Defendant Class Actions Under Rule 23(b)(2): Resolving the Language Dilemma

*David H. Taylor**

I. INTRODUCTION

Class actions developed out of "the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their . . . rights nor grant them immunity from their . . . wrongs."[1] Subsection (b)(2) of Rule 23 of the Federal Rules of Civil Procedure, which provides for class certification in actions seeking declaratory or injunctive relief,[2] was primarily intended to provide a procedural mechanism for public interest litigation.[3] Most traditionally, the class seeking certification under subsection (b)(2) is a class of plaintiffs who bring suit to establish, through declaration and injunction, certain norms of conduct by a defendant. Certification of a plaintiff class ensures that the resulting decree will have res judicata effect on the defendant with respect to all persons who are adversely affected by the challenged behavior.

If provided for by subsection (b)(2), certification of a defendant class in an action brought by an individual plaintiff or, in appropriate situations, by a plaintiff class, would be an extremely useful device in public interest litigation to establish norms of conduct applicable to a category of defendants, such as local governmental officials, with regard to a plaintiff class of individuals, such as

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* Visiting Assistant Professor, Northern Illinois University College of Law; B.A., 1976, Duke University; J.D., 1980, Washington University (St. Louis). This Article is dedicated to the memory of my father, Daniel H. Taylor.

1. CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 72, at 471 (4th ed. 1983) (quoting Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948)).

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

3. *Proposed Rules of Civil Procedure*, 39 F.R.D. 69, 102 (1966) (advisory committee's note) [hereinafter *Proposed Rules*] ("Illustrative [of the type of actions contemplated by subsection (b)(2)] are various actions in the civil-rights field where a party is charged with discriminating unlawfully . . . .") Although Rule 23(b)(2) was drafted with an eye to civil rights litigation, the rule is not limited to civil rights cases. The Advisory Committee's note also discusses the section's applicability to tying violations by patentees and unlawful pricing differential practices of sellers. *See also* 1 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.12, at 292-94 (2d ed. 1985).

welfare recipients or pretrial detainees.[4] Certification of a defendant class would ensure that all those who engage in the challenged behavior are bound by a decision that the practice is illegal. Additionally, the defendant class mechanism is useful to resolve the difficulty created by the recent decision in *Martin v. Wilks* in which the Court held that persons who were affected by a decree entered in a suit, but who neither had been named as parties nor had sought timely leave to intervene, could later challenge the decree.[5] The defendant class action device would enable a court to join as parties large numbers of individuals whose joinder otherwise would be impracticable and who were not members of an entity that could be sued. Without a mechanism by which such persons could be brought into the litigation, a binding decree could never be entered that would not be subject to later attack.[6]

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4. Bilateral class litigation with certification of both a plaintiff and a defendant class pursuant to FED. R. CIV. P. 23(b)(2), though a somewhat unique device, is not unheard of. It has been utilized as an effective tool to obtain broad-based compliance with previously established rights and obligations.

For example, in Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972), a bilateral class action was brought on behalf of all persons tried before magistrates after a specified date for traffic violations in Alabama against a class of all justices of the peace, sheriffs, and state troopers in Alabama. The suit sought to end a practice in Alabama whereby a magistrate would retain as compensation part of the fine leveled in a traffic case. The practice had been previously declared unlawful in Bennet v. Cottingham, 290 F. Supp. 759, 763, *aff'd*, 393 U.S. 317 (1969). Although the United States Supreme Court had upheld the decision, the Attorney General of Alabama considered it to be applicable only to the named defendants, and the practice continued. *Callahan*, 466 F.2d at 61 n.2. Class certification was upheld and an injunction was issued against the defendant class, thereby ending the practice previously declared to be unlawful without the necessity of a multitude of identical individual suits. *Id.* at 62.

See also Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979) (state-wide plaintiff class of pretrial detainees successfully brought suit against defendant class of county sheriffs who had refused to allow plaintiffs to have contact visits with friends and family). For a detailed discussion of *Marcera*, *see infra* notes 104-07 and accompanying text.

5. 490 U.S. 755, 758, 761 (1989) (Court held that white firefighters who had not been joined and had not sought timely intervention in an earlier employment discrimination case could challenge the consent decree entered therein because they were affected by the action).

6. For a discussion of the use of subsection (b)(2) defendant class actions as a possible solution to the *Martin v. Wilks* problem, *see* George M. Strickler, *Martin v. Wilks*, 64 TUL. L. REV. 1557, 1596-99 (1990). Professor Strickler states that "courts have been far from receptive to the concept" of subsection (b)(2) defendant class certification. *Id.* at 1596.

As discussed below, subsection (b)(2) is the only viable device for certification of a defendant class. *See infra* note 17. Therefore, a resolution of the subsection (b)(2) dilemma is necessary to resolve the situation created by *Martin v. Wilks* in which a binding resolution in civil rights litigation may be practically impossible because of the inability to bind to

Yet, despite the efficacy of Rule 23(b)(2) as a means of conducting litigation intended to establish broad-based norms of conduct, and the concomitant need in appropriate cases to have the norms thus established bind all members of the class whose conduct is sought to be influenced, courts have split on the issue of whether Rule 23(b)(2) provides for defendant class certification.[7] The uncertainty as to whether Rule 23(b)(2) provides for defendant class certification arises from the specific language of the subsection. While the general provisions of Rule 23(a) clearly contemplate defendant class actions, the language of subsection (b)(2) is couched in terms that make it unclear whether defendant class actions are provided for by the subsection. The issue is presently pending on appeal before the Supreme Court.[8]

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the decree all those affected by the litigation.

As this Article was going to press, President Bush signed into law the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, which reversed the holding of *Martin v. Wilks* in the area of employment discrimination. The Act prohibits the collateral challenge to a consent decree entered in an action challenging discriminatory employment practices if the person bringing the challenge, either, prior to the entry of the consent decree had actual notice of the proposed consent decree and a reasonable opportunity to present objections to the consent decree, or was someone whose interests had been adequately represented in a previous challenge. Civil Rights Act of 1991 § 108. Outside the area of employment discrimination, defendant class certification pursuant to Rule 23(b)(2) remains the only viable mechanism to bind all persons to a decree who may be affected by that decree but who are not members of a suable legal entity.

7. Decisions of the Fourth, Sixth, and Seventh Circuits are cited as holding that Rule 23(b)(2) does not provide for defendant class certification. Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1129 (1981); Thompson v. Board of Educ., 709 F.2d 1200, 1204 (6th Cir. 1983); Henson v. East Lincoln Township, 814 F.2d 410, 416 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987). As will be discussed later, neither *Paxman* nor *Thompson* actually held Rule 23(b)(2) to be totally inapplicable to defendant class certification. Nevertheless, in struggling with the dilemma of the language of Rule 23(b)(2) when applied to defendant classes, both courts inserted into the subsection a requirement for certification that subsection (b)(2) does not provide and that is redundant of the general prerequisite requirements of Rule 23(a)(2) and (3): "commonality" and "typicality." Though redundant, the newly imposed requirement of *Paxman* and *Thompson* is more stringent and approaches "identicality." *See infra* notes 57-65 and accompanying text. Citing *Paxman* and *Thompson* as authority, *Henson* did hold subsection (b)(2) to be inapplicable to defendant class certification. *Henson*, 814 F.2d at 413.

Most notably, the Second Circuit has found Rule 23(b)(2) to provide for defendant class certification. Marcera v. Chinlund, 595 F.2d 1231, 1239 (2d Cir. 1979). For other cases certifying defendant classes under Rule 23(b)(2), see *infra* notes 91-92, 96, 99, 108-10, 113, 120-22 and accompanying text.

8. *Henson*, 484 U.S. at 923. It appeared that the issue would be resolved when the Supreme Court granted Mr. Henson's petition for writ of certiorari on November 2, 1987. Subsequently, the parties involved have entered into settlement discussions deferring further proceedings, and the question remains unresolved whether a defendant class may be certified pursuant to FED. R. CIV. P. 23(b)(2). *Id.* at 1001 and 1057.

This Article explores the language dilemma created by the provisions of subsection (b)(2). After setting out the precise nature of the language dilemma, the Article discusses the arguments of those courts that have denied subsection (b)(2) defendant class certification based upon a literal reading of the subsection's language, and the arguments of those courts that have used various devices, some involving quite contorted reasoning, to overcome the language dilemma based upon the functional need for defendant class certification under subsection (b)(2).[9] The Article asserts that neither side has developed a persuasive argument for its position because neither side has engaged in the thorough analysis grounded in principles of statutory construction that is necessary to determine the proper interpretation of Rule 23(b)(2). The Article then offers such an analysis, in which it demonstrates that defendant class certification is provided for under Rule 23(b)(2).

II. THE RULE 23(b)(2) DEFENDANT CLASS ACTION LANGUAGE DILEMMA

A. A Brief Background of Rule 23

A determination as to whether a suit may be maintained as a class action pursuant to Rule 23 involves a two-step, conjunctive process.[10] First, the proposed class must satisfy each of the four prerequisites of paragraph (a):[11] 1) "numerosity" of class

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9. As will be discussed herein, two schools of thought have emerged on (b)(2) class certification and have received much discussion by commentators. On the side of certification, see Scott D. Miller, Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371 (1984). For the arguments opposing certification, see Angelo N. Ancheta, Comment, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283 (1985); and 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).

10. Class certification of either a plaintiff or a defendant class involves the same general application of the two step requirement of Rule 23. *See Proposed Rules*, *supra* note 3, at 100, "Subdivision (a) states the prerequisites for maintaining *any* class action . . . ." (emphasis added).

11. *See* FED. R. CIV. P. 23(b) ("An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied . . . .").

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

> (a) 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 or fact 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.

members;[12] 2) "commonality" among the members of the proposed class members of factual or legal questions;[13] 3) "typicality" of the claims or defenses of the representative with regard to those of unnamed class members;[14] and, 4) "adequacy of representation" by the representative party of the interests of the class.[15] The language of Rule 23(a), "a class may sue or be sued," clearly states that a defendant class action may be maintained under Rule 23.[16]

Second, after meeting the four prerequisites of Rule 23(a), the proposed action must fit within at least one of the three categories of actions described in paragraph (b).[17] Although none of the three

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12. FED. R. CIV. P. 23(a)(1); *see* 3B JAMES W. MOORE & JOHN E. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.05[1], at 23-137 (2d ed. 1991) ("The raison d'etre of the class suit is necessity, which in turn depends upon the question of when is a class so numerous as to make . . . [joinder] impracticable to bring all its members individually before the court."); *see also* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1762, at 150-95 (2d ed. 1986); 1 NEWBERG, *supra* note 3, §§ 3.03-3.09, at 134-52.

13. FED. R. CIV. P. 23(a)(2); *see* 3B MOORE & KENNEDY, *supra* note 12, ¶ 23.06[1], at 23-159 to 23-160 (courts generally do "not require that *all* questions of fact and law be common, but only [demand] that a question of law *or* fact be presented which is shared in the grievances of the prospective class as defined"); *see also* 7A WRIGHT ET AL., *supra* note 12, § 1763, at 196-228; 1 NEWBERG, *supra* note 3, §§ 3.10-3.12, at 153-63.

14. FED. R. CIV. P. 23(a)(3); *see* 3B MOORE & KENNEDY, *supra* note 12, ¶ 23.06[2], at 23-175 to -176 ("It has been consistently held that typicality of claims does not require that the claims of the individual class members to be identical."); 1 NEWBERG, *supra* note 12, § 4.57, at 396 ("Rule 23(a)(3) typicality of claims or defenses focuses on the presence of a common issue from the perspective of the proposed class representative."); *see also* 7A WRIGHT ET AL., *supra* note 12, § 1764, at 228-62; 1 NEWBERG, *supra* note 3, §§ 3.13-3.20, at 163-97.

15. FED. R. CIV. P. 23(a)(4); *see* 3B MOORE & KENNEDY, *supra* note 12, ¶ 23.07[1], at 23-188 (generally, courts "consider (1) whether the interest of the named party is coextensive with the interests of the other members of the class; (2) whether his interests are antagonistic in any way to the interests of those whom he represents; (3) the proportion of those made parties as compared with the total membership of the class; and (4) any other facts bearing on the ability of the named party to speak for the rest of the class"); *see also* 7A WRIGHT ET AL., *supra* note 12, § 1765, at 262-94; 1 NEWBERG, *supra* note 3, §§ 3.21-3.27, at 197-212.

16. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue *or be sued* . . . .") (emphasis added).

17. *See Proposed Rules*, *supra* note 3, at 100 ("Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.").

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

(b) Class Action 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 a risk of

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

categories explicitly address whether a defendant class may be

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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 interest; 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 only 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.

Subsection (b)(1), which is divided into two clauses, (b)(1)(A) and (b)(1)(B), provides a mechanism to bring a unitary action to resolve multiple claims in situations in which there would be a risk of inconsistent adjudications if multiple individual actions were pursued. *Proposed Rules*, *supra* note 3, at 100-02. Subsection (A) seeks to avoid the creation of such inconsistencies for the party opposing the class in respect to individual members of the class. Subsection (B) is designed to prevent what would amount to the practical disposition of the interests, or prejudice to the interests of persons not parties to the adjudication. FED. R. CIV. P. 23(b)(1).

To date, defendant class certification pursuant to Rule 23(b)(1), particularly in the area of civil rights enforcement, has not often been sought, and the area remains largely unexplored. *See* 7 WRIGHT ET AL., *supra* note 12, § 1772, at 421, 423; 1 NEWBERG, *supra* note 3, § 4.04, at 275. This is most likely due to the fact that Rule 23(b)(2) is the category that was designed to provide injunctive and declaratory relief to an aggrieved plaintiff class, particularly in the area of civil rights litigation, and it is that which has most often been invoked for that purpose. In light of the defendant class action device pursuant to Rule 23(b)(2) no longer being viable in the Fourth, Sixth, and Seventh Circuits, perhaps Rule 23(b)(1)(A) will be explored as a mechanism for civil rights defendant class action litigation.

