule 23. These legacies, including the modern class actions, are the focus and target of backlash.

With this sketch in place, the “holy war” against class actions can be seen as part and parcel of these larger social, political and legal patterns: the class action, especially since 1966, has served as the procedural side of the “liberal” substance produced by New Deal and Civil Rights lawmaking. Again, consider Miller:

The explosion of civil rights class action suits provides an excellent example of these phenomena. *Brown v. Board of Education* and some voting rights legislation predated the promulgation of the new rule, so that the Advisory Committee note does reflect an appreciation of the class action's utility in the civil rights context. But the great flood of this litigation had not begun by 1962 when the redrafting took place; the earlier years of civil rights controversy focused on a small number of test cases serving to define the contours of *Brown*. It was not until the mid-1960's that two major pieces of legislation, the Civil Rights Act of 1964 and the Voting Rights Act of 1965, were enacted, thereby forming the core around which the majority of contemporary class discrimination actions gather. These congressional grants of equal access to jobs, public facilities, and voting rights cut deeply into matters unreachable under *Brown*. Moreover, many of these rights were guaranteed across a spectrum spanning not only race but sex and age.⁸⁷

It is precisely because class actions became, after 1966, an increasingly potent law enforcement tool in Civil Rights, antitrust,

86. See *supra* notes 83–84 and sources cited therein (on backlash politics).

87. Miller, *supra* note 4, at 670–71 (citations omitted).

securities fraud, environmental justice, consumer protection, and similar kinds of cases that the “holy war” against class actions becomes part of the culture wars against New Deal and Civil Rights legacies. In effect, the lesson to be learned is that ruling classes within the United States are able to tolerate laws on the books that promise civil rights, human rights and individual liberty, but are unwilling to tolerate the vigorous enforcement of those very laws.

Therefore, to the extent that class actions have indeed become associated with antissubordination goals and practices, or more generally with civil and human rights, Rule 23 will correspondingly become a lightning rod for backlash politics. To the extent that the culture wars are aimed at curtailing civil rights and anything deemed a “liberal” artifact, the Rule 23 “holy war” and its curtailment of class actions will work hand-in-hand with the broader and deeper politics of backlash in law and society. With this sketch in place, the mutually-reinforcing imperatives of the class action “holy war” and the larger patterns of backlash *kulturkampf* can be noted, mapped, and combated.

This intersection of the Rule 23 “holy war” with the larger campaign of the culture wars is acutely evident in the “strict scrutiny” that judges give to race-based class actions.⁸⁸ This hostile scrutiny, as studies and scholars have shown, leads to the frequent and wrong denial of class certifications in these cases, which amounts to a denial of access to Rule 23 procedures.⁸⁹ In effect, the practice means a race-based denial of access to justice. In effect, this judicial practice favors power, privilege, and even injustice.⁹⁰

Before concluding, let me clarify that antissubordination practice via Rule 23 class actions is not policy-making. On the contrary, established choices of policy, oftentimes with an antissubordination purpose, abound in the form of constitutions, statutes, ordinances, regulations, and the like: consumer rights, environmental protection,

88. George A. Martinez, *Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities from the Class Action Device*, 33 J. LEGIS. 181, 188 (2007).

89. *Id.* at 189.

90. *See id.* at 187–93.

antitrust regulation, or the very notion of access to justice, and of equal protection, and of due process—all these legal conceptions embody, to varying degrees, a substantive policy choice in favor of antisubordination values. The class action device does not itself seek to establish or promulgate those substantive policy choices; the class action instead provides the vehicle to give them some real-world bite. The class action, like other procedures, is a vehicle for the enforcement and vindication of substantive rights and obligations embodied in positive policy choices that pre-exist the class action.

