CIVIL RIGHTS COMMONALITY: *DUKES*' SEARCH FOR CENTRAL COMMON ANSWERS, § 1983 CLASS CLAIMS & GOVERNMENT REFORM

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Abstract: Class action claims via 42 U.S.C. § 1983 offer a powerful mechanism to vindicate the mass violation of civil rights by state and municipal officials. Shifts in barriers to accessing this aggregate litigation tool can both limit the protection of Constitutional and federal rights, and also stymie reform the government entities, polices, and programs that have caused such harms.

This paper considers the possibility that the Supreme Court's heightening of class certification's commonality requirement in *Wal-Mart v. Dukes* may have just such implications for § 1983 class claims, which have as of yet gone unexamined. I argue that the shift in commonality possesses novel requirements not only for all injunctive relief classes, but also for § 1983 class claims brought against state defendants, due to the underlying legal character of § 1983.

Prior to *Dukes*' holding, the Rule 23 (a)(2) commonality threshold demanded a precise question, common to the named plaintiff and the class members, but not one central to the resolution of the case. This changed with *Dukes*' search for a central common question able to resolve an issue at the heart of a class' claims. This article closely maps the non-rigorous application of this prior standard and how, applied to injunctive classes, the search had often been limited to ascertaining whether class-wide injury justified systemic relief.

In light of that baseline, I then consider the first wave of federal district and appellate court applications of *Dukes*' commonality to § 1983 class litigation, focusing the Fifth and Seventh Circuits' rejections of certifications for deficient commonality. These cases demonstrate a closing gap between Rule 23 (a) and (b) requirements. I also argue § 1983 class claims against state defendants evidence a greater vulnerability to strengthened commonality, given the preexisting demand that § 1983 claims for municipal liability evidence a policy or custom at the heart of the common harm.

INTRODUCTION

In 2012, the Fifth[1] and Seventh[2] Circuits turned away class actions brought, respectively, by a group of children in Texas' foster care system and by a group of Milwaukee public school students with learning disabilities. The two classes shared many features: both had attempted to assert claims via 42 U.S.C. § 1983 ("§ 1983"), had demanded systemic change by a government agency or institution that had allegedly violated the class' Constitutional or federally created rights, and had sought class-wide injunctive relief under the specific Federal Rule of Civil Procedure 23 ("Rule 23") (b)(2) class type.[3] And, both federal appeals courts found the class before them failed to satisfy the Rule 23 (a)(2) threshold condition of commonality, which requires that any putative class share common "questions of law or fact,"[4] due to heightened demands laid out by the Supreme Court in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011).[5]

Rule 23(a) offers four universally applicable thresholds for certification: commonality; numerosity of the class members; typicality of the claims of the class representative for the class as a whole; and adequacy of class representation.[6] These requirements aim to ensure that the claims of the named class member and the class are "so interrelated that the interests of the class members will be fairly and adequately protected in their absence" because the class claims are only "those fairly encompassed by the named plaintiff's claim."[7] As such, past commonality analyses attempted to gauge neither the centrality of the common question to the class' claims

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[1] MD *ex rel*. Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012).
[2] Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 497 (7th Cir. 2012).
[3] *MD ex rel Stukenberg*, 675 F.3d at 835; *Jamie S.*, 688 F.3d at 488.
[4] Fed. R. Civ. P 23(a)(2).
[5] *MD ex rel Stukenberg*, 675 F.3d at 844; *Jamie S.*, 688 F.3d at 498.
[6] FED. R. CIV. P. 23(a).
[7] General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13, 156 (1982) (internal quotes omitted).

nor the role the common claim would play in broader adjudication. Rather, the standard assessed whether the class representative had specifically demonstrated the presence of "a class of persons who have suffered the same injury [as his] . . . so that respondent's claim and the class claims share common questions of law or fact."[8] Prior to *Dukes*, an asserted class claim was not regularly required to demonstrate "dispositive" common issues.[9] Nonetheless, the *Dukes* Court rejected the certification of a class of past and present female employees of Wal-Mart, who alleged gender-based employment discrimination via the grant of pay and promotion authority to the subjective discretion of individual Wal-Mart store managers; the Court held the class failed to adequately demonstrate common questions of law or fact under Rule 23 (a)(2).[10]

In the process of decertifying the Wal-Mart women's class, the Court redefined commonality as a qualitative threshold by demanding the presence of a common question that, under one formulation, is able to provide an answer that could "resolve an issue that is central to the validity of each one of the claims in one stroke."[11] Conspicuously, Rule 23's three (b) class subcategories already examine the feasibility of class adjudication, tailored to the purposes and characteristics of each distinct class type and their related remedies: while Rule 23 (b)(3) class members must share questions that "predominate," Rule 23 (b)(2) classes must merely be primed for a single injunctive resolution that "affect[s] the entire class at once."[12] Given the similarity of "centrality" to (b)(3)'s preexisting test, incorporating a demand for a "central" question at Rule 23 (a)'s threshold analysis is more likely to block Rule 23 (b)(2) classes that would have previously been certified. Such a shift begs consideration of whether investigating the centrality

[8] *Id*. at 148.
[9] *See* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:22 (5th ed.) (2012).
[10] *Dukes*, 131 S. Ct. at 2547 (finding additionally that the class could not be certified under Rule 23(b)(2) as they sought monetary damages in the form of back pay as well as injunctive relief).
[11] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).
[12] *Id*. at 2558.

of class claims is more appropriately and effectively undertaken in a manner universal to all classes, via (a)(2), or in a manner adapted to class type subsets.

Legal scholars, experts at multiple symposiums, and the national media have all extensively deliberated over the potential ramifications of *Dukes* on future class actions. These analyses have primarily considered the relevance of *Dukes*' various holdings to analogous factual and legal contexts: class certification for employment discrimination cases,[13] class claims seeking simultaneous injunctive relief and damages under Rule 23 (b)(2),[14] and litigation against companies as large as Wal-Mart or by classes of a similar scale to the Wal-Mart women.[15] In addition, attention has been paid to a potential shift in statistical evidence standards.[16] As of yet, the scale of the commonality holding's impact remains debatable. In the immediate wake after *Dukes*, some defendants in pending class actions attempted, but failed, to argue that the decision should decertify their opponent class.[17] Still, certifications for classes alleging discrimination based on the delegation of authority analogous to Wal-Mart's have begun to be rejected: at least four federal courts of appeals have held such classes had deficient commonality under *Dukes*.[18]

Despite this attention, no one has yet trained an eye on the post-*Dukes* viability of class actions for injunctive relief that seek to vindicate Constitutional and federal rights violated by government entities or their officials, policies, or programs. This paper sets out to undertake that

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[13] *See e.g.* Suzette Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 52 (2011) (concluding that the holding "redefined the class certification requirements for Title VII cases in ways that jeopardize potentially meritorious challenges to systemic employment discrimination").
[14] *See e.g.* Neil K. Gehlawat, *Monetary Damages and the (b)(2) Class Action*, 90 TEX. L. REV. 1535 (2012).
[15] *See* Catherine Fisk and Erwin Chemerinsky, *The Failing Faith in Class Actions*, 7 DUKE J. OF CON. L. & PUB. POL'Y SPECIAL ISSUE 73, 76, 77 (2011) (arguing the Court has been motivated by "pro-corporate protectionism," and has both "abandoned any pretense of equilibration" and "handed large companies huge victories").
[16] *See* Mary Dunn Baker, *Class Certification Statistical Analysis Post-Dukes*, 27 ABA J. LAB. & EMP. L. 471 (2012).
[17] *See, e.g.*, Kingsbury v. U.S. Greenfiber, LLC, No. 08-CV-00151, WL 2775022 (C.D. Cal. Jul. 2, 2012) (denying motion to reconsider order granting class certification for homeowners alleging defective insulation inclined to water retention and mold contamination); Jermyn v. Best Buy Stores, Inc., 276 F.R.D. 167 (S.D.N.Y. 2011) (upholding prior commonality analysis, irrespective of *Dukes*).
[18] *See In re* Countrywide Fin. Corp. Mortg. Lending Practices Litig., No. 12-5250, 2013 WL 149853 (6th Cir. Jan. 15, 2013); Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011); Bolden v. Walsh Const. Co., 688 F.3d 893, 897 (7th Cir. 2012); Bennett v. Nucor Corp., 656 F.3d 802 (8th Cir. 2011).

analysis, and finds that Justice Scalia's redefinition of commonality has already stymied such actions. *MD ex rel Stukenberg* and *Jamie S.*, the two appellate decisions described in opening of this paper, provide the most dramatic evidence of such an impact. These first two § 1983 class claims to reach federal courts of appeal since the passage of *Dukes* suggest "central" commonality is shrinking the pool of certifiable (b)(2) classes and is differentially impacting § 1983 class claims against state officials. § 1983 liability for municipal officials requires that a policy or custom be at the heart of the Constitutional or federal violation; given the inherent centrality in this substantive legal standard, the certification of class claims against municipalities does not seem susceptible to a more stringent commonality assessment. In contrast, § 1983 claims against state entities require no demonstration of a central policy. Thus, for classes facing state defendants, a command for a central claim *does* generate a novel certification threshold, and one that appears to have already blocked the certification of class claims that could have been approved prior to *Dukes*.

