NOTES

THE DUE PROCESS RIGHT TO OPT OUT OF CLASS ACTIONS

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INTRODUCTION

A continuing debate over the proper role and operation of group litigation in the United States has focused on a host of problems with the class action mechanism.[1] Among the topics of much discussion is the right to opt out of class actions.[2] In recent terms, the Supreme Court has had two opportunities to specify when, as a matter of due process, courts must grant the right to opt out of class litigation. The Court dismissed both cases on procedural grounds.[3]

The more recent case, *Adams v. Robertson*,[4] presented the issue of whether due process requires a court to offer opt out rights in state "hybrid"[5] actions seeking both monetary and nonmonetary re-

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1 See, e.g., Symposium, The Institute of Judicial Administration Research Conference on Class Actions, 71 N.Y.U. L. Rev. 1 (1996); Symposium, Mass Tortes: Serving Up Just Desserts, 80 Cornell L. Rev. 811 (1995); Symposium, Rule 23: Class Actions at the Crossroads, 39 Ariz. L. Rev. 406 (1997); see also Program, Summing Up Procedural Justice: Exploring the Tension Between Collective Processes and Individual Rights in the Context of Settlement and Litigating Classes, 30 U.C. Davis L. Rev. 787 (1997). The debate has led to proposals to amend Rule 23 of the Federal Rules of Civil Procedure. See Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559 (1996).

2 The right to opt out is simply the right to return a form and be excluded from both the benefits and the binding effect of the class litigation. Actions that do not include opt out rights are termed "mandatory."

3 In both cases, the Supreme Court dismissed the writs of certiorari as improvidently granted. See Adams v. Robertson, 117 S. Ct. 1028 (1997) (per curiam) (dismissing writ because federal constitutional issue was not properly presented to state supreme court); Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 118 (1994) (per curiam) (dismissing writ because "deciding [the] case would require [the Court] to resolve a constitutional question that may be entirely hypothetical").

4 117 S. Ct. 1028 (1997) (per curiam).

5 The term "hybrid" is used in this Note to refer to those actions seeking both monetary damages and nonmonetary relief, such as an injunction. This use of the term "hybrid" should not be confused with its use to describe Federal Rule of Civil Procedure 23(a)(2) from 1938 to 1966. See Fed. R. Civ. P. 23(a)(2) (1938) (repealed 1966), reprinted in 39

lief.[6] *Robertson* is typical of many state court class actions. In these actions, individuals from around the nation receive mail notification informing them that they are members of a class represented by an attorney they have neither met nor hired. The notice informs[7] the class members that they will be bound by the proceedings. In settlement negotiations, the class counsel decides the best interests of the class.[8] Although class members may appear and object to the fairness of any settlement, if the court enters judgment, the class will be bound and no members of the class will have the right to bring individual actions. The action, in short, is mandatory; even though it involves claims that directly affect the lives of the class members,[9] the class members are locked in—they cannot opt out of the litigation. Additionally, many in the class neither are residents of the forum state nor have minimum contacts with the forum, yet their claims may be extinguished without their consent.

The unfairness of many mandatory class actions demands a robust right to opt out. While opt out rights cannot always guarantee the fairness of a settlement,[10] they can ensure that class members, particularly those with high stakes claims, will have the option of avoiding the agency problems frequently associated with class litigation and pursuing individual actions for redress. Although the Supreme Court in *Phillips Petroleum Co. v. Shutts*[11] held that due process requires opt

F.R.D. 69, 94-95 (1966) (providing for action to determine several rights related to specific property).

6 See *Robertson*, 117 S. Ct. at 1029.

7 The effectiveness of notice to the class is a matter of dispute. See, e.g., Thomas E. Willging et al., An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 134 (1996) ("Many, perhaps most, of the notices [in federal court class actions] present technical information in legal jargon. Our impression is that most notices are not comprehensible to the lay reader.").

8 The terms of any settlement, however, are subject to court approval. See Fed. R. Civ. P. 23(e) (ordering court approval of dismissal or compromise of class actions).