Defendant class certification under subsection (b)(1)(A) has been limited to a few areas such as trademark and patent infringement. *See, e.g.*, 7A WRIGHT ET AL., *supra* note 12, § 1773, at 435-36; 1 NEWBERG, *supra* note 3, § 4.63, at 407-08. Defendant class certification pursuant to Rule 23(b)(1)(B) has been largely limited to situations where plaintiffs seek to obtain relief from a common limited fund which does not contain sufficient resources to satisfy all claims. 7A WRIGHT ET AL., *supra* note 12, § 1774, at 441-43. This is due to the requirement of Rule 23(b)(1)(B)—that as a "practical matter" the adjudication would be "dispositive of the interests of other members not parties to the adjudication"—having been interpreted to necessitate the showing of something more than the decision being given stare decisis effect in subsequent litigation brought by the "other members" who are not "parties." For cases holding that something more than stare decisis effect is needed to meet the requirements of Rule 23(b)(1)(B), see 7A WRIGHT ET AL., *supra* note 12, § 1774,

maintained under its provisions, categorical subsections (b)(1) and (b)(3) each contain language that indicates the subsection is applicable to defendant class certification.[18] The language of subsection (b)(2) does not contain a comparable expression of applicability to defendant class certification, nor does it state any exclusion from applicability to defendant classes. It is at best awkward in its application to defendant classes and can be read to be inapplicable to defendant class certification.[19] It is that reading that led to the prohibition of (b)(2) defendant classes in *Henson v. East Lincoln Township* and the imposition of a new requirement for (b)(2) defendant classes in *Paxman v. Campbell* and *Thompson v. Board of Education*.[20]

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at 439 n.4.

As previously noted, subsection (b)(2) was intended by its drafters to provide a mechanism for class action civil rights litigation. *See Proposed Rules*, *supra* note 3, at 102 ("[I]llustrative [of the type of actions contemplated by subsection (b)(2)] are various actions in the civil-rights field where a party is charged with discriminating unlawfully . . . ."). For examples of cases where defendant classes have been certified in suits seeking injunctive relief against government agencies, see 1 NEWBERG, *supra* note 3, § 4.08, at 287 n.88. Nevertheless, it is not limited to such actions and has been utilized in many other contexts. *See id.* § 4.12, at 292-94.

Numerous defendant classes have been certified under subsection (b)(2), which has been the most commonly used device for defendant classes. The *Henson* court states that there have been 45 cases in which defendant classes have been certified as subsection (b)(2) classes. Henson v. East Lincoln Township, 814 F.2d 410, 413 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987). The actual number exceeds 45, but it is not necessary to burden this Article with a list of every instance of (b)(2) defendant class certification. The Article categorizes the body of cases by the manner with which the cases have dealt with the language dilemma as "by hook," "by crook," and "by no look" and provides examples of each. *See infra* note 87 and accompanying text.

Class certification pursuant to subsection (b)(3) is by far the most encompassing for it provides for class certification where common questions of law or fact predominate over individual questions, and the class action device is "superior" to other methods of adjudication. The type of civil rights litigation in *Henson*, *Paxman*, and *Thompson* could certainly qualify for defendant class certification under subsection (b)(3), but because of its breadth of scope, subsection (b)(3) is subject to a requirement unique to the three categories of class actions. Rule 23(c)(2) requires that members of a (b)(3) class be given notice of the pending action that allows a specific time period within which the notified member may exclude itself from the class. If unruly potential defendants are refusing to comply with established legal obligations, it is highly unlikely that they would not exercise their right to "opt out" of the litigation upon receiving notification and further escape being subjected to enforcement.

18. *See* FED. R. CIV. P. 23(b)(1) ("the prosecution of separate actions by or against individual members"); FED. R. CIV. P. 23(b)(3)(A) ("the prosecution or defense"); FED. R. CIV. P. 23(b)(3)(B) ("commenced by or against members of the class").

19. This Article argues that a fair reading of Rule 23(b)(2) is ambiguous as to defendant class certification. Therefore, an analysis of statutory interpretation is necessary to derive the subsection's applicability to defendant class certification. *See infra* notes 128-44 and accompanying text.

20. *Henson*, 814 F.2d at 414-15; Thompson v. Board of Educ., 709 F.2d 1200, 1203-

B. The Language Dilemma of Subsection (b)(2)

Subsection (b)(2), the only one of the three categorical subsections which is relief oriented, provides for injunctive relief or declaratory relief 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."[21] Because it is the action or inaction of the party who is in opposition to the class that is the object of the injunctive relief, the subsection may be read as if it is only the plaintiff who may be a class and obtain the benefit of injunctive relief against the party, the defendant.[22] Otherwise, one would face the anomaly that the plaintiff's actions or refusals to act in regard to a defendant class provide the basis for class certification in a suit filed for the purpose of obtaining injunctive relief against the defendant class.[23] Therefore, the ironical situation exists that the device designed by the Advisory Committee for class certification in the area of civil rights enforcement,[24] and best suited for defendant class certification,[25] does not expressly provide so on its face. As is often quoted by those opposed to (b)(2) defendant class certification, the language of the subsection must be "stretched . . . to allow" defendant classes.[26]

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04 (6th Cir. 1983); Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1129 (1981).

21. FED. R. CIV. P. 23(b)(2) (emphasis added).

22. The language dilemma often has been discussed by the commentators. *See, e.g.*, Ancheta, *supra* note 9, at 311-12, 323 (most often cited as the leading writing in opposition to (b)(2) defendant class certification); Note, *supra* note 9, at 390-96 (also concluding that the rule does not provide for defendant class certification); Diane Terrell, Comment, *Defendant Class Certification: The Difficulties Under Rule 23(b)(2) and the Rule 65(d) Solution*, 8 N. ILL. U. L. REV. 143, 155-56 (1987); Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 634 n.23 (1978). *But see* Miller, *supra* note 9, at 1376-78 (most often cited as the leading writing in favor of (b)(2) defendant class certification; though, as will be discussed at *infra* notes 64-65, 116-19 and accompanying text, this work argues for limiting defendant certification to situations in which the members of the class are "juridically linked.") This Article will argue that such requirement is unnecessary because it is redundant of the provisions of Rule 23(a)(2) and (3).

23. Courts struggling with the dilemma of the subsection's applicability to defendant classes have invented creative contortions to find action or inaction warranting injunctive or declaratory relief on the part of the plaintiff opposing the defendant class. *See infra* notes 89-100 and accompanying text for discussion of certification "by hook" of a subsection (b)(2) defendant class.

24. *Proposed Rules*, *supra* note 3 at 95, 102.

25. *See supra* note 17 and accompanying text.

26. 3B MOORE & KENNEDY, *supra* note 12, ¶ 23.40[6] at 23-285. Many cases discussing the applicability of subsection (b)(2) to defendant class certification have cited a previous edition of *Moore's* for the proposition that the language of subsection (b)(2) must be "wrenched to fit" defendant classes. 3B JAMES W. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 23.40[6], at 23-310 (1985).

At the same time, however, in light of the general provision for defendant classes in subsection (a),[27] it is puzzling that the subsection does not expressly provide for the exclusion of defendant class certification if that was intended.

III. TWO SCHOOLS OF THOUGHT

Two schools of thought have developed on the applicability of subsection (b)(2) to defendant class certification. These can be viewed as the literalists and the functionalists;[28] the former viewing the language of Rule 23(b)(2) as not providing for defendant class certification, and the latter ignoring the difficulty with the language

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27. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties . . . .").

28. The term "literalist" has been used by various commentators to refer to the school of thought that finds that Rule 23(b)(2) does not support the certification of defendant classes. *See, e.g.*, Ancheta, *supra* note 9, at 315-17 (referring to "literal interpretations"); Terrell, *supra* note 22, at 156-57 (referring to the "literal approach").

The school referred to in this Article as the functionalists has been most often divided into two approaches called instrumental and plaintiff-based. *See* Ancheta, *supra* note 9, at 312-15 (referring to "instrumental certification" and "plaintiff-based certification"); Terrell, *supra* note 22, at 157-60 (referring to the "instrumental approach" and the "plaintiff-based approach"); Miller, *supra* note 9, at 1392-94 (referring to "plaintiff-based certification").

The author disagrees with the division of approaches, both for and against certification, into the three approaches utilized above. The issue is viewed more clearly by first dividing the issue into the camp in favor of certification and the camp opposed. The distinction between the two camps is that the "instrumentalists" advocate defendant class certification under subsection (b)(2) largely because of the usefulness of the tool and the necessity for widespread injunctive relief. The instrumentalists have not sought to resolve the difficulty with the language of the Rule. *See infra* notes 101-18 and accompanying text for a discussion of subsection (b)(2) defendant class certification "by crook."

As discussed at *infra* notes 89-95 and accompanying text, the plaintiff-based camp advocates defendant class certification stating that the language of subsection (b)(2) does not pose a difficulty to certification because the plaintiff class has acted on "grounds generally applicable to the [proposed defendant] class," thereby removing the difficulty with the language. This argument is but one of several methods employed by the functionalists to rationalize (b)(2) defendant class certification.

As will be discussed later, the functionalists have actually taken more than these two lines of reasoning, but the overriding concern of this school of thought is to perpetuate the function of (b)(2) defendant class certification. Additionally, though the commentators refer to two methods used to support certification, they are not in agreement as to the rationale used by the two. For example, one commentator refers to "certification by analogy," Miller, *supra* note 9, at 1394, which the other commentators have not discussed. The disagreement is caused because there actually have been more than two methods employed. Hence, those who have advocated that subsection (b)(2) supports certification of defendant classes will be referred to as the functionalists, and the several approaches they have used will be discussed individually as approaches of "by hook," "by crook," and "by no look."

in order to retain the device as a matter of judicial economy and social utility. The analysis of each side has been incomplete. The literalists have done little more than read Rule 23(b)(2) in isolation from the rest of Rule 23. The functionalists have failed to provide a valid explanation for overcoming the difficulty with the language. Therefore, the dilemma has been little more than acknowledged by both sides, and neither has offered a defensible resolution.[29]

A. The Literalists

The literalist approach appears to have originated with Wright & Miller[30] and has been furthered by several other commentators.[31] It formed the basis for several lower court decisions which denied defendant class certification under subsection (b)(2),[32] and reached

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29. The resolution is not complex. It simply involves the application of accepted principles of statutory interpretation in order to discern the applicability of subsection (b)(2) to defendant class certification. *See infra* notes 125-65 and accompanying text. Though courts faced with the issue have applied principles of statutory interpretation, they have done so in a piecemeal fashion. Resolution requires a comprehensive analysis.

30. *See* 7A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, CIVIL § 1775, at 21-22 (1972), which mentions the difficulty with the applicability of the language to defendant class actions. Prior to that work, the decision in Technograph Printed Circuits Ltd. v. Methode Elecs., 285 F. Supp. 714, 723 (N.D. Ill. 1968), noted that subsection (b)(2) required that the plaintiff have acted on grounds generally applicable to the class in a defendant class situation. Nevertheless, the court did not find this to be any impediment to defendant class certification and used creative ways to find the required actions by the plaintiffs, thereby choosing to ignore the anomaly of basing certification of a defendant class in order to provide injunctive relief against that class upon the acts of the plaintiffs. *See infra* notes 90-95 and accompanying text.

31. *See* 3B MOORE & KENNEDY, *supra* note 12, ¶ 23.40[6], at 23-284 to -288, and ¶ 23.40 n.17 (Supp. 1973); Note, *supra* note 9, at 391-96; Ancheta, *supra* note 9, at 315-17.

32. *See, e.g.*, Coleman v. McLaren, 98 F.R.D. 638, 651-52 (N.D. Ill. 1983); Mudd v. Busse, 68 F.R.D. 522, 530 (N.D. Ind. 1975); Stewart v. Winter, 87 F.R.D. 760, 770 (N.D. Miss. 1980), *aff'd on other grounds*, 669 F.2d 328 (5th Cir. 1982).

In *Coleman*, the court apparently held that a defendant class never may be certified under subsection (b)(2).

In *Mudd*, bilateral class action was brought by pre-trial detainees against Indiana judicial officers challenging certain bond procedures. It is unclear whether the court denied certification solely because it viewed (b)(2) to be inapplicable to defendant class certification. The court discussed the problem with the language but said that the Wright & Miller argument (*see supra* note 30) was considered and rejected in Gibbs v. Titelman, 369 F. Supp. 38, 53 (E.D. Pa. 1973), *order rev'd with directions*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974). The court then distinguished *Gibbs*, stating that it was a suit challenging the constitutional validity of a statute. Perhaps the court would have maintained (b)(2) defendant class certification if *Mudd* had been such a suit. As discussed *infra* notes 47-51, 57-60, 83 and accompanying text, the court is reading into subsection (b)(2) a requirement that is redundant of Rule 23(a)(2) and (3), yet more restrictive.

In *Stewart*, the court engaged in an analysis very similar to that of *Mudd* when distinguishing the authority cited by plaintiff for defendant class certification as involving more typical claims.

its greatest notoriety with decisions of the Fourth,[33] Sixth,[34] and Seventh[35] Circuits.[36] With *Paxman v. Campbell*, the Fourth Circuit became the first appellate court to endorse the literalist approach.

In *Paxman*, two public school teachers brought suit on behalf of themselves and all pregnant public school teachers in the State of Virginia against a class of defendants, comprised of all city or county school boards in the State of Virginia, which numbered more than 130.[37] The suit alleged that maternity leave policies of the defendant class violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The validity of the claims of plaintiffs was not subject to dispute, for the Supreme Court previously had held that policies similar to those being challenged by the plaintiffs were violative of the Due Process Clause of the Fourteenth Amendment.[38] The law having been declared in the area, the plaintiffs were attempting to obtain the compliance of recalcitrant school districts that chose not to stop doing what the Supreme Court had ruled unconstitutional for school districts to

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33. Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1129 (1981).

34. Thompson v. Board of Educ., 709 F.2d 1200 (6th Cir. 1983).

35. Henson v. East Lincoln Township, 814 F.2d 410 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987). Prior to *Henson*, the Seventh Circuit had expressed doubt about the applicability of the language of subsection (b)(2) to defendant class certification but did not need to reach a decision on the issue because the court denied certification of the proposed bilateral plaintiff class, thereby obviating the need for a defendant class. Adashunas v. Negley, 626 F.2d 600, 604-05 (7th Cir. 1980).

