RULE 23(B)(2) CERTIFICATION OF EMPLOYMENT CLASS ACTIONS: A RETURN TO FIRST PRINCIPLES

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INTRODUCTION

Federal Rule of Civil Procedure 23(b)(2) authorizes a class action if "the party opposing the class has acted 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."

Unlike Rule 23(b)(3), the principal alternative route to class certification, the text of Rule 23(b)(2) does not require notice to absent class members, nor does it require (or even permit) class members to opt out of the lawsuit. Moreover, Rule 23(b)(3) requires a court to make pre-certification findings that common questions predominate and that a class action is the superior method of resolving the dispute. These findings need not be made under Rule 23(b)(2) as written.

For these reasons, many class plaintiffs find it advantageous to seek class certification under Rule 23(b)(2) rather than meet the more rigorous and protective standards of Rule 23(b)(3). As classes seeking certification of claims for monetary damages under Rule 23(b)(2) have grown more common, so too have certification orders containing judicially grafted solutions to perceived problems with class treatment of such claims.[1]

Plaintiffs alleging discrimination in employment in particular have made aggressive use of Rule 23(b)(2). For the two largest putative employment class actions in history, one alleging sex discrimination and one claiming disability discrimination, plaintiffs secured district court certification under Rule 23(b)(2).[2]

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1. Such "work-arounds" raise a host of interesting issues. *See infra* note 21.

2. *See* Hohider v. United Parcel Serv., Inc., 243 F.R.D. 147, 153 (W.D. Pa. 2007) (Americans With Disabilities Act); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 143 (N.D. Cal. 2004) (Title VII of the 1964 Civil Rights Act). The *Dukes* certi-

Proponents of an expansive reading of Rule 23(b)(2), particularly in the employment context, frequently point to the Advisory Committee's Note stating that this provision was intended to encompass "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class."[3]

But these proponents, and virtually all courts, have failed to recognize the relevance of the interpretive methodology set forth by the Supreme Court in *Ortiz v. Fibreboard Corp.*[4] for determining whether a particular claim may proceed under the "mandatory" provisions of Rule 23—subdivisions (b)(1) and (b)(2)—or, instead, must be certified (if at all) under subdivision (b)(3). The *Ortiz* Court made clear that adherence to the principles articulated in the historical antecedents of the mandatory provisions is a presumptively necessary precondition to class certification under those provisions.[5]

The historical antecedents to Rule 23(b)(2) uniformly involved claims of de jure segregation, and in those cases the courts approved class-wide injunctions precluding the defendant (usually a school district) from continuing to separate the races.[6] Such cases are worlds apart from a modern suit alleging employment discrimination, an intentional tort, and seeking a wide range of monetary remedies (including back pay, compensatory damages, and punitive damages) under federal statutes such as Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act.[7]

When the *Ortiz* analysis is applied to Rule 23(b)(2), it strongly suggests that most modern employment discrimination cases cannot be certified under that subdivision. Rather, claims of intentional discrimination in employment brought under federal statutes authorizing legal relief and a statutory or constitutional entitlement to a jury trial must be certified in accordance with Rule

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fication order is still undergoing appellate review. *See* 556 F.3d 919 (9th Cir. 2009) (granting rehearing en banc). The *Hohider* certification order was vacated on appeal. 574 F.3d 169, 171 (3d Cir. 2009).

3. Adv. Comm. Notes to 1966 Amendments, 39 F.R.D. 69, 102 (1966) [hereinafter Notes to 1966 Amendments]. The Advisory Committee also indicated that certain antitrust claims could be certified under subdivision (b)(2). *See infra* text accompanying note 128; *see also* Reeb v. Ohio Dep't of Rehab'l Corr., 435 F.3d 639, 651–52 (6th Cir. 2006) (Keith, J. dissenting); Brief of Plaintiffs-Appellees at 46–47, Hohider v. United Parcel Serv., Inc., 574 F.3d 169 (3d Cir. April 24, 2008) (No. 07-4588) (citing Barnes v. Am. Tobacco Co., 161 F.3d 127, 142 (3d Cir. 1998)).

4. 527 U.S. 815 (1999).

5. *Id.* at 845.

6. *See infra* Part V (discussing historical antecedents to Rule 23(b)(2)).

7. *See infra* Part III (discussing modern employment cases).

23(b)(3), which both imposes more stringent requirements on class certification and affords more protections to defendants and absent class members.

This Article proceeds as follows: Part I addresses the origins of the modern Rule 23 class action generally, and Rule 23(b)(2) in particular. Part II describes recent developments in employment class action litigation. Part III sets forth the framework for analyzing the mandatory certification provisions, in the context of Rule 23(b)(1), in *Ortiz*. Part IV applies that framework to Rule 23(b)(2). Part V addresses the implications of that analysis to the modern employment class action and suggests that such cases, insofar as they seek monetary damages, generally cannot be certified under Rule 23(b)(2).

I.
DEVELOPMENT OF RULE 23(B)(2)

Class action practice in federal court is governed by Federal Rule of Civil Procedure 23, adopted by the Supreme Court pursuant to the Rules Enabling Act, a federal statute that authorizes promulgation of procedural rules that may not "abridge, modify, or enlarge" the substantive law.[8]

As the drafters of Rule 23 recognized, class actions are a continually evolving feature of American law.[9] Representative legal actions first appeared in the Court of Chancery as exceptions to the rule of compulsory joinder where that rule, "relentlessly applied, would preclude decision of cases where it was impracticable or impossible to get all the interested persons before the court."[10] During the time of the divided bench, American courts adopted and built upon the English exceptions, allowing collective actions to

8. 28 U.S.C. § 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals"); *id.* § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); *see also Hohider*, 574 F.3d at 185.

9. *See* Notes to 1966 Amendments, *supra* note 3, at 97 ("Difficulties with the original rule" discussion).

10. James W. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 307 (1938); *see also* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 1–7 (1987) (tracing the origins of group litigation to medieval England).

proceed as an exercise of the court's equity powers.[11] This practice was recognized by former Equity Rule 38.[12]

Commentators periodically sought to discern patterns within the cases proceeding pursuant to the equity power. For example, in the mid-nineteenth century, Justice Story articulated three categories of exceptions: questions of common or general interest; suits by previously associated parties; and cases involving parties too numerous to be brought before the court.[13] In 1909, Thomas Street proposed an alternative classification of two categories: "true" class actions, where the subject of the suit was property upon which a class of persons claim an interest; and "spurious" class actions in which personal liability, not property, was at issue.[14]

After the merger of law and equity, class actions were recognized in the 1938 revisions to the Federal Rules of Civil Procedure,[15] which drew upon both Story's and Street's classifications but provided a new alternative categorization based upon the nature of the rights at issue.[16] As the Advisory Committee explained in 1938, new Rule 23 followed Equity Rule 38 in providing for certification of a class where the question to be litigated was "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."[17] Three categories of rights were recognized as appropriate for class actions: rights held jointly by a class; several rights involving property; and several rights involving a common question and common relief.[18] In practice, the terms "true," "hybrid," and "spurious" were frequently applied to these categories, and stubbornly persisted into contemporary usage.[19] That unfortunate practice caused ongoing confusion by implying a nonexistent con-

11. *See*, *e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921).

