1-1-1985

# Defendant Class Actions and Federal Civil Rights Litigation

Angelo N. Ancheta
*Santa Clara University School of Law*, aancheta@scu.edu



Recommended Citation
33 UCLA L. Rev. 283

# COMMENTS

## DEFENDANT CLASS ACTIONS AND FEDERAL CIVIL RIGHTS LITIGATION

### INTRODUCTION

The class action[1] plays a central role in the enforcement of federal civil rights.[2] Frequently, plaintiffs bring suit on behalf of a class in order to end a defendant's discriminatory or unconstitutional practices.[3] Only rarely, however, does a civil rights suit contain a *defendant* class action, designed to end the illegal practices of multiple defendants.[4] Clearly au-

1. Rule 23 of the Federal Rules of Civil Procedure governs class actions in the federal courts. FED. R. CIV. P. 23; *see infra* notes 69–70, 82–83.

2. Civil rights actions constitute the largest percentage of class action suits filed in federal court. *See* 1984 DIRECTOR AD. OFF. U.S. CTS. ANN. REP. 486–88 (Table X-5) (38.6% in 1983; 37.3% in 1984).

Civil rights claims are raised under a number of federal statutes, the most important being the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), which provides for constitutional claims against state and local officials, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), which provides for employment discrimination claims against public and private employers. *See infra* notes 40–41. This Comment focuses on § 1983 and Title VII class actions, but the analysis is equally applicable to cases involving voting rights, *see* 42 U.S.C. §§ 1971, 1973 to 1973aa-6 (1982), or racial discrimination in employment, *see* 42 U.S.C. § 1981 (1982).

3. Civil rights class actions typically involve injunctive relief for the plaintiff class as the primary claim. Ancillary claims for damages may be raised under 42 U.S.C. § 1983 (1982). *See infra* note 40. Additionally, Title VII of the Civil Rights Act of 1964 allows an award of back pay in employment discrimination cases. 42 U.S.C. § 2000e-5(g) (1982). For a general discussion of injunctive and declaratory relief in civil rights class actions, see 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1776 (1972 & Supp. 1985).

4. A common defendant class action is one in which plaintiffs bring suit against a class of semiautonomous public officials in order to challenge the constitutionality of a state statute. Another type of civil rights defendant class action is an employment discrimination class action in which the litigation is expanded to include both a plaintiff class of employees and a defendant class of employers who are linked by a trade or collective bargaining agreement. *See infra* notes 50–67 and accompanying text.

thorized by Rule 23 of the Federal Rules of Civil Procedure,[5] the defendant class action is a powerful, albeit uncommon, procedure for vindicating constitutional and statutory civil rights.[6]

Defendant class actions provide two advantages over single-party litigation. First, defendant class actions foster judicial economy.[7] By consolidating a large number of parties and defenses in a single proceeding, a defendant class action prevents the relitigation of identical issues in multiple suits. Second, defendant class actions enhance the enforcement of substantive rights.[8] A judgment against a class of defendants ensures a uniform outcome for all plaintiffs by imposing a single classwide remedy.[9]

Despite these advantages, certification of defendant class actions under Rule 23 has become a source of conflict in the federal courts.[10] Almost invariably, civil rights de-

5. "One or more members of a class may sue *or be sued* as representative parties on behalf of all . . . ." FED. R. CIV. P. 23(a) (emphasis added).

6. Outside the civil rights context, defendant class actions have been certified in a variety of settings: patent infringement, *see, e.g.*, Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc., 285 F. Supp. 714 (N.D. Ill. 1968), antitrust, *see, e.g.*, Thillens, Inc. v. Community Currency Exch. Ass'n, 97 F.R.D. 668 (N.D. Ill. 1983); Management Television Sys. v. National Football League, 52 F.R.D. 162 (E.D. Pa. 1971); Research Corp. v. Pfister Associated Growers, 301 F. Supp. 497 (N.D. Ill. 1969), securities, *see, e.g.*, *In re* Itel Sec. Litig., 89 F.R.D. 104 (N.D. Cal. 1981); *In re* Gap Stores Sec. Litig., 79 F.R.D. 283 (N.D. Cal. 1978), corporate shareholder suits, *see, e.g.*, Dudley v. Southeastern Factor & Fin. Corp., 57 F.R.D. 177 (N.D. Ga. 1972), and land title claims, *see, e.g.*, Cayuga Indian Nation v. Carey, 89 F.R.D. 627 (N.D.N.Y. 1981); Oneida Indian Nation v. New York, 85 F.R.D. 701 (N.D.N.Y. 1980).

7. *See infra* notes 29–39 and accompanying text.

8. *See infra* notes 40–67 and accompanying text.

9. This Comment does not address the problems of administering remedies in civil rights defendant class actions. In most cases involving equitable relief, a single injunction or declaratory judgment will be effective against a class of defendants, since the behavior of the individual defendants will have been judged identical or highly similar. If, however, significant differences exist among defendant class members, remedial action may raise new problems of administration. *See* Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 902–06 (1978). It is unlikely, though, that a defendant class will be certified at all if differences among class members are great. *See infra* notes 89–105 and accompanying text.

10. The Supreme Court has never directly addressed the question of defendant class certification under Rule 23, although in recent years the Court has encountered suits containing defendant classes. *See, e.g.*, General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (defendant class composed of contractors, trade associations, and union); Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979) (defendant class of directors of mental health and

fendant class actions have arisen in litigation involving both a plaintiff class and a defendant class—a "bilateral" class action.[11] Plaintiff class actions based on civil rights claims usually are certified under Rule 23(b)(2),[12] which is applied when equitable relief with respect to a class is appropriate.[13] Because defendant class actions are certified in conjunction with plaintiff class actions and because civil rights enforcement is at the heart of the litigation,[14] most courts have cer-

---

mental retardation facilities); Zablocki v. Redhail, 434 U.S. 374 (1978) (defendant class of county clerks); Trainor v. Hernandez, 431 U.S. 434 (1977) (defendant class of state public aid officials); Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (defendant class of wardens, jailers, and sheriffs).

Currently, an intercircuit conflict exists concerning the certification of defendant class actions under Rule 23(b)(2). Among those courts that have addressed the question, the Courts of Appeals for the Fourth and Sixth Circuits have ruled explicitly that a defendant class action may not be certified under Rule 23(b)(2). Thompson v. Board of Educ., 709 F.2d 1200, 1203–04 (6th Cir. 1983) (defendant class of school boards); Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980) (same), *cert. denied*, 449 U.S. 1129 (1981); *see infra* notes 158–62 and accompanying text. The Court of Appeals for the Second Circuit has held that a defendant class action may be maintained under Rule 23(b)(2). Marcera v. Chinlund, 595 F.2d 1231, 1238 (2d Cir.) (defendant class of sheriffs), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); *see infra* note 150.

Rulings in the district courts have been equally mixed. *Compare* Doss v. Long, 93 F.R.D. 112, 119 (N.D. Ga. 1981) ("With only isolated exceptions, the courts universally have allowed plaintiffs to maintain (b)(2) class actions against a class of defendants." (citation omitted)) *with* Coleman v. McLaren, 98 F.R.D. 638, 651 (N.D. Ill. 1983) ("[Some cases] bend Rule 23(b)(2) out of shape to produce [the] result [of certification]. Other cases . . . simply endorse and accept the policy considerations to reach the same result. In this Court's view neither such approach is legitimate.").

11. *See* cases cited *infra* note 43.

12. FED. R. CIV. P. 23(b)(2); *see infra* note 70.

13. *See* FED. R. CIV. P. 23 advisory committee note ("Illustrative [of (b)(2) class actions] 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."), *reprinted in* 39 F.R.D. 98, 102 (1966) [hereinafter cited as Advisory Committee Note]; 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.02[2.—6], at 23-52 to 23-53 (1985) ("Rule 23(b)(2) was enacted in part for the specific purpose of assuring that the class action device would be available as a means of enforcing the civil rights statutes. . . . [T]he discrimination or other deprivation of rights at issue will generally be applicable to an entire class of individuals.") [hereinafter cited as MOORE'S FEDERAL PRACTICE]; *infra* notes 198–206 and accompanying text. *See generally* 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1776.

14. For a discussion of substantive law's influence on procedural requirements in the certification of civil rights class actions, see Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868 (1979). *See generally* 7 C. WRIGHT & A. MILLER, *supra* note 3, § 1771; 7A *id.* § 1776.

tified defendant classes under subdivision (b)(2) as well.[15] Yet the reasoning of these courts has been lax, often ignoring the requirements of Rule 23.[16] Only a few courts have read the requirements of the rule more circumspectly, limiting certification because Rule 23(b)(2) is inapplicable to defendant classes.[17]

In part, the conflicting interpretations of Rule 23 may be attributed to judicial inexperience with defendant classes.[18] On a more fundamental level, however, the vari-

15. *See infra* notes 139–57 and accompanying text.

16. *See infra* notes 145–57 and accompanying text.

17. *See infra* notes 158–65 and accompanying text.

18. Nevertheless, defendant class actions are rooted in the common law. The historical antecedent of the class action—the English Court of Chancery's bill of peace—served as an equitable procedure by which a plaintiff could bind a group of defendants by a single ruling. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 200–01 (1950). Usually, bills of peace were issued against tenants for the payment of rent, *see, e.g.*, How v. Tenants of Bromsgrove, 23 Eng. Rep. 277 (Ch. 1681), or against parishioners for the payment of parson's tithes, *see, e.g.*, Brown v. Vermuden, 22 Eng. Rep. 796 (Ch. 1676), and in the sixteenth and seventeenth centuries, bills of peace were used as frequently against a group of defendants as by a group of plaintiffs. *See* Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 880 (1977) [hereinafter cited as Yeazell, *Social Context*].

In Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853), the Supreme Court first endorsed the use of a defendant class as a procedure for binding a group of defendants who possessed common legal and factual backgrounds. Settling a property dispute between two factions of the Methodist Episcopal Church, the Court stated:

> The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.

*Id.* at 302.

Moreover, American rules of equity and civil procedure have codified the potential use of defendant class actions. Prior to Smith v. Swormstedt, the Supreme Court promulgated Equity Rule 48, which provided in part:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs *and the defendants* in the suit properly before it.

42 U.S. (1 How.) lvi (1842) (emphasis added). Rule 48's effects were limited, however, because judgments were not binding on absentees. Seventy years later, the Court promulgated Equity Rule 38: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue *or defend* for the whole." 226 U.S. 659 (1912) (emphasis added). Replacing Equity Rule 38,

ous readings of Rule 23 illuminate an inconsistency in the rule itself. Rule 23 is designed primarily for plaintiff class certification,[19] and theoretical justifications for the current wording of the rule reflect a bias toward plaintiff class certification.[20] Analysis of the defendant class action as a distinct procedural device is therefore essential.[21]

This Comment explores the viability of defendant class actions in the context of federal civil rights litigation.[22] Ini-

---

the original Rule 23 of the Federal Rules of Civil Procedure, promulgated in 1938, also provided for defendant classes:

> If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or *be sued,* when the character or the right to be enforced for *or against* the class . . . .

Fed. R. Civ. P. 23(a) (superceded), 308 U.S. 689 (1939) (emphasis added). The current Rule 23, amended in 1966, has maintained the potential use of defendant class actions in contemporary litigation. *See infra* notes 69–70.

19. *See infra* notes 167–71 and accompanying text.

20. *See infra* notes 190–207 and accompanying text.

21. As one writer has stated, "[N]oting the deficiencies of Rule 23 with respect to defendant class actions, [commentators] have argued that the drafters of present Rule 23 did not vigorously analyze the functions and problems of defendant class actions within the context of the revised rule." 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.45, at 373 (2d ed. 1985). Indeed, defendant class actions have spawned a significant body of commentary in recent years. *See, e.g.,* 3B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 23.40[6]; 1 H. NEWBERG, *supra,* §§ 4.45–4.70; 7 C. WRIGHT & A. MILLER, *supra* note 3, § 1770; Anderson & Roper, *Limiting Relitigation by Defendant Class Actions from Defendant's Viewpoint,* 4 J. MAR. J. PRAC. & PROC. 200 (1971); Max, *Defendant Class Suits as a Means of Legal and Social Reform,* 13 CUM. L. REV. 453 (1983); Parsons & Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23,* 4 ECOLOGY L.Q. 881 (1975); Williams, *Some Defendants Have Class: Reflections on the GAP Securities Litigation,* 89 F.R.D. 287 (1981); Wolfson, *Defendant Class Actions,* 38 OHIO ST. L.J. 459 (1977); Note, *The Juridical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship Between Standing and Typicality,* 58 B.U.L. REV. 492 (1978) [hereinafter cited as Note, *Juridical Links*]; Note, *Certification of Defendant Classes Under Rule 23(b)(2),* 84 COLUM. L. REV. 1371 (1984) [hereinafter cited as COLUMBIA Note]; Comment, *Federal Rule of Civil Procedure 23: Class Actions in Patent Infringement Litigation,* 7 CREIGHTON L. REV. 50 (1973); Note, *Defendant Class Actions,* 91 HARV. L. REV. 630 (1978) [hereinafter cited as HARVARD Note]; Note, *Personal Jurisdiction and Rule 23 Defendant Class Actions,* 53 IND. L.J. 841 (1978); Note, *Statutes of Limitations and Defendant Class Actions,* 82 MICH. L. REV. 347 (1983) [hereinafter cited as Note, *Statutes of Limitations*]; Note, *Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative,* 9 VAL. U.L. REV. 357 (1975) [hereinafter cited as VALPARAISO Note].

