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There Is Always a Need: The "Necessity Doctrine" and Class Certification Against Government Agencies

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NOTE

There Is Always a Need: The "Necessity Doctrine" and Class Certification Against Government Agencies

*Daniel Tenny**

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INTRODUCTION

On its face, Rule 23(b)(2) of the Federal Rules of Civil Procedure seems tailor-made for lawsuits against government.[1] Rule 23(b)(2) allows a class action 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

* Thanks to Professor David Super of the University of Maryland School of Law for suggesting the topic and for his continuing guidance. Thanks also to Professor Margaret Berger of Brooklyn Law School and Professor Nina Mendelson of the University of Michigan Law School for their helpful ideas.

1. *See* FED. R. CIV. P. 23(b)(2).

declaratory relief with respect to the class as a whole."[2] This situation arises frequently in people's dealings with government agencies: recipients of public benefits and consumers using public utilities, for example, constitute large groups of people all subject to identical government policies who might seek injunctive relief.[3]

Litigants attempting to invoke Rule 23(b)(2) against government agencies have encountered an unforeseen obstacle, however, often referred to as the "necessity doctrine." Many courts have declined to certify classes when "[n]o useful purpose would be served by permitting [the] case to proceed as a class action."[4] These denials of class certification are premised on the idea that all putative plaintiffs would benefit from a favorable finding and the resulting injunctive or declaratory relief, and thus class certification is unnecessary. For example, one court denied class certification because "[t]he court could reasonably assume the good faith of a defendant such as the Chief Clerk of a state court especially given his express willingness to follow the court's injunction."[5] Dependence on the good faith of the defendant creates a problem for future potential litigants. If rulings are limited to the individual litigants in the case, those who are not parties to the original lawsuit cannot invoke the judgment, but must instigate new proceedings if the defendant does not adhere to the ruling. Particularly for people whose resources and access to the legal system are limited, the costs of beginning new proceedings can be prohibitive.[6] In addition, even litigants with the resources to begin new proceedings can encounter difficulties enforcing judgments against government entities.[7]

The necessity doctrine has great geographical acceptance, and at first glance appears fairly well-entrenched. Courts in most of the federal circuits have permitted the use of the necessity doctrine.[8]

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2. *Id.*

3. *See, e.g.*, Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684 (6th Cir. 1976), *rev'd on other grounds*, 436 U.S. 1 (1978) (utilities); Almendares v. Palmer, 222 F.R.D. 324 (N.D. Ohio 2004) (food-stamp benefits).

4. Ihrke v. N. States Power Co., 459 F.2d 566, 572 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972).

5. Dionne v. Bouley, 757 F.2d 1344, 1357 (1st Cir. 1985).

6. For a discussion of the problems of potential class members who have difficulty accessing the legal system, see Daan Braveman, *Class Certification in State Court Welfare Litigation: A Request for Procedural Justice*, 28 BUFF. L. REV. 57, 73-79 (1979).

7. See *infra* Part II for more on the difficulties for individual litigants.

8. *See, e.g.*, Kansas Health Care Ass'n v. Kansas Dep't of Soc. & Rehab. Servs., 31 F.3d 1536, 1548 (10th Cir. 1994); Sandford v. R.L. Coleman Realty Co., 573 F.2d 173, 178 (4th Cir. 1978); Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 686-87 (6th Cir. 1976), *rev'd on other grounds*, 436 U.S. 1 (1978); United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974); Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973); Ihrke v. N. States Power Co., 459 F.2d 566, 572 (8th Cir. 1972), *vacated as moot*,

A few circuits have accepted some form of the doctrine, but have limited it to situations in which the defendant promises to apply the ruling broadly or the nature of the ruling would make it automatically apply broadly.[9] In other circuits, the status of the doctrine is unclear.[10] Only the Seventh Circuit has completely rejected the necessity doctrine, arguing that such analysis has no place in Rule 23 jurisprudence.[11] Courts of appeals may be reluctant to overturn the necessity doctrine because it has been applied for a long time.[12] In addition, the Supreme Court has not shown interest in resolving the split,[13] and the Advisory Committee did not address this issue in recent amendments to Rule 23.[14]

Still, the widespread acceptance of the necessity doctrine among appellate courts does not mean that its application is universal. Several district courts in circuits that accept the necessity doctrine have utilized their discretion and declined to apply the necessity doctrine.[15]

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409 U.S. 815 (1972); Lobue v. Christopher, 893 F. Supp. 65, 78 (D.D.C. 1995); Lucky v. Bd. of Regents, 34 Fair Empl. Prac. Cas. (BNA) 986, 993 (S.D. Fla. 1981).

9. *See, e.g.*, Dionne v. Bouley, 757 F.2d 1344 (1st Cir. 1985); Boyland v. Wing, No. 92-CV-1002, 2001 U.S. Dist. LEXIS 7496 (E.D.N.Y. Apr. 6, 2001).

10. *See* Bacal v. SEPTA, 4 Am. Disabilities Cas. (BNA) 707 (E.D. Pa. 1995); Nehmer v. United States Veterans' Admin., 118 F.R.D. 113 (N.D. Cal. 1987).

11. *E.g.*, Vergara v. Hampton, 581 F.2d 1281, 1284 (7th Cir. 1978). Early in the history of the necessity doctrine, two student notes contended that the necessity doctrine did not constitute an appropriate reading of Rule 23. *See* Michael J. Murphy & Edwin J. Butterfoss, Note, *The "Need Requirement": A Barrier to Class Actions Under Rule 23(b)(2)*, 67 GEO. L.J. 1211 (1979); Richard S. Talesnick, Note, *The Necessity Doctrine: A Problematic Requirement for Certification of Rule 23(b)(2) Class Actions*, 8 HOFSTRA L. REV. 1025 (1980). Still, the Seventh Circuit alone rejects the doctrine.

12. *See* Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) ("[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.").

13. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 7-8 (1978). In *Craft*, although no writ of certiorari was sought on the issue of class certification, the Supreme Court did consider, sua sponte, the issue of mootness, which would have been avoided had a class been certified. *Id.* The Court noted that "[s]ince the Court of Appeals affirmed the District Court's refusal to certify a class, the existence of a continuing 'case or controversy' depends entirely on the claims of respondents." *Id.* at 8. The Court did not take this opportunity to make *any comment at all* about the propriety of the denial of class certification. *See id.* The Court has similarly declined to comment on the necessity doctrine in other cases. For example, in *Northern States Power Co. v. Ihrke*, 409 U.S. 815 (1972), the Supreme Court dismissed the case as moot but did not consider whether a class should have been certified to avoid mootness. Overruling the denial of class certification would have avoided the mootness problem, but the Supreme Court did not consider the issue. *See* Murphy & Butterfoss, *supra* note 11, at 1230.

14. *See* Amendments to the Federal Rules of Civil Procedure (Mar. 27, 2003), *at* http://www.supremecourtus.gov/orders/courtorders/frcv03p.pdf.