Analysis of § 1983 class claims reveals shifting procedural barriers to accessing injunctive relief against government officials, across rights. At their core, class actions facilitate access to legal remedies: the mechanism enables the adjudication of claims and rights that would otherwise escape enforcement, often through the (b)(3) class type's "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[19] In addition, class actions offer a route to systemic change via class injunctive relief. By aggregating claims, including against government programs and agencies, claims can be brought that individuals alone may not be able to effectively demonstrate.[20] Additionally,

[19] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (internal quotation marks omitted) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L.REV. 497, 497 (1969)).

[20] Systemic injunctive litigation against the government is most frequently referred to as "impact litigation," though it certainly has other names. *See, e.g.* Katherine Alfisi and Steven J. Stauffer, *Panel Discussion Defines, Debates*

individuals making such claims often lack the resources or legal understanding to perceive a violation of their rights or to enforce them, rather than lack of a significant stake in the legal remedy.[21] Litigating § 1983 claims as a class can efficiently vindicate those rights and uniquely force reform in the government actor or system that violated the rights en masse.

Still, § 1983 class claims do not encompass every case characterized as impact litigation. § 1983 is only one vehicle for claims of rights violated by the government, as it provides a cause of action against certain persons, acting under state authority, who have violated the Constitution, or in some instances federal statutes.[22] Thus, § 1983 can be asserted primarily against state and municipal officials, not those in the federal government, and only for violations of Constitutional law or federally created rights, not of a state or municipality's own laws or rights. Notably, § 1983 is often not litigated in isolation; plaintiffs assert these claims in addition to others, including mixes of injunctive and monetary relief. Additionally, courts do not always consider § 1983 claims distinctly when performing a Rule 23 analysis, perhaps complicating the ability to discern precise interactions between the procedural demands and this substantive area of law. Beyond only § 1983, impact litigation's injunctive remedies appear broadly vulnerable to *Dukes*' heightened commonality standard, particularly the new demand to evidence central common questions that can "resolve the litigation in one swoop."[23] Nonetheless, an examination

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Significance of Impact Litigation, DC BAR (June 2008) *available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/june_2008/legalbeat.cfm (quoting Leonard Becker and providing a working definition of impact litigation: "Any class-action suit or individual civil damage action which is brought to vindicate or advance the rights or interests of aggrieved persons interacting with the government, which has the objective or the effect of initiating systemic change in government administration and policy.").

[21] Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 134 (2011) (discussing the drafting of Rule 23's and the intention to "facilitate access to courts for those who lacked the resources or the knowledge that they had possibly been harmed").

[22] Gonzaga Univ. v. Doe, 122 S.Ct. 2268 (2002) (holding federal statutes must contain rights creating language to be enforceable under § 1983).

[23] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

§ 1983 claims begins to answer the question: did *Dukes* change the nature or scope of access to systemic injunctive remedies against rights-violating government officials?

Part I of this paper considers the form of Rule 23 (a)(2)'s commonality requirement prior to *Dukes*, particularly as applied in suits seeking injunctive relief. In *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), the Supreme Court emphasized the need to precisely identify a question common to the representative and the class members, but did not specifically require that such a question be central to the resolution of the case. Before *Dukes*, many lower courts applied *Falcon*'s commonality test fairly non-rigorously, though a minority of courts required questions central to the case. In actions for injunctive relief prior to *Dukes*, courts often applied the commonality analysis to ascertain whether class-wide injury justified systemic relief.

Part II examines the *Dukes* commonality holding, in light of this prior baseline, and its initial application by federal courts of appeal. In particular, the *Dukes* Court required a common question central to the class' claim and susceptible to a common answer, a search that heightens certification requirements for plaintiffs. Federal courts of appeal have implemented this formulation with some flexibility, but have not cabined its application to *Dukes*' facts or substantive law.

Part III considers the first wave of impact of *Dukes*' commonality standard on § 1983 litigation, focusing on *MD ex rel Stukenberg* and *Jamie S.*, as well as on additional decisions by federal district courts that applied *Dukes* in a § 1983 certification analysis. *MD ex rel Stukenburg* and *Jamie S.* demonstrate the power of this more stringent commonality test on § 1983 claims and provide insight into its potential ongoing implications. The Fifth Circuit's vacatur of an order certifying a Rule 23 (b)(2) class in *M.D. ex rel. Stukenberg* illustrates the closing gap between Rule 23 (a) and (b) requirements, as that court's decision appears

simultaneously driven by both *Dukes*' commonality and its Rule 23 (b)(2) holdings. In *Jamie S.*, the Seventh Circuit disapproved of a Rule 23 (b)(2) class bringing claims against municipal and state defendants, via an analysis that appears to overlap with the requirements for showing municipal liability under § 1983. Finally, this Part presents findings of a study of federal district court decisions since *Dukes*, to more fully consider the scope of the shift in commonality on § 1983 classes. Additionally, these cases further illustrate *Dukes*' greater impact on cases involving state defendants, due to the nature of the underlying § 1983 claims.

I. PRE-*DUKES* COMMONALITY ANALYSIS AND ITS APPLICATION TO INJUNCTIVE RELIEF CLASSES

A. *Falcon* Commonality: Specific Demonstration of Any Common Question from the Shared Injury of Class Representatives and Class Members

Prior to *Dukes*, *Falcon* governed the Rule 23 (a)(2) commonality requirement, as the principal Supreme Court case on point for nearly three decades. The *Falcon* Court held that a putative class representative must "possess the same interest and suffer the same injury" as the class, as demonstrated by a "specific presentation identifying the questions of law or fact… common to the claims of respondent and of the class members."[24] In this way, the holding focused on both the existence of shared claims within the class and on the relationship of that wider group to the named plaintiff, but notably not on the *role* of a common question in adjudicating the claims.[25] Under this standard, the Court denied class certification to a group of Mexican-Americans seeking to bring an employment discrimination suit alleging bias both in promotion practices against the named plaintiff and also in hiring practices against the class.[26] The Court found the pleading lacked "any common question," given the distinction between the

[24] General. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156, 158 (1982).
[25] *See* Neal *ex rel*. Kanter v. Casey, 43 F.3d 48, 56 (3rd Cir. 1994) (explaining typicality assesses named plaintiff characteristics in relation to the class while commonality examines group characteristics).
[26] *Falcon*, 457 U.S. at 147, 149 ("[H]e commenced this action under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended 42 U.S.C. § 2000 e.").

alleged harms to the named plaintiff and those to the class; any consideration that the common question was insufficiently focal to the claims was absent from the analysis.[27]

The *Falcon* Court discussed commonality as a higher bar than mere notice and as one tied to the thresholds of pleading, applauding the Fifth Circuit judge who had called for "more precise pleadings."[28] The decision additionally emphasized that commonality considerations necessitate a "rigorous analysis" by a district court before granting class certification because of the "potential unfairness to the class members bound by the judgment if the framing of the class is overbroad."[29] The holding presented commonality as a burden on the named plaintiff to "prove much more than the validity of his own claim," explaining the necessity to "bridge the gap" from the harm to the named plaintiff to a display of common questions with class claims.[30] Specifically, the *Falcon* Court distinguished a successful showing of shared injury from the pleading of a claim of harm to the class representative with a mere "unsupported allegation… [of] a policy of discrimination" absent any specifics about resulting injury.[31]

B. Lower Courts Apply *Falcon* Commonality: Generally "Not Demanding," Though Deviations Demand Centrality

Lower courts treated *Falcon*'s commonality standard as necessitating a rigorous and specific pleading of the existence of shared injuries that gave rise to at least one common question, but also as asserting no threshold role that common question would play in adjudicating the case. Descriptively, this commonality standard was called "not demanding," [32] a

[27] *Id*. at 158 (finding the class representative "provided an insufficient basis for concluding that the adjudication of his claim would require the decision of any common question concerning petitioner's failure to hire more Mexican-Americans").
[28] *Id*. at 161.
[29] *Id*.
[30] *Id*. at 148.
[31] *Id*. at 157.
[32] Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 625 (5th Cir. 1999).

"not high" bar,[33] and "construed permissively."[34] Conspicuously, when analyzing the certifications of Rule 23 (b)(3) classes, courts often contrasted *Falcon*'s commonality and (b)(3)'s predominance requirement, characterized as the "more demanding"[35] or "more stringent"[36] test. Courts recognized that while commonality demanded a mere "single" common issue, predominance required an issue at the "heart of the litigation," and thus at times subsumed commonality under the predominance analysis.[37] This tactic, however, did not alter commonality. Rather, these courts appear to have drawn from *Falcon* that commonality assessed the presence of shared harm, while predominance advanced to consider the appropriateness of a class resolution of those claims, requiring courts "to consider how a trial on the merits would be conducted;"[38] as such, those issues could be measured together via the higher standard.

