COMMENTS

DUE PROCESS LIMITATIONS ON RULE 23(B)(2) MONETARY REMEDIES: EXAMINING THE SOURCE OF THE LIMITATION IN *WAL-MART STORES, INC. V. DUKES*

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INTRODUCTION

The *Wal-Mart v. Dukes* decision prompted a storm of media attention, with some predicting the end of large-scale class actions.[1] On the one-year anniversary of the *Dukes* decision, legislation was proposed to reverse the "damage" done by the *Dukes* decision.[2] The decision is still very much in the public's mind, and it is viewed as having damaged workers' ability to hold employers accountable for discriminatory employment policies.

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1 *See* Kimberly Atkins, *The new class of 2011: U.S. Supreme Court defeats didn't end class actions, but they did change them*, LAWYERS USA ONLINE (July 26, 2011), http://lawyersusaonline.com/blog/2011/07/26/the-new-class-of-2011/ (articulating Professor Malveaux's belief that "[t]he class action 'is not dead, but it certainly was injured by the Court this year'"); *see also* Katherine Kimpel, *Wal-Mart ruling disarms employees in David vs. Goliath cases*, DAILY BUSINESS REV., July 18, 2011 (observing that with the *Wal-Mart v. Dukes* decision, "the Supreme Court . . . effectively disarmed employees, taking back the class action slingshot by inventing a new, virtually impossible standard for class certification" and that "[t]he perverse result of this new standard is that the larger the corporation gets, the harder it will be for an employee to succeed"); Piper Hoffman, *Court to women: You're on your own*, NEWSDAY, June 22, 2011, *available at* http://www.newsday.com/opinion/oped/hoffman-court-to-women-you-re-on-your-own-1.2977422 (describing the *Wal-Mart v. Dukes* decision as "a major loss for women, minorities, senior citizens, the disabled and any other group that tends to get the short end of the stick in the workplace").

2 Press Release, The Lawyer's Comm. for Civil Rights Under Law, House and Senate Introduce Legislation to Restore Workers' Rights, Reverse Damage Resulting From Wal-Mart Supreme Court Decision (June 20, 2012), *available at* www.lawyerscommittee.org/projects/employment_discrimination/press_releases?id=0241.

Justice Scalia began the *Dukes* decision by observing that it was "one of the most expansive class actions ever."[3] *Dukes* held that the certification of a class of female employees of Wal-Mart was inconsistent with Federal Rules of Civil Procedure 23(a) and 23(b)(2).[4] The class action involved claims of sex discrimination in violation of Title VII. The one and a half million current and former female employees of Wal-Mart sought injunctive relief and declaratory relief to prevent Wal-Mart from continuing its allegedly discriminatory pay and promotion practices.[5] The plaintiff class also sought monetary damages in the form of a backpay award of lost wages and earnings due to Wal-Mart's alleged discrimination.[6]

In the portion of the decision most frequently discussed, *Dukes* provided clarification on the commonality requirement in Rule 23(a)(2) and made it harder for a potential class to meet the requirements.[7] *Dukes* also provided commentary on the question of whether claims for monetary relief can be included with claims for injunctive relief. Despite having a history of considering this question but not fully resolving it, the Supreme Court yet again[8] skirted the question. The growing circuit split on this particular issue—whether claims for monetary relief are ever consistent with certification under Rule 23(b)(2)—had presented a perfect opportunity for resolution. Instead of resolving the issue, the Supreme Court, in dicta, simply raised serious doubt that there were any forms of incidental monetary relief that could be certified under Rule 23(b)(2) without violating the Due Process Clause.[9]

If true, this possibility would create an enormous roadblock to Title VII employment discrimination claims, which have historically been brought under Rule 23(b)(2) and have also included awards for backpay. To better understand the implications for class actions going forward, it is helpful to first examine why the Supreme Court limited—and potentially removed altogether—the possibility of class certification under Rule 23(b)(2) when monetary damages are also in-

3 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

4 *Id.* at 2556–57.

5 *Id.* at 2547.

6 *Id.*

7 *Id.* at 2556–57.

8 *See infra* Parts I.C. and II.B.

9 *Dukes*, 131 S. Ct. at 2559 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. . . . While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." (internal citation omitted)).

involved. Was it simply the sheer size of this particular class, or was there something more?

This Comment examines the *Dukes* decision through the lens of due process. Based on the history of Rule 23 and the way in which the Supreme Court has interpreted the requirements of due process in the context of class actions, there is a lack of due process protection for the absent class members in Rule 23(b)(2) when those actions involve monetary damages. Part I takes up these issues. In light of the Supreme Court's emphasis on the history of Rule 23 and its structure, the limitations on monetary remedies in Rule 23(b)(2) classes can—and should—be understood as being driven by underlying due process concerns. The Supreme Court's lack of a blanket prohibition on all monetary relief from Rule 23(b)(2) class actions is consistent with the 1966 Civil Rules Advisory Committee's implied understanding of courts' ability to determine due process requirements on a case-by-case basis for Rule 23(b)(2) classes. This analysis is presented in Part II.

Finally, what are the implications of due process concerns driving the limitation on monetary remedies in Rule 23(b)(2) class actions? How should these due process concerns be accounted for in employment discrimination class actions? What impact does *Dukes* have on the other routes to resolving these types of aggregate disputes? Part III begins this assessment by presenting the approach taken by the *Dukes* plaintiffs in the subsequent litigation as a case study. Next, two alternative approaches that address the due process concerns are briefly explored with the aim of beginning the discussion on how to accommodate the due process concerns underlying *Dukes*' limitation on monetary remedies in Rule 23(b)(2) actions.

I. CLASS ACTIONS AND DUE PROCESS

Parties may not be bound to a judgment in which they were not a party.[10] Class actions, however, are one of the few exceptions to this general rule.[11] While this exception is fundamentally in tension with the general requirements of due process, class actions are nonethe-

10 *See* Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that 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.").

11 *Id.* at 41 ("To these general rules there is a recognized exception that . . . the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.").

less an important part of the American litigation system. Class actions are crucial to vindicating rights that would not otherwise be vindicated, for example, in discrimination cases where the primary relief sought is to prevent the entity from continuing to discriminate.

Because class actions may bind parties who are not even aware of the litigation, class actions raise a host of potential issues related to the Due Process Clause. Federal Rule of Civil Procedure Rule 23, which governs class actions, requires only that absent class members be adequately represented.[12] The Supreme Court has affirmed that this is the only protection required by the Due Process Clause in class actions seeking primarily injunctive relief.[13] When a class seeks both equitable and monetary relief, as is frequently the case in employment discrimination cases, Rule 23 as it currently exists and is applied by the Supreme Court, may not adequately protect the due process rights of absent class members.[14] The due process analysis is further complicated by the preclusive effect of the class judgment on the absent class members.[15] When taking into account the history of Rule 23, judicial concerns, and the interaction of preclusion doctrine with Rule 23, there may be a lack of due process protection for absent class members in classes seeking certification under Rule 23(b)(2) when the class also includes claims for monetary relief. Title VII employment discrimination cases are a common example of this type of class action.

A. Federal Rule of Civil Procedure 23 and Rule 23(b)(2) Classes

Federal Rule of Civil Procedure 23 governs class actions.[16] Class actions allow plaintiffs to pool claims that would otherwise not be litigated due to their small size or where joinder of all interested parties would be impractical.[17] A proposed class must satisfy the four prerequisites in Rule 23(a): numerosity, commonality, typicality, and adequacy.[18]

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12 *See infra* Part I.A.

13 *See infra* Part I.B.

14 *See infra* Part I.C.

15 *See infra* Part I.D.

16 FED. R. CIV. P. 23.

17 *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Modern plaintiff class actions . . . permit[] litigation of a suit involving common questions when there are too many plaintiffs for proper joinder" and may also permit "the plaintiffs to pool claims which would be uneconomical to litigate individually.").

18 FED. R. CIV. P. 23(a) (defining the four prerequisites: "numerosity" requires that the class be sufficiently large as to make joinder impractical; "commonality" requires that the named parties and absent class members share at least one common issue of law or fact;

The proposed class must next satisfy the requirements of one of the three subdivisions of 23(b).[19] Rule 23(b)(1) encompasses class actions where multiple actions would risk either inconsistent outcomes or would "substantially impair" other class members' ability to protect their interests.[20] Rule 23(b)(2), the focus of this Comment, requires that the relief sought be primarily injunctive and be applicable to the class as a whole.[21] Finally, Rule 23(b)(3), which is the most inclusive of the three types of classes, requires that there be common "questions of law or fact" that predominate over individual issues and that class adjudication be "superior to other available methods" of adjudicating the controversy.[22]

A classic example of a Rule 23(b)(2) class is a civil rights case, where the class is suing to prevent an entity or person from continuing its discriminatory policies.[23] Historically, Title VII employment discrimination cases have used Rule 23(b)(2) to bring employment discrimination actions. Title VII cases "typically involve[] allegations that [an] employer [has] engaged in a pattern and practice of intentional discrimination" and are often handled in two phases.[24] In the first, the liability phase, the employer's liability as to its allegedly discriminatory employment practices is determined, and injunctive relief is granted if discriminatory practices are found; in the second, the remedial phase, remedies for individual members of the class are de-

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"typicality" requires that the claims of the named parties are typical of those of the absent class members; and "adequacy" requires that the named parties adequately represent the interests of the absent class members).

19 FED. R. CIV. P. 23(b).

20 A class action may be certified under Rule 23(b)(1)(A) if separate actions risk generating inconsistent outcomes in the individual actions, which would potentially hold the defendant to incompatible standards of conduct. FED. R. CIV. P. 23(b)(1)(A). A class action may be certified under Rule 23(b)(1)(B) if individual adjudication by one member of the class would "substantially impair" the ability of the other class members to protect their interests. FED. R. CIV. P. 23(b)(1)(B).

21 FED. R. CIV. P. 23(b)(2) (requiring that "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").

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

23 FED. R. CIV. P. 23 advisory committee's notes (1966) (explaining that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages"). The advisory committee notes also observe that the civil-rights field is an illustrative example of a Rule 23(b)(2) class, but notes that Rule "[23](b)(2) is not limited to civil-rights cases." *Id.*

24 Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305, 312 (2001). My description of Title VII oversimplifies the reality. For a more detailed discussion of Title VII and the impact of the 1991 Civil Rights Act, which changed the type of remedies available to plaintiffs, thereby creating complications with certifying Title VII cases under Rule 23(b)(2), see generally *id.* at 312–15.

termined–often monetary damages such as backpay.[25] Courts have allowed the inclusion of backpay awards because they have been viewed as flowing from the alleged discrimination itself, thus making it difficult to disentangle from the injunctive relief sought.[26] The plaintiffs in *Dukes* similarly sought an injunction to stop Wal-Mart's alleged discriminatory pay and promotion practices, along with backpay damages.[27]

The first two classes of subdivision 23(b), 23(b)(1) and 23(b)(2), are distinguishable from the third, 23(b)(3), in terms of the right to and ability of absent class members to remove themselves from the litigation.[28] For this reason, the first two classes are commonly referred to as the mandatory classes. Absent class members in Rule 23(b)(3) classes have the right to opt out of the litigation and also must be given notice of the pending class action.[29] This distinction between the mandatory classes and Rule 23(b)(3) classes is made on the basis of "class cohesiveness," which theoretically makes representation by named plaintiffs more likely to be adequate in the mandatory classes.[30] Further, the lack of opt-out rights for absent class members in the mandatory classes has been rationalized on the basis of these injuries being "group interest injuries," meaning that, given the

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25 *See* Piar, *supra* note 24, at 312–13.

26 *See* AM. LAW INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 2.04 illus. 5 (2010) (discussing divisible and indivisible remedies in the context of preclusion doctrine and explaining that courts "should consider whether aggregate treatment of any common issues concerning Defendant's liability will determine, in practical effect, the availability and method for the distribution of back pay," because if it does, the claims for backpay should be treated on an aggregate basis); Robert B. Fitzpatrick, *Damages and Other Remedies In Employment Cases*, *in* AM. LAW INST. & AM. BAR ASS'N, DAMAGES IN EMPLOYMENT CASES 271, 290 (2008) ("Prevailing parties . . . are entitled to back wages in the amounts they would have earned but for the . . . discrimination."). For further discussion, see *infra* note 118.

27 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

28 FED. R. CIV. P. 23(c)(2)(A); *see also* Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1588 (2007) (explaining that in (b)(1)(A), (b)(1)(B), or (b)(2) classes, participation in the class is "mandatory," whereas in a (b)(3) class, members have the option to opt out of the proceeding).

29 FED. R. CIV. P. 23(c)(2)(B) ("[T]he 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)(v) (stating "that the court will exclude from the class any member who requests exclusion").

30 *See* Holmes v. Cont'l Can Co., 706 F.2d 1144, 1155 n.8 (11th Cir. 1983) ("Although the interests of the different members of a (b)(2) class are by no means identical the substantial cohesion of those interests makes it likely that representative members can adequately represent the interests of absent members . . . ." (quoting Comment, *Notice in Rule 23(b)(2) Class Actions for Monetary Relief:* Johnson v. General Motors Corp., 128 U. PA. L. REV. 1236, 1253–54 (1980))).

nature of the claim, the defendant must necessarily treat all class members the same.[31] In contrast, Rule 23(b)(3) classes involve individualized monetary relief, which makes the class less homogenous and introduces conflict of interest problems within the class.[32] With individualized monetary relief, opt-out rights are necessary to protect the minimum due process rights of the absent class members, in this case, the right to pursue their claim for monetary damages individually.[33]

Rule 23 incorporates specific provisions to address due process concerns. All three types of classes are protected by the adequacy requirement in subdivision 23(a).[34] Rule 23(b)(3) classes, as discussed above, have notice and opt-out rights.[35] In addition, Rule 23 grants courts the discretion to direct that notice be given to absent class members in the mandatory classes.[36] Absent class members in the mandatory classes are afforded additional due process protection when a class settlement is proposed: all proposed settlements must be approved by the court and notice must be given to all affected class members.[37]

Thus, adequate representation is the only requirement in the text of Rule 23 itself that helps ensure absent class members' due process rights in the mandatory classes. Adequate representation requires only that the representative plaintiffs "fairly and adequately protect the interests of the [whole] class"[38] and that class counsel "fairly and adequately represent[s] the interests of the class."[39] There is no requirement in the text of Rule 23 that an absent class member be

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31 *See* Rima N. Daniels, *Monetary Damages in Mandatory Classes: When Should Opt-Out Rights Be Allowed?*, 57 ALA. L. REV. 499, 504 (2005).