15. *See, e.g.*, D.D. v. New York City Bd. of Educ., No. CV-03-2489, 2004 U.S. Dist. LEXIS 5189, at *42-45 (E.D.N.Y. Mar. 30, 2004) (discussing limitations on the Second Circuit's acceptance of the doctrine); Almendares v. Palmer, 222 F.R.D. 324, 334 (N.D. Ohio 2004) (discussing limits on the Sixth Circuit's approach); Bacal v. SEPTA, 4 Am. Disabilities Cas. (BNA) 707 (E.D. Pa. 1995) (discussed *infra* notes 76-87 and accompanying text).

Indeed, two circumstances suggest that district courts should limit the application of the necessity doctrine: the inability of plaintiffs to invoke offensive nonmutual collateral estoppel against government agencies,[16] and the tendency of agencies to decline to apply adverse circuit court rulings to nonlitigants, a practice known as "nonacquiescence."[17] Both of these factors make it less certain that people who are not parties to the initial litigation will be able to benefit from a ruling unless a class is certified.

This Note argues that district courts should rarely, if ever, refuse to certify classes based on the necessity doctrine, even in circuits which have endorsed it. Part I argues that class certification is necessary to ensure that class-wide relief will be available. Part II argues that ensuring the availability of relief with sufficiently broad scope is particularly critical because of its benefits for putative class members, noting in particular the relevance of the inability of plaintiffs to use nonmutual collateral estoppel against the government and agency nonacquiescence.

I. CLASS CERTIFICATION AND THE SCOPE OF THE JUDGMENT

The most critical distinction between class actions and individual lawsuits is the relief granted by the court. In class actions, judicial relief affects a large number of people, whereas judgments in individual actions usually impact only the parties to the litigation. Courts invoking the necessity doctrine have held that class certification is not necessary in some cases because broad injunctive relief can be granted without class certification.[18] This argument has two major flaws. First, as shown in Section I.A, defendants seek to avoid class certification largely to avoid a remedy with broad

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16. *See* United States v. Mendoza, 464 U.S. 154, 162 (1984). Under the doctrine of collateral estoppel, once a court decides something against a party in one lawsuit, it is given conclusive effect in subsequent lawsuits. *Id.* at 158. Nonmutual collateral estoppel, in which the party that seeks to invoke collateral estoppel was not a party to the original lawsuit, was approved by the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

> Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.

Mendoza, 464 U.S. at 159 n.4.

17. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) [hereinafter Estreicher & Revesz I]; Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990) [hereinafter Estreicher & Revesz II].

18. *See, e.g.*, Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973); Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973).

application. Because defendants may use the necessity doctrine as a pretext for limiting the reach of the final judgment, district courts should be wary of denying class certification based on the assumption that injunctive relief will apply broadly anyway. Second, as argued in Section I.B, district courts are not well-positioned at the time of the decision on class certification to predict what sort of relief will be appropriate. Thus, although appellate courts have approved the necessity doctrine in cases in which district courts had already granted class-wide relief without class certification, district courts cannot know ahead of time that class certification will be unnecessary.

A. *Impact on the Scope of Relief*

Class certification may truly be unnecessary in cases in which the ruling will be broadly applicable even without certification. In *Dajour B. v. City of New York*,[19] the district court limited the scope of the necessity doctrine to circumstances in which the government acknowledged that the ruling would be broadly applicable.[20] Because the government contested the applicability of the ruling to the broad class, the court did not apply the necessity doctrine.[21] This limitation of the necessity doctrine seems sensible, although it leaves open the question of the binding force of the government acknowledgment.[22] Still, the government's purported willingness to promise to apply the ruling broadly calls into question why the doctrine is invoked at all. If class certification would not affect the scope of relief, why should the government oppose it? This Section suggests that opposition to class certification really stems from a desire to limit the scope of relief, and that district courts should therefore not apply the necessity doctrine unless they can be sure it will not limit the scope of the relief granted.

Assuming it will not affect the scope of the defendant's liability, class certification actually benefits the defendant.[23] If a case is certified as a class action and the defendant prevails, the defendant prevents all class members from relitigating; in an individual action, the defendant

19. No. 00 Civ. 2044, 2001 U.S. Dist. LEXIS 15661 (S.D.N.Y. Sept. 27, 2001).

20. *Dajour B.*, 2001 U.S. Dist. LEXIS 15661, at *34-35.

21. *Id.* at *34.

22. See *infra* Section II.B for more discussion of the effect of government promises.

23. *See* Timothy Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U. L. REV. 597, 597-98 (1983) (contending that in "social reform" cases certified under Rule 23(b)(2), the certification of a class benefits the defendant rather than the plaintiff). Professor Wilton gives "efforts to challenge statutes or governmental regulations as unconstitutional, as well as school desegregation cases, prison and mental hospital reform cases, and employment discrimination cases" as examples of "social reform" cases in which plaintiffs might seek certification under Rule 23(b)(2). *Id.* at 601 (footnotes omitted).

only estops the parties to the litigation.[24] Thus, class certification protects defendants in cases in which class-like relief could be granted.[25] The potential harm to defendants if no class is certified is not merely hypothetical. For example, in *Lewis v. New Mexico Department of Health*,[26] the government sought to prohibit "class action-like" relief on the ground that no class had been certified.[27] The court allowed class-wide relief notwithstanding the failure to certify a class, citing, among other cases, the case in which the Tenth Circuit accepted the necessity doctrine.[28] This type of ruling allows the plaintiff to obtain class-wide relief, but does not give the defendant an opportunity to bind the entire class because due process concerns prevent the defendant from using the ruling against new plaintiffs.[29]

The procedural posture of *Lewis* merits some attention. The court invoked the necessity doctrine in a ruling that favored the plaintiff not at the class certification phase of the proceedings, but rather when granting class-wide relief through summary judgment.[30] The government defendants opposed the ruling, and thus had a strong incentive to argue that the necessity doctrine was inapposite: only if class certification was *necessary* could the government contend that failure to certify a class was sufficient grounds for overturning the relief granted.[31] These arguments are exactly reversed from the arguments typically made at the class certification stage, where the plaintiff wants to certify a class and the defendant argues that the necessity doctrine applies and therefore that certifying a class is not necessary.

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24. For a discussion of the merits of class actions for defendants, see generally *id.* To guarantee this benefit for defendants, the drafters of Rule 23 required that plaintiffs seek class certification at the beginning of the case if broad relief was contemplated. FED. R. CIV. P. 23(c)(3) advisory committee's notes (1966). The Advisory Committee's notes forbid the practice of "one-way intervention," through which putative plaintiffs would intervene in the case only after a favorable decision on the merits. FED. R. CIV. P. 23(c)(3) advisory committee's notes (1966); *see also* FED. R. CIV. P. 23(c)(1) advisory committee's notes (2003) ("The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of 'one-way intervention' that was rejected by the 1966 revision of Rule 23.").

25. *See* Wilton, *supra* note 23, at 603-04.

26. 275 F. Supp. 2d 1319 (D.N.M. 2003).

27. *Lewis*, 275 F. Supp. 2d at 1346.

