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Class Actions at the Crossroads: An Answer to Wal-Mart v. Dukes

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INTRODUCTION

The Supreme Court has recently decided to hear argument in the largest private-employer civil rights case in American history, *Dukes v. Wal-Mart Stores, Inc.*[1] This historic case began over a decade ago when former and current female employees brought a class action against Wal-Mart, one of the largest companies in the world, on behalf of approximately 1.5 million women, alleging gender discrimination in pay and promotions. The class contends that women are disproportionately denied promotions and are underpaid for comparable work in comparison to their male colleagues because of a corporate culture that gives store managers undue discretion when making employment decisions. The lawsuit is premised on the theory that excessive subjectivity enabled improper gender stereotyping to permeate the company, resulting in a pattern or practice of gender discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended.

Like many employees who challenge companywide employment discrimination, the plaintiffs in *Dukes* brought their case as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.[2] Rule 23(b)(2)

* Associate Professor, The Catholic University of America, Columbus School of Law. I am indebted to many for their support of this project. I am particularly grateful to the following people for providing me with invaluable insights and feedback in record time: Professor Kathryn Kelly, Professor A. Benjamin Spencer, Professor Robert G. Bone, Professor Elizabeth Chamblee Burch, and Cyrus Mehri, Esq. A special thanks goes the following people for their excellent research assistance: Associate Director Elizabeth A. Edinger, Research Fellow Alfred Dumetz, and Research Assistants Christina K. Setlow and Grant Mulkey. Thank you to Dean and Professor Veryl V. Miles and the Columbus School of Law for their generous funding of this project. Much appreciation goes to the American Association of Law Schools (AALS) for selecting my topic as a "hot topic" and permitting me to present my work on a panel at the 2011 annual conference. For purposes of full disclosure, over eight years ago, I briefly served as counsel for plaintiffs in *Dukes v. Wal-Mart* as an associate at Cohen, Milstein, Hausfeld & Toll, P.L.L.C. This article is dedicated to my mother, whose inspiration, support and unwavering faith in me has enabled me to engage in this labor of love.

[1] 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 795 (Dec. 6, 2010) (No. 10-277).

[2] In order for a case to be certified as a class action, all of the Rule 23(a) provisions and any one of the Rule 23(b) provisions must be met. Rule 23(a) is satisfied when (1) the class is so numerous that joinder would be impracticable; (2) the class shares common questions of law or fact; (3) the representative parties are typical of the class; and (4) the representative parties will fairly and adequately represent the class. *See* FED. R. CIV. P. 23(a). Rule 23(b)(1) allows a class action when there is a risk that in the absence of a class action, (a) the party opposing the class will be subject to inconsistent obligations or (b) as a practical matter, piecemeal litigation of individual class members will impair the interests of other class members who are not parties to the individual lawsuits, as is the case in a trust fund. *See* FED. R. CIV. P. 23(b). Rule 23(b)(2) permits a class action when there is class-wide conduct that makes final injunctive or corresponding declaratory relief appropriate for the whole class. *See id.* Rule

does not require that class members be given notice and an opportunity to exclude themselves from the case. This mandatory class action is allowed, however, because of the cohesiveness and homogeneity of the class. Rule 23(b)(2) permits a case to be certified as a class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[3] Plaintiffs sought an injunction to enjoin Wal-Mart's alleged discriminatory practices and a declaration that the company's conduct was illegal.

In addition, plaintiffs sought two types of monetary relief: back pay and punitive damages. Back pay includes lost wages and salary, benefits, and other monetary benefits lost due to discrimination.[4] Back pay is designed to put a victim of discrimination back in his or her rightful place, to make the person whole.[5] Punitive damages are awarded to plaintiffs when a defendant has carried out discrimination with "malice or reckless indifference to the federally protected rights of an aggrieved individual."[6] Punitive damages are meant to punish a defendant and deter him or her from future misconduct. The plaintiffs chose not to pursue compensatory damages, which compensate individuals for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses"[7] resulting from discrimination.

The district court held that the plaintiffs met Rule 23(b)(2)'s criteria, along with Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements.[8] After several appeals, class certification was largely upheld by the Ninth Circuit in a sharply divided en banc opinion. The Ninth Circuit affirmed the district court's Rule 23(b)(2) certification of a class of current employees with respect to their claims for injunctive and declaratory relief and back pay.[9] The Ninth Circuit reversed as to plaintiffs' punitive damages claims, holding that the district court abused its discretion in certifying a Rule 23(b)(2) class that included such damages without first determining

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23(b)(3) authorizes a class action when common questions predominate over individual ones and a class action is a superior method for resolving the dispute. *See id.*

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

[4] BARBARA T. LINDEMANN & PAUL GROSSMAN, 2 EMPLOYMENT DISCRIMINATION LAW § 32.VIII.C.1., at 2199, §40.II.B.1.a., at 2759–71 (4th ed. 2007).

[5] Although less common than back pay, front pay is also awarded to put victims of discrimination back in their "rightful place." Front pay compensates a plaintiff for any anticipated future loss because the plaintiff cannot be reinstated, immediately hired, or promoted. 1–2 EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE § 2.10(2)(b), at 2-218.60 (2010).

[6] 42 U.S.C. § 1981a(b)(1) (2006) (enacted in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (1991)).

[7] 42 U.S.C. § 1981a(b)(3) (2006) (enacted in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (1991)).

[8] *See* FED. R. CIV. P. 23(a).

[9] While the Ninth Circuit held that former employees (as of the date the complaint was filed) lacked standing to seek injunctive or declaratory relief in the (b)(2) class—thereby reducing the class to approximately 500,000 women—it remanded to the district court the question of whether a class of former employees could comprise a separate Rule 23(b)(3) class for back pay and punitive damages. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 623–24 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 795 (Dec. 6, 2010) (No. 10-277).

whether the case would qualify as predominantly one for injunctive or declaratory relief. Thus, on this issue, the Ninth Circuit remanded so the district judge could determine whether certification was appropriate for the punitive damages claims under Rule 23(b)(2) or under Rule 23(b)(3).[10]

This ruling set the stage for review by the nation's highest court because of the ruling's potential impact on class actions all over the country, involving areas as varied as employment discrimination, securities, antitrust, and products liability. The potential impact of the case stems not so much from the size of the *Dukes* class as from how the case will influence the very survival of certain types of class actions. At issue is whether it will become more difficult for plaintiffs who seek monetary relief for systemic misconduct to meet the class action criteria. This is important because for many employees and others, a class action is their only meaningful access to the courts. Moreover, class actions are important to the civil justice system because of the substantial time and cost savings they provide the courts and parties. The *Dukes* case has the potential to redefine the terms on which this critical procedural device is available.

While the case involves numerous complex procedural and substantive issues, this article addresses the discrete issue presented before the Court of "[w]hether claims for monetary relief can be certified under Rule 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances."[11] The answer to this question will have significant implications for the future of class action law.

As described above, there are different types of monetary relief. Some monetary relief is equitable, such as back pay. Other monetary relief is legal, such as compensatory and punitive damages. Such distinctions matter because the courts have treated petitions for Rule 23(b)(2) certification differently depending on the type of monetary relief being sought. Most importantly, courts have historically permitted back pay in Rule 23(b)(2) class actions because of its equitable nature and uniform relief, which makes back pay compatible with the Rule's premise that the class be cohesive and relatively homogeneous.

In contrast, the courts have treated requests for monetary damages (compensatory and punitive) very differently. The courts permit (b)(2) certification only when damages do not predominate over the injunctive or declaratory relief sought. This is because monetary damages may not lend themselves to common proof, but instead require individualized assessments.[12] While the courts disagree over how predominance should be determined, they uniformly apply a predominance test to claims involving

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[10] Rule 23(b)(3) provides for certification when common issues predominate over individual ones and a class action is superior to other mechanisms for resolving a dispute. *See* FED. R. CIV. P. 23(b)(3).

[11] Petition for a Writ of Certiorari at i, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (Aug. 25, 2010), 2002 WL 3355820 at *i.

[12] *See Dukes*, 603 F.3d at 622.

monetary damages to ensure that the class remains primarily focused on group-wide injury and relief.

This article examines the discrete yet critical question presented in the *Dukes* litigation of whether *any* monetary relief is permitted in a (b)(2) class, and if so, under what circumstances. Part I analyzes the first part of this inquiry and Part II addresses the latter. More specifically, Part I applies the two primary modes of statutory construction—textualism and intentionalism—to determine how the Supreme Court should interpret Rule 23(b)(2)'s silence on the issue of whether monetary relief is permitted. Under either mode of construction, the Supreme Court should consult the Advisory Committee's notes to clarify an ambiguous text or to avoid an absurd result involving an unambiguous text. Moreover, because the Advisory Committee is tasked with drafting the Federal Rules of Civil Procedure for the Supreme Court, subject to Congress's approval, the Court should defer to the Committee's notes when discerning the Rule's meaning. The notes' unique development and role distinguish them from statutory legislative history and its interpretive drawbacks.

The Advisory Committee notes state that so long as the appropriate final relief does not relate "exclusively or predominantly to money damages," class certification under Rule 23(b)(2) is proper.[13] This language makes clear that the drafters did not intend to ban *all* forms of monetary relief, but only a small subset—exclusive or predominant damages. Thus, the answer to the threshold question of whether *any* monetary relief is allowed by the Rule's text is yes. Wal-Mart's interpretation to the contrary goes against well-settled law, including decisions by all of the courts of appeals that have addressed the issue. Part I concludes that regardless of which interpretive mode of statutory construction is used, the Advisory Committee's intent[14]—to permit monetary relief so long as it is not exclusive or predominant—should govern.

Part II examines under what circumstances monetary relief is justified under Rule 23(b)(2). This part concludes that back pay[15] and monetary damages that are not exclusive or predominant justify (b)(2) certification. Because of its equitable nature and uniform relief, back pay has regularly been permitted in Rule 23(b)(2) employment discrimination class actions brought under Title VII of the Civil Rights Act of 1964. Monetary damages (compensatory and punitive) are also allowed so long as they are not the exclusive or predominant relief sought under (b)(2). Predominance ensures that the class remains sufficiently cohesive to provide due process, while sufficiently flexible to provide the efficiency of aggregate litigation. The Rule's

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[13] FED. R. CIV. P. 23 advisory committee note.

[14] Because of the unique rulemaking process set forth in the Rules Enabling Act, congressional intent is expressed through the Advisory Committee. See discussion below at Part I.B.1.

[15] For similar reasons, front pay and other typical equitable forms of monetary relief should be permitted. *See, e.g.*, Patterson v. Am. Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976) (awarding front pay as part of Title VII's "make whole" remedy).

drafters and all of the courts of appeals that have addressed the issue have identified predominance as the linchpin of certification of claims involving damages. Thus, Wal-Mart's contention that there are *no* circumstances under which monetary relief is justified under (b)(2) is at odds with well-established jurisprudence in this area.

Although there is no disagreement over the propriety of using a predominance test, the courts of appeals disagree over how predominance should be defined. Part II describes the three major predominance approaches: the Fifth Circuit's incidental test established in *Allison v. Citgo Petroleum Corp.*,[16] the Second Circuit's ad hoc balancing test established in *Robinson v. Metro-North Railroad Co.*,[17] and the Ninth Circuit's objective effects test established in *Dukes v. Wal-Mart.*

Part III critiques each of the three tests used by the circuit courts for determining whether monetary damages predominate under Rule 23(b)(2), including the new test the Ninth Circuit crafted and applied in *Dukes.* Relying on principles such as judicial discretion, judicial economy, due process, and civil rights enforcement, this part conducts a comparative analysis of the three different approaches. This part concludes that the youngest predominance test, formulated in *Dukes*—which balances pragmatism and efficiency with due process and civil rights interests—may offer the most promising insights.

I. Monetary Relief Is Permitted By the Text of Rule 23(b)(2)

The threshold question to address is whether, given the text of the Rule, *any* monetary relief is appropriate in a Rule 23(b)(2) class.[18] In other words, the question is whether monetary relief is permitted when the Rule requires 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."[19] Wal-Mart argues that the Rule on its face proscribes monetary relief. The text of Rule 23(b)(2), however, neither explicitly prohibits nor permits monetary relief. The Rule makes clear that final injunctive or corresponding declaratory relief is permissible given generally applicable conduct that impacts the class as a whole. Rule 23(b)(2) is silent, however, as to whether monetary relief is permissible under such circumstances.

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[16] 151 F.3d 402 (5th Cir. 1998).

[17] 267 F.3d 147 (2d Cir. 2001).

[18] Wal-Mart's framing of the question as "[w]hether 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" presumes that the text itself *limits* the type of relief permitted—the very question at issue. Petition for Writ of Certiorari, *Dukes*, 603 F.3d 571 (No. 10-277), 2002 WL 3355820. Despite this semantic imprecision, the Supreme Court granted review on the question as framed. *Dukes*, 603 F.3d 571, *cert. granted*, 131 S. Ct. 795 (Dec. 6, 2010) (No. 10-277).

[19] Fed. R. Civ. P. 23(b)(2).

