DePaul University
UNIVERSITY LIBRARIES

DePaul Law Review

Volume 62
Issue 3 *Spring 2013: Symposium - Class Action Rollback? Wal-Mart v. Dukes and the Future of Class Action Litigation*

Article 7

Issue Certification under Rule 23(c)(4): A Reappraisal

Mark A. Perry

Follow this and additional works at: http://via.library.depaul.edu/law-review

Recommended Citation
Mark A. Perry, *Issue Certification under Rule 23(c)(4): A Reappraisal*, 62 DePaul L. Rev. 733 (2013)
Available at: http://via.library.depaul.edu/law-review/vol62/iss3/7

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized administrator of Via Sapientiae. For more information, please contact mbernal2@depaul.edu, MHESS8@depaul.edu.

ISSUE CERTIFICATION UNDER RULE 23(c)(4): A REAPPRAISAL

*Mark A. Perry**

INTRODUCTION

In *Wal-Mart Stores, Inc. v. Dukes*,[1] the Supreme Court reiterated that "[t]he class action is 'an *exception* to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[2] As the *Dukes* Court stressed, departure from that rule must be justified.[3] Such a justification may be found in a properly conducted class action, but only if the requirements of Federal Rule of Civil Procedure 23 are carefully adhered to.[4]

As exemplified by the title of this Symposium, *Class Action Rollback?*, many observers expect that *Dukes* will reduce the number of class actions certified. This has led some practitioners and academics to propose various strategies for increasing the number of classes certified in the wake of *Dukes*. Professor John C. Coffee, in particular, has offered what he calls a "trail map" for expanding future class actions.[5]

According to Professor Coffee, "[a]s of this juncture, the long-term future of the class action is in doubt, and only some basic compromises (*such as the acceptance of partial certification*) seem capable of preserving it as a broad form of litigation practice."[6] Unlike some of the other post-*Dukes* proposals, the practice of "partial" or "issue" certification has a textual basis: Rule 23(c)(4) provides that "[w]hen

---

* Partner, Gibson, Dunn & Crutcher LLP; Adjunct Professor, Georgetown University Law Center. I have represented parties or amici in several of the cases discussed in this Article, but the views expressed herein are entirely my own. I gratefully acknowledge the assistance of Lochlan Shelfer, a student at Yale Law School, in preparing this Article for publication.

1. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
2. *Id.* at 2550 (emphasis added) (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)).
3. *See id.*
4. *See* Taylor v. Sturgell, 553 U.S. 880, 894 (2008).
5. John C. Coffee, Jr., *The New Class Action Landscape: A Trail Map to Class Certification and Practice in the Era After* Wal-Mart *and* Concepcion, THE 15TH ANNUAL NATIONAL INSTITUTE ON CLASS ACTIONS (Oct. 14, 2011).
6. JOHN C. COFFEE, JR., BUREAU NAT'L AFFAIRS, THE NEW CLASS ACTION LANDSCAPE: TRENDS AND DEVELOPMENTS IN CLASS CERTIFICATION AND RELATED TOPICS 2005–2011, at S-51 (2011) (emphasis added).

appropriate, an action may be brought or maintained as a class action with respect to particular issues."[7]

The proper scope of issue certification under Rule 23(c)(4) has divided the appellate courts, and has not yet been addressed directly by the Supreme Court. The Court has, however, adopted an interpretive methodology for construing Rule 23, which requires examining the text and structure of the Rule itself in light of the Rules Enabling Act, the Constitution, and historical practice.[8] The part of the *Dukes* opinion construing Rule 23(b)(2) was a straightforward, and unanimous, application of this methodology.

This Article uses the Supreme Court's interpretive methodology to reappraise the extant judicial approaches to Rule 23(c)(4), as well as Professor Coffee's proposal for a more expansive use of issue certification. It concludes that issue certification is properly limited to bifurcating liability from remedies, and does not allow the certification (or exclusion) of discrete claim elements and defenses as advocated by Professor Coffee and permitted by some courts.