For early commentary on defendant class actions, see Note, *Federal Class Actions: A Suggested Revision of Rule 23,* 46 COLUM. L. REV. 818, 827–29 (1946) [hereinafter cited as Note, *Suggested Revision*]; Note, *Action Under the Codes Against Representative Defendants,* 36 HARV. L. REV. 89 (1922).

22. The analysis in this Comment need not be limited to applications in the

tially, the Comment presents an overview of the defendant class action procedure and discusses its applicability to cases involving constitutional and statutory civil rights.[23] The Comment then examines the requirements for certifying defendant classes and analyzes the conflicting approaches that courts have adopted in this area.[24] Finally, the Comment discusses and criticizes Rule 23's treatment of the defendant class action[25] and offers a joinder-based theory of defendant class certification that attempts to justify the proper use of defendant classes under the rule.[26]

## I. BACKGROUND: ECONOMY, ENFORCEMENT, AND DEFENDANT CLASSES

Traditionally, class litigation has been a means by which parties too numerous to gather individually in one forum may be bound by a judgment after a named representative has advocated class interests.[27] Although a rarity in modern litigation,[28] the defendant class action can be, in many instances, more effective than single-party litigation. By consolidating a large number of defenses in a single proceeding, a defendant class action can encourage judicial economy and prevent injustices that could arise from inconsistent adjudications of the same issue. This Part examines the effectiveness of the defendant class action in promoting both economy in litigation and broad injunctive relief in the civil rights field.

---

substantive area of civil rights. The parameters defining the analysis are (1) Rule 23(b)(2) as a source of judicial uncertainty in defendant class certification, (2) the influence of substantive law on courts' ignoring procedural limitations, and (3) the inadequacy of current theoretical justifications for defendant class actions. Because most suits falling within these contours have been civil rights suits, the Comment draws upon civil rights cases as examples. The analysis may be extended to other substantive areas, such as securities regulation or environmental protection, in which equitable relief is sought to benefit a plaintiff class.

23. *See infra* notes 27–67 and accompanying text.

24. *See infra* notes 68–166 and accompanying text.

25. *See infra* notes 167–206 and accompanying text.

26. *See infra* notes 207–21 and accompanying text.

27. *See generally* 7 C. WRIGHT & A. MILLER, *supra* note 3, § 1751; Yeazell, *Social Context, supra* note 18; Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1980) [hereinafter cited as Yeazell, *Group Litigation—Part I*]; Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980) [hereinafter cited as Yeazell, *Group Litigation—Part II*].

28. *Cf. supra* note 18 (discussing history of defendant class actions).

A. *Judicial Economy*

An underlying goal of class litigation is the promotion of judicial economy.[29] By allowing one large suit to replace numerous single actions, a class action limits the number of suits in federal court and conserves judicial resources.[30] A defendant class action promotes judicial economy by extending over absentees the scope of collateral estoppel,[31] or issue preclusion, which prevents the relitigation of issues actually litigated and essential to the judgment of the first suit.[32] If a plaintiff sues an individual defendant and wins,

29. *See* Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUD. 349 (1978); *see also* R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.8 (2d ed. 1977).

30. Although they may promote judicial economy by consolidating a large number of suits in a single adjudication, plaintiff class actions also may drain judicial resources by fostering litigation that otherwise might not have been pursued because individual transaction costs were preemptive. *See* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COMM. L. REV. 501 (1969). Nevertheless, a fundamental goal of plaintiff class actions is overcoming transaction costs so that substantive rights may be vindicated. *See Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1353–71 (1976) [hereinafter cited as *Developments*].

31. The basic rule of collateral estoppel is that the preclusion of issues may not be asserted against individuals who were not parties to the previous action. *See generally* 1B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶¶ 0.441[3], 0.411[1]; McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 709–10 (1976). However, the long-standing mutuality doctrine, which required that individuals asserting collateral estoppel have been parties to the original litigation, has broken down in recent years. Defendants absent from earlier litigation may assert collateral estoppel against plaintiffs who have lost with respect to previously litigated issues. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971). Additionally, new plaintiffs may assert collateral estoppel offensively against defendants bound in earlier litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); *cf.* United States v. Mendoza, 464 U.S. 154 (1984) (nonmutual offensive collateral estoppel does not apply in suits against United States). However, plaintiffs still may not assert collateral estoppel against defendants who were not involved in previous litigation without violating due process. Thus, the usefulness of class litigation for binding additional defendants remains compelling.

32. Collateral estoppel effects on future litigation may create statute of limitations problems. If a defendant class is decertified, then plaintiffs may be unable to continue a suit on an individual basis because of the statute of limitations. In American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), the Supreme Court held that the statute of limitations tolls with respect to absent plaintiff class members when the suit is commenced. *See also* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) (statute of limitations tolls with respect to individual actions if class decertified). However, courts have not directly addressed the issue of when the statute of limitations should toll in defendant class actions. *See* Appleton Elec. Co. v. Graves Truck Line, 635 F.2d 603 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981). *See generally* 1 H. NEWBERG, *supra* note 21, § 4.52; Note, *Statutes of Limitations*, *supra* note 21.

the judgment cannot be used to prevent the same issues from being contested by other defendants sued in subsequent litigation.[33] But if a plaintiff prevails in a defendant class action, the judgment binds all defendants included in the class.[34]

*Callahan v. Wallace*,[35] for example, involved a challenge to the common practice among Alabama justices of the peace of retaining a percentage of the fee obtained in traffic violation cases. Because the justices had pecuniary interests in the cases, the practice was declared unconstitutional by the United States Supreme Court in *Bennett v. Cottingham*,[36] in which the Court affirmed a lower court decision enjoining public officials in a single Alabama county from continuing the practice. However, after the Court's decision in *Bennett*, the state attorney general issued several informal opinions stating that the *Bennett* decision applied only to the named defendants.[37] Consequently, plaintiffs initiated *Callahan v. Wallace* as a bilateral class action with a plaintiff class composed of all persons tried for traffic offenses in the Alabama courts and a defendant class composed of all justices of the peace, sheriffs, and state troopers in Alabama.[38] The court upheld certification of both classes and issued an injunction prohibiting all defendants from trying or bringing traffic cases in the justice courts.[39] Because the suit proceeded as a defendant class action, the plaintiffs avoided the burden of multiple suits by binding all members of the defendant class in a single adjudication.

### B. *Civil Rights Enforcement*

As *Callahan* illustrates, in addition to promoting judicial economy, defendant class actions can facilitate the enforcement of constitutional and statutory rights. Claims raised

33. If the plaintiff loses, however, subsequent defendants could assert collateral estoppel against the plaintiff. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

34. Stare decisis could bind the parties in future litigation, but plaintiffs still would have to bring individual suits in order to prevent all defendants from acting illegally. *See* HARVARD Note, *supra* note 21, at 630–31.

35. 466 F.2d 59 (5th Cir. 1972).

36. 393 U.S. 317 (1969), *aff'g per curiam* 290 F. Supp. 759 (N.D. Ala. 1968).

37. *Callahan*, 466 F.2d at 61 n.2.

38. *Id.* at 60.

39. *Id.*

under 42 U.S.C. § 1983[40] against state and local government officials and under Title VII of the Civil Rights Act of 1964[41] against private and public[42] employers have been the basis for bilateral class actions in which both plaintiff and defendant classes have been certified.[43]

---

40. 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

41. Title VII of the Civil Rights Act of 1964 provides in relevant part:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982). Title VII allows injunctive relief, reinstatement, and hiring with or without back pay to remedy unlawful employment practices. *Id.* § 2000e-5(g).

42. Defendant class actions against public employers usually contain both § 1983 and Title VII claims. *See, e.g.*, Thompson v. Board of Educ., 71 F.R.D. 398 (W.D. Mich. 1976) (defendant class of school boards setting allegedly discriminatory maternity leave policies), *rev'd*, 709 F.2d 1200 (6th Cir. 1983); Paxman v. Wilkerson, 390 F. Supp. 442 (E.D. Va. 1975) (same), *rev'd sub nom.* Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1129 (1981).

43. *See, e.g.*, Marcera v. Chinlund, 595 F.2d 1231 (2d Cir.) (plaintiff class of pretrial detainees seeking contact visitation rights; defendant class of county sheriffs), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972) (plaintiff class of persons fined in justice courts for traffic violations and challenging judicial fee system; defendant class of justices of the peace, sheriffs, and state troopers); Harris v. Graddick, 593 F. Supp. 128 (M.D. Ala. 1984) (plaintiff class of black voters; defendant class of state election officials); Lake v. Speziale, 580 F. Supp. 1318 (D. Conn. 1984) (plaintiff class of individuals challenging incarceration for failure to provide child support; defendant class of judges); Doss v. Long, 93 F.R.D. 112 (N.D. Ga. 1981) (plaintiff class of civil litigants challenging judicial fee system; defendant class of judges); Leist v. Shawano County, 91 F.R.D. 64 (E.D. Wis. 1981) (plaintiff class of welfare recipients; defendant class of municipalities); Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329 (E.D. Pa. 1978) (plaintiff class of employees alleging racial discrimination; defendant class composed of contractors, trade associations, and union), *aff'd mem.*, 648 F.2d 923 (3d Cir. 1981) (en

The clear advantage of using the defendant class action procedure is that substantive rights can be enforced on a wider scale than is possible through a single-party suit.[44] A defendant class action can bind a statewide class of public

banc), *rev'd on other grounds sub nom.* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982); Hobson v. Pow, 434 F. Supp. 362 (N.D. Ala. 1977) (plaintiff class of disenfrachised men convicted of "assault and battery on the wife"; defendant class of voting registrars); Thompson v. Board of Educ., 71 F.R.D. 398 (W.D. Mich. 1976) (plaintiff class of female teachers challenging maternity leave policies; defendant class of school boards), *rev'd*, 709 F.2d 1200 (6th Cir. 1983); Hopson v. Schilling, 418 F. Supp. 1223 (N.D. Ind. 1976) (plaintiff class of welfare recipients; defendant class of township trustees); Redhail v. Zablocki, 418 F. Supp. 1061 (E.D. Wis. 1976) (plaintiff class of state residents challenging "permission-to-marry" statute; defendant class of county clerks), *aff'd*, 434 U.S. 374 (1978); Kidd v. Schmidt, 399 F. Supp. 301 (E.D. Wis. 1975) (plaintiff class of minors challenging commitment to mental institutions without hearing; defendant class of state commitment officials); Paxman v. Wilkerson, 390 F. Supp. 442 (E.D. Va. 1975) (plaintiff class of pregnant teachers challenging maternity leave policies; defendant class of school boards), *rev'd sub nom.* Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1129 (1981); Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972) (plaintiff class of voters challenging durational residence requirement; defendant class of state election officials); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970) (plaintiff class of individuals incarcerated for chronic alcoholism; defendant class of judges); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966) (plaintiff class of prisoners challenging racial segregation in state prisons; defendant class of wardens, jailers, and sheriffs), *aff'd per curiam*, 390 U.S. 333 (1968). *But cf.* Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982) (single plaintiff challenging antihomosexuality statute; defendant class of district attorneys), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985) (en banc).

An exception to the usual bilateral class action is a civil rights defendant class action in which the federal government is the plaintiff. *See, e.g.*, United States v. Trucking Employers, Inc., 75 F.R.D. 682 (D.D.C. 1977) (defendant class of common carriers of freight bound by national collective bargaining agreement and alleged to have practiced racial discrimination in employment); United States v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969) (defendant class of owners of bars and cocktail lounges alleged to have practiced racial discrimination against military personnel). However, a suit initiated by the federal government usually is brought on behalf of a class whose members have been injured by the defendant or defendant class. *See* General Tel. Co. v. EEOC, 446 U.S. 318, 323–29 (1980) (Equal Employment Opportunity Commission not required to fulfill Rule 23 requirements to maintain suit on behalf of class of plaintiffs). For example, in United States v. Trucking Employers, 75 F.R.D. 682, 685, 693 n.7 (D.D.C. 1977), the Equal Employment Opportunity Commission brought suit on behalf of a class of black and Latino employees alleged to have been injured by the defendant class's discriminatory policies.

44. *See* Redhail v. Zablocki, 418 F. Supp. 1061, 1066 (E.D. Wis. 1976) ("Where . . . a statute with statewide application is challenged on the ground of its unconstitutionality, allowing the action to proceed against the class of officials charged with its enforcement is in accordance with the interests of judicial administration and justice which Rule 23 is meant to further."), *aff'd*, 434 U.S. 374 (1978).

officials or a collection of employers who practice discrimination on a systematic basis. However, though in theory one might imagine a defendant class so large that discriminatory practices could be eliminated on a national or industry-wide basis,[45] in practice defendant classes are more limited in scope. It would be unlikely, for example, for a court to certify a defendant class consisting of all employers in a certain geographical area who are alleged to practice racial discrimination. All defendants might be guilty of discriminatory practices, but the policies and the methods[46] by which individual defendants discriminate might be too dissimilar to

45. The only national, industry-wide defendant class action has been United States v. Trucking Employers, Inc., 75 F.R.D. 682 (D.D.C. 1977). In *Trucking Employers,* the Equal Employment Opportunity Commission (EEOC) brought suit against a nationwide class composed of employers and unions who were subject to a collective bargaining agreement in the trucking industry. Specifically, the class included as members all common carriers of general commodity freight by motor vehicle who were subject to the agreement, employed at least 100 employees, and had annual gross revenues over $1,000,000. The EEOC complaint alleged that a pattern of racially discriminatory employment practices pervaded the trucking industry, running from hiring through assignment, transfer, promotion, and seniority. Stating that defendant class treatment was especially appropriate in this case, the court upheld the nationwide class. *Id.* at 686–94.