Again, the veterans' suit of July 23rd illustrates the distinction between the practice of antisubordination through class actions and the act of policy-making preceding it. In this instance, the substantive policy for the medical treatment of wounded veterans is codified in the relevant rules promulgated at some prior points in time by the sovereign.⁹¹ Those established rules define and protect the substantive rights of the affected individuals, or class.⁹² The class action then becomes the device used by the individuals, as a class, to vindicate those rights, as previously established in those rules or policies.⁹³ Despite much noise suggesting the contrary, class actions simply provide an effective and efficient means of enforcing the substance of legal rules. If in doubt, recall the counsel of Kalven, Rosenfield, Miller, and others.⁹⁴

CONCLUSION

Perhaps the most dramatic development in civil procedure in recent decades has been the growth of interest in the class action

91. Complaint for Declaratory & Injunctive Relief Under United States Constitution & Rehabilitation Act at 22, Veterans for Common Sense v. Nicholson, No. C 07-3758 (N.D. Cal. July 23, 2007).

92. *Id.* at 9 (“The VA’s failure to satisfy its statutory mandates to provide health care and disability benefits to disabled veterans has been exacerbated by a deliberate and chronic pattern of underfunding. While the government continues to pay lip service to assisting wounded veterans, the VA has been chronically understaffed and left without the resources or procedures necessary to fulfill the nation’s commitments to veterans.”).

93. *Id.* at 62–63.

94. See *supra* notes 46–67 and accompanying text (on the virtues of class actions).

as an actual and potential means of resolving a wide range of disputes. This interest, of course, extends far beyond the bounds of civil procedure itself into the domains of substantive tort and contract law, federalism, and the proper interpretation of the constitutional guarantee of due process. Indeed, it is partly through the class action device that we may be witnessing, and taking part in, a sea change in our understanding of both substantive and procedural law.

- Professor David L. Shapiro⁹⁵

To conclude, let me propose that calls to “reform” Rule 23 class actions be assessed critically from this antisubordination perspective. Let me also propose that we consider questions of class action reform—or curtailment—from the telling perspective of, “who wins and who loses?” Ask: are the antisubordination purposes of formal antisubordination policies being promoted or eroded when so-called reformers itch to tinker with class actions? In a pluralistic, democratic society committed formally to “equal justice for all,” it would seem plain that legal reforms should not subvert the antisubordination promise of remedial laws or policies. In a society such as this, it would seem plain that the affirmative vindication and reinforcement of antisubordination purpose would be the preferable, and principled, choice of law enforcers. Yet these are the choices and questions that backlash noise tends to obscure.

But the noisy “holy war” that Miller and others have long warned against should obscure neither the underlying dynamics and imperatives of power that fuel the assault on Rule 23, nor the serious and legitimate issues in the administration of class actions that recent or current experience reveals. More specifically, if not importantly, this holy din should not be allowed to obscure the normative or substantive anchor of the modern class action: backlash noise should not obscure that principled resolution of difficult legitimate questions

95. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

should proceed, consciously, from an antisubordination perspective to ensure that the access-to-justice utility of the class action is not subverted—whether intentionally or incidentally. Again: when considering a particular change or “reform” to Rule 23, step back—step back from the noise of the moment—and critically inquire: Are the policies embodied in substantive law, from the Constitution on down, likely to be promoted or eroded when judicial appointees (or other legal actors) seek to curtail access to this procedural device?

Of course, measuring the impact, or potential impact, of any reform or proposal will necessarily be fluid and multidimensional, as social, legal, political, and economic scenarios inevitably change in increasingly complex and post-modern societies. But the whole point of legal analysis, of sharp and critical legal analysis, is to pierce uncertainties and promote clarity. Thus, rigorous antisubordination analysis can help provide a principled bedrock foundation for these difficult assessments. A critical assessment of reformatory campaigns directed at class actions to assess their subordinating impact may not clarify entirely how social and legal change may unfold under any given proposal, but this approach will have the salutary effect of centering the importance of antisubordination specifically to the class action and to the effects of efforts that purport to “reform” them for the better.

