"Much to Gain and Nothing to Lose"
Implications of the History of the Declaratory
Judgment for the (b)(2) Class Action*

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Whether a class action should be certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure remains a troubling problem for both courts and commentators, especially if such a class asks to be certified, in whole or part, for declaratory relief.¹ Courts seeking guidance will find little from the federal rulemakers, and even less from the Supreme Court, which has noted its concerns about mandatory class actions but has offered little in the way of doctrine.² A phalanx of academics has joined the Court in expressing significant reservations about the due process rights of absent members of mandatory classes because they typically are denied notice and the right to opt out of the litigation.³ Despite these fears, Rule 23 does provide for certification of classes for final injunctive or

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². See Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121-22 (1994); see also Molski v. Gleich, 318 F.3d 937, 948 (9th Cir. 2003) ("[W]e recognize the Court's growing concerns regarding the certification of mandatory classes when money damages are involved."); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 n.3 (5th Cir. 1998) (recognizing that Ticor Title "casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2)").

“corresponding declaratory relief” in many instances, in some cases including prayers for money damages.4

This article suggests that courts seeking guidance in these (b)(2) certification disputes should consider turning to a literature often ignored: the history of the declaratory judgment itself. The history of declaratory relief, especially the writings of its most prominent advocate, Professor Edwin Borchard, reveals principles that could be profitably applied to class certification issues today. The history of the declaratory judgment demonstrates that those who advocated it thought they were providing courts with more flexibility to settle disputes outside the traditional remedial structure. In brief, broader recognition of this philosophy would allow courts dealing with class certification issues to feel more free to certify entire classes, or some class questions, under Rule 23(b)(2).

Although most courts deciding whether to certify a (b)(2) class action for declaratory relief cite the text of Rule 23 and its accompanying advisory committee’s note, few courts examine the history of the Declaratory Judgments Act5 or Federal Rule of Civil Procedure 576 for guidance. Commentators who reference this history generally assume that a declaratory judgment is only appropriate for claims seeking preventive relief—when parties seek guidance from the court on how to act before an alleged wrong has been committed—as opposed to cases determining liability for past wrongs.7 This perception is based on a misreading of the history of declaratory relief in American civil procedure. Writings of the framers of American declaratory judgment statutes demonstrate that declaratory relief is appropriate for numerous purposes other than to obtain relief before a wrong is committed.

Of course, it is understandable that the history of the declaratory judgment in America has been somewhat ignored in the Rule 23 context. After all, Rule 23 does not incorporate the entirety of the Declaratory Judgments Act or Rule 57, and the

4. FED. R. CIV. P. 23 advisory committee’s note.
6. FED. R. CIV. P. 57.
7. See Mullenix, supra note 1, at 221 (claiming, without citation, that “[n]either declaratory judgments nor injunctions were intended to provide judicial determinations on ultimate liability issues”).
contours of Rule 23 are defined by its own extensive history and jurisprudence. Moreover, the term "corresponding declaratory relief," as mandated by the text of Rule 23, may, and I will argue, does place limitations on the sorts of declaratory relief available in the class action context.

Even with these caveats in mind, the history of the American declaratory judgment provides insight into current problems surrounding requests for certification of classes for declaratory relief under Rule 23(b)(2). Those who agitated most strongly for the adoption of state and federal declaratory judgment statutes in the first third of the twentieth century did so in an attempt to provide courts with a new procedural tool to settle disputes where they might not otherwise have been able to act, and to allow courts the opportunity to apply a milder remedy when the parties requested it, or when it would help resolve the controversy. As Professor Borchard, the remedy’s foremost proponent, noted in the preface to his comprehensive treatise on declaratory relief: “A better realization of [courts’] social function in the community should enable and inspire them to aid in the avoidance of purposeless technicalities which so frequently enmesh the quest for substantive justice in the bogs of procedure.” When dealing with declaratory relief in the class action context, I will argue that this quotation from Borchard should be a court’s lodestar.

In particular, I will apply Borchard’s analysis to several (b)(2) certification dilemmas, demonstrating how a more flexible use of declaratory relief, coupled with a strong concern for due process rights of absentees, might produce consistent and sensible results. And, in some instances, when a lack of class certification may render a statute ineffective and unenforceable, I will argue that broader use of certification for declaratory relief would provide a solution.

I will begin in Part I by sketching out the early history of the broad adoption of declaratory relief in the United States, culminating in the passage of the federal Declaratory Judgments

8. FED. R. CIV. P. 23(b)(2).
10. EDWIN BORCHARD, DECLARATORY JUDGMENTS viii (2d ed. 1941) [hereinafter BORCHARD, DECLARATORY JUDGMENTS].
Act in 1934. In this section, I will focus on the case for using the declaratory judgment for "preventive relief," both because this was central to the argument for the Act's passage, but also because it was the most controversial element of declaratory relief. After examining that history, I will turn in Part II to the less-often discussed purposes of the declaratory judgment, namely to provide a milder remedy to litigants and to be strategically combined with other forms of relief to help resolve controversies. These lesser-known aspects of the case for declaratory relief provide insight into the (b)(2) class action problem.

In Part III, I will examine the class action problem in earnest, focusing on the unique interests involved in the question of whether to certify a class action under (b)(2) and the interesting history behind the Rule's peculiar language "corresponding declaratory relief." Parts IV and V will apply the writings of those who advocated most strongly for declaratory relief to several class action problems. Part IV, specifically, will assess: (1) classes seeking to be certified for only declaratory relief, but which could have sought money damages, and (2) classes seeking (b)(2) certification for both declaratory relief and money damages. Part V will deal with the related but distinct problem of classes seeking certification for declaratory relief and money damages under (b)(2) when injunctive relief is unavailable, thus testing the limits of the language "corresponding declaratory relief" in Rule 23. In this last category, I will focus on litigation under the federal Fair Debt Collection Practices Act ("FDCPA"), a statute which could be enforced more effectively if more classes were certified following a Borchardian approach.

Any court dealing with a mandatory class certification question must keep the due process interests of absent plaintiffs at the forefront of its thoughts. Nevertheless, I suggest that the history of declaratory relief counsels a more flexible use of (b)(2) certification, either for entire classes or particular issues in class litigation. While any application of decades-old writings to a modern procedural context is somewhat imprecise, the

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original principles of declaratory relief could provide courts with much needed guidance in this very difficult area.

I. THE HISTORY OF THE DECLARATORY JUDGMENT IN THE UNITED STATES

Although the concept of declaratory relief dates back to Roman law, it has existed in its current sweeping form in American civil procedure only for the last eighty or so years, mostly thanks to the agitation of Professors Edwin Borchard and Edson Sunderland. The influence of Borchard and Sunderland’s writings and advocacy ensured passage of the federal Declaratory Judgments Act in 1934. However, they are rarely cited in opinions dealing with certification of class actions for injunctive or declaratory relief under Federal Rule of Civil Procedure 23(b)(2).

Before applying the history of the declaratory judgment to the problem of class actions, it is necessary to review that history to see what the framers of the Act and Rule intended. Borchard, Sunderland, and their colleagues could not have predicted the labyrinthine intricacy of current complex litigation, but the general principles they espoused do provide relevant insight. Their explanations are important not because they speak directly to the class action problem (although Professor Borchard’s treatise does include a small section on class declaratory relief, which I will discuss below), but because their reasons for demanding a declaratory judgment statute remain salient in 23(b)(2) cases.

12. ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 381-82 (1952). Millar noted that American acceptance of the principle . . . did not get well under way until the third decade of the 1900s. But thanks especially to the writings of Professors Borchard and Sunderland, its subsequent progress has evidenced a reception of the institution, resembling in rapidity and much exceeding in extent, that which attended the code movement in the middle years of the last century.


15. See infra notes 170-75 and accompanying text.
A. Early Advocacy for the Declaratory Judgment

After fifteen years of advocacy by academics and the American Bar Association, the federal declaratory judgment statute finally culminated in the enactment of the law in 1934, almost simultaneously with the Rules Enabling Act. Professor Borchard, along with Professors Sunderland and Charles Clark, had been advancing the statute at both the federal and state levels and fighting for the legitimacy of declaratory relief as early as 1918. It is difficult to imagine now, after seventy years with the federal declaratory judgment statute on the books, that the concept of wide-ranging authorization for declaratory relief was so controversial. Regardless, ensuring widespread acceptance of the declaratory judgment was a lengthy and arduous affair.

Borchard and Sunderland believed that the judicial system was too rigid and fraught with procedural requirements that prevented courts from resolving legal disputes in advance of a wrong being committed and from applying a milder remedy when parties preferred it to damages or an injunction. These were the twin aims of the Declaratory Judgments Act: to allow courts to provide preventive relief before a potential wrong was committed, and to provide a milder alternative to coercive remedies. Most academic commentators and courts have focused on the first of these aims, which makes sense because


17. See, e.g., Edwin M. Borchard, The Declaratory Judgment—A Needed Procedural Reform, 28 YALE L.J. 1 (1918) [hereinafter Borchard, Needed Procedural Reform I]. This article focuses primarily on Borchard’s writings because he was by far the most prolific scholar on the subject. He published many law review articles and gave many speeches to bar associations in support of the statute throughout the 1920s, and he published the first edition of his famous treatise on the eve of the federal act’s passage in 1934.

18. Sunderland, supra note 9, at 163-64.


preventive relief was at the center of the contemporaneous controversy surrounding passage of the law at the federal level, because of the concern that such judgments would be "advisory opinions" in contravention of Article III's case or controversy requirement.\textsuperscript{22}

Borchard's first major article on declaratory relief was published in 1918,\textsuperscript{23} and Sunderland's followed soon thereafter in 1920.\textsuperscript{24} Borchard's article was so lengthy that it was published in two parts in consecutive issues of the \textit{Yale Law Journal}.\textsuperscript{25} The articles focused on the dual purposes of the declaratory judgment, but Borchard's work predominantly made the case for the declaratory judgment as for preventive relief, even stating the purpose of the remedy at the outset as "to afford security and relief against uncertainty and doubt."\textsuperscript{26} He continued: "As a measure of preventive justice, the declaratory judgment probably has its greatest efficacy. It is designed to enable parties to ascertain and establish their legal relations, so as to conduct themselves accordingly, and thus to avoid the necessity of future litigation."\textsuperscript{27} Borchard repeated this refrain throughout his career, as he saw the declaratory judgment as critical to "dissipate clouds" of uncertainty so parties might clarify their legal obligations before acting.\textsuperscript{28}

This desire to make available preventive relief before social damage was done is still considered the core of the declaratory

\textsuperscript{22} The Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure—or never. The Act permits parties so situated to forestall the accrual of potential damages by suing for a declaratory judgment, once the adverse positions have crystallized and the conflict of interests is real and immediate.

\textit{Id.} 22. \textit{S. Rep. No. 73-1005, at 5 (1934)} (noting that doubts about the constitutionality of declaratory relief in advance of a wrong were a primary obstacle to passage of the federal act); \textit{see also} 10B CHARLES ALAN WRIGHT ET AL., \textit{FEDERAL PRACTICE AND PROCEDURE} § 2753, at 461 (3d ed. 1998).

\textsuperscript{23} Borchard, \textit{Needed Procedural Reform I}, supra note 17.

\textsuperscript{24} Sunderland, \textit{supra} note 9.


\textsuperscript{26} Borchard, \textit{Needed Procedural Reform I}, supra note 17, at 4.

\textsuperscript{27} Borchard, \textit{Needed Procedural Reform II}, supra note 25, at 110.

\textsuperscript{28} Edwin M. Borchard, \textit{The Constitutionality of Declaratory Judgments}, 31 \textit{COLUM. L. REV.} 561, 592 (1931) [hereinafter Borchard, \textit{Constitutionality}].
judgment. It was also at the center of the argument of the declaratory judgment’s other major supporter, the American Bar Association,29 which focused almost exclusively on preventive relief in presenting its case.30 Those who championed the bill in the House and Senate echoed this refrain, including Representative Gilbert, who famously quipped: “Under the present law you take a step in the dark and then turn on the light to see if you stepped in a hole. Under the declaratory law, you turn on the light and then take the step.”31 While this historical ground has been tred before,32 and it is my intention to focus on the lesser-known aspects of the advocates’ writing, it is important to at least sketch the case for preventive relief because it was at the core of the controversy surrounding passage of declaratory judgment statutes at the state and federal levels. It also explains the lack of focus on other aspects of declaratory relief during the period of agitation for its broader adoption and, perhaps, the present day.

B. The Supreme Court’s Reluctance to Affirm Jurisdiction over Declaratory Judgments

At the state level, declaratory judgment statutes usually passed and survived court challenge with little difficulty, particularly after the drafting of the Uniform Declaratory Judgments Act in 1922.33 By 1932, thirty-two states and territories had passed statutes authorizing their courts to render declaratory judgments,34 and state courts typically approved the

29. Nathan MacChesney, representing the ABA in Congressional hearings on the Declaratory Judgments Act, noted that support for the statute was overwhelming within the organization. See Declaratory Judgments: Hearing on H.R. 5365 Before the H. Comm. on the Judiciary, 69th Cong. 7 (1926) (statement of Nathan W. MacChesney, representing the American Bar Association).

30. See Doernberg & Mushlin, supra note 16, at 551 n.16 (citing 44 A.B.A. REP. 284 (1919) (calling the declaratory judgment statute the “most important legislation of the year affecting the administration of justice”)); Frank K. Dunn, The Declaratory Judgment, 45 A.B.A. REP. 383, 386 (1920).

31. 69 CONG. REC. H2030 (1928) (remarks of Rep. Gilbert). He preceeded this with another oft-quoted gem, referencing the “old conundrum as to how to tell a mushroom from a frogstool. They say eat it and [if] it kills you it is a frogstool and if it does not it is a mushroom. That is largely the situation of the law now.” 69 CONG. REC. H2030.

32. See generally Doernberg & Mushlin, supra note 16.


34. Id. at 7.
remedy.\textsuperscript{35} Michigan became the exception when its supreme court ruled the state’s declaratory judgment statute unconstitutional because it supposedly authorized the issuance of so-called advisory opinions.\textsuperscript{36} Eventually, though, even Michigan reversed itself on the propriety of the declaratory judgment once the statute was rewritten to make clear that relief would only be available in cases of actual controversy.\textsuperscript{37}

The federal declaratory judgment statute passed the House three times without being enacted, at least in large part, because of judicial uncertainty about the remedy’s constitutionality.\textsuperscript{38} Despite the declaratory judgment’s success in the states, passage at the federal level was blocked by Supreme Court \textit{dicta}, which expressed concerns that the remedy would violate the Article III case or controversy requirement by allowing advisory opinions.\textsuperscript{39} The most important of these cases, and the one whose language Professors Doernberg and Mushlin characterize

\textsuperscript{35} Typical of state court opinions is that of Chief Justice Moschzisker in the Supreme Court of Pennsylvania. See Petition of Kariher, 131 A. 265, 269 (Pa. 1925). Moschzisker was one of the early adherents of the declaratory judgment and testified in support of it before Congress. See 78 CONG. REC. S10,565 (1934) (statement of Sen. King referring to past testimony of Chief Justice Moschzisker). Later, Borchard often cited Moschzisker’s opinion as exemplary. See, e.g., Borchard, \textit{Constitutionality}, supra note 28, at 572.

\textsuperscript{36} Anway v. Grand Rapids Ry., 179 N.W. 350, 361 (Mich. 1920). The case involved a suit by a railroad conductor against his employer for a declaration that a state law, which limited labor hours, was unconstitutional. \textit{Id.} at 351. The state never threatened to enforce the law, and the Michigan Supreme Court rejected the suit as an opinion that was purely advisory. \textit{Id.} at 351, 361; see Doemberg & Mushlin, supra note 16, at 555-58 (providing a fuller description of the case). Professor Borchard reacted strongly to the result in this case, claiming that the problem was not with declaratory relief, but that there was no real controversy between these parties. See generally Borchard, \textit{Constitutionality}, \textit{supra} note 28. In fact, he indicated that the Michigan Supreme Court was correct to refuse to award declaratory relief in this case but wrong to indict the remedy generally, demonstrating a fundamental “misconception as to the nature of the declaratory judgment.” \textit{Id.} at 561.

