
CLASS ACTIONS, INDIVISIBILITY, AND RULE 23(B)(2)

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ABSTRACT

The federal class-action rule contains a provision, Rule 23(b)(2), that authorizes class-wide injunctive or declaratory relief for class-wide wrongs. The procedural needs of civil rights litigation motivated the adoption of the provision in 1966, and in the intervening years, it has played an important role in managing efforts to bring about systemic change. At the same time, courts have sometimes struggled to articulate what plaintiffs must show in order to invoke Rule 23(b)(2). A few years ago, the Supreme Court weighed in, stating that the key to this type of class action is the “indivisible” nature of the remedy the plaintiffs seek.

Some defendants have encouraged federal courts to adopt an extremely restrictive version of indivisibility, which I term “endpoint indivisibility,” as a standard for applying Rule 23(b)(2). This Article argues that an endpoint indivisibility requirement would be fundamentally inconsistent with the historical models for Rule 23(b)(2). Moreover, such a requirement would have devastating effects on civil rights litigation. An alternative standard, which I term “root-cause indivisibility,” offers a better logical and historical fit.

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INTRODUCTION

In 1966, civil rights plaintiffs gained a valuable tool in their fight against discriminatory policies and practices, and federal courts gained a valuable tool for managing cases seeking systemic change.¹ The provision in question, Rule 23(b)(2) of the Federal Rules of Civil Procedure, authorizes class certification when a defendant “has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”² The drafters of this provision designed it to address the procedural challenges that had recently arisen in desegregation litigation.³

Decades later, a group of immigrants sought to invoke Rule 23(b)(2) in their lawsuit against the federal government.⁴ The immigrants had been detained, without bond hearings, for prolonged periods of time—more than six months, and in some cases years. They alleged that the government’s blanket refusal to

¹ See Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 857-61 (2016) (describing civil rights origins of Rule 23(b)(2)); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 678-81 (2011).

² FED. R. CIV. P. 23(b)(2). All class actions must satisfy the prerequisites of numerosity, commonality, typicality, and adequacy of representation, which are set forth in Rule 23(a). FED. R. CIV. P. 23(a). In addition, each class action must meet the requirements of one of the subtypes set forth in Rule 23(b). See Carroll, *supra* note 1, at 852-53 (describing these subtypes).

³ See Marcus, *supra* note 1, at 678-95 (describing desegregation litigation’s effect on origins of Rule 23(b)(2)); see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011) (noting that Rule 23(b)(2) “reflects a series of decisions involving challenges to racial segregation”). Professor Arthur Miller, who participated in the drafting of Rule 23(b)(2), recently explained that the provision was thought necessary because:

[T]here was no confidence, at that point, that simply because Mrs. Brown got an injunction against discriminatory conduct that a school board or a venal employer would apply that decree to every other member of the affected group. You didn’t have [*Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)] back then; you had mutuality of estoppel. So, to make sure that there really would be relief to the affected group and to forestall game playing in terms of extending the application of the decree, the (b)(2) was thought necessary. And there also was a recognition that if you put one parent up against the school board, or an organized political entity, it wouldn’t work because of the disparity in resources.

Interview by Professor Samuel Issacharoff with Professor Arthur R. Miller, N.Y.U. at Ctr. on Civil Justice 2016 Fall Conference (Dec. 3, 2016), in *RULE 23 @ 50: THE 50TH ANNIVERSARY OF RULE 23*, N.Y.U. CTR. ON CIVIL JUSTICE 1, 5 (2016), http://www.law.nyu.edu/sites/default/files/ICCVCJUS17.1-CCJ%20Rule%2023%4050%20Booklet%20Project_RELEASE.pdf [<https://perma.cc/VEP8-7STL>].

⁴ As the district court put it, “hundreds of immigrants are held for years . . . without an individualized determination of their flight risk or danger to society. Without a bond hearing, this prolonged detention raises due process issues, considering the aliens do not have an opportunity to contest their detention.” *Rodriguez v. Holder*, No. 07-cv-03239, 2011 WL 13180220, at *1 (C.D. Cal. Jan. 27, 2011).

provide such hearings violated their constitutional rights.⁵ Class treatment can have a significant effect on this type of case; without it, the case might become moot before the merits can be adjudicated, or the relief might be limited to a single immigrant detainee.⁶ At the direction of the Supreme Court⁷ (by way of the Ninth Circuit),⁸ the district court is now charged with considering whether the detainees' constitutional claims are eligible for class treatment under Rule 23(b)(2).⁹

In particular, the Supreme Court has questioned whether "a single injunction or declaratory judgment would provide relief to each member of the class," as the Court recently held Rule 23(b)(2) to require.¹⁰ But what does it mean for "a single injunction or declaratory judgment" to provide relief to the entire class? How can courts distinguish between injunctions or declaratory judgments that are truly "appropriate respecting the class as a whole,"¹¹ as the text of Rule 23(b)(2) requires, and those that provide impermissibly individualized relief?¹²

⁵ See *id.* Initially, the plaintiffs argued that prolonged detention without a bond hearing violated federal statutes as well. The Supreme Court, however, rejected those statutory claims. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (holding that Immigration and Nationality Act of 1965 does not implicitly place six-month limit on detention or require periodic bond hearings).

⁶ See Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2027-39 (2015) (analyzing benefits of class treatment under Rule 23(b)(2), including protection against mootness and promotion of resolution as broad as challenged conduct).

⁷ See *Jennings*, 138 S. Ct. at 851 ("The Court of Appeals should also consider whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for respondents' claims . . .").

⁸ See *Rodriguez v. Jennings*, 887 F.3d 954, 955-56 (9th Cir. 2018) (directing parties to file supplemental briefs addressing specified questions, including "whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for petitioners' claims in light of [*Dukes*]" and "whether a Rule 23(b)(2) class action litigated on common facts is an appropriate way to resolve petitioners' claims"). I co-authored an amicus brief addressing these questions. See Brief of Amici Curiae Administrative Law, Civil Procedure, and Federal Courts Professors in Support of Petitioners-Appellees, *Rodriguez v. Jennings*, 887 F.3d 954 (9th Cir. 2018) (No. 13-56706).

⁹ See *Rodriguez v. Marin*, 909 F.3d 252, 257 (9th Cir. 2018) (remanding with instructions to the district court to consider specified questions, including "whether the [Rule 23(b)(2)] class certified by the district court should remain certified for consideration of the constitutional issue and available class remedies").

¹⁰ *Jennings*, 138 S. Ct. at 851-52 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011)); Alexandra D. Lahav, Maureen Carroll, David Marcus & Adam Zimmerman, *Government Class Actions After Jennings v. Rodriguez*, HARV. L. REV. BLOG (May 8, 2018), <https://blog.harvardlawreview.org/government-class-actions-after-jennings-v-rodriguez/> [<https://perma.cc/6SCM-W77J>].

¹¹ FED. R. CIV. P. 23(b)(2).

¹² Cf. *Dukes*, 564 U.S. at 360 ("[Rule 23(b)(2)] does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.").

And why, after more than a half century of judicial experience with Rule 23(b)(2), do some courts find the answers to those questions unclear? The lack of clear guidance has hindered courts' ability to reach consistent and principled decisions about class certification in cases involving education,¹³ foster care,¹⁴ conditions of confinement,¹⁵ and other issues implicating the public interest.¹⁶

Pockets of confusion about the Rule 23(b)(2) standard have been around for decades, but in 2011, the Supreme Court made things worse. In its decision in *Wal-Mart Stores, Inc. v. Dukes*,¹⁷ the Court used the term "indivisible" to describe the requirements for class certification under Rule 23(b)(2).¹⁸ That term ("indivisible" or "indivisibility") had never before appeared in a published federal opinion as a Rule 23(b)(2) requirement.¹⁹ Yet the portion of the *Dukes*

¹³ Compare *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 485, 496 (7th Cir. 2012) (reversing certification of Rule 23(b)(2) class of students seeking injunctive relief for alleged violations of Individuals with Disabilities Education Act's "child find" requirement, and suggesting that child-find violations are never amenable to class treatment under Rule 23(b)(2)), with *DL v. District of Columbia*, 860 F.3d 713, 724-25 (D.C. Cir. 2017) (upholding certification of Rule 23(b)(2) class of students seeking injunctive relief for alleged child-find violations).

¹⁴ Compare *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 835 (5th Cir. 2012) (reversing certification of Rule 23(b)(2) class seeking injunctive relief for alleged systemic deficiencies in Texas foster care system), with *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010) (upholding certification of Rule 23(b)(2) class seeking similar injunctive relief for alleged systemic deficiencies in Oklahoma foster care system).

¹⁵ Compare *Shook v. Bd. of Cty. Comm'rs of El Paso*, 543 F.3d 597, 602, 605 (10th Cir. 2008) (affirming denial of certification of Rule 23(b)(2) class of prisoners seeking injunction compelling defendants to "cease using restraints, pepper spray, and electroshock weapons ('tasers') against prisoners exhibiting signs of mental illness in circumstances that pose a substantial risk of harm to such prisoners" because "different injunctions would be required to establish the appropriate behavior towards different groups of class members"), with *Parsons v. Ryan*, 754 F.3d 657, 687 (9th Cir. 2014) (criticizing *Shook* and upholding certification of Rule 23(b)(2) class of prisoners seeking injunction requiring defendants "to develop and implement, as soon as practical, a plan to eliminate the substantial risk of serious harm that prisoner Plaintiffs and members of the Plaintiff Class suffer due to Defendants' inadequate medical, mental health, and dental care, and due to Defendants' isolation policies").

¹⁶ Cf. David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 782 (2016) (arguing that public interest class action has entered "new, confused era"). By noting the lack of clear guidance, I don't mean to suggest that the correct answers are always in doubt. To the contrary, one purpose of this Article is to demonstrate why many of those answers should be apparent.

¹⁷ 564 U.S. 338 (2011).

¹⁸ *Id.* at 360 (quoting Richard A. Nagereda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

¹⁹ *Pre-Dukes*, at least one federal court had used the term "indivisible" in connection with the requirements of Rule 23(b)(1), rather than Rule 23(b)(2). See *Markocki v. Old Republic Nat'l Title Ins. Co.*, 254 F.R.D. 242, 250 (E.D. Pa. 2008) (determining that "class certification under Rule 23(b)(1) is appropriate" because "each of Plaintiff's causes of action seeks to

opinion that discusses indivisibility is only four paragraphs long,²⁰ and the core passage consists of only four sentences.²¹ This brief discussion of indivisibility has done little to clarify the standard for certifying a Rule 23(b)(2) class; indeed, it appears to have unsettled things further.²²

This Article does not aim to evaluate whether *Dukes* was correctly decided. Instead, it takes the Court's interpretation of Rule 23(b)(2) as given, but underspecified—in a manner that some defendants are attempting to exploit. Consider *Tinsley v. McKay*,²³ in which the plaintiff-children allege that Arizona's maladministration of its foster care system has exposed them to serious risks of harm.²⁴ The plaintiffs sought class certification under Rule 23(b)(2), which would help to ensure that any system-wide problems receive a system-wide response.²⁵ The district court certified the class, but on appeal, the state defendants have argued that Rule 23(b)(2) is not satisfied because the plaintiffs do not seek indivisible relief.²⁶ In the defendants' view, indivisibility

enforce duties and obligations owed the proposed class members in a collective and indivisible fashion"). In addition, federal courts occasionally used the term in their analyses of other issues, distinct from class certification under Rule 23(b)(2), that arose in class action cases. *See, e.g.,* *Pelt v. Utah*, 539 F.3d 1271, 1291 (10th Cir. 2008) (regarding nonparty preclusion); *Finch v. N.Y. State Office of Children & Family Servs.*, 252 F.R.D. 192, 200 n.79 (S.D.N.Y. 2008) (regarding mootness doctrine).

²⁰ *See Dukes*, 564 U.S. at 360-63.

²¹ This core passage reads as follows:

The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Id. at 360-61 (quoting Nagareda, *supra* note 18, at 132). This passage draws on legal scholarship about indivisibility in class actions. Because much of that scholarship discusses indivisibility as a concept applicable to all of the mandatory subtypes, however, it has limited potential to illuminate what the *Dukes* opinion means for Rule 23(b)(2), specifically. *See infra* Part I (discussing history of concept of indivisibility). The mandatory subtypes are those set forth in Rule 23(b)(1)(A), Rule 23(b)(1)(B), and Rule 23(b)(2). The label reflects that the class action rule does not guarantee absent class members the right to opt out of classes certified under these provisions. *See* FED. R. CIV. P. 23(c)(2)(A) (explicitly requiring class members be allowed to opt out from Rule 23(b)(3) classes but not from Rule 23(b)(1) or 23(b)(2) classes).

²² *See infra* Section I.B (discussing unresolved questions about indivisibility in *Dukes*).

²³ 156 F. Supp. 3d 1024 (D. Ariz. 2015).

²⁴ *Id.* at 1026 (summarizing plaintiffs' claims).

²⁵ *See id.* (describing plaintiffs' arguments that experiences were caused by "structural and operational failures").

²⁶ Appellants' Joint Opening Brief at 47-54, *Tinsley v. McKay*, 156 F. Supp. 3d 1024 (9th Cir. filed Apr. 30, 2018) (No. 17-17501).

“requires more than an alleged injury that *can* be remedied on a class-wide basis by an injunction. Rule 23(b)(2) applies to injuries that can *only* be remedied by a class-wide injunction”²⁷

Adopting this restrictive view of Rule 23(b)(2) would make structural injunctions all but impossible in a broad swath of cases, in which a defendant has obligations toward individuals but falls short of those obligations on a wholesale basis. While the outcome of the Arizona foster-care litigation remains to be seen,²⁸ state defendants have made similar arguments in a range of other cases,²⁹ and some of those defendants have succeeded. School districts have argued—and at least one court has accepted—that violations of the Individuals with Disabilities Education Act’s “child find” requirement cannot be addressed under Rule 23(b)(2).³⁰ State prison systems have argued—and at least one court has accepted—that a facility’s excessive heat³¹ or extreme overcrowding³² cannot be addressed under Rule 23(b)(2). State Medicaid agencies have argued—and at least one court has accepted—that a formal policy limiting services for persons with disabilities cannot be addressed under Rule 23(b)(2).³³

This Article responds to the push for an overly restrictive interpretation of Rule 23(b)(2), and to the need for a better understanding of what that provision *does* require, with three contributions. First, it offers a framework for understanding indivisibility, as the Supreme Court used that term in *Wal-Mart Stores, Inc. v. Dukes*. Relying on the work of the late Professor Richard Nagareda, the Court in *Dukes* described indivisibility as “the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.”³⁴ One version of indivisibility draws only

²⁷ *Id.* at 53.

²⁸ I co-authored an amicus brief in support of affirmance. Brief of Amici Curiae Administrative Law, Civil Procedure, and Federal Courts Professors in Support of Appellees at i, *Tinsley v. McKay*, 156 F. Supp. 3d 1024 (9th Cir. filed July 6, 2018) (No. 17-17501).

²⁹ See Marcus, *supra* note 16, at 831 (“[S]ome lawyers for state agency defendants have recommended an approach to Rule 23(b)(2) that would prohibit certification unless the plaintiffs can identify a classwide injunction that each member would be entitled to had she sued as an individual.” (citing Brief for the District of Columbia Appellants (Final Version) at 42-43, *D.L. v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013) (No. 11-7153))).

³⁰ See *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 485 (7th Cir. 2012) (holding that 23(b)(2) class certification was inappropriate). *But see* *DL v. District of Columbia*, 860 F.3d 713, 724-25 (D.C. Cir. 2017) (affirming grant of 23(b)(2) class certification).

³¹ See *Yates v. Collier*, 868 F.3d 354, 358 (5th Cir. 2017) (affirming district court’s decision to grant plaintiffs’ motion to certify class).