12. FED. EQUITY R. 38.

13. JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA 123–24 (4th ed. 1848).

14. THOMAS A. STREET, FEDERAL EQUITY PRACTICE §§ 547–548 (1909).

15. FED. R. CIV. P. 23 (1938).

16. YEAZELL, *supra* note 10, at 230–31; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 377–79 (1967); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 398 n.201 (1987–88) ("Moore blended the jurisdictional ideas of Street with the 'jural relations' ideas of Story and others.").

17. FED. R. CIV. P. 23 advisory committee's note (1937).

18. FED. R. CIV. P. 23(a)(1)–(a)(3) (1938).

19. *See* Notes to 1966 Amendments, *supra* note 3, at 97 ("Difficulties with the original rule" discussion).

tinuity in class action categories from the nineteenth century through the modern understanding.[20] Moreover, the loaded nature of the terms served to undermine the intent of the drafters.[21]

By the 1960s, however, the 1938 categories widely were regarded as a failure in both form and substance. Professor Kaplan, Secretary of the 1966 Advisory Commission on Civil Rules, put it bluntly: "They were confusing. . . . The class-action device, then, had become snarled."[22] The official Advisory Committee Notes described the 1938 classes as "obscure and uncertain."[23] Professor Cohn, Chairman of the Committee on Federal Rules and Procedure, was more diplomatic, noting that "the expected advantages of

20. *See id.*

21. *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 United States, at 7 (June 10, 1965), http://www.usecourts.gov/rules/Reports/CV06-1965.pdf [hereinafter *Committee Statement*] (referring to "the mistaken assumption that (b)(3) is merely the 'spurious' action by another name"); Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967) (referring, in apparent jest, to "the illicit, outlawed, and patently counterfeit 'spurious' ones"). A modern development that can only add to this confusion is the use of the term "hybrid" for the questionable practice of creating classes partially certified under subdivision (b)(2) and partially certified under (b)(3), *see, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 418 (5th Cir. 1998), as well as for cases in which Rule 23(b)(3) safeguards are judicially grafted onto a class certified under Rule 23(b)(2), *see, e.g.*, Eubanks v. Billington, 110 F.3d 87, 93–95 (D.C. Cir. 1997) (permitting opt-out rights in the context of a settlement class). Certain scholars have sanctioned this approach, despite its lack of authorization in the Federal Rules. *See, e.g.*, George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 259–60 (1996). While a detailed critique of such practices is beyond the scope of this Article, we note that they appear to be inconsistent with the Supreme Court's admonition that lower courts are to apply Rule 23 as promulgated. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) ("The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement-class context."); *see also, e.g.*, Kern v. Siemens Corp., 393 F.3d 120, 122, 126–29 (2d Cir. 2004) (refusing to approve "opt-in" class not authorized by Rule 23); McManus v. Fleetwood Enters. Inc., 320 F.3d 545, 554 (5th Cir. 2003) (explaining that such judicial modifications would "undo the careful interplay between Rules 23(b)(2) and (b)(3)" by permitting plaintiffs to pursue substantial monetary claims without "requiring [them] to meet the rigorous Rule 23(b)(3) requirements" of predominance and superiority). We also note that allowing such claims raises significant Due Process Clause, Seventh Amendment and Rules Enabling Act concerns. *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 118, 120–21 (1994) (identifying Due Process Clause concerns); McClain v. Lufkin Indus., Inc., 519 F.3d 264, 283 (5th Cir. 2008); *In re* Simon II Litig., 407 F.3d 125, 139 (2d Cir. 2005).

22. Kaplan, *supra* note 16, at 380–85.

23. Notes to 1966 Amendments, *supra* note 3, at 97.

this tripartite categorization did not materialize."[24] Thus eulogized, they were "put to rest" by the Committee.[25]

Due to these concerns, substantial revisions to Rule 23 were made in the form of the 1966 amendments, through which the modern class action was born.[26] Those revisions responded to "an insistent demand and need for going forward to develop improved methods of handling disputes affecting groups."[27] To effectuate this goal, the drafters sought to identify and affirm those class action categories that had emerged in practice as sound and legitimate, and to define those categories in practical terms, rather than by reference to abstract principles:

> The Advisory Committee . . . perceived, as lawyers had for a long time, that some litigious situations affecting numerous persons "naturally" or "necessarily" called for unitary adjudication. The problem was how to elaborate this insight while avoiding the pitfalls of abstract classification on the style of 1938. . . . [T]he Committee strove to sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*. The revised rule was written upon the framework thus revealed[.][28]

Perhaps in no place was this approach more clear than in the new Rule 23(b), which contained three alternative routes to certification. Subdivisions (b)(1) and (b)(2) were the product of the "sorting out" of existing effective group-based litigation.[29] They were intended to capture specific categories of actions that, by virtue of familiarity and experience, the Committee could confidently assert were appropriate for a representative class model.[30]

Subdivision (b)(1) captured a defined subset of cases, such as those involving riparian landowners, security holders, or claimants to a limited fund, that inherently required class-wide resolution.[31]

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24. Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1213 (1955–66).

25. *Id.*

26. FED. R. CIV. PROC. 23 (amended 1966).

27. *Committee Statement*, *supra* note 21 at 7.

28. Kaplan, *supra* note 16, at 386.

29. *Id.*; *Committee Statement*, *supra* note 21, at 4–5 (describing "the standard cases covered by (b)(1) and (b)(2)").

30. Subdivision (b)(1) is further divided into two distinct categories ((A) and (B)), emphasizing the drafters' express organization of the existing body of class actions into a descriptive scheme, complete with its own hierarchical structure.