28. *Id.* (citing Martinez v. Richardson, 472 F.2d 1121, 1126 (10th Cir. 1973)).

29. Wilton, *supra* note 23, at 622-23. The decision will of course still have an effect on future litigation as stare decisis. Still, there are ways to obtain a judgment in the face of adverse precedent which are not available in the face of res judicata. *See id.* at 625-26.

30. *See Lewis*, 275 F. Supp. 2d at 1346-47.

31. *See id.* at 1346 (citing government's argument that class-like relief was inappropriate because the case had not proceeded as a class action).

Why the change of heart? Only one explanation attributes consistent and logical mindsets to each party.[32] At each stage, the defendant seeks to limit the scope of any judgment that may be issued, while the plaintiff seeks to expand its scope. At the class certification stage, this means the plaintiff wants class certification and the defendant does not. Once a judgment in favor of the plaintiff is issued *and the case has already proceeded without class certification*, the defendant attempts to limit the scope of the judgment by arguing that a judgment should not have wide application unless the class was certified. The plaintiff argues that a judgment with wide application is permissible without class certification.

This explanation suggests that the critical feature of class certification is its impact on the scope of the relief granted. The other features of class certification have modest impacts by comparison. The characteristics that make class actions significantly more time-consuming — notice and opportunity to opt out — apply only to Rule 23(b)(3) class actions in which a group of individual claims is at issue.[33] The features that attach to Rule 23(b)(2) class actions — a description of the members of the class in any judgment that ensues,[34] court approval of settlements,[35] and appointment of class counsel[36] — are all necessary requirements for cases that will affect a large number of people.[37] Further, the burden on defendants from these requirements is minimal.[38]

32. *But see* Wilton, *supra* note 23, at 603 (suggesting that defendants are behaving irrationally when they oppose class certification). Professor Wilton's explanation, unlike the argument that defendants consider the scope of relief at each stage, is unappealing because it implies that defendants are consistently making strategic errors, which is particularly unlikely for government defendants who are likely to be relatively sophisticated.

33. *See* FED. R. CIV. P. 23(c)(2) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances .... [T]he court will exclude from the class any member who requests exclusion."). Confusion between these requirements and the more modest requirements of Rule 23(b)(2) may cause some of the opposition to Rule 23(b)(2) class actions. *See* Wilton, *supra* note 23, at 640.

34. FED. R. CIV. P. 23(c)(3).

35. FED. R. CIV. P. 23(e).

36. FED. R. CIV. P. 23(g).

37. Wilton, *supra* note 23, at 636 ("[A]bsent dissenting interests can effectively be protected only if class treatment is approved."); *see also* Hansberry v. Lee, 311 U.S. 32, 45-46 (1940) (expressing concerns about absent interests being protected).

38. Careful description of the class members should not burden defendants at all. Appointment of class counsel for plaintiffs similarly places no burden on defendants. Court approval of settlements could limit the defendant's ability to settle the case, but is necessary to protect absent class members. *See supra* note 37.

B. *The Influence of Procedural Posture*

As illustrated in the previous Section, decisions about applying the necessity doctrine should be made with reference to the scope of the relief that will eventually be granted. This fact limits the utility of appellate decisions on the necessity doctrine. Appellate courts reviewing class certifications know what relief the district court granted,[39] and take the relief granted into account in deciding whether class certification was truly necessary.[40] In addition, appellate courts know whether the case proceeded in a manner typical of the class or in a manner specific to an individual claim.[41] At the time of class certification, district courts are not privy to this information.

Section B.1 observes that appellate courts routinely make reference to this additional information in making their decisions. Section B.2 argues that because district courts lack information, particularly information regarding the scope of relief granted, they cannot apply the necessity doctrine in the same way and thus should be more inclined to certify classes. Section B.3 argues that district courts in every circuit retain discretion to certify classes, and that doing so does not contradict appellate approval of the necessity doctrine.

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39. The appellate case law on the necessity doctrine comes not from interlocutory appeals but rather from appeals after the case has been fully decided on the merits. *See, e.g.*, Dionne v. Bouley, 757 F.2d 1344, 1356 (1st Cir. 1985); Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 686 (6th Cir. 1976), *rev'd on other grounds*, 436 U.S. 1 (1978); Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973); Martinez v. Richardson, 472 F.2d 1121, 1122 (10th Cir. 1973); Ihrke v. N. States Power Co., 459 F.2d 566, 572 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972). There are several possible explanations for this trend. Before 1998, when Federal Rule of Civil Procedure 23(f) was promulgated allowing interlocutory appeals on the issue of class certification at the discretion of the courts of appeals, denials of class certification were not appealable as of right to appellate courts. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 (1978); FED. R. CIV. P. 23(f); 523 U.S. 1221 (1998) (adding Rule 23(f)). In addition, appellate courts are unlikely to use their discretion to decide necessity doctrine cases even when interlocutory appeal is available. The claim of a court invoking the necessity doctrine is that class certification will make no difference, suggesting that appellate review is less urgent. Further, the procedures that attach when a class is certified under Rule 23(b)(2) are much less significant than the procedures that attach when classes are certified under Rule 23(b)(3) and numerous monetary claims are joined, again suggesting that immediate appellate review is less critical. *See* FED. R. CIV. P. 23(c)(2)(B) (imposing additional requirements only on Rule 23(b)(3) class actions).

40. *See, e.g.*, Martinez v. Richardson, 472 F.2d 1121, 1127 (10th Cir. 1973) (discussed *infra* notes 44-49 and accompanying text).

41. *See, e.g.*, Hurley v. Ward, 584 F.2d 609, 611-12 (2d Cir. 1978) (discussed *infra* notes 67-71 and accompanying text).

1. *Procedural Posture in the Appellate Court*

In two circuits that accept the necessity doctrine, the Tenth[42] and the Second,[43] the leading cases made very explicit use of information available only to the appellate court. Both courts emphasized that class certification was not necessary to provide the relief that was eventually granted.[44] In *Martinez v. Richardson*,[45] the Tenth Circuit held that "a class action was not demanded here because the same relief could be afforded without its use and seemingly the [district] court had something of this kind in mind" when it allowed for further enforcement action.[46] The appellate court emphasized in its order that the trial court should make sure of future compliance.[47] The trial court complied, issuing an order which applied to "all those Medicare beneficiaries similarly situated."[48] Over a decade later, a new plaintiff, not a party to the original lawsuit, reactivated the court's order and obtained an order to show cause.[49] Similarly, in *Galvan v. Levine*,[50] the Second Circuit upheld a class-wide injunction that had been issued in the absence of a certified class, noting that "what is important ... is that the *judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated."[51]

The First Circuit's approach to the necessity doctrine in *Dionne v. Bouley*[52] brings the importance of knowing what relief was granted into even sharper focus. In *Dionne*, the First Circuit held that the necessity doctrine should not be "mechanical," and that "the justification for denying class certification rests on the particular circumstances."[53] The *Dionne* case involved a challenge to Rhode Island's procedure for issuing "Writs of Attachment" which froze bank accounts or seized assets.[54] The circuit court affirmed a denial of

42. *See Martinez*, 472 F.2d at 1127.

