AGGREGATION FOR ME, BUT NOT FOR THEE: THE RISE OF COMMON CLAIMS IN NON-CLASS LITIGATION

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When a plaintiff seeks an injunction or declaration based on a defendant's generally applicable policy or practice, the case has an inherently aggregate dimension, regardless of whether the plaintiff brings it as a class action or as an individual suit. Recent cases involving marriage rights for same-sex couples, affirmative action in higher education, the National Security Agency's metadata program, and the Affordable Care Act's contraceptive mandate—among others—have all taken the non-class form, notwithstanding the underlying claims' amenability to class treatment.

Difficult problems arise when a plaintiff brings a common claim in non-class litigation. The plaintiff might obtain system-wide relief without the knowledge or participation of other potential claimants; this creates a representational asymmetry. The defendant might be bound by collateral estoppel or a system-wide decree if the plaintiff wins, but other potential claimants will not be bound by collateral estoppel if the plaintiff loses; this creates a preclusive asymmetry. Most important, the absence of class treatment jeopardizes values that the judicial system should promote, such as judicial economy, accuracy, and rights articulation.

This Article analyzes plaintiffs' structural disincentives to seeking class treatment for claims seeking purely injunctive or declaratory relief, and the wide-ranging repercussions of the plaintiffs' procedural choice for other litigants and the judicial system. It then proposes a set of changes designed to make the class action device more attractive and available to plaintiffs bringing these types of claims.

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INTRODUCTION

Some cases contain an inherently aggregate dimension, regardless of whether the plaintiff styles the claim as a class action or an individual suit.[1] This occurs whenever a plaintiff seeks purely injunctive or declaratory relief against a policy or practice that applies to a substantial number of persons on a generalized basis;[2] examples would include a state's refusal to issue marriage licenses to same-sex couples, or a university's consideration of race in its admissions process.[3] In such cases, the court must determine the system-wide legality of the policy or practice in order to resolve the common claim, and a system-wide injunction or declaration may follow.[4] One might think, then, that the class action device offers no clear benefits over an individual suit; either way, it might seem, the court will decide the same question and issue the same decree.

Indeed, one might think that the individual path would be preferable; a significant number of courts have expressed that view.[5] Aggregation creates challenges, as courts and scholars have long recognized. Permitting one plaintiff to stand in for others raises serious questions about litigant autonomy and intra-class conflicts, among other concerns.[6] In cases seeking purely injunctive or declaratory relief against a defendant's generally applicable policy or practice, however, those challenges inhere in the claims themselves; they cannot be solved by removing the formal mechanisms of aggregation from the litigation. Rather, as this Article explains, the absence of class treatment pushes the

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1 *See generally* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183 (2009); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105 (2010).

2 *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04 cmt. a (2010) [hereinafter ALI Principles] ("Litigation seeking prohibitory injunctive or declaratory relief against a generally applicable policy or practice is already aggregate litigation in practice . . . ."). The similar preclusive and coercive effects of injunctive and declaratory relief justify treating them as functional equivalents for purposes of this Article. *See* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091 (2014).

3 As these examples suggest, quasi-individual actions usually involve litigation against government defendants; however, they are not limited to that context. *See infra* Part I.A.

4 *See, e.g.*, Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963) ("[W]hether or not appellants may properly represent all Negroes similarly situated, the decree to which they are entitled is the same."); *see also* ALI Principles, *supra* note 2, at § 2.04, cmt. a ("[T]he relief that would be given to an individual claimant is the same as the relief that would be given to an aggregation of such claimants.").

5 *See* M.R. v. Bd. of Sch. Comm'rs of Mobile Cnty., 286 F.R.D. 510, 518 & n.11 (S.D. Ala. 2012) (collecting cases); *see also infra* Part I.A (discussing the "necessity" doctrine).

6 *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573 (2007); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

litigants and the judicial system into a game of Whack-A-Mole;[7] when one aggregation-related issue disappears, another pops up.

In other contexts, having multiple courts weigh in on legally and factually similar questions allows the common law to develop and evolve, and litigants can attempt to distinguish prior decisions based on the existence of any legal or factual differences, however minute. The cases at issue here, however, do not involve damages claims or other individuating features that depend on the identity of the current plaintiff. Rather, they involve a broadly applicable policy or practice that either is illegal, or is not; and thus either should be enjoined (or declared invalid), or should not. For example, a challenged statute either is or is not facially unconstitutional; an agency either does or does not have a statutory obligation to disclose a requested document. The very nature of a purely injunctive challenge to a defendant's generally applicable conduct means that the legal and factual issues are truly common to all potential claimants, with no distinctions for future litigants to exploit.[8] Although plaintiffs may bring these cases in individual form, the indivisibility of the liability question means that the litigation cannot have truly individual effects;[9] accordingly, I refer to cases that take the formally individual path as "quasi-individual" actions.

Quasi-individual actions give rise to troubling asymmetries. If the plaintiff wins, he might obtain system-wide relief or a precedent with potential issue-preclusive effect against the defendant;[10] but if the plaintiff loses, the defendant cannot invoke preclusion if another plaintiff subsequently brings an identical claim.[11] This creates a preclusive asymmetry to the detriment of the defendant, potentially

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7 This term comes from a classic arcade came in which cylindrical "moles" pop up repeatedly from a number of round holes in the surface of the game machine, and the player must use a mallet to pound them back down. For a more thorough explanation of the arcade game, as well as examples of the colloquial use of the term "Whack-A-Mole" (or "Whac-A-Mole"), see *Whac-A-Mole*, WIKIPEDIA, http://en.wikipedia.org/wiki/Whac-A-Mole (last visited May 31, 2015). Howard Erichson has used the term in a similar manner: "Mass disputes do not disappear, so neither does mass litigation; it just reappears in different forms. Call this the Whac-a-Mole effect. Knock the mole down in one spot, and it pops up in another." Howard M. Erichson, *Cafa's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1606–07 (2008) (footnote omitted).

8 *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 180 (2003) ("Absent demands for damages, the liability issue—whether the defendant's generally applicable conduct deviates from the governing legal standard—is indivisible in the sense that the defendant's conduct is either lawful or unlawful as to everyone it affects.").

9 *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1647 (1997) (noting that these types of lawsuits are "not purely self-regarding acts with no externalities").

10 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). This issue-preclusive effect does not apply against the United States as a defendant. *See* United States v. Mendoza, 464 U.S. 154 (1984).

11 *See* Taylor v. Sturgell, 553 U.S. 880 (2008).

exposing it to serial relitigation.[12] Conversely, through the existence of a truly indistinguishable precedent or a system-wide remedy with which they disagree, other potential claimants may find that a prior action has effectively decided their claims, even though the plaintiff did not even purport to represent their interests.[13] This creates a representational asymmetry to the detriment of the other potential claimants, potentially denying them an opportunity to be heard.[14] Defendants and nonparties will not know at the outset of the initial litigation which of them will ultimately experience these asymmetries, limiting their ability to protect their own interests.

From an institutional perspective, quasi-individual actions can jeopardize the efficiency, accuracy, and integrity of judicial processes.[15] For example, the absence of class treatment undermines the court's ability to consider the full range of relevant facts and interests when determining liability and fashioning relief. Although accommodating and protecting those representational interests can cause a class action to take longer than an individual case, the absence of class treatment can ultimately cause greater harm to judicial economy by permitting serial relitigation.[16] Additional concerns arise in civil rights and other statutory fee-shifting cases, where the individual form can cause the fee-shifting mechanism to generate a fraction of the benefits without a commensurate reduction in costs.[17]

There is no perfect solution for these inherent tensions among the judiciary's institutional needs, defendants' interests in closure, and each claimant's individual right to be heard. The existing mechanisms of formal aggregation, however, offer a vast improvement over the quasi-individual path. The relevant provision, Rule 23(b)(2) of the Federal Rules of Civil Procedure, authorizes class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[18] This provision was drafted during the desegregation litigation of the 1950s

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12 *See infra* Part II.A; *see also* Nagareda, *supra* note 1, at 1113 (discussing the concept of "preclusive symmetry").

13 In the case of a final Supreme Court decision on the merits, the prior case would bind every lower court in the federal system, making it a "de facto class action" in terms of its precedential effect. *See* Arthur S. Miller, *Constitutional Decisions As De Facto Class Actions: A Comment on the Implications of* Cooper v. Aaron, 58 U. DET. J. URB. L. 573 (1981).

14 *See infra* Part II.B.

15 *See infra* Part II.C.

16 This effect brings to mind the maxim originated by Jack Bergman: "There is never enough time to do it right, but there is always enough time to do it over." *See* 2 GLENN PARKER, THE PARKER TEAM SERIES 13 (2011).

17 *See infra* Part II.C.5.

18 FED. R. CIV. P. 23(b)(2); *see also* FED. R. CIV. P. 23(a) (setting forth the class action prerequisites of numerosity, commonality, typicality, and adequate representation).

and 1960s, and was designed to address the procedural issues that can arise when a representative plaintiff seeks broad injunctive or declaratory relief on behalf of a larger group.[19] Class treatment pursuant to Rule 23(b)(2) increases the likelihood that a court will issue a final decision on the merits that reaches system-wide (i.e., as broadly as the policy or practice itself), enabling the court to "say what the law is" through a process designed to protect the interests of all those affected.

Notwithstanding the availability of Rule 23(b)(2), plaintiffs currently face a set of structural disincentives to class treatment that cause many of them to choose the individual form.[20] Plaintiffs made this choice in recent cases involving, among others, marriage rights for same-sex couples,[21] affirmative action in higher education,[22] mandatory drug testing of state employees,[23] the National Security Agency's metadata program,[24] and the Affordable Care Act's contraceptive mandate.[25] In each of those cases, the plaintiffs sought injunctive or declaratory relief against a defendant's generally applicable policy or

19 *See generally* David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

20 *See infra* Part I.

21 *See* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (involving a challenge to California's ban on marriage recognition for same-sex couples). Analogous challenges in other states have similarly proceeded on a non-class basis. *See, e.g.*, Bishop v. United States, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013). In Virginia, one challenge proceeded on a non-class basis, while another was certified as a class action. Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014) (non-class action); Harris v. McDonnell, 988 F. Supp. 2d 603 (W.D. Va. 2013) (class action).

22 *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (involving a challenge to UT Austin's race-conscious admissions policy).

23 Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott, 717 F.3d 851 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1877 (2014).

24 *See* Klayman v. Obama, 957 F. Supp. 2d 1 (D.D.C. 2013). The American Civil Liberties Union (ACLU) has similarly filed a challenge to the metadata program on a non-class basis; the district court hearing that case upheld the program eleven days after the district court in *Klayman* ruled it unconstitutional. *See* ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013). The *Klayman* plaintiffs originally sought to represent a class, but in January 2014 they abandoned their pursuit of class treatment "in order to streamline and to expedite" the litigation. Plaintiffs' Praecipe Regarding Class Actions at 1, *Klayman*, 957 F. Supp. 2d 724 (No. 13-cv-851), *available at* http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2013cv00851/160387/71. One month later, Senator Rand Paul filed a class action lawsuit in the same district court. *See* Rebecca Ballhaus, *Rand Paul Files Class Action Lawsuit Over NSA Surveillance*, WALL ST. J. (Feb. 12, 2014, 4:07 PM), http://blogs.wsj.com/washwire/2014/02/12/rand-paul-files-class-action-lawsuit-over-nsa-surveillance; *see also* Dana Milbank, *Dana Milbank: Fighting over Rand Paul's NSA Lawsuit Continues*, WASH. POST (Feb. 19, 2014), http://www.washingtonpost.com/opinions/dana-milbank-fighting-over-rand-pauls-nsa-lawsuit-continues/2014/02/19/f7a16006-99b8-11e3-b931-0204122c514b_story.html.

25 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). A challenge to a related requirement for nonprofit corporations has similarly proceeded on a non-class basis. *See* Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius, 6 F. Supp. 3d 1225 (D. Colo. 2013), *injunction granted pending appeal*, 134 S. Ct. 1022 (2014) (Mem.).

practice; but in each, they chose not to bring a class action to litigate the common claim.[26]

This Article offers a comprehensive analysis of the incentives and disincentives affecting a plaintiff's choice whether to invoke Rule 23(b)(2) for claims seeking purely injunctive or declaratory relief, and the wide-ranging repercussions of that choice for other litigants and the judicial system.[27] Although scholars have recognized that nominally individual cases can entail system-wide analysis and system-wide effects,[28] the current literature emphasizes types of claims not suitable for class treatment, for reasons such as dissimilarities or conflicts within the potential plaintiff class.[29] In contrast, this Article analyzes common claims that can—and, I argue, usually should—proceed on a class basis. Existing scholarship has failed to recognize the extent of plaintiffs' disincentives to class treatment for these claims, or the severity of the problems that result.

This Article fills an additional gap in existing scholarship by identifying ways to improve plaintiffs' incentives to invoke Rule 23(b)(2) when bringing claims seeking purely injunctive or declaratory relief against a defendant's generally applicable policies or practices. I propose expedited timelines for plaintiffs who choose class treatment over quasi-individual actions, to reduce the disincentives caused by delay; a reform of the "necessity" doctrine,[30] so that plaintiffs will not be forced into quasi-individual actions; and a fee-shifting multiplier, to improve the availability and motivation of counsel to seek class

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26 To be clear, I do not claim any insight into these particular plaintiffs' thought processes, and I do not know what actually motivated any of them to choose the non-class form. However, it seems safe to assume that the litigants and their counsel were aware of the possibility of pursuing class treatment, and that their decision not to do so was based on their view of the device's costs and benefits in the context of their particular cases.

27 In 1983, Timothy Wilton conducted a similar analysis, but limited it to "social reform litigation." *See* Timothy Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U. L. REV. 597 (1983). In 1991, Ann Lever and Herbert Eastman analyzed plaintiffs' incentives with regard to class treatment in the context of Medicaid litigation. *See* Ann B. Lever & Herbert A. Eastman, *"Shake It Up In a Bag": Strategies for Representing Beneficiaries in Medicaid Litigation*, 35 ST. LOUIS U. L.J. 863, 865–71 (1991). This Article both expands upon that earlier work to encompass a broader range of claims and updates the analysis to reflect the significant changes that have occurred in class action law over the intervening decades.

28 *See, e.g.*, Rhode, *supra* note 6, at 1195–97; Rubenstein, *supra* note 9, at 1646; David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 925 & n.31 (1998). *But see* Nagareda, *supra* note 1, at 1108 (criticizing the debate over class actions for "tend[ing] to convey the impression that the world neatly divides itself into the mass effects unique to class actions and the confined realm of litigation between individuals, each standing alone and each separately represented").

29 *See* Issacharoff, *supra* note 1; Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563 (2013); Nagareda, *supra* note 1.

30 The necessity doctrine permits the denial of class certification on the basis that the district court could issue as broad a decree in an individual case as in a class action. *See infra* Part I.A.

treatment for these types of claims.[31] Because some plaintiffs will continue to choose non-class litigation in spite of these changes, I also propose changes applicable to quasi-individual actions.[32] I do not propose any means of forcing plaintiffs to pursue class treatment, however, because the current state of class action law counsels against such an approach.[33]

The Article proceeds as follows. Part I defines the phenomenon of quasi-individual litigation and analyzes plaintiffs' structural incentives and disincentives as to class treatment. Part II examines the Whack-A-Mole effects that quasi-individual actions can have on defendants and interested nonparties, and, most important, the institutional harm that such cases can inflict on the judicial system as a whole. Finally, Part III offers proposals to improve the institutional response to these types of challenges, with a particular focus on the civil rights claims that spurred the adoption of Rule 23(b)(2).

I. THE PLAINTIFFS' PROCEDURAL CHOICE

A plaintiff who seeks purely injunctive or declaratory relief based on a defendant's generally applicable policy or practice must decide whether he will pursue class treatment—an option made possible by Rule 23(b)(2) of the Federal Rules of Civil Procedure—or whether he will instead bring a quasi-individual action. This Part analyzes the incentives and disincentives relevant to that choice from a plaintiff's perspective, both conceptually and as applied to two recent cases at opposite ends of the ideological spectrum.

A. *Identifying the Options*

Plaintiffs have not always had a clear path to class treatment when seeking injunctive or declaratory relief based on a defendant's generally applicable policy or practice. Throughout the 1950s and 1960s, for example, civil rights plaintiffs attempted to bring a number of cases on a class basis.[34] In many cases—perhaps most famously, *Brown v. Board of Education*[35]—they succeeded. In others, however, judges found ways to deny class treatment for their claims.[36]

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31 *See infra* Part III.A.
32 *See infra* Part III.B.
33 *See infra* Part III.C.
34 *See* Marcus, *supra* note 19, at 679–95.
35 347 U.S. 483 (1954).
36 *See* Marcus, *supra* note 19, at 694.

Being pushed onto the quasi-individual path presented a serious problem for civil rights plaintiffs, because many judges at that time refused to grant system-wide relief to non-class litigants in civil rights cases.[37] In some cases a court would hold that a desegregation plaintiff had established his right to access the disputed facilities, but would refuse to order any remedy beyond an injunction or declaration requiring access for that particular individual.[38] The typical reasoning was that because the case was not a class action, only the individual plaintiff was before the court, and the order granting him access afforded him complete relief for his claim.[39] That remedial approach could result in integration of the disputed facility only after a long and arduous process involving multiple lawsuits and great expense.

The drafters of the 1966 revisions to the Federal Rules of Civil Procedure—aware of the hurdles facing civil rights plaintiffs in unsympathetic and hostile courts—sought to improve the utility of the class action as a device for bringing about desegregation on a larger scale.[40] Their efforts resulted in the adoption of the current version of Rule 23(b)(2), which permits the certification of class actions seeking injunctive or declaratory relief when "the party opposing the class has acted or refused to act on grounds that apply generally to the class."[41]

The adoption of Rule 23(b)(2) facilitated class treatment in desegregation cases, and although its application is not limited to constitutional challenges, the situation it governs is more likely to arise in public law litigation than in private law cases.[42] The rule generally

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37 In addition, "[a] lone plaintiff was extremely vulnerable to the pressure of intimidation by state and local officials, and it was not above those officials to bring such pressure to bear." Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2186 (1989).

38 For example, "[t]he Fifth Circuit did not sanction an integration injunction in an individual suit until 1963, and regardless of this decision, recalcitrant district judges still cited a suit's nonclass status to justify meaningless, individual-by-individual injunctions." Marcus, *supra* note 19, at 710 (footnote omitted).

39 *See, e.g.*, Clark v. Thompson, 206 F. Supp. 539, 542 (S.D. Miss. 1962) ("This is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled.").

40 *See* Marcus, *supra* note 19, at 695–711.

41 FED. R. CIV. P. 23(b)(2). Like the bulk of the Rules, this provision is transsubstantive, and litigants can invoke it in cases that do not involve civil rights. Yet it has great importance for the type of civil rights litigation the drafters of the 1966 revisions had in mind. Describing this type of tension "between procedure generalized across substantive lines and procedure applied to implement a particular substantive end," Robert Cover observed in 1975 that "there are . . . demands of particular substantive objectives which cannot be served except through the purposeful shaping, indeed, the manipulation, of process to a case or to an area of law." Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1028 (2013) (citing Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975)).

42 *Cf.* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 651 (2011) ("The 1966 reforms that empowered federal judges to deal with school desegregation through class action lawsuits paved

gives a plaintiff seeking injunctive or declaratory relief against a defendant's broadly applicable policy or practice the option of bringing his claim on a class basis.[43] The rule does not, however, require a plaintiff to invoke its provisions. Even when a plaintiff's claim would fit neatly into Rule 23(b)(2),[44] the plaintiff can choose to bring it on a nominally individual basis, giving rise to the type of case that I refer to as a quasi-individual action.