However, following the Supreme Court's decision in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), in which a seniority system similar to the one in *Trucking Employers* was declared bona fide and therefore legal, the class was decertified and the case dismissed following the modification of a consent decree between the parties. United States v. Trucking Management, Inc., 20 Fair Empl. Prac. Cas. (BNA) 342 (D.D.C. 1979), *aff'd,* 662 F.2d 36 (D.C. Cir. 1981).

46. Two fundamental approaches to employment discrimination claims brought under Title VII exist: "disparate treatment" theory and "disparate impact" theory. In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court described the two theories of liability:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. . . . Either theory may, of course, be applied to a particular set of facts.

*Id.* at 335 n.15 (citations omitted). For a general discussion of the two theories,

make class litigation appropriate. Individual defenses[47] might differ, and even with a determination of classwide liability, individual practices might require individual remedies.[48]

Therefore, defendant class members must be linked by a common legal and factual bond.[49] Employers bound by a single racially discriminatory collective bargaining agreement have been held to be an appropriate group for defendant class litigation.[50] More commonly, courts have allowed suits involving a defendant class of semiautonomous public officials charged with enforcing a statute challenged as unconstitutional.[51] Suits involving public officials have con-

---

see 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 65.00 (1983); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1–12 (1983).

Multiple defendants could be liable under either or both theories, possibly precluding the uniformity necessary for class treatment. Moreover, even if separate employers were alleged to have discriminated under the same legal theory, factual differences among different employers could make class treatment inappropriate.

47. Defenses under Title VII correspond to the separate theories of liability that the courts have developed. *See supra* note 46. Both factual and legal differences among potential defendant class members would defeat class certification, since the named representative's defenses must be typical of the defenses of the class. *See infra* notes 89–94 and accompanying text.

48. Courts can minimize the problem of individualization by limiting the class action to certain issues or by certifying subclasses, breaking the class into smaller, more manageable groups. FED. R. CIV. P. 23(c)(4); *see, e.g.*, Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329, 337 (E.D. Pa. 1978) (two defendant subclasses composed of (1) all trade associations subject to collective bargaining agreement with union, and (2) all contractor-employers subject to collective bargaining agreement with union), *aff'd mem.*, 648 F.2d 923 (3d. Cir. 1981) (en banc), *rev'd on other grounds sub nom.* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982). *See generally* MANUAL FOR COMPLEX LITIGATION § 1.42 (5th ed. 1982). Additionally, the court may decertify a class after finding classwide liability and administer individual remedies. *See* Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 90 F.R.D. 589, 595 (E.D. Pa. 1981) (after determination of liability defendant class decertified for individual hearings on damages). However, unless the class itself is small, a more prudent method would be to make certain that a class is homogeneous enough to administer a single remedy against all members. *See infra* notes 90–91 and accompanying text.

49. *See infra* notes 72–105 and accompanying text.

50. *See, e.g.*, Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329 (E.D. Pa. 1978) (collective bargaining agreement between union and trade associations and contractor-employers), *aff'd mem.*, 648 F.2d 923 (3d Cir. 1981) (en banc), *rev'd on other grounds sub nom.* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982); United States v. Trucking Employers, Inc., 75 F.R.D. 682 (D.D.C. 1977) (national collective bargaining agreement among common carriers of freight).

51. If the public officials are under a unified authority, then a suit against the authority rather than a defendant class would be more appropriate.

tained a variety of defendant classes, including justices of the peace,[52] township trustees,[53] election officials,[54] school boards,[55] county sheriffs,[56] district attorneys,[57] mental institution commitment officials,[58] and correctional institutions.[59]

At the center of a civil rights defendant class action is a public law or private agreement that links the class of defendants and provides the basis for systematic attack by the plaintiffs. Defendant class actions often have been used to challenge the facial validity of a state statute.[60] Additionally, defendant class actions have appeared in complex institutional reform litigation[61] in which broad injunctive relief is applied against a defendant class in order to benefit a plaintiff class. In *Marcera v. Chinlund*,[62] for example, plaintiffs challenged the constitutionality of the common practice among New York detention officials of denying contact visitation rights[63] to pretrial detainees.[64] In order to end the widespread practice, plaintiffs sought certification of a plain-

52. *See, e.g.*, Doss v. Long, 93 F.R.D. 112 (N.D. Ga. 1981).

53. *See, e.g.*, Hopson v. Schilling, 418 F. Supp. 1223 (N.D. Ind. 1976).

54. *See, e.g.*, Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972).

55. *See, e.g.*, Thompson v. Board of Educ., 71 F.R.D. 398 (W.D. Mich. 1976), *rev'd*, 709 F.2d 1200 (6th Cir. 1983).

56. *See, e.g.*, Marcera v. Chinlund, 91 F.R.D. 579 (W.D.N.Y. 1981).

57. *See, e.g.*, Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985) (en banc).

58. *See, e.g.*, Kidd v. Schmidt, 399 F. Supp. 301 (E.D. Wis. 1975).

59. *See, e.g.*, Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966) (three-judge court), *aff'd per curiam*, 390 U.S. 333 (1968).

60. *See, e.g.*, Hobson v. Pow, 434 F. Supp. 362 (N.D. Ala. 1977) ("wife-beater" disenfranchisement statute and provision of Alabama constitution); Redhail v. Zablocki, 418 F. Supp. 1061 (E.D. Wis. 1976) ("permission-to-marry" statute), *aff'd*, 434 U.S. 374 (1978); Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973) (nonconsensual repossession statute), *rev'd*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974).

61. The term "institutional reform" has been used to describe litigation in which broad, prospective injunctive relief is sought to change conditions in large public institutions such as schools, prisons, and mental hospitals. Synonymous with "institutional reform litigation" are terms such as "public law litigation" and "structural reform litigation." *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Special Project, *supra* note 9.

62. 595 F.2d 1231 (2d Cir.), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979).

63. Contact visitation rights include the right to "shake hands with a friend, to kiss a wife, or to fondle a child." *Id.* at 1234.

64. Pretrial detainees are prisoners who have not been convicted of a crime but are held in custody to ensure their attendance at trial. *Id.*

tiff class composed of all pretrial detainees in the state of New York and a defendant class composed of all county sheriffs in the state who authorized the challenged practice.[65] The court certified both classes and issued an injunction requiring all members of the defendant class to implement plans for contact visits.[66] By joining the two classes in a single adjudication, the "double-edged class action"[67] ensured a broad institutional remedy to end an illegal statewide policy.

Thus, the defendant class action fosters two important goals underlying class litigation: judicial economy and judicial enforcement of substantive rights. By addressing in a single adjudication a civil rights question involving multiple defendants, a defendant class action prevents the relitigation of identical issues and binds defendant class members to a common judgment. Combined with a plaintiff class action, a defendant class action becomes a potent tool for securing constitutional and statutory rights.

## II. THE PROCEDURAL CONTEXT: RULE 23 AND DEFENDANT CLASS CERTIFICATION

Federal Rule of Civil Procedure 23 governs the certification and management of class actions in the federal courts. Under Rule 23, plaintiffs bear the burden of meeting the requirements of defendant class certification,[68] and courts may certify classes only after a two-part test has been satisfied. First, a defendant class must fulfill all four requirements stated in Rule 23(a): the class must be too numerous for practicable joinder; common questions of fact or law must

65. *Id.* at 1235.

66. *Id.* at 1238–41.

67. *Id.* at 1235. The Supreme Court vacated *Marcera* pursuant to its decision in Bell v. Wolfish, 441 U.S. 520, 531 (1979), in which the Court held that due process did not require that pretrial detainees incur only restraints inherent in the confinement itself. Lombard v. Marcera, 442 U.S. 915 (1979). On remand, the district court in *Marcera* continued to proceed on a classwide theory to deal with the unaddressed issue of a pretrial detainee's contact visitation with family and friends. The court recertified both the plaintiff and the defendant classes and issued a preliminary injunction to allow contact visits. Marcera v. Chinlund, 91 F.R.D. 579, 587 (W.D.N.Y. 1981).

68. Carracter v. Morgan, 491 F.2d 458, 459 (4th Cir. 1973); Stewart v. Winter, 87 F.R.D. 760, 768 (N.D. Miss. 1980), *aff'd*, 669 F.2d 328 (5th Cir. 1982); Tucker v. City of Montgomery Bd. of Comm'rs, 410 F. Supp. 494, 499 (M.D. Ala. 1976); Mason v. Garris, 360 F. Supp 420, 422–23 (N.D. Ga. 1973).

exist among members of the class; the named representative's defenses must be typical of the class; and the named defendant must adequately represent and protect the interests of the class.[69] Second, a class action must fulfill the requirements of one of the three subdivisions of Rule 23(b).[70] Subdivision (b)(2), applied when equitable relief with respect to the class is appropriate, has become the category most often invoked in civil rights litigation.[71] This Part discusses the certification of civil rights defendant class actions under Rule 23. After addressing some of the unique issues presented by defendant classes in satisfying the conditions of Rule 23(a), this Part explores the problem of categorizing

69. FED. R. CIV. P. 23(a) provides:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

70. FED. R. CIV. P. 23(b) provides:

Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting any individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

71. *See supra* note 13; *infra* notes 199–206 and accompanying text.

defendant classes under Rule 23(b) and analyzes the different approaches that courts have adopted in allowing or denying defendant class certification under subdivision (b)(2).

### A. *Rule 23(a)*

The Rule 23(a) prerequisites serve as reminders, as well as formal requirements, that a class action must foster judicial economy and guarantee due process of law. Numerosity, commonality, typicality, and adequacy of representation—as the four prongs of Rule 23(a) are commonly known—attempt to guarantee that certified classes will be both well defined and well represented. However, the requirements of Rule 23(a) present thornier problems for defendant class actions than for plaintiff class actions. While the numerosity[72] and commonality[73] requirements of Rule 23(a) must be fulfilled in the same manner for both defendant and plaintiff class actions, the adequacy of representation and typicality requirements must be tailored more carefully in defendant class actions because of the possibility of a binding judgment *against* the defendant class: Since liability and remedy lie against all members of the class, the

72. No minimum or maximum has been set to determine the number of class members appropriate for class treatment. *Compare* Dale Elecs., Inc. v. R.C.L. Elecs., Inc., 53 F.R.D. 531 (D.N.H. 1971) (thirteen members in the defendant class) *with* Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (over six million members in the plaintiff class), *rev'd on other grounds,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 417 U.S. 156 (1974). Fulfillment of the numerosity requirement will be contingent upon the facts of a case.

73. Rule 23(a)(2) requires only that there exist "questions of law or fact common to the class," rather than that common questions predominate as in a class action brought under Rule 23(b)(3). *See supra* notes 69–70. In any case, justification for class treatment under any Rule 23(b) provision will fulfill the common question requirement. *See* Vernon J. Rockler & Co. v. Graphic Enters., 52 F.R.D. 335, 340 n.9 (D. Minn. 1971) ("the existence of common questions is implicit in a finding that a suit is definable as a (b)(1), (2) or (3) class action."); *see also* A. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE 25 (2d ed. 1977).

In a civil rights bilateral class action, the challenged statute or private agreement provides the legal commonality and comprises the substance of the litigation. *See* Gibbs v. Titelman, 369 F. Supp. 38, 52 (E.D. Pa. 1973) ("The validity of the statutory scheme . . . , as it pertains to both classes, comprises the substance of the action . . . . It is the same procedures [authorized by the statute] that form the bond of legal commonality between the plaintiffs and defendants."), *rev'd,* 502 F.2d 1107 (3d Cir.), *cert. denied,* 419 U.S. 1039 (1974); *see also* HARVARD Note, *supra* note 21, at 643–44 ("If the class action simply challenges the facial validity of the law, as opposed to the manner in which it is administered or enforced, there is by definition only one issue at stake perfectly common to all class members.").

named defendant plays an especially important role in protecting the interests of the absent class members.

### 1. Adequacy of Representation

The adequacy of representation requirement of Rule 23(a)[74] is designed to guarantee due process for members of the class. Because absent class members are not present in the judicial forum in which their interests are at issue, class actions may bind absent parties only when their interests are adequately represented.[75] The adequacy of representation requirement is especially important in defendant class actions because of the potential liability of all members of the class.[76]

When interpreting the adequacy of representation requirement, courts traditionally have required that class representatives retain competent counsel and have interests consistent with the interests of the class.[77] Because the plaintiff in a defendant class suit names the defendant class representative,[78] courts must carefully examine the plain-

---

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

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

76. As one court has stated:

> [A] defendant class differs in vital respects from a plaintiff class, and . . . the very notion of a defendant class raises immediate due process concerns. When one is an unnamed member of a plaintiff class one generally stands to gain from the litigation. The most one can lose—in cases where res judicata operates—is the right to later bring the same cause of action. However, when one is an unnamed member of a defendant class, one may be required to pay a judgment without having had the opportunity to personally defend the suit. Although we believe that the Rule 23 requirements of adequacy of representation and notice to class members were designed to safeguard due process rights, we note the inherent difference in the nature of plaintiffs and defendants in most suits and suggest that a defendant class should be certified and such an action tried only after careful attention to these safeguards.