³² See *Williams v. Jones*, No. 9:14-cv-00787, 2014 WL 2155251, at *2 (D.S.C. May 22, 2014) (denying plaintiffs’ motion to certify class).

³³ See Brief of Appellees at 20, *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016) (No. 15-2377) (arguing that, due to nature of claims, “relief would necessarily be unique for each class member”).

³⁴ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (quoting Nagareda, *supra* note 18, at 132).

on the “can be enjoined” part of this definition. It amounts to a requirement that the defendant could not possibly change its behavior toward one class member without also changing it towards all others, and thus that a court could not possibly enjoin the conduct as to one class member without also halting it (or compelling it) as to all others. This Article refers to this version as “endpoint indivisibility.”³⁵ A putative class of foster children asking the defendant to hire more caseworkers would satisfy an endpoint indivisibility requirement, because a defendant could not both hire and not hire a caseworker, and the expanded capacity would benefit all of the foster children at once.³⁶ In contrast, a putative class of immigrants asking the defendant to provide each of them with bond hearings would not satisfy an endpoint indivisibility requirement, because a defendant could provide a hearing to a particular immigrant without simultaneously providing one to any of the others.

Another version of indivisibility includes the “or declared unlawful” part of the definition quoted above.³⁷ It amounts to a requirement that the challenged conduct could not be lawful as to one class member and unlawful as to others, and thus that the court could not declare the conduct unlawful as to one class member without also deeming it unlawful as to all others.³⁸ This Article refers to this version as “root-cause indivisibility.”³⁹ As with endpoint indivisibility, a root-cause indivisibility requirement would operate in tandem with the commonality requirement,⁴⁰ which requires a common question of law or fact that has the same answer for every member of the class.⁴¹ In order to satisfy both commonality and root-cause indivisibility, therefore, the immigrant detainees discussed above would have to demonstrate that the government’s refusal to provide a bond hearing was either constitutional or unconstitutional as to all of the class members at once, and thus that a court could not declare the blanket denial of bond hearings unlawful as to one class member without simultaneously deeming it unlawful as to all of the others.

This Article’s second contribution is to demonstrate that a root-cause indivisibility requirement makes sense for Rule 23(b)(2), but an endpoint

³⁵ See *infra* Section II.B.1 (discussing concept of endpoint indivisibility).

³⁶ In theory, a defendant could hire a dedicated caseworker for a single plaintiff-child—prohibiting that caseworker from serving any other children, even as her colleagues labored under heavy caseloads. In practice, however, that approach is profoundly unlikely.

³⁷ *Dukes*, 564 U.S. at 360.

³⁸ See Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 232 (2003) (“Properly conceived, mandatory class treatment proceeds from the recognition that it is not possible to ascertain the legality of the defendant’s conduct as to one affected claimant without necessarily doing so as to all others.”).

³⁹ See *infra* Section II.B.2 (discussing concept of root-cause indivisibility).

⁴⁰ FED. R. CIV. P. 23(a)(2).

⁴¹ See *Dukes*, 564 U.S. at 350 (“That common contention, moreover, must be of such a nature that it is capable of classwide resolution . . .”).

indivisibility requirement does not.⁴² The analysis draws on the Court's recognition in *Dukes* that, because of Rule 23's equitable origins, those determining its meaning should look to "the historical models on which the Rule was based."⁴³ An endpoint indivisibility requirement would prevent class certification in cases that Rule 23(b)(2) has historically encompassed.⁴⁴ In contrast, a root-cause indivisibility requirement meshes well with the language and history of Rule 23(b)(2).⁴⁵

A root-cause indivisibility requirement alone, however, would fail to screen out cases that do not seek the "final injunctive relief or corresponding declaratory relief" that Rule 23(b)(2) contemplates.⁴⁶ Some courts have imposed a "cohesiveness" requirement in an effort to accomplish that type of screening-out.⁴⁷ The cohesiveness requirement, however, is deeply flawed, and its goal could be better achieved through more direct means.⁴⁸ The Article's final contribution is thus to introduce a supplemental inquiry, to be applied along with root-cause indivisibility as a test for compliance with Rule 23(b)(2). This supplemental inquiry is rooted in the essential characteristics of "final injunctive relief" and "corresponding declaratory relief," as those terms are used in the text of Rule 23.⁴⁹

Ultimately, it matters less that courts adopt root-cause indivisibility than that they do not adopt endpoint indivisibility as a Rule 23(b)(2) requirement. The latter has the potential to do great harm. When this Article discusses classic civil rights cases, it focuses mainly on the point that screening them out of Rule 23(b)(2) would be inconsistent with their status as historical models for that

⁴² This is not to say that endpoint indivisibility has no relevance to Rule 23. To the contrary, endpoint indivisibility can help to inform the interpretation of Rule 23(b)(1)(A). *See infra* Section II.B.1 (discussing link between endpoint indivisibility and Rule 23(b)(1)(A)).

⁴³ *Dukes*, 564 U.S. at 361 (first citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); and then citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841-45 (1999)).

⁴⁴ *See infra* Section II.B.1 (discussing historical models for Rule 23(b)(2)).

⁴⁵ *See infra* Section II.B.2 (explaining how root-cause indivisibility aligns with history of Rule 23(b)(2)).

⁴⁶ FED. R. CIV. P. 23(b)(2); *see infra* Section II.C (providing example of damages-only case that would satisfy root-cause indivisibility requirement). An endpoint indivisibility requirement would not screen out such cases either. *See infra* Section II.B.1 (providing examples of damages-only cases that would satisfy endpoint indivisibility requirement).

⁴⁷ 2 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 4:34 (5th ed. 2012) ("[One] function that the cohesiveness requirement serves for some courts is that it gauges whether the case is truly one for injunctive relief, not individualized monetary damages."); *see also* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 701-02 (2014) (analyzing relationship between monetary relief and intra-class unity).

⁴⁸ *See* Bone, *supra* note 47, at 716 ("Cohesiveness limits the availability of the class action and does so in a crude way that correlates poorly with the values that the limits are supposed to serve.").

⁴⁹ *See infra* Section III.A (discussing these characteristics).

provision.⁵⁰ But it is also worth noting—and, I hope, uncontroversial—that those cases had tremendous social value. Adopting an endpoint indivisibility requirement for Rule 23(b)(2) would cause that value to be lost in current and future cases addressing important societal issues. As a society, we may be able to recognize that value only in retrospect; but, if we are to have the chance to do so, the next *Brown v. Board of Education*⁵¹ must be given a chance to exist.

I. HISTORICIZING INDIVISIBILITY

Although the term “indivisibility” was new to the federal courts at the time of the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, the term did not appear out of nowhere. Rather, the Court drew on the work of the late Professor Richard Nagareda⁵² and the other authors of the American Law Institute’s *Principles of Aggregate Litigation* (the “ALI Principles”).⁵³ This Part looks to that prior work to shed some light on the Court’s brief discussion of indivisibility in connection with Rule 23(b)(2). As explained below, the version of indivisibility set forth in the legal scholarship encompasses not only Rule 23(b)(2), but the provisions of Rule 23(b)(1) as well.⁵⁴

A. *Nagareda and the ALI Principles*

Nagareda first introduced the concept of remedial indivisibility in an article published in 2003.⁵⁵ That article identified its “central focus” as “the distinction between situations in which class treatment may be mandated . . . and situations in which the court must afford class members the opportunity to opt out.”⁵⁶ On one side of this line are the “mandatory” classes, which include not only those certified under Rule 23(b)(2), but also those certified under Rule 23(b)(1)(A) and Rule 23(b)(1)(B).⁵⁷ On the other side of the line are opt-out class actions,

⁵⁰ See *infra* Section II.A (discussing civil rights cases identified as historical models for Rule 23(b)(2)).

⁵¹ 347 U.S. 483 (1954).

⁵² See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 359 (2011) (citing Nagareda, *supra* note 18, at 131-32; Nagareda, *supra* note 38, at 176 n.110).

⁵³ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (AM. LAW INST. 2010).

⁵⁴ Each class action must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation. FED. R. CIV. P. 23(a). In addition, each class action must fall within one of four subtypes set forth in Rule 23(b). FED. R. CIV. P. 23(b).

⁵⁵ Nagareda, *supra* note 38, at 175-181, 232. An earlier version of indivisibility had appeared previously as part of David Shapiro’s discussion of the entity theory of class actions. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 925 & n.31 (1998) (referring to “truly indivisible interests of the class members” in Rule 23(b)(1)(A) and Rule 23(b)(1)(B) classes and noting that “[i]n certain cases in which injunctive relief is sought, a class of people will be affected if the relief is granted, whether the action is brought in form as an individual action or as a class action”).

⁵⁶ Nagareda, *supra* note 38, at 153.

⁵⁷ Rule 23(b)(1)(A) applies when a defendant may be subject to inconsistent judgments in

which are certified under Rule 23(b)(3) and usually involve requests for monetary relief.⁵⁸

Nagareda argued that class actions under Rule 23(b)(1)(A) and Rule 23(b)(2) focus on class-wide questions, such as the lawfulness of the defendant's policies, rather than individualized questions, such as the amount of damages due to a particular class member.⁵⁹ When class members seek damages, the defendant might be liable only to those class members who can prove specific causation and compensable harm.⁶⁰ But when they do not seek damages, Nagareda wrote, "the liability issue—whether the defendant's generally applicable conduct deviates from the governing legal standard—is *indivisible* in the sense that the defendant's conduct is either lawful or unlawful as to everyone it affects."⁶¹

When the defendant's conduct toward the class "is either permissible or not,"⁶² Nagareda argued, "a winning effort to stop the disputed conduct (or to compel legally required conduct) would, as a practical matter, redound to the benefit not just of those who are parties to the litigation but also to other affected

the absence of class treatment. FED. R. CIV. P. 23(b)(1)(A). Rule 23(b)(1)(B) applies when multiple potential plaintiffs have claims against a limited fund too small to satisfy them all. FED. R. CIV. P. 23(b)(1)(B). These provisions, together with Rule 23(b)(2), are sometimes described as "mandatory" class actions, because they do not guarantee absent class members the right to opt out. *See* FED. R. CIV. P. 23(c)(2) (explicitly requiring class members be allowed to opt out from Rule 23(b)(3) classes but not from Rule 23(b)(1) or Rule 23(b)(2) classes).

⁵⁸ *See* FED. R. CIV. P. 23(b)(3) (allowing class certification when "court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"); FED. R. CIV. P. 23(c)(2)(B) (requiring notice for classes certified under Rule 23(b)(3) that informs members "that the court will exclude from the class any member who requests exclusion").

⁵⁹ Nagareda, *supra* note 38, at 180. Nagareda's subsequent work expanded this concept of remedial indivisibility to explicitly include Rule 23(b)(1)(B) as well. *See, e.g.,* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1100 n.142 (2011).

⁶⁰ Although requests for damages can introduce individualized questions—especially in the mass tort cases that were Nagareda's primary focus—they do not always do so. For example, in a case involving an unwanted, but otherwise inoffensive, text message sent to a known group of recipients, each recipient might be entitled to an identical amount in statutory damages. *See* 47 U.S.C. § 227(b)(3)(B) (2012) (allowing individual suing for violation of Telephone Consumer Protection Act "to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater").

⁶¹ Nagareda, *supra* note 38, at 180 (emphasis added); *see also* Nagareda, *supra* note 18, at 132 ("[T]he crux of [Rule 23(b)(2)] in actual operation today consists of the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.").

⁶² Nagareda, *supra* note 38, at 180; *see also id.* at 232 ("Properly conceived, mandatory class treatment proceeds from the recognition that it is not possible to ascertain the legality of the defendant's conduct as to one affected claimant without necessarily doing so as to all others.").

persons who remain on the sidelines.”⁶³ Those benefits would occur regardless of whether the initial plaintiff sought class treatment. For example, if an employee successfully challenged an employer’s use of a discriminatory test in pay and promotion decisions, the employer would likely cease using that test for *any* of its pay and promotion decisions—and not just for decisions involving that particular plaintiff.⁶⁴ Nagareda deemed it permissible to disallow opt-outs in such cases because “a mandatory class action does not so much impose its mandate [under those circumstances] as act upon the antecedent interdependence of class members’ claims.”⁶⁵

Nagareda served as an Associate Reporter for the ALI Principles, a project that began in 2004 and was completed in 2010.⁶⁶ The project further developed the concept of indivisibility, articulating a distinction between “divisible” and “indivisible” remedies and mapping that distinction onto Rule 23(b): “As a general matter, ‘indivisible remedies’ are those handled primarily under Rules 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure. By contrast, ‘divisible remedies’ are claims typically handled under Rule 23(b)(3).”⁶⁷

Thus, like Nagareda’s solo work, the ALI Principles deem remedial indivisibility to be a feature of all of the mandatory subtypes.⁶⁸ Moreover, and

⁶³ *Id.* at 180. Nagareda added that, “even if this were not true as a practical matter, opt-out claimants could attempt to invoke *Parklane* issue preclusion in order to get the benefit of a class victory against the defendant.” *Id.* If one employee’s challenge failed, however, any nonparty employees would remain free to challenge the test again, unburdened by issue preclusion. *Id.* at 179 (noting that nonparties “could not have issue preclusion successfully interposed against them”). In Nagareda’s view, “[t]he situation of the injunctive or declaratory relief class challenging a general course of conduct thus forms a distinctive case for mandatory class treatment to rope in all would-be invokers of *Parklane* issue preclusion, if a class action is to take place at all.” *Id.* at 180. This argument references the Supreme Court’s decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), which sometimes allows a plaintiff to rely on a proposition established in a case between a different plaintiff and the current defendant. For a more detailed explanation of *Parklane* preclusion, see *infra* note 128.

⁶⁴ See Nagareda, *supra* note 38, at 180 (“A disputed feature of a pension plan is either permissible or not; the same is true of a disputed administrative procedure or employment practice.”).

⁶⁵ *Id.* at 232. The ALI Principles, discussed below in notes 129 and 182, echo this language. See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 cmt. h (AM. LAW INST. 2010) (arguing that “[m]andatory aggregation with respect to claims for an indivisible remedy simply recognizes the preexisting interdependence of such claims”).

⁶⁶ See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(h) (AM. LAW INST. 2010). Robert Klonoff and Charles Silver also served as Associate Reporters, and Samuel Issacharoff was the project’s Reporter. *Id.*

⁶⁷ *Id.* § 2.04 cmt. a.

⁶⁸ Much of the ALI Principles’ discussion of indivisible relief focuses on the “limited fund” scenario covered by Rule 23(b)(1)(B). See *id.* § 2.04; Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628, 669 (2011) (noting this focus and commenting that “relatively few [of the] illustrative cases involve injunctive relief”) However, the ALI Principles do

also like Nagareda’s individual work, the ALI Principles describe the distinction between divisibility and indivisibility in functional terms: the central question is whether ordering relief for one claimant would “as a practical matter”⁶⁹ (or “in practical effect”⁷⁰) determine the availability of relief for other claimants.

B. Wal-Mart Stores, Inc. v. Dukes

A year after the ALI Principles were completed, the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*. The case involved a putative class action on behalf of female Wal-Mart employees nationwide.⁷¹ The plaintiffs alleged that sexism suffused the company’s culture, harming all of the women who worked there.⁷² They sought injunctive relief, which would operate company-wide to change Wal-Mart’s allegedly discriminatory pay and promotion practices, and back pay, which would be distributed to eligible class members individually.⁷³ The plaintiffs sought certification under Rule 23(b)(2) for a single class seeking both forms of relief.⁷⁴

The Court unanimously held that the plaintiffs’ back pay claims could not be certified as part of a Rule 23(b)(2) class.⁷⁵ Quoting Nagareda, the Court drew upon the scholarship about indivisibility discussed above:

The key to the (b)(2) class is “the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or

provide an example of indivisible relief that maps onto Rule 23(b)(2); it involves a case in which “a claimant seeks a prohibitory injunction or a declaratory judgment with respect to a generally applicable policy or practice maintained by a defendant.” PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.04 cmt. b, illus. 5 (AM. LAW INST. 2010).