One caveat is necessary as to the availability of the plaintiff's procedural choice. Notwithstanding the language and intent of Rule 23(b)(2), some district courts have *required* plaintiffs to take the individual path when seeking purely injunctive or declaratory relief based on a defendant's generally applicable policy or practice.[45] Applying a doctrine known as the "necessity" or "need" requirement—and assuming, at least implicitly, that the defendant will comply with a broadly-written order in a non-class case[46]—these courts have noted that the plaintiffs could achieve system-wide injunctive or declaratory relief in an individual case, and have thus denied class certification as unnecessary.[47] The Supreme Court has not directly weighed in on this doctrine,[48] and the circuit courts have not developed a uniform

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the way for parallel structural remedies for violations of rights in jails, prisons, and mental hospitals, and by social welfare agencies.").

43 To obtain certification under Rule 23(b)(2), a plaintiff must also satisfy the class action prerequisites set forth in Rule 23(a), which include numerosity, commonality, typicality, and adequacy of representation. *See* FED. R. CIV. P. 23(a). Some courts also impose a "cohesiveness" requirement for 23(b)(2) classes. *See, e.g.*, Barnes v. Am. Tobacco Co., 161 F.3d 127, 142–43 (3d Cir. 1998). Momentum is building towards an "indivisibility" requirement as well. *See* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. (forthcoming 2016).

44 Courts and scholars disagree on the extent to which a plaintiff may seek monetary damages in a Rule 23(b)(2) class action, but when a plaintiff seeks *purely* injunctive or declaratory relief against a defendant's generally applicable policy or practice (and meets the Rule 23(a) prerequisites, *see supra* note 43), the plaintiff's claim fits neatly into Rule 23(b)(2).

45 *See* M.R. v. Bd. of Sch. Comm'rs of Mobile Cnty., 286 F.R.D. 510, 518 & n.11 (S.D. Ala. 2012) (collecting cases denying class certification under Rule 23(b)(2) as unnecessary); *see generally* Michael J. Murphy & Edwin J. Butterfoss, Note, *The "Need Requirement": A Barrier to Class Actions Under Rule 23(b)(2)*, 67 GEO. L.J. 1211 (1979); Daniel Tenny, Note, *There Is Always a Need: The "Necessity Doctrine" and Class Certification Against Government Agencies*, 103 MICH. L. REV. 1018 (2005).

46 Defendants do not always act in accord with this assumption. For example, in 1978 the Secretary of the United States Department of Health and Human Services entered into a consent decree, in a non-class case, in which the Secretary agreed to provide supplemental security income benefits to certain immigrants. *See* Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985). When a group of immigrants later sued to enforce the decree, the Secretary argued that because the initial case had not been a class action, the immigrants seeking enforcement were not entitled to the agreed-upon benefits and had no standing to seek enforcement of the decree. *See id.* at 1566–67. The Second Circuit sharply criticized the Secretary's position and permitted the immigrants to intervene for purposes of seeking enforcement. *See id.* at 1567.

47 *See, e.g.*, *M.R.*, 286 F.R.D. at 521 (denying certification because "[a]n injunction for the individual plaintiffs would amount to exactly the same relief as an injunction for an entire class").

48 *See* Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1930 (2014) ("The Supreme Court of the United States has never issued a major holding on the

approach to it.[49] One commentator has noted, however, that "the vast majority of courts" have found no legal barriers to applying some version of the necessity requirement, which "now seems well-accepted as an appropriate consideration when certifying a Rule 23(b)(2) action."[50]

Subject to the caveat presented by the necessity doctrine, plaintiffs in a range of substantive areas have the ability to choose whether to bring a class action or a quasi-individual claim.[51] For example, if an employer has a policy allowing men to request any job but restricting women to jobs that do not require lifting more than thirty-five pounds, a female employee may seek to change that policy through Title VII, regardless of whether she represents all other female employees.[52] If an organization denies membership to openly gay individuals, a gay man may ask a court to enjoin that exclusion, regardless of whether he represents all other gay men and lesbians who wish to be members.[53] And if a public university considers race in its admissions process,[54] or a state refuses to allow same-sex couples to marry,[55] plaintiffs may challenge the constitutionality of those actions, regardless of whether they represent everyone affected.

B. *(Many) Plaintiffs' Net Disincentives to Class Treatment*

A wide range of considerations bear on a plaintiff's decision whether to pursue class treatment under Rule 23(b)(2) when seeking injunctive or declaratory relief against a defendant's generally applicable

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discretion not to certify, but the Court has assumed and relied upon the existence of such discretion."). Although language in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 398–400 (2010), can be read as an implicit rejection of the necessity doctrine, the case did not actually address the question of the doctrine's validity. *See* Wolff, *supra*, at 1946–47.

49 The Seventh Circuit has explicitly rejected the necessity doctrine, holding that "class certification may not be denied on the ground of lack of 'need' if the prerequisites of Rule 23 are met." *See* Vergara v. Hampton, 581 F.2d 1281, 1284 (7th Cir. 1978). Moreover, one commentator has asserted that arguments based on the necessity doctrine should fail in the wake of the Supreme Court's decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979), which held that a class may be certified under Rule 23(b)(2) even if there is no absolute need for it. *See* 5 JAMES WM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.43[4] (2013).

50 CHARLES ALAN WRIGHT ET AL., 7AA FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 1785.2 (4th ed. 2014).

51 Pattern-or-practice claims for declaratory or injunctive relief under Title VII present a notable exception. *See* Davis v. Coca-Cola Bottling Co., 516 F.3d 955, 967 (11th Cir. 2008) (explaining that when brought by private plaintiffs, such claims "must be litigated either as class actions or not at all").

52 *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

53 *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

54 *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (discussed *infra* Part I.C.1).

55 *See* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (discussed *infra* Part I.C.2).

policy or practice. As discussed below, although each option involves both pros and cons, many plaintiffs will find that the net incentives weigh in favor of bringing a quasi-individual action.[56] The considerations leading to that net effect include: litigant autonomy; remedial scope; expediency and expense; mootness and standing; and potential relitigation and enforcement.

1. Litigant Autonomy

In individual litigation, the duties of plaintiffs' counsel run to the client, and the client answers only to himself. In contrast, in a class action both class counsel and the class representatives owe fiduciary duties to the class as a whole.[57] To enable the court to evaluate and enforce the execution of those duties, the procedures set forth in Rule 23 limit the authority of named plaintiffs and their counsel to make litigation decisions that will affect absent class members. As a result of these limitations, which are further explained below, a plaintiff in a quasi-individual action possesses far greater autonomy than does a class representative with regard to a wide range of litigation decisions.

Consider Rule 23(g), which governs the appointment of class counsel. Unlike a plaintiff in an individual case, a class representative cannot contract for his own attorney. Rather, the court must appoint the best available attorney for the class,[58] taking into account such factors as the candidate's experience, knowledge, resources, and "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[59] Although courts usually appoint the named plaintiff's counsel of choice, the Rule 23(g) factors give the court considerable discretion in selecting among candidates. If a plaintiff wants to ensure that he will be represented by his chosen counsel,[60] or if

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56 *See* DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT 506 (2010) (reaching "mixed and enigmatic conclusions" about the need for class treatment under Rule 23(b)(2)); Wilton, *supra* note 27, at 603 (arguing that in social reform litigation, individual actions better serve the interests of the plaintiff group than do class actions under Rule 23(b)(2)).

57 *See* Allen v. Int'l Truck & Engine Corp., 358 F.3d 469, 471 (7th Cir. 2004) ("Formal certification . . . obliges counsel (and the representative plaintiffs) to proceed as fiduciaries for [the entire class] . . . rather than try to maximize the outcome for [the named plaintiffs] at the potential expense of the other[s] . . . .").

58 *See* FED. R. CIV. P. 23(g)(2). If only one candidate comes forward, the court may appoint that candidate to be class counsel only if it deems the applicant "adequate" under the Rule 23(g) criteria. *Id.*

59 *See* FED. R. CIV. P. 23(g)(1).

60 This subjective preference could correspond to an objective harm to the plaintiff's interests if his chosen attorney lacks the expertise that other attorneys, more experienced in the field, might possess. *See generally* Rubenstein, *supra* note 9, at 1675–80 (discussing the tensions between individualist and expertise-based models of decisionmaking in civil rights litigation).

a plaintiff's attorney wants to ensure that she will be the one to litigate the claim, foregoing class treatment will best protect those preferences.[61]

Even if the court ultimately appoints the attorney preferred by the named plaintiff, the class counsel and class representative will face significant restrictions on their autonomy with regard to actions such as entering into a settlement, converting an injunction into a damages remedy, choosing what claims to pursue, and determining the overall strategy of the litigation. With regard to settlement, the class action rule provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised *only with the court's approval*."[62] A court may grant such approval only after directing notice to the class, holding a hearing at which objecting class members may be heard, and finding the settlement to be "fair, reasonable, and adequate."[63] A plaintiff bringing common claims in non-class litigation, in contrast, can enter into the settlement he deems best, with no input from the court or other potential claimants.

The same constraint that limits settlement authority also implicates a plaintiff's ability to convert an injunction into a damages remedy. In individual litigation, a preliminary injunction will sometimes lead to a monetary settlement; in a sense, the plaintiff "sells" his right to enforce the preliminary injunction against the defendant.[64] A class representative (or class counsel) cannot enter into this type of transaction unless the court finds it to be fair to the class as a whole; and if the class representative would get the bulk of the money, the court would be unlikely to approve the deal. In contrast, a plaintiff who does not formally represent a class can settle on whatever terms he chooses, and if he does, the settlement proceeds will belong only to him.[65]

With regard to the choice of what claims to pursue, although Rule 23 does not explicitly require a class action plaintiff to seek all possible forms of relief, it does require a showing that "the representative parties will fairly and adequately protect the interests of the class."[66] Some courts have interpreted the adequacy requirement as a prohibition on omitted claims, particularly where the putative class representative (or class counsel) has decided to seek only equitable relief.[67] In contrast, a

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61 *Cf.* Nagareda, *supra* note 8, at 161 (noting that appointment as class counsel confers a monopoly that displaces competition by other lawyers).

62 *See* FED. R. CIV. P. 23(e) (emphasis added).

63 *See* FED. R. CIV. P. 23(e)(1)–(5).

64 *See* Douglas Lichtman, *Irreparable Benefits*, 116 YALE L.J. 1284, 1295–96 & n.20 (2007); *see also* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001).

65 Of course, depending on the fee arrangement, the plaintiff may be obligated to give a portion of the settlement proceeds to his counsel.

66 *See* FED. R. CIV. P. 23(a)(4).

67 *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 781–88 (2013). Some commentators have argued that the underlying concern—that absent class members may face a preclusive bar to bringing the omitted claims—conflicts with the holding of *Cooper v.*

plaintiff and his retained counsel in a non-class case have the authority to seek only the forms of relief they deem worth pursuing.

More generally, a plaintiff and retained counsel in a non-class case have significantly broader ability to shape the overall strategy of the litigation than do a class representative and class counsel. The duties that class representatives and counsel owe to the class as a whole, and the mechanisms by which courts enforce those duties, impose limits not only on the relief pursued but the strategies employed in pursuing it. For example, a named plaintiff may be deemed an inadequate representative, or class counsel may be removed, if the court deems their litigation tactics not to be in the best interests of the class. In contrast, plaintiffs and their counsel in an individual case may shape the litigation strategy however they see fit.

It bears noting that, as with many of the other factors bearing on a plaintiff's decision whether to bring a class action, Rule 23's protections for absent class members have salutary purposes and often have salutary effects. The analysis in this Part, however, is limited to the plaintiff's point of view. Viewed from the standpoint of a plaintiff who prioritizes his own autonomy as a litigant—who wishes to pursue his own goals, with his own attorney, employing his preferred tactics—the requirements discussed above create disincentives to class treatment.

2. Remedial Scope

If he brings a class action and prevails on the merits, a plaintiff who seeks injunctive or declaratory relief against a generally applicable policy or practice will obtain a class-wide remedy. When a plaintiff proves the merits of a common claim in non-class litigation, in contrast, the court will not necessarily grant system-wide relief (i.e., relief as broad as the policy or practice at issue).[68] Indeed, some scholars have asserted that

Federal Reserve Bank of Richmond, 467 U.S. 867 (1984), which distinguished between individual and systemic claims for purposes of preclusion. *See id.* at 782 (citing Edward F. Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 485 (2011); Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 321–22 (2011)). Other commentators, however, have disagreed. *See id.* at 782–83 (citing Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 730 (2005)). In any event, so long as some courts enforce the prohibition on omitted claims, plaintiffs will need to consider that prohibition when determining their litigation strategy.

[68] *Cf.* Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 605 (2012) ("Certainly, 'an injunction can benefit parties other than the parties to the litigation,' and a court can enjoin enforcement of an unconstitutional regulation, but a court has discretion whether to do so as to non-parties." (quoting Doe v. Rumsfeld, 341 F. Supp. 2d 1, 17 (D.D.C. 2004))).

courts are generally *prohibited* from issuing such relief;[69] the government recently made a similar argument in the context of litigation about the Affordable Care Act.[70] As discussed below, however, the case law does not actually support any clear rule.

Upon determining that a defendant's generally applicable policy or practice violates the law, a court will be faced with competing remedial principles. On the one hand, a grant of relief should be commensurate with the scope of the violation;[71] and a court has broad authority, as well as an affirmative obligation, to shape an appropriate remedy for a proven violation.[72] Courts may therefore enjoin "acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past."[73] These principles would seem to suggest that proof of a common claim should usually result in system-wide relief, even in a non-class action; the very nature of a generally applicable policy or practice implies that the defendant will, unless enjoined, expose others to the same unlawful treatment on a system-wide basis.[74]

On the other hand, another equitable principle provides that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[75] This principle

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69 *See, e.g.*, Marty Lederman, *The Court's Five Options in the California Marriage Case*, SCOTUS BLOG (Mar. 1, 2013, 11:11 AM), http://www.scotusblog.com/2013/03/the-courts-five-options-in-the-california-marriage-case ("[D]istrict court judges generally do not have the power to issue injunctions that protect persons other than the parties before them, absent a class action or a case in which a broader injunction is necessary to ensure that the plaintiffs receive complete relief.").

70 *See* Letter from Alisa B. Klein, Counsel for the Appellees, to Mark Langer, Clerk, U.S. Court of Appeals for the D.C. Circuit (Mar. 12, 2014), *available at* http://www.cato.org/sites/cato.org/files/documents/govt_28j_on_class_actions.pdf (arguing that a lawsuit challenging tax credits under the Affordable Care Act could not result in an injunction applicable to nonparties because "[p]laintiffs did not seek to represent a class," and some of the affected nonparties would prefer that the credits remain in place).

71 *See* Hills v. Gautreaux, 425 U.S. 284, 293–94 (1976) ("Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." (citation and internal quotation marks omitted)); *see also* Lewis v. Casey, 518 U.S. 343, 359 (1996) (articulating the same principle in the negative, as a limitation on relief extending beyond the scope of the violation).

72 *See Hills*, 425 U.S. at 297 ("'Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971))).

73 NLRB v. Express Pub. Co., 312 U.S. 426, 435 (1941).

74 In the administrative law context, for example, these principles support the D.C. Circuit's rule that "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *See* Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)) (internal quotation marks omitted).

75 Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

would seem to support the conclusion that an individual case should generally *not* result in a system-wide remedy; a court can usually afford a plaintiff complete relief by enjoining the policy or practice only as to that plaintiff, without requiring the defendant to change its conduct as to others.[76]

In light of the competing principles described above, it should come as no surprise that courts have articulated conflicting rules and holdings when deciding whether a plaintiff can obtain system-wide relief without bringing a class action. For example, the Seventh Circuit recently upheld a system-wide injunction in a non-class case, reasoning that "[w]hen the court believes the underlying right to be highly significant, it may write injunctive relief as broad as the right itself."[77] Yet a prior decision by the same circuit had held a system-wide injunction to be improper in a non-class case, reasoning as follows: "A wrong done to plaintiff in the past does not authorize prospective, class-wide relief unless a class has been certified. Why else bother with class actions? [T]he scope of the injunctive relief . . . is in large part determined by the class action question."[78]

The Seventh Circuit's inconsistent treatment of system-wide relief in quasi-individual actions does not make it an outlier, as the Ninth Circuit's case law demonstrates. The latter court overturned a system-wide injunction in a non-class case as overbroad, reasoning that "[t]his is not a class action" and "[e]ffective relief can be obtained by directing the [defendant] not to apply its regulation to" the plaintiff.[79] Similarly, the court stated in another case that "injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification," and relief in a non-class case could extend more broadly

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76 For example, consider *Perry*: After concluding that California had unlawfully refused to marry the two plaintiff couples because of Proposition 8, the district court might have determined that it could redress the plaintiffs' injuries through an order requiring the state to marry only those two couples, leaving Proposition 8 otherwise intact. *See* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). Some have argued that the Court should have so limited its order. *See, e.g.*, Marty Lederman, *Understanding Standing: The Court's Article III Questions in the Same-Sex Marriage Cases (VII)*, SCOTUS BLOG (Jan. 21, 2013, 9:01 PM), http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-vii.

77 *See* Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 879 (7th Cir. 2011) (Posner, C.J.) (quoting 1 DAN B. DOBBS, LAW OF REMEDIES 113, § 2.4(6) (2d ed.1993)); *see also* Allen v. Int'l Truck & Engine Corp., 358 F.3d 469, 471 (7th Cir. 2004) (Easterbrook, C.J.) (recognizing the existence of cases in which "the equitable aspects of the litigation are class-wide whether the judge certifies a class action or not").

78 McKenzie v. Chicago, 118 F.3d 552, 555 (7th Cir. 1997) (Easterbrook, C.J., joined by Posner & Manion, J.J.) (citing Ill. Migrant Council v. Pilliod, 540 F.2d 1062, 1072 (7th Cir. 1976)) (alteration and internal quotation marks omitted). It bears noting that the same well-respected judges appear on both sides of the conflict between *McKenzie* and *Zamecnik*/*Allen*: Judge Easterbrook, who wrote *Allen*, also wrote *McKenzie*; and Judge Posner, who wrote *Zamecnik*, joined him. *See supra* note 77. This common authorship suggests that the different outcomes in these cases do not result from differences in judicial philosophy or ability.

79 *See* Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1480 (9th Cir. 1994).

only where necessary to afford the named plaintiffs complete relief.[80] Yet in other non-class cases, the Ninth Circuit has held that a system-wide violation justifies system-wide relief,[81] even in a non-class case in which a more limited order would have completely redressed the named plaintiffs' grievances.

An unarticulated concern about judicial legitimacy lurks beneath the surface of these decisions. When a court determines that the defendant's unlawful conduct is harming a large number of people, but orders the defendant to cease that conduct only as to one (or a handful) of them, allowing the violation to continue undermines the rule of law. This is especially true when "the underlying right [is] highly significant," to borrow Judge Posner's phrase.[82] At the same time, allowing a single claimant to use an individual lawsuit to bring about institutional change raises serious concerns about democratic accountability and the proper role of the courts. These conflicting considerations have driven conflicting results.

In light of the variations and inconsistencies in the case law described above, a plaintiff will likely be able to find authority supporting a grant of system-wide relief in a non-class case, and a defendant will likely be able to find authority opposing it. The same will be true of the district and appellate courts. The scope of relief in individual litigation will therefore lie, in practical terms, in the

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80 Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1501–02 (9th Cir. 1996) (citations and internal quotation marks omitted). In *Easyriders*, a non-class case involving the California Highway Patrol's policy in regard to motorcycle helmets, the court upheld a statewide injunction. *See id.* at 1502. The court reasoned that plaintiffs would not receive complete relief through a narrower injunction because

> the CHP policy regarding helmets is formulated on a statewide level, other law enforcement agencies follow the CHP's policy, and it is unlikely that law enforcement officials who were not restricted by an injunction governing their treatment of all motorcyclists would inquire before citation into whether a motorcyclist was among the named plaintiffs or a member of [the organizational plaintiff].

Id.