II. Discussion

The class action is an exceptional form of litigation because, among other things, the final judgment in such an action implicates the rights of absent persons. Overly capacious standards for class action certifications endanger absent parties' procedural and substantive rights.

In *Taylor v. Sturgell*, a unanimous Court reiterated the foundational judicial principle that absent persons may not be bound by judgments unless one of a limited number of historically recognized exceptions is satisfied.[9] One such exception is for a "properly conducted" class action, which requires the following: (1) "the interests of the nonparty and her representative are aligned"; (2) "either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty"; and (3) there was

7. Fed. R. Civ. P. 23(c)(4).

8. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 817–18 (1999).

9. *See* Taylor v. Sturgell, 553 U.S. 880, 884 (2008). This opinion enumerated six circumstances in which nonparties may be bound by judgments: (1) they "agree[ ] to be bound," *id.* at 893 (quoting 1 Restatement (Second) of Judgments § 40 (1980)); (2) they have "substantive legal relationship[s]" to a party, *id.* at 894 (quoting David L. Shapiro, Civil Procedure: Preclusion in Civil Actions 78 (2001)); (3) they are "adequately represented" in "properly conducted class actions," *id.* (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)); (4) they "'assume[ ] control' over the litigation," *id.* at 895 (quoting Montana v. United States, 440 U.S. 147, 154 (1979)); (5) they litigate through a "proxy," *id.*; or (6) they are precluded by "a special statutory scheme" (e.g. bankruptcy), *id.* The *Taylor* Court declined to add a seventh category for so-called "virtual representation," suggesting that this enumeration is now exclusive.

"notice of the original suit to the persons alleged to have been represented."[10] In the class action context, the *Taylor* Court continued, "these limitations are implemented by the procedural safeguards in Federal Rule of Civil Procedure 23."[11] These protections are constitutionally mandated and "grounded in due process."[12]

Rule 23 thus provides a constitutional safe harbor for litigants pursuing a class action. Litigants must, however, comply precisely with the strictures of Rules 23(a) and (b) to remain in that safe harbor. Consistent with the text of the Rule, the Court has repeatedly held that "the party seeking certification must demonstrate, first, that [Rule 23(a)'s requirements are met]," and "[s]econd, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)."[13] As the advisory committee's note to Rule 23(c)(1), which pertains to certification orders, confirms, "[t]he [certification] determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b)."[14]

Rule 23 is, after all, a *rule*. The Supreme Court can amend Rule 23 prospectively, but the federal courts otherwise have no license to depart from its requirements. Some parts of Rule 23 are discretionary and some are mandatory—but it is not a mere suggestion or guideline. As the *Taylor* Court emphasized, there are no "common-law" class actions.[15] Instead, nonparty preclusion requires "crisp rules with sharp corners."[16]

In *Ortiz v. Fibreboard Corp.*, the Supreme Court articulated an analytical methodology for resolving questions concerning the application of Rule 23.[17] The Court in *Ortiz* held that courts must be careful to

---

10. *Id.* at 894, 900.

11. *Id.* at 900–01.

12. *Id.* at 901.

13. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548 (2011); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("In addition to satisfying Rule 23(a)'s *prerequisites*, parties seeking class certification *must* show that the action is maintainable under Rule 23(b)(1), (2), or (3)." (emphasis added)).

14. FED. R. CIV. P. 23(c)(1) advisory committee's note (1966) (emphasis added); *see also* Wachtel *ex rel.* Jesse v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 186 (3d Cir. 2006) (noting the "overlap between compliance with Rule 23(c)(1)(B) and compliance with Rule 23(c)(4)(A)," which "shed[s] light on a district court's numerosity, commonality, typicality, and predominance analysis under Rule 23(a) and (b)").