⁶⁹ “Indivisible remedies are those such that the distribution of relief to any claimant *as a practical matter* determines the application or availability of the same remedy to other claimants.” PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.04(b) (AM. LAW INST. 2010) (emphasis added).

⁷⁰ “Divisible remedies are those that entail the distribution of relief to one or more claimants individually, without determining *in practical effect* the application or availability of the same remedy to any other claimant.” *Id.* § 2.04(a) (emphasis added).

⁷¹ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011).

⁷² *Id.* (“The basic theory of [plaintiffs’] case is that a strong and uniform ‘corporate culture’ permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart’s thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice.”).

⁷³ *Id.* (“[Plaintiffs] seek[] injunctive and declaratory relief, punitive damages, and backpay.”).

⁷⁴ *Id.*

⁷⁵ *Id.* at 360. A separate holding, which interpreted the commonality requirement imposed by Rule 23(a)(2), split the Court five-four. *Id.* at 367-68 (Ginsburg, J., concurring in part and dissenting in part) (expressing agreement that case “should not have been certified under Federal Rule of Civil Procedure 23(b)(2)” but dissenting from majority’s holding as to commonality).

as to none of them.” In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.⁷⁶

Even as the Court in this passage quotes a statement about Rule 23(b)(2) specifically,⁷⁷ it invokes a concept—indivisibility—that scholars had developed for all of the mandatory subtypes.⁷⁸

Dukes has left a number of questions unanswered as to how courts should interpret Rule 23(b)(2).⁷⁹ First, the majority opinion makes no mention of “cohesiveness,” a judge-made requirement that some courts have applied to Rule 23(b)(2).⁸⁰ This requirement has been heavily criticized,⁸¹ and some courts have rejected it outright.⁸² Even among those courts that have adopted a cohesiveness

⁷⁶ *Id.* at 360-61 (majority opinion) (quoting Nagareda, *supra* note 38, at 132). The Court went on to add that “[c]lasses certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class.” *Id.* at 361-62 (citation omitted).

⁷⁷ See *supra* notes 34-41 and accompanying text (analyzing meaning of language quoted from Nagareda, *supra* note 18, at 132).

⁷⁸ See *supra* notes 65-70 and accompanying text (discussing development of indivisibility as concept applicable to all mandatory classes).

⁷⁹ See Marcus, *supra* note 16, at 830 (“Rule 23(b)(2) poses a stricter test after [*Dukes*], but confusion dogs its application.”).

⁸⁰ RUBENSTEIN, CONTE & NEWBERG, *supra* note 47, § 4:34 (“Courts have developed a test to ensure that such glue in fact exists in (b)(2) cases. Specifically, many courts demand that proponents of a (b)(2) class action demonstrate that the class’s claims are ‘cohesive.’”); see, e.g., Barnes v. Am. Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1998) (“While 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive.”).

⁸¹ See, e.g., Bone, *supra* note 47, at 716 (“Cohesiveness limits the availability of the class action and does so in a crude way that correlates poorly with the values that the limits are supposed to serve.”); Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1856 (2015) (arguing that “[c]lass actions are no longer functional” due in part to courts’ “misguided focus on class members’ cohesiveness vis-à-vis one another”); Marcus, *supra* note 16, at 788-89 (arguing that cohesiveness requirement has “no anchor in the text of the rule” and has “proved incoherent in application”).

⁸² See RUBENSTEIN, CONTE & NEWBERG, *supra* note 47, § 4:34 (identifying district courts across three circuits that have rejected cohesiveness test). At the same time, the Supreme Court has suggested that cohesiveness may be a relevant consideration under several other provisions of Rule 23. See Burch, *supra* note 81, at 872 (noting that Court has variously “identified cohesion as part of the predominance inquiry under Rule 23(b)(3), . . . suggested that cohesion was ensconced in Rule 23(b)(1)(B), . . . [and] appeared to locate cohesion within Rule 23(a)(2)’s commonality” (citations omitted)).

requirement, the test has taken on several distinct forms.⁸³ The *Dukes* opinion has left unclear whether indivisibility is meant to clarify, reject, replace, or supplement cohesiveness.⁸⁴

Second, the *Dukes* opinion does not explain how a lower court should distinguish between a single injunction with class-wide effects, on the one hand, and multiple injunctions with similar individual effects, on the other hand. This distinction has largely escaped scholarly attention, but it has significant implications. For example, consider a state law that prohibits granting marriage licenses to same-sex couples.⁸⁵ Does an order enjoining that law amount to a single injunction, because it invalidates a uniform statewide policy?⁸⁶ Or does it amount to multiple injunctions, one for each couple seeking to marry, because each couple will have to apply for their own marriage license in order to obtain relief? The answer should be an easy one, but there are potential misunderstandings of indivisibility that would point in the other direction.⁸⁷

Third, the Court asserted that “the relief sought [under Rule 23(b)(2)] must perforce affect the entire class at once,”⁸⁸ but it did not explain what type and degree of class-wide effects would suffice. This question, too, has largely escaped scholarly attention despite its broad potential effects. Consider, again, a state’s same-sex marriage ban. Does a plaintiff couple challenging that law seek relief that “perforce affect[s] the entire class at once,” so long as the legal question presented by any same-sex couple would be the same?⁸⁹ Or do such

⁸³ Marcus, *supra* note 16, at 789 (describing three different forms of cohesiveness that appear in case law: (1) “a predominance inquiry,” (2) an inquiry into “whether a court could craft an injunction in fairly specific terms that would not require individualized tailoring for each class member,” and (3) an assessment of “the harmony of interests among class members”); see also RUBENSTEIN, CONTE & NEWBERG, *supra* note 47, § 4:34 (identifying “at least three distinct functions” served by cohesiveness requirement).

⁸⁴ See Marcus, *supra* note 16, at 830 (noting that after *Dukes*, “[s]ome courts continue to treat the Rule 23(b)(2) inquiry as a test for class ‘cohesion’”). Indeed, some courts have suggested that the cohesiveness and indivisibility inquiries are now identical. See *Houser v. Pritzker*, 28 F. Supp. 3d 222, 250 (S.D.N.Y. 2014) (“The cohesiveness element merely requires that plaintiffs’ legal injuries be similar enough that they all can be remedied with a single ‘indivisible’ injunction.”).

⁸⁵ This example is based on *Harris v. Rainey*, 299 F.R.D. 486, 494 (W.D. Va. 2014) (“[Defendant] puts forward one additional argument against class certification—that it should be denied because the plaintiffs have failed to demonstrate that [defendant] acted or refused to act on grounds that apply generally to the entire class [by denying marriage licenses to same-sex couples].”).

⁸⁶ See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 445 (2017) (noting “shift in the conception of legal invalidity, from an invalid law being one a judge merely failed to apply because a higher law controlled, to the conception of a judge ‘striking down’ and thus removing from operation an invalid law”).

⁸⁷ See *infra* Section II.B (discussing different forms of indivisibility).

⁸⁸ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361-62 (2011).

⁸⁹ As discussed *infra* Section II.B, Rule 23(b)(2) must be read in tandem with the commonality requirement in Rule 23(a)(2), which prevents certification unless class

plaintiffs seek relief that does *not* “perforce affect the entire class at once,” because the defendant could issue one same-sex couple a marriage license while continuing to deny marriage licenses to all others? Here, too, an overly restrictive understanding of indivisibility has the potential to lead courts astray.

Getting Rule 23(b)(2) right is important. Class treatment under Rule 23(b)(2) protects against mootness, avoids the need for multiple claimants to spend money and social capital on their own separate litigation, ensures that the scope of the remedy will match the scope of the violation proved, limits a defendant’s ability to resist system-wide enforcement, and subjects the plaintiffs to the same preclusive consequences as the defendant.⁹⁰ Answering the foregoing questions incorrectly would jeopardize these benefits in a broad range of cases affecting the public interest⁹¹—whether because class certification is sought and denied, potentially leaving members of the claimant group with inadequate or no relief,⁹² or because class certification is not sought in the first place, potentially resulting in the individual action becoming moot before the court can reach a decision as to the lawfulness of the defendant’s conduct.⁹³

II. MAPPING INDIVISIBILITY

As the previous Part explained, the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* described indivisibility as a requirement for Rule 23(b)(2) class actions specifically, but it drew upon an understanding of indivisibility from legal scholarship that applied to all of the mandatory subtypes. As noted previously,

members’ claims “depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 564 U.S. at 350.

⁹⁰ See generally Carroll, *supra* note 6 (discussing benefits and drawbacks of class treatment for plaintiffs seeking injunctive or declaratory relief).

⁹¹ See *supra* notes 13-16 and accompanying text (discussing class certification decisions in cases involving education, foster care, and conditions of confinement).

⁹² See *infra* note 262 (discussing *Jamie S. v. Milwaukee Bd. of Sch. Dirs.*, No. 2:01-cv-00928, 2012 WL 3600231, at *4 (E.D. Wis. Aug. 20, 2012), in which the district court dismissed remaining individual actions on remand from appellate court’s decision reversing class certification).

⁹³ See Carroll, *supra* note 6, at 2036-38 (discussing risk that plaintiff’s claim will become moot if class certification is not sought). For example, in *Preiser v. Newkirk*, 422 U.S. 395 (1975), the Supreme Court vacated an appellate decision in a prisoners’ rights case and remanded with instructions to dismiss the action as moot. Justice Marshall’s concurrence reads, in its entirety, as follows:

I join this opinion only because for some reason respondent did not file this case as a class action. As a result, the State of New York by releasing the other three named plaintiffs, transferring respondent back to Wallkill after the District Court action, and finally to a lesser correctional facility after the Court of Appeals acted, thereby made the case moot.

Id. at 404 (Marshall, J., concurring).

this Article seeks not to challenge *Dukes*, but to make sense of it. Making sense of *Dukes* requires breaking indivisibility down into its component parts and identifying which of those components best fits with Rule 23(b)(2). This Part takes up those tasks.

A. *Evaluating Consistency with Rule 23(b)(2)*

Even as the *Dukes* opinion left a number of questions unanswered, it implicitly suggested a framework for evaluating whether a particular interpretation of indivisibility would pass muster as a test for compliance with Rule 23(b)(2). The sources of that framework are twofold.

First, of course, is the Court's actual holding as to whether the putative class of Wal-Mart employees could meet the requirements of Rule 23(b)(2). The Court explained that Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to . . . an individualized award of monetary damages."⁹⁴ Because the plaintiffs in *Dukes* sought such individualized monetary relief—specifically, back pay—the Court held that the proposed class could not be certified under Rule 23(b)(2).⁹⁵

Second, the Court explained that, because of Rule 23's equitable origins, those determining its meaning should look to "the historical models on which the Rule was based."⁹⁶ In that regard, the Court noted that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination' are prime examples of what (b)(2) is meant to capture."⁹⁷ The Court referred specifically to the cases listed in the Advisory Committee note to the 1966 amendments to the rule.⁹⁸ Several of those cases involved challenges to the segregation of K-12 public schools; another, *Frasier v. Board of Trustees of the University of North Carolina*,⁹⁹ involved a challenge to a public university's policy of refusing to admit African American students.¹⁰⁰

Taken together, these two aspects of *Dukes* suggest a test for evaluating whether a particular version of indivisibility should apply as a requirement for

⁹⁴ *Dukes*, 564 U.S. at 360-61.

⁹⁵ *Id.* at 360.

⁹⁶ *Id.* at 361 (first citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); and then citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841-45 (1999)).

⁹⁷ *Id.* (quoting *Amchem Prods., Inc.*, 521 U.S. at 614).

⁹⁸ *Id.* (citing *Potts v. Flax*, 313 F.2d 284, 289 n.5 (5th Cir. 1963); *Brunson v. Bd. of Trs. of Sch. Dist. No. 1, Clarendon Cty.*, 311 F.2d 107, 109 (4th Cir. 1962); *Frasier v. Bd. of Trs. of the Univ. of N.C.*, 134 F. Supp. 589, 593 (M.D.N.C. 1955), *aff'd*, 350 U.S. 979 (1956) (per curiam)).

⁹⁹ 134 F. Supp. 589 (M.D.N.C. 1955), *aff'd*, 350 U.S. 979 (1956) (per curiam).

¹⁰⁰ *Id.* at 590. The Advisory Committee note also referred to two hypothetical cases outside of the civil rights context, one involving an action by retailers against a seller alleged to impose an unlawful pricing differential, and another by purchasers or licensees against a patent-holder alleged to impose an unlawful tying condition. See FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (Subdivision (b)(2)).

certification under Rule 23(b)(2). Properly construed, an indivisibility requirement should *prevent* class certification for a group of plaintiffs seeking back pay, and it should *permit* class certification for the plaintiff groups who brought the cases listed in the Advisory Committee note (including both the K-12 student plaintiffs and the university-applicant plaintiffs). With that test in mind, this Article takes up the question of the different meanings indivisibility can take.

B. *The Forms of Indivisibility*

As explained below, this Article identifies two forms of indivisibility:¹⁰¹ endpoint indivisibility¹⁰² and root-cause indivisibility.¹⁰³ Each falls under the umbrella concept of indivisibility set forth in the legal scholarship upon which the Court relied in *Dukes*, but only root-cause indivisibility is consistent with the historical models for Rule 23(b)(2).

Whatever form it takes, indivisibility cannot erase the commonality requirement, which is imposed by Rule 23(a)(2) and applies to all class actions. In order to satisfy commonality, a putative class must show that a legal or factual question central to all of their claims has the same answer for every member of the class.¹⁰⁴ The following discussion will therefore evaluate the interaction between the commonality requirement and each potential version of indivisibility.

¹⁰¹ A third form of indivisibility, which is less relevant to this discussion, involves multiple potential plaintiffs with valid claims against a monetary fund too small to satisfy them all. See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.04 cmt. a (AM. LAW INST. 2010) (referring to limited-fund scenario as example of indivisible relief). In those circumstances, if the defendant were to pay the complete amount of one plaintiff's claim, it would become impossible for the defendant to pay the complete amount of all the other valid claims as well. One could use the term "limited-fund indivisibility" to describe this type of indivisible relief, in which providing complete relief to one class member makes it impossible to provide complete relief to all of the others. In such cases, to use the language of *Dukes*, "the relief sought must perforce affect the entire class at once." *Dukes*, 564 U.S. at 361-62.

The limited-fund scenario is the prototypical case for class treatment under Rule 23(b)(1)(B). See, e.g., *Ortiz*, 527 U.S. at 816-17 (discussing propriety of limited fund class treatment). Accordingly, a requirement of limited-fund indivisibility would fit well with that provision. It plainly does not fit with the historical models for Rule 23(b)(2), however. See *supra* Section II.A (discussing the historical models for Rule 23(b)(2)). For example, admitting one African American student to a previously all-white high school does not make it impossible to admit others—or, indeed, to integrate the school district as a whole.

¹⁰² See *infra* Section II.B.1 (discussing endpoint indivisibility).

¹⁰³ See *infra* Section II.B.2 (discussing root-cause indivisibility).

¹⁰⁴ *Dukes*, 564 U.S. at 350 ("[Plaintiffs'] claims must depend upon a common contention . . . [that] must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

1. Endpoint Indivisibility

In some circumstances involving indivisible relief, a defendant will be literally unable to provide complete relief to one claimant without simultaneously extending it to other members of a broader group. This Article uses the term “endpoint indivisibility” to describe this scenario, which is characterized by the immediate and unavoidable effects of providing complete relief to any member of the putative class.¹⁰⁵ For example, a defendant cannot simultaneously build and not build a particular wheelchair ramp, issue and not issue a particular bond, or cease and not cease dumping wastewater from a particular pipe. In such cases, to use the Court’s language in *Dukes*, “the relief sought must perforce affect the entire class at once.”¹⁰⁶

That the members of a group are all immediately and unavoidably affected by the same conduct, so as to satisfy an endpoint indivisibility requirement, does not always entail that their claims all involve a common question of law or fact, so as to satisfy the commonality requirement.¹⁰⁷ For example, consider a group of claimants who seek the construction of a wheelchair ramp, which would immediately and unavoidably benefit each of them. One subgroup of customers might base their demand for the ramp on the Americans with Disabilities Act’s (“ADA”) public accommodation provisions, while another subgroup of employees might base their demand for the ramp on the ADA’s employment discrimination provisions. In that scenario, an endpoint indivisibility requirement would operate in tandem with the commonality requirement to define the appropriate scope of the class (and any necessary subclasses).

