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Saving the Public Interest Class Action by Unpacking Theory and Doctrinal Functionality

Suzette M. Malveaux
University of Colorado Law School

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Author : Suzette M. Malveaux

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David Marcus, *The Public Interest Class Action*, 104 **Geo. L.J.** 777 (2016).

Scholars, lawyers, and litigants struggle to understand the class action landscape that has evolved over the past five decades and has sharply contracted more recently. Seminal rulings such as *Wal-Mart v. Dukes* and its progeny in the lower courts have sown division and analytical confusion over the meaning and normative value of this obstructionist shift in jurisprudence. In *The Public Interest Class Action*, David Marcus dives into this morass, examining one slice of this jurisprudential retrenchment and its varied implications—class action procedure in public interest litigation, litigation brought against government officials and agencies for injunctive relief.

Marcus's focus on structural-reform cases against public actors illustrates how most of the policy concerns animating class certification retrenchment are unjustified, misplaced, and dangerous to enforcement of constitutional rights. Much of the academic critique has centered around the role of monetary interests in aggregation—a distortion and distraction for understanding the public interest class action. The casualties of this misalignment are vulnerable populations such as foster children, prisoners, and students with disabilities, who have historically successfully sought structural remedies through aggregate litigation. Marcus speaks directly to judges chewing on how to approach class-certification motions and counsels them to manage structural reform litigation, not destroy it. Marcus puts retrenchment advocates to their proof, concluding that they have failed to prove how public interest class actions pose policy problems that can be rectified by Rule 23 obstructionism.

The article sets up the shift in class action treatment in recent history. The "Old Era" was characterized by easy certification of public interest classes, with Rule 23(a)(2) commonality and the Rule 23(b)(2) injunctive class as the two primary entry points. Commonality was easily satisfied, as the common issue was defined at such a high level of abstraction that the mere question of liability or allegation of group harm often sufficed. Moreover, courts were reluctant to engage the merits when determining whether commonality was met. Rule 23(b)(2) was also easily cleared, and in fact, was designed with civil rights and group rights in mind.

By contrast, the "New Era"—foreshadowed by Judge Frank Easterbrook in 2008 and in full bloom over the last decade as seen in cases such as *Wal-Mart*—has erected numerous barriers to public interest class litigation. By heightening commonality and refashioning Rule 23(b)(2) to require indivisibility of remedy, *Wal-Mart* has hampered structural reform litigation that does not affect policy concerns over monetary interests the opinion purported to address. Lower courts have followed suit, regardless of the inapplicability of monetary stakes in public interest aggregation.

Without answering why this class action retrenchment has occurred, Marcus argues that judges should use class action procedure consistent with the function of Rule 23. As a starting point, he recognizes two characteristics of classes certified for injunctive relief: claim interdependence and remedial indivisibility. He then creates a three-part typology based on the different degrees of each characteristic in a particular case: I) necessarily interdependent & necessarily indivisible; II) necessarily interdependent & plausibly indivisible; or III) plausibly interdependent & plausibly indivisible.

Marcus provides useful examples. For example, a Type I case is one that involved plaintiffs challenging California highway patrol officers for enforcing a state law that punishes motorcyclists who do not wear helmets that comply with federal law. Plaintiffs contended that stopping motorists without knowing if their helmets were out of compliance

necessarily lacked reasonable suspicion, in violation of the Fourth Amendment. They consequently sought to enjoin enforcement of the state law. These claims are necessarily interdependent because a judge cannot determine the validity of one motorcyclist's claim without determining the validity of all others. Moreover, the remedy is necessarily indivisible because a remedy for one motorcyclist–an injunction prohibiting enforcement of the law—would inure to the benefit of all.

An example of a Type II case is one that involved same-sex couples challenging Virginia's prohibition on same-sex marriage. The plaintiffs sought an injunction prohibiting enforcement of the state law prohibiting same-sex couples from obtaining marriage licenses and ordering the responsible county clerks to issue licenses. These claims are necessarily interdependent because, again, a judge cannot determine the lawfulness of the state policy against same-sex marriage for one couple without determining the same for all others. Because a court could theoretically require different remedies for each couple denied a license by each county clerk, however, the remedy is plausibly indivisible. Individually tailored injunctions, although unlikely, are possible.

