The Persistence and Uncertain Future of the Public Interest Class Action

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The modern class action originated in lawsuits against government defendants for injunctive relief.[1] At times, these "public interest class actions"[2] have attracted criticism from policymakers dissatisfied with the deployment of judicial processes in the service of structural reform.[3] By the mid-1990s, however, the use of aggregate procedure in public interest litigation receded as a matter of policy concern.[4] Amidst lengthy campaigns for retrenchment in class action doctrine, fought in legislative,[5] rulemaking,[6] and judicial theaters,[7] the device's use in public interest litigation all but evaded scrutiny. Indeed, those bent on limiting monetary relief class actions often juxtaposed civil rights litigation as a virtuous foil against the lawsuits they disdained.[8] A common refrain echoed in one decision after the next: when public interest plaintiffs moved to certify classes seeking injunctive relief, Rule 23's requirements were "almost automatically satisfied."[9]

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[1] Deseg history article.
[2] By no means do I intend to suggest that other class action litigation, including cases for money damages, does not serve the public interest. I use this term as shorthand, to refer to lawsuits against government defendants for injunctive relief. These lawsuits tend to be brought by a different category of litigators than those who sue for money damages. Their financing differs from money damages suits, and their management involves a categorically different set of challenges than suits seeking individualized monetary compensation do. For this reason, I believe that this litigation deserves its own category.
[3] Cites.
[4] Note omission in Democracy by Decree.
[5] CAFA
[6] 1990s reform efforts.
[7] Farhang and Burbank on SCOTUS.
[8] Cites.
[9] Bzdawka v. Milwaukee County, 238 F.R.D. 469, 476 (E.D. Wis. 2006); Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 58 (3d Cir. 1994); Marisol A. v. Guiliani, 929 F. Supp. 662, 692 (S.D.N.Y. 1996); Nicholson v. Williams, 205 F.R.D. 92, 100 (E.D.N.Y. 2001); M.D. v. Perry, Civ. No. 11-84, 2011 WL 2173673, at *!1 (S.D. Tex. June 2, 2011).

This landscape for the public interest class action shifted after June 20, 2011, the day the U.S. Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*.[10] The *Wal-Mart* class sought significant monetary remedies in addition to injunctive relief.[11] But an odd wrinkle in class action doctrine meant that the case proceeded pursuant to the sections of Rule 23 typically used when plaintiffs seek injunctive relief.[12] The Court decertified the class and in so doing remade the law governing these sorts of claims. Although the Court yet again identified the public interest class action as an exemplar for Rule 23's proper use,[13] nothing in its restrictive interpretations of Rule 23's commonality and injunctive relief requirements suggested that they be limited to cases like *Wal-Mart.* Government defendants quickly began to wield the decision as a weapon in their combat against reform litigation.[14] As I explain in my description of *Wal-Mart* and its aftermath in Part I, federal courts soon began to treat this "watershed" decision as a demand for greater scrutiny of public interest classes.[15]

Eight years have passed since *Wal-Mart* arrived as an exogenous shock to a previously stable system of public interest litigation. Has class certification become a significant obstacle for plaintiffs seeking structural reform? To answer this question, I have reviewed every reported decision involving class certification issued by the federal courts in cases for injunctive relief brought against government defendants from June 21, 2011, to the present.[16] This judicial

[10] Cite decision. *See generally* DL v. District of Columbia, 713 F.3d 120 (D.C. Cir. 2013) (claiming that *Wal-Mart* has "changed the landscape"); Alonso on behalf of I.A. v. Sch. Bd. of Collier County, Florida, Civ. No. 16-379, 2018 WL 5304813, at *11 (M.D. Fla. Aug. 8, 2018) (referring to the "watershed" case of *Wal-Mart*); **more cites re: Wal-Mart and change.**
[11] Cites.
[12] Explain wrinkle – from 1970s employment discrimination cases brought by LDF.
[13] Cite.
[14] Cite.
[15] *E.g.*, DL, MD, Jamie S., Taylor v. Zucker, Civ. No. 14-5317, 2015 WL 4560739, at *7 (S.D.N.Y. July 27, 2015), **more cites.**
[16] Explain why excluded all hybrid cases and why excluded cases against private defendants. Explain why just reported decisions – doctrine.

corpus, consisting of about four hundred decisions, yields several lessons. As Part II explains, *Wal-Mart* has not in fact derailed public interest litigation. Courts across the United States certify public interest classes at a 75% clip.

Part II also includes a detailed qualitative investigation of *Wal-Mart*'s doctrinal effects. The decision has had its only real significance for cases challenging customs, practices, and patterns of deliberate indifference. Class certification motions in these cases now require more significant litigation investments by plaintiffs. When district courts grant these motions, they now must provide more careful, detailed analysis for their decisions to stick.

Other than this practice, what has changed are not adjustments to class action doctrine *per se*. Rather, the "rigorous analysis" *Wal-Mart* demands has prompted parties and judges to clarify more precisely the contours of the underlying substantive law that enables systemic challenges to government maladministration. This effort has unveiled a "group rights" jurisprudence lurking in several substantive areas. These are bodies of law that treat people not as distinct individuals but as members of groups as the law protects them from a government-created systemic risk of harm. *Wal-Mart*'s major doctrinal effects are substantive. It has pushed courts to confirm that, just as government actors responsible for policy creation and administration treat regulatory targets and regulatory beneficiaries as undifferentiated members of groups, so too can the substantive liability policy that protects these groups.

Part III argues for what class certification ought to become in light of these findings. *Wal-Mart* has turned class certification into a poorly regulated merits inquiry. Commonality and Rule 23(b)(2) now force plaintiffs to show that the substantive law creates group-wide protection against the sort of risk of harm they allege, and they require plaintiffs to show that they have sufficient evidence to establish that the risk in fact exists for the group they seek to protect.

Summary judgment does everything that Rule 23 post-*Wal-Mart* tries to do, only better. Class certification in public interest cases should return to what it was before *Wal-Mart* – a quick check for the adequacy of class member representation and little more.

Part III also speculates on what class certification might yet become. *Wal-Mart*'s implications for public interest litigation got worked out during a time when the federal bench tilted leftward. Since January 2017, the federal judiciary has turned sharply to the right. Consistent with other scholarship, my survey of post-*Wal-Mart* decision-making suggests an ideological imbalance in judges' willingness to certify classes. But more than just generalized conservative hostility to Rule 23 or structural reform litigation threatens the public interest class action. The lower federal courts have clarified that class certification in custom, practice, and deliberate indifference litigation – the category of cases most prone to retrenchment post-*Wal-Mart* – turns on the existence of group rights. The very notion of group rights protecting vulnerable populations has long prompted criticism in conservative legal circles. The increased focus on the underlying nature of the rights at issue in public interest class actions may prompt retrenchment, not only in procedural doctrine, but in substantive liability policy itself. Hints in a couple of important cases suggest the embrace of a radical individualism in the governance of public interest litigation. If these hints are signs of a gathering storm, the public interest class action's landscape will not just shift. It will collapse.

I. Unsettling the Old Equilibrium

A. The Old Era

Two determinants in particular decide whether a court will certify a proposed class in

an episode of public interest litigation.[17] Rule 23(a)(2)'s commonality requirement provides that "there [must be] questions of law or fact common to the class."[18] Rule 23(b)(2) enumerates the second distinctive criterion for these cases: a class action "may be maintained" if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[19]

Before *Wal-Mart*, neither commonality nor Rule 23(b)(2) posed much of a hurdle to class certification in most public interest cases.[20] Plaintiffs could satisfy commonality with questions of law and fact posed at a "high level of abstraction" that amounted to little more than "did the defendant violate the class members rights."[21] Crediting allegations of systemic causes in complaints, courts accepted that these questions could be answered for all class members with common evidence, even when each one's experience with the defendant's conduct differed.[22] Proposed injunctions couched in very general terms – suggested orders requiring defendants "to cease violating the plaintiffs' rights," for instance – satisfied Rule 23(b)(2).[23] Even if aspects of proposed injunctions would not remediate some class members' discrete injuries, cases sailed past the Rule 23(b)(2) barrier so long as the defendant acted "generally' with regard to the class, and so long as the injunction would "benefit" the class.[24]

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[17] *See* Marcus, *supra* note __ at 785-786 (describing class action basics and explaining why commonality and Rule 23(b)(2) matter in particular for public interest litigation).
[18] Fed. R. Civ. P. 23(a)(2).
[19] Fed. R. Civ. P. 23(b)(2).
[20] Marcus, *supra* note __ at 785 (arguing that before *Wal-Mart* both requirements "unambiguously favored certification").
[21] *E.g.*, Marisol A. v. Guiliani, 126 F.3d 372, 377 (2d Cir. 1997) ("whether each child has a legal entitlement to the services of which that child is being deprived" and "whether defendants systematically have failed to provide these legally mandated services" satisfied commonality); Marcus, *supra* note __ at 786.
[22] Cite.
[23] Cite.
[24] Marcus, *supra* note __ at 788.

The administration of Rule 23 in child welfare litigation, an important if understudied segment of structural reform practice, exemplified the low threshold most courts set for class certification.[25] These cases allege that resource inadequacies and systemic mismanagement by central bureaucratic actors create a substantial risk of serious harm faced by all children in a state's or city's foster care or child welfare system.[26] At first glance, these cases seemed unlikely candidates for class treatment. Some children suffered from trauma because overworked case workers cannot monitor their placements closely enough. Other children received inadequate healthcare because the system poorly screens them as they get placed. Still other children were injured because the system makes inadequate efforts to keep them with their siblings.[27] Some children managed to endure their placements with no specific injuries at all.

Nonetheless, classes won certification because complaints alleged that generalized customs and practices placed all children at a common risk of harm.[28] Questions like "[w]hether [the agency] has a policy or practice of failing to adequately monitor the safety of plaintiff children causing significant harm and risk of harm to [their] safety, health and wellbeing" met the commonality test.[29] If this sort of question were answered in the affirmative, the court could fashion injunctive relief whose details may not address any specific class member's situation, but which would provide overall benefit to the class.[30] As one court noted, commenting on an influential Third Circuit decision, "it [was] an abuse of discretion *not* to certify a class" of foster

[25] *But see* Carson P.
[26] Cites.
[27] Cites.
[28] D.G. v. Yarbrough, Marisol, Baby Neal.
[29] D.G. ex rel. Strickland v. Vaughn, 594 F.3d 1188, 1196 (10th Cir. 2010).
[30] Cite.

children alleging substantial risk of harm.[31] These classes "almost automatically satisfied" Rule 23, the Third Circuit insisted.[32]

B. *Wal-Mart* and its Initial Reception

1. *Wal-Mart* as Exogenous Shock

The class action began to weather continual challenge from skeptical policymakers starting in the early 1990s,[33] and the device's use in public interest litigation did not escape some scrutiny. Congress prohibited Legal Services Corporation-funded lawyers from bringing class actions in 1996.[34] That same year, it enacted barriers to class action litigation targeting the administration of immigration law and policy.[35] Both developments, however, had discrete histories that shared little with the trans-substantive pressure for retrenchment that built throughout the 1990s.[36] None of the main proposals for reform at this level of generality that surfaced during this time targeted public interest litigation.[37] Into the 2000s no court or scholar of whom I am aware developed a serious argument that Rule 23's use in injunctive relief litigation against government defendants needed fixing.[38] The Court that decided *Wal-Mart* also decided *Brown v. Plata*, a case that won a revolutionary class-wide remedy designed to fix

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[31] Marisol A. v. Guiliani, 126 F.3d 372, 377 (2d Cir. 1997) (commenting on *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994)).
[32] Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 58 (3d Cir. 1994) (insisting that Rule 23(b)(2) is "almost automatically satisfied in actions primarily seeking injunctive relief"); *see also* Nicholson v. Williams, 205 F.R.D. 92, 100 (E.D.N.Y. 2001) ("[C]ommonality is presumed [when a] court certifies an injunctive class of civil rights claimants pursuant to Rule 23(b)(2)."); Bzdawka v. Milwaukee County, 238 F.R.D. 469, 476 (E.D. Wis. 2006) ((b)(2) "almost automatically satisfied"). *Cf.* Californians for Disability Rights, Inc. v. California Dept. of Transp., 249 F.R.D. 334, 346 (N.D. Cal. 2008) (stressing that Rule 23(b)(2) was designed for civil rights class actions).
[33] Cite my history. For suggestion that this pressure affected public interest litigation, Leti Volpp.
[34] Cite.
[35] Cite.
[36] Cite.
[37] Rule 23 proposed amendments in mid-1990s, CAFA, PSLRA.
[38] Easterbrook in 7th Circuit.