While the foregoing example involves injunctive relief, endpoint indivisibility also embraces some situations involving monetary relief. For example, consider a situation in which an anticipated future beneficiary of a retirement plan alleges that the defendant has caused losses to the fund as a whole.¹⁰⁸ In those circumstances, a provision in the Employee Retirement Income Security Act of 1974 (“ERISA”) “permits plan participants to bring counts on behalf of the plan to recover *plan* injuries, not individual injuries.”¹⁰⁹ A plaintiff bringing such a claim can therefore seek an order requiring the defendant to make a payment in the amount of the loss to the retirement fund,

¹⁰⁵ See *supra* text accompanying notes 34-35 (defining and discussing endpoint indivisibility). The term “logical indivisibility” could fit this category as well. See Carroll, *supra* note 1, at 854-55 (using term “logical indivisibility” in connection with Rule 23(b)(1)(A)). I avoid that term in this Article, however, because of the potential confusion caused by the meaning of “logical impossibility” as understood by philosophers. I thank Professor Larry Solum for alerting me to this potential confusion.

¹⁰⁶ *Dukes*, 564 U.S. at 361-62.

¹⁰⁷ See FED. R. CIV. P. 23(a)(2) (requiring members of class to show that “there are questions of law or fact common to the class”).

¹⁰⁸ See, e.g., *Harris v. Koenig*, 271 F.R.D. 383, 385-86 (D.D.C. 2010).

¹⁰⁹ *Id.* at 390 (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008)).

where it would be available for the payment of any future benefits. Because a defendant making that payment would simultaneously confer a benefit on all of the other anticipated beneficiaries, the situation is one of endpoint-indivisible relief. Such ERISA claims constitute the most common type of Rule 23(b)(1)(A) class action for monetary relief,¹¹⁰ which suggests that a requirement of endpoint indivisibility would fit well with that provision.

Further support for a link between endpoint indivisibility and Rule 23(b)(1)(A) comes from *Supreme Tribe of Ben-Hur v. Cauble*.¹¹¹ There, a fraternal benefit organization sought to reorganize financially, and some members of the organization opposed the move.¹¹² Of course, an organization cannot both financially reorganize and not financially reorganize at the same time. Accordingly, if the defendant were to halt the reorganization at the request of some members, all other members would also immediately and unavoidably experience that relief. The claimant group could thus satisfy an endpoint indivisibility requirement. The Advisory Committee note to the 1966 amendments listed *Cauble* as a historical model for Rule 23(b)(1)(A), further suggesting that an endpoint indivisibility requirement would fit well with that provision.

Might an endpoint indivisibility requirement also apply to Rule 23(b)(2)?¹¹³ To answer that question, this Article turns to the test identified above, and particularly to the cases listed in the Advisory Committee note to the 1966 amendments as historical models for Rule 23(b)(2).¹¹⁴ As noted previously, some of those cases involved challenges to the racial segregation of K-12 public schools.¹¹⁵ Whether the students bringing such challenges would satisfy an

¹¹⁰ Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 GEO. WASH. L. REV. 798, 814 (2014) (“The most common type of [Rule 23](b)(1)(A) action for money is a suit under ERISA.”).

¹¹¹ 255 U.S. 356 (1921); see also Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1605 (2007) (discussing *Cauble* as example of “situations in which the party opposing the class can act only indivisibly towards the class members”).

¹¹² *Cauble*, 255 U.S. at 359-60 (describing details of reorganization and resulting litigation).

¹¹³ After all, some courts and scholars now treat Rule 23(b)(1)(A) and Rule 23(b)(2) as largely overlapping, if not interchangeable. See, e.g., *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1197 (9th Cir. 2001) (Fletcher, J., dissenting) (criticizing majority opinion for essentially “collapsing the Rule 23(b)(1)(A) certification inquiry into that of Rule 23(b)(2)”; Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 746 n.92 (2013) (noting that some courts’ interpretations of Rule 23(b)(1)(A) have rendered provision “essentially meaningless” because of resulting overlap with Rule 23(b)(2)).

¹¹⁴ See *supra* Section II.A (discussing Advisory Committee’s note to 1966 amendments to Rule 23).

¹¹⁵ See *supra* note 98 and accompanying text (listing civil rights cases addressed by Advisory Committee note).

endpoint indivisibility requirement depends on the nature of the underlying rights and remedies.

In that regard, the Supreme Court has made clear that the Equal Protection Clause entitles a K-12 student to a racially nondiscriminatory public school assignment, not a racially integrated public school system.¹¹⁶ Accordingly, a defendant can provide complete relief through the named plaintiff's race-neutral assignment to a particular school, even if the defendant takes no other steps toward racial integration.¹¹⁷ Because a defendant could provide that relief for one student while leaving all of the other students' school assignments unchanged,¹¹⁸ providing complete relief to one claimant would not immediately and unavoidably afford relief to any of the others, and the putative class would not satisfy an endpoint indivisibility requirement.¹¹⁹

¹¹⁶ In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), for example, the Court held that the defendants' race-conscious school assignments violated the Equal Protection Clause, notwithstanding that the defendants' goal was to promote racial diversity. *Id.* at 711. The Court "emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.'" *Id.* at 721 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

¹¹⁷ Of course, it is possible to imagine a different understanding of the Equal Protection Clause, pursuant to which K-12 students in segregation cases *would* satisfy an endpoint indivisibility requirement. In a 2007 dissent, for example, Justice Breyer expressed the view that the Clause requires "racially integrated education." See *Parents Involved*, 551 U.S. at 803 (Breyer, J., dissenting). On that view, the remedy due to any particular student would involve integration of the student's entire school (or school district), such that a defendant could not possibly provide complete relief to one student without immediately and unavoidably providing it to others. Cf. *Bray*, *supra* note 86, at 455 (noting that "some desegregation decrees [in the post-*Brown* era] did go beyond protecting the plaintiff"). Justice Breyer's dissent, however, was a dissent—the constitutional understanding it reflects did not carry the day.

¹¹⁸ As Charles Alan Wright—one of the drafters of the 1966 amendments to Rule 23—put it, it would be entirely possible for a court "to tell a school board that it must accept Smith in a white school but need not accept Jones." Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 351 (2017) (quoting Letter from Charles Alan Wright to Benjamin Kaplan (Mar. 30, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, *microformed on* CIS No. CI-7001, at 13, 15 (Cong. Info. Serv.)); cf. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2186 (1989) ("In the face of massive official resistance to local implementation of the Court's decision in *Brown*, the civil rights attorney could never count on school officials to construe a court order admitting enumerated individual plaintiffs to a segregated school as an order to desegregate.").

¹¹⁹ Benjamin Kaplan, the Advisory Committee reporter during the drafting of the 1966 amendments, appears to have believed (or at least feared) that courts would take this view of the relief warranted in a K-12 desegregation case. In support of the provision that would ultimately become Rule 23(b)(2), he wrote that "[i]f a school desegregation case, for example, is maintained by an individual on his own behalf, rather than as a class action, very likely the relief will be confined to admission of the individual to the school and will not encompass

In addition to K-12 desegregation cases, the 1966 Advisory Committee note included *Frasier v. Board of Trustees of the University of North Carolina*, a case about a public university's policy of excluding African American students. There, the plaintiffs sought (and ultimately received) an order requiring the university to consider African American applicants on the basis of their individual qualifications, rather than excluding them on the basis of their race.¹²⁰ The university could have provided the requested relief to any African American applicant, by considering his or her application without regard to the racially exclusionary policy, without immediately and unavoidably affecting any of the other potential class members. The plaintiffs would therefore not have satisfied an endpoint indivisibility requirement, making such a requirement inconsistent with another of the historical models for Rule 23(b)(2).

The Advisory Committee note also provided two illustrative scenarios for Rule 23(b)(2) that did not involve civil rights:

[A]n action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or

broad corrective measures—desegregation of the school.” Marcus, *supra* note 1, at 700 (quoting Letter from Benjamin Kaplan to John P. Frank (Feb. 7, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, *microformed on* CIS-6312-31, at 17-18 (Cong. Info. Serv.)).

¹²⁰ *Frasier v. Bd. of Trs. of the Univ. of N.C.*, 134 F. Supp. 589, 593 (M.D.N.C. 1955), *aff'd*, 350 U.S. 979 (1956) (per curiam) (“[W]e decide only that the Negroes as a class may not be excluded because of their race or color; and the Board retains the power to decide whether the applicants possess the necessary qualifications.”). Even after the court issued the requested injunction in *Frasier*, the defendant still needed to consider each applicant's unique qualifications in order to determine whether to actually admit any one of them. *Id.* This aspect of *Frasier* suggests that courts should generally not deny certification under Rule 23(b)(2) on the basis that the defendant will have individualized interactions with class members after the court issues a remedy. For example, in *Jamie S. v. Milwaukee Public Schools*, the plaintiffs alleged that the defendant had not done enough to seek out and identify students with disabilities as required by 20 U.S.C. § 1412(a)(3)(A) (2012)—the Child Find provision of the IDEA. 668 F.3d 481, 485 (7th Cir. 2012). The plaintiffs sought an injunction that would have involved extensive outreach to parents of children with potential disabilities, some of whom would then receive individual evaluations of their need for special education services. *Id.* at 487. The remedy thus involved the class-wide removal of barriers to individualized consideration, just as in *Frasier*. The Seventh Circuit, however, reversed the district court's certification of the Rule 23(b)(2) class on the grounds that “the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made.” *Id.* at 499.

licensors of the unpatented machine, to test the legality of the “tying” condition.¹²¹

In the first of these scenarios, the defendant seller could use the lower price in transactions with any given retailer without immediately and unavoidably changing its pricing in transactions with any of the others. In the second, the defendant patentee could allow any given purchaser to buy only the primary machine while still requiring others to buy the ancillary machine as well. Accordingly, in neither of these scenarios would the plaintiffs satisfy an endpoint indivisibility requirement, making such a requirement inconsistent with these historical models for Rule 23(b)(2).

In sum, although an endpoint indivisibility requirement appears to be a good fit for Rule 23(b)(1)(A),¹²² such a requirement would lead to the denial of class certification in cases and scenarios recognized as historical models for Rule 23(b)(2). In the context of the latter provision, a different version of indivisibility must therefore apply.

2. Root-Cause Indivisibility

Another version of indivisibility, which I term “root-cause indivisibility,” similarly applies to circumstances in which “the relief sought must perforce affect the entire class at once.”¹²³ But while endpoint indivisibility turns on the *literal impossibility* of a defendant providing complete relief to one claimant without producing a class-wide impact, root-cause indivisibility turns on the *practical effects* of successful litigation by any given member of the putative class.¹²⁴

Specifically, in situations of root-cause indivisibility, the plaintiff challenges a defendant’s conduct that causes harm to both the plaintiff and a broader group, such that deciding the case in the plaintiff’s favor would require a court to rule the conduct unlawful.¹²⁵ In such cases, as Nagareda put it, “it is not possible to ascertain the legality of the defendant’s conduct as to one affected claimant without necessarily doing so as to all others.”¹²⁶ Even if the court does not then

¹²¹ FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (Subdivision (b)(2)).

¹²² See Carroll, *supra* note 1, at 854-55 (noting connection between this form of indivisibility and Rule 23(b)(1)(A)).

¹²³ Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 361-62 (2011).

¹²⁴ As noted previously, the scholarly articulation of indivisibility explicitly contemplated that practical effects could create situations of indivisible relief. See *supra* Section I.A (discussing scholarship linking indivisibility to practical effects of litigation).

¹²⁵ See *supra* text accompanying notes 38-39 (defining and discussing root-cause indivisibility). To frame the point in terms used by Professor Elizabeth Burch, this type of challenge involves “conduct components” shared by the entire class. See Burch, *supra* note 81, at 1874-81 (explaining distinction between “conduct components” of claim, which relate to defendant’s conduct, and “eligibility components,” which entitle particular plaintiffs to relief they request).

¹²⁶ See Nagareda, *supra* note 38, at 232.

enjoin the defendant's conduct as to all of those affected, the litigation can be expected to produce class-wide benefits—whether through the generation of precedent about the lawfulness of the defendant's conduct,¹²⁷ the invocation of issue preclusion in other claimants' lawsuits against the defendant,¹²⁸ or the defendant's decision to cease engaging in the challenged conduct altogether.¹²⁹

As with endpoint indivisibility, root-cause indivisibility operates in tandem with commonality to define the appropriate scope of the class (and any necessary subclasses) in light of the applicable substantive law.¹³⁰ Consider *Ms. L. v. ICE*,¹³¹ a substantive due process challenge to the government's "family separation" practice of separating migrant parents from their children at the border.¹³² When a putative class of migrant parents sought certification under Rule 23(b)(2), the district court narrowed the proposed class definition to

¹²⁷ Cf. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1647 (1997) (arguing that generation of precedent means that some cases are "not purely self-regarding acts with no externalities").

¹²⁸ See Nagareda, *supra* note 38, at 175-81 (discussing interplay between issue preclusion and mandatory class treatment). The form of issue preclusion (also known as collateral estoppel) relevant here is nonmutual offensive issue preclusion, which refers to the following scenario: Plaintiff *A* sues Defendant *X* in non-class litigation. Plaintiff *B* also sues Defendant *X* on a claim presenting an issue that was decided against Defendant *X* in its litigation with Plaintiff *A*. Although Plaintiff *A* and Plaintiff *B* are not the same party, Plaintiff *B* seeks to bind Defendant *X* to the prior court's decision on that issue. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (permitting nonmutual offensive collateral estoppel, at discretion of the district court, under certain circumstances). The Supreme Court has held that courts may not apply this form of issue preclusion against the federal government. See *United States v. Mendoza*, 464 U.S. 154, 158 (1984) ("*Parklane Hosiery's* approval of nonmutual offensive collateral estoppel is not to be extended to the United States.>").

¹²⁹ As the ALI Principles put it in their discussion of indivisible remedies involving injunctive or declaratory relief:

When a claimant seeks a prohibitory injunction or a declaratory judgment with respect to a generally applicable policy or practice maintained by a defendant, those remedies—if afforded—generally stand to benefit or otherwise affect all persons subject to the disputed policy or practice, even if relief is nominally granted only as to the named claimant. Even in litigation against governmental entities, to which limitations on preclusion may apply as a formal matter, the generally applicable nature of the policy or practice typically means that the defendant government will be in a position, as a practical matter, either to maintain or to discontinue the disputed policy or practice as a whole, not to afford relief therefrom only to the named claimant.

PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.04 cmt. a (AM. LAW INST. 2010). The formal "limitations on preclusion" referenced in this passage result from *Mendoza*, which held that courts may not apply nonmutual collateral estoppel against the federal government. *Mendoza*, 464 U.S. at 158; see also *supra* note 128 (discussing *Mendoza* and limitations on preclusion).

¹³⁰ See *supra* text accompanying note 107 (discussing how commonality requirement operates in tandem with endpoint indivisibility requirement to define class scope).

¹³¹ 302 F. Supp. 3d 1149 (S.D. Cal. 2018).

