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AGGREGATION AND CONSTITUTIONAL RIGHTS

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Constitutional rights can impact large groups, yet most plaintiffs in civil rights cases bring individual claims. Critics of the Supreme Court's decisions regarding class actions, such as Wal-Mart Stores, Inc. v. Dukes,[1] *have argued that the Court adopts unduly restrictive interpretations of class action procedures. I trace the problem deeper into the substance of constitutional doctrine. The Court has defined certain constitutional rights to require highly individualized inquiries. For example, Fourth Amendment excessive force claims, the bread and butter of constitutional tort litigation, often require an individual analysis of the reasonableness of the search. As a result, courts may deny class certification citing to a lack of common issues. Other constitutional rights—ranging from due process rights, criminal procedure rights, equal protection claims, and takings claims—similarly resist aggregate treatment. The* Wal-Mart *ruling—although procedural—will have a disproportionate impact on particular substantive areas of the law, even within civil rights litigation. I suggest that this confluence of procedural rulings and change in constitutional doctrine was not anticipated nor is it entirely desirable. I explore changes to subconstitutional remedial doctrine and statutes that could rekindle aggregate constitutional litigation, as well as associational standing rulings that facilitate group litigation. If constitutional litigation becomes a purely solitary affair, sporadic cases may have an outsized impact, but in an* ad hoc *way that provides poor notice to government officials. Aggregation can improve clarity, legitimacy, participation, and representation. Bigger lawsuits may sometimes be better—particularly when developing constitutional values.*

* Roy L. and Rosamund Woodruff Morgan Professor of Law, University of Virginia School of Law. I thank for their invaluable comments, Kerry Abrams, Samuel Issacharoff, Jennifer Laurin, Alexander Reinert, George Rutherglen, and Larry Walker, and participants in a panel at the 2012 SEALS conference.

1 131 S. Ct. 2541 (2011).

INTRODUCTION

Constitutional rights and remedies are not just individual rights. Interpretation of constitutional provisions alters the structure and obligations of government and rights and responsibilities of citizens. Constitutional law affects groups, groups pursue impact litigation to press forward new constitutional theories, and courts supervise injunctions requiring government bodies to comply with constitutional norms. Despite the group-based nature of some civil rights litigation and the impact of constitutional litigation on groups, individual plaintiffs chiefly bring civil rights litigation in constitutional tort suits. Why is that?

One reason is that class actions seeking group-based civil rights remedies may be difficult to bring. This is no surprise to observers of the Supreme Court's recent class action decisions, particularly the high profile ruling in *Wal-Mart v. Dukes*,[2] decertifying a massive nationwide class action seeking remedies under Title VII, a civil rights statute, and calling for "rigorous" merits assessment of commonality prior to class certification.[3] The Court called the *Wal-Mart* class action, in which plaintiffs sought individualized relief, inconsistent with the historical purpose of the applicable class action provision, which grew out of "a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order."[4] The history of the evolution of civil rights class actions has been unexpected and little examined.[5] Groundbreaking 1968 revisions to the class action rule, Federal Rule of Civil Procedure 23, sought to facilitate civil rights class actions seeking injunctions. The Court has repeatedly noted Rule 23(b)(2) was designed for "[c]ivil rights cases against parties charged with unlawful, class-based discrimination."[6]

All of the Justices agreed with the portion of the *Wal-Mart* decision narrowing 23(b)(2) practice to such civil rights actions seeking injunctions.[7] The Court's still broader ruling (contested by the dissenters) required a searching merits examination of the threshold

2 *Id.*

3 *Id.* at 2551.

4 *Id.* at 2558.

5 For a piece exploring the origins of Rule 23(b)(2) in concerns arising from the civil rights movement, see David Marcus, *Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702–08 (2011).

6 Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997).

7 Thus, the *Wal-Mart* dissenters agreed that 23(b)(2) was not appropriate ("I agree with the Court [that this class action] should not have been certified under Federal Rule of Civil Procedure 23(b)(2).") but argued that it could be certified under 23(b)(3). *Wal-Mart,* 131 S. Ct. at 2561 (Ginsburg, J., dissenting).

Rule 23(a) requirement of commonality (that there be common questions of fact and law shared by the putative class members).[8] Observers predicted a negative impact not just in Title VII class actions, but also civil rights class actions more broadly.[9] However, the *Wal-Mart* decision will affect some types of civil rights class actions far more than others. That is because for some time now, the Court has defined a range of constitutional rights to require individualized inquiries, which may then run afoul of the commonality requirement.

For example, Fourth Amendment use of force claims, the bread and butter of constitutional tort litigation, require an individual inquiry regarding the reasonableness of the use of force.[10] As a result, a court may deny class certification citing a lack of common issues in the class. For related reasons, individual victims may have a difficult time pursuing injunctive relief to improve police policies. Other constitutional rights—ranging from due process rights, criminal procedure rights, Equal Protection Clause claims, and Takings Clause claims—similarly resist aggregate treatment as well as injunctive relief.[11] Why? The Court has elaborated "totality of the circumstances" or "individualized suspicion" or "materiality" or other context-specific tests. The story is mixed; for other constitutional claims, some involving the same Bill of Rights or Fourteenth Amendment provisions, the Court has expanded or narrowed rights, but in ways that do not hinder aggregation. At the same time, the Court has developed doctrines regarding standing and official immunity, as well as remedial barriers, that each created individual issues frustrating civil rights class actions.[12]

Over time, constitutional substance and not procedure may explain the decline of civil rights class actions. The number and proportion of class actions brought in federal civil rights cases has appar-

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8 FED. R. CIV. P. 23(a)(2).

9 *See* Erwin Chemerinsky, *New Limits on Class Actions*, TRIAL, Nov. 2011, at 54, 54 ("Wal-Mart does not end the ability of plaintiffs to bring employment discrimination class actions. . . . Despite this, class actions will be more difficult to bring."); David G. Savage, *Supreme Court Blocks Huge Class Action Suit Against Wal-Mart*, L.A. TIMES, June 21, 2011 (quoting law professor John Coffee commenting that "it largely eliminates the monetary threat facing big employers"); Nina Totenberg, *Supreme Court Limits Wal-Mart Discrimination Case*, NPR.ORG (June 20, 2011), http://www.npr.org/2011/06/20/137296721/supreme-court-limits-wal-mart-discrimination-case (quoting civil rights attorney David Sanford, stating "[t]his is a disaster not only for civil rights litigants but for anyone who wants to bring a class action").

10 *See infra* Part II.A.2.

11 *See infra* Part II.A.

12 *See infra* Part II.B.

ently fallen over the years.[13] There are many potential explanations, but it is possible at least that the Court's rulings have over time rendered some constitutional rights unsuitable to class action resolution. Regardless, no clear lines can be drawn because Congress has also at times enacted new civil rights statutes that are not directly tied to Bill of Rights provisions, but rather grounded in Commerce Clause power.[14] Those statutes are far more amenable to class treatment—though not always intentionally so. The Court has repeatedly stepped in, as in *Wal-Mart*, to impose limits. The Court has restricted access to class actions asserting bare constitutional claims and claims under federal civil rights statutes. In both respects, the civil rights class action has not fulfilled its promise. The result not only makes litigation outcomes more unpredictable for plaintiffs and for government, but it provides a poor forum for development of constitutional doctrine. The role of aggregation in civil rights litigation may need to be reconsidered from the ground up.

In Part I, I describe how in the areas of mass torts, securities litigation, antitrust, and others, courts, scholars and legislators have over time come to recognize that the class action device redefined aspects of the civil system by affecting the content of substantive rights.[15] By permitting mass litigation, the rise of modern class actions practice not only changed the way cases were handled procedurally, but it also affected how courts interpreted common law and statutory substantive rights. This connection between class action procedure and substantive rights also exists in regards to constitutional litigation, but the relationship has not been developed.[16] Nevertheless, scholars increasingly appreciate the role that procedure and remedies play in the development of constitutional rights.[17] That literature has not taken

13 *See infra* Part II.

14 *See infra* Part II.C.

15 *See infra* Part I.A. On the general connection between substantive law and aggregation, see AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.03, cmt. a–b, at 105–07 (2010).

16 *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 478; Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1643 (2000) (facilitating aggregation in consumer class actions "the substantive law has dispensed with requiring consumers to directly prove reliance and instead imposed either strict liability, a rebuttable presumption of reliance, or a hybrid that presumes the seller will be held accountable for its affirmative representations").

17 *See* Brandon Garret & James Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261, 324–27 (2004); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 113 (1999); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 6–8 (2002); Daryl J. Levinson, *Rights Essentialism*

stock of the advent of the class action, modern nonparty preclusion law, as well as other procedural developments that have reshaped constitutional litigation.

Part II explores unintended procedural results of substantive constitutional rulings, examining Eighth Amendment, Fourth Amendment, Equal Protection Clause, Takings Clause, and criminal procedure claims.[18] The constitutional text rarely includes any language that addresses issues of individualized or aggregate proof. Instead, the Supreme Court to an unappreciated degree has in its rulings scaled constitutional rights. In other respects, the Court adopts constitutional rules that define the harm as a group harm suited to aggregate resolution. Even different theories under the same constitutional provision may be either amenable or totally incompatible with aggregate treatment. Remedies have also been individualized, in ways that hinder aggregate litigation, with an exception: the Court's associational standing cases that highlight the advantages of group litigation.

Part III develops a theory of the relationship between democratic accountability and aggregation. Our overly individualized constitutional litigation system does not generally compensate individuals well, although in some cases it can. Many constitutional tort suits founder on official immunity and other procedural defenses. Nor does our system deter system-wide constitutional violations well. An alternative to a class action is an individual suit seeking injunction, which may challenge a statute or practice that also affects the public, and may set an important precedent. However, individual injunctions are not clearly enforceable by non-parties, making class actions highly preferable when challenging statutes, policies, and practices. When damages and not injunctions are sought, *ad hoc* individualized litigation may compensate individuals some of the time, but it can also have perverse results. It is a poor way to develop constitutional law (and indeed, in part for that reason, the Court has increasingly encouraged

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and Remedial Equilibration, 99 COLUM. L. REV. 857, 857 (1999); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 249–52 (1988); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1016 (2004).

18 I have previously developed how individualized criminal procedure rights, accompanied by changes in habeas corpus procedure, have undesirably hindered systemic claims regarding criminal procedure violations in federal (but not necessarily state) courts. *See generally* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383 (2007).

lower courts to rule on non-merits grounds.)[19] The constitutional tort lottery may result in windfalls to a few injured individuals but not most others. Judgments impose damages on a few officers, which insurance will usually cover, while supervisors and policymakers are left off the hook.

In contrast, class action litigation can focus on systemic issues,[20] creating more efficient mechanisms to remedy harms, and perhaps vindicating rights in a way that is more legitimate from a democratic perspective. All members of a group have rights in the litigation and can benefit from the remedy. While counsel and interest groups may drive the litigation, conversely, idiosyncratic individual plaintiffs will not. Indeed, some constitutional rights may be particularly suited for aggregate treatment precisely because they protect groups that are otherwise disadvantaged in the political process.

I conclude by describing how several changes in sub-constitutional and remedial doctrine could change the balance in favor of the aggregate over the individual. In aggregate cases, individualized limitations on remedies need not bar aggregate relief to the class, including injunctions, though they may limit liability for damages to individual plaintiffs. The Court has also expressed concern for ensuring plaintiffs have proper standing to address matters of government policy. The fact that a case is a class action should affect the standing analysis, just as it does when an association or organization brings a case. Prioritizing injunctive remedies—and rules that are not unduly individualized—may better develop the interests at stake when developing constitutional rights.

A litigation system that prioritizes the aggregate may better address systemic constitutional violations. The Court may continue down the path of individualizing rights, but doing so does not effectively insulate Government. Instead, it provides poor notice to officials, creates an *ad hoc* system for compensation, and provides an unsuitable litigation forum for developing the meaning of the Constitution.

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19 Pearson v. Callahan, 555 U.S. 223, 242 (2009) (abandoning the two-step *Saucier v. Katz*, 533 U.S. 194 (2001), procedure in which merits of a constitutional claim were considered before reaching issue of qualified immunity).

20 David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 847–53 (2002).

I. Class Actions and Constitutional Rights

A. Class Actions and Substantive Rights

The class action, as a procedural mechanism, may not by its terms impact underlying substantive rights. The Rules Enabling Act forbids that any Rule of Civil Procedure "abridge, enlarge or modify any substantive right."[21] However, judicial decisions regularly interpret substantive rights without reference to any procedural rule. In so doing, courts may be influenced by the procedural background and not just interpretation of substantive rights in a vacuum. The advent of class action litigation dramatically reshaped major areas of civil litigation. Courts then interpreted underlying substantive rights in response.

The class action mechanism, governed by Federal Rule of Civil Procedure 23, permits aggregation in which a representative of a class may join and bind claims of persons not before the court as formal parties.[22] In the years immediately after the 1966 revisions creating modern Rule 23, early critics noted this procedural innovation might have a wide impact on the substance of the law. Geoffrey Hazard explained "substantive law is shaped and articulated by procedural possibilities," and particularly where common law rights tended to be highly individualized, "the rules of the common law are legal responses to single transactions, each hand-tailored," and the likely result of aggregate class action litigation would be definition of rights in a less individualized way.[23] In the first decade following the 1966 revisions, commentators focused on the rule drafters' central procedural justifications for the rule as providing the means to permit more efficient adjudication of large numbers of claims, particularly those with small value which otherwise would go unremedied.[24] However, a few scholars described already visible effects on how courts interpreted substantive law. Hal Scott, for example, called the class action a "catalyst" for expansive interpretation in securities fraud.[25]

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21 *See* 28 U.S.C. § 2072(a)–(b) (2006).

22 *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all . . . .").

23 Geoffrey B. Hazard, *The Effect of the Class Action Device upon the Substantive Law, in* 58 F.R.D. 307, 307, 309 (1973).

24 William Simon, *Class Actions—Useful Tool or Engine of Destruction?, in* 55 F.R.D. 375, 376 (1972).

25 Hal S. Scott, *The Impact of Class Actions on Rule 10b-5, in* The Structure of Procedure 86, 86–95 (Robert M. Cover & Owen M. Fiss eds., 1979); *see also* Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971) (discusssing class actions in antitrust context).

One cannot attribute cause to procedure and effect to substantive law. Changes facilitating aggregation both in substance and procedure may both have been common reactions to what Arthur Miller called in 1979 "the mass character of contemporary American society and the complexity of today's substantive regulations."[26] Perhaps aggregation was in the air. Perhaps there was a general optimism about public law judging and the promise of citizen suits in the courts.