\textsuperscript{37} Washington-Detroit Theater Co. v. Moore, 229 N.W. 618, 621 (Mich. 1930).

\textsuperscript{38} Doemberg & Mushlin, \textit{supra} note 16, at 558-61.

\textsuperscript{39} See, e.g., Liberty Warehouse v. Burley Tobacco Growers’ Coop. Mktg. Ass’n, 276 U.S. 71, 89 (1928); see also Borchard, \textit{Constitutionality}, \textit{supra} note 28, at 562; Doemberg & Mushlin, \textit{supra} note 16, at 554 (“From 1919, when a federal declaratory judgment act was first seriously proposed, to 1934, when it finally was passed, the courts struggled with this jurisdictional problem. That fight had a significant impact on Congress’s deliberations.”).
as a "virtual judicial veto" on the federal declaratory judgment statute, was Willing v. Chicago Auditorium Association. Willing was a state court case brought under the Illinois declaratory judgment statute by a lessee for a declaration that the terms of the lease allowed him to tear down a building on the land. The defendant lessors removed the case to federal court, where it was dismissed by the district court for lack of subject matter jurisdiction. The Seventh Circuit reversed, characterizing the suit as one to quiet title and requiring the lower court to hear the evidence.

The Supreme Court reversed. Justice Brandeis, writing for the majority, held that the case fell outside the bounds of Article III because there was no real controversy between the parties, only a nascent disagreement about the meaning of the terms of the lease. He continued: "What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred on the federal judiciary."

The forcefulness of Justice Brandeis's language, along with the fact that no justice dissented, presented a significant roadblock to the passage of a federal declaratory judgment statute.

41. 277 U.S. 274 (1928).
42. Id. at 283, 285.
43. Id. at 283-84.
44. Id. at 284.
45. Id.
46. Willing, 277 U.S. at 288 ("Obviously, mere refusal by a landlord to agree with a tenant as to the meaning and effect of a lease, his mere failure to remove obstacles to the fulfillment of the tenant's desires, is not an actionable wrong, either at law or in equity.").
47. Id. at 289. Justice Brandeis continued, "The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action. No defendant has wronged the plaintiff or has threatened to do so." Id. at 289-90.
48. While no justice dissented from the decision, Justice Stone concurred separately. Id. at 290 (Stone, J., concurring). In unequivocal language, he wrote that the reason the Court could not decide the case was because Congress had not passed a declaratory judgment statute, not because such a statute would violate Article III. Id. at 290-91 (Stone, J., concurring). Justice Stone wrote:

But it is unnecessary, and I am therefore not prepared, to go further and say anything in support of the view that Congress may not constitutionally confer on the federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this Court is without constitutional power to review such judgments of state courts when they involve a federal question.
To try to alleviate these concerns, the proposed federal bill was amended to add the words "[i]n cases of actual controversy" in order to assure Congress and the Court that the statute would not exceed the limits of Article III.49 Furthermore, Borchard continued his fight in the academic literature and in Congress to convince legislators that the declaratory judgment was constitutional. To do this, Borchard took an interesting approach, claiming simultaneously that the declaratory judgment was really nothing novel, but also that it would be a crucial advance in the administration of justice.

According to Borchard, the declaratory judgment had been a part of jurisprudence, both in America and Europe, for centuries. Indeed, he presented declaratory relief as ancient, finding its roots in Roman law and spreading throughout the continent until it was codified throughout Western Europe in the nineteenth century.50 Not only had the declaratory judgment been a fixture of European legal systems for centuries, Borchard claimed that it had always been a part of the American legal system as well.51 Declaratory judgments had long been employed by American courts in actions to quiet title, to decide the validity of marriage status, and to provide a trustee with advice under a trust agreement.52 Borchard explained that these venerable legal institutions would "suffice to show that the formal adoption of the declaratory judgment in our practice, far from constituting a radical innovation in our legal institutions, would merely serve to extend the application of remedies already employed."53

Willing, 277 U.S. at 290-91 (Stone, J., concurring). Five years later, Justice Stone wrote the opinion in Nashville, Chattanooga & St. Louis Ry. v. Wallace, which affirmed the constitutionality of Supreme Court review of a state declaratory judgment. 288 U.S. 249, 258, 264 (1933).

51. Id. at 29-30 (noting that "it is proper to observe that many of our states have without formal recognition admitted [the declaratory judgment's] efficacy in various departments of the law").
52. Id. at 30-32.
53. Id. at 32. Chief Justice Moschzisker emphasized this point in his opinion upholding the constitutionality of the Pennsylvania declaratory judgment statute: "[W]e in this state have long resorted to the declaratory judgment in many fields, though not calling it by that name." Petition of Kariher, 131 A. at 268.
Borchard also emphasized that no other procedural changes would have to accompany the adoption of the declaratory judgment.\(^{54}\) The only difference would be in the final remedy:

the procedure is or should be identical with that prevailing in any other action, with the one exception of the prayer for relief, which seeks only a declaration or determination of the rights of the plaintiff or the parties, instead of coercive relief by way of damages, injunction, specific performance, or other mandate.\(^{55}\)

Legislators debating the bill parroted Borchard’s argument, recognizing that the addition of declaratory relief as a possible remedy would not fundamentally alter civil procedure.\(^{56}\)

At the same time Borchard was contending that the declaratory judgment was nothing new, he, along with Professor Sunderland, also argued that it was a critical procedural advance necessary to the effective functioning of the judicial system. Along with continuing to press the twin aims of declaratory relief—preventive relief and availability of a milder remedy—Borchard began to forcefully criticize the Supreme Court’s holding in *Willing*, with his rhetoric growing stronger as the years went by.\(^{57}\) From Borchard’s perspective, *Willing* was just the sort of case for which a declaratory judgment would be appropriate—one in which the parties sought an authoritative determination of their rights in advance of action that would precipitate litigation and significant costs, to wit, tearing down the building in possible violation of the lease agreement.\(^{58}\)

54. Borchard, *Constitutionality*, supra note 28, at 606 (“No new procedure is involved; merely the extension of an old procedure into new facts.”).


56. 73 CONG. REC. S10,564 (1934) (statement of Sen. King that “[i]n principle, therefore, there is nothing novel about the procedure”).

57. Indeed, friend Nathan Boone Williams noted that Borchard “seems to have despaired of congressional action” by 1934. See Nathan Boone Williams, *Declaratory Judgments, in Current Legal Literature*, 20 A.B.A. J. 774, 775 (1934). Borchard’s language is very forceful when discussing the *Willing* case, prefacing his 1931 article in the *Columbia Law Review* by saying “no less an authority than the United States Supreme Court, although never having had occasion to apply or construe a declaratory judgment act, has undertaken in several *dicta* to express the opinion that the declaratory judgment is unconstitutional, . . . .” Borchard, *Constitutionality*, supra note 28, at 562.

58. Borchard, *Constitutionality*, supra note 28, at 604 (describing *Willing* as “an indictment of a remedial system which necessitates such an awkward, baffling, and anti-
case served as a prime example of why traditional forms of relief were inadequate, and why preventive relief was an apt function of the judicial system.

C. The Supreme Court’s Change of Heart and the Passage of the Declaratory Judgments Act

Perhaps because of Borchard’s agitation, as well as a growing congressional interest in a declaratory judgment statute, the Supreme Court abruptly changed its mind in 1933. Writing for a unanimous Court in *Nashville, Chattanooga & St. Louis Railway v. Wallace*, Justice Stone affirmed that the federal courts could retain jurisdiction to review a state declaratory judgment regarding a federal question in compliance with Article III.59 In *Wallace*, a railroad brought an action under the Tennessee declaratory judgment statute for a declaration that a state excise tax for storage of gasoline was unconstitutional.60 The Tennessee Chancery Court as well as Supreme Court ruled for the State, and the railway appealed to the United States Supreme Court, which, before reaching the merits, had to decide whether review of the judgment violated Article III.61

Aided by an extensive brief supporting jurisdiction written by Borchard and Charles E. Clark,62 and citing several Borchard articles, including the *Columbia Law Review* piece which was so critical of the Willing opinion,63 a unanimous Court held that there was jurisdiction to review the declaration.64 Noting at the outset that “we are concerned, not with form, but with substance,” the Court stated that “we look not to the label which the legislature has attached to the procedure followed in the state courts . . . but to the nature of the proceeding which the statute authorizes.”65 The Court noted that the state was actually threatening to enforce the tax, thus creating an actual

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59. 288 U.S. at 264.
60. Id. at 258.
61. Id. at 258-59.
64. Id. at 265.
65. Id. at 259.
controversy "of the kind which this Court traditionally decides." In language that would be at home in one of Professor Borchard's articles, the Court stated:

The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below.

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The Court then reached the merits of the question and found for the state, but the decision removed the primary judicial hurdle to a federal declaratory judgment statute.

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The same Congress that passed the Rules Enabling Act quickly passed the Declaratory Judgments Act in 1934.69 The American Bar Association responded effusively: "This measure is only second in importance to the Act conferring the rule-making power, and the wonder is that it has been so long delayed."70 Indeed, thanks in large part to the Supreme Court removing doubts about its constitutionality,71 President Franklin D. Roosevelt signed the Declaratory Judgments Act on June 14, 1934.72

The Supreme Court unanimously affirmed the constitutionality of the federal act in Aetna Life Insurance Co. v. Haworth in 1937.73 The plaintiff insurance company sought a declaration that Haworth's policies had lapsed as a result of non-payment of premiums, while Haworth claimed to be permanently disabled and therefore eligible to collect benefits under the policy.74 Aetna argued that an actual controversy

66. Id. at 262.
67. Id. at 264.
68. Wallace, 288 U.S. at 265-68.
70. Id. at 422-23.
71. S. REP. No. 73-1005, at 5 (1934).
72. See Williams, supra note 57, at 775. Williams was ebullient about the Act's passage, proclaiming that "[w]hatever comes to much of the other legislation by the last Congress, this measure will in time come to be known as the greatest advance in federal jurisprudence within the memory of living men." Id.
73. 300 U.S. 227, 244 (1937).
74. Id. at 237-38.
existed and that Haworth never would have sued Aetna to allow
the insurance company to prove that the policies had lapsed.\textsuperscript{75}
Noting that the jurisdiction created by the statute was limited to
cases within the purview of Article III, the Supreme Court held
that there was an actual controversy in the case "admitting of
specific relief through a decree of conclusive character, as
distinguished from a decision advising what the law would be
upon a hypothetical state of facts."\textsuperscript{76} The Court continued:

Where there is such a concrete case admitting of an
immediate and definitive determination of the legal rights
of the parties in an adversary proceeding upon the facts
alleged, the judicial function may be appropriately
exercised although the adjudication of the rights of the
litigants may not require the award of process or the
payment of damages. And as it is not essential to the
exercise of the judicial power that an injunction be sought,
allegations that irreparable injury is threatened are not
required.\textsuperscript{77}

\textit{Haworth} answered any lingering concerns about the
constitutionality of the federal act.\textsuperscript{78}

\textsuperscript{75.} \textit{Id.} at 239.
\textsuperscript{76.} \textit{Id.} at 241. The Supreme Court later stated:

The difference between an abstract question and a "controversy"
contemplated by the Declaratory Judgment Act is necessarily one of degree,
and it would be difficult, if it would be possible, to fashion a precise test for
determining in every case whether there is such a controversy. Basically, the
question in each case is whether the facts alleged, under all the
circumstances, show that there is a substantial controversy, between parties
having adverse legal interests, of sufficient immediacy and reality to warrant
the issuance of a declaratory judgment.

\textsuperscript{77.} \textit{Haworth}, 300 U.S. at 241 (citations omitted).
\textsuperscript{78.} Of course, there is a significant academic debate about the scope of federal
question jurisdiction under the Declaratory Judgments Act, centering on the holdings of
two noteworthy cases. \textit{See Franchise Tax Bd. v. Construction Laborers Vacation Trust},
article does not endeavor to enter the fray on these questions, but scholars have provided
excellent discussions of the problem in various contexts. \textit{See Doernberg & Mushlin, supra
note 16; Herman L. Trautman, Federal Right Jurisdiction and the Declaratory Remedy, 7
VAND. L. REV. 445 (1954); see also RICHARD H. FALLON, JR. ET AL., HART &
WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 890-905 (5th ed. 2003).}
II. NOT ONLY FOR PREVENTIVE RELIEF—OFT-IGNORED ADDITIONAL EARLY JUSTIFICATIONS FOR DECLARATORY RELIEF

Given that the tumultuous history of the passage of the Declaratory Judgments Act centered so much around whether courts could decide questions of preventive relief, it is understandable that courts and commentators have seized upon preventive relief as the sole purpose of declaratory relief. Indeed, many of Professor Borchard’s articles, and the advocacy of legislators as well as the American Bar Association, focus on this aspect of the declaratory judgment. It is somewhat odd that the controversy surrounding declaratory relief in class actions bears no resemblance to the concern which prevented the passage of the declaratory judgment statute for over a decade—in the 1920s the fear was that the declaratory judgment would allow courts to release advisory opinions in cases not involving actual controversies, while in the class action context there is no doubt that the cases involved are ones of actual controversy, the harm having almost always already occurred.

Consequently, Borchard and Sunderland’s writings on preventive relief do not shed tremendous light directly on declaratory relief in the class action context. Rather, the writings of these advocates that provide the most guidance for Rule 23(b)(2) class certification involve the use of the declaratory judgment in cases where other relief may be available, or prayed for, and how judges should decide whether to award declaratory relief. Those writings suggest that prayers for declaratory relief were meant to be used strategically by both plaintiffs and judges to resolve legal disputes when other forms of relief might be unavailable or less desirable. They also suggest that judges should make creative use of the declaration to simplify procedure and resolve legal questions efficiently. I argue that, while keeping due process concerns of absent class members in mind, these prescriptions can be very helpful for judges dealing with certification questions under Rule 23. I will

79. See Mullenix, supra note 1, at 221.
80. Given the Supreme Court dicta that declaratory relief fell outside the confines of Article III, it makes sense that Borchard, attempting to convince lawyers, legislators, and academics of the constitutionality of the declaratory judgment, would focus on why a complaint seeking preventive relief presented an “actual case or controversy.”
discuss these elements of Borchard and Sunderland's writings, returning to them later when evaluating how courts deal with 23(b)(2) certifications for declaratory relief.

Above all, the declaratory judgment was meant to make procedure more flexible on a broad scale. 81 This purpose went beyond just the desire to provide an avenue for preventive relief, although that purpose has remained at the core of declaratory judgment jurisprudence. 82 To be sure, the declaratory judgment was meant in large part to provide a form of relief when no other relief was available, primarily because a potential wrong had not yet occurred. 83 For the most part, these situations involved cases where no injunction could issue because the requirements of the irreparable injury rule were not met; as the potential wrong had not yet taken place, preserving the status quo would perpetuate uncertainty, not irreparable harm. 84

Indeed, one of Borchard's primary concerns in advocating the declaratory judgment was that some courts were ignoring the

81. Such a result would coincide with Professor Sunderland's general approach, as he abhorred the inefficiency of the archaic procedural system which would be extensively changed by the Federal Rules of Civil Procedure. See Stephen B. Burbank, Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?, 1 J. EMPIRICAL LEGAL STUD. 591, 597 (2004).

82. See generally 1OB WRIGHT ET AL., supra note 22, at § 2751, at 456 (noting that the declaratory judgment “enlarges the judicial process and makes it more pliant and malleable”).

83. In his discussion of the subject, Borchard stated:
It seems unfortunate that the courts should refuse their aid in settling controversies which involve adverse parties ... and which disturb important property interests, until actual damage is done. But when private interests are involved, this is all the more reason why the declaratory action designed to remove or dissipate clouds from the plaintiff's rights should be sustained, if properly before the court in an adversary proceeding.