¹³² *Id.* at 1162.

exclude those with criminal histories or communicable disease, reasoning that separating such parents from their children could involve factual and legal questions not shared by the broader group.¹³³ Because the government's practice of family separation could not be constitutional as to some members of the narrowed class but not others,¹³⁴ the narrowed class satisfied a root-cause indivisibility requirement. Because it would be possible for the government to keep some families together while separating others, however, an endpoint indivisibility requirement would not have been satisfied.

Consider, also, a state that refuses to issue marriage licenses to same-sex couples solely because of their same-sex status (i.e., without regard to whether they are otherwise eligible to marry). Because the state's conduct could not be lawful as to one same-sex couple but unlawful as to another, a court hearing such a challenge by any same-sex couple would have to decide the lawfulness of the state's conduct (i.e., the denial of marriage licenses solely because the applicants are members of the same sex) as to all same-sex couples.¹³⁵ A putative class of same-sex couples bringing such a challenge would therefore satisfy a root-cause indivisibility requirement. That class would not satisfy an endpoint indivisibility requirement, however, because the defendant could provide complete relief to one same-sex couple (by issuing that couple a marriage license) without simultaneously providing relief to any of the others.¹³⁶

¹³³ See Order Granting in Part Plaintiffs' Motion for Class Certification at 11, 17 n.10, Ms. L. v. ICE, 302 F. Supp. 3d 1149 (S.D. Cal. June 26, 2018).

¹³⁴ See *id.* at 17 ("A determination regarding whether the practice of family separation and failure to reunify such families violates due process and warrants injunctive relief *would apply to each class member . . .*" (emphasis added)).

¹³⁵ The point here is not that all such couples must be permitted to marry or not; rather, the point is that the state has given the same reason for denying marriage licenses to all such couples, and that reason must be constitutionally permissible or not. The Supreme Court has established that it is not, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015), but the opposite conclusion would have supported class certification as well.

¹³⁶ Cf. Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 492 n.18 (2016) ("Even if a law is facially unconstitutional, it often will be possible for a trial or appellate court to enjoin its enforcement solely against individual plaintiffs in a case, rather than completely."). To be sure, a state might choose to treat all same-sex couples similarly with respect to the issuance of marriage licenses. It might even determine that state or federal law requires it to do so. It nonetheless remains true that a state can issue a marriage license to one same-sex couple without simultaneously granting one to all of the others; indeed, that type of differential treatment has occurred fairly recently. During a period in 2004, for example, some same-sex couples in San Francisco, California were issued marriage licenses while couples in other parts of the state were denied them. See Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J.C.R. & C.L. 1, 6-7 (2007) (describing San Francisco mayor's decision to grant marriage licenses to same-sex couples). And during a period in 2015, some same-sex couples in Rowan County, Kentucky were denied marriage licenses while couples in other parts of the state were issued them. See Josh Blackman & Howard M. Wasserman, *The Process of*

As the foregoing examples demonstrate, there exist cases in which the plaintiff group could satisfy a requirement of root-cause indivisibility but not endpoint indivisibility. In such cases, the defendant interacts with the claimants both as individuals (e.g., in denying particular marriage license applications) and as members of a group (e.g., in enacting a ban on same-sex marriages). Although the defendant's *group-directed* conduct is the root cause of every group member's injuries, those injuries could be prevented or ameliorated through deviations in the defendant's *individually-directed* conduct.¹³⁷ What ties the potential plaintiffs together is not the defendant's inability to treat them differently, but the defendant's actual conduct that treats them similarly.¹³⁸ Such root-cause, group-directed conduct is a common feature of government institutions and other large organizations, which often lack the capacity to engage in wholly individualized decision-making.¹³⁹

Notwithstanding this area of difference, a putative class that satisfies the commonality requirement and an endpoint indivisibility requirement will generally satisfy a root-cause indivisibility requirement as well.¹⁴⁰ Take, for example, *Supreme Tribe of Ben-Hur v. Cauble*. As discussed above,¹⁴¹ *Cauble*

Marriage Equality, 43 HASTINGS CONST. L.Q. 243, 269 (2016) (noting Rowan County Clerk's refusal to issue marriage licenses).

¹³⁷ This set of cases roughly corresponds to Types II and III in Professor David Marcus's typology of public interest class actions: bureaucratic intermediaries carry out a defendant's high-level policy or systemic practice, and the claimants experience either undifferentiated but individually directed conduct (Type II) or differentiated conduct (Type III). See Marcus, *supra* note 16, at 799-805.

¹³⁸ See *id.* at 801-02.

¹³⁹ The ubiquity of abstracted decision-making rules is one of the reasons that federal agencies have increasingly turned to administrative class actions and other forms of aggregate adjudication in recent years. See Michael Sant' Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1634 (2017) (describing "agencies' nascent efforts to use class actions and other complex procedures in their own hearings").

¹⁴⁰ On the one hand, this relationship between endpoint and root-cause indivisibility reflects the existence of overlap between Rule 23(b)(2) and Rule 23(b)(1)(A). The drafters of the 1966 amendments recognized the possibility that some classes could fit within both categories, but they decided to include both provisions nonetheless, largely because of the possibility that pro-segregation judges would not deem Rule 23(b)(1)(A) satisfied in desegregation cases. See Marcus, *supra* note 1, at 705-07 (describing discussions among John Frank, Charles Alan Wright, and Benjamin Kaplan). On the other hand, the overlap between those two forms of indivisibility is more extensive than the overlap between the two provisions of Rule 23(b), assuming (as Professor Robert Klonoff has persuasively argued) that Rule 23(b)(1)(A) should be interpreted to cover classes seeking monetary relief. See Klonoff, *supra* note 110, at 803 ("[B]oth [Rule 23](b)(1)(A) and [Rule 23](b)(1)(B) contemplate suits for money, even when money is the exclusive or predominant relief sought.").

¹⁴¹ See *supra* text accompanying notes 111-12 (noting endpoint indivisibility satisfied because "if the defendant were to halt the reorganization at the request of some members, all other members would also immediately and unavoidably experience that relief").

involved a situation of endpoint indivisibility, because the defendant could not both undergo and not undergo a financial reorganization.¹⁴² In addition, that reorganization either would be lawful or it would not—a court would not be able “to ascertain the legality of the defendant’s conduct as to one affected claimant without necessarily doing so as to all others.”¹⁴³ Accordingly, the plaintiffs in *Cauble* would also satisfy a root-cause indivisibility requirement.

For root-cause indivisibility, as for endpoint indivisibility, what matters to the analysis is the right actually invoked and the relief actually requested. Class action complaints do not exist in a state of nature, awaiting discovery by claimants and counsel. Rather, class action plaintiffs must decide what legal theories they will pursue and what remedies they will seek, and those choices affect the relevance of intra-class differences and the scope of a proper Rule 23(b)(2) class.

For example, consider *Wal-Mart Stores, Inc. v. Dukes*, in which the plaintiffs alleged that sex discrimination resulted from the combination of a discriminatory corporate culture and the delegation to local managers of discretion over pay and promotion decisions.¹⁴⁴ As noted previously, the plaintiffs in *Dukes* sought both company-wide injunctive relief and individualized awards of back pay.¹⁴⁵ The latter form of relief cannot satisfy a root-cause indivisibility requirement, because any particular employee’s entitlement to back pay will depend on circumstances specific to that employee.¹⁴⁶ Consider, for example, an employer’s decision to promote male Employee *A* over female Employees *B* and *C*. The employer’s conduct might be unlawful as to Employee *B*, who is more qualified than the promoted employee (and who is entitled to back pay for the employer’s failure to promote her), but lawful as to Employee *C*, who is less qualified than the promoted employee (and who is not entitled to back pay for the employer’s failure to promote her).

The plaintiffs’ actual choice of remedy in *Dukes* made intra-class differences relevant to the class certification inquiry.¹⁴⁷ But what if they had requested *only* injunctive relief, seeking to change Wal-Mart’s company-wide pay and promotion practices? If the plaintiffs’ evidence about those practices were sufficient to satisfy the commonality requirement—a point on which the actual

¹⁴² See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 359 (1921).

¹⁴³ Nagareda, *supra* note 38, at 232.

¹⁴⁴ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342 (2011).

¹⁴⁵ See *supra* Section I.B (describing remedies sought by plaintiffs).

¹⁴⁶ See *Dukes*, 564 U.S. at 352 (“Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.”). As the Court noted, in an individual’s Title VII claim seeking back pay, “the crux of the inquiry is ‘the reason for a particular employment decision.’” *Id.* (quoting *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

¹⁴⁷ See *Dukes*, 564 U.S. at 352.

majority and dissent disagreed¹⁴⁸—then the hypothetical class would also satisfy a root-cause indivisibility requirement. That is because a court could not deem those company-wide practices unlawful as to one female employee, in the sense that they produced a disparate impact and should be enjoined, but lawful as to another. Intra-class differences would not disappear, but they would cease to be relevant to the indivisibility requirement in light of the relief being sought.

Because it would prevent certification of a putative class of employees seeking back pay, a root-cause indivisibility requirement satisfies one aspect of this Article's framework for evaluating consistency with Rule 23(b)(2).¹⁴⁹ The other aspect of that framework is that, if it is to be applied to Rule 23(b)(2), an indivisibility requirement should permit class certification in the cases forming the historical models for the provision.¹⁵⁰ Consider, first, a group of African American students challenging a school district's operation of segregated K-12 public schools. Whether brought by one student or many, a successful challenge would require a court to declare such segregation unlawful; it could not be unlawful for a school to exclude one African American student on the basis of race but lawful for the school to exclude another African American student on the basis of race.¹⁵¹ The putative class would therefore satisfy a root-cause indivisibility requirement.

Next, consider *Frasier v. Board of Trustees of the University of North Carolina*. The university's policy of rejecting all African American applicants on the basis of race—regardless of their qualifications for admission—could not be lawful as to one African American applicant but unlawful as to another.¹⁵²

¹⁴⁸ While all nine justices agreed with the Rule 23(b)(2) portion of the *Dukes* opinion, the Court split five-four as to whether the putative class satisfied commonality. *See id.* at 367-68 (Ginsburg, J., concurring in part and dissenting in part) (disagreeing with majority's disqualification of class at "starting gate" of commonality). The majority held that Wal-Mart's delegation of discretion to local managers was not a "specific employment practice" subject to challenge under Title VII. *Id.* at 357 (majority opinion) (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988)).

¹⁴⁹ *See supra* Section II.A (describing framework for evaluating whether particular type of indivisibility should be imposed as requirement for certification under Rule 23(b)(2) by determining whether indivisibility requirement would prevent certification of classes seeking back pay).

¹⁵⁰ *See supra* Section II.A (describing further framework for evaluating indivisibility by determining whether indivisibility requirement would prevent certification of classes corresponding to historical models for Rule 23(b)(2)).

¹⁵¹ While successful litigation might not lead to all African American students receiving different school assignments than they otherwise would have, the school district's *reason* for excluding all African American students from particular schools (i.e., because of their race) could only be unlawful, or not, as to all of the excluded students at once.

¹⁵² *See Frasier v. Bd. of Trs. of the Univ. of N.C.*, 134 F. Supp. 589, 593 (M.D.N.C. 1955), *aff'd*, 350 U.S. 979 (1956) (per curiam) ("[W]e decide only that the Negroes as a class may not be excluded because of their race or color; and the Board retains the power to decide whether the applicants possess the necessary qualifications.").

This is true notwithstanding that, once a court ordered the university to consider each African American applicant on his or her merits, those individuals' qualifications for admission would surely vary; ultimately, the university would admit some and not others. Because a successful challenge by any African American applicant would require a court to rule the blanket exclusion of African Americans unlawful, the plaintiffs in *Frasier* would satisfy a root-cause indivisibility requirement as well.

Finally, consider the two hypothetical cases listed in the Advisory Committee note, one involving a seller that imposed a pricing differential between different classes of purchasers, and the other involving a patent-holder that imposed a tying condition on its products.¹⁵³ The pricing differential or tying arrangement could not be lawful as to some members of the disadvantaged class but unlawful as to others, and a successful challenge to either arrangement would require the court to rule on that practice's lawfulness.¹⁵⁴ Accordingly, the putative classes in both scenarios would satisfy a root-cause indivisibility requirement.

In sum, unlike endpoint indivisibility, a root-cause indivisibility requirement would both screen out back pay awards and screen in the historical models on which Rule 23(b)(2) was based. Root-cause indivisibility also offers the best normative fit for Rule 23(b)(2), as it allows the provision to fulfill its promise of providing a remedy as broad as the challenged conduct and "settling the legality of the [defendant's] behavior with respect to the class as a whole."¹⁵⁵ Accordingly, while other forms of indivisibility can play a useful role in the interpretation of other class action subtypes, only root-cause indivisibility makes sense as a requirement for Rule 23(b)(2).

C. *Due Process Implications*

Rule 23(b)(2) class actions are mandatory, in the sense that Rule 23 does not give claimants the right to opt out of classes certified under that provision.¹⁵⁶ This aspect of the rule has occasionally led courts to express concerns about the due process rights of absent class members.¹⁵⁷ Those concerns cannot render the

¹⁵³ FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (Subdivision (b)(2)) (describing hypotheticals involving class of purchasers challenging price differentials and class of licensees or sellers of unpatented machine challenging tying condition); *supra* note 122 and accompanying text (explaining why neither of these plaintiff groups would satisfy endpoint indivisibility requirement).

¹⁵⁴ *See supra* text accompanying note 122 (explaining relief sought by plaintiffs in both scenarios).

¹⁵⁵ FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (Subdivision (b)(2)) (observing Rule 23(b)(2) intended to apply where defendant "has taken action or refused to take action with respect to a class, and final relief . . . settling the legality of the behavior with respect to the class as a whole is appropriate").

¹⁵⁶ FED. R. CIV. P. 23(c)(2) (explicitly requiring class members be allowed to opt out from Rule 23(b)(3) classes but not from Rule 23(b)(1) or Rule 23(b)(2) classes).

¹⁵⁷ *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011) (noting due

foregoing analysis irrelevant, because the canon of constitutional avoidance permits a court only to “interpret [a rule or] statute, not rewrite it.”¹⁵⁸ Still, if an endpoint indivisibility requirement would clearly make Rule 23(b)(2) comply with due process, and a root-cause indivisibility requirement would clearly make Rule 23(b)(2) violate due process, some judges might be tempted to adopt the former. That temptation, however, should be easily avoided; as explained below, neither form of indivisibility would render mandatory class treatment under Rule 23(b)(2) unconstitutional.¹⁵⁹

Opt-outs protect an absent class member’s right to his or her own day in court, but as Professor Robert Bone has noted, the day-in-court right is not absolute.¹⁶⁰ Rather, “[i]t is an institutional right and, as such, is subject to and defined by the norms that govern the institution of adjudication itself,” including “factors that have to do with making adjudication a just and efficacious institution.”¹⁶¹ A claimant’s right not to sue the defendant,¹⁶² which is the negative form of the day-in-court right, is subject to the same analysis. One must therefore ask not only how mandatory class treatment can constrain claimants in situations of endpoint and root-cause indivisibility, but also how disallowing opt-outs in such situations can promote institutional values like fairness and judicial legitimacy.

The constraints imposed by mandatory class treatment are not unique to Rule 23; to the contrary, other procedural rules similarly reflect a judgment that the benefits of those constraints outweigh their costs. Consider Rule 19, which governs required-party joinder in non-class cases. The provision allows a defendant to seek dismissal of a case because the plaintiff has not joined a person who would be affected by the outcome, or in whose absence the court could not afford complete relief.¹⁶³ In some circumstances, if a required party refuses to

process concerns in connection with Court’s interpretation of Rule 23(b)(2) as excluding claims for individualized monetary relief).

¹⁵⁸ *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (“Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts But a court relying on that canon still must *interpret* the statute, not rewrite it.”).

¹⁵⁹ *But see infra* text accompanying notes 193-94 (noting that, for either form of indivisibility, supplemental inquiry would be necessary in order to comply with Supreme Court precedent about due process and class actions seeking monetary relief).