The search for common questions, nonetheless, has not been perfectly uniform: at times, courts deviated from the *Falcon* consensus to assess of how central a role the asserted common question would play in adjudicating the merits of the claims at hand. For example, courts in various cases required that common issues be at the "core"[39] or "nucleus"[40] of the class' claims

[33] Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993).
[34] Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) ("All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.").
[35] Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416, 421 (5th Cir. 2004).
[36] Sullivan v. DB Invs. Inc., 667 F.3d 273, 297 (3rd Cir, 2012); *see also* Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 146 n.4 (4th Cir. 2001).
[37] Powers v. Hamilton Cnty. Pub. Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007) ("The commonality requirement is satisfied if there is a single factual or legal question common to the entire class. The predominance requirement is met if this common question is at the heart of the litigation.").
[38] Bell Atl. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) (internal citations omitted).
[39] Savino v. Computer Credit, Inc., 173 F.R.D. 346, 352 (E.D.N.Y. 1997) ("The critical inquiry is whether the common questions lay at the 'core' of the cause of action alleged."); *see also* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).
[40] Herkert v. MRC Receivables Corp., 254 F.R.D. 344, 350 (N.D. Ill. 2008) ("To satisfy Rule 23(a)(2), the proposed class members' claims must generally arise from a common nucleus of operative fact, and there must be at least one question of law or fact common to the class."); *but see* Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992) (holding a "common nucleus to be sufficient to establish commonality, though not necessary: it "is usually enough to satisfy the commonality requirement of Rule 23(a)(2)").

in order to merit certification.[41] One outlier court's commonality search looked for both "a common issue the resolution of which will advance the litigation" and also "the single answer to that question [that] will resolve a central issue in all class members' claims," a notably demanding and *Dukes* reminiscent construction.[42] However, these articulations did not match the "conventional" low commonality threshold.[43]

C. Applying *Falcon*'s Commonality to Rule 23 (b)(2) Injunctive Relief, Including Civil Rights Claims and Impact Litigation

When considering the certifications of Rule 23 (b)(2) injunction classes, courts have applied the commonality threshold in light of the demand, applicable only to (b)(2) classes, for conduct by the defendant that "applies generally" to the plaintiffs.[44] Analogous to courts' examinations of commonality alongside predominance, these applications have not distorted commonality to meet the needs of (b)(2) classes, but rather have emphasized that commonality should not introduce concerns irrelevant to the adjudication of class-wide injunctive relief. Specifically, courts have found commonality satisfied irrespective of patent factual[45] and legal[46] differences between individual class members' claims. The Ninth Circuit explained that "in a civil rights suit . . . commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members."[47] The Sixth Circuit similarly

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[41] WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:22 (5th ed.) (2012).
[42] Sprague v. General Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998) ("It is not every common question that will suffice . . . at a sufficiently abstract level of generalization, almost any claims can be said to display commonality.").
[43] RUBENSTEIN, *supra* note 41, at 1.
[44] Fed. R. Civ. P. 23 (b)(2).
[45] *See e.g.* Appleyard v. Wallace, 754 F.2d 955 (11th Cir. 1985) (certifying a class challenging regulations for Medicaid benefits in spite of factual differences among claims).
[46] *See e.g.* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988) ("The mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.").
[47] Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001) (A § 1983 suit by prisoners and parolees alleging state parole revocation policies and procedures, differences in the plaintiff's disabilities did not ruin commonality as "all . . . suffer similar harm from the Board's failure to accommodate their disabilities.").

pronounced cases "alleging a single course of wrongful conduct," despite the presence of individualized factors, as "particularly well-suited to class certification."[48]

These applications of commonality do not banish cohesiveness from such classes, but rather remove pressure from commonality to be the locus of assessing whether the defendant's action towards the plaintiff class is sufficiently consistent to warrant a remedy under the (b)(2) mechanism. As such, the Third Circuit noted that class certification has been granted in "a legion of civil rights cases where commonality findings were based primarily on the fact that defendants' conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct."[49] The *Baby Neal* court further explained that "challenges based on alleged violations of statutory standards" do satisfy commonality, as do other injunctive claims, as they do not "involve an individualized inquiry for the determination of damage awards" and so "by their very nature, often present common questions."[50] In this way, some distinctions between (b)(2) class members are immaterial given the character of shared injunctive relief, underlining the value of a commonality assessment that merely establishes a baseline of shared harm rather than prescribes a central shared answer.[51]

Still, federal appeals courts have not unfailingly certified Rule 23 (b)(2) classes in the presence either of variations among the alleged common harm to the class or of allegations that a standard policy demonstrates shared harm. The D.C. Circuit called commonality "complicated" when "the proffered 'common issue' is a somewhat amorphous claim of systemic or widespread

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[48] Powers v. Hamilton Cnty. Pub. Defender Comm'n, 501 F.3d 592, 618 (6th Cir. 2007) (finding commonality in a (b)(2) § 1983 claim against a Public Defender accused of "failing to seek indigency hearings for criminal defendants facing incarceration for non-payment of fines" via "a single theory of wrongdoing" despite individualized facts).
[49] *See* Neal *ex rel*. Kanter v. Casey, 43 F.3rd 48 (3rd Circuit 1994) (reversing, as an abuse of discretion, the denial of a 23(b)(2) class certification for children in Philadelphia foster care seeking to remedy systemic program deficiencies, which allegedly violated legal and constitutional requirements, because of the unity of the government's conduct towards the class).
[50] *Id*. at 57 (citing WRIGHT ET AL., 7A FED. PRAC. & PROC. CIV. § 1763) (internal quotations omitted).
[51] In addition, class action case management regularly bifurcates cases by issues; a class can be certified to determine issues regarding injunctive relief, then reconsider certification for individualized damages.

misconduct on the part of the defendant."[52] Concerns arise where such a commonality interpretation purportedly risks replacing *Falcon*'s specific pleading standard with "mere allegations of systemic violations of the law" that should not "automatically satisfy Rule 23 (a)'s commonality requirement."[53] However, the more typical commonality application for Rule 23 (b)(2) classes should not inherently loosen the analysis, as it does not need to remove the demand for common harm, but instead can obviate pursuits of cohesion beyond that which a class-wide injunctive remedy requires.[54]

II. *DUKES*' COMMONALITY: CENTRAL COMMON QUESTIONS WITH DISPOSITIVE COMMON ANSWERS

A. Transformed Commonality: Common Answers that Resolve a Central Issue and Drive the Litigation

In this context, the certification of a Rule 23 (b)(2) class of tens of thousands of Wal-Mart's past and current female employees arrived at the Supreme Court.[55] In descriptive terms, the Court nodded to the preexisting commonality standard and did not declare to be rewriting law: Justice Scalia reproduced *Falcon*'s calls for a "rigorous" certification analysis and for a demonstration that the class members had "suffered the same injury."[56] And, the Court allowed that "even a single common question" could suffice to satisfy commonality.[57] However, the *Dukes* Court also demanded that such a question have certain characteristics: putative class members, Justice Scalia explained, cannot present the mere presence of literal common questions

[52] Lightfoot v. District of Columbia, 273 F.R.D. 314, 325 (D.D.C. 2011) (rejecting certification of a class of former District employees claiming Due Process violations in their terminations on both commonality and (b)(2) "cohesiveness" grounds, as certifying such distinct claims would compel class actions to be "appropriate . . . no matter how disparate the class members' individual injuries may be and no matter their origins").
[53] DG *ex rel*. Stricklin v. Devaughn, 594 F.3d 1188, 1195 (10th Cir. 2010).
[54] Reinholdson v. Minnesota, No. 02 Civ. 795, 2002 WL 31026580, at *8 (D.Minn. Sept. 9, 2002) ("The reciting of the word 'systemic' in mantra-like fashion . . . does not overcome the prerequisites to class certification.").
[55] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
[56] *Id*. at 2551 (quoting General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 (1982)).
[57] *Id*. at 2556.

as "any competently crafted class complaint" could satisfy that threshold.[58] Commonality, the Supreme Court declared, is not a "mere pleading standard."[59]

Instead, the decision laid out a series of constructions for satisfactory commonality, all featuring marks of a factual or legal issue central to the claims of the class, not merely common to them. Most explicitly, the Court held that the common "contention" must "resolve an issue that is central to the validity of each one of the claims in one stroke."[60] To establish the presence of commonality uniting the plaintiffs, the *Dukes* Court wrote that the class must additionally present proof of a common *answer,* specifically one "apt to drive the resolution of the litigation."[61] The Court indicated that the *Dukes* plaintiffs would specifically have to offer a common answer to the question, "why was I disfavored?;" Justice Scalia held this standard could further only be met if the *Dukes* class could offer "significant proof" of a company policy of discrimination, which he found to be "entirely absent."[62] Finally, the Court held that "dissimilarities within the proposed class" can potentially "impede the generation of common answers," an analysis that helped dictate the rejection of certification.[63] The *Dukes* dissent objected to the stringency of the majority's framework as counter to existing authority and to an "easily satisfied" requirement.[64] Justice Ginsberg singled out the "dissimilarity" scrutiny as a "far reaching" and harmful conflation of commonality and predominance, noting that Professor Nagareda composed his cited formulation regarding predominance.[65]

B. Concerns over a *Dukes* Mandated Full Merits Consideration

[58] *Id*. at 2551 (internal quotes omitted) (citing to Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. REV 97, 131-132 (2009)) (enumerating inadequate common questions: "Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice?").
[59] *Id*.
[60] *Id*.
[61] *Id*. (quoting *Falcon* at 157, 102 S.Ct. 2364); *id*. (italics in original) (Nagareda, *supra* note 58, at 132).
[62] *Id*.
[63] *Id*. (citing Nagareda, *supra* note 58, at 132).
[64] *Id*. at 2561 (citing to 5 J. Moore et al., MOORE'S FEDERAL PRACTICE § 23.23[2], 23-72 (3rd ed. 2001)).
[65] *Id*. at 2566.