32 *See id.* at 504–05.

33 *See id.*

34 FED. R. CIV. P. 23(a)(4) (stating that "the representative parties [must] fairly and adequately protect the interests of the class").

35 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."); FED. R. CIV. P. 23(c)(2)(B)(v) (stating that notice to (b)(3) classes must clearly explain "that the court will exclude from the class any member who requests exclusion").

36 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.").

37 FED. R. CIV. P. 23(e)(1) (requiring, for all proposed settlements, that the court "direct notice in a reasonable manner to all class members who would be bound by the proposal"); *see also* Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 388 (1988) (discussing Federal Rule 23 and the protections afforded absent class members).

38 FED. R. CIV. P. 23(a)(4).

39 FED. R. CIV. P. 23(g)(4).

aware of the litigation; because of this, adequate representation is a weak form of protection. Representative plaintiffs and class counsel have incentives to try to certify a proposed class action under Rule 23(b)(2) to avoid the additional requirements imposed by Rule 23(b)(3). However, when the relief sought in the proposed Rule 23(b)(2) class action includes monetary damages in addition to the injunctive relief, absent class members with a legitimate monetary damage claim may be bound to an adverse outcome in the class action—an action about which the absent class member may not have known and from which the absent class member could not have opted out.

B. Due Process Protection for Absent Class Members

Class actions are an exception to the general rule that an in personam judgment is not binding on a person when he was not designated as a party or was not served with process.[40] In contrast to the general rule, a class action is binding on the absent parties, even when the absent parties were unaware of the action.[41] For this reason, Rule 23 strictly imposes conditions on when a class may be certified. Courts must rigorously assess whether Rule 23's requirements are met to ensure that the due process rights of absent class members are protected.[42]

In the academic discourse, there is consensus that due process requires adequate representation at minimum.[43] Indeed, this is re-

40 Hansberry v. Lee, 311 U.S. 32, 40 (1940).

41 *See* FED. R. CIV. P. 23(c)(3). *See generally* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 35–36 (2011) ("The [absent] class members are bound by a court judgment they may not have known about, much less consented to. This extraordinary situation is justified by the class's homogeneity and cohesiveness."); Weber, *supra* note 37, at 348 ("Together the [binding judgment and notice] provisions cause individuals to be bound by res judicata by cases they never knew existed. This situation seems patently unfair.").

42 *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160–61 (1982) (emphasizing the importance of adhering to the prerequisites of Rule 23 in Title VII class actions).

43 *See, e.g.*, Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1089–90 (2009) (observing that the Supreme Court "equated adequate representation with due process as a prerequisite to a binding class judgment" in *Hansberry* and that it insisted on adequate representation in *Amchem* and *Ortiz* as well (citing Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Hansberry v. Lee, 311 U.S. 32 (1940))); Stephen J. Safranek, *Do Class Action Plaintiffs Lose Their Constitutional Rights?*, 1996 WIS. L. REV. 263, 282–83 (1996) (observing that in *Wetzel v. Liberty Mutual Insurance Co.*, the Third Circuit found that "adequacy of representation, not opt out rights or personal jurisdiction, was the touchstone of due process" (citing Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975))). For an argument that the Supreme Court's doctrine has been paternalistic in

quired by Rule 23.[44] Adequate representation encompasses two parts: (1) adequate representation by the named plaintiffs in the class action; and (2) adequate representation by the class counsel.[45] With regard to the first, the interests of the representative plaintiffs must be aligned with those of the absent class members, meaning that there should not be conflicts of interest within the class and that there should be uniformity within the class.[46] With regard to the second, there is a distinction drawn between individual and aggregate litigation contexts. In the individual context, the plaintiff assumes the risk of poor decisions regarding his representation or litigation strategy.[47] In contrast, with aggregate litigation such as a class action, there is concern about having the absent class members assume all of this risk. This concern is illustrated by the requirement in Rule 23 that class counsel "fairly and adequately represent the interests of the class."[48]

There is a distinction between the due process concerns raised by actions seeking monetary relief and those seeking purely injunctive relief. Generally, monetary damages are backward-looking in nature. Monetary damages are sought to address wrongs that have already happened and to compensate the individuals who were injured.

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focusing solely on the adequacy of representation, see generally Redish & Larsen, *supra* note 28, at 1616 ("Although both Rule 23 and Supreme Court doctrine seek to protect the due process rights of absent class members, at no point [has anyone] recognized that what has been implemented is purely a *paternalistic* form of due process—i.e., the concern that those who represent the interests of the absent litigants enforce and protect those litigants' rights enthusiastically and in good faith.").

44 FED. R. CIV. P. 23(a)(4).

45 *Id.*; FED. R. CIV. P. 23(g)(4).

46 Professor Wolff describes the often-overlooked problems with adequacy of representation posed by class actions for the purposes of preclusion doctrine, which is nevertheless applicable to this discussion as well. Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 723 (2005) [hereinafter Wolff, *Preclusion in Class Action Litigation*] ("Foremost among these [problems] are potential conflicts of interest. When members of an otherwise cohesive class possess different configurations of factually related claims beyond those presented for class certification, the threat of claim and issue preclusion can give them starkly different incentives to prosecute or settle the action. Still other preclusion problems can affect the entire class uniformly. Strategic litigation choices—like a decision to eschew a federal cause of action in order to stay in state court, or a failure to request a particular form of injunctive relief when seeking institutional reform—raise questions about the limits of the representational role in a class proceeding.").

47 *See id.* at 721 ("Just as an individual litigant in a civil proceeding does not enjoy any right of adequate representation that could enable him to escape the effects of a judgment, and hence assumes the risk that his lawyers will make bad litigation choices on his behalf, so a litigant assumes the risk that the judgment that results from a lawsuit may compromise other important interests that he possesses.").

48 FED. R. CIV. P. 23(g)(4).

Consequently, monetary damages are more focused on individual relief[49] than an injunction, and theoretically are specifically attributable to individuals rather than a collective group. As a result, there is a sense that each individual class member has a right to a monetary remedy for this injury. Due process is necessary to protect these individual rights to a monetary remedy.

In contrast, injunctions are forward-looking. They seek to prevent injury that an actor, for example the defendant, is currently inflicting, such as discriminating on the basis of sex. In this way, an injunction is essentially about preventing a collective harm. Injunctive relief, therefore, seeks to prevent the defendant from harming members of the class *in the future*. Because of this, it is more difficult to argue that absent class members' due process rights are not sufficiently protected in a Rule 23(b)(2) class seeking only injunctive relief.[50]

C. Concerns About the Adequacy of Due Process Protection for Absent Class Members

There is disagreement in the academic discourse about which due process protections provided to absent class members in Rule 23(b)(1) and 23(b)(2) classes are sufficient. Some argue for a sliding scale[51] or balancing test approach[52] to determine what due process protection is required in a particular instance. Others argue that due process may require an opt-in, rather than an opt-out, mechanism.[53]

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49 *See infra* note 225 (discussing the distinct issues raised by punitive damages).

50 However, there are arguments that this deprives absent class members of an important right, the right of individual litigant autonomy. *See generally* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 135–75 (2009).

51 *See* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2076 (2008) (arguing that "*Shutts* requires a degree of procedural due process in class proceedings that varies with the extent to which a court proposes to place class members at risk of an alteration in their legal position" (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985))).

52 *See* Steven T.O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480, 482, 510 (1998) (arguing that "two separate due process arguments support the right to opt out: one related to adjudicatory jurisdiction and the other dealing with basic procedural fairness," and advocating the use of a balancing test "[t]o determine whether due process requires opt out rights as a matter of procedural fairness").

53 *See* Bassett, *supra* note 43, at 1115–16, 1118 (concluding that "the due process protections accorded to unnamed class members are limited, and their attenuated nature creates a striking contrast to the more vigilant protections provided in nonclass litigation" and recommending using an opt-in mechanism rather than an opt-out mechanism to address this problem); Safranek, *supra* note 43, at 266 (arguing "that absent a unitary class interest, the Constitution arguably requires the use of an 'opt in' procedure to establish the

Finally, one scholar argues that individuals have a right to individual litigant autonomy, meaning both a right to fully control the litigation and to decide whether to turn to litigation at all.[54] Class actions, by definition, strip absent class members of this right to individual litigant autonomy.

Looking back at the history of Rule 23's amendments, the Civil Rules Advisory Committee, which drafted Rule 23, did not seem particularly concerned about the due process rights of absent class members in the mandatory classes, Rule 23(b)(1) and (b)(2) classes.[55] While unusual at first glance, this makes sense with what appears to be the Committee's underlying assumption: the courts are capable of determining the extent of due process required for absent class members on a case-by-case basis.[56] The Supreme Court's decisions on the issue of what due process requires indicate the Court's own lack of certainty as to what the Due Process Clause requires for absent class members in the mandatory classes.[57]

1. Rule 23 Amendment History

In 1966, the class action rules were significantly revised.[58] While there were substantial revisions to Rule 23 after the 1966 amendments, none of them significantly affected the Rule's treatment of Rule 23(b)(2) classes.[59] The 1966 Rule Amendment Committee

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plaintiff class" and that "[s]uch a requirement would clearly satisfy due process" and "ensure the liberty of those who do not want to be part of a lawsuit").

54 *See generally* REDISH, *supra* note 50, at 135–75. In addition, others have argued that there is a "right of access to the courts," which is often specifically guaranteed in state constitutions. *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 89 (2011) (noting that such rights can be found, implicitly or explicitly, in forty state constitutions).

55 *See infra* Part I.C.1.

56 *See infra* Part I.C.1.

57 *See infra* Part I.C.2.

58 This was one of the biggest amendments to Rule 23 and these amendments set up the current framework that still exists in Rule 23 today.

59 While the 2003 amendments did not substantially alter the Rule's treatment of Rule 23(b)(2) classes, the 2003 Amendments did have an effect on Rule 23(b)(2) classes. *See* FED. R. CIV. P. 23(c)(2) advisory committee's notes (2003) (discussing revision of Rule 23(c)(2) and calling attention "to the court's authority—already established in part by Rule 23(d)(2)—to direct notice of certification of a Rule 23(b)(1) or (b)(2) class" and making changes to the Rule's notice provisions, settlement provisions, class counsel provisions, and attorney fee provisions); FED. R. CIV. P. 23(e) advisory committee's notes (2003) (noting Rule 23(e)'s amendment of class action settlement procedure for classes certified under any of the subdivisions of Rule 23(b)). The 1998 Rule 23 amendments significantly altered Rule 23, but did not change the Rule's treatment of Rule 23(b)(2) class actions. *See* FED. R. CIV. P. 23 advisory committee's notes (1998) (amending rule 23

notes and reports suggest that the Civil Rules Advisory Committee was not terribly concerned about the due process rights of absent class members in Rule 23(b)(1) and 23(b)(2) classes. The Committee Note to the 1966 Amendments to Rule 23 does not mention due process anywhere within the description of subdivision 23(b).[60] It is only raised once—in the discussion of subdivision 23(d).[61]

In the Report to the Standing Committee, the Civil Rules Advisory Committee is almost cursory in its discussion of Rule 23(b)(2) and focuses much more extensively on the details of and requirements for Rule 23(b)(3) classes.[62] The discussion of due process is similarly limited in the Committee's Report.[63] Even the acknowledged purpose of the Rule 23 amendments is not particularly motivated by due process concerns.[64]

A contemporaneous article written by Professor Kaplan, the Reporter to the Advisory Committee on Civil Rules at the time the 1966 amendments were drafted, captures the intentions of the Civil Rules

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to provide for permissive interlocutory review of class certification orders). The 1987, 2007, and 2009 amendments to Rule 23 did not significantly alter Rule 23. *See* FED. R. CIV. P. 23 advisory committee's notes (1987) (making technical amendments); FED. R. CIV. P. 23 advisory committee's notes (2007) (updating as part of the general restyling of the Federal Rules); FED. R. CIV. P. 23 advisory committee's notes (2009) (revising rules with ten-day time periods to fourteen-day time periods). For an additional discussion of the Rule 23 amendment history, see Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. ANN. SURV. AM. L. 681, 688–89 (2010) (discussing Rule 23 amendment history). Perry and Brass represented Wal-Mart in *Dukes*. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2546 (2011) (listing attorneys for each party).

60 FED. R. CIV. P. 23(b) advisory committee's notes (1966).

61 FED. R. CIV. P. 23(d)(2) advisory committee's notes (1966).

62 There is only one paragraph dedicated to discussing Rule 23(b)(2), whereas the discussion of Rule 23(b)(3) is nearly five pages. *See* Statement on Behalf of the Advisory Comm. on Civil Rules to the Standing Comm. on Practice and Procedure of the Judicial Conference of the U.S., at 5 (June 10, 1965), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1965.pdf [hereinafter Advisory Committee Statement].

63 There is only a single mention of due process in the Advisory Committee Statement. *See* Advisory Committee Statement, *supra* note 62, at 9 (stating "in the end constitutional standards of due process must be complied with or the member will not be bound by the judgment"); *see also* Weber, *supra* note 37, at 371 (observing that the Rule 23 framers "could not anticipate the role that the Rule would play" in "the explosion in civil rights and antipoverty litigation . . . in the late 1960's," and consequently, "[t]he Advisory Committee Note and Benjamin Kaplan's 1967 article explaining the Advisory Committee's intentions in the 1966 revisions treat subdivision (b)(2) almost as an afterthought") (citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967)).