43. *See* Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973).

44. *See Martinez*, 472 F.2d at 1127; *Galvan*, 490 F.2d at 1261.

45. 472 F.2d 1121 (10th Cir. 1973).

46. *Martinez*, 472 F.2d at 1127.

47. *Id.* (ordering the trial court to "fashion an appropriate decree or order so as to make certain that there will be future compliance with the law in order that persons in the dire straits which these plaintiffs were in are not cut off without a hearing").

48. Martinez v. Bowen, 655 F. Supp. 95, 98 (D.N.M. 1986) (quoting trial court's order after remand).

49. *Id.* at 98, 104.

50. 490 F.2d 1255 (2d Cir. 1973).

51. *Galvan*, 490 F.2d at 1261.

52. 757 F.2d 1344 (1st Cir. 1985).

53. *Dionne*, 757 F.2d at 1356.

54. *Id.* at 1347.

class certification, referring to the fact that the injunction issued by the district court applied not only to the named plaintiff but to all Writs of Attachment issued by the defendant.[55] Further, the court noted that "[w]hile apparently some writs may have been issued shortly after this injunction, the practice has now ceased and we understood at appellate argument that the [defendant] is issuing no more writs in any post-judgment attachment cases. Under the circumstances, we see no practical need for class certification."[56]

These cases all resulted in injunctions covering entire classes despite the lack of certification of a class action.[57] Thus, in these particular cases class certification truly was not necessary: the same relief could be and was granted without class certification. But each appellate court based its conclusion that class certification was not necessary on the relief actually granted, something that did not come to light until after the district court issued its injunction, well after the district court made its decision on class certification. Still, the court in *Dionne* suggested explicitly, and the other courts implicitly, that in future cases district courts should take into account the ability to provide class relief without certifying a class.[58]

2. *The Difficult Situation of District Courts*

The lesson for district courts from the appellate cases is far from clear. The cases hold that denying class certification is permissible if class-wide relief is granted despite the court's refusal to certify a class, but do not suggest how the district court should go about determining what relief is likely to be granted while still making a determination on class certification in the appropriate time frame. Because appellate courts have not been required to rule on the propriety of the application of the necessity doctrine at the time of class certification,[59] district courts operate with little guidance from appellate courts at that

55. *Id.* at 1356.

56. *Id.* at 1356-57.

57. In *Martinez*, persons who were not parties to the original case made use of the judgment. *See supra* notes 48-49 and accompanying text. In *Galvan*, the parties were directed to settle an order and judgment, and the appellate court held that the judgment bound the government with respect to all claimants. Galvan v. Levine, 490 F.2d 1255, 1259, 1261 (2d Cir. 1973). In *Dionne*, the plaintiff sought a "permanent injunction" and the lower court's order "enjoined [the defendant] from issuing writs of attachment pursuant to the existing forms and procedures insofar as they are inconsistent with this opinion." Dionne v. Bouley, 583 F. Supp. 307, 309, 319 (D.R.I. 1984).

58. *See Dionne*, 757 F.2d at 1356. The other cases did not give explicit instructions to future district courts, but their role as precedent in their respective circuits suggests that district courts should look to them for guidance when making decisions about class certification that implicate the necessity doctrine.

59. *See supra* note 39.

stage of the proceedings. District courts know very little about the facts of cases when they are deciding whether to certify a class because they must determine whether to maintain class actions without first investigating the merits of plaintiffs' claims.[60]

Although recent changes to Rule 23 have removed the requirement that courts make rulings on class certification "as soon as practicable," the Advisory Committee advocating the rule change noted that "an evaluation of the probable outcome on the merits is not properly part of the certification decision,"[61] and that discovery prior to the decision on class certification should be "limited to those aspects relevant to making the certification decision on an informed basis."[62] Thus, while the Advisory Committee did anticipate more leeway for district courts to delay a decision on class certification, the Committee did not suggest that the probable outcome on the merits should be determined before the decision on class certification.[63]

The amended Rule 23 recognizes the potential for changes after the class certification decision by permitting alteration of the class certification order before final judgment.[64] But conducting a post-hoc inquiry into exactly whom the named plaintiff does and does not represent does not comport with the logic of Rule 23, which provides mechanisms for the interests of absent class members to be considered as the case proceeds.[65] Further, while Rule 23 contemplates changes to the class as the case progresses,[66] it does not contemplate a post-hoc reversal of an initial refusal to certify a class.

In some cases, it may initially appear that all putative class members would benefit from a judgment even without class certification, but subsequent developments may make class-wide relief inappropriate in the absence of class certification. In *Hurley v. Ward*,[67] the Second Circuit held that class-wide relief was inappropriate absent

60. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974). The impact of recent amendments to Rule 23 is discussed *infra*.

61. FED. R. CIV. P. 23(c)(1) advisory committee's note (2003).

62. *Id.*

63. *See id.* Although, arguably, applying the necessity doctrine means that determining the scope of relief that may be granted is necessary to determine whether the case can proceed as a class action, an in-depth look into the merits does not comply with the suggestions of the advisory note or the text of the rule itself. *See* FED. R. CIV. P. 23(c)(1)(A) (requiring a decision on class certification at "an early practicable time").

64. FED. R. CIV. P. 23(c)(1)(C); *see also id.* advisory committee's note (2003) ("A determination of liability after certification . . . may show a need to amend the class definition.").

65. *See, e.g.*, FED. R. CIV. P. 23(e) (governing court approval of settlement in class actions to ensure that all the interests of class members are represented).

66. *See* FED. R. CIV. P. 23(c)(1)(C) ("An order under Rule 23(c)(1) [certifying a class] may be altered or amended before final judgment.").

67. 584 F.2d 609 (2d Cir. 1978).

class certification because there was not agreement on the typicality of the claim.[68] The court distinguished *Galvan* by arguing that "[i]n *Galvan* and in other similar decisions, the constitutionality of a statute or administrative practice was in issue and the State conceded that the same legal question was posed by the application of the challenged statute or practice to all those within the purported class."[69] The court noted that "[t]he *record* in this case, as we have pointed out, focused upon [the individual plaintiff] and not the general prison population."[70] But this record resulted from the failure to certify a class; had the class been certified, the course of the litigation would have changed and the record created would likely have better supported class-wide relief.

In *Hurley*, the appellate court conducted its inquiry into whether class-wide relief was appropriate after hearings had been conducted with the case proceeding as an individual action, and therefore the case had focused on the individual circumstances of the named plaintiff.[71] The resulting inability to grant class-wide relief illustrates the dangers of proceeding as though class relief will be available without formally certifying a class. In addition, because the appellate decision came after the case had proceeded as an individual action, it does not give binding guidance to a district court making a decision on class certification at the outset of the litigation.