31. Notes to 1966 Amendment, *supra* note 3, at 100–01; Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 (1999).

Thus, as framed, a class could be certified if "prosecuting separate actions by or against individual class members would create a risk" of "varying adjudications" that "would establish incompatible standards of conduct"[32] or because a decision on the merits would "inescapably . . . alter the substance of the rights of others having similar claims."[33]

Subdivision (b)(2) was designed to "secure for the class any appropriate injunctive or declaratory relief" in the face of conduct applying generally to the class.[34] Professor Kaplan explained that "subdivision (b)(2), [builds] on experience mainly, but not exclusively, in the civil rights field."[35] Similarly, the Advisory Committee Notes provide: "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."[36]

Finally, the drafters added subdivision (b)(3), a "relatively flexible" category of action "located at a growing point in the law."[37] The Committee explained that this category was developed to provide "improved methods of handling disputes affecting groups."[38] It was also controversial; at the time it was adopted, dissenters viewed (b)(3) as too unbounded and too much at odds with the basic principle that judgments could not bind parties not before the court.[39] Accordingly, subdivision (b)(3), and only subdivision (b)(3), was supplemented by "further protective devices."[40] These additional limits were crafted to inform the determination of superiority and to minimize the ill-effects of abuse. Specifically, safeguards in the form of mandatory notice and opt-out procedures were designed for subdivision (b)(3) alone. Thus, (b)(3) certification was viewed as appropriate where "questions of law or fact com-

32. FED. R. CIV. P. 23(b)(1).

33. McDonnell Douglas Corp. v. U.S. Dist. Court, 523 F.2d 1083, 1086 (9th Cir. 1975); *see also Ortiz*, 527 U.S. at 833; Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 896 (7th Cir. 1999).

34. Kaplan, *supra* note 16, at 389; *see also* FED. R. CIV. P. 23(b)(2).

35. Kaplan, *supra* note 16, at 389.

36. Notes to 1966 Amendments, *supra* note 3, at 102.

37. *Committee Statement*, *supra* note 21, at 5, 7; YEAZELL, *supra* note 10, at 238 n.2, 246–47 (explaining structure of Rule 23 subdivisions).

38. *Committee Statement*, *supra* note 21, at 7.

39. *Id.* at 8–9; Frankel, *supra* note 21, at 45–46; Kaplan, *supra* note 16, at 394–400. These concerns are hardly unjustified. Subdivision (b)(3) itself is essentially a grant of discretion to the court to make the determination "that a class action is superior to available methods." FED. R. CIV. P. 23(b)(3)(A)–(D) (enumerating requirements for superiority determination).

40. *Committee Statement*, *supra* note 21, at 8.

mon to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods" of adjudication.[41]

Professor Kaplan was unapologetic about the novel and potentially expansive nature of subdivision (b)(3), noting that it reaches cases where "there are no such clear indicia for use of class actions as in the prior examples [of (b)(1) and (b)(2)]."[42] "New [Rule] 23 alters the pattern of class actions; subdivision (b)(3), in particular, is a new category deliberately created."[43] Writing a year after the adoption of the new Rule, and in specific reference to subdivision (b)(3), he noted that "[i]n the actual handling of *pioneer cases* under the rule, the courts have prevailingly shown good understanding in spelling out and applying the delimiting criteria."[44] Such cases included tort claims affecting large numbers of people.[45]

Thus, from the beginning, it was understood that the new Rule 23 "effected broad and challenging innovations."[46] Rule 23(b)(1) applied to certain claims that inherently require class resolution, Rule 23(b)(2) applied to certain claims that inherently result in class relief, and Rule 23(b)(3) applied to all other claims.

The class certification requirements in Rule 23 remained largely unchanged until 2003.[47] The 2003 amendments did not alter Rule 23(b), yet they provide additional guidance on the class certification decision. Specifically, the 2003 amendments "call at-

41. FED. R. CIV. P. 23(b)(3); *see also* Amchem Prods. v. Windsor, 521 U.S. 591, 623–24 (1997) (explaining that the predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a), and asks whether the proposed class is "sufficiently cohesive" for class treatment).

42. Kaplan, *supra* note 16, at 389.

43. *Id.* at 399.

44. *Id.* at 395 (emphasis added).

45. Notes to 1966 Amendments, *supra* note 3, at 103.

46. Frankel, *supra* note 21, at 39.

47. In 1998, Rule 23 was amended to provide for permissive interlocutory review of class certification orders where "the certification decision turns on a novel or unsettled question or law, or when, as a practical matter, the decision on certification is likely to be dispositive of the litigation." FED. R. CIV. P. 23(f) advisory committee's note (1998). Because cases for which the permissive 23(f) interlocutory appeal is granted of necessity involve "changing areas of uncertainty in class litigation," *id.*, the majority of appellate decisions addressing the propriety of the newly expansive use of 23(b)(2) classes are made in connection with interlocutory review. The 1998 amendments do not otherwise alter the class certification decision. *See also* Julian W. Poon et al., *Interlocutory Appellate Review of Class-Certification Rulings under Rule 23(f): Do Articulated Standards Matter?*, CERTWORTHY 8 (DRI Appellate Advocacy Comm., Chicago, Ill.) (Winter 2009), *available at* http://www.dri.org/open/NewsLetterArchive.aspx?com=0010.

tention 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."[48] As the Advisory Committee Notes explain, "[m]embers of a class certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice," although "there may be less need for notice than in a (b)(3) class."[49] This, explained the Advisory Committee, is because "there is no right to request exclusion from a (b)(1) or (b)(2) class."[50] Because the characteristics of those mandatory classes may reduce the need for notice, and the cost of providing notice "could easily cripple actions that do not seek damages," the Rules provided that the trial court may often determine not to direct notice.[51]

Thus, under the presently formulated Rule 23, to be certified as a class action, a case must meet the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy; and fit within one of the provisions of Rule 23(b).[52] A certification order must make findings on these points and specify the "claims, issues, and defenses" to be tried on a class basis.[53] A district court is not just empowered, but obligated, to resolve any factual differences that bear on the Rule 23 prerequisites to certification.[54]

II.
RECENT RULE 23(B)(2) EMPLOYMENT CLASS ACTIONS

Rule 23(b)(2) was relatively quiescent from its adoption in 1966 through the end of the twentieth century. The past decade, however, has seen a significant increase in Rule 23(b)(2) litigation, as plaintiffs' lawyers, primarily in employment discrimination cases, have sought to avoid the requirements and protections of Rule 23(b)(3). Rule 23(b)(2) has been invoked in recent years to certify classes of thousands or even millions of persons.

The largest and highest profile of these cases is *Dukes v. Wal-Mart Stores, Inc.*, a putative Title VII class action brought on behalf

48. *See* FED. R. CIV. P. 23 advisory committee's notes (2003).

49. *Id.*

50. *Id.*; *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 & n.13 (1999).