See Borchard, Constitutionality, supra note 28, at 592; see also Edwin M. Borchard, Judicial Relief for Peril and Insecurity, 45 HARV. L. REV. 793, 796 (1932); Borchard, Needed Procedural Reform II, supra note 25, at 110; Sunderland, supra note 9, at 180.

84. See Edwin M. Borchard, Declaratory Judgments, 3 U. CIN. L. REV. 24, 33 (1929) [hereinafter Borchard, Declaratory Judgments—Cincinnati article.]

But most courts still insist that as a condition of an injunction, you must show irreparable imminent injury and inadequacy or [sic] the relief at law. If you fail in your demand for the injunction, you are out of court, and do not know your rights. You have to start all over again.

Id.; see also Borchard, Declaratory Judgment in the United States, supra note 55, at 136 (“Were declaratory judgments universally authorized, it would not be necessary to abuse the injunction—now so widely under attack—in order to render what is in effect and purpose a declaratory judgment.”).
irreparable injury rule and issuing injunctions out of a desire to settle disputes when a non-coercive declaration would serve much better. Instead of discarding the irreparable injury rule, he suggested that a declaratory judgment be available for a judge either in law or equity when an injunction would be inappropriate. As such, the judge in any court would have a new arrow in his quiver to solve a legal dispute whether or not the formal requirements of the writ system or the irreparable injury rule had been met. As Borchard aptly put it: “Litigants should not be turned out of the courts on the excuse that they have come in through the wrong door.”

Extending this theme of flexibility, Borchard repeatedly emphasized that plaintiffs should ask for declaratory relief even if other forms of relief might be available. That declaratory relief is still available, whether or not additional relief is or could be granted, is explicit in the text of both the Declaratory Judgments Act and Rule. This language is central to the less

85. Borchard, Declaratory Judgments, supra note 10, at 434-35. One cannot reference the irreparable injury rule without discussing Professor Laycock’s work on the rule, and his contention that the rule has “died.” See generally Douglas Laycock, The Death of the Irreparable Injury Rule (1991). While Laycock is very convincing on this subject, he also acknowledges that most courts still at least require argument on the doctrine of irreparable injury, and that it still plays a role in declaratory judgment proceedings. Id. He notes in his casebook on remedies:

We are left with a tradition that the uncertainty and actual controversy necessary to sustain a declaratory judgment may be a little bit less than the irreparable injury and propensity necessary to sustain an injunction. But no one can clearly articulate the difference, and it is hard to find or imagine examples where a declaratory judgment should be granted but an injunction would not do as well. But it is routine that a declaratory judgment should suffice and that the express coercive threat of an injunction appears unnecessary.

Douglas Laycock, Modern American Remedies 526 (3d ed. 2002). If Laycock is correct, and the irreparable injury rule truly has died, it has larger implications for the declaratory judgment rule. Should the trend of requiring fewer formal requirements for the issuance of an injunction continue, it is entirely conceivable that the difference between declaratory and injunctive relief may only be the effect of failing to obey it, which, in the latter case, would result in a finding of contempt.

86. Borchard, Federal Declaratory Judgments Act, supra note 40, at 38.

87. Id. at 39.

88. Edwin Borchard, Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments, 26 Minn. L. Rev. 677, 694 (1942) [hereinafter Borchard, Discretion].

89. 28 U.S.C. § 2201 (2000) (allowing a court to award declaratory relief “whether or not further relief is or could be sought”).

90. Fed. R. Civ. P. 57 (“The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.”).
prominent aim of declaratory relief, the availability of a milder remedy, and the intention that declaratory relief make procedure more flexible. It does, however, refute the notion that a declaratory judgment was never meant to establish a party’s liability.

As to the former, early advocates of the declaratory judgment, especially Sunderland, thought one of the primary benefits of declaratory relief was the ability to seek a milder remedy when damages or an injunction were technically available.91 Sunderland described the approach:

We have first the case where coercive relief might be had, but it is not desired. Here there is merely a new remedial right granted to the plaintiff. He has a cause of action of the conventional type, but he wants to use it for a new purpose. Instead of asking that the defendant be ordered to perform his contract, he only wants the court to assure him and inform the defendant that he has a right to performance. Instead of enjoining the defendant from taking certain action, he merely asks the court to advise him and the defendant whether the latter has the right to take it.92

According to Sunderland, there are two major advantages to asking for a declaration rather than coercive relief, even though it might be had. First, the pleading could present a clear legal question to which the court could respond “yes or no.”93 Second, and more importantly, is the “psychological” advantage of advancing the case as a “friendly suit.”94 According to Sunderland, “to sue is to fight, and fights make endless feuds,”95 while the declaratory action merely asks the court for advice rather than a use of force. The difference is important because it allows parties with a disagreement to seek final resolution of the matter in a court without destroying their ongoing business or familial relations. Sunderland’s language is aspirational, if a bit naïve (particularly in the class action context):

91. See Sunderland, supra note 9, at 171.
92. Id.
93. Id. at 171-72.
94. Id. at 172. Note, however, that the suit must be adversarial on some level. 10B Wright Et Al., supra note 22, at § 2757, at 473.
95. Sunderland, supra note 9, at 172.
To ask the court merely to say whether you have certain contract rights as against the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war; the former assumes that both parties wish to do right, the latter is based on an accusation of wrong. A request for a declaration of right plainly implies full confidence that the defendant will promptly and voluntarily do his duty as soon as the court points it out to him. It indicates a willingness to rely on the defendant's sense of honor, as a sufficient remedy. It makes the lawsuit a co-operative proceeding, in which the court merely assists the parties to settle their own differences by stating to them the rules of law which govern them.96

Indeed, in the meetings of the advisory committee during the drafting of Federal Rule 57, Sunderland personally moved for the addition of the sentence, "The existence of another adequate remedy shall not preclude the use of declaratory relief in cases where it is appropriate."97 The committee was even

96. Id. at 172-73. Borchard also echoed Sunderland on this point, if using language that was a bit less utopian. See Borchard, Declaratory Judgment in the United States, supra note 55, at 137-38 (observing that plaintiffs may choose to ask for declaratory judgments "partly because they enable the issues to be determined in a more peaceful atmosphere, partly because they are more expeditious, and partly because they save destruction of values, of contracts, of business relations").


There has been some trouble on that, some of the courts going at least sometimes on the theory that this is an extraordinary remedy and it must appear that there is no other remedy available. The Pennsylvania courts have been the worse offenders along that line. We have had one or two very foolish decisions in Michigan, and I think it might as well be eliminated by rule.

The common English practice is to make no such distinction as this, and I think three-quarters of the cases where they ask for declaratory relief are cases in which they ask for other relief at the same time, they ask for both.

Id. Very few minutes exist pertaining to Rule 57, but this makes sense because the Rule internally refers back to the Declaratory Judgments Act. FED. R. CIV. P. 57 (referring to 28 U.S.C. § 2201). Indeed, the advisory committee's note states that the federal statute and Uniform Declaratory Judgments Act should guide the scope of the Rule. FED. R. CIV. P. 57 advisory committee's note.
more explicit in the advisory committee's note to Rule 57, stating that "the fact that another remedy would be equally effective affords no ground for declining declaratory relief." Professor Borchard echoed this refrain, noting that declaratory relief should certainly be available to the plaintiff and judge even if coercive relief was also possible, both to ensure that the plaintiff retain his choice of remedy and to take advantage of the social benefits of declaratory versus coercive relief.

Borchard and Sunderland did not limit the scope of the declaratory judgment to cases in which a plaintiff preferred declaratory relief but could have obtained coercive relief. They deemed it a critical component of both the statute and the rule that parties could simultaneously ask for both declaratory and coercive relief, and that judges could award declaratory relief alongside, or instead of, coercive relief. After the initial passage of state declaratory judgment statutes in the 1920s, some judges refused to award declaratory relief if coercive relief was prayed for, or even available—an action Borchard described as the "most profound error" courts had made in the early application of the statutes. Borchard always anticipated that plaintiffs would ask for declaratory relief alongside legal and injunctive relief. Much like current practice in asking for class certification under both Rule 23(b)(2) and (b)(3) today, Borchard assumed that a plaintiff would strategically ask for both declaratory and legal relief because he had "much to gain and nothing to lose by asking [for] it." It was common practice in England to ask for both types of relief, in part

98. FED. R. CIV. P. 57 advisory committee's note.
99. Borchard, Federal Declaratory Judgments Act, supra note 40, at 39. Borchard noted that some physical "wrong" or breach may already have been committed, but the plaintiff, desiring not to sunder the economic or social relations involved, which a "fight to the finish" might entail, contents himself with a suit for judgment declaring his rights in the premises, enabling him thus to proceed to adjust his established legal relations accordingly.

Id.

100. See BORCHARD, DECLARATORY JUDGMENTS, supra note 10, at 316.
101. Id. at 295.
102. Borchard, Discretion, supra note 88, at 694. Borchard writes, "Twenty years of effort have gone into dissipating this erroneous presumption, which conflicts with the express wording of the statutes and with Federal Rule 57." Id. at 687.
103. See BORCHARD, DECLARATORY JUDGMENTS, supra note 10, at 340-41.
because a plaintiff might be denied relief by the formal requirements for an injunction or damages, and in part because a declaration might be combined with final relief to completely settle a dispute. This latter function of the declaratory judgment might helpfully be thought of as a gap-filling function. As Borchard and Clark explained in their Wallace brief:

As already observed, a usual and popular use of the procedure is in connection with a claim for other relief. A party seeking coercive relief will also add a prayer for a declaration of rights. Here too the motive is obvious and reasonable. A decision on the issue as to the coercive relief alone may not settle the entire case, either because such relief is not available for technical reasons in the particular case or because the granting of such relief does not involve all the issues in dispute. With the added prayer for a declaration in the complaint the court may adjudicate the matter at issue between the parties in such a way that neither it nor the parties themselves are forced to the time, trouble, and expense of further litigation.

Not only would the parties commonly be expected to ask for a combination of declaratory, legal, and equitable relief in a complaint, but the judge should be prepared to award it liberally when doing so would help settle the dispute between the parties, even if he must do so sua sponte. The advisory committee's note to Rule 57 affirms the judge's power to do this "when coercive relief only is sought but is deemed ungrantable or inappropriate," and if the declaration "serves a useful purpose." A court's ability to choose to apply declaratory

106. Borchard, Federal Declaratory Judgments Act, supra note 40, at 47. It was also clear to Borchard that a court could decline to award declaratory relief if the legal or equitable relief it chose to award would have settled the controversy between the parties. Borchard, Discretion, supra note 88, at 694-95 ("The truth is that the other remedy which might bar declaratory relief must be a better and more effective remedy, which would accomplish more complete relief or take in more parties or broader aspects of the case.").
108. See BORCHARD, DECLARATORY JUDGMENTS, supra note 10, at 429-30 (arguing "this valuable exercise of judicial power enabled an issue to be determined, whereas without it the action would have had to be dismissed on procedural grounds without an indication of the substantive rights of the parties").
109. FED. R. CIV. P. 57 advisory committee’s note.
relief, whether alone or in combination with another form of relief, underscores the overall purpose of the declaratory judgment, which is to allow courts and parties to settle disputes using a procedural device with no formal requirements.

However, just as a judge has broad discretion to award declaratory relief, he also retains broad discretion to decline to award it. Although neither the federal statute nor Rule 57 explicitly speaks to the discretion to dismiss an action for a declaratory judgment, the Uniform Declaratory Judgments Act states that the "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." According to Borchard, for the court to award declaratory relief, it must conclude that such relief will "terminate the uncertainty or controversy giving rise to the proceeding" and that it will serve a useful purpose in stabilizing legal relations. However, these guidelines do not mean that the declaration must bring the entire proceeding between the parties to an end. Rather, Borchard explains, "only the narrow point in issue need be decided, although the presumption is that this point will settle some autonomous and independent issue of inherent importance, even should it not dispose of the entire litigation." The exercise of discretion boils down to a single maxim: "the declaration is an instrument of practical relief and will not be issued where it does not serve a useful purpose."

The Supreme Court has generally confirmed Borchard’s conception of broad judicial discretion to award or refuse a declaratory judgment. In Public Service Commission of Utah v. Wycoff Co., Justice Jackson reaffirmed that the decision must be tied to the facts of the particular case. In Wycoff, the plaintiff asked for a declaration against the State of Utah affirming that carriage of film would qualify as interstate commerce and would therefore avoid any sort of interference by the state with the

110. See generally 10B WRIGHT ET AL., supra note 22, at § 2758, at 509-11.
112. See BORCHARD, DECLARATORY JUDGMENTS, supra note 10, at 296 (referring to language in the UNIF. DECLARATORY JUDGMENTS ACT § 6, 12A U.L.A. 302).
113. Id. at 298.
114. Id. at 307.
transportation of said film. The Court rejected the plea for declaratory relief on the grounds that there did not appear to be any evidence that the state planned to interfere with the plaintiff's activities. As Justice Jackson put it, "One naturally asks, 'So what?' To that ultimate question no answer is sought."

Justice Jackson also provided further guidance regarding a court's ability to decline declaratory relief:

when all of the axioms have been exhausted and all words of definition have been spent, the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially [sic] in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be "ripe for determination" as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.

The Court recently reaffirmed such broad district court discretion in Wilton v. Seven Falls Co., with Justice O'Connor writing:

We agree, for all practical purposes, with Professor Borchard, who observed half a century ago that "[t]here is . . . nothing automatic or obligatory about the assumption of 'jurisdiction' by a federal court" to hear a declaratory judgment action. By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district

116. Id. at 239.
117. Id. at 240-41.
118. Id. at 244.
119. Id. at 243-44.
court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants.\textsuperscript{120}

Above all, the discretion to award declaratory relief comes down to a practical judgment by the court as to whether doing so will aid in settling the controversy between the parties, which is really at the root of how Borchard and his colleagues thought the remedy should be used. I will argue for the remainder of this article that these mantras—practicality and flexibility—should also guide courts in their decisions on whether to certify classes, either in whole or in part, for declaratory relief. This approach is consistent with the aims of the original framers of the American declaratory judgment.

III. THE UNIQUE NATURE OF THE CLASS ACTION CERTIFIED UNDER FEDERAL RULE 23(b)(2)

The writings of those most responsible for the adoption of the declaratory judgment provide insight into modern-day class action litigation and the vexing problem of when to certify a class under Rule 23(b)(2). Several lessons from Borchard's writings that this article has discussed are pertinent to the discussion of declaratory relief in the class action context. First, and contrary to Professor Mullenix's statement in her recent article,\textsuperscript{121} declaratory relief was not meant only to be used in advance of a controversy. Borchard, to the contrary, thought it was natural for a plaintiff to ask for declaratory relief to determine issues of liability, either because the plaintiff preferred the milder remedy, or because he was asking for it in combination with coercive relief.\textsuperscript{122} Second, it is clear that Borchard intended judges to have broad discretion to award declaratory relief when it would be useful in settling all or part of the controversy between the parties, either by itself or in combination with any other relief he might deem appropriate.\textsuperscript{123} According to Borchard's vision, the judge also retains broad discretion to deny declaratory relief when it would not serve any useful purpose in the litigation.\textsuperscript{124} The overall picture is of a

\textsuperscript{120} 515 U.S. 277, 288 (1995) (citation omitted).
\textsuperscript{121} See Mullenix, supra note 1, at 221.
\textsuperscript{122} See supra notes 88-90, 99-107 and accompanying text.
\textsuperscript{123} See supra notes 108-09 and accompanying text.
\textsuperscript{124} See supra notes 110-14 and accompanying text.
remedy designed to avoid procedural technicalities and to be applied as necessary.

However, one must temper any enthusiasm for declaratory relief in class actions with the unique risks involved in representative litigation. Furthermore, it is clear that doctrinally the entirety of the Declaratory Judgments Act is not incorporated into the provisions of Rule 23. The term “corresponding declaratory relief” in the Rule suggests that only a subset of declaratory judgment actions that may be viable in one-on-one litigation may be maintainable in a class action certified under Rule 23(b)(2). While these limitations mean that any application of the early advocacy for declaratory relief must be modified for use in a class action, I will argue that they do not render the writings of Borchard, or others, irrelevant. Rather, the undercurrents provoking the adoption of the declaratory judgment may provide courts guidance in grappling with knotty Rule 23 problems.