Scholars noted within a few years after passage of the revisions that courts had relaxed the requirement of a showing of "reliance," in securities class actions brought under § 10(b) of the 1934 Securities Exchange Act and the SEC's Rule 10b-5.[27] Showing each stockholder's individualized reliance on a misrepresentation would render an action involving thousands or hundreds of thousands of stockholders impracticable.[28] In response, for "pragmatic reasons," where "class actions provide the only effective remedy for open market investors," the lower courts' proceeded to innovate a "fraud on the market" theory of aggregate reliance that "relaxed" the reliance requirement and made securities class actions feasible.[29] In 1988, the Supreme Court endorsed the fraud on the market theory, altering the nature of proof required to permit a generalized inquiry into what would mislead a

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26 *See* Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 666–69 (1979).

27 *See* 17 C.F.R. § 240.10b-5 (2005). A plaintiff must "allege, in connection with the purchase or sale of securities, (1) a misstatement or an omission (2) of material fact, (3) made with scienter (4) on which plaintiff relied (5) that proximately caused [the plaintiffs'] injury." Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 661 (5th Cir. 2004).

28 The Advisory Committee noted the problem but left the issue open:

> [A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representation made or in the kinds or degrees of reliance by the persons to whom they were addressed.

FED. R. CIV. P. 23(b)(3) advisory committee's note.

29 Simon, *supra* note 24, at 382 ("Courts apparently think ignoring these elements make unmanageable cases manageable."); *see* Morris v. Burchard, 51 F.R.D. 530, 536 (S.D.N.Y. 1971); Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements In Certain Open Market Transactions*, 62 N.C. L. REV. 435, 440 (1984) ("[Courts] unwilling to destroy the utility of the class action suit in securities fraud litigation, sought to relax or even eliminate the reliance requirement.").

reasonable investor.[30] Of course, Congress then perceived that securities class actions became too easy to file, and heightened pleading and other requirements.[31] The Court itself acted to limit aggregation in 2005 by individualizing certain causation requirements.[32]

Aggregation accompanied legal change in other areas as well.[33] The California Supreme Court ruled in 1971, the year that California adopted similar class action revisions, "[f]requently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all."[34] State courts proceeded to develop in consumer cases rules of reliance that similarly permitted aggregate proof, based in inferences or an objective reasonable person standard.[35]

Far more broadly, strict products liability in tort replaced the requirement of showing individualized proof of negligence. Similarly, in contract law, the implied warranty of merchantability under Section 2-314 of the Uniform Commercial Code replaced an objective inquiry into the basis of the bargain, with the need to show individual reliance on a representation made.[36] Those developments, whether related to the development of aggregate litigation or not, made "mass torts" cases and products liability cases far more amenable to class action resolution.

Apart from changes in definitions of substantive rights, innovations in remedial law also facilitated aggregation by expanding reme-

30 *See* Basic Inc. v. Levinson, 485 U.S. 224, 244 (1988) ("With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. . . . The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price." (quoting *In re* LTV Sec. Litig., 88 F.R.D. 134, 143 (N.D. Tex. 1980))); Issacharoff, *supra* note 16, at 1649–50.

31 *See* Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737.

32 *See* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 337 (2005) (rejecting rulings that securities class action plaintiffs may adequately plead loss causation by alleging that a misrepresentation artificially inflated the stock price at the time of purchase).

33 *See* Patrick Higginbotham, *Class Action Litigation*, 41 N.Y.L. SCH. L. REV. 343, 344 (1997) ("Today, the law of class actions consists of a set of legal cultures that revolve and oscillate around distinct substantive areas of the law. The law of class actions in the antitrust field is different from the law of class actions in the securities field, and the law of class actions with regard to discrimination cases is also different in the same way. We cannot back away from this interplay of substance and procedure.").

34 *See* Vasquez v. Superior Court, 484 P.2d 964, 968 (Cal. 1971).

35 *See* Issacharoff, *supra* note 16 at 1634, 1643–53.

36 *See id.* at 1644.

dies available to a class. Concepts of "fluid recovery" obviated necessity of showing individualized damages, and though the Supreme Court rejected the approach in certain circumstances, states have adopted it and federal courts still use the approach, particularly to distribute damages in class actions that settle.[37] Medical monitoring claims permitted class-wide equitable remedies in mass tort cases, making injunctive-relief only class actions far more favorable.[38]

Thus, in several substantive areas, courts relaxed common law or statutory requirements of individualized showings. These rulings facilitated class action aggregation in areas where large numbers of people would predictably be affected by the same conduct. Those substantive rulings explained the remarkable changes in class action practice following the procedural changes to the federal rule when it was revised.

B. Origins of Class Actions in Public Law Litigation

While recent class action controversies concerning mass tort litigation increasingly caused commentators to examine the connection between aggregation and the underlying substantive rights, that connection remains unexplored in constitutional litigation.[39] Yet a central goal of aggregation has long been to facilitate vindication of

37 Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973) (rejecting the fluid recovery concept); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION §§ 21.66, 21.662 (4th ed. 2004). *But see* Six (6) Mex. Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990) ("Federal courts have frequently approved this remedy [fluid recovery for distribution of unclaimed funds] in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly."); *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 179, 185–86 (2d Cir. 1987) ("[S]ome 'fluidity' is permissible in the distribution of settlement proceeds." (citations omitted)). *See generally* California v. Levi Strauss & Co., 75 P.2d 564 (1986) (outlining various methods of fluid recovery and providing guidance for selecting the appropriate method).

38 *See, e.g.*, *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 787–88 (3d Cir. 1994) (outlining elements for certification of a medical monitoring claim); Linda S. Mullenix, *Federal Practice: Complex Litigation—Medical Monitoring*, NAT'L L.J., Mar. 29, 1999, at B17; Pankaj Venugopal, *The Class Certification of Medical Monitoring Claims*, 102 COLUM. L. REV. 1659, 1673–74 (2002).

39 *See generally* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006) (examining "the proper relationship between aggregation and the remedial scheme set forth by the legislature in the underlying substantive law"). The prevalence of settlements in the vast majority of class actions certified makes analyzing the role of substantive law difficult. *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 143 (1996) ("The percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settle-

constitutional and civil rights. The Federal Rule of Civil Procedure providing a class action mechanism, Rule 23, was amended in 1966 at the civil rights era's height.

The Advisory Committee "explained that (b)(2) was inspired by the civil rights litigation then taking shape."[40] Rule 23(b) was crafted to offer class-wide injunctive relief in archetypical cases "in the civil-rights field where a party is charged with discriminating unlawfully against a class."[41] Drafter Benjamin Kaplan noted at a meeting during the drafting of the rule that, "if by any chance the desegregation case could be found by a judge not to be a class action after the adoption of the rule, we would of course be in a very, very bad way."[42]

Why did civil rights litigation call out for changes to the class action mechanism? Class actions had not been, early on, a central part of the litigation surrounding the civil rights movement. In the first landmark civil rights cases, such as *Brown v. Board of Education*,[43] civil rights lawyers brought test cases in which a carefully selected individual plaintiff brought a claim, not a class of affected individuals. Rulings by the Supreme Court had a stare decisis effect on all litigants. Perhaps a class action would be superfluous.[44] John Bronsteen and Owen Fiss asked, "what is to be gained" by seeking injunctive relief using a class action, since after all, "[i]f the named plaintiff brings suit individually and wins, then the defendant will be bound to act in a way that confers benefits on the entire class—to desegregate the schools—and that obligation can easily be enforced by all the members of the class."[45]

However, the drafters of the modern Rule 23 knew that civil rights litigants had encountered a series of obstacles that federal courts placed in the path of individuals seeking to enjoin unconstitutional racial segregation in the South. Some federal courts raised concerns whether they could order broad injunctive decrees in cases

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ment rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%.").

40 John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1433 (2003) (citation omitted).

41 FED. R. CIV. P. 23(b)(2) advisory committee's note.

42 *See* Marcus, *supra* note 5, at 657 (citing Transcript of Session on Class Actions 10 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.)).

43 377 U.S. 483 (1954).

44 *See* Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of* Cooper v. Aaron, 58 U. DET. J. OF URB. L. 573, 574 (1981).

45 *See* Bronsteen & Fiss, *supra* note 40, at 1433.

brought by individual plaintiffs.[46] Further, as David Marcus has carefully explored, "[t]o defeat desegregation litigation, most southern state legislatures replaced de jure policies of segregation with mechanisms that purported to treat blacks as individuals but invariably produced the same segregated results."[47] Judges had initially held that such policies created individual issues and potential conflicts in proposed class action litigation.[48] The substantive equal protection law post-*Brown* was interpreted in a way that frustrated common remedies. Thus, as James Pfander writes,

> By treating the plaintiffs as individuals . . . rather than as members of a class, the courts played into the hands of massive resistance. . . . Class action treatment might have facilitated a speedier challenge to such laws, cutting through the ordinary rule that individuals must exhaust their administrative remedies before bringing suit to challenge administrative action.[49]

Substantive equal protection law then shifted. Judges over time interpreted the underlying substantive command of *Brown* in a way that facilitated class actions, interpreting the Rule to require an affirmative obligation to desegregate and not simply to offer individual students freedom of choice. As Marcus explains, "[b]ecause it made individual litigant characteristics substantively irrelevant, the shift to the systemic integration interpretation of Brown facilitated the prosecution of desegregation suits as class actions."[50]

In addition, to prevent litigation regarding integration of schools in the wake of *Brown*, local government in the South imposed onerous administrative requirements to delay litigation, such as requiring black students to apply for a transfer to the white district, and then delaying decision or denying this application.[51] Some courts had held that if a single individual enjoined an unconstitutional government action, then perhaps only that plaintiff could claim its benefit by suing for contempt should the government fail to comply. After all, absent a class action, only named parties are bound by a judgment; due process and standing doctrine reflect "the general prohibition on a liti-

46 *See* Marcus, *supra* note 5, at 680 ("[U]ntil 1963, when the Fifth Circuit decided the important case of *Potts v. Flax*, courts doubted that they could issue broadly applicable injunctions in individual actions. . . . A student-by-student approach to desegregation litigation posed enormous difficulties and all but nullified *Brown*.").

47 *Id.* at 683.

48 *Id.*

49 James E. Pfander, *Brown II: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 71 (2006).

50 Marcus, *supra* note 5, at 688.

51 Pfander, *supra* note 49, at 71.

gant's raising another person's legal rights . . . ."[52] Perhaps subsequent courts would abide by the earlier decision, but the prior trial court decision would not be binding precedent. 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.[53] This could raise great practical difficulties, particularly in school desegregation cases where original plaintiffs might face threats and be reluctant to come forward, or the case might be moot as against that plaintiff (say if the plaintiff graduated from the school) and where government was frequently in contempt.

A class action provides important benefits in a civil rights case seeking injunctive relief. A decade later, some of the practical concerns concerning enforcement by non-parties would be addressed by the Court's decision in *Parklane Hosiery*,[54] permitting non-mutual collateral estoppel to allow non-parties to come forward and rely on the prior judgment.[55] Nevertheless, the *Parklane* standard is flexible and its application not definite. Nor can plaintiffs using preclusion pursue contempt and directly enforce the original injunctive decree. New parties would have to file entirely new actions, with the application of non-mutual issue preclusion somewhat uncertain. Further, while government might voluntarily choose to abide by an injunction as to non-parties, or simply withdraw an unconstitutional policy, should officials not comply and non-parties try to bring a challenge, courts have often held that non-parties are not formally bound.[56] Nor might all affected

52 Allen v. Wright, 468 U.S. 737, 751 (1984).

53 Doe v. Rumsfeld, 341 F. Supp. 2d 1, 17 (D.D.C. 2004). For a 1963 Fifth Circuit case noting uncertainty in the lower courts, but concluding, that even without certifying a class action, "[t]he very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated," see Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963). For additional cases expressing uncertainty about circumstances under which an injunction may benefit non-parties, see Califano v. Yamasaki, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."); NLRB v. Express Publ'g Co., 312 U.S. 426, 435 (1941) ("A federal court has broad power to restrain 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."); *Rumsfeld*, 341 F. Supp. 2d at 17–18 ("Government-wide injunctive relief for plaintiffs and all individuals similarly situated can be entirely appropriate" but "the appropriate scope is in the court's discretion.").

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

55 *Id.* at 333–37.

56 Some commentators have noted that class actions seeking injunctive relief may not always be strictly necessary to practically bind government. *See* 7AA CHARLES ALAN

by the noncompliance be aware of the prior settlement or judgment. All of these reasons explain the importance of Rule 23(b)(2) for civil rights cases seeking injunctions.

As noted, the experiences of civil rights litigants in the South deeply concerned the drafters of Rule 23. As then-NAACP legal director Jack Greenberg recounts, "Civil rights and class actions have an historic partnership."[57] Indeed, Greenberg noted:

> Professor Albert Sacks, who was Associate Reporter of the revised rules, was intimately familiar with civil rights litigation and had in mind the role of class actions in civil rights litigation in formulating the rule. (For years he was an instructor at legal training sessions of the NAACP Legal Defense and Education Fund and was a consultant to the Fund.)[58]

The new Rule 23, as Abram Chayes wrote, "confirmed the self-image of public interest lawyers as spokesmen for large groupings toward which they had duties and responsibilities different from those of the ordinary lawyer-client relationship."[59]

WRIGHT, ARTHUR R. MILLER & MARY ANN KANE, FEDERAL PRACTICE & PROCEDURE § 1785.2, 428–447 (3d ed. 2005); *see also* 32B AM. JUR. 2D FEDERAL COURTS § 1705 ("An action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of an action in which a class action designation under Rule 23(b)(2) is largely a formality since the judgment would run to the benefit not only of the named plaintiffs but also of all others similarly situated where the state officials have made it clear that they understand the judgment to bind them with respect to all claimants."). However, the class action is a formality if state officials agree to be bound with respect to all claimants. *See, e.g.*, Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973) (recognizing certification as a formality because the State agreed to be bound by the judgment with respect to all claimants and withdrew its challenge to the policy before the court's ruling). As a formal matter, non-parties are not bound by a judgment in an individual case, and the "usual rule" is "that litigation is conducted by and on behalf of the individual named parties only." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982) (quoting *Califano*, 442 U.S. at 700–01). Therefore, courts in individual cases, as noted, may or may not in their discretion extend the injunction to bar enforcement against non-parties, depending perhaps on whether class-certification is necessary to provide relief adequately to the named party. *See* Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n, 263 F.3d 379, 393 (4th Cir. 2001) ("In this case VSHL is the only plaintiff. An injunction covering VSHL alone adequately protects it from the feared prosecution."); Hernandez v. Reno, 91 F.3d 776, 781 (5th Cir. 1996) ("Class-wide relief may be appropriate in an individual action if such is necessary to give the prevailing party the relief to which he or she is entitled."); *supra* note 57.

57 Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997).