¹⁶⁰ *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 618-19 (2011) (“The day-in-court right is not a background right that applies in all settings, like the right to be free from torture.”).

¹⁶¹ *Id.* at 618.

¹⁶² *See* Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 604 (2015) (discussing interests of “prospective class members who wish to keep their legal claims out of court entirely” (emphasis omitted)).

¹⁶³ *See* FED. R. CIV. P. 19(a)(1)(A)-(B) (requiring joinder where either (1) “court cannot accord complete relief” in party’s absence or (2) absent party “claims an interest relating to the subject of the action”).

join the action, the court may order him joined as an involuntary plaintiff.¹⁶⁴ From the perspective of the involuntary plaintiff, Rule 19 thus constrains a claimant's ability to avoid suing the defendant; and from the perspective of the original plaintiff, it constrains a claimant's ability to go it alone.¹⁶⁵ Those constraints on claimant autonomy are analogous to those imposed by mandatory class treatment; because absent class members cannot opt out, they can neither avoid suing the defendant nor go it alone in a separate action. In the context of Rule 19, those constraints are "justified by a balance of institutional considerations."¹⁶⁶

Similar institutional considerations also justify those constraints in the context of mandatory class actions that satisfy an endpoint or root-cause indivisibility requirement.¹⁶⁷ Consider situations of endpoint indivisibility, in which one claimant's victory would immediately and unavoidably result in relief for all of the others.¹⁶⁸ Because a defendant in such a case literally cannot treat different claimants differently,¹⁶⁹ allowing some claimants to opt out and sue separately would create the risk of "inconsistent or varying adjudications . . . that would establish incompatible standards of conduct" for the defendant.¹⁷⁰ Opt-outs would thus jeopardize the defendant's ability to comply with court orders and undermine the legitimacy of the judicial system.¹⁷¹ At the same time, because of the inherently interdependent nature of the potential plaintiffs' claims, opt-out rights would not confer commensurate benefits upon absent class members. To the extent that opting out would allow a claimant to avoid the impact of a

¹⁶⁴ See FED. R. CIV. P. 19(a)(2) ("A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.").

¹⁶⁵ See Carroll, *supra* note 1, at 855-56 nn.67-69 and accompanying text (noting Rule 19 similarly addresses risk of inconsistent adjudications).

¹⁶⁶ Bone, *supra* note 160, at 618. As Professor Bone explains, "plaintiffs—indeed, all parties—have a general duty to conduct litigation with due regard for fairness to other litigants and for the integrity of the institution of adjudication itself. Some types of harm are serious enough to implicate this duty, and those are the harms Rule 19 targets." *Id.*

¹⁶⁷ See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 cmt. h-i (AM. LAW INST. 2010) (discussing institutional interests furthered by mandatory aggregation in cases involving indivisible remedies).

¹⁶⁸ See *supra* text accompanying note 105 (noting that endpoint indivisibility is "characterized by the immediate and unavoidable effects of providing complete relief to any member of the putative class").

¹⁶⁹ See *supra* Section II.B.1 (defining endpoint indivisibility).

¹⁷⁰ FED. R. CIV. P. 23(b)(1)(A) (permitting class action in cases of inconsistent or varying adjudications described in text).

¹⁷¹ See Carroll, *supra* note 1, at 854-57 (discussing purposes of class treatment under Rule 23(b)(1)(A)). Opt-outs would also deny the defendant the benefit of any cases resolved in its favor; so long as even one case went the other way, the defendant would have to comply with the resulting decree. See Redish & Larsen, *supra* note 111, at 1606 (noting that defendant "would lose the benefit of its victory" if this scenario were to occur, which "should not be deemed an acceptable result").

potential loss while maintaining the ability to reap the benefits of a potential victory, that interest should not be given controlling weight in the due process analysis.¹⁷²

The institutional considerations that support mandatory class treatment in situations of root-cause indivisibility, in which deciding the case in one claimant's favor would require a court to rule the defendant's conduct unlawful as to others, are also quite strong. As with endpoint indivisibility, situations of root-cause indivisibility involve an action that stands to affect all of the other potential class members, even in the absence of class certification—here, through the operation of issue preclusion, precedent, or semi-voluntary changes in the defendant's behavior.¹⁷³ Those mechanisms can similarly create a situation in which one claimant's victory will redound to the benefit of all of the others. As Nagareda put it, mandatory class actions “rope the would-be invokers of [nonmutual offensive] issue preclusion into a single class such that they will be bound by any resulting adjudication of classwide issues.”¹⁷⁴

From the perspective of absent class members, while opting out could have benefits, those benefits are limited by the potential impact of precedent. Arthur Miller once argued that “Supreme Court decisions, in constitutional cases at least, are de facto class actions” because of the binding principles they establish for all other cases to follow.¹⁷⁵ Similar effects can flow from a previous appellate decision about the lawfulness of *the exact same policy or practice*—not merely a related or analogous one—being challenged in a subsequent case.¹⁷⁶ From the perspective of those subsequent litigants, the absence of class-wide preclusion will not make a practical difference in their ability to have their claims heard anew in light of the precedent foreclosing their claims.¹⁷⁷

¹⁷² See Nagareda, *supra* note 38, at 180 (“If permitted to opt out, however, the members of such a class would enjoy the benefits of a class victory on the liability question either practically or, if need be, through invocation of *Parklane* issue preclusion.”).

¹⁷³ See *supra* text accompanying notes 127-29 (describing class-wide benefits).

¹⁷⁴ Nagareda, *supra* note 38, at 177. For further discussion of this type of issue preclusion and its relevance to mandatory class actions, see *supra* note 128 and accompanying text.

¹⁷⁵ Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. URB. L. 573, 574-75 (1981) (explaining constitutional “rulings in cases involving individuals ‘impose official and practical consequences upon members of society at large’” (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (Brennan & Marshall, JJ., concurring))); see also Sant’Ambrogio & Zimmerman, *supra* note 139, 1647-48 (recognizing connection between precedential impact of individual adjudication and preclusive effect of class actions).

¹⁷⁶ See Redish & Larsen, *supra* note 111, at 1609 n.129 (“Even though neither *res judicata* nor collateral estoppel would apply to the class member who had removed herself from the class, the problem of same situation *stare decisis* would remain a very significant concern.”).

¹⁷⁷ See Rubenstein, *supra* note 127, at 1647 (“The only difference between this precedential effect and pure preclusion is that the later plaintiffs can literally have their day—albeit a short one—in court.” (footnote omitted)); see also Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012 (2003) (“[W]hen viewed from the

To be sure, many class actions do not generate binding precedent;¹⁷⁸ if the defendant were to prevail in such a case, those who opted out might benefit from being able to sue again.¹⁷⁹ From a defendant's perspective, that type of parallel or follow-on litigation can create the risk of serial relitigation,¹⁸⁰ but from an absent class member's perspective, it can reflect genuine disagreements about what remedies to pursue. In a desegregation case, for example, some claimants might favor the creation of magnet schools, while others might seek modified pupil assignment policies for the existing schools.¹⁸¹ It may even be possible—if not efficient—for a defendant to provide different claimants with different remedies simultaneously. At the same time, allowing different claimants to pursue separate actions can make settlement more difficult for any of them to achieve¹⁸²—and, as recent multidistrict litigations have demonstrated, can lead

perspective of an individual litigant, *stare decisis* often functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases.”).

¹⁷⁸ See Carroll, *supra* note 6, at 2052 n.202 (“For example, the initial plaintiff might choose not to appeal an adverse decision, or the appellate court might resolve the case in an unpublished opinion that cannot be cited as precedent. The latter has a high degree of likelihood, as more than eighty-eight percent of federal appellate decisions are unpublished.” (citation omitted)).

¹⁷⁹ Then again, they might not; even unpublished opinions and district court decisions sometimes have precedent-like effects. For example, some unpublished opinions “are followed without being either cited or quoted” because “portions of their text get repeatedly copied and pasted into other unpublished opinions.” Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 153 (2012). Some judges have tallied up other district courts’ opinions on the question before them in deciding how to rule. See Brian Soucek & Remington B. Lamons, *Heightened Pleading Standards for Defendants: A Case Study of Court-Counting Precedent*, 93 ALA. L. REV. (forthcoming) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164416 [<https://perma.cc/3H9M-Y5RP>].

¹⁸⁰ See Carroll, *supra* note 6, at 2052 (“[A] defendant cannot know ahead of time how much force that precedent will ultimately exert; it may end up acting as a practical bar to lawsuits by other affected claimants, or it may leave the defendant subject to serial relitigation.”).

¹⁸¹ On remedial disagreements in desegregation cases, see generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

¹⁸² Even without regard to settlement incentives, the ALI Principles argue that “the mandatory nature of the proceeding advances due process in several ways” in class actions involving indivisible relief:

First, it creates a forum in which all interested persons may voice their views concerning the practice or policy. Second, it enables the court to craft an indivisible remedy that burdens the defendant and any dissenting claimants to the minimum extent needed to vindicate the rights asserted in the complaint. Third, it avoids the risk of inconsistent adjudications and relief. Fourth, it affords complete resolution of the dispute concerning indivisible relief in the event of judgment on the merits in favor of the party opposing the aggregated claimants.

PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 cmt. h (AM. LAW INST. 2010).

to coercive settlement provisions designed to promote the defendant's interests in closure.¹⁸³

Class treatment in situations of root-cause indivisibility offers other benefits, despite the potential burdens, for the litigation autonomy of absent class members.¹⁸⁴ In the absence of class treatment, although the litigation might generate precedent that forecloses their claims, similarly situated claimants will be strangers to the litigation (unless they happen to learn about it and successfully intervene).¹⁸⁵ Class treatment can improve on those circumstances by creating participatory opportunities—for example, by permitting absent class members to object to any proposed settlement¹⁸⁶—and, more generally, by obligating the court to conduct the proceedings in a manner that protects the interests of the class as a whole.¹⁸⁷

Perhaps surprisingly, the Supreme Court has not squarely addressed the constitutionality of mandatory class treatment under Rule 23(b)(2); it has, however, stated that due process requires opt-out rights in class actions “concerning claims wholly or predominately for money judgments.”¹⁸⁸ Neither an endpoint indivisibility requirement nor a root-cause indivisibility requirement would screen out cases seeking such relief. As to root-cause indivisibility,¹⁸⁹ consider a challenge to a university's action uniformly raising tuition by two hundred dollars for all undergraduates in the middle of a prior academic year, in

¹⁸³ See D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 *FORDHAM L. REV.* 2175, 2176 (2017) (noting that “securing sufficient closure is often critical to making settlement possible” and offering taxonomy of approaches to achieving such closure in multidistrict litigation settlements).

¹⁸⁴ See RUBENSTEIN, CONTE & NEWBERG, *supra* note 47, § 4.34 (“[I]n a (b)(2) setting, certification is not a penalty to the class but protection for it.”).

¹⁸⁵ Carroll, *supra* note 6, at 2060 (“[C]hoice of class treatment gives those similarly situated to the plaintiff the status of class members, while the individual form leaves them as strangers to the litigation (unless and until they successfully intervene.)”); see also *id.* at 2058 (“In a challenge to a defendant's generally applicable policy or practice, . . . the threat to litigant autonomy comes as much from the interdependent nature of the potential claims as the procedural means of prosecuting them. The existence of the policy or practice creates an interrelationship among those persons affected by it, and that interrelationship gives rise to difficult questions about remedial scope and preclusive effects. The class action represents an attempt to address those questions; it does not create them.” (footnotes omitted)).

¹⁸⁶ See FED. R. CIV. P. 23(e) (requiring that absent class members receive notice and opportunity to object prior to approval of any proposed settlement).

¹⁸⁷ See Carroll, *supra* note 6, at 2060 (“Class proceedings on the whole must be conducted so as to protect the interests of absent class members.”). The interests of those who are not class members can be better protected as well; for example, they may appear and object to a proposed class settlement, something that is generally not possible in a non-class case. See *id.*

¹⁸⁸ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985). But see Klonoff, *supra* note 110, at 800 (arguing that this language in *Shutts* and later cases reaffirming it “can be characterized as dictum”).

¹⁸⁹ For an example of a putative class seeking solely monetary relief that would satisfy an endpoint indivisibility requirement, see *supra* Section II.B.1.

alleged violation of a state statute prohibiting midyear tuition increases.¹⁹⁰ So long as the tuition increase either did or did not violate the statute as to all undergraduates, a successful challenge by any student who sought a refund would require a court to rule the increase unlawful as to all of them. The plaintiff group could therefore satisfy a root-cause indivisibility requirement, even if they were to seek only monetary relief.

In light of the Court's assertions about the due process rights of absent class members with claims "wholly or predominately" for monetary relief, root-cause indivisibility is necessary but not sufficient as a test for compliance with Rule 23(b)(2). A supplemental inquiry, which would screen out putative classes seeking such relief, is needed. The next Part takes up that task.

III. SUPPLEMENTING INDIVISIBILITY

As noted previously, the text of Rule 23(b)(2) requires that the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."¹⁹¹ Root-cause indivisibility essentially asks whether the defendant has acted or refused to act on grounds that apply generally to the class, so that *the requested remedy* is appropriate respecting the class as a whole.¹⁹² What remains, then, is the requirement that the requested remedy involves "final injunctive relief or corresponding declaratory relief."¹⁹³ Compliance with that requirement would address the due process concerns that the Supreme Court has expressed in connection with claims seeking only monetary relief.¹⁹⁴

¹⁹⁰ This example is loosely based on *Arriaga v. Members of Board of Regents*, 825 F. Supp. 1 (D. Mass. 1992).

¹⁹¹ FED. R. CIV. P. 23(b)(2).

¹⁹² The "so that . . . appropriate" language also presumes that the requested relief will actually relate to the root cause of the plaintiff's injury; the plaintiff class cannot challenge the lawfulness of the defendant's conduct but seek an injunction or declaratory judgment wholly unrelated to that conduct. *Id.* Because it is hard to imagine a scenario in which those circumstances would satisfy the adequacy of representation requirement imposed by Rule 23(a)(4), however, it seems more appropriate to treat this language as reflecting a background assumption rather than an independent requirement.

¹⁹³ *Id.* There has long been disagreement as to when and whether classes certified pursuant to Rule 23(b)(2) may seek monetary relief in addition to injunctive or declaratory relief. *See Malveaux, supra* note 118, at 364-65 (noting division among the federal circuit courts of appeals over the availability of monetary damages for Rule 23(b)(2) classes" in wake of Civil Rights Act of 1991). At the same time, however, there has been widespread agreement that injunctive or declaratory relief must be at least a part of the remedy sought. *Id.* at 365 (noting that "all of the circuits that considered the issue concluded that monetary relief was permissible so long as it did not predominate over the injunctive and declaratory relief sought").

¹⁹⁴ *See supra* Section II.C (discussing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)). *Shutts* held that in class actions "concerning claims wholly or predominately for money judgments," due process requires notice and opt-out rights for absent class members.

A. *Final Injunctive Relief or Corresponding Declaratory Relief*

One point bears emphasis at the outset: the question whether a plaintiff class seeks “final injunctive relief,” which brings the action within the realm of Rule 23(b)(2), differs from the question whether a court *should issue* an injunction. While the remedial-stage inquiry asks whether the plaintiff has satisfied the requirements for obtaining injunctive relief,¹⁹⁵ the certification-stage inquiry asks whether the remedy the plaintiff seeks is actually injunctive in nature. Similarly, the question whether a plaintiff class seeks “corresponding declaratory relief,” which also suffices to bring the action within the realm of Rule 23(b)(2), differs from the question whether a court *should issue* a declaratory judgment.¹⁹⁶

As discussed below, a plaintiff class seeks “final injunctive relief” within the meaning of Rule 23(b)(2) only if it seeks a non-provisional remedy that is directed at the prevention of future harm.¹⁹⁷ Similarly, declaratory relief “correspond[s]” to final injunctive relief when its issuance would reflect that the putative class faces preventable future harm.¹⁹⁸

1. Characteristics of “Final Injunctive Relief”

The question of whether a plaintiff seeks relief that is “final” within the meaning of Rule 23(b)(2) is relatively straightforward. Remedies such as preliminary injunctions and temporary restraining orders are provisional, in the sense that they are intended to last only for the duration of the litigation. By contrast, permanent injunctions are not provisional; while they are generally not expected to last forever (and thus are not “permanent” in a strictly literal sense),¹⁹⁹ they do not automatically expire when the litigation ends. The “final” in “final injunctive relief” thus draws a distinction between permanent injunctions, on the one side, and provisional remedies, such as temporary restraining orders and preliminary injunctions, on the other.²⁰⁰ A case that seeks

Shutts, 472 U.S. at 811 n.3. With regard to claims seeking *both* monetary and injunctive relief, see *infra* Section III.B.