A. Unique Due Process Concerns Surrounding the 23(b)(2) Class Action

Any application of a procedural doctrine in the class action context must come to grips with the unique nature of the representative action. The purpose of the class action is to allow a group of litigants to come together to litigate a claim as an entity when litigating the case as individuals would be infeasible. The paradigm tort class action, of course, is for “negative value,” or where the individual recovery to the plaintiff would not be enough to justify her bringing the action. But when all of these small claims are added together, bringing the lawsuit becomes financially worthwhile for an attorney, and the public benefits from the enforcement of the law against a defendant who might otherwise get away with illegality. However, traditional due process notions of each

125. FED. R. CIV. P. 23(b)(2).
127. See, e.g., Gammon v. GC Servs. Ltd. P'ship, 162 F.R.D. 313, 321 (N.D. Ill. 1995) (“[A]dministrative damages, if awarded, would amount to approximately 13 cents per class member.”).
128. See John Bronsteen & Owen Fiss, The Class Action Rule, 78 NOTRE DAME L. REV. 1419, 1419 (2003). This is known as the “private attorney general” justification for
plaintiff having her day in court and controlling her own case are offended when a single class counsel represents a group of much less actively organized plaintiffs consisting of potentially thousands, or millions, of people who have likely never met before. Yet the system is willing to subordinate these due process concerns to attain the economies of scale inherent in the class action procedure. Professor Shapiro concisely captures this sentiment:

It suggests that notions of individual choice, autonomy, and participation—and their resonance in the constitutional guarantee of due process—are not so rigid that they cannot yield to practical arguments about the nature of the case, the character of the wrong complained of, and the individual interests at stake, as well as the countervailing interests and preferences of others. Of course, the notion that due process, and the values underlying it, are capable of such interpretation and application is well accepted in our jurisprudence, even if there is no solid consensus on the appropriate balance in particular instances.

Because of these due process concerns, there are several safeguards for absent class members built into Rule 23, particularly with respect to the adequacy of representation, class counsel, and any class settlement. Furthermore, courts require those attempting to certify a class action to meet a whole


129. See Bronstein & Fiss, supra note 128, at 1447. Many scholars have written excellent articles about the potential dangers of the class action to absent plaintiffs, in which they paint a picture of unscrupulous attorneys who put their own interests before those of their clients. As Susan Koniak claims, “the class action world is full of abuse.” Susan P. Koniak, How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation, 79 NOTRE DAME L. REV. 1787, 1797 (2004). While this article does not purport to examine the extent of real-world abuse in class litigation, suffice it to say that real and theoretical problems do exist in the class framework. My purpose is to recognize these problems in discussing the values a judge ought to place on either side of the ledger in deciding how to utilize the declaratory judgment in the class context. However, although it is not my intention to engage in empirical study of class treatment, I do think it is important to acknowledge the significant risks to the due process interests of absentees. A thorough catalogue of these risks can be found in other writings. See, e.g., Steven T.O. Cottreau, The Due Process Right to Opt Out of Class Actions, 73 N.Y.U. L. REV. 480 (1998).

130. Shapiro, supra note 126, at 925.

131. See FED. R. CIV. P. 23.
set of requirements familiar to anyone who has studied the subject. For example, a class must meet all the "prerequisites" of Rule 23(a)—the famous quartet of numerosity, commonality, typicality, and adequacy of representation—and it must fall into one of the "categories" of Rule 23(b). 132

Rule 23(b)(1) and (2) class actions are called "mandatory" because, by rule, certification of these classes does not require the judge to order the class representative to notify all class members and provide them with the opportunity to "opt out" of the litigation. 133 In brief, (b)(1) class actions are those in which individual litigation would somehow prejudice other potential class members, 134 such as in the typical limited fund class action where the defendant's finite resources may be completely sapped by the plaintiff who wins the race to the courthouse. A (b)(2) class action, the primary focus of this article, and the definition of which is somewhat in flux, seeks primarily injunctive or corresponding declaratory relief. 135 A (b)(3) class action, referred to in the original Rule 23 as the "spurious" class, 136 is a collection of claims primarily for money damages in which common questions of law or fact predominate over individual issues such that class treatment would be superior to a wave of singleton lawsuits. 137 Not only do (b)(3) classes face the additional requirements of proving predominance and superiority, but the court must also direct the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,"

132. See Bronsteen & Fiss, supra note 128, at 1423 (stating their proposal to eliminate the 23(b) categories, focusing instead on the 23(a) prerequisites); see also FED. R. CIV. P. 23(a).
133. See Cottreau, supra note 129, at 485.
134. See FED. R. CIV. P. 23(b)(1).
135. See FED. R. CIV. P. 23(b)(2).
136. See Marvin E. Frankel, Amended Rule 23 from a Judge's Point of View, 32 ANTITRUST L.J. 295, 296 (1966).
137. See FED. R. CIV. P. 23(b)(3).

The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3).
describing their membership in the class and their opportunity to exclude themselves from the litigation—these requirements are known as the shorthand “notice and opt-out.”

These additional requirements, the expense of notifying individual class members and the possibility that the number of opt-outs will render the class infeasible, together constitute a strong set of incentives for class counsel to seek certification under (b)(1) or (b)(2) rather than (b)(3). A judge may, under Rule 23(d)(2), require notice and opt-out in a (b)(1) or (b)(2) class action, but if she does not, and the class is certified as a true mandatory class action, the due process concerns regarding absent class members become even stronger, especially if it appears that an absent class member will be foreclosed from commencing an individual action for significant money damages. However, along with increased concerns about absentees who are never notified and cannot opt out come efficiency gains from adjudicating the controversy in a single proceeding. The result is that plaintiffs try to widen the

138. FED. R. CIV. P. 23(c)(2)(B).
139. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (noting that the “usual rule is that a plaintiff must initially bear the cost of notice to the class”); see also Shapiro, supra note 126, at 954 (discussing how in some cases the costs of notice will effectively preclude continuing a class action).
140. FED. R. CIV. P. 23(d)(2)(A); see also FED. R. CIV. P. 23(c)(2)(A).
141. See Cottreau, supra note 129, at 486-87.
142. See generally Steve Baughman, Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out, 70 TEX. L. REV. 211 (1991). Some authors advocate doing away with the right to opt out even in the 23(b)(3) context. See, e.g., David Rosenberg, Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit, 2003 U. CHI. LEGAL F. 19 (2003) (arguing that class actions in mass tort contexts provide important economies of scale and ensure the best possible deterrence of defendants and that allowing opt-outs reduces the effectiveness of the class action as a deterrent, and most opt-outs are really free-riding on the actions of the class counsel). Rosenberg criticizes due process concerns of other scholars as the “proceduralist” way of thinking:

In this case involving class action opt-out, as in many, the basic deficiency of the proceduralist mode is compounded by shoddy cost-benefit analysis, general disregard of pre-suit, ex ante conditions, and resort to deontological and even ontological claims, usually asserted in the form of vacuous and question-begging moralisms, hackneyed slogans, pseudo-traditions, and other conceptual shell games like “plaintiff autonomy,” “day in court,” and “process values.”

Id. at 19 n.2. Although Rosenberg’s argument, to the extent I understand it, is persuasive on some levels, it is unlikely to become a reality anytime soon, especially given the Supreme Court’s solicitude for absent class members in its recent Rule 23 decisions.
category of class actions within the mandatory categories in an attempt to avoid the additional requirements of the (b)(3) class action. Professor Mullenix has described the phenomenon: “Pleading the 23(b) class categories, and supporting those categories at certification, is tantamount to a procedural jumping-through-the-hoop trick, with a ringmaster not overly concerned with whether the dog actually makes it through.”

The Supreme Court has also demonstrated its concern for the due process interests of absent class members in the last two decades. In Phillips Petroleum Co. v. Shutts, the Court based its holding that a state could exercise personal jurisdiction over non-resident class members without minimum contacts to the forum state on its finding that non-resident absentees’ due process interests were adequately safeguarded by their right to notice and the ability to opt out of the class. Shutts famously did not decide the question of whether there was a constitutional due process right to opt out of a class action, stating in a footnote that the Court had “no view concerning other types of class actions, such as those seeking equitable relief.”

Although the Court has never explicitly stated that there is a constitutional right to notice and opt-out in a mandatory (b)(1) or (b)(2) class action, they have dropped the hint. In Ticor Title Insurance Co. v. Brown, a writ the Court dismissed as improvidently granted, the per curiam opinion representing the views of Justices Blackmun, Stevens, Scalia, Souter, Thomas, and Ginsburg stated that it was “at least a substantial possibility” that actions seeking primarily monetary damages can be certified only under 23(b)(3). The Court has also

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143. See Mullenix, supra note 1, at 238.
144. See Issacharoff, supra note 3, at 1057 (referring to several Supreme Court cases discussing due process concerns).
146. Id. at 811-12 n.3. Professor Mullenix called this question “the enduring legacy of the Shutts decision . . . .” Mullenix, supra note 1, at 204. Professor Miller, who argued the Shutts case, described the open question in an article with David Crump: “There is no neat and logical means of resolving the question whether mandatory [class] actions survive Shutts. The answer depends upon the view one takes of Shutts itself and of the need for mandatory classes. It also depends upon the characteristics of the particular class action.” Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 52 (1986) (footnote omitted).
147. 511 U.S. 117, 121-22 (1994). The Court noted, however, that it would not decide any constitutional question until it had determined whether there was a right to opt
demonstrated concern for the rights of absentees in its recent decisions concerning settlement classes. While detailed analyses of those opinions are beyond the scope of this article, it is fair to say that the Supreme Court has shown significant interest in due process concerns of absent class members in its recent decisions, and there remains speculation that the Court could go further in protecting absentees' rights.

B. The History of Federal Rule 23(b)(2) and "Corresponding Declaratory Relief"

The (b)(2) class action, according to the text of the Rule, is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ." Courts have not had an easy time interpreting this language, particularly in the context of classes seeking to be certified under (b)(2), which also seek money damages, or could seek money damages, but do not. The purpose of the remainder of this article is to explore how the writings of Professor Borchard and others originally advocating adoption of broad declaratory relief might inform how courts deal with these issues. Before doing so, it is important to look back to what the framers of the 1966 version of Rule 23 thought they were getting when they drafted it. This is important not only to avoid overstating the importance of Borchard's writings in this context, but also to frame the approach courts are currently taking.

According to Professor Miller, the drafters of the 1966 amendments to Rule 23 did not think they were revolutionizing out of any class action predominantly for money damages under Rule 23. The Court did not reach either question in Ticor Title, and it has not done so in the decade since. See generally id.; see also Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 n.3 (5th Cir. 1998) (recognizing that Ticor Title "casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2)").

148. See Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); see also Coffee, supra note 3, at 372.


150. FED. R. CIV. P. 23(b)(2).
the class action. Instead, they "apparently believed that they simply were making Rule 23 a more effective procedural tool." According to Miller, the "class action onslaught" since the promulgation of the 1966 amendments "caught everyone, including the draftsmen, by surprise."

Although the increase in class actions may, as Miller claims, be a result of the combination of the increased complexity of modern society and an increase in substantive rights granted by federal statutes, it is clear that the framers of the amended language of Rule 23(b)(2) intended the new class action rule to facilitate broad civil rights actions for injunctive relief. The papers of the advisory committee demonstrate that the primary purpose for the (b)(2) class action was the civil rights and segregation context. Courts dealing with (b)(2) class actions have echoed this notion, often referring to civil rights actions as the purpose of the Rule.

Despite the seemingly unanimous agreement among courts, commentators, and the rulemakers themselves that the primary purpose of the amendments to (b)(2) is for civil rights class actions seeking injunctive relief, it is equally clear that the Rule's purview is not limited to those cases. The advisory

151. Miller, Of Frankenstein Monsters, supra note 14, at 670.
152. Id.
153. Id.
154. Id. at 671-76.
155. As Rules Committee Member John Frank stated, "'If there was a single, undoubted goal of the [Advisory Committee on Civil Rules], the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation.'" William W. Schwarzer, Structuring Multiclaim Litigation: Should Rule 23 Be Revised?, 94 MICH. L. REV. 1250, 1252 (1996) (quoting John P. Frank, Thirty Years of Class Actions in Historical Prospective 3 (Apr. 28, 1994) (unpublished paper on file with the Advisory Committee on Civil Rules, United States Judicial Conference)).
156. See id.; Memorandum on Completion of Work of Committee Meeting of October 31-November 2, 1963 (Dec. 2, 1963), microformed on Records, supra note 97, No. CI-7104-25, at -31; see also Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 HARV. L. REV. 356, 389 (1967) (describing section (b)(2) as "building on experience mainly, but not exclusively, in the civil rights field").
157. See, e.g., Fujishima v. Board of Educ., 460 F.2d 1355, 1360 (7th Cir. 1972) ("The action may be maintained under Rule 23(b)(2), which was intended to cover civil-rights cases."); see also 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1775, at 71 (3d ed. 2005) (stating that "subdivision (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil-rights area").
158. FED. R. CIV. P. 23 advisory committee's note.
committee's note states that the "subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." 159 It goes on to say, however, that the section "is not limited to civil-rights cases," noting that a (b)(2) class action might also be appropriate in cases where consumers are overcharged for a good by a seller in violation of applicable law or when a licensee of a patented machine is forced by the patentee to also use a non-patented machine. 160 The inescapable implication of the advisory committee's note is that, while a core (b)(2) class action would be a civil rights action for an injunction, the drafters anticipated that some other types of class actions, including those adding prayers for money damages, would be certified under the section.

The advisory committee labored for some time on the section's language, particularly the words "final injunctive relief or corresponding declaratory relief . . ." 161 This language was "tightened" from the initial wording of the proposed rule, which was "specific or declaratory final relief," out of a desire "to make clear that [(b)(2)] excludes ordinary cases of liability for money damages." 162 The change arose out of the concern of Rules Committee member John Frank, who feared that the language "declaratory final relief" would allow the (b)(2) class action to be used for declaratory judgments in mass accident cases, which according to Frank were "matters which almost everybody in this room doesn't have the faintest wish to cover . . . ." 163 As a result, the Committee changed the language to that which is in the current Rule and made the following comment in a memorandum:

159. FED. R. CIV. P. 23 advisory committee's note.
160. FED. R. CIV. P. 23 advisory committee's note. This latter situation, dealing with the patent "tying" condition, seems to mirror the facts of a famous patent misuse case. See Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942).
161. FED. R. CIV. P. 23(b)(2).
163. Transcript of Session on Class Actions, October 31, 1963-November 2, 1963, (comments of John Frank), microformed on Records, supra note 97, No. CI-7104-53, at -90; see also Comments of Benjamin S. Kaplan, supra note 162 (stating that the revisions "have had general acceptance in the comments received, and specific approval by Mr. Frank, who was most concerned to see the language tightened").
Our Committee has accepted the basic principle underlying proposed (b)(2), that is, that a class action should be available to enjoin action or inaction based on grounds generally applicable to a class, as in civil rights cases—but concern was expressed that the text of (b)(2) and the accompanying Note might inadvertently permit class actions for a declaration related exclusively or predominantly to liability for money damages, including perhaps liability for ordinary money damages in tort. We were instructed to change the Note and to consider whether improvements could be made in the text.

On reconsideration, we have made changes in both the text of (b)(2) and the Note, in the direction of a generally clarified and tightened draft. Our purpose is to make clear that the class actions under (b)(2) are limited to instances in which the appropriate final relief is either injunctive relief or is declaratory relief corresponding to injunctive relief.\footnote{Memorandum on Completion of Work of Committee Meeting of October 31-November 2, 1963, supra note 156, No. CI-7104-25, at -30.}

The Advisory Committee then made the following addition to the note following Rule 23: “Declaratory relief ‘corresponds’ to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief.”\footnote{FED. R. CIV. P. 23 advisory committee’s note.} Since it is clear that injunctive relief need not be awarded alongside declaratory relief under (b)(2), the above statement is more a model of tautology than clarity.