64 The Advisory Committee Statement notes that the 1966 revisions responded to "an insistent demand and need . . . to develop improved methods of handling disputes affecting groups" going forward. *See* Advisory Committee Statement, *supra* note 62, at 7.

Advisory Committee in the 1966 amendments of Rule 23 (or at least one view of the Committee's intentions).[65] Professor Kaplan notes that the earlier equity rules upon which Rule 23 is based paid little attention to the details of procedural management of class actions and the possibility of due process requirements for absent class members.[66] In revising the class action rules, the Civil Rules Advisory Committee was particularly concerned with distinguishing between what were seen as "natural" class actions and those actions for which class resolution served efficiency goals instead of deriving naturally from the type of claim.[67] Rule 23(b)(2) was built largely on experience "in the civil rights field," though not exclusively so.[68]

Rule 23(b)(3) was the Civil Rules Advisory Committee's attempt to deal with situations that did not fit in the "natural" class action arena, yet would be well-served by "advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party."[69] Because these Rule 23(b)(3) class actions did not have a clear precursor in the old class action rules, the Civil Rules Advisory Committee spent considerable time setting out procedural safeguards,[70] along with other requirements to help courts manage the class action and ensure that a class action was "'superior' to other means of disposing of the particular set of quarrels."[71] These procedural safeguards demonstrate some concern with the due process rights of both plaintiffs and defendants. The Civil Rules Advisory Committee also addressed the possibility of an opt-in provision for Rule 23(b)(3) classes, instead of the opt-out provision, but concluded that it would not be fair to the defendant.[72]

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65 Kaplan, *supra* note 63, at 379 (recapturing the Civil Rules Advisory Committee's discussions during the 1966 amendments to Rule 23).

66 *Id.* ("Management questions, including notably the general question of the desirability of providing some notice or information to class members, came to the fore in the professional appraisals of *Hansberry v. Lee*, decided in 1940." (citing Hansberry v. Lee, 311 U.S. 32 (1940))).

67 *See* Kaplan, *supra* note 63, at 386–87.

68 *See id.* at 389.

69 *Id.* at 390.

70 *See id.* at 390–92.

71 *Id.* at 390.

72 *See id.* at 397 (discussing the argument that "[i]t is unfair to a defendant opposing the class . . . to subject him to possible liability toward individuals who remain passive after receiving notice"). While counter-intuitive, the defendant would not prefer an opt-in procedure because one of the appealing aspects of a class action is that all potential related claims can be resolved in a single action. With an opt-in procedure, the defendant risks being sued later by those former class members that chose not to opt in. Because class members were required to opt in, the defendant does not have an exhaustive list of all

The revised Rule 23 included a general provision listing discretionary steps that a court could take to better manage class actions of all types, including a provision stating "that notice be given to some or all members of the class informing them of any event in the action, or of their opportunity to speak their piece on the adequacy of the representation, or to intervene in the action."[73] In discussing criticism of this discretionary notice, Professor Kaplan notes that "[n]otice which is fair in the circumstances of the case is a constitutional requirement," and it is reasonable to "expect courts to work toward providing the best practicable notice, as indeed (c)(2) . . . requires."[74] This explanation lends support to the idea that there is a constitutional right to notice in some class action circumstances, and that this right exists outside of the requirements of Rule 23.

Presumably the Civil Rules Advisory Committee felt that courts were well equipped to determine the extent of notice required by the Due Process Clause. Professor Kaplan's observation about constitutional notice implies that the Civil Rules Advisory Committee did not think that the same type of notice was required for every possible type of class and set of facts. His article suggests that the lack of attention to due process with regard to Rule 23(b)(2) classes was not because due process was not a concern of the Committee. Instead, because the Constitution already contained a guarantee of due process, there was no need to mandate all the circumstances under which constitutional due process might require more for a Rule 23(b)(2) class action. Thus, the Civil Rules Advisory Committee arguably felt that courts had the competence to determine the extent of protection required for absent class members by the Due Process Clause on a case-by-case basis.

2. *Judicial Interpretation of Due Process Requirements in Mandatory Classes*

Prior to the 1966 Rule 23 amendments, the Supreme Court first recognized the need to consider the due process rights of absent class

this potential plaintiffs. With the opt-out provision, in contrast, the defendant can fully resolve all the claims in a single action, except those of the class members choosing to opt out. But unlike the opt-in scenario, the defendant has an exhaustive list of those plaintiffs, and could potentially reach out proactively to resolve, if the defendant wished.

73 *Id.* at 394 (describing discretionary steps laid out within the revised Rule 23(d)(2)).

74 *Id.* at 396 (referencing Rule 23(c)(2)).

members in 1940, in *Hansberry v. Lee*.[75] In *Hansberry*, the Supreme Court held that there was a "failure of due process" only when the procedure adopted did not "fairly insure[] the protection of the interests of absent parties who [were] to be bound by it."[76] A decade later, the Supreme Court provided additional guidance in *Mullane v. Central Hanover Bank & Trust Co.*, holding that due process required notice "reasonably calculated to reach interested parties."[77] Following *Mullane*, only two Supreme Court class action decisions provide additional guidance on the due process requirements for classes certified under Rule 23(b)(2).[78]

Nearly a half-century after *Hansberry*, the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts* changed how courts viewed due process in the context of class actions.[79] *Shutts* involved a class action seeking monetary relief, brought by investors in a gas company.[80] The class was certified under Kansas state law, instead of one of the Rule 23(b) classes.[81] Each member of the nationwide class was provided notice via mail, which explained the right to opt out of the litigation.[82] The Kansas court's jurisdiction over the absent, out-of-state class members was challenged.[83] The Supreme Court rejected the argument that due process required absent class members to affirma-

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75 311 U.S. 32 (1940). This decision is cited in the Advisory Committee Notes to the 1966 Rule 23 Amendments. *See* FED. R. CIV. P. 23(d)(2) advisory committee's notes (1966) (citing *Hansberry* in support of the proposition that "mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process").

76 *Hansberry*, 311 U.S. at 42. *Hansberry* laid open "[t]he task of specifying the requirements of 'adequacy' that conform to due process" and that task has not yet been fully resolved. Geoffrey C. Hazard, Jr. et. al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1948 (1998). For an argument that "*Hansberry* supports the proposition that the failure to provide adequate representation violates due process if the adjudication binds an absent class member," see Weber, *supra* note 37, at 384.

77 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).

78 *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (considering whether due process requires absent class members to opt in to an action affirmatively); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (deciding whether due process requires opt-out rights for absent class members in a 23(b)(1) action).

79 *See* Daniels, *supra* note 31, at 510 (arguing that, "[i]n the context of class actions, *Phillips Petroleum Co. v. Shutts* substantially reconfigured the way in which courts view due process rights").

80 *Shutts*, 472 U.S. at 799.

81 *Id.* at 801.

82 *Id.*

83 *See id.* at 806 ("Reduced to its essentials, petitioner's argument is that unless out-of-state plaintiffs affirmatively consent, the Kansas courts may not exert jurisdiction over their claims.").

tively opt in to the litigation.[84] Holding that due process required "at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class" when monetary claims were involved, the Supreme Court affirmed the notice procedure and the Kansas court's jurisdiction over the absent, out-of-state class members.[85] However, the Supreme Court explicitly left open the question of what the Due Process Clause required when only equitable relief was sought.[86]

In *Ortiz v. Fibreboard Corp.*, the Supreme Court addressed the conditions for certification under the other mandatory class, Rule 23(b)(1).[87] Specifically, the Court addressed the certification of "a mandatory settlement class on a limited fund theory" under 23(b)(1)(B).[88] A limited fund is where the money that is available (i.e. the fund) is inadequate to compensate fully all the class members.[89] *Ortiz* involved an asbestos class action settlement, with substantial monetary damages.[90] Because of the monetary damages, the Supreme Court focused on the need for opt-out rights for the absent class members.[91] Drawing similarities to the situation in *Shutts*, the Supreme Court explained that both cases involved extinguishing an absent class member's monetary claim and that minimum due pro-

84 *See id.* at 812 ("We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of the class if they do not 'opt out.'").

85 *Id.* at 811–12.

86 *See id.* at 811 n.3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a defendant class." (emphasis omitted)); *see also* Safranek, *supra* note 43, at 264 (observing that the *Shutts* "Court did not explain why the Constitution required such an option solely in money damage cases" and noting that the *Shutts* Court did not provide guidance on when a class action "was wholly or predominately for money judgments" (internal quotation marks omitted)).

87 Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

88 *Id.*

89 An example is in bankruptcy when the claims of creditors exceed the amount available. By aggregating the claims together, the total amount available can be equitably distributed to all the creditors, instead of creating a race to the courthouse, which would potentially leave some creditors empty-handed.

90 *Ortiz*, 527 U.S. at 824–25 (describing a negotiated "Global Settlement Agreement" valued at $1.535 billion and a backup "Trilateral Settlement Agreement" that would provide $2 billion in the event that the Global Settlement agreement failed to win approval).

91 *See id.* at 846–48 (noting that "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class"); *see also* Daniels, *supra* note 31, at 511 (observing that "minimum procedural due process includes, among other things, the opportunity to opt out" (footnote omitted)).

cess required that an absent class member be given the opportunity to remove himself from the litigation.[92] Finding that the settlement class did not satisfy the requirements of Rule 23(b)(1)(B), the Supreme Court invalidated the settlement class.[93]

In particular, the Supreme Court was concerned because the case did not involve a true limited fund;[94] instead, "the fund was limited . . . by the agreement of the parties," which the Supreme Court found to be at odds with the concept of limited funds embodied in Rule 23(b)(1).[95] The Supreme Court's discomfort with mandatory classes involving monetary damages is evidenced in the Court's language: "[t]he inherent tension between representative suits and the day-in-court ideal is *only magnified* if applied to damages claims gathered in a mandatory class."[96] Some, or much, of the discomfort was likely due to the Supreme Court's finding that the case did not involve a true limited fund, not just the inclusion of monetary damages in a mandatory class.[97] It is not clear whether the Supreme Court would have had the same due process concerns had the case involved a true limited fund.

The Supreme Court has yet to rule definitively on the permissibility of monetary damages in Rule 23(b)(2) actions.[98] To date, the Supreme Court has not provided clarification on the question of "when absent class members have a constitutional right to [choose to] opt out of [a] class action[] . . . assert[ing] monetary damages on their behalf."[99] Twice the Supreme Court granted certiorari on this issue, but in both cases, it dismissed the case as improvidently granted.[100]

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92 *See Ortiz*, 527 U.S. at 848 (observing that "before an absent class member's right of action was extinguishable due process required that the member 'receive notice plus an opportunity to be heard and participate in the litigation,' and we said that 'at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class'" (alteration in original) (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)).

93 *Ortiz*, 527 U.S. at 864–65.

94 *See id.* at 841 (describing a true limited fund as one "justified with reference to a 'fund' with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution").

95 *Id.* at 848.

96 *Id.* at 846 (emphasis added).

97 *See id.* at 846–47.

98 *See* Daniels, *supra* note 31, at 511 (observing that, following *Ortiz*, "it is . . . unclear whether opt-out rights are required in *all* cases where monetary damages are involved or whether they are necessary *only* in cases where such damages '*predominate*'").

99 *Id.* at 500.

100 *See* Adams v. Robertson, 520 U.S. 83 (1997) (dismissing the writ as improvidently granted, but noting that the Court remained interested in considering the issue of monetary dam-

In the first of these cases that the Supreme Court dismissed as improvidently granted, *Ticor Title Insurance Co. v. Brown*, the Court dismissed the writ because it would have required resolution of "a constitutional question that may [have been] entirely hypothetical."[101] In the Court's subsequent discussion, the Court observed that there was "at least a substantial possibility" that "in actions seeking monetary damages, classes [could] be certified only under Rule 23(b)(3) . . . and not under Rules 23(b)(1) and (b)(2)."[102] The Court presented this "substantial possibility" as a reason for avoiding the due process issue. Three years later, the Supreme Court again granted certiorari on the issue, but again dismissed the case as improvidently granted, in *Adams v. Robertson*.[103] In *Adams*, the Supreme Court simply noted its "continuing interest" in this issue before it dismissed the case.[104] As a result of the Supreme Court leaving the issue unresolved, Circuit Courts have taken different approaches to analyzing whether monetary relief sought by class members can be certified under Rule 23(b)(2).[105]

D. Further Complications Raised by Preclusion Doctrine

Moreover, whether the due process protections afforded absent class members are sufficient depends to some degree on the preclusive effect given to the class judgments in subsequent litigation. Generally, preclusion doctrine operates to prevent parties from relitigating the same issue or multiplying litigation by litigating different aspects of the same claim in subsequent litigation.[106] Adequate representation is a prerequisite for the application of issue and claim preclusion to judgments in a class action.[107]

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ages in a Rule 23(b)(2) action); Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (declining to decide the question of whether monetary damages are permissible in Rule 23(b)(2) actions).

101 *Ticor*, 511 U.S. at 118.

102 *Id.* at 121.

103 *Adams*, 520 U.S. at 85.

104 *Id.* at 92 n.6.

105 *See* Julian W. Poon & Blaine H. Evanson, *Class Distinctions*, L.A. LAWYER, Feb. 2011, at 18–20. *See also infra* Part II.B (discussing the approaches taken by the circuits and the impact of *Dukes* on the continued viability of the various circuit tests).

106 *See infra* Part I.D.1.

107 *See infra* Part I.D.2.

1. Background on Preclusion

There are two types of preclusion: issue preclusion and claim preclusion.[108] Issue preclusion bars parties from re-litigating an issue if the parties previously litigated the issue involved and the issue was determined and necessary to the judgment.[109] Claim preclusion bars parties from raising any claim that was brought or should have been brought in prior litigation when that litigation resulted in a judgment on the merits.[110] Due process, as a general rule, prevents both preclusion doctrines from applying to those who were not parties in the original litigation.[111]

There are limited exceptions to this general rule that only parties may be bound by preclusion doctrine; one exception is for Rule 23 class actions.[112] The *nonparty* absent class members are bound by the class action judgment, even though they were not parties in the original action in the traditional sense.[113] Until recently, the literature has overlooked the implications of giving class action decisions preclusive

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108 There are four sources of the rules governing inter-jurisdictional preclusion: (1) the Full Faith and Credit Statute, *see* 28 U.S.C. § 1738 (2006) (stating that all "Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"); (2) the Full Faith and Credit Clause, *see* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); (3) the Supremacy Clause, *see* U.S. CONST. art. VI, cl. 2 (stating that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); and (4) Article III of the Constitution, *see* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. CONST. art. III, § 2, cl. 1 (stating that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution" and listing other areas to which the federal judicial power extends).