How should the Supreme Court interpret the Rule's silence on this matter? On the one hand, silence may be a deliberate prohibition of any type of relief not explicitly mentioned. If the rule makers wanted to allow monetary relief under the Rule, they could have easily included it in the text. But nothing in the text explicitly *permits* monetary relief. On the other hand, silence may be a mere omission. Nothing in the text explicitly *prohibits* monetary relief. Providing that injunctive or corresponding declaratory relief is appropriate when a party acts on a class-wide basis does not foreclose the possibility that monetary relief may also be sought,[20] especially when the latter is ancillary to the former. Given that the Supreme Court has at different times interpreted silence to allow for and foreclose a particular remedy,[21] Rule 23(b)(2) is open to either interpretation.

This part makes procedural and substantive arguments. Procedurally, the Court should consult the Advisory Committee's notes to discern whether Rule 23(b)(2) allows monetary relief and should defer to them because of their unique development and function. Substantively, the Advisory Committee's notes allow monetary relief for Rule 23(b)(2) class actions, including those challenging contemporary systemic discrimination. A contrary interpretation of the notes—put forth by Wal-Mart—would go against well-settled law.

A. Courts Should Consult the Advisory Committee Notes to Determine Rule 23(b)(2)'s Meaning

Although the starting point for interpreting the meaning of a rule is its text, when the text is ambiguous, courts should consult legislative history to discern the drafters' intent. Moreover, even when a text is unambiguous, courts should rely on legislative history to confirm the rule's plain meaning or to avoid an absurd result. The ambiguity of Rule 23(b)(2), underscored by the Rule's silence on the availability of monetary relief, justifies the Supreme Court's reliance on the Rule's drafters—the Advisory Committee—to clarify the Rule's meaning. Alternatively, even if the Rule is unambiguous, the Court is empowered to consult the Advisory Committee notes to confirm the Rule's meaning or to avoid an illogical outcome.

A court's decision whether to use legislative history to discern a statute's meaning depends not only on whether the text is ambiguous, but also

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[20] *See* Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974) (finding that the language authorizes a class action in these circumstances, not that it limits the remedy available).

[21] *See* 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, 183–85 (2006); *see generally* Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. MIAMI L. REV. 375 (1992).

on which mode of statutory interpretation the court uses.[22] While the Court has traditionally relied on the original intent and purpose of a statute when construing its meaning,[23] in recent history, the Court has splintered between two approaches—textualism and intentionalism.[24] Textualism, often associated with Justice Antonin Scalia, involves examination of the text and structure of a statute to discern its plain meaning.[25] When a text is ambiguous, textualists consult legislative history. But when a text is unambiguous, they rely only on the text and the statute as a whole to determine the statute's meaning. On the other hand, intentionalism, often associated with Justice Stephen Breyer, focuses on the legislative intent and purpose of a statute and involves examination of extrinsic sources.[26] Whether a statute is ambiguous or unambiguous, intentionalists consult legislative history. The Court applies these interpretative modes not only to statutes, but also to the Federal Rules of Civil Procedure.[27] Although the long-standing tension between these two general interpretive approaches is beyond the scope of this article, the tension raises important implications for the *Dukes* case and for the survival of a myriad of class actions involving monetary relief.

The decision whether to consult legislative history generally hinges upon whether the statutory text is ambiguous, because under either theory of statutory construction, ambiguity enables courts to use extrinsic sources for analysis.[28] However, because textualists are less likely to find a text ambiguous,[29] textualism poses a greater challenge than intentionalism for plaintiffs contending that Rule 23(b)(2) permits monetary relief.[30] Given the Court's increasing propensity to rely on textualism when discerning a rule's mean-

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[22] For an examination of the ways Rule 23(b)(2)'s silence on the availability of monetary relief can be interpreted, depending on the mode of statutory construction used by the Supreme Court, see Dasani, *supra* note 21, at 169.

[23] William N. Eskridge, Jr., *The New Texualism*, 37 UCLA L. REV. 621, 624, 626 (1990).

[24] They are also referred to as a "plain-meaning" approach and "purposivism," respectively.

[25] *See* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J., 1039, 1074 (1993); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997); Dasani, *supra* note 21, at 177–78.

[26] *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1152 (2002); *see also* Dasani, *supra* note 21, at 180–81; *see, e.g.*, Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., with Breyer, J., concurring) ("it is always appropriate to consider all evidence of Congress' true intent when interpreting its work product"); *see generally*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85–101 (Vintage Books, 2005).

[27] Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 11 (1998) ("[T]he Court routinely uses principles of statutory interpretation in construing the rules.").

[28] Dasani, *supra* note 21, at 183–84.

[29] Moore, *supra* note 25, at 1074 ("Plain meaning adherents often find that statutory language is clear, even when others argue that the same statutory language is ambiguous.").

[30] *See* Dasani, *supra* note 21, at 198–99.

ing,[31] plaintiffs are vulnerable to having Rule 23(b)(2) limited to injunctive and declaratory relief. Although this would suggest that a prohibition on monetary relief under Rule 23(b)(2) is a foregone conclusion, two critical points suggest that under either theory, the Court should consult the Advisory Committee's notes, which indicate that monetary relief is permitted.

First, Rule 23(b)(2) is ambiguous, and therefore, under either interpretive approach, the Court should consider the underlying legislative history,[32] as set forth in the Advisory Committee's notes. As Justice John Paul Stevens observed, "'ambiguity' is a term that may have different meanings for different judges" and is "apparently in the eye of the beholder."[33] A textualist might argue that there is nothing ambiguous about Rule 23(b)(2)'s language because on its face, it plainly does not include monetary relief. If the Court interpreted silence to mean that such relief is allowed, any party could import whatever terms were absent from the Rule on the grounds that the Rule did not explicitly forbid them. The text would be meaningless and the Rule would be limitless.

However, the better argument is that Rule 23(b)(2)'s language is ambiguous. In Supreme Court practice, a statute is ambiguous when its text may reasonably be given two or more meanings.[34] Here, it is clear that Rule 23(b)(2) is ambiguous given its susceptibility to multiple interpretations, ranging from the view that the Rule plainly does not include monetary relief to the view that the Rule plainly does not exclude monetary relief. Indeed, *all* of the federal courts of appeals that have considered the issue have concluded that monetary relief is allowed. This demonstrates that Rule 23(b)(2)'s text is *at least* ambiguous as to whether a blanket *prohibition* exists against monetary relief. From the Fifth Circuit's most restrictive class certification standard in *Allison*, to the Second Circuit's most permissive one in *Robinson*, the circuit courts have not interpreted Rule 23(b)(2)'s silence to foreclose monetary relief.[35] Had the Rule's text been so clear, there would have been no need for the federal appellate courts to seek counsel from the Advisory Committee.

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[31] Eskridge, *supra* note 23, at 625, 656; Moore, *supra* note 25, at 1073 ("[T]he Court has increasingly relied on a 'plain meaning' analysis to dispose of difficult questions involving the interpretation and application of various Federal Rules.").

[32] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise *ambiguous* terms.") (emphasis added); Eskridge, *supra* note 23, at 658 ("Probably all of the Justices are willing to consult relevant legislative history if the statutory text is genuinely ambiguous or open-textured.").

[33] *Exxon Mobil*, 545 U.S. at 572 (Stevens, J., dissenting).

[34] Although there is no one way of determining ambiguity and the Supreme Court has interpreted statutory silence in a variety of ways, ambiguity is a natural consequence of silence because "silence does not define itself." Rotenberg, *supra* note 21 at 375; *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) ("the silence of Congress is ambiguous"); Carlisle v. United States, 517 U.S. 416, 449 (1996) (identifying legislative silence as "ambiguous").

[35] *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 (5th Cir. 1998) (relying on Advisory Committee's note); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 163–64 (2d Cir. 2001) (relying on Advisory Committee's note).

Moreover, if the Court interprets silence to mean that class-wide monetary relief is forbidden, a party could move to prohibit anything a rule did not explicitly provide. This approach would be unworkable for the drafters, who would have to anticipate and enumerate every possible circumstance permitted by the Rules. Concise rules would be impossible. In sum, given Rule 23(b)(2)'s ambiguity, the Court should consult legislative history to determine the intent of the drafters—the Advisory Committee.[36]

Second, even if the Court finds Rule 23(b)(2) unambiguous, the Court may consult legislative history under a textualist approach "to avoid absurdities"[37] or under a "soft plain-meaning" approach to "confirm or rebut the plain meaning of a clear statute."[38] Interpreting Rule 23(b)(2)'s text as foreclosing all monetary relief would arguably "produce an absurd result."[39] Absurdity is not limited to a scrivener's error but includes interpretations that Congress could not conceivably have intended.[40] Here, the Advisory Committee[41] could not conceivably have intended to prohibit all monetary relief under Rule 23(b)(2) because the Committee explicitly contemplates the presence of monetary damages in a (b)(2) class. The Committee's note accompanying (b)(2) states: "The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[42] This language makes clear that Rule 23(b)(2) does not ban *all* forms of monetary relief, but instead permits such relief (in the form of damages), so long as it is not exclusive or predominant. This logic has not escaped the federal courts of appeals, all of which have relied on this language to justify monetary relief in (b)(2) classes.[43]

The *Dukes* case is similar to other Supreme Court cases, in which the justices relied on legislative history to avoid an absurd result. For example, in *Green v. Bock Laundry Machine Co.*, the Court looked beyond the plain meaning of Rule 609(a) of the Federal Rules of Evidence on the grounds that "[n]o matter how plain the text of the Rule may be, we cannot accept an

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[36] Dasani, *supra* note 21, at 194.

[37] Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring); *see also* Moore, *supra* note 25, at 1074–75 (noting Justice Scalia's receptivity to use of extrinsic sources when text's literal interpretation would "produce an absurd result"); Eskridge, *supra* note 23 (discussing absurdity exception); SCALIA, *supra* note 25 at 20–21.

[38] Eskridge, *supra* note 23, at 658.

[39] Moore, *supra* note 25, at 1074–75 (noting Justice Scalia's receptivity to use of extrinsic sources when text's literal interpretation would "produce an absurd result").

[40] Eskridge, *supra* note 23, at 658.

[41] The Advisory Committee notes and text of proposed Rule amendments are forwarded to the Judicial Conference, then to the Supreme Court, and then to Congress. Consequently, congressional intent is evidenced by the Advisory Committee notes.

[42] FED. R. CIV. P. 23 advisory committee's note.

[43] *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 124 (1994) (per curiam) (O'Connor, J., dissenting) ("lower courts have consistently held that the presence of monetary damages claims does not preclude class certification under . . . [R]ule 23(b)(2)"); *see, e.g.*, Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 615–16 (9th Cir. 2010) ("An interpretation of Rule 23(b)(2) that prevented any claim for monetary relief would render this advisory committee requirement redundant or irrelevant."); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 (5th Cir. 1998).

interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant."[44] Because the majority found it "unfathomable" that the Rule would subject a civil plaintiff to such risk,[45] the court concluded the Rule "can't mean what it says."[46] Similarly, to the extent that Rule 23(b)(2) does not plainly provide for monetary relief, the Court should not accept an interpretation that would deny a plaintiff the right to pursue make-whole relief under Title VII. The Rule "can't mean what it says" when Rule 23(b)(2)'s drafters explicitly contemplated the availability of monetary relief and designed the Rule to enable plaintiffs to pursue make-whole relief under Title VII.

Some may argue that characterizing a prohibition of Rule 23(b)(2) monetary relief as "absurd" is going too far. The Court has the prerogative to disagree with the courts of appeals and is not bound by the Advisory Committee, even if they have all concluded that the Rule permits monetary relief. As Justice Stevens noted, however, in another case: "[W]e cannot escape [an] unambiguous statutory command by proclaiming that it would produce an absurd result. We can, however, escape by using common sense."[47] If not absurd, it certainly defies common sense that the Rule's drafters would impose a limitation on monetary relief they intended to completely ban under the Rule.

In the event that the Court finds a monetary ban does not rise to the level of an "absurdity," the Court may rely on legislative history to double-check the meaning of the Rule. Professor William N. Eskridge, Jr. describes a "soft plain-meaning rule"—a hybrid between textualism and intentionalism—when the Court uses legislative history as a check on the plain meaning of the statute.[48] As discussed *supra*, using the Advisory Committee notes to check Rule 23(b)(2)'s plain meaning only illustrates that monetary relief is permissible—a conclusion shared by every single court of appeals to have decided the issue.

Therefore, even a textualist approach or soft plain-meaning approach supports relying on the Advisory Committee's guidance. Consequently, re-

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[44] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989).

[45] *Id.* at 510–11.

[46] *Id.* at 527 (Scalia, J., concurring) ("We are confronted here with a statute which, if interpreted literally, produces an absurd . . . result."). Similarly, in *Harbison v. Bell*, the Court looked beyond the plain text of 18 U.S.C. § 3599—which provides for the appointment of federal counsel in state clemency proceedings—to discern whether a state inmate faced with imminent execution would have to procure new counsel to file a stay because his federal counsel was not authorized to represent him. 129 S.Ct. 1481 (2009). Where the plain language of the statute failed to resolve this question, the various justices disagreed over whether inserting the word "federal" into the statute would produce absurd results and be inconsistent with the statute's basic purpose. *Id.* at 1487–89, 1487 n.6, 1491–92, 1498.

[47] Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring).

[48] *See* Eskridge, *supra* note 23, at 658; *see, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 431–33, 433 n.12 (1987) (consulting legislative history to determine if it expressly contradicted statutory language).

gardless of the statutory interpretive mode employed, Rule 23(b)(2), by its terms, does not proscribe monetary relief.