Considering the history of the 1966 amendments to Rule 23 in light of the history of the Declaratory Judgments Act, it is clear that the Rule 23 drafters intended that the world of declaratory relief available to classes would only be a subset of declaratory relief generally available under 28 U.S.C. § 2201 and Rule 57. Declaratory relief in general, as explained above, need not “correspond” to final injunctive relief; in fact it was designed in part for situations where injunctive relief was not even possible. It is entirely possible that Borchard would have considered the concept of “corresponding declaratory relief” somewhat meaningless.

Professor Mullenix writes in her recent article on class actions that
courts have uncritically accepted the idea that class counsel can simply re-plead any 23(b)(3) legal damage claim as a 23(b)(2) action for declaratory judgment or injunctive relief. This is wrong, and a misuse of the declaratory judgment and injunctive relief action. Neither declaratory judgments nor injunctions were intended to provide judicial determinations on ultimate liability issues.\(^{166}\)

However, it would be more accurate to say that this behavior does not comply with the corresponding declaratory relief requirement of Rule 23. Declaratory relief, as we have seen, was always intended to, in Professor Mullenix’s words, “provide judicial determinations on ultimate liability issues.”

Furthermore, it is unclear how Borchard and his colleagues would have responded to the suggestion that declaratory relief must “as a practical matter” afford injunctive relief, since injunctive relief and declaratory relief are somewhat different both in purpose and effect, as no coercive power of the court is animated to enforce a declaration.\(^{167}\) These quibbles aside, the advisory committee demonstrated its conviction that it did not intend classes to be certified under (b)(2) for a declaration “exclusively or predominantly” related to money damages.\(^{168}\)

Despite the seeming clarity of this language, it begs numerous questions. First, is a class seeking only declaratory relief, but which could have also sought money damages, automatically precluded from certification under (b)(2)? Second, how does one decide whether a class seeking both declaratory relief and money damages is “predominantly” seeking money damages? Third, could a class seeking both

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166. Mullenix, supra note 1, at 221.
167. The question of whether declaratory relief is practically the same as injunctive relief is an interesting one. While declaratory relief is not accompanied by use of force by a court, a litigant who has won a declaration can sue for “further relief,” which is usually granted as a matter of course. See Borchard, Federal Declaratory Judgments Act, supra note 40, at 47 (noting that final declaratory relief “is intended to afford a successful petitioner for a declaration an opportunity to have the judgment carried into coercive effect in the event that a recalcitrant losing party declines to respect it”). The Supreme Court has also famously debated the practical difference between a declaratory judgment and an injunction. See Steffel v. Thompson, 415 U.S. 452 (1974). Writing for the Court, Justice Brennan described the declaratory judgment as a “milder alternative” to an injunction. Id. at 467. Justice Rehnquist pointed out the danger of allowing the declaratory judgment to become “a giant step toward obtaining an injunction . . . .” Id. at 481 (Rehnquist, J., concurring); see also FALLON ET AL., supra note 78, at 1229-43.
168. FED. R. CIV. P. 23 advisory committee’s note.
declaratory relief and money damages seek certification for the questions associated with the former under (b)(2) and the latter under (b)(3)? Fourth, if a class is suing under a statute for which injunctive relief is unavailable, can the court still certify the class under (b)(2) for declaratory relief if the claim for declaratory relief predominates over the claim for money damages? Also, if the court decides to certify some or all class questions under (b)(2), should it exercise its (d)(2) power to direct notice to the absent class members? Courts have split on all of these questions, thus indicating that no matter how clear the drafters of the 1966 amendments to Rule 23 thought they were being, they did not define once and for all the borders around the world of certifiable classes for declaratory relief under section (b)(2).

IV. APPLYING THE EARLY ADVOCACY FOR DECLARATORY RELIEF TO RULE 23 CLASS ACTIONS INVOLVING MONEY DAMAGES

In answering the above-noted open questions, the work of Borchard and the other advocates for the declaratory judgment might be useful, limiting any enthusiasm for the application of Borchard’s principles with the restrictions imposed by the advisory committee and the need to protect due process rights of absent class members. It is beyond the scope of this article to review every approach to these questions, particularly those to the “hybrid” class action for both money damages and declaratory or injunctive relief, about which much has been written. ¹⁶⁹ However, I hope to animate the Borchardian vision in these instances to suggest that the courts ought to approach these problems in the spirit of flexibility and resolution of controversies that Borchard’s writings represent, and thus give Borchard a voice in what already is a much larger conversation about class certification generally.

¹⁶⁹. See, e.g., Brava-Partain, supra note 149; see also W. Lyle Stamps, Getting Title VII Back on Track: Leaving Allison Behind for the Robinson Line, 17 BYU J. PUB. L. 411 (2002).
A. Professor Borchard's Limited Writing on Class Actions

To begin with, it makes sense to see what, if anything, Professor Borchard wrote in connection with the problem of declaratory relief in the class context. My research has turned up precious little in that regard from his treatise and articles. However, he did make some explicit comments worth summarizing here before delving into how his more general principles might inform modern class action practice.\(^{170}\)

Borchard always anticipated that declaratory relief might be awarded to a class, so long as the class was adequately represented, and he intended the judge to have significant discretion in determining when such relief would be appropriate.\(^{171}\) Borchard placed high importance on class members being adequately represented and notified of the action, but he only demanded notice by publication.\(^{172}\) He demonstrated his concerns about issues being determined with parties in interest absent from the proceedings in another context as well. In one article, he criticized as improper an insurance case where the insurer and insured colluded to bring a sham declaratory suit to find a lack of coverage that would preclude

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\(^{170}\) It makes sense that Borchard did not focus on class actions as the number of class actions was much smaller in the 1920s and 1930s, which is when he was doing the bulk of his work on declaratory relief. While this article is agnostic as to the reason for the increase in class action lawsuits, Professor Miller presents a strong case for the reasons being related to general social trends and increased federal substantive law rather than the 1966 changes in Rule 23. See generally Miller, Of Frankenstein Monsters, supra note 14; see id. at 668.

\(^{171}\) See BORCHARD, DECLARATORY JUDGMENTS, supra note 10, at 269-70.

This occurs generally where the persons constituting a class are so numerous as to make it impractical for them all to come before the court, but where the court deems a given number of them within the jurisdiction adequate to assure proper representation of the class. The interests thus represented must generally be joint or common or affect specific property. But in declaratory actions the court has a wide discretion not only in directing joinder but in refusing to decide the case in the absence of the representation of groups or classes deemed essential to the termination of the controversy.

\(^{172}\) Id. at 270. Borchard quotes a Connecticut Supreme Court opinion endorsing notice by publication to absentees. Id. at 270-71 (quoting National Transp. Co. v. Toquet, 196 A. 344, 350-51 (Conn. 1937)). Once again, context is important. It is probable that Borchard did not anticipate the enormous classes often at issue today. He might have revised his satisfaction with notice by publication if faced with the reality of the nationwide class.
recovery by all others insured under the same circumstances.\textsuperscript{173} Given these limitations—shades of the due process concerns echoed by the Supreme Court and other commentators today—Borchard does not appear stingy with declaratory relief in the group context if it will resolve the legal issue in dispute without sacrificing the rights of the absent parties.\textsuperscript{174}

Although Borchard's writings do not provide much specific guidance on the class action, his general principles for declaratory relief do provide interesting background guidelines for a court faced with a (b)(2) certification question. As discussed above,\textsuperscript{175} Borchard believed that declaratory relief should be awarded when it would settle the dispute between the parties but procedural hurdles prevented other legal or injunctive relief. Furthermore, he argued that the courts should be willing to award declaratory relief when it would be useful but should also possess broad discretion to deny declaratory relief when it would not help settle the dispute between the parties. In general, then, combined with his sparse writing on class actions, Borchard would seem to counsel that courts certify classes for declaratory relief under (b)(2) as long as doing so would advance the ball in settling the legal dispute but not disadvantage absent parties who might not be adequately represented.

B. Applying Borchard's Intentions for Declaratory Relief to the (b)(2) Class Action

In order to be more specific in applying these themes, I will look at various types of (b)(2) cases for declaratory relief and how courts have dealt with them. One thing to keep in mind at the outset, which is an important part of my analysis, is that no two class actions tend to be exactly alike, and class certification decisions tend to be very fact-dependent. As such, comparing cases to one another can be somewhat clumsy, which is why I suggest that courts look at several factors applied to particular circumstances to make certification decisions.

\textsuperscript{173} See Borchard, Discretion, supra note 88, at 683.
\textsuperscript{174} See BORCHARD, DECLARATORY JUDGMENTS, supra note 10, at 269-70.
\textsuperscript{175} See supra notes 108-14 and accompanying text.
Problems arise, mainly, in three sets of class actions seeking certification under (b)(2). First are claims seeking only declaratory relief even though money damages are available. Second are claims seeking (b)(2) certification for declaratory relief and money damages. Finally, as discussed in Part V, are claims seeking declaratory relief when injunctive relief may be unavailable, as under the Fair Debt Collection Practices Act. I will address each in turn.

1. Claims Demanding (b)(2) Certification for Only Declaratory Relief When Other Relief Is Available

The first set includes cases which seek only declaratory relief, but for claims in which the plaintiff could, or normally would, ask for money damages. These cases, while theoretically possible, are reasonably rare, in part because of a likely lack of monetary recovery for the attorneys trying the cases, but also in part because there seems to be a universal rejection of this approach. Courts have rejected class certification primarily because it appears that the plaintiff is really attempting to lay the foundation for a later damages action while avoiding the additional requirements of notice and opt-out, which are attendant to a (b)(3) class action. In such cases, notice may be too expensive for the plaintiff, so it might make financial sense to get a declaration of liability and then seek damages in a subsequent action when victory would be assured because of collateral estoppel, and the risk would therefore be much lower. Doctrinally, courts have hung this result on the idea that corresponding declaratory relief must "perform the same function as an injunction," rather than "lay the basis for a later damage award."
This result would at first glance seem to be contrary to the text of the Declaratory Judgments Act and Rule 57, both of which counsel that declaratory relief is not to be denied simply because further relief is available.\(^{180}\) This, remember, was one of Borchard and Sunderland’s greatest grievances with early jurisprudence under the state and federal declaratory relief statutes.\(^{181}\) There is reason to believe, however, that neither Borchard nor Sunderland would quarrel with the result in these class actions.

To begin, the result emphasizes that Rule 23 does not embrace the entirety of the Declaratory Judgments Act.\(^{182}\) Moreover, Borchard and Sunderland’s concern was with courts that deemed declaratory relief an extraordinary remedy, only to be awarded if no other relief was available. Including the above-referenced explanatory sentence in the Act and the Rule would have emphasized that declaratory relief could be awarded alongside damages and/or an injunction to ensure that the overall remedy would provide adequate relief and resolve any controversy between the parties.\(^{183}\)

Additionally, from the beginning of their agitation for the declaratory judgment, Borchard and Sunderland intended that the remedy be available to the plaintiff who might have been entitled to money damages but instead preferred a milder remedy, either because it met his needs or because the parties wanted to resolve the controversy without ruining ongoing business relations.\(^{184}\) While such a decision may be appropriate for an individual pursuing only his personal ends in a lawsuit, this is not applicable to the class setting where it would surely be unfair for an individual to decide on behalf of a class to settle for a milder remedy.\(^{185}\) If the action were allowed to go forward, the groundwork would be laid for class members to proceed with damages actions, but that the situation is not analogous to

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180. See supra notes 89-90 and accompanying text.
181. See supra notes 88-107 and accompanying text.
182. See supra note 164 and accompanying text.
184. See supra notes 94-96 and accompanying text.
185. One court has picked up on this idea that a (b)(2) certification should not seek less relief than that to which the class might be entitled. See McManus v. Fleetwood Enters., Inc., 320 F.3d 545, 554 (2003).
one-on-one litigation demonstrates that Borchard's concern that parties be able to choose milder relief does not fit within the class action context.

Furthermore, it seems appropriate to deny declaratory relief in this context because it would not settle any legal dispute between the parties, as per Borchard's directive. As we shall see below, in some cases a declaratory judgment as to liability can help hasten the conclusion of a class action suit in a meaningful way, but in those cases the court maintains control of the entire action, with an eye toward both manageability and due process. When other relief is available but not prayed for, all a declaratory judgment for the plaintiff will do is engender further litigation for money damages.\(^1\) This result neither furthers the ends of the declaratory judgment, nor the efficiencies sought by the class action in general because the unitary action will not resolve the dispute for the class.

2. A Tougher Case—The (b)(2) Class Action for Declaratory Relief and Money Damages

Although it seems clear that a class representative cannot seek to certify a class under (b)(2) while foregoing potentially available money damages, the issue becomes more difficult when the representative seeks certification under (b)(2) for both declaratory relief and money damages—the so-called hybrid class action. In a way, this seems backward. Seemingly, a class seeking both monetary damages and declaratory relief would be less likely to be certified than a class seeking only declaratory relief, especially given the cautionary language in Rule 23 advisory committee's note that (b)(2) is not for cases relating "predominantly to money damages."\(^2\) However, most controversial cases under section (b)(2) are complaints asking

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186. An argument might be made that such a result will still achieve efficiencies because later plaintiffs will be able to benefit from collateral estoppel. However, this may not ensure recovery; significant obstacles must be overcome before a plaintiff may obtain the benefits of offensive collateral estoppel. See Laura J. Hines, The Dangerous Allure of the Issue Class Action, 79 Ind. L.J. 567, 572-75 (2004). Concerns about dealing with these problems from later litigants may be an additional unspoken reason why courts do not certify these classes. However, as I will suggest below, when a court may maintain control over the entire litigation, such certification may make more sense. See infra note 234 and accompanying text.

for money damages along with declaratory or injunctive relief.\textsuperscript{188}

In general, courts have accepted that there are two primary requirements for certification of a hybrid class under (b)(2): (1) the party opposing the class must have acted in a way generally applicable to the entire class, and (2) the claim for relief must be predominantly for injunctive or declaratory relief, as opposed to money damages.\textsuperscript{189} Most of the action surrounds how a court should determine if the claim for declaratory or injunctive relief predominates over the claim for money damages, or vice versa, and the circuits have not yet settled on a clear standard.\textsuperscript{190} Furthermore, courts must make these decisions in the shadow of the Supreme Court's growing interest in mandatory class actions in general,\textsuperscript{191} expressed in \textit{Philips Petroleum Co. v. Shutts},\textsuperscript{192} \textit{Ticor Title Insurance Co. v. Brown},\textsuperscript{193} and \textit{Ortiz v. Fibreboard Corp.},\textsuperscript{194} with only the cryptic language of the Rule and the advisory committee's note to guide them.\textsuperscript{195}

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\textsuperscript{188} Many of these complaints ask for all three, or at least ask for both injunctive and declaratory relief. It is difficult, therefore, to separate out cases asking only for declaratory relief with no injunctive component. However, this is not an insuperable problem as this article simply attempts to add to the analysis on this issue by inserting the views of the framers of declaratory relief.

\textsuperscript{189} See, e.g., Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 975 (5th Cir. 2000); see also Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 162-63 (2d Cir. 2001); Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 898 (7th Cir. 1999). Note that this requirement of "predominance" does not exist in the text of the Rule, but only in the advisory committee's note.

\textsuperscript{190} See Mullenix, supra note 1, at 207 (noting that "the federal courts are all over the map" on this issue); Brava-Partain, supra note 149, at 1368 (discussing the lack of a clear standard across the federal courts).

\textsuperscript{191} See supra notes 144-49 and accompanying text.

\textsuperscript{192} 472 U.S. 797 (1985).

\textsuperscript{193} 511 U.S. 117 (1994).

\textsuperscript{194} 527 U.S. 815 (1999).