California's malfunctioning prison system.[39] If the Court intended *Wal-Mart* as commentary on the public interest class action, *Brown v. Plata* is inexplicable.

By no plausible account, then, could one understand *Wal-Mart*, decided in 2011, as a reaction to perceived pathologies in public interest litigation as I have defined it. Only by dint of an unusual path dependency did a case with billions of dollars in monetary relief at stake come before the Court in a posture that would soon make its relevance for public interest class actions plain.[40] The decision was an exogenous shock.

The *Wal-Mart* court made three principal adjustments to class action doctrine that have proven germane for public interest cases. First, it elevated the commonality requirement. A case cannot merely pose some supposedly common question at whatever level of abstraction permits class certification. Rather, the class members' "claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution," and the "determination of" this contention's "truth or falsity" must "resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke."[41]

Second, the plaintiffs cannot simply allege that a qualifying common question exists. Rather, they have to "prove" that their proposed class "*in fact*" meets Rule 23's requirements. A class meets the commonality requirement only if evidence exists to bridge the "conceptual gap" between each class member's individual experience with the defendant and the defendant's general conduct.[42] A court can only certify a class after it does a "rigorous analysis" to make sure that this is the case.[43]

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[39] Cite.
[40] Describe path dependency/my history.
[41] *Id.* at 350.
[42] Cite.
[43] *Id.* at 350-351.

Third, Rule 23(b)(2) "applies only when a single injunction . . . would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction . . . ."[44] Moreover, the class-wide relief must be "final" and "indivisible."[45] A proposed remedy that contemplates individualized administration for class members after its issuance on behalf of the class fails the Rule 23(b)(2) test.[46]

2. The Initial Aftermath

Wal-Mart quickly proved a "watershed" in this domain.[47] Each of the first three circuit courts to review a class certification issue after *Wal-Mart* ordered the class decertified.[48]

An episode of foster care reform litigation in Texas generated one of these decisions. On June 2, 2011, eighteen days before *Wal-Mart*, a district court certified a class of all children in Texas's system.[49] Addressing commonality, the court conceded that "the individual circumstances of each . . . class member . . . is unique," and that children in foster care experience the system in different ways.[50] But "plaintiffs' common questions . . . relate not to the individual story of each child, but rather the alleged shortcomings" of the system as a whole.[51] "While it may be true that each plaintiff would experience those shortcomings in a different way, depending on their particular backgrounds," the court concluded, "these alleged

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[44] *Id.* at 360.
[45] Cite.
[46] Cite.
[47] *E.g.*, Alonso on behalf of I.A. v. Sch. Bd. of Collier County, Florida, Civ. No. 16-379, 2018 WL 5304813, at *11 (M.D. Fla. Aug. 8, 2018) (referring to *Wal-Mart* as a "watershed"); Aguilar v. Immig. & Customs Enforcement Division of the U.S. Dep't of Homeland Sec., Civ. No. 07-8224, 2012 WL 1344417, at *3 (S.D.N.Y. Apr. 16, 2012) (describing *Wal-Mart* as a turning point in Rule 23(b)(2) litigation); Taylor v. Zucker, Civ. No. 14-5317, 2015 WL 4560739, at *11 (S.D.N.Y. July 27, 2015) (describing the proposed class as "paradigmatic" of those certified before *Wal-Mart* but insisting that it is no longer an appropriate one after *Wal-Mart*);
[48] Cite only cases where this isn't true – 10th Circuit – Valdez, Shook, and Caroline C., I think.
[49] M.D. v. Perry, Civ. No. 11-84, 2011 WL 2173673 (S.D. Tex. June 2, 2011).
[50] *Id.* at *5.
[51] *Id.* at *__.

deficiencies would exist for all those in the system."[52] Commonality required nothing more than allegations that all class members endure the same risk from being subject to these deficiencies.[53] "[W]hether defendants' actions in general caused harm or risk of harm to plaintiffs" qualified by Rule 23(a)(2)'s terms.[54]

"Although the district court's analysis may have been a reasonable application of pre-*Wal-Mart* precedent," the Fifth Circuit held that the "heightened standards" for commonality post-*Wal-Mart* required reversal.[55] The district court "failed to consider or explain how the determination of" questions pertaining to deficiencies in caseworker staffing, the number and types of foster care placements, and protections from abuse would resolve a central issue for each class member's claim "in one stroke."[56] The district court neither analyzed the relevant substantive law nor considered the evidence to determine that these questions' resolutions would help prove each class member's claim.[57] The decision included no analysis of claims or applicable doctrine, to support the district court's determination that class members' claims did not require individualized adjudication.[58] Crediting the plaintiffs' allegations to this effect was not enough.[59]

The early success government defendants enjoyed after *Wal-Mart* has fueled arguments for strict limits in Rule 23's administration. Some argue that commonality after *Wal-Mart* limits class certification to instances when precisely the same governmental misconduct injures class

[52] Cite.
[53] *Id.* at *6-*7.
[54] *Id.* at *5.
[55] Cite.
[56] 841/839.
[57] *Id.* at 841.
[58] *Id.* at 842.
[59] *Id.* at 844.

members in precisely the same way.[60] By this argument, for instance, inmates cannot sue as a class to challenge a prison's lack of air conditioning unless each one has the same health condition that excessive heat threatens to worsen in the same way.[61] Government lawyers have also identified a bright line in Rule 23(b)(2) after *Wal-Mart*. Plaintiffs satisfy the requirement only if they seek a single, indivisible injunction that finally and completely resolves the totality of harm each class member suffers.[62]

In effect, arguments like these, if successful, would limit the public interest class action's domain to only those instances when identically situated class members challenge a single, explicit policy that the government administers uniformly.[63] As the next Part argues, such efforts to shrink Rule 23's reach in public interest litigation have not succeeded.[64]

II. The Current Equilibrium

On the surface, the current landscape for public interest class actions does not look all that different from the old. Federal district courts have certified classes at a robust clip, and plaintiffs have mostly prevailed at the appellate level. Moreover, the types of classes that have enjoyed success do not differ from those that won certification before 2011. Below the surface, however, practice has changed. For the category of public interest litigation most vulnerable to post-*Wal-Mart* retrenchment, class certification has pushed litigators and judges to clarify more precisely the contours of the substantive law that vests plaintiffs with claims. A "group rights"

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[60] Parsons v. Ryan, 784 F.3d 571, 579 (9th Cir. 2015) (Ikuta, J., dissenting from denial from rehearing en banc); B.K. v. McKay, Appellant Gregory McKay's Petition for Rehearing En Banc, No. 17-17501, Ninth Circuit, May 24, 2019, at 12; DL v. District of Columbia, 277 F.R.D. 38, 45-46 (D.D.C. 2011); Glover v. City of Laguna Beach, Civ. No. 15-1332, 2017 WL 4457507, at *3 (C.D Cal. June 23, 2017).

[61] Yates v. Livingston, Fifth Circuit, No. 16-20505, Oct. 11, 2016, Brief of Appellants at 28.

[62] DL v. District of Columbia, 713 F.3d 120, 129-130 (D.C. Cir. 2013) (Edwards, J., concurring) (quoting government lawyer's position at oral argument); DL v. District of Columbia, No. 16-7076, Brief for the District of Columbia Appellants, D.C. Cir., Oct. 17, 2016, at 43.

[63] Jamie S. (no such thing as systemic violation of IDEA).

[64] *E.g.*, Gray v. Golden Gate Nat'l Recreational Area, 279 F.R.D. 501, 518 (N.D. Cal. 2011) (rejecting a reading of Wal-Mart that would require an "express, centralized policy" for class certification).

jurisprudence has coalesced out of these efforts. Class certification has succeeded in cases challenging customs, practices, and deliberate indifference because the underlying substantive doctrine treats class members not as discrete individuals but as undifferentiated members of groups.

A. The Landscape by the Numbers

The three early wins at the circuit level proved a false dawn for government defendants wielding *Wal-Mart* to block structural reform litigation. Since the last of these cases, the federal circuits have decided nineteen appeals involving the propriety of class certification. Plaintiffs have won sixteen of these cases.[65] Of the three losses, one produced an unpublished decision,[66] a second resulted from a specific class action bar in the Immigration and Nationality Act,[67] and the third affirmed a district court's decision to decertify a class after a trial revealed insufficient evidence of class-wide harm.[68] With the three early decisions included, plaintiffs' overall appellate record is 16-6 since *Wal-Mart*.

A deeper dive yields more evidence of the persistence of the public interest class action. Reviewing judges' votes in circuit opinions on class certification from 1967-2017, Steve Burbank and Sean Farhang have documented "a very strong association between the political

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[65] For decisions either affirming class certification or reversing a decision denying or vacating class certification, see B.K. v. Snyder, 922 F.3d 957 (9th Cir. 2019) (pp); In re District of Columbia, 792 F.3d 96 (D.C. Cir. 2015) (Olmstead, pp); DL v. District of Columbia, 860 F.3d 713 (D.C. Cir. 2017) (pp); M.D. by Stukenberg v. Abbott, 907 F.3d 237 (5th Cir. 2018) (pp); Postawko v. Missouri Dep't of Corrections, 910 F.3d 1030 (8th Cir. 2018); Lacy v. Cook, 897 F.3d 847 (7th Cir. 2018); Brown v. District of Columbia, No. 17-7152, 2019 WL 2895992 (D.C. Cir. July 5, 2019) (pp); J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019); Driver v. Marion County Sheriff, 859 F.3d 489 (7th Cir. 2017); Richardson v. Bledsoe, 829 F.3d 273 (3d Cir. 2016); Cole v. City of Memphis, 839 F.3d 530 (6th Cir. 2017); In re Rodriguez, 695 F.3d 360 (5th Cir. 2012); Yates v. Collier, 868 F.3d 354 (5th Cir. 2017); Shelton v. Bledsoe, 775 F.3d 554 (3d Cir. 2015); Gayle v. Warden, Monmouth County Correctional Institution, 838 F.3d 297 (3d Cir. 2016); Parsons v. Ryan, **cite. (pp).** For decisions vacating class certification decisions, see Hamama v. Adducci, 912 F.3d 868 (6th Cir. 2018) (holding that 5 U.S.C. § 1252(f) bars the certification of a class challenging immigration removal proceedings); Phillips v. Sheriff of Cook County, 828 F.3d 541 (7th Cir. 2016). Unpublished – Ward v. Hellerstedt, 753 Fed. Appx. 236 (5th Cir. 2018).