81 For example, the court upheld a statewide injunction against a California Department of Corrections mail policy, in one prisoner's non-class case, on the basis of evidence that other CDC-operated prisons had adopted the unlawful policy and others were considering it. *See* Clement v. Cal. Dep't of Corr., 364 F.3d 1148, 1152–54 (9th Cir. 2004). In another individual case, the court upheld a statewide injunction governing involuntary commitment procedures because "[t]he challenged provisions were not unconstitutional as to [the plaintiff] alone, but as to any to whom they might be applied." Doe v. Gallinot, 657 F.2d 1017, 1025 (9th Cir. 1981).

82 *Zamecnik*, 636 F.3d at 879.

cascading discretion of the district and appellate courts.[83] For a plaintiff seeking system-wide relief,[84] the class action presents the surer path.

3. Expediency and Expense

Over the past two decades, courts and lawmakers have created various obstacles that make it more difficult for plaintiffs to achieve class certification, including certification under Rule 23(b)(2).[85] The class action rule has long required numerosity, commonality, typicality, and adequacy of representation for each class;[86] but courts now demand a heightened evidentiary showing in support of each of those elements, even where an element overlaps with the merits.[87] The commonality requirement, in particular, has become more difficult to satisfy in the wake of the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.[88] Similarly, courts have long required plaintiffs to define the class they seek to represent, but the recent trend has been for courts to deny certification due to a flawed class definition, without giving plaintiffs an opportunity to amend the definition to address the court's concerns.[89] Moreover, since the adoption of Rule 23(f) in 1998, the class certification decision has been subject to interlocutory review at the discretion of the appellate court, introducing potential delays that would not be present in a non-class case.[90]

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83 Some courts have explicitly articulated this discretion. *See, e.g.*, Doe v. Rumsfeld, 341 F. Supp. 2d 1, 17 (D.D.C. 2004) ("[T]he injunction is not prohibited merely because it confers benefits upon individuals who were not named plaintiffs or members of a formally certified class . . . . [T]he appropriate scope is in the court's discretion.").

84 Some plaintiffs might favor individual relief, though not for reasons worthy of institutional concern. For example, consider a company that wishes to challenge a government regulation it views as onerous. The company might prefer an order that exempts it from the regulation, and by omission, leaves its competitors subject to compliance. *See infra* Part II.C.4.

85 *See generally* Klonoff, *supra* note 67. As I argue in a companion piece, the justifications for these obstacles are strongly rooted in the aggregated-damages class action, and their application to the other subtypes—including Rule 23(b)(2)—should be reconsidered. *See* Carroll, *supra* note 43.

86 *See* FED. R. CIV. P. 23(a).

87 *See, e.g.*, In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (stating that it "cannot be helped" that certification decisions frequently "will entail some overlap with the merits of the plaintiff's underlying claim"); Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 611 (2014) (discussing some implications of "the evolving rigorous analysis standard for class certification and the increased use of evidentiary hearings").

88 131 S. Ct. at 2551 (requiring proof that a contention "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke").

89 *See* Klonoff, *supra* note 67, at 795–801; *see also* FED. R. CIV. P. 23(c)(1)(B).

90 *See* FED. R. CIV. P. 23(f). Although Rule 23(f) provides that "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders," a

Of course, a plaintiff who does not invoke the class action device does not need to obtain class certification, and thereby avoids the "drawn-out procedural bog" that certification proceedings have become.[91] This delay differential makes class treatment less attractive than the individual path, not least because a plaintiff who seeks injunctive or declaratory relief against a defendant's unlawful policy or practice is experiencing ongoing or imminent harm. Unless the plaintiff can obtain a preliminary injunction, delay will exacerbate that harm. Moreover, litigation costs accrue by the hour, and a case that involves no monetary relief cannot proceed on a contingency basis. An increase in the time spent on litigation is therefore likely to cost the plaintiff more money, or to push back the date when the plaintiff's counsel will recoup (via statutory attorney's fees) the litigation costs that they have advanced.[92]

In addition to the costs occasioned by delay, meeting the heightened evidentiary showing required for class certification can involve considerable expense. For example, some courts now conduct a full *Daubert*[93] analysis at the certification stage,[94] requiring plaintiffs to bear large expert witness fees early in the litigation. Even where a fee-shifting statute allows a prevailing plaintiff to recover his attorney's fees, the award often will not fully cover the expenses incurred in obtaining class certification, leaving the plaintiff—or his counsel—with a net loss.[95] Moreover, a plaintiff unwilling or unable to bear the costs of class treatment cannot rely on federally funded legal aid groups to do so; a statutory ban prohibits organizations receiving Legal Services Corporation funding from bringing class actions.[96] On the whole,

district court concerned with managing its docket will think twice before devoting significant time and attention to a case in which its certification decision might be reversed. *Id.*

91 *See* Issacharoff, *supra* note 1, at 208.

92 Aggregate litigation can require plaintiffs' counsel to incur significant—sometimes prohibitive—up-front costs. *See* Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1286–87 (2012).

93 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (imposing restrictions on the admission of expert testimony).

94 *See, e.g.*, Am. Honda Motor Co., Inc. v. Allen, 600 F.3d 813 (7th Cir. 2010).

95 Under some fee-shifting statutes, for example, the court will be required or permitted to exclude expert witness fees from the amount awarded. *See, e.g.*, 42 U.S.C. § 1988(c) (2012) (giving the court discretion to award expert fees as part of the attorney's fee in litigation under Section 1981 or 1981a), *partially overruling* W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83 (1991); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (holding expert fees noncompensable under the fee-shifting provision of the Individuals with Disabilities Education Act). Fee-shifting statutes have many other deficiencies with regard to Rule 23(b)(2) class actions. *See infra* Part II.C.5.

96 *See* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 653 (2013) ("Although publicly-funded legal aid once provided support for some civil litigation by those without financial means, there is not now a functioning federal civil legal aid system worthy of the name, and federal legal aid is prohibited for class actions.").

considerations of cost and delay create strong disincentives to class treatment.

4. Mootness and Standing

When plaintiffs bring quasi-individual actions, they face the risk that their claims will become moot before the court issues a decision on the merits. Because the federal courts have no authority to issue an opinion in the absence of a live claim (or, in the language of Article III, a "case or controversy"), mootness deprives plaintiffs of the ability to obtain any relief and requires dismissal of their case. The class action device protects against the risk of mootness; even after the class representative's personal claim has become moot, the case may continue so long as some member of the class retains a live claim.[97]

The class action device has particular importance for standing to pursue forward-looking relief, which requires a "real and immediate" threat of future injury.[98] Because of the future-injury requirement, an individual plaintiff will lose the ability to obtain injunctive or declaratory relief at the point when she stops being subject to the same harm. In a class action, in contrast, the representative can satisfy this standing requirement by demonstrating that some member of the class remains subject to ongoing or imminent harm (so long as the representative fit that description at the time the complaint was filed and, usually, at the time the class was certified).[99]

The history of affirmative action litigation in the Supreme Court illustrates the foregoing risks, as well as the capacity of class treatment to avoid them. In *De Funis v. Odegaard*,[100] which the Court decided in 1974, the plaintiff did not bring his case as a class action; the Court dismissed on mootness grounds because the plaintiff was about to graduate.[101] In 1978, similar questions arose about the plaintiff's standing in *Regents of the University of California v. Bakke*,[102] another non-class case.[103] Subsequently, in 1999, a unanimous Court ruled against the plaintiff in *Texas v. Lesage*[104]—also not a class action—on justiciability grounds.[105]

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97 *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

98 *See* City of L.A. v. Lyons, 461 U.S. 95, 105–07 (1983). *But see* Bray, *supra* note 2 (arguing that a lighter standard sometimes applies in declaratory judgment cases).

99 *See* Sosna v. Iowa, 419 U.S. 393, 402–03 & n.11 (1975).

100 *See* De Funis v. Odegaard, 416 U.S. 312 (1974).

101 *Id.*

102 *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Although the district court issued an injunction, a four-justice minority expressed the view that it applied only to the individual plaintiff. *See id.* at 320.

103 *Id.*

104 *See* Texas v. Lesage, 528 U.S. 18 (1999). *But see* Adam D. Chandler, *How (Not) to Bring an*

The next affirmative action cases to reach the Supreme Court, *Grutter v. Bollinger*[106] and *Gratz v. Bollinger*,[107] were both class actions. Writing for the Court in *Gratz*, Justice Rehnquist noted that "class-action treatment was particularly important in this case because the claims of the individual students run the risk of becoming moot and the class action vehicle . . . provides a mechanism for ensuring that a justiciable claim is before the Court."[108] The Court decided both *Grutter* and *Gratz* on the merits.

Issues of mootness arise with particular frequency in litigation involving schools and universities, because students often graduate in less time than it takes to adjudicate their claims, and in litigation involving jails and detention centers, because the defendants can release or transfer the plaintiffs before the case ends.[109] However, these issues are by no means limited to any particular context. To put it bluntly, anyone can get hit by a bus; any plaintiff's circumstances can change in unanticipated ways.

For example, consider *Arizonans for Official English v. Arizona*.[110] There, the plaintiff brought a non-class case challenging an Arizona constitutional amendment declaring English "the official language of the State" and "the language of . . . all government functions and actions."[111] The plaintiff had standing at the beginning of the litigation, because at that point she was working for the state; but she later left that job to work for a private employer, which rendered her personal claim moot.[112] Because the plaintiff had not brought her claim as a class action, the Supreme Court ordered the case dismissed and vacated all prior opinions of the lower courts.[113] At that time, the case had been pending for nearly nine years.

Joining multiple plaintiffs or engaging in organizational litigation can protect against the risk of mootness, at least to some degree. This will be more feasible in some cases than others; for example, in long-term litigation about a university's admissions system, it would be

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Affirmative-Action Challenge, 122 YALE L.J. ONLINE 85, 98–100 (2012) (noting confusion over the proper interpretation of *Lesage* and arguing that it should be understood as a merits decision).

105 *Id.*

106 539 U.S. 306 (2003).

107 539 U.S. 244 (2003).

108 *Id.* at 268 (alterations and internal quotation marks omitted).

109 *See, e.g.*, Preiser v. Newkirk, 422 U.S. 395, 404 (1975) (Marshall, J., concurring) ("I join this opinion only because for some reason respondent did not file this case as a class action. As a result, the State of New York by releasing the other three named plaintiffs, transferring respondent back to Wallkill after the District Court action, and finally to a lesser correctional facility after the Court of Appeals acted, thereby made the case moot.").

110 520 U.S. 43 (1997).

111 *Id.* at 48; *see also* ARIZ. CONST. art. XXVIII, §§ 2, 4.

112 *Arizonans for Official English*, 520 U.S. at 48.

113 *Id.* at 74–75 (ordering "vacatur down the line").

necessary either to join as plaintiffs prospective applicants who were young children at the outset of the litigation (presenting potential ripeness issues) or to serially recruit new prospective applicants as each existing plaintiff graduated (introducing an additional source of inefficiency and expense). Moreover, a plaintiff (or his attorney) gains the protection offered by joinder or organizational litigation only by sacrificing other benefits that non-class litigation would otherwise provide, such as litigation control.

5. Potential Relitigation and Enforcement

A plaintiff might want to ensure that, even if he loses his own case, other potential claimants will be able to continue pressing the common claim against the defendant.[114] Such relitigation will not be possible if the plaintiff obtains class certification, which results in "two-way preclusion" no matter whether the claim succeeds or fails on the merits.[115] If the plaintiff brings a quasi-individual action, however, subsequent claimants will retain the right to their own day in court, at least as a formal matter.[116] One scholar has therefore argued that "[t]he interests of the plaintiff group are best served . . . if the plaintiffs' attorney brings the suit as an individual action."[117] Others have suggested that, from a public interest attorney's point of view, "the *res judicata* effect of an adverse class judgment may contraindicate a class format in cases where there is not a reasonable likelihood of success."[118]

To the extent that the plaintiff wants not only a system-wide change, but an enforceable one, the impact on other potential claimants points in the opposite direction.[119] A favorable judgment in a class action embraces absent class members and gives them authority to enforce its terms.[120] In contrast, a defendant in an individual case might refuse to apply a system-wide remedy to anyone other than the plaintiff; under those circumstances, the other potential claimants (as nonparties) would have no power to enforce the injunction or declaration.

In sum, although issues of justiciability and remedy weigh in favor of class treatment for these claims, many plaintiffs will find that

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114 The defendant, of course, will want the opposite. *See infra* Part II.A.2.

115 *See* Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORDHAM L. REV. 3043, 3056 (2013) (stating that Rule 23(b)(2) "ensures two-way preclusion, for both defendants and plaintiffs").

116 *See* Taylor v. Sturgell, 553 U.S. 880 (2008). The degree to which future litigants will have a meaningful opportunity to litigate the common claim is addressed *infra* Part II.B.1.

117 Wilton, *supra* note 27, at 603.

118 Lever & Eastman, *supra* note 27, at 871 (emphasis in original).

119 *Id.* at 865–66.

120 *See infra* Part II.B.3 (providing a more detailed examination of enforceability issues from the point of view of other potential claimants).

countervailing factors involving litigation control, delay, and expense result in net incentives that strongly favor the formally individual path. Especially when viewing the litigation from an ex ante perspective, those plaintiffs will recognize the possibility of achieving aggregate effects without compromising their independence, clearing the hurdles of class certification, or risking the class-wide preclusion that a loss would entail.

C. *Applying the Analysis to* Perry *and* Fisher

The discussion below provides a more contextualized illustration of the plaintiff's procedural choice by taking a closer look at two cases decided in the Supreme Court's October 2012 term: *Hollingsworth v. Perry* (a challenge to California's ban on marriage recognition for same-sex couples)[121] and *Fisher v. University of Texas at Austin* (a challenge to UT Austin's race-conscious admissions policy).[122]

Both *Perry* and *Fisher* involved plaintiffs who decided not to invoke the class action device when seeking injunctive and declaratory relief based on the defendant's generally applicable policy. The *Perry* complaint named only two same-sex couples as plaintiffs, but asked the court "to enjoin, preliminarily and permanently, all enforcement of Prop. 8 and any other California statutes that seek to exclude gays and lesbians from access to civil marriage."[123] Similarly, the *Fisher* complaint named only two college applicants as plaintiffs, but sought "to preliminarily and permanently enjoin [the defendants] from employing racially discriminatory policies and procedures in administering the undergraduate admissions program at the University of Texas at Austin."[124]

Some have suggested,[125] or even stated outright,[126] that the plaintiffs' counsel in each case erred in deciding not to pursue a class action. The purpose of the following discussion is not to evaluate the ultimate wisdom of the procedural choice in either case, or to speculate about the subjective considerations that actually motivated either set of

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121 133 S. Ct. 2652 (2013).

122 133 S. Ct. 2411 (2013).

123 Complaint for Declaratory, Injunctive, or Other Relief at ¶ 2, *Perry*, 133 S. Ct. 2652 (No. CV 09 2292 VRW).

124 Second Amended Complaint for Declaratory, Injunctive, and Other Relief at ¶ 1, *Fisher* 133 S. Ct. 2411 (No. 1:08-cv-00263-SS). By the time the case reached the Supreme Court, only one of the applicants remained as a litigant.

125 *See, e.g.*, Perry v. Schwarzenegger, 628 F.3d 1191, 1201 (9th Cir. 2011) (Reinhardt, J., concurring) ("[A]ll of this would have been unnecessary and Plaintiffs could have obtained a statewide injunction had they filed an action against a broader set of defendants . . . .").

126 Chandler, *supra* note 105, at 87 ("The critical blunder was that . . . *Fisher* was not brought as a class action on behalf of future nonminority applicants").

plaintiffs or their counsel. Rather, my aim is to illuminate the structural incentives relevant to the choice between class treatment and quasi-individual actions.

1. The Plaintiffs' Choice in *Perry*

In May 2008, the California Supreme Court held that the state constitution required marriage recognition for same-sex couples.[127] Over the next few months, thousands of same-sex couples entered into officially recognized marriages.[128] That November, however, the state electorate passed a ballot initiative known as Proposition 8.[129] The initiative amended the state constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."[130]

Attorneys David Boies and Ted Olson initiated the *Perry* litigation, challenging Proposition 8 as a violation of same-sex couples' federal constitutional rights, on behalf of four individual plaintiffs in May 2009.[131] Many LGBT advocates reacted to news of the lawsuit with anger and concern.[132] They believed that the timing was wrong, and that the potential for creating bad precedent was severe. Boies and Olson disagreed; they believed that the U.S. Supreme Court could be persuaded to recognize same-sex couples' right to marry, and that California offered an ideal fact pattern for obtaining that decision.[133]

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127 *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

128 *See* Janet Kornblum, *California Approves Gay Marriage Ban*, USA TODAY (Nov. 5, 2008, 8:54 PM), http://usatoday30.usatoday.com/news/politics/election2008/2008-11-05-gay-marriage_N.htm.

129 *See id.*

130 CAL. CONST. art. I, § 7.5.

131 The American Foundation for Equal Rights, a nonprofit organization, sponsored the litigation. *See About Us*, AM. FOUND. FOR EQUAL RTS., https://www.afer.org/about/the-foundation (last visited May 31, 2015). The organization hired Boies and Olson, and recruited each of the plaintiff couples. *See id.*; *see also* Jacob Combs, *'It Feels Different'*: Paul Katami and Jeff Zarrillo, *Prop 8 Plaintiffs, Talk Winning, Wedding and What Comes Next*, HUFFINGTON POST (Aug. 6, 2013, 12:14 PM), http://www.huffingtonpost.com/jacob-combs/paul-katami-jeff-zarrillo-prop-8_b_3713625.html; Howard Mintz, *Kristin Perry and Sandy Stier, California Couple, at The Center Of Prop 8 Supreme Court Case*, HUFFINGTON POST (Mar. 19, 2013, 8:00 AM), http://www.huffingtonpost.com/2013/03/19/kristin-perry-sandy-stier_n_2912223.html.

132 *See* Jesse McKinley, Bush v. Gore *Foes Join to Fight Gay Marriage Ban*, N.Y. TIMES, May 27, 2009, http://www.nytimes.com/2009/05/28/us/28marriage.html.

133 *See* Chuleenan Svetvilas, *Challenging Prop 8: The Hidden Story*, CAL. LAWYER (Jan. 2010), http://www.callawyer.com/Clstory.cfm?eid=906575. This type of disagreement—between established civil rights groups, on the one side, and attorneys who do not belong to those groups, on the other side—has occurred many times throughout the history of American civil rights litigation. For a discussion of examples from 1947 through the mid-1990s, see Rubenstein, *supra* note 9, at 1627–44.

A few weeks into the litigation, three LGBT organizations represented by the ACLU, Lambda Legal, and the National Center for Lesbian Rights sought to intervene.[134] Their motion emphasized the experience and expertise of the organizations and their counsel in advocating for LGBT rights.[135] Plaintiffs opposed the attempt at intervention, noting that the organizations' counsel had publicly condemned the litigation as premature; plaintiffs implied that, as intervenors, the organizations might intentionally slow the other parties' progress towards resolution of the case.[136] The trial court denied the intervention motions, finding that the existing plaintiffs adequately represented the interests of the proposed intervenors and that permitting intervention might introduce delay.[137]

Had *Perry* been brought as a class action, Boies and Olson (or, more precisely, their law firms) would have had to seek designation by the court as class counsel.[138] The negative reactions of LGBT advocates to the timing of the *Perry* litigation, and the intervention attempt supported by LGBT legal advocacy groups, suggest that other candidates may have sought appointment in their stead. The presence of more than one qualified applicant for class counsel would have required the court to "appoint the applicant best able to represent the interests of the class,"[139] based on such factors as "counsel's experience in handling . . . the types of claims asserted in the action" and "counsel's knowledge of the applicable law."[140] As between the law firms that actually represented the *Perry* plaintiffs, on the one hand, and the hypothetical competitors with specific expertise in LGBT rights litigation, on the other hand, these factors would have pointed in different directions. The case would have been left in limbo until the trial court worked through the relevant factors to reach its decision.[141]

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134 *See* Notice of Motion and Motion to Intervene as Party Plaintiffs, Perry v. Schwarzenegger, 714 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW), *available at* https://www.aclu.org/files/pdfs/lgbt/perry_motion_to_intervene.pdf.