¹⁹⁵ See *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (setting forth four-part test for issuance of permanent injunctive relief).

¹⁹⁶ See, e.g., *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (requiring “substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment”).

¹⁹⁷ See *infra* Section III.A.1 (discussing features of final injunctive relief).

¹⁹⁸ See *infra* Section III.A.2 (explaining meaning of corresponding declaratory relief).

¹⁹⁹ See FED. R. CIV. P. 60(b)(5) (allowing court to dissolve injunction if “applying it prospectively is no longer equitable”); *Freeman v. Pitts*, 503 U.S. 467, 487 (1992) (discussing courts’ “inherent capacity to adjust remedies in a feasible and practical way,” including by withdrawing or reducing judicial supervision); *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 368 (1992) (interpreting Rule 60(b)(5) in context of motion to dissolve consent decree).

²⁰⁰ See RUBENSTEIN, CONTE & NEWBERG, *supra* note 47, § 4:30.

no permanent injunction, but only temporary injunctive relief that the plaintiff does not seek to make permanent, will not fall under Rule 23(b)(2).²⁰¹

At first glance, the question whether a plaintiff seeks “injunctive relief” within the meaning of Rule 23(b)(2) might also seem like an easy one. After all, one might think that the court could simply read the complaint to determine whether the plaintiffs are requesting “[a] court order commanding or preventing an action.”²⁰² Indeed, some prayers for relief are clearly injunctive in nature (e.g., issue a marriage license to this couple) and others are clearly not (e.g., pay a sum certain directly to this plaintiff). Between those two poles, however, things get murkier. For example, consider a tort plaintiff who wants to obtain medical care as a result of her lawsuit. If what she seeks is not cash, but an order requiring the defendant to pay for her care, it seems reasonable to conclude that she “cannot transform a claim for damages into injunctive relief simply by asking for an injunction that orders the payment of money.”²⁰³ But what if she asks for the defendant not just to pay for her medical care, but to provide it to her directly?²⁰⁴ Does that request constitute “injunctive relief” as that phrase is used in Rule 23(b)(2), because it involves an order to provide a service? Or does it constitute monetary relief in disguise, because it merely changes the circumstances under which the defendant writes the check?²⁰⁵

At this point, it is worth pausing to ask why Rule 23 might treat injunctions and declaratory relief differently than pure demands for monetary damages, even in situations of root-cause indivisibility. In that regard, while either form of relief requires the plaintiff group to establish the unlawfulness of the defendant’s actual or threatened conduct, injunctive relief is broadly defendant-oriented, while monetary relief is broadly plaintiff-oriented. An injunction generally tells a defendant what he must (or must not) do in order to comply with the governing substantive law going forward; a monetary award generally tells a plaintiff what she will receive, based on the injuries she incurred in the past. These differences entail that injunctive relief can more directly and effectively benefit individuals within a class “whose members are incapable of specific enumeration,” as the

²⁰¹ *Id.* Courts have “[o]ccasionally . . . interpret[ed] what appears to be final injunctive relief as merely provisional” for purposes of Rule 23(b)(2). *Id.* For discussion and criticism of a Seventh Circuit case interpreting Rule 23(b)(2) in that manner, see *infra* note 223 and accompanying text.

²⁰² *Injunction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁰³ *Barraza v. C. R. Bard Inc.*, 332 F.R.D. 369, 387 (D. Ariz. 2017); *Werlein v. United States*, 746 F. Supp. 887, 895 (D. Minn. 1990) (“Payment of cash by one party to reimburse other parties for costs incurred is not injunctive relief.”), *vacated in part on other grounds*, 793 F. Supp. 898, 900 (D. Minn. 1992).

²⁰⁴ This question implicates medical monitoring. For a discussion of medical monitoring and Rule 23(b)(2), see *infra* Section III.C.

²⁰⁵ Courts have struggled with this question. See RUBENSTEIN, CONTE & NEWBERG, *supra* note 47, § 4:45.

drafters of the 1966 amendments put it.²⁰⁶ Individualized notice—which is not required for Rule 23(b)(2) classes at the certification stage—may be deemed less important when a court does not need to identify and locate individuals in order for them to benefit from the relief entered in their favor. Indeed, an injunction entered today can directly and effectively benefit individuals who will not even interact with the defendant until well into the future.

Such future effects are not an incidental aspect of injunctive relief; to the contrary, courts and scholars have long recognized that injunctions are inherently *prospective* in nature.²⁰⁷ Because they provide prospective rather than retrospective relief, injunctions cannot provide redress “[f]or harm that has already happened, and for future harm that can no longer be prevented.”²⁰⁸ The law of standing reflects this essential feature of injunctive relief; in order to have standing to seek an injunction, a plaintiff must do more than allege harm that occurred entirely in the past.²⁰⁹ Rather, the plaintiff must allege a threat of future harm (instead of, or in addition to, past harm) that the requested injunction could prevent.²¹⁰

Although injunctions are prospective in nature, they may have corrective effects.²¹¹ Indeed, courts recognize that even reparative injunctions²¹²—those designed to undo some or all of the damage caused by a defendant’s past violation—prevent harm in the future.²¹³ For example, the Supreme Court held

²⁰⁶ FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (Subdivision (b)(2)). By this statement I do not mean to suggest that all class actions for monetary relief must involve direct payments to class members. On the issue of *cy pres* remedies—which may not involve such payments—see Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 914 (2017).

²⁰⁷ See, e.g., *Strickland v. Alexander*, 772 F.3d 876, 883 (11th Cir. 2014) (“[I]njunctions regulate future conduct only; they do not provide relief for past injuries already incurred and over with.”).

²⁰⁸ DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES* 315 (5th ed. 2018).

²⁰⁹ See *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (“Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, . . . if unaccompanied by any continuing, present adverse effects.”).

²¹⁰ See *id.* at 498 (concluding that “threat of injury from the alleged course of conduct [plaintiffs] attack is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court”); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (“Lyons’ standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers.”).

²¹¹ See LAYCOCK & HASEN, *supra* note 208, at 312 (“All injunctions are preventive in the most fundamental sense; they seek to prevent harm from wrongful conduct. The distinction between preventive and reparative injunctions is between preventing the wrongful act . . . and preventing some or all of the harmful consequences of that act . . .”).

²¹² See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7-8 (1978) (introducing term “reparative injunction”).

²¹³ See, e.g., *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State*, 104 F.3d 1349, 1352 (D.C. Cir. 1997) (deeming reparative injunction to be prospective for purposes of

in 1977 that an order requiring the establishment of educational programs as a remedy for prior school segregation was prospective in nature.²¹⁴ The educational programs in question were “designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit.”²¹⁵ The programs would prevent harm to current and future public school students, rather than directly aiding the students who attended Detroit’s public schools in the past. As the Court explained, “[t]hat the programs are also ‘compensatory’ in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system.”²¹⁶

Courts have extensive experience differentiating between prospective and retrospective relief in the context of the Eleventh Amendment.²¹⁷ That distinction does not turn on the terminology used by the parties or the court to describe the relief;²¹⁸ nor does it turn on the monetary cost to the defendant of providing the relief or the monetary value to the plaintiff of receiving it. To the contrary, even if a remedy can be implemented only at great expense, it will be deemed prospective so long as it is not “tantamount to an award of damages for a past violation.”²¹⁹ Thus, the key question is whether the remedy would compensate for harm that occurred entirely in the past, or whether it would instead prevent harm that still lies in the future.

In the context of Rule 23(b)(2), some courts have implicitly or explicitly recognized the need for class members to seek relief directed at preventing future harm. Generally speaking, however, they have not identified that need as an essential feature of the “injunctive relief” referenced in the text of the rule. Some have shoehorned that analysis into the cohesiveness requirement that some courts have grafted onto Rule 23(b)(2),²²⁰ or the requirement that injunctive

Eleventh Amendment analysis because it “would not serve as a remedy commensurate with damages for past wrongs. Instead, the injunction would serve to prevent what would allegedly be a continuing violation of the statute”).

²¹⁴ *Milliken v. Bradley*, 433 U.S. 267, 290 (1977).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ The Eleventh Amendment bars lawsuits against states, but state officials may be sued in their official capacities for relief that is prospective rather than retrospective in nature. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (permitting prospective relief, but prohibiting retrospective relief, against state officials as matter of Eleventh Amendment immunity doctrine (citing *Ex parte Young*, 209 U.S. 123 (1908))).

²¹⁸ *See Papasan v. Allain*, 478 U.S. 265, 278 (1986) (“For Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct” (citation omitted)).

²¹⁹ *Id.*

²²⁰ *See, e.g., Abraham v. Ocwen Loan Servicing, L.L.C.*, 321 F.R.D. 125, 177 (E.D. Pa. 2017) (holding that cohesiveness was lacking because some class members did not face future harm that plaintiffs’ proposed remedy would address).

relief predominate over any incidental request for monetary relief.²²¹ However, neither of those inquiries has any obvious connection to the question of whether the relevant harm lies in the future or entirely in the past.

Other courts have deployed the “final” part of “final injunctive relief” as a bulwark against creatively disguised requests for damages. The Seventh Circuit, for example, stated in *Kartman v. State Farm Mutual Automobile Insurance*²²² that “[a]n injunction is not a *final* remedy if it would merely lay an evidentiary foundation for subsequent determinations of liability.”²²³ In that case, the plaintiffs sued for breach of contract, bad-faith denial of insurance benefits, and unjust enrichment based on allegations that the defendant company had underpaid on insurance claims for hail damage to their roofs.²²⁴ The district court denied certification of a Rule 23(b)(3) class seeking damages, but granted certification of a Rule 23(b)(2) class seeking reinspection of policyholders’ roofs pursuant to a “uniform and objective standard.”²²⁵ The Seventh Circuit reversed, reasoning that the requested injunction was not “final” as required by Rule 23(b)(2); rather, “[a] class-wide roof reinspection would only lay an evidentiary foundation for subsequent individual determinations of liability and damages.”²²⁶

At best, the Seventh Circuit’s reasoning stretches the word “final” well beyond its plain meaning of “not provisional”;²²⁷ at worst, it requires a subjective and unbounded inquiry into what the class members *really* want from the litigation. The court could have instead noted that the harm alleged by the class members (i.e., the hail damage and alleged underpayment) occurred entirely in the past; that the requested order thus could not be directed to the prevention of future harm; and that it therefore lacked a necessary characteristic of the “injunctive relief” contemplated by Rule 23(b)(2).²²⁸ This analysis would

²²¹ See, e.g., *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 525 (5th Cir. 2007) (“Rule 23(b)(2) certification is also inappropriate when the majority of the class does not face future harm This situation leaves monetary claims for retrospective damages predominant in the case.” (citation omitted)); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000) (“Most of the class consists of individuals who do not face further harm from [the defendant’s] actions. These plaintiffs have nothing to gain from an injunction, and the declaratory relief they seek serves only to facilitate the award of damages. Thus, the definition of the class shows that most of the plaintiffs are seeking only damages.”).

²²² 634 F.3d 883 (7th Cir. 2011).

²²³ *Id.* at 893.

²²⁴ *Id.* at 885-86.

²²⁵ *Id.* at 886.

²²⁶ *Id.*

²²⁷ Cf. RUBENSTEIN, CONTE & NEWBERG, *supra* note 47, § 4:30 (noting that reinspection order requested by the *Kartman* plaintiffs “would have been part of their final relief”).

²²⁸ Indeed, in distinguishing a case relied upon by the plaintiffs, the court implicitly recognized that the prospective relief that is appropriate for a Rule 23(b)(2) class requires an alleged threat of future harm:

Unlike this case, . . . the remedies sought by the *Allen* plaintiffs were designed to cure

have the advantage of greater ease of application and a firmer connection to the language of the rule.²²⁹

Two caveats are in order. First, the requirement that the requested relief be directed at the prevention of future harm should not be used as an excuse to jump ahead to the merits stage of the case. Requiring proof that plaintiffs actually face a threat of future harm, and not merely that they seek to prevent such harm, could increase the plaintiff's evidentiary burdens prematurely.²³⁰ Second, this prospectiveness requirement would interact poorly with a strict ascertainability standard.²³¹ The latter would prevent certification of classes in which claimants will face harm in the future, but cannot be individually identified in the present—for example, because they have not yet enrolled in the defendant high school, been imprisoned in the defendant correctional facility, or gone to work for the defendant employer.²³² Some courts have rejected ascertainability as a requirement for class certification, and those that have adopted a strict version of it have generally recognized that it should not apply to classes certified under

two distinct injuries: past and future discrimination. Monetary damages, if awarded, would compensate the employees for the discrimination they had already suffered; damages would provide a final retrospective remedy for that injury. An injunction, on the other hand, would require the employer to cease its discriminatory conduct, providing a final prospective remedy for ongoing and future discrimination. Here, in contrast, the plaintiffs have suffered only one cognizable injury—[the defendant's] alleged underpayment of their hail-damage claims—and a retrospective damages remedy would provide final, adequate relief for this singular harm.

Kartman, 634 F.3d at 894 (emphasis omitted) (discussing *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004)).

²²⁹ In addition, as with the interaction between commonality and root-cause indivisibility, *see supra* Section II.B.2, the distinction between prospective and retrospective relief could help to illuminate the appropriate boundaries of a particular Rule 23(b)(2) class. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364-65 (2011) (implying that Rule 23(b)(2) class should include only those who have “need for prospective relief”); *Donegan v. Norwood*, No. 1:16-cv-11178, 2017 WL 6569634, at *7 (N.D. Ill. Dec. 21, 2017) (excluding, from 23(b)(2) class seeking changes to state benefits program, individuals who are not currently enrolled in that program).

²³⁰ *See In re Digital Music Antitrust Litig.*, 321 F.R.D. 64, 91 (S.D.N.Y. 2017) (denying certification because “[p]laintiffs have proffered no evidence that [d]efendants are currently engaging in anticompetitive conduct or that there is a risk to the class of future harm”).

²³¹ The strict version of ascertainability requires “not just that the class itself be defined clearly, but also that individuals be identifiable as members of the class in a reliable and administratively feasible way.” Bone, *supra* note 206, at 914.

²³² *See id.* at 960 (“[C]onsider a (b)(2) class action alleging racial discrimination against African-American employees . . . [I]n theory at least, an injunction would still make sense even if all current employees happened to quit at the time the injunction was entered and a new set of employees was hired—since the target is the group and that group includes new as well as current employees.”).

Rule 23(b)(2).²³³ If that were to change, the requirement proposed here would put plaintiffs between a prospectiveness rock and an ascertainability hard place.