9 For example, the class representatives in *Robertson* asserted that the defendant's fraudulent statements induced class members to switch their cancer insurance policies to inferior policies, causing some members of the class who subsequently developed cancer to have to pay for treatment that would have been covered by the old policies. For a more detailed account of *Robertson*, see infra Part IV.A.

10 Opt out rights, although helpful in many cases, will not solve most of the problems that exist in class litigation. See Marcel Kahan & Linda Silberman, Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims, 1996 S. Ct. Rev. 219, 234 (noting that "opt-out rights may not afford effective protection to class members"). The main impediment is that few class members actually exercise the right. See Willging et al., supra note 7, at 135 (reporting that study of federal class actions found that "the median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class, and 75% of the opt-out cases had 1.2% or fewer class members opt out"). The scant use of opt out rights may stem from insufficient information, the small stakes of the litigation, or both. See infra note 33.

11 472 U.S. 797 (1985).

out rights in actions "wholly or predominately" for monetary damages, the Court expressly reserved judgment on other types of class actions.[12] This Note argues that two separate due process arguments support the right to opt out: one related to adjudicatory jurisdiction[13] and the other dealing with basic procedural fairness. This Note treats these two arguments separately.[14]

After providing a brief background on class action litigation in Part I, this Note then examines in Part II the first due process issue: opt out rights when a state court lacks adjudicatory jurisdiction to bind the class. This Note argues that the due process requirement of minimum contacts[15] should apply to absent class members in all mandatory class actions. For nonresident class members lacking minimum contacts with the forum, the right to opt out should be required to establish the state court's jurisdiction to render a binding in personam judgment.[16] The Supreme Court in *Shutts* so held in a state court class action seeking monetary relief,[17] and this Note argues that the holding in *Shutts* should extend to all state court class actions, including those seeking nonmonetary relief.[18] In those cases where a single adjudication of a controversy is desirable and no state has adjudicatory jurisdiction to bind the entire class in a mandatory action, the controversy will have to be resolved in multiple actions unless a federal solution exists.[19]

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12 See id. at 811 n.3.

13 This Note uses the term "adjudicatory jurisdiction" to refer to the judicial power (apart from subject matter jurisdiction) over individuals or property to enter binding judgments. As such, the term encompasses in personam, in rem, and quasi in rem forms of jurisdiction, as well as jurisdiction gained via the consent of a party.

14 The reasons for doing so are addressed infra Part I.B.

15 The minimum contacts test originated in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that due process requires "that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))). The test was later applied to in rem jurisdiction. See Shaffer v. Heitner, 433 U.S. 186, 206, 216-17 (1977). For a review of the test in practice, see Lea Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 Sup. Ct. Rev. 77.

16 Such opt out rights allow the forum to gain jurisdiction via consent. See infra text accompanying notes 60-63.

17 See *Shutts*, 472 U.S. at 811-12.

18 At first glance, the extension of minimum contacts analysis to nonmonetary class actions may threaten to destroy all of the benefits of unitary adjudication. Closer examination, however, reveals that most class actions maintained in state courts satisfy the minimum contacts analysis. See infra Part II.C.

19 Because the national government is not subject to the same territorial limitations on its powers as are the states, a federal court may be able to assert jurisdiction over the entire class consistent with due process. See infra notes 112-14 and accompanying text.

Part III explores the second due process issue: when opt out rights are required as a basic matter of procedural fairness, apart from concerns of adjudicatory jurisdiction. This Note argues that the establishment of adjudicatory jurisdiction is necessary, but not sufficient, to satisfy the demands of due process. Some actions demand as a matter of basic procedural fairness that courts allow litigants to pursue their claims in individual actions. Thus, due process requires courts to grant opt out rights in some cases involving classes comprised solely of residents of the forum state (a class over which the state court unquestionably has personal jurisdiction). This Note proposes a framework to evaluate when due process so requires. This second due process argument concerning procedural fairness applies equally to class actions in state and federal courts. Finally, Part IV applies the analysis set forth in Parts II and III to the facts of *Adams v. Robertson* to demonstrate how the two strands of due process would operate in practice.