135 *Id.*

136 *See* Plaintiffs' Opposition to Proposed Intervenors' Motions to Intervene, *Perry*, 714 F. Supp. 2d 921 (No. C 09-2292 VRW), *available at* http://docs.justia.com/cases/federal/district-courts/california/candce/3:2009cv02292/215270/135.

137 Transcript of Proceedings at 53:3–10, Perry v. Schwarzenegger, 133 S. Ct. 2652 (2013) (No. C 09-2292 VRW) (denying intervening motions on August 19, 2009).

138 *See* FED. R. CIV. P. 23(g).

139 *See* FED. R. CIV. P. 23(g)(2).

140 *See* FED. R. CIV. P. 23(g)(1)(A)(ii)–(iii). The mandatory factors include the following: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class . . . ." *See* FED. R. CIV. P. 23(g)(1)(A)(i)–(iv).

141 The court could, however, appoint interim class counsel before finalizing its analysis. *See* FED. R. CIV. P. 23(g)(3).

Once the court had appointed counsel, the plaintiffs would have had to present evidence demonstrating the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy of representation.[142] This would likely have required them to offer expert testimony on issues such as the number of same-sex couples in California. Opposing counsel might then have raised a number of arguments in an effort to defeat (or, more likely, delay) certification. For example, they could have argued that the plaintiffs had presented insufficient evidence to show the number of same-sex couples who wished to marry, precluding a finding of numerosity;[143] or that the inability to marry injured gay and bisexual individuals in different ways, precluding a finding of typicality or commonality.[144] Recent case law makes these types of arguments more plausible than they might seem; indeed, in the class action litigation over Virginia's ban on marriage recognition for same-sex couples, the defendants contested the plaintiffs' evidentiary showing as to numerosity.[145] In any event, it is highly unlikely that arguments against certification would have succeeded in *Perry*, but addressing and disproving them would have taken time and effort.

Having expended that time and effort, the plaintiffs then would have faced the possibility of an interlocutory appeal from the grant of class certification. Their opponents would surely have requested such review, requiring the plaintiffs to expend additional time and effort to oppose the request (and, possibly, to defend the appeal). All the while, the merits of the claim would likely have gone unaddressed,[146] and without a favorable merits decision, same-sex couples would have remained unable to marry in California.

Notwithstanding the drawbacks apparent in the foregoing hypothetical, the actual history of the *Perry* litigation demonstrates that a class action would have offered benefits as well. For example, although

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142 *See* FED. R. CIV. P. 23(a).

143 *Cf.* Vega v. T-Mobile USA, Inc., 564 F.3d 1256 (11th Cir. 2009) (holding that a plaintiff had failed to introduce sufficient evidence of numerosity to certify a statewide class of T-Mobile employees in Florida, notwithstanding the plaintiff's evidence that the company had thousands of employees nationwide). For similar examples of courts' rigid enforcement of evidentiary requirements, see Klonoff, *supra* note 67.

144 *Cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (holding that the plaintiff must prove that all class members suffered the same injury in order to satisfy the commonality requirement). For an analysis of the harm to bisexual individuals caused by laws like Proposition 8, see Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012).

145 The Virginia trial court rejected the defendants' argument and certified the class. *See* Harris v. Rainey, 299 F.R.D. 486 (W.D. Va. 2014).

146 Rule 23(f) provides that an interlocutory appeal of a class certification decision "does not stay proceedings in the district court unless the district judge or the court of appeals so orders." *See* FED. R. CIV. P. 23(f). Although the provision does not require a stay, the trial court would have been unlikely to take the case to trial while the certification question—and thus the identity of the parties whose claims the trial needed to encompass—remained unresolved.

the district court issued a statewide injunction, the defendant-intervenors argued that the non-class format of the case made the injunction overbroad. Ninth Circuit case law made the overbreadth argument plausible,[147] rendering the injunction vulnerable to reversal on appeal. Indeed, the plaintiffs themselves argued at one point that without further judicial or executive action, the district court's injunction would apply in only two of the state's fifty-eight counties.[148]

Although the state defendants did not appeal the trial court's injunction, the defendant-intervenors attempted to do so;[149] this raised a question as to their standing to appeal. Answering that question dramatically lengthened the time consumed by the litigation; the Ninth Circuit determined that the proponents' standing depended upon an issue of state law, and thus certified a question to the California Supreme Court, a process that took nearly a year to complete.[150] Although the Ninth Circuit subsequently determined that the defendant-intervenors did have standing,[151] the U.S. Supreme Court disagreed and vacated the Ninth Circuit's decision.[152] Accordingly, the appellate process left the trial court's decision intact, and generated no other merits decisions.

The absence of an appellate decision on the merits raised a separate concern about the remedy. Namely, a California statute requires state agencies to continue enforcing a law until an *appellate* court has deemed it unconstitutional.[153] This statute gave the *Perry* plaintiffs reason to obtain a merits decision from the Ninth Circuit (or the Supreme Court) as a safeguard against challenges to the district court's injunction. They ultimately obtained no such decision.[154]

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147 *See supra* Part I.B.2.

148 *See* Perry v. Schwarzenegger, 628 F.3d 1191, 1195 n.2 (9th Cir. 2011) ("At oral argument, Plaintiffs contended that were we to do so, the district court decision would be binding on the named state officers and on the county clerks in two counties only, Los Angeles and Alameda, and that further litigation in the state courts would be necessary to clarify the legal status of Proposition 8 in the remaining fifty-six counties. Alternatively, they suggested that the Governor, Attorney General, or State Registrar would be required to issue a 'legal directive' to the county clerks to cease enforcing Proposition 8.").

149 The state declined to defend the case. The proponents of the Proposition 8 ballot initiative intervened to defend its constitutionality, and were the sole appellants in the actual litigation.

150 *See Perry*, 628 F.3d 1191 (certifying question to the California Supreme Court on January 4, 2011); Perry v. Brown, 265 P.3d 1002, 1005 (Cal. 2011) (answering the certified question on November 17, 2011).

151 *See* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

152 *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (vacating and remanding "with instructions to dismiss the appeal for lack of jurisdiction").

153 *See* CAL. CONST. art. III, § 3.5.

154 As noted above, the Ninth Circuit's opinion does not amount to such a decision because the Supreme Court's vacatur rendered it a legal nullity. *See Hollingsworth*, 133 S. Ct. at 2668; *Brown*, 671 F.3d at 1052.

The past sometimes appears inevitable from the vantage point of the present, but at the time the Supreme Court decided *Perry*, few viewed the current status of California marriage law as inevitable. To the contrary, uncertainty reigned. Commentators disagreed as to what would (or should) happen next; some well-respected scholars expressed the view that only the two plaintiff couples would (or should) be able to wed; others argued that the district court's decision should be vacated altogether.[155]

After the Supreme Court issued its decision in *Perry*, the state defendants did not seek to narrow or vacate the district court's statewide order;[156] to the contrary, they responded by directing county clerks throughout the state to issue marriage licenses to same-sex couples.[157] The Proposition 8 proponents then petitioned the California Supreme Court, arguing that the state defendants had an obligation to continue

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155 *See, e.g.*, Vikram David Amar, *Precisely What Will, or Should, Happen to Same-Sex Marriage in California if the Supreme Court Finds in* Hollingsworth v. Perry *that the Proposition 8 Sponsors Lack Standing*, VERDICT (Apr. 11, 2013), https://verdict.justia.com/2013/04/11/precisely-what-will-or-should-happen-to-same-sex-marriage-in-california-if-the-supreme-court-finds-in-hollingsworth-v-perry-that-the-proposition-8-sponsors-lack-standing (arguing that the injunction should be vacated, and that the two plaintiff couples should then receive a default judgment requiring marriage licenses to be issued only to them); Adam Winkler, *In DOMA, Prop 8 Ruling, the Supreme Court Put Procedure Over People*, DAILY BEAST (June 26, 2013, 11:35 AM), http://www.thedailybeast.com/articles/2013/06/26/in-doma-prop-8-ruling-the-supreme-court-put-procedure-over-people.html ("[C]onsistent with existing law on injunctions, Walker's injunction is likely to be read . . . [to] requir[e] only that officials permit the two same-sex couples who challenged Proposition 8 to wed.").

156 The sequence of events in California stands in sharp contrast to the procedural morass in Alabama in the wake of non-class litigation over marriage rights for same-sex couples in that state. A federal district court in Alabama ordered one of the state's probate judges to issue marriage licenses to same-sex couples, including the plaintiffs who brought the non-class case; but the state Supreme Court subsequently enjoined the other probate judges from issuing marriage licenses to same-sex couples. *See* Adam Steinman, *Alabama Supreme Court Enjoins Probate Judges from Issuing Marriage Licenses to Same-Sex Couples*, PRAWFSBLAWG (Mar. 3, 2015, 10:20 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/03/alabama-supreme-court-enjoins-probate-judges-from-issuing-marriage-licenses-to-same-sex-couples.html; Howard Wasserman, *Another Twist in the March to Marriage Equality*, PRAWFSBLAWG (Feb. 24, 2015, 10:02 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/02/another-twist-in-the-march-to-marriage-equality.html; *see also* Adam Steinman, *Alabama Same-Sex Marriage Litigation: Important Rulings & Documents*, CIV. PROC. & FED. CTS. BLOG (Feb. 10, 2015), http://lawprofessors.typepad.com/civpro/2015/02/alabama-same-sex-marriage-litigation-important-rulings-documents.html. The plaintiffs eventually moved to amend their complaint and to have the case certified as a class action. *See* Howard Wasserman, *I See Your Mandamus and Raise You a Class Action*, PRAWFSBLAWG (Mar. 9, 2015, 9:31 AM), http://prawfsblawg.blogs.com/prawfsblawg/2015/03/i-see-your-mandamus-and-raise-you-a-class-action.html.

157 The governor took this step after asking the attorney general whether it would be permissible to do so. *See* Letter from Kamala D. Harris, Cal. Att'y Gen., to Edmund G. Brown, Jr., Governor of Cal. (June 3, 2013), *available at* http://gov.ca.gov/docs/AG_Letter.pdf. The proponents of Proposition 8 argued that the governor lacked authority to control the clerks' actions. *See* Maura Dolan, *California Supreme Court Rejects Bid to Revive Prop. 8*, L.A. TIMES (Aug. 14, 2013), http://articles.latimes.com/2013/aug/14/local/la-me-ln-california-supreme-court-prop-8-20130814.

enforcing the ballot initiative in the absence of an appellate decision declaring it unconstitutional.[158] The court denied their petition without comment,[159] and the proponents reacted with the following statement: "Though the current California officials are unwilling to enforce the state Constitution, we remain hopeful that one day Californians will elect officials who will."[160]

Class treatment would have allowed the plaintiffs to avoid the foregoing issues of remedy and justiciability:[161] In a statewide class action, the plaintiffs would have named as defendants all county clerks throughout the state, rather than only the two clerks in the counties where the plaintiff couples lived.[162] This would have ensured the presence of an adverse defendant with standing to appeal, thereby protecting the plaintiffs' ability to secure an appellate decision on the merits. The class action format would also have matched the scope of the claimants' harm with the scope of the relief requested, eliminating any plausible argument as to whether the statewide injunction issued by the district court was overbroad.

2. The Plaintiffs' Choice in *Fisher*

Although *Perry* involved a substantive claim likely to have greater resonance on the left than the right, the incentives and effects discussed above apply across traditional liberal/conservative lines, as an analysis of *Fisher v. University of Texas at Austin*[163] demonstrates. The latter case began when Abigail Fisher, who is white, applied to be admitted to the University of Texas at Austin's undergraduate program.[164] The university rejected her application pursuant to a selection procedure

158 Petition for Writ of Mandate and Request for Immediate Stay or Injunctive Relief; Memorandum of Points and Authorities: Stay Requested to Forbid Issuance of Marriage Licenses in Violation of State Law, Hollingsworth v. O'Connell, No. S211990 (2013), *available at* http://www.sfcityattorney.org/modules/showdocument.aspx?documentid=1325.

159 Denial of Petition for Review, Hollingsworth v. O'Connell, No. S211990 (2013), *available at* http://www.adfmedia.org/files/HollingsworthMandateDenial.pdf.

160 *See California's High Court Rejects Bid to Revive Prop. 8*, CBS SF BAY AREA (Aug. 14, 2013, 9:24 PM), http://sanfrancisco.cbslocal.com/2013/08/14/californias-high-court-denies-petition-to-reinstate-same-sex-marriage-ban (internal quotation marks omitted).

161 Class treatment would also have protected against mootness risks that did not materialize during the litigation, such as the death of a named plaintiff, the separation of a plaintiff couple, or the relocation of a plaintiff couple to another state. *See supra* Part I.B.4 (explaining the ways in which class treatment protects against mootness).

162 As an alternative to naming all of the clerks individually, the plaintiffs could have sued the clerks as a defendant class; the plaintiffs in the Alabama marriage litigation ultimately took a similar approach. *See supra* note 156.

163 133 S. Ct. 2411 (2013).

164 *See id.* at 2413.

that included a race-conscious component.[165] Attorney Edward Blum, who has referred to himself as "the low-cost, high-volume producer" of challenges to government programs that rely on race,[166] then filed a lawsuit on her behalf[167] to challenge the constitutionality of UT Austin's use of race in its admissions process.

Had the plaintiffs' counsel in *Fisher* attempted to pursue a class action, he would have faced an initial challenge in creating an adequate definition of the class.[168] Would the plaintiffs represent applicants rejected from UT Austin because of race? That would have required them to demonstrate by a preponderance of the evidence that a significant number were in fact rejected on that basis, in order to establish that the class existed and that it satisfied the numerosity requirement.[169] That may have proved difficult; indeed, it was unclear whether Fisher herself would have been accepted under a facially race-neutral regime. Unless she could show that she was in fact rejected on the basis of her race, she would not be able to satisfy the requirement that the named plaintiff must be a member of the class she seeks to represent.[170]

The Supreme Court's definition of injury in affirmative action cases would have assisted the *Fisher* plaintiffs with their hypothetical class definition and, correspondingly, their ability to satisfy the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy of representation. The Court has held that all applicants who compete in a race-conscious system that *may* prejudice them (regardless of whether it actually *does* prejudice them) suffer a cognizable injury.[171] This relaxed injury requirement has allowed for certification of plaintiff

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165 *See id.* at 2415. The University of Texas at Austin (UT Austin) also offered a facially race-neutral path to admission for all in-state applicants in the top ten percent of their high schools, but Fisher did not qualify. *See id.* at 2416.

166 *See* Adam Liptak, *Unofficial Enforcer of Ruling on Race in College Admissions*, N.Y. TIMES, Apr. 7, 2014, http://www.nytimes.com/2014/04/08/us/politics/edward-blum-one-man-organization-keeps-watchful-eye-on-college-race-admissions-policies-.html. Blum's Project on Fair Representation (http://www.projectonfairrepresentation.org) has since sued Harvard University and the University of North Carolina-Chapel Hill over their race-conscious admissions programs. *See* Jeffrey Scott Shapiro, *Harvard, UNC Sued over Race-Based Admissions Policies*, WASH. TIMES (Nov. 18, 2014), http://www.washingtontimes.com/news/2014/nov/18/harvard-unc-sued-over-race-based-admission-policie.

167 As noted previously, the complaint also named a second individual plaintiff, who stopped participating in the litigation before it reached the Supreme Court. *See supra* note 124.

168 *See* FED. R. CIV. P. 23(c)(1)(B) ("An order that certifies a class action must define the class . . . .").

169 *Cf. In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006) (requiring class action plaintiffs to establish all certification requirements by a preponderance of the evidence).

170 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011).

171 *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 211 (1995) ("The injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing. . . . The aggrieved party need not allege that he would have obtained the benefit but for the barrier in order to establish standing." (citations and internal quotation marks omitted)).

classes defined as members of racial groups "treated less favorably" in the defendant's race-conscious admissions process.[172]

Because of affirmative action-specific case law, the plaintiffs could likely have argued that white applicants who had been or would be rejected by UT Austin, pursuant to its race-conscious admissions process, constituted an adequate class definition.[173] Their task then would have been to introduce evidence sufficient to demonstrate that the class, thus defined, satisfied each prerequisite set forth in Rule 23(a). For example, they might have presented evidence regarding the number of white applicants in past years and an expert projection as to future years, so as to prove the existence of the class and satisfy the numerosity requirement. The plaintiffs would almost certainly have met their evidentiary burden, provided that they expended the necessary time and resources.

Once the plaintiffs had created an adequate definition and presented sufficient evidence to convince the trial court to certify the class, they then would have faced the possibility of interlocutory review. As in the hypothetical *Perry* class action, a request for appeal (and the appeal itself, if the appellate court accepted it) would have involved additional delay and expense. In the meantime, due to the likely absence of a merits decision in the plaintiffs' favor, the race-conscious admissions regime at UT Austin would have remained in place.[174]

The actual history of the *Fisher* litigation shows that class treatment would have involved positives as well as negatives for the plaintiffs. The plaintiff had graduated by the time the case reached the Supreme Court, rendering injunctive relief unavailable.[175] Even before that point, the Fifth Circuit had concluded that no forward-looking relief could be granted, because there were no class claims and the plaintiff had no

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172 *See* Gratz v. Bollinger, 539 U.S. 244, 252–53 (2003) (stating that certified class included "those individuals who applied for and were not granted admission . . . for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission" (citations and internal quotation marks omitted)); Grutter v. Bollinger, 539 U.S. 306, 317 (2003) (stating that certified class included "all persons who (A) applied for and were not granted admission . . . for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission . . . .").

173 *See Gratz*, 539 U.S. at 252–53; *Grutter*, 539 U.S. at 317.

174 As in the hypothetical *Perry* class action, it is unlikely that the *Fisher* court would have attempted to decide merits questions while the certification issue remained unresolved. *See supra* note 146.

175 *See* Transcript of Oral Argument at 5:17–20, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (Sotomayor, J.), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf (noting that the plaintiff could not obtain injunctive relief because she had graduated).

intention of reapplying to UT Austin.[176] Among the remedies listed in the complaint, only the $100 the plaintiff spent in application fees and costs even plausibly remained available, and commentators have raised serious questions as to whether Article III or the Eleventh Amendment should prevent the plaintiff from recovering those fees and costs.[177]

Oddly (and, from the plaintiff's perspective, luckily), the Supreme Court did not analyze these justiciability issues in its opinion.[178] If it had done so and determined that the plaintiff could not obtain any of the relief she had requested, it would have had to dismiss *Fisher* without reaching the merits, as it had in other non-class litigation involving schools and universities.[179] Instead, the Court vacated the Fifth Circuit's decision and remanded with instructions for the appellate court to revisit its merits analysis.[180] On remand, the Fifth Circuit acknowledged that "factual developments since summary judgment call into question whether [the plaintiff] has standing," but expressed the view that the Supreme Court's decision required it to reach the merits nonetheless.[181] In the October 2015 term the case will once more go up to the Supreme Court,[182] where the question of standing could again be revisited.[183]

The class action device would have protected the *Fisher* plaintiffs against the foregoing justiciability problems, provided that plaintiffs' counsel defined the class to include some of those who now intend to apply to UT Austin in the future.[184] After Fisher had graduated, she could have continued to represent those prospective applicants, and the class would have remained eligible for injunctive relief.

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176 *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217 (5th Cir. 2011).

177 *See, e.g.*, Chandler, *supra* note 105, at 90–95; Erwin Chemerinsky, *Chemerinsky: What's Next for Affirmative Action?*, ABA J. (Aug. 6, 2013, 3:25 PM), http://www.abajournal.com/news/article/chemerinsky_whats_next_for_affirmative_action ("Although the Supreme Court granted review, I strongly believe that the court did not have jurisdiction to hear the case.").