109 *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 132.01 (3d ed. 1997). The discussion of preclusion doctrine is significantly streamlined for the purposes of this Comment.

110 *See id.* at § 131.01 (citing the classic formulation from *Cromwell v. Cnty of Sac.*, 94 U.S. 351, 352 (1876)).

111 *See* MOORE, *supra* note 109, at §§ 131.40, 132.04. *See also* Bassett, *supra* note 43, at 1097 (observing that courts are generally "cognizant that the preclusion doctrines may only be applied under circumstances that comport with constitutional due process").

112 *See* Bassett, *supra* note 43, at 1110 (noting that class actions are "the most attenuated of all the nonparty exceptions" and are "distinctive even within the representative suit exception").

113 *See, e.g.*, Bassett, *supra* note 43, at 1079 (noting that class members do not enjoy direct representation in litigation).

effect when absent class members seek to raise issues or claims similar to those litigated in the class action.[114]

The purpose of the preclusion doctrines is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."[115] These practical concerns are present in the class action context as well, but class actions also raise concerns about the ability of absent class members to choose to participate in litigation. In Rule 23(b)(3) classes, parties are given the opportunity to opt out of the litigation,[116] and thus, absent class members in 23(b)(3) classes have an opportunity to make a choice about whether to remain in the class. Presumably those who wanted to try to get a better result on their own chose to opt out of the class.

In contrast, the fact that Rule 23 does not require notice and opt-out rights for class members in a Rule 23(b)(2) class action[117] raises a potential problem when preclusion doctrine is applied to bar absent class members from litigating the same issues or a related claim. Similar justifications support the use of preclusion for Rule 23(b)(2) judgments when applied in a later action seeking the same sort of relief, i.e., injunctive relief, as support the lack of additional requirements in certifying a Rule 23(b)(2) class, namely the indivisible nature of the remedy.[118] Given the indivisible nature of injunctive relief

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114 For a detailed examination of preclusion in the context of class actions and a framework for "allow[ing] courts to reclaim their proper role in constraining the preclusive effects of the class proceedings that they shepherd to judgment," see generally Wolff, *Preclusion in Class Action Litigation*, *supra* note 46, at 717.

115 Allen v. McCurry, 449 U.S. 90, 94 (1980).

116 *See* FED. R. CIV. P. 23(c)(2)(B)(v) (describing the requirement that notice, in Rule 23(b)(3) classes, must state "that the court will exclude from the class any member who requests exclusion").

117 *See* FED. R. CIV. P. 23(c)(2)(A) (specifying, as the only notice requirement in Rule 23(b)(2) classes, that "the court may direct appropriate notice to the class").

118 *See* AM. LAW INST., *supra* note 26, at § 2.04 cmt. a (2010). Section 2.04 defines indivisible remedies as "those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants." *Id.* at § 2.04(b). Section 2.04 continues by noting that:

> court[s] may authorize aggregate treatment of common issues concerning an indivisible remedy by way of a class action, with no requirement . . . that claimants . . . be afforded an opportunity to exclude themselves . . . . Aggregate treatment as to an indivisible remedy may be appropriate even though additional divisible remedies are also available that warrant individual treatment . . . .

Id. at § 2.04(c). Section 2.04 explains that "considerations of due process generally require that the court determine the distribution of divisible remedies on an aggregate basis only upon affording claimants an opportunity to escape the preclusive effect of that determination." *Id.* at § 2.04(c) cmt. a. However, claim preclusion operates differently; there is an exception to the general rule against claim splitting, when the court in the original action "expressly reserved the plaintiff's right to maintain the second action . . . ."

usually sought in Rule 23(b)(2) classes, it is neither feasible nor logical for parties to opt out of the class to get a better, or different, injunction on their own.[119]

In addition, preclusion gives defendants incentives to settle the class action to conclusively determine and extinguish their liability in a single action.[120] Class actions, "[a]s a procedural device, . . . would likely suffer an immediate decline in utility if a class judgment carried only precedential value without preclusive effect."[121] The application of preclusion doctrines to class actions, thus, makes it more attractive for defendants to resolve the class claims. This, in turn, helps both the representative plaintiffs and the absent class members get relief and resolution.

2. Due Process, Preclusion Doctrine, and Collateral Attacks

Traditionally, the view has been that adequate representation is a necessary precursor to the application of preclusion against absent class members.[122] This traditional approach dates back to *Hansberry v. Lee*, in 1940.[123] In the last decade, there has been a growing debate over "whether an absent class member may attack a class judgment for inadequate representation in subsequent litigation."[124]

RESTATEMENT (SECOND) OF THE LAW: JUDGMENTS 2d § 26(1)(b) (1982). There is at least a possibility here that when a court certifies a Rule 23(b)(2) class that excludes damages relief, a subsequent court could interpret that as an express reservation of the plaintiff's right to maintain a later action for damages relief. I am indebted to Professor Struve for this suggestion.

119 For an example involving alleged pattern-or-practice employment discrimination, see AM. LAW INST., *supra* note 26, § 2.04 illus. 5. While employees' claims for backpay are divisible remedies, "the court should consider whether aggregate treatment of any common issues concerning Defendant's liability will determine, in practical effect, the availability and method for the distribution of backpay." *Id.* If it does, then the court may treat the claims for backpay on an aggregate basis. *Id.*

120 *See, e.g.*, Weber, *supra* note 37, at 375 (observing that "[t]he value of suits such as *Mullane* lies in their preclusion, by res judicata, of all potential claims over the accounts").

121 *See* Bassett, *supra* note 43, at 1116.

122 *See* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4455, at 485 (2d ed. 2002) ("It has long been the general understanding that only adequate representation can justify preclusion against nonparticipating class members."); *see also* Bassett, *supra* note 43, at 1099 (observing that the preclusion analysis is set within an adequate representation framework); Wolff, *Preclusion in Class Action Litigation*, *supra* note 46, at 742 (observing that preclusion is often thought about under the "rubric of adequacy of representation").

123 *See* Hansberry v. Lee, 311 U.S. 32, 45–46 (1940) (allowing absent class members to collaterally attack the class judgment on the ground that they were inadequately represented).

124 Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917, 917 (2010).

Starting with an influential article criticizing the long-held view,[125] there has been a push by critics of the traditional view to narrow the "traditional availability of collateral attack for inadequate representation."[126] A collateral attack allows a party to challenge the enforcement of a prior judgment.[127] Thus, an absent class member is able to challenge the class action judgment on the grounds that there was inadequate representation. One scholar, Professor Woolley, argues that this narrowing is "inconsistent with the proper interpretation of class action rules and the Constitution."[128] Professor Woolley explains that "[t]he foundation of the traditional approach to adequate representation rests on the recognition that the 'interest' protected by the adequate representation requirement is the constitutionally-protected property interest of an individual class member in his or her claim."[129]

Both preclusion doctrine and Rule 23 depend on the adequacy of representation. This raises some troubling issues when considering the inclusion of monetary damages in Rule 23(b)(2) actions. The absent class members in these suits may not know about the litigation, yet not only are they bound by it, but they also have limited opportunity to challenge the adequacy of the representation in the original class proceeding.[130] Preclusion doctrine, and the potentially limited availability of a collateral attack for inadequate representation, exacerbate the due process concerns raised in Rule 23(b)(2) classes. Additionally, these due process concerns may become more pressing, depending on how the debate over the availability of collateral attacks for inadequate representation plays out.

II. EFFECT OF *WAL-MART V. DUKES* ON EXISTING JUDICIAL STANDARDS FOR MONETARY DAMAGES IN RULE 23(B)(2) CLASSES

Prior to *Wal-Mart Stores, Inc. v. Dukes*, the existing case law regarding when claims for monetary damages could be certified along with

125 Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765 (1998) (proposing that, instead of the traditional approach that there must have been adequate representation in order to apply preclusion against absent class members, incentives should be provided to all parties to participate in the original action, coupled with a narrower, process-based standard for collateral attack).

126 Woolley, *supra* note 124, at 919.

127 *See* MOORE, *supra* note 109, at § 130.06.

128 Woolley, *supra* note 124, at 920.

129 *Id.* at 921.

130 Additionally, if the narrowing of the availability of collateral attacks described by Professor Woolley continues, it will be even more difficult to collaterally attack.

claims for injunctive relief under Rule 23(b)(2) had resulted in a circuit split. The Supreme Court had previously observed in dicta that there was a "substantial possibility" that claims for monetary damages could "be certified only under Rule 23(b)(3)," but had declined to fully resolve the question.[131] The Supreme Court's discussion in *Wal-Mart Stores, Inc. v. Dukes* of monetary remedies in Rule 23(b)(2) classes emphasizes the history of Rule 23 and the Rule's structure. *Dukes* significantly limits the standards that had been used by lower courts in assessing when Rule 23(b)(2) classes involving monetary damages could be certified. A close reading of the Supreme Court's decision suggests that the Court's limitation on monetary remedies in Rule 23(b)(2) can be understood as having been motivated by due process concerns. In addition, the lack of an outright prohibition on claims for monetary relief in Rule 23(b)(2) class actions is consistent with the 1966 Civil Rules Advisory Committee's implied understanding of a court's ability to determine the due process required for Rule 23(b)(2) classes on a case-by-case basis.

A. Wal-Mart v. Dukes *Leaves Open the Question of the Permissibility of Monetary Damages in a Rule 23(b)(2) Class*

Given the lack of clarity surrounding the question of when, if at all, monetary damages could be included in a Rule 23(b)(2) class, *Wal-Mart Stores, Inc. v. Dukes* was an opportunity for the Supreme Court to provide clarification. Indeed the Court granted certiorari to address this question.[132] The Supreme Court unanimously held that the class in *Dukes* was not one that could be certified under Rule 23(b)(2).[133] However, the Court passed on the opportunity to provide guidance on whether monetary damages could ever be certified under Rule 23(b)(2), addressing it only speculatively in dicta.[134]

Thus, the Supreme Court's decision explicitly left unanswered the question with which the circuits were struggling. The Supreme Court

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131 Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994).

132 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795, 795 (2010) (granting certiorari to address Question 1 presented by the petition); Petition for Writ of Certiorari at i, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2010) (No. 10-277) ("Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances.").

133 *Dukes*, 131 S. Ct. at 2557.

134 In addition, the Supreme Court held that the certification of the plaintiff class in *Dukes* was inconsistent with the Federal Rule of Civil Procedure 23(a). *Dukes*, 131 S. Ct. at 2552–53. This Comment does not discuss that portion of the decision.

found that plaintiffs' damages were not incidental because they would require individual determination and were significant in dollar amount.[135] Because the Court found that the monetary damages predominated over the injunctive relief sought, it chose not to address the question of what level of monetary damages might be allowable under Rule 23(b)(2).[136] Instead, the Court held simply that the "claims for individualized relief" in *Dukes* did not satisfy Rule 23(b)(2).[137] The Court followed this with an observation in dicta that the Court was not sure if there were any forms of incidental monetary relief that would be consistent with the Supreme Court's interpretation of Rule 23(b)(2) and that would also comply with the Due Process Clause.[138]

1. Focus on the Historical Uses of Class Actions

In *Dukes*, the Supreme Court emphasized the historical approach that it had taken in *Ortiz v. Fibreboard Corp.* when seeking to determine the types of classes properly brought under each of the subdivisions of 23(b).[139] In *Ortiz*, the Court was particularly concerned about the significant monetary damages sought and the lack of an opportunity for absent class members to opt out. Additionally, the Supreme Court in *Dukes* found persuasive the illustrative examples in the Advisory Committee Notes to Rule 23, which indicate that Rule 23(b)(2) was based on experience with the civil rights field.[140] The Court observed that the Advisory Committee Notes contained no examples of

135 *Id.* at 2560–61.

136 *Id.* at 2560.

137 *Id.* at 2557 (concluding that "at a minimum, claims for individualized relief (like the backpay at issue here) [did] not satisfy the Rule," and not reaching the broader question of whether incidental monetary damages would ever be consistent with Rule 23(b)(2) because "the monetary relief [was] not incidental to the injunctive or declaratory relief" (emphasis omitted)).

138 *See id.* at 2560 ("We need not decide in this case whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause.").

139 *See id.* at 2557 (acknowledging Rule 23's roots in equity and the Supreme Court's focus on "the historical models on which the Rule was based" in *Ortiz*). For a more in-depth argument from Wal-Mart's counsel of why *Ortiz*'s historical analysis should be applied to an analysis of the classes that properly belong under 23(b)(2), see generally Perry & Brass, *supra* note 59.

140 *See Dukes*, 131 S. Ct. at 2557 ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture."); *see also* FED. R. CIV. P. 23 advisory committee's note (1966) ("Illustrative [of Rule 23(b)(2)] are various actions in the civil-rights field . . . ."); Kaplan, *supra* note 63, at 389 (explaining that the 1966 amendments to Rule 23 were "building on experience mainly, but not exclusively, in the civil rights field").

predecessors to Rule 23(b)(2) involving claimants who combined individual claims for monetary relief with class-wide claims for injunctive relief.[141] Based on these historical models, the Court concluded that the key to a Rule 23(b)(2) class was the "indivisible nature of the injunctive or declaratory remedy."[142]

The Supreme Court observed that the discussion in the Advisory Committee Notes of the historical precursors to Rule 23(b)(2) does not include either classes seeking relief that would entitle individuals "to a *different* injunction or declaratory judgment against the defendant" or classes seeking relief that would entitle each class member "to an individualized award of monetary damages."[143] The Advisory Committee Notes to which the Supreme Court refers do not emphasize due process concerns in the discussion of Rule 23(b)(2), and their treatment of Rule 23(b)(2) relative to the Rule 23(b)(3), which does deal with procedural due process concerns, is quite sparse.[144] However, the Civil Rules Advisory Committee did not focus on due process in its discussion of Rule 23(b)(2) because of a likely underlying assumption that courts were competent to determine, without guidance from the Rules of Civil Procedure, the extent of protection required by the Due Process Clause for absent class members. The Supreme Court's hesitation to unilaterally prohibit certification of any monetary damages under Rule 23(b)(2) is consistent with the Civil Rules Advisory Committee's underlying expectations that courts would determine, on a case-by-case basis, the due process rights necessary for absent class members in Rule 23(b)(2) classes.