Marchwinski v. Oliver Tyrone Corp., 81 F.R.D. 487, 489 (W.D. Pa. 1979) (defendant class composed of union and employers).

77. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.) ("Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class."), *cert. denied*, 421 U.S. 1011 (1975). Usually, judicial inquiry into the competency of the class representative's counsel is perfunctory, and courts rarely deny adequacy of representation on the basis of inadequate counsel.

78. *See* Z. CHAFEE, *supra* note 18, at 237 ("It is a strange situation where one side picks out the generals for the enemy's army."). Defendant class members,

tiff's choice: It may be in the plaintiff's interest to choose a weak or ill-suited representative. This is a legitimate problem, especially when damages may be assessed against the defendant class and variations in liability exist among the different class members.[79] Nevertheless, regardless of the remedy plaintiffs are seeking, the named representative should advocate the class's interests out of self-interest. The representative's potential liability is as central to the litigation as the liability of the absent class members. The named defendant should assert her own position, and once Rule 23's typicality[80] requirement has been met, this position should coincide with the interests of the class.[81]

---

like plaintiff class members, often have little say in who the initial class representative will be. *See* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 691 (1941). Of course, through intervention defendant class members may seek representative status after the named plaintiff has selected the initial named defendant. *See, e.g.*, Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973) (denying defendant class certification), *rev'd in part on other grounds sub nom.* McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976); Otero v. New York City Hous. Auth., 354 F. Supp. 941 (S.D.N.Y.) (certifying defendant class), *rev'd on other grounds*, 484 F.2d 1122 (2d Cir. 1973).

79. The seminal case exemplifying the problem of a weak representative defendant is Richardson v. Kelly, 144 Tex. 497, 191 S.W.2d 857 (1945), *cert. denied*, 329 U.S. 798 (1947). In *Richardson*, defendant class members protested an adverse judgment because the plaintiff intentionally had chosen representatives whose liability was small relative to other members of the class. As a result, the named defendants offered only token opposition to the plaintiff's claims. *Id.* at 502, 191 S.W.2d at 859. For a more thorough discussion of the *Richardson* case, see Z. CHAFEE, *supra* note 18, at 239–42.

In a civil rights suit challenging a statute or private agreement, a problem similar to the one in *Richardson* is less likely because injunctive relief would bind defendant class members equally. In more complex situations, however, such as a suit containing claims involving damages or back pay, the adequacy of the named representative could be more important because a relatively weak, or judgment-proof, defendant representative might not advocate group interests sufficiently.

80. *See infra* notes 89–94 and accompanying text.

81. In Marcera v. Chinlund, 595 F.2d 1231, 1239 (2d Cir.), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979), the court stated:

> Rule 23(a)(4) does not require a willing representative but merely an adequate one. It will often be true that, merely by protecting his own interests, a named defendant will be protecting the class. Where . . . the legal issues as to liability are entirely common to members of the defendant class, there is little reason to fear unfairness to absentees.

*See also* United States v. Trucking Employers, Inc., 75 F.R.D. 682, 688 (D.D.C. 1977) ("In sum, where the court can fairly conclude that by pursuing their own interests vigorously the named representatives will *necessarily* raise all claims or defenses common to the class, representativeness will be satisfied." (emphasis in original)).

Additionally, the adequacy of representation requirement affects the issue of whether prejudgment notice of the litigation must be provided to absent defendant class members. Under Rule 23, notice is required only to allow class members to exclude themselves from a class certified under subdivision (b)(3).[82] The rule does not permit the self-exclusion of class members under the other categories of Rule 23(b), and the rule leaves to the court's discretion the question of whether notice to absent class members is necessary.[83]

Although Rule 23 mandates notice only to classes certified under the (b)(3) category, it remains unclear whether notice to defendant class members is constitutionally required. In *Zablocki v. Redhail,*[84] the Supreme Court encountered the issue of a defendant class notice requirement, but the Court skirted the issue by holding that the named defendant lacked standing to raise the issue on appeal; only unnamed class members could make the due process challenge.[85] Nevertheless, fundamental fairness would seem to require notice to absent members of defendant classes. Defendants should be apprised of proceedings in which per-

82. FED. R. CIV. P. 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

*See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (individual notice, when practicable, required under Rule 23(c)(2), and costs of notice to be borne by plaintiffs).

83. FED. R. CIV. P. 23(d) provides in relevant part:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action . . . .

84. 434 U.S. 374 (1978).

85. *Id.* at 381 & n.6.

sonal liability is at stake;[86] class members should not be held liable by a judgment of which they had never been informed.

Still, even if not constitutionally required, notice to absentees can aid representation of the class. Since inadequate representation may jeopardize certification of the class, the court must make certain that the named defendant has sufficient resources and advocates proper defenses on behalf of the class. Notice to class members gives the court a better opportunity to assess the adequacy of the named defendant, to foster additional representation by absent class members,[87] or to act sua sponte to appoint other representatives.[88]

### 2. Typicality and the "Juridical Link" Test

While adequacy of representation is considered a central requirement of class certification, Rule 23's typicality requirement has been criticized as superfluous. Other portions of the rule accomplish the same function.[89] Nevertheless, whether interpreted as a discrete requirement or merged with other Rule 23(a) requirements, judicial inquiry into the typicality of defenses can provide a useful safeguard against class heterogeneity[90] and can aid in protecting the

86. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

87. *See supra* notes 78, 83.

88. *See* United States v. Trucking Employers, Inc., 75 F.R.D. 682, 694 (D.D.C. 1977); Z. CHAFEE, *supra* note 18, at 238.

89. *See, e.g.*, A. MILLER, *supra* note 73, at 26 ("[T]here does not seem to be *any* function [typicality] performs that is not accomplished by some other portion of the Rule." (emphasis in original)); 3B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 23.06-2, at 23-325 ("[A]ll meanings attributable to [typicality] duplicate requirements prescribed by other provisions in Rule 23."). *See generally* Comment, *Federal Rule of Civil Procedure 23(a)(3) Typicality Requirement: The Superfluous Prerequisite to Maintaining a Class Action*, 42 OHIO ST. L.J. 797 (1981).

90. Class heterogeneity can place an extra burden on both the named defendant and the court. The representative defendant, who usually will not have chosen his role, must coordinate the interests and defenses of the class. When class heterogeneity is great, the representative bears the burden of ensuring that a multiplicity of interests are advocated. This increased burden could compromise adequate representation by the named defendant, a result that could violate fundamental notions of due process. *See* HARVARD Note, *supra* note 21, at 647–50. In addition, certification of a heterogeneous class can impose a significant burden on the court. *See* Mudd v. Busse, 68 F.R.D. 522, 527 n.1 (N.D. Ind. 1975) ("As the size and scope of plaintiff class versus defendant class lawsuits expend, [sic] there

interests of unnamed class members.[91]

Courts generally have taken two approaches when applying the typicality requirement stated in Rule 23(a)(3). Some courts have held that no conflicts of interest may exist among members of the class.[92] In certain circumstances, this interpretation would be useful to prevent the certification of a class that included competitors who would advocate different defenses in order to obtain the best remedy for themselves. A second, and more useful, approach has been to interpret typicality to mean that the representative's claims or defenses must be grounded in the same legal theory as that of the class.[93] Framed in these terms, the typicality requirement helps prevent class heterogeneity, because the class representative's defenses must coincide with class defenses.[94]

Additionally, some courts have expanded the notion of typicality by requiring that defendant class members be joined by a preexisting relationship when the class is certified.[95] In *La Mar v. H & B Novelty & Loan Co.*,[96] the Ninth

---

increasingly must be concern that the federal courts may become employed in ways inappropriate to the nature of the judicial process."). Although a single injunction might be sufficient, the administration of relief might be too taxing on a court if individual remedies were required after a finding of class liability. *See* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 236 (9th Cir. 1974) (denying certification of defendant class of 2000 members in which trial would "repeat itself with individual differences some 2,000 times"), *cert. denied*, 421 U.S. 963 (1975).

91. *See* Mudd v. Busse, 68 F.R.D. 522, 529 (N.D. Ind. 1975) ("Particularly in the case of a defendant class representative, the court must be concerned with the possible effects of non-typical claims or defenses on the litigation posture of the representative and consequent effects upon the defense of the interests of the other class members.").

92. *See* Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 24 (2d Cir. 1971) (conflicts among inmates preclude adequate plaintiff class representation); *cf.* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 293 (E.D. Pa. 1972) (absence of conflicts among defendant school officials fosters typicality and adequacy of representation).

93. Gonzales v. Cassidy, 474 F.2d 67, 71 n.7 (5th Cir. 1973) (named plaintiff typical of class because claims for relief based on same legal or remedial theory).

94. *But see* COLUMBIA Note, *supra* note 21, at 1390 (typicality does little to limit class heterogeneity).

95. *See* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 465 (9th Cir. 1973) (denying defendant class certification); Coleman v. McLaren, 98 F.R.D. 638, 648 (N.D. Ill. 1983) (same); Hopson v. Schilling, 418 F. Supp. 1223, 1237–38 (N.D. Ind. 1976) (certifying defendant class of over 1000 township trustees); Mudd v. Busse, 68 F.R.D. 522, 527–28 (N.D. Ind. 1975) (denying defendant class certification). *See generally* Note, *Juridical Links*, *supra* note 21.

96. 489 F.2d 461 (9th Cir. 1973).

Circuit treated the typicality requirement as a significant restraint on class definition. In *La Mar,* the named plaintiff brought suit on behalf of a class of pawnbrokers' customers against a defendant class of all licensed pawnbrokers in Oregon to recover damages for alleged violations of the Truth in Lending Act.[97] Because the named plaintiff had dealt with only one of the defendants and because the named plaintiff's claims were not "typical" of claims that might be asserted against unnamed defendants, the court denied certification of both classes.[98]

In dicta, however, the *La Mar* court suggested two exceptions in which plaintiff typicality might have been satisfied: (1) if the defendants were related as a result of a conspiracy or a concerted scheme,[99] or (2) if the defendants were "juridically related in a manner that suggest[ed] a single resolution of the dispute would be expeditious."[100] The second exception—commonly known as the "juridical link" exception—tests whether individual class members are joined by a legal enactment or agreement that authorizes specific conduct, which then may be challenged as discriminatory or unconstitutional.[101]

The *La Mar* court's holding limited plaintiff class typicality, but the *La Mar* court and other courts have used the juridical link exception to define the proper scope of a defendant class.[102] Indeed, the *La Mar* court specifically cited defendant classes composed of public officials as examples of juridically related groups.[103]

---

97. *Id.* at 462.

98. *Id.* at 465.

99. *Id.* at 466. For applications of the *La Mar* "conspiracy or concerted scheme" exception, see Thillens, Inc. v. Community Currency Exch. Ass'n, 97 F.R.D. 668 (N.D. Ill. 1983); *In re* Itel Sec. Litig., 89 F.R.D. 104 (N.D. Cal. 1981).

100. 489 F.2d at 466.

101. *See generally* Note, *Juridical Links, supra* note 21.

102. *See, e.g.,* Coleman v. McLaren 98 F.R.D. 638, 648 (N.D. Ill. 1983) (denying defendant class certification); United States v. Trucking Employers, Inc., 75 F.R.D. 682, 690 (D.D.C. 1977) (certifying defendant class of employers); Hopson v. Schilling, 418 F. Supp. 1223, 1237–38 (N.D. Ind. 1976) (certifying defendant class of township trustees); Mudd v. Busse, 68 F.R.D. 522, 527–28 (N.D. Ind. 1975) (denying defendant class certification).

103. 489 F.2d at 469–70. However, the *La Mar* court did not articulate the range of juridically related groups outside the public official context. If one gives "juridical" its usual meaning, namely referring to the administration of justice, then a juridically linked class may refer only to a class of public officials charged with enforcing a statute. But if "juridical" is defined more broadly to include

Applied to defendant classes, the juridical link test establishes a higher standard of typicality: Group interests should be more homogeneous because a juridical relationship—such as the one between a set of public officials charged with enforcing a statute—guarantees similar defenses.[104] Although not a specifically delineated requirement of Rule 23, the juridical link test serves the useful purpose of defining the scope of a defendant class and ensuring typical defenses by the named representative.[105]

---

other legal relationships such as one connecting parties to a trade or collective bargaining agreement, then a defendant class could be composed of a set of employers or businesses. *See* United States v. Trucking Employers, Inc., 75 F.R.D. 682, 689–90 (D.D.C. 1977) (commodity freight agreement analogized to statute juridically linking defendant class members).

104. *See* COLUMBIA Note, *supra* note 21, at 1394–1401 (advocating juridical link test to limit scope of defendant class and prevent burdens associated with class heterogeneity).

105. The juridical link test also has been used by courts to fulfill the constitutional requirement of standing, which mandates that interested parties have a personal stake in the outcome of a legal controversy in order for their claims to be adjudicated. *See, e.g.*, Hopson v. Schilling, 418 F. Supp. 1223, 1237–38 (N.D. Ind. 1976); *cf.* Mudd v. Busse, 68 F.R.D. 522, 527–28 (N.D. Ind. 1975) (absence of juridical link precludes class certification for lack of standing). *See generally* Note, *Juridical Links*, *supra* note 21.