\textsuperscript{195} See, e.g., Molski v. Gleich, 318 F.3d 937, 948 (9th Cir. 2003); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412 (5th Cir. 1998) (noting the "absence of clear guidance from the Rule"). Furthermore, the problem has become more prevalent in the context of employment discrimination suits under Title VII of the Civil Rights Act, as amended in 1991 to allow compensatory and punitive damages. The result is that class actions for employment discrimination may also seek compensatory and punitive damages under (b)(2), creating the potential for large hybrid classes in which individual members might receive significant individualized damage awards. Both Robinson and Allison were employment discrimination suits. See generally Nikaa Baugh Jordan, Note, Allison v. Citgo Petroleum: The Death Knell for the Title VII Class Action?, 51 ALA. L. REV. 847.
Two main tests have emerged in the circuits: the incidental damages approach first outlined by the Fifth Circuit in Allison v. Citgo Petroleum Corp., and the ad hoc balancing test endorsed by the Second Circuit in Robinson v. Metro-North Commuter R.R. The Allison test focuses on whether “the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each potential class member’s case.” Once it appears that damage awards will require an individualized assessment of damages, the judicial economy of group litigation is no longer present, and the risk of competing class interests grows. As such, under the Allison test, a (b)(2) hybrid class should only be certified if monetary relief is “incidental” to declaratory or injunctive relief, meaning that the “damages flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.” These damages should “be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member’s circumstances.” In Allison itself, the court refused (b)(2) (and (b)(3), for that matter) certification in an employment discrimination case because the individualized nature of the monetary damage determinations for each employee predominated over the blanket claim for injunctive relief.

Robinson, decided three years after Allison, was also a Title VII case, and it explicitly rejected the Allison approach. Calling Allison “unduly stringent,” the Robinson court opted for an “ad hoc approach.” The Second Circuit was concerned that the Allison court’s focus on the individualized nature of compensatory damages prevented “certification of all claims that include compensatory damages (or punitive damages) even

196. 151 F.3d at 415.
197. 267 F.3d at 164 (citing often the dissenting opinion by Judge Dennis in Allison).
198. 151 F.3d at 413.
199. Id. at 414.
200. Id. at 415.
201. Id.
202. Id. at 416.
203. Robinson, 267 F.3d at 155, 164.
204. Id. at 162, 164.
if the class-wide injunctive relief is the ‘form of relief in which the plaintiffs are primarily interested.’"\(^{205}\) Instead of following this bright-line approach, \textit{Robinson} directed lower courts to consider all of the evidence and arguments at the certification hearing and decide if (b)(2) certification is appropriate ‘‘given all of the facts and circumstances of the case.’’\(^{206}\) The court may certify under (b)(2) if it finds that ‘‘(1) ‘the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed,’ and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.’’\(^{207}\)

In order to help a court balance the interests involved, the \textit{Robinson} court elaborated further. ‘‘At a minimum,’’ the district court should satisfy itself that ‘‘even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought,’’ and ‘‘the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.’’\(^{208}\) The court added, perhaps addressing the ‘‘damages-available-but-not-requested’’ situation described above, that ‘‘[i]nsignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery.’’\(^{209}\) The court claimed that its test would ensure lower court discretion in the face of myriad possible class action factual patterns while still achieving the manageability and due process aims of \textit{Allison}.\(^{210}\) Significantly, the court cited the district court’s ability under Rule 23(d)(2) to ‘‘afford[] notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters—\textit{i.e.}, the damages phase of the proceedings.’’\(^{211}\)

\(^{205}\) \textit{Id. at} 163 (quoting Hoffman v. Honda of Am. Mfg., Inc., 191 F.R.D. 530, 535-36 (S.D. Ohio 1999)).

\(^{206}\) \textit{Id. at} 164 (quoting Hoffman, 191 F.R.D. at 536).

\(^{207}\) \textit{Id. (quoting Allison, 151 F.3d at 430 (Dennis, J., dissenting)).}

\(^{208}\) \textit{Robinson}, 267 F.3d at 164.

\(^{209}\) \textit{Id.}

\(^{210}\) \textit{Id. at} 165.

\(^{211}\) \textit{Id. at} 166. The Fifth Circuit later acknowledged that this may be appropriate. \textit{See In re Monumental Life Ins. Co.}, 365 F.3d 408, 417 (5th Cir. 2004) (‘‘A district court is empowered by rule 23(d)(2) to provide notice and opt-out for any class action, so rule
Perhaps even more significantly, the court explicitly endorsed bifurcating the liability and damages phases of the proceedings by using Rule 23(c)(4)(A), "to certify separate issues," thus reducing the number of issues in dispute.\textsuperscript{212} Rule 23(c)(4) states, "When appropriate . . . an action may be brought or maintained as a class action with respect to particular issues, . . . and the provisions of this rule shall then be construed and applied accordingly."\textsuperscript{213} Under the Robinson approach, the court would litigate the "liability phase" of the trial first for claims applying basically homogeneously to the class (to wit, whether the defendant engaged in a pattern or practice of discrimination), in order to "reduce the range of issues in dispute and promote judicial economy."\textsuperscript{214} If the defendant wins at the liability phase, the case is over.\textsuperscript{215} If the plaintiff class wins, then the court will award declaratory and/or injunctive relief,\textsuperscript{216} thereby potentially benefiting the class by ending an ongoing harmful practice, and will decide how to proceed with the damages phase, perhaps certifying the damages phase under (b)(3) and/or requiring notice and opt-out. The court will, therefore, be able to control and manage the litigation from beginning to end and flexibly apply the rules at its disposal to settle the dispute.\textsuperscript{217}

Given the Supreme Court's demonstrated interest in the area, the lack of guidance provided by the advisory committee, and the split among the circuits, it is certainly an open question 23(b)(2) certification should not be denied on the mistaken assumption that a rule 23(b)(3) class is the only means by which to protect class members.").

\textsuperscript{212} Robinson, 267 F.3d at 167.
\textsuperscript{213} FED. R. Civ. P. 23(c)(4).
\textsuperscript{214} 267 F.3d at 168.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} The Seventh Circuit offered yet another possibility. Once again in the Title VII context, the court suggested that "[d]ivided certification also is worth consideration. It is possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3), achieving both consistent treatment of class-wide equitable relief and an opportunity for each affected person to exercise control over the damages aspects." Jefferson, 195 F.3d at 898. Or, echoing Robinson, the court "could treat a Rule 23(b)(2) class as if it were under Rule 23(b)(3), giving notice and an opportunity to opt out on the authority of Rule 23(d)(2)." Id. According to the Seventh Circuit, if the money damages sought are "more than incidental" to the declaratory or injunctive relief sought, the court should either take one of the above options or certify the entire class as a (b)(3). Id. at 899.
what the future will hold for the hybrid class action. Professor Borchard’s writing provides a fruitful new avenue toward looking at these problems, given the declaratory judgment’s pedigree of adaptability to disparate factual scenarios and its amenability to combination with other forms of relief to achieve closure of legal disputes.

An approach which takes seriously these aspects of declaratory relief will follow the more flexible Robinson line, perhaps choosing to certify (b)(2) classes for declaratory relief on certain issues via Rule 23(c)(4)(A), while still allowing individualized determinations of damages, so long as declaratory relief is a significant aspect of the remedy sought and not just a “sham” request to avoid notice and opt-out.218 This approach might make sense in the case of a class action where damages tend to be small, such that the case could not be brought without the benefit of the class action device, or where the offending action is ongoing. Furthermore, the approach allows the court to maintain a broad view of the litigation—deciding whether the class may be bifurcated and ensuring that due process issues will be taken into account. If the court thinks that the liability question can be dealt with as a declaratory judgment, particularly in order to end a continuing harmful practice, but that due process requires some plaintiffs to have individualized damages determinations, the court could craft the litigation accordingly, including requiring notice and opt-out at the appropriate stage.219

218. See 267 F.3d at 164.
219. The concept of issue class actions has been hotly debated in the literature over the past several years. Most of this debate is occurring in the mass tort context, and is asking whether an issue class action can be certified under 23(c)(4)(A) without meeting the requirements of predominance and superiority under (b)(3). See Laura J. Hines, Challenging the Issue Class Action End-Run, 52 EMORY L.J. 709, 717-19 (2003) (noting that the language of (c)(4)(A) is “inscrutable,” but concluding that the requirements of (b)(3) cannot be bypassed); see also Jon Romberg, Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A), 2002 UTAH L. REV. 249 (arguing in favor of broader use of issue class actions for mass torts). I am somewhat agnostic on the (b)(3) question, though as a policy argument I am in favor of broader use of issue-only class actions. In the context of negative value class actions, the problem is that if notice and opt-out are required, the class action ceases to be economically viable. An issue-only class action certified under (b)(2) avoids this problem but raises greater due process problems because of the mandatory nature of the class. My argument is that an issue-only class action could be certified under (b)(2) for the declaratory relief aspect of a hybrid class action if the court finds that the efficiency and
At the outset, there is nothing per se wrong with the hybrid class action complaint from the declaratory judgment perspective, particularly given Borchard's emphatic endorsement of the strategic inclusion of a prayer for declaratory relief in case the court found a procedural obstacle to awarding damages or an injunction. Professor Borchard's writings, and particularly the amicus brief he co-authored with Charles Clark for Nashville, Chattanooga & St. Louis Railway v. Wallace, make it clear that the declaratory judgment was meant to be combined with other forms of relief, both at the complaint and remedial stages. Furthermore, Borchard believed the judge should freely, and sua sponte if necessary, be willing to award declaratory relief, either alone or in combination with other relief, if it would settle the dispute between the parties.

At this point, then, if the action were a normal one-on-one dispute, the court would determine if it should award declaratory relief, asking whether the award of declaratory relief would resolve a legal question in the dispute, both in this case and for future parties. If not, the court would then deny declaratory relief. The same principle should help guide the court in the class action setting. If a declaration with respect to a legal question in the case, which is generally applicable to the class, will help resolve the dispute, then the court should consider certification for declaratory relief. For instance, if a party has acted, or is continuing to act homogeneously toward all class members, the manageability benefits of certification outweighed the due process concerns in the individual case. This assumes that the Robinson test is satisfied and the request for declaratory relief is legally significant and not merely designed to avoid notice and opt-out.

220. See Borchard, Needed Procedural Reform If, supra note 25, at 106; see also supra notes 88-104 and accompanying text.


222. See supra note 108 and accompanying text.

223. See supra text accompanying note 109; see also Latino Officers Ass'n v. City of N.Y., 209 F.R.D. 79, 93 (S.D.N.Y. 2002) (certifying partial (b)(2) class on the question of whether the N.Y.P.D. was engaged in a pattern or practice of discrimination, noting that it would be useful to stop that practice independent of damage awards); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (N.D. Cal. 1994) (certifying partial (b)(2) class in case involving theater access under the ADA because declaratory and injunctive relief would require architectural changes at defendant's facilities); Coleman v. McLaren, 98 F.R.D. 638, 655 & n.7 (N.D. Ill. 1983) (noting that declaratory relief for a class would be particularly appropriate when the defendants continued to engage in the challenged behavior).
members, then the court should consider whether that action is legal or not, and it should therefore consider (b)(2).  

The Fifth Circuit has explicitly rejected any method that attempts to determine the “subjective intentions” of the plaintiffs as to whether the declaratory relief is a “prime goal” of class action, choosing instead to decide predominance solely based upon whether the damages are incidental. However, the court does, as a threshold matter, query whether the declaratory or injunctive relief that plaintiffs have asked for will “benefit” them. This relieves the court of deciding whether (as instructed by the advisory committee) the money damages predominate, but it is unclear how this determination differs from the Robinson requirement that the court not certify any sham requests for declaratory relief under (b)(2). Indeed, all that the Robinson test, and I believe Professor Borchard, would require is that the declaratory relief serve a purpose in settling the legal dispute and benefit the parties—no more than the Fifth Circuit currently demands.

Of course, finding that declaratory relief is a worthwhile and significant remedy should not end the certification inquiry. The class action context gives rise to an additional set of concerns, as noted by the Supreme Court and the courts dealing with hybrid class actions, namely the due process concerns of the absent class members and the manageability of the class action as a group action. Rather than split hairs as to which form of relief “predominates” in the case, a court should take a more practical approach, asking whether declaratory relief can help resolve some of the issues in the case, while still keeping it manageable and respecting the due process interests of the class members. This, too, is consistent with Borchard’s stated

224. See Arnold, 158 F.R.D. at 451-52 (recognizing “the cohesiveness of the class and the homogeneity of the members’ interests as the salient factors on which the availability of the (b)(2) class action form hinges”); see also Gammon v. GC Servs. Ltd. P’ship, 162 F.R.D. 313, 320 (N.D. Ill. 1995) (holding that, in a case where a debt collection agency had sent exactly the same letter to a class of up to four million people, a declaratory judgment as to the legality of the letter was appropriate).

225. See In re Monumental Life Ins. Co., 365 F.3d at 415, 417; Allison, 151 F.3d at 412.

DEclaratory judgments

concern for individual class members in class actions for declaratory relief. The court should consider what the class member is giving up by inclusion in a mandatory class. It may be that the class member is giving up a very small amount of damages, in which case there will be little on the due process side of the ledger outside of the traditional right to a day in court—a right unlikely to be exercised. If the damage claims are very small, it may be the case that the economies of the paradigm small claims class action might be best achieved in a mandatory class. Doing so would satisfy the need to resolve the uncertainty surrounding the defendant’s behavior, given that individual awards would not be large enough to provoke an individual lawsuit. The declaratory relief, coupled with the lump sum award, might also achieve enforcement of the law and deterrence of the defendant from future violations.

As the potential damage awards get larger, of course, the question becomes more difficult, especially if the damage awards are sizable, but the class action still would be infeasible on an individual basis. In other words, the money at stake is significant, but an individual action would still be of negative value for an attorney. A judge in these cases will have to examine the particular circumstances of the cases and decide whether certification is necessary to deter the defendants; sometimes classes with somewhat sizable damage awards should be certified under (b)(2) to ensure enforcement of the particular statute involved. Once the damage awards get very large, as is the case in many mass tort or products liability questions, due process concerns become even greater, because each individual plaintiff has a greater interest in controlling the

227. See supra notes 170-75 and accompanying text.

228. See Borcherding-Dittloff v. Transworld Sys., Inc., 185 F.R.D. 558, 566-67 (W.D. Wis. 1999) (certifying a mandatory (b)(2) class for declaratory relief and money damages when the individual damages due each plaintiff would be less than $10); Colorado Cross-Disability Coal. v. Taco Bell Corp., 184 F.R.D. 354, 361-62 (D. Colo. 1999) (certifying a (b)(2) class when individual damages would be $50 per plaintiff).