Instead, district courts should conduct an inquiry into typicality of the claim at the beginning of the case.[72] A court's decision whether to certify a class must be made "at an early practicable time," as it may shape the rest of the litigation.[73] Indeed, Rule 23 requires that an order certifying a class "define the class and the class claims, issues, or defenses."[74] Denying class certification based on the necessity doctrine postpones or precludes this narrowing of the issues of the case, and can alter the scope of the litigation by eliminating some elements relevant to the class as a whole but not to the individual plaintiff.[75]

In summary, district courts are left in a difficult position. They cannot, as the appellate courts do, refer to the relief granted in determining whether to apply the necessity doctrine because they do not yet know what relief will be granted. Thus, district courts are unlikely to be in a position to state definitively that class certification

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68. *Hurley*, 584 F.2d at 611-12.

69. *Id.* at 611 (footnote omitted).

70. *Id.* at 612 (emphasis added).

71. *See id.*

72. *See* FED. R. CIV. P. 23(a)(3) (requiring typicality for class certification).

73. FED. R. CIV. P. 23(c)(1)(A).

74. FED. R. CIV. P. 23(c)(1)(B).

75. *See, e.g.*, *Hurley*, 584 F.2d at 610.

is unnecessary, and should be especially cautious in invoking the necessity doctrine. The next Section argues that a district court's refusal to invoke the necessity doctrine does not contravene appellate precedent in favor of the doctrine.

3. *District Courts Retain Discretion to Find Necessity and Certify Classes*

Even if courts of appeals do not eliminate the necessity doctrine, district courts in all circuits retain the discretion to decline to invoke it. Courts of appeals that accept the necessity doctrine have not mandated that district courts refuse to certify classes. Instead, acceptance of the necessity doctrine consists of approving district courts' refusal to certify classes when, in the opinion of the district court, certification would not have served a useful purpose. Thus, district courts in all circuits remain free to certify classes should they deem class certification necessary in an individual case.

The necessity doctrine cannot legitimately be characterized as a mandate in any circuit. As the district court noted in *Bacal v. Southeastern Pennsylvania Transportation Authority*,[76] "courts of appeals appear to have only applied this approach when affirming the denial of a class certification, as opposed to when overruling a district court's decision to certify a class."[77] Indeed, the *Bacal* court questioned the degree to which its own circuit endorsed the necessity doctrine.[78] The court noted that decisions subsequent to the Third Circuit's apparent approval of the necessity doctrine had cast doubt on the viability of the doctrine.[79] In addition, the court noted the ambivalence expressed by the Third Circuit when it initially approved the doctrine in *Carter v. Butz*.[80] Though the *Carter* opinion is commonly cited as supporting the necessity doctrine,[81] the *Carter* court gave only a measured approval of the necessity doctrine, stating: "[t]he [district] court also concluded that the precedential value of its decision would render a judgment in favor of the class unnecessary.

76. 4 Am. Disabilities Cas. (BNA) 707 (E.D. Pa. 1995).

77. *Bacal*, 4 Am. Disabilities Cas. (BNA) at 712. Additional research by the author, reviewing cases both before and after *Bacal*, did not disclose any cases which would constitute exceptions to this principle.

78. *Id.* at 712-13.

79. *Id.* at 713 (citing Geraghty v. United States Parole Comm'n, 579 F.2d 238, 252 (3d Cir. 1978), *vacated on other grounds*, 445 U.S. 388 (1980); Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 58 (3d Cir. 1994)).

80. *See Bacal*, 4 Am. Disabilities Cas. (BNA) at 712-13 (citing Carter v. Butz, 479 F.2d 1084, 1089 (3d Cir. 1973)).

81. *See, e.g.*, Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 686 (6th Cir. 1976), *rev'd on other grounds*, 436 U.S. 1 (1978) (citing *Carter*, 479 F.2d at 1089).

While we might well have decided otherwise we conclude that the class action determination was within the range of discretion permitted by Rule 23."[82] As one commentator observed, "like Newton's Law of Thermodynamics, for every class denial on the basis of lack of need, one is able to find a decision, or several decisions, often in the same circuit, where other courts have certified Rule 23(b)(2) classes under virtually the same circumstances."[83]

This less-than-ringing endorsement of the necessity doctrine is not limited to the Third Circuit. As the *Bacal* court pointed out, several other circuits have explicitly emphasized the discretion of the district court in approving some form of the necessity doctrine.[84] For example, the First Circuit looks to the "discretion that the district court enjoys under the rule to deny class certification should it reasonably determine that class relief is not 'appropriate.'"[85] Similarly, the Ninth Circuit noted in a necessity doctrine case that "[t]he determination of class action status rests within the sound discretion of the district court."[86] And, as noted above, even circuits that have not stressed the discretion of district courts have not gone so far as to overturn a class certification on the basis of the necessity doctrine.[87]

Thus, even in circuits in which appellate courts have strongly endorsed the necessity doctrine, district courts continue to have discretion to certify classes with little risk that certification will be overturned. As a consequence, the necessity doctrine does not constrain district courts, which remain free to examine the circumstances and determine that certification would serve a useful purpose in an individual case. To be sure, in circuits that have accepted the necessity doctrine, the district court must consider whether class certification is truly necessary. Still, no appellate court has overturned class certification on the ground that it was unnecessary.[88] As a result, a district court that certifies a class because

82. *Carter*, 479 F.2d at 1089 (emphasis added). The *Bacal* court did not note this passage explicitly, but did suggest that *Carter* did not stand strongly for the necessity doctrine by stating that *Carter* "*apparently* approv[ed] the decision by a district court denying class certification on the basis that the precedential value of its decision would render a judgment in favor of the class unnecessary." *Bacal*, 4 Am. Disabilities Cas. (BNA) at 712-13 (emphasis added).

83. *Bacal*, 4 Am. Disabilities Cas. (BNA) at 712 (alteration in original) (quoting 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.19, at 4-62 (3d ed. 1992)).

84. *Bacal*, 4 Am. Disabilities Cas. (BNA) at 712 (citing Dionne v. Bouley, 757 F.2d 1344, 1356 (1st Cir. 1985); James v. Ball, 613 F.2d 180, 186 (9th Cir. 1979), *rev'd on other grounds*, 451 U.S. 355 (1981); Martinez v. Richardson, 472 F.2d 1121, 1127 (10th Cir. 1973)).

85. *Dionne*, 757 F.2d at 1356.

86. *James*, 613 F.2d at 186.

87. *See supra* note 77 and accompanying text.

88. *See supra* note 77 and accompanying text.

it perceives a necessity to do so does not disobey circuit court instruction to the contrary. Instead, such a district court exercises its discretion within the bounds articulated by the circuit court.

In summary, the impact of the necessity doctrine comes down to whether the certification of a class affects the likelihood that the ruling will have broad application. If a ruling issued without class certification would be the same as the ruling that would issue with class certification and will be widely followed or easily enforced, class certification may truly be unnecessary. But if the defendant is prepared to fight to avoid certification, a more reasonable conclusion is that the defendant anticipates that class certification would have an impact on the content or scope of the ruling, or on the ease with which future litigants will be able to invoke the ruling to obtain equivalent relief. In such cases, class certification does make a difference and thus the necessity doctrine should not be invoked, particularly because district courts are not well-positioned to determine whether class relief will be available without certification. The future impact of failure to provide class-wide relief is the focus of Part II.