58 *Id.*

59 Abram Chayes, *The Supreme Court 1981 Term: Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 27–28 (1982).

The drafters had two broad types of civil rights remedies in mind when they developed the new Rule 23.[60] The four threshold requirements of Rule 23(a) are: (1) numerosity (there must be a class so large that "joinder of all members is impracticable");[61] (2) commonality (there must be "questions of law or fact common to the class");[62] (3) typicality (the claims or defenses brought by class representatives "are typical . . . of the class");[63] and (4) adequacy of representation (the class representatives "will fairly and adequately protect the interest of the class.").[64] Each of those requirements can pose particular problems for certain types of civil rights class actions. Next, Rule 23 creates two broad types of class actions, *voluntary* and *mandatory*, and in civil rights cases they can be described by the remedy chiefly sought, either damages or injunctive relief. As noted, the drafters thought of injunctive relief class actions under Rule 23(b)(2) as archetypal class actions. However, damages class actions also became an important vehicle in civil rights actions.

1. Damages Class Actions

Consider the interests of an individual civil rights plaintiff. That person might be most interested in receiving financial compensation for injuries, and not in changing the system by seeking an injunction. Class actions seeking primarily damages remedies under can be formed pursuant to Rule 23(b)(3) when the members of the putative class share "questions of law or fact" in common, and "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[65] Chief Judge Michael Boudin has called Subsection (b)(3) "the cute tiger cub that has grown into something unexpectedly fearsome in civil rights and mass tort litigation."[66] The chief rationale for the enactment of this provision goes to the core of the efficiency that the modern class action rule promises—to make litigation of small claims economically feasible. As the Supreme Court has explained, "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual

60 *See* Benjamin Kaplan, *A Prefatory Note,* 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) ("The reform of Rule 23 was intended to shake the law of class actions free of abstract categories contrived from . . . bloodless words . . . and to rebuild the law on functional lines . . . .").

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

62 FED. R. CIV. P. 23(a)(2).

63 FED. R. CIV. P. 23(a)(3).

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

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

66 Tardiff v. Knox Cnty., 365 F.3d 1, 4 (1st Cir. 2004).

suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."[67]

Despite their benefits, damages class actions raise dangers that attorneys may be opportunistically motivated by their recovery rather than the interests of class members.[68] Unlike class actions brought under Rule 23(b)(1) and (2), Rule 23 mandates that all putative damages class members under (b)(3) be afforded notice and an opportunity to opt-out.[69]

As will be discussed below, rulings by the Court after the passage of the modern Rule 23 made litigation of damages issues in civil rights cases more complex. In contrast to private law cases discussed above, which at times obviate necessity for individualized proof of damages, § 1983, the core federal civil rights right of action has been interpreted to require individual proof of a plaintiff's "actual damages" though also permitting symbolic recovery of nominal damages.[70]

2. Injunctive Relief Class Actions

As described, Rule 23(b)(2) permits a mandatory class action if plaintiffs seek primarily injunctive or declaratory relief.[71] The provision is "mandatory" because plaintiffs need not be provided with individual notice and an opportunity to opt-out,[72] as the remedy sought would—as a practical matter—bind all parties. This provision was "designed specifically for civil rights cases seeking broad declaratory

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67 Deposit Guar. Nat'l Bank. v. Roper, 445 U.S. 326, 339 (1980).

68 *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348–62 (1995); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 928–29 (1998); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

69 *See* FED. R. CIV. P. 23(c)(2)(B).

70 *See also* Daly v. Harris, 209 F.R.D. 180, 197 n.5 (D. Haw. 2002) ("[T]he fluid recovery system, as a method of aggregating damages as opposed to a distribution method, would not be appropriate here since Section 1983 requires proof of actual damages.").

71 *See* FED. R. CIV. P. 23; *supra* text accompanying notes 56–59.

72 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833–34 & n.13 (1999). *See generally* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (examining the right to opt out in the context of class actions in which a majority of the class members' claims do not warrant individual prosecution).

or injunctive relief."[73] As a result, injunctive classes "have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct [was] central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct."[74] An injunction, as a practical matter, may benefit the entire class, requiring less individual participation.

Of course, an injunction may also be sought by an individual person in a challenge to the constitutionality of a government law, policy, or practice. But as noted, extending the benefits of that injunction to a class of similarly situated individuals can face a series of obstacles, including that courts may not grant an injunction so broad as to bar enforcement of the unconstitutional rule or practice against the class if it is an individual case. In addition, class members can be compensated if there are also damages sought in addition to an injunction. Nevertheless, the special treatment of injunctive class actions in Rule 23 reflects how injunctions provide a remedy that benefits a group, if not the public, regardless of the degree to which all affected actually participate in the litigation.

Injunctive relief-only class actions might not be economical where the injunctive remedy does not chiefly include damages to compensate class members and from which attorneys could obtain a contingency fee.[75] The drafters of Rule 23 may have had in mind organizations like the NAACP that were nonprofits and not chiefly seeking economic rewards through litigation. However, Congress intervened to make the economics of such litigation more attractive by passing a statute adopting a "private attorneys general" rational, seeking to entice lawyers by entitling award of attorney's fees to "prevailing" civil rights parties.[76]

The *Wal-Mart Stores, Inc. v. Dukes* decision may have an outsized impact on Rule 23(b)(2) in that it appears to more sharply require a remedial choice. That is, all of the Justices agreed that 23(b)(2) can-

73 2 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 4.11, at 62 (4th ed. 2002); *see* FED. R. CIV. P. 23(b)(2) advisory committee's note (1966 amend.) ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class . . . ."); George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 688 (1980).

74 Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 57 (3d Cir. 1994).

75 *See* Thomas E. Willging et al., *supra* note 39, at 91 (reporting study results that "the median fee award was considerably smaller for (b)(2) class counsel when compared to fees in nonsecurities (b)(3) cases").

76 *See* Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2006).

not be used to secure an injunction in a case where there is more than just incidental monetary relief. Justice Ruth Bader Ginsburg began her dissent by stating that "[t]he class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2)" where the plaintiffs sought "monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available."[77] The majority opinion authored by Justice Antonin Scalia did not precisely reach whether an injunctive relief class action could include some damages to compensate class members. Instead, it concluded that not only was backpay a form of monetary relief,[78] but that it was the "individualized" nature of the monetary relief that precluded resolution under Rule 23(b)(2). Justice Scalia emphasized how "the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order."[79] Therefore, the Court held that "the combination of individualized and classwide relief" was inconsistent with the remedial choice dictated by the structure of Rule 23, which separates the three subsections of 23(b) based on the type of remedy sought.[80] The Court interpreted that separation to be strict.[81]

Civil rights litigants must pursue compensation and an injunction in separate actions—lest their desire to obtain monetary compensation for their injuries result in dismissal of the action seeking to enjoin future civil rights violations. In each case, the litigants must make a remedial choice. Forcing plaintiffs to use 23(b)(3) when seeking compensation may promote greater fairness in the distribution of monetary remedies, since 23(b)(3) requires notice and provision of opt-out rights. However, faced with that choice, fewer plaintiffs lawyers, except perhaps at nonprofit firms, may choose to bring injunctive relief-only class actions in which compensation will be slight.[82]

77 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (Ginsburg, J. dissenting).

78 For criticism of this aspect of the Court's ruling, see Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. 34, 45 (2011) ("The Court's unanimous conclusion that back pay was not appropriate for the type of class action certified in *Dukes* was surprising. This gratuitous decision effectively reversed almost a half-century of Title VII jurisprudence permitting back pay under such circumstances.").

79 *Wal-Mart*, 131 S. Ct. at 2558.

80 *Id.*

81 *Id.* at 2559.

82 *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013) (describing how some courts have required plaintiffs to assert all possible claims in a class action, in the guise of scrutinizing adequacy of representation, and potentially preventing plaintiffs from later asserting Section 1983 suits, although

Enjoining constitutional violations will have to be its own reward—that and statutory attorneys fees—which, of course, Congress could enhance to make 23(b)(2) actions more attractive after *Wal-Mart*. So far, this suggests that *Wal-Mart* may reduce the economic incentives to bring 23(b)(2) class actions, but it will not affect classic injunctive-relief only civil rights class actions under 23(b)(2). As I will develop, that may not turn out to be right either, for some types of constitutional rights.

C. Aggregation of Defendants in Civil Rights Cases

Government interests may be aggregated when defendants are joined together. In many civil rights cases, the plaintiffs sue several individual government officers, who are thus joined in one lawsuit, though they may retain separate counsel. They may also sue the government entity itself, if it is a local (municipal) entity and not the state, which enjoys sovereign immunity. One unnoticed feature of the Supreme Court's decision in *Monell v. Department of Social Services of New York*,[83] which permitted a municipal entity to be sued, was to promote one type of aggregation of defendants in civil rights cases, by permitting suits against the government entity responsible for policy, supervision, and training.

The Court, however, increasingly individualized civil rights litigation in cases seeking monetary damages against individually named government defendants. The Court changed the qualified immunity standard so that a judge need not any longer ask whether the government official acted with subjective intent to violate the constitution, which required a highly individualized showing.[84] Instead, a judge asks an only slightly less individualized question, requiring the plaintiff to show that no reasonable official would have acted as the defendant did in light of then-clearly established federal law. Even if several officials were involved in alleged unconstitutional acts, the inquiry

noting that some courts have not done so); *see also* Edward F. Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 484–85 (2011) (discussing the preclusive effect of separating class equitable claims from individual damage claims). As Klonoff points out, the Court in *Wal-Mart* did suggest that the "strategy of including only back pay claims" in the case could create a "possibility" that their "compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from . . . ." Klonoff, *supra*, at 60 (quoting *Wal-Mart*, 131 S. Ct. at 2559). As Klonoff describes, the "notion that lawyers must assert all conceivable claims to avoid adequacy attacks . . . is the antithesis of effective advocacy." *Id.* at 62.

83 436 U.S. 658 (1978).

84 *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 242 (2009).

must be conducted as to each individually. Thus, qualified immunity doctrine does more than protect officers and reduce costs of constitutional innovation.[85] Qualified immunity doctrine also limits the efficiency gain of joinder of multiple individual officers as defendants. In addition, lower courts have held one must show a defendant's "personal involvement" in the violation, which for supervisors may require a showing that they either participated in the relevant acts, or condoned it, such as by acting with "deliberate indifference."[86]

In other respects, the Court has also ruled so as to individualize damages awards as against the Government. The Court requires that an individual officer have violated the Constitution as a predicate to a suit that also seeks to hold the municipal entity liable. The Court has already increasingly required proof that the claimed constitutional violation was, if not the product of a facially unconstitutional policy, then representative of some larger pattern of violations or "deliberate indifference" on the part of the Government entity. The Court's recent *Connick v. Thompson*[87] decision is an example, finding that a lack of policies and training on the fundamental duty of prosecutors to disclose exculpatory evidence, together with past instances of violations, did not show that the office itself was sufficiently at fault.[88] The ruling may not surprise observers of the Court's *Monell* jurisprudence, which sets a high bar for what constitutes a subject so "obvious" that it would be considered deliberately indifferent for policymakers to fail to effectively train or supervise on it.

The result is that absent a facially unconstitutional policy, civil rights litigants must show violations by individual government actors—but also a high degree of aggregate responsibility by the entity itself. In contrast, government policies (and to a lesser extent practices) may be enjoined, affecting government in the aggregate, but as will be developed in the Parts that follow, the ways that some constitutional rights are defined, and remedial case law, may make injunctive relief remedies far less effective than they should be.

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85 *See generally* Jeffries, *supra* note 17 at 87 (recognizing that a right-remedy gap is embedded in our current doctrine of constitutional law).

86 *See, e.g.*, Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) ("It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." (quotation omitted)); Jones v. City of Chicago, 856 F.2d 985, 992–93 (7th Cir. 1988) (noting that supervisors must act "either knowingly or with deliberate, reckless indifference").

87 131 S. Ct. 1350 (2011).

88 *Id.*

D. Benefits of Aggregation in Civil Rights Cases

To briefly preview the discussion in Part III regarding the benefits of aggregation in civil rights cases, in either type of class action, for damages or injunctive relief, aggregation provides a series of procedural benefits. First, the "policy at the very core" of aggregation is achieving efficiency through economies of scale.[89] In situations where low-value cases would not be "economically feasible" if brought alone, the Court notes "aggrieved persons may be without any effective redress unless they may employ the class action-device."[90] Not only plaintiffs, but defendants may benefit by avoiding piecemeal litigation, and in the same way courts can benefit from economies of scale.[91] Further, civil rights cases may frequently involve rights violations that are difficult to quantify and do not result in large amounts of individual damages.

Aggregation may result in greater equality in results.[92] As will be discussed, the Court has often complained of the *ad hoc* nature of constitutional tort litigation and the danger that local government will face inconsistent verdicts or be held to unexpected constitutional standards. Aggregate treatment can regularize litigation and avoid burdensome, piecemeal litigation with inconsistent results for plaintiffs, and for government actors. In cases that seek an injunction, an individually obtained injunction would practically resolve the constitutional question.

Aggregation may also improve the legitimacy and the quality of adjudication in civil rights cases, even in those seeking solely an injunction. A class action may permit greater participation by affected

89 *See* Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

90 Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

91 *See* FED. R. CIV. P. 23(b)(3) advisory committee's note (1966 amend.) ("The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered.").

92 *See* FED. R. CIV. P. 23(b)(1)(A) advisory committee's note (1966 amend.) ("Actions by or against a class provide a ready and fair means of achieving unitary adjudication."); *see also In re* Ephedra Prods. Liab. Litig., 314 F. Supp. 2d 1373, 1375 (J.P.M.L. 2004) ("Centralization under Section 1407 is thus necessary in order to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary."); Alexandra D. Lahav, *The Case for "Trial by Formula"*, 90 TEX. L. REV. 571, 571 (2012) (advocating outcome equality by using more statistical analysis).

parties than through intervention in a suit by a single plaintiff. Aggregation may also provide improved access to representation; better lawyers may be attracted to a class case involving larger issues and greater financial rewards. Similarly, plaintiffs may have access to better expert assistance given the stakes in a class action seeking injunctive relief.

Plaintiffs and defendants may have better access to information. Civil rights cases seeking to demonstrate patterns of violations and the need for injunctive relief or even structural reform might benefit from pooling of information gathered from class members, as well as the deterrent effect of collective participation (and the award of class-wide attorneys' fees).[93] As the Second Circuit explained in a class action challenging strip searches of detainees: "Absent class certification and its attendant class-wide notice procedures, most of these individuals—who potentially number in the thousands—likely never will know that defendants violated their clearly established constitutional rights, and thus never will be able to vindicate those rights."[94] The Supreme Court has permitted in some circumstances, consideration of aggregate evidence as part of a decision whether to enjoin government actors.[95] Finally, plaintiffs and defendants may have better access to judicial resources if judges focus more of their attention on class actions, in part perhaps due to the procedural steps built into Rule 23.