As part of "affirmatively demonstrating compliance" with commonality, the *Dukes* majority noted that it "sometimes . . . may be necessary . . . to probe behind the pleadings before coming to rest on the certification question."[66] A specific and rigorous examination of the veracity of an asserted common question, including looking beyond the pleadings, has long been integrated into the certification analysis.[67] But, this "redefined" demand for a "higher level of specificity" has, some argue, "increased the difficulty of proving a common question" to the point of establishing a full blown "determination on the merits at the time of class certification."[68]

The identification of *central* common answers requires far deeper analysis than that of specific common questions, and has particular impacts on injunctive classes that would not otherwise be subject to a test on the predominance of a single claim. Such an investigation requires understanding the full claims and their path past certification to adjudication; this analysis can preemptively decide the fate of the litigation, as was apparent in the majority's own analysis, which resembled a de novo review of the lower court's factual findings.[69] An expectation of fully formed and provable assertions of liability is a distinctly more robust threshold for class certification. This is particularly true in contexts of information imbalances, including not only employment discrimination but also litigation against a government official. Securing early discovery could now be critical to a class' ability to "provide sufficient factual

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[66] *Id*., at 2551 (citing *Falcon*, 457 U.S., at 160).
[67] Fisk and Chemerinsky, *supra* note 15, at 84 ("The essence of the majority's reasoning depends on two debatable factual assumptions about the nature and prevalence of employment discrimination in large organizations," namely that corporate managers would make promotional decisions for solely performance reasons and that the size of Wal-Mart precludes local managers from having acted consistently towards their employees, both "factual findings that the Court has no business making.").
[68] *Id*. at 79 (internal quotes omitted).
[69] *See* Robert G. Bone, *Sorting Through the Certification Muddle*, 63 VAND. L. REV. EN BANC 105 (2010) (arguing the 9th Circuit *Dukes* court incorrectly "insist[ed] that a merits inquiry is not an estimate of likely success but only a determination that Rule 23's requirements are satisfied").

material for the court to supply the legal reasoning necessary" to demonstrate its commonality. [70] While some courts have already indicated *Dukes*' standard should make pre-certification discovery an ordinary occurrence, where courts are unsympathetic, plaintiffs may be newly barred from bringing aggregate claims.[71] Even when granted discovery, plaintiffs will still bear associated costs, which could additionally deter meritorious litigation.[72]

C. Circuits Apply *Dukes'* Central Commonality while Rarely Restricting Access to Certification, Except for Discrimination and § 1983 Claims

The reach of *Dukes* is already being felt, as courts employ its commonality analysis and other holdings. Federal courts of appeal appear uniform in their application of *Dukes*' commonality as considering the centrality of an asserted common question to the class claims at hand.[73] Yet, since *Dukes*, commonality has been a dispositive barrier to certification in only a handful of appellate cases, including two classes bringing § 1983 claims, to be examined in Part III.[74] In particular, commonality appears to have most consistently blocked certification of classes asserting discrimination via the exercise of discretion; the Sixth,[75] Seventh,[76] and

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[70] Recent Case, *Civil Procedure–Class Actions–Fifth Circuit Holds that District Court Failed to Conduct Rigorous Class Certification Analysis in Light of Wal-Mart Stores, Inc. v. Dukes*: M.D. ex rel. Stukenberg v. Perry, 126 HARV. L. REV. 1130, 1135 (2013).

[71] *See e.g.* Burton v. District of Columbia, 277 F.R.D. 224, 230-31 (D.D.C. 2011) ("The Supreme Court's ruling in Wal-Mart confirms that pre-certification discovery should ordinarily be available where a plaintiff has alleged a potentially viable class claim because Wal-Mart emphasizes that the district court's class certification determination must rest on a 'rigorous analysis' . . . .").

[72] Recent Case, *supra* note 70, at 1135.

[73] Drawn from an examination of all citations to *Dukes* in federal courts of appeal cases, searched through both Westlaw and LexisNexis.

[74] MD *ex rel*. Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012); Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481 (7th Cir. 2012). *See also* Ellis v. Costco Wholesale Corp., 657 F.3d 970, 980 (9th Cir. 2011) (vacating and remanding approved commonality for gender discrimination class, as lower court "impermissibly declined to resolve numerous disputed issues of law and fact" and thus did not properly undertake "rigorous analysis" demanded by *Dukes*).

[75] *In re* Countrywide Fin. Corp. Mortg. Lending Practices Litig., No. 12-5250, 2013 WL 149853 (6th Cir. Jan. 15, 2013) (affirming the certification rejection of a class borrowers because discrimination via the delegation of authority to local agents could not be determined on a class-wide basis).

[76] Bolden v. Walsh Const. Co., 688 F.3d 893, 897 (7th Cir. 2012) (reversing class certification for construction workers bringing racial discrimination claims based on the discretion of local managers and relying on statistical evidence).

Eighth[77] Circuits have all found such a class to fail commonality, in close analogies to *Dukes*' facts and holding. Notably, the only court of appeals that appears to have searched for "dissimilarities" is the Fifth Circuit, which in doing so discovered ones that ruined commonality.[78]

The Third[79], Fourth[80], Fifth,[81] Sixth,[82] and Seventh[83] Circuits have all defined commonality by employing *Dukes*' formulations that the class must present a common question either "apt to drive the resolution of the litigation" or able to "resolve an issue that is central to the validity of each one of the claims in one stroke."[84] In *Sullivan v. DB Investments Inc.*, the Third Circuit explained that a common question "apt to drive the litigation" was "exactly" presented, as "questions about [the] alleged misconduct and the harm it caused would be common as to all of the class members, and would thus inform the resolution of the litigation."[85] Elsewhere, the Third Circuit appears to have preserved its preexisting allowance for class dissimilarities, explaining that commonality "does not require identical claims or facts among class members" and citing *Dukes*' admission that "even a single common question will do."[86]

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[77] Bennett v. Nucor Corp., 656 F.3d 802, 816 (8th Cir. 2011) (upholding that commonality failed under *Dukes* because policies varied between departments and promotion criteria was subjective).
[78] *MD ex rel Stukenberg*, 675 F.3d at 843.
[79] Sullivan v. DB Invs. Inc., 667 F.3d 273, 300 (3rd Cir. 2012).
[80] Gray v. Hearst Commc'ns Inc., 444 Fed. Appx. 698, 704 (4th Cir. 2011).
[81] *MD ex rel Stukenberg*, 675 F.3d at 842.
[82] *In re* Whirlpool Corp. Front-Loading Washer Products Liab. Litig., 678 F.3d 409, 418 (6th Cir. 2012); *see also* Young v. Nationwide Mut. Ins., 693 F.3d 532, 543 (6th Cir 2012) (finding that common proof of causation, the "use of geocoding software could have prevented the harms suffered by the class members --is central to all of Plaintiffs' claims and would advance the interests of the class as a whole); *see also* Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 630 (6th Cir. 2011) (rejecting certification because the common question was already dispensed at summary judgment; as a result, the court found "no common contention capable of classwide resolution such . . . that will resolve an issue that is central to the validity of each one of the claims in one stroke").
[83] Ross v. RBS Citizens, N.A., 667 F.3d 900, 909 (7th Cir. 2012).
[84] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2551 (2011).
[85] Sullivan v. DB Invs. Inc., 667 F.3d 273, 300 (3rd Cir. 2012) (reporting *Dukes* to have held "that commonality and predominance are defeated when it cannot be said that there was a common course of conduct in which the defendant engaged with respect to each individual").
[86] Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 596 (quoting Chiang v. Veneman, 385 F.3d 256, 265 (3rd Cir. 2004)).

The Sixth and Seventh Circuits have allowed for uncertainty in the role a central common question could play in adjudication on the merits. The Sixth Circuit deemed issues around allegedly deficient Whirlpool product designs and consumer warnings to be satisfactory, as they would "*likely* result in common answers, thus advancing the litigation."[87] Meanwhile, the Seventh Circuit accepted an "unofficial policy" as "the common answer that *potentially* drives the resolution of this litigation."[88]

III. APPLICATION OF *DUKES*' REFRAMED COMMONALITY TO § 1983 CLAIMS

A. § 1983 Legal and Factual Context

Individuals and groups who assert that government action violated their rights or seek to reform government programs and policies have no single claim or legal panacea. This analysis considers claims under § 1983 as one opportunity to identify impacts of *Dukes* on claims against state and local governments for violations of a variety of rights. § 1983 is not itself a source of rights, but rather provides a cause of action against violations of constitutional and some federally created rights by those acting under state or municipal authority.[89] Enacted in its first form as part of the Civil Rights Act of 1871, the law filled the need for a legal mechanism to enforce federal rights against state officials, after state police and courts failed to protect citizens from the violence of the Ku Klux Klan, "denying decent citizens their civil and political

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[87] *In re* Whirlpool Corp. Front-Loading Washer Products Liab. Litig., 678 F.3d 409, 415 (6th Cir. 2012) (emphasis added) (explaining additionally that *Dukes* demand for merits consideration at the certification phase is a change in law, as it has interpreted *Eisen* to ban such analysis).