[66] Cite.

[67] Cite.

[68] Cite.

party of the appointing President and certification votes and outcomes." They find that judges appointed by Republican presidents voted for certification 37% of the time and their Democratic colleagues 50% of the time.[69] The behavior of these judges in public interest cases post-*Wal-Mart* is striking by contrast, although the total number of votes since June 2011 is too small to make claims with any statistical rigor. Circuit judges appointed by Democratic presidents have indeed voted in favor of class certification at a higher rate than their Republican colleagues. But neither the difference nor the rate at which they vote in favor of certification – 80% pro-certification votes for Democratic appointments (20 out of 25 votes) versus 70% for Republican appointments (26 out of 37) – suggests a significant partisan skew.

The record at the district court level tilts in favor of plaintiffs as well. Table I reflects the results from my effort to gather and code every reported class certification decision rendered by district courts since *Wal-Mart*.[70] **[note – these data are not yet complete but I believe they're representative]** The numbers tilt strongly in favor of certification. The lack of a pre-2011 baseline renders these results less illuminating, as they cannot show whether practice has changed since *Wal-Mart*. But at the least, this pattern dispels any facile suggestion that *Wal-Mart* has erected anything approaching an impregnable barrier to class certification in public interest litigation.[71] Moreover, the rate at which district courts issue plaintiff-friendly decisions does not vary dramatically from circuit to circuit. This pattern counters any suggestion that plaintiff-friendly results post-*Wal-Mart* reflect the significance of a particularly favorable circuit-level decision and plaintiffs' subsequent choices to file in that circuit.

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[69] Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, Draft at 6, 24.

[70] I have limited my search to these databases with an awareness that my data will not capture unpublished class certification decisions that exist solely on docket sheets. These decisions have no precedential significance and as such are fairly excluded from a database purporting to represent how class certification doctrine has evolved since *Wal-Mart*.

[71] Address the Gelbach point later.

Table I. District Court Decisions on Class Certification, June 21, 2011-Present

Circuit Membership	Plaintiff-Friendly Decisions	Defendant-Friendly Decisions
First	100% (6 decisions)	0% (0 decisions)
Second	83.33% (30 decisions)	16.67% (6 decisions)
Third	78.95% (15 decisions)	21.06% (4 decisions)
Fourth	72.73% (8 decisions)	27.27% (3 decisions)
Fifth	73.68% (14 decisions)	26.32% (5 decisions)
Sixth	76.00% (19 decisions)	24% (6 decisions)
Seventh	66.67% (26 decisions)	33.33% (13 decisions)
Eighth	82.61% (19 decisions)	17.39% (4 decisions)
Ninth	75.61% (62 decisions)	24.39% (20 decisions)
Tenth	58.33% (7 decisions)	41.67% (5 decisions)
Eleventh	63.16% (12 decisions)	36.84% (7 decisions)
D.C. Circuit	88.89% (8 decisions)	11.11% (1 decision)
Federal Circuit	0% (0 decisions)	100% (1 decision)
Total	**75.08% (226 decisions)**	**24.92% (75 decisions)**

The partisan skew at the district court level does seem more significant than at the appellate level. District judges appointed by Democratic presidents have ruled in favor of class certification in 80.53% of the cases they have decided. Their Republican colleagues have done so in 63.73%, a difference that better resembles the pattern identified by Burbank and Farhang. I return to the significance of this difference in Part III.

B. The Doctrinal Landscape

So much for the numbers. A deeper, more qualitative dive into class certification patterns since *Wal-Mart* reveals that the core arguments for doctrinal retrenchment have not yet prevailed. In a previous article, I proposed a three-part typology as a way to think clearly about the types of injunctive relief cases class litigants bring against government defendants and how Rule 23 works in each. I use the same typology to show that little has changed since *Wal-Mart*.

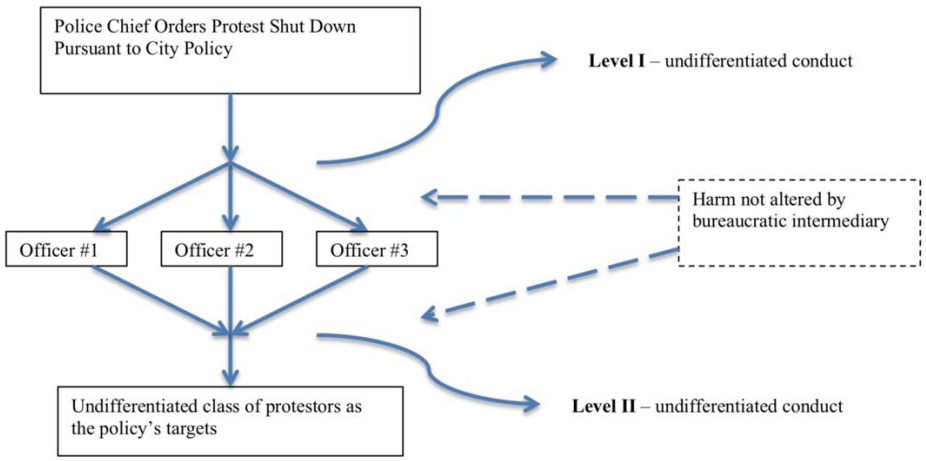
1. The Typology

Differences in relationships among levels of a government bureaucracy and targets or

beneficiaries of government programs give rise to three types of public interest class actions. These types vary depending on the degree to which class members' claims are interdependent, and the degree to which the remedy is necessarily indivisible.

In a Type I case, the central agency, the Level I actor, crafts a policy or makes a decision that bureaucratic intermediaries, the Level II actors, then administer without altering the policy in any way, and without differentiating among beneficiaries or targets as they do so. Prompted by a crowd control policy, a police chief decides to shut down a protest. Following orders, police officers move into the crowd to do so. The officers (the bureaucratic intermediaries) do not administer the order in a differentiated way, by singling out particular protestors for particularized enforcement. Rather, the officers order the crowd as a whole to disperse. The conduct at the upper level of the bureaucracy and the lower level conduct are the same. The lack of differentiation gives the protestors a necessarily interdependent claim when they challenge the crowd control policy. The court cannot possibly adjudicate the lawfulness of one class member's First Amendment claim without also deciding the claim for all protestors. Moreover, the inability of the police to differentiate among protestors as they order the crowd dispersed means that the remedy is necessarily indivisible. If the court declares the policy unconstitutional, it must enjoin its enforcement against protestors in general and not as administered against any particular one.

Figure 1. Type I: Necessarily Interdependent Claim, Necessarily Indivisible Remedy



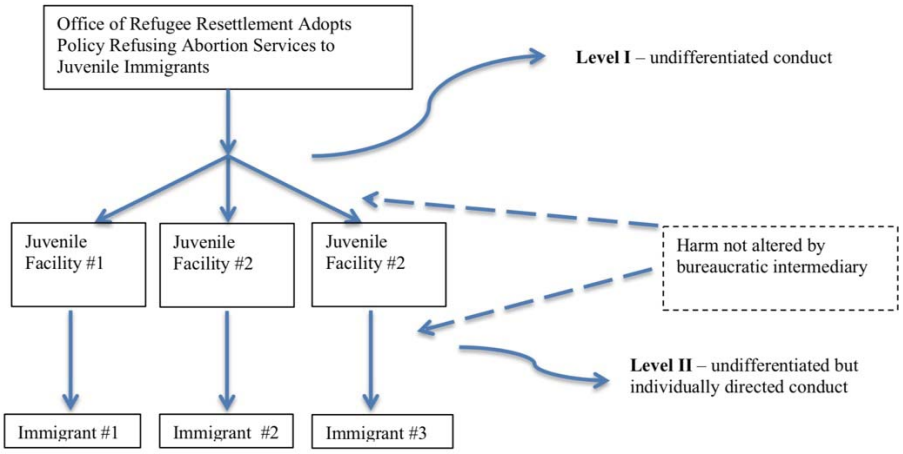
A Type II case involves necessarily interdependent claims and plausibly indivisible remedies. As with a Type I case, a central agency adopts a policy at Level I. Bureaucratic intermediaries administer the policy without alteration at Level II. But, because of the policy's nature, they do so in an individualized, albeit identical, fashion. The intermediaries can differentiate among beneficiaries or targets, but they do not do so. Each beneficiary or target thus experiences the policy in an identical way.

In 2017, for instance, the Office of Refugee Resettlement adopted a policy that effectively banned the provision of abortion services to immigrant juveniles in its shelters.[72] ORR's director promulgated the policy (the Level I conduct), and agency personnel administered it uniformly when juveniles requested abortions (the Level II conduct). Because these bureaucratic intermediaries did not alter or adjust the policy when they denied requests for abortions, each class member had the same interdependent claim. The court could not decide the lawfulness of anyone's treatment without doing so for all. But the individualized administration of the policy by bureaucratic intermediaries made the remedy plausibly indivisible. A court

[72] Cite.

could enjoin the policy's enforcement to benefit a single juvenile, while leaving it undisturbed for all others.

Figure 2. Type II: Necessarily Interdependent Claim, Plausibly Indivisible Remedy

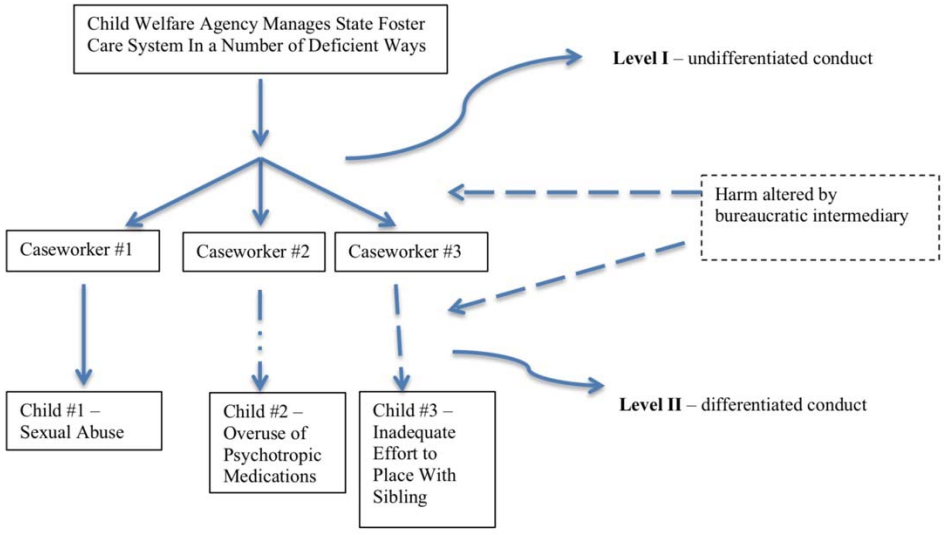


A Type III case involves plausibly interdependent claims and plausibly indivisible remedies. Cases challenging some mix of customs, practices, and deliberate indifference are the paradigm here. Plaintiffs allege that the central agency manages a program in systemically deficient ways at Level I. But class members experience this maladministration as filtered through a set of bureaucratic intermediaries, such that the deficiencies manifest themselves differently for each one at Level II. A state child welfare agency fails to hire enough caseworkers, recruits too few foster placements, and audits these placements inadequately. One overworked caseworker (the bureaucratic intermediary) ignores warning signs and places a child in a home where she is at risk of sexual assault. Another caseworker, stretched too thin, fails to monitor a child's mental health adequately. Foster children thus experience the Level I failures in different ways at Level II.