Aggregation also has costs. It may not be effective or allowed where the underlying law defines access to relief as individual, as in the early post-*Brown* cases. If individual entitlement to relief varies, there may be outright conflicts of interest that would make aggregation unattractive or problematic. Indeed, a class-wide injunction may be objectionable to members of a class—although they may intervene to object whether it is a class action or individual case. If representation is not adequate, the ramifications for plaintiffs in a class action may be greater. Certainly, the costs of a class action remedy may be far greater and more burdensome on the government in a class action, or on private actors in a statutory civil rights case against a corporation.

II. Individualized and Aggregated Constitutional Rights

As one group of researchers concluded, "[t]he data tell us that *the world of class actions . . . was primarily a world of Rule 23(b)(3) damage*

93 *See, e.g.*, Lesley Frieder Wolf, Note, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 Colum. L. Rev. 1847, 1848 & n.4 (2000).

94 *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 229 (2d Cir. 2006).

95 Rogers v. Lodge, 458 U.S. 613 (1982) (providing an example of a case where statistical, historical, other aggregate evidence were all considered).

class actions, not the world of civil rights and other social policy reform litigation that . . . the 1966 rule drafters had in mind."[96] In examining cases brought in 1995 and 1996, they found that civil rights cases represented 14% of reported opinions.[97] The most recent Federal Judicial Center study of class actions examining the impact of the Class Actions Fairness Act (CAFA), and examining federal filings from 2001 to 2007, found a "noticeable decline" in civil rights class actions, of seventeen percent in absolute numbers, and from 14% to 7% of total class action filings.[98] The vast majority of class actions filed in federal courts were labor cases, chiefly under the Fair Labor Standards Act (FLSA) and Employment Retirement Security Act (ERISA), constituting 27% of federal class actions, securities class actions (13%), and contract class actions (10%).[99]

If that decline is real and in fact represents a consistent trend and not a temporary aberration, there may still be a host of reasons for that observed decline, including, for example, changes in substantive law, procedural law (like the CAFA), or in background compliance with civil rights and constitutional law. However, though civil rights class actions have not constituted a large proportion of the class action practice in federal courts, the perception remains that civil rights cases present "easy" issues for courts and are routinely certified as class actions.[100] This view is mistaken, at least concerning some constitutional rights. In a range of contexts, the Supreme Court acted to sharply individualize the inquiry into whether a class action is appropriate in a civil rights case. The relationship between aggregation and underlying civil rights is both complex and sometimes counterintuitive. The sections that follow develop a series of constitutional rights that the Court individualized, each of which exists alongside related theories, which more easily permit aggregate litigation. Second, I will discuss rulings that individualized remedies for rights violations. Third, I will describe how in response to some of these

96 DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 52–53 (2000).

97 *Id.*

98 THOMAS E. WILLGING & EMERY G. LEE, III, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 10 (2006), *available at* http://www.classactionlitigation.com/CAFA_Report_0906.pdf (presenting report of results of long term study of federal class action filings from July 1, 2001 through June 30, 2005).

99 *Id.*

100 *See* Willging et al., *supra* note 39, at 86–88 (concluding based on study of four federal district courts that civil rights class actions were "routine" and "easy cases" that are readily certified as class actions, though noting the small number of such cases in the study group).

decisions, Congress has intervened with statutes that facilitate aggregation but also by enacting statutes that seek to limit aggregation.

A. Individualized Constitutional Rights

A series of constitutional rights remain highly individualized and therefore difficult to assert in damages class actions that require commonality and predominance. The Supreme Court individualizes rights in a variety of ways: regarding the definition of the right violation itself, or regarding other elements of the right such as causation, or regarding defenses that the government might raise to rebut presumptions of a violation. The Court may do so to simply make it difficult to obtain a remedy for a violation of a right except in egregious cases. The Court may view the right as requiring a case-specific inquiry, based on text or purpose or other interpretative methods. The Court may view a brighter-line rule as unduly burdensome on government. In contrast, the Court may seek to create brighter-line to give notice to government. As Fred Schauer has prominently developed, general rules may be advantageous for a host of reasons.[101] They more readily protect the interests of the broader public. They may be more difficult to evade and may simplify proof. They provided clearer notice. On the other hand, they may be less adaptable and flexible. Difficult substantive choices all impact the scaling of a right and therefore the ability to pursue aggregate remedies. It would be far beyond the scope of this piece to comprehensively describe differences as to the individualized or aggregated definitions of various constitutional rights. Instead, I provide a set of particularly illustrative examples to show differences in the Court's approach to the substance of the constitutional right and the impact on aggregate litigation.

1. The Eighth Amendment

Requirements that a plaintiff satisfy a showing of subjective government intent to violate the constitution render the inquiry a highly individualized one. In Eighth Amendment cases involving prison conditions, the Court has ruled that plaintiff must satisfy both an objective prong and a subjective prong that the government official (usually a prison guard) acted with "deliberate indifference," under the circumstances.[102] Eighth Amendment claims by prisoners commonly

101 FREDERICK SCHAUER, PLAYING BY THE RULES (1993).

102 *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."); Amy Laderberg, Note,

involve allegations concerning prison conditions such as provision of adequate medical care,[103] personal security from violence by other inmates, excessive force by corrections officers (which requires a showing of an "unnecessary and wanton infliction of pain"),[104] and punitive measures taken against prisoners.

The Court in *Wilson v. Seiter*[105] specifically rejected the argument advanced by the plaintiffs that there should be a different showing in a case alleging systemic violations and not a single act. The plaintiffs had hoped to avoid the need to show that officials acted with a particular malicious mental state, but rather to rely on evidence of systemic violations. The Court held that there was no difference between the need to show an individual official's state of mind in a "one-time" versus a "systemic" violation, arguing that the word "punishment" in the Eighth Amendment implies a mental state that must be present to make out a claim.[106] However, the Court also cited to policy reasons supporting individualization of the inquiry, where in particular cases there may be "composite conditions" that resist "pigeonholing."[107] The Court explained that

> [u]ndoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a "condition of confinement" and the other is not—much less that the one constitutes "punishment" and the other does not.[108]

As a result, plaintiffs attempting to bring a class action concerning prison conditions must show that officials engaged in "deliberate indifference," both showing that the conditions are objectively unconstitutionally inadequate and subjectively manifesting deliberate indif-

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The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse, 40 WM. & MARY L. REV. 323, 329 (1998).

103 *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103 (1976).

104 *See* Hudson v. McMillian, 503 U.S. 1, 6–7 (1992).

105 501 U.S. 294 (1991)

106 *See id.* at 300 ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*.").

107 *See id.* at 300–02 ("Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind . . ."). *But see* Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994) (allowing fact finder to make inferences about prison official's state of mind by examining circumstantial evidence).

108 *Wilson*, 501 U.S. at 299 n.1.

ference through an "unnecessary and wanton infliction of pain."[109] Those requirements pose problems where prisoners would need to show that policymakers possessed "deliberate indifference" towards the entire class.[110] Those objective and subjective requirements both pose obstacles to aggregate handling of cases involving medical treatment of prisoners, although many prisons have special mental health or medical needs.[111] As one court explained in denying class certification in a case alleging inadequate prison dental care:

> Cases involving personal injury and inadequate medical care are particularly fact specific . . . . In order to prove the objective element of an Eighth Amendment claim, a plaintiff must first show that he had a condition that required dental care; second, that he did not receive adequate dental care; third, that he suffered significant injury or harm; and fourth that the injury or harm was causally related to the inadequate care. Each plaintiff's case would necessarily be different.[112]

Similarly, litigation regarding prison discipline or use of force or security from self-harm or harm by other inmates may require "examination of the unique circumstances surrounding each incident alleged to constitute a constitutional deprivation."[113] In addition, the Prison Litigation Reform Act (PLRA)[114] imposes limitations on the ability to obtain injunctive remedies to correct systemic prison conditions deficiencies.[115]

More generalized claims regarding prison policies may be more readily litigated through class actions, or for that matter, in individual suits seeking injunctions. The Court has cautioned that remedies should be narrowly tailored to any constitutional violation and Con-

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109 Ingraham v. Wright, 430 U.S. 651, 670 (1977) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)).

110 *See* Lowery v. Mich. Dep't of Corr., 16 F.3d 1220 (6th Cir. 1994).

111 *See* Maureen Mullen Dove, *Law and Fact of Health Care in Prisons*, 44 DEC. MD. B.J. 4 (2011) (generally discussing the status of prisoners' healthcare rights).

112 Smith v. Sheriff of Cook Cnty., 2008 WL 1995059, at *2 (N.D. Ill. May 6, 2008) (No. 07C3659); *see also* Shook v. Bd. of Cnty. Comm'rs, 2006 WL 1801379, at *4 (D. Colo. June 28, 2006) (No. 02-cv-00651-RPM) (denying class certification in Eighth Amendment challenge to provision of mental health services in Colorado Springs jail, noting "inherent complexities in determining what persons present a need for treatment of mental disorders while confined").

113 *Shook*, 2006 WL 1801379 at *9.

114 Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e (2006).

115 For example, the court must find prospective relief "narrowly drawn" and such relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A).

gress has limited access to such remedies in the PLRA.[116] However, some violations may even, according to the Court, be considered "'in combination' . . . when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets."[117] Such an inquiry is more easily conducted in the aggregate under substantive due process decisions.

Perhaps due to the dramatic evidence of systemic deficiencies compiled in the record by the lower court, and perhaps because the state itself "conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights," the Supreme Court in the October 2010 term in *Brown v. Plata* upheld a remarkable injunctive order in a class action for the release of thousands of California prisoners.[118]

Thus, class actions premised on prison conditions may be pursued and aggregate proof may be relevant. However, in contrast to suits based on general conditions such as overcrowding, food, and sanitation premised on a highly deferential "reasonably safe conditions" standard, class actions based on conditions that the courts have considered more individual in nature, such as personal safety or adequate medical care, do not as readily receive class treatment (with extreme cases like *Brown v. Plata* as perhaps the exception). Settlements or consent decrees could potentially encompass such additional issues, but aggregate relief may be far more difficult to pursue for such theories standing alone.

2. The Fourth Amendment

The Fourth Amendment establishes a series of rights commonly the subject of § 1983 litigation, including the requirement that arrests may be made only if police have probable cause, the prohibition on unreasonable searches and seizures, the Court's rule that a "stop and frisk" must be supported by "reasonable suspicion,"[119] and regulation of police use of force, including deadly force.[120] As to some of these

116 *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

117 Wilson v. Seiter, 501 U.S. 294, 304 (1991); *see also* Youngberg v. Romeo, 457 U.S. 307, 314–25 (1982) (holding that the State has substantive due process obligation to ensure safety of involuntarily committed mental health patients). *See generally* Marisol A. v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996) (same).

118 Brown v. Plata, 131 S. Ct. 1910, 1922, 1926 (2011).

119 Terry v. Ohio, 392 U.S. 1, 10, 37 (1968).

120 *See, e.g.*, Scott v. Harris, 550 U.S. 372 (2007) (discussing the use of force in a high speed chase).

rights, the constitutional text arguably calls for an individualized inquiry. For example, the concept of "probable cause" implies an individualized question whether a particular search or seizure was reasonable under the circumstances. Perhaps to obtain damages for a violation, an individual inquiry must be conducted, which would tend to frustrate aggregate treatment. Courts have denied class certification for classes of individuals alleging false arrest, for that very reason.[121] Alternatively, however, courts could define classes of searches and seizures that are per se unreasonable, which could then support aggregate litigation. The Court has adopted both approaches depending on the context, making some Fourth Amendment class action litigation common and most quite rare.

For example, the Court has reaffirmed that in the context of police use of deadly force the inquiry is context-specific and does not forbid the use of particular police practices; a court must examine the totality of the "facts and circumstances of each particular case."[122] Class actions may be easier to bring in the situation where a large group of people, say at a political demonstration, were subjected to, say, common "command decisions to disperse the crowd."[123] Otherwise, however, each individual use of force must be evaluated on its own terms. Class actions regarding the use of excessive force, therefore, are quite rare; as one court explained, "[c]laims of excessive physical force require a case-by-case analysis of the circumstances in order to determine whether the amount of force used in each scenario was commensurate with the perceived need for force."[124] One would have to show that police behaved in the same unconstitutionally excessive way in similar-enough circumstances so as to justify class-wide relief. As a result, the bread and butter of § 1983 practice, litigation of claims of excessive police force, focuses on individual incidents and individual compensation, and rarely on issues raised in class actions, regarding systemic police policy or practices.

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121 *See, e.g.*, McCarthy v. Kleindienst, 741 F.2d 1406, 1413 (D.C. Cir. 1984) ("[T]he liability determination in the present case is likely to turn upon highly individualized proof, [where] probable cause may have existed for . . . some putative class members.").

122 Graham v. Connor, 490 U.S. 386, 396 (1989).

123 Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles, 246 F.R.D. 621, 635 (C.D. Cal. 2007).

124 Jones 'El v. Berge, 2001 WL 34379611, at *14 (W.D. Wis. Aug. 14, 2001) (No. 00-C-421-C) ("Because the inquiry is highly individualized, plaintiffs' claim that the physical force used against mentally ill inmates at Supermax is excessive does not pass the typicality or commonality prerequisites to class certification under [Federal Rule of Civil Procedure] 23(a).").

For other Fourth Amendment rights, the constitutional text does not speak to whether individual fact-specific showings must be made. The Court interprets the right to require such a showing, at least under some theories of liability. The Court holds that a stop and frisk must be supported by individualized reasonable suspicion, based on the circumstances of the individual stop.[125] That Fourth Amendment doctrine provides police with "enormous discretion."[126] The type of class action brought commonly on behalf of arrestees relates not to whether the arrest itself was supported by probable cause, but the situation where law enforcement adopts a "blanket policy" that does not make a reasonable suspicion judgment at all—such as a policy of strip-searching all detainees regardless whether the officers possessed reasonable suspicion (and in that context, the Court's ruling in *Florence v. County of Burlington* made such suits far more difficult by holding that at least for those placed in the general population, such blanket strip-search policies are constitutional).[127] Class actions alleging racial profiling, bringing Fourth Amendment but also Equal Protection claims

125 *See* Terry v. Ohio, 392 U.S. 1 (1968).

126 *See* David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 107 (2007).