B. The Advisory Committee Notes Clarify That Rule 23(b)(2) Permits Some Monetary Relief

The Advisory Committee notes accompanying Rule 23(b)(2) confirms the availability of monetary relief under the provision. The notes explain:

> This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. . . . The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.[49]

The crux of a (b)(2) class action is that because conduct has been directed toward a group of people, group-wide relief, such as an injunction or declaration, is appropriate. This does not mean, however, that the *only* relief available to a (b)(2) class is group wide. Relief that may not address the class as whole, such as monetary damages, is contemplated by the notes. By referencing a limitation on monetary damages, the Committee explicitly recognizes the availability of such relief. The next question is what significance the Supreme Court should give to the Committee's notes.

1. *The Advisory Committee Should Be Given Considerable Deference*

When consulting legislative history to decipher a statute's meaning, the Court must determine what deference to give the drafters. The late Professor Charles Alan Wright and Professor Arthur R. Miller acknowledge the central role the Advisory Committee notes play in contextualizing the Federal Rules and fleshing out their meaning for the courts:

> In interpreting the federal rules, the Advisory Committee Notes are a very important source of information and direction and should be given considerable weight. Although these Notes are not conclusive, they provide something akin to a "legislative history" of the rules, and carry, in addition, the great prestige that the individual members of the successive Advisory Committees, and the Committees themselves, have enjoyed as authorities on procedure.[50]

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[49] FED. R. CIV. P. 23 advisory committee's note.

[50] 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029 (3d ed. 2004).

Paralleling the familiar divide between textualists and intentionalists, there is a similar divide between critics and supporters of legislative history. Legislative history comes under fire as an interpretive tool because it is arguably "murky, ambiguous, and contradictory;"[51] unreliable and subject to manipulation;[52] and exempt from the formal legislative process.[53]

The Advisory Committee notes, however, are not susceptible to the same criticisms as traditional legislative history. Significant distinctions between the Advisory Committee notes and congressional legislative history justify the Court's reliance on the former when discerning the drafters' intent. The unique process involved in creating the Federal Rules and the distinct nature of the notes themselves make reliance on them a more productive enterprise. More specifically, unlike other extrinsic sources that accompany federal statutes, the Advisory Committee notes are a single source, designed to provide official guidance for rule interpretation, drafted by the same authors of the rule, subject to review from inception to final enactment, and formally approved of by the United States Judicial Conference and the Supreme Court itself before transmission to Congress.[54] Moreover, given the active role that judges play in drafting and commenting on the rules and accompanying notes, the review by the Judicial Conference, and the ultimate promulgation by the Supreme Court (subject only to congressional override), there is not the same concern over the balance of power between the judicial and legislative branches when courts interpret the Advisory Committee notes as there is when they interpret traditional legislative history.[55] In sum, these safeguards make the Advisory Committee notes a reliable and authoritative source for discerning the rule makers' intent.[56]

Admittedly, the Supreme Court has not recognized the Advisory Committee notes as authoritative;[57] it is the Court's job to dispositively interpret

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[51] Exxon Mobil v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

[52] *Id.*

[53] *See* Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2815 (2006) (Scalia, J., dissenting) (objecting to reliance on legislative history); SCALIA, *supra* note 25, at 29–37.

[54] *See* Dasani, *supra* note 21, at 190–91, 194–95 (describing distinctions between Advisory Committee notes and legislative history and arguing why notes should be used to interpret Federal Rules); Struve, *supra* note 26, at 1112–14, 1152, 1158–61.

[55] *See* Dasani, *supra* note 21, at 190–91.

[56] The fact that the Advisory Committee is tasked with drafting the rules for the Court—subject to its and Congress's approval—further supports the Court's reliance on the Committee's notes. Consequently, some commentators have argued that the federal courts should enjoy a more expansive role and power when interpreting the Federal Rules. *See* Joseph P. Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 720 (1988); Moore, *supra* note 25, at 1093.

[57] Struve, *supra* note 26, at 1167; WRIGHT & MILLER, *supra* note 50, at § 1029, § 1029 n.21 ("Notes are not conclusive"); FED. R. CIV. P. 23 advisory committee's note ("The notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them"); *see, e.g.*, Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2498–99 (2010) (Scalia, J., concurring) (Advisory Committee's notes are useful like other scholarship, but the Committee's intentions do not impact the Rule's meaning, only text does).

the Rules.[58] In practice, however, when deciphering the Federal Rules, the Supreme Court has regularly relied on the Advisory Committee notes and accorded them significant weight.[59] For example, in the seminal class-certification cases, *Ortiz v. Fibreboard Corporation* and *Amchem Products, Inc. v. Windsor*, the Court repeatedly resorted to the Advisory Committee notes to discern the drafters' intent and Rule 23's meaning.[60] Consequently, the courts of appeals have simply assumed the notes' applicability when interpreting Rule 23(b)(2).[61]

When originally drafting the Federal Rules, the Advisory Committee itself noted that its notes were not controlling.[62] The initial notes to Rule 23(b)(2) in 1966 were terse additions to the Rules, without binding effect. However, procedural experts have noted that over time the Advisory Committee has written "more extensive and discursive" notes when explaining rule changes, and has even written notes "to guide judicial construction of a rule along proper lines" in the absence of a rule change, in "apparent . . . recogni[tion of] the authoritative character that the Notes have assumed."[63] As of 1988, the Advisory Committee is required to draft notes to accompany any proposed rule amendment, and "these Notes are drafted, redrafted, voted on, and approved in much the same manner as the text of the proposed Rules."[64] In sum, because of the distinctive process involved in creating the Rules and the qualities of the notes themselves, the Court should defer to the Advisory Committee's clarification that Rule 23(b)(2) permits monetary relief.

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[58] Moore, *supra* note 25, at 1094 ("the dispositive interpretive consideration should be . . . [the] Court's own understanding of the Rule," rather than the Advisory Committee notes).

[59] Struve, *supra* note 26, at 1161 (describing the "Court's frequent resort to Notes in construing the Rules" and noting over the years that "despite the Court's internal debate over textualism in statutory interpretation—all the Justices have made liberal use of the Notes"); *id.* at 1162–63 (2002) (noting that "despite his predominantly textualist approach to statutory interpretation—Justice Scalia frequently joins, or even writes, opinions that rely upon Advisory Committee Notes"); *id.* at 1663–65, 1165 n. 273 (citing cases). *But see* Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("I have previously acquiesced in, . . . and indeed myself engaged in, . . . similar use of the Advisory Committee Notes" and concluded "that is wrong") (citations omitted). *See generally* Commentary, Use of Notes and Statements of Advisory Committee in Construction of Rules, 2 Fed. R. Serv. (Callaghan) 632 (1940); Commentary, Use of Notes and Statements of Advisory Committee in Construction of Rules, 3 Fed. R. Serv. (Callaghan) 663 (1940).

[60] *See e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 833–35, 835 n.15, 838, 841–45, 844 n.20–21, 864 (2009) (citing Advisory Committee's notes extensively in interpretation of Rule 23(b)(1) in personal injury asbestos case); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614–17 (1997) (citing Advisory Committee's notes throughout in describing characteristics of class actions under Rule 23's provisions in personal injury asbestos case).

[61] *See, e.g.*, Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162 (2d Cir. 2001); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 (5th Cir. 1998).

[62] FED. R. CIV. P. 23 advisory committee's note (the notes "have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases."); Struve, *supra* note 26, at 1112, 1112 n.40.

[63] WRIGHT & MILLER, *supra* note 50, at § 1029; *see also* Struve, *supra* note 26, at 1099, 1112–13, 1158 (noting evolution of notes in terms of length and varied uses).

[64] Struve, *supra* note 26, at 1113–14.

2. *The Advisory Committee Makes Monetary Relief Available in Contemporary Civil Rights Cases*

The Advisory Committee does not limit the availability of monetary relief to historical desegregation cases. The Committee makes clear that Rule 23(b)(2) not only permits monetary relief, but functions particularly well for various civil rights cases. To illustrate this, the Committee follows its description of Rule 23(b)(2) with this example: "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."[65] In *Dukes*, plaintiffs' case falls squarely within the Advisory Committee's broad description of an illustrative Rule 23(b)(2) civil rights case. *Dukes* is an action brought under Title VII where plaintiffs charge Wal-Mart with discriminating unlawfully against a class of women. Although the members of the *Dukes* class may generally be capable of specific enumeration—like most employment discrimination classes—this does not disqualify the class from (b)(2) certification. Moreover, the (b)(2) class certified in *Dukes* only encompasses back pay—relief that lends itself to collective proof.[66]

Wal-Mart argues that Rule 23(b)(2) is not appropriate for *all* civil rights cases because otherwise there would be no reason for the Committee to describe and list "illustrative" ones.[67] It is true that not all civil rights cases may be appropriate for (b)(2) certification, but it does not follow that *only* those cases that mirror the "illustrative" ones are. Illustrations are merely examples or demonstrations, not limitations. The list of illustrative cases is not meant to be an exhaustive one. Rule 23(b)(2) is not even limited to civil rights cases,[68] much less to those the Advisory Committee identified as "illustrative" in 1966.

The fact that the note lists prototypical cases at the time Rule 23(b)(2) was enacted in no way limits (b)(2)'s applicability to civil rights cases today. Not surprisingly, the Advisory Committee's note to the 1966 amendments to Rule 23 list civil rights cases from the 1950s and 1960s that sought injunctive and declaratory relief for *de jure* segregation because that constituted civil rights litigation endemic of the times. The drafters' explicit mention of desegregation cases as fitting for a (b)(2) class action was in response to opposition to desegregation and to efforts to force integration on an individ-

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[65] FED. R. CIV. P. 23 advisory committee's note.

[66] The plaintiffs also sought punitive damages which may lend themselves to collective proof, given their aim to punish and deter corporate misconduct, rather than provide individual compensation. The plaintiffs, however, did not seek compensatory damages, which risks creating fissures in the class because of individualized proof issues.

[67] *See* Brief for Petitioner at 48, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (Jan. 20, 2011).

[68] FED. R. CIV. P. 23 advisory committee's note (stating that "[s]ubdivision (b)(2) is not limited to civil-rights cases" and providing examples of non-civil rights cases).

ual-by-individual basis at the time.[69] Wal-Mart incorrectly interprets the Advisory Committee's mention of desegregation cases as a proscription of any other type of Rule 23(b)(2) civil rights case, claiming that this would violate *Ortiz v. Fibreboard*'s admonition that a Rule 23(b)(1)(B) mandatory class action stay close to the Advisory Committee's historical models.[70] Wal-Mart construes *Ortiz* too narrowly. In *Ortiz*, "[n]one of the examples cited in the Advisory Committee Notes . . . remotely approach[ed]" the type of limited fund case plaintiffs sought for Rule 23(b)(1) certification, resulting in decertification of the class.[71] *Ortiz* did not require plaintiffs' limited fund case to be *identical* to the Rule's historical antecedents. On the contrary, recognizing that limited fund cases could arise from various circumstances, *Ortiz* only required that plaintiffs' case share certain characteristics with the historical models.[72] Moreover, plaintiffs could seek certification that departed from the traditional norm, so long as they justified this departure.[73]

In contrast, *Dukes* is just the type of case Rule 23(b)(2) was designed to address. As the Supreme Court has recognized, Rule 23(b)(2) is uniquely suited to civil rights cases, including those brought today.[74] It should be no surprise that discrimination cases almost half a century after Rule 23(b)(2)'s enactment do not mirror the ones initially described by the Advisory Committee. The availability of compensatory and punitive damages and jury trials for intentional discrimination claims under Title VII since 1991 have reshaped modern civil rights cases. Wal-Mart's position that only those civil rights cases resembling *de jure* segregation litigation qualify for Rule 23(b)(2) certification is ahistorical and divorced from modern reality. Of course, civil rights cases today will rarely challenge facially discriminatory policies based on racial segregation. Discrimination goes beyond just race

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[69] *See* David Marcus, *Flawed But Noble: Desegregation Litigation and its Implications for the Modern Class Action* 53–62, *available at* http://ssrn.com/abstract=1678803.

[70] *See* Brief for Petitioner, *supra* note 67, at 14, 47–49.

[71] Ortiz v. Fibreboard Corp., 527 U.S. 815, 843 (1999).

[72] *Id.* at 838. It was these characteristics—which justify the limited fund rationale under the Rules' subdivision—that were "presumptively necessary" for class certification. *See id.* at 841–42, 845.

[73] *See id.* at 842.

