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CLASS ACTION MYOPIA

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ABSTRACT

Over the past two decades, courts and commentators have often treated the class action as though it were a monolith, limiting their analysis to the particular class form that joins together a large number of claims for monetary relief. This Article argues that the myopic focus on the aggregated-damages class action has led to under-theorization of the other class-action subtypes, which serve far different purposes and have far different effects, and has allowed the ongoing backlash against the aggregated-damages class action to affect the other subtypes in an undifferentiated manner. The failure to confine this backlash to its intended target has had a negative impact on the availability of the other class forms, harming the interests of both litigants and the judiciary. In particular, in civil-rights cases involving injunctive or declaratory relief, obstacles to class treatment pose a threat to remedial efficacy and the rule of law. Courts, lawmakers, and scholars should therefore engage in a broader analysis that takes into account all of the subtypes set forth in the modern class-action rule.

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TABLE OF CONTENTS

Introduction	844
I. The Neglected Structure of The Class-Action Rule	852
A. Three Categories Rooted in Judicial Experience.....	853
1. <i>Inconsistent Judgments and Rule 23(b)(1)(A)</i>	854
2. <i>Depleted Resources and Rule 23(b)(1)(B)</i>	855
3. <i>Civil Rights and Rule 23(b)(2)</i>	857
B. A Fourth Category “Deliberately Created”	861
II. The Limited Terms of the Class-Action Debate	863
A. Settlement Pressure	865
B. Attorney Overcompensation	869
C. Delay and Expense	871
D. Other Topics of Debate.....	874
III. The Undifferentiated Products of the Class-Action Debate	875
A. Interlocutory Appeals.....	876
B. Evidentiary Burdens	879
C. Enumerated Ascertainability.....	881
D. Class Waivers.....	884
E. Heightened Commonality	886
IV. Case Studies of The Harm to Courts and Litigants	890
A. <i>Jamie S. v. Milwaukee Public Schools</i>	890
B. <i>M.D. ex rel. Stukenberg v. Perry</i>	895
C. <i>Fisher v. University of Texas at Austin</i>	898
V. Beyond Myopia: Broadening the Discussion.....	902
A. Disaggregating the Concerns, Differentiating the Responses.....	902
B. Converting to Subtype-Differentiated Standards	903
C. Highlighting History	906
Conclusion.....	908

INTRODUCTION

It has become a commonplace to say that the class action is dying, or at least, that courts and lawmakers are trying to kill it.¹ This

1. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (“[I]t is likely that, with a handful of exceptions, class actions will soon be virtually extinct.”); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 516 (2013) (“Various Cassandras over the past four decades have frequently, inaccurately, and repetitively reported the class action’s death. . . . Class action litigation, it turns out, is hard to kill off.”); Jay

Article argues that something different is going on: courts and lawmakers are trying to rein in a specific *type* of class action, and in the process, they are imposing unwarranted constraints on all of the others.

The problem is one of square pegs and round holes, and it arises from a myopic focus on the aggregated-damages class action,² the particular class form that aggregates a large number of monetary claims into a single class-wide recovery. Myopia is not blindness, and this problem has not arisen from a lack of knowledge on the part of courts, lawmakers, or scholars. Those who deal with class actions in their professional lives are aware that subtypes other than the aggregated-damages class action exist, and when they explicitly discuss those other class forms, they also recognize significant differences among them. However, when they turn their attention to perceived problems with the class-action device—and the appropriate responses to those problems—their knowledge and recognition of the other class forms tends to fall by the wayside. At that point, they tend to focus almost entirely on the aggregated-damages class action.

In an aggregated-damages class action, the amount of the recovery increases in connection with the number of people in the class, a feature that is both a blessing and a curse. On the one hand, the scaling-up from individual to class-wide recoveries can create economic viability where none existed before, by increasing the potential contingency fee enough that the litigation becomes worth an attorney's time.³ On the other hand, the incentive to create ever-larger classes can lead to unwieldy litigation, eyebrow-raising fees, and confiscatory recoveries.⁴

Tidmarsh, *Living in CAFA's World*, 32 REV. LITIG. 691, 691 (2013) (“It is fashionable these days to talk about the death of class actions.”).

2. FED. R. CIV. P. 23(b)(3).

3. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))). It bears emphasis that the creation of economic viability occurs only in negative-value class actions, that is, those in which the costs of individual litigation exceed the potential for recovery. Some aggregated-damages class actions, however, involve individual claims large enough to bring on their own. For those claims, rather than serving a litigation-facilitating purpose, the aggregated-damages class action can promote values of efficiency and uniformity. See *infra* Part I.B.

4. For discussion of the negative impacts of suboptimal class sizes, see generally David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79

Over the past two decades, courts and commentators have been arguing about the settlement pressure arising from class certification, the massive fee awards received by class counsel, and the time and expense required for class-action litigation, among other issues.⁵ Disagreements tend to center on the extent to which the benefits of class treatment justify these deviations from the asserted norms of traditional bilateral litigation,⁶ rather than the question whether class treatment in fact entails those deviations.⁷ This debate has led to a series of restrictions on class treatment, as courts and lawmakers have aimed for a better balance between the costs and benefits of allowing the class action to achieve its litigation-facilitating purpose.⁸

The class action, however, does not have *a* purpose; it has *purposes*.⁹ The current debate largely fails to reflect the versatility of the class action's design. Consider the following examples:

Logically indivisible relief: Residents of New York City allege that the city's emergency-preparedness program fails to accommodate the needs of persons with disabilities by, for example, failing to adequately provide for the evacuation of persons with disabilities from multistory buildings.¹⁰ The residents sue for an injunction to change the program.

Limited funds: Hurricanes cause the levees in New Orleans to break, leading to extensive flooding. Residents suffer hundreds of millions of dollars in damages, but only about \$21 million in insurance funds is available to satisfy their claims.¹¹ The residents sue to recover their fair share of the funds.

GEO. WASH. L. REV. 542 (2011); Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767 (2014).

5. See *infra* Part II.

6. For a discussion of the asserted norms of traditional bilateral litigation, see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

7. Cf. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1108 (2010) (criticizing the debate over class actions for "tend[ing] to convey the impression that the world neatly divides itself into the mass effects unique to class actions and the confined realm of litigation between individuals, each standing alone and each separately represented").

8. See *infra* Part III; see generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (arguing that by weakening plaintiffs' ability to bring class-action lawsuits, courts are undermining the efficiency, deterrence, and compensatory functions of the class action).

9. See *infra* Part I.

10. See *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 595–96 (S.D.N.Y. 2013).

11. See *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 189–90 (5th Cir. 2010).

Civil rights: A mental health provider alleges that a California law banning “sexual orientation change efforts” for minors (that is, therapy designed to convert minors from homosexual to heterosexual) violates his First Amendment rights. The provider sues for an injunction prohibiting the statute’s enforcement, not only as to him, but as to all others who provide such therapy.¹²

Aggregated damages: Consumers in Ohio allege that a company has sold them defective washing machines, which damage their clothing and create unpleasant odors in their homes.¹³ The consumers sue to recover the damages allegedly caused by the machines.

Plaintiffs may bring a class action in each of the foregoing scenarios, but each situation entails a different justification for class treatment and a different set of procedural needs. The class-action rule thus contains a different provision, with different procedural requirements, applicable to each:¹⁴ Federal Rule of Civil Procedure 23(b)(1)(A) for logically indivisible relief,¹⁵ Rule 23(b)(1)(B) for the distribution of a limited fund,¹⁶ Rule 23(b)(2) for civil rights and common conduct,¹⁷ and Rule 23(b)(3) for aggregated damages.¹⁸ For

12. See *Pickup v. Brown*, 740 F.3d 1208, 1221–22 (9th Cir. 2014).

13. See *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 844 (6th Cir. 2013).

14. In order to obtain certification under Rule 23 of the Federal Rules of Civil Procedure, a plaintiff must demonstrate that the proposed class meets each of the four prerequisites described in Rule 23(a), which consist of numerosity, commonality, typicality, and adequacy of representation. Many courts also impose the implicit requirements that a definable class must exist, and that the plaintiff must be a member of the class. 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:1 (5th ed. 2011); see also *infra* Part III.C (discussing the “ascertainability” requirement for class certification). The plaintiff must also show that the proposed class falls under at least one of the four subtypes described in Rule 23(b), which are set forth in the text. Confusingly, Rules 23(a) and (b) differ in their numbering; although the four prerequisites are set forth in (a)(1), (2), (3), and (4), the four subtypes are set forth in (b)(1)(A), (b)(1)(B), (b)(2), and (b)(3). FED. R. CIV. P. 23.

15. FED. R. CIV. P. 23(b)(1)(A) (“A class action may be maintained if Rule 23(a) is satisfied and if . . . prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class . . .”).

16. FED. R. CIV. P. 23(b)(1)(B) (“A class action may be maintained if Rule 23(a) is satisfied and if . . . prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests . . .”).

17. FED. R. CIV. P. 23(b)(2) (“A class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the class has acted or refused to act on grounds that apply

simplicity, I will refer to these subtypes as the logical-indivisibility, limited-fund, injunctive civil-rights, and aggregated-damages class actions, respectively.¹⁹ In contrast to the efficiency and litigation-facilitating purposes of the aggregated-damages class action,²⁰ the logical-indivisibility subtype protects against inconsistent judgments, the limited-fund subtype promotes the fair distribution of insufficient resources, and the injunctive civil-rights subtype facilitates class-wide relief for class-wide harms.²¹

These subtypes came into being nearly a half century ago, through revisions to Rule 23 that took effect in 1966.²² By then, centuries of Anglo American case law had demonstrated a need for devices like the logical-indivisibility and limited-fund subtypes as a means of protecting judicial legitimacy and preventing unfairness to litigants.²³ Similarly, relatively recent experiences with desegregation claims had demonstrated a need for a device like the injunctive civil-rights subtype as a means of promoting the rule of law and securing effective relief for large-scale harms.²⁴ In contrast, the aggregated-damages class action reached beyond previous judicial experience to encompass situations in which class treatment was “not as clearly called for,” as the authors of the revisions put it.²⁵ Although the other

generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . .”).

18. FED. R. CIV. P. 23(b)(3) (“A class action may be maintained if Rule 23(a) is satisfied and if . . . the 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.”).

19. Note that, although I use these labels as shorthand, they do not capture the full range of claims that each subtype can encompass. For example, although courts and scholars sometimes refer to Rule 23(b)(2) as the civil-rights class action, its application is not limited to any particular area of substantive law. In addition, in rare circumstances, courts have certified Rule 23(b)(1)(B) classes in cases that do not involve the distribution of a limited fund. *See* 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 23.42[3][c] (3d ed. 1997); *see also*, e.g., *Oneida Indian Nation of Wis. v. New York*, 85 F.R.D. 701 (N.D.N.Y. 1980) (certifying a class under 23(b)(1)(B) to adjudicate aboriginal rights). For a more detailed explanation of the scope and origin of each subtype, see *infra* Parts I.A–B.

20. *See supra* notes 3–4 and accompanying text; *see also infra* Part I.B.

21. *See infra* Part I.A.

22. *See infra* Part I; *see also* FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

23. *See infra* Parts I.A.1–2.

24. *See infra* Part I.A.3; *see generally* David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011) [hereinafter Marcus, *Flawed but Noble*] (arguing that prior desegregation actions played a role in the drafting of the 1966 Rule 23 amendments).

25. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

subtypes were designed to capture the lessons of existing case law, the aggregated-damages class action was an innovation, designed for procedural flexibility and adaptation.²⁶

And adaptation did indeed occur. Incentivized by the promise of sizable contingency fees, which were largely unavailable under the other subtypes, plaintiffs' lawyers turned their creative energies to the aggregated-damages class action. They achieved great success, and by the mid-1990s, courts certified more class actions under the aggregated-damages subtype than any other.²⁷ Yet even as the use of the aggregated-damages class action has expanded, the need for the other subtypes has remained—research suggests that about one third of class actions involve subtypes other than the aggregated-damages class action, with the injunctive civil-rights class action accounting for a large majority of that subset.²⁸ Moreover, due to the substantive claims involved, those subtypes have an importance beyond their raw numbers. The injunctive civil-rights class action, in particular, plays an important role in the articulation and enforcement of constitutional rights.²⁹ The mandate of *Brown v. Board of Education*,³⁰ for example,

26. See *infra* Part I.B.

27. As late as the mid-1980s, the injunctive civil-rights subtype accounted for most of the class actions that achieved certification. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 246 (1987). A few years later, however, a large-scale study of federal class-action activity demonstrated that “the world of class actions in 1995–96 was primarily a world of Rule 23(b)(3) damages class actions.” DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 52 (2000); see also Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 94 (1996) (affirming this finding in a smaller-scale study). But see Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 147 (2011) (noting that only limited data are available about class-action litigation).

28. Willging et al., *supra* note 27, at 94; see also *infra* note 193 (noting that, among the limited subset of interlocutory appeals from class certification decisions between November 30, 1998 and May 31, 2012, about 29 percent involved the injunctive civil-rights subtype). On the one hand, if class treatment were more readily available, this proportion might well be higher. See *infra* Part IV.C; see also Maureen Carroll, *Aggregation for Me, But Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2024–37 (2015) (analyzing plaintiffs' structural incentives and disincentives to pursuing class treatment when challenging a defendant's generally applicable policy or practice). On the other hand, these studies took place before the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* limited the types of claims that could be pursued in an injunctive civil-rights class action, see *infra* note 138 and accompanying text, which suggests that the proportion of such class actions might now be lower.

29. Carroll, *supra* note 28, at 2068–69; see also Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 598 (2012) (arguing that class actions offer important institutional advantages for the development of constitutional rights).

30. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

would have been more difficult to carry out if African American students had to sue one by one to obtain admission to previously segregated schools.³¹

Not only does the current debate largely fail to reflect the function and importance of subtypes other than the aggregated-damages class action,³² but more important, it also has produced across-the-board changes in class-action law that have made the purposes of the other subtypes more difficult to achieve.³³ Limitations ranging from broadened appellate review of class-certification decisions³⁴ to heightened commonality under *Wal-Mart Stores, Inc. v. Dukes*³⁵ have rendered the device inefficient or unavailable for some of its least controversial uses, as a result of perceived problems that may have little or nothing to do with those uses.³⁶ Indeed, it is unclear whether the paradigmatic post-*Brown* desegregation cases could be certified as class actions under today's restrictive standards.³⁷

As the foregoing discussion suggests, the impact of these undifferentiated restrictions on civil-rights litigation deserves particular concern.³⁸ Effective enforcement of civil-rights laws

31. By noting that it would have been more difficult without the class-action device, I do not mean to imply that it was easy. Nor do I mean to imply that the work is done. *See generally* GARY ORFIELD & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT, AND AN UNCERTAIN FUTURE* (May 15, 2014) (reviewing the impact of desegregation efforts over the past sixty years).

32. *See infra* Part II.

33. *See infra* Part III. “Myopia” implies inadvertence, and indeed, the initial creation of these across-the-board changes has generally resulted from courts’ and scholars’ inattention, rather than hostility, to the other subtypes. That initial inattention, however, creates room for subsequent opportunism. For example, a court that doubts the legitimacy or goals of an injunctive civil-rights case can rely on the broadly-stated holdings of prior aggregated-damages cases to deny class treatment. *See infra* notes 290–96 and accompanying text.

34. FED. R. CIV. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.”); *see also infra* Part III.A.

35. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *see also infra* Part III.E.

36. *Cf.* Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 439–40 (2014) (arguing that “[t]he ascendancy of the damage class action has been accompanied by the panoply of problems that bring class litigation into disrepute,” and that “[m]any of the class action harms that have developed recently would be avoided with elimination of the damage class action from the rule”).

37. *See infra* notes 285–89 and accompanying text.

38. *See* Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 484–508 (2014) (noting that “the class action device . . . plays a special role in the civil rights context” and explaining how civil-rights claimants “have been hit particularly hard by increasingly restrictive applications and interpretations of Rule 23”). *Cf.* David Marcus, *The*

depends on private litigation, as Congress recognized long ago.³⁹ But when only declaratory or injunctive relief is at issue, the private sector generally lacks an economic incentive to bring such litigation,⁴⁰ let alone to do so on a class basis.⁴¹ Market forces thus suppress the litigation of class actions seeking declaratory or injunctive relief for civil-rights violations. Increases in the transaction costs associated with injunctive civil-rights class actions can only further suppress this type of class litigation.⁴²

Recent cases brought under the injunctive civil-rights subtype illustrate the harms that undifferentiated restrictions on class treatment can cause.⁴³ In some such cases, the denial of class certification can prevent the courts from reaching the merits of important issues.⁴⁴ In others, it can increase the time and expense involved in litigating those issues on a class basis, without a corresponding benefit to the fairness or accuracy of the results.⁴⁵ Increases in the time and expense required for class litigation, in turn, will lead some litigants to forego seeking class treatment in the first instance; that choice can have negative consequences for judicial economy, rights articulation, and other values that the judicial system should promote.⁴⁶ In order to prevent these harms and improve the conceptual coherence of class-action law, courts, lawmakers, and scholars should move beyond the prevailing myopia to undertake a

Public Interest Class Action, 104 GEO. L.J. (forthcoming 2016) (manuscript at 4) (on file with the *Duke Law Journal*) [hereinafter, Marcus, *Public Interest*] (“Significant public interest cases have recently run aground for failure to meet Rule 23’s requirements, in ways that would have been nearly unimaginable a decade ago.”).

39. See, e.g., *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401–02 (1968) (describing the congressional intent underlying fee-shifting statutes).

40. Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 678 (2013).

41. Carroll, *supra* note 28, at 2073–74 (explaining that class-action status does not itself increase the fee available under fee-shifting statutes).

42. Cf. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 605–06 (1997) (discussing the effect of rising transaction costs on the litigation rate of widely held claims). It bears noting that suppressing the *class* litigation of a particular type of claim, such as civil rights, is often not the same as suppressing that type of litigation overall. As explained *infra* Part IV.C, increases in the transaction costs associated with class treatment will lead some plaintiffs to bring their claims on an individual rather than a class basis, causing inefficiencies and other difficult institutional problems.