36. The Fifth Circuit has also expressed its concern with the "troublesome issue" of whether subsection (b)(2) provides for defendant class actions because of the literal language of the rule. *See* Greenhouse v. Greco, 617 F.2d 408, 413 n.6 (5th Cir. 1980). *Greco* was a bilateral class action challenging alleged discriminatory practices of certain parochial schools within a diocese. The court did not have to reach the issue because it found that the requirements of Rule 23(a) were not met in the case. As will be argued at *infra* notes 47-51, 57-60, 83 and accompanying text, Rule 23(a) is the proper area of inquiry for the concerns of those courts which have denied (b)(2) defendant class certification on the basis of the language dilemma. *Greco* found that the proposed defendant class did not have an adequate class representative as required by Rule 23(a)(4) because the named representative "ha[d] no intention of defending the policies and interests of [other members of the defendant class]." *Id.* at 412.

37. The defendant class was certified as, "all persons who were or are, during the period December 6, 1969 to June 25, 1975, members of a public county or city school board of the Commonwealth of Virginia which required that a pregnant school teacher cease her teaching at some time during the period of pregnancy other than a time of her own choosing." Paxman v. Campbell, 612 F.2d 848, 852 (4th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1129 (1981).

38. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 650 (1974).

do.[39] Plaintiffs sought declaratory and injunctive relief and back pay they allegedly had lost as a result of the unlawful policies of the defendant class.[40]

The Fourth Circuit determined, in less than one page of text encompassing two paragraphs, that subsection (b)(2) did not provide for the certification of a defendant class.[41] The decision made no mention of the numerous prior cases that had certified defendant classes and made no acknowledgment of the arguments in favor of defendant class certification. The decision is based on nothing more than a literal reading of subsection (b)(2), separate and apart from the rest of the rule, and the dilemma caused by the subsection's language, which reads as if it provides only for injunctive relief on behalf of a class of plaintiffs against a single defendant. As authority, the opinion cites Wright & Miller, whose analysis goes no deeper than that of the opinion.[42]

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39. Judge Frank M. Johnson, Jr. told the following story applicable to the situation in which a defendant class action is brought for the purpose of obtaining compliance with an established legal obligation:

> This fellow had a mule he couldn't train. When he told it to giddy-up, why the mule would stop. But when he'd tell it to whoa, the mule would get up. You'd tell it to gee, it would haw. You'd tell it to haw, it would gee. He finally decided he had to take it to a mule trainer, and he did. He took it across the county, left it, and told the man what he wanted. The man said, "Sure, I think I can train your mule," he says, "leave your mule here, and come back in 30 days." The man started to walk off that owned the mule, and the mule trainer picked up a singletree, a piece of wood about three feet long, you know what a singletree is. So he knocked the mule in the head with it. The mule fell to his feet, and the owner of the mule says, the man says, "I wanted you to train my mule. I didn't want you to beat him to death." And the man says, "Well, I haven't started training your mule." He says, "I'm just trying to get his attention."

—Judge Frank M. Johnson, Jr., Interview with Bill Moyers, July 24, 1980, on getting the attention of Alabama local school boards in desegregation cases as retold in JUDGE FRANK JOHNSON: ANTICS AND ANECDOTES 14 (anonymous editors, 1985).

As United States District Court Judge for the Middle District of Alabama, Judge Johnson had occasion to certify defendant classes in several actions brought by plaintiffs to obtain the compliance of recalcitrant officials of the State of Alabama with established legal obligations. Two of those cases figure significantly in the resolution proposed by this Article to the dilemma of whether Rule 23(b)(2) provides for the certification of defendant classes. *See infra* notes 161-63 and accompanying text.

40. It is interesting to note that the Supreme Court's decision in *Cleveland Bd. of Educ.*, 414 U.S. at 636-38, 648, 650-51, reversed the decision of the Fourth Circuit in Cohen v. Chesterfield County Sch. Bd., 474 F.2d 395 (4th Cir. 1973), *rev'd*, 414 U.S. 632 (1974). Having been reversed on the substantive issue, perhaps the Fourth Circuit was looking for a procedural method to bar the relief sought by plaintiffs.

41. *Paxman*, 612 F.2d at 854. At the time that *Paxman* was decided, subsection (b)(2) defendant classes had been certified on many occasions. *See infra* notes 90, 92, 96, 99, 102, 104-05, 108-10, 113, 115, 120-22 and accompanying text.

42. *Paxman*, 612 F.2d at 854 (quoting 7A WRIGHT & MILLER, *supra* note 30, § 1775,

Also cited as authority by the Fourth Circuit, are the Notes of the Judicial Conference Advisory Committee.[43] The Notes do little to resolve the dilemma created by the language of subsection (b)(2), because they employ the precise language of the rule. They are not conclusive as to whether the use of the phrase, "party has taken action or refused to take action with respect to the class," was intended to exclude the defendant class action device from subsection (b)(2) and make the subsection applicable only to situations in which a class of plaintiffs seeks relief against a single defendant. Unfortunately, the Notes are completely silent as to defendant class actions under subsection (b)(2), as well as under the entire Rule 23.

Paxman typifies the literalist approach. Its lack of analysis makes it less than persuasive authority, and it leaves two basic questions unanswered. First, although subsection (b)(2), when read in isolation from the language of subsection (a), does not literally provide for certification of a defendant class, how does the literalist approach reconcile Rule 23 when read as a whole? The prerequisite provisions of subsection (a) clearly provide for the certification of a defendant class.[44] Second, were so many courts so wrong when they certified defendant classes?[45] At least some mention of the adverse authority is warranted.[46]

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at 21-22 ("It should be noted that the injunctive relief must be sought in favor of the class. As a result, an action to enjoin a class from pursuing or failing to pursue some course of conduct would not fall under Rule 23(b)(2) . . . ."). Unfortunately, the authority cited contains no deeper analysis than that engaged in by the Fourth Circuit. Wright and Miller merely recite the language dilemma and conclude that subsection (b)(2) does not provide for the certification of a defendant class.

43. *Id.* at 854 (quoting *Proposed Rules*, *supra* note 3, at 102: "This subdivision [(b)(2)] is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate."). This quotation is from the two paragraphs of the Advisory Committee's notes that address subsection (b)(2).

44. Recently, an author argued that, in light of the "sue or be sued language" of Rule 23(a), one would have to first determine "that the drafters could not have meant what they said" to conclude that subsection (b)(2) is inapplicable to defendant classes. Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1 U. ILL. L. REV. 43, 46 (1989). As discussed herein, this argument is not without difficulty and does not in and of itself conclusively resolve the issue. *See infra* notes 96-98 and accompanying text.

45. Numerous cases have certified defendant classes under subsection (b)(2). *See infra* notes 90, 92, 96, 99, 102, 104-05, 108, 109-10, 113, 115, 120-22.

46. This seems particularly appropriate in light of the Supreme Court's decision in Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam) (affirming a lower court decision which had granted injunctive and declaratory relief against a defendant class of correction officials). *See infra* notes 161-63 and accompanying text.

More importantly, the Fourth Circuit's expressed concerns with defendant class certification have little to do substantively with the language dilemma of Rule 23(b)(2). They are more properly rooted in Rule 23(a)(2) and (3), the commonality and typicality prerequisites.[47] The court expressed concern that each school board, whose members comprised the defendant class, may have had widely varying policies on maternity leave, and that the similarities among those policies were unknown.[48] If the substance of the challenged policies was in fact unknown, making it impossible for the court to determine whether similarities existed, it can only follow that the plaintiffs did not sustain their burden of establishing that the proposed defendant class met the prerequisites of section (a), and defendant class certification should have been denied on that basis.[49] If the prerequisites of section (a) were not met, there

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47. *See* FED. R. CIV. P. 23(a)(2) ("questions of law or fact common to the class"); FED. R. CIV. P. 23(a)(3) ("claims or defenses of the representative parties are typical of the claims and defenses of the class").

48. *See* Paxman v. Campbell, 612 F.2d 848, 854 n.9 (4th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1129 (1981) ("In this case, in contrast, more than 130 different school boards were free to adopt maternity leave policies of entirely unknown differences or similarities. It is uncontradicted that there was no state-wide policy in force, centrally directed or otherwise.").

49. The *Paxman* court, itself, had recognized that the burden of establishing the prerequisites is on the plaintiffs (citing Carracters v. Morgan, 491 F.2d 458, 459 (4th Cir. 1973); Poindexter v. Teubert, 462 F.2d 1096, 1097 (4th Cir. 1972)). *Id.* at 855.

Courts have refused to certify defendant classes because of a lack of commonality or typicality of the defenses of the class members or the class representative. *See, e.g.*, Ellis v. O'Hara, 105 F.R.D. 556, 563-64 (E.D. Mo. 1985) (denied certification of a (b)(2) defendant class comprised of "[a]ll juvenile officers, guardians *ad litem* appointed by juvenile courts, school officials, Division of Family Service employees, and local law enforcement officers who are delegated power under the challenged state statutes to utilize state courts to investigate parents who choose to offer their children at home an education that is Christ-centered and based on the Holy Bible," because of lack of typicality among defenses in a suit brought to challenge a Missouri compulsory education statute as well as statutes that provide for investigation of parents in homes of children suspected to be victims of educational neglect); Rios v. Marshall, 100 F.R.D. 395, 412-13 (S.D.N.Y. 1983) (denied certification of defendant class comprised of "all New York apple growers who have applied for the use of temporary foreign workers from 1975 to the present," because of lack of typicality of defenses in a suit brought by 38 U.S. citizen migrant farm workers alleging a conspiracy among defendants to replace them with foreign workers); Manning v. Princeton Consumer Discount Co., 390 F. Supp. 320, 324 (E.D. Pa. 1975) (denied certification of defendant class of automobile dealers and consumer loan companies in a challenge to alleged industry practice of treating credit sales as loan transactions in violation of Truth in Lending Act, in part, because the plaintiffs' allegation—that the legality of the proposed class members' conduct made the claims against the class typical—was meaningless), *aff'd*, 533 F.2d 102 (1977); Coniglio v. Highwood Serv., Inc., 60 F.R.D. 359, 363, 364 (W.D.N.Y. 1972) (denied certification of a defendant class of all National Football League teams in a challenge to an alleged practice of requiring season ticket holders to

was no reason for the court to address the subsection (b)(2) dilemma.[50] Nevertheless, the concerns of the court that there was no "statewide policy"[51] in question indicate that the court was looking for something beyond commonality or typicality—perhaps "identicality."

The second literalist case, *Thompson v. Board of Education*,[52] involved the same claims as *Paxman* and sought certification of an almost identical defendant class.[53] The opinion quotes *Paxman* extensively, stating that the reasoning of the Fourth Circuit is "sound" and should be "followed" and recites the language dilemma of the subsection.[54] Thus, the *Thompson* opinion appears to be strictly following the literalist approach but then becomes unclear as to whether it is actually holding that subsection (b)(2) is not applicable to defendant class actions.

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purchase tickets to exhibition games, because the commonality requirement was not met in that the practices in question were found to vary greatly within each locality and "share little if anything in common").

50. The *Paxman* court also overstated the problem caused by the differences, or lack of commonality or typicality, among the defenses of the defendant class. Plaintiffs simply sought an injunction against policies which treated pregnancy differently than other temporary disabilities. 612 F.2d at 852. The constitutionality of individual policies was not at issue. The suit was brought in order to obtain broad-based compliance with the decision of the Supreme Court which declared such disparity in the treatment of pregnancy as unconstitutional. *Id.* at 853.

The problem was rooted in the proposed definition of the defendant class. *See supra* note 37. If the definition had included the phrase "because of a policy which treats pregnancy differently than other disabilities," school boards which did not have offending policies would not be members of the defendant class. *See id.* at 854 n.9. Compare with *Paxman* the definition of the proposed defendant class in Thompson v. Board of Educ., 709 F.2d 1200, 1202 (6th Cir. 1983):

> All school boards in the State of Michigan which, since March 24, 1972, have treated or now treat pregnancy related disabilities differently than other temporary disabilities, limited to the school boards in districts wherein the MEA [Michigan Education Association] has female members who have been or will be subject to such policies or practices.

Though more than 130 possibly different policies were being challenged in *Paxman*, such a definition would obviate the need for the court to inquire into the specifics of each policy. *Paxman*, 612 F.2d at 854 n.9. By means of the class definition, only those parties who would have no defense, because of the issue having been previously decided by a higher court, would be defendants.

51. *Paxman*, 612 F.2d. at 854 n.9.

52. *Thompson*, 709 F.2d at 1200.

53. *See supra* note 50. Defendants alleged that the defendant class included approximately 500 school districts, each of which may have had different maternity leave policies. *Thompson*, 709 F.2d at 1202. As with *Paxman*, the court's concerns may have been more properly addressed as a commonality or typicality problem, but the class definition largely removes that problem.

54. *Id.* at 1204.

In equivocating language, the opinion indicates that the court would certify a (b)(2) defendant class if the defendant class had some "binding link" or were operating under a common directive.[55] As with *Paxman*, this discussion indicates that the court's concerns more properly would have been addressed as a commonality or typicality problem, and that if certification of a defendant class was not proper, it was not proper due to a failure to meet the requirements of Rule 23(a)(2) or (3). Therefore, it is unclear whether the court is holding that a defendant class may not be certified under subsection (b)(2), or whether it is holding that a defendant class may only be certified under subsection (b)(2) if there is a common directive or binding link, ensuring that commonality and typicality are present. The language most strongly suggests the latter, yet *Thompson*, together with *Paxman*, is cited by courts and commentators as holding the former.[56]

This latter interpretation of the holdings of *Paxman* and *Thompson*, that a subsection (b)(2) defendant class is appropriate if there is a common directive or binding link among the members of the defendant class, though more properly rooted in the commonality and typicality requirements of Rule 23(a)(2) and (3), speaks to typicality and commonality in a heightened sense. Neither requirement has been held to require that the issues presented by the

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> It is true, as the district court indicated, that in very limited circumstances some courts have been willing to recognize a defendant class under Rule 23(b)(2). These circumstances, however, generally have been restricted to situations where the individual defendants are all acting to enforce "a locally administered state statute or similar administrative policies." Greenhouse v. Greco, 617 F.2d 408, 413, n.6 (5th Cir. 1980). The present case involves approximately 500 separate school districts, each of which was free to adopt its own maternity leave policies. No state statute or uniform administrative policies are involved in the case. The district court acknowledged that "[t]his is not a case where all defendants are acting under one directive from some superior authority or where there is an obvious binding link among all defendants on this particular policy issue." 519 F. Supp. at 1377 [*Thompson* district court case]. In light of the above, we see no reason to depart from the reasoning of the Fourth Circuit in *Paxman*.