The focus on Rule 23's historical roots can be understood as a desire to distinguish between the "natural" class actions and those allowed primarily for efficiency reasons.[145] The Court's language sug-

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141 *See Dukes*, 131 S. Ct. at 2558 ("In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their class-wide injunction.").

142 *Id.* at 2557. This is consistent with the discussion of indivisible and divisible remedies in AM. LAW INST., *supra* note 26, § 2.04 ("As a general matter, 'indivisible remedies' are those handled primarily under Rules 23(b)(1) and (b)(2) . . . ."); *see also* discussion *supra* note 118.

143 *Dukes*, 131 S. Ct. at 2557.

144 *See supra* Part I.B.

145 By "natural" class actions, I mean generally those that fit the requirements of Rules 23(b)(1) and (b)(2), in which adjudication by one member of the class thus necessarily impacts the other class members. Take, for example, the following situation. There is a bus accident with 119 victims. The bus company is insolvent, but has an insurance policy limit of $1.5 million. If the first victim sues the bus company by herself, then whatever amount she is awarded is taken out of the $1.5 million available to all the victims. Because this situation involves a limited fund, it falls within the category of a "natural" class

gests that it agrees with the Civil Rules Advisory Committee's sense that in these "natural" class actions, today's mandatory classes, the Due Process Clause demands less because of the type of claim being brought. This makes sense because, for example, in the sort of civil rights action upon which Rule 23(b)(2) was based, the idea of a single absent class member trying to opt out of the injunction or declaratory judgment makes little sense and would most likely be infeasible. The defendant is either enjoined from continuing to use its racially discriminatory policies, or not. Further, providing mandatory notice to *all* class members in the classic civil rights actions upon which Rule 23(b)(2) is based would often be prohibitively expensive.

2. Emphasis on Structure of Rule 23

In addition, the Supreme Court focused intently on the structure of Rule 23. Given the Rule's structure, the Court observed that "it [is] clear that individualized monetary claims belong in Rule 23(b)(3)."[146] Here again, the Court relied on the Advisory Committee's Notes, noting its observation in *Amchem Products, Inc. v. Windsor* that Rule 23(b)(3) was an "'adventuresome innovation'" of the 1966 Rule Amendments.[147] The Court focused on the rule's structural differences in requirements for Rule 23(b)(3) classes as compared to Rule 23(b)(2) classes. The Court emphasized that the mandatory classes lack the additional protections of Rule 23(b)(3), not because Rule 23 finds these protections unnecessary, but instead "because [the Rule] considers them unnecessary *to a (b)(2) class*."[148]

In acknowledging that notice is missing from Rule 23(b)(2)'s requirements, the Court is careful to add that this is "presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right

action. In contrast, take the case in which a CD manufacturer overcharged for its CDs. All consumers who purchased CDs in the past five years paid $0.02 more per CD than they should have. Here, for efficiency reasons, it would make sense to bring a class action on behalf of all consumers who purchased CDs in the past five years because the amount per CD otherwise is too low to justify individual claims. However, one consumer's ability to get compensation from the CD manufacturer does not impact another consumer's ability to do so.

146 *Dukes*, 131 S. Ct. at 2558.

147 *Id.* at 2558 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)).

148 *Id.* at 2558 ("The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*.").

to sue in this manner complies with the Due Process Clause."[149] The Court contrasts this with its prior holding in *Shutts*, that the "absence of notice and opt-out [rights] violates due process" in class actions predominantly for monetary relief.[150] Claims for monetary damages play an important role in how the Court thinks about the absent class members' due process rights. Acknowledging that it had not yet addressed due process requirements in cases where classes seek monetary relief that does not predominate, the Court observed that there is a "serious possibility" that due process would require notice and opt-out rights in *any* class seeking monetary relief.[151] The Court suggested this as its reason for declining to read Rule 23(b)(2) broadly.[152] But the Court stopped short of holding that due process did require notice and opt-out rights in any class action seeking monetary relief.

The Supreme Court's emphasis on the structure of Rule 23 is reminiscent of the Civil Rules Advisory Committee's emphasis on the procedural safeguards for Rule 23(b)(3) classes. The Civil Rules Advisory Committee's procedural safeguards in Rule 23(b)(3) classes were motivated by due process concerns, as well as manageability concerns.[153] Thus, the Court's focus on the structure of Rule 23 as a reason to reject certification of large, individualized monetary damages under Rule 23(b)(2) is likely explained by due process concerns. In addition, underlying the Civil Rules Advisory Committee's lack of attention to due process in relation to Rule 23(b)(2) class action was an assumption that the courts were bound by the Due Process Clause to address due process concerns on a case-by-case basis for Rule 23(b)(2) classes. The *Dukes* Court's push of this particular class towards the greater protections required by Rule 23(b)(3) may have been its way of doing just that.

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149 *Id.* at 2559.

150 *Id.* at 2559 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("The plaintiff must receive notice . . . . Additionally, we hold that due process requires . . . that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' . . . form to the court.")).

151 *Dukes*, 132 S. Ct. at 2559.

152 *See id.* at 2559 ("[T]he serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here."). The Supreme Court's desire to punt on this issue is consistent with its decisions in *Ticor* and *Adams*; both times the Court certified this question, but dismissed the grant of certiorari as improvidently granted. *See* Adams v. Robertson, 520 U.S. 83 (1997); Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994).

153 *See supra* Part I.C.1.

3. Appropriate Standard for Determining When Monetary Damages Can Be Included in a Rule 23(b)(2) Class

Finally, the Supreme Court addressed which standard to use when evaluating whether monetary damages might be brought under Rule 23(b)(2), the question on which circuits were split. When the Ninth Circuit upheld the certification of *Dukes* under Rule 23(b)(2), it had created a third standard, thereby adding to the existing circuit split. The Supreme Court's clarification of this issue is limited.

The Ninth Circuit had held that Rule 23(b)(2) authorizes any action with monetary damages, so long as the monetary relief does not predominate.[154] The Ninth Circuit's standard relied on the definition of "predominate" and the Advisory Committee Note's explanatory statement.[155] After relying heavily on the Advisory Committee Notes previously, the Supreme Court was dismissive of the plaintiff's reliance on those same Notes: "[o]f course it is the Rule itself, not the Advisory Committee's description of it, that governs."[156] Certainly, there is a distinction between how the Supreme Court and the Ninth Circuit are using the Advisory Committee Notes. However, given the importance the Notes play in the Court's earlier analysis, the Court's approach here is quite dismissive.

Emphasizing its earlier arguments about the structure of Rule 23, the Supreme Court observed that, were it to accept the Ninth Circuit's interpretation of the Advisory Committee Notes, parties could avoid the protections that the Rules Committee considered critical to classes seeking Rule 23(b)(3) certification simply by adding "predominating" injunctive relief to their monetary claims.[157] The Court was troubled by the idea that absent class members might be denied

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154 *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 616–17 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

155 *See id.* at 616 ("Merriam-Webster defines 'predominant' as 'having superior strength, influence, or authority: prevailing.' To be certified under Rule 23(b)(2), therefore, a class must seek only monetary damages that are not 'superior [in] strength, influence, or authority' to injunctive and declaratory relief." (internal citation omitted) (alteration in original)), *rev'd*, 131 S. Ct. 2541 (2011); *see also* FED. R. CIV. P. 23 advisory committee's notes (1966) (stating that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages").

156 *Dukes*, 131 S. Ct. at 2559.

157 *See id.* ("We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "'predominating request'—for an injunction.").

compensatory damages for their valid employment discrimination claims if backpay were denied in this class action.[158]

The Supreme Court also discussed the Fifth Circuit's "incidental" damages test, which defines incidental damages as those "flow[ing] directly from liability to the class *as a whole*."[159] The Court considered whether the Fifth Circuit's incidental test was consistent with its interpretation of Rule 23(b)(2) and with the Due Process Clause.[160] Sidestepping a decision on this precise issue, the Supreme Court held that because "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay," the "incidental" test could not be met.[161] The Supreme Court further explained that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[162] The Supreme Court declined to offer a definition of "incidental." As a result, the Court's decision may lead to a shift in the understanding of the incidental test to something that considers whether the damages are individualized.[163]

Thus, due process considerations run throughout the Supreme Court's analysis, even if these considerations are at times below the surface. Due process considerations are behind the Court's concern with the potential of a plaintiff precluded from later bringing a compensatory action for discrimination; likewise, due process considerations are behind the Court's concern with a defendant not able to litigate its statutory defense. Despite granting certiorari to resolve the circuit split on when monetary damages can be included under Rule 23(b)(2), the Court did only a mediocre job of providing guidance on the issue. However, the Court's decision can be harmonized with the 1966 Civil Rules Advisory Committee's implied view of due process for mandatory classes. The Committee presumably felt that courts had the competence to determine the extent of protection re-

158 *See id.* ("That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have.").

159 Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998); *see also infra* Part II.B.2.

160 *See Dukes*, 131 S. Ct. at 2560 ("We need not decide in this case whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause.").

161 *Id.*

162 *Id.* at 2561.

163 *See* John C. Coffee, Jr., *"You Just Can't Get There From Here": A Primer on* Wal-Mart v. Dukes, 80 U.S.L.W. (BNA) 93 (July 19, 2011) ("But after *Wal-Mart*, that 'incidental' standard may not survive and the focus may shift to whether the damages are 'individualized' or uniform.").

quired by the Due Process Clause on a case-by-case basis. While the Court could have held that the monetary relief in *Dukes* was not suitable for certification under Rule 23(b)(2) because all claims for monetary relief were inconsistent with Rule 23(b)(2) class actions, it did not. Instead, the Court held that the monetary relief in *Dukes* was inappropriate for Rule 23(b)(2) because it required individual determination and was significant. The Court's hesitation to state a blanket rule regarding whether monetary relief was appropriate for certification under Rule 23(b)(2) is consistent with addressing due process on a more case-by-case basis.

B. Impact on Lower Courts' Interpretation of Rule 23(b)(2)'s Requirements

Prior to *Dukes*, circuits had taken different approaches to handling classes seeking injunctive and/or declaratory relief, as well as monetary damages.[164] These approaches were developed in light of the Supreme Court's decision in *Ticor Title Insurance Co. v. Brown*, which left unresolved the question of whether class actions with monetary damages could be certified under Rule 23(b)(2).[165] With the Ninth Circuit's certification of the class in *Wal-Mart Stores, Inc. v. Dukes*, a third standard was adopted—the predominance standard.[166]

In *Dukes*, the Supreme Court yet again granted certiorari on the issue of whether the absent class members in classes asserting monetary damages on their behalf have a constitutional right to opt out of the class. However, the Court has yet to render a decision on the issue.[167] *Dukes* presented an opportunity for the Court to step in to resolve the circuit split and provide guidance to future class actions. The Supreme Court explicitly addressed two of the existing circuit tests: the Ninth Circuit's predominance test and the Fifth Circuit's incidental test. The Court did not discuss the Second Circuit's balancing test.

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164 *See* Daniels, *supra* note 31, at 500 ("[T]he constitutional rights of absent class members continue to create considerable controversy among the circuits, specifically in the area of opt-out rights concerning monetary damage claims.").

165 *See supra* Part I.C.

166 Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 616 (9th Cir. 2010) (rejecting the Second Circuit's "subjective intent" balancing test and the Fifth Circuit's "incidental damages standard" in favor of a new approach that turns on whether or not monetary damages predominate over injunctive and declaratory relief), *rev'd*, 131 S. Ct. 2541 (U.S. 2011).

167 The Supreme Court had previously granted certiorari on this issue in *Adams v. Robertson*, 520 U.S. 83 (1997), and *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). *See supra* Part I.C.

1. Ninth Circuit's Predominance Test

The Ninth Circuit created a three-way circuit split in the standard used to assess whether classes seeking both equitable relief and monetary relief could be certified under Rule 23(b)(2).[168] The source of the Ninth Circuit's standard was the Advisory Committee's Note to Rule 23, which states that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[169] Relying on the dictionary definition of "predominate," the Ninth Circuit formulated a new standard for assessing when classes seeking monetary relief could be certified under 23(b)(2): "[t]o be certified under Rule 23(b)(2) . . . a class must seek only monetary damages that are not superior in strength, influence, or authority to injunctive and declaratory relief."[170] The Supreme Court explicitly rejected this approach in *Dukes*.[171]

2. Fifth Circuit's Incidental Test

Following *Ticor Title Insurance Co. v. Brown*, the Fifth Circuit was the first appellate court to address the issue of classes seeking both equitable relief and monetary relief, doing so in *Allison v. Citgo Petroleum Corp.*.[172] The Fifth Circuit acknowledged that many circuits had taken the position that monetary relief is acceptable under Rule 23(b)(2), so long as it does not predominate over other claims.[173] Recognizing that notice and opt-out rights were to be balanced against the "need and efficiency of a class action," the Fifth Circuit concluded that: "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory re-

168 *See* Poon & Evanson, *supra* note 105, at 18, 20 (noting the three-way split between the Ninth Circuit's new predominance test, the Fifth Circuit's incidental test, and the Second Circuit's balancing test).

169 FED. R. CIV. P. 23 advisory committee's notes (1966); *see also Dukes*, 603 F.3d at 615 (quoting FED. R. CIV. P. 23 advisory committee's notes (1966)).