[88] Ross v. RBS Citizens, N.A., 667 F.3d 900, 907 (7th Cir. 2012) (emphasis added) (holding that "*Dukes* does not change the district court's commonality result, and as such find that the district court properly certified both classes").

[89] 42 U.S.C. §1983 ("Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

rights."[90] Despite this long history, the use of § 1983 was minimal until recent decades' case law transformed access to this remedy.[91] Today, prisoners who contend violations of their civil rights bring a substantial portion of § 1983 suits.[92] Asserting § 1983 claims as a class may improve the efficiency of reforming rights-infringing government actions. Nonetheless, § 1983 class claims remain rare, perhaps partially due to the "unarticulated tension" in § 1983 claims "between wanting to protect taxpayers from liability" and "protect[ing] citizens by deterring violations of federal law."[93]

The text of § 1983 designates the actions of a "person" acting "under color" of any state law as the trigger for liability and for redress at law or equity.[94] However, case law has evolved distinct requirements around both the target of liability and the allowed remedies, based on whether the claim is asserted against a state or municipal official. While states themselves are not considered "persons," a state official can be sued in his official capacity and for injunctive relief.[95] Prior to 1961, such § 1983 claims were understood to attach only against "misconduct either officially authorized or so widely tolerated as to amount to a custom or usage."[96] In *Monroe v. Pape*, the Supreme Court initiated a modern expansion of § 1983 claims when it held that a police officer acting outside the lines of state policy, or even while violating state

[90] ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 486 (Aspen Publishers, 5th ed. 2007) (quoting Wilson v. Garcia, 471 U.S. 261, 276 (1985)); *see also* Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("[T]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as the guardians of . . . federal rights.").
[91] *Id*. at 482, 488 (citing MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 1-5 (4th ed. 2003) (explaining that, while in 1961 only 287 § 1983 suits were brought, the number rose to over 36,000 in 1985 and expanded by 2003 to approximately 50,000 suits asserting § 1983 filed each year).
[92] *Id*. at 483 (citing GEORGE C. PRATT, Foreward to M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES at xvii (4th ed. 2003)). The Prison Litigation Reform Act has altered requirements for prisoners bringing § 1983 claims in ways beyond the scope of this paper.
[93] *Id*. at 525.
[94] 42 U.S.C. §1983.
[95] City of Los Angeles v. Lyons, 461 U.S. 95, 97-98 (1983) (Plaintiff seeking injunctive relief plaintiff must demonstrate a real or immediate threat of future harm; a hypothetical chance is insufficient for standing.).
[96] CHEMERINSKY, *supra* note 90, at 490 (quoting PETER W. LOW & JOHN C. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 917 (4th ed. 1998)).

law, could still be acting "under color" of state law.[97] Liability thus expanded to state officials acting outside the scope of granted state authority, but still in their official capacity. State sovereign immunity doctrines remain as a limit to the availability of monetary relief against such state officials.[98]

In contrast, municipalities and local governments are currently liable under § 1983 law for both injunctive relief and damages for actual injuries suffered,[99] but only for rights violations by their "official policies" or customs so "permanent and well settled as to constitute a custom or usage with the force of law."[100] Extensive case law has developed to explicate the allowable ways to evidence such a policy or custom.[101] In short, liability can be generated by: (1) the actions of a municipal legislative body;[102] (2) the actions of a municipal agency that "exercise authority delegated by the municipal legislative body;"[103] (3) the actions of "those with final authority;"[104] (4) inaction in the form of a policy of inadequate training or supervision, given more than one incident and proof of deliberate indifference;[105] or (5) the most amorphous, the existence of a "custom."

B. Court of Appeals Rejections for Failed Commonality in *MD ex rel Stukenberg* and *Jamie S.*

[97] *Id*. at 492.
[98] Edelman v. Jordan, 94 S. Ct. 1347, 1362 (1974) (limiting relief against state officials to prospective injunctions only, not allowing retroactive payment of funds from a state treasury).
[99] CHEMERINSKY, *supra* note 90, at 598 (citing Carey v. Piphus, 435 U.S. 247 (1978)).
[100] Monell v. N.Y.C Dep't of Soc. Servs, 436 U.S. 658, 691 (1978); *see also* Pineda v. City of Houston, 291 F.3d 325, 328 (5th Cir. 2002) (noting municipal liability under § 1983 may be established by "[a] persistent, widespread practice of city officials or employees . . . common and well settled as to constitute a custom.").
[101] CHEMERINSKY, *supra* note 90, at 511–521.
[102] Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).
[103] CHEMERINSKY, *supra* note 90, at 512 (citing Monell, 436 U.S. at 661).
[104] *Id*. (citing *Pembaur*, 475 U.S. at 469).
[105] *Id*. at 518.

Two federal courts of appeal have reviewed § 1983 class certifications since *Dukes*, and both have rejected certification because of deficient commonality.[106] Applying commonality is intertwined with a claim's context; given the factual and legal variety across § 1983 claims, particularly around the allegedly violated rights, these cases' distinguished and shared features are particularly notable. The two cases provide examples both of claims against both local and state government officials and also of some of the myriad rights able to be asserted via § 1983 claims. The *MD ex rel Stukenberg* plaintiffs contended Constitutional violations by state officials, while the plaintiffs in *Jamie S.* asserted violations of a federal statue by both a municipal and a state agency.[107] Both classes sought injunctive relief under Rule 23 (b)(2), and both courts rejected certification not only on the basis of inadequate commonality, but also on (b)(2) grounds for an inability to devise relief uniform to the class.[108]

i. *MD ex rel Stukenberg*: Fully Applying *Dukes*, Including a Search for Dissimilarities

In *MD ex rel Stukenberg*, nine children in the custody of Texas's Permanent Managing Conservatorship, the state's long term foster care, brought § 1983 claims against Governor Rick Perry and the heads of the state agencies that manage the program.[109] The plaintiffs sought to represent a class of all children in the foster care system and alleged that the program's failure to "maintain a caseworker staff of sufficient size and capacity to perform the tasks critical to [the] safety, permanency, and well-being" constituted a series of Constitutional harms against that

[106] MD *ex rel*. Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012); Jamie S. v. Milwaukee Pub. Schs., 688 F.3d 481 (7th Cir. 2012).
[107] *MD ex rel Stukenberg*, 675 F.3d at 853; *Jamie S.*, 688 F.3d at 484.
[108] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2551, 2557 (2011) (internal quotes removed) (citing Nagareda, *supra* note 58, at 132) ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or to none of them.").
[109] *MD ex rel Stukenberg*, 675 F.3d at 833.

purported class.[110] When the Southern District of Texas certified the class, it had identified a common question in the "legal claim that . . . systemic deficiencies resulted in widespread violations of their statutory and constitutional rights" and had explicitly indicated that "individual issues did not preclude commonality."[111] The Fifth Circuit disagreed. It vacated and remanded the certification and held that the District Court "failed to conduct the rigorous analysis" in the form now required under *Dukes*.[112] Additionally, the Fifth Circuit asserted that *Dukes*' (b)(2) back pay holding universally barred individualized remedies for (b)(2) classes, and thus found that the lower court abused its discretion by certifying a (b)(2) class that requested "at least twelve broad, class-wide injunctions," some containing individualized relief.[113] These holdings were not treated in isolation: the Court identified an "[attempt] to aggregate a plethora of discrete claims challenging aspects of Texas's PMC into one 'super-claim'" as the "common thread running through the proposed class's current deficiencies."[114]

In its analysis, the Fifth Circuit adopted *Dukes*' search for a common question central to the resolution of the litigation, emphasizing that the District Court did not establish "the scope" of the stated common questions in order to assess "whether they were capable of class-wide resolution."[115] Additionally, the decision faulted the District Court for failing to be "particularly precise" in its articulation of how common claims could resolve "an issue that is central to the

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[110] *Id*. at 835 (asserting violations of "(1) substantive Due Process rights to be free from harm while in state custody under the 14th Amendment, (2) liberty interests, privacy interests, and associational rights not to be deprived of a child-sibling or child-parent family relationship where safe and appropriate, under the First, Ninth, and Fourteenth Amendments, and (3) procedural due process rights under the Fourteenth Amendment by depriving them of alleged state law entitlements.").

[111] *Id*. at 843, 839 (citing prior precedent: "merely having different claims, or . . . some individualized analysis is not fatal to commonality") (quoting James v. City of Dallas, 254 F.3d 551, 570 (5th Cir. 2001)).

[112] *Id*. at 838-839 ("Although the district court's analysis may have been a reasonable application of pre-Wal-Mart precedent, the Wal-Mart decision has . . . render[ed] the district court's analysis insufficient.")

[113] *Id*. at 845 (requiring "a single injunction or declaratory judgment" to "provide relief to each class member").

[114] *Id*. at 848.