43. See *infra* Part IV.

44. See *infra* Part IV.A.

45. See *infra* Part IV.B.

46. See *infra* Part IV.C.

broader analysis, one that takes into account all of the subtypes set forth in the modern class-action rule.⁴⁷

This Article proceeds as follows. Part I analyzes the origin and structure of the modern class-action rule to demonstrate its multifunctional design. Part II demonstrates the ways in which the current class-action debate neglects the existence and function of subtypes other than the aggregated-damages class action. Part III examines the mismatch between this conceptually limited debate and the across-the-board changes that it has produced. Part IV presents case studies of the harms that the undifferentiated changes can cause, and Part V identifies a set of approaches to mitigating and reversing those harms.

I. THE NEGLECTED STRUCTURE OF THE CLASS-ACTION RULE

The class-action rule took on its current structure through amendments that went into effect in 1966.⁴⁸ By that time, American courts had decades of experience with the prior version of Rule 23 of the Federal Rules of Civil Procedure, in addition to a much larger body of Anglo American case law on aggregate litigation generally.⁴⁹ The authors of the 1966 amendments took the lessons of history into account,⁵⁰ but they did not allow that history to constrain them. They created a new framework requiring that all class actions must satisfy the prerequisites of numerosity, commonality, typicality, and adequacy of representation,⁵¹ and must also fit within one of four

47. See *infra* Part V. When referring to the “modern” class-action rule, I mean the structure adopted in 1966, which introduced the subtypes set forth in Rule 23(b). FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment; see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999) (explaining that “modern class action practice emerged in the 1966 revision of Rule 23”).

48. David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 588 (2013) [hereinafter Marcus, *History*]; see also FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (replacing the original rule, which had defined the categories of class actions “in terms of the abstract nature of the rights involved”).

49. See YEAZELL, *supra* note 27, at 238–50.

50. For example, because scholars had criticized the prior version of the rule for allowing class members to opt into litigation after it became clear that the class would be successful, the 1966 authors determined that every certified class action would result in a judgment declaring all members of the class to be bound. FED. R. CIV. P. 23(c)(3) advisory committee’s note to 1966 amendment; Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1225 (1966) (“The new rule eliminates the unfairness of what the Advisory Committee terms one-way intervention by a spurious class member, who, under the old rule, could remain uncommitted until the termination of the litigation.”).

51. See FED. R. CIV. P. 23(a).

class-action subtypes.⁵² As described below, three of the subtypes represented an effort to codify a set of best practices that courts had already developed, whereas the fourth marked an ambitious and uncertain change in American civil procedure. It is that final category that, over the past two decades, has driven the path of the class-action rule as a whole.

A. *Three Categories Rooted in Judicial Experience*

Advisory Committee reporter Benjamin Kaplan, writing in the year following the adoption of revised Rule 23, described the drafters' approach to prior judicial experience with class actions as follows:

The Advisory Committee . . . perceived, as lawyers had for a long time, that some litigious situations affecting numerous persons “naturally” or “necessarily” called for unitary adjudication. . . . Approaching rule 23, then . . . the Committee strove to sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*. The revised rule was written upon the framework thus revealed⁵³

This analysis of recurring fact patterns resulted in the first three categories described in the class-action rule: the logical-indivisibility subtype set forth in Rule 23(b)(1)(A), the limited-fund subtype set forth in Rule 23(b)(1)(B), and the injunctive civil-rights subtype set forth in Rule 23(b)(2).⁵⁴ These three subtypes are collectively known as the “mandatory” class actions, because if a court certifies a class action under one of these subtypes, class members do not have an absolute right to decline membership in the class—that is, to “opt out.”⁵⁵ (In contrast, the aggregated-damages class action set forth in

52. See FED. R. CIV. P. 23(b).

53. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386 (1967). Kaplan had a strong leadership role in the drafting of the revisions to Rule 23. John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions*, in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 262, 265 (1997), <http://www.uscourts.gov/file/workingpapers-vol2pdf> [<http://perma.cc/9SJW-KMXX>].

54. For an explanation of these labels, see *supra* note 19.

55. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998) (“[T]he drafters of Rule 23 found it unnecessary to provide (b)(1) and (b)(2) class members with the absolute right to notice or to opt-out of the class”). *But see* 5 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 16:17 (4th ed. 2002) (“[C]ourts have the discretionary power to allow exclusion in Rule 23(b)(1) and (b)(2) class actions” but “generally courts have declined to extend the exclusion rule to include these classes.”).

Rule 23(b)(3) does provide an absolute right to opt out.⁵⁶) Due to their historical pedigrees, and because of the confusion that the term “mandatory” can cause,⁵⁷ I will refer to these three subtypes as the “traditional” class actions.

1. *Inconsistent Judgments and Rule 23(b)(1)(A)*. The Advisory Committee began its search for the traditional class-action categories by asking what would happen, in different factual scenarios, if more than one potential claimant brought an individual lawsuit.⁵⁸ In one scenario that courts had repeatedly faced, individual actions by multiple claimants created a risk of inconsistent judgments. The problem arose when a defendant had to choose whether to take a single, impersonal action with the potential to affect numerous other people—for example, taking water from a stream,⁵⁹ constructing a building,⁶⁰ or issuing a bond.⁶¹ The defendant’s conduct in such cases is logically indivisible in the sense that it cannot possibly be modified as to one plaintiff but not another.⁶² For example, a defendant cannot take water from a particular stream so as to reduce the amount of water available to one downstream landowner, yet leave the amount of water available to another downstream landowner unchanged. Similarly, a defendant cannot both construct and not construct a particular building, or issue and not issue a particular bond.

Although the defendant in a case involving logical indivisibility has no ability to take different actions toward different plaintiffs,

56. See FED. R. CIV. P. 23(c) (creating an opt-out provision only for classes certified under the aggregated-damages subtype). For this reason, courts and scholars sometimes refer to this subtype as the “opt-out” class action. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (“Rule 23(b)(3) ‘opt-out’ class actions superseded the former ‘spurious’ class action . . .”).

57. Some who hear the term “mandatory” take it to mean that, if a case falls into one of these three categories, then the plaintiff has no choice but to bring it as a class action. As explained *infra* Part IV.C, however, such a plaintiff does have a choice in the matter, and the potential for a plaintiff to make an institutionally suboptimal choice should factor into the development of class-action law.

58. Kaplan, *supra* note 53, at 387–88.

59. See *Fleming v. Bennett*, 116 P.2d 442, 444 (Cal. 1941); Kaplan, *supra* note 53, at 388.

60. See FED. R. CIV. P. 23(b)(1)(A) advisory committee’s note to 1966 amendment; *Gart v. Cole*, 263 F.2d 244, 247 (2d Cir. 1959).

61. See FED. R. CIV. P. 23(b)(1)(A) advisory committee’s note to 1966 amendment; *Maricopa Cty. Mun. Water Conservation Dist. No. One v. Looney*, 219 F.2d 529, 530 (9th Cir. 1955).

62. In some cases, the indivisibility results from legal rather than logical constraints, as when a utility is required by law to treat all customers alike. Kaplan, *supra* note 53, at 388.

multiple claimants might individually possess the right to sue the defendant over its conduct. In the absence of class treatment, this potential for multiple lawsuits would present an adjudicatory problem for both courts and litigants. A court might issue a decree requiring the defendant to take an action different from that required by another court's decree. Defendants might thereby find themselves subject to conflicting orders, or orders that simultaneously permitted and prohibited the challenged conduct. It was this risk of inconsistent judgments, and its negative consequences for judicial legitimacy, that the authors of the 1966 revisions sought to avoid.

To address cases involving logically indivisible relief, the authors of the 1966 revisions created Rule 23(b)(1)(A). The text of this subtype explicitly sets forth its purpose of preventing inconsistent judgments, providing for class treatment when “prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.”⁶³ The Advisory Committee envisioned that the logical-indivisibility subtype would enable a single, class-wide adjudication of the claimants' rights and the defendant's duties, preserving judicial legitimacy and assuring the possibility of compliance.⁶⁴

2. *Depleted Resources and Rule 23(b)(1)(B)*. In creating the logical-indivisibility subtype, the authors of the 1966 revisions generally took a defendant's perspective on the risks of individual adjudications. In contrast, when they turned to the limited-fund subtype, they took up the perspective of potential claimants.⁶⁵ Here, the risk to be avoided was that the adjudication of one claimant's rights would prejudice the interests of the others—for example, by depleting the resources available to satisfy future judgments.⁶⁶ Rule 19, which governs joinder of required parties,⁶⁷ addresses the same

63. FED. R. CIV. P. 23(b)(1)(A).

64. FED. R. CIV. P. 23(b)(1)(A) advisory committee's note to 1966 amendment.

65. Kaplan, *supra* note 53, at 388–89.

66. *Id.* at 389. As noted, on rare occasions this subtype has been used when circumstances other than the limited-fund scenario create this potential for intra-group prejudice. *See supra* note 19.

67. Specifically, Rule 19(a)(1) states,

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that

risk on a smaller scale;⁶⁸ not coincidentally, amendments to that rule took effect simultaneously with the revisions to Rule 23.⁶⁹

At the time of the 1966 revisions, principles similar to those captured in Rule 19 had already existed for centuries.⁷⁰ Courts had developed those principles to address recurring fact patterns, including the limited-fund scenario, in which the externalities of an individual case had the potential to harm similarly situated plaintiffs.⁷¹ Just as the logical-indivisibility scenario involved the impossibility of a defendant complying with incompatible standards of conduct, the limited-fund scenario involved another problem of impossibility, one that arose when a defendant would not be able to pay out all of the judgments that could be entered against it.⁷²

Early limited-fund cases involved situations such as foreclosure on a property subject to multiple mortgages and the distribution of a decedent's assets to his creditors.⁷³ Those types of cases continued into the modern era even as new forms, such as lawsuits seeking to

person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1). Previous versions of the rule used different terminology, referring to "necessary" and "indispensable" parties rather than "required" parties. FED. R. CIV. P. 19(b) ("When persons who are not indispensable . . . have not been made parties . . . the court shall order them summoned . . .").

68. FED. R. CIV. P. 19. Because required-party rules also address the risk of inconsistent adjudications, they can be seen as precursors to both Rule 23(b)(1)(A) and (B). See Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1257–58 (1961) (discussing cases concerned with "avoidance of inconsistent results").

69. See Kaplan, *supra* note 53, at 389 (noting the relationship between amended Rule 19 and the criteria set forth in Rule 23(b)(1)); see also *id.* at 358–59 (demonstrating reliance on Geoffrey Hazard's work in amending Rule 19).

70. See generally Hazard, *supra* note 68, at 1257–58 (discussing seventeenth-century decisions about necessary-party joinder, which courts justified for reasons including "avoidance of a multiplicity of actions, assurance of adequate presentation of the issues and relevant evidence, efficient use of judicial effort, and avoidance of inconsistent adjudication between different parties to the transaction").

71. See William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 722–23 (2006) ("[E]ach of the various types of class cases can be understood as necessitated by the externalities of individual litigation. . . . In a limited fund class case, for example, individual lawsuits produce spillover effects on persons not parties: by depleting the defendant's available resources, the early individual cases harm later litigants.").

72. Kaplan, *supra* note 53, at 361.

73. See Hazard, *supra* note 68, at 1256–70 (discussing seventeenth- through nineteenth-century cases).

divide insurance proceeds among those injured in an accident or natural disaster, came into being.⁷⁴ The thread tying the cases together was the risk that the latest-in-time claimants might be left with no recourse, despite having valid claims against the defendant, because of the practical effects of judgments already entered in favor of others.

In order to address that risk in cases involving large numbers of claimants,⁷⁵ the authors of the 1966 revisions created the limited-fund subtype under Rule 23(b)(1)(B). By its terms, this subtype authorizes class treatment when “prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.”⁷⁶ The provision allows for the equitable distribution of a limited fund through a single class proceeding, eliminating the need for claimants to race to the courthouse in order to secure relief.

3. *Civil Rights and Rule 23(b)(2)*. The injunctive civil-rights class action responded to a more recent set of cases, and a more immediate set of concerns, than the other two traditional class forms discussed above. Throughout the 1950s and 1960s, civil-rights plaintiffs attempted to bring a number of cases on a class basis.⁷⁷ In many cases—most famously, *Brown v. Board of Education*—they succeeded in obtaining class treatment and correspondingly broad orders for relief.⁷⁸ Often this breadth occurred in spite of the

74. See *supra* note 11 and accompanying text (discussing *In re Katrina Canal Breaches Litigation*, 628 F.3d 185 (5th Cir. 2010)); see also Kaplan, *supra* note 53, at 371–75 (discussing *Provident Tradesmens Bank & Trust v. Lumbermens Mutual Casualty*, 365 F.2d 802 (3d Cir. 1966), *vacated sub. nom.* *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968)).

75. Kaplan, *supra* note 53, at 364–65. As noted, simultaneous reforms to Rule 19 addressed such risks in cases involving fewer claimants. See *supra* notes 68–70 and accompanying text.

76. FED. R. CIV. P. 23(b)(1)(B).

77. See Marcus, *Flawed but Noble*, *supra* note 24, at 678–95 (categorizing the three periods of increased desegregation litigation as the few years before *Brown v. Board of Education*, the five years after *Brown*, and the early 1960’s); Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 468 (1960) (“The class action has recently been used extensively in the field of civil liberties . . .”).

78. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“[P]laintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

formalistic requirements imposed by the pre-1966 version of the class-action rule, which appeared to prevent class-wide remedies in desegregation cases.⁷⁹ Some judges, “[i]gnoring doctrinal constraints altogether . . . signaled that plaintiffs’ judgments in desegregation class actions would benefit all black schoolchildren included in the class definition,” even though the rule required a different result.⁸⁰

Other courts, however, refused to allow class treatment for desegregation and other civil-rights claims.⁸¹ Especially during the post-*Brown* period of Southern intransigence, many courts and legislatures engaged in legal strategies designed to limit the reach of the decision.⁸² These judicial and legislative strategies were mutually reinforcing: judges interpreted *Brown* as a prohibition on de jure discrimination rather than a requirement of integration, and legislatures “replaced de jure policies of segregation with mechanisms that purported to treat blacks as individuals but invariably produced the same segregated results.”⁸³ For example, some states enacted pupil-assignment laws that allowed school boards to conduct an individualized, multiple-factor assessment of each student’s appropriate school placement.⁸⁴ These replacement policies made dissimilarities within a potential class of African American students theoretically relevant to the class-certification analysis, and thus defeated requests for class treatment.⁸⁵

This is not to minimize the difficulties that civil-rights plaintiffs faced in securing *enforcement* of that relief. *See, e.g.*, *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 441 (1968) (noting that, more than thirteen years after *Brown* was decided, no white children and 85 percent of the African American children were attending one of the two schools in a defendant school district); DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 146–49 (5th ed. 2004) (describing resistance to desegregation in the decade following the *Brown* decision).

79. *See* Marcus, *Flawed but Noble*, *supra* note 24, at 681–83 (“Individual litigant preferences were theoretically relevant, even in cases challenging de jure, blanket policies because formally Fourteenth Amendment rights were several. But courts tended not to let abstract jural relationships alone hamstring class suits, taking a more realistic view of what these suits put at issue.”).

80. Marcus, *History*, *supra* note 48, at 601.

81. Marcus, *Flawed but Noble*, *supra* note 24, at 681–91. Some courts “emphasized the theoretical possibility, rather than the practical likelihood, that preferences among class members might diverge, and they refused class treatment on these grounds.” *Id.* at 683. Others “denied class treatment on grounds that individuals alone could choose when or how to vindicate their Fourteenth Amendment rights.” *Id.* at 685.

82. *Id.* at 683–86.

83. *Id.* at 683.

84. *Id.* at 684.

85. *Id.* at 685–86.

The unavailability of class treatment created serious problems for civil-rights plaintiffs. It could prevent them from obtaining any decision on the merits of their claims; for example, a school desegregation case might drag on until the individual plaintiffs had graduated, rendering the action moot.⁸⁶ It could create additional obstacles to compliance; for example, even if an individual case did result in a broad remedial order, the intended beneficiaries might find themselves unable to enforce it because of their status as nonparties.⁸⁷ Most important, it could result in an order so narrow as to be meaningless—many judges at that time refused to grant system-wide relief to individual litigants in civil-rights cases.⁸⁸ Some courts, upon holding that a desegregation plaintiff had proved his claim, would refuse to order any remedy beyond the admission of that one African American student to an otherwise all-white school.⁸⁹ That remedial approach could result in integration only after multiple lawsuits and great expense.

The creation of the injunctive civil-rights subtype can best be understood against this societal backdrop.⁹⁰ Although the modern version of Rule 23 took effect in 1966, the authors began work on the revisions several years earlier.⁹¹ As Advisory Committee member John Frank explained, those revision efforts proceeded “in direct parallel to the Civil Rights Act of 1964 and the race relations echo of that decade was always in the committee room.”⁹² The drafters were well aware of the hurdles facing civil-rights plaintiffs in unsympathetic and hostile courts,⁹³ as well as the inadequate relief that many of those

86. *Id.* at 679.

87. *Id.* at 679–80.

88. *Id.* at 680.

89. *Id.* at 710 (“The Fifth Circuit did not sanction an integration injunction in an individual suit until 1963, and regardless of this decision, recalcitrant district judges still cited a suit’s nonclass status to justify meaningless, individual-by-individual injunctions.” (footnote omitted)).

90. *Cf.* YEAZELL, *supra* note 27, at 21 (arguing that “[s]ocial context matters” to the understanding of procedural rules, especially those involving group litigation).

91. Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 HARV. L. REV. 664, 670 n.31 (1979) (“Although not promulgated until 1966, the basic text of the current rule actually was drafted by the Advisory Committee on Civil Rules in 1961 and 1962 . . . [A]s a practical matter the contours of the new rule had become firm by 1964.”).

92. Frank, *supra* note 53, at 266.

93. For example, Dave Marcus recounts that in a letter to the principal author of the 1966 revisions, Advisory Committee member Charles Alan Wright

described a recent case where a well-known segregationist judge had denied class treatment, then limited the injunction desegregating the defendant’s bus lines to the

litigants obtained from individual-by-individual injunctions.⁹⁴ This mismatch between remedy and harm had negative consequences not only for the other affected individuals, but also for judicial legitimacy and the rule of law.⁹⁵

With the need for system-wide responses to civil-rights claims specifically in mind,⁹⁶ the authors of the 1966 revisions created Rule 23(b)(2), which applies when “the party opposing the class 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.”⁹⁷ As the authors noted, this subtype allows a court to “sett[le] the legality of the [defendant’s] behavior with respect to the class as a whole,”⁹⁸ rather than through piecemeal litigation. If the court decides in favor of the class, all class members can rely on the resulting injunction or declaration. If the court decides in favor of the defendant, all class members are bound to that result.

three named plaintiffs. Given how this judge manipulated procedure to achieve an unjust end, Wright argued, “[i]t is absolutely essential to the progress of integration that such suits be treated as class actions, with the judgment binding on all members of the class.”