15. *See Taylor*, 553 U.S. at 901.

16. *Id.* (internal quotation marks omitted).

17. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999). *Ortiz* was one of two cases involving asbestos settlement classes, the other being *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1999). Both cases concerned mandatory class action settlements designed to limit liability, and in both cases the Court rejected the proposed classes because a judgment would limit the claims of future and absent plaintiffs. The Court in both cases emphasized the limits Rule 23 places on what types of class actions may be certified. As Justice Ginsburg wrote in *Amchem*, "of overrid-

avoid certifying classes that would violate the rights of litigants, including the representative plaintiffs, absent class members, and defendants. The Court ruled that these rights could best be protected by applying Rule 23 in accordance with the foundational principles of the Constitution, the Rules Enabling Act, and historical practice.

First, the Court held that the Constitution limits certain classes from being certified. For example, class actions are subject to the Seventh Amendment's jury-trial guarantees,[18] and thus any class that would deny the jury rights of a party cannot be certified. Moreover, the Court held that Rule 23 operates against the backdrop of the Due Process Clause rule that all litigants must have their "day in court."[19]

Second, the Rules Enabling Act simultaneously authorizes the Supreme Court to adopt rules of procedure, and mandates that those rules may not "abridge, enlarge, or modify any substantive right."[20] The Supreme Court has long recognized that "Rule 23's requirements must be interpreted in keeping with" and "with fidelity to" the Rules Enabling Act.[21] This has two consequences for all federal courts. First, the Rules Enabling Act precludes judicial tinkering with Rule 23 outside the special process for adopting and amending all procedural rules.[22] Second, the Rules Enabling Act prevents certification of classes that would deny any particular individual's substantive right.[23] In the class action context, a common dispositive question is whether the litigants are accorded the same procedural rights that they would possess in an individual suit.

---

ing importance, courts must be mindful that the Rule as now composed sets requirements they are bound to enforce." *Amchem*, 521 U.S. at 620. Similarly, Justice Souter stated in *Ortiz* that any tension between class certification and other substantive rights "is best kept within tolerable limits" by keeping interpretations of Rule 23 "close to the practice preceding its adoption." *Ortiz*, 527 U.S. at 845.

18. *Ortiz*, 527 U.S. at 845–46 ("[T]he certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members.").

19. Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (referencing the "deep-rooted historic tradition that everyone should have his own day in court" (internal quotation marks omitted)); *see also Ortiz*, 527 U.S. at 846 ("[M]andatory class actions aggregating damages claims implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940))).

20. 28 U.S.C. § 2072(b) (2006).

21. *Amchem*, 521 U.S. at 613, 629.

22. *See Ortiz*, 527 U.S. at 845; *see id.* at 861 ("[W]e are bound to follow Rule 23 as we understood it upon its adoption, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.").

23. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

Third, the Court has found that historical practice imposes substantive constraints on what sort of classes may be certified. This has included examining the advisory committee's notes for the Federal Rules of Civil Procedure, and looking to equitable and legal practices from before the fusion of law and equity. For instance, the Court in *Ortiz* held that the advisory committee's notes counseled against expanding "limited funds" beyond their historical basis in equitable trusts. As the Court stated, "[t]he prudent course . . . is to presume" that Rule 23's limited fund classes were designed to "stay close to the historical model."[24]

Although *Ortiz* has been on the books for more than a decade, few lower courts have applied its interpretative methodology to disputes over the applicability of Rule 23. That should change.

In the unanimous part of *Dukes*, the Court held that individualized claims for monetary relief could not be certified under Rule 23(b)(2).[25] In so doing, the *Dukes* Court applied the methodology from *Ortiz*, reasoning that allowing such claims to proceed collectively would be inconsistent with the Constitution, the Rules Enabling Act, and historical practice.