127 Florence v. County of Burlington, 132 S. Ct. 1510 (2012). For class actions predating that ruling, see, for example, *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 229–30 (2d Cir. 2006) (noting class definition "referenced only defendants' 'blanket policy,' thus avoiding questions of probable cause" and that though the question remains "whether, regardless of the policy, some plaintiffs were strip searched based upon 'reasonable and contemporaneously held suspicion,'" that defense "'does not . . . foreclose class certification'" (citations omitted)); Tardiff v. Knox Cnty., 365 F.3d 1, 6 (1st Cir. 2004) ("[T]he individualized-suspicion issue will arise only in a limited number of cases, assuming always that plaintiffs can establish as a background fact the existence of an improperly broad strip search rule, policy[,] or custom."); Eddleman v. Jefferson Cnty., 1996 WL 495013, at *1 (6th Cir. Aug. 29, 1996) (No. 95-5394) (certifying class in which strip searched plaintiffs had been arrested for "minor, nonviolent offenses"); Bame v. Dillard, 2008 WL 2168393 (D.D.C. May 22, 2008) (No. 05-1833 (RMC)) (certifying case in which strip searches, not arrests, were litigated); Calvin v. Sheriff of Will Cnty., 2004 WL 1125922, at *3–5 & n.2 (N.D. Ill. May 17, 2004) (03-C-3086) ("[I]n the event that defendants believe that specific searches or classes of searches had a reasonable antecedent justification, defendants are not precluded from offering proof that the subjects of those searches should be excluded from the class."); Maneely v. City of Newburgh, 208 F.R.D. 69, 78–79 (S.D.N.Y. 2002) (denying class certification as to constitutionality of individual searches, but granting as to alleged policy of strip searching without reasonable suspicion); Doe v. Calumet City, 754 F. Supp. 1211, 1220 n.22 (N.D. Ill. 1990) ("[I]f [defendant] believed that any specific searches or classes of searches had a reasonable antecedent justification, [defendant] could have offered proof that the subjects of those searches should be excluded from the class, but it has failed to do that."). *But see* Noon v. Sailor, 2000 WL 684219, at *1 (S.D. Ind. Apr. 17, 2000) (No. NA99-0056-C-H/G) (denying certifi-

have been brought as well, and despite challenges in underlying constitutional and remedial standards, some have resulted in consent decrees, often requiring data collection to monitor the use of race in policing.[128] Sufficient common issues surrounding police policies may have made settlement the best outcome for all sides, at least when they mainly require investigating the problem further. Additional class actions challenging police practices have been certified in cases where plaintiffs could make strong showings, based on statistics or information about department practices, that a specific central policy led to a pattern of unconstitutional stops, searches, or arrests.[129]

In other circumstances the Court declares a prophylactic rule that avoids the question whether individual circumstances supported probable cause. Such bright-line rules facilitate aggregate relief. For example, in *Gerstein v. Pugh*, former detainees brought a class action seeking to challenge a policy of pre-trial detention without a warrant and without an opportunity for a probable cause determination by a judge.[130] The Court held that the Fourth Amendment requires not that the particular facts of each case be examined before a class action could be maintained, but that the policy of not granting hearings pre-trial was itself unconstitutional, and that the Constitution requires

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cation in strip searches case, citing need to "consider all the circumstances of the individual arrest, detention, and search").

128 *See, e.g.*, Daniels v. City of New York, 2007 WL 2077150 (S.D.N.Y. July 16, 2007) (No. 99 Civ. 1695(SAS)) (requiring New York Police Department to provide plaintiffs with racial profiling data on a quarterly basis); Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 64–74 (2001) (summarizing Supreme Court jurisprudence related to racial profiling); Rudovsky, *supra* note 126 at 114–15 (discussing constitutional standing in cases where there is an official "policy" to racially profile). Far more consent decrees have been the product of DOJ enforcement actions under 42 U.S.C. § 14141. *See infra* notes 230–31; *see, e.g.*, Consent Decree, United States v. Los Angeles, (C.D. Cal. June 15, 2001) (No. 00-11769 GAF), *available at* http://www.lapdonline.org/assets/pdf/final_consent_decree.pdf.

129 For a post-*Wal-Mart* ruling certifying a class action alleging racial profiling by the New York City Police Department (shortly after the expiration of the consent degree in *Daniels*, 2007 WL 2077150) and citing to "overwhelming and indisputable evidence" of a "centralized" NYPD policy concerning police stops, see Floyd v. City of New York, (S.D.N.Y. Aug. 17, 2012) (1:08-cv-01034-SAS-HBP). For additional class certifications in cases raising Fourth and Fourteenth Amendment challenges to police policies, see, for example, Stinson v. City of New York, 2012 WL 1450553 (S.D.N.Y. Apr. 23, 2012) (No. 10 Civ. 4228 (RWS)); Ortega-Melendres v. Arpaio, 836 F. Supp.2d 959, 977 (D. Ariz. 2011); Morrow v. Washington, 277 F.R.D. 172, 192–94 (E.D. Tex. 2011). *But see* Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec., 2012 WL 1344417 (S.D.N.Y. Apr. 16, 2012) (No. 07 Civ. 8224 (KBF)) (denying class certification for Latinos in New York area who have or will be subject to Immigration and Customs Enforcement home raid operation).

130 420 U.S. 103 (1975).

that there must be "a timely judicial determination of probable cause as a prerequisite to detention."[131] Such cases suggest bright-line rules can predictably facilitate class actions where officials cross the line—they also have the advantage that they provide greater notice to officials so that they need not cross that line.

3. The Equal Protection Clause of the Fourteenth Amendment

The Court has repeatedly stated that lawsuits involving claims of race discrimination "are often by their very nature class suits, involving classwide wrongs."[132] For almost a decade following the 1966 revisions, "employment discrimination lawsuits were routinely certified as class actions based on the rationale that such claims were inherently of a class nature, and presumptively appropriate for class certification."[133] This practice of reflexively certifying "across-the-board" class actions changed as the Court began to emphasize "careful attention to the requirements of Fed. Rule Civ. Proc. 23."[134]

The Court explained that "[t]he mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination."[135] Further, the Supreme Court in *General Telephone Co. of Southwest v. Falcon*, while stating that class actions are most appropriate in race discrimination cases, where "racial discrimination is by definition class discrimination," ruled that courts must strictly police whether the specific type of discrimination suffered by class representatives was shared by the entire group.[136] The Court ruled that as to the named plaintiff, though he "was passed over for promotion when several less deserving whites were advanced" which might support an individual claim, it did not support a class action regarding promotion practices in the division more generally, or regarding other employment practices such as hiring policies.[137] Thus, "to bridge that gap," between individual discrimination and group harm, a plaintiff "must prove much more than the validity of his own claim."[138] Today it may seem obvious that a named plaintiff cannot sue on behalf of others

131 *Id.* at 126.

132 E. Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 405 (1977).

133 Charles Mishkind, Alison Marshall & Walter Connolly, *The Big Risks: Class Actions and Pattern and Practice Cases,* 591 PUB. LAW INST. 329, 338 (1998).

134 *Id.*

135 *Id.*

136 Gen. Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 (1982).

137 *Id.* at 158.

138 *Id.* at 157–58.

who faced a completely different type of discrimination. However, at the time, the effect of the *Falcon* decision was to end the practice in some Circuits of routinely certifying civil rights class actions targeting general practices of discrimination, and instead focusing the district court on narrower practices supported by evidence of policies or patterns.[139] Circuits do still permit challenges to generally pervasive discrimination, but following *Falcon*, they insist on evidence of such broad patterns.[140]

The Court's *Wal-Mart Stores, Inc. v. Dukes* decision will further increase the insistence on an individualized inquiry, even in Rule 23(b)(2) cases pursuing injunctions, including by focusing courts on evidence of focused patterns of discrimination, and perhaps limited to smaller workplaces. The Court in *Dukes* heavily relied on its ruling more than three decades earlier in *Falcon,* beginning its analysis of the Rule 23(a) commonality requirement applicable to all class actions by noting "[t]his Court's opinion in *Falcon* describes how the commonality issue must be approached," and then detailing the *Falcon* ruling.[141]

However, the Court's focus in *Falcon* and *Dukes* on whether the individuals adequately represent a larger group has a very different impact depending on the context. Perhaps *Dukes* is less trans-substantive than the Court suggested. Whether members of a group have enough in common depends how the court characterizes the underlying substantive right and harm it seeks to protect. Equal protection claims may be individualized—but only under some theories of liability. In cases in which there is no showing that the decision maker acted using an explicit racial classification, a more individualized showing must be made. The Court in *Washington v. Davis*[142] rejected reliance solely on aggregate statistics showing a racially disparate impact, requiring some showing of an intent to discriminate or discriminatory purpose. In other decisions the Court made clear that there must be "stark" evidence that race is a "motivating factor" in the government decision.[143]

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139 *See, e.g.*, John A. Tisdale, *Deterred Nonapplicants in Title VII Class Actions: Examining the Limits of Equal Employment Opportunity*, 64 B.U. L. REV. 151, 171 (1984) ("The case signals an end to the procedural favoritism often granted Title VII plaintiffs by the federal courts and effectively rejects the across-the-board concept of class certification.").

140 *See, e.g.*, Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 596-98 (2d Cir. 1986).

141 *Id.* at 2552–53.

142 426 U.S. 229 (1976).

143 *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266, 270 (1977); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Lane v. Wilson, 307 U.S. 268 (1939); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

This requirement that the plaintiff show intent to discriminate may explain why in employment discrimination suits, much of the class action litigation is now brought under Title VII of the Civil Rights Act of 1964 (Title VII),[144] rather than under the Equal Protection Clause using § 1983. In cases involving group-wide harms, showing intent to discriminate by an organization, not just against a particular individual, but a class, may be prohibitively difficult absent the ability to rely on a pattern or practice of behavior. Title VII permits reliance on such a showing of disparate treatment. Indeed Congress revised provisions concerning disparate treatment in response to the decisions by the Court that made reliance on disparate impact evidence more difficult under Title VII.[145]

In other contexts, the Court similarly acted to individualize claims of race discrimination. In the death penalty context, the Court rejected in *McCleskey v. Kemp* an attempt to show race discrimination in capital sentencing by relying on aggregate, statewide statistics.[146] Thus, Judith Resnick points out that in *Dukes*, "[t]he Court does not cite *McCleskey v. Kemp* . . . but the analytic approach is similar."[147]

However, the Court admits that depending on the context, its rulings alter the showing required under the Equal Protection Clause. For example, the Court explained in *Arlington Heights* that "[b]ecause of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*."[148] Of course, the relief sought in a challenge to jury selection would typically be individual relief in a particular case. A more generous approach is also followed in voting rights cases, also relying on voting rights statutes. There the Court has held that discriminatory purpose may be inferred from statistical evidence, even where not nearly as

144 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

145 *See* 42 U.S.C. § 2000e-2(k); S. REP. NO. 101-315, at 6 (1990); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 651–53 (1989) (holding that statistical evidence in a hiring discrimination case must often include data regarding the pool of "qualified applicants," and that "[r]acial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions, even where workers for the different positions may have somewhat fungible skills").

146 481 U.S. 279 (1987). For the argument that *McCleskey* could have been brought as civil class action, see Steven Graines & Justin Wyatt, *The Rehnquist Court, Legal Process Theory, and* McCleskey v. Kemp, 28 AM. J. CRIM. L. 1 (2000).

147 Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 83 n.9 (2011).

148 *Arlington Heights,* 429 U.S. at 266 n.13 (citing Turner v. Fouche, 396 U.S. 346, 359 (1970); Sims v. Georgia, 389 U.S. 404, 407 (1967)).

"stark" as that rejected in cases such as *McCleskey*.[149] In contrast, in Title VII cases after *Wal-Mart v. Dukes*, more rigorous statistical evidence may be required; certainly the Court emphasized that mere anecdotal evidence and general regression evidence without further analysis would not suffice at the class certification stage.[150] For different theories, then, the inquiry is either individualized or generalized, affecting whether claims may be readily aggregated.

4. Criminal Procedure Claims

For constitutional criminal procedure claims, the Court has added as part of the substantive definition of the right itself, requirements that one show prejudice, or that the outcome would have been different had the state provided a fair trial. Classic examples include the *Brady v. Maryland*[151] and *Strickland v. Washington*[152] "materiality" tests. The "totality of the circumstances" test for voluntariness of confessions requires a case-specific inquiry,[153] as do the tests requiring a showing that destruction or fabrication of evidence was in bad faith.[154] I have previously explored how these individualized tests substantially hinder aggregate treatment. It is very difficult to bring a class action regarding a pattern or practice of deprivations of procedural due process rights, such as the right to effective assistance of counsel, or to be free from a coerced confession or fabrication of evidence by law enforcement.

For example, the Second Circuit ruled that where a class of juveniles alleged a pattern of coercive interrogations violating their Fifth Amendment rights, the proper remedy was "case-by-case" adjudication in hearings to suppress the confessions during their criminal prosecutions or an individual civil rights suit, but not a class action.[155] One reason cited was reluctance to interfere with the criminal pro-

149 *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 646 (1993); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993). The Court adopts the term "expressive harm" in *Bush v. Vera*, 517 U.S. 952, 984 (1996) ("[W]e also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available.").

150 Wal-mart v. Dukes, 131 S. Ct. 2541, 2557–58 (2011).

151 373 U.S. 83, 87–89 (1963).

152 466 U.S. 668, 694 (1984).

153 Dickerson v. United States, 530 U.S. 428, 444 (2000).

154 *See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (requiring showing of bad faith where potentially exculpatory evidence was destroyed by police); Napue v. Illinois, 360 U.S. 264, 272 (1959) (rule against bad faith fabrication of evidence).

155 Deshawn E. by Charlotte E. v. Safir, 156 F.3d 340, 347 (2d Cir. 1998).

cess, where the Court has held that federal courts should be highly reluctant to enjoin pending prosecutions;[156] but another was the individualized constitutional right, "because the voluntariness of a confession depends upon an examination of the totality of circumstances in each individual case."[157]

Nevertheless, aggregation is possible in cases raising systemic constitutional criminal procedure violations, as counterintuitive as that may seem in our single-case focused criminal justice system. I have previously argued courts should be more open to aggregate resolution of criminal procedure claims—perhaps before trial, before harmless error, abuse of the writ and other procedural barriers would frustrate litigation of systemic criminal procedure problems.[158] Indeed, the Supreme Court's "emphasis on a formal individualized day in court has ironically pushed lower courts to adopt aggregation as judicial self-help."[159] While changes in the law of habeas corpus have made federal courts a poor forum for such claims, they have used informal methods of aggregation, state courts have been more receptive to such suits, in part in reaction to crises in criminal defense and perceived need to resolve systemic errors that have arisen, for example, fraudulent forensic crime lab work.[160]

5. Takings Clause of the Fifth Amendment

The Takings Clause of the Fifth Amendment, which states "private property [shall not] be taken for public use, without just compensation[,]"[161] implicates several types of government action as the Supreme Court has interpreted its text, including regulations that reduce the economic value of property, outright physical takings of private property, and physical invasions of private property.[162]

Class actions involving "regulatory takings" are typically not feasible. Why are leading takings cases, like *Kelo v. City of New London*,[163] brought by individual property owners and not as class actions? As the

156 *See* Younger v. Harris, 401 U.S. 37, 55 n.2 (1971). The Court held that federal courts must abstain from enjoining pending state prosecutions except in highly extraordinary circumstances. *Id.* at 56.