Marcus, *Flawed but Noble*, *supra* note 24, at 704–05 (alteration in original); *see also* Marcus, *History*, *supra* note 48, at 608 (noting “Rule 23’s use as an aid to desegregation lawsuits, the only real tool for civil rights enforcement before the 1964 Civil Rights Act”).

94. Marcus, *Flawed but Noble*, *supra* note 24, at 710.

95. YEAZELL, *supra* note 27, at 258 (arguing that the injunctive civil-rights subtype “expresses a strong preference, on grounds of seemliness, for consistency of outcome when similarly situated persons are involved” and reflects the drafters’ view of “the necessity of the legal order”); Carroll, *supra* note 28, at 2033; *see also* William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISCOURSE 136, 136 (2013) (introducing the concept of “social loyalty,” which provides that the shape of litigation should correspond to the “shape of the social activity that gave rise to [it]”).

96. Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294 (2014) (“The Committee’s motivation, in significant part, was to create a receptive procedural vehicle for the explosion of civil rights cases that followed the Supreme Court’s seminal 1954 decision in *Brown v. Board of Education . . .*”); *see also* FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (“Illustrative [of situations to which Rule 23(b)(2) would apply] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.”).

97. FED. R. CIV. P. 23(b)(2).

98. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

B. A Fourth Category “Deliberately Created”

The final subtype created by the 1966 revisions, unlike the other three, did not result from the lessons of judicial experience with aggregate litigation. Nor did it result from the Advisory Committee’s search for the categories of “natural” class actions.⁹⁹ Rather, it represented “a new category deliberately created,” and an “innovation[],” as its principal author described it.¹⁰⁰ This subtype, the aggregated-damages class action, applies when “the 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.”¹⁰¹

Rule 23(b)(3) enables a representative plaintiff to bring a class action based on an aggregation of multiple damages claims. The Advisory Committee stated that classes certified under the aggregated-damages subtype could “achieve economies of time, effort, and expense,” as well as “promote[] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”¹⁰² Alternatively, by offering the potential for a larger overall recovery and thus a larger contingency fee,¹⁰³ this subtype can create an economic incentive to litigation where none existed before. As Jack Weinstein wrote several years after the new rule’s adoption, “[m]atters which would not have been litigated can now be brought to court.”¹⁰⁴ These efficiency and

99. Kaplan, *supra* note 53, at 387.

100. *Id.* at 399. The Supreme Court, many years later, referred to Rule 23(b)(3) as “the most adventuresome’ innovation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

101. FED. R. CIV. P. 23(b)(3). The rule goes on to describe “[t]he matters pertinent to these findings” of predominance and superiority, which includes

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id.

102. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

103. The sometime and uncertain inclusion of monetary damages claims in Rule 23(b)(2) class actions offers some potential for plaintiffs’ attorneys to secure a contingency fee through the injunctive civil-rights subtype, but that potential is limited by the requirement that such damages must be “incidental” to other forms of relief. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

104. Jack B. Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299, 300 (1973).

litigation-generating purposes contrast sharply with the other subtypes' focus on avoiding the unfair or unworkable outcomes of individual litigation.¹⁰⁵

The authors of the 1966 revisions had doubts as to whether they should include the aggregated-damages class action in their changes to Rule 23.¹⁰⁶ The Advisory Committee's Note described the subtype in remarkably tentative terms, noting that "[i]n the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts."¹⁰⁷ In an article published in the year after the rule's adoption, Benjamin Kaplan assured readers that "(b)(3) is well confined,"¹⁰⁸ and that it "invites a close look at the case before it is accepted as a class action and even then requires that it be specially treated."¹⁰⁹ That special treatment includes express judicial findings of predominance and superiority, as well as notice and opt-out rights for members of the class—procedural protections not required under the other subtypes.¹¹⁰

Notwithstanding these additional protections, the aggregated-damages class action became the focus of criticism and controversy from the start.¹¹¹ Moreover, although the authors of the 1966 revisions had envisioned a more limited use for the new subtype,¹¹² the plaintiffs' bar increasingly recognized the possibilities it presented for economic rewards, and they attempted to bring class actions in areas

105. As Bill Rubenstein has described it, the aggregated-damages subtype aims to produce positive externalities, whereas the other subtypes aim to prevent negative externalities. Rubenstein, *supra* note 71, at 722–23.

106. Frank, *supra* note 53, at 267 (“[T]he most sharply disputed question [among members of the Advisory Committee] was whether to have Rule (b)(3) at all.”).

107. FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

108. Kaplan, *supra* note 53, at 395.

109. *Id.* at 390.

110. FED. R. CIV. P. 23(b)(3); FED. R. CIV. P. 23(c)(2).

111. As Kaplan noted, “[c]riticism of the draft new rule started with the suggestion that the rule should confine itself to the more ‘standard’ class actions of (b)(1) and (2) and stay out of the difficult terrain of (b)(3).” Kaplan, *supra* note 53, at 394. He rejected that “timid course” as “unthinkable.” *Id.* Later, he defended the need for the aggregated-damages subtype in terms of the class action's “historic mission of taking care of the smaller guy.” Marvin E. Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966) (recounting a conversation between Frankel and Kaplan).

112. See, e.g., FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (expressing the expectation that “mass accident” cases would not be appropriate for class-action certification).

ranging from mass torts to consumer claims.¹¹³ Unsurprisingly, defendants resisted these efforts,¹¹⁴ and before long, “segments of the bench and bar [were] waging a holy war” over the class-action rule.¹¹⁵ Stories of class counsel engaging in “undesirable or unprofessional conduct” became commonplace, notwithstanding objections that such “abuse does not appear to have been widespread,”¹¹⁶ and that “to the extent there are difficulties they center around . . . class actions under rule 23(b)(3), rather than actions under subdivision (b)(1) or (b)(2).”¹¹⁷

Due in large part to the creativity of the plaintiffs’ bar with regard to the aggregated-damages subtype, the other subtypes now represent a minority of class actions. But they are a significant minority, not only in number, but also in importance.¹¹⁸ The conditions that created a need for the traditional subtypes, having existed for decades or even centuries, have not suddenly disappeared. As the next Part explains, however, those subtypes have played a nearly invisible role in the development of class-action law over the past two decades.

II. THE LIMITED TERMS OF THE CLASS-ACTION DEBATE

Courts and commentators have long weighed the costs and benefits of the class-action device when debating its appropriate level of availability.¹¹⁹ In its current form, that debate involves vigorous disputes over issues relating to settlement pressure, attorney overcompensation, and the expense and delay associated with class

113. See, e.g., Mullenix, *supra* note 1, at 521 (“The dominant legal debate of the 1980s and 1990s focused on the use of the class action to resolve mass tort litigation.”). For a discussion of an aggregated-damages class action brought under consumer-protection laws, see *supra* note 13 and accompanying text.

114. See Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2127 (1989) (“[I]t did not escape attention at the time [of the 1966 revisions] that [Rule 23(b)(3)] would open the way to the assertion of many, many claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants.”).

115. Miller, *supra* note 91, at 664.

116. *Id.* at 666–67.

117. *Id.* at 667 n.18.

118. See *supra* notes 27–29 and accompanying text.

119. Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 572 (2013) (“The standard answer toward which most scholars in the debate gravitate balances the costs against the benefits; although different scholars weigh the costs and benefits differently (and hence come to different conclusions about the proper breadth of modern class actions), the methodology is the same . . .”).

treatment, among other topics. Over the past two decades, the class action's proponents and opponents alike¹²⁰ have tended to frame these disputes in a manner that neglects the existence of the logical-indivisibility, limited-fund, and injunctive civil-rights class-action subtypes.

It bears noting that the following analysis does not depend on whether the concerns described below are well taken in the context of the aggregated-damages class action.¹²¹ I will note my view, however, that these concerns have varying degrees of validity and import within that context. Arguments that plaintiffs' counsel in aggregated-damages class actions are overcompensated, for example, are often overstated (especially when unaccompanied by any inquiry into the compensation received by defense counsel), whereas concerns about the settlement pressure arising from certification of an aggregated-damages class sometimes carry more weight (especially as a justification for interlocutory appeals from class-certification decisions). My purpose in this Part is not to take a position with respect to these disputes in the context of the aggregated-damages class action. Rather, my argument is that *even if one agrees* that each of these concerns justifies restricting the availability of the aggregated-damages class action, the justification (as currently articulated and examined) does not extend to restrictions on the other subtypes.¹²²

120. For simplicity, I refer to those who generally favor greater availability of class treatment as proponents of the class action, and those who generally favor greater restrictions as its opponents. In some ways this is an oversimplification, but in others it represents a true divide in the political and scholarly debate. See Resnik, *supra* note 27, at 145–48.

121. FED. R. CIV. P. 23(b)(3). For an argument that does depend on the validity of concerns about the aggregated-damages class action, see Mullenix, *supra* note 36, at 440. Mullenix expresses concern about the ascendancy of the aggregated-damages class action, *id.* at 428, and argues that a juridical “category creep” (similar, but not equivalent, to the myopia that I describe here) “has significantly undermined the utility of these different [Rule 23(b)] class categories,” *id.* at 426. In light of her view that a great deal of the criticism of the aggregated-damages class action is warranted, she “advocates a return to a simpler class action rule limited to injunctive relief cases, with abandonment of the Rule 23(b)(3) damage class action.” *Id.* at 405. In contrast, I argue here that the purposes and effects of Rule 23(b)(3) should be distinguished from those of the other class forms, not that the aggregated-damages provision should be abolished. See *infra* Part V.B.

122. At the same time, examining these concerns in the context of the other subtypes may reveal ways in which they fall short even for a subset of aggregated-damages class actions. See *infra* Part II.C.

A. Settlement Pressure

Those who favor greater restrictions on class actions often raise the specter of “blackmail”¹²³ or “in terrorem”¹²⁴ settlements, in which a defendant pays to settle a case not because of its merits, but because class certification has increased the stakes of the litigation beyond what the defendant can bear.¹²⁵ Scholars raised concerns about settlement pressure as early as 1971,¹²⁶ but the issue did not gain widespread traction until 1995, when the Seventh Circuit decided *In re Rhone-Poulenc Rorer, Inc.*¹²⁷ In that influential opinion, Judge Posner expressed his concern that class certification could “forc[e] . . . defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”¹²⁸ In the intervening years, the notion that judges should guard against uses of the class action that result in irresistible settlement pressure has gained credence among courts and scholars.¹²⁹

123. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (“[C]lass certification creates insurmountable pressure on defendants to settle These settlements have been referred to as judicial blackmail.” (citations omitted)).

124. See, e.g., *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting that aggregated damages in class actions could create “an *in terrorem* effect on defendants, which may induce unfair settlements”).

125. See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015–16 (7th Cir. 2002) (arguing that class treatment “makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims”).

126. Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) (“Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail.”); see also HENRY J. FRIENDLY, *FEDERAL JURISDICTION* 120 (1973) (coining the term “blackmail settlement”).

127. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

128. *Id.* at 1299.

129. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (“Other courts have noted the risk of ‘in terrorem’ settlements that class actions entail”); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1254 (2002) (“Loose certification standards risk high costs by inviting frivolous class action suits that defendants settle rather than face potentially crippling, even bankrupting, damage awards.”); Bruce Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: *Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1379 (2000) (examining possible procedural solutions to the problem of certification-induced settlement pressure); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1878 (2006) (“This is not to say that class settlement pressure is absent from such cases, only that the law should not regard it as objectionable.”).

Of course, the blackmail thesis also has its critics: courts and scholars have questioned it on both empirical and normative grounds.¹³⁰ Some have pointed to the lack of evidence that defendants actually experience bet-the-company levels of settlement pressure because of class certification, or that settlements in fact result from certification-induced pressure, as opposed to pressure arising from the merits of the plaintiffs' claims.¹³¹ Others have argued that courts have no authority to consider settlement pressure as a factor in certification decisions, as no such provision appears in the class-action rule.¹³² Finally, some have disputed that there is anything unfair about the increased settlement pressure associated with class certification, as it results only from the scope of the defendant's own activity.¹³³

Notwithstanding the disagreements between them, both sides of this debate start from the assumption that class certification does in fact increase the stakes involved in the litigation, in the sense of increasing the total amount that the defendant would have to pay if it lost the case. To be sure, this assumption will always hold true for the aggregated-damages class action, because the joining together of multiple monetary claims necessarily increases the defendant's potential liability. Whatever the size of the claims, summing up two monetary values produces a total greater than either one taken alone.

What has gone largely unnoticed, however, is that the assumption of increased liability often does not hold true for subtypes other than the aggregated-damages class action.¹³⁴ For example, the

130. See generally Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494 (2013) (showing that courts inconsistently accept settlements of meritless claims despite criticizing the tendency of class actions to blackmail defendants); Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (arguing that the blackmail thesis lacks a persuasive normative explanation).

131. See, e.g., Silver, *supra* note 130, at 1359 ("The authors of a Federal Judicial Center study doubt that 'the certification decision itself, as opposed to the merits of the underlying claims, coerce[s] settlements with any frequency.'"). But see Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 524 (1991) (contending that securities settlements do not reflect the merits of the case).

132. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004); Lahav, *supra* note 130, at 1513.

133. See Lahav, *supra* note 130, at 1519 (contending that class actions allow the plaintiff class to "stand on equal footing with an organizational defendant with the same capacity to pursue a lawsuit," which the class members could not do as individuals); Silver, *supra* note 130, at 1366 (noting that a defendant's decision to settle for fear of losing at trial "is a reason for thinking the defendant is right to settle, not for thinking the defendant is coerced").

134. For a notable exception, see Robert G. Bone, *Sorting Through the Certification Muddle*, 63 VAND. L. REV. EN BANC 105, 113 (2010) (arguing that "the amount of improper leverage certification creates . . . is likely to vary with the type of class action involved").

very nature of logically indivisible relief is that the remedy available to a single claimant is the same as the remedy available to a group of claimants.¹³⁵ No matter whether one or many residents seek a particular change in a city's emergency-preparedness plan, the cost of making that change will remain the same; no matter whether one or many customers request that a restaurant build a wheelchair ramp, the cost of building that ramp will not change; no matter whether one or many neighbors complain about the fumes emanating from a hot sauce plant, the cost of containing the fumes will not be affected. In these types of cases, although many factors may affect the defendant's potential liability, the mere fact of class treatment does not. The same is true of limited-fund class actions,¹³⁶ which are available only when factors unrelated to the litigation limit the amount of money the defendant might be required to pay.¹³⁷

Prior to 2011, the link between certification and settlement pressure was more complicated in cases brought pursuant to the injunctive civil-rights subtype. At that time, courts routinely included claims for individualized monetary relief in classes certified under Rule 23(b)(2), creating a scaling-up effect similar to that involved in aggregated-damages class actions. In its 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*, however, the Supreme Court held that the members of a class certified under the injunctive civil-rights subtype could not seek individualized monetary relief.¹³⁸ Accordingly, although litigants may seek certification of an aggregated-damages class contemporaneously with certification of an injunctive civil-rights class, the latter should not itself entail the aggregation of individualized monetary claims.

To be sure, a defendant may well face pressure to settle a case that does not involve the aggregation of monetary claims. The cost of implementing an injunction, for example, may reach into the millions

135. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04 cmt. a (AM. LAW INST. 2010).

136. FED. R. CIV. P. 23(b)(1)(B).

137. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“[A]pplicants for contested certification on this rationale must show the fund is limited by more than the agreement of the parties . . .”).

138. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557–60 (2011). In addition to this holding about Rule 23(b)(2) and claims for individualized monetary relief, the *Wal-Mart* Court issued a holding addressing commonality, as discussed *infra* Part III.E.

of dollars.¹³⁹ In contrast to the aggregated-damages class action, however, for which the cost of the remedy necessarily increases with the number of people in the class,¹⁴⁰ the cost of a system-wide injunction will often be independent of the size or existence of the class.¹⁴¹ The cost of such an injunction depends on the expense associated with changing the defendant's generally applicable conduct, rather than the expense associated with delivering an individualized remedy to each class member. Moreover, even when logically indivisible relief is not at issue, a court might award system-wide relief to an individual plaintiff, further attenuating the relationship between class treatment and remedial cost.¹⁴² Accordingly, although subtypes other than the aggregated-damages class action can involve significant settlement pressure, class treatment is not usually the source of that pressure.

As the foregoing discussion suggests, the connection between class certification and settlement pressure requires separate analysis under each class-action subtype. But courts and scholars have generally failed to recognize the need for this differentiated analysis—class-action myopia has instead led the debate to proceed on the basis of mere assumptions, which remain unexamined precisely because they hold true in the context of the aggregated-damages subtype. Indeed, scholarship discussing certification-induced settlement pressure has routinely neglected even to mention that the

139. See, e.g., *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 491 (7th Cir. 2012) (noting that the injunction ordered by the district court would cost millions of dollars to implement); see also *infra* Part IV.A (discussing the appellate decision in *Jamie S.*).

140. For discussion of this scaling-up effect from individual to class-wide remedies in the context of the aggregated-damages class action, see *supra* notes 3–4 and accompanying text.

141. Exceptions exist in which the number of class members will directly increase the cost of an injunction. For example, enjoining the collection of a tax from all taxpayers will cost proportionally more than enjoining it only as to an individual plaintiff. Cf. *Richards v. Jefferson Cty.*, 517 U.S. 793 (1996). However, exceptions also exist in which the direct economic cost of a class-wide remedy will be less than the direct economic cost of individual relief. For example, in *Klayman v. Obama*, the district court ordered the National Security Agency (NSA) to stop collecting telephone metadata only as to two individual plaintiffs. 957 F. Supp. 2d 1, 43 (D.D.C. 2013). The NSA would thus continue to incur the costs of operating the metadata program, and to take additional actions to identify and disaggregate the information specific to those two individuals, *id.* at 43 n.70, as opposed to terminating the program altogether.