[115] *Id*. at 842, 845 (The District Court had acknowledged "each class member experienced the alleged shortcomings . . . in a different way" but held commonality satisfied as class members were "within the same system and subject to the alleged deficiencies in that system.").

validity of each class member's claims."[116] The Fifth Circuit judged the question that the District Court had considered common – "whether Defendants failed to maintain a caseworker staff of sufficient size and capacity to perform properly" – to be inadequately central.[117] The discussion, the Circuit holding complained, "contained no reference" to the "three causes of action advanced" and thus no clear link to "how that question will resolve the claims in one stroke."[118] Finally, the District Court was found to have insufficiently inspected the merits of the claims, with the Circuit Court all but announcing such an analysis as required under *Dukes*.[119]

The Fifth Circuit additionally explicitly searched for "dissimilarities," which the defendant asserted were present and dispositive against commonality. The holding explained that by "declining to analyze Texas's argument," the District Court failed to complete the requirements of Rule 23 (a)(2).[120] This dissimilarity analysis indicates that the Fifth Circuit is open, at least in the presence of ardent advocacy by government defendants, to a level of heightened commonality and certification scrutiny not only unnecessary in the past, but as of yet not applied by other appeals courts.

The Fifth Circuit found the lower court's certification process clearly deficient under *Dukes*. However, by intertwining its commonality and (b)(2) coherence analyses, the holding obscured which threshold was dispositive against certification. Thus, it is not clear whether this case provides an example of a class newly blocked from certification under *Dukes*' commonality, or instead of a class that could have survived commonality only to be held insufficiently cohesive for a class-wide injunctive remedy under *Dukes* (b)(2) holding. This merging of Rule

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[116] *Id*. at 845.
[117] *Id*. at 841.
[118] *Id*.
[119] *Id*. at 842 (criticizing the lack of "analysis of the elements and defenses for . . . any of the proposed class claims").
[120] *Id*. at 843 ("Texas contends that the individual class member's substantive due process claims are not capable of classwide resolution because deciding each plaintiff's claim requires an individualized inquiry . . . .").

23's standards illustrates how using commonality to identify a central claim is redundant to the tailored (b)(2) consideration of the features necessary to adjudicate a class-wide injunctive remedy. The blunter tool of heightened commonality risks excluding classes from certification that could still satisfy the (b)(2) threshold.

ii. *Jamie S.*: No Central Answers in Individualized Actions, Door Open to Central Answers in Illegal Policy

Special education public school students brought the class claim in *Jamie S.* and contended that the public school district and the state's Department of Public Instruction had violated the district's "Child Find obligations," or duty to identify children eligible for special education services, under the Individuals with Disabilities Education Act (IDEA).[121] The suit arrived at the Seventh Circuit years into litigation. Already, the parties had wrangled over class definition and class certification and the Eastern District of Wisconsin had held a bench trial, issued a finding that the defendants were liable for "various systemic IDEA violations," and granted preliminary approval of a settlement.[122] Still, the Seventh Circuit decertified the class as too broad and unable to satisfy commonality.[123] The holding rejected the use of the injunctive (b)(2) class because "relief cannot be ordered on a class-wide basis" and deemed the approval of the class settlement inappropriate.[124] The decision focused on the absence of a common question able to "resolve an issue" central to "the validity of each one of the claims in one stroke."[125] The opinion accused the plaintiffs of "completely misunderstand[ing]" Rule 23 (a).[126]

The Seventh Circuit did not simply find that a central common question was absent; rather, its holding went to the nature of flawed IDEA child-find inquiries as potentially

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[121] Jamie S. v. Milwaukee Pub. Schs., 688 F.3d 481, 485 (7th Cir. 2012).
[122] *Id*. at 486 ("Initially . . . a class so broad that it effectively included all students eligible for special education.").
[123] *Id*. at 493.
[124] *Id*.
[125] *Id*. at 497.
[126] *Id*.

impervious to § 1983 class litigation.[127] The decision identified a single satisfactory "bottom line liability question" in any child-find IDEA claim: whether "MPS failed in its obligations… and thereby deprived an eligible disabled child of a free appropriate public education."[128] The Court implied that because such individual claims "[require] an inherently particularized inquiry," it may be impossible for *any* class to demonstrate a shared "question of law or fact that can be answered all at once" and provide "the single answer to . . . resolve a central issue in all class members' claims."[129] The majority saw the child-find process as having "no such thing as a systemic failure," given that the relevant inquiries are a "necessarily child specific" and individualized action.[130] Still, the Court conceded that commonality could "perhaps" be possible if the school system "operated under child-find policies that violated the IDEA."[131] This holding potentially draws a line around individualized government actions as incapable of producing shared harm, and so unable to generate a common answer ripe for class adjudication under § 1983. Yet, the Seventh Circuit did not draw conclusions about the reach of such an implication or address the abundance of individually administered government programs that are still driven by common policy.

The Seventh Circuit also did not explicitly link this search for a policy at the root of the plaintiffs' alleged harms to the necessary presence of an "official policy" or "custom" for § 1983 liability against the municipal school system. The concurring opinion did make such a connection. In his dissent, Judge Rovner argued that in addition to "an illegal policy," "widespread practices might also" be able to "support a claim for a systemic violation" of the

[127] *Id*. at 498.
[128] *Id*. at 497.
[129] *Id*. ("That all the class members have 'suffered' as a result of disparate individual IDEA child-find violations is not enough; it does not establish the individual claims have any question of law or fact in common.").
[130] *Id*.
[131] *Id*.

IDEA mandate.[132] The dissent agreed that it was "difficult to discern a… wrongful policy or practice" as the common source of the alleged harms before them, but stated that a "truly systemic failure" *could* exist and be the basis of class litigation.[133]

For § 1983 class claims against state officials, a central common question threshold that mandates a central policy would signal a novel and dramatic shift. The need for an official policy or custom and a causal link from that policy to the claims is not novel for § 1983 municipal liability. Moreover, the Supreme Court recently clarified that even § 1983 suits seeking solely injunctive relief from municipalities must still demonstrate a policy or custom at the root of the harm.[134] In contrast, § 1983 claims for injunctive relief against state officials mandate no such evidence of an "official policy," though a group that alleges the same government official violated their same rights may inherently implicate a state policy. Thus, an assertion that separate harms derived from the same individualized process must fail commonality would newly undermine the efficient and valuable tool offered through class resolution of § 1983 claims. Moreover, these concerns may not be limited to the overlap with this specific legal context: as the concurrence noted, an "effort to sweep many individual plaintiffs and sets of facts into one class on the premise that all reflect illegal conduct by the defendant in practice and culture if not in policy" is "precisely" what *Dukes* rejected."[135] Whether *Dukes'* commonality holding alone or its intersection with specific legal frameworks generates this demand for a common policy as the cause of class harm, the Seventh Circuit may

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[132] *Id.* at 505 (Rovner, J., concurring).
[133] *Id.* at 504, 505 ("Suppose, for example, that [the school district] ignored and did not refer for evaluation students with a particular type of potential disability – e.g. dyslexia – and, as a result, large numbers of students went unidentified . . . . To my mind, this would be a genuinely systemic violation of the district's child-find obligations that would be amenable to recognition and remediation in a class action.").
[134] L. A. Cnty., Cal. v. Humphries, 131 S. Ct. 447, 453-54 (2010) ("*Monell*'s 'policy or custom' requirement applies in § 1983 cases irrespective of whether the relief sought is monetary or prospective.").
[135] *Jamie S.*, 688 F.3d at 504.

have signaled a transformation in the treatment of § 1983 class claims for injunctive relief against a state official.

C. District Court § 1983 Decisions and Initial Shifts in Claims Against State Officials

In the past year and half, federal district courts have cited to *Dukes* in at least thirty decisions, both published and unreported or non-precedential, regarding the class certification of § 1983 claims.[136] The cases span all possible outcomes, including: the certification of four (b)(2) classes against municipalities[137] and seven (b)(2) classes against state officials;[138] and eight rejections of (b)(2) class certifications, two against a municipality[139] and six against a state official.[140] In addition, district courts decertified one (b)(2) class[141] and rejected two motions to decertify additional (b)(2) classes.[142] These holdings reveals that, while lower courts have applied *Dukes* in analyzing § 1983 class commonality, the new standard has not yet presented a

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[136] *See infra* Figure 1. These cases were selected via searches on Westlaw and Lexis for citations to *Dukes* within both published and unpublished cases citing § 1983, and vice versa. I obtained 45 cases, including *MD ex rel Stukenberg* and *Jamie S.*; I then narrowed the pool to cases considering certification and applying *Dukes* in the context of that analysis. This particularly excluded cases citing to *Dukes* for its holdings on standards of proof and employment discrimination. The greatest limitation of this search is the exclusion of § 1983 class certifications that did not cite to *Dukes*, which would have provided an insightful baseline of comparison as well as context about the rarity or dominance of this analysis. I believe this selection nonetheless provides insight into the role of *Dukes* commonality in this area of law. In addition, these databases may simply omit some decisions, further narrowing the sample's representativeness.

[137] Olson v. Brown, 284 F.R.D. 398 (N.D. Ind. 2012); Stinson v. City of New York, 282 F.R.D. 360 (S.D.N.Y. 2012); Ortega-Melendres v. Arpaio, 836 F.Supp.2d 959 (D. Ariz 2011); Thompson v. Altoona Hous. Auth., Civ. Act. No. 3:10–CV–312, 2012 WL 3204498 (W.D. Pa. 2012).