First, according to the *Dukes* Court, the Due Process Clause is violated when class actions predominantly for money damages lack notice and opt-out procedures.[26] Even when the monetary claims do not predominate, there is still a "serious possibility" that lack of notice and opt-out violates due process, and thus "provides an additional reason not to read Rule 23(b)(2) to include monetary claims here."[27]

Second, the Court held that the Rules Enabling Act mandated allowing defendants to raise their affirmative defenses. The plaintiffs suggested the use of statistical sampling to determine what percentage of the class's claims was valid. The Court rejected this approach, which it labeled "Trial by Formula." In an ordinary proceeding, including one involving "pattern or practice" allegations, a plaintiff would first establish a pattern or practice of discrimination and the defendant could then prove affirmative defenses.[28] As the Court ex-

24. *Ortiz*, 527 U.S. at 842; *see also id.* at 843–44 (finding that the advisory committee's notes "did not contemplate" limited fund classes for tort cases).

25. *See Dukes*, 131 S. Ct. at 2557; *see also* FED. R. CIV. P. 23(b)(2) ("A class action may be maintained if Rule 23(a) is satisfied and 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 . . . ." (emphasis added)).

26. *Dukes*, 131 S. Ct. at 2559 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)).

27. *Id.*

28. *Id.* at 2561.

plained, "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[29]

Third, the *Dukes* Court noted that historical practice prior to the adoption of the Rule, as explicated in the advisory committee's notes, did not accord with allowing monetary claims in a Rule 23(b)(2) action. According to the Court, the committee adopted the Rule to remedy racial desegregation claims, which (if liability were established) could be enforced by a single classwide order. However, as the Court stated, "[i]n none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction."[30]

The Rule 23(b)(2) holding of *Dukes* was thus an example of the Court's application of the established *Ortiz* methodology to ascertain the boundaries of Rule 23. The Court adhered to its consistent approach of conforming to the Constitution, the Rules Enabling Act, and historical practice when interpreting procedural rules. Some critics of *Dukes* do not like the constraints that this interpretation places on class certification. But this is a necessary consequence of Rule 23, which imposes constitutionally based limitations on the ability of federal courts to adjudicate collective claims.

As the thought leader of the *Dukes* critics, Professor Coffee has proposed "partial certification" as one "path out of the wilderness" that avoids the "roadblock" of *Dukes*.[31] Indeed, according to Professor Coffee, "the best hope for survival of the class action in money damages cases may lie in the expansion of issue certification under Rule 23(c)(4)."[32] Coffee further posits that "one way courts could protect the viability of the class action [is] by . . . employing partial certification."[33]

Partial certification, in Professor Coffee's view, is a process whereby "the defendant's liability could be established at the class trial."[34] Then, "individual issues, such as reliance, proximate causation, or damages could be established in separate proceedings."[35] Courts

29. *Id.* (citation omitted).

30. *Id.* at 255.

31. Coffee, Jr., *supra* note 5, at 158, 160.

32. *Id.* at 159.

33. *Id.* at 160–61.

34. *Id.* at 159.

35. *Id.*

could also "relegate the affirmative defenses raised by the defendant to individual actions."[36]

The sole virtue of Professor Coffee's proposal is that, unlike some of the other proposals put forward by critics of *Dukes*, it is grounded in the language of Rule 23: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."[37]

The Supreme Court has never directly addressed issue certification under Rule 23(c)(4), and the appellate courts have taken three principal approaches to issue certification—although none has gone so far as Professor Coffee suggests.