157 *Deshawn E.*,156 F.3d at 347.

158 Brandon L. Garrett, *supra* note 18 at 403–04.

159 *Id.* at 449.

160 *Id.* at Part II. For a piece suggesting that to change this state of affairs, habeas corpus statutes could be altered to facilitate systemic litigation, see Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 2 (2010).

161 U.S. CONST. amend. V.

162 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005).

163 545 U.S. 469 (2005).

Federal Court of Claims explained in a case involving regulation of cigarette vending machines, "takings cases are, by their nature, factually intensive."[164] The court must focus on individual-specific questions, and as the court stated, "In evaluating whether a governmental action amounts to a taking or a mere diminution in property value (which by itself does not constitute a taking), the Court must assess the nature of the governmental action, the economic impact of the regulation on each plaintiff, and the extent to which the challenged regulation has interfered with each plaintiff's distinct investment-backed expectations."[165]

The complexity of the Fifth Amendment analysis arises from the Court's multi-factor test in *Penn Central Transportation Co. v. New York City*.[166] After all, "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case'" and described the inquiry as "essentially ad hoc, factual inquiries."[167] The Court of Claims had denied class certification, explaining that "[t]he factual intensity of a regulatory takings claim, then, pertains not only to the quantum of damages that each plaintiff claims, but also to the very question of whether or not a particular Government action has effected a compensable fifth amendment taking as to each plaintiff" and concluded that such complexities "in both the liability and damages phases of a regulatory takings claim renders inappropriate the large, multi-party case contemplated by the plaintiffs."[168]

Property owners may bring declaratory judgment action before enforcement of a regulation, and in that way obtain a ruling on the constitutionality of the rule without the need for such a class action.[169] In cases involving seizures of property or permanent physical invasions of property, property owners can individually challenge the

164 A-1 Cigarette Vending Inc. v. United States, 40 Fed. Cl. 643, 645 (Fed. Cl. 1998).

165 *Id.* at 645–46.

166 438 U.S. 104 (1978).

167 *Id.* at 124 (citing United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).

168 *A-1 Cigarette*, at 646; *see also* Neumont v. Monroe Cnty. Fla., 104 F. Supp .2d 1368, 1371 (S.D.Fla. 2000) (In a case involving a Florida statute banning vacation rentals, the court stated, "In a partial takings situation, the Court must make an ad hoc inquiry based upon the particular circumstances in each case to determine whether a constitutional taking has occurred.").

169 *See, e.g.*, ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1286 (N.D. Okla. 2007) (pre-enforcement challenge to statute prohibiting property owners from banning storage of firearms in locked vehicles).

planned action by seeking declaratory or injunctive relief before it occurs. Challenges after the fact regarding whether sufficient just compensation was provided may be difficult to pursue as class actions, because each must exhaust state remedies providing compensation; the Court has held that such an action is not ripe until the party "seek[s] compensation through the procedures the State has provided for doing so," unless no state process was provided or that process was inadequate.[170]

Further, claims involving calculation of compensation for takings will tend to involve the assessment of the value of the property interest, which may vary considerably and involve questions of state law. For example, in one putative class action, in *Swisher v. United States*,[171] the district court denied class certification in a case concerning a conversion of a railroad easement into a nature trial, stating that to proceed "the Court [would have to] review each deed or other instrument, the governing state law at the time of the original conveyance and the facts and circumstances of the transaction . . . . Plaintiff has not shown that her deed, Kansas state law or the circumstances of the conveyance of her land are typical of the claims of class members."[172]

In some unusual cases involving permanent physical invasions of property, courts have held that the common questions are of sufficient complexity so as to justify class treatment. In *Tommaseo v. United States*,[173] a large group of homeowners in the Lower Ninth Ward of New Orleans sued the Army Corps of Engineers on a theory of a "continuous physical process taking," stating that the creation and maintenance of the Mississippi River Gulf Outlet (MRGO) lead to ongoing erosion and saltwater intrusion that resulted in damage after Hurricane Katrina and continues to threaten their property.[174] The court noted, "Although the circumstances and extent of each Plaintiff's injury may vary, each relies on a common set of facts and the same legal theory."[175]

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170 Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985); *see also* Neumont v. Monroe Cnty., Fla., 242 F. Supp. 2d 1265, 1288 (S.D. Fla. 2002) (dismissing takings claims in class action where plaintiffs did not make a proper showing of exhaustion).

171 189 F.R.D. 638 (D. Kan. 1999).

172 *Id.* at 641.

173 80 Fed. Cl. 366 (Fed. Cl. 2008).

174 *Id.* at 374.

175 *Id.*

Other constitutional rights may be amenable to similar analysis, including the Establishment Clause of the First Amendment.[176] What explains the inconsistencies observed, where even claims in the same clause of the same Bill of Rights provision may be aggregated or individualized, or both? In some instances, the constitutional text may explain the decision to individualize. The individual litigation context may also explain some of the individualized focus of many constitutional claims. In individual damages cases, the Court became focused not with issues of systemic deterrence, but rather whether individual claims should be affecting larger operations of government. Similarly, regarding rights arising in criminal cases arising on appeal post-conviction, the Court focused on individual questions in the context of a whether a new trial should be granted. In contrast, in settings in which litigation was typically class litigation, such as in employment discrimination, school desegregation, and prison conditions suits, the Court examined the scope of remedies rather than impose individualized tests, raising separate problems—but problems focused on the nature of the aggregate remedy.[177]

Constitutional rules can be narrowed in multiple ways. Bright-line rules can narrow a constitutional right, since conduct on one side of the line cannot be remedied. Individualized or totality of the circumstances-type rules also narrow a constitutional right, since it may be only egregious violations that, on balance, satisfy the test and obtain a remedy. It is the individualizing type of limit that has a far greater impact on aggregate remedies. Such individualization, however, also creates less certainty for officials and it makes rights more diffuse. The individual model for constitutional litigation should be questioned, as aggregate litigation may be preferable in a host of areas where rights as currently constructed resist class treatment. Not only may rights be individualized, but related remedial doctrine may be individualized as well. Next I turn to decisions regarding remedies that may also hinder aggregate treatment.

176 Establishment Clause class actions include: Stott v. Haworth, 916 F.2d 134, 143 (4th Cir. 1990) (finding no class certification in employment First Amendment case, where "in political patronage cases, the critical and dispositive question is whether a particular position is one that requires, as a qualification for its performance, political affiliation"); Forest Hills Early Learning Ctr., Inc. v. Lukhard, 789 F.2d 295, 295 (4th Cir. 1986) (involving child care operators challenging the constitutionality of the statutory exemption of religiously affiliated child care centers under the Establishment Clause); Sherman *ex rel.* Sherman v. Twp. High Sch. Dist. 214, 540 F. Supp. 2d 985, 988 (N.D. Ill. 2008) (involving claim that Illinois "Silent Reflection and Student Prayer Act" violated their rights under the Establishment Clause).

177 *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 746 (1974).

B. Individualized Constitutional Remedies

Sub-constitutional rules, whether called constitutional common law, or law of constitutional remedies, or decision rules,[178] may also individualize and create obstacles to relief that pose particular challenges for aggregate cases.[179] For several constitutional claims, the Court has individualized the right in its treatment of questions related to the remedy, as distinguished from the underlying constitutional right. In contrast, the Court has expansively interpreted associational standing, suggesting there is nothing inevitable about viewing constitutional litigation through an individualized lens.

First, regarding damages remedies, for many constitutional rights, showing that an individual suffered harm due to the rights violation alone may be difficult. The Court has repeatedly ruled, however, that damages for the violation of the Constitution itself will not be "presumed." Individualized showings as to damages may not bar class action treatment, but they may militate against class action certification. For example, in due process cases, for both civil and criminal procedure claims, courts require a highly individualized showing. In civil rights due process cases, each plaintiff must show not just a denial of process under some generally applicable procedure, but to recover anything more than nominal damages, they must also show that if proper procedure had been provided that the outcome would have been in their favor.[180]

This impact is particularly felt in the area of welfare benefits. Randal Jeffrey has asked why class actions are so difficult to bring, where hundreds of thousands of people receive welfare benefits in some states, and where improper denial of benefits as a matter of practice or negligence can be routine.[181] Class actions could make correcting erroneous denials on a systemic basis far more efficient.

178 Michell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004).

179 On the connection between remedial law, substantive rights, and aggregation more generally, see AM. LAW INST., *supra* note 15, at § 2.03–04 (noting also the distinction between indivisible and divisible remedies).

180 *See* Carey v. Piphus, 435 U.S. 247, 248 (1978); *see also* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) ("[T]he abstract value of a constitutional right may not form the basis for § 1983 damages.").

181 *See* Randal S. Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees to Work*, 69 BROOK. L. REV. 281, 281–84 (2003). Jeffrey states that "even one instance of discontinuing food stamps without notice violates the law" yet few class actions are brought. *Id.* at 292. "Given that tort damages generally facilitate contingency fee arrangements, and welfare rights plaintiffs have access to tort damages, the question becomes why nonprofit and private attorneys pursue so few welfare rights cases." *Id.* at 298. Contempt damages may in contrast be obtained for noncompliance with prospective welfare rights injunction. *See* Alexander v. Hill,

To recoup prior benefits, however, could run afoul of sovereign immunity limits if the welfare agency is a state entity.[182] In addition, challenging ongoing denials would require litigation of whether they in fact were entitled to their welfare benefits, which may typically require live testimony from welfare administrators, who often retain broad statutory discretion, and testimony and documentation from the recipients' witnesses.

Other procedural rulings may discourage civil rights attorneys from bringing class actions. Civil rights attorneys may receive fees even in a class action obtaining only nominal damages,[183] but they will not necessarily receive significant statutory fees if the case settles.[184] Further, a contingency fee, the typical means for compensation in mass tort actions, has little significance even in a case involving hundreds of thousands of persons receiving a nominal one dollar recovery.[185]

In cases not seeking damages, but rather an injunction, civil rights class actions face other challenges. As noted, Rule 23(b)(2), is the provision that the drafters of modern Rule 23 had in mind as a vehicle for injunctive relief-seeking civil rights class actions. In such class actions, as Samuel Issacharoff writes, giving a school desegregation case as an example, "[w]hile each aggrieved child is deemed to have standing to bring a claim for wrongful deprivation of a claimed right to integrated schools, no child has an individual stake in the outcome of that litigation separate from that of the other similarly situated children."[186]

Despite the group-based nature of injunctive relief class actions, the Supreme Court adopted important limitations on actions seeking injunctive relief in *Los Angeles v. Lyons* that made the characteristics of

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707 F.2d 780, 783 (4th Cir. 1983); Rodriguez v. Swank, 496 F.2d 1110, 1113 (7th Cir. 1974).

182 *See* Edelman v. Jordan, 415 U.S. 651, 663–64 (1974).

183 *See* Farrar v. Hobby, 506 U.S. 103, 112 (1992) (holding that nominal damages are sufficient for plaintiffs to receive prevailing party status, entitling the plaintiff's attorney to statutory fees).

184 *See* Cummings v. Connell, 402 F.3d 936, 946 (9th Cir. 2005).

185 In addition, it may be difficult to recover damages where sovereign immunity can bar recovery against the State, or even some counties considered as arms of the state under state law. *See, e.g.*, Baxter v. Vigo Cnty. Sch. Corp., 26 F.3d 728, 738 (7th Cir. 1994); Keller v. Prince George's Cnty., 923 F.2d 30, 32 (4th Cir. 1991). Congress also restricted federal funded Legal Services Corporation lawyers from litigating class actions. *See* Legal Services Corporation Act, 42 U.S.C. § 2996e(d)(5) (2006); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 220–26 (2003).

186 Issacharoff, *supra* note 72, at 1059.

the named plaintiff highly consequential.[187] That decision has been much criticized for its interpretation of Article III standing as linked with the "irreparable injury" requirement for obtaining an injunction, and in addition, for the Court's strained interpretation of the facts in the case. However, that opinion should also be understood as reshaping the nature of aggregate civil rights litigation. The Court ruled that plaintiffs must sufficiently allege an individual likelihood of harm in the future, pursuant to a policy or pattern of government behavior, to obtain standing to pursue injunctive relief.[188] The *Lyons* decision had a unique impact on cases seeking to enjoin police departments, because the Court ruled that it would not presume that plaintiffs would be likely to break the law and then encounter police in the future.[189] The Court also emphasized restraint in issuing injunctions against law enforcement, for reasons of comity, federalism and deference.[190]

Rather than focus on the question whether the state has adopted an unconstitutional practice that would be remedied by class-wide injunctive relief, the Court required a showing that a particular individual plaintiff is likely to be harmed again.[191] This inquiry must be conducted for individual named plaintiffs in a class action. The Court has held "[t]hat a suit may be a class action . . . adds nothing to the question of standing," where plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."[192] Even if it is highly certain that members of a class will be harmed in the future, the Court will not

187 *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983).

188 *Id.* at 111–13.

189 *Id.* at 106–07; *see* Brandon Garrett, Note, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1817–19 (2000).

190 *See Lyons*, 461 U.S. at 112 (urging "restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws"); *see also* Rizzo v. Goode, 423 U.S. 362, 380 (1976) (suggesting that principles of federalism have applicability where injunctive relief is requested against state and local executive branches); O'Shea v. Littleton, 414 U.S. 488, 499–500 (1974) (denying relief on ripeness grounds, but stating that monitoring state courts would violate principles of federalism).

191 Hodgers-Durgin v. De la Vina, 199 F.3d 1037, 1045 (9th Cir. 1999) (en banc) (denying class certification to motorists claiming profiling in immigration enforcement and noting "system-wide injunctive relief is not available based on alleged injuries to unnamed members of a proposed class").

192 Lewis v. Casey, 518 U.S. 343, 357 (1996) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976)) (internal quotation marks omitted).

take action if the particular named plaintiff's future injury is unduly "speculative."