2. Characteristics of “Corresponding Declaratory Relief”

The Declaratory Judgment Act authorizes a court to “declare the rights and other legal relations of any interested party seeking such declaration,” provided that there exists an “actual controversy” between the parties.²³⁴ A plaintiff may seek declaratory relief in a range of circumstances in which the parties to a potential lawsuit face legal uncertainty, regardless of whether that potential suit would include a request for damages, an injunction, or some other form of relief. For example, a patent-holder might believe that a licensee will owe it royalties from future sales of a product, while the licensee may disagree because it believes the underlying patent to be invalid and unenforceable.²³⁵ In those circumstances, the licensee may be able to bring a declaratory judgment action to determine the patent’s validity before the dispute ripens into a claim for damages or injunctive relief.²³⁶

Not all of the circumstances in which a plaintiff can seek declaratory relief, however, will involve a request for “corresponding declaratory relief” within the meaning of Rule 23(b)(2).²³⁷ If that were the case, any group of plaintiffs could transform a claim for damages that would not fall under Rule 23(b)(2) (e.g., “we seek damages because the defendant breached our contract”) into a claim for declaratory relief that would (e.g., “we seek a declaration that the defendant breached our contract”).²³⁸ Rather, as the drafters of Rule 23(b)(2) put it, “[d]eclaratory relief ‘corresponds’ to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief.”²³⁹

²³³ See *id.* at 929 (“[E]ven the Third Circuit, the strongest proponent of a strict ascertainability rule, declines to apply it to class actions certified under Rule 23(b)(2).” (citing *Shelton v. Bledsoe*, 775 F.3d 554, 559-63 (3d Cir. 2015))).

²³⁴ 28 U.S.C. § 2201 (2018).

²³⁵ See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 121-22 (2007) (“Petitioner did not think royalties were owing, believing that the . . . patent was invalid and unenforceable.”).

²³⁶ *Id.* at 136 (“The Declaratory Judgment Act provides that a court ‘may declare the rights and other legal relations of any interested party’ We leave the equitable, prudential, and policy arguments in favor of such a discretionary dismissal for the lower courts’ consideration on remand.” (emphasis omitted) (citation omitted)).

²³⁷ See Andrew Bradt, “*Much to Gain and Nothing to Lose*” *Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 792 (2006) (“The term ‘corresponding declaratory relief’ in the Rule suggests that only a subset of declaratory judgment actions that may be viable in one-on-one litigation may be maintainable in a class action certified under Rule 23(b)(2).”).

²³⁸ RUBENSTEIN, CONTE & NEWBERG, *supra* note 47, § 4:31 (“In short, declaratory relief under (b)(2) cannot simply turn a (b)(3) damages action into an action under (b)(2).”).

²³⁹ FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (Subdivision (b)(2)).

Presumably, the phrase about declaratory relief “as a practical matter . . . afford[ing] injunctive relief” refers to a situation in which a defendant changes its behavior to comply with the legal interpretation set forth in the declaratory judgment.²⁴⁰ On the flip side, declaratory relief would “serve[] as a basis for later injunctive relief” if the defendant *failed* to change its behavior in that manner, prompting the plaintiff to seek injunctive relief to secure compliance. Either scenario is possible only if the defendant has not already permanently changed its behavior, prior to the issuance of the declaratory relief; that is, if the plaintiff faces a risk of future harm that an injunction could prevent.²⁴¹

Accordingly, the question whether a putative class seeks “corresponding declaratory relief” under Rule 23(b)(2) essentially boils down to the same question about the prevention of future harm discussed above²⁴²: declaratory relief “correspond[s]” to injunctive relief when it targets a defendant’s conduct that exposes a plaintiff class to preventable future harm.²⁴³

B. *Incidental Retrospective Relief?*

If the putative class does not seek *any* relief that meets the requirements set forth above—i.e., relief that meets the root-cause indivisibility standard and is directed at the prevention of future harm—then the inquiry ends there, and the class action may not be certified under Rule 23(b)(2). In many cases, however, a plaintiff class seeks some relief that meets those requirements and some relief that does not. This latter category of “incidental” retrospective relief (usually involving monetary damages) has caused courts and scholars great consternation over the last several decades.²⁴⁴

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court declined to decide whether Rule 23(b)(2) allows for any form of incidental retrospective relief.²⁴⁵

²⁴⁰ See Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1108 (2014) (noting that “most common scenarios for federal plaintiffs to seek a declaratory judgment” present “no need for a command” because “[a]fter the declaratory judgment, everyone knows what to do”).

²⁴¹ *Id.* at 1095 (“*When used prospectively*, [injunctions and declaratory judgments] are rough substitutes, and in many cases they have the same effect.” (emphasis added)).

²⁴² See *supra* Section III.A.1 (discussing characteristics of final injunctive relief).

²⁴³ Some courts have expressed a similar idea in the form of a requirement that declaratory relief not merely “lay the basis for a later damage award.” See, e.g., *Sarafin v. Sears, Roebuck & Co.*, 446 F. Supp. 611, 615 (N.D. Ill. 1978). This approach leads courts to try to determine the “real goal” of the litigation. See *id.* Thus, it suffers from some of the same drawbacks discussed in *supra* note 223 and accompanying text (discussing *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883 (7th Cir. 2011)).

²⁴⁴ See RUBENSTEIN, CONTE & NEWBERG, *supra* note 47, § 4.37. I use “retrospective” here, rather than “monetary,” because that term more fully encompasses the range of relief that could be pursued alongside a qualifying request for an injunction or declaratory judgment.

²⁴⁵ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011) (“We need not decide

It would be plausible to conclude that it does not, as the text refers only to injunctive and corresponding declaratory relief, and the historical models for the provision did not involve requests for retrospective remedies.²⁴⁶ The Advisory Committee note to the 1966 amendments, however, strongly implies that such remedies are permissible; it states that Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages.”²⁴⁷ With regard to this statement, the Court wrote in *Dukes* that “a mere negative inference” would not lead it to grant the plaintiffs’ request to seek back pay through a Rule 23(b)(2) class, because such a result “has no basis in the Rule’s text, and . . . does obvious violence to the Rule’s structural features.”²⁴⁸

The question remains, then, whether the Court would deem there to be any forms of incidental retrospective relief that would *not* do violence to the structure of Rule 23—or, for that matter, to the due process rights of absent class members.²⁴⁹ That question is ultimately beyond the scope of this Article, which takes no position on whether retrospective relief that satisfies a root-cause indivisibility requirement would (or should) be deemed permissible. This Article notes only that if there is to be any remaining role for cohesiveness,²⁵⁰ it must be here—in situations of incidental monetary or other retrospective relief—and not in situations of purely injunctive or declaratory relief, which are fully addressed by the standard set forth above.

in this case whether there are any forms of ‘incidental’ monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause.”).

²⁴⁶ *Id.* at 360-61 (“Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. . . . [I]t does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.”).

²⁴⁷ FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (Subdivision (b)(2)) (emphasis added). The implication of this statement is that *non-predominating* requests for monetary relief *are* sometimes permissible. See Bone, *supra* note 47, at 702 n.217 (“There would have been no need to mention this limitation if Rule 23(b)(2) were intended only for injunctive and declaratory relief.”); Suzette M. Malveaux, *Class Actions at the Crossroads: An Answer to Wal-Mart v. Dukes*, 5 HARV. L. & POL’Y REV. 375, 378 (2011) (“This language makes clear that the drafters did not intend to ban all forms of monetary relief, but only a small subset—exclusive or predominant damages.” (emphasis omitted)).

²⁴⁸ *Dukes*, 564 U.S. at 363. On the proper weight to be accorded the Advisory Committee notes in the interpretation of Rule 23(b)(2), see Malveaux, *supra* note 247, at 385-87.

²⁴⁹ *Cf. Dukes*, 564 U.S. at 363 (“In the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process. While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.” (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985))).

²⁵⁰ See *supra* notes 80-84 and accompanying text (discussing whether cohesiveness has continued relevance Rule 23(b)(2) or if it has been subsumed by indivisibility).

C. *Examples and Implications*

Putting together all of the pieces of the foregoing discussion results in the following test for compliance with Rule 23(b)(2): the plaintiffs must seek relief that (i) satisfies the root-cause indivisibility requirement; (ii) is permanent, as opposed to being intended to last only for the duration of the litigation; and, (iii) is prospective, in the sense of being directed to the prevention of future harm rather than solely being directed to compensation for past harm.

This test brings greater clarity to some of the questions about Rule 23(b)(2) with which courts have struggled. For example, consider medical monitoring claims, in which plaintiffs exposed to toxic substances seek to have the defendant create or fund a program to identify any illnesses that may manifest because of the exposure. A court could rule a defendant's conduct toward a plaintiff in such a case unlawful—for example, because the defendant wrongfully exposed the plaintiff to a toxic substance in amounts sufficient to increase the plaintiff's risk of particular illnesses—without ruling the defendant's conduct unlawful as to anyone else. Accordingly, a group of such claimants would not satisfy a root-cause indivisibility requirement. Moreover, the requested relief would not be directed at the *prevention* of future harm, but only at the *detection* of any future harm that may occur.²⁵¹

As another example, consider a city that operates a civil forfeiture program,²⁵² the proceeds of which are shared between the district attorney's office and the police department.²⁵³ Plaintiffs file a lawsuit alleging that the revenue-sharing agreement creates a structural conflict of interest that renders the entire program unconstitutional. Because the agreement either does or does not render the program unconstitutional, a successful challenge to the future operation of the program would require the court to rule on its constitutionality, and plaintiffs seeking such an injunction would satisfy a root-cause indivisibility requirement.

But what if the plaintiffs also seek to recover the property seized from them—which includes both fungible goods, like cash, and potentially unique goods, like jewelry? As to the plaintiffs seeking recovery of fungible goods, the requested order would not be directed at the prevention of future harm, but rather to compensation for past harm.²⁵⁴ As to the remaining plaintiffs, ongoing

²⁵¹ In some circumstances, early detection of an illness can prevent some of the harm the illness might otherwise cause. Even in those circumstances, however, medical monitoring would likely be “tantamount to an award of damages for a past violation . . .” *Papasan v. Allain*, 478 U.S. 265, 278 (1986). That is because an award of damages would enable the claimant to obtain the necessary medical services just as well as (if not better than) a medical monitoring program would.

²⁵² Civil forfeiture refers to “[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity.” *Civil Forfeiture*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁵³ This example is loosely based on *Sourovelis v. City of Philadelphia*, 320 F.R.D. 12, 17 (E.D. Pa. 2017).

²⁵⁴ Indeed, part of the settlement in the actual case on which this hypothetical is based

separation from one's unique property can constitute future harm (in a way that ongoing separation from one's money cannot), but that harm will be preventable only with regard to property that remains in the defendants' possession. The test proposed here would thus narrow the appropriate scope of a Rule 23(b)(2) class seeking restitution to those whose unique property was seized and remains in the defendants' possession.

Finally, consider a case in which plaintiffs allege that a county conducted an election for justice of the peace in a racially discriminatory manner—for example, by maintaining separate voter lists and separate voting booths for white and African American voters.²⁵⁵ Assume that the plaintiffs request certification of a Rule 23(b)(2) class seeking to have the election results set aside and a new election conducted in a nondiscriminatory manner. The situation is one of root-cause indivisibility, because any claimant's successful request for such an order would require a determination of the initial election's lawfulness.²⁵⁶ Moreover, though prompted by a violation that occurred in the past, the requested order would also be directed at the prevention of future harm—specifically, the harm of subjecting the class members to the authority of an unlawfully elected official. Accordingly, the requirements of Rule 23(b)(2) would be satisfied in that scenario as well.

CONCLUSION

More than a half century after Rule 23(b)(2) took effect, fundamental questions about its application remain. This Article has aimed to provide a framework for answering those questions in a manner that promotes consistency in class certification decisions, respects the due process rights of absent class members, and maintains fidelity to the text and history of Rule 23(b)(2). Specifically, the rule should be understood to require root-cause indivisibility,²⁵⁷ permanence,²⁵⁸ and prospectiveness.²⁵⁹ Putative classes that meet those requirements should be certified, so long as the prerequisites set forth in Rule 23(a) are satisfied as well; an endpoint indivisibility requirement should not be imposed.

involved creation of a three million dollar fund to compensate those affected by the city's forfeiture practices. See P.J. D'Annunzio, *City to Roll Back Civil Forfeiture and Compensate Philadelphians Affected by It*, THE LEGAL INTELLIGENCER (Sept. 18, 2018, 12:38 PM), <https://www.law.com/thelegalintelligencer/2018/09/18/city-to-roll-back-civil-forfeiture-and-compensate-philadelphians-affected-by-it/> ("The city of Philadelphia has agreed to stop allowing law enforcement to profit from civil forfeiture . . . [and] has also agreed to set up a \$3 million fund to compensate those affected by it.").

²⁵⁵ This example is based on *Bell v. Southwell*, 376 F.2d 659, 660 (5th Cir. 1967).

²⁵⁶ The plaintiff group would also satisfy an endpoint indivisibility requirement, because a county cannot both conduct and not conduct an election for a particular position.

²⁵⁷ See *supra* Section II.B.3.

²⁵⁸ See *supra* note 200 and accompanying text.

²⁵⁹ See *supra* Section III.A.

The push for an endpoint indivisibility requirement under Rule 23(b)(2) appears to be on a collision course with case law permitting “national injunctions” and similarly broad injunctive relief in non-class cases.²⁶⁰ (I refer here to injunctions that constrain the defendant’s behavior with respect to nonparties, not just the named plaintiffs, even though no class has been certified). As Professor Samuel Bray has recently explained, the doctrine governing national injunctions and similar non-class relief is “a muddle of inconsistent generalizations.”²⁶¹

Because of the confusion surrounding both Rule 23(b)(2) and the national injunction, a plaintiff seeking broad injunctive relief faces a difficult choice: should she seek class treatment, knowing that if certification is denied, the court may be unlikely to order injunctive relief as broad as the class it refused to certify?²⁶² Or should she instead avoid any mention of class treatment, hoping that the court will decide that broad injunctive relief is appropriate anyway? The latter option may become less available—or may even cease to exist—as courts, scholars, and lawmakers begin to devote more attention to the question of the national injunction.²⁶³ In any event, a functional version of Rule 23 would make

²⁶⁰ See Bray, *supra* note 86, at 456 (discussing availability of injunctive relief that affects defendants’ behavior toward non-parties); Carroll, *supra* note 6, at 2030-34 (same); Marcus, *supra* note 16, at 801-02, 802 n.163 (same).

²⁶¹ Bray, *supra* note 86, at 465; see also Carroll, *supra* note 6, at 2032 (noting that “courts have articulated conflicting rules and holdings when deciding whether a plaintiff can obtain system-wide relief without bringing a class action”).

²⁶² Indeed, the denial of class certification may result in the dismissal of the plaintiff’s individual case as well. See *Jamie S. v. Milwaukee Bd. of Sch. Dirs.*, No. 2:01-cv-00928, 2012 WL 3600231, at *4 (E.D. Wis. Aug. 20, 2012) (dismissing individual actions, on remand from reversal of class certification, because “[n]one of the plaintiffs exhausted their administrative remedies, and the exception [to the administrative exhaustion requirement] for systemic violations is essentially a ‘class action exception’” (citation omitted)).

²⁶³ See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (“I am skeptical that district courts have the authority to enter universal injunctions. . . . [Such injunctions] appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts.”). *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir. 2018) (“We are cognizant of the possible hazards of the use of nationwide injunctions [They] should be utilized only in rare circumstances.” (citations omitted)); Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (2018) (“No court of the United States . . . shall issue an order that purports to restrain the enforcement against a non-party . . . unless the non-party is represented by a party acting in a representative capacity”); Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. FORUM 49, 51-55 (2017); Bray, *supra* note 86, at 419; Carroll, *supra* note 6, at 2075-83; Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1067-69 (2018); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. FORUM 56, 62 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2098 (2017); Nicholas Bagley & Samuel Bray, *Judges Shouldn’t Have the Power to Halt Laws Nationwide*, THE ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471/> [<https://perma.cc/A9FF-Z4FU>].

the former choice the better one.²⁶⁴ That version of Rule 23(b)(2) still exists, and so long as courts apply an appropriate understanding of indivisibility, plaintiffs need not shy away from it.

²⁶⁴ See generally Carroll, *supra* note 6.