Bilateral class actions can present standing problems because the named plaintiff usually will have a justiciable claim against the named defendant but not against other defendant class members who have not injured him personally. In Weiner v. Bank of King of Prussia, 358 F. Supp. 684 (E.D. Pa. 1973), the court encountered a bilateral class action involving a defendant class of 19 state and national banks alleged to have violated a statute governing the calculation of interest rates on loans, and a plaintiff class of all borrowers from the banks. Determining that the named plaintiff lacked standing because he had dealt with only one of the banks, the *Weiner* court stated that a "plaintiff may not use the procedural device of a class action to boot strap himself into standing he lacks under the express terms of the substantive law." *Id.* at 694. The court then provided a two-step approach for bilateral class certification: the plaintiff first must establish his personal standing to sue each defendant, and then he must meet the Rule 23 requirements to act as a class representative. *Id.*

The *Weiner* ruling, although dealing directly with the issue of standing in bilateral class actions, rarely has been followed in civil rights defendant class litigation. Most courts that have addressed the standing question have used the *La Mar* juridical link exception to bypass any standing problems in litigation containing a defendant class of public officials or private employers. *See, e.g.*, Mudd v. Busse, 68 F.R.D. 522, 527–28 (N.D. Ind. 1975) ("where all members of the defendant class were connected by a common 'juridical link,' a plaintiff class versus a defendant class suit could be appropriate, even though no named plaintiff would have personal claims against most members of the defendant class").

Although the juridical link test may allow courts to sidestep the standing question, the test is better limited to defining the scope of the class rather than evading standing questions. A more direct approach would view standing on the basis of the class as a whole rather than on the standing of the individual class

B. *Rule 23(b)*

In addition to meeting the four requirements of Rule 23(a), a defendant class must meet the requirements of one of the three subdivisions of Rule 23(b). Subdivision (b)(1) applies when the risk of inconsistent judgments would compromise the rights of the parties.[106] Subdivision (b)(2) applies when equitable relief relative to the class is appropriate.[107] Subdivision (b)(3), Rule 23's "catch-all" provision, applies when common questions of law or fact predominate over individual questions and a class action is the most appropriate form of litigation.[108] Rule 23(b)(2) has become the major source of conflict in the certification of civil rights defendant classes, and close examination of the different readings of subdivision (b)(2) is essential to understand judicial interpretation of the rule. However, before considering Rule 23(b)(2), it is helpful to examine the two other subdivisions of Rule 23(b) in order to understand the alternatives to (b)(2) certification.

1. Inapplicability of Rule 23(b)(3)

Rule 23(b)(3) establishes the least stringent requirements for certification under Rule 23(b). Class members need be linked only by the predominance of common legal or factual questions. Defendant class certification is clearly authorized by Rule 23(b)(3): The subdivision states that the court may inquire into "the interest of members of the class in individually controlling the prosecution or *defense* of separate actions" and the "extent and nature of any litigation concerning the controversy already commenced by or *against* members of the class."[109]

Nonetheless, when applied to defendant classes, Rule 23(b)(3) has limited value because absent members may ex-

members. Class standing would imply that the plaintiff and defendant classes be considered separate entities rather than collections of individuals. Injuries suffered by the plaintiff class at the hands of the defendant class would replace individual injuries suffered by individual class members. *See generally* Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430 (1973); Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives*, 26 BUFFALO L. REV. 83 (1976); Note, *Class Standing and the Class Representative*, 94 HARV. L. REV. 1637 (1981).

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

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

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

109. FED. R. CIV. P. 23(b)(3) (emphasis added).

clude themselves from the class.[110] Although they may remain in the class if they have a sufficient stake in the outcome of the litigation, absent defendant class members may easily "opt out" of the class to escape liability.[111] If the broad enforcement of substantive rights is a primary goal of defendant class litigation, the self-exclusion of defendant class members is untenable. Therefore, from a practical standpoint, subdivision (b)(3) has little potential as a vehicle for defendant class certification.[112]

### 2. Rule 23(b)(1): Protecting the Interests of the Parties

Because courts usually have invoked Rule 23(b)(2) to certify defendant classes, Rule 23(b)(1) largely has been ignored as a method for certifying civil rights defendant class actions. Nevertheless, the (b)(1) category provides a viable conduit for certifying defendant classes. Rule 23(b)(1) is designed to protect the parties' rights against inconsistent adjudications.[113] The subdivision is split into two clauses:

---

110. FED. R. CIV. P. 23(c)(2); *see supra* note 82.

111. *See* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 238 (9th Cir. 1974) (Duniway, J., concurring), *cert. denied*, 421 U.S. 963 (1975):

> What member of a class of defendants who is in his right mind, and who is told that, if he does not elect to be excluded, he may be liable . . . , will fail to opt out? It seems more than probable that the court, having gone to the trouble and expense of learning the name and address of each potential . . . defendant and of devising a proper notice and having sent it out, will wind up with no "class" of defendants, but only those who are named as defendants and are served with process in the ordinary way.

*See also* United States v. Trucking Employers, Inc., 75 F.R.D. 682, 693 (D.D.C. 1977); Guy v. Abdulla, 57 F.R.D. 14, 17 (N.D. Ohio 1972). *But see* 1 H. NEWBERG, *supra* note 21, § 4.60 (discussing suitability of Rule 23(b)(3) for defendant class actions).

112. Nevertheless, defendant class actions have been certified under Rule 23(b)(3). *See, e.g.*, Northwestern Nat'l Bank v. Fox & Co., 102 F.R.D. 507 (S.D.N.Y. 1984) (securities litigation containing defendant class of partners in accounting firm); Thillens, Inc. v. Community Currency Exch. Ass'n, 97 F.R.D. 668 (N.D. Ill. 1983) (antitrust suit containing defendant class of trade association members); National Constructors Ass'n v. National Elec. Contractors Ass'n, 498 F. Supp. 510 (D. Md. 1980) (same), *modified*, 678 F.2d 492 (4th Cir. 1982), *cert. dismissed*, 463 U.S. 1234 (1983); *In re* Gap Stores Sec. Litig., 79 F.R.D. 283 (N.D. Cal. 1978) (securities litigation containing defendant class of underwriters); Research Corp. v. Pfister Associated Growers, 301 F. Supp. 497 (N.D. Ill. 1969) (defendant class of patent infringers); Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc., 285 F. Supp. 714 (N.D. Ill. 1968) (same).

113. "The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the

(b)(1)(A) protects the party opposing the class,[114] and (b)(1)(B) protects members of the class themselves.[115] The clauses are not mutually exclusive, however, and class actions may be certified under (b)(1)(A), (b)(1)(B), or both.[116]

a. *Clause (b)(1)(A).* Rule 23(b)(1)(A) applies when separate actions against members of the defendant class would create a risk of "inconsistent or varying adjudications with respect to individual members of the [defendant] class which would establish incompatible standards of conduct for the party opposing the class [i.e., the plaintiff]."[117] Under clause (b)(1)(A), a class action must fulfill two requirements. First, a concrete risk of future adjudications must exist, otherwise differing standards could not be formulated by the courts.[118] Second, as a result of the prospect of multiple adjudications, the plaintiff must face potentially "incompatible standards of conduct" relative to defendant class members.[119]

Defendant classes certified under Rule 23(b)(1)(A) have arisen primarily in two settings:[120] patent infringement litigation[121] and securities litigation.[122] Illustrative is *In re Itel Securities Litigation,*[123] in which the court certified a defendant class of underwriters who were alleged to have violated the Securities Act of 1933 by making debenture offerings based

---

reasons for, and the principal key to, the propriety and value of utilizing the class-action device." Advisory Committee Note, *supra* note 13, at 100.

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

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

116. *See generally* 3B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 23.31[2]; 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1772.

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

118. *See* 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1773, at 8–9.

119. *See id.*; A. MILLER, *supra* note 73, at 44 (Rule 23(b)(1)(A) is designed to protect against "situations in which the non-class party does not know, because of inconsistent results, whether or not it can pursue a particular course of conduct.").

120. Defendant classes certified under subdivision (b)(1)(A) have appeared only rarely in civil rights litigation. *See* Smith v. United Bhd. of Carpenters & Joiners, 28 Fed. R. Serv. 2d (Callaghan) 731, 733 (N.D. Ohio 1978); Danforth v. Christian, 351 F. Supp. 287, 288–89 (W.D. Mo. 1972).

121. *See, e.g.*, Dale Elecs., Inc. v. R.C.L. Elecs., Inc., 53 F.R.D. 531, 537 (D.N.H. 1971); Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc., 285 F. Supp. 714, 721–23 (N.D. Ill. 1968).

122. *See, e.g.*, Weinberger v. Jackson, 102 F.R.D. 839, 848–49 (N.D. Cal. 1984); McFarland v. Memorex Corp., 96 F.R.D. 357, 360 (N.D. Cal. 1982); *In re* Itel Sec. Litig., 89 F.R.D. 104, 126 (N.D. Cal. 1981).

123. 89 F.R.D. 104 (N.D. Cal. 1981).

on false and misleading registration statements and prospectuses.[124] In determining the propriety of (b)(1)(A) certification, the court considered whether the plaintiffs would be faced with different determinations of whether the registration statements and prospectuses published by individual defendant class members were true.[125] The court stated that because the "same plaintiff would be suffering inconsistent adjudications on the same issue,"[126] certification of a defendant class under clause (b)(1)(A) was proper. Determining the validity of the statements' truth through a class action would prevent the possibility of inconsistent future adjudications setting inconsistent standards for the plaintiffs.[127] Thus, a class action prevented the plaintiffs from facing inconsistent standards of conduct relative to the defendant class—what one commentator has called a "conflicted position."[128]

In the civil rights context, a defendant class action can be certified under Rule 23(b)(1)(A) if future inconsistent litigation might place the opposing party, namely the plaintiff class, in a conflicted position relative to the defendant class. If members of a plaintiff class could obtain complete relief only by suing numerous individual defendants in separate

---

124. *Id.* at 109–27. The court certified two defendant classes of underwriters: one class, certified under Rule 23(b)(3), allegedly made debenture offerings based on registration statements containing misrepresentations or omissions, *id.* at 109–14; the other class, certified under Rule 23(b)(1)(A), was accused of having made debenture offerings based on prospectuses with untrue statements, *id.* at 114–27.

125. *Id.* at 123–25.

126. *Id.* at 125.

127. *But cf. In re* Victor Technologies Sec. Litig., 102 F.R.D. 53, 63–65 (N.D. Cal. 1984) (defendant class of underwriters certified under (b)(3) rather than (b)(1)(A) because requirement of incompatible standards of conduct from inconsistent adjudications would not be met).

128. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 388 (1967):

> [C]onsider, in relation to varying states of fact, the difficulties that could arise if litigations were carried on, one by one, with individual members of the class. If such repetitious litigations might confront the party opposing the class with adjudications establishing for him inconsistent or incompatible standards of action, then a class action with a single adjudication is evidently in order. . . . [Clause (b)(1)(A)] takes in cases where the party is obliged by law to treat the members of the class alike . . . , or where the party must treat all alike as a matter of practical necessity . . . . The party is saved by a class action from being forced into a "conflicted" position.

actions, and the different suits resulted in different injunctions or the absence of liability for some defendants, then the plaintiff class members would be placed in a conflicted position.[129] For example, in multiple suits against a collection of public officials, separate plaintiffs could be forced to modify their conduct because a statute enforced by different defendants would be applied inconsistently against the plaintiff class. Conduct judged permissible in one suit might be judged impermissible in another suit.[130] Similarly, in an employment discrimination suit, plaintiff class members could be forced to modify their employment status to comply with different hiring or promotion practices among employers who had different policies arising from separate adjudications.[131]

b. *Clause (b)(1)(B).* Under Rule 23(b)(1)(B), a defendant class may be certified if separate actions would create a risk of "adjudications with respect to individual members of the [defendant] class which would as a practical matter be dispositive of the interests of the other [defendant class] members not parties to the adjudications or substantially impair or impede their ability to protect their interests."[132] Clause (b)(1)(B), unlike clause (b)(1)(A), does not require a concrete risk of future litigation because a single adjudication "as a practical matter" would affect the rights of other

129. If the plaintiff class as a whole is considered a party, then the interests of the plaintiff class could suffice to place the party opposing the defendant class, namely the plaintiff class, into a conflicted position relative to individual defendants. However, if the term "party opposing the class" must refer to an individual rather than a class, then defendant class certification under clause (b)(1)(A) may be unavailable in a bilateral class action. The Advisory Committee Note to Rule 23 appears to indicate that the party opposing the class may refer only to an individual: "One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct." Advisory Committee Note, *supra* note 13, at 100. Nevertheless, the Note presents examples of possible litigation and does not necessarily limit the potential classes maintainable under clause (b)(1)(A). In any case, the Note further states, "Actions by or against a class provide a ready and fair means of achieving unitary adjudication." *Id.* Since a goal of a defendant class action is unitary adjudication in order to enforce substantive policies, a plaintiff class should be considered a party for the purposes of the rule.

130. *See infra* note 152 and accompanying text.

131. *See* Smith v. United Bhd. of Carpenters & Joiners, 28 Fed. R. Serv. 2d (Callaghan) 731, 733 (N.D. Ohio 1978); *infra* notes 153–55 and accompanying text.