These children have plausibly interdependent claims. They could sue to challenge the Level I maladministration, but each one could also individually target the particular Level I

conduct that produces her discrete harm. The court could adjudicate mistreatment at Level II for one child without pronouncing on the Level I maladministration, what all children have in common. But if the child targets the Level I conduct, then the court necessarily adjudicates all children's claims. Likewise, the court could fashion a discrete remedy for the Level II harm, just to benefit one child. A remedy targeting the Level I maladministration would necessarily benefit all children and for that reason be indivisible.

Figure 3. Type III: Plausibly Interdependent Claim, Plausibly Indivisible Remedy



2. Type II Cases After *Wal-Mart*

Very few class actions fit the Type I mold. Rarely do situations arise when bureaucratic intermediaries truly cannot differentiate among regulatory beneficiaries or targets as they administer centrally designed policy. Type II cases, by contrast, arise basically anytime a class action challenges a stated, explicit policy. Since *Wal-Mart*, these cases tend to fit into one of two categories, distinguished by the degree to which the common policy bears responsibility for the entirety of class members' harm.

The first category involves cases where a single, class-wide injunction completely and fully corrects any injurious effects the class member suffers from her exposure to the policy at issue. A lawsuit challenging an inmate mail policy at a Kansas jail illustrates. The sheriff prohibited inmates from sending or receiving any mail other than postcards.[73] Alleging First Amendment claims, inmates sued, and they filed a straightforward and easily granted class certification motion. The central claim, the policy's lawfulness under the First Amendment, easily met the commonality threshold. If the "postcard only" policy violated any inmate's First Amendment rights, it violated every inmate's rights, as the same policy applied identically to each one. Rule 23(b)(2) likewise posed a modest hurdle. Since the postcard-only policy was the sole and complete reason for any inmate's injury, a single, identical injunction (an order enjoining the policy) would completely fix any harm an inmate might experience, with no further remedial intervention.[74]

Defendants cannot plausibly contest commonality or Rule 23(b)(2) in these Type II cases,[75] examples of which are legion.[76] To the extent Type II "single remedy" classes run into problems at the certification stage, they do so not because of commonality's or Rule 23(b)(2)'s stringency. Rather, sometimes courts invoke the decades-old "Necessity Doctrine" to deny class certification.[77] So the logic of this defense goes, a facial challenge to a statute's legality is inherently aggregated and can only be adjudicated for all people the statute targets at once.[78] The doctrine is unpersuasive, as it ignores scope-of-remedy principles that should limit an

[73] Ogden v. Figgins, 315 F.R.D. 670, 671-672 (D. Kan. 2016).
[74]
[75] McGee v. Pallito, Civ. No. 04-335, 2015 WL 5177770, at 4 (D. Vt. Sept. 4, 2015) – **explain**
[76] *E.g.*, **cites.**
[77] *E.g.*,
[78] **Cite.**

injunction to benefit only the actual parties to the case.[79] Regardless, *Wal-Mart* has no significance for this doctrine, which has generated confused, conflicting treatments for decades.[80]

A second category of Type II cases involve efforts by plaintiffs to secure a "fair chance" to obtain some benefit or vindicate some right, an outcome thwarted for all by a single, usually explicit policy.[81] A recent spate of cases challenging money bail systems fits this description.[82] A centrally fixed policy instructs judges, the bureaucratic intermediaries, to set bail for pretrial detainees without an inquiry into ability to pay.[83] The policy thus denies detainees a fair chance to argue for a bail amount pegged to their financial conditions.[84] The class action targets the

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[79] *See* Garnett v. Zeilinger, 301 F. Supp. 3d 199, 205 & n.4 (D.D.C. 2018) (rejecting a necessity argument against class certification by stressing scope-of-remedy limitations).

[80] Cite.

[81] For examples beyond those discussed in this paragraph, see In addition to the cases discussed in this paragraph, see also Nak Kim Chhoeun v. Marin, Civ. No. 17-1898, 2018 WL 6265014 (C.D. Cal. Aug. 14, 2018) (right of immigrants to file a motion to reopen before their orders of removal are executed); Brown v. Precythe, Civ. No. 17-4082, 2018 WL 3118185 (W.D. Mo. June 25, 2018) (challenge to policies state uses to determine if people convicted as juveniles can be paroled); Martin v. City of Fort Wayne, Civ. No. 15-384, 2016 WL 5110465 (N.D. Ind. Sept. 20, 2016) (challenge to policy of towing cars to impound lots even if a **driver is available – restate**); Lebron v. Wilkins, 277 F.R.D. 664 (M.D. Fla. 2011) (challenge to policy of drug-testing all applicants for welfare benefits regardless of reasonable suspicion); R.I.L.-R v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015) (including the enhanced deterrent effect of detention on likelihood to immigrate when determining whether to detain immigrant families); Unthaksinkun v. Porter, Civ. No. 11-588, 2011 WL 4502050 (W.D. Wash. Sept. 28, 2011) (right to adequate notice before health benefits are terminated); Robinson v. Purkey, 326 F.R.D. 105 (M.D. Tenn. 2018) (right to have indigency considered before drivers' license is suspended for nonpayment of traffic debt); M.G. v. New York City Dep't of Educ., 162 F. Supp. 3d 216 (S.D.N.Y. 2016) (challenge to policies New York City had for adjudicating IEPs for children with autism); Hart v. Colvin, 310 F.R.D. 427 (N.D. Cal. 2015) (right to have application for disability benefits adjudicated without influence of particular physician's consultative examination); Sherman v. Burwell, Civ. No. 15-1468, 2016 WL 4197575 (D. Conn. Aug. 8, 2016) (challenge to "secret policy" of having private contractor invariably deny Medicare appeals); R.F.M. v. Nielsen, 365 F. Supp. 3d 350 (S.D.N.Y. Mar. 15, 2019) (right to have Department of Homeland Security consider orders from New York family court in support of applications for special immigrant juvenile visas); Graham v. Parker, Civ. No. 16-1954, 2017 WL 1737871 (M.D. Tenn. May 4, 2017); Stafford v. Carter, Civ. No. 17-289, 2018 WL 1140388 (S.D. Ind. Mar. 2, 2018); Chimenti v. Wetzel, Civ. No. 15-3333, 2018 WL 2388665 (E.D. Pa. May 24, 2018); Hoffer v. Jones, 323 F.R.D. 694 (N.D. Fla. 2017); Buffkin v. Hooks, Civ. No. 18-502, 2018 WL 6271855 (M.D.N.C. Nov. 30, 2018); Postawko v. Missouri Dep't of Corrections, Civ. No. 16-4219, 2017 WL 3185155 (W.D. Mo. July 26, 2017), *aff'd* 910 F.3d 1030 (8th Cir. 2018).

[82] *E.g.*, Daves v. Dallas County, Texas, Civ. No. 18-154, 2018 WL 4537202 (N.D. Tex. Sept. 20, 2018); Dixon v. City of St. Louis, Civ. No. 19-112, 2019 WL 2437026 (E.D. Mo. June 11, 2019); Caliste v. Cantrell, Civ. No. 17-6197, 2018 WL 1365809 (E.D. La. Mar. 16, 2018); Walker v. City of Calhoun, Civ. No. 15-170, 2016 WL 361580 (N.D. Ga. Jan. 28, 2016); Booth v. Galveston County, Civ. No. 18-104, 2019 WL 1129492 (S.D. Tex. Mar. 12, 2019); Buffin v. City and County of San Francisco, Civ. No. 15-4959, 2018 WL 1070892 (N.D. Cal. Feb. 26, 2018); O'Donnell v. Harris County, Civ. No. 16-1414, 2017 WL 1542457 (S.D. Tex. Apr. 28, 2017).

[83] *E.g.*, Daves v. Dallas County, Texas, Civ. No. 18-154, 2018 WL 4537202 (N.D. Tex. Sept. 20, 2018)

[84] Cite.

policy to give class members the opportunity to argue for a discount that reflects their indigency.[85] Ultimately, each class member wants an affordable bail or release on his own recognizance, the ultimate benefit that a successful challenge to the class-wide policy makes possible. Another example were lawsuits brought to challenge the use of mandatory detention for categories of immigrants in removal proceedings.[86] The policy denied immigrants bond hearings and thus a fair chance to argue for release – the ultimate benefit that the policy uniformly thwarts for all class members.

To date, challenges to class certification in Type II "fair chance" cases have all but uniformly failed. Defendants argue that class members really want the ultimate benefit or vindicated right – an indigency-adjusted bail for inmates, for instance, or release on bond for immigrants.[87] The proposed injunction that would order the defendant to give the class members a fair chance at pursuing this ultimate benefit is a half measure, not "final" relief of the sort that Rule 23(b)(2) requires.[88] Moreover, a court could not administer this ultimate benefit with a single, indivisible injunction, as individualized factors would determine the bail amount set for a particular inmate or whether a particular immigrant meets the criteria for release on bond.[89] These sorts of arguments "miss the boat," as one district judge put it.[90] The defendant violates the law with its policy that denies all plaintiffs a fair chance. This denial is the injury, one that

[85] Cite.
[86] Gayle v. Warden, Monmouth County Correctional Institution, Civ. No. 12-2806, 2017 WL 5479701 (D.N.J. Nov. 15, 2017); Gordon v. Johnson, 300 F.R.D. 31 (D. Mass. 2014); Gayle v. Johnson, 81 F. Supp. 3d 371 (D.N.J. 2015); Preap v. Johnson, 303 F.R.D. 566 (N.D. Cal. 2014); Khoury v. Asher, 3 F. Supp. 3d 877 (W.D. Wash. 2014); Gonzalez v. Sessions, 325 F.R.D. 616 (N.D. Cal. 2018). **Rodriguez and change**.
[87] Cites.
[88] Cite.
[89] Cite.
[90] Cite.

an indivisible injunction ordering the defendant to give class members the chance to pursue the ultimate benefit can redress.[91]

3. Type III Cases After *Wal-Mart*

Type III cases would seem the most vulnerable to retrenchment after *Wal-Mart*.[92] *Wal-Mart* itself fits the Type III mold, as do the three cases that generated the first appellate engagements with Rule 23 in public interest litigation after June 2011.[93] Bureaucratic intermediaries interrupt the causal connection between the central agency's customs and practices at Level I, or what all class members have in common. More individualized experiences and injuries at Level II result from this differentiated treatment. This scenario arguably creates commonality and Rule 23(b)(2) problems. A class member's injury results from a mix of causal forces, including common, Level I maladministration and individualized, Level II treatment. This individualized treatment would seem to make individualized remedies necessary.