170 *Dukes*, 603 F.3d at 616 (internal quotation marks omitted).

171 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011) (rejecting the Ninth Circuit's approach and observing that in face of the challenges in determining backpay claims, the Ninth Circuit should not have imposed an "arbitrary limitation on class membership," but instead should have concluded that the "backpay claims should not be certified under Rule 23(b)(2) at all").

172 Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); *see also* Natasha Dasani, Note, *Class Actions and the Interpretation of Monetary Damages Under Federal Rule of Civil Procedure 23(b)(2)*, 75 FORDHAM L. REV. 165, 171–72 (2006) (discussing *Allison* and the development of the incidental damages test).

173 *See Allison*, 151 F.3d at 411 (collecting cases).

lief."[174] The Fifth Circuit defined incidental as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[175]

Importantly, the Fifth Circuit limited incidental damages to "those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established."[176] The Fifth Circuit clarified that "incidental damages should not require additional hearings" or "entail complex individualized determinations."[177] Prior to the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, several courts approved class certification under Rule 23(b)(1) or Rule 23(b)(2) even though substantial monetary damages were requested, relying on the Fifth Circuit's test.[178]

The Supreme Court did not directly rule on the permissibility of the Fifth Circuit's incidental test.[179] However, in the cases addressing the impact of *Dukes* on certification of a Rule 23(b)(2) class, courts have concluded that *Dukes* overruled a portion of the Fifth Circuit's incidental test.[180] Courts in the Fifth Circuit read *Dukes* as clarifying the existing Fifth Circuit law interpreting the requirements of Rule 23(b)(2).[181] However, none of the cases deal with monetary damages

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174 *Id.* at 414–15.

175 *Id.* at 415.

176 *Id.*

177 *Id.*

178 *See, e.g.*, Smith v. Crystian, 91 F. App'x 952, 954 (5th Cir. 2004) (affirming mandatory class certification under (b)(1)(A) or (b)(2) even though there were substantial damages present), *cert. denied*, 543 U.S. 1089 (2005); *see also* Poon, *supra* note 105, at 20 (observing that several circuits follow the Fifth Circuit's incidental test) (citing Reeb v. Ohio Dep't of Rehab. & Corr., 435 F. 3d 639 (6th Cir. 2006); Barabin v. Aramark Corp., No. 02–8057, 2003 WL 355417 (3d Cir. Jan. 24, 2003); Murray v. Auslander, 244 F. 3d 807 (11th Cir. 2001); Jefferson v. Ingersoll Int'l Inc., 195 F. 3d 894 (7th Cir. 1999)).

179 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011).

180 *See, e.g.*, FPX, LLC v. Google, Inc., 276 F.R.D. 543, 552 (E.D. Tex. 2011) ("In reaching this decision [in *Dukes*], the Supreme Court overruled, at least in part, Fifth Circuit precedent that claims for monetary relief are permissible in a(b)(2) [sic] class so long as injunctive or declaratory relief is the predominant relief sought."); Morrow v. Washington, 277 F.R.D. 172, 202 (E.D. Tex. 2011) (noting the same). The Eastern District of Texas certified "a [Rule 23](b)(2) class for injunctive and declaratory relief" in *Morrow*, but noted that it did not need to resolve the question of monetary relief in connection with the 23(b)(2) class because the claims in this case could not even satisfy the *Allison* standard. *Morrow*, 277 F.R.D. at 197, 203.

181 *M.D. ex rel. Stukenberg v. Perry*, is one example of such a case. 675 F.3d 832, 845 (5th Cir. 2012) (holding that the lower court "abused its discretion" in certifying a class under 23(b)(2), and observing that the Fifth Circuit has interpreted 23(b)(2)'s provisions "to create two relevant requirements when a proposed class seeks classwide injunctive relief: (1) the class members must have been harmed in essentially the same way, . . . and (2) the injunctive relief sought must be specific" (citations omitted) (internal quotation marks omitted)). The Fifth Circuit explained that *Dukes* elaborated on the requirements

falling within the Fifth Circuit's incidental test, and consequently, the cases addressing class certification in the wake of *Dukes* can rely on the fact that the monetary damages would not have even satisfied Fifth Circuit law pre-*Dukes*.[182]

Given the Supreme Court's focus on the class-wide nature of the Rule 23(b)(2) damages, a narrowly construed interpretation of the incidental test likely would be consistent with the Supreme Court's Rule 23(b)(2) interpretation. Such a narrowly construed incidental test would require a class in which the monetary damages "flow directly from liability to the class as a whole."[183] However, it is not clear that this is true in many of the class actions seeking both equitable and monetary relief today. One scholar argues that post-*Dukes* the Fifth Circuit's incidental test may change to put more emphasis on whether the damages are individual than on whether they are incidental.[184] In light of the Supreme Court's observation in dicta that due process may require notice and opt-out rights for a class seeking *any* monetary relief, the Fifth Circuit's incidental test may not meet

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of Rule 23(b)(2): "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class" and that for "[f]or a class certified under Rule 23(b)(2), 'the relief sought must perforce affect the entire class at once.'" *Id.* (citing *Dukes*, 131 S. Ct. at 2557–58). In *Stukenberg*, "[t]he proposed class [sought] 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." *Id.* The Fifth Circuit acknowledged that "some of the proposed class's sub-claims could potentially be certified under Rule 23(b)(2)," but ultimately found "that the proposed class claims [did] not satisfy Rule 23(b)(2) because they include[d] claims for individualized injunctive relief," which the Fifth Circuit found explicitly barred by the Supreme Court's decision in *Dukes*. *Id.* at 846.

182 *See, e.g.*, Iberia Credit Bureau, Inc. v. Cingular Wireless, No. 6:01–2148, 2011 WL 5553829, at *7 (W.D. La. Nov. 9, 2011) (noting that the court's "findings and conclusions . . . [were] also influenced by a recent Supreme Court opinion[] [*Dukes*]," which "held that [Rule] 23(b)(2) precludes class treatment where monetary relief is not merely incidental to injunctive or declaratory relief that might be available" and that "[i]ndividualized monetary claims belong in . . . Rule 23(b)(3)"); *FPX*, 276 F.R.D. at 550, 553 (noting that "class treatment under Rule 23(b)(2) is not appropriate [under Fifth Circuit law] where resolution of the claims at issue would require complex individualized determinations and numerous individualized hearings" and holding that the "individualized nature of each class member's . . . claim precludes certification under Rule 23(b)(2)" (citations omitted) (internal quotation marks omitted)); Altier v. Worley Catastrophe Response, LLC, Nos. 11–241 & 11–242, 2011 WL 3205229, at *10–11 (E.D. La. July 26, 2011) (explaining that class certification under Rule 23(b)(2) was inappropriate because plaintiffs were not seeking injunctive or declaratory relief and were only seeking monetary relief, and relying on prior Fifth Circuit precedent while noting that "*Dukes* recently clarified that Rule 23(b)(2) does not authorize a class action when individualized claims for monetary relief predominate").

183 Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (emphasis omitted).

184 *See* Coffee, *supra* note 163 ("[A]fter [*Dukes*], that 'incidental' standard may not survive and the focus may shift to whether the damages are 'individualized' or uniform.").

the additional requirements of the Due Process Clause, as interpreted by the *Dukes* Court.

3. Second Circuit's Balancing Test

The Second Circuit rejected the Fifth Circuit's bright-line test, and instead, in *Robinson v. Metro-North Commuter Railroad Co.,* adopted an "ad-hoc balancing" test.[185] This test assesses "whether [Rule 23](b)(2) certification is appropriate in light of the relative importance of the remedies sought, given all of the facts and circumstances."[186] The Second Circuit's test is more flexible than the Fifth Circuit's test and focuses on whether the request for injunctive relief is a sham.[187]

Robinson involved a Title VII class action alleging race discrimination and seeking certification under Rule 23(b)(2), with both disparate impact claims and pattern-or-practice claims.[188] Pattern-or-practice claims are usually divided into a liability stage and a remedial stage.[189] Individual relief, such as backpay or compensatory relief, sought in addition to class-wide relief, must be ascertained at the remedial stage.[190] The Second Circuit held that the district court, on remand, should certify the "disparate impact claim for Rule 23(b)(2) class treatment" and evaluate "whether the pattern-or-practice disparate treatment claim [would be] appropriate" for Rule 23(b)(2) certification, given the standard the Second Circuit set forth in its opin-

185 Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001). The Second Circuit describes its ad-hoc balancing in the following manner:

> Although the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case, before allowing (b)(2) certification a district court should, at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits. Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery.

Id.

186 *Id.* at 164 (internal quotation marks omitted).

187 *See id.*

188 *Id.* at 155.

189 *See id.* at 158 ("Generally, a pattern-or-practice suit is divided into two phases: liability and remedial." (citation omitted)).

190 *See id.* at 159 ("If individual relief such as back pay, front pay, or compensatory recovery is sought in addition to class-wide injunctive relief, the court must conduct the 'remedial' phase.").

ion.[191] If the district court found that Rule 23(b)(2) certification of the pattern-or-practice claim was inappropriate, the Second Circuit held that the district court should bifurcate the claim, per Rule 23(c)(4), and certify the liability portion of the claim for Rule 23(b)(2) class treatment.[192]

In developing and applying the ad-hoc balancing test to the disparate impact claims, the Second Circuit explicitly noted its concern with due process considerations for absent class members.[193] With regard to non-incidental monetary damages in Rule 23(b)(2) class actions, the Second Circuit observed that "due process may require the enhanced procedural protections of notice and opt out for absent class members," and consequently, "certification of a claim for non-incidental [monetary] damages under Rule 23(b)(2) poses a due process risk because this provision does not expressly afford the procedural protections of notice and opt out."[194] However, the Second Circuit held that the "due process risk posed by [Rule 23](b)(2) class certification of a claim for non-incidental [monetary] damages" could be eliminated by the district court affording notice and opt-out rights to absent class members in the portions of the proceeding where non-incidental monetary damages were involved, for example, the damages stage of a disparate impact claim under Title VII.[195]

With regard to the bifurcation of the pattern-or-practice claim, the Second Circuit observed that "litigating the pattern-or-practice liability phase for the class as a whole" reduces "the range of issues in dispute and promote[s] judicial economy."[196] Thus, this eliminates the need for a separate trial with regard to liability during the individual proceedings in the damages phase of the trial.[197] Plaintiffs enter this

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191 *Id.* at 154. There is no subsequent district court opinion, and the case appears to have been settled. *See* Robinson v. Metro-North Commuter R.R. Co., 325 F. Supp. 2d 411, 413 (S.D.N.Y. 2004) (allowing parties to reform the settlement agreement).

192 *Robinson*, 267 F.3d at 154. Bifurcation of the claim, in this context, means splitting the liability and damages portions of the claim. For example, the first phase of the litigation would involve a trial on the issue of whether the defendant had displayed a pattern of discriminatory behavior. If the answer were determined to be yes, then there would be a second phase of the trial to determine damages.

193 *See id.* 165 ("[W]e find that an ad hoc approach satisfies the very concerns that have led other courts to adopt the incidental damages standard—specifically, (1) achieving judicial efficiency, and (2) *ensuring due process for absent class members*." (emphasis added)).

194 *Id.* at 165–66.

195 *Id.* at 166.

196 *Id.* at 168.

197 *Id.* (explaining that if a Title VII defendant succeeds in the liability stage, then "the question of whether it engaged in a pattern or practice of intentional discrimination that injured its [minority] employees would be completely and finally determined, thereby eliminating entirely the need for a remedial stage inquiry on behalf of each class member").

second phase with a presumption "in their favor 'that any particular employment decision,'" was made pursuant to the discriminatory policy.[198] The employer can rebut the presumption by showing that the adverse employment decision was made for lawful reasons.[199]

The Supreme Court did not rule on the permissibility of the Second Circuit's ad-hoc balancing test in *Wal-Mart Stores Inc. v. Dukes*. While several district courts in the Second Circuit have ruled on the certification of Rule 23(b)(2) classes following *Dukes*, the decisions do not explicitly address whether the Second Circuit's ad-hoc balancing test survives. In contrast, the decisions clearly indicate that the Second Circuit does not read *Dukes* as undermining a court's ability to use Rule 23(c)(4) to certify issue classes.

Most courts in the Second Circuit acknowledge that, at a minimum, *Dukes* has overruled the *Robinson* ad-hoc balancing test to the extent that it would allow Rule 23(b)(2) certification in cases where the class seeks monetary relief that is more than incidental.[200] However, in a case involving sex discrimination claims under Title VII, a district judge sitting in the Southern District of New York limited the prohibition of backpay in a Rule 23(b)(2) class *only* to those instances in which an individualized determination of backpay was necessary.[201]

In the portion of the proceedings where *Robinson* certified incidental monetary damages under Rule 23(b)(2), *Robinson* advocated for the use of notice and opt-out rights for absent class members.[202] On the one hand, the notice and opt-out rights ameliorate, at least to

198 *Id.* at 159 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977)).

199 *See Robinson*, 267 F.3d at 159–60 (explaining that, once a class member qualifies for the liability stage presumption, the burden shifts to the employer to demonstrate that the employment decision was made for lawful reasons) (citing *Teamsters*, 431 U.S. at 362).

200 *See, e.g.*, Stinson v. City of New York, No. 10 Civ. 4228, 2012 WL 1450553, at *20 (S.D.N.Y. Apr. 23, 2012) (observing that "[b]oth the Second Circuit and this Court have followed the 'predominates' approach the Supreme Court rejected in *Dukes*"); Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950, 2012 WL 205875, at *7 (S.D.N.Y. Jan. 19, 2012) (concluding that plaintiff's claims for monetary relief were not incidental and thus could not be included in a Rule 23(b)(2) class); Easterling v. Conn. Dept. of Corr., 278 F.R.D. 41, 45 (D. Conn. 2011) (observing that "the Supreme Court [in *Dukes*] rejected the Second Circuit's broad reading of Rule 23(b)(2)").