Thompson, 709 F.2d at 1204.

56. *See, e.g.*, Henson v. East Lincoln Township, 814 F.2d 410, 413 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987); 1 NEWBERG, *supra* note 3, § 4.64, at 409 n.674; Strickler, *supra* note 6, at 1596 n.166; Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REF. 347, 402 n.220 (1988); Ancheta, *supra* note 9, at 316; Robert E. Holo, Comment, *Defendant Class Actions: The Failure of Rule 23 and a Proposed Solution*, 38 UCLA L. REV. 223, 238 n.64 (1990); David E. Rigney, Annotation, *Permissibility of Action Against a Class of Defendants Under Rule 23(b)(2) of Federal Rules of Civil Procedure*, 85 A.L.R. FED. 263, 275-76 (1987) (discusses *Paxman*, but not *Thompson*, as barring (b)(2) defendant class certification.).

members of the class be identical.[57] The reasoning of both the Fourth and Sixth Circuit suggest that "identicality"[58] is what the courts were looking for among the proposed defendant classes.[59] Surely there was a common question of law and fact in regard to the constitutionality of the leave policies being challenged. In order for a defendant class to be certified, both courts would have required that each leave policy be identical.[60]

The Fourth Circuit, in *Bazemore v. Friday*,[61] retreated from the far reach of its own prior decision stating that its decision in *Paxman* and the decision of the Sixth Circuit in *Thompson* held that defendant class certification is not appropriate under subsection (b)(2) when the members of the defendant class are not acting under a common directive, apparently agreeing with the latter of the interpretations of *Thompson* previously suggested.[62] Therefore, though cited for the literalist proposition, *Thompson* does not actually hold that a defendant class may not be certified under subsection (b)(2),[63] and the Fourth Circuit has stated that is not

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57. *See supra* notes 13-14 and accompanying text.

58. This new requirement of a higher degree of commonality or typicality, "identicality," could limit subsection (b)(2) defendant class certification to situations where class certification was unnecessary. Pursuant to FED. R. CIV. P. 65(d), an order granting an injunction is binding upon the parties, "and upon those persons in active concert or participation with the[m] . . . ." *See* Terrell, *supra* note 22, at 166.

The scope of the requirements of commonality and typicality in the context of subsection (b)(2) defendant class certification are beyond the extent of this Article and await a latter day. In the context of plaintiff class certification, these requirements impose a standard that is substantially less than that of a binding link or common directive.

59. Because this limitation on the breadth of defendant class certification is apparently imposed upon subsection (b)(2) as result of the dilemma with the language, those decisions will continue to be considered among the literalist approach even though, as discussed at *infra* notes 63-64, the cases do not hold that subsection (b)(2) is inapplicable to defendant class certification.

60. If "identicality" were a requirement for certification, defendant class certification would not be available as a solution to the problem posed by the decision in *Martin v. Wilks*. The persons sought to be made a defendant class in order to fashion a decree that is binding upon all parties would rarely, if ever, possess identical legal and factual questions. *See* Strickler, *supra* note 6, at 1596; *see also*, *supra* notes 5-6 and accompanying text.

61. Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984), *cert. granted*, 474 U.S. 978 (1985), *aff'd in part, vacated in part, on other grounds*, 478 U.S. 385 (1986) (per curiam).

62. 751 F.2d at 669-70. In *Bazemore*, the court upheld the denial of certification of a defendant class sought under subsection (b)(1)(B). *Id.* Therefore, the relevant discussion arguably is dicta.

63. Thompson v. Board of Educ., 709 F.2d 1200 (6th Cir. 1983), has been cited as supporting subsection (b)(2) defendant class certification in the "limited circumstance" where the individual members of the proposed defendant class "are all acting to enforce 'a locally administered state statute or similar administrative policies.'" Akron Center for Reproductive Health v. Rosen, 110 F.R.D. 576, 579 (N.D. Ohio 1986) (citing *Thompson*) (quoting Greenhouse v. Greco, 617 F.2d 408, 413 n.6 (5th Cir. 1980)).

what *Paxman* meant. Apparently, if the defendants have what has been referred to as a "juridical link," (b)(2) defendant class certification is appropriate according to the Fourth and Sixth Circuit.[64] Curiously, the same courts which insisted upon reading subsection (b)(2) literally were willing to write a requirement into the rule that clearly is not there and does not even address, let alone resolve the dilemma from which it was spawned.[65] Though a juridical link may exist among the members of the proposed defendant class, the language of subsection (b)(2) remains arguably inapplicable to defendant classes.

The literalist approach to the language dilemma reached its culmination in the Seventh Circuit's decision in *Henson v. East Lincoln Township* which relied upon *Paxman* and *Thompson* and held that subsection (b)(2) does not provide for certification of a defendant class.[66] *Henson* was a suit brought by a plaintiff class[67]

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64. *See* Miller, *supra* note 9, at 1394-98, for a discussion of the juridical link approach of (b)(2) defendant class certification. Miller argues that "[o]nly if such a 'juridical link' is present is certification of a defendant class appropriate." *Id.* at 1401.

65. Writing the juridical link requirement into subsection (b)(2) when it is clearly not there, would be the same type of impermissible judicial intervention of which the literalists complain when criticizing those cases that have ignored the language dilemma and certified (b)(2) defendant classes. The first determination is whether subsection (b)(2) provides for defendant class certification. If not, defendant class certification should not be created by the courts through the imposition of the juridical link device, which is not included in subsection (b)(2). If it provides for defendant class certification, certification should not be limited by the courts to only juridically linked defendants in a manner not intended by subsection (b)(2).

The concept of juridical link is a variation on the theme of "identicality." The concerns that gave rise to the former approach also are more properly addressed under the prerequisites of Rule 23(a)(2), (3), and (4): commonality of questions of law or fact, typicality of defenses, or possibly adequacy of representation. These three requirements often merge when considering the overriding principle of whether the rights of unnamed class members are adequately represented and protected. *See Rosen*, 110 F.R.D. at 581-82 (N.D. Ohio 1986) (citing General Tel. Co. v. Falcon, 457 U.S. 147, 157-58 n.13 (1982)) (discussing the merger of the concepts of commonality, typicality and adequacy of representation in the context of subsection (b)(2) defendant class certification).

There may be situations in which the requirements of Rule 23(a) are met, but the proposed defendant class members do not meet the juridical link test. Certification should not be denied in that situation if subsection (b)(2) provides for certification of a defendant class.

66. Henson v. East Lincoln Township, 814 F.2d 410, 416 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987).

An almost identical suit to *Henson* was filed in the northern half of the state and is still pending, Rodriquez v. Township of DeKalb, No. 85-C-20190 (N.D. Ill. filed 1980). Though the case has a 1985 case number, it was actually filed in 1980 and renumbered upon being transferred from the Eastern Division of the Northern District of Illinois to the Western Division of the Northern District of Illinois. In *Rodriquez*, defendant class certification was originally denied in an unpublished order dated October 31, 1984. The denial was

of general assistance recipients and applicants[68] against a proposed defendant class of the 770 townships in downstate Illinois.[69] The proposed defendant class sought certification under subsection (b)(2).[70] Mr. Henson brought suit in order to obtain the compliance of the defendant class with the Seventh Circuit's previous decision in *White v.Roughton.*[71] *White* had held that the Due Process Clause of the Fourteenth Amendment required a local unit of government in Illinois to operate a general assistance program pursuant to

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based on a problem with typicality under subsection (a)(3), and the court indicated that defendant certification was proper under subsection (b)(2). Upon refinement and narrowing of the claims presented, a (b)(2) defendant class was certified in an unpublished order dated January 28, 1986. After the decision in *Henson*, the court entered an order on April 6, 1988, which decertified the defendant class. Plaintiffs sought interlocutory appeal of that order to the Seventh Circuit for the purpose of making a motion pursuant to 28 U.S.C. § 1254(3) to certify the question for review by the Supreme Court in order that the matter could be consolidated with *Henson*, which at that time had been deferred by agreement of the parties. The Seventh Circuit denied the motion for interlocutory appeal. Rodriquez v. Township of DeKalb, No. 88-8024 (7th Cir. May 24, 1988).

67. The plaintiff class was defined as all past, present, and/or future recipients of general assistance who have been or will be denied due process in regard to their application, receipt, or termination of general assistance. 814 F.2d at 411-12.

68. ILL. REV. STAT. ch. 23, ¶ 1-1 to -6 and ¶ 6-1 to -1.9 (1988). General assistance in Illinois is a program designed by the state legislature to provide financial assistance in an amount necessary to meet basic life maintenance requirements of persons who, in general, are not categorically eligible to receive welfare assistance from any other state or federal program. Though the statutory scheme establishes a basic framework for eligibility and levels of assistance, each unit of local government that administers a general assistance program, most often a township, is given almost total autonomy in its administration of its general assistance program. General assistance is financed through county taxation. Only if a township obtains state funding for its program must it submit to state-established administrative practices.

69. The term "downstate" commonly is used in Illinois to refer to any part of the state outside of Cook County, or perhaps outside of the City of Chicago. For purposes of this Article, the term refers to the 65 counties that comprise the southern geographic half of the state.

70. A defendant class similar to that sought to be certified in *Henson* was certified in Hopson v. Schilling, 418 F. Supp. 1223 (N.D. Ind. 1976). The suit was a bilateral class challenge to certain practices of Indiana township trustees in administering assistance under Indiana's poor relief laws, IND. CODE ANN. §§ 12-2-1-1 to -2-1-39 (Burns 1973), a program analogous to general assistance in Illinois. *Hopson*, 418 F. Supp. at 1227. The defendant class was comprised of all township trustees (1,008) in Indiana. *Id.* at 1232. The practices alleged to be constitutionally inadequate concerned the failure to maintain written standards and the failure to provide notice of adverse action and appeal rights. *Id.*

71. White v. Roughton, 530 F.2d. 750, 754 (7th Cir. 1976) (per curiam). *White* was an action brought by three individuals against an individual township, Champaign Township. Two of the individuals had their receipt of general assistance terminated, and one had her application for general assistance denied, without adequate written notice of the reason for the action denying or terminating the assistance and without notice of the opportunity for appeal of the adverse action. *Id.* at 751.

established written standards and to utilize notice and hearing procedures when granting, denying, or terminating assistance. Though the law in the area had been decided, the townships were not complying with the principles established in *White*.[72] Because the individual members of the proposed defendant class had not been included as parties in *White*, principles of res judicata did not bind the townships to follow its decree. The potential stare decisis effect of *White* was not adequate incentive for the townships to willingly comply with the decision.[73] Faced with the opportunity to provide enforcement of its earlier decree, the Seventh Circuit, with Judge Posner writing for the majority of a divided panel, declined to do so and ruled that the language of Rule 23(b)(2) did not provide for the certification of a class of defendants.[74]

The Seventh Circuit's reading of *Thompson* and *Paxman* is interesting. The court notes that the Fourth Circuit in *Bazemore* read *Thompson* and *Paxman* "narrowly,"[75] yet the Seventh Circuit states that both courts found (b)(2) defendant class certification to be "impermissible."[76] *Henson* thus reads more into *Paxman* than the Fourth Circuit has expressly stated was intended and

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72. Henson alleged that the members of the proposed defendant class were each administering its general assistance program without written standards and without constitutionally sufficient notice and hearing procedures as required by *White*. Henson v. East Lincoln Township, 814 F.2d 410, 411, 412 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987). That the desire for broad-based relief against the defendant class was apparently not unwarranted appears from the answers to discovery that were received from 525 of the 770 potential members of the proposed defendant class, the entire number of townships responding to depositions upon written question. The answers indicated that each, in some fashion, was not in compliance with the principles announced in *White*. *Id.* at 412.

73. Because there were 770 townships involved, some very small, spread across the entire downstate area, bilateral class litigation would seem an efficient and appropriate mechanism to obtain compliance with the principles of *White*, obviating the need for 770 plaintiffs to file 770 separate actions. The action brought in *Henson*, is very similar to an example discussed in Note, *supra* note 9, at 358-59. The Note concludes that such an action is not maintainable as a defendant class action certified under Rule 23(b)(2) because of the language dilemma of that subsection and argues that such an action should be maintained under Rule 23(b)(1)(B). It is the language dilemma and a resolution thereof that is the subject of this Article. For a discussion of the certification of a defendant class under Rule 23(b)(1), see *supra* note 17.

74. As discussed at *supra* note 8, *Henson* is presently pending before the Supreme Court in deferral status. 484 U.S. 923, 1001 and 1057 (1987).

75. *Henson*, 814 F.2d at 413.

76. *See id.* at 413 ("But the only courts of appeal to discuss the permissibility of such actions (there is decision but no discussion in *Marcera*) have held that they are not permissible.").

reads more into *Thompson* than the case actually held.[77]

Henson reasons with the other literalist courts, relying almost entirely upon the language dilemma and looking to the Advisory Committee's notes, though the court elaborates upon the previous literalist analysis.[78] The *Henson* court's opinion does counter some of the arguments which have been made by the functionalists.[79] For example, the court rejects the argument that because the Rule 23(a) prerequisites state that a class may sue or be sued by a representative party, defendant class actions are authorized under all the following subsection (b) categories.[80] The court also rejects the argument that the use in subsection (b)(2) of the language "the party opposing the class" instead of the word "defendant" resolves the language dilemma.[81] Nevertheless, the *Henson* opinion suffers from the same lack of in-depth, consistent reasoning as did *Paxman* and *Thompson*, and, therefore, is not persuasive authority.[82]

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77. Another troubling aspect of the *Henson* decision is the manner in which the court referred to the plaintiffs. Throughout the opinion, the plaintiffs are not called by their own names but instead by the name of the legal services organization which was representing them, The Land of Lincoln Legal Assistance Foundation. The following excerpts illustrate this aspect:

(1) "A downstate legal-aid bureau, the Land of Lincoln Legal Assistance, filed the present suit in 1980." *Id.* at 411.

(2) "Henson (realistically, the Foundation) cannot fit his case under (b)(1) . . . ." *Id.* at 412-13.

(3) "The Foundation points out . . . ." *Id.* at 414.