142. Most of the recent litigation about marriage rights for same-sex couples, for example, has proceeded on a nonclass basis yet has resulted in state-wide remedial orders. See, e.g., *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013) (noting that the District Court declared Proposition 8 unconstitutional, enjoined its enforcement by the California officials named as defendants, and directed those officials not to permit its enforcement by anyone under their control or supervision).

other subtypes exist.¹⁴³ Thus, although the debate over settlement pressure purports to be a debate about the class action writ large, on its current terms it amounts to a debate only about the aggregated-damages class action.

B. Attorney Overcompensation

The myopic focus on the aggregated-damages class action is not limited to disputes over settlement pressure, as disagreements over compensation for class counsel demonstrate. On one side of this disagreement, those who would limit the availability of the class action argue that plaintiffs' counsel receive excessive attorney's fees in class litigation.¹⁴⁴ Members of the public tend to agree: "[P]ublic attitudes about plaintiffs' class action lawyers have often been strongly negative,"¹⁴⁵ fueled in large part by stories of attorneys who receive huge contingency fees while class members receive little to no monetary relief.¹⁴⁶

As with settlement pressure, scholars have responded to the charges of overcompensation both empirically and normatively. Some have noted that, contrary to political rhetoric and popular belief, attorney's fees for class counsel have not in fact increased over time, and that "[f]ees and costs decline as a percent of the recovery as the recovery amount increases, suggesting the efficiency of this form of aggregate litigation."¹⁴⁷ Others have pointed to the deterrent function of class litigation, arguing that attorney compensation needs to be high enough to encourage class actions that deter harmful conduct.¹⁴⁸

143. See generally Hay & Rosenberg, *supra* note 129 (analyzing the blackmail charge in the context of Rule 23(b)(3)); Silver, *supra* note 130 (analyzing the blackmail charge largely in the context of Rule 23(b)(3), but including a reference to a particular limited-fund class action decision).

144. See, e.g., S. REP. NO. 109-14, at 14 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 15.

145. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 117-18 (noting that courts and lawmakers have also expressed negative views of class counsel).

146. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2043-44 (2010) ("Class action lawyers are some of the most frequently derided players in our system of civil litigation. The focus of this ire is usually the 'take' that class action lawyers receive from class action settlements.").

147. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 281 (2010); see also Fitzpatrick, *supra* note 146, at 2045-46 (noting that the percentage fee received by class counsel is lower on average than the typical contingency fee in an individual case).

148. Fitzpatrick, *supra* note 146, at 2046-47.

At times, this discussion looks like an argument over who is the fatter cat, with the class action's opponents pointing to class counsel who reap huge fee awards (despite doing little to earn them), and its proponents pointing to companies that reap huge profits (despite engaging in harmful activity).¹⁴⁹ Nonprofit public-interest lawyers seldom appear as characters in this drama. Just as the phrase "class action" is unlikely to make most people think of *Brown v. Board of Education*,¹⁵⁰ the phrase "class-action lawyer" is unlikely to make them think of Thurgood Marshall. Yet *Brown* was no less a class action than the consumer or securities cases that might come to mind, and Marshall was no less a class-action lawyer than the attorneys who bring those cases.

More generally, what the compensation debate neglects to recognize is that some class actions cannot generate huge contingency fees, or indeed any contingency fees, because they do not seek monetary relief. For example, consider class actions seeking only injunctive or declaratory relief pursuant to the civil-rights subtype.¹⁵¹ Such actions can yield a court-ordered attorney's fee only if a fee-shifting statute applies.¹⁵² Even then, absent exceptional circumstances, class counsel will at most receive a reasonable hourly rate for the hours reasonably spent on the litigation;¹⁵³ the typical award will fall below counsel's market rate for hours actually worked.¹⁵⁴ Indeed, many successful cases covered by a fee-shifting

149. This aspect of the class-action debate thus resembles political discussions of litigation and litigiousness in the early 1990s, when Republicans tried to focus the conversation on greedy "trial lawyers" and Democrats aimed to redirect it to "well-heeled corporate interests." See Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1757–62 (2013).

150. *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954) (deciding four consolidated class actions from Kansas, South Carolina, Virginia, and Delaware).

151. FED. R. CIV. P. 23(b)(2).

152. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 267–68 (1975) (holding that prevailing parties in federal litigation can recover their attorney's fees only through statutory authorization); see, e.g., 42 U.S.C. § 1988 (2012) (permitting a prevailing party to recover a reasonable attorney's fee in litigation brought pursuant to enumerated civil-rights statutes).

153. See *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 1673 (2010) (holding that enhancing attorney's fees will only be allowed in "rare" and "exceptional" circumstances). Fee awards cannot be adjusted to reflect the contingent nature of the fee. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992).

154. See generally Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535 (1990) (describing the economic hardship that civil-rights plaintiffs' attorneys endure due to fee restrictions). Courts can refuse to compensate the attorneys for the hours actually worked if

statute will yield no fee at all.¹⁵⁵ As with settlement pressure, compensation issues play out differently in the context of each class-action subtype, but the current class-action debate fails to recognize or account for those differences.

C. *Delay and Expense*

The same unrecognized limitation affects discussions of the delay and expense associated with the class-action device. Critics complain that class proceedings cost too much and take too long, with the effect of clogging court dockets, delaying relief to class members, and miring defendants in protracted litigation.¹⁵⁶ The class action's proponents largely concede that class proceedings consume more time and money than nonclass litigation, but argue that those additional costs are necessary to ensure that absent class members will be protected and that the necessary deterrence will be achieved.¹⁵⁷ The underlying assumption, on both sides, is that class actions are more expensive and time-consuming *because* they are class actions.

they deem the reported time unreasonable; for example, they may determine that a firm assigned more attorneys than necessary for a particular assignment, or that an attorney working on an assignment took more time than it should have required. In addition, “the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate” must be reduced based on the “degree of success obtained” in the litigation, “even where the plaintiff’s claims were interrelated, nonfrivolous, and raised in good faith.” *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

155. For example, if a defendant makes a settlement offer that includes a waiver of attorney’s fees, the plaintiff’s attorney may be ethically obligated to accept it on the client’s behalf. *See Evans v. Jeff D.*, 475 U.S. 717 (1986) (approving such offers); MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2013) (requiring an attorney to “abide by a client’s decision whether to settle a matter”); *see also* Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL’Y 1, 2 (2008) (discussing the impact of *Evans v. Jeff D.* on fee-shifting plaintiffs). Alternatively, if a defendant moots the case by unilaterally changing its conduct in the manner the plaintiff requested, the court will award no fees. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598, 600 (2001); *see generally* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007) (discussing the impact of *Buckhannon* on fee-shifting plaintiffs).

156. *See*, for example, the discussion of the expense and delay involved in class proceedings in the Supreme Court’s recent decisions interpreting the Federal Arbitration Act. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (“[T]he switch from bilateral to class arbitration . . . sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011))); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685–86 (2010) (noting that class arbitrations are less likely than bilateral arbitrations to receive the benefits of “lower costs, greater efficiency and speed”); *see also infra* Part III.D.

157. *See, e.g., Concepcion*, 131 S. Ct. at 1759–60 (Breyer, J., dissenting).

The assumption of increased time and effort holds true for the negative-value aggregated-damages class action, because in the absence of class treatment, little to no litigation would in fact occur.¹⁵⁸ Beyond that context, however, the issue becomes much murkier. To be sure, class certification proceedings take up courts' and litigants' time, and are not required in a nonclass case.¹⁵⁹ Yet the effect of those proceedings, when certification is granted, is to collapse multiple lawsuits (whether actual or potential) into one. More important, to the extent that the question is whether to increase the obstacles to class treatment, it must focus on *postcertification* delay and expense. Certification-related delay and expense would otherwise lead to obstacles that further increase certification-related delay and expense in an endless, one-way ratchet.

In terms of post-certification delay and expense, the class-action device can enable some lengthy and expensive litigation, involving extensive briefing and discovery. However, it also can enable the efficient, class-wide resolution of a purely legal question, involving no discovery at all. For example, in *Doe v. Marion County*,¹⁶⁰ the plaintiff brought an injunctive civil-rights class action challenging, on First Amendment grounds, an Indiana statute that prohibited registered sex offenders from using social-networking websites. He filed his complaint on June 27, 2012, and the Seventh Circuit resolved the "single legal question" presented by the case only nineteen months later, on January 23, 2013.¹⁶¹

Moreover, some of the "big" injunctive civil-rights class actions would be resource-intensive even if they proceeded on a nonclass basis. Consider California prison litigation. Before there was *Coleman/Plata*,¹⁶² a massive and ongoing pair of class actions addressing prison overcrowding, there was *Johnson v. California*,¹⁶³ a nonclass case addressing inmate segregation. Although the latter

158. A negative-value class action is one in which the expected costs of litigation exceed the expected monetary recovery. As noted, the application of the aggregated-damages class action is not limited to negative-value claims. *See supra* note 3 and accompanying text.

159. *See* Carroll, *supra* note 28, at 2063–65 (discussing the effect of certification burdens on plaintiffs' incentives and disincentives to pursuing class treatment).

160. *Doe v. Marion Cty.*, 705 F.3d 694 (7th Cir. 2013).

161. *Id.* at 697.

162. *See* *Brown v. Plata*, 131 S. Ct. 1910 (2011). The Supreme Court's decision in *Brown v. Plata* (like the decision of the three-judge district court below) encompassed two class actions: *Coleman v. Brown*, which involves prisoners with serious mental disorders, and *Plata v. Brown*, which involves prisoners with serious medical conditions. *See id.* at 1922.

163. *Johnson v. California*, 543 U.S. 499 (2005).

proceeded in the absence of class treatment, it nonetheless consumed over a decade of courts' and litigants' time, and it resulted in a state-wide, structural consent decree.¹⁶⁴

In some types of cases, class treatment can actually save both time and money, accelerating the provision of relief to the claimants. For example, in *Ortiz v. Fibreboard Corp.*,¹⁶⁵ the litigants attempted to settle asbestos litigation under the limited-fund subtype.¹⁶⁶ When the case reached the U.S. Supreme Court,¹⁶⁷ the entire Court agreed that “the elephantine mass of asbestos cases . . . defies customary judicial administration.”¹⁶⁸ The defendant had faced thousands of asbestos claims over a period of decades, and new claimants continued to come forward on a regular basis. The proposed class settlement would have stopped this flood, providing compensation for the claimants, closure for the company, and docket relief for the courts. Because the Court determined that the litigation was not amenable to class treatment, however, the company and claimants were instead “consigned to the endless waiting that characterizes asbestos bankruptcies.”¹⁶⁹ This is not to say that the class settlement in *Ortiz* should have been approved. My point is only that class treatment would have saved time and money, a possibility that the current class-action debate largely neglects.

The aggregation of monetary claims large enough to proceed individually, like those in *Ortiz*, can create efficiencies by reducing the duplication of effort by judges and litigants in factually and legally

164. See *id.* at 503 (noting that the plaintiff filed his complaint on February 24, 1995); Settlement and Release Agreement, *Johnson v. California*, No. 01-56436, 336 F.3d 1117 (9th Cir. 2003) (signed on December 12, 2005), <http://www.clearinghouse.net/chDocs/public/PC-CA-0041-0001.pdf> [<http://perma.cc/5PFP-FBW8>].

165. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1998).

166. *Id.* at 816.

167. The case remained live after the parties agreed to settle it because under Rule 23(e) of the Federal Rules of Civil Procedure, a class action may not be settled without judicial approval, and class members who object to a proposed settlement may appeal that approval. See, e.g., *Devlin v. Scardelletti*, 536 U.S. 1, 1 (2002) (holding that “non-named class members . . . who have objected in a timely manner to approval of a settlement at a fairness hearing have the power to bring an appeal”).

168. *Ortiz*, 527 U.S. at 821; *id.* at 865 (Rehnquist, C.J., concurring); *id.* at 866 (Breyer, J., concurring).

169. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005); see also RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 108 (2007) (noting that much of the asbestos litigation after *Ortiz* and *Amchem* has proceeded through asbestos-related reorganizations under the Bankruptcy Code, which disserve claimants “in ways that make the qualms about the *Amchem* and *Ortiz* class settlements seem mild by comparison”).

similar cases. These potential efficiency gains exist regardless of whether the aggregation occurs pursuant to the limited-fund class action or the aggregated-damages class action—under either subtype, discovery between the plaintiffs and the defendant will be bilateral rather than multilateral, and common questions will be decided in one proceeding rather than several.¹⁷⁰ An analysis of the other subtypes thus reveals that this aspect of the current debate has been limited in its focus, not only to the aggregated-damages class action, but to the *negative-value* aggregated-damages class action.

D. Other Topics of Debate

What is true of the foregoing topics is true of many others. Discussions of litigant autonomy,¹⁷¹ agency costs,¹⁷² distortion of substantive law,¹⁷³ and institutional competence¹⁷⁴ all have focused almost exclusively on the aggregated-damages class action, resulting

170. To some degree, aggregation through the multi-district litigation statute, 28 U.S.C. § 1407 (“the MDL statute”) also offers these potential efficiency gains. *See, e.g., In re Bank of N.Y. Mellon Corp. Foreign Exch. Transactions Litig.*, 857 F. Supp. 2d 1371, 1373 (J.P.M.L. 2012) (“Centralization [pursuant to the MDL statute,] will avoid duplicative discovery, eliminate the risk of inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.”). The MDL statute, however, allows consolidation only for pretrial matters; if not settled, individual cases must be transferred back to their originating courts before trial. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 26 (1998).

171. *See, e.g., Owen M. Fiss, The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 24 (1996) (discussing concerns about litigant autonomy, and stating that “the class action could be viewed as a device to fund the private attorney general and is able to play that role because of the aggregation of the claims of a large number of persons who have similar or identical claims, none of which—standing alone—would justify the suit.”). *But see Samuel Issacharoff, Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058 (2002) (noting that an individual’s effective degree of litigant autonomy differs in situations governed by the injunctive civil-rights and limited-fund subtypes as compared to the aggregated-damages subtype).

172. *See, e.g., John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 879 & n.5, 882–83 (1987) (discussing concerns about agency costs, and acknowledging the existence of Rules 23(b)(1) and (b)(2) in a footnote, but arguing that the description of the plaintiff’s lawyer as an “independent entrepreneur” rather than “as an agent of the client” applies across the substantive areas in which class actions are brought).

173. *See, e.g., Richard A. Epstein, Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 477–78 (discussing the distortion of substantive law, and stating that “the theory of class actions is to take a weak signal and to amplify it by aggregating small claims that would not otherwise be pursued individually, lowering the cost per individual suit”).

174. *See, e.g., Richard A. Nagareda, Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 610 (2008) (discussing concerns about institutional competence, and making only a brief reference to “the unusual settings” for class treatment under subtypes other than the aggregated-damages class action).

in a conceptually incomplete debate over the costs and benefits of the class-action device.¹⁷⁵ The class action's opponents and proponents have found common ground, but that common ground represents only a portion of the territory covered by the class-action rule. Even the most respected and accomplished attorneys and scholars have at times limited their analysis in this manner. For example, consider John Frank, a highly regarded scholar and advocate who served on the rulemaking committee that drafted the modern class-action rule in the early 1960s.¹⁷⁶ Writing in the mid-1990s, Frank described the rule's origins and subtypes, then went on to discuss what he viewed as the problems with the rule.¹⁷⁷ The concerns that he identified in that discussion related only to the aggregated-damages subtype. He concluded that "the modern class action . . . ha[d] become a legal mechanism out of control,"¹⁷⁸ yet the analysis supported only the conclusion that *the aggregated-damages class action* was a mechanism out of control. If the luminaries who designed the modern rule can fall prey to class-action myopia, it should come as no surprise that others do as well.

III. THE UNDIFFERENTIATED PRODUCTS OF THE CLASS-ACTION DEBATE

The current concerns about the class-action device have been debated within the limited context of the aggregated-damages class action,¹⁷⁹ largely neglecting considerations related to the other subtypes set forth in the rule.¹⁸⁰ Even as the class-action debate has narrowed in focus, however, its products have multiplied in scope and effect. As this Part explains, over a period beginning roughly in the

175. I do not mean to suggest that these concerns have no salience under any of the other subtypes; some do, to varying degrees. *See infra* Part V.A. But the criticisms have their origin in the aggregated-damages class action, and their applicability to the other subtypes has gone largely unexamined.

176. *See generally* John Q. Barrett, *Teacher, Student, Ticket: John Frank, Leon Higginbotham, and One Afternoon at the Supreme Court—Not A Trifling Thing*, 20 YALE L. & POL'Y REV. 311 (2002) (describing the success of Frank as a professor and advocate); Jonathan L. Entin, *In Memoriam: John P. Frank (November 10, 1917–September 7, 2002)*, 53 CASE W. RES. L. REV. 239 (2002) (chronicling the efforts of Frank that led to the widespread recognition of his success). Frank dissented from the inclusion of the aggregated-damages subtype in the revised rule. Frank, *supra* note 53, at 267.

177. Frank, *supra* note 53, at 264–70, 273–77.

178. *Id.* at 282.

179. FED. R. CIV. P. 23(b)(3).

180. *See* FED. R. CIV. P. 23(b)(1)(A), (b)(1)(B), (b)(2).

mid-1990s,¹⁸¹ courts and lawmakers have imposed a series of significant, across-the-board restrictions on class actions.

A. *Interlocutory Appeals*

The perceived connection between class certification and settlement pressure has driven, in whole or in part, multiple efforts to restrict the availability of the class-action device.¹⁸² In particular, a 1998 amendment to the class-action rule relied heavily on the concern that class certification would lead to “in terrorem” settlements—that is, compromises that reflect the defendant’s fear of a massive damages award rather than the merits of the plaintiffs’ claims.¹⁸³ Other motivations for the amendment included the fear that denial of class treatment would effectively end the plaintiff’s case, and the need to promote the development of appellate law about class certification.¹⁸⁴

The 1998 amendment added Rule 23(f),¹⁸⁵ which makes class certification decisions subject to interlocutory review at the discretion of the appellate court.¹⁸⁶ The Advisory Committee notes to the amendment make its primary motivations clear:

[S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff

181. As Robert Klonoff has noted, “for many years following the adoption of the modern federal class action rule (Rule 23) in 1966, most courts believed that the class action device was a salutary tool for the administration of justice. This perception has changed to a significant degree [in more recent times].” Klonoff, *supra* note 8, at 732; see also Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 677 (2014) (“The liberal attitude toward Rule 23, characteristic of the Rule’s early period, began to change in the 1990s.”).

182. Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1110 (2013) (“[T]here is no doubt that concerns about improper settlement leverage have had a major impact on class action decisions since the late 1990s.”). For a discussion of the limited terms of the debate over settlement pressure, see *supra* Part II.A.

183. Klonoff, *supra* note 8, at 740–41; see also *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004) (explaining that fears that class certification would cause undue settlement pressure “were the main reason behind the enactment of Rule 23(f)”).

184. FED. R. CIV. P. 23 advisory committee’s note to 1998 amendment.

185. The full text of Rule 23(f) reads:

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

FED. R. CIV. P. 23(f).

186. *Id.* An “interlocutory” appeal is one taken from an order or judgment that does not end the case. See *Interlocutory*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “interlocutory” as “interim or temporary; not constituting a final resolution of the whole controversy”).

with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.¹⁸⁷

These concerns, involving settlement pressure and negative-value monetary claims, have been debated almost exclusively within the context of the aggregated-damages class action.¹⁸⁸ Yet Rule 23(f) opens up the possibility of interlocutory review for all class-certification decisions, not just those involving monetary relief.¹⁸⁹

Although the rule allows either party to seek interlocutory review, Robert Klonoff has demonstrated that “in terms of sheer numbers, Rule 23(f) has served primarily as a device to protect defendants.”¹⁹⁰ Of all the appeals accepted from the provision’s effective date through May 2012, more than two-thirds resulted from a defendant’s request for review of a grant of class certification, and defendants secured reversal in approximately 70 percent of those appeals in which their request was granted.¹⁹¹ Conversely, “even when plaintiffs convinced the appellate court to grant review, they lost in the majority of cases.”¹⁹²

A subtype-specific analysis of these Rule 23(f) appeals reveals that plaintiffs fared at least as badly in the appellate courts when attempting to invoke the traditional subtypes as when attempting to

187. FED. R. CIV. P. 23 advisory committee’s note to 1998 amendment.

188. The other concern referenced in this excerpt, regarding the potential lack of economic viability for an individual claim, represents a version of the “death knell” thesis. This recognizes that a plaintiff with an individually small damages claim may abandon the litigation if the court denies certification, because in the absence of aggregation, the potential recovery (and contingency fee) will not be worth the candle. *See generally* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (analyzing the death knell thesis). As with concerns about settlement pressure, this analysis tends to assume that all class-action subtypes will increase the potential recovery for the class (and thus the potential contingency fee). For an explanation of why this assumption fails, see *supra* Part II.A.

189. FED. R. CIV. P. 23(f) (creating no distinction among class-action subtypes or relief sought).

190. Klonoff, *supra* note 8, at 741; *see also* Malveaux, *supra* note 38, at 505 (“Even when employees and other civil rights litigants are successful at class certification, their success runs the risk of being short lived because of increased access to appellate review.”).

191. Klonoff, *supra* note 8, at 741. This high reversal rate results in part from the changes discussed *infra* in Parts III.B–E, which constrain the availability of the class-action device by “impos[ing] new hurdles that make certification even more challenging for plaintiffs.” *Id.*

192. *Id.*

rely on the aggregated-damages subtype.¹⁹³ For example, considering only those appeals involving the injunctive civil-rights subtype, defendants won reversal in more than three-quarters of cases in which the district court granted certification, while plaintiffs won reversal in only one-third of cases in which the district court denied certification.¹⁹⁴ Accordingly, the effect of the rule has been to increase the difficulty of obtaining class-wide adjudication of a claim, regardless of subtype.

Moreover, plaintiffs must expend time and resources even on those appeals in which they ultimately succeed, further increasing the transaction costs associated with class treatment. The impact of these increased transaction costs should not be minimized, especially in the context of litigation seeking injunctive or declaratory relief for civil-rights violations. Because this type of litigation usually consumes rather than generates resources on the plaintiffs' side, even when the litigation succeeds in obtaining relief,¹⁹⁵ even the strongest claims are unlikely to get to court without the involvement of nonprofit organizations, pro bono attorneys, or other charitable efforts.¹⁹⁶ Higher transaction costs further suppress the availability of representation for these types of class-action plaintiffs, and they limit the resources that organizations can commit to other activities when they do represent such plaintiffs on a class basis.

193. The data in this paragraph are based on my review of the 209 appeals decided pursuant to Rule 23(f) from its effective date through May 31, 2012, listed in Klonoff, *supra* note 8, at app. A. The appeals broke down as follows: 4.31 percent (nine appeals) involved the logical-indivisibility subtype; 2.39 percent (five appeals) involved the limited-fund subtype; 29.19 percent (sixty-one appeals) involved the injunctive civil-rights subtype; and 85.17 percent (178 appeals) involved the aggregated-damages subtype. *Id.* These percentages do not add up to 100 because of cases in which plaintiffs sought certification under more than one subtype.

194. As noted previously, only 9 of the 209 appeals involved the logical-indivisibility subtype, and only 5 involved the limited-fund subtype. *See supra* note 193. Considering only those two subtypes, defendants won reversal in two-thirds and 100 percent, respectively, of the cases in which the district court granted certification, while plaintiffs won reversal in *none* of the cases in which the district court denied certification. *Id.*

195. *See supra* notes 39–42 and accompanying text.

196. *See* Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 482–88 (2014) (explaining that “[c]ivil litigation is often an expensive proposition” requiring “ample financial resources”).

B. Evidentiary Burdens

The class-action rule does not state the evidentiary burden required of plaintiffs seeking class treatment.¹⁹⁷ Before 2000, many plaintiffs obtained certification on the basis of minimal evidence, or even mere allegations, that the proposed class met the requirements of Rule 23.¹⁹⁸ In the early 2000s, however, courts began to increase the standard of proof required for class certification, regardless of subtype.¹⁹⁹

The heightened standards of proof flow largely from concerns about settlement pressure.²⁰⁰ Consider, for example, the Third Circuit's influential decision in *In re Hydrogen Peroxide Antitrust Litigation*.²⁰¹ The court held that “[i]n deciding whether to certify a class under [Rule] 23, the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties.”²⁰² As articulated by the court, this standard requires judicial findings in support of each Rule 23 element, including factual determinations based on a preponderance of the evidence.²⁰³ The court decided that a more lenient standard would not suffice, largely because it viewed the certification decision as crucially important to both parties:

Careful application of Rule 23 accords with the pivotal status of class certification in large-scale litigation, because “denying or granting class certification is often the defining moment in class actions (for it may sound the ‘death knell’ of the litigation on the

197. FED. R. CIV. P. 23; Bone, *supra* note 182, at 1112.

198. Bone, *supra* note 182, at 1111–12.

199. *Id.* In 2006 and 2008, the Second and Third Circuits issued influential opinions addressing the evidentiary showing required for class certification. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24 (2d Cir. 2006). The two decisions “are examples of a trend in the circuits toward stricter evidentiary burdens.” RICHARD A. NAGAREDA, ROBERT G. BONE, ELIZABETH CHAMBLEE BURCH, CHARLES SILVER & PATRICK WOOLLEY, *THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION* 280 (2d ed. 2013). Both were influenced by the Seventh Circuit's prior decision in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001).

200. Bone, *supra* note 182, at 1110. For a discussion of the concerns that courts and commentators have raised about improper settlement pressure resulting from class certification, see *supra* Part II.A.

201. *Hydrogen Peroxide*, 552 F.3d at 305.

202. *Id.* at 307.

203. *Id.*

part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants).”²⁰⁴

Like other cases imposing strict evidentiary standards, this reasoning relies on the products of a debate limited to the context of the aggregated-damages class action.²⁰⁵ Yet its holding, and others like it, embrace all of the class-action subtypes in an undifferentiated manner.²⁰⁶

Heightened evidentiary burdens increase the transaction costs associated with class treatment, as they require plaintiffs to introduce evidence supporting certification at an early stage in the proceedings,²⁰⁷ often without the benefits of full discovery.²⁰⁸ As to cases brought under subtypes other than the aggregated-damages class action, courts have not articulated a justification for those increased costs, which have a negative impact on the availability of the traditional subtypes.

204. *Id.* at 310 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)).

205. For a discussion on the scope of disputes over settlement pressure, see *supra* Part II.A (discussing the scope of disputes over settlement pressure); *supra* note 188 (discussing the scope of the “death knell” thesis).

206. See, e.g., *Hydrogen Peroxide*, 552 F.3d at 316 (referring to “the requirements of Rule 23” rather than the requirements of a particular subtype); see also *Brown v. Kelly*, 609 F.3d 467, 484–85 (2d Cir. 2010) (applying the predominance standard to both the aggregated-damages and the injunctive civil-rights subtypes). The Supreme Court’s decision in *Wal-Mart* did not clarify the applicable evidentiary standard to the extent that some had hoped. See, e.g., *Bone*, *supra* note 134, at 116 (arguing that the Court should adopt a more principled standard, possibly differentiated by subtype, in its *Wal-Mart* decision). It did, however, make clear that class-action plaintiffs must present evidence, not just allegations, to demonstrate their compliance with Rule 23. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

207. See FED. R. CIV. P. 23(c)(1)(A) (requiring a court to decide the certification issue at “an early practicable time after a person sues or is sued as a class representative”).

208. In theory, courts should permit sufficient precertification discovery to allow the plaintiff an opportunity to make the required showing; but in practice, some impose circular constraints or strict limits on precertification discovery. See, e.g., *Edwards v. First Am. Corp.*, 385 Fed. App’x 629, 631 (9th Cir. 2010) (reversing the district court’s denial of precertification discovery, and permitting the plaintiff to bring a new motion for class certification after completion of that discovery); *Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303, 305 (D. Colo. 1998) (“Before classwide discovery is allowed, plaintiffs must demonstrate that ‘there is some factual basis for plaintiffs’ claims of classwide discrimination.’” (quoting *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 267 (D. Minn. 1991))); see also 3 RUBENSTEIN, *supra* note 14, § 7:17 (“Courts . . . struggle to balance the fact that the certification decision overlaps with the merits with the idea that certification ought to be resolved before the merits, perhaps before full-on merits discovery.”); *Malveaux*, *supra* note 38, at 498 (“[T]he trajectory for [pre-certification] discovery has been increasingly constrictive . . . [E]mployers are now seeking to dismiss class claims on the face of the complaint pre-discovery, and some are prevailing.”).

C. *Enumerated Ascertainability*

In 2003, five years after the adoption of Rule 23(f),²⁰⁹ another amendment to the class-action rule codified the requirement that “[a]n order that certifies a class action must define the class and the class claims, issues, or defenses.”²¹⁰ This class-definition requirement had appeared in case law before the 2003 amendment, but at that point, few courts had denied certification on the basis of an inadequate definition.²¹¹ Courts have increasingly done so in the years following the amendment, often without giving plaintiffs an opportunity to amend the class definition to address the court’s concerns.²¹²

The Manual for Complex Litigation, published by the Federal Judicial Center for the benefit of federal trial judges, provides “some general guidance” as to the characteristics of an adequate class definition.²¹³ It states that “[t]he definition must be precise, objective, and presently ascertainable,” but with regard to ascertainability, it notes that “Rule 23(b)(3) actions require a class definition that will permit identification of individual class members, while Rule 23(b)(1) or (b)(2) actions may not.”²¹⁴ The latter part of this articulation of the ascertainability standard accords with the Advisory Committee’s statement, in its note to the 1966 revisions, that the injunctive civil-rights subtype was intended to reach situations “where a party is charged with discriminating unlawfully against a class, *usually one whose members are incapable of specific enumeration.*”²¹⁵

209. See *supra* Part II.A.

210. FED. R. CIV. P. 23(c)(1)(B).

211. Klonoff, *supra* note 8, at 763–64.

212. *Id.* at 761–68. In addition to the possibility of giving plaintiffs the opportunity to change their class definition, courts have discretion to change the definition themselves, and many continue to do so rather than deny certification altogether. See generally Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1918–26 (2014) (examining cases in which courts “alter[ed] the definition or scope of a plaintiff’s proposed class” instead of denying certification).

213. Klonoff, *supra* note 8, at 761 (noting that Rule 23 “does not elaborate on what constitutes an adequate class definition”).

214. MANUAL FOR COMPLEX LITIGATION § 21.222 (4th ed. 2004).

215. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (emphasis added). For an argument that this articulation is incorrect even as to the aggregated-damages subtype, see Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354, 2367 (2015); see also *infra* note 219 (showing that the language of Rule 23 recognizes that not all individuals in a class will be ascertainable).

As the Manual and the Advisory Committee note suggest, the function of the class definition varies depending on the particular subtype involved. In an aggregated-damages class action, for example, class members are entitled to notice of the action,²¹⁶ an opportunity to opt out,²¹⁷ and (usually) a personalized monetary award if the action succeeds.²¹⁸ Unless the class definition enables the court and litigants to create an enumerated list of the members of the class, providing notice and distributing monetary awards might prove difficult.²¹⁹ In contrast, an injunctive civil-rights class action does not require notice to class members²²⁰ or the distribution of individualized monetary relief.²²¹ Instead of individual compensation, such an action focuses on changing the defendant's conduct, which can be done without identifying each member of the class by name.²²² Accordingly, "it is not clear that the implied requirement of definiteness [another

216. FED. R. CIV. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.").

217. FED. R. CIV. P. 23(c)(2)(B)(v) ("The notice must clearly and concisely state . . . that the court will exclude from the class any member who requests exclusion.").

218. *But see* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 620 (2010) (discussing "fluid recovery" and "cy pres" remedies, which "refer to efforts to provide the 'next best' form of relief in cases where it is impractical or impossible to directly compensate the injured class members").

219. The class-action rule itself, however, appears to contemplate that some members of an aggregated-damages class will not be individually identifiable. Specifically, the notice provision states that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort.*" FED. R. CIV. P. 23(c)(2)(B) (emphasis added). A requirement of enumerated ascertainability would render that final phrase superfluous. *See Shaw, supra* note 215, at 2367 (noting the tension between this language and the ascertainability requirement).

220. The class-action rule gives courts discretion as to whether notice must be provided in a particular case involving one of the traditional subtypes. FED. R. CIV. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class." (emphasis added)).

221. Indeed, the Supreme Court has explicitly held that a class action certified under the injunctive civil-rights subtype *cannot* include claims for individualized monetary relief. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557–61 (2011).

222. Under any subtype, the class definition facilitates class-wide preclusion, but the features of the class definition that are necessary to achieve that preclusion vary by subtype as well. In an injunctive civil-rights class action, for example, the definition need only describe the class in terms that will enable a later court to tell whether the plaintiff standing before it belonged to that class (and thus is now precluded from bringing his or her claim). Enabling this reverse-engineering does not require individual enumeration of class members at the time of the original class certification or judgment.

term for ascertainability] should apply to Rule 23(b)(2) class actions at all.²²³

Not all courts impose a strict “definiteness” or “ascertainability” requirement for class certification, and of those that do, some recognize that enumerated ascertainability (that is, the ability to identify each class member by name at the time of the class certification or judgment) should not be required under all subtypes.²²⁴ Recently, however, some courts have begun to apply a more exacting version of the ascertainability standard,²²⁵ even in cases involving the injunctive civil-rights subtype.²²⁶ This approach can have the illogical result that an inability to enumerate each person affected by a defendant’s policy or practice prevents the court from determining whether to enjoin the defendant from engaging in that policy or practice.²²⁷ Class-action law may thus be moving toward another undifferentiated restriction on the availability of class

223. 1 RUBENSTEIN, *supra* note 14, § 3:7.

224. *Id.*; *see, e.g.*, Shelton v. Bledsoe, 775 F.3d 554, 563 (3d Cir. 2015) (concluding that ascertainability is a requirement for certification of an aggregated-damages class action but not an injunctive civil-rights class action). The subtype-differentiated nature of the inquiry into the adequacy of the class definition has long been recognized:

This case brings into sharp focus the relationship between class actions under Rule 23(b)(2), and class actions under Rule 23(b)(3). The provisions of Rule 23(b)(2) are designed to cover cases in which the primary concern is the grant of injunctive or declaratory relief. In such cases, there is no requirement that notice be given to all of the class members, and there is no opportunity for putative class members to “opt out.” Moreover, the precise definition of the class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance, since presumably at least the representative plaintiffs would be available to seek, and interested in obtaining, follow-up relief if necessary.

In a (b)(3) action, on the other hand, because of the notice and “opt out” features, greater precision in class definition is required. Moreover, most such actions involve claims for damages, and it is usually necessary, at some point, to identify individual members of the class.

Rice v. City of Phila., 66 F.R.D. 17, 19 (E.D. Pa. 1974).

225. Klonoff, *supra* note 8, at 762 (“In recent years . . . a significant number of courts have utilized the requirement of an adequate class definition to deny class certification. In the last five years alone, dozens of cases have denied class certification because of a flawed definition (either solely on that ground or as one of alternative grounds).”); *see also id.* at 762 n.188 (identifying dozens of cases in which courts have denied class certification by finding an inadequate class definition).

226. *Id.* at 764–65 (discussing *Romberio v. UnumProvident Corp.*, 385 Fed. App’x 423 (6th Cir. 2009), involving the injunctive civil-rights subtype, and noting that “[t]he approach in *Romberio* is especially troublesome because courts are supposed to be less exacting in assessing class definitions in (b)(2) cases than in (b)(3) cases”); *see also infra* Part IV.A (discussing *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481 (7th Cir. 2012), involving the injunctive civil-rights subtype).

227. For a detailed example of this effect, *see infra* Part IV.A.

treatment, one that not only increases the transaction costs associated with class certification, but that also can defeat certification altogether.