51. FED. R. CIV. P. 23 advisory committee's notes (2003).

52. FED. R. CIV. P. 23; *see, e.g.*, Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 724 (9th Cir. 2007).

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

54. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008); Oscar Private Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 268 (5th Cir. 2007); *In re* Initial Pub. Sec. Litig., 471 F.3d 24, 42 (2d Cir. 2006).

of a nationwide class of all current and former female employees of Wal-Mart over a period of eleven years (and growing).[55] In that case, the district court certified a Rule 23(b)(2) class estimated at the time to exceed 1.5 million women despite the fact that plaintiffs sought punitive damages of billions of dollars as well as back pay.[56] Similarly, in *Ellis v. Costco*,[57] plaintiffs sought and obtained (b)(2) certification of a nationwide class of current and former female employees denied promotion to management positions since 2002. In that case, despite claims for punitive and compensatory damages, the district court granted certification in reliance on a declaration stating that plaintiffs' "primary motivation" was to change Costco's behavior.[58]

In *Hohider v. United Parcel Service, Inc.*, a district court certified a nationwide (b)(2) class of all current and former UPS employees who took medical leave and were allegedly deterred from returning to work.[59] The class, which may have had more than 36,000 members, was the largest ever certified under the Americans with Disabilities Act.[60] It included persons with a wide variety of physical and mental impairments, real or imagined, of varying severity, who took leaves of differing lengths, for different reasons, under numerous and widely divergent policies and procedures.[61] And, as in *Dukes* and *Ellis*, it involved claims for significant monetary relief, specifically punitive and compensatory damages and back pay.[62] The district court found it could read the compensatory punitive damages claims out of the complaint and defer consideration of the claims for monetary relief (particularly back pay) until a later date.[63]

55. *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), *reh'g granted*, 556 F.3d 919 (9th Cir. 2009) (granting en banc review of certification of Title VII class). The authors are counsel for a party on this case. For an interesting discussion of the substantive issues raised by *Dukes* and similar cases, see Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009); *see also* Sarah Kirk, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 TEX. REV. L. & POL. 163 (2009).

56. *See* Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1196–97 (9th Cir. 2007) (Kleinfeld, J. dissenting).

57. 240 F.R.D. 627 (N.D. Cal. 2007). The authors are counsel for an amicus on this case.

58. *Id.* at 642.

59. 243 F.R.D. 147, 245 (W.D. Pa. 2007). The authors are counsel for a party on this case.

60. *Id.* at 219–20.

61. *Id.* at 154.

62. Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 173 (3d Cir. 2009). The Third Circuit, in a sweeping decision, reversed the certification order.

63. *See Hohider*, 243 F.R.D. at 243–44.

Such attempts to push Rule 23(b)(2) past its historical bounds are not limited to the context of alleged discrimination. Plaintiffs' attorneys also have attempted to obtain Rule 23(b)(2) certification in cases involving wage-and-hour claims. For example, in *Sepulveda v. Wal-Mart Stores, Inc.*, plaintiff assistant managers brought claims seeking classification as "non-exempt" under California's labor laws, and sought unpaid wages and penalties, as well as an injunction barring Wal-Mart from continuing the challenged practice.[64] In that case, while the district court denied certification under Rule 23(b)(2) because of the monetary relief claimed, a three-judge Ninth Circuit panel reversed that determination.[65]

These cases have arisen, in part, because the Supreme Court has thus far declined to clarify the contours of subdivision (b)(2), particularly where monetary relief is sought by the plaintiffs. The Supreme Court has twice agreed to decide whether awarding monetary relief in a (b)(2) class action, without opt-out rights for absent class members, violates the Due Process Clause.[66] The Court ultimately did not answer the constitutional question in either case, and thus it "is an open question . . . in the Supreme Court . . . whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue."[67]

In the absence of guidance from the Supreme Court, the lower federal courts have divided on the applicability of Rule 23(b)(2) to claims for monetary relief. The majority rule holds that such claims may be certified under Rule 23(b)(2) only if the money is "inciden-

64. 237 F.R.D. 229, 245 (C.D. Cal. 2006). The authors are counsel for a party on this case.

65. Sepulveda v. Wal-Mart Stores, Inc., 275 F. App'x 672 (9th Cir. 2008). Both the *Ellis v. Costco* and *Sepulveda v. Wal-Mart* cases are stayed at various stages of appeal to the Ninth Circuit Court of Appeals pending the en banc court's decision in *Dukes*. Attempts to certify such classes are not limited to district courts within the Ninth Circuit. In *Brown v. Nucor Corp.*, a putative class action brought in the District of South Carolina, plaintiffs sought back pay, compensatory damages and punitive damages, and moved for Rule 23(b)(2) certification. *See* 576 F.3d 149 (4th Cir. 2009). Certification of that class was denied because the class lacked commonality, a holding reversed by a divided Fourth Circuit. *Compare id.* at 156–57, *with id.* at 162–64 (Agee, J. dissenting); *see also, e.g.*, Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639 (6th Cir. 2006). Whether the claims for monetary relief bar certification under that circuit's prior decision in *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006), remains an open question.

66. Adams v. Robertson, 520 U.S. 83, 85 (1997) (raising but not resolving this question); Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 118, 121–22 (1994) (same).

67. Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 897 (7th Cir. 1999).

tal" to an injunction or declaration.[68] The minority rule is that monetary claims may be certified under Rule 23(b)(2) if money is not the plaintiffs' "primary purpose" in pursuing the litigation.[69] As we develop below, both of these approaches are inconsistent with the framework set forth by the Supreme Court in *Ortiz* for analyzing the mandatory provisions of Rule 23.[70]

III.
THE *ORTIZ* FRAMEWORK

Although the Supreme Court has thus far passed up the opportunity to construe Rule 23(b)(2), the Court has not been entirely silent on the application of Rule 23(b). In *Ortiz*, the Court engaged in an extensive analysis of Rule 23(b)(1), which, like Rule 23(b)(2), does not require notice nor permit opt-outs in class actions certified under that subdivision. In our view, the teachings of *Ortiz* have tremendous significance in the (b)(2) context.

A central insight of the *Ortiz* decision is that the "mandatory" provisions of Rule 23(b)—those that do not require notice or allow opt-out—must be carefully applied to ensure that the procedural class action device does not transgress the rights of either the defendant or the absent class members.

Ortiz involved the settlement of several hundred thousand asbestos claims.[71] The settling parties sought certification of a mandatory class comprised of all past, present, and future claimants.[72] They relied on Rule 23(b)(1)(B), which authorizes certification of a class "when claims are made by numerous persons against a fund insufficient to satisfy all claims."[73] Their theory was that the available assets, a contribution from the manufacturer plus the proceeds of various insurance policies, would not be enough to cover all the claimants' claims.[74] The lower courts allowed the case to

68. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998); *see also Reeb*, 435 F.3d at 649–50; *Thorn*, 445 F.3d at 331; Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001); Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 580–81 (7th Cir. 2000).

69. Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 162–63 (2d Cir. 2001), *disapproved*, *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 35–38, 42 (2d Cir. 2006); Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003).

70. For a discussion of the split among circuits as to how to evaluate these questions, see Kirk, *supra* note 55 at 171–73.

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

72. *Id.* at 825–26.

73. Notes to 1966 Amendments, *supra* note 3, at 101.

74. *Ortiz*, 527 U.S at 825–27.

proceed as a class action, but the Supreme Court reversed the certification order.[75]

In *Ortiz*, the Court held that the "limited fund" category of class actions was delineated by the pre-1966 precedents and, in particular, the defining characteristics laid down by such cases.[76] This constraint, the Court explained, had three justifications: the Advisory Committee's deliberately retrospective approach to mandatory class actions;[77] the Rules Enabling Act's prohibition against altering substantive rights;[78] and the Due Process Clause limitations on resolving damage claims asserted by absent parties.[79]

The *Ortiz* Court carefully examined the historical antecedents of Rule 23(b)(1) to ascertain the scope of actions encompassed by that provision.[80] The Court explained:

> Rule 23(b)(1)(B) speaks from a vantage point within the class, from which the Advisory Committee spied out situations where lawsuits conducted with individual members of the class would have the practical if not technical effect of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests.[81]

Among the types of claims to which Rule 23(b)(1) was specifically addressed are actions in which claims are made by numerous persons against a fund insufficient to satisfy all claims.[82] The class in *Ortiz* was certified under this "limited fund" rationale.[83] The Court surveyed the pre-1966 cases allowing classes to proceed on that basis, and derived from them three "conditions" that must be met in limited fund cases: the fund must be inadequate to pay all the claims; the whole fund must be devoted to pay the claims; and the claimants must be treated equitably among themselves.[84]

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75. *Id.* at 830.
76. *Id.* at 842.
77. *Id.*
78. *Id.* at 845.
79. *Id.* at 846.
80. *Id.* at 834.
81. *Id.* at 833 (citing Kaplan, *supra* note 16, at 338) (alteration in original); *see also* Notes to 1966 Amendments, *supra* note 3, at 100 ("The difficulties which would be likely to arise if resort were had to separate actions by . . . the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device."); *id.* at 101 ("In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit.").
82. *Id.* at 101.
83. *Ortiz*, 527 U.S. at 838–39.
84. *Id.*

The *Ortiz* Court held that the characteristics drawn from the pre-1966 cases were both sufficient and presumptively necessary preconditions to certification.[85] "[T]his limiting construction," the Court explained, "finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims."[86]

The same analysis can and should be conducted with respect to subdivision (b)(2). As Professor Kaplan explained, subdivisions (b)(1) and (b)(2) were crafted in light of an empirical approach. Those cases that had a demonstrable suitability to class-based adjudication were the basis for the categories created.[87] Their prior acceptance and stability is captured by the Committee's subsequent description of them as "the standard cases covered by (b)(1) and (b)(2)."[88] Accordingly, those categories of cases could be tried as class actions without the additional analysis required by Rule 23(b)(3), or the safeguards of Rule 23(c)(2)(B).

Beyond the substance of the referenced "standard cases," the manner in which the Committee defined these categories was important. In part, the drafters were performing the traditional work of commentators in a common law system: deriving patterns and categories from the broad run of cases. But in seeking to "avoid[ ] the pitfalls of abstract classification," they eschewed the traditional technique of abstracting from those patterns and categories broad principles that future courts were to apply to novel fact patterns.[89] Instead, they defined the categories as concretely as they were able, and provided example precedents.[90] Through these descriptive classifications, they intended to create bounded sets of actions that years of practice had found suitable for "automatic" class treatment.[91] There was nothing in the contemporaneous record to suggest that these categories were intended to operate prospectively, as flexible tools to be applied by the courts to emerging situations.[92] To the contrary, subdivision (b)(3) and the Committee's discussion of its terms clearly demonstrate that, as Justice Souter would later

85. *Id.* at 842.
86. *Id.*
87. Kaplan, *supra* note 16, at 386.
88. *Committee Statement*, *supra* note 21, at 7.
89. Kaplan, *supra* note 16, at 386.
90. *Id.* at 386–87.
91. *Id.*
92. *Id.* at 90.

phrase it, subdivision (b)(3) was intended to be the "Rule's growing edge."[93]

Each of the bases for the Supreme Court's limitation of the "limited fund" category of Rule 23(b)(1)(B) equally justifies confining the "civil rights" category of Rule 23(b)(2) to the precedents, with their defining characteristics, decided before 1966 and expressly incorporated by the Advisory Committee into the Notes to the 1966 amendments. Rule 23(b)(2), like subdivision (b)(1), is deliberately retrospective. Both subdivisions raise Rules Enabling Act problems if applied beyond their intended scope, and neither provides for opt-out rights. Therefore they raise identical due process concerns.

Importantly, in *Ortiz* itself, the Supreme Court emphasized that "the text of Rule 23(b)(1)(B) . . . covers more historical antecedents than the limited fund."[94] Thus *Ortiz* articulates the mode of analysis that courts are to use in analyzing certification requests under Rule 23(b)(1); that *Ortiz* happened to involve the "limited fund" category hardly suggests that the same analysis is not equally applicable to the other three categories of Rule 23(b)(1), or to the other mandatory class category, Rule 23(b)(2). On the contrary, consistent principles of interpretation suggest that the same analytical method should be applied to all categories of mandatory classes.[95]

IV.
APPLYING THE *ORTIZ* FRAMEWORK TO RULE 23(B)(2)

The *Ortiz* Court explained that "when subdivision (b)(1)(B) was devised . . . . the object was to stay close to the historical model."[96] That statement is equally true for Rule 23(b)(2), which was premised on a specific category of cases where group rights had previously been effectively litigated.

The *Ortiz* Court drew the defining characteristics of a permissible "limited fund" class action from the pre-1966 precedents identified by the Advisory Committee, finding that "[t]he cases [cited in the Notes] show what the Advisory Committee must have assumed

93. Ortiz v. Fibreboard Corp., 527 U.S. 815, 862 (1999).

94. *Id.* at 842.

95. *See* Mark A. Perry & Paul Blankenstein, *The Inapplicability of Rule 23(b)(1) to ERISA Class Actions*, BNA WORKPLACE L. REP., December 5, 2008, at 1.