[74] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions). *Amchem's* Rule 23(b)(3) certification analysis is also instructive. Despite the Advisory Committee's observation that "mass accident" cases were "ordinarily not appropriate" for Rule 23(b)(3) certification, the Supreme Court noted that such cases could still be certified under certain circumstances. *Id.* at 625. The Rule's text did "not categorically exclude mass tort cases" from (b)(3) certification and district courts had been increasingly certifying such cases since the 1970s. *Id.* The Committee's warning meant only that counsel should exercise caution "when individual stakes are high and disparities among class members great." *Id.* In *Amchem*, the Court concluded that counsel had not exercised such caution and instead interpreted Rule 23(b)(3)'s predominance requirement in a way that was "irreconcilable with the Rule's design." *Id.* Consequently, the Court decertified the class. In *Dukes*, interpreting Rule 23(b)(2) to permit civil rights cases involving monetary relief for individual class members is not "irreconcilable with the Rule's design." When plaintiffs seek predominantly injunctive and declaratory relief to curtail systemic discrimination—as is the case in *Dukes*—certification is consistent with the Rule. Additional caution may be exercised under (b)(2) by providing notice and an opt-out right, if necessary. *See* FED. R. CIV. P. 23(b)(2).

and has become more subtle and nuanced over time. As the Supreme Court has aptly noted in an analogous context, because of the changing nature of societal discrimination, statutes originally meant to prohibit one type of "evil" may over time appropriately cover others.[75] When plaintiffs assert a "novel" theory of discrimination or bring a civil rights case not identical to those brought almost a half century ago, plaintiffs may nonetheless seek (b)(2) certification.[76] Otherwise, Rule 23(b)(2) would cease to work for civil rights cases today.

C. *Proscribing All Monetary Relief Would Go Against Well-Settled Law*

A blanket proscription of monetary relief under Rule 23(b)(2) would go against decades of well-settled law. Wal-Mart's view that no monetary relief is available under Rule 23(b)(2)[77] is far outside the mainstream and contrary to well-established precedent. Wal-Mart is asking the Court to overrule all the circuit courts that have addressed the issue.[78] Even the Fifth Circuit, which has set the highest bar for Rule 23(b)(2) certification in its seminal case *Allison*, conceded that "Rule 23(b)(2), *by its own terms*, does not preclude all claims for monetary relief."[79] Wal-Mart's position is far out of step with all of the appellate courts on this issue, as illustrated by the historical availability of back pay and non-predominant monetary damages discussed

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[75] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998) (declining to categorically exclude male-on-male sexual harassment claims under Title VII, even though such harassment was "not the principal evil Congress was concerned with when it enacted Title VII" because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils").

[76] *See* Brief for Petitioner, *supra* note 67, at 49. The characterization of plaintiffs' theory as novel is Wal-Mart's, not the author's.

[77] Wal-Mart's reliance on Sosna v. Iowa, 419 U.S. 393, 397 n. 4 (1975), for this proposition is misplaced. Wal-Mart contends, "This Court's observation that Rule 23(b)(2) certification turns on '*the absence of a claim for monetary relief* and the nature of the claim asserted' (*Sosna v. Iowa*, 419 U.S. 393, 397 n.4 (1975) (emphasis added)) ends plaintiffs' contention that 'nothing in the text of the Rule places any limit on relief available in a (b)(2) class action.'" Reply Brief for Petitioner at 19, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (Mar. 17, 2011). In fact, *Sosna* does not state what a Rule 23(b)(2) class "turns on" or requires. The *Sosna* Court merely stated, "[a]lthough the complaint did not so specify, the absence of a claim for monetary relief and the nature of the claim asserted disclose that a Rule 23(b)(2) class action was contemplated." 419 U.S. 393, 398 n.4. In other words, where a complaint was unclear about which Rule 23 provision was being invoked, the Court presumed that plaintiffs contemplated bringing a (b)(2) class because they did not seek monetary relief and sought a declaration that a residency requirement was unconstitutional. Given that many plaintiffs who challenge the constitutionality of a government policy may seek solely injunctive or declaratory relief under (b)(2), the Court's presumption is unremarkable. *Sosna* is not a ban on Rule 23(b)(2) class actions seeking monetary relief and certainly does not end the debate over the correct interpretation of Rule 23(b)(2)'s text.

[78] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 618 (9th Cir. 2010).

[79] Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 (5th Cir. 1998) (emphasis added); *see also* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 331 (4th Cir. 2006) ("[W]e do not hold, nor have we ever held, that monetary relief is fundamentally incompatible with Rule 23(b)(2).").

in Part II below.[80] Given that no circuit has adopted Wal-Mart's position, the Supreme Court would strain to adopt this position without violating its duty to exercise judicial restraint. Wal-Mart invites judicial inventiveness, contrary to traditional Supreme Court jurisprudence.[81]

II. Circumstances Justifying Monetary Relief Under Rule 23(b)(2)

Having determined that Rule 23(b)(2) permits a class to seek monetary relief, the next question is under what circumstances such relief should be allowed. If the monetary relief is back pay, it should be allowed. Because of its equitable nature, back pay has historically been permitted in Rule 23(b)(2) employment discrimination class actions brought under Title VII of the Civil Rights Act of 1964. Wal-Mart's position to the contrary goes against well-settled law. Alternatively, if the monetary relief is comprised of monetary damages (compensatory or punitive), it should be allowed so long as it is not the exclusive or predominant relief sought. As the Advisory Committee and courts of appeals all recognize, non-exclusive and non-predominant monetary damages are consistent with Rule 23(b)(2) certification.

A. Back Pay, as an Equitable Remedy, Is Regularly Certified Under Rule 23(b)(2)

Back pay and other equitable monetary relief should be permitted for Rule 23(b)(2) classes challenging employment discrimination. The courts have historically certified (b)(2) class actions seeking monetary relief in the form of back pay for cases brought under Title VII of the Civil Rights Act of 1964.[82] Long before the circuits diverged over which predominance test should be used for permitting monetary *damages* under Rule 23(b)(2), courts had been certifying (b)(2) class actions involving back pay. Prior to 1991, employees had limited recourse under Title VII. They could pursue only equitable relief, such as injunctions, declarations, reinstatement, back pay, and front pay.

The Civil Rights Act of 1991 amended the Civil Rights Act of 1964 to enhance enforcement and expand remedies. More specifically, it provided compensatory and punitive damages, and attendant jury trials, in cases alleg-

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[80] Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 124 (1994) (O'Connor, J., dissenting) (per curiam) ("The lower courts have consistently held that the presence of monetary damages claims does not preclude class certification under . . . (b)(2).").

[81] Ortiz v. Fibreboard Corp., 527 U.S. 815, 841–42 (1999).

[82] Janice Goodman et al., Employee Rights Litigation: Pleading and Practice § 2.10(2)(a)(i) at 2-218.54 (2010) ("Back pay is the most common form of monetary relief in Title VII cases" and is "routinely granted barring extraordinary circumstances."); *id.* at 2-218.55 ("the denial of back pay to prevailing plaintiffs is a minor exception rather than the rule."); Lex K. Larson, Larson on Employment Discrimination (2d ed.) § 92.11 at 5-92 (2010) (citing cases to support the assertion that "the majority of courts have had little difficulty fitting an action for back pay and injunctive relief into Rule 23(b)(2).").

ing intentional discrimination under Title VII.[83] The enactment of the 1991 Act ignited the debate over the propriety of monetary damages under Rule 23(b)(2)—starting with the Fifth Circuit's ruling in *Allison v. Citgo*. However, the 1991 Act has not prevented plaintiffs from being awarded back pay. Pre- and post-1991, courts have regularly permitted back pay to accompany injunctive and declaratory relief in (b)(2) classes.

This is not to suggest that courts have not carefully considered the propriety of back pay, but that their consideration has been relatively bloodless. Why has back pay escaped such controversy? What is it about back pay in comparison to monetary damages that has enabled the courts to comfortably permit its inclusion under the (b)(2) tent? The answers to these questions explain why back pay claims should continue to be certified under (b)(2) and what characteristics monetary damages should have to fit a (b)(2) class.

Back pay awards have rarely been held to a predominance standard, and when they have, they have easily met it because of their equitable nature and uniform relief. Wal-Mart contends that "[t]he fact that plaintiffs are seeking monetary relief in the form of backpay, as opposed to compensatory damages, does not alter the conclusion that the request for monetary relief predominates."[84] To the contrary, plaintiffs' pursuit of back pay often moots the question of predominance altogether. Unlike compensatory and punitive damages, back pay is not regularly subjected to a predominance test, even by courts with the most stringent Rule 23(b)(2) certification requirements. For example, the Fifth Circuit, in *Allison*, applied its incidental predominance test only to plaintiffs' compensatory and punitive damages claims, setting apart back pay because of its equitable nature.[85] Other courts have similarly excluded back pay from a predominance inquiry because such relief is equitable, not legal.[86] This distinction, however, is not dispositive. The Fourth Circuit, for example, applied a predominance test to all monetary relief,

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[83] 42 U.S.C. § 1981 (2006).

[84] *See* Brief for Petitioner, *supra* note 67, at 53.

[85] Allison v. Citgo Petroleum Corp., 151 F.3d 402, 416 n.10 (5th Cir. 1998) ("Of course, to the extent the district court applied an incidental damages standard to plaintiffs' claims for back pay, its analysis was flawed."); *id.* at 425 ("[W]e hold that nonequitable monetary relief may be obtained in a class action certified under Rule 23(b)(2) if the predominant relief sought is injunctive or declaratory.").

[86] *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 618 ("[I]t is . . . well accepted, even by circuits that are generally restrictive in certifying classes seeking monetary damages under Rule 23(b)(2), that a request for back pay in a Title VII case is fully compatible with the certification of a Rule 23(b)(2) class.") (citing cases). In *Dukes*, the Ninth Circuit refrained from deciding whether back pay weighed against (b)(2) certification. Although the Ninth Circuit created a new objective effects test for determining when monetary relief predominates, as discussed below in Part I.B.2., the court did not apply it to back pay. Rather, the court adopted the "consensus view that a request for back pay in a Title VII case is fully consistent with the certification of a Rule 23(b)(2) class action." *Id.* at 619. The court was persuaded to join the consensus on the grounds that back pay usually involves uncomplicated factual issues and few individualized ones, and that back pay is integral to Title VII's "make whole" remedial scheme. By contrast, the Ninth Circuit concluded that "claims for punitive damages weigh against certification under Rule 23(b)(2)" and applied its objective effects predominance test to plaintiffs' punitive damages claims. *Id.* at 620–23.

whether equitable or not.[87] But even those circuits applying the predominance standard to back pay have recognized the compatibility of equitable monetary relief and Rule 23(b)(2) in the Title VII context.[88]

Courts have largely certified (b)(2) classes seeking back pay awards by characterizing them as equitable under Title VII.[89] This characterization has its roots in the statute itself[90] and in employment discrimination jurisprudence.[91] As an equitable rather than legal remedy, back pay awards under Title VII are determined by a judge and not a jury.[92] This remains true after the Civil Rights Act of 1991's provision of a jury trial in Title VII intentional discrimination cases seeking compensatory or punitive damages.[93] Congress originally gave judges the authority to determine whether or not to award back pay because of its concern that juries would make biased decisions.[94] Placing the decision in the hands of judges was necessary to address "a historic evil of national proportions."[95] Because of the importance of back pay, this discretion has been cabined by the Supreme Court's creation of a presumption in favor of such monetary relief:

> [G]iven a finding of unlawful discrimination, back pay should be denied *only* for reasons which, if applied generally would not frustrate the central statutory purposes of *eradicating discrimination* throughout the economy and *making persons whole* for injuries suffered through past discrimination.[96]

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[87] *See* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 332 (4th Cir. 2006) ("Rule 23(b)(2) class certification is proper in the Title VII context not *because* back pay is an equitable form of relief, but because injunctive or declaratory relief predominates *despite* the presence of a request for back pay."); Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 202 (3d Cir. 2009) (predominance test required for back pay request).

[88] *See Thorn*, 445 F.3d at 331; In re Monumental Life Ins. Co., 365 F.3d 408, 418 (5th Cir. 2004); *Dukes*, 603 F.3d at 619, 620 n. 42 (joining "consensus view").

[89] *See* 2 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.14 (4th ed. 2010) (monetary relief that is equitable in nature is characteristic of monetary relief permitted under b(2)).

[90] *See* 42 U.S.C. § 2000e-5(g) (2006); *see also* Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) ("The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury.").

[91] Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (concluding that Rule 23(b)(2) permits monetary relief that is equitable, and "[b]ack pay, of course, had long been recognized as an equitable remedy under Title VII."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[92] LARSON, *supra* note 82, § 92.02; Donlin v. Philips Lighting N. Am. Corp., 581 F.3d 73, 78 n.1 (3d Cir. 2009) ("[B]ack pay and front pay are equitable remedies to be determined by the court.").

[93] LARSON, *supra* note 82; *see, e.g.*, Spencer v. Wal-Mart Stores, Inc., 469 F.3d 311 (3d Cir. 2006) (back pay within the court's discretion, not the jury's, after the Civil Rights Act of 1991); Lutz v. Glendale Union High Sch., 403 F.3d 1061 (9th Cir. 2005). *But see* Johnson v. Spencer Press of Me., Inc., 364 F.3d 368 (1st Cir. 2004) (juries permitted to make back pay determinations when deciding liability and compensatory damages).

[94] *See* Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1630 & n.297 (2002).

[95] *Albemarle*, 422 U.S. at 416.

[96] *Id.* at 421 (emphasis added).

Back pay has been essential to these twin statutory goals and thus favored by the courts for decades.