Foster care reform litigation exemplifies Type III cases and their vulnerability to derailment after *Wal-Mart*. The plaintiffs argue that widespread deficiencies in the state's system result from deliberate indifference to child safety and well-being at the central agency, the Level I actor. But each child, who interfaces with the agency through his or her own caseworker, experiences this maladministration differently. One child's claim for sexual

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[91] Cite.

[92] Cases of this sort include Yates v. Collier, 868 F.3d 354 (5th Cir. 2017); Parsons v. Ryan, **Cite**; Shelton v. Bledsoe, 775 F.3d 554 (3d Cir. 2015); Gray v. County of Riverside, Civ. No. 13-444, 2014 WL 5304915 (C.D. Cal. Sept. 2, 2014); Lippert v. Baldwin, Civ. No. 10-4603, 2017 WL 1545672 (N.D. Ill. Apr. 28, 2017); Rasho v. Walker, Civ. No. 07-1298, 2016 WL 11514940 (C.D. Ill. Aug. 14, 2015); Rosas v. Baca, Civ. No. 12-428, 2012 WL 2061694 (C.D. Cal. June 7, 2012); Lewis v. Cain, 324 F.R.D. 159 (M.D. La. 2018); Hill v. County of Montgomery, Civ. No. 14-933, 2017 WL 9249663 (N.D.N.Y. Sept. 29, 2017) (**class not certified)**; Hernandez v. County of Monterey, 305 F.R.D. 132 (N.D. Cal. 2015); Scott v. Clarke, 61 F. Supp. 3d 569 (W.D. Va. 2014); Dockery v. Fischer, 253 F. Supp. 3d 832 (S.D. Miss. 2015); Braggs v. Dunn, 317 F.R.D. 634 (M.D. Ala. 2016).

[93] Cite.

molestation, defendants argue, shares little in common with a second child's claim for over-exposure to psychotropic medication, given that the two children have different caseworkers, are in different placements, enter the system with different preexisting conditions, and so forth.[94] Not only do their claims turn on different, particularized evidentiary showings, they also need individually-fashioned remedies inconsistent with Rule 23(b)(2)'s insistence on indivisibility.[95]

In a couple of Type III cases, courts, apparently convinced by this sort of logic, have all but declared class certification out of bounds except when a single, explicit policy affects each child equally.[96] But in many instances Type III classes have won certification.[97] These cases share an important characteristic. In them, plaintiffs describe the injury not as how Level I maladministration manifests for any particular class member, but rather as the systemic risk of harm that deficient customs, inadequate practices, and deliberate indifference create in uniform measure for all class members.[98]

This strategy proceeds in two steps. First, plaintiffs demonstrate that the applicable substantive law recognizes potential liability for the creation of a risk of harm without requiring proof that the risk actually materializes as specific, concrete harm for each class member.[99] If

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[94] Cite.
[95] Cite.
[96] Jamie S. v. Milwaukee Public Schools, 668 F.3d 481, 498 (7th Cir. 2012); Thornhill v. Aylor, Civ. No. 15-24, 2016 WL 8737358, at *14 (W.D. Va. Feb. 19, 2016).
[97] In addition to the cases cited in note ___, see Ball by Burba v. Kasich, Civ. No. 16-282, 2017 WL 1148358 (S.D. Ohio Mar. 27, 2017) (risk of harm claim under Americans With Disabilities Act); Kenneth R. v. Hassan, 293 F.R.D. 254 (D.N.H. 2013) (same); M.B. by Eggemeyer v. Corsi, 327 F.R.D. 271 (W.D. Mo. 2018) (risk of harm to children in foster care); B.K. v. Snyder, 922 F.3d 957 (9th Cir. 2019) (risk of harm to children in foster care); Connor B. ex rel. Vigurs v. Patrick, 278 F.R.D. 30 (D. Mass. 2011) (risk of harm to children in foster care); S.R., by and through Rosenbauer v. Pennsylvania Dep't of Human Services, 325 F.R.D. 103 (M.D. Pa. 2018); O.B. v. Norwood, Civ. No. 15-10463, 2016 WL 2866132 (N.D. Ill. May 17, 2016); Steward v. Janek, 315 F.R.D. 472 (W.D. Tex. 2016) (?); Westchester Independent Living Ctr. v. State University of New York, Purchase College, Civ. No. 16-5949, 2019 WL 2474254 (S.D.N.Y. June 12, 2019) (ADA mobility barriers); S.R., by and through Rosenbauer v. Pennsylvania Dep't of Human Services, 325 F.R.D. 103 (M.D. Pa. 2018) (disabled kids in horrible institutionalization situations); Manker v. Spencer, 329 F.R.D. 110 (D. Conn. 2018) (discharge upgrade case).
[98] Cite.
[99] *E.g.*, B.K. v. Snyder, 922 F.3d 957, 968-969 (9th Cir. 2019); Shelton v. Bledsoe, 775 F.3d 554, 564-565 (3d Cir. 2015); M.B. by Eggemeyer v. Corsi, 327 F.R.D. 271, 281 (W.D. Mo. 2018).

the underlying substantive law indeed provides for risk of harm liability, then each class member could conceivably suffer the same injury, an undifferentiated risk of harm. The elements of this undifferentiated risk of harm claim beg common questions of law, and common evidence of maladministration at Level I can conceivably answer them. If the defendant indeed creates this undifferentiated risk of harm for all class members, a single, indivisible injunction can issue to mitigate the risk by correcting Level I maladministration.[100]

Parsons v. Ryan, a case challenging the provision of healthcare at nine Arizona prisons, produced a particularly influential treatment of this strategy.[101] The state "describe[d] the plaintiffs' claims as little more than an aggregation of many claims of individual mistreatment," ones that required individualized inquiries that did not pose common questions capable of generating common answers. This view, the Ninth Circuit reasoned, "rest[ed] . . . on a fundamental misunderstanding of . . . Eighth Amendment doctrine, and the plaintiffs' constitutional claims."[102] The law that allegedly imposes liability on corrections agencies distinguishes between a "systemic, future-oriented Eighth Amendment claim" that prison officials are "deliberately indifferent to policies and practices that expose inmates to a substantial risk of serious harm," on one hand, and a claim rooted in a "past instance of mistreatment," on the other.[103] The latter might require individualized adjudication, but the former recognizes the

[100] *B.K.*, 922 F.3d at 971; Braggs v. Dunn, 317 F.R.D. 634, 656 (M.D. Ala. 2016).
[101] On *Parsons*' influence, see, e.g., cites. *B.K. v. Snyder*, another Ninth Circuit case, affirmed the certification of a class of foster children alleging substantive due process claims against the State of Arizona. But the court also de-certified a "Medicaid subclass" of children contending that the state did not afford them adequate medical screening, diagnostic, and treatment services to which the Medicaid Act entitled them. The difference boiled down to a distinction of substantive law. The Fourteenth Amendment protects against a substantial risk of harm to children in foster care, a claim that doesn't require any particular child to prove that the harm materialized for him or her. "The same is not true of a claim under the Medicaid Act," the court insisted, "which must be based on acts or omissions by the state that actually violate the requirements imposed by the" statute." Proving risk alone, or something that each class member can do with common evidence, isn't enough to establish the defendant's liability. B.K. v. Snyder, 922 F.3d 957, 975-976 (9th Cir. 2019).
[102] *Id.* at 675-676.
[103] *Id.* at 676-677.

possibility that "every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide . . . policy or practice that creates a substantial risk of serious harm."[104]

The turn to undifferentiated risk of harm liability means that the plaintiffs' theory of the case involves questions of law and fact common to all class members. But the many discrete injuries that class members suffer at Level II, while possibly the manifestation of a common risk, might also prove not to share any common causal connection. However widespread, injuries at Level II might in fact result from idiosyncratic behavior by bureaucratic intermediaries. In theory, a risk of harm claim poses common questions. In any particular case, however, the class members' injuries might not have anything in common.

This prospect motivates the second step in the strategy. Plaintiffs have marshaled extensive evidence of Level I customs, policies, and practices and their causal connections to Level II outcomes to show that the array of injuries class members endure are in fact manifestations of systemic risk that they all suffer.[105] This evidence enables the class to bridge the "conceptual gap" between individual injuries and the questions of law or fact common to the class as a whole that the underlying substantive law recognizes.[106]

Again, *Parsons* illustrates. As the Ninth Circuit recognized, "utterly threadbare allegations that a group is exposed to illegal policies and practices are [not] enough to confer commonality."[107] A complaint may allege that a common causal thread connects systemic mismanagement with various inadequacies in prison healthcare that individual prisoners endure. But if this thread does not in fact link what class members share in common with their injuries,

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[104] *Id.* at 678.
[105] Gray v. County of Riverside, Civ. No. 13-444, 2014 WL 5304915, at *30 (C.D. Cal. Sept. 2, 2014); Dockery v. Fischer, 253 F. Supp. 3d 832, 854 (S.D. Miss. 2015); Kenneth R. v. Hassan, 293 F.R.D. 254, 267 (D.N.H. 2013).
[106] Lewis v. Cain, 324 F.R.D. 159, 169 (M.D. La. 2018).
[107] *Parsons*, 754 F.3d at 683.

then their claims do not pose common questions capable of generating the requisite common answers that *Wal-Mart* demands. Nor can a single injunction benefit all class members, since the lack of a common cause would require individualized remedies to address the harms they suffer. But the *Parsons* class adduced extensive evidence – expert reports, documents obtained in discovery from the state, and class member declarations – that in fact established a common threat that all class members faced.[108]

Since the initial trio of post-*Wal-Mart* appellate decisions, only one Type III case has failed at the circuit level.[109] In 2016, the Seventh Circuit affirmed the decertification a class of prisoners alleging that a prison system's practices and policies expose them to a substantial risk of serious harm to their dental health.[110] Some have seized on this decision as suggesting that commonality requires each class member to have endured the same experience at the defendant's hands, a threshold that would render most risk of harm claims uncertifiable.[111] But others, including district courts within the Seventh Circuit, recognize that the class failed for the prosaic reason that the plaintiffs lacked sufficient evidence at the second step of the risk of harm analysis. The plaintiffs simply failed to make an adequate showing that class members' experiences were manifestations of systemic misconduct and not merely isolated instances of harm.[112] This case, then, amounts to little more than commentary on the evidence necessary to establish a risk of harm claim against a prison system. It is hardly about Rule 23 at all.

C. What Has Changed

1. New Evidentiary Rigor

[108] *Id.* at 683-684.
[109] Confirm Ward v. Hellerstadt
[110] Phillips v. Sheriff of Cook County, 828 F.3d 541 (7th Cir. 2016)
[111] Dearduff v. Washington, 330 F.R.D. 452, 466 (E.D. Mich. 2019); gov't brief in BK.
[112] *E.g.*, Williams v. Sheriff of Cook County, Civ. No. 16-7639, 2017 WL 878731, at *4 (N.D. Ill. Mar. 6, 2017); Lippert v. Baldwin, Civ. No. 10-4603, 2017 WL 1545672, at **page** (N.D. Ill. Apr. 28, 2017).