II. THE CONSEQUENCES OF FAILING TO PROVIDE CLASS-WIDE RELIEF

Although the advantages are not quite as self-evident as when a group of plaintiffs all seek money damages from the same defendant, class certification is critical in cases where plaintiffs seek injunctive relief.[89] First, plaintiffs have an opportunity to pool resources to obtain the best possible counsel.[90] Second, the court can protect the interests of a whole group through court approval of settlements.[91] Third, certifying classes enables anyone within the class to enforce the judgment.[92] Finally, class actions help to avoid mooting of claims.[93]

As discussed above, the third advantage listed — ability of unidentified class members to enforce court orders — is likely to be the most contentious issue for defendants.[94] This Part shows why this

89. In *Nehmer v. United States Veterans' Admin.*, 118 F.R.D. 113, 119 (N.D. Cal. 1987), the court succinctly laid out these advantages, so the following summary follows that case closely. The advantages have also been well-rehearsed elsewhere, and thus are not limited to that case. *See, e.g.*, Murphy & Butterfoss, *supra* note 11, at 1228-32 (discussing prejudgment problems with failure to certify classes); Talesnick, *supra* note 11, at 1040-44 (criticizing necessity doctrine on policy grounds).

90. *Nehmer*, 118 F.R.D. at 119.

91. *Id.*; *see also supra* note 37.

92. *Nehmer*, 118 F.R.D. at 119.

93. *Id.*; *see also* Murphy & Butterfoss, *supra* note 11, at 1229-30 (discussing mootness problems and giving examples).

94. *See supra* Section I.A.

feature of class certification is also critical for putative class members. In particular, it argues that difficulties that future litigants will have in applying judgments suggest that the necessity doctrine should virtually never be invoked.

The other factors listed above can preclude the use of the necessity doctrine in some instances,[95] but may not be relevant in other cases and in any event have not been deemed sufficient to require a blanket rejection of the necessity doctrine.[96] These benefits have been fairly well-rehearsed over the history of Rule 23 and the necessity doctrine.[97] Thus, this Part focuses on a factor that has not been expressly considered by courts but will influence all necessity doctrine cases: the ability of future litigants to enforce the judgment.

Section II.A discusses the possibility that the government will decline to apply the ruling to nonparties, and the difficulties that such potential litigants will have in ensuring that the ruling is followed. Section II.B notes the inadequacies of one possible alternative to class certification: a promise by the government to apply the ruling to all similarly situated people.

A. *Unavailability of Nonmutual Collateral Estoppel and the Possibility of Nonacquiescence*

In 1984, the Supreme Court issued its decision in *United States v. Mendoza*,[98] holding that nonmutual collateral estoppel could not be used against the federal government.[99] Government agencies have taken advantage of this holding by reserving the right to decline to apply adverse judgments to parties who have not litigated through a process known as "agency nonacquiescence."[100] Simply stated, agency nonacquiescence is "[t]he selective refusal of administrative agencies

95. *See, e.g.*, Dionne v. Bouley, 757 F.2d 1344, 1356 (1st Cir. 1985) (limiting the applicability of the necessity doctrine in cases in which mootness may become an issue).

96. *See supra* note 8 and accompanying text (discussing the continuing acceptance of the necessity doctrine in several circuits); *see also Dionne*, 757 F.2d at 1356 (continuing to apply the necessity doctrine in cases in which these factors are not deemed problematic).

97. *See, e.g.*, Murphy & Butterfoss, *supra* note 11, at 1228-32 (discussing prejudgment problems with failure to certify classes).

98. 464 U.S. 154 (1984).

99. *Mendoza*, 464 U.S. at 162 ("We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues such as those involved in this case."). Although *Mendoza*'s holding has been narrowed by some rulings in lower courts, it has not been overruled by the Supreme Court and continues to be applied. Note, *Nonmutual Issue Preclusion Against States*, 109 HARV. L. REV. 792, 793 (1996). Lower courts have split on whether *Mendoza*'s rationale applies to state governments as well. *See id.* at 803-04 (reviewing cases).

100. For a thorough discussion of agency nonacquiescence, see Estreicher & Revesz I, *supra* note 17, and Estreicher & Revesz II, *supra* note 17.

to conduct their internal proceedings consistently with adverse rulings of the courts of appeals."[101] Agencies have availed themselves of this option since the 1920s.[102] There continues to be controversy about the appropriateness of agency nonacquiescence, at least when an agency disregards the judicial opinions of a court of appeals in cases within the same circuit.[103] Although courts have roundly criticized the practice at least where it involves disregarding rulings of the circuit court in which a new plaintiff appears,[104] it continues to have some acceptance when agencies seek to create a uniform rule of law around the nation by challenging, through nonacquiescence, a circuit's rulings.[105]

Although a full discussion of the appropriateness of agency nonacquiescence is beyond the scope of this Note, for the purposes of a district court determining whether to certify a class, it suffices to know that an agency, rightly or wrongly, might not apply a non-class

101. Estreicher & Revesz I, *supra* note 17, at 681.

102. *Id.* Note that although *Mendoza* did not come down until 1984, the status of nonmutual collateral estoppel was sufficiently uncertain before then that it had not routinely been used against the government. *See* Note, *supra* note 99, at 792.

103. *Compare, e.g.*, Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990) (criticizing "intracircuit" nonacquiescence), *with* Estreicher & Revesz I, *supra* note 17, *and* Estreicher & Revesz II, *supra* note 17 (defending intracircuit nonacquiescence in some cases).

104. *See, e.g.*, Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985). In *Stieberger*, the court held that intracircuit nonacquiescence was not permitted in the case before it. *Id.* at 1356-57. The court noted that "[a]lthough not specifically dealt with by the Supreme Court, the SSA's non-acquiescence policy has been the subject of almost universal condemnation by those courts which have considered its legality." *Id.* at 1353. Other courts have been similarly critical. *See, e.g.*, Lopez v. Heckler, 725 F.2d 1489, 1497, 1503 (9th Cir. 1984), *vacated on other grounds*, 469 U.S. 1082 (1984) (holding that "[f]ar from raising questions of judicial interference in executive actions, this case presents the reverse constitutional problem: the executive branch defying the courts and undermining what are perhaps the fundamental precepts of our constitutional system — the separation of powers and respect for the law," and "[t]hat the Secretary, as a member of the executive, is required to apply federal law as interpreted by the federal courts cannot seriously be doubted"); *see also* Estreicher & Revesz I, *supra* note 17, at 699 (describing *Lopez* and *Stieberger* as "representative of the judicial rebuke that intracircuit nonacquiescence by SSA has engendered").