Back pay has long been permitted in Rule 23(b)(2) class actions because it is an integral part of Title VII's broad remedial scheme.[97] Title VII was designed to "make whole" those who suffered employment discrimination. To facilitate this, the statute gives the courts the power to enjoin a defendant from engaging in discriminatory practices and to order appropriate affirmative relief.[98] Congress has made clear that not only is injunctive and declaratory relief necessary to curtail discrimination, but back pay is an essential ingredient in making a victim of discrimination "whole."[99] Back pay compensates the victim for earnings and other financial benefits that he or she would have received but for the discrimination. Not surprisingly, then, courts have regularly certified (b)(2) classes involving back pay to make victims of systemic discrimination whole.[100]

As part of Title VII's remedial scheme, back pay has been permitted in (b)(2) classes because of its role in deterring future systemic discrimination. In addition to playing a restorative function, back pay awards encourage voluntary compliance:

> The role that backpay plays in employment discrimination cases is twofold. First, . . . it provides compensation for the tangible economic loss suffered by those who are discriminated against. Secondly, and even more importantly, because backpay awards act as a deterrent to employers . . . , such awards play a crucial role in the remedial process . . . . They provide the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history. If backpay is consistently awarded, companies . . . will certainly find it in their best interest to remedy their employment procedures without court intervention, whether that intervention is initiated by the Government or by individual employees.[101]

Because of back pay's equitable nature, many courts, including the Fifth Circuit in *Allison*, have concluded that an "award of back pay, as one ele-

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[97] In re Monumental Life Ins. Co., 365 F.3d 408, 418 (5th Cir. 2004); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998); Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 619 (9th Cir. 2010).

[98] *See* 42 U.S.C. § 2000e-5(g) (2006).

[99] Title VII's purpose is "[t]o make the victims of unlawful discrimination whole," which requires "elimination of the particular unlawful employment practice complained of, but also "so far as possible, restor[ing victims] to a position where they would have been were it not for the unlawful discrimination." 118 CONG. REC. 7168 (1972). *See also* GOODMAN, *supra* note 82, at 2-218.70 ("Particularly in the case of class-based discrimination, the prohibitory injunction is often coupled with affirmative relief.").

[100] *See, e.g.*, *Allison*, 151 F.3d at 415.

[101] U.S. v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973) (quoting in part Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975)).

ment of the equitable remedy, conflicts in no way with the limitations of Rule 23(b)(2)."[102] Back pay—like injunctive and declaratory relief—is equitable, and therefore weighs on the side favoring class certification.[103]

However, because back pay is monetary, other courts have come to the opposite conclusion.[104] Just because monetary relief is equitable does not mean that it is *always* appropriate for (b)(2) certification. Any type of relief in addition to injunctive or declaratory relief should not undermine the cohesiveness or homogeneity of a (b)(2) class.[105] Because members of a Rule 23(b)(2) class are not entitled to notice of the class action or an opportunity to exclude themselves from the litigation, the interests of the class members must be aligned with each other so as to provide them due process. The cohesiveness that justifies a mandatory class arguably starts to break down when, after a class-wide finding of liability, class members seek individual monetary awards.[106] Thus, monetary awards involving complicated, highly individualized assessments or hearings would militate against (b)(2) certification.

But because back pay awards in the Title VII context tend to involve relatively uncomplicated factual determinations, comprise few individualized issues, and can be calculated on a class-wide basis, this type of monetary relief has been and should be regularly certified under (b)(2).[107] For example, back pay for each class member may be calculated on a statistical basis, using a formula that approximates over time what salary an employee would have received but for an employer's discrimination. Because back pay lends itself to common proof, it does not jeopardize the cohesiveness and homogeneity of the class. In contrast, compensatory damages—which compensate individuals for emotional harm and distress—do not often lend themselves to the same common proof, but instead require individual evaluations. Similarly, to the extent that punitive damages cannot be proven on a class-wide basis because of their dependence on the recovery of compensatory damages, punitive damages may also require individualized determina-

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[102] *Allison*, 151 F.3d at 415.

[103] *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *overruled in part on other grounds as stated in* Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

[104] *See, e.g.*, Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 331, 332 (4th Cir. 2006).

[105] Eubanks v. Billington, 110 F.3d 87, 94–95 (D.C. Cir. 1997). *See also* Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 256 (3d Cir. 1975) (describing a (b)(2) class as "homogeneous without any conflicting interests between the members of the class").

[106] *See Eubanks*, 110 F.3d at 94.

[107] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 619 (9th Cir. 2010); *Thorn*, 445 F.3d at 331; *In re* Monumental Life Ins. Co., 365 F.3d 408, 418; Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 449 (6th Cir. 2002); *see* LARSON, *supra* note 82, § 92.11 ("It is sometimes impractical, when a large class is involved, to calculate back pay for each member on an individual basis. The approaches that have been adopted by the various circuits confirm that a court may put into motion the mechanism for an award of back pay on a class-wide, rather than individual, basis."); *id.* ("[C]ourts generally have employed a class-wide remedy when individual determinations are impracticable."); *see, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257, 262 (citing various methods of calculating class-wide back pay). *But see* Shipes v. Trinity Indus., 987 F.2d 311, 318 (5th Cir. 1993) (individualized computation of back pay used in large class action).

tions.[108] To the extent back pay offers a uniform remedy not requiring highly individualized assessments, such monetary relief maintains the necessary cohesion for a mandatory class.

The relevant factor in (b)(2) certification is the nexus between back pay and the injunctive or declaratory relief. To the extent that back pay relates to the injunctive or declaratory relief, such monetary relief is entirely consistent with (b)(2) certification. Therefore, when assessing the propriety of any type of monetary relief under (b)(2), a court should consider the relationship between this relief and the injunction or declaration pursued.[109] The closer the nexus, the more advisable the certification. Where the *only* monetary relief certified pursuant to Rule 23(b)(2) is back pay, as in *Dukes*, there is a strong basis for finding that the monetary relief does not predominate.[110]

In sum, for the reasons described above, courts have regularly permitted back pay under Rule 23(b)(2) and should continue to do so. To the extent that other types of monetary relief resemble back pay, as described above, such relief should be permitted under (b)(2) as well.

B. Monetary Damages That Do Not Predominate Are Regularly Certified Under Rule 23(b)(2)

1. *Predominance*

The courts of appeals have uniformly permitted monetary damages in a (b)(2) class so long as they do not predominate over injunctive or declaratory relief. With the Ninth Circuit's *Dukes* decision, the courts of appeals have now carved out three distinct tests for determining when monetary damages predominate. These tests properly ground themselves in the Advisory Committee's guidance that monetary damages should not be the exclusive or predominant form of final relief sought. As discussed above, adoption of the Advisory Committee's predominance principle is appropriate given the Committee's seminal role in formulating and interpreting the Federal Rules of Civil Procedure. A predominance test properly reflects the rule

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[108] *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417–18 (5th Cir. 1998). The Fifth Circuit acknowledges that punitive damages may be awarded on a class-wide basis when the class members have been subjected to the same discriminatory act. *Id.* at 417. Other courts have taken a more liberal approach, permitting punitive damages under Rule 23(b)(2) on the grounds that the focus of such damages is on the defendant's conduct. *See, e.g.*, Barefield v. Chevron, No. C 86-2427, 1988 WL 188433 at *3 (N.D. Cal. Dec. 6, 1988).

[109] Some civil procedure professors have suggested that the conduct underlying the monetary and injunctive relief claims should be related as a prerequisite for (b)(2) certification. *See* Brief for Civil Procedure Professors as Amici Curiae in Support of Respondents at 34–35, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (Mar. 11, 2011).

[110] In *Dukes*, plaintiffs also sought punitive damages. The Ninth Circuit held that the district court abused its discretion by certifying a Rule 23(b)(2) class involving punitive damages, without first determining whether the plaintiffs predominantly sought injunctive or declaratory relief. Thus, the district court is to decide on remand whether the punitive damages claims are appropriate for certification under Rule 23(b)(2), or alternatively, under Rule 23(b)(3).

makers' intention to permit some measured amount of monetary damages to accompany the injunctive and declaratory relief. Therefore, predominance should anchor any test the Supreme Court adopts for allowing monetary damages under (b)(2).

Not only does a predominance test mirror the drafters' objectives, it also serves important competing interests. On the one hand, a predominance test addresses due process concerns. It ensures that the class is sufficiently cohesive to justify certification of a mandatory class and that the benefits of aggregate litigation go to the class as whole.[111] Predominance under Rule 23(b)(2) serves as a proxy for the procedural due process protections (notice and opt out) available under Rule 23(b)(3).[112] Consequently, there is generally no need to provide such protections—either as an addition to a (b)(2) class action, or alternatively, as a requirement of a (b)(3) class action[113]—when injunctive or declaratory relief predominates and systemic conduct is being challenged. On the other hand, a predominance test serves judicial economy by favoring collective action over seriatim individual litigation.[114]

The predominance approach represents a reasonable middle ground for determining the propriety of (b)(2) certification involving monetary damages. In *Allison v. Citgo*, relying on Rule 23(b)(2)'s text, plaintiffs argued that there was no predominance test for monetary relief; certification is available for *all* relief.[115] Similarly, in *Dukes*, relying on the Rule's text, Wal-Mart argues that there is no predominance test for monetary relief; certification is available *only* for injunctive and declaratory relief. The Fifth Circuit—which has adopted the *most* rigorous standard for (b)(2) certification of monetary damages in *Allison*—ultimately chose an "intermediate approach" by allowing monetary damages as long as they were not exclusive or predominant, as contemplated by the Advisory Committee.[116] All of the other circuits have followed, adopting some version of predominance. Thus, Wal-Mart's position radically departs from a uniform interpretation of the law by the courts. The real question is *how* courts should determine predominance.

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[111] *See Thorn*, 445 F.3d at 330 (Rule 23(b)(2)'s predominance test functions like that of Rule 23(b)(3), ensuring the requisite class cohesion); *Allison*, 151 F.3d at 414–15 (predominance test protects due process interests of class members who potentially want to seek individualized monetary relief).

[112] *See Thorn*, 445 F.3d at 330 n.25; *Monumental Life Ins.* 365 F.3d at 417; *Allison*, 151 F.3d at 412–15.

[113] *Monumental Life Ins.*, 365 F.3d at 417 ("[T]o deny certification on the basis that the damage claims would be better brought as a Rule 23(b)(3) class serves no function other than to elevate form over substance.").

[114] *Allison*, 151 F.3d at 414–15; *see also id.* at 414 n.8 (contending that efficiency and manageability standards of (b)(3) are implied in a predominance requirement under (b)(2)).

[115] *Allison*, 151 F.3d at 410–11; *see also id.* at 430 (Dennis, J., dissenting).

[116] *Allison*, 151 F.3d at 411. The Fifth Circuit concluded that the district court's imposition of a predominance test was not an error, even in light of the Supreme Court's doubt over the availability of monetary damages under Rule 23(b)(2), expressed in Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994). *Allison*, 151 F.3d at 411 n.3.

2. *The Debate Over the Predominance Test*

While the courts agree that predominance is the linchpin of whether monetary damages are appropriate for classes seeking injunctive or declaratory relief under Rule 23(b)(2) class, there is significant disagreement over how predominance should be determined. The courts of appeals have developed three distinct approaches to defining "predominance."

In *Allison*, the Fifth Circuit established the most demanding test for predominance. The court concluded that monetary relief predominates unless it is "incidental" to the injunctive or declaratory relief sought.[117] Incidental damages are those "that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[118] Incidental damages should 1) "be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief"; 2) "be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances"; 3) "not require additional hearings to resolve the disparate merits of each individual's case"; and 4) "neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations."[119] In sum, such monetary damages function as a group remedy adjunct to the injunctive relief.

In *Allison*, applying the "incidental" test, the Fifth Circuit affirmed the district court's conclusion that neither the compensatory nor punitive damages were incidental to the requested injunctive and declaratory relief sought, thereby making (b)(2) certification inappropriate. In a nutshell, the Fifth Circuit concluded that compensatory damages could not be determined objectively and instead required specific, individualized proof for each class member.[120] Moreover, because the punitive damages were dependent upon the compensatory damages calculations, neither could be determined objectively and without individualized proof.[121]

The "incidental" test, also adopted by the Sixth, Seventh and Eleventh Circuits,[122] is the most difficult to meet for Title VII cases because it leads to the almost inescapable conclusion that compensatory and punitive damages are not in fact incidental.[123] Consequently, some commentators have concluded that the "incidental" approach is the death knell for such class actions.[124]

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[117] *Allison*, 151 F.3d at 415.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 416–17.

[121] *Id.* at 416–18.

[122] *See* Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 649–50 (6th Cir. 2006); *In re* Allstate Ins. Co., 400 F.3d 505, 507 (7th Cir. 2005); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001).

[123] *See Allison*, 151 F.3d at 417 (compensatory and punitive damages are by "nature" not "incidental").

[124] *See, e.g.*, Harvey S. Bartlett III, *Determining Whether a Title VII Plaintiff Class's "Aim is True": The Legacy of Allison v. Citgo Petroleum Corp. for Employment Discrimination*

The Second Circuit, in *Robinson*, explicitly rejected the incidental approach in favor of an "ad hoc" balancing test for determining whether monetary damages predominate under Rule 23(b)(2).[125] The Second Circuit concluded that a district court must consider "the evidence presented at a class certification hearing and the arguments of counsel" and then determine the "relative importance of the remedies sought, given all of the facts and circumstances of the case."[126] A court may certify a (b)(2) class when, in its "informed, sound judicial discretion," it finds that:

> [T]he positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are . . . claimed . . . and . . . class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.[127]

To certify a (b)(2) class action when plaintiffs seek monetary damages and injunctive or declaratory relief, a court should, at a minimum, satisfy itself that:

> [E]ven in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and . . . the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.[128]

The "ad hoc" balancing approach incorporates the goals of flexibility and judicial economy into the predominance test. Plaintiffs bringing Title VII cases find it easier to meet the (b)(2) certification criteria under this approach because non-incidental damages are not automatically eliminated.