The Fifth Circuit has characterized Rule 23(c)(4) as a "housekeeping rule that allows courts to sever . . . common issues for a class trial."[38] It is not an independent basis for class certification, and "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)," because a "district court cannot manufacture predominance through the nimble use of subdivision (c)(4)."[39] Thus, only in a properly certified class that first meets the requirements of subdivisions (a) and (b) may (c)(4) be used to manage the action.[40]

The Seventh Circuit, on the other hand, interprets Rule 23(c)(4) to permit "divided certification," which allows courts to separately "certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3)."[41] This permits certification of less than an entire action, provided that such certification concerns a question central to the litigation (such as liability) and otherwise does not compromise a defendant's rights.[42]

The Second Circuit follows a middle ground, allowing issue certification when a number of questions would remain for individual adjudication unless the court finds that "issue certification would not reduce the range of issues in dispute and promote judicial economy."[43] This approach has led to inconsistent results within the Second Circuit. In one leading case, for example, the court refused to

36. *Id.*

37. FED. R. CIV. P. 23(c)(4).

38. Castano v. Am. Tobacco Co., 84 F.3d 734, 745–46 n.21 (5th Cir. 1996).

39. *Id.*

40. *See, e.g.*, Corley v. Orangefield Indep. Sch. Dist., 152 F. App'x 350, 355 (5th Cir. 2005).

41. Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 898 (7th Cir. 1999).

42. *See, e.g.*, *In re* Allstate Ins. Co., 400 F.3d 505, 508 (7th Cir. 2005); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004); Merjdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911–12 (7th Cir. 2003); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

43. McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008) (internal quotation marks omitted).

allow issue certification because "the issue of defendants' scheme to defraud[ ] would not materially advance the litigation because it would not dispose of larger issues, such as reliance, injury, and damages."[44] On the other hand, in another leading case, the court ruled that an issue may be certified regardless of whether the claim as a whole satisfies the predominance test.[45]

However, none of these approaches is wholly satisfactory. No court of appeals has performed the *Ortiz* analysis, which requires interpreting the text of the Rule, and then checking that construction against the Constitution, the Rules Enabling Act, and historical practice. Conducting that inquiry—to which the Supreme Court *unanimously* subscribed in *Dukes*—points up the shortcomings in the extant cases as well as the fatal flaws in Professor Coffee's proposal that courts apply Rule 23(c)(4) expansively.

The text of Rule 23(c)(4), to reiterate, provides: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."[46] Several terms within the text of this provision require construction. The Rule states that its provisions apply "[w]hen *appropriate*." This language refers to judicial discretion. The Rule further provides that "an *action* may be brought or maintained," which refers to a civil action in federal court.[47] The Rule goes on, "as a *class action*." Rule 23 has already defined class actions; they are those actions that meet the four prerequisites of Rule 23(a), and also fall into one of the three categories of Rule 23(b).[48] Finally, the Rule concludes, "with respect to *particular issues*." The term "issues" has been the focal point of the divergent approaches in interpreting Rule 23(c)(4).

The key question is therefore presented: Does the term "issues" in Rule 23(c)(4) encompass claim elements (such as causation or reliance) and defenses (such as knowledge or consent)? If it does not, then Professor Coffee's proposal fails.

The advisory committee's notes elaborate somewhat on the concept of issue certification: "For example, in a fraud or similar case the action may retain its 'class' character only through the adjudication of *liability* to the class; the members of the class may thereafter be re-

44. *Id.*

45. *In re* Nassau Cnty. Strip Searches, 461 F.3d 219, 221 (2d Cir. 2006).

46. FED. R. CIV. P. 23(c)(4).

47. *See* FED. R. CIV. P. 1 ("These rules govern the procedure in all *civil* actions and proceedings in the *United States* district courts." (emphasis added)).

48. *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1999) ("[T]he 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b).").

quired to come in individually and prove the *amounts* of their respective claims."[49] Thus, we know that "liability" and "remedies" may be "issues," but what about claim elements or defenses? In 1996, the advisory committee considered—and rejected—an amendment to Rule 23(c)(4) that would have referenced "claims" and "defenses" in addition to "issues."[50] Professor Coffee's proposal would have courts read the rule as if it had been amended; but it was not.