178 The Court made no mention of standing in its opinion, even though the question had been briefed and argued, and even though the Court always has an obligation to ensure its jurisdiction. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013). Because the Court has drawn criticism for its unusually lax enforcement of standing in affirmative action cases and because the Court issued a restrictive standing decision in *Perry* the same week it decided *Fisher*, perhaps this omission is not as surprising as it might seem. *See, e.g.*, Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* Fisher v. University of Texas *Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77, 78–84 (2012).

179 *See supra* Part I.

180 *See Fisher*, 133 S. Ct. at 2414.

181 *See* Fisher v. Univ. of Tex at Austin, 758 F.3d 633, 639 (5th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3682 (U.S. June 29, 2015) (No. 14-981).

182 *See* Order List of June 29, 2015, *available at* http://www.supremecourt.gov/orders/courtorders/062915zor_4g25.pdf; *see also* Lyle Denniston, Fisher *Case On Way Back to the Court*, SCOTUS BLOG (Nov. 12, 2014, 3:58 PM), http://www.scotusblog.com/2014/11/fisher-case-on-way-back-to-the-court.

183 *See* Richard Re, *Is* Fisher v. University of Texas *a Precedent on Jurisdiction?*, RE'S JUDICATA (Dec. 2, 2014, 9:16 AM), http://richardresjudicata.wordpress.com/2014/12/02/is-fisher-v-university-of-texas-a-precedent-on-jurisdiction.

184 *See supra* Part I.B.4.

II. THE WIDE-RANGING COSTS OF QUASI-INDIVIDUAL ACTIONS

Many plaintiffs who seek purely injunctive or declaratory relief against a defendant's generally applicable policy or practice currently face net disincentives to class treatment. Viewed narrowly, a plaintiff's choice not to bring a class action creates some benefits for other litigants and the judiciary. For example, because judges generally spend more time on class actions than on individual cases, they may realize short-term resource savings when a plaintiff chooses not to utilize the class action device.[185]

By choosing the formally individual path, however, the plaintiff does not somehow transform a commonly held claim into a truly individual one. The class action device provides mechanisms, imperfect as they may be, for addressing the issues that common claims necessarily present. Proceeding without those mechanisms can create wide-ranging costs, as this Part explains. Quasi-individual actions can result in unfairness to defendants and interested nonparties, whose perspectives are used below to shed light on the more serious institutional harms that the absence of class treatment can cause.

A. *The Whack-A-Mole Effect on Defendants*

Defendants often oppose the mechanisms of aggregation, especially when it occurs through the plaintiff class action. When a plaintiff seeks purely injunctive or declaratory relief against a defendant's generally applicable policy or practice, however, the class action device offers defendants significant benefits in addition to its costs. Defendants' actions, as reflected in case law, suggest that most tend to recognize the value of these benefits only after the fact, if at all. For example, defendants facing serial relitigation have asked courts in hundreds of cases to accord broad preclusive effect to common claims litigated in prior non-class actions.[186] In other cases, defendants have sought class treatment for mass tort claims only *after* large numbers of individual cases have been filed.[187] Both situations represent attempts by defendants to achieve some form of after-the-fact aggregation, even though they might have opposed formal aggregation (via class treatment) in the first instance.

As discussed below, quasi-individual actions have a "whack-a-mole" effect on defendants, protecting them from some of the problems

185 *See infra* Parts II.A.1 & II.C.1.

186 *See infra* notes 200–11 and accompanying text.

187 *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997) ("The settlement-class certification we confront evolved in response to an asbestos-litigation crisis.").

associated with class actions only by exposing them to other aggregation-related risks. The lack of formal recognition for the aggregate dimension of the claim leaves defendants vulnerable. Significant factors affecting the tradeoffs between class actions and quasi-individual actions, from the defendant's point of view, include: litigation costs and public relations; preclusive symmetry and relitigation; and over-deterrence and inferential stare decisis.

1. Litigation Costs and Public Relations

Defendants must generally spend more money to litigate against a plaintiff class than they must spend to litigate an individual case. As noted, procedures specific to the class action take time to carry out;[188] because defendants usually pay their attorneys by the hour, this translates to increased costs. In addition, class actions can impose on defendants other financial costs that have no precise parallel in individual litigation. For example, when the parties wish to settle a class action, most courts require the defendant to bear the cost of sending notice of the proposed settlement to members of the plaintiff class.

A plaintiff's pursuit of a class action can also increase the defendant's public relations costs. A class action (or even a putative class action) will often gather more media attention than an individual case, which in turn may cause the defendant to suffer greater reputational damage or expend more resources on rehabilitating its image.[189] Consider *Wal-Mart Stores, Inc. v. Dukes*: If the case had been about the company's alleged mistreatment of Betty Dukes, rather than its alleged mistreatment of 1.5 million women, the case would have been unlikely to generate even a fraction of the media coverage it actually received.[190]

Moreover, a defendant who wishes to avoid attention cannot make a class action go away as quietly as an individual case. A non-class case can usually be settled privately, without the court's involvement. In contrast, a class action can be settled only after the court holds a fairness hearing, which will be open to the press and other members of the public, and determines that the parties' agreement represents a fair, reasonable, and adequate settlement of the case.[191] Prior to the fairness hearing, "[t]he court must direct notice in a reasonable manner to all

188 *See supra* Part II.A.2.

189 That the class action device *can* have this effect does not mean that it always *will*; for example, there is no reason to believe that defendants' public relations costs in the *Perry* or *Fisher* litigation would have been any greater had either case been brought as a class action. *See supra* Part I.C.

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

191 *See* FED. R. CIV. P. 23(e).

class members who would be bound by the proposal,"[192] potentially increasing public awareness of and attention to the case.

A defendant may also mistakenly believe that a federal class action will expose it to liability for attorney's fees that would not be available in non-class litigation. It is true that some states have fee-shifting statutes that make a fee award in state court conditional on the number of persons affected by the litigation.[193] Federal fee-shifting statutes, however, do not explicitly or implicitly condition eligibility for attorney's fees on the number of persons who benefit from the litigation; nor do those statutes otherwise make fees available in class actions that would be unavailable in individual litigation.[194] Accordingly, for the federal-court litigation discussed here, any perceived connection between a class action and the existence of fee liability has no legal or factual basis.

The foregoing analysis compares the cost of a class action with the cost of a *single* non-class case. A defendant's generally applicable policy or practice, however, necessarily affects *multiple* potential claimants. That scope, combined with the effects of the preclusion doctrine discussed in the following Section, might make it more appropriate to compare the costs of one class action to the costs of *many* quasi-individual actions. The outcome of that comparison will depend on a number of factors, including: the number of potential claimants affected by the policy or practice; the respective cost and value to the defendant of uncertainty and closure; and the amount of relitigation that will actually occur.

Defendants cannot easily compare the cost of a single class action in the present against the cost of an unknown number of lawsuits in the future. When defending against a quasi-individual action, they may hope that only one plaintiff will actually file suit, especially if they believe that other potential claimants generally lack sufficient resources to bring their own lawsuits, or if they hope to win the case against the first plaintiff in a manner likely to discourage others. Depending on the course the litigation takes, defendants may view the desirability of aggregation very differently ex ante as compared to ex post.

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192 *See* FED. R. CIV. P. 23(e)(1).

193 *See, e.g.*, CAL. CODE CIV. PROC. § 1021.5 (West 2014) (permitting an award of attorney's fees only if "a significant benefit, whether pecuniary or nonpecuniary, has been conferred *on the general public or a large class of persons*" (emphasis added)).

194 *See infra* Part II.C.5.

2. Preclusive Symmetry and Relitigation

A properly certified class action results in two-way preclusion, creating a final result for both sides regardless of who wins on the merits.[195] In a sense, class certification amounts to an exchange of procedural rights; the representative plaintiffs gain assurance that success will result in class-wide relief, and in return, the defendant gains assurance that it will not have to litigate separately the claims of the other class members. This exchange results in what Richard Nagareda has termed "preclusive symmetry."[196]

In contrast, quasi-individual actions involve preclusive *asymmetry*. A losing defendant may be subject to a system-wide remedy,[197] and a defendant (other than the federal government) may also be collaterally estopped, in subsequent actions brought by other claimants, from relitigating the issues resolved against it.[198] Notwithstanding those possibilities, however, the litigation cannot generate system-wide preclusion in favor of the defendant.[199] A defendant who prevails against a plaintiff in an individual case can rely only on precedent, not res judicata or collateral estoppel, against a new plaintiff who brings suit on the same claim.[200] The defendant cannot know ahead of time how much force that precedent will ultimately exert; it may end up acting as a practical bar to lawsuits by other affected claimants,[201] or it may leave the defendant subject to serial relitigation.[202]

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195 *See* Smith v. Bayer Corp., 131 S. Ct. 2368, 2380 (2011). The Supreme Court recently made clear that this preclusion attaches only at the point of certification; accordingly, a denial of certification has no class-wide preclusive effect. *See id.* In referring to a "properly" certified class action, I mean one that comports with the due process rights of absent class members, such that it cannot be collaterally attacked on that basis. *See* Juris v. Inamed Corp., 685 F.3d 1294, 1312 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 940 (2013) (noting that "[c]lass action judgments will typically bind all members of the class" but that "[b]efore the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process").

196 *See* Nagareda, *supra* note 1, at 1113.

197 *See supra* Part I.B.

198 *See* United States v. Mendoza, 464 U.S. 154 (1984) (holding that nonmutual collateral estoppel cannot be invoked against the United States as a defendant); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (giving trial courts broad discretion over the application of nonmutual collateral estoppel).

199 *See* Nagareda, *supra* note 8, at 162 (recognizing this asymmetry); *see also id.* at 177 (noting the potential of class actions to restore two-way preclusion).

200 *See* Taylor v. Sturgell, 553 U.S. 880 (2008).

201 *See infra* Part II.B.2.

202 For example, the initial plaintiff might choose not to appeal an adverse decision, or the appellate court might resolve the case in an unpublished opinion that cannot be cited as precedent. The latter has a high degree of likelihood, as more than eighty-eight percent of federal appellate decisions are unpublished. *See* Adam Liptak, *Courts Write Decisions that Elude Long View*, N.Y. TIMES, Feb. 2, 2015, http://www.nytimes.com/2015/02/03/us/justice-clarence-thomas-court-decisions-that-set-no-precedent.html.

The possibility that quasi-individual actions could lead to serial relitigation is more than theoretical. Over a period beginning in the mid-1970s,[203] issues involving the relitigation of identical claims by different plaintiffs arose frequently enough that the circuit courts developed the doctrine of "virtual representation" to address them.[204] That doctrine allowed courts to bar a suit by a new plaintiff on the grounds that he had been adequately represented by a party bringing an identical claim in a prior, non-class suit against the same defendant. Although the standard for virtual representation varied across the circuits, the underlying goal of preventing serial relitigation held constant across all its variations.[205]

Courts viewed the problems arising from serial relitigation as severe enough that, even after the Supreme Court rejected the due process principles underlying virtual representation in a 1996 case,[206] most federal courts continued to apply the doctrine for another twelve years.[207] When the Supreme Court squarely addressed the issue in its 2008 decision in *Taylor v. Sturgell*,[208] it unanimously reversed the D.C. Circuit's decision applying virtual representation,[209] finally sounding the death knell for the doctrine in the federal courts.[210]

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203 *See* Sw. Airlines Co. v. Tex. Int'l Airlines, 546 F.2d 84 (5th Cir. 1977); Aerojet-Gen. Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975)); Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1882 (2009) ("The inception of the modern concept of virtual representation can be traced to a trio of Fifth Circuit cases in the 1970s." (citing Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978))).

204 In the period beginning with the Fifth Circuit's 1975 decision in *Aerojet* (*see supra* note 203) and ending with the Supreme Court's 2008 decision in *Taylor v. Sturgell* (discussed *infra*), the phrase "virtual representation" appeared in more than 100 federal appellate decisions.

205 As noted above, defendants' efforts in pursuing this goal demonstrate the value that they placed on gaining closure through after-the-fact aggregation, even though they might have opposed such aggregation on an ex ante basis. *See supra* notes 186–84 and accompanying text.

206 *See* Richards v. Jefferson Cnty., 517 U.S. 793 (1996). *Richards* concerned the constitutionality of a tax imposed by the defendant county. *See id.* at 794–95. A set of taxpayers brought a non-class action challenging the tax, but they were unsuccessful. *See id.* at 795. Several years later, a different set of taxpayers—the *Richards* plaintiffs—attempted to bring a class action challenging the same tax. *See id.* at 795–96. The Supreme Court held that the Alabama state courts could not give the prior suit preclusive effect against the *Richards* plaintiffs, who had not been represented in the earlier action and retained a due process right to their own day in court. *See id.* at 801–02. Notably, the *Richards* Court rejected the defendant county's suggestion that preclusion should apply differently "in cases raising a public issue of this kind." *See id.* at 803. Three years later, the Court decided *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), which reaffirmed the due process principles set forth in *Richards*.

207 *But see* Perry v. Globe Auto Recycling, Inc., 227 F.3d 950, 953 (7th Cir. 2000) (rejecting the doctrine of virtual representation).

208 553 U.S. 880 (2008).

209 As it had in *Richards*, the Court in *Taylor* again rejected the proposition "that nonparty preclusion should apply more broadly in 'public law' litigation than in 'private law' controversies." *See id.* at 902.

210 *See* Redish & Katt, *supra* note 203, at 1878 (arguing that in *Taylor*, "the Court quite clearly signaled the demise of *all* versions of virtual representation" (emphasis in original)).

The *Taylor* decision "affirms the potential that certain kinds of claims could be brought repeatedly, even if against the same defendant and even if a second litigant has the same lawyer as did a first, unsuccessful claimant."[211] Challenges to a defendant's generally applicable policy or practice are among the claims for which such relitigation could occur, as multiple potential plaintiffs each hold an individual right to sue over the common claim. Depending on the strength of the precedent generated by the initial case, the absence of class treatment can cost the defendant a great deal in terms of the possibility of global peace (regardless of whether the defendant recognizes that cost on an ex ante basis).[212]

Not only do quasi-individual actions fail to offer two-way preclusion, but the possibility of system-wide relief in an individual case creates an incentive for serial relitigation.[213] For example, instead of convincing the district court that the Constitution prohibited California's ban on same-sex marriage, suppose the *Perry* plaintiffs lost.[214] Because the case was not a class action, the district court's decision would not have generated class-wide preclusion. A second set of same-sex couples could bring an identical claim in another district court, and while the second court might view the first court's decision as persuasive authority (or horizontal stare decisis), it would not be formally bound by that prior decision. If the plaintiffs in the second case lost, a third set of couples could sue, and so on and so forth; the relitigation on Proposition 8 could continue until each of the thousands of same-sex couples in California lost their own suit, all those who had not yet sued became discouraged, or one of the litigating couples won. In the latter scenario, the last court to hear the case might award statewide relief, making the single positive trump all the negatives.

The actual outcome in *Perry* was that no one who had standing to appeal wanted to do so;[215] because the *Perry* defendants wanted the plaintiffs to achieve their requested relief, they probably would not have objected to the ultimate outcome described above. However, they probably would have taken issue with the time and expense involved in being hauled into court repeatedly. In any event, the *Perry* defendants

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211 Resnik, *supra* note 42, at 685; *see also* Smith v. Bayer Corp., 131 S. Ct. 2368, 2381 (2011) ("[T]he rule against nonparty preclusion . . . perforce leads to relitigation of many issues, as plaintiff after plaintiff after plaintiff (none precluded by the last judgment because none a party to the last suit) tries his hand at establishing some legal principle or obtaining some grant of relief.").

212 *See* Wilton, *supra* note 27, at 603 (arguing that "lawyers for defendants should litigate social reform cases in class action form whenever possible").

213 For a discussion of the relitigation incentives of other potential claimants and their effect on judicial economy, see *infra* Part II.C.1.

214 For a discussion of the litigation in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), see *supra* Part I.C.1.

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

were outliers in terms of their relationship to the litigation.[216] Most defendants do not like losing, especially after they have already won; quasi-individual actions expose them to that risk.[217]

For those sympathetic to the goals of the *Perry* litigation, it bears noting that the preclusive asymmetries involved in quasi-individual actions disfavor defendants regardless of the motivations for their conduct. For example, serial relitigation could as easily occur in a challenge to Proposition 8 as in a challenge to California's ban on gay conversion therapy for minors.[218] Not everyone would object to litigation continuing, even after a loss, until their own side wins; but few would agree that every claimant group should be able to continue pursuing an identical claim, even after losing once or several times, until it finally wins.

3. Over-Deterrence and Inferential Stare Decisis

The potential for serial relitigation must be viewed in combination with the increased possibility that a case will become moot prior to a merits decision,[219] as well as the inferential stare decisis effects (i.e., the effects beyond the rule announced by the court) of a decision that does not finally resolve the case.[220] These factors combine to expose defendants in quasi-individual actions to a risk of over-deterrence that would not be present in a class action.

To see why, consider the *Fisher* litigation.[221] As of this writing, the case has been pending for more than seven years, but the courts have not yet reached a final decision as to the legality of the defendant's admissions program. The plaintiff has lost the ability to obtain forward-looking relief, and it remains possible that the case will be held non-

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216 Outliers, but not unique: multiple attorneys general eventually announced that they would not defend their states' bans on marriage rights for same sex couples. *See, e.g.*, Press Release, Commonwealth of Va. Office of the Att'y Gen., Attorney General Herring Changes Virginia's Legal Position in Marriage Equality Case, Jan. 23, 2014, *available at* http://www.oag.state.va.us/index.php/media-center/news-releases/96-attorney-general-herring-changes-virginia-s-legal-position-in-marriage-equality-case.

217 *See* ALI Principles, *supra* note 2, § 2.04 cmt. a (noting that class treatment of a challenge to a generally applicable policy or practice benefits the defendant by "eliminat[ing] the possibility of multiple claimants repeatedly litigating the same issues in successive proceedings" and "help[ing] to ensure that a denial of an indivisible remedy will redound to the disadvantage of all affected claimants, consistent with the kind of two-way preclusion contemplated for the modern class action").

218 *See* Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).

219 *See supra* Part I.B.4.

220 On the general risks of inferential stare decisis, see Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737 (2013).

221 For a discussion of the litigation in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), see *supra* Part I.C.2.

justiciable.[222] That outcome would leave the defendant with huge litigation costs, but little guidance as to how to shape its future behavior, apart from a Supreme Court opinion that seemed skeptical of affirmative action programs in general.

The defendant in *Fisher* thus faces the risk that another individual plaintiff will bring suit on the same exact issue, subjecting it to further years of litigation and associated expense, perhaps going back up to a Supreme Court that would rather its affirmative action program just disappear. A more faint-hearted or cost-conscious defendant facing similar circumstances might well decide to abandon its challenged policy or practice altogether, rather than bear the uncertainty and expense of continuing to defend it. The possibility of similar types of over-deterrence animates a number of doctrines, such as qualified immunity, that seek to protect defendants from the burdens of litigation.[223]

An opinion that addresses but does not finally resolve the merits of a case—like the one in *Fisher*, and like those made more likely by the justiciability problems in quasi-individual actions—contains an ambiguity that may warp its precedential effect.[224] Such an opinion announces a rule, but does not dictate an outcome, notwithstanding that its tone may suggest one. Adam Steinman has described the destabilization that can occur in a similar situation, when the rule announced by the precedent-setting court does not dictate the outcome it reached.[225] He posits that future courts engaging in "an inferential, result-based approach" to stare decisis "may . . . read [such] decisions more sweepingly than is justified."[226] The destabilizing effect of inferential stare decisis can only be greater when future courts must base their inferences on the court's apparent hostility to, rather than rejection of, the underlying claim or defense (which, in the context of a generally applicable policy or practice, can be the *identical* claim or defense at issue in the subsequent case). That destabilization, in turn, may deter defendants from taking actions near (but within) the margins of established law.

In sum, although a defendant may realize short-term resource savings when a plaintiff challenging its generally applicable policy or practice decides not to seek class treatment, the decreased likelihood of a

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222 *See supra* Part I.C.2.

223 *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985).