Wal-Mart has had no impact on Type I cases, and it has prompted easily refuted arguments in Type II "fair chance" cases. Plaintiffs weathered early setbacks in Type III cases. But especially after *Parsons v. Ryan* clarified the proper analytical steps for a risk of harm case, plaintiffs have notched numerous and significant victories. The numbers likewise suggest a favorable climate for public interest class actions. To a certain extent, the federal courts have largely sidelined *Wal-Mart* as directly relevant to public interest litigation, distinguishing it on its facts[113] or explaining it away as a case concerned with individualized monetary relief and not injunctive remedies.[114] Has *Wal-Mart* proven much ado about nothing for litigants seeking to hold governments accountable, a decision momentarily scrambling the landscape before plaintiffs, their lawyers, and most federal judges put it back much as it was before?

Not quite. Public interest practice in the class action domain has changed. *Wal-Mart*'s demand for rigorous analysis has dramatically increased investments in substantive law exposition and evidentiary development at the class certification stage, especially in Type III cases.[115] In the Texas foster care reform case, for example, the district court's initial class

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[113] *E.g.*, Braggs v. Dunn, 317 F.R.D. 634, 655 n.24 (M.D. Ala. 2016); *id.* at 658; Floyd v. New York, 283 F.R.D. 153, 173 (S.D.N.Y. 2012); Morrow v. Washington, 277 F.R.D. 172, 192 (E.D. Tex. 2011); Spurlock v. Fox, Civ. No. 09-756, 2012 WL 1461361, at *5 (M.D. Tenn. Apr. 27, 2012); Hart v. Colvin, 310 F.R.D. 427, 434 (N.D. Cal. 2015); Parsons v. Ryan, Civ. No. 12-601, 2013 WL 1208598, at *8 (D. Ariz. Mar. 6, 2013)

[114] *E.g.*, McGee v. Pallito, Civ. No. 04-335, 2015 WL 5177770, at *2 (D. Vt. Sept. 4, 2015); S.R., by and through Rosenbauer v. Pennsylvania Dep't of Human Services, 325 F.R.D. 103, 110 (M.D. Pa. 2018).

[115] A revealing example involves the treatment of numerosity. Because public interest cases challenge government policy or its administration, they presumptively target conduct that affects numerous people. For this reason among others, courts often take numerosity arguments in public interest cases at face value. Hughes v. Judd, Civ. No. 12-568, 2013 WL 1821077, **pages** (M.D. Fla. Mar. 27, 2013); Rojas v. Johnson, Civ. No. 16-1024, 2017 WL 1397749, **pages** (W.D. Wash. Jan. 10, 2017); Robinson v. Purkey, 326 F.R.D. 105, 166 (M.D. Tenn. 2018); Hizer v. Pulaski County, Civ. No. 16-885, 2017 WL 3977004, **pages** (N.D. Ind. Sept. 11, 2017). More generally, as the leading treatise on class actions maintains, "certification denials on" numerosity grounds "are rare," and "courts are generally forgiving where plaintiffs are unable to do more than set forth commonsense assumptions" to support their numerosity arguments. 1 William B. Rubenstein, Newberg on Class Actions § 3:13; *see also* Allen v. City of Chicago, Civ. No. 98-7673, 2001 WL 1548966, at *2 (N.D. Ill. Apr. 23, 2001) ("The test for numerosity is whether it is general knowledge or common sense that the proposed class would be so large that joinder would be impracticable."). But a significant number of courts, prompted by *Wal-Mart*'s demand for rigorous analysis, have subjected numerosity arguments to far more searching review. *E.g.*, Chief Goes Out v. Missoula County, Civ. No. 12-155, 2013 WL 139938, **pages.** (D. Mont. Jan. 10, 2013); Does 1-10 v. University of Washington, 326 F.R.D. 669, **pages** (W.D. Wash. 2018); Murphy v. Piper, Civ. No. 16-2623, 2017 WL 4355970, **pages** (D. Minn. Sept. 29,

certification decision includes no detailed analysis of the children's substantive due process claim in its 10-paragraph commonality discussion.[116] When the Fifth Circuit decertified the class, it faulted the district court for its failure to explain how the answer to a question like "did the state maintain an adequate staff of caseworkers" could drive the resolution of every child's claim.[117] In effect, the Fifth Circuit demanded an analysis of what substantive due process law required for plaintiffs to prevail on a risk of harm theory, and whether their evidence gave reason to think that the numerous distinct harms individual children endured in fact reflected a systemic risk due to central agency maladministration.

On remand, the plaintiffs filed ____ pages of exhibits in support of their ___ page class certification motion. The district court held a multi-day evidentiary hearing. When it recertified the class, the district court included a detailed, six-page analysis of the substance of the due process claim, to document what showing it requires and how children can make this showing without individualized evidence.[118] The court also included a detailed, 24-paragraph discussion of evidence showing how the class members bridge the "conceptual gap" between each child's injury and the state's overall management of its foster care system.[119]

2017). **ADD MORE CITES.** More than a trivial number of proposed classes have failed for inadequate numerosity showings, including in instances when common sense – if not the plaintiffs' evidence – would surely establish that the case meets the requisite threshold. [Homelessness Case]

[116] M.D. v. Perry, Civ. No. 11-84, 2011 WL 2173673, at *5-*8 (S.D. Tex. June 2, 2011).

[117] M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832, 841 (5th Cir. 2012).

[118] M.D. v. Perry, 294 F.R.D. 7, 31-36 (S.D. Tex. 2013). For another example of an analysis of the underlying substantive law and a determination of what sort of evidence can support a liability finding, see, e.g., Gray v. Golden Gate Nat'l Recreational Area, 279 F.R.D. 501, 516 (N.D. Cal. 2011).

[119] *Id.* at 38-45. For other examples of a district court marshaling evidence to connect individual class members' injuries with systemic causes, see Parsons v. Ryan, Civ. No. 12-601, 2013 WL 1208598, at *9 (D. Ariz. Mar. 6, 2013); O'Donnell v. Harris County, Civ. No. 16-1414, 2017 WL 1542457, at *5 (S.D. Tex. Apr. 28, 2017); Steward v. Janek, 315 F.R.D. 472, 484-488 (W.D. Tex. 2016); Kenneth R. v. Hassan, 293 F.R.D. 254, 267 (D.N.H. 2013). For examples of a proposed class that failed to bridge the conceptual gap, see Haldane v. Hammond, Civ. No. 15-1810, 2017 WL 4122545, at 4 (W.D. Wash. Sept. 18, 2017); Northwest Immigrant Rights Project v. USCIS, 325 F.R.D. 671 (W.D. Wash. 2016).

Other courts have engaged in similarly exhaustive consideration of the underlying substantive law and evidence of a common risk of harm at the class certification stage. Adjusting to this new expectation, class counsel now tend to move for class certification later into the case, presumably to pursue class discovery; they tend to buttress their class certification motions with more extensive evidence;[120] and they tend to make longer arguments in their memoranda arguing for class certification.

The litigation behavior of Children's Rights, the leading organization litigating foster care reform cases, illustrates.[121] Before *Wal-Mart*, its lawyers routinely filed motions for class certification at the same time or just a few days after filing initial complaints. Commonality arguments typically took 4-5 pages in the briefs supporting these motions. After *Wal-Mart*, this pattern changed dramatically. In no case has Children's Rights filed a class certification motion sooner than eleven months after filing suit, presumably because it needs class discovery to find supporting evidence. Its two contested class certification motions post-*Wal-Mart* indicates just how differently sophisticated public interest lawyers understand the commonality requirement; one of these briefs took 46 pages to argue commonality, and the other took 27 pages.

[120] In one recent case, for instance, the plaintiffs challenged inadequate mental health services, the use of segregation and restraints, and other practices at a school for boys with mental illness. Class counsel supported the argument that these deficits together posed a common, class-wide substantial risk of serious harm with 1800 pages of exhibits they assembled after extensive discovery.[120] J.S.X. v. Foxhoven, 330 F.R.D. 197, 204 (S.D. Iowa 2019).
[121] Cite.

Table II. Children's Rights Pattern or Practice Class Actions, 1999-2018

Case Name	Date Filed	Date Class Certification Motion Filed	Pages of Commonality Discussion
Charlie H.	August 4, 1999	August 5, 1999	N/A
Brian A.	May 10, 2000	May 10, 2000	N/A
Kenny A.	June 6, 2002 (filed in state court)	June 6, 2002 (filed in state court)	7 pages[122]
Olivia Y.	March 30, 2004	March 30, 2004	N/A
Dwayne B.	August 8, 2006	August 9, 2006	5 pages
Andrew C.	June 28, 2007	June 28, 2007	4 pages
DG	February 13, 2008	February 13, 2008	5 pages
Connor B.	April 15, 2010	April 15, 2010	3 pages
MD	March 29, 2011	April 5, 2011 (initial motion) October 5 2012 (renewed motion)[123]	5 pages 46 pages
Michelle H.	January 12, 2015	June 3, 2016 (joint motion for certification of a settlement class)	
BK	February 3, 2015	November 29, 2016	27 pages
HG	February 20, 2018	March 11, 2019 (joint motion for certification of a settlement class)	
MB	November 16, 2018	No class certification motion filed yet	

2. The Law of Group Rights

The persistence of Type III cases after *Wal-Mart* and its initial reception in the courts of appeals has depended not so much on trans-substantive elaboration of Rule 23's requirements. Rather, these cases have succeeded in large measure because of claims, whether implicit or explicit, about the contours of underlying substantive claims and the sort of evidence necessary to establish the defendants' liability. As courts discharge their obligation to undertake a "rigorous analysis," they have come to describe the substantive elements of plaintiffs' claims and the evidence needed to prove a prima facie case in terms that make little sense if the relevant rights-bearer is conceived of as a discrete individual. Rather, these descriptions cast class

[122] Explain – state court standard
[123] Explain.

members as undifferentiated bearers of rights that they possess by virtue of their membership in a group. *Wal-Mart*, in short, has prompted an articulation of group rights in public interest litigation.

Type III classes have passed muster in large measure because their members allege risk of harm claims. Because the injury is the risk itself, each class member can plausibly allege that his or her injury flows from the same agency-wide conduct, provable with common evidence and redressable by an indivisible injunction.[124] One prisoner might suffer from inadequate access to insulin today, while another endures shortcomings in psychiatric care. But systemic deficiencies in prison-wide healthcare caused by maladministration at Level I expose both inmates to an identical risk of harm that might materialize in the same way for each tomorrow.[125]

In reality, of course, an inmate's pre-existing condition exacerbates a particular risk he endures. Deficiencies in healthcare that disrupt insulin supplies obviously threaten diabetic inmates and pose little risk to ones without diabetes. Two responses explain why these individual differences have not derailed class certification in Type III cases. One claims that the risk posed by systemic maladministration to even the healthiest inmate creates liability for the defendant.[126] The extra risk that the unhealthy inmate suffers is gratuitous, at least for the purposes of proving a claim. The second response posits that the individual characteristics and circumstances of inmates are simply substantively irrelevant.