201 *See* Cronas v. Willis Grp. Holdings, Ltd., No. 06 Civ. 15295, 2011 WL 5007976, at *4 (S.D.N.Y. Oct. 18, 2011) ("Plaintiffs' backpay claim does not require additional hearings to resolve the disparate merits of each individual's case, and neither introduce[s] new substantial legal or factual issues, nor entail[s] individualized determinations. . . . In contrast to *Wal-Mart*, Defendants here have agreed in the Revised Proposed Consent Decree that the allocation of backpay to class members will be done by formula." (alteration in original) (citation omitted) (internal quotation marks omitted)).

202 *See Robinson*, 267 F.3d at 165–66 ("[D]ue process may require the enhanced procedural protections of notice and opt out for absent class members.").

some extent, the due process concerns with certifying monetary damages under Rule 23(b)(2). Courts are authorized under Rule 23(c)(2) to order notice to the class, for classes certified under 23(b)(1) or (b)(2).[203] However, there is no general right to opt out for the mandatory classes.[204] On the other hand, the Supreme Court has stated, in dicta, that it may read Rule 23(b)(2) as inconsistent with monetary damages of any amount.[205] If it were to so hold, then little would remain of *Robinson*'s advocacy for notice and opt-out rights in connection with certification of monetary damages under Rule 23(b)(2).

Courts in the Second Circuit are open to the idea of certifying two classes, with one class certified under Rule 23(b)(2) seeking injunctive relief and another certified under Rule 23(b)(3) seeking monetary relief. For example, in a case involving a refusal by Best Buy Stores to honor its price-match guarantee, a district judge sitting in the Southern District of New York held that classes certified in a bifurcated manner, with one class seeking injunctive relief certified under Rule 23(b)(2) and another class seeking monetary relief certified under Rule 23(b)(3), were not impacted by *Dukes*.[206] Subsequent decisions have relied on this decision to certify both a Rule 23(b)(2) injunctive class and a Rule 23(b)(3) monetary relief class.[207] The class

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203 FED. R. CIV. P. 23(c)(2)(A).

204 However, at least one court has ordered plaintiffs to do so, relying on its discretionary power. *See* In re Conseco Life Ins. Co. Lifetrend Ins. Sales & Mktg. Litig., Nos. M 10–02124, C 08–05746, C 10–00652, 2010 WL 5387793, at *3 (N.D. Cal. Dec. 22, 2010) (observing that the Court ordered "plaintiffs to provide class members with notice of [the] action and an opportunity to opt out" because of the concurrent regulatory settlement and leaving that order in place).

205 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (observing that there is a "serious possibility" that due process would require notice and opt-out rights in any class seeking monetary relief); *see also supra* Part I.C.2.

206 *See* Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 173–74 (S.D.N.Y. 2011) (explaining that the "abrogation of *Robinson* does not affect certification in this case" because the (b)(2) class seeks "only an injunction against further statutory violations"). The district judge did note the necessity of reexamining the issue of Rule 23(b)(2) certification in light of the fact that "*Dukes*' second holding, concerning the effect of claims for monetary relief on the court's certification of an injunction class under Rule 23(b)(2) [was] potentially pertinent" because the Second "Circuit had long followed the 'predominates' approach rejected in *Dukes*." *Id.* at 173. The district judge also found that the Second Circuit's earlier decisions allowing certification of an injunction class under Rule 23(b)(2) and a damages class under Rule 23(b)(3) were not undermined by *Dukes*. *Id.* at 169.

207 *See, e.g.*, *Stinson v. City of New York*, No. 10 Civ. 4228, 2012 WL 1450553, at *20–21 (S.D.N.Y. Apr. 23, 2012) (certifying the class under both Rule 23(b)(2) and (b)(3) after observing that recent precedent in the Southern District "establishes that when a district court engages in the analysis required under Rule 23(b)(2) and Rule 23(b)(3), a class

certified under Rule 23(b)(3) must satisfy the additional requirements imposed on those types of classes.[208]

Further, the portion of the *Robinson* analysis pertaining to bifurcated claims appears to be in full vigor following *Dukes*. Shortly after *Dukes*, a district judge sitting in the Eastern District of New York held that "[t]he Second Circuit's interpretation of Rule 23(c)(4)," which "has consistently endorsed a broad reading of Rule 23(c)(4)" and its allowance of certification of issue classes, was "consistent with [*Dukes*'] interpretation of Rule 23(b)."[209] Courts in the Second Circuit have followed this reasoning and have read *Dukes* as not cutting back on the authority granted in Rule 23(c)(4).[210] Claims brought under Title VII are well suited to bifurcation, with an initial liability stage certified under Rule 23(b)(2), followed by a remedial stage.[211]

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can be certified seeking both declaratory and injunctive relief as well as money damages") (citing *Jermyn*, 276 F.R.D. at 173).

208 *See Stinson*, 2012 WL 1450553 at *21 (noting that, to be certified under Rule 26(b)(3), a class must also satisfy predominance and superiority requirements); *Jermyn*, 276 F.R.D. at 173–74 (finding that the class satisfied the Rule 23(b)(3) predominance and superiority requirements).

209 United States v. City of New York, 276 F.R.D. 22, 33–34 (E.D.N.Y. 2011) (holding that *Dukes* did not abolish *Robinson* insofar as *Robinson* addresses a court's ability to certify issue classes pursuant to Rule 23(c)(4) when only portions of the claim satisfy Rule 23(b)(2)).

210 *See, e.g.*, Maziarz v. Hous. Auth. of Vernon, 81 Fed. R. Serv. 3d 1203, 1214, 1217 (D. Conn. 2012) (commenting that "[w]here a class may be maintained with respect to particular issues, . . . the court is free to certify separate issues, pursuant to Rule 23(c)(4), in order 'to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies'" and granting motion for class certification pursuant to Rules 23(b)(2) and (b)(3)) (citing Robinson v. Metro–North Commuter R.R. Co., 267 F.3d 147, 167 (2d Cir. 2001)), *reconsideration denied* (Mar. 14, 2012); Easterling v. Conn. Dep't of Corr., 278 F.R.D. 41, 45 (D. Conn. 2011) ("In *Robinson*, the Second Circuit exhorted district courts to take full advantage of [Rule 23(c)(4)] to certify separate issues in order to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies." (internal quotation marks omitted)).

211 *See* Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950, 2012 WL 205875, at *7 (S.D.N.Y. Jan. 19, 2012) (observing that "[t]he defendants overstate[d] *Dukes'* reach" by arguing "that as a matter of law, the presence of the plaintiffs' claims for individualized relief preclude[] certification of *any* portion of this case under Rule 23(b)(2)" because Rule 23(c)(4) allows class actions, when appropriate, to "be brought or maintained . . . with respect to particular issues") (citation omitted). The court goes on to explain that the question of individual relief in a Title VII case arises only after proof that an "employer has followed an employment policy of unlawful discrimination," and that Title VII claims "therefore can be bifurcated into an initial stage at which the plaintiff must establish a prima facie case of discrimination and a separate remedial stage." *Id.* Observing that Second Circuit law encourages district courts to "take full advantage of [Rule 23(c)(4)] to certify separate issues in order to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies," the court concludes that "[d]isparate impact and pattern-or-practice disparate treatment cases are especially appropriate for bifurcation precisely because . . . individual issues arise only if the class established the employer's liability." *Id.* (citation omitted) (internal quotation marks omit-

As courts in the Second Circuit have observed, *Dukes* does not address the ability of courts to split proceedings and certify classes under both Rule 23(b)(2) and (b)(3), or to bifurcate proceedings by certifying an issue class under Rule 23(c)(4). Thus, at least within the Second Circuit, these two options remain available to judges considering class certification. Those portions of the *Robinson* analysis are unaffected by *Dukes*.

III. IMPLICATIONS OF *WAL-MART V. DUKES*' LIMITATION FOR MONETARY REMEDIES IN RULE 23(B)(2) CLASSES

Ultimately, *Wal-Mart Stores, Inc. v. Dukes* leaves unanswered the question of when monetary damages can be included, if ever, under Rule 23(b)(2). The limitations the Supreme Court placed on monetary remedies under Rule 23(b)(2) can be understood as being motivated by underlying due process concerns, consistent with the historical assumption that courts would determine, on a case-by-case basis, the due process required for a particular Rule 23(b)(2) class action. Considering this, what are the best options for structuring a class action that seeks both injunctive and monetary relief, as is typical in Title VII employment discrimination cases? What approaches to structuring class actions can be taken that help address the due process concerns of both plaintiffs and defendants, but also provide a measure of certainty for the parties by setting clear expectations? The approach taken in the subsequent *Dukes* litigation offers one example: the strategy so far has been to split the litigation regionally and separate the classes into an injunction class seeking relief under Rule 23(b)(2) and a damages class seeking relief under Rule 23(b)(3). Finally, two alternative approaches to address the due process concerns underlying the certification of mandatory classes that involve monetary damages are briefly explored.

A. Dukes *Plaintiffs' Litigation Strategy Moving Forward: A Case Study*

The subsequent litigation in the *Dukes* case provides a case study of one approach to the concerns raised by the Supreme Court in

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ted). The court found that "the plaintiffs plan to seek class certification pursuant to Rule 23(b)(2) for the liability stage only" was "materially identical to that endorsed by the Second Circuit in *Robinson* and [thus] would be fully consistent with *Dukes'* careful attention to the distinct procedural protections attending (b)(2) and (b)(3) classes." *Id.* at *8 (citation omitted) (internal quotation marks omitted).

Dukes.[212] The Plaintiffs' Fourth Amended Complaint[213] in the California litigation makes two key changes from the Third Amended Complaint[214] that formed the basis of the Supreme Court's decision: first, it brings the action on behalf of a much smaller, regionally-based class; second, it splits the class in two, with a Rule 23(b)(2) injunctive relief class and a Rule 23(b)(3) monetary relief class.[215]

This strategy appears consistent with the Supreme Court's holding. The injunctive relief class, consisting of women employed (or who will be employed) by Wal-Mart in the California Region, seeks only an injunction to prevent Wal-Mart's alleged discriminatory employment practices and a declaratory judgment that Wal-Mart's employment practices violate Title VII.[216] This is consistent with both the historical roots of Rule 23(b)(2) classes that the Supreme Court emphasized in *Dukes* and the Supreme Court's concern about whether any monetary relief could ever be certified under Rule 23(b)(2). In

212 While subsequent regional actions have been filed in California, Texas, Florida, and Tennessee, my discussion focuses solely on the California litigation as an illustrative example. *See* WAL-MART CLASS WEBSITE, http://www.walmartclass.com/public_home.html (last visited Oct. 20, 2012). On October 15, 2012, the Texas action was dismissed; the district court held that the claims were "barred by the statute of limitations." *See* Margaret Cronin Fisk, *Wal-Mart Wins Dismissal of Texas Women's Class Action*, BLOOMBERG NEWS (Oct. 16, 2012), http://www.businessweek.com/news/2012-10-15/wal-mart-wins-dismissal-of-texas-women-s-class-action. In late September, the California action survived Wal-Mart's motion to dismiss. *See* WAL-MART CLASS WEBSITE, http://www.walmartclass.com/public_home.html (last visited Oct. 20, 2012).

213 Plaintiffs' Fourth Amended Complaint, Wal-Mart Stores, Inc. v. Dukes, No. 01-2252 (N.D. Cal. Oct. 26, 2011) [hereinafter Fourth Amended Complaint].

214 Plaintiffs' Third Amended Complaint, Wal-Mart Stores, Inc. v. Dukes, No. 01-2252 (N.D. Cal. Sept. 12, 2002) [hereinafter Third Amended Complaint].

215 Plaintiffs' Fourth Amended Complaint seeks to certify two separate classes: an "Injunctive Relief Class," consisting of "all women who are currently employed or will be employed at any Wal-Mart retail store in a California Wal-Mart Region"; and a "Monetary Relief Class," consisting of "all women employed at any Wal-Mart retail store in a California Region at any time from December 26, 1998." Fourth Amended Complaint at 4. Plaintiffs argue that the Injunctive Relief Class should be certified under Rule 23(b)(2) and that the Monetary Relief Class should be certified under Rule 23(b)(3). *Id.* at 5. Alternatively, plaintiffs argue for using Rule 23(c)(4). *Id.* In contrast, Plaintiffs' Third Amended Complaint sought to certify one class, consisting of "all past, present and future female employees of Wal-Mart's retail stores . . . in the United States." Third Amended Complaint at 4. Plaintiffs argued that the class could be properly certified under either Rule 23(b)(2) or Rule 23(b)(3). *Id.* Plaintiffs also argued that Rule 23(c)(4)(A) allows certification, as an alternative. *Id.* The same approach was taken in the Texas regional class actions, with a small change in that the argument for Rule 23(c)(4) issue class certification was not listed as an alternative, it was simply listed alongside the Rule 23(b)(2) and Rule 23(b)(3) certification arguments. *See* Plaintiffs' First Amended Complaint and Jury Demand at 7, Odle v. Wal-Mart Stores, Inc., No. 3:11-cv-02954-O (N.D. Tex. Jan. 19, 2012) [hereinafter Texas Complaint].

216 Fourth Amended Complaint at 29, 32.

addition, this is consistent with the Second Circuit's interpretation of *Dukes* as applied to splitting injunctive and monetary relief into two separate classes, with one certified under Rule 23(b)(2) and one under Rule 23(b)(3), or using Rule 23(c)(4) to certify an issue class.