D. Class Waivers

Beginning in 2010, in a series of decisions interpreting the Federal Arbitration Act, the U.S. Supreme Court has dramatically expanded defendants' ability to avoid class treatment through the use of contractual waivers.²²⁸ Taken together, these cases establish that a preexisting contract between the plaintiff and defendant can preclude class treatment, both in federal court and within the arbitral forum, if it contains an arbitration clause that either prohibits the aggregation of claims²²⁹ or is silent on the issue.²³⁰ In the view of some scholars, "[a]ll of the doctrinal developments of recent years circumscribing the reach of class actions pale in import" next to these decisions, which permit companies to "opt out of potential liability by incorporating class action waiver language in their standard form contracts with consumers (or employees or others)."²³¹

The rationales for these class-waiver holdings reflect the limited scope of the class-action debate. The Court has asserted that class proceedings take too long and cost too much to be used in arbitration,²³² reflecting the limited terms of disputes over expense and delay.²³³ The Court has also stated that "class arbitration greatly increases risks to defendants," and that "[a]rbitration is poorly suited to the higher stakes of class litigation,"²³⁴ reflecting the limited terms of disputes over settlement pressure.²³⁵ Moreover, in the most recent of these cases, the Court provided a justification for precluding the creation of economically viable claims under the aggregated-damages

228. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750–51 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010).

229. *Concepcion*, 131 S. Ct. at 1752–53.

230. *Stolt-Nielsen*, 130 S. Ct. at 1771. If the arbitrator finds that the parties' contract provides for class arbitration, however, a court will not reverse that finding. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2070 (2013).

231. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012).

232. See *Stolt-Nielsen*, 130 S. Ct. at 1775.

233. See *supra* Part II.C.

234. *Concepcion*, 131 S. Ct. at 1752.

235. See *supra* Part II.A.

subtype.²³⁶ Yet the Court has failed to acknowledge or justify the simultaneous constriction of the other subtypes, even as it has announced these new interpretations of the Federal Arbitration Act that apply across the board in permitting defendants to contract their way out of class treatment.²³⁷

The impact of the Court's recent class-waiver decisions on the injunctive civil-rights class action is especially troubling. Consider, for example, employment-discrimination class actions seeking injunctive relief against an employer's generally applicable policy or practice. Such actions could ultimately disappear from the courts altogether, because "[a]t the time of hiring—or, indeed, at any time thereafter—businesses can (and often do) ask their employees to sign contractual agreements, including clauses to arbitrate any dispute that might arise."²³⁸ It is reasonable to think that most—if not all—businesses will eventually choose to adopt employment contracts with nonclass arbitration clauses, and thereby prevent employment-related class actions from being brought against them.²³⁹

Courts and lawmakers have long recognized that cases seeking broad injunctive relief can offer public as well as private benefits. Indeed, Congress has enacted a range of fee-shifting statutes to encourage litigants to secure those public benefits, and the Supreme Court has recognized that when a fee-shifting plaintiff "obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."²⁴⁰ Permitting defendants to avoid class actions seeking this type of injunctive relief limits the efficacy of the would-

236. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

237. Previously, for example, California law did not allow a defendant to compel arbitration of certain claims seeking broad injunctions that would benefit the public. *See Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1165 (Cal. 2003); *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 73–74 (Cal. 1999). In light of *Concepcion* and the other arbitration cases discussed above, however, those claims are now subject to mandatory arbitration. *See Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 933–34 (9th Cir. 2013) (recognizing the abrogation of *Broughton* and *Cruz*); *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198, 214–15 (Cal. App. 2012), *as modified on denial of reh'g* (Aug. 14, 2012).

238. Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 176 (2015).

239. *Id.*

240. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401–02 (1968). This is not to say that a remedial system offering only injunctive relief is without problems. *See generally* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006) (arguing that a remedial system offering only injunctive relief reduces the amount of cases brought and encourages conduct that defendants view as abusive).

be private attorney general by consigning him to the arbitral forum—or, potentially, dissuading him from seeking enforcement at all.

E. Heightened Commonality

In its 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court introduced yet another undifferentiated restriction on the availability of class treatment. The decision imposed a much stricter version of the commonality requirement—one of the four prerequisites that all class actions must satisfy²⁴¹—than courts had previously applied.²⁴² Notwithstanding the language of the rule, which requires only that there be “questions of law or fact common to the class,”²⁴³ the Court rejected the proposition that the identification of common questions should suffice to establish commonality.²⁴⁴ Instead, the Court held that all class members must “have suffered the same injury,”²⁴⁵ that “[t]heir claims must depend upon a common contention” that is “central to the validity of each one of the claims,” and that resolution of the common contention must resolve a central issue “in one stroke.”²⁴⁶ This inquiry requires a focus on dissimilarities within the proposed class, the Court explained, because those dissimilarities “have the potential to impede the generation of common answers” to the common questions that the class purports to present.²⁴⁷

In dissent, Justice Ginsburg objected that the Court had imported into the commonality requirement, which applies to all class-action subtypes, the more stringent “predominance” and “superiority” standards that apply only to the aggregated-damages class action. Specifically, Justice Ginsburg argued that²⁴⁸

241. See FED. R. CIV. P. 23(a).

242. A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 463 (2013).

243. FED. R. CIV. P. 23(a)(2).

244. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

245. *Id.* (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)).

246. *Id.*; see also Spencer, *supra* note 242, at 464 (referring to these three requirements as “the same injury, centrality, and efficiency requirements”).

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

248. *Id.* at 2565–66 (Ginsburg, J., dissenting); see also FED. R. CIV. P. 23(b)(3) (allowing certification of an aggregated-damages class action only if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority]”).

[t]he Court’s emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions “predominate” over individual issues. And by asking whether the individual differences “impede” common adjudication, the Court duplicates 23(b)(3)’s question whether “a class action is superior” to other modes of adjudication. . . . If courts must conduct a “dissimilarities” analysis at the Rule 23(a)(2) [commonality] stage, no mission remains for Rule 23(b)(3).²⁴⁹

The dissent noted that the Court’s directive to focus on dissimilarities as part of the commonality analysis was “far reaching” because of its effects on subtypes other than the aggregated-damages class action: “Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met.”²⁵⁰

The *Wal-Mart* commonality holding²⁵¹ appears to arise from a somewhat different source than the other products of myopia discussed above. The Court did not explicitly articulate the concerns that motivated its ratcheting-up of the commonality requirement, creating ambiguity as to whether it analyzed those concerns only within the limited context of the aggregated-damages subtype.²⁵² Moreover, another part of the opinion explicitly discussed (and strengthened) the distinctions between the traditional subtypes and the aggregated-damages class action, making clear that the Court had the existence of those subtypes firmly in mind.²⁵³

249. *Wal-Mart*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting) (citation and quotation marks omitted).

250. *Id.* The majority responded, “We consider dissimilarities not in order to determine (as Rule 23(b)(3) [the aggregated-damages subtype] requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) [the commonality prerequisite] requires) whether there is even a single common question.” *Id.* at 2556 (majority opinion) (alterations omitted) (emphases omitted) (quotation marks omitted).

251. For an argument that “the Court’s holding does not speak primarily to the content of Rule 23(a)’s commonality requirement,” but instead “sounds in the liability policies of Title VII,” see Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1038 (2013).

252. *Cf.* Bone, *supra* note 181, at 699 (“The Court’s rationale for this stricter rule [i.e. the commonality holding in *Wal-Mart*] is not terribly clear.”).

253. *Wal-Mart*, 131 S. Ct. at 2557–61 (holding that claims for individualized monetary relief cannot be brought pursuant to the injunctive civil-rights subtype). As Elizabeth Porter has noted, these two portions of the *Wal-Mart* opinion demonstrate dramatic differences in tone and interpretive approach, to the point that they almost seem like they could have been written by different justices. See Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 128 (2015).

The features of the opinion described in the previous paragraph suggest that the Court may not have fallen prey to the same form of myopia that led to the other undifferentiated changes discussed in this Part. The across-the-board nature of those changes resulted from what might be termed a “concern-based” form of myopia, in which concerns about the aggregated-damages class action are permitted to spill over onto and restrict the availability of the other subtypes. That is, it does not appear that the Court imposed its across-the-board change in the commonality requirement based on a specific concern that applies only in the limited context of the aggregated-damages class action.

Although the *Wal-Mart* commonality holding does not appear to represent a *concern-based* form of myopia, it does appear to represent a *claim-based* form of myopia, in which undue attention to the monetary relief sought by the class renders invisible the injunctive or declaratory relief being sought simultaneously. The plaintiffs’ stated purpose in the *Wal-Mart* litigation was to obtain a class-wide injunction restructuring the defendant’s employment practices, so as to counteract the gender bias that (according to plaintiffs) pervaded the company’s operations. The part of the opinion addressing commonality ignored that stated purpose entirely. Instead, consistent with a myopic focus on aggregated-damages claims, the Court focused exclusively on the monetary relief the plaintiffs sought for individual class members: it identified the “crucial question” in the litigation as “why was I disfavored”²⁵⁴ (that is, are individual class members entitled to *monetary* relief) rather than “are the defendant’s company-wide employment practices unlawful”²⁵⁵ (that is, is a class-wide *injunction* warranted).

The Court reached its conclusion about the “crucial question” in the case after citing to *Cooper v. Federal Reserve Bank of Richmond*²⁵⁶ for the proposition that “in resolving an individual’s Title VII claim, the crux of the inquiry is ‘the reason for a particular employment decision.’”²⁵⁷ This choice of authority is odd, to say the least. *Cooper* emphasized the “manifest” differences between a Title VII class

254. *Wal-Mart*, 131 S. Ct. at 2552.

255. *See id.* at 2565 (Ginsburg, J., dissenting) (“The Court gives no credence to the key dispute common to the class: whether Wal-Mart’s discretionary pay and promotion policies are discriminatory.”).

256. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984).

257. *Wal-Mart*, 131 S. Ct. at 2552.

action challenging a general pattern and practice of discrimination (like *Wal-Mart*) and a Title VII claim involving an individual.²⁵⁸ The *Cooper* Court stated that “[t]he inquiry regarding an individual’s claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.”²⁵⁹ The *Wal-Mart* Court’s reasoning and choice of authority makes sense only if one views the case narrowly (indeed, myopically) as a collection of individual damages claims, overlooking that the plaintiffs requested class-wide injunctive relief.

To be clear, the problem with the across-the-board reach of the *Wal-Mart* commonality holding is not that commonality should mean something different for each subtype. Rather, the problem is that, because different subtypes involve different types of claims and different forms of relief, there are some functions that the commonality requirement—which applies to all of the subtypes, unlike, for example, the predominance requirement²⁶⁰—should not perform. As with enumerated ascertainability,²⁶¹ overextending commonality can prevent the class-wide adjudication of claims, thereby preventing the traditional subtypes from performing their intended functions.

The decision in *Wal-Mart* is widely recognized as a sea change in class-action law, though as the foregoing discussion demonstrates, class-action plaintiffs did not find themselves in friendly seas even before that opinion issued. Over the past several years, an “unambitious and unflattering vision of class actions . . . has become the regnant view among legislative and judicial policymakers.”²⁶² That vision has caused significant changes to the law governing all class-action subtypes, but it arises from a debate focused almost entirely on the aggregated-damages class action.

258. *Cooper*, 467 U.S. at 876.

259. *Id.* (quotation marks omitted).

260. *See Wal-Mart*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting).

261. *See supra* Part III.C.

262. Tidmarsh, *supra* note 1, at 698. Though not discussed in the text, the Class Action Fairness Act of 2005 both responded and contributed to this negative view of class actions; the statute expanded federal jurisdiction over class actions, but its impact reaches beyond the doctrinal changes it introduced. *See id.*; *see also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1530 (2008) (“[S]ome of CAFA’s supporters were not seeking different class action law so much as they were seeking different attitudes towards class certification.”).

IV. CASE STUDIES OF THE HARM TO COURTS AND LITIGANTS

Concerns arising from the limited context of the aggregated-damages class action²⁶³ have constrained the availability of the class-action device as a whole, including the logical-indivisibility,²⁶⁴ limited-fund,²⁶⁵ and injunctive civil-rights²⁶⁶ subtypes. This constriction implicates a deep historical irony. The least controversial class forms—the ones that had already achieved widespread acceptance as situations demanding class treatment at the time of the 1966 revisions—have been eclipsed by the form that the designers of the modern framework were not even sure whether to include.²⁶⁷ Worries about the “‘adventuresome’ innovation”²⁶⁸ represented by the aggregated-damages class action have thereby lessened the availability of the subtypes that have long been viewed as institutionally beneficial.²⁶⁹ This Part aims to illustrate the harms caused by that lessened availability through case studies of recent actions in which the plaintiffs relied on the injunctive civil-rights class action, or in which they could have done so, but chose not to.

A. *Jamie S. v. Milwaukee Public Schools*

For some civil-rights claims, the recent constraints on class treatment have effectively prevented any adjudication of the factual and legal issues presented, whether in favor of the plaintiffs or the defendants.²⁷⁰ For example, consider *Jamie S. v. Milwaukee Public Schools*,²⁷¹ a case decided by the Seventh Circuit in 2012. In *Jamie S.*, the plaintiffs sought declaratory and injunctive relief on behalf of a putative class of special-education students, alleging that defendants Milwaukee Public Schools and Wisconsin Department of Instruction

263. FED. R. CIV. P. 23(b)(3).

264. FED. R. CIV. P. 23(b)(1)(A).

265. FED. R. CIV. P. 23(b)(1)(B).

266. FED. R. CIV. P. 23(b)(2).

267. *See supra* Part I.

268. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citation omitted).

269. *See supra* Part III (discussing across-the-board restrictions on the class-action device imposed in response to concerns largely rooted in the aggregated-damages subtype).

270. *Cf. Parsons v. Ryan*, 754 F.3d 657, 680 (9th Cir. 2014) (noting that in the absence of class treatment, Eighth Amendment violations allegedly caused by the under-resourcing of a prison system would likely go unaddressed); *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc) (holding that, in a nonclass damages suit against prison officials, under-resourcing can excuse what would otherwise constitute an Eighth Amendment violation).

271. *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481 (7th Cir. 2012).

had violated their rights under the Individuals with Disabilities Education Act (IDEA).²⁷² Specifically, the IDEA requires participating states to implement a process known as “child find,” under which all children with disabilities who are “residing in the State . . . and who are in need of special education and related services, are identified, located, and evaluated.”²⁷³ The *Jamie S.* plaintiffs alleged that the defendants had failed to satisfy the child-find requirements, resulting in students with disabilities being denied or delayed access to special-education services.²⁷⁴

The district court granted certification, under the injunctive civil-rights subtype, for a class defined as follows:

Those students eligible for special education services from the Milwaukee Public School System who are, have been or will be either denied or delayed entry or participation in the processes which result in a properly constituted meeting between the IEP team and the parents or guardians of the student.²⁷⁵

The court subsequently found the defendants liable for violating the child-find requirements.²⁷⁶ It ordered the defendant school district²⁷⁷ to implement a complex remedial scheme, under which the parents or guardians of potential class members would receive notice and an opportunity for an evaluation of their child’s special-education needs.²⁷⁸

On appeal, the Seventh Circuit vacated the remedial order and decertified the class, holding that the proposed class failed on grounds of ascertainability,²⁷⁹ commonality,²⁸⁰ and indivisibility.²⁸¹ As to

272. *Id.* at 484–86. The plaintiffs were represented by attorneys from Disability Rights Wisconsin, a nonprofit advocacy group. *Id.* at 484.

273. 20 U.S.C. § 1412(a)(3)(A) (2012).

274. *Jamie S.*, 668 F.3d at 485. The plaintiffs had initially pleaded a broader set of allegations, but by the time of the appellate court’s decision, the scope of the case had been narrowed. *Id.*

275. *Id.* at 487–88. An IEP, or Individualized Education Plan, outlines the specific educational services to which a child is statutorily entitled. Those services are identified and memorialized at a meeting attended by the members of the child’s “IEP team,” including his or her parent or guardian. *Id.* (citing 20 U.S.C. §§ 1412(a)(4)–(5), 1414(d)(1)(B) (2012)).

276. *Id.* at 488.

277. The defendant state agency had settled with the plaintiffs after the liability phase ended. *Id.*

278. *Id.* at 489.

279. *Id.* at 485. Ascertainability, a term that does not appear in the class-action rule, refers to a court’s ability to identify the members of the class. For a discussion of the impact of myopia on the ascertainability requirement, see *supra* Part III.C.

ascertainability, the court held that “this class lacks the definiteness required for class certification; there is no way to know or readily ascertain who is a member of the class.”²⁸² It then held commonality to be lacking because “resolving any individual class member’s claim for relief under the IDEA requires an inherently particularized inquiry into the circumstances of the child’s case.”²⁸³ Finally, it held that the class did not seek an appropriately class-wide remedy because “as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made; this kind of relief would be class-wide in name only.”²⁸⁴

It is profoundly unlikely that any of the reasons articulated in *Jamie S.* would have prevented certification under the injunctive civil-rights class action as it was understood in 1966. Consider a paradigmatic desegregation case during the time of pupil-assignment laws, which allowed school boards to conduct an individualized, multiple-factor assessment of each student’s appropriate school placement.²⁸⁵ Even though the process as a whole resulted in segregated schools, there was no way to know what the outcome of the individualized inquiry for any particular African American student would have been if the process had been conducted fairly. Under the logic of *Jamie S.*, the class of students denied equal treatment would thus be unascertainable on the basis that “there is no way to know or readily ascertain who is a member of the class.”²⁸⁶ Similarly, because resolving any particular class member’s claim for

280. *Jamie S.*, 668 F.3d at 485–86. Commonality refers to the requirement, set forth in Rule 23(a)(2), that “there are questions of law or fact common to the class.” FED. R. CIV. P. 23(a)(2). For a discussion of the impact of myopia on the commonality requirement, see *supra* Part III.E.

281. *Jamie S.*, 668 F.3d at 485–86. Indivisibility, another term that does not appear in the class-action rule, has resisted a straightforward definition. See *infra* Part V.C. In *Wal-Mart*, the Court explained indivisibility as “the notion that the conduct [challenged by the class] is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (quoting Nagareda, *supra* note 247, at 132).

282. *Jamie S.*, 668 F.3d at 495. The Seventh Circuit recently declined to adopt an ascertainability standard for aggregated-damages class actions as strict as the one that other courts have applied. See *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 658 (7th Cir. 2015). In that opinion, however, the Seventh Circuit referred to *Jamie S.* as an example of an acceptably “weak” ascertainability requirement applicable to all subtypes. *Id.* at 659.

283. *Jamie S.*, 668 F.3d at 498.