229. See Shapiro, supra note 126, at 928. This position moves closer to the Rosenberg position on mandatory class actions. See Rosenberg, supra note 142. But I do not go as far as he does. Professor Rosenberg would make all class actions mandatory, while I would only do so in the small claims context, where an individual damage award would not be large enough to justify individual suits.

litigation, which makes a mandatory class without notice and opt-out a non-starter. 231

In addition, the court should focus on manageability: will awarding declaratory relief on some or all of the legal question(s) make progress to a point where the court can still effectively manage the class? The Allison court was primarily concerned with whether individualized hearings would be necessary to determine liability and damages for each class member, and whether the court was really getting any increased efficiency through the class action form. 232 Such a concern hearkens to Professor Borchard’s meditation on discretion to award declaratory relief; if such a declaration will not resolve all or part of the legal dispute, the court should decline to award it. 233 In this same vein, if the award of declaratory relief will not provide any gain in efficiency, then the court should not certify the class for declaratory relief under (b)(2). However, if the court finds that a declaration on a legal issue in the case, applicable to all class members, will resolve a critical question, and that the class action will be easily managed from that point, certification under (b)(2) might be proper. 234

The Allison court considered objectively computable damages to which all class members would automatically be entitled upon a finding of liability to be “incidental” damages—“incidental to requested injunctive or declaratory relief”—and, therefore, the class might be certified under (b)(2). 235 Cases like

231. Judge Newman has noted this issue. Parker v. Time Warner Entm’t Co., 331 F.3d 13, 24 (2d Cir. 2003) (Newman, J., concurring) (stating concern for “undermining the (b)(3) requirement that ‘a class action is superior to other available methods for the fair and efficient adjudication of the controversy’) (quoting FED. R. CIV. P. 23(b)(3)).
232. See 151 F.3d at 414, 416.
233. See supra text accompanying note 112.
234. This idea is at the root of why I believe a court might consider certifying a hybrid class action for both declaratory relief and money damages, but will rarely certify a class for declaratory relief alone when the class might have requested money damages. Not only is the problem of the class representative opting for less relief than that to which the class might be entitled not present in the former situation, but the court can preview the results of its action at the certification stage. If the court certifies a (b)(2) class and awards declaratory relief, it has no idea whether or even if the individual damages actions will be taken. The action may be over at the declaratory phase, while in the hybrid class action context, the court can take the long view, understanding all the possible outcomes and how the damages phase of the proceedings might play out. The court, of course, can also maintain control of the subsequent proceedings.
235. 151 F.3d at 415.
these are undoubtedly appropriate for (b)(2) certification because the declaratory relief will primarily resolve the legal dispute, and the absentee will not be highly prejudiced by inclusion in the mandatory class. Such cases might include the paradigm small claims class action for damages of a few dollars (or even cents) per person, or cases where the amount of damages is fixed by statute and is still small enough to avoid major due process concerns. However, the Robinson line offers an even more flexible approach, sanctioning (b)(2) certification for compensatory and/or punitive damages, so long as declaratory or injunctive relief still predominates. Borchard would probably agree with this as well, choosing to balance the various efficiency and due process interests in the case rather than focus on the label placed on the remedy.

As such, the more flexible approach of Robinson is more in line with the Borchardian original conception of the declaratory judgment. Allison provides a bright-line test for inclusion in (b)(2) or (b)(3)—either the damages are incidental, or they are not—and on that determination hinges the classification of the class action. Borchard wanted courts always to retain the ability to use declaratory relief when doing so would help resolve the controversy, whether on a specific legal question, or in combination with another form of relief. The Allison test may present too rigid a framework for the court to retain this flexibility. In general, Borchard's writings on declaratory relief demonstrate distaste for rigid categories; indeed, the rigidity of old procedural forms was what made widespread adoption of declaratory relief a needed reform. For these reasons, Borchard may have preferred the Robinson approach, which would allow (b)(2) certification in some cases where damages

236. See Colorado Cross-Disability Coal., 184 F.R.D. at 356, 361-62 (certifying under (b)(2) where plaintiffs sought the statutory minimum of $50 per person); Arnold, 158 F.R.D. at 452-53 (certifying under (b)(2) where plaintiffs sought the statutory minimum of $250 per person).
237. 267 F.3d at 164.
238. 151 F.3d at 415-16; see also Mullenix, supra note 1, at 212 (noting that Allison functions like an “on-off switch”).
239. See supra text accompanying notes 108 and 113.
240. See supra text accompanying note 87.
may be somewhat individualized, but where the declaratory relief at stake plays a critical role in the judgment. 241

Moreover, Borchard may have favored liberal use of the court’s discretionary power to provide notice and opt-out in the remedial phase of a (b)(2) class action under Rule 23(d)(2). 242 Doing so would allow the certification for declaratory relief to resolve a major legal uncertainty and advance the case to its outcome, 243 and could also help resolve some of the manageability concerns of a class action in which damages are somewhat more difficult to deal with than in the Allison paradigm. 244 Taking this path should both reinforce the court’s ability to certify classes for declaratory relief when appropriate and protect absent class members if and when that is necessary throughout the course of the proceedings. 245

241. Borchard almost certainly would have disagreed with the distinction some courts make between monetary relief that is “equitable” or “legal.” Some courts have hinted that only claims for “equitable” relief, such as back pay, may be certified under (b)(2). See Allison, 151 F.3d at 415-16. Borchard, who resisted categorizing remedies as equitable or legal, would most likely have focused on the efficiency gains possible through (b)(2) certification, as the Robinson test does. See infra note 285 and accompanying text.

242. The primary basis for this claim is Borchard’s continued emphasis on the declaratory judgment being available when it will resolve the legal questions of the parties. However, Borchard’s suggestion in his scant writings on class actions did argue that notice by publication would mitigate concerns about parties being absent from group proceedings for declaratory relief in which they had an interest. See Borchard, DECLARATORY JUDGMENTS, supra note 10, at 271.

243. See supra text accompanying note 112.

244. At least one court has stated:

While plaintiffs do ask for monetary damages, the qualitative value of the declaratory and injunctive relief they seek overwhelms these requests for damages. It would be an extremely inefficient use of judicial resources to try the liability phase of each plaintiff’s claims [sic] individually. If defendants are liable, as plaintiffs allege, it is in everyone’s interest to have the Court enter the equitable relief that, if complied with, would prospectively remedy any wrong.

See, e.g., Latino Officers Ass’n, 209 F.R.D. at 93.

245. See Molski, 318 F.3d at 950-51 (following the Robinson approach, holding that a case may be certified for declaratory relief under (b)(2) if the defendant acted generally toward the class, but that notice and opt-out would be required if damages were large enough to “trigger[] minimum due process requirements”). This sort of flexible approach, as opposed to the bright-line rule in Allison, appears consistent with the Borchard writings. But see In re Allstate Ins. Co., 400 F.3d 505, 508 (7th Cir. 2005) (holding that where “variance in circumstances . . . pervades the entire class,” restructuring (b)(2) to include notice and opt-out “would be complicated and confusing” and suggesting that it made more sense just to certify the class under (b)(3)). However, in In re Allstate Ins. Co., Judge Posner failed to recognize a crucial difference between the (b)(2) and (b)(3) class action: in a (b)(3) class action, the plaintiff must overcome the additional hurdles of predominance
In a recent case, *Jones v. Ford Motor Credit Co.*, the Southern District of New York, per Judge Holwell, followed this bifurcated approach. The case, filed under the Equal Credit Opportunity Act, involved a class of African-Americans who claimed that company policy allowed car dealers to mark-up the interest rates on their financed automobiles based on their race. The class fell into the category of negative value for an attorney but with damage awards significant to the plaintiffs (as opposed to a few cents). The court, therefore, was faced with the full panoply of class action concerns: efficiency, due process, and manageability.

After deciding that the class fulfilled the four Rule 23(a) prerequisites, the court proceeded to decide whether the class could be certified under (b)(2). The class asked for declaratory and injunctive relief and disgorgement of profits obtained through the mark-up policy, and it proposed four possibilities for certification: complete certification under (b)(2), certification for "some or all of plaintiffs' claims under" (b)(3), certification under both (b)(2) and (b)(3), and bifurcation, certifying for declaratory and injunctive relief under (b)(2) while "reserving judgment on certification of a class for purposes of disgorgement." The court first decided that declaratory and injunctive relief would be appropriate in the case because if the policy were proven to violate the statute such a result would provide relief to all the class members, each of whom signed contracts under the maligned policy. The court then considered how it might deal and superiority. See generally id. While, certainly, the failure to surmount these obstacles in the (b)(3) setting may also counsel against certification under (b)(2), there may be cases where certification under (b)(2) for a particular legal issue could solve an important common question at the outset, while predominance and superiority overall may not be met. Furthermore, I would leave open the possibility for the court to certify under (b)(2) to resolve an important common question, and then require notice and opt-out if, during the course of the proceedings, it became necessary. In any event, it might require more study, but it bears noticing that a (b)(2) plus notice and opt-out is not identical to the (b)(3) class action, as Judge Posner suggests it is.

247. Id. at *2, *8-9 ("[P]laintiffs allege that . . . African-Americans pay on average twice the amount of mark-up paid by Caucasian customers.").
248. Id. at *19-61.
249. Id. at *61.
250. Id. at *67.
with the claim for disgorgement of profits, noting its concern that the damages would have to be "highly individualized" for each plaintiff. While these manageability concerns would have led to a rejection of (b)(2) certification under the Allison test, the Jones court, applying Robinson, elected to bifurcate the trial, litigating the liability phase first as a (c)(4) issue class. The court could thus decide the declaratory and injunctive issues at the outset, while retaining control over the monetary damages phase, including the ability to order notice and opt-out. This approach realizes the best of all worlds; by achieving the benefits of deciding liability (either in terms of awarding valuable relief or resolving the issue in favor of the defendant) while still keeping an eye on due process and manageability concerns, it complies with both the strictures of Rule 23 and taking advantage of the flexibility afforded by declaratory relief.

Jones provides one example of how these different tests affect real-world class certification disputes. The primary difference is that Allison opts for a bright-line test, while Robinson opts for a more wide-ranging, totality of the circumstances approach. In sum, the philosophy behind the Robinson approach is more consistent with the history of the declaratory judgment, which was premised on the notion that courts should be able to flexibly respond to the disputes with which they are faced, rather than being hemmed in by the formalities of procedural rules.

252. Id. at *76-79.
253. Professor Mullenix opposes the more flexible approach because of several concerns: (1) that plaintiffs will plead a class action under (b)(2) in hopes of avoiding the more onerous requirements of (b)(3), (2) that in too many cases courts will certify the class under (b)(2), harming the due process interests of the absent class members, and (3) that plaintiff lawyers will replead class actions under (b)(2) only for declaratory relief in order to avoid (b)(3) requirements and get preclusive effect of the judgment. See Mullenix, supra note 1, at 220-24. However, Mullenix's doomsday scenarios assume a court that has completely fallen asleep at the switch and does not weigh the possibility that a (b)(2) class action might be in everyone's interests.
V. TO CERTIFY OR NOT TO CERTIFY A HYBRID CLASS ACTION UNDER (b)(2) IF INJUNCTIVE RELIEF WOULD BE UNAVAILABLE: THE FAIR DEBT COLLECTION PRACTICES ACT ("FDCPA")

A different, but analogous problem surrounds whether a (b)(2) class action may be certified for declaratory relief if an injunction is not available. The problem exposes several weaknesses of current interpretation and application of Rule 23(b)(2) and is evident in litigation under the federal FDCPA.\footnote{254. 15 U.S.C. § 1692 (2000).} The present difficulties in certifying a class for declaratory relief under the Act throw into sharp relief the disadvantages associated with a narrow reading of the language "corresponding declaratory relief" and lack of recognition of declaratory relief in general. The result is that class actions well-suited to (b)(2) certification for a class-wide declaratory judgment may not go forward, defeating the purposes of the FDCPA and Rule 23 generally. Litigation under the FDCPA demonstrates the potential advantages of the more flexible approach to (b)(2) certification described in the previous section.

Congress passed the FDCPA and its various restrictions on debt collectors' tactics in 1977 in response to the "increasing incidence of debt collectors abusing consumers by using various means of harassment and deception," ranging from "phony legal documents" to "threats of bodily harm or death."\footnote{255. H.R. REP. No. 95-131, at 2 (1977).} The problem has not disappeared in the nearly three decades since the law was passed.\footnote{256. 2004 FTC ANN. REP.: FAIR DEBT COLLECTION PRACTICES ACT 2, available at http://www.ftc.gov/os/2004/03/2004fdcpareport.pdf (last visited Feb. 2, 2006).} According to the Federal Trade Commission ("FTC"), the number of complaints it received about third-party debt collectors tripled from 1999 to 2003,\footnote{257. Ieva M. Augstums, What to Do When a Debt Collector Calls, DALLAS MORNING NEWS, Jan. 17, 2005, at 3D.} totaling 34,543.\footnote{258. 2004 FTC ANN. REP., supra note 256, at 2.} Furthermore, the FTC "continues to believe that the number of consumers who complain to the agency represents a relatively small percentage of the total number of consumers who actually encounter problems with debt collectors."
Consumers’ complaints include illegal harassment at home or work, use of threats and abusive language, failure to verify debts, demanding inflated payments, and harassing family members of the alleged debtor.  

The statute’s enforcement regime allows both suits by private individuals and suits by the FTC. The legislative history reveals little about how these enforcement duties should be divided, although the Senate Report accompanying passage of the bill notes that the “committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance.”  

Such consumers may sue debt collectors as individuals or on behalf of a class. The plaintiff in an individual suit, or the named plaintiff(s) in a class action may recover actual damages and up to an additional $1000 in damages “as the court may allow.” The absent class members may share a sum of $500,000 or 1% of the defendant’s net worth, whichever is less. Both individual and named class plaintiffs may also recover costs and reasonable attorney’s fees. The statute makes no explicit mention of the availability of injunctive or declaratory relief for consumers in FDCPA actions.

The statute also allows for administrative enforcement by the FTC. Although the text does not list the remedial options available to the FTC, it does say that “[a]ll of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance . . . .” As such, the FTC is authorized to seek injunctive relief.

Class actions under the FDCPA typically seek damages arising from the illegal tactics of a defendant debt collection agency inflicted across the class, such as a threatening letter.

259. Id.
260. Id. at 3-6.
268. See, e.g., Ballard v. Equifax Check Servs., 158 F. Supp. 2d 1163, 1167 (E.D. Cal. 2001) (stating that the defendant had allegedly demanded an illegal service charge of
The typical and controversial class claim I will examine more closely is brought seeking the following: a declaration that the defendant's practice violates the FDCPA, damages to the class, and damages to the named plaintiff, as well as costs and attorney's fees.

This arrangement poses several interpretive problems. First, does the statute as written preclude consumer plaintiffs and plaintiff classes from seeking injunctive relief? If so, does the statute then preclude consumer plaintiffs and plaintiff classes from seeking declaratory relief? And, if a plaintiff class can seek declaratory relief but not injunctive relief, is the class certifiable under Rule 23(b)(2) as for "corresponding declaratory relief" even though there is no possible injunction to which the declaratory relief might correspond? Courts have split on all of these questions, and I will examine each in turn. I suggest that application of the history of American declaratory relief should encourage certification of many of these classes under Rule 23(b)(2) whether or not injunctive relief is available. Doing so would best realize the aims of both Rule 23 and the FDCPA.

The first question is whether injunctive relief is available for individual plaintiffs under the FDCPA. A negative answer, I will argue, should not necessarily mean that declaratory relief is also unavailable. But, for the purposes of complying with the "corresponding declaratory relief" language in Rule 23(b)(2), the availability of injunctive relief makes it much easier to certify a class seeking declaratory relief. After all, if injunctive relief is available, then a class can more easily make the case that the declaratory relief it seeks "corresponds" to a possible injunction.

Most courts have agreed that injunctive relief is unavailable under the FDCPA, except when pursued by the FTC. These courts have held that the FDCPA does not provide a private right of action for injunctive relief. The FTC is the only entity authorized to bring an action for injunctive relief under the FDCPA. Thus, individual plaintiffs are precluded from seeking injunctive relief under the FDCPA.

269. See, e.g., Weiss v. Regal Collections, 385 F.3d 337, 341-42 (3d Cir. 2004) (citing Zanni v. Lippold, 119 F.R.D. 32, 33-34 (C.D. Ill. 1988) (arguing that Congress intended only that the FTC be able to sue for injunctive relief under the FDCPA)).
first court pronouncement to this effect came in a 1982 District of Arizona case, *Duran v. Credit Bureau of Yuma.* The court rejected certification of a class under Rule 23(b)(2) because it did not have jurisdiction to entertain a claim for injunctive or declaratory relief under the FDCPA. The court based its result on the lack of explicit language authorizing injunctive relief and cited "the Act's legislative history." Unfortunately, the court's citation is to the legislative history of a different statute, the Equal Credit Opportunity Act.

These problems notwithstanding, the Eleventh Circuit agreed with the *Duran* result in *Sibley v. Fulton DeKalb Collection Service.* In *Sibley,* the court stated only that "equitable relief is not available to an individual under the civil liability section of the Act." The court cited no legislative history and apparently based its conclusion on the lack of any explicit language in the statute authorizing injunctive relief.