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

potential class members.[133] Instead, the clause focuses on the impairment of class members' interests in relation to a common property or fund.[134]

In cases involving semiautonomous public officials acting under a challenged statute, a (b)(1)(B) defendant class action has been held to be appropriate because the interests of each official in relation to the questioned statute were identical.[135] For example, in *Pennsylvania Association for Retarded Children v. Pennsylvania,*[136] the court certified a defendant class composed of state school districts charged with enforcing a statute that excluded retarded children from a public school education.[137] Because the conflict revolved around the constitutionality of the statute, all the officials had a stake in the outcome of the suit. The common interest in the legality of a statute linked the officials and provided the basis for (b)(1)(B) certification. A declaration of the statute's legality would be dispositive of the interests of the defendant class members.[138] Certification of civil rights defendant classes under clause (b)(1)(B) has been limited, however, primarily because most courts have certified defendant classes under Rule 23(b)(2).

### 3. Disparate Readings of Rule 23(b)(2)

Rule 23(b)(2) has become the focal point for certifying civil rights defendant class actions. The courts, however, are divided over the proper interpretion of subdivision (b)(2). Most courts have certified defendant classes under Rule 23(b)(2) as a matter of course.[139] Since a civil rights bilateral class action matches a plaintiff class against a defendant class, courts have certified defendant classes as simple ad-

133. *See generally* 3B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 23.35[2]; 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1774.

134. *See* Advisory Committee Note, *supra* note 13, at 100–02.

135. *See, e.g.,* Lake v. Speziale, 580 F. Supp. 1318 (D. Conn. 1984) (defendant class of superior court judges); Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975) (defendant class composed of mayors, aldermen, and election commissioners); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (defendant class composed of school districts and state board of education). *But see* Mudd v. Busse, 68 F.R.D. 522, 530 (N.D. Ind. 1975) (rejecting certification under (b)(1)(B) of defendant class of judges).

136. 343 F. Supp. 279 (E.D. Pa. 1972).

137. *Id.* at 291–92.

138. *See* VALPARAISO Note, *supra* note 21, at 402–06.

139. *See infra* notes 144–50 and accompanying text.

juncts of the plaintiff classes. Other courts have interpreted Rule 23(b)(2) more carefully, but they have applied the terms of the rule mechanically and often have failed to examine both the relationship between the parties and the nature of the defendant class itself.[140] In contrast, a few courts have denied certification as a doctrinal matter, holding Rule 23(b)(2) completely inappropriate for certifying defendant classes.[141]

The conflicts among the courts may be traced directly to the language of Rule 23(b)(2), which states that a class action may be maintained when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[142] Applied to a plaintiff class, the language of the rule is clear: When a defendant has acted in a certain way toward the class, injunctive relief to curtail the defendant's conduct becomes appropriate. But applied to a defendant class, Rule 23(b)(2)'s language is awkward and ambiguous: The party opposing the class becomes the plaintiff (or plaintiff class), and the actions of the plaintiff would appear to necessitate equitable relief *against* the plaintiff.[143]

Thus, the debate revolves around the proper interpretation of the language of subdivision (b)(2) and the relationship of the parties in a defendant class suit. Because of the rule's ambiguity regarding defendant class certification, the courts have developed discordant interpretations of the rule's requirements. Three basic theories have emerged: an instrumental certification theory, a plaintiff-based certification theory, and a literal interpretation (noncertification) theory.

a. *Instrumental Certification.* Courts employing the most common approach to defendant class certification view Rule 23(b)(2) solely as an expedient for enforcing substantive

140. *See infra* notes 151–57 and accompanying text.

141. *See infra* notes 158–62 and accompanying text.

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

143. Applied to a defendant class, Rule 23(b)(2) reads as follows: "[The plaintiff (class)] has acted or refused to act on grounds generally applicable to the [defendant] class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the [defendant] class as a whole."

law. Regardless of whether plaintiff class certification or defendant class certification is sought, Rule 23(b)(2) is the appropriate provision. The linchpin of this instrumental approach predicates the certification of a (b)(2) defendant class on the need for injunctive relief,[144] not on the actions of either party or on the relationship between the parties. This approach has become commonplace in bilateral class actions in which plaintiff and defendant classes are certified in a single judicial stroke.[145] Because the courts focus more on the nature of the relief sought, the language of Rule 23(b)(2) regarding the actions of the parties largely is ignored.[146]

For example, in the leading case of *United States v. Trucking Employers, Inc.*,[147] the court certified a defendant class of employers and unions who were subject to a national collective bargaining agreement that allegedly fostered racially discriminatory employment practices.[148] The court stated:

> [S]ection (b)(2) is designed simply to facilitate class actions in which injunctive relief plays a central role. Whether the injunction would bind all members of a defendant class or benefit all members of a plaintiff class, or both, should be of no consequence so long as the complaint raises issues common to the class.[149]

The court went on to state: "[T]he suit is, in effect, both a plaintiff and a defendant class action. With respect to the language of Rule 23(b)(2), the suit then appears to be one in which *each* side has acted on grounds generally applicable to the other."[150]

---

144. Injunctive relief also is available under other provisions of Rule 23(b). *See* Advisory Committee Note, *supra* note 13, at 100 (multiple suits for injunctive relief may trigger the need for class certification under subdivision (b)(1)).

145. *See, e.g.*, Marcera v. Chinlund, 595 F.2d 1231 (2d Cir.), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); Harris v. Graddick, 593 F. Supp. 128 (M.D. Ala. 1984); Doss v. Long, 93 F.R.D. 112 (N.D. Ga. 1981); United States v. Trucking Employers, Inc., 75 F.R.D. 682 (D.D.C. 1977); Hopson v. Schilling, 418 F. Supp. 1223 (N.D. Ind. 1976).

146. *See* Doss v. Long, 93 F.R.D. 112, 119 (N.D. Ga. 1981) ("[A]lthough Rule 23(b)(2) is, on its face, inapplicable to defendant classes, the courts are simply unwilling to deprive the plaintiff of this useful measure.").

147. 75 F.R.D. 682 (D.D.C. 1977).

148. *See supra* note 45.

149. 75 F.R.D. at 692.

150. *Id.* at 693 (emphasis in original). The Second Circuit adopted this approach in Marcera v. Chinlund, 595 F.2d 1231 (2d Cir.), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979). Approving certification of a defendant class of sheriffs, the *Marcera* court stated, "Since declaratory and injunc-

Nevertheless, although an instrumental approach fosters the substantive policies behind a civil rights suit, it grants only lip service to the rule. The provisions of Rule 23(b)(2) are specific; they require both action by the party opposing the class and the need for injunctive relief. Clearly, a court that relies solely on the injunctive nature of a class action suit to justify certification is misreading Rule 23. Even if the litigation revolves around civil rights enforcement, the requirements of the rule cannot be ignored so readily.

b. *Plaintiff-Based Certification.* Another line of reasoning among courts that have certified defendant classes under subdivision (b)(2) predicates the appropriateness of class-wide injunctive relief on actions by the named plaintiff or the plaintiff class as a whole. Rule 23(b)(2) states that the party opposing the class must have acted or refused to act in relation to the class; therefore, the language of the rule requires focusing on the plaintiff's actions if certification of a defendant class is to be possible at all. Accordingly, the courts have developed a number of plaintiff-based approaches to certify (b)(2) defendant classes.

Courts employing one plaintiff-based approach argue that the named plaintiff's initiation of the lawsuit qualifies as an action against the defendant class.[151] This approach, while ostensibly adhering to the language of subdivision (b)(2), makes a travesty of the rule. If simply filing a claim against a defendant class suffices to fulfill all the requirements of subdivision (b)(2), then the subdivision is gratuitous. Defendant class actions would be certified automatically once the Rule 23(a) requirements are satisfied.

Courts employing another plaintiff-based approach to defendant class certification view deterministically a plaintiff's acts or omissions.[152] For example, if a defendant has discriminated by refusing to hire a plaintiff, then the plaintiff

---

tive relief is sought against identical behavior, we conclude that this case is a proper (b)(2) defendant class action." *Id.* at 1238 n.10.

151. *See, e.g.,* United States v. Trucking Employers, Inc., 75 F.R.D. 682, 692 (D.D.C. 1977) ("[P]laintiff 'has acted . . . on grounds generally applicable to the [defendant] class' merely by bringing the action."); Kidd v. Schmidt, 399 F. Supp. 301, 304 (E.D. Wis. 1975) ("[T]he plaintiff class in challenging the constitutionality of [the state statute] acts on grounds generally applicable to the defendant class.").

152. *See* Baker v. Wade, 553 F. Supp. 1121, 1125 n.1 (N.D. Tex. 1982) (plaintiff

is forced to act differently—she must look for a job elsewhere. Adopting this line of reasoning, the court in *Pennsylvania v. Local 542, International Union of Operating Engineers*[153] certified a defendant class composed of the union and a set of employers and trade associations; the court concluded that when "a class of plaintiffs is forced, if they wish to be employed . . . , to act with respect to the defendant class of employers in one and only one way, the requirements of 23(b)(2) are met."[154] The court's approach adheres to subdivision (b)(2)'s requirement that the opposing party must have acted relative to the class, but a weakness in this reasoning is that in many civil rights cases, an act or an omission is not important. Rather, a person's individual characteristics, namely those features that determine her *status* as a member of a protected group, are essential.[155]

Yet even if a court finds that the plaintiffs have "acted" in relation to the defendant class, this approach fails to recognize the causal connection between the requirements of subdivision (b)(2).[156] It is because the opposing party has acted in a certain way toward class members that injunctive relief to end the action is appropriate. A (b)(2) plaintiff class is defined by the illegal actions of the party opposing the class, namely the defendant. But a (b)(2) defendant class cannot be defined by the illegal actions of a plaintiff. In a defendant class suit, acts or omissions by the plaintiff class, while fulfilling the "action" requirement of subdivision (b)(2), lack the nexus to fulfill the "appropriate relief" requirement, because injunctive relief against the plaintiffs' actions would be misguided.[157]

c. *Literal Interpretations.* Those courts that have denied defendant class certification under Rule 23(b)(2) have ar-

---

forced to behave in certain way to avoid prosecution under antihomosexual sodomy statute), *rev'd on other grounds,* 769 F.2d 289 (5th Cir. 1985) (en banc).

153. 469 F. Supp. 329 (E.D. Pa. 1978), *aff'd mem.,* 648 F.2d 923 (3d Cir. 1981) (en banc), *rev'd on other grounds sub nom.* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

154. *Id.* at 416.

155. Title VII, for example, is designed to protect individuals from discrimination on the basis of race, national origin, color, sex, or religion—characteristics that pertain more to status and condition than action. *See supra* note 41.

156. FED. R. CIV. P. 23(b)(2) (party opposing class has acted "on grounds generally applicable to the class, *thereby making appropriate*" relief with respect to the class (emphasis added)).

157. *See* Coleman v. McLaren, 98 F.R.D. 638, 651–52 (N.D. Ill. 1983).

gued that the literal language of the subdivision precludes defendant class certification.[158] Both the Fourth and Sixth Circuits have held flatly that Rule 23(b)(2) does not apply to defendant class actions. In *Paxman v. Campbell,*[159] the Fourth Circuit criticized the certification of a defendant class of school boards under Rule 23(b)(2) and stated that "[t]o proceed under 23(b)(2) against a class of defendants would constitute the plaintiffs as 'the party opposing the class,' and would create the anomalous situation in which the plaintiffs' own actions or inactions could make injunctive relief against the defendants appropriate."[160] For the same reason, in *Thompson v. Board of Education,*[161] the Sixth Circuit stated, "[T]he language in [Rule 23(b)(2)] contemplates certification of a plaintiff class against a single defendant, not the certification of a defendant class."[162]

Moreover, a literal interpretation of subdivision (b)(2) is supported by the Advisory Committee Note to Rule 23. Although the Note states that civil rights litigation is an appropriate basis for certifying plaintiff classes under subdivision (b)(2),[163] the Note also states that the injunctive relief in response to the opposing party's action must "settl[e] the legality of the behavior with respect to the class as a whole."[164] This reference to settling the legality of a party's behavior can only be intended to describe the actions of a defendant. Therefore, although the framers of Rule 23 envisioned civil rights enforcement as a basis for categorizing class actions under subdivision (b)(2),[165] the provision simply does not sanction defendant class certification.

The judicial misreading of Rule 23(b)(2) is troubling. Courts that have certified defendant classes as plaintiff class counterparts have ignored the requirements of Rule 23(b)(2). Courts that have interpreted the subdivision's lan-

158. *See, e.g.,* Thompson v. Board of Educ., 709 F.2d 1200 (6th Cir. 1983); Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980), *cert. denied,* 449 U.S. 1129 (1981); Coleman v. McLaren, 98 F.R.D. 638 (N.D. Ill. 1983).

159. 612 F.2d 848 (4th Cir. 1980), *cert. denied,* 449 U.S. 1129 (1981).

160. *Id.* at 854.

161. 709 F.2d 1200 (6th Cir. 1983).

162. *Id.* at 1204.

163. Advisory Committee Note, *supra* note 13, at 102.

164. *Id.*

165. *See infra* notes 198–206 and accompanying text.

guage so that it may be "wrenched to fit"[166] defendant classes have failed to realize that such an interpretation is misapplied in civil rights cases in which injunctive relief can lie only against a defendant. Given the language of subdivision (b)(2), the literal interpretation appears to be the correct view regarding Rule 23(b)(2)'s applicability to defendant class actions.