I
CLASS ACTIONS AND OPT OUT RIGHTS

A. Rule 23

Federal Rule of Civil Procedure 23 governs class actions in the federal courts and serves as a model upon which a majority of states base their own rules governing class actions.[20] Rule 23 creates three general categories of class actions: (b)(1), (b)(2), and (b)(3).[21] Courts

[20] See Kurt A. Schwarz, Note, Due Process and Equitable Relief in State Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*, 68 Tex. L. Rev. 415, 425 n.84 (1989) (noting that "[t]hirty—eight states have adopted a class action rule modeled on amended federal rule 23"). Some states have also recognized federal interpretations of Rule 23 as persuasive authority for interpreting their corresponding state rules. See, e.g., First Ala. Bank of Montgomery, N.A. v. Martin, 381 So. 2d 32, 34 (Ala. 1980) (citing federal cases as persuasive authority in Alabama class action); Nottingham Partners v. Dana, 564 A.2d 1089, 1094 (Del. 1989) (noting persuasive authority of Fed. R. Civ. P. 23 advisory committee's notes and federal court interpretations); Bloyed v. General Motors Corp., 881 S.W.2d 422, 428 n.5 (Tex. App. 1994) (following federal court precedent for settlement approval and noting its use as persuasive authority), aff'd, 916 S.W.2d 949 (Tex. 1996). Although actions under state rules generally proceed as they would under the federal rules, minor differences in language may have important consequences for opting out. See, e.g., Kan. Stat. Ann. § 60-223(c)(2) (1997) ("[T]he court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor."). When such differences are relevant to the discussion below, they will be noted.

[21] See Fed. R. Civ. P. 23(b):

> (b) Class Actions Maintainable. An action may be maintained as a class action if . . .
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of

certify actions under Rule 23(b)(1) when individual actions may harm the interests of the defendant or some members of the class. The second category, Rule 23(b)(2) actions, includes actions seeking declaratory or injunctive relief. The third category, 23(b)(3) actions, involves the aggregation of individual claims (typically for monetary damages) where common questions of law or fact predominate.[22]

The availability of opt out rights generally depends upon the subsection of the Rule under which the court certifies the action.[23] Rule 23 does not explicitly provide the right to opt out of (b)(1) and (b)(2)

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) 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; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

22 See Fed. R. Civ. P. 23(b)(3); see also Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966) ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense . . . .").

23 The different treatment of opt out rights in these three types of actions may reflect, in part, the history of class actions in America. See generally Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987); Diane Wood Hutchinson, Class Actions: Joinder or Representational Device?, 1983 Sup. Ct. Rev. 459, 460-76 (summarizing Supreme Court's historical treatment of joinder before 1938 adoption of Rule 23 and analyzing both original Rule 23 and its amended forms). Early class actions in equity were used when justice required a single adjudication. One example is an action seeking to enforce group rights. See, e.g., Beatty v. Kurtz, 27 U.S. (2 Pet.) 566 (1829) (maintaining action by governing committee of church on behalf of all church members to assert group's interest in land). Under the original Rule 23, such actions were considered "true" class actions. See Fed. R. Civ. P. 23(a)(1) (1938) (repealed 1966), reprinted in 39 F.R.D. 69, 94-95 (1966); see also infra note 98.

In the twentieth century, the use of class actions has expanded dramatically. The most dramatic symbol of this expansion is Rule 23(b)(3), which allows class actions to enforce individual rights where common questions of law or fact predominate and where the class device is the superior mechanism for the fair and efficient prosecution of the action. See Fed. R. Civ. P. 23(b)(3). For the benefits of such an expansion, see, e.g., Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 688 (1941). Rule 23(b)(3) actions have the potential to reduce the burdens and expenses that class members face when enforcing their rights. The risk, however, is that these benefits may accrue entirely at the expense of individual control over litigation. Opt out rights can protect individual interests by returning control to individuals, at least where the stakes justify individual actions.