The monetary relief class, consisting of women employed by California-region Wal-Marts during the relevant time period, seeks all "back pay, front pay, general and specific damages for lost compensation and job benefits" that class members "would have received but for the discriminatory practices" of Wal-Mart.[217] Plaintiffs also request "exemplary and punitive damages" for the monetary relief class.[218] This too is consistent with the Supreme Court's limitations on remedies available under the different subdivisions of Rule 23(b); however, the class may still have issues with the additional requirements of Rule 23(b)(3).[219]

When rejecting the Ninth Circuit's predominance test in *Dukes*, the Supreme Court expressed its concern that plaintiffs would add in claims for equitable relief in order to bypass the stricter requirements of Rule 23(b)(3). This concern is not implicated here. For one, the damages class still must meet the stricter requirements in Rule 23(b)(3). These plaintiffs will not be able to rely solely on a determination of liability in the injunction class because of Wal-Mart's statutory right to an individualized adjudication on the backpay claims; additional litigation to adjudicate Wal-Mart's individual defenses will be necessary. The issues common to both classes can be tried together, without implicating the concern raised by the Supreme Court in *Dukes* that plaintiffs would be able to bypass Rule 23(b)(3)'s stricter requirements.

In addition, this approach addresses the due process concerns discussed previously. Since all monetary damages would be part of a Rule 23(b)(3) class, absent class members, for the class seeking monetary relief, would receive notice and have the opportunity to opt out the litigation. Furthermore, this approach increases the likelihood

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217 Fourth Amended Complaint at 31–32.

218 Fourth Amended Complaint at 32. The Third Amended Complaint requested all damages noted in the Fourth Amended Complaint, but also requested that class members be restored to the jobs and wages they would have had, but for Wal-Mart's discriminatory practices. Third Amended Complaint at 25. The Fourth Amended Complaint is more modest in its approach, though still far-reaching, requesting that the injunctive relief include an assessment of job promotion processes and wages and "affirmative action to provide lost promotion opportunities" to the injunctive class members. Fourth Amended Complaint at 32.

219 Given this Comment's focus on Rule 23(b)(2) remedies, I save that analysis for another Comment.

that absent class members will be adequately represented, since the class will not include both former and current employees of Wal-Mart. Thus, the approach taken in the subsequent litigation in the *Dukes* case appears to address the underlying due process concerns that likely motivated the Supreme Court's limitation on monetary remedies in Rule 23(b)(2) classes.

However, in light of the Supreme Court's decision to grant certiorari in *Comcast v. Behrand*,[220] the Northern District of California judge ordered the parties in *Dukes* to submit supplemental briefing on the impact of this case on the plaintiffs' claims in *Dukes*.[221] At a hearing in June 2012, Judge Breyer of the Northern District of California reportedly "signaled that plaintiffs could again fall short of showing that they have enough in common to sue the company as a class."[222] The primary obstacle plaintiffs face is "to allege class standing that [will] survive when tested against the language of the high court's decision."[223] In that regard, Judge Breyer commented that he was "seriously concerned [that] the plaintiff [had] not done so."[224]

These concerns appear to stem more from the requirements of Rule 23(a), and less so from Rule 23(b). It is therefore possible that the approach taken in the subsequent *Dukes* cases will be found to adequately address the concerns raised by the Supreme Court. However, the question certified in *Comcast* raises issues connected with what evidence must be shown at the certification stage to demonstrate that a case is susceptible to having damages awarded on a class-wide basis, and thus, the decision could impact the analysis in *Dukes*.

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220 Comcast Corp. v. Behrend, No. 11-864, 2012 WL 113090 (U.S. June 25, 2012) (granting certiorari on the question of "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis"). *Behrend* involved an antitrust class action brought by customers alleging that Comcast obtained a monopoly and engaged in conduct to exclude competition, seeking certification under Rule 23(b)(3). Behrend v. Comcast Corp., 655 F.3d 182, 185 (3d Cir. 2011), *cert. granted in part*, No. 11-864, 2012 WL 113090 (U.S. June 25, 2012).

221 Cynthia Foster, *Judge Asks for More Briefing in Retooled Gender Bias Suit Against Wal-Mart*, THE RECORDER (July 2, 2012), http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202561703936&Judge_Asks_for_More_Briefing_in_Retooled_Gender_Bias_Suit_Against_WalMart.

222 *Id.*

223 *Id.*

224 *Id.*

B. *Approaches Addressing Due Process Concerns in Rule 23(b)(2) Classes That Also Involve Monetary Damages*

The approach taken by the plaintiffs in the subsequent *Dukes* litigation is one way to address the due process concerns entailed in certifying a class seeking monetary relief. However, splitting the claims between two separate classes certified under Rule 23(b)(2) and Rule 23(b)(3) is not the only solution. From a policy level, what is the best way to structure a class action, when the class seeks a mix of injunctive and monetary relief? How can that be done in a manner that balances the competing interests of ensuring that legitimate claims involving both forms of relief can be certified as a class, but also ensuring that certification does not become a quick way to force the defendant to settle? The approach taken in *Dukes*, in the subsequent regional cases, attempts to find a middle line, which is consistent with how the Second Circuit views the class action landscape post-*Dukes*.

In addition to that approach, two other approaches are explored below. These approaches are offered more as a discussion-starter than a thorough treatment of the alternative approaches. The first approach would offer a measure of certainty for both parties by addressing the underlying due process concerns via a rule amendment to Rule 23. The second approach would offer courts more discretion and relies solely on the other existing provisions of Rule 23, specifically the Rule 23(c)(4) issue class. Yet another way to approach this question is to consider the normative policies underlying Rule 23(b)(2) and ask what types of monetary relief, if any, those policies support.[225] For the purpose of the discussion below, this approach is not developed. In thinking about all of these approaches, it is important to keep in mind that class actions are only one of several devices to facilitate aggregate litigation, and there are other ways to achieve resolution of aggregate claims outside of Rule 23.[226]

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225 This strategy is developed in a recent article. *See* Neil K. Gehlawat, Note, *Monetary Damages and the (b)(2) Class Action: A Closer Look at* Wal-Mart v. Dukes, 90 TEX. L. REV. 1535, 1555 (2012) (concluding "that while it might be problematic for courts to authorize compensatory damages in [Rule 23](b)(2) class actions, courts should be more willing to authorize backpay and punitive damages," because "[w]hile compensatory damages are more individualized by nature, punitive damages and backpay are both inherently group remedies" and "are aimed less at compensating individual plaintiffs and more at deterring defendants' wrongful behavior"). For a more detailed discussion of this approach and the policy underlying Rule 23(b)(2), see Gehlawat's article.

226 For a discussion of some other devices in the Federal Rules of Civil Procedure that could be used as an alternative to Rule 23 class actions, see Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475 (2005) (discussing Federal Rules of Civil

1. Amendment to Rule 23(b) to Create a Hybrid Class

One option for addressing the due process concerns is simply to expand the protections afforded absent class members in Rule 23(b)(3). This would make certification much more difficult for plaintiffs seeking only injunctive or declaratory relief because all absent class members in Rule 23(b)(2) actions would be required to receive notice and have the opportunity to opt out of the litigation. Class certification would be more difficult because of the additional time and expense needed to identify and contact all of the absent class members. Given that many Rule 23(b)(2) classes seek only injunctive or declaratory relief, this additional cost and time may result in a decrease of valuable claims.

However, an alternative to prohibiting all monetary relief from classes certified under Rule 23(b)(2) in order to satisfy due process, or extending the protections afforded absent class members in Rule 23(b)(3) actions to those in Rule 23(b)(2), is to create an intermediate "hybrid" class. This approach would entail amending Rule 23 to create this new hybrid class. The hybrid class would allow certification of both equitable and monetary relief, but would require notice and the opportunity to opt out, similar to Rule 23(b)(3). As an intermediary between the existing Rule 23(b)(2) and 23(b)(3) classes, this new hybrid would not have a "predominance" test, but the monetary damages would need to meet a strict interpretation of the Fifth Circuit's incidental test. Thus, under this new hybrid class, the monetary damages would have to flow directly from the equitable relief to the class as a whole, with no individual determinations necessary.[227]

The benefit of an amendment to Rule 23 is that it would provide certainty to plaintiffs and defendants. It would allow for careful crafting of a class that recognized the unique position of potential claimants seeking relief under Title VII, or something similar. There are two large downsides: (1) it would be necessary to craft the hybrid class in such a way as to prevent claims that normally would be brought under Rule 23(b)(3) from sneaking into the new hybrid class because its requirements are less strict; and (2) it would be difficult to draft and approve the hybrid class, given the Supreme Court's concerns that using the Ninth Circuit's predominance test might al-

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Procedure 20, 22, and 42). In addition, Multi-District Litigation provides yet another alternative. *See* 28 U.S.C. § 1407 (2006).

227 This approach is similar to the guidance provided in illustration 5 of § 2.04 of Principles of the Law of Aggregate Litigation. AM. LAW INST., *supra* note 26, § 2.04 illus. 5 (2010); *see also* discussion, *supra* note 119.

low classes to add in claims for injunctive relief that predominated over monetary claims, thereby bypassing Rule 23(b)(3)'s stricter requirements. Further, a rule amendment to this effect would seem to necessitate a reading of Rule 23(b)(2) to exclude any claims for monetary relief.

2. Reliance on Rule 23(c)(4) Issue Classes

Another approach is to expand the use of the Rule 23(c)(4) issue class and to encourage plaintiffs to take greater advantage of this existing provision.[228] Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[229] Professor Cabraser notes that the issue class has been "infrequently invoked, perhaps due to uncertainty as to how it is to be 'construed and applied'" with regard to Rule 23(b)(3)'s predominance analysis.[230] The role of the court with respect to Rule 23(c)(4) issue classes is to separate common issues from individual ones, certifying common issues for trial, and therefore allowing more efficient resolution of the common issues.[231] The issue class could be used for cases like *Wal-Mart Stores, Inc. v. Dukes*, allowing resolution of the common issues related to discrimination claims, while pulling out claims requiring individual determination for later adjudication. Indeed, both the California and Texas complaints in the subsequent *Dukes* litigation include an argument for certification of the common issues under Rule 23(c)(4) and thus, discretion by the courts as to what due process may be required in this instance.[232]

This approach is, in some ways, more consistent with the underlying due process concerns in *Dukes* because it leaves the court with significant discretion in determining when there are common issues suitable to certification under Rule 23(c)(4). This discretion was the underlying theme in Professor's Kaplan's article discussing the 1966 amendments to Rule 23. However, this approach leaves both plaintiffs and defendants with much uncertainty as to how courts will analyze their particular case, given the discretion allocated to the court. While it is important that the decisions in the Second Circuit post-

228 The plaintiffs in *Dukes* relied on this rule in both complaints discussed in this Comment, as an alternative to certification under 23(b). *See* Fourth Amended Complaint at 5; Texas Complaint at 7. The Texas complaint relies on this as a primary claim, instead of relegating it to an alternative claim. Texas Complaint at 7.

229 FED. R. CIV. P. 23(c)(4).

230 Cabraser, *supra* note 226, at 1499.

231 Cabraser, *supra* note 226, at 1501.

232 Fourth Amended Complaint at 5; Texas Complaint at 7.

Dukes generally endorse this approach, there is the risk that the Supreme Court will decide that the Rule 23(c)(4) issue class is being used abusively or too opportunistically, leading it to cut back on this approach.[233]

In addition, there may be some logistical issues to work through. Even when a particular issue, such as whether an employer had discriminatory promotion policies, can be certified as a Rule 23(c)(4) issue class, that is only step one. Presumably an employer would still be entitled to rebut each individual's presumption of a discriminatory reason for an adverse employment action. Thus, Rule 23(c)(4) issue class certification, while allowing for great discretion on the part of courts consistent with the due process concerns likely underlying *Dukes*, would not achieve the efficiencies ideally achieved by class actions. Despite that, creative use of the issue class may be a way to help address some of the due process concerns underlying the certification of classes involving both equitable and monetary claims.

CONCLUSION

Ultimately, the decision in *Wal-Mart Stores, Inc. v. Dukes* left unanswered the question of "whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2) [that the Supreme Court] . . . announced and that comply with the Due Process Clause."[234] A close examination of the history of Rule 23 and the Supreme Court's class action jurisprudence suggests that Rule 23(b)(2), as it exists and is applied, does not adequately protect the due process rights of absent class members when monetary relief is sought in addition to equitable relief. The Supreme Court's approach in *Dukes*, considered in conjunction with Rule 23's history and the existing judicial standards for certifying monetary damages in Rule 23(b)(2) classes, suggests that due process may require notice and opt-out rights for absent class members in actions seeking monetary damages. But the Court's lack of a complete prohibition on claims for monetary relief in Rule 23(b)(2) classes is con-

233 Indeed, some read the Supreme Court's decision in *Dukes* as signaling that the Court would narrowly interpret Rule 23(c)(4). *See, e.g.*, James P. Muehlberger & Gregory K. Wu, *Does 'Wal-Mart' doom expansive reading of rule authorizing class actions for 'particular issues'?*, THE NAT'L LAW J. (July 11, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202562602715&Does_WalMart_doom_expansive_reading_of_rule_authorizing_class_actions_for_particular_issues&slreturn=20120821095750 (positing that *Dukes* and other recent cases "signal that the Supreme Court would look with disfavor upon an expansive interpretation of Rule 23(c)(4)").

234 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011).

sistent with the 1966 Civil Rules Advisory Committee's implied assumption that courts had the competence to determine the due process required on a case-by-case basis for Rule 23(b)(2) classes. Thus, while significant individualized monetary relief cannot be certified in a Rule 23(b)(2) class after the Court's decision in *Dukes*, there may be other forms of monetary relief that nonetheless could be certified under Rule 23(b)(2) consistent with the Due Process Clause.

Following the Supreme Court's decision, the plaintiffs in *Dukes* adopted a regional strategy of splitting the litigation into two classes, one class seeking only injunctive relief under Rule 23(b)(2), and the other class seeking monetary relief under Rule 23(b)(3). This approach appears to address the due process concerns likely motivating the Supreme Court in limiting the availability of monetary damages under Rule 23(b)(2). In addition, this Comment briefly explored two alternative approaches: an amendment to Rule 23 to create a new hybrid class and an expansion of the use of the Rule 23(c)(4) issue class. The first approach offers litigants some certainty in what is required for certification and how the court will analyze the proposed class. The second approach is more consistent with the emphasis in the 1966 amendments to Rule 23 on a court having discretion to determine what the Due Process Clause requires in any particular instance; however, it provides very little certainty to litigants.