Regarding the rights previously described, such as Fourth Amendment claims, in which the Court has individualized the inquiry, *Lyons* poses an obstacle. Plaintiffs may distinguish *Lyons* in a range of situations in which they can show that they and other class members are likely to be harmed again.[193] For example, judges have found that the *Lyons* test is satisfied for claims in which the harm is defined in the aggregate, such as for equal protection violations in which it is alleged that a policy of discrimination affected the entire class in the same way and in an ongoing manner. Those rulings do not, however, consider it relevant that the case is brought as a class action.[194]

The proper inquiry would focus on whether the class possesses a live case or controversy, that is, whether an ongoing constitutional violation predictably threatens members of the class. If the potential harm is severe enough, an injunction may be justified even if the risk to any particular single person is small. The notion that a single class plaintiff must show a particular degree of personal threat of future injury flies in the face of the purposes of Rule 23(b)(2). The 23(b)(2) class action involves a group entitled to injunctive relief precisely because identities of individual class members are not relevant to the merits of the underlying remedy that is sought. Further, such a rule is inconsistent with the equitable discretion of the judge, which does permit judges even in individual cases to extend injunctive relief to a class (though the scope of the injunction may be tailored more narrowly, as discussed).

Such an approach would not permit the Federal Rules of Civil Procedure to substitute for Article III standing requirements. It is not clear what daylight there is between that requirement and the Rule 23 requirement that the injunctive relief be appropriate because the opposing party has acted "on grounds that apply generally to the class."[195] The separate requirement of *Lyons* that an individual plaintiff show likelihood of future harm to obtain an injunction arguably has little to do with Article III standing. It has more to do with whether an injunction should in fact be granted on the merits in the court's equitable discretion. The Court recognized that the requirements "obviously shade" together.[196]

193 *See* Garrett, *supra* note 18, at II.A.

194 *See id.*

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

196 *Lyons,* 461 U.S. at 103 (quoting O'Shea v. Littleton, 414 U.S. 488, 499 (1974)).

Today, the Court might make clear that *Lyons* is in fact a pleading requirement, asking that a plaintiff be specific about the need for an injunction. *Wal-Mart* represented a real change in course for the Court; its earlier decision in *Eisen* had included dicta suggesting that the merits could not be examined at the class certification stage. The *Wal-Mart* Court rejected any such suggestion as "mistaken," and instead explicitly held that class certification can demand preliminary examination of the merits.[197] Indeed, the dissent did not disagree with the notion that there may need to be "rigorous analysis" of the merits at the class certification stage, even an analysis of expert evidence.[198]

Such analysis would proceed differently than the *Lyons* analysis. After all, the public interest is relevant to a preliminary injunction analysis and an injunctive relief analysis. The presence of a group of similarly situated class of people should impact that piece of the merits analysis; a class of the public is seeking relief.

Further, courts recognize that once a class action is certified, "statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs."[199] The Seventh Circuit explained, in approving certification of a class involving all nineteen Illinois counties, though named plaintiffs were in four counties, that "there are cases where appropriate relief may only be obtained through one broad suit, and it will be impossible to find a named plaintiff to match each defendant."[200] The Supreme Court recognized as much in its decision in *United States Parole Commission v. Geraghty*,[201] holding that though the claims of the named plaintiff were moot and the district court had denied class certification, the plaintiff could represent the class on appeal, which the Court granted,[202] and similarly in *Deposit Guaranty National Bank v. Roper,* permitting class certification even

197 Wal-Mart v. Dukes, 131 S. Ct. 2542, 2552 n.6 (2011) (calling the suggestion that based on *Eisen,* the merits could not be examined "mistaken" and the "purest dictum" and calling a preliminary examination of the merits a "necessity" in some class actions (citing Eisen v. Carlisle & Jacquelin, 417 U. S. 156, 177 (1974))).

198 *Id.* at 2551. There are difficult questions, however, that the Court did not answer regarding what the standard now is for adequately showing that the suit has merit to be certified. *See* Susanna Sherry, *Hogs Get Slaughtered at the Supreme Court,* 2011 SUP. CT. REV. 1, 29 (2011) (noting troubling "ambiguity" where the Court demands "rigorous analysis" and "convincing proof" but not "actual proof of the merits of the case").

199 Payton v. Cnty. of Kane, 308 F.3d 673, 680 (7th Cir. 2002).

200 *Id.* at 681.

201 445 U.S. 388 (1980).

202 *See id.* at 404.

though the defendants had offered to settle with the individual named plaintiffs.[203]

There is a tension between *Geraghty* and *Lyons*.[204] Jonathan Macey and Geoffrey Miller have argued that where the plaintiff class has a live controversy the fact that named plaintiffs may lack a personal stake is "hardly relevant as a realistic or functional matter" where the cases are "controlled by plaintiffs' attorneys throughout."[205] They provocatively argued that so long as some class members have a sufficiently concrete stake, "it should not be necessary to demand a representative plaintiff who fulfills traditional Article III requirements for injury in fact and a stake in the outcome."[206] Class actions could be treated differently.

One more modest way to reinvigorate the role aggregate litigation plays in constitutional cases would be to undo *Lyons* in this respect—withdraw the sub-constitutional statement by the Court that the class action status of a suit "adds nothing to the question of standing."[207] The presence of a class of individuals should sometimes add to the question whether an injunction is appropriate. The Court's ruling in *Lyons* viewed the underlying Fourth Amendment claim as highly individualized, and perhaps even if such a case goes forward, that might make an injunction more difficult to tailor.[208] Even when plaintiffs seek injunctive relief in a classic 23(b)(2) civil rights action, the definition of the underlying substantive right affects whether a remedy may be obtained, even when it is a class that seeks relief. However, postponing addressing the question of standing until class certification, and treating class certification as very much adding

203 *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332–33 (1980).

204 There is also tension with the Court's statement in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997), that "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)).

205 Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 82 (1991).

206 *Id.* at 83. They also proposed that a "Jane Doe" or "Richard Roe" complaint seeking class certification could satisfy Article III justiciability requirements, disposing of the requirement that "there be *any* named plaintiff at all." *Id.* at 83–84.

207 Lewis v. Casey, 518 U.S. 343, 357 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976)).

208 James Keenley, *How Many Injuries Does it Take? Article III Standing in the Class Action Context*, 95 CALIF. L. REV. 849, 883–84 (2007) (criticizing application of *Lyons* in defendant class actions).

something to the question of standing, would both simplify the analysis and permit a more careful merits consideration.

C. Associational and Organizational Standing

Another way to allow groups to participate in constitutional challenges is to allow groups to themselves sue on behalf of their members. There is a great deal of tension between the Court's treatment of associations and with class actions. The Court has viewed associational standing expansively, for example in *NAACP v. Alabama*,[209] where the organization asserted the right of members to remain anonymous.[210] The Court's test for associational standing focuses on whether the relief sought would reasonably benefit the members of the organization, and whether one or more members would individually have standing to sue themselves—and where there are not issues of "individualized proof," permitting the claims to be "properly resolved in a group context."[211] In doing so, the Court adopts a test somewhat like that used to decide whether to certify a class action—but far more relaxed, including because the test permits the case to go forward even if not all members of the association would have standing to sue.

The Court has rejected the argument that groups must use the class action device and satisfy the requirements of Rule 23. The Court held in *UAW v. Brock*[212] that despite the lack of procedural restrictions for associational suits, as opposed to class actions, it can be preferable to have an entity sue: "an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital."[213] The Court added that, "The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests."[214] Such

209 357 U.S. 449 (1958).

210 *See id.* at 459 ("To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.").

211 Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343–44 (1977) (describing three part test for associational standing, where: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"). For a recent case denying associational standing premised on statistical evidence that members would be harmed, citing to the need to show that at least one member would have standing, see Summers v. Earth Island Inst., 555 U.S. 488, 498 (2009).

212 477 U.S. 274 (1986).

213 *Id.* at 289.

214 *Id.* at 290.

a representative suit does not bind non-members, and the Court noted that if there was a lack of adequacy of representation, the ruling might not preclude subsequent suits by members.[215]

The same justifications—expertise, capital, and efficiency—support use of class actions. Nor is the Court overly concerned with what kind of organization it is; the organization need not even be a traditional membership organization, and may sue if it "for all practical purposes" serves the interests of others.[216] And in contrast, when an organization sues to assert its own interests, distinct from those of its members, the inquiry is whether the entity itself suffered a concrete injury to its own interests, apart from any injury to its members.[217]

Such rulings suggest that where the class action device itself creates a group litigation entity, with the additional procedural rigor of a class action, the standing requirements should similarly be relaxed so long as the group itself seeks a common benefit.[218] Further, associations formed to protect constitutional rights of their members can themselves litigate constitutional claims, perhaps more readily than plaintiffs joining together in a class action, as can organizations themselves if they can show a drain on their resources or some other concrete injury. The Court's associational and organizational cases provide important tools that can encourage group constitutional litigation—but they will be useful tools only if the underlying rights are amenable to aggregate treatment and do not involve too many individualized issues.

D. Aggregation Under Civil Rights Statutes

Perhaps procedural obstacles to the aggregate resolution of civil rights claims under § 1983 explain why much of civil rights class action litigation is brought under more modern civil rights statutes

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215 *Id.*; *see also* United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 556–57 & n.6 (1996).

216 *Hunt,* 423 U.S. at 344; *see also* Karl S. Coplan, *Is Voting Necessary? Organization Standing and Non-Voting Members of Environmental Advocacy Organizations,* 14 SE. ENVTL. L.J. 47, 75 (2005) (describing inconsistent caselaw concerning the functional membership test set out in *Hunt*).

217 *See* Sierra Club v. Morton, 405 U.S. 727, 738–40 (1972); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n.19 (1982) ("We have previously recognized that organizations are entitled to sue on their own behalf for injuries they have sustained."). For a case distinguishing *Lyons* and citing to organizational standing, see Md. State Conference of NAACP Branches v. Md. Dep't of State Police, 72 F. Supp. 2d 560, 565 (D. Md. 1999).

218 *See* Heidi Li Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest,* 87 MICH. L. REV. 733, 744 (1988) (advocating theory of "collective standing").

enacted by Congress and not direct constitutional claims. Congress cannot undo decisions by the Court to individualize standards defining constitutional rights. However, Congress can set out expansive standards for remedies, procedures that facilitate aggregate litigation, and can define the substance of civil rights violations more broadly than constitutional rights.

Thus, while the Equal Protection Clause may not be amenable to certain types of aggregate employment discrimination, as noted, much employment discrimination litigation is brought under Title VII. The Court in *Falcon* emphasized that nothing in Title VII indicated "that Congress intended to authorize such a wholesale expansion of class-action litigation."[219] The impact of that decision was that "[b]y 1991, due in large part to the Supreme Court's decision in *Falcon*, the class action device was seldom used in addressing claims of employment discrimination."[220] This changed with revisions enacted to Title VII in 1991, which included making compensatory and punitive damages available. The statement of purpose said nothing about class actions.[221] However, the amendments encouraged plaintiffs to now seek damages and file 23(b)(3) class actions, or try to find a way to include compensation within a 23(b)(2) action.[222] Unlike § 1983, Title VII permits reliance on aggregate evidence of a disparate impact on employees, which may be particularly attractive in cases in which it is particularly difficult to show that the employer acted with a discriminatory motive.[223] The *Wal-Mart* decision will impact class action practice under Title VII. But Congress may intervene again, perhaps

219 Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 (1982).

220 Scotty Shively, *Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act*, 23 U. ARK. LITTLE ROCK L. REV. 925, 935–36 (2001) ("It was no longer sufficient for one plaintiff, represented by one law firm, to allege across-the-board discrimination.").

221 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071 (1991) (describing general purposes of the amendments, including "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"). There were few references to class actions in the legislative history, and none regarding facilitating aggregate litigation. *See* 137 CONG. REC. H9505-01, H9530 (daily ed. Nov. 7, 1991).

222 42 U.S.C. § 1981a (2006).

223 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) ("An unlawful employment practice based on disparate impact is established under this subchapter only if—a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . ."); *see also* GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW 79–82 (2001).

regarding the promotions standards at issue in the case (which itself may explain in part the Court's emphasis on a need to show common practices across different Wal-Mart stores and divisions.) Similarly, disparate impact claims may be brought under the Age Discrimination in Employment Act (ADEA).[224]

Congress may alternatively prefer individualization of rights. For example, the Americans with Disabilities Act (ADA) has a different structure than Title VII, focusing on whether employers provide "reasonable accommodations" to employees, requiring in turn an individualized assessment of the extent of disability, or indeed a medical assessment whether members of the class in fact satisfy the statutory criteria for disability.[225] As a result, the "class action device has been virtually nonexistent in disability discrimination employment cases."[226] In contrast, ADA suits regarding public accommodations, which lack such an inquiry and which typically involve 23(b)(2) actions requesting injunctive relief that would benefit all class members, have been commonly resolved as class actions.[227]

Congress may also intervene to pass statutes that limit the ability to bring aggregate *constitutional* and not just statutory claims. Congress significantly limited availability of injunctive relief in suits regarding prison conditions.[228] The Prison Litigation Reform Act (PLRA) provides that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."[229] The PLRA prohibits approval of a consent decree that does not comply with that limitation.[230]

Congress took a very different approach towards the problem of *Lyons* and the difficulty of bringing Fourth Amendment excessive force or search and seizure class actions. In 1994, Congress enacted a statute, 42 U.S.C. § 14141,[231] providing the Department of Justice with

224 *See* Smith v. City of Jackson, 544 U.S. 228, 232 (2005).

225 *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 478 (1999); Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 867 (2006).

226 Stein & Waterstone, *supra* note 225, at 861; *see id.* at 883–84 & n. 95.

227 *See, e.g.*, Colo. Cross-Disability Coal. v. Taco Bell Corp., 184 F.R.D. 354, 357–63 (D. Colo. 1999); Neff v. VIA Metro. Transit Auth., 179 F.R.D. 185, 191 (W.D. Tex. 1998).

228 Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321-66 (1996) (codified as amended in 18 U.S.C. §§ 3601, 3626 (2006)).

229 18 U.S.C. § 3626(a)(1) (2006).

230 18 U.S.C. § 3626(c)(1) & (2)(B) (2006).

231 42 U.S.C. § 14141 (2006).

authority to secure injunctive relief to remedy violations; prosecutors can pursue broad systemic remedies that private plaintiffs cannot.[232]

III. In Defense of Constitutional Aggregation

What the Court gives or takes, Congress may alter to privilege or prohibit aggregation. That is for the best. A theory of democratic accountability and class actions would support judicial caution in individualizing constitutional rights, but less caution in interpreting statutes and remedial law which can be more easily altered by Congress. Normative theories for class action litigation have focused chiefly on efficiency gains from aggregation, but not on the civil rights context and their relationship with constitutional litigation. This Part describes how aggregate litigation can sometimes better accomplish the goals of a civil rights system than piecemeal individual litigation, and how constitutional interpretation should be conducted with a consciousness of its effects upon the structure of litigation.