Several years later, a court did cite the correct legislative history in coming to the same conclusion. In *Zanni v. Lippold,* a Central District of Illinois case, the court rejected certification for injunctive relief on grounds that injunctive relief was unavailable to the class under section 1692k. The court cited both *Sibley* and *Strong,* but it also referred to (this time, the correct) legislative history of the FDCPA, stating that because Congress listed the remedies available to consumer plaintiffs and the FTC, those lists must be considered complete. The legislative history does not say that injunctive or declaratory

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271. *Id.* at 608-09. The court also noted, almost as an afterthought, that it did not deem the claim for injunctive relief to predominate over the claim for damages. *Id.* at 609.
272. *Id.* at 608 & n.3.
273. *Id.* (citing S. REP. NO. 94-589 (1976)). Even this citation provides the court with little help, as it says that injunctive relief is available to private litigants. S. REP. NO. 94-589, at 12.
274. 677 F.2d 830, 834 (11th Cir. 1982).
275. *Id.*
276. *Id.* The Eastern District of Arkansas has agreed with the Eleventh Circuit. See *Strong v. National Credit Mgmt. Co.,* 600 F. Supp. 46, 47 (E.D. Ark. 1984). In *Strong,* the complaint asked for both declaratory and injunctive relief. *Id.* at 46. The court dismissed both remedies, stating that because the statute explicitly authorized the FTC to seek injunctive relief, the omission of that remedy as a possibility for a consumer plaintiff indicated congressional intent that it be unavailable. *Id.* at 46-47.
277. 119 F.R.D. at 33.
278. *Id.* at 33-34.
Although questions remain as to whether Congress actually intended injunctive relief to be unavailable to private litigants under the FDCPA, one can plausibly argue that the statutory scheme supposed that only the FTC would have the power to enforce an injunction. In any event, for our purposes, I will assume that injunctive relief is unavailable under the FDCPA, thus setting up the interesting question as to whether a class may seek declaratory relief when injunctive relief is unavailable. This query must be divided into two parts. The first part asks whether declaratory relief is available under the FDCPA at all—an open question. The second part asks whether, even if declaratory relief were available to an individual litigant, a class seeking declaratory relief could be certified under Rule 23(b)(2) as for “corresponding declaratory relief.” I suggest that the answer to both questions ought to be yes.

279. See generally S. REP. NO. 95-382.
280. Zanni, 119 F.R.D. at 34.
281. I will not delve into the merits of these arguments to avoid being sidetracked into the labyrinthine world of implied private rights of action. That said, it does seem rather odd that a class would not be able to enjoin a private debt collector. Writ large, the analysis barring injunctive relief under the FDCPA could bar all 23(b)(2) class actions for any statute under which an administrative agency or the federal government would have the right to sue.

In general, courts are hesitant to add injunctive relief to the listed remedies of a federal statute when it is not explicitly authorized. This may stem in part from the traditional concept of equitable relief as an “extraordinary remedy.” 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2942, at 43 (2d ed. 1995). In fact, the presumption is greater when an administrative agency is also involved in enforcing a statute. See DAN B. DOBBS, LAW OF REMEDIES § 2.10, at 249 (2d ed. 1993). This presumption is usually based on the idea that plaintiffs should exhaust their administrative remedies before seeking redress in a court of general jurisdiction. See LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE, supra note 85, at 136. Professor Borchard concurred with this presumption, noting that a complaint for declaratory relief should not be a means to circumvent a statutory scheme that demands administrative enforcement. See BORCHARD, DECLARATORY JUDGMENTS, supra note 10, at 342-43. Such a presumption is unpersuasive in the case of the FDCPA because an individual plaintiff need not exhaust any administrative remedies within the FTC before filing a complaint in court. Furthermore, the legislative history of the FDCPA explicitly states that the statute should be “self-enforcing,” indicating that Congress was not worried about plaintiffs circumventing a carefully designed scheme of administrative enforcement. See S. REP. NO. 95-382, at 5.
Courts have split on the question of whether declaratory relief is available at all under the FDCPA. Many courts have expressed the opinion that because injunctive relief is unavailable, declaratory relief must necessarily also be unavailable because both are examples of "equitable relief." The District of Minnesota provides a paradigmatic example of this justification in Jones v. CBE Group, Inc.: "Courts issuing declaratory judgments exercise their equitable powers and equitable relief is not available under the FDCPA." This result, however, is at odds with the history of the declaratory judgment.

Professor Borchard made very clear that declaratory relief was neither legal, nor equitable, per se. He did not classify the remedy as either legal or equitable because he did not want it to be denied based on what court the parties were in. Rather, he intended it to be available both to judges at law and equity: "It has the advantage of escaping the technicalities associated with equitable and extraordinary remedies, thus enabling the substantive goal to be reached in the speediest and most inexpensive form." Indeed, one of the main purposes of the

282. See Jones v. CBE Group, Inc., 215 F.R.D. 558, 562-63 (D. Minn. 2003) (noting the split as to whether declaratory relief is available under the FDCPA).
284. 215 F.R.D. at 563.
285. See Borchard, Federal Declaratory Judgments Act, supra note 40, at 38. This turns on its head Borchard's concerns with early administration of state declaratory judgment statutes. Initially, Borchard was primarily vexed that states were refusing to award declaratory relief when coercive relief was available. See supra notes 101-02 and accompanying text. In this case, courts are refusing to award declaratory relief when injunctive relief is unavailable, which flies in the face of the original intent behind the statute—to provide an alternative remedy when an injunction was not available. See Borchard, DECLARATORY JUDGMENTS, supra note 10, at 434. However, one of Borchard's concerns was that some courts were ignoring the irreparable injury rule and awarding improper injunctions when the requirements of irreparable injury were not met. See supra text accompanying note 85. Borchard proposed the declaratory judgment as a better remedy in such a case, allowing the court to resolve the controversy without flouting or stretching the irreparable injury rule. See supra text accompanying note 86. His concerns are less relevant in the FDCPA context because it involves a statutory offense, not a typical equity situation. But, even so, there is little reason why a declaratory judgment should not be available even though an injunction is not, especially if it will resolve the controversy between the parties.
declaratory judgment was to ensure that declaratory relief be available when injunctive relief was not. 286

Borchard argued that declaratory relief was analogous to equitable relief because of the flexibility a court had in applying it: "The declaratory judgment in a sense partakes of the character of equitable decrees and in flexibility exceeds them, in that the court has wide discretion in declining to give a declaration of rights if it does not believe a useful purpose, in terminating the controversy, will thereby be served." 287 Despite this description of declaratory relief, it is not accurate to classify declaratory relief as simply "equitable." Courts should instead look at the practical results of the availability of declaratory relief rather than refuse to apply it simply because of a label. The courts that have been willing to award declaratory relief under the FDCPA have done so, focusing, as Borchard would have counseled, on the ability to resolve the legality of the challenged behavior and settle the dispute between the parties. 288

For a plaintiff class, certification under Rule 23(b)(2) will still be a challenge even if it overcomes the hurdle of establishing that declaratory relief is available under the FDCPA. In Bolin v. Sears, Roebuck & Co., the Fifth Circuit held that certification under Rule 23(b)(2) was unavailable because injunctive relief was unavailable under the statute. 289 As such, any declaratory relief awarded could not "correspond" to any possible injunctive relief. 290 The opinion quoted the advisory committee’s note to Rule 23, finding that any declaratory relief would not "as a practical matter afford[] injunctive relief or serve[] as a basis for later injunctive relief." 291

286. See supra notes 100-09 and accompanying text.
287. See Borchard, Constitutionality, supra note 28, at 613.
288. See Ballard, 158 F. Supp. 2d at 1177; Gammon, 162 F.R.D. at 320.
289. 231 F.3d 970, 978-79 (5th Cir. 2000).
290. Id.; see also Sibley v. Diversified Collection Servs., Inc., No. 3:96-CV-0816-D, 1998 U.S. Dist. LEXIS 9969, at *13 (N.D. Tex. June 30, 1998) ("[P]laintiffs cannot seek injunctive relief, their requested declaratory relief does not correspond to injunctive relief even assuming that plaintiffs could cloak an application for injunctive relief as a request for declaratory relief, and the only remaining FDCPA remedy is for damages.").
The court’s concerns in Bolin were not merely formalistic, however. The court was more worried that the plaintiff class was trying to “shoehorn” a damages action under Rule 23(b)(2) to avoid the requirements of notice and opt-out. This is a valid concern, as I have argued throughout this article, one made greater in Bolin because the plaintiffs sought recovery under a multitude of claims. But this is not the situation in a run-of-the-mill FDCPA case where the plaintiffs are seeking very small damage awards. The Fifth Circuit was rightly attuned, as was Professor Borchard, to uses of declaratory relief which might sacrifice due process interests of absent parties. But, in a case involving very small damages—or at least damages that make individual lawsuits infeasible—and an ongoing activity by a defendant which threatens to deprive a significant number of people of their statutory protections, declaratory relief seems very appropriate.

The courts that have approved class-wide declaratory relief in FDCPA cases have focused on their ability to make a general determination of legality of the defendants’ activities, the small damages usually involved, and the need to enforce the law through private attorneys such as the representative plaintiff. Such cases are ideal candidates for class-wide declaratory relief even though the declaration pertains to liability, and would probably be certifiable (b)(2) classes even under the Allison test, but for the reluctance of some courts to award declaratory relief under the FDCPA. The award of declaratory relief would settle the legal relations between the parties and render a final decision on the legality of the defendants’ activity toward the class. Because the damage claims are nominal, the court would be able to resolve the issue efficiently for the entire class without sacrificing enormous

292. Id. at 976.
293. Id. at 972-73.
296. See supra text accompanying notes 282-84.
interests for the individual absentees.\textsuperscript{298} If significant actual damages are available to the individual class members, the court may consider requiring notice and opt-out before deciding on the liability question, either for the entire class or a sub-class.\textsuperscript{299}

The doctrinal sticking point, however, remains. The unavailability of injunctive relief under the statute still means that any declaratory relief awarded to a (b)(2) class in an FDCPA action would not correspond to any final injunctive relief that could be awarded.\textsuperscript{300} Practically, however, requiring the class to be certified under (b)(3) with notice and opt-out, with its attendant and costly protections, may doom some classes and eliminate the ability to privately enforce the FDCPA.

As such, given the history of declaratory relief in the class action setting, a more appropriate balance might be to give a broader reading to "corresponding declaratory relief" and its definitional language in the advisory committee's note. The note defines declaratory relief as "corresponding" to final injunctive relief when "as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief."\textsuperscript{301} While most courts hold that no injunction can be issued to a private litigant in an FDCPA case, the declaration of the illegality of the defendant's behavior might certainly afford injunctive relief "as a practical matter," given that the defendant is on notice that his activities violate the statute. This broader reading would remove a roadblock to (b)(2) certification, which may be the most efficient path to private enforcement of the FDCPA.\textsuperscript{302} Without this reading, FDCPA class actions will be relegated to Rule

\textsuperscript{298} Id. at 321 (noting that "the requested maximum statutory damages, if awarded, would amount to approximately 13 cents per class member"). Although these damages mean little to the individual plaintiff, their multiplication across a class of four million would go much further in deterring the defendant from future illegal conduct.

\textsuperscript{299} See Ballard, 158 F. Supp. 2d at 1169 (certifying a (b)(2) class under the FDCPA for liability, declaratory relief, and statutory damages and certifying a (b)(3) actual damages class, which required notice for (b)(3) class members pursuant to Rule 23(c)(2)).

\textsuperscript{300} See Bolin, 231 F.3d at 978-79.

\textsuperscript{301} FED. R. CIV. P. 23 advisory committee's note.

\textsuperscript{302} But see Weiss, 385 F.3d at 342 (noting that there should be different penalties depending on who brings the action). However, given that the FDCPA explicitly allows for class actions, there is a component of private enforcement to the statute. When the defendant's activity makes declaratory relief generally appropriate, it would seem that any private enforcement regime would be made more effective by allowing (b)(2) class actions, which facilitate easier and more streamlined certification.
23(b)(3) certification, making them virtually impossible to certify because of the expense of notice and opt-out.

One case that appropriately navigates this doctrinal minefield is *Gammon v. GC Services Limited Partnership*, a 1995 Northern District of Illinois case. In that case, Gammon sued the debt collector defendant on behalf of a class of four million other individuals who had received the defendant’s debt collection form letter. Gammon asked for both statutory damages of $1000 for himself, as well as damages for the class of the lesser of $500,000 or 1% of the defendant’s net worth to be split among the absentees. The court agreed with past precedent that injunctive relief was unavailable under the FDCPA, but it proceeded to evaluate whether the class could be certified under (b)(2) for declaratory relief. The court noted Professor Borchard’s criteria for awarding declaratory relief, namely that the remedy would serve a purpose and settle the controversy; it also noted the purposes of the class action—promoting “judicial efficiency and economy”—and affirmed that the statute allowed for declaratory relief to be awarded to the class.

Before certifying the class, however, the court examined whether the claim for declaratory relief predominated over the money damages sought by the class. The court found that damages would be readily calculable and split evenly among the class, meaning there would be little concern about manageability of the damages phase of the trial. Furthermore, because the damages would be very small, about thirteen cents per person, the court did not perceive significant due process problems with certifying the mandatory class.

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303. 162 F.R.D. 313.
304. *Id.* at 315. Gammon’s complaint contended that language in the form letter indicated that the defendant was somehow affiliated with state and federal governments and was unnecessarily intimidating. *Id.* at 316. For example, the letter noted warmly, “You must surely know the problems you will face later if you do not pay.” *Id.*
305. *Id.*
307. *Id.*
308. *Id.*
309. See *id.* at 321.
310. *Id.* The defendant did argue that certifying the class would potentially prevent individual plaintiffs from suing for their possible $1000 in statutory damages. *Gammon*, 162 F.R.D. at 321. The court dismissed this, saying that the statute contemplated class
Such an approach should, again, be guided by the concerns inherent in both class certification and awarding declaratory relief. On the class action side, courts should examine whether individuals’ due process rights are being sacrificed on the altar of efficiency. If absent class members lose the right to pursue significant individual claims, even if they are not large enough to save the lawsuit from having negative value, the court should consider requiring notice and opt-out. On the declaratory judgment side, a court should be motivated by the same discretionary elements that Professor Borchard described decades ago: whether the declaratory relief will terminate uncertainty and resolve the dispute between the parties. In FDCPA cases, where the defendant typically continues to engage in the challenged activity even after the suit is filed, class-wide declaratory relief may be especially appropriate. Certification under (b)(2) seems especially apt in this context based on the legislative history and purpose of the FDCPA, namely to give consumers the power to enforce legislative restrictions on the activities of debt collectors. Broad use of the class action in this setting would facilitate the aggregation of debtors, often people with little social power or means, to come together and challenge the illegal activities of debt collectors, who are potentially intimidating foes.

VI. CONCLUSION

Although declaratory relief in the class action setting has been a controversial topic, courts and commentators rarely look to the history of the declaratory judgment for guidance. My research has found that declaratory relief was intended to be applied flexibly as necessary to provide relief in individual cases, rather than be the subject of procedural formalities. Indeed, one of the leitmotifs of those who supported adoption of actions, and that such aggregation was necessary to achieve the statute’s goal of deterrence. Quite appropriately, the court noted:

The Court is mindful of the practical reality that few individuals will pursue the filing of a federal lawsuit, with its attendant costs, when their statutory damage recovery is capped at $1,000. Class certification is not barred simply because some class members may recover lesser statutory damages than they would have had they brought their claims individually.

Id. at 322.

311. See supra text accompanying note 112.
broad declaratory relief in America was that formal procedural rules were preventing parties from resolving disputes effectively. With respect to the class action, the extensive infrastructure of rules, as well as the attending disagreements among the courts that have grown up around Rule 23(b)(2) certification, are obstacles to the freer use of the declaratory judgment. While, to be sure, the desire to create this set of rules makes sense because of the due process concerns attendant to representative litigation, courts may have gone too far in limiting the discretion with which judges were intended to consider awarding declaratory relief. Should the Supreme Court, other appellate courts, Congress, or the advisory committee face this issue in the near future, it may behoove them to examine the writings of those who championed the adoption of declaratory relief in the United States for additional guidance for its proper use under Rule 23.