96. 527 U.S. at 842; *see also id.* at 843 ("[T]he Committee intended subdivision (b)(1) to capture the 'standard' class actions recognized in pre-Rule practice.") (citation omitted).

would be at least a sufficient set of conditions to justify binding absent members of a class under Rule 23(b)(1)(B), from which no one has a right to secede."[97] The cases cited by the Advisory Committee to illustrate the mandatory Rule 23(b)(2) category similarly demonstrate the appropriate operation of this provision. And, as in *Ortiz*, the historical antecedents reveal a far more limited approach to class certification than the lower federal courts have recently adopted. The examples of proper (b)(2) certifications provided by the Advisory Committee (as well as further examples offered by Professor Kaplan in his 1966 analysis) are vintage, *Brown*-era desegregation actions. Every single one of them, as explained below, involved a challenge to de jure racial segregation. These cases, litigated before the Civil Rights Acts of 1964 (with one exception) and 1991, sought neither compensatory nor punitive damages, were not tried before juries, and awarded few, limited attorneys' fees.

Read in concert, several common features emerge from these cases. While all were adjudicated on a class-wide basis, several of them involved little or no discussion of class certification.[98] It appears that there was little serious debate by this point about the propriety of class treatment for claims seeking an injunction to end de jure segregation.[99] Where the courts did address that question, however, the discussion was illuminating: several made the point that certification was not an issue of great importance, given the nature of the injunctive relief sought.[100] As the Fifth Circuit explained in *Bailey v. Patterson*, a case seeking desegregation of a common carrier, "[w]e find it unnecessary to determine, however,

97. *Id.* at 838.

98. Northcross v. Bd. of Educ., 302 F.2d 818 (6th Cir. 1962); Mannings v. Bd. of Pub. Instruction, 277 F.2d 370 (5th Cir. 1960); Todd v. Joint Apprenticeship Comm. of Steel Workers, 223 F. Supp. 12 (N.D. Ill. 1963).

99. Buckner v. County Sch. Bd., 332 F.2d 452, 454 (4th Cir. 1964) ("The right of the plaintiffs to obtain injunctive relief for the class they represent as well as individual relief for themselves is clear beyond doubt."); Green v. Sch. Bd., 304 F.2d 118, 124 (4th Cir. 1962) ("[T]he individual appellants are entitled to relief, and also they have the right to an injunction on behalf of the others similarly situated."); *cf.* Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963) ("The decisions of this court are divided on the question of whether appellants have standing to represent not only themselves but the class of all Negroes similarly situated. The remand by the Supreme Court in the present case would seem to indicate an affirmative answer. The Court specifically noted that this is a class action.") (internal citations omitted).

100. *Id.*; *see also* Potts v. Flax, 313 F.2d 284, 289–90 (5th Cir. 1963) ("[I]f it was error to treat the case as a class suit and enter such a decree, such error, if any, was harmless since the decree for all practical purposes would have been the same had it been confined to the Teal or Flax children.").

whether this action was properly brought under Rule 23(a) . . . . The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of the appellants but also for all persons similarly situated."[101]

Where the opinions cited by the drafters of Rule 23 discuss the substance of the certification question, they are consistent in finding that the absence of individualized issues is the critical factor allowing the cases to proceed as a class. For example, in *Orleans Parish School Board v. Bush*: "Appellees were not seeking specific assignment to particular schools. They, as Negro students, were seeking an end to a local school board rule that required segregation of all Negro students from all white students."[102] In *Frasier*, a case concerning the desegregation of the University of North Carolina, the court expressly provided that its decree did not reach the individualized circumstances of particular plaintiffs. In response to the University's claim that it would be unable to exercise its legitimate discriminatory function of merit-based admissions, the court stated:

> The action in this instance is within the provisions of Rule 23(a) of the Federal Rules of Civil Procedure because the attitude of the University affects the rights of all Negro citizens of the State who are qualified for admission to the undergraduate schools. But we decide only that the Negroes as a class may not be excluded because of their race or color; and the Board retains the power to decide whether the applicants possess the necessary qualifications.[103]

Finally, in *Potts*, the court went through a more complete certification analysis, noting that the large number of students made joinder impractical, representation was able, and, "there was not the slightest suggestion either on the trial (or since) that within that large mass there was any substantial conflict either in interest or in the legal positions to be advanced."[104]

This line of cases left the Committee confident that subdivision (b)(2) actions were appropriate for class relief and presented no

101. *Bailey*, 323 F.2d at 206.

102. 242 F.2d 156, 162 (5th Cir. 1957); *see also* Brunson v. Bd. of Tr. of Sch. Dist. No. 1, 311 F.2d 107, 109 (4th Cir. 1962) ("Whether the School Board is assigning pupils, involuntarily, on the basis of race is a question of fact which is common to all of these objecting plaintiffs. The right of each to some relief will turn upon the resolution of that common question of fact. The complaint does not present those disparate factual controversies which the District Court envisioned.").

103. Frasier v. Bd. of Tr. of Univ. of N.C., 134 F. Supp. 589, 593 (M.D.N.C. 1955).

104. *Potts*, 313 F.2d at 289.

serious concerns when adjudicated as such. Advisory Committee Chair Professor Cohn noted that while (b)(2) was "new . . . the rule appears to be catching up to the present day practice of many courts."[105] Indeed, the applicability of representative litigation to these segregation disputes was seen as so self-apparent that "a line of decisions, commencing under the original version of rule 23, has held that certification of a class action is unnecessary when the plaintiff seeks injunctive or declaratory relief that extends to an entire class."[106]

Only one of the exemplary cases was brought under Title VII of the Civil Rights Act of 1964. *Hall v. Werthan Bag Corp.* was an employment discrimination class action instituted under the pre-1966 Rule 23.[107] The defendant maintained that a class action could not be brought under Title VII, apparently relying on pre-Title VII cases holding that class actions were not appropriate when the alleged discrimination was not based on an expressly discriminatory policy.[108] The court rejected that position out of hand, coining the oft-quoted phrase, "[r]acial discrimination is by definition a class discrimination."[109] The court then went on to distinguish between the common interest in the eradication of discrimination, which it found suitable for class treatment, and the individualized questions of redress for past conduct, which it did not:

> This does not mean, however, that the effects of the discrimination will always be felt equally by all the members of the racial class. . . . But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class. The court is of the opinion, therefore, that a significant question of fact common to all members of the class exists in this case insofar as the complaint seeks the removal of the alleged discriminatory policies. *To the extent that*

105. Cohn, *supra* note 24, at 1216.

106. George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 700–01 (1980).

107. 251 F. Supp. 184, 185 (M.D. Tenn. 1966).