This rule-based approach to opt out rights has been criticized as untenably formalistic. See Flanagan v. Ahearn (In re Asbestos Litig.), 90 F.3d 963, 1005 (5th Cir. 1996) (Smith, J.,

actions. In these "mandatory" actions, class members may be bound by a suit that they did not initiate and that proceeded to settlement or judgment against their will. Courts deny opt out rights in (b)(1) and (b)(2) actions because such rights may destroy the benefits of unitary adjudication. In contrast to (b)(1) and (b)(2) actions, Rule 23 expressly provides opt out rights to all class members in (b)(3) actions.[24]

The reality of opt out rights, however, is a bit more complicated than Rule 23 suggests. First, some courts do grant opt out rights in (b)(1) and (b)(2) actions.[25] Second, some state court class action rules do not automatically provide opt out rights in (b)(3) actions.[26] Third, courts possess a fair amount of discretion in choosing the rule under which to certify a class action.[27]

The analytic structure proposed in Parts II and III of this Note lessens the importance of such formalistic certification choices. In considering whether due process requires opt out rights, this Note asserts that such certification choices are irrelevant to establishing adjudicatory jurisdiction and not necessarily determinative of opt out rights as a matter of basic procedural fairness. Although the analysis proposed herein lessens the disparity in the granting of opt out rights between different types of class actions, a disparity is created between resident and nonresident class members in state court class actions. Before setting forth the two due process arguments supporting opt out rights, the following section explains why this latter disparity is acceptable.

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dissenting), vacated, 117 S. Ct. 2503 (1997). For a review of opt out rights in general, see John E. Kennedy, Class Actions: The Right to Opt Out, 25 Ariz. L. Rev. 3 (1983).

24 See Fed. R. Civ. P. 23(c)(2)(A) ("[T]he court will exclude the member from the class if the member so requests . . . ."). Some state provisions that are analogous to Federal Rule 23 do not unconditionally grant opt out rights. See supra note 20 (describing Kansas's discretionary opt out rule). The right to opt out is of recent practice. Prior to the 1966 amendments to the Federal Rules of Civil Procedure (and the subsequent state court adoption of those rules), either class actions were mandatory or class members were allowed to opt in. See Fed. R. Civ. P. 23 (1938) (repealed 1966), reprinted in 39 F.R.D. 69, 94-95 (1966).

25 Some courts grant opt out rights in (b)(1) and (b)(2) actions under limited circumstances. See 3 Herbert Newberg & Alba Conte, Newberg on Class Actions § 16.17 (3d ed. 1992) ("Under Rule 23(b)(1) or (b)(2), there is no such absolute right [to opt out, t]hough under Rule 23(d) courts have the discretionary power to allow exclusion in Rule 23(b)(1) and (b)(2) class actions . . . ." (footnotes omitted)), see also, e.g., Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997) (holding that district court has discretion under Rule 23 to grant opt out rights in 23(b)(2) class action).

26 See, e.g., supra note 20 (describing Kan. Stat. Ann. § 60-223(c)(2) (1997)).

27 See infra notes 77-78 and accompanying text.

B. *The Basis for a Separate Analysis of the Two Due Process Issues*

Class actions and opt out rights involve many competing interests. The denial of opt out rights may be administratively efficient,[28] advantageous to the defendant,[29] and a benefit to class counsel,[30] but mandatory actions often entail downsides for resident and nonresident[31] class members alike. First, mandatory actions may force class