224 In a sense, merits decisions are never absolutely final, because the Supreme Court can (and sometimes does) overturn its own prior rulings. However, a class-wide decision on the merits in the Supreme Court creates a significant degree of finality by making litigation of a legally and factually identical claim trivial to defend, and potentially unethical to bring, in the trial and appellate courts.

225 *See* Steinman, *supra* note 220, at 1751–66.

226 *Id.* at 1742.

merits decision and the absence of two-way preclusion create serious long-term costs. From a defendant's point of view, whether the long-term costs will ultimately outweigh the short-term savings in a particular case depends on contingencies that cannot be known at the time of the initial litigation. Accordingly, defendants are much more likely to recognize the problems involved in quasi-individual actions ex post than ex ante.

B. *The Whack-A-Mole Effect on Interested Nonparties*

Quasi-individual actions affect not only the plaintiffs and defendants who appear as parties to the litigation, but also those with an interest in the subject matter, including those who would be class members if the case were brought in class form. As with defendants, the quasi-individual form protects interested nonparties from some of the disadvantages of class actions, but it does so only by imposing serious disadvantages of its own. The most relevant considerations, from interested nonparties' point of view, relate to litigant autonomy, representation and agency, and enforcement and appeal.

1. Litigant Autonomy

As the Supreme Court has noted, "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[227] Although this passivity can be viewed as a benefit, it can also be viewed as a cost; just as absent class members need not participate in decisions about the adjudication of their rights, they also generally lack the ability to control those decisions.

The Federal Rules of Civil Procedure limit litigant autonomy in multiple ways.[228] For example, Rule 19 requires plaintiffs to join certain "required" parties, even if the plaintiff would prefer to leave those persons out of the litigation.[229] The class action rule is thus not unique in having an impact on litigant autonomy; yet it has the potential to

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227 Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985).

228 *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 617–18 (2011); Redish & Larsen, *supra* note 6, at 1585–86.

229 *See* Bone, *supra* note 228, at 618. Similarly, Rules 42(b) and 20(b) allow the court to order separate trials or otherwise divide the plaintiff's claims prior to their final resolution. *See id.* at 617. In addition, Rule 13(a) imposes a compulsory counterclaim requirement, and 28 U.S.C. § 2201 (2012) allows a potential defendant to bring a declaratory judgment action against a potential plaintiff; "[i]n both situations, a potential plaintiff may be forced to litigate her claim at a time and in a forum not of her choice." *See* Redish & Larsen, *supra* note 6, at 1585.

affect that autonomy more severely than other procedural devices. Absent class members cannot control the timing of the litigation or the forum in which it occurs; even if they intervene in order to weigh in on litigation strategy, their "ability to make strategic choices concerning the control of the litigation is usually so diluted by the influence and control of other named parties as to be almost nonexistent."[230] Because the Court has recognized the "chose in action" as a constitutionally protected property interest, this threat to litigant autonomy implicates serious due process concerns.[231]

In a challenge to a defendant's generally applicable policy or practice, however, the threat to litigant autonomy comes as much from the interdependent nature of the potential claims as the procedural means of prosecuting them.[232] The existence of the policy or practice creates an interrelationship among those persons affected by it, and that interrelationship gives rise to difficult questions about remedial scope and preclusive effects. The class action represents an attempt to address those questions; it does not create them.[233]

As to remedial scope, the potential for relief broad enough to affect nonparties results from the reach of the defendant's policy or practice and the impersonal manner in which it applies, not from the class action form. While it is true that a class action can result in class-wide relief without the knowledge or participation of absent class members, it is also true that a quasi-individual action can result in system-wide relief without the knowledge or participation of other potential claimants. Class treatment makes the broader remedy more likely, but does not bring it into existence; the scope of the defendant's policy or practice, which preexists the procedural form, does that.

As to preclusive effects, class actions and quasi-individual actions have different formal effects on the autonomy of subsequent litigants, but in some cases the practical impact will be the same. A properly certified class action bars the future claims of absent class members,

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230 *See* Redish & Larsen, *supra* note 6, at 1586.

231 *See id.* The constitutional component of litigant autonomy, however, does not provide absolute protection for all aspects of litigation control. *See* Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 567 (2013) ("[T]he dominant approach to due process analysis allows a court to trade off losses in litigant control against social gains (in particular, reductions in the expense of litigation) achieved from less adversarial processes.").

232 *See* Nagareda, *supra* note 8, at 227 ("[C]onditions antecedent to the class itself—in this instance, the generally applicable conduct to be enjoined or declared unlawful—make interdependent the claims of would-be class members.").

233 As Bill Rubenstein has pointed out, "this is no defense of autonomy at all, only a recognition that the exercise of the plaintiffs' autonomy forecloses the autonomous choices of others . . . ." Rubenstein, *supra* note 9, at 1648. The point is not that the class action can perfectly protect the autonomy of all similarly situated individuals; the interdependent nature of the claims makes that impossible. Rather, the point is that the other-regarding safeguards offered by the class action represent an improvement over the absence of such safeguards in a quasi-individual action.

while formally individual actions cannot create a bar for other potential claimants as a matter of res judicata or collateral estoppel.[234] From the point of view of other potential claimants, the potential for serial relitigation in the wake of a prior plaintiff's loss can be a strong positive.[235]

The way in which the original plaintiff conducted the litigation, however, will necessarily limit the choices available to future litigants.[236] As Bill Rubenstein has written, "litigation is not a 'self-regarding' act and thus the framing, as much as the filing, can seriously impair the autonomy of other framers."[237] Because courts have broad horizons and long memories, the exercise of any attorney's professional judgment creates externalities for concurrent and subsequent cases,[238] especially in the context of the common claims addressed in quasi-individual actions. Counsel for future litigants will have to understand and incorporate the initial attorney's choices with regard to legal theories and arguments, however idiosyncratic or ill-advised those choices may have been.[239]

Future litigants may also have to grapple with the precedent created by a quasi-individual action, which may functionally preclude their claims. The stare decisis effects of a quasi-individual action on other common claimants will be extremely strong relative to other precedents, because the same policy or practice will be at issue and thus the legal and factual issues will be identical.[240] Under vertical stare decisis, which would occur if the prior case resulted in a published merits decision on appeal within the same circuit (or in the Supreme Court), the lower court would be bound to the truly indistinguishable decision of the higher court. Under horizontal stare decisis, the deciding court would not be formally bound but might nonetheless decide to follow the indistinguishable precedent, depending on its views about uniformity, the persuasiveness of the initial opinion, or similar factors. Because these precedential effects depend on the course of the initial litigation and the interpretation of its outcome by subsequent courts, a nonparty cannot know ahead of time whether or to what degree a quasi-individual action will ultimately act as a constraint on its own future litigation choices.

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234 *See* Taylor v. Sturgell, 553 U.S. 880 (2008).

235 For an analysis of the defendant's perspective on serial relitigation, see *supra* Part II.A.2.

236 *See* Rubenstein, *supra* note 9, at 1651.

237 *Id.*

238 *See id.*

239 *See id.*

240 *See id.* at 1646–47 ("[E]ach initial lawsuit will infringe upon the freedom of other community members to litigate their own individual cases (or to choose *not* to litigate). . . . The only difference between this precedential effect and pure preclusion is that the later plaintiffs can literally have their own day—albeit a short one—in court.").

Whatever form a challenge to a defendant's generally applicable policy or practice takes, those similarly situated to the plaintiff will lack the authority to decide that the claim should not proceed, or that it should proceed at a later time.[241] They will have no control over the arguments plaintiff's counsel makes against the defendant's policy or practice. They can attempt to intervene, but doing so will require them to show either that the named plaintiff will not adequately protect their interests, or that their participation will not "unduly delay or prejudice the adjudication of the original parties' rights."[242] The need for intervention might become apparent only after the existing parties propose, or the court orders, a remedy that the absent parties view as harmful or inadequate; by then, the court might view any attempt at intervention as untimely. All of this will be true regardless of whether the plaintiff brought the case as a class action or in quasi-individual form.

Notwithstanding these similarities, the class action affords some protections for litigant autonomy that quasi-individual actions do not. For example, the choice of class treatment gives those similarly situated to the plaintiff the status of class members, while the individual form leaves them as strangers to the litigation (unless and until they successfully intervene). The class action rule explicitly allows a court to require notice of the litigation to absent class members,[243] and mandates the court to require notice of a proposed settlement;[244] no parallel rules of procedure apply in non-class litigation. Class members who object to a representative's proposed settlement of the claim can appear at the fairness hearing and be heard, while nonparties to a quasi-individual action have no role in fashioning any relief ultimately afforded. Class proceedings on the whole must be conducted so as to protect the interests of absent class members;[245] quasi-individual actions involve no analogous requirement.[246]

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241 For an example of disagreement over the timing of a quasi-individual action, see *supra* Part I.C.1.

242 *See* FED. R. CIV. P. 24. The same intervention standard applies in class actions as in other cases: "Although it is possible to read the passages in Rule 23 bearing on intervention more broadly than those in Rule 24, the two sets of provisions should be construed so that the rules are applied harmoniously." CHARLES ALAN WRIGHT ET AL., 7B FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 1799 (4th ed. 2014); *see, e.g.*, Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324, 331 (5th Cir. 1982). However, "the very nature of Rule 23 representative litigation" makes the standard effectively easier to satisfy in class actions. *In re* Cmty. Bank of N. Va., 418 F.3d 277, 314 (3d Cir. 2005); *see also* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 703 n.222 (2014) ("A class action facilitates intervention and has heuristic advantages for conceiving of the wrong in group terms.").

243 *See* FED. R. CIV. P. 23(c)(2)(A).

244 *See* FED. R. CIV. P. 23(e)(1).

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

246 *See* ALI Principles, *supra* note 2, § 2.04 cmt. a ("Aggregate treatment has the further advantages of giving all persons with interests in the disputed policy or practice an opportunity to

2. Representation and Agency

The representatives and counsel to whom absent class members cede their autonomy must in theory act for the class as a whole, but the difficulties in ensuring their fidelity create serious principal-agent problems.[247] In a class action, the client does not speak with a single voice. It cannot select its attorney or control his conduct. If the attorney pursues goals other than those the class would prefer, the class itself cannot fire him; it must rely on the court, class representatives, and other fiduciaries to protect its interests. Those fiduciaries do not always do a good job of policing class counsel (to put it mildly).[248]

Not only may class representatives do little or nothing to protect the interests of the class,[249] they may even attempt to maximize their own recovery at the expense of absent class members. For example, settlements sometimes provide for named plaintiffs to receive "incentive payments" that may reduce the resources the defendant devotes to injunctive or other relief;[250] some courts and commentators have criticized these payments, noting the potential they create for conflicts and abuse.[251] Congress too has weighed in, condemning incentive payments as a practice by which "unjustified awards are made to certain plaintiffs at the expense of other class members."[252]

When a plaintiff decides not to use the class action device, and instead brings a quasi-individual action, these issues of agency and

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be heard and enabling the court to fashion the indivisible remedy with all relevant interests in mind.").

247 *See* Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993, 1004 (2011) (noting the recognition of principal-agent problems in the class action literature); *see also* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 292 (2010) (noting that such problems "remain intractable despite repeated efforts by Congress and the courts to curb highly visible abuses").

248 For example, in one infamous case, a court approved a settlement in which class counsel received several million dollars, but class members ended up with a net loss. *See* Kamilewicz v. Bank of Bos. Corp., 92 F.3d 506 (7th Cir. 1996). Pursuant to the settlement, the defendant bank deposited up to $8.76 in class members' accounts, but then deducted class counsel's fees from the accounts, resulting in the net loss. *See id.* at 508.

249 *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1304 (2006) ("The 'named' or 'representative' plaintiff, who supposedly acts as the champion of the class, is sometimes little more than an eponym.").

250 *See, e.g.*, Marek v. Lane, 134 S. Ct. 8, 8 (2013) (describing a class settlement in which "the named plaintiffs received modest incentive payments").

251 *See, e.g.*, Radcliffe v. Experian Info. Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013) ("[D]istrict courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives."); *see also* Eisenberg & Miller, *supra* note 249, at 1312–13 (discussing criticisms). Because of these types of concerns, I do not propose large incentive payments as a means of encouraging plaintiffs to pursue class treatment. *See infra* Part III (discussing other proposals aimed at facilitating the choice of class treatment).

252 Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3)(B), 119 Stat. 4.

representation do not disappear. The plaintiff's conduct of the litigation will necessarily affect other potential claimants in some way, whether due to the outcome, the process by which it is reached, or both.[253] With regard to outcome, the plaintiff's strategic choices may cause him to lose the case, which might practically impede litigation by other potential claimants; or he may participate in shaping a system-wide remedy, which might not be the remedy that other potential claimants would prefer. The latter scenario will be especially likely to occur if the remedy is indeterminate, as in desegregation or other institutional reform litigation;[254] in that type of case, potential claimants may agree that a violation has occurred, but disagree as to the best means of addressing it.[255]

With regard to process, the plaintiff may make arguments that demean or ignore other members of the claimant group, causing dignitary harm, or that effectively limit the legal theories available to other claimants in subsequent litigation.[256] For example, consider litigation over marriage rights for same-sex couples. Plaintiffs in those cases have actively worked against any acknowledgement of bisexuality, contributing to a phenomenon known as "bisexual erasure" and shaping the law in a manner that excludes arguments grounded in bisexual identity.[257] Moreover, some of the legal arguments put forth in the marriage litigation follow a "postracial narrative" that can alienate and offend LGBT people of color.[258]

Thus, whether through the outcome of the litigation or the manner in which it was conducted, the plaintiff in a quasi-individual action will have represented the other potential claimants, as a functional matter, to some degree. Unlike a class-action plaintiff, however, he will not have formally represented anyone else nor entered into a recognized agency relationship with them. This creates a representational asymmetry; the plaintiff might gain the authority to resolve others' claims, practically speaking, but those others have no authority to direct or constrain the plaintiff.[259]

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253 *Cf.* Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1026–27 (2010) (discussing outcome-based and process-based theories of procedural rights).

254 *See* Bell, *supra* note 6.

255 As courts and scholars have recognized, this type of intra-class divergence should not defeat class certification. *See* Rhode, *supra* note 6, at 1194–96.

256 *See* Rubenstein, *supra* note 9, at 1651.

257 *See* Boucai, *supra* note 144, at 453–57 (describing bisexual erasure in *Perry* and other marriage litigation). On bisexual erasure more generally, see Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

258 *See* Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010 (2014).

259 *Cf.* Manheim, *supra* note 29, at 566 (noting that individual plaintiffs in redistricting litigation similarly have "an ability to affect the rights of non-parties without providing protections that would be required in a class-action setting"). This representational asymmetry

Taking the class action mechanism out of the picture lessens the agency issues involved in the litigation, due to the absence of formal preclusion against absent class members, but it also takes away the protections designed to ensure the fidelity of the agents for the class. Class treatment offers the benefit of assigning class-wide fiduciary duties to the court, class representatives, and class counsel. Those aspects of the class action mechanism at least attempt to address the agency issues involved in aggregate litigation, however imperfectly they may do so in practice. In quasi-individual actions, in contrast, no formal constraints prevent the plaintiff from pursuing his own goals and interests, even where they differ from those of other potential claimants.

3. Enforcement and Appeal

Class actions provide interested nonparties with more options for enforcing a favorable decision, or appealing an unfavorable decision, than do quasi-individual actions. If a class representative and counsel succeed in obtaining relief for the class, an unnamed class member will generally have the authority to enforce the resulting order or consent decree.[260] If the class member disagrees with the compromise embodied in a settlement, she will have the opportunity to object to its approval;[261] and if the court approves the settlement over her objection, she will have the authority to appeal that decision.[262]

In contrast, a settlement in a quasi-individual action may take the form of a private agreement between the parties, rather than a court-approved consent decree. Even if the parties do not settle privately, affected nonparties may not be able to secure enforcement of a resulting order or decree, because nonparties generally lack authority to enforce an injunction.[263] Moreover, an injunction binds only named parties and

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can be mitigated if other affected claimants intervene in the plaintiff's individual case, but courts will not always permit such intervention. *See supra* note 242 and accompanying text.

260 *See* WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 16:1 (4th ed. 2014) ("Absent class members are parties for purposes of being bound by the judgment, receiving the benefit of the tolling of the statute of limitations, meeting the venue requirements, and having standing to appeal from decisions and to object to *and enforce* settlements." (emphasis added)). Depending on the circumstances of the case, the unnamed class members may be required to intervene before seeking enforcement. *See* Reynolds v. Butts, 312 F.3d 1247, 1250 (11th Cir. 2002).

261 *See* FED. R. CIV. P. 23(e)(5) ("Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.").

262 *See* Devlin v. Scardelletti, 536 U.S. 1 (2002).

263 *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975) ("[A] well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it."). *But see* FED. R. CIV. P. 71 ("When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.");

those acting in concert with them,[264] which might create a further difficulty for system-wide enforcement.[265] And finally, if the other potential claimants disagree with the relief awarded, or if the plaintiff loses, they will have no ability to appeal.

If a quasi-individual action results in system-wide relief that they deem inadequate, other potential claimants have the option of bringing their own, separate lawsuits (provided that they have the resources necessary to do so).[266] The complainants might be able to invoke collateral estoppel to prevent relitigation of the issues previously decided in their favor, but in litigation against the federal government, that option would not be available to them.[267] The government might engage in "nonacquiescence"—i.e., "[t]he selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals."[268] Unless vertical stare decisis applied (and thus foreclosed the government's position in the new case),[269] the claimants then would have to prove the merits of the claim again. Success in doing so would not necessarily lead to the relief they sought; even if the court determined that the defendant had violated the law, it might also determine that the previously-granted relief sufficed to address the violation, eliminating any need for a further remedy.

Similar issues would arise if potential claimants agreed with the relief rewarded, but the defendant refused to apply it to them. There too,

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United States v. FMC Corp., 531 F.3d 813, 819–20 (9th Cir. 2008) (noting exceptions to the *Blue Chip* rule).

264 *See* FED. R. CIV. P. 65(d)(2).

265 For example, in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), enforcement questions arose because fifty-six of California's fifty-eight county clerks were nonparties. *See* Perry v. Schwarzenegger, 628 F.3d 1191, 1201 (9th Cir. 2011) (Reinhardt, J., concurring) ("[A]ccording to what their counsel represented to us at oral argument, the complaint [the Plaintiffs] filed and the injunction they obtained determines only that Proposition 8 may not be enforced in two of California's fifty-eight counties."). The governor, a named defendant, ultimately concluded that he had the authority under state law to direct state officials to comply with the court's order. *See supra* Part I.C.1.

266 *See* Lever & Eastman, *supra* note 27, at 865–66 (arguing that class actions "can reduce, if not eliminate" the need for individual litigation by potential claimants who "lack the resources, information and ability" to initiate such lawsuits); Tenny, *supra* note 45, at 1040 ("[F]ailure to certify a class can have a significant adverse impact on future litigants, particularly those who lack the resources to instigate a new action.").

267 *See* United States v. Mendoza, 464 U.S. 154 (1984).

268 *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989); *see also* Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 65 (2003) ("[Nonacquiescence] aids in the development of a coherent national body of law by facilitating the 'percolation' of important issues up to the Supreme Court, but in the short term the very process of percolation imposes on parties the costs of repetitive litigation and uncertainty about the law."); Samuel Figler, *Executive Agency Nonacquiescence to Judicial Opinions*, 61 GEO. WASH. L. REV. 1664, 1665 (1993) ("The judicial response to agency nonacquiescence has been largely ineffective. Although courts do not hesitate to criticize voraciously agency nonacquiescence, they are hesitant to mandate any remedial action.").

269 *See supra* note 240 and accompanying text on stare decisis and quasi-individual actions.

the claimants could bring their own, separate lawsuits; but there too, in litigation against the government, they would not be able to invoke preclusion and might face nonacquiescence.[270] Even if the defendant had promised during the quasi-individual action that it would apply the judgment broadly, a court might not enforce that promise through judicial estoppel, especially against a government litigant.[271]

In sum, class actions present both costs and benefits to interested nonparties as compared to quasi-individual actions. Because of the broadly-shared nature of the common claims involved, however, many interested nonparties will likely find that the participatory opportunities facilitated by the class action device weigh in favor of its use.