108. *Id.*

109. *Id.* at 186; *see, e.g.*, Tijerina v. Henry, 398 U.S. 922, 922 n.2 (1970) (Douglas, J., dissenting from dismissal) (quoting *Hall*). *But see* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982) ("The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.").

> *it seeks redress for past effects of the alleged discrimination, however, the controlling questions of fact are not common to the entire class.*[110]

The *Hall* court's explicit consideration of the question of monetary relief, the only such reference to monetary relief in the historical antecedents, confirms that such claims are inconsistent with Rule 23(b)(2) certification. The court ultimately concluded that "the complaint herein properly states a class action under Rule 23(a) insofar as it seeks a prohibitive injunction."[111] But the court specifically excluded "whatever back pay or reinstatement which might be sought as ancillary relief" from class treatment on the grounds that only the named plaintiff had exhausted his administrative remedies regarding those claims.[112] Even absent an administrative exhaustion requirement, which plainly can never be satisfied by unnamed and absent plaintiffs,[113] the court's analysis strongly suggests that individualized relief could never receive mandatory class treatment because "the controlling questions of fact are not common to the entire class."[114]

Hall points the way toward a clear distinction between the civil rights cases recognized by the drafters of Rule 23 as "standard" class actions and modern employment actions. The modern cases display obvious and substantial differences from the category of cases described by subdivision (b)(2). All of the historical antecedents involved conduct that affected every class member alike—a facially discriminatory policy—and a request for injunctive relief to the exclusion of individuated damages. Modern employment cases, in contrast, typically involve conduct that affects each plaintiff differently, for which individually tailored monetary relief is sought.

The question raised by *Ortiz* is whether the nature and scope of those differences is sufficient to disqualify a modern employment class action from certification under subdivision (b)(2). Analysis of the historical antecedents within the framework set forth by the Supreme Court suggests that the answer is yes. Specifically, those cases suggest that the highly individuated claims at the heart of the modern employment class action are a far cry from the challenges to explicit exclusionary policies addressed in the antecedent cases, and that the drafters of Rule 23 did not contemplate the monetary claims at the heart of most contemporary employment cases when crafting Rule 23(b)(2).

110. *Hall*, 251 F. Supp. at 186 (emphasis added).
111. *Id.* at 188.
112. *Id.*
113. *Cf.* Fed. Express v. Holowecki, 552 U.S. 389 (2008).
114. *Hall*, 251 F. Supp. at 186.

V.
EMPLOYMENT CLAIMS GENERALLY SHOULD NOT BE CERTIFIED UNDER RULE 23(B)(2)

The *Ortiz* Court drew from the historical antecedents three characteristics that are presumptively necessary preconditions to certification under Rule 23(b)(1). The historical antecedents to subdivision (b)(2) likewise yield defining features of any class action certified under that provision.

First, Rule 23(b)(2) by its terms permits certification only of claims brought on grounds generally applicable to the class. Many courts have described this through the concept of "cohesiveness," which looks at whether a case involves class-wide or individualized questions.[115] This concept embodies the "naturalness" of litigating a claim on a class-wide basis, as explained by Professor Kaplan.[116]

The categorical discrimination cases provide the historical context for the "generally applicable" requirement and illustrate the type of claim that can meet that requirement. In every one of the historical antecedents, the class plaintiffs challenged a single policy that on its face discriminated against each of them equally (*e.g.*, no black children may attend this school). Some private employers have historically adopted similar blanket restrictions ("no Irish need apply"). Modern employment cases, by contrast, are increasingly brought on behalf of a class of individuals with fundamentally distinct and individualized claims. For example, as the Third Circuit recognized in the *Hohider* case, failure to accommodate claims brought under the Americans with Disabilities Act, which necessitate individualized determinations of disability, qualification and reasonableness of a requested accommodation, raise fundamentally individualized claims which may be incapable of class-based litigation under Rule 23(b)(2) because they are not brought on grounds generally applicable to the class.[117]

The second feature of Rule 23(b)(2) made clear by the antecedents is that class-based adjudication of the type of claims for monetary relief regularly sought under Title VII and other civil rights statutes, whether the back pay authorized by the 1964 Civil Rights Act or the compensatory and punitive damages authorized by the 1991 Civil Rights Act, was not contemplated by the drafters

115. *See* Barnes v. Am. Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1998) ("[A] [23(b)(2)] class must be cohesive . . . .") (citing cases).

116. Kaplan, *supra* note 16, at 386.

117. Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 184–86, 193–96, 200 (3d Cir. 2009).

of the 1966 amendments to Rule 23. Not one case cited in the Advisory Committee Notes allowed class resolution of monetary claims.[118] And the only case identified in 1966 to consider the question, *Hall*, declined to certify such claims.

Instead, the drafters permitted Rule 23(b)(2) adjudication only of injunctive and declaratory claims—a distinction between the legal and equitable remedies well known at the time of both the 1938 and 1966 versions of Rule 23. Rule 23(b)(2) permits certification if "final injunctive relief or corresponding declaratory relief" is appropriate with respect to "the class as a whole." As the Advisory Committee Notes to the 1966 amendments explain, Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[119]

While the drafters might not have foreclosed all claims for monetary relief in a (b)(2) action, the available remedies are best understood as limited to the kinds of monetary relief that a Chancellor could award in equity.[120] If a claim requests legal relief, that is, if it must be tried to a jury on request of either party by statute or under the Seventh Amendment,[121] then it cannot be certified under Rule 23(b)(2).[122]

This distinction has arisen most often in employment class actions in the context of claims for back pay relief under Title VII. Since the 1970s, courts regularly certified Rule 23(b)(2) classes seeking back pay on the basis that such claims are "equitable," with little further analysis.[123] Recently, however, that justification, and class claims for back pay generally, are receiving significantly increased scrutiny. For example, the Fourth Circuit has squarely rejected certification of claims for back pay on that basis because the text of Rule 23(b)(2) says "nothing whatsoever about equitable relief."[124] That court, and others, have suggested that Rule 23(b)(2) certification might be appropriate in cases only where injunctive and declaratory relief predominate despite the presence of a re-

118. *See supra* Part IV.

119. Notes to 1966 Amendments, *supra* note 3, at 102.

120. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 218 n.4 (2002) (explaining that all back pay awards are not the same; some are money damages claims, pure and simple, regardless of how they are labeled).

121. U.S. CONST. amend. VII.

122. *Cf.* Millsap v. McDonnell Douglas, 368 F.3d 1246, 1260 (10th Cir. 2004).