284. *Id.* at 499.

285. See *supra* Part I.A.3.

286. *Jamie S.*, 668 F.3d at 495.

admission to the all-white school would “require[] an inherently particularized inquiry into the circumstances of the child’s case,”²⁸⁷ the class would also lack commonality. Finally, because reassigning students on a nonsegregated basis would “merely initiate a process through which highly individualized determinations of liability and remedy are made,”²⁸⁸ the remedy would not be deemed appropriate under Rule 23(b)(2). Yet this was precisely the type of case for which the injunctive civil-rights class action was designed.²⁸⁹

The *Jamie S.* opinion contains some suggestions that the court’s real objection was not to the appropriateness of class treatment, but to the cost and intrusiveness of the proposed remedy. The court noted that the district court’s order “required [the defendant] to create a massive identification and evaluation system consuming significant educational resources and costing millions of dollars.”²⁹⁰ It also dismissed a precedent upon which the plaintiffs had relied as “a relic of a time when the federal judiciary thought that structural injunctions taking control of executive functions were sensible.”²⁹¹ The increasing restrictions on class treatment enable courts to transform objections like these into barriers to certification.

If the burdensomeness of the remedy is the problem, however, class certification is not the appropriate point at which to address it.²⁹² Indeed, the certification stage often will not even be an *effective* point

287. *Id.* at 498.

288. *Id.* at 499.

289. This is not to say that these types of cases should automatically be certified without procedural protections, such as class-wide notice and subclassing, that the authors of the 1966 revisions would have deemed unnecessary. Indeed, insights gained in the years since the adoption of the modern class-action rule suggest a need for more thorough analysis of intraclass conflicts in injunctive civil-rights class actions than those authors likely had in mind. *See, e.g.,* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976). Denying certification altogether, however, cannot generally offer an effective response to such conflicts, as it “would often introduce all the inefficiencies attending individual suits, without necessarily restricting the scope of the ultimate decree.” Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1195 (1982); *see also infra* Part IV.A (arguing that, before limiting class treatment in response to a concern about the class-action device, courts and policymakers should determine whether the denial of class treatment will effectively address that concern).

290. *Jamie S.*, 668 F.3d at 491.

291. *Id.* at 496 (quoting *Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008)).

292. *Cf. Marcus, Public Interest*, *supra* note 38, at 21 (noting that “no one has developed . . . to any extent” the idea that “class action procedure is the right lever to pull” to rein in structural reform litigation); Wolff, *supra* note 251, at 1042 (arguing, in the context of statutory-damages actions, that “Rule 23 does not set policy on the propriety of aggregate remedies as a means of accomplishing regulatory goals”).

at which to address that problem, as many courts will issue structural injunctions or other potentially burdensome remedies in the absence of class treatment.²⁹³ Moreover, denying class certification leaves defendants without the benefit of class-wide preclusion. They remain subject to suit on the identical issue, and there is no preclusive barrier to a subsequent suit proceeding in class form.²⁹⁴ At the same time, the absence of class treatment can leave plaintiffs without a meaningful remedy, no matter how egregious or widespread the violation. For example, those affected may be unaware that their rights have been violated, or they may lack the resources to bring individual lawsuits in numbers sufficient to justify systemic relief.²⁹⁵ It would be far better to resolve the factual and legal issues as to the class as a whole—whether in favor of the plaintiffs or the defendants—and if the plaintiffs prevailed, to apply remedial principles to determine the appropriate scope of the remedy.²⁹⁶

293. To the contrary, courts sometimes deny a plaintiff's request for class certification on the ground that the court will issue as broad a remedy to the individual plaintiff as it would to a plaintiff class, making class treatment unnecessary. See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 7AA FEDERAL PRACTICE AND PROCEDURE § 1785.2 (3d ed. 2005 & Supp. 2015). For criticism of this "necessity" doctrine, see Carroll, *supra* note 28, at 2077–78.

294. This is because, as the Supreme Court recently made clear, "[n]either a proposed class action nor a rejected class action may bind nonparties." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011). The Court acknowledged that "the rule against nonparty preclusion . . . perforce leads to relitigation of many issues, as plaintiff after plaintiff after plaintiff (none precluded by the last judgment because none a party to the last suit) tries his hand at establishing some legal principle or obtaining some grant of relief." *Id.* at 2381.

295. Writing separately in *Jamie S.*, Judge Rovner expressed concerns along these lines. See *Jamie S.*, 668 F.3d at 505 (Rovner, J., concurring in part and dissenting in part). She argued that:

[The absence of class treatment] would surely mean that many such students would remain unidentified and denied their right to free appropriate public education (if only because they would be unaware of their rights) and likely would mean that the systemic violation underlying their claims to relief would persist, as any individual proceedings would result in individual rather than structural relief.

Id. Similarly, in a case involving unlawful strip searches, the Second Circuit determined that [a]bsent class certification and its attendant class-wide notice procedures, most of these individuals—who potentially number in the thousands—likely never will know that defendants violated their clearly established constitutional rights, and thus never will be able to vindicate those rights. As a practical matter, then, without use of the class action mechanism, individuals harmed by defendants' policy and practice may lack an effective remedy altogether.

In re Nassau Cty. Strip Search Cases, 461 F.3d 219, 229 (2d Cir. 2006).

296. See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").

B. M.D. ex rel. Stukenberg v. Perry

The recent restrictions on class treatment, coupled with the instability of the doctrine, have led to significant and unproductive delays in the resolution of class actions brought under the traditional subtypes. *M.D. ex rel. Stukenberg v. Perry*,²⁹⁷ a case decided by the Fifth Circuit in 2012, provides an example of this phenomenon. The plaintiffs in *M.D.* alleged that understaffing and general under-resourcing of the Texas foster-care system exposed the state's 12,000 foster children to an unreasonable risk of harm, in violation of the children's Fourteenth Amendment rights.²⁹⁸ The plaintiffs filed their complaint in March 2011, and they moved for class certification less than a week later; the district court granted certification less than two months after that, and soon set a trial date for February 2013.²⁹⁹ The case appeared to be moving relatively expeditiously toward a merits resolution.

An interlocutory appeal pursuant to Rule 23(f), however, sent the case back to the certification stage.³⁰⁰ In its March 2012 decision in that appeal, the Fifth Circuit held that the Supreme Court's intervening decision in *Wal-Mart Stores, Inc. v. Dukes* required it to vacate the district court's class certification order.³⁰¹ First, the Fifth Circuit held that the lower court had failed to conduct the "rigorous analysis" that *Wal-Mart* required as to commonality.³⁰² Next, the appellate court held that the proposed class failed to meet the requirements of the injunctive civil-rights subtype, because the plaintiffs had not shown that a single injunction could provide relief to the entire class.³⁰³ The court noted that if the plaintiffs attempted to

297. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012).

298. *Id.* at 835.

299. *See M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 18 (S.D. Tex. 2013) (describing this timeline).

300. *See M.D. ex rel. Stukenberg*, 675 F.3d at 836 (describing this procedure).

301. *Id.* at 839 ("Although the district court's analysis may have been a reasonable application of pre-*Wal-Mart* precedent, the *Wal-Mart* decision has heightened the standards for establishing commonality under Rule 23(a)(2), rendering the district court's analysis insufficient."); *see also id.* at 848 n.8 ("We acknowledge that [*Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (per curiam),] found that the district court did not abuse its discretion by certifying a similar class action. But the court did acknowledge that the proposed class 'stretch[ed] the notions of commonality and typicality,' . . . and it was decided before the Supreme Court's opinion in *Wal-Mart*." (citation omitted)).

302. *Id.* at 838.

303. *Id.* As with *Jamie S.*, aspects of the opinion suggest that the court's real concern was with the burdensomeness of the proposed remedy, rather than the fitness of the claims for class

cure these deficiencies by creating subclasses, each corresponding to a discrete legal claim and a commensurate request for relief, the district court would need to perform the required “rigorous analysis” as to each subclass.³⁰⁴

After engaging in additional discovery, the plaintiffs filed a new motion for class certification several months later, and the district court held a three-day hearing on the motion in January 2013. In support of their respective positions for and against certification, the parties presented extensive evidence, including expert testimony and reports, live and written testimony from individuals involved in the Texas foster-care system, and the foster-care agency’s internal documents.³⁰⁵ Several more months passed before the district court again granted class certification, announcing its decision in a sixty-one-page order.³⁰⁶ In addition to the more extensive evidence considered and the more detailed analysis conducted (as compared to the certification order issued seventeen months earlier), the new order set forth a number of subclasses in addition to the original, general class of Texas foster children.³⁰⁷ The purpose of this subclassing was not to address actual or potential conflicts within the class, but to match the scope of each subclass with the scope of each discrete claim and potential remedy, in accordance with the Fifth Circuit’s directive.³⁰⁸

Defendants again attempted to appeal the class-certification order under Rule 23(f), but they missed the filing deadline, causing the Fifth Circuit to reject the effort.³⁰⁹ A bench trial on the merits of the plaintiff’s claims took place in December 2014. The issues addressed at that trial—for example, “whether [the challenged]

treatment. *See id.* at 841 n.3 (“[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.” (quoting *Lewis v. Casey*, 518 U.S. 343, 349–50 (1996))); *id.* at 845 (“The proposed class seeks at least twelve broad, classwide injunctions, which would require the district court to institute and oversee a complete overhaul of Texas’s foster care system.”).

304. *Id.* at 848.

305. M.D. *ex rel.* *Stukenberg v. Perry*, 294 F.R.D. 7, 36–38 (S.D. Tex. 2013).

306. The plaintiffs’ motion was denied in part; one of the proposed subclasses could not be certified because its representatives had left the foster system during the lengthy certification dispute. *Id.* at 62–63. The district court permitted the plaintiffs to amend their complaint to include substituted representatives for that subclass, and authorized discovery as to those newly named representatives. *Id.* at 63–65.

307. *Id.* at 30–31.

308. *Id.* at 56, 59, 61–62 (identifying potential remedies corresponding to each subclass).

309. M.D. *ex rel.* *Stukenberg v. Perry*, 547 F. App’x 543, 544 (5th Cir. 2013).

policies subject class members to an unreasonable risk of harm, and whether that risk is so unreasonable as to rise to a constitutional violation”³¹⁰—were essentially the same as they would have been in February 2013.

The trial court recently decided the case in the children’s favor.³¹¹ Its opinion emphasized the harms that the children have experienced over a period of many years:

[The Texas Department of Family Services (“DFPS”)] has ignored 20 years of reports, outlining problems and recommending solutions. DFPS has also ignored professional standards. All the while, Texas’s [long-term foster-care] children have been shuttled throughout a system where rape, abuse, psychotropic medication, and instability are the norm.³¹²

The court found that these harms have continued during the time the lawsuit has been pending.³¹³

The delay in *M.D.* flowed directly from the across-the-board changes that the current class-action debate has produced. The defendants were able to appeal because of the adoption of Rule 23(f),³¹⁴ the appellate court deemed the district court’s analysis insufficient because of newly heightened evidentiary and commonality requirements,³¹⁵ and the appellate decision was itself delayed by the need to await and respond to the doctrinal changes introduced by *Wal-Mart Stores, Inc. v. Dukes*.³¹⁶ Yet it is unclear what values, if any, have been served by the more formalistic but substantively equivalent analysis that resulted. Nothing about the history of this case demonstrates any clear benefit with regard to settlement pressure, attorney overcompensation, delay and expense,

310. *M.D. ex rel. Stukenberg*, 294 F.R.D. at 45.

311. *M.D. ex rel. Stukenberg v. Perry*, No. 2:11-cv-00084 (Dec. 17, 2015), <http://www.childrensrightrights.org/wp-content/uploads/2015/12/2015-12-17-Memo-opinion-and-verdict-of-the-court-2.pdf> [<http://perma.cc/B28L-EXTR>].

312. *Id.* at 255.

313. The court rejected the defendants’ assertions that they had made meaningful improvements to the foster-care system, stating that “[o]f the two reforms to which DFPS pointed . . . one was instituted in the wake of this lawsuit, the other is an abject failure, and neither answers any of Plaintiffs’ claims.” *Id.*

314. *See supra* Part III.A.

315. *See supra* Part III.B, III.E.

316. *See supra* note 301.

or any other topic embraced by the current class-action debate.³¹⁷ Indeed, as to delay and expense, there has been a clear detriment.

This increase in delay and expense implicates the concerns about transaction costs discussed previously. That is, increases in the transaction costs of injunctive civil-rights class actions have the effect of further suppressing a type of litigation that is already suppressed by market forces.³¹⁸ Concerns about transaction costs may have particular relevance to the *M.D.* litigation—the plaintiffs, like plaintiffs in many class actions seeking only injunctive or declaratory relief, were represented by a nonprofit legal organization.³¹⁹

C. *Fisher v. University of Texas at Austin*

As the foregoing discussion of delay would suggest, the recent restrictions on class treatment create structural disincentives for plaintiffs to use the class-action device. Those disincentives have particular relevance in cases seeking purely injunctive or declaratory relief against a defendant's generally applicable policy or practice, because a plaintiff bringing such a claim must decide whether to pursue class treatment or whether to instead bring the claim on a formally individual basis.³²⁰

As I have argued elsewhere, difficult problems can arise when a plaintiff chooses to challenge a defendant's generally applicable policy or practice on a nonclass basis.³²¹ For example, consider the lengthy and ongoing litigation in *Fisher v. University of Texas at Austin*.³²² The plaintiff brought the lawsuit only on her own behalf,³²³

317. *See supra* Part II.

318. *See supra* notes 41–43 and accompanying text. For further discussion of the particular sources of increased transaction costs in injunctive civil-rights class actions, see *supra* Part III.A–C.

319. Three law firms, working on a pro bono basis, joined nonprofit Children's Rights, Inc. in representing the plaintiffs. *See* Press Release, Children's Rights, Inc., National Advocates and Texas Attorneys File Federal Class Action Seeking Reform of Texas Child Welfare System (Mar. 29, 2011), <http://www.childrensrights.org/press-release/national-advocates-and-texas-attorneys-file-federal-class-action-seeking-reform-of-texas-child-welfare-system> [<http://perma.cc/YG5F-25ZS>] (identifying Children's Rights, Inc., Haynes and Boone, Yetter Coleman, and Canales & Simonson as plaintiffs' counsel).

320. *See* Carroll, *supra* note 28, at 2024–27. Depending on the nature of the plaintiff's claim and the defendant's conduct, class treatment may be available under the injunctive civil-rights subtype, the logical-indivisibility subtype, or both.

321. *Id.*

322. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

323. Shortly after the filing of the original complaint, a second individual plaintiff joined the lawsuit, but that plaintiff is no longer involved in the litigation. *See* Second Amended Complaint

but sought to stop the defendant from making race-conscious admissions decisions with regard to all applicants to its undergraduate program.³²⁴ If the defendant ultimately prevails on the merits, its victory will have preclusive effect only with regard to the individual plaintiff. Accordingly, as a matter of preclusion, the university will remain subject to further litigation on the identical issues decided in its favor.³²⁵ Under the original posture of the case, however, a win for the plaintiff could have resulted in a sweeping order restructuring the defendant's admissions program.³²⁶ These potential outcomes created

for Declaratory, Injunctive, and Other Relief at ¶ 1, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No.A-08-CA-263-SS), 2008 WL 7318510 (identifying the additional plaintiff).

324. *Id.* (seeking “to preliminarily and permanently enjoin [the defendants] from employing racially discriminatory policies and procedures in administering the undergraduate admissions program at the University of Texas at Austin”).

325. *See Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) (holding that, apart from class actions and other limited exceptions, “one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process” (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940))); *see also Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011) (“[T]he rule against nonparty preclusion . . . perforce leads to relitigation of many issues . . .”). As a matter of precedent, there may be a bar to relitigation of legal issues decided in the initial case. The existence of such a bar will depend on numerous factors, including the original plaintiff's decision whether to appeal and the appellate court's decision whether to issue an “unpublished” (nonprecedential) decision. *See Carroll*, *supra* note 28, at 2052 & n.202.

326. The plaintiff initially had standing to seek forward-looking relief only because the Supreme Court has defined the injury to plaintiffs challenging affirmative-action plans as the “inability to compete on an equal footing” with members of the group that the affirmative action plan aims to benefit. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). This definition of a constitutionally cognizable injury is in tension with the Court's standing jurisprudence outside of the affirmative-action context, and it has garnered a great deal of criticism. *See, e.g., Vikram David Amar, Is Honesty the Best (Judicial) Policy in Affirmative Action Cases? Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77, 78 (2012) (noting that “procedural requirements concerning the Court's ability to adjudicate the merits of disputes have played out with particular incoherence, if not result-orientation, in affirmative action lawsuits”); Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 919–21 (2011) (discussing the tensions between standing decisions in affirmative-action cases and other school-assignment cases); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whiteness Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 81 (2010) (arguing that the Court's affirmative-action cases “reflect[] a doctrinal move towards converting efforts to rectify racial inequality into white racial injury”); Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1048–49 (2002) (criticizing the Court for “unduly magnifying the practical harm suffered by white applicants” in affirmative-action cases and failing to recognize that “the admission of minority applicants and the rejection of white applicants are largely independent events”).

a preclusive asymmetry to the detriment of the defendant.³²⁷ Had the plaintiff brought the case as a class action, the stakes could have been more evenly aligned; after certification, a win for the defendant would have generated class-wide preclusion in its favor.³²⁸

Developments during the *Fisher* litigation ruled out the possibility of a structural injunction, or indeed any forward-looking remedies. Before the Fifth Circuit decided her initial appeal, the plaintiff disclaimed any intent to reapply to the defendant's undergraduate program.³²⁹ Before the Supreme Court issued its decision, the plaintiff had graduated from college, ruling out any remaining possibility that she would reapply.³³⁰ These circumstances rendered moot the plaintiff's claim for injunctive relief.³³¹ At the time it reached the Supreme Court, the case had been pending for more than eight years, but it could result in no injunctive or declaratory relief. At most, a court could award damages for any harm the plaintiff had individually suffered.³³²

On remand, the Fifth Circuit expressed doubt as to the availability of even a damages remedy, due to the plaintiff's apparent lack of standing to seek monetary relief.³³³ The court decided the merits of the case in the defendant's favor, but in doing so, it

327. Carroll, *supra* note 28, at 2052–55.

328. *Id.* at 2052. Class treatment would have had benefits for the plaintiff as well. Indeed, some have asserted that the plaintiff erred by not bringing the case as a class action. *See, e.g.*, Adam D. Chandler, *How (Not) To Bring an Affirmative-Action Challenge*, 122 YALE L.J. ONLINE 85, 87 (2012); Erwin Chemerinsky, *What's Next for Affirmative Action?*, ABA J. (Aug. 6, 2013, 2:25 PM), http://www.abajournal.com/news/article/chemerinsky_whats_next_for_affirmative_action [<http://perma.cc/LDG7-YRQN>].

329. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217 (5th Cir. 2011) (concluding that the plaintiff could not seek forward-looking relief because she had no intention of reapplying to the defendant's undergraduate program).

330. Transcript of Oral Argument at 5, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 4812586, at *5 (showing Justice Sotomayor's comment that the plaintiff could not seek injunctive relief because she had graduated).

331. *See generally* *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–07 (1983) (requiring a “real and immediate” threat of future injury to establish standing for injunctive relief).

332. *Fisher*, 631 F.3d at 217.

333. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 639 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015). The Supreme Court has again granted certiorari, and UT Austin has devoted seven pages of its merits brief to the argument that *Fisher* lacks standing. *See* Brief for Respondents at 17–24, *Fisher v. Univ. of Tex. at Austin*, No. 14-981, 2015 WL 6467640; *see also* Richard M. Re, *Does Fisher I Establish Jurisdiction for Fisher II?*, PRAWFSBLAWG (Nov. 17, 2015, 8:25 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/11/does-fisher-i-establish-jurisdiction-for-fisher-ii.html> [<http://perma.cc/FQ2Z-YWS5>] (discussing UT Austin's standing arguments).

suggested that it may have issued an unconstitutional advisory opinion.³³⁴ In terms of judicial economy and legitimacy, this result is hardly an optimal one. Had the plaintiff brought a class action, this strain on the courts' resources and authority could have been avoided: even after the plaintiff's individual claim had become moot, she would have been able to continue seeking injunctive and declaratory relief on behalf of the class.³³⁵

Like the plaintiff in *Fisher*, plaintiffs in many other recent cases have chosen not to pursue class treatment when challenging a defendant's generally applicable policy or practice; notwithstanding the absence of class treatment, these cases address matters of widespread significance.³³⁶ It is not possible to draw a direct connection between the plaintiff's decision in any one of those cases and the across-the-board barriers that the current class-action debate has produced.³³⁷ Yet simple logic suggests that making class treatment more difficult will cause fewer plaintiffs to pursue it, especially when another option appears to be available. The undifferentiated constraints on class actions thus contribute to the harms and inefficiencies involved in these types of nonclass cases.

In sum, courts now refuse to certify class actions that would readily have achieved certification in 1966, causing the loss of some of the benefits that the authors of the 1966 revisions sought to capture. Class treatment of injunctive and declaratory claims under the civil-rights subtype was designed to promote remedial efficacy and the rule

334. *Fisher*, 758 F.3d at 640 (acknowledging that the defendant's "standing arguments carry force," but interpreting the Supreme Court's mandate to decide the merits of the case as a bar to considering whether the plaintiff lacked standing).

335. See U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980); *Sosna v. Iowa*, 419 U.S. 393, 402–03 (1975).

336. See generally Carroll, *supra* note 28, at 2039–48 (discussing the disincentives to pursuing class treatment and their impact on important litigation). For example, consider the recent litigation over marriage rights for same-sex couples: the majority of those cases, including the cases that ultimately reached the Supreme Court, proceeded on a nonclass basis. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). The absence of class treatment caused significant problems—including confusion over remedial scope, and tension between federal and state courts—in several states, including Alabama. See, e.g., Howard M. Wasserman, *Crazy in Alabama: But Not for the Reasons Everyone Thinks*, JURIST (Mar. 14, 2015, 11:22 AM), <http://jurist.org/forum/2015/03/howard-wasserman-alabama-marriage.php> [<http://perma.cc/4ZEN-B3DW>] (describing the "uncertain, inefficient and even ugly" manner in which same-sex marriage came to Alabama, including procedural moves and counter-moves by the Alabama Supreme Court and the U.S. District Court for the Southern District of Alabama).

337. See *supra* Part III.

of law—as the *Fisher* example suggests, its absence can give rise to difficult problems of preclusive asymmetry and judicial inefficiency.³³⁸ Similarly, when cases seeking logically indivisible relief proceed in the absence of class treatment, they expose courts and defendants to the risk of inconsistent judgments. And when cases seeking distribution of a limited fund proceed individually, they jeopardize the interests of those who obtain their judgments last. Whatever limitations might be justified for those subtypes should be imposed intentionally, after reasoned analysis of their particular costs and benefits, and not as a spillover effect of concerns about a separate class form.

V. BEYOND MYOPIA: BROADENING THE DISCUSSION

A myopic focus on the aggregated-damages subtype has impeded courts' and litigants' ability to achieve the full potential of the structure set forth in the class-action rule, particularly for those situations in which the need for class treatment has long been well recognized. As this Part explains, a broader discussion would take into account all of the purposes served by the class-action rule, and all of the subtypes it contains.

A. *Disaggregating the Concerns, Differentiating the Responses*

To achieve the necessary broadening of the discussion, debates over the costs and benefits of class actions must consistently address two neglected questions. First, does a particular concern about “the class action” actually apply in the context of subtypes other than the aggregated-damages class action, and if so, how? As suggested by the earlier discussions of settlement pressure and the logical-indivisibility subtype;³³⁹ attorney overcompensation and the injunctive civil-rights subtype;³⁴⁰ and delay, expense, and the limited-fund subtype;³⁴¹ the concerns that courts, lawmakers, and scholars have identified in the context of the aggregated-damages class action can play out very differently in the context of other class forms. Each subtype therefore requires separate analysis with regard to the salience of each particular concern.

338. See Carroll, *supra* note 28, at 2052–68.

339. See *supra* Part II.A.

340. See *supra* Part II.B.

341. See *supra* Part II.C.

Second, if a concern does arise in the context of another subtype, will denying class treatment effectively address it, and will it do so without generating countervailing concerns? The current class-action debate generally relies on an underlying assumption that denying certification usually does represent an effective response to concerns about class treatment. This assumption itself arises from the context of the aggregated-damages class action, where denying certification can be expected to lead to the abandonment of individually low-value claims and the nonclass litigation of individually high-value claims. In other contexts, however, the absence of class treatment may permit or even exacerbate the threatened harm.³⁴² Tailoring the conduct of class proceedings to the problem at issue may therefore present a better institutional response.³⁴³

Though the problem of class-action myopia is wide-reaching in scope and effect, the solution can be simply stated: courts and lawmakers should stop imposing undifferentiated limitations on the availability of class treatment unless they conclude that (1) the concerns motivating a particular limitation actually apply to each of the class-action subtypes and (2) the concerns can be uniformly resolved by the denial of class treatment. If this solution were adopted, it would result in more effective and conceptually coherent standards for the conduct of class actions.

B. Converting to Subtype-Differentiated Standards

Achieving the necessary recalibration of class-action law will not only require changing the approach that courts and lawmakers take going forward, when evaluating new restrictions on class actions, it will also require reevaluating the restrictions that courts and lawmakers have already imposed. That reevaluation should include a consideration of which of the recent across-the-board changes, if any,

342. See Rhode, *supra* note 289, at 1196.

343. See Carroll, *supra* note 28, at 2074–83. For example, a proposed injunctive civil-rights class action may present concerns about agency costs because of ideological disagreements among members of the class. *Id.* at 2080–81. Denying certification on the basis of those concerns, however, could leave the plaintiff free to seek a system-wide remedy in the nonclass case, regardless of whether that remedy were the one that other class members would prefer. See *supra* note 289. Accordingly, a court hearing such a case might better respond to concerns about agency costs by inviting broader intervention or amicus participation in the remedial phase of the proceedings. This would be especially true if the court viewed the case as likely to result in a wide-reaching precedent or a system-wide remedy. See Carroll, *supra* note 28, at 2081–82.

should be converted via rulemaking into subtype-differentiated standards.³⁴⁴

In particular, the rulemaking committees should consider revising Rule 23 to create subtype-differentiated standards for interlocutory appeals, evidentiary burdens, and ascertainability. With regard to interlocutory appeals, the rationale for Rule 23(f)³⁴⁵ relied almost entirely on concerns about settlement pressure and the “death knell” thesis. As explained earlier, those concerns are strongly rooted in the aggregated-damages class action, and have little to no salience outside that context.³⁴⁶ An additional motivation for the provision was to facilitate the development of appellate law on class certification, which is a valid purpose regardless of subtype. But interlocutory review appears to be less important to achieving that purpose in the context of the traditional subtypes than in the context of the aggregated-damages class action. This difference exists because, in the absence of in terrorem settlement concerns, the class certification decision can be effectively reviewed as part of an appeal from the final judgment—or, at least, it can be reviewed as effectively as any other pretrial ruling subject to the final judgment rule.³⁴⁷ Moreover, as noted previously, interlocutory review can increase the time and effort required for litigation under the traditional subtypes,³⁴⁸ creating a detriment that weighs against the potential benefit of the development of appellate law. Accordingly, Rule 23(f) should be revised to permit interlocutory appeals from certification decisions only under the aggregated-damages subtype.³⁴⁹

With regard to evidentiary burdens, concerns about settlement pressure have provided the bulk of the motivation for recent judicial

344. By “subtype-differentiated standards” I mean class-action procedures or requirements that apply differently depending on the subtype at issue. For example, in its current form, the class-action rule requires a court to order notice to class members when granting certification under the aggregated-damages subtype, but gives the court discretion whether to order such notice when granting certification under the other subtypes. FED. R. CIV. P. 23(c)(2)(A)–(B). The rule thus imposes subtype-differentiated standards for class notice.

345. FED. R. CIV. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.”).

346. See *supra* Part II.A.

347. *Jamie S. v. Milwaukee Public Schools*, discussed *supra* Part IV.A, is an example of a case in which such review occurred.

348. See *supra* Part IV.B.

349. I have argued elsewhere that Rule 23(f) should not apply in cases involving purely injunctive or declaratory relief under the civil-rights subtype. See Carroll, *supra* note 28, at 2075–76.

decisions raising the standard of proof required for class certification.³⁵⁰ As Robert Bone has noted, these decisions are “thin on careful analysis” and have “fail[ed] to seriously engage the competing policies at stake,” particularly as those policies vary with the type of class action involved.³⁵¹ A robust rulemaking process should fill that gap, creating a set of evidentiary standards that reflect the different costs and benefits associated with each subtype. Although the particular evidentiary standards to be adopted are beyond the scope of this Article, the situating of concerns within the aggregated-damages subtype suggests that a higher evidentiary standard would be appropriate under that subtype as compared to the others.

Indeed, it may make sense to revise the injunctive civil-rights subtype so that it permits certification based on no greater showing than that required to establish the plaintiffs’ standing.³⁵² This certification burden would not relieve plaintiffs of the obligation to prove the merits of their claims or the appropriateness of their proposed remedy at later stages in the litigation, but it would help to avoid scenarios in which courts never reach the merits of widely held claims at all.³⁵³ Further, such a standard would reduce the delays involved in obtaining class certification,³⁵⁴ and would thereby help to avoid scenarios in which plaintiffs proceed through the personally less burdensome, but institutionally less desirable, nonclass path toward a structural injunction.³⁵⁵ Finally, it would promote preclusive symmetry, as a postcertification merits decision would bind class members to a determination that the defendant did not in fact engage in the alleged policy or practice.³⁵⁶ Current law does not generally provide for that binding effect, because class members can be bound

350. Bone, *supra* note 182, at 1110.

351. Bone, *supra* note 134, at 112–14.

352. David Marcus introduced this argument in the context of public-interest class actions brought pursuant to the injunctive civil-rights subtype. *See* Marcus, *Public Interest*, *supra* note 38 (manuscript at 58) (“The evidentiary burden at class certification for public interest plaintiffs [under Rule 23(b)(2)] should equal the evidentiary burden a plaintiff would bear to establish standing . . .”).

353. *See supra* Part IV.A.

354. *See supra* Part IV.B.

355. *See supra* Parts IV.C.

356. *See supra* notes 322–27 and accompanying text.

only through class certification,³⁵⁷ and a finding that the defendant did not engage in the alleged policy or practice can defeat certification.³⁵⁸

With regard to ascertainability, the problem is less that courts have created an undifferentiated standard and more that, due to their myopic focus on aggregated-damages class actions, they have lost sight of the differentiation that the rule was intended to include from the start.³⁵⁹ As noted earlier, the Advisory Committee note to the 1966 revisions recognized that the members of a class certified under the injunctive civil-rights subtype would “usually” be “incapable of specific enumeration.”³⁶⁰ Nothing in the text of the rule, however, explicitly codifies the subtype-differentiated understanding of ascertainability set forth in the note.³⁶¹ Accordingly, the rulemaking committees should modify the text so that it imposes a looser ascertainability requirement for injunctive civil-rights and logical-indivisibility class actions than for aggregated-damages and limited-fund class actions.

C. *Highlighting History*

Courts will be more likely to embrace an appropriately subtype-differentiated analysis if lawmakers, scholars, and litigants draw their attention to the historical origins of the traditional subtypes,³⁶² and to the longstanding history of creating and acknowledging doctrinal differences between those subtypes and the aggregated-damages class action.³⁶³

357. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011). *But see* Tobias Barrington Wolff, *Multiple Attempts at Class Certification*, 99 IOWA L. REV. BULL. 137, 141 (2014) (arguing against “the suggestion in *Bayer* that the current version of Rule 23 would foreclose a district court from ever employing procedures designed to give a denial of certification binding effect”).

358. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552–54 (2011).

359. *See supra* Part III.C.

360. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

361. Indeed, nothing in the text of the rule explicitly codifies any requirement of ascertainability. The text onto which the ascertainability requirement has been engrafted states only that “[a]n order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).” FED. R. CIV. P. 23(c)(1)(B).

362. Recent scholarship has greatly enhanced the tools available for understanding and illuminating these historical origins. *See, e.g.*, 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, 810–22 (2014); Marcus, *Flawed but Noble*, *supra* note 24, at 671–711; Marcus, *History*, *supra* note 48, at 600–22.

363. *See, e.g.*, FED. R. CIV. P. 23(c)(2)(A)–(B) (creating different notice and opt-out requirements for aggregated-damages class actions versus the other class forms); Phillips

The U.S. Supreme Court, in particular, has emphasized the importance of history to the interpretation and application of the class-action rule.³⁶⁴ Yet dicta in *Wal-Mart Stores, Inc. v. Dukes* suggest that the Court has lost sight of a crucial aspect of that history, involving the origins and purposes of the injunctive civil-rights class action. The Court acknowledged, as it had before,³⁶⁵ that “[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples’ of what (b)(2) is meant to capture.”³⁶⁶ Yet it went on to assert that the “justification[] for class treatment” pursuant to the injunctive civil-rights subtype is “that the relief sought must perforce affect the entire class at once”³⁶⁷—in other words, that the relief in such cases is “indivisible.”³⁶⁸

If taken literally, the *Wal-Mart* Court’s assertion about the purpose of the injunctive civil-rights class action cannot be squared with the history of that provision,³⁶⁹ which was motivated in part by the problem that the relief in desegregation cases was *not* logically indivisible, permitting district courts to enter “meaningless, individual-by-individual injunctions” instead of structural relief.³⁷⁰ As Benjamin Kaplan wrote during the drafting process,

If 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

Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985) (acknowledging implicitly that the procedural-due-process analysis differs for aggregated-damages class actions versus the other class forms).

364. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557–58 (2011); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833–45 (1999); Wolff, *supra* note 251, at 1040 (noting that the *Wal-Mart* Court “discusse[d] the history and origins of Rule 23 as a lens through which to scrutinize the proper function of subsection (b)(2)”).

365. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

366. *Wal-Mart*, 131 S. Ct. at 2557–58 (alteration in original) (quoting *Amchem*, 521 U.S. at 614).

367. *Id.* at 2558.

368. See *id.* at 2557 (“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.’” (quoting Nagareda, *supra* note 247, at 132)).

369. Elsewhere in the opinion, the Court articulated the purpose of the injunctive civil-rights subtype in a more historically consistent way. For example, it accords with historical practice to state (as the Court did in *Wal-Mart*) that “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart*, 131 S. Ct. at 2557.

370. Marcus, *Flawed but Noble*, *supra* note 24, at 710.

school and will not encompass broad corrective measures—
desegregation of the school. This would be unfortunate. . . .³⁷¹

The history of desegregation litigation, and its role in the drafting of the injunctive civil-rights class action, thus refutes the Court's assertion that the relief in such cases "must perforce affect the entire class at once."³⁷²

As this example suggests, the proper interpretation of the class-action rule—including the appropriate analysis of subtype-differentiated standards embodied within the rule—may require greater efforts to bring the Court back to the historical origins of the traditional subtypes, especially with regard to the injunctive civil-rights class action.

CONCLUSION

In interpreting and modifying procedural law, courts and lawmakers must move beyond the erroneous assumption that all class forms entail the same challenges and concerns as the aggregated-damages class action, which is the newest and most controversial of the subtypes captured in the modern class-action rule. If those decisionmakers continue with their current level of class-action myopia, many of the intended benefits of the device's other forms will ultimately be lost. Regardless of what restrictions the aggregated-damages class action may warrant, those restrictions should not be permitted to destroy the utility of the other mechanisms that the class-action rule creates.

371. *Id.* at 700 (alteration in original). Kaplan added that "if the action is not maintained as a class action, the contempt remedy would presumably not be available to anyone but the individual plaintiff, and others in similar position could be put to separate proceedings with ensuing delay." *Id.* at 700–01.

372. *Wal-Mart*, 131 S. Ct. at 2558. One way of squaring this circle is to read the Court as referring not to logical indivisibility, but to what might be termed *precedential* indivisibility—the notion that the liability question cannot be decided differently for different members of the class, making the resulting precedent legally and factually indistinguishable in cases brought by similarly situated claimants. Richard Nagareda, on whose scholarship the *Wal-Mart* Court relied, appears to have originally intended this meaning of indivisibility. See Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 180 (2003) ("Absent demands for damages, 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.").