Finally, in making the necessary difficult choices following an antisubordination analysis, let us not overlook altogether two substantive details that should additionally help to anchor our thinking regarding class actions and their functions. The first of these important substantive details is the origins of the class action in equity, which mandates justice over technicality, while the second is the threshold mandate of Rule 1 of the Federal Rules of Civil Procedure, which similarly mandates the application of all other rules to procure fairness and justice, on the merits, without undue delay or expense.⁹⁶ These historical and contemporary substantive anchors, coupled with the antisubordination principle rooted in constitutional

96. See *supra* notes 47–48 and 73–79 and accompanying text (on class actions, equity, and Rule 1).

and national policy commitments to equality, should help us to distinguish legitimate reform efforts that improve the operation of class actions from pretextual reforms that would serve to erode or subvert the antisubordination functions of this traditional procedural device. Varied examples can help to illustrate how the application of antisubordination perspective may better yield a sense of principled clarity when considering any reformatory proposal to class action practices.

Class action, of course, can be abused to perpetuate frauds against defendants, the courts, and justice itself. A current and dramatic example of this scenario is the case of William Lerach, described in the media as one of the “most feared lawyers in the United States” due to the fact that he has won billions of dollars in various class actions, including seven billion in one involving Enron investors.⁹⁷ In this case, Mr. Lerach pled guilty to paying kickbacks to individuals who became claimants in his class action suits, which targeted large corporate defendants such as AT&T, Lucent, Microsoft, and Prudential Insurance. Through this practice, Mr. Lerach and his associates maneuvered to become among the first attorneys to file litigation in mass wrong cases, thereby securing the lucrative position of attorneys for the lead claimants in these class actions. Clearly, reform efforts designed to prevent and punish this sort of fraud and abuse are completely compatible with the antisubordination functions of the modern class action.

In addition, class actions can be abused when individuals in a legitimate class are disempowered. The certification of a “settlement” class, for instance, can help to accomplish that result. In this scenario, the class action device is used simply to establish a settlement with a particular defendant, or defendants. Thus, in this scenario, the purpose of the class action may not be to secure the just remediation of a mass wrong, but instead the relatively cheap escape from liability for a defendant seeking to foreclose future vigorous lawsuits. In this

97. This case is especially egregious, but illustrative. These facts and similar details are reported in Philip Goldstein, *Lerach Pleads Guilty to Class Action Bribery Charges*, TIMES ONLINE, Oct. 30, 2007, <http://business.timesonline.co.uk/tol/business/law/article2771082.ece>.

scenario, scheming corporate defendants and corrupt collusive attorneys abuse the class action by hijacking it for their own gain. In recent years this scenario has prompted scholars to query whether, “settlement classes [are] being used to disempower individuals rather than empower them, to buy peace for defendants and the Federal Courts at the expense of justice for the absent members of the class[.]”⁹⁸ The manipulation of a settlement (or conclusion) to the litigation thus might be tailored to the benefit of the representative and the attorney, rather than the class. Reforms aimed at curbing these kinds of abuses also are compatible with antisubordination analysis because they, too, are tailored to the effective delivery of a remedy to a wronged person or group that otherwise would be procedurally tricked into exclusion.

Another example is provided by the ongoing controversies relating to judicial certification of classes under Rule 23. This scenario applies to various settings,⁹⁹ but is perhaps most sharply illustrated by judicial hostility to the certification of classes involving race and civil rights.¹⁰⁰ Unlike the settlement class scenario, this scenario focuses on judicial manipulation or constriction of class action doctrine in order to make “it significantly more difficult for racial minorities [or other disfavored plaintiffs] to bring class actions to redress racial [or other forms of subordinating] discrimination.”¹⁰¹ Efforts like these to “reform” class actions, which foreseeably perpetuate inter-group

98. Burbank & Silberman, *supra* note 67, at 685–86.

The incentives operating in settlement class actions can often work to the disadvantage of absent class members. Plaintiffs’ attorneys begin with substantial leverage because class actions are burdensome and difficult to defend. Defendants have strong incentives to settle class actions to avoid the substantial litigation costs associated with litigation. Plaintiffs’ attorneys may procure a limited recovery for class members but a generous attorneys’ fee for themselves; and the defendants want to buy whatever “global peace” they can achieve by “binding” the largest group at the least cost. Judges, for their part, see a way of clearing masses of cases from their calendars.

Silberman, *supra* note 58, at 208.