Finally, the Ninth Circuit, in *Dukes*, has created an alternative predominance test, rejecting the incidental test and a test that relied solely on the plaintiffs' subjective intent.[129] The Ninth Circuit fashioned an "objective effects" test, which focuses on the practical impact monetary relief will have on the litigation if the case is certified under Rule 23(b)(2).[130] Relying on

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Class Certification Under Rule 23(b)(2), 74 TUL. L. REV. 2163, 2165, 2184 (2000) ("*Allison* represents the demise of the effectiveness of the Civil Rights Act of 1991"); *see also Allison*, 151 F.3d at 431 (Dennis, J., dissenting) ("The majority's rule . . . threatens a drastic curtailment of the use of (b)(2) class actions in the enforcement of Title VII and other civil rights acts."); *Reeb*, 435 F.3d at 654 (Keith, J., dissenting).

[125] 267 F.3d 147, 164 (2d Cir. 2001).

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 616 (9th Cir. 2010); *see also* Molski v. Gleich, 318 F.3d 937, 949–50 (9th Cir. 2003) (adopting approach similar to *Robinson*).

[130] *Dukes*, 603 F.3d at 616–17 (explaining district courts should evaluate the "objective 'effect of the relief sought' on the litigation.") (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998)). While the Ninth Circuit uses the generic term "monetary relief" when describing the objective effects test, it does not actually apply it to plaintiffs' back pay claims. By contrast, the Ninth Circuit treats plaintiffs' punitive damages claims—the only damages claims plaintiffs sought—very differently. The Ninth Circuit applies all four factors

the dictionary definition, the Ninth Circuit concluded that monetary relief is "predominant" if it is "superior [in] strength, influence or authority" to the injunctive or declaratory relief.[131] The relevant factors to consider when determining if monetary relief predominates are

> whether [it] determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns . . . .[132]

This new test explicitly adds due process as a consideration in the predominance determination. Moreover, the test permits non-incidental damages—contrary to *Allison*—but moves away from the plaintiff-valuation approach favored in *Robinson*.[133] As such, the Ninth Circuit's approach may come down the middle in terms of its impact on permitting (b)(2) certification of Title VII case involving monetary damages. Its nascent status makes it too early to tell.

Despite their apparent differences, all three tests correctly anchor themselves in predominance. This is important because it offers a framework for the Supreme Court when deciding under what circumstances monetary damages should be permitted in a Rule 23(b)(2) class action.

In sum, the availability of back pay under Rule 23(b)(2) is settled law. The (b)(2) door is regularly open to this equitable type of monetary relief for plaintiffs challenging systemic discrimination under Title VII. Similarly, so long as they do not predominate, monetary damages are commonly available under the Rule's provision. The only issue left is which predominance test should apply. The next part explores this complex question by critiquing each test and conducting a comparative analysis of them.

III. Analysis of Rule 23(b)(2) Certification Jurisprudence Involving Monetary Damages

Whether endorsing an existing test or cutting one from whole cloth, the Supreme Court may find certain guiding principles useful in determining when monetary damages predominate, thereby justifying (b)(2) certification. Using these principles, this part critiques the courts of appeals' three predominance tests and concludes that the youngest one, formulated in *Dukes*, may provide the most useful insights.

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to the punitive damages claims, modeling what the district court might consider on remand, *Id.* at 621–22.

[131] *Id.* at 616.

[132] *Id.* at 616 (No one factor is determinative).

[133] *Id.* at 616–17.

A. *Guiding Principles*

Coursing throughout the body of case law are important principles upon which the Supreme Court may rely when determining the proper circumstances for permitting monetary damages in a Rule 23(b)(2) class. These principles are judicial discretion, judicial economy, due process, and civil rights enforcement.

First, no matter which predominance test is adopted for permitting monetary damages under (b)(2), the district courts must be given enough discretion to conduct the "rigorous analysis" necessary to determine the propriety of class certification, as stated in *General Telephone Co. of the Southwest v. Falcon*.[134] In order to ascertain whether Rule 23's criteria have been met, judges must be able to fully analyze each case based on its own factual record and unique context. The complexity of the class certification assessment requires this, and district court judges are uniquely positioned to make these frontline determinations.

Second, another factor relevant to any predominance test is judicial economy. The class action device is designed to achieve judicial economy because aggregate litigation is more efficient than litigating similar individual cases *seriatim*. The predominance test should not be so demanding that it becomes too difficult for litigants to get a case certified, thereby compromising the judicial economy aggregate litigation has to offer.

However, in order for a class action to be efficient, the case must be manageable. Unlike Rule 23(b)(3), which explicitly incorporates manageability into its analysis,[135] Rule 23(b)(2) does not. Despite this absence, some courts have read a manageability requirement into the Rule,[136] in recognition of the practical implications of allowing monetary damages in a (b)(2) class.

Third, when considering under what circumstances monetary damages should be permitted in a mandatory Rule 23(b)(2) class action, an important factor is whether absent class members will be afforded due process. The

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[134] 457 U.S. 147, 160–61 (1982).

[135] One of the criteria of a Rule 23(b)(3) class action is that it be "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). Its provision (D) identifies as pertinent to this finding "the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3)(D).

[136] *Compare* Shook v. El Paso Cnty., Bd. of Cnty. Comm'rs, 386 F.3d 963, 972–73 (10th Cir. 2004) (considering manageability and efficiency in (b)(2) determination), *with* Forbush v. J.C. Penney Co., 994 F.2d 1101, 1105 (5th Cir. 1993) ("[M]anageability and judicial economy are . . . irrelevant to 23(b)(2) class actions."). *See generally* ROBERT H. KLONOFF, EDWARD K.M. BILICH & SUZETTE M. MALVEAUX, CLASS ACTIONS AND OTHER MULTIPARTY LITIGATION: CASES AND MATERIALS 210 (2d ed. 2006) (describing conflict). For example, the Ninth Circuit identifies manageability as a factor courts should consider when determining the practical impact of monetary relief and whether this relief predominates. *See Dukes*, 603 F.3d at 617 (monetary damages predominate when their size and nature "raise . . . manageability concerns"). The Second Circuit permits (b)(2) certification when injunctive or declaratory relief predominates and judicial economy is served. Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001) (a judge may allow (b)(2) certification when "class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.").

Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution protect persons from deprivation of "life, liberty, or property without due process of law."[137] Because money is considered "property," district court judges must exercise restraint when requiring persons to participate in a class action involving monetary damages. Since members of a (b)(2) class are not entitled to notice of the lawsuit or a right to opt out, care must be taken to protect their due process rights. As the Supreme Court stated in dicta in *Ortiz v. Fibreboard Corp.*, the "inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class" because the "legal rights of absent class members . . . are resolved regardless of either their consent, or . . . their express wish to the contrary."[138]

In fact, in *Phillips Petroleum Co. v. Shutts*, the Court concluded that when plaintiffs sought *"wholly or predominately"* monetary damages in a mandatory class, absent class members could be bound even without contacts with the forum state sufficient to establish personal jurisdiction over them.[139] The Court concluded, however, that under such circumstances, prior to extinguishing an absent class member's cause of action, the class member must "receive notice plus an opportunity to be heard and participate in the litigation" and "at a minimum" be given "an opportunity to remove himself from the class," in addition to having his interests adequately represented.[140] Although the Court did not rule on what due process requires when plaintiffs seek monetary damages in a mandatory class that are less than exclusive or predominant,[141] the Court has suggested, in *Ticor Title Insurance Co. v. Brown*, that the right to opt out found in Rule 23(b)(3) may be necessary.[142] Because of the due process concerns of certifying a mandatory class with monetary damages claims, judges must be mindful to provide additional procedural protections when necessary.

Finally, a predominance test for monetary damages should take into account the special role Rule 23(b)(2) plays in enforcing civil rights. When drafting Rule 23(b)(2), the Advisory Committee specifically identified civil

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[137] U.S. CONST. amend. V; *id.* at amend. XIV, § 1.

[138] 527 U.S. 815, 846–47 (1999).

[139] 472 U.S. 797, 811–12 (1985) (emphasis added).

[140] *Id.*

[141] The Court noted its "continuing interest" in this question in *Adams v. Robertson*, but concluded that the petition for writ of certiorari had been improvidently granted in that case. 520 U.S. 83, 92 n.6 (1997).

[142] 511 U.S. 117, 121 (1994) (per curiam). However, this observation was made only as dicta in a hypothetical. Moreover, *Ticor* did not squarely address the question; this per curiam opinion only held that a writ of certiorari was improvidently granted and that the case should therefore be dismissed. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 n.3 (5th Cir. 1998) (noting "absence of a clearer statement by the Supreme Court"). The concept of due process has been explicitly incorporated in the Ninth Circuit's analysis for determining the predominance of monetary damages in a (b)(2) class. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 617 (9th Cir. 2010) (monetary damages predominate when their size or nature "raise[s] particular due process . . . concerns" for individual class member recovery), *cert. granted*, 131 S. Ct. 795 (Dec. 6, 2010) (No. 10-277).

rights cases as illustrative of Rule 23(b)(2) class actions.[143] Moreover, the Supreme Court and others have recognized Rule 23(b)(2)'s unique role as a vehicle specifically tailored to civil rights enforcement.[144]

B. Critique of the Rule 23(b)(2) Predominance Tests

Given the rationales justifying (b)(2) certification, and the various principles anchoring the availability of monetary damages under Rule 23(b)(2), how do the current predominance tests adopted by the courts of appeals for monetary damages fare? The courts of appeals' three distinct approaches each offer valuable insights.

1. *Incidental Test*

As an initial matter, the Fifth Circuit's approach—the incidental test—appropriately recognizes the availability of monetary relief under Rule 23(b)(2) as intended by the Rule's drafters, the Advisory Committee. Like all of the circuit courts to address the issue, the Fifth Circuit, in *Allison*, and its sister circuits correctly defer to legislative intent in light of the Rule's ambiguity. The Fifth Circuit and its followers, thus, fittingly use predominance as the standard for permitting monetary damages for a (b)(2) class.

The incidental test protects class members' due process rights by ensuring the cohesiveness and homogeneity of a (b)(2) class. However, by establishing such a high bar for damages claims that are allowed under Rule 23(b)(2), the Fifth Circuit compromises other important goals, such as protecting judicial discretion, civil rights enforcement, and judicial economy.

The incidental test promotes due process by using an objective standard that largely tracks the approach used by many courts for justifying the inclusion of back pay in Rule 23(b)(2) classes. Incidental damages, much like back pay, "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."[145] Incidental damages resemble the equitable remedy of back pay because of the close nexus between them and the injunctive or declaratory relief sought.[146] Moreover, like back pay, incidental damages do not threaten the cohesiveness of the class because they are "capable of computation by means of objective standards" rather than "intangible, subjective differences" for each class mem-

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[143] *See* FED. R. CIV. P. 23 advisory committee note ("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.").

[144] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of (b)(2) classes]."); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.43(1)(b), § 23–192 (3d ed. 2005) ("Rule 23(b)(2) was promulgated . . . essentially as a tool for facilitating civil rights actions.").

[145] *Allison*, 151 F.3d at 415.

[146] *See id.* (incidental damages are "concomitant with, not merely consequential to, class-wide injunctive or declaratory relief").

ber, and do not require "complex individualized determinations."[147] Because incidental damages mirror some of the characteristics of back pay and other equitable monetary relief, they fit well under the (b)(2) tent.

Moreover, many courts are drawn to the incidental predominance test because it offers simplicity and administrative ease. Most bright lines do. But just because incidental damages are like back pay, this does not mean these are the *only* damages that should be allowed under Rule 23(b)(2). The problem with the Fifth Circuit's approach is that it is unnecessarily restrictive. Equating non-predominant with "incidental" goes too far. This approach excludes monetary relief contemplated by the Advisory Committee—i.e., monetary damages that fall short of predominating but surpass incidental. Consequently, the incidental test suffers from being over-inclusive.[148]

The Fifth Circuit's approach fails to protect the broad judicial discretion so critical to the complex class certification decision. The incidental test, as applied in Title VII and similar cases, functions as a bright line test, forbidding district court judges from using all of the factual evidence and procedural options at their disposal. Their ability to analyze cases on a case-by-case basis and conduct the "rigorous analysis" required by *Falcon* is further undermined by the Fifth Circuit's interpretation of compensatory and punitive damages as being "by nature" incidental. For all intents and purposes, this interpretation shuts down the demanding examination that judges are expected to conduct and dictates the outcome of certification decisions for a whole class of cases.

Although incidental damages and back pay share a similar basis for justifying certification with injunctive or declaratory relief under (b)(2), discussed above, the similarities stop there. Courts have consistently permitted back pay in (b)(2) class actions, in large measure because of its importance to civil rights enforcement and Title VII's broad remedial purpose. By contrast, the Fifth Circuit's application of the incidental predominance test compromises plaintiffs' capacity to eradicate systemic discrimination, to be made whole, and to deter future misconduct.[149] This constricted approach undermines Title VII enforcement in a number of ways.