The language and structure of Rule 23 confirm that claims and defenses are not "issues." Several times the Rule distinguishes between various concepts, referring to "claims, issues, or defenses."[51] This means that these terms may not be used interchangeably, and that it is significant because Rule 23(c)(a) only employs one of them.[52] That provision's reference only to "issues"—and not "claims" or "defenses"—should therefore be given effect.

The Supreme Court has repeatedly held that sections (a) and (b) of Rule 23 are mandatory, while the rest of the Rule contains details for resolving cases that involve compliant classes. *Dukes* explained that "the party seeking certification must demonstrate, first, that [Rule 23(a)'s requirements are met]," and "[s]econd, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)."[53] *Amchem*, which dealt with a question similar to certification under (c)(4)—namely, whether Rule 23(e) (dealing with class settlement) allows certification of a class that does not comport with one of the 23(b) subdivisions—observed that settlement under Rule 23(e) "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one

49. FED. R. CIV. P. 23(c)(4) advisory committee's note (emphasis added); *see* Minutes of the Civil Rules Advisory Committee Meeting, Oct. 31–Nov. 2, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935–1988, No. C1-7104-53 ("[I]n fund cases, for example, the action is a class action only in part, for after *the general determination of liability* the claimants must come forward individually and prove their respective claims." (emphasis added)).

50. *See* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 761 (2003).

51. *See, e.g.*, FED. R. CIV. P. 23(c)(1)(B) ("An order that certifies a class action must define the class and the class *claims, issues, or defenses* . . . ." (emphasis added)); FED. R. CIV. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3) . . . [t]he notice must [state] . . . the class *claims, issues, or defenses* . . . ." (emphasis added)); FED. R. CIV. P. 23(e) ("The *claims, issues, or defenses* of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." (emphasis added)).

52. *Cf.* Duncan v. Walker, 533 U.S. 167, 173 (2001) ("It is well settled that [w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (internal quotation marks omitted)).

53. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2549 (2011); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 832–33 (1999).

qualified for certification under Rule 23(a) and (b)."[54] But if a class could be certified based only on commonality, then the "vital prescription" of predominance—which "assure[s] the class cohesion that legitimizes representative action in the first place"—"would be stripped of any meaning."[55]

Moreover, the headings of the sections within Rule 23 suggest that (a) and (b) are always mandatory, while the rest of the Rule is supplementary. Subdivision (a) is titled "Prerequisites to a Class Action" and (b) is titled "Class Actions Maintainable." Subdivision (c), on the other hand, goes by a catchall title: "Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses," suggesting a wealth of comparably less important management devices to be used—but only after Rule 23(a) and (b) are satisfied.[56]

The principles outlined in *Ortiz* reveal more fundamental problems with issue certification as envisioned by Professor Coffee. These difficulties are crystallized by examining the Constitution, the Rules Enabling Act, and historical practice.

First, the Reexamination Clause[57] forbids two separate jury trials for the same claims and facts. As the Court has stated in interpreting this Clause, two jury trials may not be used for the same case "unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."[58] Claim elements and defenses, however, are not "distinct and separable" from liability. Accordingly, Professor Coffee himself has admitted that the Seventh Amendment may prevent partial certification.[59] Therefore, "partial certification" raises significant constitu-

54. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997).

55. *Id.* at 623; *see also* Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 448 (4th Cir. 2003) (Niemeyer, J., concurring in part and dissenting in part) ("The majority, adopting an expansive interpretation of Rule 23(c)(4), has enlarged the reach of Rule 23 in a manner not contemplated by the Rule's drafters and not consistent with the Supreme Court's approach calling for an 'undiluted' application of Rule 23(b)(3)'s requirements in every case." (quoting *Amchem*, 521 U.S. at 620)).

56. *See* Hines, *supra* note 50, at 718–19 ("Its placement in subdivision (c) . . . reflects a managerial rather than a primary role for (c)(4)(A). While subdivision (b) defines types of 'Class Actions Maintainable,' the provisions in subdivision (c) reflect the laundry list of steps a court may take after properly certifying a subdivision (b) class action." (citation omitted)).