[28] The argument is that one class action takes up fewer judicial resources than do a multitude of individual actions. The efficiency benefits of a mandatory class action, however, are frequently overstated. First, the availability of opt out rights does not guarantee their invocation. See supra note 10. Second, mandatory class actions may increase the likelihood of collateral-attack litigation. See Maximilian A. Grant, Comment, The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions, 63 U. Chi. L. Rev. 239, 263 (1996) (arguing that collateral attack is more likely when action is mandatory). On the other hand, defendants in class actions would likely have to defend such collateral attacks and thus have an incentive to pursue the result that minimizes costs: that is, the defendant would insist on settlements offering opt out rights when the costs of defending collateral attacks (which may risk the undoing of the entire settlement) are likely to be greater than the costs of allowing some plaintiffs to opt out and pursue individual actions. The costs imposed on defendants, however, will not necessarily ensure the proper allocation of judicial resources because defendants must consider the combined costs of liability and litigation. Thus, a mandatory class settlement that significantly undervalues class claims may be approved by a defendant, despite the increased likelihood of collateral litigation, because the gains from undervaluing class claims may be greater than the expenses incurred in collateral litigation.

[29] A defendant's transaction costs are likely to be reduced by having to defend just one action. Furthermore, those who exercise opt out rights are likely to be those class members with the strongest claims. See Kincade v. General Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981) (noting that only "class members with questionable claims" would remain and members with stronger claims would opt out). For these reasons and others, some have advocated restrictions on opt out rights. See Steve Baughman, Note, Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out, 70 Tex. L. Rev. 211, 215 (1991) (arguing that right to opt out violates due process rights of class members who remain); Mark W. Friedman, Note, Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action, 100 Yale L.J. 745, 756-63 (1990) (arguing that good cause requirement be added to Rule 23(b)(2)); see also A.B.A. Section of Litig., Report and Recommendations of the Special Comm. on Class Action Improvements, 110 F.R.D. 195, 202 (1986) (recommending that courts be allowed to place conditions on right to opt out requests and deny such rights when other interests outweigh interests of class members who seek to opt out).

[30] Attorneys' fees in class litigation frequently increase in proportion to the benefits to the class as a result of the litigation. A mandatory class helps to maximize the benefits for which class counsel can claim responsibility, thus justifying a higher fee. If a significant portion of the class opts out, however, the action will not produce as great a benefit. See Stephen J. Safranek, Do Class Action Plaintiffs Lose Their Constitutional Rights?, 1996 Wis. L. Rev. 263, 271.

[31] This Note frequently uses the term "nonresidents" as a shorthand way of referring to those class members lacking minimum contacts with the forum state, even though some class members residing in a state other than the forum state may have minimum contacts with the forum state.

members to voice their objections in an inconvenient forum, possibly requiring the retention of counsel in a distant location where the litigation is proceeding. To the extent that these burdens deter monitoring and participation, the court may be deprived of important information regarding the fairness of settlements. Second, class members have little control over the selection of class counsel and even less control over counsel's conduct after selection.[32] In short, class members have few means of ensuring that their interests are aligned with the class attorney's interests. Although courts independently review the fairness of settlements, opt out rights offered after a settlement has been proposed serve as an additional vote on the fairness of a settlement.[33] Third, class members cannot choose the structure of relief offered as part of a settlement agreement. Some may prefer injunctive relief, others monetary damages, and yet others an in-kind benefit. Individual actions allow each class member to negotiate a settlement that offers the greatest utility.[34]

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[32] Class members do not have the power to fire class counsel without court approval. See, e.g., Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1077-79 (2d Cir. 1995) (holding that decision to discharge class counsel rests with court, not class representatives); Paula Batt Wilson, Note, Attorney Investment in Class Action Litigation: The *Agent Orange* Example, 45 Case W. Res. L. Rev. 291, 315 (1994) (explaining that class must obtain court approval to dismiss attorney).

[33] Professors Kahan and Silberman recognize that fairness is not the only factor influencing a class member's decision whether to opt out:

> [O]pting out should be more frequent if the settlement amount is low relative to the litigation value of the claims. However, in instances where the claims of individual plaintiffs are low, it is likely that most would not opt out even if the settlement amount were substantially below the expected recovery in a class litigation. Plaintiffs with individually small claims will not bother to expend the effort to determine the litigation value of their claims and will thus not know that the proposed settlement is low. Moreover, even a plaintiff who knows that the proposed settlement is low may decide not to opt out if he believes that most other plaintiffs will fail to opt out, and that it would not be economical to pursue the claims of the few plaintiffs who do opt out in individual or class actions.