(4) "To get all the relief this suit seeks the Foundation will have to find a plaintiff in each of the other 770 townships . . . ." *Id.* at 415.

(5) "The Foundation paints with too vivid a palette." *Id.* at 415.

These references suggest that the court believed *Henson* did not present an actual case or controversy, or perhaps that Mr. Henson was not a real party in interest. If such was the case, the decision would more properly have been based upon such grounds, and an invalidation of (b)(2) defendant class certification would not have been necessary.

78. It is interesting to note that although the opinion states without equivocation that subsection (b)(2) does not provide for certification of a defendant class, there is equivocation in its reasoning. In discussing that (b)(2) defendant classes have been certified in 45 cases, the court states that some are distinguishable such as where the "members of the defendant class were acting in concert." *Id.* at 413. This sounds like the same "narrowing" of *Paxman* engaged in by the Fourth Circuit in *Bazemore* (*see supra* notes 61-62 and accompanying text), and the same contradiction as the Sixth Circuit made in *Thompson* (*see supra* notes 52-65 and accompanying text).

79. *See generally infra* notes 87-144 and accompanying text.

80. *Henson*, 814 F.2d at 413-14. The functionalist's argument will be referred to as one of the "by hook" approaches. *See infra* notes 96-98 and accompanying text.

81. *Id.* at 414. This will also be discussed as one of the "by hook" arguments. *See infra* notes 89-95 and accompanying text.

82. Senior District Judge William J. Campbell, sitting by designation, dissented in part and concurred in part. Judge Campbell dissented from the absolute prohibition against subsection (b)(2) defendant class actions, stating that the literalist approach of the majority

As previously discussed, the concerns raised by *Paxman*, are more properly rooted in commonality and typicality concerns.[83] Those concerns may have been the proper area of inquiry for *Henson*. Whereas *Paxman* sought to obtain injunctive relief against a "type" of policy, *Henson* sought injunctive relief against operating a welfare program without any written policies or notice and hearing procedures. The defenses of the members of the proposed defendant class are less common or less typical than *Paxman* or *Thompson*, for questions concerning whether individual defendant's written procedures satisfied the dictates of due process could become quite diverse. Thus, commonality or typicality might be lost once the relief sought went beyond an injunction against operating a welfare program without any written policies or notice and hearing procedures.

Outside the Seventh Circuit, *Henson* has not been followed,[84] but the issue cannot be considered to be settled. *Henson* remains in deferral status before the Supreme Court,[85] and the arguments

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"borders on the simplistic." *Id.* at 420. He concurred in the denial of certification, finding that the suit was "too unmanageable and the remedies too unfocused," without specifying which provisions of Rule 23 were not met. Nevertheless, one could reasonably infer that he was troubled with problems of commonality and typicality of the defenses of the defendant class. *Id.*

83. *See supra* notes 47-51, 57-60 and accompanying text.

84. *See, e.g.*, Luyando v. Bowen, 124 F.R.D. 52, 59 n.7 (S.D.N.Y. 1989) (the court, citing Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979), held that despite the contrary authority of *Paxman* and *Thompson*, defendant class certification was appropriate under subsection (b)(2)) but referred to *Henson* as "well-reasoned," and appeared to prefer the literalist approach if the law in the Second Circuit was not to the contrary); Follette v. Vitanza, 658 F. Supp. 492, 507-09 (N.D.N.Y. 1987); DeAllaume v. Perales, 110 F.R.D. 299, 303-05 (S.D.N.Y. 1986).

See also Frederick County Fruit Growers Ass'n v. Dole, 709 F. Supp. 242, 245 (D.D.C.) (declining to certify a defendant class for reasons other than the difficulty with subsection (b)(2), noting that *Henson* "has been given little precedential weight outside the Seventh Circuit"), *amend. denied*, 703 F. Supp. 1021, 1032 (D.D.C. 1989) (considering the propriety of (b)(2) defendant-class certification to be an "open question" in light of the Supreme Court's grant of certiorari in *Henson*, and deferring consideration of certification of a defendant class to await the Supreme Court's decision in that case, though incongruously accepting the parties' stipulation to a related defendant class); United States v. Rainbow Family, 695 F. Supp. 314, 319-21 (E.D. Tex. 1989); NBC v. Cleland, 697 F. Supp. 1204, 1215-17 (N.D. Ga. 1988); State v. Anheuser-Busch, Inc., 117 F.R.D. 349, 351-52 (E.D.N.Y. 1987) (noting the Second Circuit has certified (b)(2) defendant classes but declining to do so because the proposed class of defendants was not so numerous that joinder was impracticable, and therefore, the requirements of Rule 23(a)(1) were not met).

But see Williams v. State Bd. of Elections, 696 F. Supp. 1574, 1576 & n.2, 1577-78 (N.D. Ill. 1988), *memorandum opinion*, 696 F. Supp. 1563 (N.D. Ill. 1988) (following *Henson*).

85. *See supra* note 14.

advanced by the functionalists have not been any more persuasive than those of the literalists. As Judge Campbell stated in his dissent in *Henson*, "[t]he arguments in this area on both sides are, at this point, stale and inconclusive."[86]

B. The Functionalists

The functionalists have overcome the dilemma of the language to certify (b)(2) defendant classes by three different mechanisms: "by hook," "by crook," and "by no look."[87] The mechanisms will be analyzed in order of decreasing persuasiveness, yet increasing frequency of use. None of the functionalist cases have utilized an in-depth analysis that is entirely intellectually sound, nor have any of the approaches utilized principles of statutory interpretation to try and discern the intention of the drafters. Therefore, like the literalist analysis, the functionalist analyses do not provide a satisfactory resolution of the Rule 23(b)(2) language dilemma.[88]

1. By Hook

One approach that has been taken to certify (b)(2) defendant classes in the face of the language dilemma is to construct a method of analysis that leads to the conclusion that, in spite of the awkwardness of the language when applied to defendant classes, the subsection really was intended to provide for defendant class certification. If sound arguments could be constructed, this approach would have the greatest precedential value. Courts have utilized three main "hooks" to accomplish this goal.

First, courts have recognized that a literal reading of subsection (b)(2) would require that the party opposing the defendant class—

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86. Henson v. East Lincoln Township, 814 F.2d 410, 420 (7th Cir.) (Campbell, J., concurring in part and dissenting in part), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987).

87. The designations of the three mechanisms as "by hook," "by crook," and "by no look," are those of the author. In Doss v. Long, 93 F.R.D. 112, 119 (N.D. Ga. 1981), the court recognized that "three methods [have been employed] to overcome the language problem: (1) ignore it ["by no look"]; (2) find conduct performed by the plaintiffs ["by hook"]; (3) decide that Rule 23(b)(2) should cover defendant classes ["by crook"]." While the author generally agrees with the first and third designations from *Doss*, the second designation, "by hook," has utilized more variations than that recognized by the court. *Doss* is most interesting in that, although it criticizes the reasoning, or lack thereof, of the three approaches that it mentions, it then adopts one of them, "by crook," perhaps transforming itself into the ultimate "by crook" case.

88. *See* Holo, *supra* note 56, at 239 (resolution of the intercircuit dispute as to whether subsection (b)(2) provides for certification of a defendant class "must wait until the Supreme Court decides *Henson*").

the plaintiff class—has acted on grounds generally applicable to the defendant class. Courts have found such actions by the plaintiff class to have occurred.[89] For example, in a patent infringement case brought against a defendant class of alleged patent infringers, the court found the requisite action in the acts of obtaining patents, notifying the alleged infringers, and threatening and bringing suit to meet the requirements of subsection (b)(2).[90] In an employment discrimination case, the court found the requisite plaintiff action in that the plaintiff class was forced by the illegal actions of the defendant class to act in certain ways to become employed.[91] These two examples are by no means exclusive.[92]

This argument, however, is unpersuasive at best. It is the action by the party opposing the class that is required to make injunctive relief appropriate.[93] Though there may be action by the plaintiffs in these cases, the plaintiffs are not seeking an injunction against their own action.[94] Additionally, this analysis would give the plaintiffs the power to create a defendant class by threatening to bring suit and insisting that defendants' conduct forced plaintiffs to act in a certain fashion.[95] But to whom would the threat have had to be made, or to how many members of the proposed class? Could the plaintiffs determine the size and scope of the defendant class by what defendants were chosen to receive their demand? If the

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89. This method of analysis has been referred to as "plaintiff-based certification," Ancheta, *supra* note 9, at 314-15; and "the plaintiff-based approach," Terrell, *supra* note 22, at 159-60. It was also recognized as the second method of certification by the court in Doss v. Long, 93 F.R.D. 112, 119 (N.D. Ga. 1981). *See supra* note 87.

90. Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc. 285 F. Supp. 714, 723 (N.D. Ill. 1968).

91. Pennsylvania v. Local Union 542, 469 F. Supp. 329, 415-16 (E.D. Pa. 1978), *aff'd by an equally divided court*, 648 F.2d 923 (3rd Cir. 1981) (en banc), *rev'd on other grounds sub nom.* General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982).

92. *See, e.g.*, Baker v. Wade, 553 F. Supp. 1121, 1125 n.1 (N.D. Tex. 1982), *cert. denied*, 478 U.S. 1022 (1986) (homosexual plaintiffs brought suit seeking, in part, to enjoin defendant class of all district county and city attorneys in Texas from enforcement of an unconstitutional statute proscribing sexual intercourse between individuals of the same gender); United States v. Trucking Employers, Inc., 75 F.R.D. 682, 691-92 (D.D.C. 1977) (plaintiff class brought a bilateral class action against a defendant class of common carriers of general commodity freight alleging discriminatory employment policies and practices in the trucking industry); Kidd v. Schmidt, 399 F. Supp. 301, 303-04 (E.D. Wis. 1975) (three judge panel) (plaintiff class brought a bilateral class action seeking declaratory and injunctive relief against a defendant class of state officers authorized by statute to commit minors to mental health facilities without a hearing); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 500 (N.D. Ill. 1969) (plaintiff patent holder brought patent infringement suit against a defendant class of patent infringers).

93. *See supra* note 89 and accompanying text.

94. *See* Note, *supra* note 9, at 393-94.

95. For criticism of this approach, see Miller, *supra* note 9, at 1393.

demand only needed to be made on the proposed defendant class representative, could that representative, by its refusal to acquiesce to the demand, create a defendant class that bound members who were not recipients of the demand? The reasoning in support of this argument is simply unworkable.

The second "hook" that courts have employed is to determine that the language of subsection (a), "may sue or be sued as representative parties," indicates that the troublesome language of subsection (b)(2) was meant to include defendant class certification.[96] This argument was considered and rejected by Judge Posner in *Henson*:

> [b]ut the next word is "only," and is followed by a list of prerequisites to maintaining a suit as a class action. The first sentence does not authorize defendant classes but merely states limitations common to all class action [sic]. Nowhere does it imply that defendant class actions are possible under every subsection of Rule 23(b).[97]

The argument is not persuasive because it would have a general provision of a statute controlling a specific provision, thereby violating a long-established principle of statutory interpretation.[98]

The final "hook" that has been employed by the functionalists has been to find that the use of the language "the party opposing the class" demonstrates that subsection (b)(2) was not meant to exclude defendant class certification because if such exclusion were intended, the word "defendant" would have been substituted for the word "party."[99] The argument does make one curious as to the choice of language by the drafters, but it is little more than an inconclusive attempt at reconciling awkward language to an intended result.[100]

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96. *See, e.g.*, Leist v. Shawano County, 91 F.R.D. 64, 68 (E.D. Wis. 1981); United States v. Trucking Employers, Inc., 75 F.R.D. 682, 691-92 (D.D.C. 1977); *see also* Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 634 (1978).

97. Henson v. East Lincoln Township, 814 F.2d 410, 413-14 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987).

98. *See, e.g.*, HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned, both being in fact parts of [the same statute] . . . .").

99. *See, e.g.*, United States v. Trucking Employers, Inc., 75 F.R.D. 682, 691 (D.D.C. 1977).

100. *Henson* also rejected this argument under the convoluted rationale that subsection (b)(2) additionally provides for declaratory actions and that the parties in such an action often are reversed. *Henson*, 814 F.2d at 414. This could be described as a "hook" to defeat a "hook."

2. By Crook

The second approach of the functionalists has been to acknowledge the dilemma of the language, but to ignore the uncertainty as to whether subsection (b)(2) provides for defendant class certification and to certify (b)(2) defendant classes because they are a useful device.[101] Though this approach has been referred to as the most "intellectually honest"[102] of the ways that courts have certified defendant classes because it does not resort to any language games to create a "hook" for certification, its intellectual honesty does not make up for it being devoid of intellectual persuasiveness. Unfortunately, wishing something to be true, without something more, does not make it so.[103]

The Second Circuit's decision in *Marcera v. Chinlund*[104] is perhaps the most frequently cited "by crook" case.[105] *Marcera* is often referred to as the prime example of the necessity for the subsection (b)(2) defendant class action device to obtain broad-based compliance with previously established legal obligations.[106] In *Marcera*, the Second Circuit certified a defendant class "although a literal reading of the rule might indicate otherwise."[107]

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101. This approach has been referred to as the "instrumental approach," Terrell, *supra* note 22, at 157-59; and "instrumental certification," Ancheta, *supra* note 9, at 312-14 (1985). It has been criticized as "certification by analogy." Miller, *supra* note 9, at 1394.

102. Doss v. Long, 93 F.R.D. 112, 119 (N.D. Ga. 1981).

103. From the personal experiences of the author on a wide variety of subjects—e.g., playing the lottery, deferring the aging process, my golf game, etc.

104. 595 F.2d 1231 (2d Cir. 1979) (plaintiff class of pretrial detainees throughout the state of New York successfully brought a bilateral class suit against a defendant class of county sheriffs who continued to deny contact visits with friends and family to pretrial detainees even though the Second Circuit had previously held that due process prevented such denial in Rhem v. Malcolm, 507 F.2d 333, 336-37 (2d Cir. 1974), *aff'd*, 527 F.2d 1041, 1043-44 (2d Cir. 1975)).