First, the incidental approach undermines civil rights enforcement by pressuring plaintiffs to forgo relief to which they are entitled under Title VII as a cost of class certification. Although Congress sought to bolster the rights of victims of intentional discrimination and expand remedies available

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[147] Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).

[148] *See* W. Lyle Stamps, Note, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. PUB. L. 411, 432–33, 447–48 (2003) (calling the *Allison* approach over-inclusive because Rule 23(b)(2) text and accompanying Advisory Committee note require that monetary damages be secondary, insignificant, or dependent upon injunctive or declaratory relief).

[149] For a fuller exploration of how the incidental approach compromises Title VII enforcement, see Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How* Allison v. Citgo's *Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405 (2005).

to them, the incidental test jeopardizes employees' ability to obtain full relief in the class action context. Plaintiffs may feel compelled to choose punitive over compensatory damages,[150] to limit the potential amount of damages for class members through the use of certain formulas, or to forgo damages altogether as the price of class certification. As a result, fewer monetary damages will be awarded to those who deserve them.[151]

Second, the incidental approach compromises Title VII enforcement by compelling plaintiffs to seek certification under Rule 23(b)(3), which imposes a more formidable certification standard not historically used in Title VII cases. This compulsion subjects plaintiffs to greater costs and burdens, thereby preventing those with small claims and limited resources from bringing potentially meritorious civil rights claims altogether. Because Rule 23(b)(3) requires plaintiffs to send personal notice to each individual class member who can be identified through reasonable effort,[152] it may be too expensive for plaintiffs to bring this type of class action. Additionally, because Rule 23(b)(3) requires plaintiffs to demonstrate that common questions predominate over individual ones and that a class action is superior to other mechanisms for resolving the dispute, plaintiffs may fail to meet this higher bar in those jurisdictions that presume damages call for individualized determinations. Thus, Wal-Mart's reassurance that, if plaintiffs cannot get a (b)(2) class certified, they can still seek (b)(3) certification[153] offers cold comfort.

Third, the incidental approach undermines civil rights enforcement by reducing the number of Title VII class actions. The Fifth Circuit's conclusion that compensatory and punitive damages are "by nature" non-incidental precludes (b)(2) certification.[154] Moreover, the Fifth Circuit's presumption that compensatory and punitive damages require individualized assessments also precludes (b)(3) certification. This is because, under such circumstances, the inescapable conclusion for the Fifth Circuit is that individual damages issues dwarf issues common to the class, in contravention of Rule 23(b)(3). This deprivation of the class action device will result in unchecked systemic employment discrimination because of the critical role the class action plays in Title VII enforcement.

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[150] This is because punitive damages arguably do not require individualized determinations that compensatory damages might require. Punitive damages are meant to punish and deter, so a claim for this type of damages does not hinge on facts unique to each member, but instead focuses on defendant's conduct toward the class as a whole. Moreover, punitive damages are more likely to be treated as an outgrowth of defendant's systemic conduct, and therefore to be considered incidental. *See id.* at 417–19.

[151] *See id.* at 419–25.

[152] FED. R. CIV. P. 23(c)(2)(B).

[153] *See* Brief for Petitioner, *supra* note 67, at 49.

[154] *Allison* contends that punitive damages may be awarded on a class-wide basis, without individualized inquiries, when all class members are subjected to the same discriminatory act. However, *Allison's* application of its incidental test in reality forecloses certification of such damages for Title VII cases because the court concludes that punitive damages are by nature dependent on non-incidental compensatory damages. 151 F.3d at 417–18, 419.

Although employees may pursue individual Title VII claims or have their interests represented by the Equal Employment Opportunity Commission (EEOC), these alternatives to aggregate litigation offer little solace. These avenues simply cannot replace the unique and important role class actions play in vindicating civil rights. An employer can more easily mask discrimination when challenged on an individual level than on a class-wide basis. Plaintiffs in class actions can craft remedies and injunctive relief far greater in scope than in individual cases. The class action mechanism enables individuals to pool their resources and thereby share the risks and burdens of bringing claims,[155] as well as more easily retain counsel. Without access to a class action, an individual may be too fearful of retaliation to challenge his or her employer. Finally, a finding of class-wide liability shifts the burden of proof in favor of the plaintiffs. By proving a pattern or practice of discrimination, each class member enjoys the rebuttable presumption that he or she was victimized by the discrimination, and the employer must prove otherwise.[156] In the event the EEOC decides to bring a pattern or practice case, its effectiveness as a government agency may be compromised by limited resources and politics.

While the incidental test purports to protect absent class members' due process rights, it may ultimately undermine them by preventing class members from vindicating their statutory rights at all. Here, the best may turn out to be the enemy of the good. For all of the above reasons, preservation of the class action is fundamental to Title VII enforcement.

Finally, the incidental test undermines judicial economy by making it so difficult for plaintiffs seeking monetary damages in addition to injunctive or declaratory relief to act collectively. The civil justice system does not enjoy the efficiencies of aggregate litigation given this difficulty. On balance, the incidental test fails to strike the right balance and poses more problems than solutions.

2. *Ad Hoc Balancing Test*

On the other end of the spectrum is the ad hoc balancing test, designed by the Second Circuit in *Robinson* for determining when monetary damages are permitted in a (b)(2) class. Like the incidental test, the ad hoc balancing test properly recognizes the availability of monetary relief under Rule 23(b)(2), resolving the text's ambiguity in accordance with the Advisory Committee's intent. The ad hoc approach, however, distinguishes itself from the incidental approach in important ways. The ad hoc approach respects

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[155] *See* Amchem Prods., Inc. v. Winsdor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)). Although an individual can recover up to $300,000 in damages under Title VII, the litigation may still be a negative value suit if the employee is not able to share high litigation costs with others.

[156] *See* Malveaux, *supra* note 149, at 417–19.

judicial discretion, promotes judicial economy, and supports civil rights enforcement. But it also poses due process concerns.

First, unlike the Fifth Circuit, the Second Circuit gives trial judges broad discretion when deciding whether and how to permit monetary damages to accompany injunctive or declaratory relief in a (b)(2) class action. By retaining this broad discretion, the Second Circuit promotes flexibility and respect for the trial courts. The ad hoc balancing approach promotes judicial autonomy by permitting district court judges to weigh the "relative importance of the remedies sought, given all of the facts and circumstances of the case" and to use their "informed, sound judicial discretion" when deciding (b)(2) certification.[157] Monetary damages under (b)(2) need not be incidental.

The problem, however, is that what judges gain in flexibility, they often lose in clarity and uniformity.[158] Prior to adopting its current predominance test, the Ninth Circuit, in *Molski v. Gleich*, rejected the incidental approach in favor of one that assessed the relative value of the relief sought based on the plaintiffs' valuation.[159] As the Ninth Circuit ultimately concluded in *Dukes*, using a predominance test that relied on plaintiffs' subjective intent was incomplete and resulted in "entirely discretionary" certification decisions.[160] Moreover, according to the Ninth Circuit, *Molski*'s lack of objective guidance on how to determine when monetary relief predominates allowed judges to effectively police (b)(2) class actions only when "a request for injunctive relief is obviously a ruse."[161] The Ninth Circuit's decision to overrule *Molski* makes sense given its sole reliance on exploring plaintiff motive and ineffectiveness at detecting manipulation.[162]

Second, the ad hoc approach properly takes into account judicial economy.[163] The test considers the practical impact monetary relief might have on a (b)(2) class by introducing efficiency and manageability into the calculus.[164] While both *Molski* and *Robinson* focus on plaintiff intent, *Robinson* requires district court judges to find that "class treatment would be efficient and manageable" as a condition of (b)(2) certification involving monetary relief.[165] In addition to this judicial economy requirement, the Second Circuit in *Robinson* also requires district court judges to check their reliance on plaintiffs' assessment against a more objective standard when

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[157] Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001) (citations omitted).

[158] *See* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 829 (2004) ("[*Robinson*] approach sacrifices simplicity for flexibility.").

[159] *See* Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003) ("[W]e have focused on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit.").

[160] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 616–17 (9th Cir. 2010) (criticizing "nebulous and imprecise inquiry into the plaintiffs' intent").

[161] *See id.* at 616.

[162] The Ninth Circuit also overturned *Molski* because of its failure to consider the practical impact monetary relief might have on the litigation itself. *See id.*

[163] Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 165 (2d Cir. 2001).

[164] *Id.* at 164.

[165] *Id.*

establishing the predominant value of the relief sought. Specifically, the Second Circuit not only requires a district court to determine "the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought," but also directs the court to, "at a minimum, satisfy itself . . . [that] even in the absence of a possible monetary recovery, *reasonable plaintiffs* would bring the suit to obtain the injunctive or declaratory relief sought."[166] This objective overlay is meant to prevent "sham requests" that "provide cover" for (b)(2) actions primarily brought for monetary recovery.[167] While this inquiry may prevent only gross manipulation, its coupling with the efficiency and manageability requirement justify *Robinson*'s survival and *Molski*'s demise.[168]

Although the Second Circuit's nod to judicial economy counterbalances the subjectivity involved in determining plaintiff intent, the Second Circuit may overreach. Unlike Rule 23(b)(3),[169] Rule 23(b)(2) does not explicitly include manageability as a certification factor. This is because Rule 23(b)(2) is premised on cohesiveness and homogeneity of a class that justify certification, which are not present for Rule 23(b)(3) classes. To rationalize certification of a class bound together solely by predominant common issues and the class action's superiority for resolving the dispute, Rule 23(b)(3) includes a manageability factor. Importing this factor into Rule 23(b)(2), however, may risk raising the (b)(2) certification bar to the point of effectively transforming this provision into (b)(3).

Third, the ad hoc approach promotes civil rights enforcement by preserving one of the most powerful Title VII enforcement mechanisms—the class action device.[170] Like the precedents permitting back pay, the Second Circuit's ad hoc approach supports Title VII's make whole remedial scheme and deters systemic misconduct.

But a permissive certification standard poses its own challenges. Preservation of (b)(2) certification for a class seeking monetary damages is a double-edged sword. For example, critics contend that the confluence of bad publicity, exorbitant litigation costs, and tremendous risk exerts intolerable pressure on defendants to settle potentially unmeritorious cases under the weight of class certification.[171] Some have argued that this concern is mini-

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[166] *Id.* (emphasis added) (citations omitted).

[167] *Id.*

[168] It is not clear whether *Molski* adopted the *Robinson* "reasonable plaintiffs" check given that *Molski* described the *Robinson* approach only as "similar," and not identical, to its own. *See* Molski v. Gleich, 318 F.3d 937, 950 n.15 (9th Cir. 2003). In *Dukes*, the Ninth Circuit implied that *Molski* did include *Robinson's* "reasonable plaintiffs" check. *See Dukes*, 603 F.3d at 617 ("To the extent *Molski* required the district court to inquire only into the intent of the plaintiffs and focus primarily on determining whether reasonable plaintiffs would bring suit to obtain injunctive or declaratory relief even in the absence of a possible monetary recovery . . . it is overruled.").

[169] FED. R. CIV. P. 23(b)(3)(D).

[170] *See* discussion *supra* Part II.B.2.

[171] *See, e.g.*, Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305, 343–45 (2001); *see also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

mized in the *Dukes* case because of Wal-Mart's power, size, and wealth. However, the fact that a mega-corporation can afford to pay ransom does not justify its being taken hostage. Rather, the solution to this problem is provided by Rule 23(f), which allows parties to petition the court of appeals for an immediate review of the class certification decision, rather than wait until the end of the litigation to challenge the decision.[172] Although the appellate court is not required to permit immediate review, warding off unfair settlement pressure on defendants is a compelling reason to do so.[173] Moreover, federal courts are more likely to review decisions that grant, rather than deny, class certification. Federal Courts are also more likely to affirm denials of class certification and reverse grants of class.[174] Both of these outcomes favor corporate defendants.

Finally, critics of the Second Circuit's lenient (b)(2) certification test also complain of the due process risk created by a mandatory class action involving monetary damages.[175] Because some class members might have a substantial financial stake in the litigation, they may prefer not to be bound by a class judgment, but to bring their own individual lawsuits instead. Without notice and the right to opt out, however, there is a risk that absent class members with significant monetary damages will be denied their property without due process of law. District court judges have readily addressed this due process concern with various procedural safeguards.[176] Some courts have imported notice and a right to opt out in mandatory class actions.[177]

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[172] *See* FED. R. CIV. P. 23(f).

[173] *See, e.g.*, Tardiff v. Knox Cnty., 365 F.3d 1, 3 (1st Cir. 2004) ("One reason for review is a threat of liability so large as to place on the defendant an 'irresistible pressure to settle.'") (citation omitted).

[174] *See* Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 13, 27 (2007); Brian Anderson, Partner, O'Melveny & Myers, LLP, Remarks at Federal Trade Commission Panel: Tools for Ensuring That Settlements Are "Fair, Reasonable, and Adequate" (Sept. 13, 2004), *in* 18 GEO. J. LEGAL ETHICS 1197, 1211 (2005) (Stating that defendants won 70% of interlocutory appeals over the five year period prior to the panel, and stating that the most common outcome of cases in those five years was reversal of class certification orders).