Kahan & Silberman, supra note 10, at 244 n.97.

[34] For examples of class members objecting to the structure of relief, see In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 781, 807-10 (3d Cir. 1995) (noting that objectors argued that relief offered—coupons redeemable only if class members purchased new trucks—was of limited utility to many class members); Robertson v. Liberty Nat'l Life Ins. Co., No. CV-92-021 (Ala. Cir. Ct. May 26, 1994) [hereinafter *Robertson I*] (stating that class members objected to settlement which offered benefits only to those who continued to do business with defendant), aff'd and reprinted in Adams v. Robertson, 676 So. 2d 1265, 1293 (Ala. 1995) [hereinafter *Robertson II*], cert. dismissed, 117 S. Ct. 1028 (1997) (per curiam). Some courts have recognized the value of opt out rights to class members who wished to pursue alternative remedies. See, e.g., Mayo v. Sears, Roebuck & Co., 148 F.R.D. 576, 582 (S.D. Ohio 1993) (noting that objections related to statutory damage caps on class recovery were "resolved" by existence of opt out rights).

Since these interests[35] generally apply to resident and nonresident class members alike, the question then arises why, as a matter of due process, the nonresidents' ability to opt out should be guaranteed by an additional due process argument (one related to adjudicatory jurisdiction[36]) beyond that which safeguards the opt out rights of all class members (a due process procedural fairness argument[37]). Under the analysis proposed herein, state courts must meet the jurisdictional requirements of due process as well as the demands of general procedural fairness; thus, nonresident class members, as a practical matter, more frequently will be granted the right to opt out. Does it make sense to grant greater opt out rights to nonresidents? After all, both have the same interests in protecting their property rights[38] to causes of action, controlling the course of litigation, choosing the counsel that will prosecute the action, determining the settlement terms, and ensuring that the class attorney serves their interests.

Despite these shared interests, opt out rights play two different roles in class actions, and this dualism dictates a more robust right to opt out for class members lacking minimum contacts with the forum. In the first role, opt out rights are a method of indicating consent to jurisdiction. By failing to opt out, one can draw the inference that a class member submits to be bound by a judgment of the court. Thus, opt out rights should be granted to those class members over whom a court cannot otherwise assert adjudicatory jurisdiction. As explained in Part II, this role leads to opt out rights for nonresident class members in actions where resident class members may be forced to remain in the class. In the second role, opt out rights offer a procedural protection to class members who wish to pursue individual actions. Many commentators have detailed the problems of agency and wholesale justice frequently associated with class litigation.[39] Opt out rights are

35 In addition to the arguments above, some have argued that individual actions, especially in tort controversies, allow plaintiffs psychological and emotional benefits from vindicating rights in individual proceedings. Such psychological benefits are unlikely to accrue in class litigation. See, e.g., Roger H. Trangsrud, Joinder Alternatives in Mass Tort Litigation, 70 Cornell L. Rev. 779, 820 (1985).

36 See infra Part II.

37 See infra Part III.

38 See infra text accompanying note 59.

39 Agency problems in class litigation have commanded a tremendous amount of attention. See, e.g., John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 877-78 (1987) (describing relationship between class counsel and class clients as "a classic illustration of market failure" which requires improved regulation through reform of legal rules); John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 671-72 (1986) (arguing for reform of legal rules governing fee arrangements for class actions in part because rules create incentive structure for class counsel that conflicts with

a procedural device which allows claim holders to escape these dangers and pursue vindication of their rights in another action. The circumstances where opt out rights must be granted as a procedural protection are examined in Part III.