105. *Marcera* has been followed in Luyando v. Bowen, 124 F.R.D. 52, 59 (1989) (though apparently grudgingly, see *supra* note 84); NBC v. Cleland, 697 F. Supp. 1204, 1213 (N.D. Ga. 1988); Follette v. Vitanza, 658 F. Supp. 492, 508 (N.D.N.Y. 1987); State v. Anheuser-Busch, Inc., 117 F.R.D. 349, 351-52 (E.D.N.Y. 1987) (citing *Marcera* with approval but declining to certify a defendant class because joinder was not impracticable, and, therefore, the numerosity requirement of Rule 23(a)(1) was not met); DeAllaume v. Perales, 110 F.R.D. 299, 304 (S.D.N.Y. 1984); and Doss v. Long, 93 F.R.D. 112, 119 (N.D. Ga. 1981).

106. *See, e.g.*, Henson v. East Lincoln Township, 814 F.2d 410, 417-21 (7th Cir.) (Campbell, J., dissenting in part and concurring in part) (explaining that a defendant class was necessary in *Marcera* to force the noncooperative sheriff departments in New York state to allow contact visits for pretrial detainees which the Second Circuit had previously established as mandated by due process), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987).

107. *Marcera*, 595 F.2d at 1238. *Marcera* did engage in a thorough discussion of whether the typicality and adequacy of representation requirements of Rule 23(a)(3) and (4) were

Unfortunately, the court does not explain how it overcomes the contrary literal reading.

Both before and after *Marcera*, courts in the face of the language dilemma have certified defendant classes under such rationales as that the certification is "in accordance with the interests of judicial administration and justice which Rule 23 is meant to further";[108] that "[t]he importance of (b)(2) certification in a case such as this is heightened because of the impossibility of obtaining make-whole injunctive relief from employment discrimination against any particular defendant";[109] or that "[t]he courts are simply unwilling to deprive the plaintiff of this useful measure."[110] No matter how compelling the plaintiffs' claims, or how useful the device, neither should cause subsection (b)(2) to be extended beyond that for which it was intended. These arguments are not of any precedential value, and open the "by crook" functionalists to easy attack by the literalists who claim that such courts are engaging in judicial legislation by expanding the rule.[111]

This is not to say that "by crook" certification has always taken place without any attempt by the courts at justification beyond some recitation that the device is useful or necessary. Two very similar arguments have been developed by courts that have engaged in "by crook" certification. What is most interesting is that these approaches overcome the language dilemma of subsection (b)(2) by allowing certification in situations that are consistent with the holdings of *Paxman* and *Thompson*.[112]

The first approach finds that the language dilemma is not a barrier to certification when the suit is essentially an attack on the constitutional validity and application of a statute, and the suit does not seek relief against the members of the proposed defendant class other than a declaration that the challenged statute is unconstitutional and an injunction against its continued enforcement.[113]

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met. *Id.* at 1238-39. If the *Henson* court had engaged in such an analysis, there may have been no reason to reach the broad holding that defendant classes are not contemplated by subsection (b)(2).

108. Redhail v. Zablocki, 418 F. Supp. 1061, 1066 (E.D. Wis. 1976).

109. Pennsylvania v. Local Union 542, 469 F. Supp. 329, 416-17 (E.D. Pa. 1978).

110. Doss v. Long, 93 F.R.D. 112, 119 (N.D. Ga. 1981).

111. *See, e.g.* Henson v. East Lincoln Township, 814 F.2d 410, 416 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987); Ancheta, *supra* note 9, at 317 ("procedural requirements cannot be ignored or twisted to foster substantive policies").

112. *See supra* notes 61-64 and accompanying text.

113. *See, e.g.*, Hopson v. Schilling, 418 F. Supp. 1223, 1237-38 (N.D. Ind. 1976); Gibbs v. Titelman, 369 F. Supp. 38, 52 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d

As with *Paxman* and *Thompson*, this approach erroneously hinges its decision as to the applicability of subsection (b)(2) upon a consideration that is appropriate only as to the commonality or typicality requirements of Rule 23(a)(2) and (3). Commonality and typicality of defenses in a bilateral class challenge to the unconstitutionality of a statute are readily apparent, but this should not be taken to mean that such situations are the only ones in which commonality or typicality can be met in a bilateral class action.[114] Moreover, and as previously stated, this analysis certainly is not

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1107 (3d Cir.), *cert. denied sub nom.* Gibbs v. Garver, 419 U.S. 1039 (1974).

Hopson involved a constitutional challenge to Indiana's poor relief laws, IND. CODE ANN. §§ 12-2-1-1 to -2-1-39 (Burns 1973), the equivalent of the general assistance program which was the subject of *Henson*, and the court certified a defendant class similar to the class that was denied certification in *Henson*. *See supra* note 70 and accompanying text. The court acknowledged the difficulty with the language, but certified the defendant class noting that the action was a challenge to the "statute on its face," and, therefore, "the defendant class is simply a procedural alternative to challenging the constitutionality of a statute by suit against the state directly." *Hopson*, 418 F. Supp. at 1237-38.

Gibbs was an action to declare as unconstitutional Pennsylvania statutes that provided for the repossession of motor vehicles pursuant to conditional sales contracts. The court noted the language dilemma but certified a defendant class noting, "in the case at hand, where the outcome will result solely in a declaration on the constitutionality of certain statutes, there is no possibility of prejudice. The relief sought here is really against the statute, not the defendants." *Gibbs*, 369 F. Supp. at 53.

114. *See, e.g.*, Moe v. Dinkins, No. 80 Civ. 1577 (S.D.N.Y. June 29, 1981) (LEXIS, Genfed library, Dist file). *Dinkins* involved a bilateral class challenge, naming as the defendant class all cities and towns in New York state, to a New York statute requiring parental consent before a marriage license could be issued to certain persons. "The question of the constitutional validity of the parental consent requirement of section 15 is common to all members of the defendant class. The shared defense—that the statute is constitutional—satisfies the requirement that the claims of the representative are typical of the class." *Id.* at *7.

The named defendant apparently argued that defendant class certification was unnecessary because if the statute was declared unconstitutional the clerks would not enforce it. The court rejected the argument, unconvinced that if there was no defendant class that the clerks would indeed cease to enforce the statute until each became bound by a decision applicable to them by principles of stare decisis. *Id.* at *8. The court distinguished Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), where defendant class certification was held unnecessary because the defendant had represented to the court that any judgment entered would be considered to have statewide effect and that the challenged policy had already been rescinded. *Id.*

See also Cicero v. Olgiati, 410 F. Supp. 1080, 1098-99 (S.D.N.Y. 1976) (a similar argument by the defendant representative was also rejected because the defendant had not made a sufficient representation to the court that any judgment would be given statewide effect, but also because of considerations of avoiding the likelihood of mootness).

But see Schneider v. Margossian, 349 F. Supp. 741, 746 (D. Mass. 1972) (denying defendant class certification in a statewide bilateral class challenge to certain prejudgment attachment procedures, finding that "we are not persuaded by the prospect of other district court clerks proceeding in disregard of our decision").

relevant to an inquiry as to whether subsection (b)(2) was intended to provide for defendant class certification. Rather, its relevance is with regard to whether the class composition affords due process to unnamed class members.

The second approach dismisses the problem with the language when the court determines that a juridical link exists between the defendants, that is, when the court finds there is some independent legal relationship among the defendants.[115] As previously discussed, that is the actual holding of *Thompson*, and the expressed interpretation by the Fourth Circuit of its holding in *Paxman*.[116] The juridical link inquiry, if relevant at all, like the constitutional challenge to a statute approach, is only relevant to determine whether the commonality of questions and typicality of defenses requirements of subsection (a)(2) and (3) are met.[117] The fact that the members of a proposed defendant class have a juridical link cannot alter the meaning of subsection (b)(2) if the subsection does not provide for defendant class certification, even though it does make the (a)(2) and (3) inquiries easier.

Because the "by crook" approach to certification openly acknowledges that it is ignoring the language dilemma in certifying

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115. *See* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 465-70 (9th Cir. 1973); DeAllaume v. Perales, 110 F.R.D. 299, 303-04 (S.D.N.Y. 1986) ("[A] unified policy links the members of the proposed defendant class . . . . In this situation, a defendant class is appropriate."); Follette v. Vitanza, 658 F. Supp. 492, 507-08 (N.D.N.Y. 1987); Hopson v. Schilling, 418 F. Supp. 1223, 1237-38 (N.D. Ind. 1976); Mudd v. Busse, 68 F.R.D. 522, 527-28 (N.D. Ind. 1975).

116. *See supra* notes 61-64 and accompanying text.

117. The determination of whether the proposed defendant class has a juridical link was originally developed in two related lines of cases that wrestled with the problem posed by bilateral class actions when the named plaintiffs did not each have a cause of action against each member of the proposed defendant class. Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 699-701 (E.D. Pa. 1973), considered this to be an insurmountable standing problem, while *La Mar*, 489 F.2d at 465, considered this to present a typicality problem that barred certification of the plaintiff class. *La Mar* created two exceptions to its holding, the second being that if the defendants were juridically linked, the claims of the named plaintiffs could be considered to be typical of the plaintiff class. *Id.* at 469-70.

If standing is more properly considered as a question of whether the plaintiff class representative has standing to bring suit against the proposed defendant class representative, the problem is overcome. To do otherwise defeats the basic concept of a class action brought on behalf of many by a representative party.

The *La Mar* juridical links exception does provide a test that insures that typicality is always met, but it artificially narrows typicality, which can also exist in some situations where there is not a juridical link. The better approach is an independent analysis of typicality in each case.

See Samuel M. Shafner, Comment, *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).

a defendant class, it also does not provide an intellectually or legally sound basis for certification that is able to silence the literalists. Additionally, the latter two variations read into subsection (b)(2) are requirements that are not actually present in that subsection and that result in requiring a heightened showing of commonality and typicality that approaches "identicality."[118]

3. By No Look

The greatest number of reported decisions that have certified a (b)(2) defendant class have done so by making no mention of the language dilemma and hence can be characterized as the "no look" approach.[119] The body of case law which employs this approach is greater than the combination of the literalist decisions with the "by hook" and "by crook" functionalist decisions.

The decisions can be divided into three categories: 1) those that have certified a defendant class without reference in the opinion to a specific Rule 23(b) category, though the relief sought indicates that the defendant class was of a (b)(2) nature;[120] 2) those that have allowed (b)(2) defendant class certification by consent of the parties;[121] and, 3) those that have allowed (b)(2) defendant class

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118. *See supra* notes 115-17 and accompanying text.

119. This approach is what the court in Doss v. Long, 93 F.R.D. 112, 119 (N.D. Ga. 1981) referred to as choosing to "ignore it." The "no look" approach also may be said to have been referred to as "blind certification." Miller, *supra* note 9, at 1391-92 (criticizing courts that have certified defendant classes without reference to one of the specific subcategories of Rule 23(b)). The "no look" approach actually encompasses a far greater body of case law than is represented by what the commentator referred to as blind certification.

120. *See, e.g.*, Brown v. Vance, 637 F.2d 272, 274 n.3 (5th Cir. 1981); Brown v. Scott, 602 F.2d 791, 795 (7th Cir. 1979); Callahan v. Wallace, 466 F.2d 59, 60 (5th Cir. 1972); Clean Up '84 v. Heinrich, 582 F. Supp. 125, 127 (M.D. Fla. 1984); Coleman v. Stanziani, 570 F. Supp. 679, 680 (E.D. Pa. 1983); Walls v. Mississippi State Dep't of Pub. Welfare, 542 F. Supp. 281, 284 (N.D. Miss. 1982); Florida Businessmen for Free Enter. v. State, 499 F. Supp. 346, 350 (N.D. Fla. 1980); Hobson v. Pow, 434 F. Supp. 362, 365 (N.D. Ala. 1977); Tucker v. City of Montgomery Bd. of Comm'rs, 410 F. Supp. 494, 499 (M.D. Ala. 1976); Hernandez v. Danaher, 405 F. Supp. 757 (N.D. Ill. 1975), *rev'd on other grounds*, 431 U.S. 434, 438 (1977) (defendant class certification is apparent only from the Supreme Court decision); West v. Cole, 390 F. Supp. 91, 93 n.1 (N.D. Miss. 1975); Lewis v. Baxley, 368 F. Supp. 768, 772 n.4 (M.D. Ala. 1973); Union Pacific R.R. v. Woodahl, 308 F. Supp. 1002, 1008 (D. Mont. 1970); Hadnott v. Amos, 295 F. Supp. 1003, 1005 (M.D. Ala. 1968), *rev'd on other grounds*, 394 U.S. 358 (1968).

121. *See, e.g.*, Baker v. Wade, 553 F. Supp. 1121, 1125 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984); Epps v. Levine, 457 F. Supp. 561, 563-64 (D. Md. 1978); Wynn v. Scott, 449 F. Supp. 1302, 1305 n.1 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979); Wynn v. Scott, 448 F. Supp. 997, 1000 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978); Kane v. Fortson, 369 F. Supp. 1342, 1343 (N.D. Ga. 1973); Rakes v. Coleman, 318 F. Supp. 181, 190 (E.D. Va. 1970).

certification without addressing or discussing the language dilemma in the reported decision.[122] Because these cases chose a "no look" approach, they are of no precedential value in supporting (b)(2) defendant classes apart from the fact that so many courts apparently have believed that subsection (b)(2) provides for defendant class certification.[123]

The functionalist commentators have not engaged in analysis that is more persuasive or greater in depth than the courts.[124] Therefore, the question as to whether a defendant class may be properly maintainable under subsection (b)(2) remains unresolved. Nevertheless, only in the Seventh Circuit is such certification completely prohibited. In the Sixth and Fourth Circuits (b)(2) certification is appropriate in the limited situation in which the defendants are closely linked or are acting to enforce a state statute or policy.

IV. A STATUTORY INTERPRETATION ANALYSIS OF RULE 23(b)(2)

Both schools have failed to conduct a thorough analysis applying principles of statutory interpretation in order to reach a legally defensible conclusion to the dilemma. Both schools have utilized some of the established principles of statutory interpretation, but in a piecemeal fashion. The literalist approach could be viewed as an application of the plain meaning rule.[125] The "by hook" func-

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122. *See, e.g.*, Baksalary v. Smith, 591 F. Supp. 1279, 1281 (E.D. Pa. 1984); Harris v. Graddick, 593 F. Supp. 128, 136-37 (M.D. Ala. 1984); Leist v. Shawano County, 91 F.R.D. 64, 68-69 (E.D. Wis. 1981); Institutionalized Juveniles v. Secretary of Pub. Welfare, 78 F.R.D. 413, 415 (E.D. Pa. 1978), *rev'd on other grounds*, 442 U.S. 640 (1979); Kendall v. True, 391 F. Supp. 413, 417 (W.D. Ky. 1975); Lynch v. Household Fin. Corp., 360 F. Supp. 720, 722 n.3 (D. Conn. 1973); Danforth v. Christian, 351 F. Supp. 287, 289 (W.D. Mo. 1972); Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971), *vacated on merits and remanded*, 405 U.S. 1036 (1972).