In dealing with bilateral class suits, courts have erred in certifying defendant classes by analogizing them to plaintiff classes. But the two devices are distinct, and Rule 23 must be applied independently for each class. Rule 23, like the other Federal Rules of Civil Procedure, is designed to facilitate substantive norms, but procedural requirements cannot be ignored or twisted to foster substantive policies.

## III. REINTERPRETING RULE 23: TOWARD A THEORY OF THE DEFENDANT CLASS ACTION

Defendant class actions, when coupled with plaintiff class actions, provide an unusual enforcement tool for vindicating constitutional and statutory rights. But as a procedural mechanism, the defendant class action is an anomaly. Like the more common plaintiff class action, it can prevent the relitigation of issues and foster the enforcement of important public laws.[167] Yet defendant class actions raise procedural and constitutional[168] problems of their own. Courts that have recognized these problems have limited the use of defendant class actions by imposing more stringent standards of adequate representation and typicality.[169] Nevertheless, in attempting to categorize defendant classes under Rule 23(b), most courts have erred. By viewing the defendant class action as a simple mirror image of the plaintiff class action, courts have ignored or misconstrued procedural requirements.[170]

The misreading of Rule 23 stems from a fundamental

166. 3B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 23.40[6], at 23-310 ("[I]n the case of a defendant class action, it becomes more problematical whether the quoted language can be wrenched to fit, since a literal reading may produce somewhat nonsensical results on the facts . . . .").

167. *See supra* notes 27–67 and accompanying text.

168. *See supra* notes 82–86, 105 and accompanying text.

169. *See supra* notes 74–105 and accompanying text.

170. *See supra* notes 139–57 and accompanying text.

problem inherent in the rule itself. The rule and the theories underlying the rule are designed for the certification of plaintiff classes; the authorization for defendant classes is in form only. In order to evaluate the propriety of defendant class certification, a theory that accurately describes defendant class actions must be developed.[171] This Part analyzes justifications for the class action under Rule 23, criticizes the rule's incomplete treatment of defendant class actions, and then proposes a framework for the defendant class action based on compulsory joinder. The framework is applied to defendant classes in civil rights litigation, and certification under Rule 23(b)(1) is suggested as the proper method for judicial application of the defendant class action.

### A. *History and Theory: Understanding the Inadequacies of Rule 23*

The current wording of Rule 23 prevents the use of the (b)(2) and (b)(3) categories to certify defendant class actions. Subdivision (b)(3) is rendered ineffective by its "opt-out" provision,[172] and subdivision (b)(2) accommodates only plaintiff classes.[173] Only subdivision (b)(1) appears to

171. Amendment would be the easiest solution to the present inadequacies of Rule 23. Certainly, the "opt out" provision for (b)(3) classes could be revised to prevent defendant class members from excluding themselves from the suit. *Cf.* UNIF. CLASS ACTIONS ACT § 8(d), 12 U.L.A. 24, 31 (Supp. 1985) (model statute worded so that defendant class members may not opt out). Additionally, the mandatory notice requirement for (b)(3) classes might be extended to all defendant classes, regardless of the category invoked. *See supra* notes 82–88 and accompanying text.

The linguistic difficulties with Rule 23(b)(2) could be alleviated by revising the subdivision so that consistent equitable relief would be applicable to both plaintiff and defendant classes. A possible amendment might be the following: "the party opposing the class or the class members themselves have acted or refused to act in a manner making appropriate final injunctive or corresponding declaratory relief with respect to the parties in the litigation." One should note, however, that this rewording presumes that the intent of subdivision (b)(2) is consistent equitable relief relative to the class. Rule 23 (b)(1)(A), which provides for unitary adjudications to prevent prejudice against the party opposing the class, *see supra* notes 117–31 and accompanying text, might render the above revision gratuitous, since clause (b)(1)(A) may be applied to prevent inconsistent standards arising from different injunctions.

In any case, it is unlikely that Rule 23 will be amended in the near future simply to accommodate the proper application of defendant class actions. Given the relative infrequency of defendant class actions, courts should conceptualize defendant classes according to the present wording of the rule.

172. *See supra* notes 110–12 and accompanying text.

173. *See supra* notes 158–66 and accompanying text.

support defendant class certification.[174] Thus, by looking solely at the language of Rule 23, a ready solution to defendant class certication emerges. But linguistic analysis alone is insufficient. The history and the theories underlying the rule must be examined in order to understand both the rule's present wording and the propriety of defendant class certification under subdivision (b)(1).

### 1. Amended Rule 23

In 1966 Rule 23 was overhauled to clarify the certification of class actions in federal court.[175] Original Rule 23, promulgated in 1938, authorized three categories of class actions,[176] framed in terms of jural relations among the class members.[177] Rights to be enforced or opposed[178] defined class membership, and classes were labeled "true," "hybrid," or "spurious."[179] Explicit in theory, the rule's categories were extraordinarily elusive in practice.[180] Courts rarely could discern whether a class was true, hybrid, or spuri-

---

174. *See supra* notes 113–38 and accompanying text.

175. *See* Advisory Committee Note, *supra* note 13.

176. Original Rule 23 provided in relevant part:

> Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Fed. R. Civ. P. 23(a) (superceded), 308 U.S. 689 (1939). *See generally* 3B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶¶ 23.08–23.10.

177. *See* Moore & Cohn, *Federal Class Actions,* 32 ILL. L. REV. 307, 314 (1937).

178. Original Rule 23 did not state in clear terms how a defendant class would be certified. Because the categories of the original rule were based on rights shared or opposed by class members, the rule appeared to require that the rights to be determined belong to the plaintiff rather than the defendant class members, which would seem misdirected in determining the nature of a defendant class. *See* Z. CHAFEE, *supra* note 18, at 246; Kalven & Rosenfield, *supra* note 78, at 696 n.39; Note, *Suggested Revision, supra* note 21, at 827 & n.42.

179. *See generally* Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 GEO. L.J. 551, 570–76 (1937).

180. *See* Advisory Committee Note, *supra* note 13, at 98–99.

ous.[181] And the distinction was crucial because absent members of spurious classes were not bound by adverse judgments unless they chose to intervene.[182] Commentators scorned the abstruse categories[183] and criticized the absence of a binding effect on members of spurious classes.[184]

The amended rule was enacted to remedy these defects and clarify class litigation. First, the new rule substituted a more functional approach to class certification.[185] The obscure categories of the old rule were replaced by a two-part inquiry designed to define the scope and representation of the class as well as the potential categories for denominating classes. Second, the spurious category was reshaped to have a binding effect on all class members.[186] Absentees can no longer collaterally attack adverse judgments; members of (b)(3) classes who elect to remain in the class after receiving notice are necessarily bound by the litigation. Finally, a new provision was added to certify civil rights class actions, which were not clearly accommodated in the old rule.[187] The (b)(2) category unambiguously provides for plaintiff class actions requiring injunctive relief against discriminatory or unconstitutional practices.

Since its enactment, amended Rule 23 has been a convenient means for certifying plaintiff class actions designed to enforce important public laws.[188] Yet the revisions to the rule contain glaring oversights regarding defendant class certification. Subdivision (b)(3) specifically authorizes defendant classes, but the category is useless for this purpose because it allows the self-exclusion of absentees. Subdivision (b)(2) sanctions the certification of civil rights plaintiff class actions, but it is inapplicable to defendant classes because the framers of the rule focused exclusively on the

181. *See* Note, *Suggested Revision*, *supra* note 21, at 823 n.24.

182. *See* Advisory Committee Note, *supra* note 13, at 99.

183. *See, e.g.*, Z. CHAFEE, *supra* note 18, at 245 ("outworn categories of rights"); Kalven & Rosenfield, *supra* note 78, at 707 n.73 ("accursed labels").

184. *See* Kaplan, *supra* note 128, at 380–86.

185. Advisory Committee Note, *supra* note 13, at 99 ("The amended rule describes in more practical terms the occasions for maintaining class actions . . . .").

186. *Id.*

187. *See id.* at 102; *infra* notes 198–206 and accompanying text.

188. *See generally* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979); *Developments*, *supra* note 30.

rights and remedies of plaintiffs. The courts have only compounded the rule's failings by insisting on certifying civil rights defendant class actions under subdivision (b)(2).[189] An examination of the theoretical underpinnings of amended Rule 23 reveals that neither the (b)(2) nor the (b)(3) category can support defendant class certification.

### 2. The Anomaly of Subdivision (b)(3)

When considered in terms of defendant class actions, the (b)(3) category becomes a paradox. The subdivision mandates notice to absentees—a requirement ideally suited to guarantee adequate representation and due process for defendant class members.[190] But notice is mandated for the wrong reason: to allow class members to exit from the litigation. Clearly, the framers of amended Rule 23 did not consider defendant classes in rewriting the rule. Instead, they envisioned the (b)(3) class action as a large-scale permissive joinder device through which absentees silently consented to the litigation by abstention rather than intervention.[191]

Because members of (b)(3) classes do not share as strong an interest in the litigation as members of (b)(1) and (b)(2) classes,[192] the rule allows them the option of indepen-

---

189. *See supra* notes 139–57 and accompanying text.

190. *See supra* notes 82–88 and accompanying text.

191. *See* 3B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 23.02-1, at 23-84. Original Rule 23 posed problems because it allowed the technique of "one-way intervention." Absentees could bypass jurisdictional requirements by intervening on an ancillary basis without having to show an independent basis for jurisdiction. Moreover, absentees could apply the date of commencement of the action for purposes of the statute of limitations. *See* Advisory Committee Note, *supra* note 13, at 99.

192. "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." *Id.* at 106.

Since the interests of (b)(2) plaintiff class members regarding specific remedies (e.g., busing to cure school segregation) may vary considerably, commentators have questioned the presumed unity of interest in (b)(2) classes and have devoted greater attention to the problems of intraclass conflict. *See, e.g.*, Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U.L. REV. 492 (1982); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); Yeazell, *Group Litigation—Part II*, *supra* note 27, at 1108–19; *see also* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing conflicts of interest among class members and attorneys for the class).

dently pursuing litigation after receiving notice.[193] This procedural safeguard operates on two levels to make defendant class certification under subdivision (b)(3) inappropriate. First, the mechanism of consent—self-exclusion following notice—eviscerates a defendant class action. Defendants do not consent to participate in litigation. Even if consent involves determining who the proper class representative should be, a defendant should not be able to escape potential liability by removing himself from the suit.[194]

On a second level, the opt-out mechanism reflects the function that (b)(3) class actions serve in contemporary litigation. Because members of a (b)(3) class share a loosely defined interest, the class action fosters litigation that arises only through a class suit. This fostering of litigation—the class action's "enabling" function—supports the vindication of substantive rights that otherwise would not be litigated because litigation expenses would far exceed the potential benefits an individual plaintiff might derive from pursuing an individual action.[195] The class action encourages litigation by uniting common claims against a common opponent.[196]

But the enabling function is inapposite to an analysis of defendant classes. Although one might conceptualize a defendant class action as a procedure for strengthening defenses against a plaintiff class, the defendant class action

193. Professor Yeazell has criticized Rule 23's consent and notice provisions as internally inconsistent. Yeazell, *Group Litigation—Part II*, *supra* note 27, at 1110–11. Rule 23(b)(3) plaintiff class actions, which usually involve money damages, do not require notice to class members because the economic incentive is sufficient to allow nonconsensual representation. Conversely, civil rights class actions certified under Rule 23(b)(2) ought to require notice because of differing interests regarding the proper remedy to be administered. *Id.*

194. Even consent based on active intervention is problematic. Intervention may be desirable, *see supra* note 78, but a defendant may be reluctant to intervene if he can escape liability by not participating at all.

195. *See* Kalven & Rosenfield, *supra* note 78.

196. The utility of the class action in opening up the courts to small claimants has generated the greatest controversy over Rule 23. *Compare* Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1259 (1970) (calling class action "one of the most socially useful remedies in history") *with* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) (describing class action as "legalized blackmail"). Rather than focus on the class action procedure alone, Professor Miller prefers to view the growth of the class action in conjunction with concomitant developments in the expansion of public law. *See* Miller, *supra* note 188, at 669–76.

plays a different role in civil litigation. Rather than aggregate claims to increase the bargaining power of class members,[197] the defendant class action consolidates cases in order to prevent inconsistencies that might arise from multiple litigation. Instead of causing new litigation, a defendant class action pulls together existing litigants.

### 3. Civil Rights and Rule 23(b)(2)

Unlike subdivision (b)(3), subdivision (b)(2) does not permit the self-exclusion of class members. Nonetheless, Rule 23(b)(2) is equally inappropriate for certifying defendant classes. Because the authors of the rule focused on accommodating plaintiff classes to promote group relief and remedy group injury, the subdivision does not sanction defendant class certification.

The (b)(2) class action was an innovation in amended Rule 23. The original rule contained no specific reference to injunctive or declaratory relief as a basis for certifying classes.[198] Although subdivision (b)(2) was promulgated as a generic rule,[199] the history surrounding the rule indicates that it was designed primarily to guarantee that civil rights suits could be maintained as class actions.[200]

Before 1966, the propriety of civil rights class actions was uncertain. A few courts had held that civil rights claims were discrete and could not be asserted by a class.[201] In *Car-*

197. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1972) ("Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.").

198. The only reference to relief in the original rule was "common relief" under the spurious category. Fed. R. Civ. P. 23(a)(3) (superceded), 83 U.S. 689 (1939); *see supra* note 176.