C. *Broader Institutional Concerns*

Several of the issues discussed above with regard to defendants and interested nonparties strongly suggest the existence of parallel concerns at the institutional level. For example, the risk that the absence of two-way preclusion will lead to serial relitigation implicates concerns about judicial economy. Indeed, a broader view shows that quasi-individual actions jeopardize several of the values the judicial system aims to promote: not just judicial economy, but also rights articulation, decisionmaking quality, process integrity, and the vindication of congressional goals for civil rights enforcement.

1. Judicial Economy

At first glance, a plaintiff's choice not to bring a class action when challenging a generally applicable policy or practice might appear to promote judicial economy. Judges sometimes view class actions as time-sinks, and indeed, a study conducted in the mid-1990s found that judges spent significantly more time on cases filed as class actions than those filed as individual lawsuits.[272] For example, "[s]ecurities class actions required 3.2 times the judicial time spent on all securities cases; other civil rights cases, 3.3 times as long; and prisoner civil rights cases, 5.03 times."[273] This increased burden has motivated some courts to apply the

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270 *See* Carter, *supra* note 37, at 2185 n.32 ("If the decree is not framed in class terms, its strare [sic] decisis value may be only as great as the defendant's good will and the limited enforcement resources of the members of the uncertified class."); *see also supra* note 268.

271 *See* Tenny, *supra* note 45, at 1036–40.

272 *See* Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 97 (1996).

273 *Id.* at 96.

"necessity" doctrine,[274] and has led some commentators to conclude that class certification causes a loss of judicial efficiency if non-class treatment could have led to the same relief.[275]

As other scholarship has noted, however, "[s]uch judicial economy is penny wise and pound foolish" in some cases.[276] The absence of class treatment can negatively affect judicial economy in multiple ways. First, if the plaintiff wins but the court awards only individual relief, "other potential plaintiffs can be expected to flock to court, inspired by the plaintiff's victory and [in some cases] comforted by the knowledge that collateral estoppel ensures their victories as well."[277] Instead of a single class action, the courts will then need to adjudicate multiple individual claims.[278]

Similar harm to judicial economy can occur if the court awards system-wide relief but the defendant refuses to honor it as to claimants other than the plaintiff. Unable to seek a contempt citation through the original litigation because of their status as nonparties, some of those claimants may choose to become parties to new litigation, filing their own lawsuits in order to secure access to the relief the original court attempted to afford them.[279] As noted previously, the resolution of that second round of litigation will not necessarily be clear or simple,[280] and thus may consume a significant amount of judicial time.

The risk of mootness involved in quasi-individual actions presents an even greater threat to the efficient operation of the judicial system. When a quasi-individual action becomes moot, the plaintiff's claim must be dismissed without a decision on the merits, notwithstanding the existence of many other potential claimants who continue to be affected by the defendant's policy or practice. The judicial resources already consumed by the case will be lost, and wastefully so, as the litigation will not produce the countervailing benefits that would have resulted from an adjudication of the rights and obligations of those involved.[281] Subsequently, further resources will be consumed when

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274 *See supra* Part I.A.

275 *See* Wilton, *supra* note 27, at 635 (citing 3B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.04(3) (2d ed. 1982)).

276 *See id.* at 635–37.

277 *Id.* at 636.

278 To the extent that serial relitigation does not occur because other affected claimants lack the information or resources necessary to come to court to vindicate their own rights, the gain in judicial economy comes at the cost of a large-scale continuing violation. That is not a feature—it is a bug.

279 Alternatively, the original court may permit the claimants to intervene for purposes of enforcement. *See, e.g.*, Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985) (discussed *supra* note 46).

280 *See supra* Part II.B.3.

281 *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 201 ("The creation of binding precedents is a beneficial byproduct of litigation . . . .").

someone with a live claim again brings suit;[282] the prior case will provide no precedential benefits for the new litigation, as it produced no merits decision to inform the new court's analysis or limit the issues to be decided.

Finally, even if an individual plaintiff loses on the merits, the absence of a binding class-wide resolution will make possible serial relitigation that needlessly taxes judicial resources. As the Supreme Court has explained, preclusion doctrines have "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[283] In the absence of class treatment, preclusion will not reach the other potential plaintiffs affected by a defendant's generally applicable policy or practice, and those purposes will not be achieved.

The fact that courts developed the doctrine of virtual representation over the course of several decades reflects the seriousness of concerns about serial relitigation, particularly in the "public law" context.[284] When the Supreme Court unanimously rejected the virtual representation doctrine in *Taylor v. Sturgell*,[285] it grounded its decision in important and well-established due process principles, but it stepped onto less certain ground when it tried to reason away relitigation concerns. First, the Court noted that the operation of stare decisis should prevent relitigation within the same circuit.[286] The procedural history of *Taylor* itself, however, shows the limited reach of stare decisis in preventing relitigation; after Herrick (the plaintiff in the initial case) lost, Taylor (the second plaintiff) simply brought suit in a different circuit, where the precedent generated by Herrick's case was not binding.[287]

Second, the Court posited that "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others."[288] Because of the potential for a single court to grant system-wide relief, however, litigant incentives provide limited protection against relitigation in the context of challenges seeking injunctive or declaratory relief against a generally applicable policy or practice. No matter how many courts deny the claim beforehand, it is only the success of that one plaintiff in achieving system-wide relief that will matter.[289] As Judge Easterbrook

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282 *See supra* note 278.

283 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

284 For a discussion of the doctrine of virtual representation, see *supra* Part II.A.2.

285 553 U.S. 880 (2008).

286 *See id.* at 903.

287 *See id.* at 880.

288 *Id.* at 903–04.

289 It also bears noting that a plaintiff in a quasi-individual action seeks nonmonetary relief

wrote in an analogous context, "[r]elitigation can turn even an unlikely outcome into reality" when "[a] single positive trumps all the negatives."[290] In a subsequent case about nonparty preclusion, the Court took a less dismissive tone towards these concerns, acknowledging the "sometimes substantial costs of similar litigation brought by different plaintiffs" in the absence of a preclusive bar.[291]

2. Rights Articulation

The Supreme Court has recognized the importance of the courts' role in articulating and clarifying rights, particularly in the context of constitutional challenges, so as not to "leave standards of official conduct permanently in limbo."[292] In light of this rights-making function, the Court has accepted that "clarify[ing] constitutional rights without undue delay" is a valid doctrinal purpose.[293] Although challenges to a defendant's generally applicable policy or practice do not always involve constitutional questions, the large-scale character of the underlying claim similarly counsels in favor of promoting rights articulation in this context.

In some ways, class actions can suppress rights articulation. Instead of multiple claims percolating through multiple courts, a class action can result in a global settlement of all related claims in a single proceeding,[294] or a single judicial decision resolving all potential litigants' claims at once.[295] This cost to rights articulation is the flip side of the class action's benefits to judicial economy and closure.

The absence of percolation, however, does not impose as severe a cost as may first appear. Although repeated litigation of *similar* legal and factual issues can advance rights articulation through the development of the common law, serial relitigation of an *identical* claim by different claimants does not yield the same benefits. Imagine a graph with one axis labeled as lexical indeterminacy (i.e., the meaning of an expression used in a statute or constitutional command) and another labeled as

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and may not be driven by financial motives. A plaintiff offended by the defendant's allegedly injurious policy or practice may continue to sue to stop it, even after others have lost; "the human tendency not to waste money" comes into play only if the plaintiff in fact views as wasteful the attempt at vindicating her rights.

290 *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003), *abrogated by* Smith v. Bayer Corp., 131 S. Ct. 2368 (2011).

291 *See Smith*, 131 S. Ct. at 2381.

292 *See* Camreta v. Greene, 131 S. Ct. 2020, 2024 (2011).

293 *Id.* at 2025 (internal citation and quotation marks omitted).

294 For a discussion of how settlements can have a negative systemic impact, including with regard to rights articulation, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

295 In the case of a class action brought under Rule 23(b)(2), the resolution will be truly global, because class members have no right to opt out. *See* FED. R. CIV. P. 23(c)(2).

fact-based indeterminacy (i.e., how the expression applies to a particular factual situation).[296] The common law develops through decisions in individual cases, each of which usually populates a different point on this graph, allowing broader patterns to emerge. In purely injunctive or declaratory challenges to a defendant's generally applicable policy or practice, however, everyone affected by the policy or practice occupies the exact same point on the graph, limiting their ability to develop the common law by bringing separate lawsuits. Because only one set of legal and factual questions is at issue in a challenge seeking injunctive or declaratory relief against a generally applicable policy or practice, the decisions produced by serial relitigation can only duplicate or conflict with each other.

Moreover, just as a class action can result in a system-wide order or settlement, so too can a quasi-individual action (though the latter creates no preclusive bar to further litigation).[297] Indeed, a class action settlement provides benefits to rights articulation that a system-wide settlement in a quasi-individual action does not; parties can enter into a non-class settlement without any judicial discussion of the legal and factual issues involved, while a class action settlement can be approved only after a judicial evaluation of whether the agreement is fair and reasonable.[298]

In terms of justiciability, class actions can promote rights articulation more successfully than can quasi-individual actions, because in the latter type of case, the claim has a higher risk of becoming moot.[299] Mootness prevents the judiciary from exercising its rights-making function; a court articulates no rights, and provides no clarity about the outer boundaries of any rights, in a moot case.

3. Decisionmaking Quality

Whatever views one may have about judicial rights articulation or the appropriate role of the judiciary in general, it is beyond dispute that courts engage in decisionmaking, and it defies objection to state that inaccurate or ill-considered decisionmaking should be avoided. Avoiding bad decisions, in turn, requires attention to the conditions under which courts make those decisions. Relative to class actions,

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296 *See* Samuel A. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1287–91 (2010).

297 For a discussion of the possibility of system-wide relief in a quasi-individual action, see *supra* Part I.B.2. For a discussion of the ways in which system-wide relief can short-circuit the percolation process, see *infra* Part II.C.3.

298 *See* FED. R. CIV. P. 23(e).

299 *See supra* Part I.B.4.

quasi-individual actions have a negative impact on the conditions under which judicial decisionmaking occurs, in several ways.

First, research has demonstrated the prevalence of cognitive flaws that give inappropriate weight to the particular, even when a decisionmaker knows that his determination will have a broader scope. As Frederick Schauer has explained, "much that we might learn from the modern social science literature suggests that the presence of a concrete dispute before the judge is likely to distort any lawmaking that occurs in that case."[300] Class action proceedings require the judge explicitly to consider the interests of absent class members, offering a mitigating influence on the power of the particular. In the absence of class treatment, that mitigation will not occur, and its potential to improve judicial decisionmaking will not be realized.

Second, the role of the court in selecting class counsel may in some instances improve the conditions under which judges make decisions. The court has an obligation to select the best available counsel for the plaintiffs in a class action,[301] taking into account such factors as the candidate's experience, knowledge, resources, and "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[302] Although courts do not always perform these responsibilities well, the selection process does provide a safeguard against plainly incompetent representation that has no meaningful parallel in non-class litigation.[303]

Moreover, just as the fiduciary duties of class counsel run to the class as a whole, the court itself has a fiduciary duty towards the unnamed plaintiffs in a class action.[304] Defendants who oppose certification often help the court to perform that duty, in effect, by identifying potential intra-class conflicts;[305] even when a defendant fails to do so, the court has an obligation to probe for conflicts before it can make a finding of adequate representation. These duties lack parallels in quasi-individual actions, which offer no similar mechanism for identifying disagreements within the potential claimant group.

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300 Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 898 (2006).

301 *See* FED. R. CIV. P. 23(g)(2).

302 *See* FED. R. CIV. P. 23(g)(1).

303 Ethical rules require lawyers to provide "competent representation" to clients in every case. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011). Such competency requirements, however, are notoriously under-enforced. *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 14–15 (2009) ("[D]isciplinary authorities typically reserve discipline for incompetence that is egregious or places future clients at risk.").

304 *See* Allen v. Int'l Truck & Engine Corp., 358 F.3d 469, 471 (7th Cir. 2004). *But see* Nagareda, *supra* note 8, at 163 (arguing that "[t]he self-interest of judges to bless class settlements as a way to clear judicial dockets" undermines courts' performances of their fiduciary duties).

305 Of course, a defendant's goal in raising intra-class conflicts is usually not to protect absent class members, but to defeat certification by way of the adequate representation requirement.

Accordingly, the class action better promotes fully informed judicial decisions on matters such as remedy, particularly where class members may disagree as to the most appropriate relief to be awarded.[306] More broadly, class proceedings offer a greater likelihood that the court's ultimate decision will benefit from adversary proceedings that give voice to all relevant interests and viewpoints.

In one important sense, quasi-individual actions offer the potential to improve the circumstances under which courts reach decisions, because the absence of system-wide preclusion makes it possible for the underlying issue to percolate through a greater segment of the judicial system.[307] To be sure, allowing multiple courts to weigh in on a common legal question can promote quality decisionmaking by airing a variety of arguments and viewpoints.[308] However, the potential for system-wide relief in an individual case—the single positive that trumps all the negatives—significantly reduces this benefit.[309] When one of the deciding courts issues an injunction that applies to all actual and potential plaintiffs system-wide, the percolation process will be cut short.[310] Although relitigation can lead to improved results, it will not always do so; the final result will not necessarily be the most accurate one, and the process creates a risk of over-deterring the defendant and others similarly situated.[311]

4. Process Integrity

As compared to the class action, quasi-individual actions increase the risk that a plaintiff will manipulate the judicial process to its own

306 *See generally* Bell, *supra* note 6.

307 *Cf.* Califano v. Yamasaki, 442 U.S. 682, 702 (1979) ("It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts.").

308 *See* Resnik, *supra* note 42, at 689–90 (arguing that the relitigation that occurred in *Taylor* demonstrates the value of redundancy for improving judicial decisionmaking).

309 *See supra* Part I.B.

310 For example, consider the two challenges to Virginia's ban on marriage recognition for same-sex couples, one of which proceeded as an individual case and the other as a class action. *See* Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014) (non-class case); Harris v. McDonnell, 988 F. Supp. 2d 603 (W.D. Va. 2013) (class action). The judge in the individual case issued a state-wide decision, and the defendant appealed. *See* Bostic v. Schaefer, 760 F.3d 352, 369 (4th Cir. 2014). As a result of the scope of the non-class decision and the pendency of the appeal, the other judge stayed the class action, and no further steps toward adjudication of the merits occurred in that case. *See Freedom to Marry Litigation Chart*, ACLU (Feb. 4, 2015), https://www.aclu.org/lgbt-rights/same-sex-marriage-litigation (providing procedural history of the Virginia class action and non-class cases). The parties to the class action ultimately agreed to terminate the litigation by way of a consent order proposed to the court in the non-class case. *See* Consent Motion to Suspend Briefing and Oral Argument, Harris v. Rainey, F.R.D. 486 (2014) (No. 5:13-cv-00077), *available at* http://www.plainsite.org/dockets/download.html?id=208179467&z=58b1015a.

311 *See supra* Part II.A.3.

advantage. For example, consider a company that contests the validity of a tax or regulation and thus seeks injunctive or declaratory relief against its enforcement. If the company brings suit on a class basis and obtains certification, any relief the company obtains from the application of the tax or regulation will flow to all other potential claimants. If the company brings a quasi-individual action, in contrast, the court may decide to enjoin the offending provision only as to the particular plaintiff.[312] This would give the company an advantage over its competitors—the competitors would have to continue to paying the tax or complying with the regulation, notwithstanding that a court had deemed the tax or regulation invalid.

As another example, consider a variation on the facts of *Taylor v. Sturgell*.[313] In the actual *Taylor* case, the plaintiff used the Freedom of Information Act (FOIA) to obtain a set of documents that he wanted to make broadly available.[314] Imagine instead that a corporation filed a state or federal FOIA request with the intent to use the requested documents for commercial gain.[315] The corporation's success in a quasi-individual action would allow it to use the documents without making them available to its competitors. The competitors would thus lack access to the documents, notwithstanding that a court had deemed them to be public in nature.

In either of the examples set forth above, a competitor could bring its own suit seeking the same relief as the original plaintiff obtained. Moreover, in litigation against a party other than the United States, the competitor could attempt to invoke issue preclusion to bar the defendant from relitigating questions decided in the first case.[316] Unless and until that additional litigation occurred, however, the initial plaintiff would enjoy a competitive advantage because of the selective invalidation of the defendant's unlawful conduct.

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312 *Cf.* L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644 (9th Cir. 2011) (holding that an invalid Medicare regulation should be enjoined only as to the particular plaintiff corporation). *But see supra* note 74 (discussing the D.C. Circuit's default rule that an invalid regulation should be enjoined system-wide).

313 553 U.S. 880 (2008).

314 *See* Dan Namowitz, *Brent Taylor to Lead Antique Airplane Association*, AIRCRAFT OWNERS & PILOTS ASS'N (Jan. 6, 2015), http://www.aopa.org/News-and-Video/All-News/2015/January/06/Brent-Taylor-to-lead-Antique-Airplane-Association (explaining Taylor's motivations); *see also* Taylor v. Babbitt, 760 F. Supp. 2d 80, 89 (D.D.C. 2011) (granting Taylor's FOIA request on remand).

315 The possibility that an individual or company could request FOIA information for purposes of commercial gain is more than theoretical; the recent case of *McBurney v. Young*, 133 S. Ct. 1709 (2013), involved such a request under Virginia's FOIA.

316 *See* United States v. Mendoza, 464 U.S. 154 (1984).

5. Civil Rights Enforcement

In addition to the more generally applicable concerns described above, special considerations apply when plaintiffs seek injunctive or declaratory relief in civil rights and other fee-shifting cases. Congress has enacted fee-shifting statutes in order to create incentives for plaintiffs to seek relief for injuries that implicate not only their own interests, but also those of the general public.[317] The statutes cover only an enumerated set of substantive claims, such as those involving constitutional violations or employment discrimination, and are generally designed to allow a prevailing plaintiff to recover some or all of its attorney's fees from the defendant.[318] Congress and the Supreme Court have referred to such plaintiffs as "private attorneys general" for their role in advancing important statutory goals.[319]

As compared to class treatment, quasi-individual actions weaken the efficacy and efficiency of fee-shifting statues in achieving the underlying congressional goals, for several reasons. First, as noted, the absence of class treatment increases the risk that the claim will become moot, requiring the court to dismiss the case without issuing a merits decision.[320] When that occurs, the "policy that Congress considered of the highest priority"[321] must go unenforced, at least until another potential claimant brings suit.

In addition, because a moot case cannot result in a decision on the merits, it cannot result in a *precedential* decision on the merits, which itself has value. As Pamela Karlan has explained,

> [I]f a private attorney general obtains a judgment in her favor, that judgment will often be accompanied by a judicial decision that articulates a rationale for her victory that extends beyond her particular case. . . . A private attorney general whose activities produce precedent is thus in some important ways more effective than a private attorney general whose activities produce only local change.[322]

Finally, the absence of class treatment can have an undesirable impact on the operation of fee-shifting statutes by decoupling the amount awarded from the change achieved. Courts generally award fees

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317 *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–02 (1968).

318 *See, e.g.*, 42 U.S.C. § 1988 (2012) ("In any action or proceeding to enforce a provision of [certain enumerated civil rights statutes] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee . . . .").

319 *See Piggie Park*, 390 U.S. at 402.

320 *See supra* Part I.B.4.

321 Christiansburg Garment Co. v. Equal Emp't Opportunity Comm., 434 U.S. 412, 418 (1978).

322 Karlan, *supra* note 281, at 502. Moreover, as noted *supra* Part II.C.2, even a settled class action results in a judicial decision as to the fairness of the agreement.

to private attorneys general based on the lodestar method, which multiplies the number of hours reasonably expended on the litigation by a reasonable hourly fee.[323] The presence or absence of class treatment does not affect this fee calculation.[324] The defendant in an individual case will thus pay the same amount in fees regardless of whether the court orders system-wide or plaintiff-specific relief, even though the former results in a dramatically greater vindication of the congressional goals underlying the fee-shifting statute. Similarly, depending on the nonreimbursable costs involved in obtaining class certification,[325] class counsel might receive a lower effective hourly rate for achieving system-wide relief than counsel in an individual case receives for obtaining relief only for her individual client. These effects create an unnecessarily wide gap between the public goals advanced by the litigation and the price paid by a losing defendant.