123. This indicates that certification of defendant classes, analogous to defendant class certification under subsection (b)(2), must have been considered by the courts to have existed prior to the enactment of Rule 23 in 1966; a court would not newly construct this mechanism from the awkward language of the new Rule. Former Rule 23(a) provided for a representative party of a class to "sue or be sued" in regard to a "right sought to be enforced for or against the class." The suit then had to fit within one of the old categories of "true," "hybrid," or "spurious." Rule 23 was amended in 1966 in large part due to difficulties encountered with applying the old categories. *Proposed Rules*, *supra* note 3, at 98.

124. *See* Miller, *supra* note 9, at 1376-83. This Note is perhaps the best attempt at analysis justifying (b)(2) defendant class certification. The Note examines the text, the underlying policies and the history of Rule 23, but does so without establishing the relevance and justification of each portion of the argument as would result from an analysis supported by principles of statutory interpretation.

125. *See infra* notes 128-30 and accompanying text.

tionalists could be viewed as attempting to discern the meaning of the statute by construing it as a whole.[126] The "by crook" functionalists could be said to be looking to the policy behind the statute to derive its meaning.[127] But these principles of statutory interpretation have been applied in a haphazard fashion in isolation from each other and not by way of thorough, systematic analysis. Both schools have been led astray by not first accurately addressing the question of whether a plain meaning can be discerned from the subsection.

A. No Plain Meaning of Subsection (b)(2) Is Discernable

Any analysis into the meaning and application of a statute begins with a determination of whether a plain meaning can be discerned.[128] If the meaning is unambiguous, the analysis goes no further unless a contrary meaning is evident from the legislative history.[129] Each school has erred in concluding that the meaning of subsection (b)(2) is plain. Given the length of time that the language dilemma has gone unresolved, the division between the circuits, the acceptance of certiorari by the Supreme Court, and the many contortions of language in which the courts have engaged, one would be hard pressed to conclude that subsection (b)(2) contains an unambiguous expression as to whether certification of a defendant class is permitted under its terms. Yet, apparently that

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126. *See infra* note 133 and accompanying text.

127. *See infra* note 142 and accompanying text.

128. The application of the plain meaning rule is of universal acceptance as the starting point in an analysis of the proper meaning of a statute. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 178 (1987) ("It would be extraordinary to require legislative history to *confirm* the plain meaning . . . .") (emphasis in original); Caminetti v. United States, 242 U.S. 470, 485 (1917) ("The meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 194 (2d ed. 1874) ("The rule is, as we shall constantly see, cardinal and universal, that if the statute is plain and unambiguous, there is no room for construction or interpretation."); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, §§ 46.01-46.05 (4th ed. 1984); Frank H. Easterbrook, *Legal Interpretations and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

129. *See, e.g.*, United States v. Turkette, 452 U.S. 576, 580 (1981); Perrin v. United States, 444 U.S. 37, 42 (1979); 2A SINGER, *supra* note 128, § 46.01, at 73. "One who questions the application of the plain meaning rule to a provision of an act must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in 'pari materia' with other acts, or with legislative history of the subject matter, imports a different meaning." *Id.* § 46.01, at 74 (footnotes omitted).

is what many of the courts and commentators have done.

The literalist approach of *Paxman* and *Thompson* relies upon the anomaly that the subsection language requires the action of the plaintiff to constitute the basis for the injunctive relief to conclude that there is an unambiguous expression that (b)(2) defendant class certification is not contemplated.[130] That analysis goes too far. The anomaly serves to make the subsection ambiguous, but it does not make it a clear expression of prohibition against defendant class certification for two reasons.

First, the use of the word "party," as opposed to "defendant," raises a question as to the drafters' choice of that usage, when substituting "defendant" would have made the subsection clearly inapplicable to defendant classes.[131] Second, even if the immediately preceding argument is rejected, as has been done,[132] a basic tenet of statutory interpretation requires that provisions of a statute not be read in isolation, but rather be read in the context of the statute as a whole.[133] Reading subsection (b)(2) in light of the "sue or be sued" language[134] of Rule 23(a) finds the two provisions in conflict and results in the creation of an ambiguity.[135]

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130. Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1129 (1981); Thompson v. Board of Educ., 709 F.2d 1200, 1203-04 (6th Cir. 1983). As previously discussed, the actual holdings of *Paxman* and *Thompson*, as expressed in Bazemore v. Friday, 751 F.2d 662, 669-70 (4th Cir. 1984), *cert. granted*, 474 U.S. 978 (1985), *aff'd in part, vacated in part, on other grounds*, 478 U.S. 385 (1986), are that subsection (b)(2) does provide for defendant class certification, but only in situations where the members of the defendant class are acting under a common directive.

This same approach was taken by the leading literalist commentators. *See* 7A WRIGHT ET AL., *supra* note 12, § 1775, at 21-22; Ancheta, *supra* note 9, at 315-17; Note, *supra* note 9, at 390-96.

131. This argument has been used by the leading functionalist commentator to reach the conclusion that the language of subsection (b)(2) supports defendant class certification. Miller, *supra* note 9, at 1377. This argument also goes too far. It serves to establish that the subsection is ambiguous but not to establish a meaning that can be fairly considered to be plain.

132. 3B MOORE & KENNEDY, *supra* note 12, ¶ 23.40[6], at 23-285.

133. *See, e.g.*, Richards v. United States, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'") (citing Mastro Plastics Corp. v. Labor Bd., 350 U.S. 270, 285 (1955)) (quoting United States v. Boisdoré's Heirs, 49 U.S. (8 How.) 113, 122 (1850)); 2A SINGER, *supra* note 128, § 46.05, at 90 ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent . . . . [E]ach part or section should be construed in connection with every other part or section so as to produce a harmonious whole.").

134. *See supra* note 11 and accompanying text.

135. *See supra* notes 96-98 and accompanying text.

As previously discussed, this argument has been used by the "by-hook" functionalists to find that subsection (b)(2) provides for defendant class certification.[136] This argument, too, has properly been rejected[137] because it also goes too far. It is useful in establishing that the subsection in question is ambiguous, but it is overreaching to say that the argument establishes a plain meaning that provides for defendant class certification. The anomaly of the language is ever present.[138] Nevertheless, the Rule 23(a) "sue or be sued" language is a death knell to the literalists finding of their own plain meaning. Although the language of Rule 23(a) is of general application, and that of subsection (b)(2) is of specific application, which could lead to the conclusion that the former cannot control over the latter,[139] the scheme of the Rule as a whole is that specific exceptions to principles of general application are specifically enumerated.[140] Subsection (b)(2) makes no mention that it acts as an exception to Rule 23(a). A fair reading can only conclude that subsection (b)(2) does not have a plain meaning, but, rather, is ambiguous[141] and warrants the next level of statutory analysis, an analysis of the relevant legislative history.[142]

Though the Seventh Circuit in *Henson* sought to engage in an analysis of statutory interpretation, including an analysis of whether the subsection had a plain meaning, its analysis is flawed. In one sentence the court states that the rule does not provide for defen-

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136. *See supra* notes 96-98 and accompanying text; *see also*, Miller, *supra* note 9, at 1377 (finding that "inferences drawn from the rule's text create a strong presumption that (b)(2) authorizes defendant class certification").

137. *See* Henson v. East Lincoln Township, 814 F.2d 410, 414 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987); *see also infra* note 143.

138. *See infra* note 143 and accompanying text.

139. *See* 2A SINGER, *supra* note 128, § 46.05, at 92 ("Where there is an inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.").

140. *See* FED. R. CIV. P. 23(c)(2) (specifically limiting the notice requirements therein to classes certified under subdivision (b)(3)); FED. R. CIV. P. 23(c)(3) (specifying that provisions contained therein are specifically applicable to classes certified under either (b)(1) and (b)(2) or under (b)(3)).

141. The remaining argument of the "by hook" functionalists which looks to action by the plaintiffs to solve the language dilemma, does not warrant further discussion except to note that it too suffers from trying to make an ambiguous provision plain by a contorted analysis. The analysis simply establishes that subsection (b)(2) is ambiguous. *See supra* notes 89-92 and accompanying text.

142. After a court has determined that a statute is ambiguous, it must then look to relevant legislative history to discern the intention of the drafters. *See, e.g.*, SEDGWICK, *supra* note 128, at 194-99; 2A SINGER, *supra* note 128, § 48.01, at 278 ("Usually a court looks into the legislative history to clear up some statutory ambiguity.").

dant class certification, apparently finding a plain meaning, yet also states that the rule contains ambiguous language.[143] The two are incongruous. If there is an ambiguity, the meaning cannot be plain, and further analysis is required. Additionally, although the *Henson* court includes an examination of the language of the subsection and makes mention of the drafting history, it does so looking for an unequivocal expression that defendant class certification is authorized by subsection (b)(2) rather than conducting the examination for the purpose of determining the meaning of an ambiguous statute.[144] Apparently, for the *Henson* court, an ambiguity in a statute signals the ending point of statutory analysis.

B. The Legislative (Drafting) History of Subsection (b)(2)[145]

The drafting history does not address, much less answer the question of whether subsection (b)(2) provides for certification of

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143. *See* Henson v. East Lincoln Township, 814 F.2d 410, 414 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987) ("[P]laintiff argued that nevertheless the language [the drafters] used brought such actions (perhaps inadvertently) under the rule. It does not, as we have shown; so we need not decide whether draftsmen of rules or statutes should ever be held to meanings that are inadvertent—the product of ambiguities inherent in the language."). The analysis in which *Henson* refuses to engage is precisely the analysis that must be conducted to resolve the language dilemma of subsection (b)(2).

144. *See id.* at 416 ("Nothing in the structure or history of the rule suggests that it was intended as a broad delegation to the courts of a power that judges would domesticate by bringing to bear limiting principles found elsewhere in Rule 23, or in the Constitution, or in the Judicial Code . . . . We are loath to embark on these uncharted and, as it seems to us, perilous seas without some indication that the framers of Rule 23 would have wanted us to do so; there is no such indication.").

These passages additionally indicate the court's concern that bilateral class actions are "unwieldy, or worse." *Id.* at 415. The court hypothesized a bilateral, nationwide class action that could become "a monstrous perversion of the principles of civil procedure." *Id.* at 416. Though noting that Rule 23 contained provisions to control such a "monster," such as the creation of subclasses, Rule 23(c)(4), or the requiring of notice to class members for the "fair conduct of the action," Rule 23(d)(2), the court stated that "the rule does not set forth the explicit limitations that would be necessary and appropriate . . . ." *Id.* at 416. The court is not only seeking an unambiguous authorization for (b)(2) defendant class certification, it is also seeking the rule to provide guidance in the certification of defendant classes under subsection (b)(2) that it does not provide for a plaintiff class under any of the three categories, or of a defendant class under subsection (b)(1) or (b)(3). The instructions that the court seeks cannot be generalized, and the rule seeks to establish the framework within which the court can tailor whatever orders are necessary to protect the members of the class.

The concerns of the court are rooted in due process concerns in group litigation of binding absent members of a class to judgment. Those concerns have previously been resolved. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 43 (1940).

145. The term legislative history is somewhat of a misnomer in this context, because

a defendant class.[146] In the entire body of the history, there is no discussion of whether defendant classes may be certified under subsection (b)(2); there is also no discussion indicating that defendant class certification is not authorized.[147] The only logical conclusion is that expressed by Newberg: "[I]n all probability, the Rules Advisory Committee never focused on how the amended rule would be applied when a defendant class suit was sought."[148] The analysis cannot stop simply because subsection (b)(2) defendant class certification may not have been expressly contemplated. The analysis must resolve what *Henson* said it did not need to decide—whether the Rule can be held to have an inadvertent meaning.[149] Further, *Henson* unfairly states the nature of the inquiry, for

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the Federal Rules of Civil Procedure are not drafted by a legislature as such. Congress has delegated to the Supreme Court the power to promulgate all necessary procedural rules and practices involving the district courts. 28 U.S.C. § 2072 (1988). The actual drafting had been assigned to an advisory committee consisting of jurists, practitioners, and legal scholars. *See* Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935). Once promulgated, the rules are reported by the Court to Congress by May 1 and take effect by Dec. 1 of the year in which the rule is reported, unless Congress expressly disapproves. 28 U.S.C. § 2074.

Therefore, the term drafting history is more appropriate. Unfortunately, a drafting history does not contain the same committee reports or floor debates that are the main tools of statutory interpretation.

146. Because of the process by which the rules are drafted and adopted, the sources are few. *See supra* note 145. In their entirety they consist of four sources: The *Reports of the Proceedings of the Judicial Conference of the United States* (1965-1967), which only recite the process by which the changes in the rules are put into effect but does not discuss the substance of the rule changes; *Proposed Rules*, *supra* note 3, at 69, 98-99, in which the discussion does little more than track the language of the ambiguous rule, *see supra* note 43; *Reports and Papers of the Judicial Conference of the United States* (1965); and, a law review article written by the official reporter to the Advisory Committee, Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-400 (1967).

147. The leading functionalist commentator concludes "[t]here is little reason to doubt that Rule 23's drafters intended subdivision (b)(2) to authorize defendant class actions." Miller, *supra* note 9, at 1380. This conclusion is based upon a discerned policy of Rule 23 to promote judicial economy and encourage enforcement of statutory and constitutional norms. One cannot argue that such policies were behind the drafting of Rule 23, but to extrapolate those policies to conclude the drafter's intentions on (b)(2) defendant class certification when none are expressed is an act more rooted in speculation than in interpretation.

148. 1 NEWBERG, *supra* note 3, § 4.18, at 305. Because the Advisory Committee never considered the application of subsection (b)(2) to defendant class certification, the "by crook" functionalist approach is somewhat more justified. *See supra* notes 101-11 and accompanying text. This approach can be viewed as looking beyond the dilemma of the language to seek an accord between the language and the policies behind Rule 23. As discussed at *supra* notes 146-47, the generalized nature of the expression of the policies makes this approach inconclusive.