199. In addition to civil rights violations, the Advisory Committee Note offers price discrimination by a wholesaler and tying violations by a patentee as potential bases for (b)(2) certification. Advisory Committee Note, *supra* note 13, at 102.

200. *See id.*; 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1775, at 24–25; Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1216 (1966). Prior to the promulgation of the amended rule, one commentator even suggested that the (b)(2) category be revised to accommodate *only* civil rights class actions. Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 647–50 (1965). The commentator proposed that "acted or refused to act on grounds generally applicable to the class" be replaced with "discriminated against the class," and that adverse judgments not be binding on losing absentees. *Id.* at 649–50.

201. *See, e.g.*, Reddix v. Lucky, 252 F.2d 930 (5th Cir. 1958); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957); Williams v. Kansas City, 104 F. Supp. 848 (W.D. Mo. 1952), *aff'd*, 205 F.2d 47 (8th Cir.), *cert. denied*,

*son v. Warlick,*[202] for example, the Fourth Circuit held that the nondiscriminatory admission of black children to public schools was an individual rather than a class right.[203] Despite apparent group injury, individual plaintiffs had to assert individual constitutional violations. The majority of courts, however, rejected this reasoning and supported the use of class actions in federal civil rights litigation.[204] For example, in *Potts v. Flax,*[205] the court stated: "[A] school segregation suit presents more than a claim of invidious discrimination to individuals by reason of a universal policy of segregation. It involves a discrimination against a *class* as a class, and this is assuredly appropriate for class relief."[206]

Codifying the majority view, Rule 23(b)(2) authorizes civil rights class actions in clarion terms. The need for class-wide injunctive relief to end a defendant's discriminatory acts makes a plaintiff class action not only desirable but essential. But this same commitment to guaranteeing civil rights class actions has prompted the widespread judicial misreading of the rule's applicability to defendant classes. Because civil rights suits contain natural candidates for (b)(2) plaintiff class certification, courts have predicated defendant class certification on the substantive law of the litigation and the nature of the relief sought by the plaintiff class. In a civil rights suit, the existence of two opposing classes has led courts to equate defendant class certification with plaintiff class certification. Yet neither the language nor the history of the rule indicates that any provision was made for the certification of defendant classes. The error is more misunderstanding than misinterpretation. Put simply, the

346 U.S. 826 (1953); Mitchell v. Wright, 62 F. Supp. 580 (M.D. Ala. 1945), *rev'd on other grounds,* 154 F.2d 924 (5th Cir.), *cert. denied,* 329 U.S. 733 (1946).

202. 238 F.2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910 (1957).

203. The court stated:

> There is no question as to the right of these school children to be admitted to the schools of North Carolina without discrimination on the ground of race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted.

*Id.* at 729.

204. *See* Advisory Committee Note, *supra* note 13, at 102 (citing eight civil rights class actions prior to amendment). *See generally* Comment, *The Class Action Device in Antisegregation Cases,* 20 U. CHI. L. REV. 577 (1953).

205. 313 F.2d 284 (5th Cir. 1963).

206. *Id.* at 289 n.5 (emphasis in original).

courts have fallen into the trap of using a single rule—with a single definition—to breathe life into two distinctly different procedural devices.

### B. *Developing a Defendant Class Action Theory*

Through a process of elimination, Rule 23(b)(1) becomes the only viable category for certifying a defendant class. This solution is too facile, however, because one cannot assume that the framers of the rule gave special consideration to certifying defendant classes under subdivision (b)(1).[207] Nevertheless, the (b)(1) category does authorize defendant class actions. The subdivision's utility lies not in its being the only remaining category, but in its maintaining the proper justification for a defendant class action: to join in a single suit all those parties who should be bound by the litigation so that complete relief may be administered.

#### 1. Joinder, Class Action, and the Necessary Parties Doctrine

The language of Rule 23(b)(1) parallels the language of Rule 19, the compulsory joinder provision of the federal rules.[208] "[T]he resemblances are not accidental but logical."[209] Both Rule 19 and Rule 23(b)(1) provide functional tests to facilitate the traditional justification for both joinder and class suits—the inclusion of "necessary parties."[210]

At common law the necessary parties doctrine man-

---

207. Indeed, all the specific examples listed in the Advisory Committee Note involve plaintiff classes. *See* Advisory Committee Note, *supra* note 13, at 100–02.

208. FED. R. CIV. P. 19(a) provides in part:

> Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

*See supra* note 70 (language of Rule 23(b)(1)); *see also* FED. R. CIV. P. 24(a) (language of rule for intervention of right parallels language of Rule 19 and Rule 23(b)(1)).

209. Kaplan, *supra* note 128, at 389.

210. *See* Advisory Committee Note, *supra* note 13, at 100; *cf.* 3B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 23.08 (discussing relationship between original Rule 19 and original Rule 23).

dated the inclusion of parties who were essential to the complete adjudication of a case.[211] When presented with a multifaceted controversy, a court could require that all individuals with an interest in the controversy be made parties. The goals of the doctrine were:

> from the viewpoint of the court, to do a complete job on the controversy in one sitting; from the viewpoint of those already parties, to protect them against the consequences of subsequent litigation reaching inconsistent results; from the viewpoint of those not made parties but by the rule required to be brought in, to assure that their practical out-of-court situation would not be adversely affected by changes in the status quo wrought in consequence of the judgment.[212]

Rule 19, framed like Rule 23 in functional terms,[213]

---

211. As stated by one early commentator:

> It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be.

J. MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY, BY ENGLISH BILL 163–64 (G. Jeremy 4th ed. 1827) (1st ed. London 1780).

212. D. LOUISELL, G. HAZARD & C. TAIT, CASES AND MATERIALS ON PLEADING AND PROCEDURE 671–72 (5th ed. 1983).

213. Rule 19 was amended in 1966 partly to overcome the cloudy distinction between necessary parties and indispensable parties. *See* FED. R. CIV. P. 19 advisory committee note, *reprinted in* 39 F.R.D. 69, 90–91 (1966). This distinction was articulated in Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1854), in which the Supreme Court stated:

> 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

Curiously, courts often dismissed cases because parties were "indispensable" rather than only "necessary." If the court could not obtain jurisdiction over an indispensable party, the litigation could not go forward despite that party's important stake in the suit. Although the labels seemed clear enough, courts often mis-

maintains the traditional justifications for the mandatory joining of parties. Joinder is required if incomplete relief would be administered to the current parties,[214] or if an individual's absence would impair her own interest or leave a party with a risk of inconsistent obligations.[215] Necessary parties—whether plaintiffs or defendants—should be included in the litigation.

The parallel between Rule 19 and Rule 23(b)(1) is crucial, for as one commentator has stated, "[Subdivision (b)(1)] provides for a mass-production solution to necessary-parties problems."[216] Because the total number of defendants is too unwieldy for individual process, a representative suit—a defendant class action—may be the only avenue to complete and consistent adjudication.[217] When the procedure is viewed as an extended compulsory joinder device rather than as a bastardized plaintiff class action, the appropriateness of the defendant class action becomes clear. If a class action is not invoked to include necessary party defendants, complete justice cannot be administered.[218] Plaintiff class members will obtain incomplete relief because some defendants will be bound by the litigation while others will be free to carry on an illegal policy.

The requirements of Rule 23(b)(1) provide the correct

---

understood the distinction and dismissed cases arbitrarily. *See generally* Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Reed, *Compulsory Joinder of Parties in Civil Actions* (pts. 1 & 2), 55 MICH. L. REV. 327, 483 (1957).

Rule 19, like Rule 23, was amended in 1966 to eschew a reliance on categorical labels and to depend more on functional tests to determine the need for multiparty litigation. *See* FED. R. CIV. P. 19 advisory committee note, *supra*, at 93.

214. FED. R. CIV. P. 19(a)(1).

215. FED. R. CIV. P. 19(a)(2).

216. Yeazell, *Group Litigation—Part II*, *supra* note 27, at 1110.

217. Common law joinder doctrine, *see supra* note 213, actually could prevent a class suit. Since the numbers were too great, indispensable parties would not be available for the litigation, and the suit would have to be dismissed. However, courts recognized the injustice that might arise if essential, but impracticably numerous, parties were not bound by the judgment. Accordingly, courts extended the necessary parties rule by allowing suits to go forward through representation. *See* F. CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY 25–26 (London 1837); Z. CHAFEE, *supra* note 18, at 211–13; 3B MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 23.02[1], at 23-36 to 23-37.

218. *See* Kalven & Rosenfield, *supra* note 78, at 709 ("In regard to defendants it may well be *impossible* to determine the plaintiff's rights without at the same time adjudicating or affecting the rights of others adversely situated to him. Here, there is literally necessary joinder." (emphasis in original)).

guidelines for certifying defendant classes. In the civil rights context, defendant classes composed of employers or public officials may be certified under subdivision (b)(1) if the court finds that single-party litigation would abridge the rights of the nonparty class members. Under clause (b)(1)(A), if the court determines that a plaintiff class would face inconsistent standards relative to individual defendants, certification is appropriate.[219] Under clause (b)(1)(B), if the court determines that the defendants' interest in the propriety of applying a challenged statute or agreement would be compromised by nonclass litigation, certification again is appropriate.[220] Although they look to the interests of different parties, the clauses of subdivision (b)(1) are two sides of the same coin. Both clauses seek to include necessary parties if the adjudication would be incomplete in their absence.

### 2. Certifying the Bilateral Class Action

An illustration may help demonstrate the application of a necessary parties test under Rule 23. Suppose a state were to pass a statute which required that all employees in the state colleges speak only English during working hours.[221] Bilingual Asian and Latino employees could challenge the

---

219. *See supra* notes 129–31 and accompanying text.

220. *See supra* notes 135–38 and accompanying text.

221. The Fifth Circuit addressed the problem of a speak-English-only rule in Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). The court held that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin. *Id.* at 272. Because the plaintiff was capable of speaking English and deliberately chose not to do so in disregard of his employer's rule, his discharge was not discrimination on the basis of national origin. *Id.* The court held that the rule did not violate Title VII as long as it did not create a burdensome atmosphere of racial and ethnic oppression; additionally, the court held that because preference for speaking one language over another was not an immutable characteristic, use of an unburdensome rule was not comparable to a rule discriminating on the basis of race or ethnicity. *Id.* at 270–71. *But cf.* Saucedo v. Brothers Wells Serv., 464 F. Supp. 919 (S.D. Tex. 1979) (discharge of employee for speaking two words of Spanish was based on racial animus and violated Title VII).

The Equal Employment Opportunity Commission (EEOC) takes a stricter approach to speak-English-only rules. The EEOC's guidelines on discrimination on the basis of national origin state that a rule will be presumed to violate Title VII if it requires English to be spoken at all times. 29 C.F.R. § 1606.7(a) (1985). A speak-English-only rule may be allowed only if it precludes communicating in a foreign language at certain times and if it is required by business necessity. *Id.* § 1606.7(b).

legality of the statute by initiating an action to certify both a plaintiff class of bilingual employees and a defendant class of state college officials. In this civil rights bilateral class action, the court, after having determined that the Rule 23(a) requirements had been satisfied for each class, would invoke Rule 23(b)(2) to certify the plaintiff class and Rule 23(b)(1) to certify the defendant class.

The court could certify the plaintiff class after an initial inquiry under Rule 23(a) into the nature of the class and the class representatives, and after a determination under Rule 23(b)(2) that the putative defendants had acted in a manner that would make equitable relief appropriate. Since the officials were charged with enforcing the law, the plaintiff class would be seeking injunctive and declaratory relief to stop the enforcement, and certification under subdivision (b)(2) would be proper.

Employing Rule 23 to certify the defendant class of state officials, the court first would apply the requirements of Rule 23(a), paying special attention to the typicality and adequacy of representation requirements. Then the court would determine whether the unnamed defendant officials were necessary parties. Using the standards of Rule 23(b)(1) to certify the defendant class, the court could apply either clause (b)(1)(A) or clause (b)(1)(B). Under clause (b)(1)(A), the party opposing the defendant class (i.e., the plaintiff class) faces potentially incompatible standards of conduct if inconsistent decisions arise from multiple litigation. Depending on their place of work, individual employees might or might not be forced to monitor their use of another language during working hours. Under clause (b)(1)(B), the members of the defendant class have an equally important stake in the outcome of the suit. Because they all had been charged with enforcing the statute, a finding of liability against one college official would determine the interests of the other officials in enforcing the statute.

Thus, the true test of whether a defendant class action should be certified is whether incomplete relief will result from nonclass adjudication. In those cases in which litigation against a single defendant would abridge the rights of the plaintiff class and affect the interests of other similarly situated defendants, a defendant class should be certified.

Only when necessary party defendants are included in the litigation may complete justice be attained.

## CONCLUSION

The defendant class action, though still a rarity in modern litigation, can be a useful procedure for expanding the range of civil rights enforcement. Although a defendant class action can be applied only in certain situations, courts should not be reluctant to certify defendant classes when classwide liability and classwide relief would be appropriate. Unfortunately, use of the defendant class action in the civil rights context has led to the judicial misapprehension of Rule 23 of the Federal Rules of Civil Procedure. The requirements of Rule 23 regarding defendant class actions should be accurately construed. By appreciating the history and the theories underlying class certification, courts may correctly categorize defendant class actions under Rule 23 and put them to their proper use in enforcing federal civil rights.

ANGELO N. ANCHETA