[138] Unthaksinkun v. Porter, No. C11–0588JLR, 2011 WL 4502050 (W.D. Wash. Sept. 28, 2011); Estate of VanDam *ex rel*. Horizon Trust, 278 F.R.D. 415 (S.D. Ind. 2011); Karsjens v. Jesson, 283 F.R.D. 514 (D. Minn. 2012); Menking v. Daines, No. 09 Civ. 4103, 2011 WL 9133040 (S.D.N.Y. Dec. 9, 2011); Marilley v. Bonham, No. C–11–02418–DMR, 2012 WL 851182 (N.D. Cal. Mar. 13, 2012); Wilhoite v. Mo. Dept. of Social Servs. *ex rel*. Levy, No. 2:10-CV-03026-NKL, 2011 WL 5025850 (W.D. Mo. 2011); BLH *ex rel*. Hensley v. Koller, C/A No. 7:11–cv–02827–GRA, 2012 WL 3581175 (D.S.C. Aug. 17, 2012).

[139] Logory v. Cnty. of Susquehanna, 277 F.R.D. 135 (M.D. Pa. 2011); Morton v. City of Detroit, No. 11–cv–12925, 2012 WL 1166984 (E.D. Mich. Apr. 9, 2012).

[140] N.B. *ex rel*. Buchanan v. Hamos, No. 11 C 6866, 2012 WL 1953146 (N.D. Ill. May 30, 2012); Unthaksinkun v. Porter, No. C11–0588JLR, 2011 WL 4502050 (W.D. Wash. Sept. 28, 2011); Wright-Gray v. Hamos, No. 09 C 04414, 2012 WL 366597 (N.D. Ill. Feb. 2, 2012); *Estate of VanDam*, 278 F.R.D. at 418; Berndt v. California Dept. of Corrections, No. C 03–3174 PJH, 2012 WL 950625 (N.D. Cal Mar. 20 2012); Powers v. Clay, C.A. No. V–11–051, 2011 WL 6130929 (S.D. Tex. Dec. 8, 2011).

[141] U.S. v. City of New York, 276 F.R.D. 22 (S.D.N.Y. 2011).

[142] D.G. *ex rel*. Strickland v. Yarbrough, 278 F.R.D. 635 (N.D. Okla. 2011); Schilling v. TransCor Am., LLC, No. C 08–941 SI, 2012 WL 2792688 (N.D. Cal. July 9, 2012).

wide barrier to the certification of either (b)(2) or (b)(3) § 1983 classes.[143] Notably, deficient commonality was a basis for rejecting certification for only three (b)(2) classes, and all three faced other arguably fatal flaws, preventing commonality from being the decisive factor.[144] In reaching these decisions, district courts nearly universally applied *Dukes'* commonality language.[145] The primary alteration from *Dukes*' search for a central common question was the absence of "dissimilarities" language from all but four cases; even where mentioned, none of these courts undertook any analysis to identify the presence or absence of dissimilarities or explained their relevance to certification.[146]

An examination of these cases nonetheless provides a window into the initial impact of the shift in commonality to this area of law. Consistent with analysis of *Jamie S.*, claims against municipal defendants appear particularly equipped to satisfy commonality's new contours because of their preexisting need to evidence an official policy or custom to access § 1983 remedies.[147] The liability threshold requiring that a policy caused the class harm renders redundant the commonality demand for a central common question able to resolve the class' claims.[148] The certifications of claims against municipal defendants did not appear threatened by the existence of individualized processes, which *Jamie S.* articulated as fatal to commonality, as

[143] *See infra* Figure 1.
[144] *Wright-Gray*, 2012 WL 366597at 1 (finding the court lacking in Article III jurisdiction and the plaintiff without standing); *Estate of VanDam*, 278 F.R.D. at 424 ("intra-class conflicts permeating this case"); *Morton*, 2012 WL 1166984 (holding the putative class to be absent any shared injury to produce a common question).
[145] *But see Unthaksinkun*, 2011 WL 4502050 at 12 ("Shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate remedies.") (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)).
[146] *Olson*, 2012 WL 3044264 at 11 ("factual variances do not ruin commonality"); *see also Wright-Gray*, 2012 WL 366597 at *8; *Estate of VanDam*, 278 F.R.D. at 424; Orvis v. Spokane Cnty., 281 F.R.D. 469, 474 (E.D. Wash. 2012).
[147] *See e.g. Olson*, 2012 WL 3044264 at 11 (finding commonality satisfied by the "specific practices relative to the handling of grievances, opening of legal mail . . . [that] caused the inmates to suffer the same potential injury").
[148] *But see* Donovan v. St. Joseph Cnty. Sheriff, No. 3:11–CV–133–TLS, 2012 WL 1601314 (N.D. Ind. May 3, 2012) (allowing certification for the question of whether a policy existed).

they simultaneously alleged policies linking the harms.[149] Even (b)(2) municipal class claims, not subject to the (b)(3) predominance test, are already crafted in a manner that satisfies *Dukes*.[150] For example, in one certified (b)(2) class, Latino motorists alleged that a County sheriff and his office violated the Fourth Amendment by "detain[ing] individuals without reasonable suspicion;" the Arizona District Court certified the class despite "factual circumstances . . . [that] differ" because of the alleged presence of "a policy of racial profiling."[151]

In contrast, claims against state officials *do* appear newly vulnerable to the demand for a central common answer in the form of a policy, as the relevant substantive § 1983 law did not previously include a requirement more rigorous than *Dukes*' commonality. In an attempt to decertify a (b)(2) class brought against Kentucky's foster care system for allegedly "failing to adequately monitor the safety" of children, defendants asserted the lack of an evidenced policy as fatal to the class' commonality.[152] The District Court rejected the notion that a policy must be the central common issue: the class "met the burden" through evidence of a "*practice* of putting children at risk," which offered the common issue of whether such practice violates the right to be free from harm while in state custody.[153] Were a court persuaded to search for a common policy, at least some class claims brought against state officials, including this one, could fail.[154] In another example, a class of Medicaid applicants and recipients satisfied commonality, but not

[149] *See e.g.* Schilling v. TransCor Am., LLC, No. C 08-941 SI, 2012 WL 2792688, at *2 (N.D. Cal. July 9, 2012) (rejecting an assertion that "individualized issues regarding each prisoner's experience in his or her transport" ruined commonality because the claims are the "direct result" of "policies and practices").
[150] *See* Stinson v. City of New York, 282 F.R.D. 360, 370 (S.D.N.Y. 2012) ("Unlike in *Dukes* where the plaintiffs alleged a corporate policy of discretion . . . . Plaintiffs here have alleged a specific policy.").
[151] Ortega-Melendres v. Arpaio, 836 F. Supp.2d 959, 989 (D. Ariz 2011).
[152] D.G. *ex rel.* Strickland v. Yarbrough, 278 F.R.D. 635, 644 (N.D. Okla. 2011).
[153] *Id.* at 639, 636 (emphasis added) ("[A]t least one proposed remedy or "answer"—i.e., an injunction setting limits on caseloads—that would be common to all plaintiffs.").
[154] Karsjens v. Jesson, 283 F.R.D. 514, 518 (D. Minn. 2012).

by demonstrating that a policy lay at the root of the shared harm.[155] Instead, that the Southern District of New York found that the presence of "the same or similar factual circumstances surrounding their applications for fair hearings to review decisions . . . regarding their Medicaid eligibility" were sufficient for a commonality showing.[156] Additionally, as of yet, district courts have not been persuaded that the presence of "factual differences" ruins commonality for § 1983 class claims against state officials. One district court rejected the contention that a "common constitutional issue at the heart of each proposed class member's claim for relief" was undermined by variety in the four statues being challenged.[157]

CONCLUSION

Mapping the impact of *Dukes*' recast commonality is linked both to the framing of a central, common answer and to the substantive law at issue in each case. Yet, the implications are clearly higher across injunctive classes, which face a new demand to evidence a central question able to resolve their claims. Rule 23 (b)(2)'s requirement for "coherence" and a showing that a class is susceptible to a class-wide remedy against a common action by the defendant may at times overlap with this concern. Still, importing such concerns to commonality appears rife with unintended consequences, as it undermines the simple ingenuity of Rule 23's design: a set of generally applicable thresholds to ensure claims brought by named plaintiffs are ripe for aggregate litigation, followed by requirements tailored to the particular demands of adjudicating that set of claims and remedies. Seeking injunctive relief, particularly against a government official, should demand the capacity to merit the relevant relief, but no more.

Specific to § 1983's substantive law, requiring a policy as the only satisfactory common

[155] Menking v. Daines, 287 F.R.D. 166, 170-71 (S.D.N.Y. Dec. 9, 2011).
[156] *Id*.
[157] Marilley v. Bonham, No. C-11-02418-DMR, 2012 WL 851182 at *4 (N.D. Cal. Mar. 13, 2012) ("California charges higher fees to non-residents for commercial fishing licenses, registrations, and permits.").

answer presents a threshold that claims brought against municipal defendants already surmount. In contrast, § 1983 claims against state officials facing the same requirement may need to be substantially altered – or may be newly excluded from aggregate litigation. This analysis could meaningfully transform class claims that demand remedies for the violation of Constitutional and federal rights by state officials and agencies. Such a shift would change the character of a valuable mechanism for creating reform in those rights-violating government entities. Moreover, this intersection between commonality's procedural redefinition and § 1983's own the highlights the need to look closely and critically at the interactions of sweeping procedural changes with precise substantive law.