149. *See supra* notes 143-44.

finding that defendant class actions are maintainable under Rule 23(b)(2) would be giving the subsection an inadvertent meaning only if a device analogous to (b)(2) defendant class certification did not exist prior to the adoption of the amended version of Rule 23 in 1966. If an analogous device did exist, it must then be decided whether the "inadvertence" of the Advisory Committee in not expressly addressing the relationship between the amended Rule 23, particularly subsection (b)(2), and defendant class actions should serve to overrule an existing procedural device.[150]

C. *Rule 23(b)(2) Defendant Class Certification Should not be Overruled by Inadvertence*

It is a fundamental principle of statutory interpretation that a revision of a statute will not be given a construction that repeals or overrules prior law without an unambiguous expression of intention by the drafters to do so.[151] As is often stated, repeals by implication are not favored.[152] Construing subsection (b)(2) to be

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150. It is the refusal to conduct this analysis that most severely flaws *Henson*. It is also the greatest weakness of the literalist approach in general, which determines that the subsection does not expressly provide for defendant class certification and stops the inquiry after an apparent determination that the meaning of the subsection is plain. *See, e.g.*, Ancheta, *supra* note 9, at 317 ("[G]iven 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."). The meaning, however, is not plain. Therefore, further inquiry is warranted.

151. *See, e.g.*, Hecht v. Malley, 265 U.S. 144, 153 (1924) ("In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment."); McDonald v. Hovey, 110 U.S. 619, 629 (1884) ("A change of phraseology in a revision will not be regarded as altering the law where it had been well settled by plain language in the statutes, or by judicial construction thereof, unless it is clear that such was the intent.") (quoting SEDGWICK, *supra* note 128, at 229); Ruth v. Eagle-Picher Co., 225 F.2d 572, 575 (10th Cir. 1955) ("It is a well-settled rule of construction that where the entire legislation affecting a particular subject matter has undergone revision and consolidation by codification the revised sections will be presumed to bear the same meaning as the original sections."); Champ v. Brown, 266 N.W. 94, 97 (Minn. 1936) ("'It is a generally accepted rule of statutory construction that a revision of existing statutes is presumed not to have changed their meaning, even if there be phraseological alterations, unless an intention to change clearly appears from the language of the revised statute when considered in connection with the subject-matter of the act and its legislative history.'"); Libby v. Pelham, 166 P. 575, 577 (Idaho 1917) ("Changes made by a revision of the statutes will not be regarded as altering the law, unless it clear that such was the intention, and, if the revised statute is ambiguous or is susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining the intention.").

152. *E.g.*, Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 523-24 (1986) ("It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored") (quoting Radzanower v. Touche Ross & Co. 426 U.S. 148, 154 (1976)). *See also*,

inapplicable to defendant class actions would amount to such a repeal, but not by implication, rather by inadvertence, if at the time subsection (b)(2) was adopted defendant classes were being certified under old Rule 23 that were analogous to those which would be certified under the new subsection.

The proper time frame of the inquiry is critical. Much has been written tracing the origins of the modern class action to early English common law,[153] and it has been stated that in the sixteenth and seventeenth centuries defendant classes were as common as plaintiff classes.[154] One commentator has utilized an historical analysis to conclude that subsection (b)(2) permits defendant class certification,[155] but inexplicably ends the analysis for all practical purposes in 1853.[156] Though the historical tracing is of intellectual interest,[157] the relevant inquiry is whether inadvertence of the

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Blanchette v. Connecticut Gen. Ins. Corp., 419 U.S. 102, 133 (1974); Amell v. United States, 384 U.S. 158, 165-66 (1966); Silver v. New York Stock Exch., 373 U.S. 341, 358 (1963); United States v. Borden Co., 308 U.S. 188, 198 (1939).

The above cases arise in the context where a court is confronted with two acts upon the same subject which are in apparent conflict. This is not the precise case at hand, but the principle is still equally applicable. A new statute should not be construed to overrule or abrogate a long standing device of civil procedure without mention or even consideration.

153. *See, e.g.*, STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1988); ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY (1950); William Weiner & Delphine Szyndrowski, *The Class Action, From the English Bill of Peace to Federal Rule 23: Is There a Common Thread?*, 8 WHITTIER L. REV. 935 (1987); Stephen C. Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1980); Stephen C. Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977); Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515 (1974).

154. Yeazell, *supra* note 153, at 880.

155. Miller, *supra* note 9, at 1380-83. The commentator discusses Professor Yeazell's arguments that early group litigation devices are distinguishable from the modern defendant class device and concludes that the arguments for distinction are unconvincing. *Id.* at 1382 n.85. Because, as this Article will discuss, the proper inquiry is whether defendant class actions analogous to subsection (b)(2) defendant class actions existed at the time of the adoption of the present Rule 23, the author does not feel compelled to enter that debate.

156. *Id.* at 1381 (citing Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853), as the earliest American defendant class action). *Swormstedt* was a bilateral class action pitting the northern and southern factions of the Methodist Episcopal Church against each other. The Court discussed the utilization of defendant class actions to serve the interests of fairness and convenience and relied heavily upon JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS §§ 97-135 (2d ed. 1840) to endorse defendant classes where appropriate.

Again, one could be tempted to enter a potential argument that the Court in *Swormstedt* impermissibly exceeded the scope of the then existing rule which provided for group litigation, Equity Rule 48, 42 U.S. (1 How.) lvi (1842), by binding absent class members

drafters of present Rule 23 in failing to consider the applicability of subsection (b)(2) to defendant class certification should lead to a result as in *Henson*. The inquiry must focus on whether the device existed in 1966, the time Rule 23 was adopted.[158] If the devise existed, it should not be overruled by inadvertence.

The predecessor to Rule 23, adopted in 1938, interestingly contained the same "sue or be sued" language as the 1966 revision, thus indicating that defendant classes were intended.[159] Examination of the pre-amendment cases shows that defendant classes were

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to the judgment contrary to the language of the rule:

> Where the parties . . . are very numerous, and cannot, without manifest inconvenience and oppressive delays . . . be brought before it, the court . . . may dispense with making all of them parties . . . and may proceed . . . having sufficient parties before it to represent all the adverse interests . . . . *But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.*

Id. (emphasis added).

But such argument need not sidetrack the truly relevant inquiry, what was the state of law at the time that present Rule 23 was adopted? Nevertheless, it is interesting to note that *Swormstedt* was cited by the Advisory Committee's Note to the original Rule 23 (1937). *See* Miller, *supra* note 9, at 1382 n.89 (citing 3B *Moore's Federal Practice* ¶ 23-15 (1982) (reprinting Advisory Committee's Note).

157. Apparently the drafters of Rule 23 were also aware of the origins of group litigation in early English common law. *See* Miller, *supra* note 9, at 1383 n.90 (citing Kaplan, *supra* note 146, at 376).

158. Professor Yeazell has argued that the decision in *Henson* is wrong because of both the historical tradition of litigation involving collective defendants and the existence of contemporary forms of litigation, such as bankruptcy, that involve collective defendants. Yeazell, *supra* note 44, at 46. As this Article has discussed, the appropriate inquiry is whether a directly analogous procedural device existed under old Rule 23 at the time that subsection (b)(2) was drafted. The fact that litigation against defendant collectives has existed and does exist does not establish conclusively that defendant class actions are authorized by subsection (b)(2).

159.

> FED. R. CIV. P. 23 (1938) provided:
>
> (a) 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.

The language also appears in Equity Rule 38, 226 U.S. 659 (1912), the predecessor to FED. R. CIV. P. 23 (1938): "one or more may sue or defend for the whole . . . ."

certified under old Rule 23 in actions brought to obtain injunctive and declaratory relief in situations that are analogous to those which would be maintainable under subsection (b)(2).[160] Most notable are two cases from the State of Alabama in the mid-1960s in which unruly state officials were certified as a defendant class under the predecessor rule.[161] In both cases, bilateral classes were certified in actions seeking declaratory and injunctive relief against a defendant class, the analogous situation to a defendant class certified under subsection (b)(2).[162] Each case received Supreme Court affirmation.[163]

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160. *See generally* Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961) (an action brought by the United States against certain individuals and a defendant class of members of the American Society of Composers, Authors and Publishers (ASCAP) to enjoin alleged antitrust violations); Calagaz v. Calhoon, 309 F.2d 248 (5th Cir. 1962) (an action for declaratory and injunctive relief brought against a nationwide defendant class of union members); Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co., 229 F.2d 901 (5th Cir. 1956) (an employer's action for declaratory and injunctive relief brought against a defendant class of employee union members); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 148 F.2d 403 (4th Cir. 1945) (an action alleging racial discrimination and seeking injunctive and declaratory relief against a defendant class); Toombs v. Forston, 241 F. Supp. 65 (N.D. Ga. 1965), *aff'd*, 384 U.S. 210 (1966) (an action brought against a defendant class for declaratory and injunctive relief to cause reapportionment of the state legislature); Stout v. Hendricks, 228 F. Supp. 568 (S.D. Ind. 1964) (an action challenging legislative reapportionment as violative of equal protection brought against a defendant class of state and county officials).

It is important to note that not all of the above actions name members of an unincorporated association as the defendant class. Otherwise, one might argue that these actions reflect a certification of a defendant class that is analogous to that provided for in FED. R. CIV. P. 23.2, and not subsection (b)(2).

161. *See* Washington v. Lee, 263 F. Supp. 327, 329 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968) (an action seeking to declare as unconstitutional and enjoin the enforcement of certain practices and statutes of Alabama which provided for the segregation by race of detainees in any state, county, or city penal institution); Sims v. Frank, 208 F. Supp. 431, 433 (M.D. Ala. 1962), *aff'd sub nom.* Reynolds v. Sims, 377 U.S. 533 (1964) (a challenge to the apportionment of the Alabama legislature seeking injunctive and declaratory relief). The court in *Henson* cites *Washington*, but dismisses the case because it "had been filed before the 1966 amendments to Rule 23 that added (b)(2) (though it was decided after)." Henson v. East Lincoln Township, 814 F.2d 410, 413 (7th Cir.), *cert. granted*, 484 U.S. 923, *and deferral granted*, 484 U.S. 1001 and 1057 (1987). This reference by *Henson* to *Washington* clearly demonstrates how the court led itself astray by not applying established principles of statutory interpretation.

162. In *Washington*, a defendant class was certified consisting of all county sheriffs of Alabama and of all wardens and jailers of the city and town jails of Alabama. 236 F. Supp. at 329. In *Sims*, a defendant class was certified of all the probate judges of Alabama with three probate judges of the three counties as representatives. 377 U.S. at 537 n.2.

163. "The State's contentions that Rule 23 of the Federal Rules of Civil Procedure, which relates to class actions, was violated in this case . . . are without merit." *Washington*, 390 U.S. at 333. Ideally, more discussion of the nature of the challenge would exist. Yet the challenge presumably was the same as that discussed in the reported decision below

Not only did certification of defendant classes occur under old Rule 23 that are analagous to subsection (b)(2) defendant classes, but the Advisory Committee expressed as its main purpose in revising the Rule in 1966, the elimination of the problems courts experienced with the three categories of class actions under the old Rule, known as true, hybrid, and spurious. The Committee also sought to clarify that a judgment entered in a class action would extend to all members of the class (such had not been the case with the so-called spurious class), and to provide measures to ensure procedural fairness. No other intended changes are discussed.[164] If the Committee had intended to eliminate defendant classes in subsection (b)(2) situations, one could reasonably have expected the Committee to make a clear expression of that intention. The dilemma of the language alone should not be taken to be such an expression.

Therefore, the ability to certify defendant classes in subsection (b)(2) situations existed on the eve of the adoption of subsection (b)(2). Thus, under the principles of statutory interpretation discussed above, the redrafting of Rule 23 in 1966 should not be interpreted as overruling by implication, or by the inadvertence of the Advisory Committee, that which previously existed.[165] As previously discussed,[166] although the Advisory Committee Notes make no mention of defendant classes, they make no mention of an intention to abolish defendant class litigation in actions seeking declaratory and injunctive relief. Thus, a statutory interpretation analysis, when properly conducted, demonstrates that defendant classes may be certified under Rule 23(b)(2).

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involving whether a defendant class could be maintained under the then existing Rule 23. *Washington*, 263 F. Supp. at 329. In *Sims*, the Court did not specifically address the propriety of the certification of the defendant class, but clearly noted that it was affirming an action brought against a class of defendants analogous to a (b)(2) defendant class. 377 U.S. at 539 n.2.

Several cases involving bilateral defendant classes have reached the Court after the adoption of Rule 23, though the issue has not been specifically discussed. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 379-80 (1978). The Court discusses that three issues relevant to (b)(2) defendant class certification are not under appeal but does not include within that list the propriety of (b)(2) class certification. *Id.* at 380 n.6. Perhaps one could infer that the Court did not consider the question to be a relevant issue.

164. *Proposed Rules*, *supra* note 3, at 98-99.

165. One could argue that the defendant classes in *Washington* and *Sims* were of the spurious category, and, therefore, absent members of the class were not bound by the judgment, thus distinguishing the defendant class certification in those cases from (b)(2) defendant class certification. Nevertheless, the res judicata effect of the decisions was not so limited, and the actuality of the nature of the defendant classes is directly analogous to a (b)(2) defendant class.

166. *See supra* notes 43, 78, 164 and accompanying text.

V. CONCLUSION

The courts that have considered the subsection (b)(2) language dilemma have erred in their analysis by concluding, either for or against certification, that the plain meaning of the language can be discerned. This has led courts either to engage in unusual contortions of analysis and language, or to refuse to engage in the statutory interpretation analysis required to resolve the dilemma. The required analysis, once performed, results in subsection (b)(2) providing for certification of defendant classes. Additionally, the language dilemma has caused the legacy of *Paxman* and *Thompson*, which results in courts inserting into subsection (b)(2) a requirement that is redundant of the requirements of Rule 23(a) and that may unnecessarily restrict the scope of defendant class certification under subsection (b)(2). Proper inquiry now should turn to the application of the Rule 23(a) prerequisites, most notably commonality and typicality, to defendant classes in order to prevent the unmanageable, unfair defendant classes that the literalists have feared.