The former response is plausible in some circumstances,[127] but it strains credulity in others. A systemic challenge to the management of a foster care system or a city's approach to

[124] Parsons v. Ryan, 754 F.3d 657, 678 (9th Cir. 2014) ("[E]very inmate suffers exactly the same constitutional injury when he is exposed to a single statewide . . . policy or practice that creates a substantial risk of serious harm . . . .").
[125] Cite.
[126] Yates.
[127] Yates.

disabilities accommodation sweeps in a wide range of flaws in policy administration, many of which pose no conceivable risk to many class members. A person who suffers from a hearing impairment endures no risk of harm from inadequate curb cuts,[128] and a foster child with no brothers or sisters suffers no harm from insufficient efforts to keep siblings placed together.[129]

The latter response treats class members as suing in a distinctive capacity, not as individuals but as undifferentiated members of a group, an entity that faces a constant, singular, and indivisible risk of generalized harm from Level I maladministration.[130] This "group rights" conceptualization better maps onto three features of class action practice that otherwise pose significant complexities.

First, to sue for injunctive relief, standing doctrine requires a plaintiff to show that the defendant's conduct places her in immediate jeopardy.[131] As a discrete individual, a class representative without siblings cannot meet this imminence of injury threshold if she challenges a state's failure to maintain sibling placements in foster care.[132] As an indistinct representative of a group of foster children, however, she can sue to remedy the undifferentiated risk she is exposed to, regardless of how it might materialize.

Second, scope-of-remedy doctrine would pose a difficult barrier to an injunction targeting Level I conduct were individual class member characteristics substantively relevant. This doctrine limits plaintiffs to a remedy no broader than what is necessary to correct the harm they suffer.[133] As an individual litigant, a prisoner with diabetes could pursue an injunction to get better access to insulin, but he could not obtain relief to address shortcomings in emergency

[128] Cite Golden Gate.
[129] Cite.
[130] Cite.
[131] Lyons.
[132] Lewis v. Casey.
[133] Lewis v. Casey/nationwide injunction stuff.

healthcare services at another facility.[134] As an undifferentiated member of the group, however, he could get a broad injunction targeting Level I maladministration, since policymaking and administration at Level I causes both deficiencies in insulin access and emergency healthcare services.

A class seeking damages often includes members who are injured in different ways by the same defendant. A securities fraud class, for instance, might include members who bought different, albeit similar, securities sold by the same defendant.[135] Sometimes courts treat the differences as implicating standing.[136] The majority – and better – view treats the differences as a class certification problem.[137] If class members are similar enough, they can be joined. Once joined, each class member has his or her own standing to sue the defendant, mooting any concern about a class representative suing to vindicate another's injury.[138]

No one would suggest that class members in these money damages cases sue in a group member capacity and not as themselves. Damages must be calibrated individually, after all, and Rule 23(b)(3)'s predominance requirement makes explicit mention to individual issues and thus conceptualizes class members in these terms.[139] But Type III class actions are different. In a damages case, each class member has standing to sue to obtain a remedy stemming from the central actor's conduct had she brought suit individually. Although few would do so, an investor

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[134] Cite.
[135] *E.g.*, NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 158-165 (2d Cir. 2012); In re Salomon Smith Barney Mutual Fund Fees Litig., 441 F. Supp. 2d 579, 604-607 (S.D.N.Y. 2006); Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co., 862 F. Supp. 2d 322, 330-341 (S.D.N.Y. 2012); Fed. Deposit Ins. Corp. v. Countrywide Financial Corp., Civ. No. 12-4354, 2012 WL 5900973, at *10 (C.D. Cal. Nov. 21, 2012); In re Bear Stearns Mortg. Pass-Through Certificates Litig., 851 F. Supp. 2d 746, 778 (S.D.N.Y. 2012). Other common scenarios involve consumer protection cases, where the class members purchased different products. *E.g.*, Anderson v. Jamba Juice Co., 888 F. Supp. 2d 1000, 1005 (N.D. Cal. 2012); Brazil v. Dell Inc., Civ. No. 07-1700, 2008 WL 4912050, at *5 (N.D. Cal. Nov. 14, 2008).
[136] Cites.
[137] Cite.
[138] Cite.
[139] Cite.

can sue the company misrepresenting its earnings as an individual. The class action can remediate the entire range of the defendant's misconduct because the class bundles together a lot of these individual claims, each one satisfying its piece of the overall standing puzzle on its own.

In a Type III public interest case, by contrast, the intervention of bureaucratic intermediaries disrupts the causal connection between the central agency's behavior at Level I and how it is experienced at Level II. An individual inmate could sue to remediate the Level II harm. But what enables him to target the Level I maladministration in a class action is not the mere fact of joinder. If it were, the class would fail on Rule 23(b)(2) grounds. The mere fact of joinder would mean that the class would seek a number of different injunctions to correct the various Level II harms, the sort of relief available in the individual lawsuits. This remedial situation violates *Wal-Mart*'s indivisible remedy requirement. What enables the class representative to sue to remediate the Level I misconduct, then, is how the substantive law treats her – not as a discrete individual, but as an undifferentiated member of the group.

A third indicator suggests that the substantive law in successful Type III cases conceptualizes the rights at stake in group terms. From time to time, defendants in these cases contest the adequacy of the named plaintiff's representation on grounds that the class action eschews damages and other individualized relief that absent class members might pursue in order to fit into Rule 23(b)(2)'s confines.[140] This argument rests on an implicit presumption, that the entry of judgment will preclude class members from litigating claims arising out of the same matter that the class action involves should they attempt to do so in the future.[141] Almost universally,[142] the federal courts have rejected this adequacy challenge, explaining that the class

[140] Cites.
[141] *E.g.*, Giannone v. York Tape & Label Co., Inc., 548 F.3d 191, 193-194 (2d Cir. 2008); Restatement (Second) of Judgments § 25 cmt. f (1982).
[142] But see.

judgment would not have the preclusive effect the defendants suggest.[143] This preclusion logic makes sense if class members in public interest cases litigate in a different capacity (class members *qua* group members) than they might in follow-on individual actions (class members *qua* discrete individuals).

The microscope that *Wal-Mart* has trained on the underlying substantive law and the evidence needed to establish liability by now has yielded clarity in Type III cases, those most vulnerable to retrenchment. The class action does not simply assemble a number of individual claims. It seeks to vindicate a claim that differs in kind. In *Parsons v. Ryan*, the Ninth Circuit relied on *Brown v. Plata* to distinguish between individual claims brought by individual prisoners tailored to their individual needs from a "systemic, future-oriented Eighth Amendment claim" that each prisoner, regardless of the specifics of his experience or treatment in confinement, can assert based on an undifferentiated risk that statewide administration creates.[144] In *Brown v. Plata*, the Court affirmed an injunction requiring a reduction in California's prison population as a remedy for overcrowding that threatened inmate health and safety.[145] As Sam Issacharoff rightly argues, no single inmate *qua* individual prisoner could possibly claim a right to this remedy:

> Each member of the class had been duly sentenced and properly subject to incarceration, leaving aside the inevitable individual appeals and habeas proceedings that may have been pending. No prisoner could claim an individual right to release from prison as a consequence of the overcrowding. . . . Absent unitary treatment through a class action, no prisoner would have a claim as to the

[143] Cite.

[144] 754 F.3d at 677; *id.* at 678 (explaining the undifferentiated nature of the risk). As for seeking redress for individual harms, *Brown v. Plata* class members could do so in individual litigation, the class action's preclusive effects notwithstanding. "Individual claims," the Ninth Circuit insists, are discrete from the claims for systemic reform addressed in *Plata.*" Pride v. Correa, 719 F.3d 1130, 1132 (9th Cir. 2013); *id.* at 1137; Burnett v. Dugan, 618 F. Supp. 2d 1232, 1234 (S.D. Cal. 2009). For other decisions reasoning similarly about the preclusive effect of a (b)(2) class action, see Thorpe. District of Columbia, 303 F.R.D. 120, 150 (D.D.C. 2014); Morrow v. Washington, 277 F.R.D. 172, 204 (E.D. Tex. 2011) *But see* Clark K. v. Guinn, Civ. No. 06-1068, 2007 U.S. Dist. LEXIS 35232, at *7-8 (D. Nev. May 9, 2007).

[145] 563 U.S. 493, 500-502 (2011).

> systemic violations caused by overcrowding, but only standing to seek legal redress for his or her individual harms.[146]

Although the Supreme Court's opinion in *Brown v. Plata* makes no mention of Rule 23, Prof. Issacharoff calls the case "perhaps the most important class action of the past decade."[147] I agree, insofar as *Brown v. Plata* countenances the substantive doctrinal basis for cases pursuing structural reform when systemic maladministration, not an unlawful policy, injures thousands of prisoners.[148] It blesses the proposition that sometimes the substantive law protects groups. When group members, not discrete individuals, are the rights-bearers, class-wide adjudication is not just appropriate but essential.

III. The Future of the Public Interest Class Action

[This part is not yet complete. It argues what class certification in public interest class actions ought to become. It also speculates what might happen to the public interest class action should the federal judiciary continue with its rightward ideological drift.]

A. Procedural Formalism and What Class Certification Ought to Be

The notion that class certification in a Type III case now hinges on the determination of whether the underlying substantive law conceives of the rights-bearer as a group or as

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[146] Samuel Issacharoff, *Class Actions and State Authority*, 44 Loy. U. Chi. L.J. 369, 376 (2012).
[147] Samuel Issacharoff & Peter Zimroth, *An Oral History of Rule 23*, 74 N.Y.U. Ann. Surv. Am. L. 105, 112 (2018).
[148] **Not just type III cases. Compare Rosales v. Bureau of Immigration and Customs Enforcement, 426 F.3d 733, 735-736 (5th Cir. 2005) - explain.** Deciding a due process challenge to an immigrant's mandatory detention, one district court noted that the constitutionality of the length of detention requires an inquiry into its reasonableness as judged by a number of individualized factors. Young v. Aviles, 99 F. Supp. 3d 443, 454-456 (S.D.N.Y. 2015). In a different case, the government argued that the court could not adjudicate a due process challenge to the use of mandatory detention without a bond hearing because the reasonableness of any immigrant's continued detention required an inquiry into each one's circumstances. The district court rejected this argument, suggesting that the due process question could be decided at once for all immigrants in the class. Reid v. Donelan, Civ. No. 13-30125, 2018 WL 5269992, at *5 (D. Mass. Oct. 23, 2018). "The Government may ultimately prevail on its merits argument that the Constitution requires an individualized determination of whether an alien's detention has become unreasonable," the court reasoned, but "the class still presents the common threshold question of whether their detention after six months without a bail hearing or reasonableness review violates the Constitution." *Id.* This argument is wrong if the class simply asserts a bundle of individual due process claims. Each one would require a context-specific reasonableness inquiry and thus could not be adjudicated together with all other class claims. If, however, the class-wide "fair chance" claim has different substantive contours from the individual one, the reasoning works.

individuals smacks of old-fashioned class action formalism. The old, pre-1966 version of Rule 23 posed just this inquiry, albeit more explicitly.[149] Whether plaintiffs could litigate a "true" class action – really the only kind with joinder and preclusion consequences equivalent to today's version – depended on whether the underlying substantive law conceived of the rights at issue in "impersonal" terms,[150] or terms that "subsume[d] litigative identity in the anonymity of an impersonal class."[151] This approach elevated the formal articulation of rights over the interests that individuals had at stake in litigation as the lynchpin for class treatment. It was derided as formalistic for that reason.[152]

The 1966 version of the rule no longer tracks any supposed distinctions among types of rights and instead attends to individuals' interests in the policy goals served by the law at issue in litigation.[153] Thus, the language some courts have used to clarify the contours of substantive rights at stake as they administer *Wal-Mart* has an ironic cast to it. But this turn to group rights is nothing like the old-fashioned rights-based formalism of a past class action era. The coalescing group rights jurisprudence simply recognizes that governments routinely treat regulatory beneficiaries or targets as undifferentiated masses, that overwhelmed or poorly trained bureaucratic intermediaries injure these targets or beneficiaries as a result of centralized maladministration, and that accountability better resides at Level I than Level II. This groups rights jurisprudence likewise accommodates resource limitations in the public interest bar that render its capacity to protect vulnerable people a scarce commodity. The conceptualization of plaintiffs as undifferentiated members of groups able to target Level I misconduct enables the

[149] Cite.
[150] Bone B.U. L. Rev. at 218; *id.* at 264, 288 – **flesh out.**
[151] Bone B.U. L. Rev. at 218.
[152] *Id.* at 288.
[153] *Id.*

few litigators in the impact litigation domain to win some relief for large numbers of people. This evolution is the opposite of formalistic.