As the impacts of this decision come into sharper focus, it will surely channel the strategic choices of litigators and the actual practices of government officials exposed to potential liability.[158] Such choices are likely already occurring, though evidence of changes in what cases are simply being brought is outside the scope of this analysis of developing case law. In particular, *Dukes*' demand for a merits consideration at the certification phase may increase the burden on plaintiffs to initiate a claim ready for adjudication, or at least able to justify discovery. If the Supreme Court desired to use procedural tools to whittle away access to class actions, and thus remedies reachable only through aggregate litigation, it may have succeeded.[159]

[158] *See e.g.* Max Helveston, *Promoting Justice through Public Interest Advocacy in Class Actions*, 60 BUFF. L. REV. 749, 751 (2012) (arguing *Dukes*' procedural changes may not only alter the outcomes of aggregate litigation, but also may "modify the behaviors of employers, producers of consumer goods, and other business entities").
[159] *See* Resnik, *supra* note 21 at 149 ("The Court's holding, written by Justice Scalia, is . . . ambitious. When granting certiorari, the Court *added* the question of whether the women had enough in common to meet the prerequisites of Rule 23.") (italics added).

APPENDIX

Figure 1: District Court Cases and Certification Outcomes

Class Type	Class Certifica-tion	Defendant	Number of Cases and Names[160]
(b)(2)	Allowed	Municipal	**Four cases**: Olson v. Brown;[161] Stinson v. City of New York;[162] Ortega-Melendres v. Arpaio;[163] Thompson v. Altoona Housing Authority.[164]
(b)(2)	Allowed	State	**Seven cases:** Unthaksinkin v. Porter;[165] Estate of VanDam ex rel Horizon Trust And Investment Management NA v Daniels;[166] Karsjens v. Jesson;[167] Menking v. Daines;[168] Marilley v. Bonham;[169] Wilhoite v. Missouri Department of Social Services *ex rel.* Levy;[170] BLH ex rel Hensley v. Koller.[171]
(b)(2)	Denied	Municipal	**Two cases**: Logory v. County of Susquehanna;[172] Morton v. City of Detroit.[173]
(b)(2)	Denied	State	**Six cases:** NB *ex rel.* Buchanan v. Hamos;[174] Unthaksinkin v. Porter;[175] Wright-Gray v. Hamos;[176] Estate of VanDam *ex rel.* Horizon Trust And Investment Management NA v Daniels;[177] Berndt v. California Department of Corrections;[178] Powers v. Clay.[179]
(b)(2)	Decert. denied	Municipal	**One case:** U.S. v. City of New York.[180]

[160] *The following cases presented certification for multiple classes, which are considered separately*: Brown v. City of Detroit, No. 10–12162, 2012 WL 4470433 (E.D. Mich. Sept. 27, 2012); Stinson v. City of New York, 282 F.R.D. 360 (S.D.N.Y. 2012); Logory v. Cnty. of Susquehanna, 277 F.R.D. 135 (M.D. Pa. 2011); U.S. v. City of New York, 276 F.R.D. 22 (S.D.N.Y. 2011); Unthaksinkin v. Porter, C11-0588JLR, 2011 WL 4502050 (W.D. Wash. Sept. 28, 2011); Estate of VanDam *ex rel*. Horizon Trust And Inv. Mgmt. NA v Daniels, 278 F.R.D. 415 (S.D. Ind. 2011).
[161] Olson v. Brown, 2012 WL 3044264 (N.D. Ind. July 25, 2012).
[162] *Stinson*, 282 F.R.D 360.
[163] Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959 (D. Ariz 2011).
[164] Thompson v. Altoona Hous. Auth., Civ. Act. No. 3:10–CV–312, 2012 WL 3204498 (W.D. Pa. 2012).
[165] *Unthaksinkun*, 2011 WL 4502050.
[166] Estate of VanDam *ex rel*. Horizon Trust And Inv. Mgmt. NA v Daniels, 278 F.R.D. 415 (S.D. Ind. 2011).
[167] Karsjens v. Jesson, 283 F.R.D. 514 (D. Minn. 2012).
[168] Menking v. Daines, 287 F.R.D. 166 (S.D.N.Y. 2011).
[169] Marilley v. Bonham, No. C–11–02418–DMR, 2012 WL 851182 (N.D. Cal. Mar. 13, 2012).
[170] Wilhoite v. Mo. Dept. of Soc. Servs. ex rel. Levy, 2011 WL 5025850 (W.D. Mo. 2011).
[171] BLH *ex rel*. Hensley v. Koller, C/A No. 7:11–cv–02827–GRA, 2012 WL 3581175 (D.S.C. Aug. 17, 2012).
[172] Logory v. Cnty. of Susquehanna, 277 F.R.D. 135 (M.D. Pa. 2011).
[173] Morton v. City of Detroit, No. 11–cv–12925, 2012 WL 1166984 (E.D. Mich. Apr. 9, 2012).
[174] N.B. *ex rel*. Buchanan v. Hamos, No. 11 C 6866, 2012 WL 1953146 (N.D. Ill. May 30, 2012).
[175] Unthaksinkun v. Porter, No. C11–0588JLR (W.D. Wash. Sept. 28, 2011).
[176] Wright-Gray v. Hamos, No. 09 C 04414, 2012 WL 366597 (N.D. Ill. Feb. 2, 2012).
[177] Estate of VanDam *ex rel*. Horizon Trust And Inv. Mgmt. NA v Daniels, 278 F.R.D. 415 (S.D. Ind. 2011).
[178] Berndt v. Cal. Dept. of Corrections, No. C 03–3174 PJH, 2012 WL 950625 (N.D. Cal Mar. 20 2012).
[179] Powers v. Clay, C.A. No. V–11–051, 2011 WL 6130929 (S.D. Tex. Dec. 8, 2011).
[180] U.S. v. City of New York, 276 F.R.D. 22 (S.D.N.Y. 2011).

Class Type	Class Certifica - tion	Defendant	Number of Cases and Names
(b)(2)	Decert. denied	State	**Two cases:** DG *ex rel.* Strickland v. Yarbrough;[181] Schilling v. TransCor Ammerica LLC.[182]
(b)(3)	Allowed	Municipal	**Seven cases**: Brown v. City of Detroit;[183] Stinson v. City of New York;[184] U.S. v. City of New York;[185] Bailiff v. Village of Downers Grove (damages class);[186] Donovan v. St Joseph County Sheriff;[187] Mangold v. Lincoln County;[188] Orvis v. Spokane (settlement class)[189].
(b)(3)	Denied	Municipal	**Six cases:** Brown v. City of Detroit;[190] Logory v. County of Susquehanna;[191] Daskalea v. Washington Humane Society;[192] Mulvania v. Sheriff of Rock Island County;[193] Morton v. City of Detroit II; Anderson v. City of Portland.[194]
(b)(3)	Decert. approved	Municipal	**One case:** Barnes v. District of Columbia (individualized damages class).[195]

[181] D.G. *ex rel*. Strickland v. Yarbrough, 278 F.R.D. 635 (N.D. Okla. 2011).
[182] Schilling v. TransCor Am., LLC, No. C 08–941 SI, 2012 WL 2792688 (N.D. Cal. July 9, 2012).
[183] Brown v. City of Detroit, No. 10–12162, 2012 WL 4470433 (E.D. Mich. Sept. 27, 2012).
[184] Stinson v. City of New York., 282 F.R.D. 360 (S.D.N.Y. Aug. 3, 2012).
[185] *City of New York*, 276 F.R.D. 22.
[186] Bailiff v. Village of Downers Grove, No. 11 C 3335, 2011 WL 6318953 (N.D. Ill. Dec. 16, 2011).
[187] Donovan v. St. Joseph Cnty. Sheriff, No. 3:11–CV–133–TLS, 2012 WL 1601314 (N.D. Ind. May 3, 2012).
[188] Mangold v. Lincoln Cnty., No. 4:10 CV 1991 RWS, 2011 WL 3880561 (E.D. Mo. Aug. 31, 2011).
[189] Orvis v. Spokane Cnty., 281 F.R.D. 469 (E.D. Wash. 2012).
[190] Brown v. City of Detroit, No. 10–12162, 2012 WL 4470433 (E.D. Mich. N.D. Sept. 27, 2012).
[191] Logory v. Cnty. of Susquehanna, 277 F.R.D. 135 (M.D. Pa. 2011).
[192] Daskalea v. Wash. Humane Soc., 275 F.R.D. 346 (D.C. 2011).
[193] Mulvania v. Sheriff of Rock Island Cnty., No. 4:10–cv–4080–SLD–JAG, 2012 WL 3486133 (C.D. Ill. Aug. 15, 2012).
[194] Anderson v. City of Portland, Civ. No. 08–1447–AA, 2011 WL 6130598 (D. Or. Dec. 7, 2011).
[195] Barnes v. District of Columbia, 278 F.R.D. 14 (D.C. 2011).