In sum, although each procedural form entails costs and benefits, on balance the class action better serves the institutional interests of the judiciary than does the quasi-individual action. By design, the class action addresses the difficulties associated with aggregate litigation in ways that the quasi-individual action does not.

III. FACILITATING THE CHOICE OF CLASS TREATMENT

The interests of the judicial system weigh in favor of class treatment for challenges seeking purely injunctive or declaratory relief against a defendant's generally applicable policy or practice, but many plaintiffs currently face net disincentives to pursuing a class action in those circumstances. Accordingly, this Part sets forth recommendations to improve the attractiveness and availability of the Rule 23(b)(2) class action to plaintiffs bringing these types of claims. Because some plaintiffs will nonetheless choose the quasi-individual form, I suggest some changes to non-class proceedings as well. Finally, I also suggest some limits on the types of changes that should be considered at this time.

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323 Perdue v. Kenny A., 559 U.S. 542, 546, 553–54 (2010).

324 I mean here that the same formula—reasonable rate times number of hours reasonably expended—applies in a class action as in a non-class case. A class action may result in a larger fee payment, due to the additional time spent on class proceedings; but as discussed in the text, that larger fee payment may also reflect a lower effective hourly rate.

325 *See supra* Part I.B.3 (noting that fee awards do not necessarily cover all certification costs).

A. *What Should Change in Class Litigation*

Robert Klonoff has persuasively argued that obtaining class certification has become too difficult, resulting in an unacceptable reduction in the compensation, deterrence, and efficiency functions of the class action device.[326] Others agree and have suggested a number of reforms designed to remove barriers to class treatment. Rather than join in that more general debate, however, I focus here on changes designed specifically to facilitate class treatment under Rule 23(b)(2) for plaintiffs seeking purely injunctive or declaratory relief based on a defendant's generally applicable policy or practice.

1. Expedited Processes

Delay forms an important part of the structural disincentives to class treatment under Rule 23(b)(2), especially because time takes on added importance in cases involving forward-looking relief. When a plaintiff seeks an injunction or declaratory judgment, the question for the court is not whether he will be compensated for an injury that occurred in the past, but whether the defendant will be permitted to continue injuring him (and those like him) on an ongoing basis. The need to halt that injury on a permanent basis creates an urgent need to resolve the plaintiff's claim.

Some class action procedures add delay without producing a corresponding benefit for the subset of cases at issue here. For example, consider Rule 23(f), which creates the opportunity to seek interlocutory review of a class certification decision. According to the Advisory Committee Notes to the amendment that added this provision, it addresses the risk that "[a]n order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation."[327] This risk does not carry any weight for plaintiffs who could obtain a system-wide order in a non-class case and who gain no economic benefits from class certification. Nor does the asserted risk to defendants—that certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"[328]—make sense in this context. Here again, because the plaintiff could obtain a system-wide order in the absence of

326 *See* Klonoff, *supra* note 67.

327 FED. R. CIV. P. 23(f) advisory committee's note (1998).

328 *Id.*

class treatment, class certification cannot itself give rise to "potentially ruinous liability."[329]

Rule 23(f) thus has no clear benefit in the context of purely injunctive or declaratory challenges to a defendant's generally applicable policy or practice, and it contributes to the risk of delay that acts as a structural disincentive to class treatment for such claims. These cases should be carved out of Rule 23(f), such that certification decisions in purely nonmonetary Rule 23(b)(2) class actions cannot be a basis for interlocutory appeal. In the absence of a rule change, circuit courts should promptly deny such interlocutory appeals and explicitly state their intention to do so in all similar cases.

Other class action procedures offer critical protections for absent class members, but those procedures take time to carry out, and in the meantime, injured plaintiffs cannot obtain a final adjudication of their claims. For example, the court's selection of class counsel must occur early in the litigation, before certification of the class.[330] The selection process aims to ensure that the class will be represented by an attorney with the experience, knowledge, and resources necessary to fairly and adequately represent class members' interests.[331] Those protections must be retained, but the time they require creates a need for the procedural regime to offer countervailing benefits.

One way to create that counterbalance would be to encourage district courts to offer expedited timelines—when setting pretrial conferences and issuing scheduling orders—to plaintiffs who choose class treatment over quasi-individual actions.[332] This would reward plaintiffs for taking the institutionally beneficial path, and would serve absent class members by speeding up the availability of any final relief. To provide the necessary benefits, the timelines should be comparable to those that would apply in an individual case.

In addition, trial courts have considerable discretion in certification decisions,[333] and they should be encouraged and permitted to exercise that discretion in favor of class treatment for purely nonmonetary claims under Rule 23(b)(2).[334] This is especially true with regard to the evidentiary requirements applicable at the certification stage. Once a defendant has acknowledged—or a plaintiff has proven—that a challenged policy or practice exists, trial courts should be able to

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329 I discuss this issue in greater detail in *Class Action Myopia*, *supra* note 43.

330 *See* FED. R. CIV. P. 23(c)(1)(B).

331 *See* FED. R. CIV. P. 23(g).

332 This suggestion has a precedent in expedited hearings for declaratory judgment actions. *See* FED. R. CIV. P. 57 ("The court may order a speedy hearing of a declaratory-judgment action.").

333 *See generally* Wolff, *supra* note 48.

334 Appellate courts could accomplish this permission and encouragement through the substance and reasoning of their decisions on certification-related issues.

make reasonable inferences about its common impact on a large set of potential claimants.

Finally, the trial court should be permitted to address dissent within the plaintiff class through subclassing and a full airing of views as to remedy, rather than by denying certification. Making class treatment unavailable because class members disagree—especially as to remedy—could lead to perverse results by excluding dissenting members of the affected group from the litigation of the group's rights.[335] The perfect must not be the enemy of the good.

Although expedited processing of Rule 23(b)(2) class actions seeking purely injunctive or declaratory relief would create a burden on trial courts in the short term, over the long term it could produce countervailing benefits to judicial economy (e.g., by reducing relitigation). Those long-term benefits, along with the reduction in other institutional harms caused by quasi-individual actions, would justify the short-term costs.

2. Reform of the "Necessity" Doctrine

Before plaintiffs can be *encouraged* to pursue class actions seeking purely injunctive or declaratory relief under Rule 23(b)(2), the "necessity" doctrine must be reformed to ensure that they will be *permitted* to do so. As discussed above,[336] although the doctrine itself remains muddled, the "vast majority" of courts have accepted that class certification can be denied in some circumstances on the basis that the court could award system-wide relief in a non-class case.[337]

Courts engaging in this analysis have failed to recognize the potential Catch-22 created by relying on the availability of system-wide relief to deny class certification in some cases while relying on the absence of a certified class to deny system-wide relief in others.[338] Moreover, application of the necessity requirement has led to relitigation that could have been avoided through class treatment. For example, relitigation has become necessary when defendants engaging in nonacquiescence refused to apply a system-wide remedy to nonlitigants in a formally individual case.[339] Because of relitigation issues and similar concerns, some courts have applied a modified version of the doctrine that considers factors such as whether the case

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335 *See* Rhode, *supra* note 6, at 1194–96; Wilton, *supra* note 27, at 637.

336 *See supra* Part I.A.

337 MOORE, *supra* note 49, § 23.43[4].

338 *See supra* Part I.B.2.

339 *See, e.g.*, Morel v. Giuliani, 927 F. Supp. 622 (S.D.N.Y. 1995); Bizjak v. Blum, 490 F. Supp. 1297 (N.D.N.Y. 1980). *See also supra* note 46 (discussing *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985)). For a discussion of nonacquiescence generally, see *supra* Part II.B.3.

presents a risk of mootness, whether the defendant has committed to applying a system-wide remedy without class certification, and whether the defendant has a history of noncompliance or nonacquiescence.

Importantly, "appellate courts have not been required to rule on the propriety of the application of the necessity doctrine at the time of class certification."[340] The existing appellate case law comes not from interlocutory appeals pursuant to Rule 23(f),[341] but from appeals taken after the lower court has already granted system-wide relief.[342] Often, the appellate decision occurs after the defendant has promised or begun to apply the relief to nonlitigants.[343]

The procedural posture of the case law creates an opportunity for courts to reform, rather than repudiate, the necessity doctrine under Rule 23(b)(2).[344] In the existing precedential decisions, the reviewing court knew that the case had not become moot, that the trial court had not declined to issue system-wide relief, and that the defendant had not refused to extend that relief to nonlitigants (at least, not yet).[345] The reasoning and outcomes of these decisions suggest that the doctrine could be reframed as a type of harmless-error analysis; if the reviewing court already knows that certification would have made no difference, it might reasonably decline to disturb the status quo.

Two tweaks should be made, however, in order to account for the tenuousness of relief for nonlitigants in quasi-individual actions. First, the reviewing court should not find the failure to certify harmless unless the nature of the violation allowed for only one possible remedy, or the trial court developed a record sufficient to conclude that there was no meaningful dissent among potential claimants as to the appropriate remedy to pursue. Second, the court should make its decision subject to revision in the event that the defendant later declines to apply the remedy to nonlitigants, or changed circumstances otherwise illuminate deficiencies in the relief granted.

If and when the application of the necessity doctrine does reach an appellate court on interlocutory review, the court should require certification in order to avoid the harms that quasi-individual actions

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340 *See* Tenny, *supra* note 45, at 1027. As noted previously, the Supreme Court has not ruled on the doctrine at all. *See supra* note 48 and accompanying text.

341 FED. R. CIV. P. 23(f) (authorizing discretionary interlocutory appeals from certification decisions).

342 *See* Tenny, *supra* note 45, at 1025 n.39.

343 *See id.* at 1026–27.

344 I intend this discussion to apply only to challenges seeking purely injunctive or declaratory relief against a defendant's generally applicable policy or practice, and express no view on discretion not to certify in other types of cases, especially those involving individualized monetary relief. For a discussion of broader questions about courts' discretion not to certify, see Wolff, *supra* note 48.

345 *Cf.* Tenny, *supra* note 45, at 1026 (noting that appellate courts reached decisions under the necessity doctrine by using information unavailable to the trial court).

can cause. Moreover, any assertions about the perceived harms of the class action should be closely interrogated—especially because, once the briefing and taking of evidence as to the certification decision have been completed and the interlocutory appeal has been taken, the parties have already paid most of the procedural costs. If no dissent exists among the affected class members and the trial court needs no information about absentees in order to accord appropriate system-wide relief, the burdens of a post-certification class action should be essentially the same as those involved in an individual case; and if dissent does exist or the court does need further information, it cannot be said that certification is truly unnecessary.

3. Fee-Shifting Incentives

Convincing a plaintiff to pursue class treatment would do little good if her attorney was unwilling to file a class action and she was unable to find one who was. Accordingly, in addition to making the Rule 23(b)(2) class action device more attractive to the plaintiffs themselves, an effective set of changes would also make it more attractive to their counsel. This is especially important in civil rights and other cases covered by fee-shifting statutes, where market forces alone do not provide adequate incentives to representation, and where fee awards may not cover the full costs of litigating a class action.[346]

Congress intended for fee-shifting statutes to create parity between lawyers for civil rights plaintiffs and those with paying clients, but under current case law, the statutes fall far short of that goal. No fee may be awarded unless the litigation results in a consent decree or a favorable judgment on the merits;[347] a private settlement or strategic change in policy by the defendant, for example, yields no fee.[348] Counsel may be ethically obligated to waive his fee if the defendant so demands in exchange for providing plaintiffs with the requested relief.[349] When a court does award a fee, it will start by multiplying a reasonable hourly fee by the number of hours reasonably spent on the litigation;[350] if the court deems counsel's actual rate or time to be too high, it will reduce

346 *See supra* Part II.C.5.

347 *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001).

348 *See generally* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007).

349 *See* Evans v. Jeff D., 475 U.S. 717 (1986).

350 *See* Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986).

them in the calculation of this "lodestar" amount.[351] The lodestar amount must be adjusted to reflect the "degree of success obtained" in the litigation,[352] but it can be increased for superior performance only under "rare and exceptional" circumstances.[353] It cannot be increased to reflect the risk that some cases will result in no fee recovery,[354] precluding counsel from spreading that risk among a portfolio of cases.[355]

Fee-shifting statutes thus create poor incentives for counsel to take on civil rights claims in general,[356] and because the amount received by the attorney does not depend on the number of people who benefit from his work, they offer little to no additional incentive to pursue class actions in particular.[357] The abundance of room for improvement creates the possibility of reinterpreting or revising fee-shifting statutes to encourage counsel to favor class treatment over quasi-individual actions. In particular, fee-shifting statutes should be interpreted to allow an upward adjustment for class treatment based on the greater "degree of success obtained"[358] relative to a quasi-individual action. Alternatively, the statutes should be amended to explicitly permit courts to make such adjustments. The adjustments should take the form of a multiplier that reflects the cost savings that the defendant achieved through class treatment as compared to relitigation by individual members of the class.

The proposed multiplier would improve the economic incentive for attorneys both to represent fee-shifting clients in cases seeking purely injunctive or declaratory relief and to pursue their claims for the benefit of the entire class of persons affected. The improved incentives could increase competition for the position of class counsel, which in turn could result in stronger representation of the class, improving judicial decisionmaking and benefitting absent class members. This competition could also reduce the agency problems between the class

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351 *Cf.* RENDLEMAN, *supra* note 56, at 505 ("My observation is that judges and courts are parsimonious with statutory fees.").

352 Hensley v. Eckerhart, 461 U.S. 424, 436 (1983).

353 *See* Perdue v. Kenny A., 559 U.S. 542, 552 (2010).

354 *See* Burlington v. Dague, 505 U.S. 557 (1992).

355 *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 257 (2004) ("[F]or any 'no win, no pay' structure, it is crucial to look not just at the economic incentives at the case level but also at the economic incentives at the practice or portfolio level.").

356 Burbank et al., *supra* note 96, at 678 ("A for-profit sector attorney weighing only economic considerations will not represent plaintiffs on the expectation of a fee award if she also has the opportunity to be paid at a comparable rate, in a timely fashion, and not contingent on prevailing.").

357 *Contra* Nagareda, *supra* note 8, at 241 ("Fee-shifting provisions in civil rights statutes . . . provide incentive for mandatory class litigation, even of the pure[ly] injunctive or declaratory variety . . . .").

358 *See* Hensley v. Eckerhart, 461 U.S. 424, 434–36 (1983).

and its counsel, as an attorney will likely be more attentive to a client's interests if he faces a realistic risk that he will be replaced.[359]

A multiplier would also reduce defendants' current incentives to drag their feet in class litigation in order to delay relief, because the defendant would have to pay more for the time any dilatory tactics caused class counsel to expend. This would help to address problems of delay. Moreover, a reasonable multiplier would not cause unfairness to the defendant, because it would reflect the defendant's own cost savings and the scope of its policy or practice.

A class multiplier could thus help to promote class treatment in a fair and consistent manner. In addition, by facilitating the choice of class treatment over quasi-individual actions, the proposed change would promote broader vindication of the congressional goals served by fee-shifting statutes.

B. *What Should Change in Non-Class Litigation*

Some plaintiffs value their ability to control the litigation highly enough that they would proceed on a non-class basis even in the presence of the reforms set forth above. Because quasi-individual actions will continue, courts must oversee them in a manner that reflects the importance of broad participation and the potential for divergence as to remedy, particularly when making decisions as to intervention. Although overly lax intervention standards can quickly render litigation unmanageable, it will often be possible to find a middle ground that recognizes the valid outcome- and process-based interests of the potential claimant group without compromising manageability.

In quasi-individual actions involving indeterminate remedies, courts should consider the extent of claimant participation as a factor in deciding the appropriate scope of the relief to be granted. Courts must also bear in mind, however, the legitimacy issues associated with determining that a system-wide violation exists without granting system-wide relief.[360] Expressly articulating these conflicting concerns could begin to bring some clarity to the currently incoherent case law regarding the issuance of system-wide relief in non-class cases.[361] Moreover, although limiting the scope of relief granted in particular cases would not solve issues related to participation or preclusion, it

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359 *See* Nagareda, *supra* note 8, at 173 ("For [counsel in] class actions, no less than for other monopolies, the prospect of entry by a would-be competitor can operate to discipline the exercise of monopoly power, even without entry actually occurring.").

360 *See supra* text accompanying note 82.

361 *See supra* Part I.B.2.

could help to push plaintiffs towards class treatment in the cases in which it is most needed.

C. *What Should Not (Yet) Change*

Although approaches other than those set forth above could achieve the goal of promoting class treatment for challenges seeking purely injunctive or declaratory relief based on a defendant's generally applicable policy or practice, some options should not be on the table. In particular, plaintiffs should not be forced to bring class actions under Rule 23(b)(2).[362] As discussed below, respect for litigant autonomy and the current barriers to class treatment both counsel against an outright prohibition on quasi-individual actions.

Although litigant autonomy under the Federal Rules of Civil Procedure is not absolute, as noted previously,[363] requiring some plaintiffs to invoke the class form would represent a much greater imposition on autonomy than existing rules.[364] For example, consider Rule 19, which can require a plaintiff to bring in certain other parties so that they may protect their own interests.[365] Although a mandated-class-action rule might at first appear similar to this rule in terms of its impact on litigant autonomy, two considerations set the situations far apart. First, a class action will by definition involve a group of potential plaintiffs "so numerous that joinder of all members is impracticable."[366] Second, a class representative must "fairly and adequately protect the interests of the class."[367] It is one thing to say that a plaintiff must bring a small number of individuals into court so that they can protect their own interests; it is quite another to say that a plaintiff must bring in a far larger group and represent all of their interests herself.

Moreover, courts and lawmakers have recently erected significant barriers to class treatment.[368] Having made it more difficult for plaintiffs to use the class action device, it would be perverse for those same courts and lawmakers to turn around and require them to use it—without removing any of the barriers they would face. It is possible that there may come a time when obstacles to class treatment are minor enough—

362 For a contrary argument, see Wilton, *supra* note 27. Whether class treatment should be required for truly indivisible relief under Rule 23(b)(1)(A) is beyond the scope of this Article.

363 *See supra* Part II.B.2.

364 As Robert Bone has explained, these existing restrictions result from "a balanc[ing] of institutional considerations," and may be justified in terms of plaintiffs' "general duty to conduct litigation with due regard for fairness to other litigants and for the integrity of the institution of adjudication itself." Bone, *supra* note 228, at 618.

365 *See* FED. R. CIV. P. 19.

366 FED. R. CIV. P. 23(a)(1).

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

368 *See generally* Klonoff, *supra* note 67.

and the risks of harm from quasi-individual actions severe enough—that courts and lawmakers may reasonably restrict plaintiffs' ability to proceed on a non-class basis. The current state of class action law, however, demonstrates that such a time remains in the future, not the present.

CONCLUSION

When a defendant engages in a generally applicable policy or practice, each affected individual holds the right to sue over a claim that is truly identical—factually and legally—to every other claim. This creates an inherent tension between the commonly held claim for injunctive or declaratory relief and the individual right to pursue it in court. No silver bullet exists for resolving that tension, but as a device actually designed for the resolution of commonly held claims, the class action represents a vast improvement over the quasi-individual form.

Although Rule 23(b)(2) has the capacity to facilitate outcomes and processes that are institutionally preferable to those facilitated by quasi-individual actions, the current incentive structure pushes many plaintiffs to choose the formally individual path. This Article has therefore offered means of facilitating the plaintiff's choice of class treatment for such claims. If implemented, although they would involve short-term costs, these changes could generate long-term benefits for litigants, interested nonparties, and the judicial system as a whole.