A. Advantages of Group Constitutional Litigation

Whether the right permits aggregate proof greatly affects the quality of the right and remedy. Class actions can provide a far more efficient means to resolve litigation than in individual litigation. Individual litigation typically focuses on compensatory damages and not on remedying systemic problems of public interest. That is not to say that individual litigants may not bring important constitutional challenges that can have broadly significant effects. However, individual litigants will also have a harder time bringing significant cases if constitutional rights are interpreted in an individualized manner. Their cases will be viewed as applying to particular circumstances and not raising larger issues. Indeed, individualized rights make both individual and aggregate litigation more idiosyncratic. As a result, the state may face inconsistent rulings and unpredictable litigation. The judicial system faces piecemeal litigation and inefficient litigation of similar facts and legal claims.

Assuming that a right is defined in a way that it applies outside particular individualized circumstances, aggregate litigation may provide a better forum to develop the meaning of that right. By bringing together all interested parties, class actions may provide greater quality of constitutional decision making in several respects. As described, there may be better access to information, including about larger pat-

232 For an analysis of litigation under that statute and proposals to improve its effectiveness, see generally, for example, Rachel Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 Stan L. Rev. 1 (2009).

terns of conduct. Participation is broader. Class actions may attract better-qualified counsel with greater resources. Repeat player civil rights groups may be better able to focus resources on deserving cases. Efficiency is generally facilitated by aggregate resolution of related cases and claims.

Aggregate litigants may select different types of claims and more systemic remedies. Class actions may increase the deterrent effect of a given case, although civil rights litigation currently invites substantial individual litigation in state and federal courts. Class actions may be beneficial to government, because they avoid unpredictable and burdensome cost of repeat individual litigation. The Supreme Court has often noted how lawsuits directed at individual government officials pose special burdens. To the extent that class actions tend to focus more on policymakers and on systemic remedies, rather than the facts of particular encounters with officials, class actions may prove far less intrusive.

On the other hand, class actions empower the attorneys, who themselves may select representative plaintiffs and generally drive the litigation. Class action attorneys may on balance be far less self-interested than individual litigants.[233] The due process dangers that class actions pose—of inadequate or self-interested class representation, conflicts, and collusion—may be reduced, though to be sure they are not avoidable, in civil rights cases. Civil rights class actions tend to involve injunctive relief and comparatively smaller damages classes.[234] Of course, large-scale class actions like the remarkable *Wal-Mart* class action pose precisely the question whether the incentives of counsel to receive massive fees makes their stake very different than the litigants; that case, of course, was, as the Court found, not primarily about an injunction. The tradeoffs between compensation and desired injunctive relief may pose some dilemmas for counsel,[235] heightened where the Supreme Court ruled in *Evans v. Jeff D.*,[236] that plaintiff class attorneys could be required to waive fees as a condition

233 *See* Carrie Menkel-Meadow, *Do The "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players In ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 28 (1999) ("Class actions and aggregations of claimants can make some one-shotters more like repeat players, as can organizational client groups and organizational litigation strategies (like those of the NAACP, Inc. Fund) . . . .").

234 *See* Judith Resnik, *From "Cases" To "Litigation,"* 54 LAW & CONTEMP. PROBS., no. 3, 1991, at 5, 66.

235 Ingles v. City of New York, 2003 WL 402565 *6 (S.D.N.Y. 2003) ("[D]efendants contend that plaintiffs have an incentive to settle on terms favor[ing] their damages claims over class-wide institutional claims. This argument is rejected . . . ." (alteration in original) (citations omitted) (internal quotation marks omitted)).

236 475 U.S. 717 (1986).

of settlement.[237] In practice, however, retainer agreements may head off such problems by commonly requiring hourly payment if no fees are recovered or a contingency fee.[238] Conflicts are greatly reduced in cases that primarily seek injunctive relief. After all, not only is there the more limited compensation in such cases through civil rights fee shifting statutes, but injunctions by their nature, as noted, permit modification over time and may already be amenable to considering whether conflicting or changing interests, or the public interest, counsel change to the injunction.

A related concern would be that permitted additional aggregate litigation would chill constitutional development, because recognition of new rights would lead to a flood of class action litigation and mass damages awards.[239] To the extent the concern remains with over-deterrence through excessive damages, qualified immunity already permits a defense to damages awards.[240] Qualified immunity issues may justify separate proceedings concerning damages in certain types of class actions. Resolving injunctive relief questions separately, however, may provide great savings. The Court often expresses a concern with over-deterrence—however, class actions to secure aggregate injunctive relief could provide the government with guidance on compliance with the Constitution, while constitutional violations would result in individual compensation only when an individual can prove a serious violation.

B. Connecting Constitutional Substance with Procedure

The Court continually reinterprets constitutional rights, often quite explicitly considering the effects of a particular interpretation on future litigation, procedural posture of cases, deterrence, comity, and other policy concerns. Among those concerns, the advent of the modern Rule 23 should be understood to have changed the backdrop

237 *Id.* at 730–32.

238 *See* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 215–16 (1997).

239 *See* Jeffries, *supra* note 17, at 100–02 ("*Brown v. Board of Education* was one of three companion cases seeking injunctive relief . . . . At the time, § 1983 damage actions had not yet been rediscovered, nor had the modern class action evolved to permit 'mass tort' litigation. . . . Of course, assessing how strict damages liability would have changed *Brown* is ultimately a matter of conjecture, but it seems likely that the prospect of money damages would have had some impact and that it would not have been good.").

240 *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1206–13 (2005) (describing a series of doctrines that limit relief to egregious constitutional violations).

against which constitutional interpretation occurs. Considering the class action device or not, the Court has in some areas, undermined the purposes of Rule 23. As Richard Nagareda has argued, "The affording or withholding of aggregate treatment is most problematic from an institutional standpoint when it operates as a backdoor vehicle to restructure the remedial scheme in applicable substantive law."[241] Perhaps still more problematic is when substantive law is interpreted in a manner that unthinkingly restricts the affording of aggregate remedies.

One way to approach the problem of aggregation and constitutional rights would be for courts to recognize that certain sub-constitutional standards are designed to limit exposure of government in individual and not group cases. For example, § 1983 litigation is constricted by a series of non-constitutional rules that the Supreme Court has adopted in its interpretation of the purposes of the § 1983 statute itself, including immunity doctrines. The quasi-constitutional standing doctrine of *Lyons* also, as discussed above, limits injunctive relief. Each of those rules could be altered in class action cases. The presence of a class of affected individuals should alter the standing analysis under *Lyons*. Further, as to particular constitutional rights and remedial law questions of qualified immunity, the issues could be separated and considered apart from the class-wide issues deserving the court's attention.[242]

Similarly, constitutional rights could be viewed as possessing aggregate and individual components. Even as to a constitutional right that contains an individualized test, the court could handle common issues separately and leave the remainder for mini-trials or individual litigation. Indeed, post-*Wal-Mart* the Seventh Circuit did just that, certifying a class action as to particular issues in an employment discrimination case.[243] In a constitutional case, a court could, say, review whether a search and seizure policy employs improper criteria and render rulings concerning injunctive relief, but leave for individual litigation questions whether officers had "reasonable suspicion" in particular encounters or whether qualified immunity protects particular officers from damages judgments.

Another way to conceive of the problem is whether the right should be remedied "upstream" or "downstream" from the conduct

241 Nagareda, *supra* note 39, at 1877–78.

242 In some cases, qualified immunity may be amenable to class-wide adjudication. *See, e.g.,* Brown v. Kelly, 244 F.R.D. 222, 232 n. 65 (S.D.N.Y. 2007).

243 McReynolds v. Merrilll Lynch & Co., 2012 WL 3932328 *14 (7th Cir. Sept. 11, 2012).

towards the individual issues that come up as the conduct affects victims.[244] Preventing conduct that affects large numbers of people at the source, by changing policies and common conduct, may better resolve problems than conceiving the right as arising only later once intractable questions of individual harm and causation arise.

C. Democratic Participation and Aggregate Litigation

Aggregate resolution of core constitutional rights resonates with the purposes of many of those provisions. When judges interpret constitutional tests in an individualized manner, they produce a particularized tort regime, but not a regime that effectively defines constitutional values. The Court has noted: "aggregation of individual claims . . . is an evolutionary response to the existence of injuries unremedied by the regulatory action of the government."[245] Plaintiffs in civil rights cases assert a different and more troubling type of injury, in which the government itself caused injuries that might otherwise go unremedied.

Constitutional theorists have long observed that the Court aggregates the government interest in various tests and balances that government interest against that of the plaintiff, even if it is an individual plaintiff bringing the suit. The *Mathews v. Eldridge*[246] due process test is a classic example.[247] Constitutional balancing tests balance the individual's liberty interest against "compelling" interests, national security interests, law enforcement interests, or other aggregate interests of government.[248]

Aggregation could help to define communities of interest, ensure that interest representation in the political process, and promote democratic participation. A political process theory of constitutional

244 *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831–32 (1997).

245 *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

246 424 U.S. 319 (1976).

247 *Id.* at 335 ("[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (citation omitted)).

248 *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1523–24 (1992); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 918 (1988).

litigation is consonant not just with a theory of judicial review, but also procedure, and in particular aggregate litigation.[249] Class action theorists have long argued that class actions create a form of governance through litigation.[250] In doing so, certification of a class establishes an entity with common interest in the interpretation and remediation of their constitutional rights.[251] This entity is represented by lawyers and not elected officials. In cases in which the lawyers may be motivated by economic interests in conflict with those of the class, the fact that lawyers call this entity into existence can be problematic. In civil rights class actions, those features have always been far less problematic. After all, civil rights class actions may provide representation to minorities whose rights have been neglected by the majority. On a theory that constitutional rights should first and foremost protect those left out by the political process, using aggregation to assemble the group, rather than leave individuals to solitary remedies, makes far more sense. Aggregate remedies may also support perceptions of legitimacy in that process.[252]

A view of judicial minimalism favors judges crafting tailored standards that are context specific.[253] Aggregate litigation is consistent with at least some views of judicial minimalism. Courts can incrementally adjust standards defining rights and define those rights without respect to individual acts but rather patterns and aggregate proof. The Supreme Court has done so by adjusting over time systemic remedies available to plaintiffs in school desegregation, voting rights, and prison suits.

The Court's definition of constitutional rights to recognize group harm in equal protection cases but not as to other rights may be explained by such a political process theory. As Daryl Levinson wrote, "we might simply recognize that group aggregation most often emerges as a possibility in legal regimes concerned with equal treatment of socially salient groups such as racial minorities and women."[254] Levinson adds that, "As for group aggregation, nothing internal to a general model of constitutional rights as prohibitions on

249 JOHN HART ELY, DEMOCRACY AND DISTRUST 181–83 (1980).

250 *See* Issacharoff, *supra* note 72, at 1058.

251 David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917–18 (1998) ("[T]he notion of class as entity should prevail over more individually oriented notions of aggregate litigation.").

252 *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 57–59 (1988); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW 49–57 (2002).

253 CASS SUNSTEIN, ONE CASE AT A TIME 61–72 (1999).

254 Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1330 (2002).

transactional harm dictates the choice between individual-level and group-level analysis," yet "the default assumption in most areas of constitutional law seems to be that harms and benefits must be calculated at the level of the individual."[255] That default assumption is flawed. A wide range of constitutional rights can implicate systemic practices. They might be far better remedied using injunctions than through sporadic individual damages awards.

To be sure, aggregation can have real costs. In some cases, as noted, aggregation may raise concerns regarding conflicts or adequacy of representation. However, the class action rules provide protections, which courts have not been shy about policing. Those concerns regarding the procedural fairness of class actions are reduced in civil rights litigation, as opposed to mass tort or other civil litigation in which financial interests between counsel and the class may far more greatly diverge. Vulnerable minority groups may feel a lack of adequate political representation particularly acutely, and aggregate litigation may provide superior access to adequate legal representation.

Conclusion

Group litigation is integral to modern civil rights law. In turn, the modern Rule 23, and Rule 23(b)(2) in particular, was drafted with civil rights class actions in mind. Core constitutional rights were then defined and redefined by the Supreme Court during the period that followed, when aggregate civil litigation rose in importance. In a range of contexts, the Court individualized constitutional rights, perhaps because the text called for an individual inquiry, but also to avoid bright-line rules and prevent over-deterring or unduly burdening government. Still other rulings facilitate aggregate litigation. As described, plaintiffs may aggregate equal protection claims in voting cases, while in policing cases, the Court generally requires plaintiffs to satisfy highly individualized requirements that frustrate aggregate litigation. Meanwhile, the Court permits associations to broadly assert constitutional rights of members.

Inconsistency in the Court's approach to constitutional interpretation is nothing new, nor is it necessarily problematic. Pluralism in constitutional theory may be here to stay with a constitutional Court staffed by a cast of Justices sharing a diversity of approaches to constitutional theory, and interpreting constitutional text and amendments with varying substance, detail, and clarity. However, when ruling on

255 *Id.* at 1374.

the meaning of constitutional rights, the Court does not often explicitly consider the procedural mechanisms that drive constitutional litigation. In turn, the Court often interprets sub-constitutional or statutory rules regarding standing, immunity, or remedies in a way that emphasizes context-specific outcomes. Such doctrines can be altered by Congress—which is for the best. Rulings individualizing constitutional rights, in contrast, may not be readily undone through the political process absent constitutional amendment. In several contexts, Congress intervened where the Court individualized rights to provide administrative or statutory private enforcement. However, the Court has itself often responded to narrow aggregate remedies under some of those statutes.

An understanding of the procedural potential of the class action device should alter our view of a series of interpretations of constitutional rights. Class action scholarship has begun to explore the normative goals of aggregate resolution, looking beyond efficiency rationales for class actions towards the implications of class action for political theory and collective justice.[256] The role that class actions play in civil rights cases justifies a deeper look at the potential for complex civil rights litigation to alter the ways constitutional rights are vindicated—as well as the ways that constitutional rights are interpreted.

The Court considers the scale of constitutional rights, but not the scale of constitutional litigation, except in the context of associational standing, where the Court favors group litigation for sensible reasons. Individuals may also be better served in the aggregate in other situations, and so may government and underlying constitutional values. Whether the Court and Congress will rethink the individualized structure and substance of much of constitutional litigation remains to be seen. Perhaps decisions like *Dukes v. Wal-Mart* can actually rekindle that dialogue. Otherwise, constitutional litigation will continue to typically proceed as a solitary affair, achieving compensation for some and with rare cases having an outsized impact, but without the legitimacy, participation, and representation that aggregation can provide, nor the systemic effects of broad injunctive remedies. Aggregate definition of rights may lead to bigger lawsuits, but bigger may sometimes be better—particularly when developing constitutional values.

256 *See* Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 756 (2007); *see also* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577 (2008) ("This article presents an argument for collective justice based on democratic participation values.").