123. *See*, *e.g.*, Domingo v. New England Fish Co., 727 F.2d 1429, 1444 (9th Cir. 1984); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 259–60 (5th Cir. 1974).

124. *See* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 331 (4th Cir. 2006) ("[I]f the Rule's drafters had intended the Rule to extend to all forms of equitable relief, the text of the Rule would say so.").

quest for back pay.[125] In most cases, however, the history of Rule 23(b)(2) suggests that the highly individualized nature of such a back pay claim should preclude certification because the claim is not on grounds generally applicable to the class.

More broadly, the historical context establishes that it is overly facile to note that Rule 23(b)(2) was drafted in light of "civil rights cases" and that employment discrimination claims are a species of civil rights cases. The historical antecedents make clear that subdivision (b)(2) was designed to capture some civil rights cases—involving categorical discrimination and only injunctive relief—and not others. Under *Ortiz*, a case falling without the principles articulated in the antecedents cannot be certified as a mandatory class.

Indeed, the Advisory Committee Notes make clear that Rule 23(b)(2) was not intended for civil rights class actions alone. Two alternative hypothetical commercial claims are also identified: claims for "specific or declaratory relief" challenging continued use of a forbidden price differential, and claims "to test the legality of a tying condition."[126] Thus, by its terms, the alternative category of cases is limited to non-monetary claims. Indeed, *Ticor Title Insurance Co. v. Brown*, in which the Supreme Court questioned whether monetary relief could ever be sought in a Rule 23(b)(2) class, involved monetary relief in connection with the settlement of tying claims.[127]

That this was the drafters' intent is confirmed by the Advisory Committee Notes in connection with subdivision 23(b)(3), which provides that where plaintiffs asserted "private damages claims . . . arising out of concerted antitrust violations" by contrast, such claims if suitable for class-based treatment were to be litigated

125. *Id.*; *see also* Heffner v. Blue Cross & Blue Shield of Ala., Inc., 443 F.3d 1330, 1340 (11th Cir. 2006).

126. While Professor Kaplan addressed the antecedent civil rights cases in his article regarding the 1966 amendments, *see* Kaplan, *supra* note 16, there was no mention of the hypothetical application of Rule 23(b)(2) to certain categories of antitrust cases. A review of antecedent class cases confirms, however, that this was the manner of class-based litigation prior to the 1966 amendments. For example, in *P. W. Husserl, Inc. v. Simplicity Pattern Co.* the court conditioned class-based adjudication of Robinson-Patman Act claims seeking monetary relief on the fact that the class procedure was non-binding—i.e., that it afforded opt-out rights. 25 F.R.D. 264, 268 (S.D.N.Y. 1960).

127. 511 U.S. 117 (1994). A typical tying claim involves a manufacturer selling a product to a customer only on the condition that the buyer purchases another specified product. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs. Co., 504 U.S. 451, 458 (1992) (allegations of tying purchase of Kodak service for photocopiers to purchase of replacement parts).

under Rule 23(b)(3).[128] Thus, while the drafters suggested that class claims for injunctive or declaratory relief regarding the legality of a tying arrangement could be certified under Rule 23(b)(2), cases involving tying claims and pursuing monetary relief are included as examples of claims where the appropriateness of certification should be considered only under Rule 23(b)(3).[129] The same distinction can and should be drawn in employment cases.[130]

The modern incarnation of employment class actions, which seek monetary damages, including back pay, compensatory damages and punitive damages, falls well outside the historical antecedents to Rule 23(b)(2). The plaintiffs almost invariably challenge a wide range of employer conduct, which affects each class member differently (and some not at all). And at least since 1991, the monetary remedies authorized by federal law are triable by jury.[131]

Under the guidance of *Ortiz*, such cases must be certified only under Rule 23(b)(3), which was designed to capture the "growing edge" of class litigation.[132] Unlike mandatory actions certified under subdivisions (b)(1) or (b)(2), members of a (b)(3) class have an automatic right to notice and an opportunity to opt out of the class. In addition, the named plaintiff bears the burden of proving that common issues predominate and that the class mechanism is a superior way of resolving the dispute.[133] Just as "the Advisory Committee looked cautiously at the potential for creativity under Rule 23(b)(1)(B)," and "was consciously retrospective with intent

128. Notes to 1966 Amendments, *supra* note 3, at 103.

129. The cases cited in the Advisory Committee Notes for Rule 23(b)(3) included tying cases in which monetary damages were sought. *See* Kainz v. Anheuser-Bush, Inc., 194 F.2d 737 (7th Cir. 1952). Notably, the drafters included both cases in which certification was considered appropriate, and those in which class treatment had been denied as guidance to courts and practitioners. *See* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 567, 590, 595 (10th Cir. 1961) (affirming class action adjudication of price fixing claims seeking treble damages); Weeks v. Bareco Oil Co., 125 F.2d 84, 87, 95 (7th Cir. 1941) (finding price fixing claims seeking treble damages could not be litigated on a class basis); Hess v. Anderson, Clayton & Co., 20 F.R.D. 466, 483–84 (S.D. Cal. 1957) (declining to certify price fixing claims seeking treble damages as ill-suited to class-based treatment).

130. For an analysis of the contrary view—that the antecedent cases "demonstrate that historically Rule 23(b)(2) has been used to enjoin invidious discrimination policies and practices," and that Congress intended to expand the remedies available to those addressing "systematic discrimination in the workplace" through this subsection—see *Reeb v. Ohio Dep't of Rehab'l Corr.*, 435 F.3d 639, 653–55 (6th Cir. 2006) (Keith, J., dissenting). *See also* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 426–40 (5th Cir. 1998) (Dennis, J., dissenting).

131. 42 U.S.C. § 1981a(c) (2006).

132. Ortiz v. Fibreboard Corp., 527 U.S. 815, 862 (1999).

133. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614–17 (1997).

to codify pre-Rule categories under Rule 23(b)(1),"[134] so too with Rule 23(b)(2).

CONCLUSION

Like the companion provisions in Rule 23(b)(1), the mandatory certification authorized by Rule 23(b)(2) should be confined to cases fitting within the historical antecedents to that provision. Such cases have two defining features: they challenge action or inaction directed to the class as a whole, rather than individual members; and they seek only relief that, historically, could have been awarded by a court of equity. Modern employment discrimination cases—premised on allegations of intentional misconduct and seeking legal monetary relief—do not share either of these characteristics. Accordingly, they should not be certified under Rule 23(b)(2); they should proceed as a class action, if at all, under the more rigorous and protective requirements of Rule 23(b)(3).

134. *Ortiz*, 527 U.S. at 842.