[175] The Second Circuit itself conceded that, unlike the ad hoc test, *Allison*'s "bright-line prohibition of (b)(2) class treatment for claims seeking non-incidental damages eliminates this risk." Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 166 (2d Cir. 2001).

[176] *See* RUBENSTEIN, *supra* note 89, at § 2:3 (describing various approaches used for certifying civil rights class actions under Rule 23(b)(2) when plaintiffs seek damages in addition to injunctive or declaratory relief); Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 897–99 (7th Cir. 1999) (same); Malveaux, *supra* note 149, at 415 n.52 (citing cases).

[177] *See, e.g.*, *In re* Monumental Life Ins. Co., 365 F.3d 408, 417 (5th Cir. 2004); Eubanks v. Billington, 110 F.3d 87, 93 (D.C. Cir. 1997) (citing circuit cases recognizing district court discretion to permit opt outs in mandatory classes). Wal-Mart's argument that opt outs are not permitted under Rule 23(b)(2) is, thus, out of step with a number of circuit courts of appeals to have addressed this issue. The text of Rule 23 also supports courts' power to provide notice and an opportunity to opt out: "For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class." FED. R. CIV. P. 23(c)(2)(A). Additionally, courts have relied on their discretionary power under Rule 23(d) to provide notice for (b)(2) classes. Courts may also use their discretion to permit absent class members to opt out of a mandatory class action. *See Robinson*, 267 F.3d at 166; Allison v. Citgo Petroleum Corp., 151 F.3d 402, 418 n.13 (5th Cir. 1998). Wal-Mart cites *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985), for the proposition that "[r]esolving monetary claims without providing no-

Other courts have certified class-wide liability and equitable issues under (b)(2) and individual damages claims under (b)(3) (i.e., hybrid certification). And others have certified solely class-wide liability issues under (b)(2), leaving the individual damages claims to be pursued individually.[178] Thus, using these safeguards, the courts have been able to afford absent class members due process even when they seek significant damages in mandatory class actions. The presence of monetary damages—even non-incidental ones—need not break down the cohesiveness of a class bound by a common injury and the need for injunctive or declaratory relief. On balance, the ad hoc test offers more advantages than the incidental one.

3. *Objective Effects Test*

In *Dukes*, the Ninth Circuit proffers a new "objective effects test" for determining whether monetary relief predominates over injunctive or declaratory relief under Rule 23(b)(2). Although the Ninth Circuit's approach has yet to be tested, it purports to build on the strengths and weaknesses of its predecessors,[179] including its own past approach.[180] Like all the other circuits to have considered the propriety of monetary relief in a (b)(2) class, the Ninth Circuit correctly anchors its inquiry in whether such relief predominates by relying on the Advisory Committee note's guidance. Thus, the *Allison*, *Robinson*, and *Dukes* triumvirate ought to have put to bed the question of whether Rule 23(b)(2)'s silence on the availability of monetary relief should be resolved by examining the drafters' intent.

Using predominance as its anchoring principle, the Ninth Circuit created an objective effects test that balances various competing interests. The *Dukes* approach attempts to do this balancing by including non-incidental damages in (b)(2) classes—contrary to *Allison*—while retreating from a plaintiff-centered and subjective analysis—contrary to *Robinson* and *Molski*, respectively.[181] *Dukes* comes down the middle, creating a predominance test that borrows the best from its sister circuits. In its short lifetime, the Ninth Circuit's predominance test seems to provide the appropriate judicial discretion, protect the due process rights of absent class members, encourage civil rights enforcement, and promote judicial economy.

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tice and opt-out rights to absent class members violates due process." Reply Brief for Petitioner at 20, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (Mar. 17, 2011). However, *Shutts* is not so broad. *Shutts* makes clear that its holding applies only to when plaintiffs' claims are "wholly or predominately for money judgments." 472 U.S. at 811-812 n.3. Thus, *Shutts* explicitly does not address monetary judgments for a lesser amount or back pay. *See also id.* ("We intimate no view concerning other types of class actions, such as those seeking equitable relief.").

[178] *See* FED. R. CIV. P. 23(c)(4). *See also Robinson*, 267 F.3d at 167–69 (certifying plaintiffs' pattern-or-practice disparate treatment claim for (b)(2) class treatment, even if the remedial stage will ultimately be resolved on a non-class basis).

[179] *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 615–17 (9th Cir. 2010).

[180] *See* discussion of *Molski supra* Part III.B.2.

[181] *Dukes*, 603 F.3d at 616–17.

First, the objective effects test upholds judicial discretion by giving the district courts ample latitude in determining predominance. Criticizing the Fifth Circuit's incidental test for "usurp[ing] the district courts' authority granted by Rule 23," the Ninth Circuit restores the broad discretion necessary for conducting a rigorous class certification analysis.[182] The objective effects test does this by not requiring the same kind of nexus between monetary relief and injunctive or declaratory relief that has justified the inclusion of back pay and other types of equitable monetary relief in a (b)(2) class. The Ninth Circuit does not require that the monetary relief sought be equitable or incidental. While *Dukes* provides factors that a district court should use when determining if monetary relief predominates, none of these are dispositive and the court may consider other factors it deems relevant.[183]

This broad discretion, however, does not go unchecked. *Dukes* embraces the objectivity and practicality of the *Allison* incidental test. *Dukes* does this by rejecting the plaintiff-centric and subjective nature of the *Robinson* and *Molski* tests, respectively, and by introducing its own practical considerations into the predominance inquiry. More specifically, factors relevant to whether monetary relief predominates involve the impact such relief will have on the litigation. The relief may impact key procedures, issues, the potential need for individualized hearings, and manageability.[184] The district court is tasked with, on a case-by-case basis, determining how the presence of monetary damages claims will actually play out in the litigation. While this swing towards objectivity is generally laudable, like the Second Circuit, the Ninth Circuit must be careful that its importation of manageability considerations does not threaten to transform Rule 23(b)(2) to (b)(3).

Second, the objective effects test affirmatively recognizes the relevance of absent class members' due process rights. One of the factors a district court should consider when determining if monetary relief predominates is if its "size and nature—as measured by recovery per class member—raise particular due process . . . concerns."[185] Furthermore, like cases awarding back pay, the objective effects test requires that the monetary relief support class cohesiveness, by not becoming " 'superior [in] strength, influence, or authority' to injunctive and declaratory relief."[186] *Dukes* ensures that monetary damages do not become superior by considering the practical ways damages would affect the litigation. Although *Dukes* introduces new criteria for determining whether monetary relief threatens class cohesiveness, the goal is the same. Any monetary relief must buttress class solidarity, not endanger it.

Third, like cases permitting back pay under (b)(2), the Ninth Circuit objective effects test promotes civil rights enforcement, in general, and Title

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[182] *Id.* at 616 (citation omitted).
[183] *Id.* at 621.
[184] *See id.* at 617.
[185] *Id.* at 617.
[186] *Id.* at 616 (citation omitted).

VII's broad remedial scheme, in particular. By permitting non-incidental damages in a (b)(2) class, the objective effects test recognizes Congress's intent in drafting Title VII to eradicate discrimination and make victims whole. It also satisfies the Advisory Committee's intent in drafting Rule 23(b)(2) as a vehicle for accomplishing Title VII's objectives.[187] The class certification bar is not so high as to preclude potentially meritorious civil rights cases from being certified when appropriate.[188]

Finally, the objective effects test promotes judicial economy by enabling plaintiffs to proceed collectively when there is group-wide harm that necessitates group-wide relief. Judges, counsel and the parties get the benefits of aggregate over piecemeal litigation. By incorporating manageability as one component among many for (b)(2) certification, the Ninth Circuit's new test encourages the efficiencies collective actions are designed to provide.

In sum, the Ninth Circuit's new predominance test, while in its infancy, suggests how courts can properly balance important competing interests for employment discrimination class actions.

C. Comparative Analysis of Predominance Tests

The *Allison*, *Robinson*, and *Dukes* trio offer important insights that may guide the Supreme Court in its determination of what circumstances justify inclusion of monetary damages in a Rule 23(b)(2) class action. On balance, *Allison*'s incidental test poses more problems than solutions. Although the Fifth Circuit's incidental test is objective and protective of due process rights, the test's primary flaw is its overly restrictive definition of predominance. As a result, *Allison* deprives the district courts of the broad discretion necessary to conduct a rigorous class certification analysis, deprives victims of discrimination of one of the most critical civil rights enforcement tools—the class action—and deprives the civil justice system of the efficiencies of aggregate litigation.

In contrast, *Robinson*'s ad hoc balancing test does a better job at striking the right balance. The Second Circuit's ad hoc test respects judicial discretion, promotes judicial economy, and champions civil rights enforcement. But this more permissive class certification standard may unfairly pressure defendants to settle and create due process concerns for absent class members. These concerns, however, are alleviated by the potential availability of

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[187] *See id.* at 616 ("*Allison* approach is in direct conflict with the text of the Advisory Committee's Note").

[188] In fact, the objective effects test may result in greater access to (b)(2) certification. In a class action brought by employees of a Chinese language newspaper alleging violations of various California labor laws, the Ninth Circuit upheld a federal district court's (b)(2) certification on the grounds that the monetary relief sought was on "equal footing" with the injunctive relief. So long as the monetary relief did not predominate over the injunctive relief, certification was appropriate. *See* Wang v. Chinese Daily News, Inc., 623 F.3d 743, 753–55 (9th Cir. 2010).

immediate appeal of the certification decision and the availability of numerous procedural protections.

Finally, *Dukes*' objective effects test, despite its infancy, may have the most to offer the Supreme Court because of the Ninth Circuit's opportunity to learn from its sister circuits, and even itself. *Dukes* attempts to strike the right balance by including non-incidental damages—contrary to *Allison*—while retreating from a plaintiff-centered and subjective analysis—contrary to *Robinson* and *Molski*. While the Ninth Circuit restores the broad discretion necessary for the complex class certification decision, it also limits and channels such discretion by introducing practical factors that address manageability and due process, thereby promoting judicial economy. Moreover, like back pay, monetary relief under the objective effects test is justified because of its importance in eradicating systemic discrimination and making victims whole. In sum, the most recent predominance test, formulated in *Dukes,* may turn out to be the most instructive.

Conclusion

The *Allison*, *Robinson*, and *Dukes* circuit split makes it clear that, although there are three distinct approaches for determining the predominance of monetary damages, there has been only one way of resolving the question of whether Rule 23(b)(2)'s silence precludes monetary relief altogether. All of the courts of appeals to have ruled on the issue have relied on the Advisory Committee's guidance, an approach warranted regardless of which primary school of statutory construction—textualism or intentionalism—is used. Whether clarifying Rule 23(b)(2)'s ambiguous text or avoiding an absurd outcome that would result from the Rule's unambiguous text, the Court should consult the Advisory Committee notes to determine the availability of monetary relief. The notes' unique development and role make them particularly reliable and worthy of significant deference.

The Advisory Committee notes make clear that the Rule's drafters did not intend to ban *all* forms of monetary relief, but only a small subset—exclusive or predominant monetary damages. Thus, the answer to the question of whether claims for monetary relief can be certified under Rule 23(b)(2) is a resounding yes. Wal-Mart's contention that there are *no* circumstances under which monetary relief is justified under (b)(2) contradicts well-established law and conflates the separate approaches courts have used for permitting back pay, on the one hand, and monetary damages, on the other.

Because of its equitable nature and susceptibility to common proof, back pay has long been permitted in Rule 23(b)(2) class actions. As a partner to injunctive and declaratory relief, back pay has played a central role in eradicating discriminatory practices and making victims whole under Title VII's broad remedial scheme. Without exception, all of the courts of appeals to have ruled on the issue have recognized the compatibility of back pay and Rule 23(b)(2) in the Title VII context.

In contrast, courts have permitted (b)(2) certification of claims for monetary damages (compensatory and punitive) so long as they are not the exclusive or predominant form of relief sought. Because damages may not lend themselves to common proof, predominance ensures that the class remains sufficiently cohesive to provide due process, while sufficiently flexible to provide the efficiency of aggregate litigation. Predominance has been the linchpin to certification of claims involving monetary damages under Rule 23(b)(2). Thus, what is at issue is *how* courts should determine when damages predominate over injunctive or declaratory relief, not whether they should be permitted at all.

The predominance tests set forth in the *Allison*, *Robinson*, and *Dukes* trio may aid the Supreme Court in its determination of what circumstances justify inclusion of monetary damages in a Rule 23(b)(2) class action. Based on the principles of judicial discretion, judicial economy, due process, and civil rights enforcement, a comparative analysis of the three approaches suggests that, although *Dukes* is youngest of the trio, it may turn out to be the wisest. *Dukes* takes the best from its sister circuits by permitting non-incidental damages—contrary to *Allison*—while retreating from a plaintiff-centered and subjective analysis—contrary to *Robinson* and *Molski*. The Ninth Circuit resurrects the broad judicial discretion required by a rigorous class certification analysis, and yet introduces practical factors that address manageability and due process concerns, thereby advancing judicial economy. Finally, the *Dukes* test offers promise, as contemplated by the Advisory Committee and Title VII's drafters, that Rule 23(b)(2) will continue to aid those fighting to rid society of systemic discrimination and repair those ravaged by its consequences.