99. See, e.g., OQUENDO, *supra* note 27, at 711 n.3 (summarizing various U.S. Supreme Court rulings interpreting Rule 23 “restrictively with respect to class actions”).

100. See Martinez, *supra* note 88, at 201–04 (listing a number of such cases).

101. *Id.* at 189.

inequality, obviously are not compatible with the antistatutory purpose.

Moreover, in this last illustrative scenario, the culture war against civil rights and the “holy war” against class actions intersect most clearly: “Although Rule 23 was supposed to serve as a vehicle for civil rights actions, racial minorities have faced, and continue to face, significant obstacles in having cases certified as class actions.”¹⁰² Thus, the non-certification of racial class actions, like the certification of settlement classes, can be commandeered in order to neutralize the antistatutory purpose and function of Rule 23, whether through judicial or other kinds of intervention. In each instance, however, the resulting effects of these putatively reformatory efforts are the same: the perpetuation of patterns of privilege and subordination that class actions are designed to help undo.

In situations akin to these, various proposals might lead, unwittingly (or calculatedly), to “reforms” that in fact diminish access to justice via Rule 23. If so, such reforms would be anomalous to the very conception of the modern class suit.¹⁰³ Moreover, such reforms would contravene the Rule 1 mandate in favor of substantive justice through the application of procedural rules.¹⁰⁴ Yet, in each instance, antistatutory perspective provides a principled angle from which to assess the impact of proposed changes.

Reform efforts in other societies should continue taking note, as they already have been doing.¹⁰⁵ As we have seen, opposition to class

102. *Id.* at 187.

103. See *supra* notes 7–14, 21–26, 47–67, and 87–89 and accompanying text (on the policy or normative goals associated with class actions, starting from their ancient roots in equity to their modern codification in 1938 and since).

104. See *supra* notes 753–77 and accompanying text (on the interaction of Rule 1 with class actions under Rule 23).

105.

Collective suits have historically played a relatively modest role in both Continental Europe and Latin America. However, legal reformists in both regions have recently started calling for change. In particular, they have propounded the broad use of such actions to implement not only civil, political, social and economic liberties, but also third generation rights in areas such as environmental or consumer law. They have mostly proposed developing already existing collective procedures. Nonetheless, they have

action variants in other societies sometimes mirror the fear-mongering that characterizes the “dogma” of the backlash campaigns in the United States.¹⁰⁶ These noisy oppositional efforts should not succeed in distracting citizens, or derailing reform efforts, from the antisubordination potential, and access-to-justice aims, that underlie the modern class action. The globalization of the North American “holy war” against the modern class action should not prevent concerned observers from asking the antisubordination question, whenever and wherever class actions are put under pressure.¹⁰⁷

This is not to say, again, that class actions are a utopic panacea. Nor that they are perfect as is. No. But this reminder should underscore that class actions are one very significant vehicle for the real-life vitality of formal antisubordination commitments embedded in various sources of positive law. Those commitments—like the federal laws of the 1960s—express democratic policy choices. When backlashers frontally attack class actions, they effectively assault those policy choices. But by couching their “holy war” in procedural terms they disguise the neocolonial agendas that drive their substantive dogma. For these reasons, every change proposed in the modern class action should be scrutinized searchingly for antisubordination effects. As Miller and others have long reminded us, don’t blame the Rule; and don’t be fooled by the noisy razzle dazzle of cultural (or holy) warriors, even those donning shiny black robes.

occasionally supported the adoption of class actions, which are foreign to the civil law tradition.

OQUENDO, *supra* note 27, at 711.

106. See *supra* notes 50–55, 60–66 and 87–89 and accompanying text (quoting Miller and others).

107. On the contrary, mutual comparativism should strengthen and sharpen critical policy analysis everywhere. Mauro Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution*, 25 *BUFF. L. REV.* 643, 645 (1976).

Comparative analysis, in short, can and should provide one more measuring unit to probe the validity, utility, and “justice” of legal developments in a given place or country—for instance, the validity, utility, and “justice” of the restrictions on class and public interest litigation recently imposed by the Supreme Court of the United States.

Id.