105. *See* Estreicher & Revesz I, *supra* note 17, at 753 ("We have shown that intracircuit nonacquiescence is justifiable only when it is employed as an interim measure that allows the agency to maintain a uniform administration of its governing statute while it makes reasonable attempts to persuade the courts to validate its preferred policy."). Even the *Stieberger* court accepted this:

> Intra-circuit non-acquiescence in a circuit court decision also might be less troublesome if utilized where the agency has substantial reason to believe that subsequent consideration of the disputed issue in other forums has created conditions which are likely to lead either to reconsideration by the circuit court in question or to Supreme Court review.

Stieberger, 615 F. Supp. at 1366.

judgment to other similarly situated people.[106] Although nonacquiescence may not be a desirable agency policy, courts' refusal or inability to eliminate it suggests that it is a legitimate concern for other putative class members. The ability of agencies to decline to apply a judgment is particularly problematic for poor plaintiffs who may have difficulty accessing the judicial system.[107] And nonacquiescence, combined with the inability to apply nonmutual collateral estoppel, suggests that other putative plaintiffs may not benefit from the judgment unless a class is certified.

Proponents of nonacquiescence have argued that circuit-wide class certification cuts off the benefits of nonacquiescence because it prevents government challenges to a judicial decision through nonacquiescence.[108] But this justification only applies in a very limited set of circumstances, when the government is actively trying to change the law in a given area.[109] When the government simply attempts to limit the consequences of an adverse ruling, the rationale for allowing nonacquiescence does not apply.[110] In addition, denying class certification on these grounds goes far beyond the necessity doctrine; rather than arguing that certification is not necessary because the same result would be achieved either way, courts following this reasoning would be accepting that certification is imprudent because it would lead to a *different* result.

Further, certifying a class does not lock the court into a wide-sweeping judgment. Because the relief sought is equitable, the court retains discretion to shape the order to guard against overbreadth, or to allow reexamination of the ruling if the circumstances change.[111] For example, Rule 60(b) of the Federal Rules of Civil Procedure allows the court to "relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment."[112] In addition, as the

106. For examples of agency nonacquiescence, see Estreicher & Revesz I, *supra* note 17, at 699-702, 706-10. For example, the Social Security Administration terminated disability benefits in some cases despite cases from the court of appeals that would have required more evidence of improvement in physical condition before benefits were terminated. *Id.* at 699-700.

107. *See supra* note 6.

108. *See* Estreicher & Revesz I, *supra* note 17, at 753 ("While a court that had previously ruled against the agency could continue to set aside agency action inconsistent with the previous rule, it could not enjoin the agency from engaging in intracircuit nonacquiescence in accordance with this standard (or accomplish the same end by certifying a circuit-wide class action including future litigants).").

109. *See supra* note 105 and accompanying text.

110. *See supra* note 105 and accompanying text.

111. *See, e.g.*, FED. R. CIV. P. 23(c)(1)(C) (allowing amendment of the definition of the class); FED. R. CIV. P. 60(b) (allowing amendment of final judgment or order).

112. FED. R. CIV. P. 60(b).

commentary accompanying the most recent revision of Rule 23 indicates, certifying a class does not require granting a sweeping judgment: "A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings."[113] Thus, courts that certify classes keep the full range of options open.

B. *The Value of Promises to Apply the Ruling Broadly*

Some courts, perhaps recognizing the possibility of nonacquiescence, have approved application of the necessity doctrine on the basis of a promise by the agency to apply the ruling to the entire class.[114] Acceptance of these promises as a substitute for class certification can lead to difficulties in future cases. Plaintiffs cannot be assured that these promises have any binding effect, and they therefore constitute a poor substitute for a ruling that applies to the entire class. Section B.1 contends that courts are unlikely to enforce such government promises. Section B.2 discusses the shortcomings of a regime in which such promises are given binding effect, and argues that instead district courts should abandon the necessity doctrine.

1. *Unlikelihood of Binding Effect*

Government promises to apply a judgment to similarly situated plaintiffs cannot be assured of having binding legal effect. The issue of what circumstances would allow promises by the government in one case to be binding in future litigation remains open to question.[115] Thus, absent assurances that the government's promise will have

113. FED. R. CIV. P. 23(c)(1) advisory committee's note (2003).

114. *See, e.g.*, Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973) ("The State has made clear that it understands the judgment to bind it with respect to all claimants; indeed even before entry of the judgment, it withdrew the challenged policy even more fully than the court ultimately directed and stated it did not intend to reinstate the policy."). Later cases reveal that this promise was not merely an additional factor, but a requirement. Boyland v. Wing, No. 92-CV-1002, 2001 U.S. Dist. LEXIS 7496, at *35 (E.D.N.Y. April 6, 2001) (quoting with approval plaintiffs' observation that "'over the last 25 years . . . federal courts in New York have routinely departed from *Galvan* when "State and City defendants have not given the type of assurance that was given in *Galvan*"'" (alteration in original) (quoting Henrietta D. v. Giuliani, No. 95-CV-0641, 1996 U.S. Dist. LEXIS 22373 (E.D.N.Y. Oct. 26, 1996)); *see also* D.D. v. New York City Bd. of Educ., No. CV-03-2489, 2004 U.S. Dist. LEXIS 5189, at *42-45 (E.D.N.Y. Mar. 30, 2004) (listing government acquiescence in applying relief across the board among factors in deciding whether to invoke the necessity doctrine).

115. *See* New Hampshire v. Maine, 532 U.S. 742, 750 (2001) ("[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." (quoting Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982))); *see also infra* note 118 and accompanying text (noting that judicial estoppel is even less likely against government litigants).

binding effect, these promises constitute a poor substitute for a court order encompassing the entire class.

Although the doctrine of judicial estoppel would make a promise binding if a nongovernmental litigant were involved, the doctrine is not necessarily available against the government.[116] In *New Hampshire v. Maine*, the Supreme Court accepted that "[t]he doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."[117] Still, the Court acknowledged that judicial estoppel would not ordinarily apply to government litigants, although the case before it constituted an exception.[118]

One major concern with estoppel against the government, articulated in *United States v. Mendoza*,[119] was that the government should have the freedom to alter its policies and to relitigate previously decided legal issues.[120] In *New Hampshire v. Maine*,[121] the Court echoed these concerns in discussing judicial estoppel, noting that "[o]f course, 'broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests.'"[122] The same argument has been offered in favor of allowing nonacquiescence: that the government should have the opportunity to attempt to overrule previous judicial decisions.[123] In light of these concerns, a court is unlikely to hold the government to a promise to be bound by a previous ruling.

A related concern in the Supreme Court's treatment of estoppel against the government involves the ability of a single government

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116. *See* New Hampshire v. Maine, 532 U.S. at 749, 755.

117. *Id.* at 749 (quoting 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.30 (3d ed. 2000)). *But see* Emergency One, Inc. v. Am. Fire Eagle Engine Co., 332 F.3d 264, 274 (4th Cir. 2003) (suggesting that judicial estoppel should be limited to factual assertions). In any event, as discussed *infra*, putative class members cannot rely on judicial estoppel.