57. U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

58. Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931).

59. Coffee, Jr., *supra* note 5, at 161 (noting that "[p]artial certification (which could sometimes result in two separate jury trials on legally distinct issues)" may only be legally permissible if a plaintiff seeks equitable relief, which would allow "the plaintiff [to] escape the shadow of the Seventh Amendment").

tional concerns, and the rule of constitutional avoidance counsels against an expansive use of Rule 23(c)(4).[60]

Second, as noted above, the Rules Enabling Act forbids the Federal Rules of Civil Procedure from abridging or modifying any substantive right.[61] In standard (nonclass) litigation, courts frequently bifurcate liability from damages. But claim elements or defenses are not stripped from a trial between two adversaries. It is hard to imagine, for example, a nonclass fraud case in which the plaintiff could establish "liability" without proving either causation or reliance, and without the defendant being permitted to present any affirmative defenses. Yet that is Professor Coffee's proposal in a nutshell. In the class context, litigants retain their rights and obligations to prove up and defend against the charges. As the Court in *Dukes* stated, a class cannot "be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims."[62] Lower courts, too, have emphasized that a class action cannot be certified if doing so requires relieving the plaintiffs of their burden of proving a claim element.[63] The sort of issue certification proposed by Professor Coffee, in short, is forbidden by the Rules Enabling Act.

Third, historical practice counsels against innovative certification models. Professor Coffee's suggestion of partially certifying certain claim elements in one trial and allowing the other elements and defenses to proceed in separate trials expands beyond the class actions recognized by the framers of the Rules of Civil Procedure. As the *Dukes* Court confirmed when it "disapprove[d] th[e] novel project" of using statistical sampling to determine the validity of classwide claims,[64] class actions are a particularly inappropriate forum for judicial innovation because the rights of absent persons are at stake. Litigating to a final and preclusive judgment pieces of a case that are more discrete than "liability" (including all claim elements and defenses) is a practice unknown to the Anglo-American legal tradition, and thus ought to be avoided in the context of class actions.

---

60. *Cf.* Ortiz v. Fibreboard Corp., 527 U.S. 815, 832–33 (1999).

61. 28 U.S.C. § 2072(b) (2006).

62. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011); *cf.* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (holding that the Due Process Clause must accommodate defendants' constitutional right "to present every available defense").

63. Hohider v. UPS, Inc., 574 F.3d 169, 196 (3d Cir. 2009) ("Because the statutorily required inquiry into qualification is incompatible with the requirements of Rule 23 in this case, and because plaintiffs cannot adjudicate their claims and requested relief without it, the class cannot be certified."); *see also* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 232 (2d Cir. 2008) ("When fluid recovery is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost . . . .").

64. *Dukes*, 131 S. Ct. at 2561.

All three aspects of the *Ortiz* methodology thus counsel against the use of partial certification as envisioned by Professor Coffee. And that should not be a surprise considering that Professor Coffee's proposal is highly implausible, if not impossible, on its face. How can "liability" be established without requiring plaintiffs to prove reliance, causation, or other elements of their claim? How can "liability" be established without allowing defendants to prove their affirmative defenses? Our system of civil justice knows of no such proceedings. To allow such novel and unprecedented litigation strategies solely to permit cases to go forward as class actions would be to sanction precisely the kind of innovation that the Supreme Court disapproved in *Dukes* and its other precedents interpreting Rule 23.

III. Conclusion

The path out of the wilderness lies not in ignoring Rule 23, but in applying it as written. With respect to Rule 23(c)(4), that means that only the "particular issues" indicated by the text and structure—that is, "liability" and "remedies"—may be certified separately, and then only in a case that otherwise meets the requirements of Rule 23(a) and (b). Rule 23(c)(4) does not authorize certification or exclusion of more discrete claim elements or defenses.