An example of a Type III case is one that involved prisoners alleging a variety of problems with the healthcare provided by ten prison complexes operated by the Arizona Department of Corrections. Unlike the express policies targeted in Type I and II cases, a Type III case targets a custom or practice of deliberate indifference that plays itself out in myriad ways for thousands of prisoners at the hands of different corrections officers. These plaintiffs' claims are only plausibly interdependent and their remedies only plausibly indivisible. This is not to say that a judge could not find unlawful systemic indifference that is manifested in different ways as to different people and issue an injunction to address the statewide problem. But depending on the level of harm challenged, the judge could also recognize individual claims and divisible remedies. The Type III public law litigation case prompts the most significant question about the propriety of Rule 23 certification.

Rather than look to the text and history of Rule 23 to explain the need for class actions in public law litigation, Marcus considers how standing and scope-of-remedy doctrines—what he calls the "right plaintiff principle"—undermine the class action device. These doctrines dictate whether the right person is seeking injunctive relief from the defendant on both the front and back ends of the litigation. Standing requires that a plaintiff have a personal stake in the outcome and suffer a personal injury-in-fact rather than a generalized one, thereby ensuring the development of a real factual record and concrete adversity necessary for informed adjudication. Standing restrictions also protect separation of powers by allowing only individuals with concrete harms to use the power of judicial enforcement, leaving citizens with generalized grievances to use the legislative process as the default for obtaining relief. Scope-of-remedy similarly requires a court to narrowly tailor relief to the actual case before it, thereby protecting the province of other courts and the circumspect range of judicial power.

These doctrines, although workable in Type I and II cases, make it difficult for an individual to successfully pursue structural reform in Type III cases. Marcus explains how the substantive law in Type III cases often vests claims in groups—an interest that is thwarted by the standing and scope-of-remedy doctrines. Relying on evidence of other individuals' experiences in Type III cases to establish systemic liability "hardly opens the courthouse doors to ordinary members of the public and to preferences better vindicated in political arenas."

Marcus argues that the result of this right plaintiff principle is substantive legal dormancy. And the antidote to this dormancy is the class action, properly administered.

Class action procedure can serve as a counterweight to the right plaintiff principle in public law litigation. For example, the class action requirement of commonality ensures a common course of government conduct that affects the class representative and class members alike, making the representative more than a generalized aggrieved citizen and ensuring a factually concrete record. Similarly, the juridical link between the defendant's conduct toward the representative and toward class members means the remedy need not be limited to the class representative. Moreover, the class representative has remedial standing to seek an injunction regardless of the likelihood of future harm, because she functions as an undifferentiated member of a group vested with a claim recognized by the

substantive law. So long as the class representative functions in this manner, the right plaintiff principle is not undermined.

The “class action’s chief function for public interest cases [is] to enable the vindication of claims the substantive law vests in groups, when other strands in the web of doctrinal governance for public interest litigation would unnecessarily render them dormant.” This function can guide judges in the proper administration of Rule 23.

Marcus circles back to his typology to demonstrate how the counterweight function of the class action must do heavier lifting in Type III cases. Type I and II cases, although more paradigmatic class cases, ironically need class certification less because of the relatively seamless connection between the individuals’ claims and remedies—the tighter the nexus, the less necessary certification is. In Type III cases, however, the distinction between the individual and the group matters.

The solution is for judges to focus on that function in applying both commonality and Rule 23(b)(2). Marcus proposes that judges consider two criteria for commonality: 1) proof that the substantive law vests a claim in a group that the class representative wants to represent and 2) proof that the group actually exists. An illustration is a Title VII pattern-or-practice claim for prospective relief. He similarly suggests that judges considering the counterweight function cabin Rule 23(b)(2) to those injunctions whose administration does not require individual determinations for each public interest plaintiff. In other words, the remedy sought should be broad and undifferentiated, in line with Rule 23(b)(2)’s constrictions.

In sum, this article makes an important contribution by challenging judges to consider the theory and doctrine of public interest class actions post-*Wal-Mart*. Its defense of modern structural reform litigation and argument against the misuse of class action procedure offers much to the literature, jurisprudence, and practice.

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