118. New Hampshire v. Maine, 532 U.S. at 755. *New Hampshire v. Maine* itself involved a dispute over the border between New Hampshire and Maine. *Id.* at 745. The Court held that *New Hampshire v. Maine* constituted an exception to the general rule against judicial estoppel of government litigants because the case did not arise out of a change in public policy, which the governmental exception is designed to allow, and applying estoppel would not prevent the states from enforcing their laws. *Id.* at 755.

119. 464 U.S. 154 (1984).

120. *Mendoza*, 464 U.S. at 161.

121. 532 U.S. 742 (2001).

122. *New Hampshire v. Maine*, 532 U.S. at 755 (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4477 (1981)). The Court went on to note that the normal prohibition on estoppel against governments did not apply in the case before it because it was not an example of a single government agent binding the whole government, or of a change in government policy. *Id.*

123. *See* Estreicher & Revesz I, *supra* note 17, at 738-39.

agent to bind the entire government. In *Office of Personnel Management v. Richmond*,[124] the Court noted the problems that could arise from allowing estoppel based on the assertion of one of the multitude of government employees.[125] Although it may appear that a promise by a government attorney in open court would be more likely to be binding, the Supreme Court has emphasized the difference between agency actions and statements by agency counsel in the course of litigation in terms of the deference they are due.[126]

Finally, the acceptance of government promises to abide by rulings in necessity doctrine cases did not presume that these promises had binding effect, but instead were premised on the notion that trustworthy government actors would not make such a promise unless they intended to abide by it.[127] In *Dionne v. Bouley*, for example, the court applied the necessity doctrine because "[t]he court could reasonably assume the good faith of a defendant such as the Chief Clerk of a state court especially given his express willingness to follow the court's injunction."[128] In *Dionne*, the court explicitly ruled that classes should be certified "where the good faith of the loser cannot be fairly presumed."[129]

The court in *Dionne* did not offer an explanation for the interjection of a court's determination of the likelihood that the defendant will proceed in good faith.[130] The reliance on the perceived good faith of the government is particularly problematic given that the government is less likely to be held to that requirement of good faith in subsequent proceedings. One can imagine a court's declining to certify a class when the defendant would have incentive to abide by the ruling because of the fear of being subject to nonmutual collateral estoppel in a subsequent case.[131] But, as discussed above, the government would not be subject to nonmutual collateral estoppel.[132]

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124. 496 U.S. 414 (1990).

125. *Richmond*, 496 U.S. at 433.

126. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988) (declining to give deference to an interpretation by agency counsel, deeming it merely the "agency's convenient litigating position").

127. *See, e.g.*, Dionne v. Bouley, 757 F.2d 1344, 1357 (1st Cir. 1985); Hurley v. Ward, 584 F.2d 609, 611-12 (2d Cir. 1978) ("Since it is ordinarily assumed that state officials will abide by the court's judgment, where the State has admitted the identity of issues as to all potential class litigants class certification is indeed unnecessary.").

128. *Dionne*, 757 F.2d at 1357.

129. *Id.* at 1356.

130. *See id.*

131. Such a fear would, of course, be justified for a nongovernmental litigant. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (allowing offensive nonmutual collateral estoppel).

132. *See supra* note 99 and accompanying text.

Further, the government has demonstrated a willingness to decline to abide by court rulings through nonacquiescence.[133] Thus, all else being equal, even if a government entity makes a promise, one would expect a court to be more skeptical that the government will follow the ruling in the future with no additional judicial supervision.

In summary, plaintiffs do not have good reason to believe that promises by government entities to apply rulings broadly will be binding. Even if the promise is indeed made in good faith, a plaintiff has no guarantee that the policy of accepting the ruling will not be changed in the future, a possibility specifically contemplated and accepted by the courts.[134]

2. *Problems with Holding the Government to Its Promises*

As discussed in the previous Section, the likelihood of future courts holding the government to its promise to apply the ruling broadly is low. This Section contends that holding governments to these promises would constitute an inferior alternative to certification under Rule 23. Such a policy would strip both parties of the protections inherent in class action litigation.

Even if the government is prepared to apply the ruling broadly, the informal nature of the promise removes several important procedural safeguards. If a court intends to apply the ruling broadly, other putative class members should receive adequate representation[135] and court approval of settlements to assure that any settlement serves the interests of all class members.[136] Rule 23 mandates that these procedures be followed in class actions; adjudicating a case affecting a broad class of persons without its protection constitutes an end run around these procedures.[137]

In addition, relying on a promise from a government entity allows that government entity to determine the scope of the ruling. In contrast, Rule 23 reserves for the court the right to determine the size and definition of the class and the issues included in the class action.[138] This distinction could have a significant effect on the impact of the ruling if the group defined by the governmental promise differs from the class that the court would certify.

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133. *See supra* section II.A.

134. *See supra* notes 119-123 and accompanying text.

135. *See* FED. R. CIV. P. 23(g).

136. *See* FED. R. CIV. P. 23(e)(1)(A).

137. *See supra* note 37 and accompanying text.

138. FED. R. CIV. P. 23(c)(1)(B) ("An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).").

Finally, even if government promises were to have any value to future putative plaintiffs, governments would probably very rapidly cease making them. If the government makes a binding promise to apply a court's ruling broadly, it in essence increases the scope of the ruling. At the conclusion of the case, rather than making a judgment applicable only to the litigants in the case, the court, if it finds for the plaintiff, will in effect be making a judgment for all potential litigants. The government will almost certainly respond to such a regime by ceasing to make such promises. As discussed earlier, defendants opposing class actions are primarily interested in limiting the scope of relief.[139] If the method of opposing the class action automatically extends the scope of relief, it will no longer appeal to defendants, particularly because the relief will be asymmetrical — if the defendant prevails, it cannot use the judgment against other potential plaintiffs who did not litigate the original case.[140]

In summary, extracting a promise from a government attorney that the government will apply the ruling more broadly does not solve any of the problems with the necessity doctrine. If, as is likely, the promise were not binding, future litigants would have nothing to rely on if the government changed its view and refused to abide by the ruling in a future case. If the promise were binding in future litigation, the government would be in the same position after the case ended as it would have been if the class had been certified, but without the safeguards built into Rule 23 that protect absent class members.

CONCLUSION

The necessity doctrine, although ostensibly about conserving judicial resources, is really used by defendants as a tool to limit the scope of the judgment. Application of the necessity doctrine has the potential to prevent putative class members from benefiting from a favorable judgment. Consequently, failure to certify a class can have a significant adverse impact on future litigants, particularly those who lack the resources to instigate a new action. Especially in the current environment, in which government agencies continue to engage in nonacquiescence and offensive nonmutual collateral estoppel is unavailable against them, protecting these litigants should be a primary concern of the courts.

Even if appellate courts do not reverse their necessity doctrine jurisprudence, district courts retain the discretion to decline to invoke the necessity doctrine and to certify classes to protect future litigants.

139. *See supra* Section I.A.

140. Indeed, this approaches the scenario that Professor Wilton contemplated in arguing that class certification only helps defendants. *See* Wilton, *supra* note 23, at 603.

District courts should utilize that discretion and ensure that their judgments are respected.