But a new class action formalism has set in post-*Wal-Mart*. By clarifying the nature of rights at stake, the lower federal courts post-*Wal-Mart* have confirmed that much of the class certification inquiry in injunctive relief cases no longer serves any distinctive procedural function. Commonality, typicality,[154] and Rule 23(b)(2) pose no meaningful barriers to class certification in Type I and Type II cases. These challenge a single, explicit policy that bureaucratic intermediaries administer without alteration, so all class members' claims are necessarily identical and provable with common evidence. Type III cases have required remarkable exertion by plaintiffs and courts to win and class certification and to protect it from appellate review. But this labor almost invariably involves efforts to show that the substantive law gives the plaintiffs a group claim, and that they have the sort of evidence to establish it as such.[155] Class certification for the type of case most vulnerable to post-*Wal-Mart* retrenchment, then, has morphed into an unregulated version of summary judgment.

Commonality and Rule 23(b)(2) discourse in these cases confirms the merger of joinder with merits assessment.[156] In the Texas foster care reform litigation, for instance, the government challenged class certification on grounds that "the class members have not been 'harmed in essentially the same way.'"[157] "Because we conclude that the State's policies with respect to caseload management, monitoring, and oversight violate plaintiffs' right to be free

[154] Cite/discuss
[155] Numerosity, adequacy.
[156] *Cf.* Brown v. District of Columbia, **cite (2019)** ("The problem with the *Wal-Mart* class action . . . was that *there was no common proof leading to a common answer* to the common question at the heart of each plaintiff's claim.") (emphasis added); Hernandez v. County of Monterey, 305 F.R.D. 132, 153 (N.D. Cal. 2015) ("[C]ommonality may be determined based on substantive law and an understanding of the *nature and merit* of the underlying claims").
[157] M.D. by Stukenberg v. Abbott, 907 F.3d 237, 271 (5th Cir. 2018) (citing Maldonado v. Oshsner Clinic Found., 493 F.3d 521, 524 (5th Cir. 2007)).

from a substantial risk of serious harm on a class-wide basis," the Fifth Circuit responded, making a merits determination on the crux of the plaintiffs' case, "we hold that the [classes] were properly certified."[158] The proposed class in the New York City stop-and-frisk litigation met the commonality requirement, the district court reasoned, because "the preponderance of the evidence shows that the answer to [the] question" of whether class members' unlawful stops "result from a common source" "is yes."[159] A class challenge to changes in Medicaid services alleged that proposed cuts placed people with disabilities at risk of institutionalization. It failed because "Plaintiffs [did] not present [sufficient] evidence" of this risk, making "it . . . difficult for the Court to find that there is a systemic risk of institutionalization resulting from defendant's policy."[160]

If *Wal-Mart* has only had significance for Type III cases, and if it has pushed the inquiry into a measure of the merits of the plaintiffs' risk of harm claim, then why bother with a commonality or Rule 23(b)(2) inquiry at all? The class certification stage is important to

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[158] *Id.* The Eighth Circuit similarly made a preliminary merits determination to find Rule 23(b)(2) satisfied in a case challenging treatment for Hepatitis C in Missouri prisons. The plaintiffs alleged that the state deployed a uniform screening and treatment policy. If true, the Eighth Circuit noted, then the proposed class met Rule 23(b)(2)'s requirement that there exist a single injunctive remedy that could benefit the class as a whole. In other words, if a sufficient evidentiary basis existed to believe that the defendants had the illegal policy, then the district court could certify the class. This is precisely what the Eighth Circuit concluded the district court had found. Postawko v. Missouri Dep't of Corrections, 910 F.3d 1030, 1040 (8th Cir. 2018).

[159] Floyd v. City of New York, 283 F.R.D. 153, 164 (S.D.N.Y. 2012); *see also* Kenneth R. v. Hassan, 293 F.R.D. 254, 267 (D.N.H. 2013) (analyzing commonality and concluding that "[s]ubstantial evidence suggests that the State's policies and practices have created a systemic deficiency in the availability of community-based health services, and that that deficiency is the source of the harm alleged by all class members."); *id.* ("In addition, the evidence suggests a causal connection between that systemic condition and the harm experienced by all class members: a serious risk of unnecessary institutionalization . . . ."); Parsons v. Ryan, 289 F.R.D. 513, __ (D. Ariz. 2013) ("[T]he evidence here suggests that the root cause of the injuries and threats of injuries suffered by Plaintiffs is the systemic failures in the provision of health care generally."); Lippert v. Baldwin, Civ. No. 10-4603, 2017 WL 1545672, at *4 (N.D. Ill. Apr. 28, 2017) (**parenthetical**);

[160] Donegan v. Norwood, Civ. No. 16-11178, 2017 WL 6569634, at *__ (N.D. Ill. Dec. 21, 2017); *see also* Valdez v. City of San Jose, **cite** (rejecting plaintiffs' commonality argument because they "have failed to produce sufficient evidence to establish that [the defendant] followed any unconstitutional policy or practice" and specifically failed "to show that . . . training procedures resulted in widespread constitutional violations"); *id.* ("nor have they provided reliable evidence showing a widespread practice of unreasonable seizures"); Steimel v. Minott, Civ. No. 13-957, 2014 WL 1213390, at *17 (S.D. Ind. Mar. 24, 2014) (**fill in parenthetical**); Johannes v. Washington, Civ. No. 14-11691, 2015 WL 5634446, at *8 (E.D. Mich. Sept. 25, 2015) (**parenthetical**).

guarantee adequate representation.[161] But otherwise, Rule 23 accomplishes nothing in public interest cases that Rule 56 cannot better handle, given the comparative maturity in summary judgment doctrine for matters involving evidentiary weight and admissibility.[162]

The distinctive functions that Rule 23 plays in money damages cases offers a useful contrast. When a (b)(3) class fails at the Rule 23 stage, it does so because class members' claims raise individual issues that out-balance whatever issues they have in common. The class representative could still prevail at summary judgment on her own claim even if class certification is denied. If an evidentiary failure at class certification foreordains an evidentiary failure at summary judgment, the issue plagued by the evidentiary shortcoming is necessarily common and supports class certification.[163] Class certification also plays a distinctive role in influencing litigation incentives and strategy. By transforming the defendant's potential liability dramatically, class certification can significantly influence settlement decision-making.[164] Class certification in a Type III case, by contrast, does not change the stakes for a government defendant in any way that summary judgment does not account for.[165] If the substantive law does not vest a claim in a group, or if the class lacks sufficient evidence to prove the group claim, the defendant would prevail at summary judgment.

Before *Wal-Mart*, courts certified public interest classes with what seems like remarkably cursory analysis.[166] They had it right, and this approach should return. Even as they demand copious evidence of class-wide liability, and even as they pen long treatments of the underlying substantive law that gives plaintiffs their claims, the federal courts have come to understand *Wal-*

[161] Numerosity as well.
[162] Cite Sj versus class cert on this score.
[163] Amgen.
[164] Cite.
[165] Why assertions about settlement pressure in public interest litigation rare. But see T.R.
[166] Cites.

Mart in public interest litigation for what it is. It is a case about substantive liability policy.[167] Its supposed significance for Rule 23's administration should be forgotten.

B. Ideological Skew and What Class Certification Might Become

Both the logic of the public interest class action and its lived experience since June 2011 give reason to think that class certification will not develop into quite the barrier to reform litigation that *Wal-Mart*'s initial reception seemed to portend. Especially in Type III cases, plaintiffs now have to jump through legal and evidentiary hoops that they did not face before. But these hoops are effectively the same that come at summary judgment, so the dramatically increased costs associated with class certification should in most instances simply reflect a shift in litigation investment from summary judgment to joinder. Even if courts persist with a formalistic "rigorous analysis" at class certification, the practice should not deter filings on grounds of anticipated burden.[168]

But at the moment the class action's persistence is a fragile one. The lower federal courts began to digest *Wal-Mart* just as the federal bench began to tilt leftward.[169] Since January 2017, the U.S. Senate has confirmed President Trump's nominees to the federal courts of appeals at a record clip,[170] and the federal district bench also includes many new members. Given the withering of norms that tended to force moderation in nominating practices,[171] President Trump's nominees may prove more ideological doctrinaire than their predecessors.[172] A more ideologically committed, right-leaning federal judiciary could remake the public interest class action yet again, and this time truly shrink its footprint.

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[167] Tobias Wolff article
[168] Gelbach
[169] Russell Wheeler, How Trump Could Reshape…
[170] Cite.
[171] Cite.
[172] Cite.

1. Ideology and Class Certification

[This section will mention the age-old conservative antipathy for structural reform litigation, an antagonism that might have even more force in an era of nationwide injunctions against the Trump Administration. The Burbank and Farhang data on class certification votes in the courts of appeals, 1967-2017, suggests that this generalized dislike indeed manifests itself in class action decision-making. I will add two new data points to support the claim that a right-leaning federal judiciary indeed poses a threat to the public interest class action's persistence. My more rudimentary data suggest that Republican appointees to the federal judiciary are less likely to vote to certify public interest classes than their Democratic colleagues. Also, Republican state attorneys general have begun to organize their efforts to oppose class certification motions, especially in Type III cases. This practice may raise even further the political salience of this litigation. It might signal to these lawyers' ideological fellow-travelers on the bench that they ought to see class certification practice in this domain as an important matter for ideological combat.

Judge Silberman's concurring opinion in J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019), suggests one tack right-leaning judges might take. He argued against class certification on grounds that one class member's preferences for what to do with her right to sue might differ from the class representative's. This emphasis on preference aggregation would be a remarkable change and destabilize a great deal of public interest litigation.]

2. Ideology and Group Rights

[This section will explain why the group rights jurisprudence that has coalesced in Type III cases makes rightward drift a particular threat to the public interest class action. It will describe the opposition conservatives have long voiced toward the notion of "group rights" and

suggest that this opposition has never really gone away. As courts justify class certification in Type III cases by more and more explicitly describing rights in group terms, the target for conservative opposition comes more sharply into relief. Conservative state attorneys general and judges might not just couch their disfavor for class certification in procedural terms. They might attempt to refashion the underlying substantive law and thereby weaken the protection it provides against systemic government maladministration. The Supreme Court in Jennings v. Ryan hinted that procedural due process claims cannot be litigated in the aggregate because Mathews v. Eldridge requires individualized administration.]