This dualistic analytic model, where due process offers additional protection to those lacking minimum contacts with the forum, has an unshaken foundation in the realm of individual actions. This additional protection is justified by both practical and theoretical considerations. First, lacking minimum contacts with the forum state is a fairly good proxy for inconvenience. Although class members do not face the same burdens as do defendants in individual actions,[40] those class members who live out of state generally will have a more difficult time monitoring the litigation, attending court proceedings, conducting discovery,[41] raising objections at the fairness hearing, and retaining and consulting with local counsel. In short, distance hampers their ability to monitor the action and participate.[42] Second, and more importantly, nonresidents have no reciprocal relationship with the forum. In short, they have not received benefits from the forum state such that it is fair for the forum to exercise power over them.[43] Although

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interests of class clients); Kenneth W. Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. Legal Stud. 47, 56-61 (1975) (noting conflicts of interest that exist between class counsel and class members); Kahan & Silberman, supra note 10, at 232 ("[The] discrepancy in power and information [between the class members and the class attorney] creates the danger that unscrupulous class counsel will settle a class claim for a generous attorney fee, but a paltry recovery to class members."); see also Geoffrey P. Miller, Some Agency Problems in Settlement, 16 J. Legal Stud. 189 (1987) (discussing effects of different fee arrangements in light of problem that interests of attorney and client are never perfectly aligned).

[40] See infra text accompanying notes 60-61 (discussing *Shutts*).

[41] Objectors may be granted the right to conduct discovery, especially where inadequate representation is suspected. See, e.g., Sandler Assocs. v. BellSouth Corp., 818 F. Supp. 695, 699 (D. Del. 1993) (observing that objectors were allowed to engage in discovery in state class action), aff'd, 26 F.3d 123 (3d Cir. 1994); De Angelis v. Salton/Maxim Housewares, Inc., 641 A.2d 834, 837, 840 (Del. Ch. 1993) (noting discovery undertaken by objectors revealed class representative's misrepresentations), rev'd on other grounds sub nom. Prezant v. De Angelis, 636 A.2d 915 (Del. 1994); Amsellem v. Shopwell, Inc., No. 5683, 1979 WL 2704, at *2 (Del. Ch. Sept. 6, 1979) (noting that objectors engaged in comprehensive review of discovery materials before voicing objections).

[42] This rationale, of course, supports curtailing the jurisdiction of federal courts over class members who reside far from the forum. These concerns of inconvenience, however, should not divest a sovereign of adjudicatory jurisdiction where the minimum contacts test is met. Instead, such considerations of inconvenience should be taken into account when a court examines the general procedural fairness reasons in favor of opting out which are discussed infra Part III.B.

[43] This social contract notion of jurisdiction is embodied by the Court's opinion in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The Court stated that

> to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those

courts usually hear this argument from defendants, plaintiffs who are bound unwillingly by an adjudication of their property rights are in a similar position.[44] Absent minimum contacts with the plaintiff, a distant state lacks a solid source of authority to decide the rights of a nonresident who has placed neither foot nor effect into the forum state. Thus, the analysis described in Part II justifiably provides an additional layer of protection for nonresident class members that is not afforded to residents: the demands of minimum contacts analysis must be met in all class actions where a court wishes to bind nonresidents without affording opt out rights.

II
JURISDICTION AND STATE COURT CLASS ACTIONS

Over a half-century ago, the Supreme Court recognized in *Hansberry v. Lee*[45] that class actions are an exception to the general rule that a court cannot bind individuals to a judgment in personam

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> obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Id. at 319. This theoretical underpinning continues to receive recognition as a protection of individual liberty interests. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-07 (1985) (discussing underpinnings of requirement of personal jurisdiction).

A different argument in favor of jurisdictional limitations on state court power posits that such limitations help define the lawmaking authority of one state in relation to the powers of the other states. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-94 (1980) (noting considerations of interstate federalism in determinations of personal jurisdiction). According to this argument, due process limitations on adjudicatory jurisdiction help protect states from the overreaching of other states. Shortly after *World-Wide Volkswagen*, however, the Supreme Court indicated that these federalism concerns should not be part of the analysis of adjudicatory jurisdiction. See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) (explaining that source of restrictions on states' adjudicatory power is liberty interest protected by Due Process Clause, not federalism concerns). The social contract argument accepted by this Note differs from the one rejected by the Court. The argument rejected in *Insurance Corp. of Ireland* involved the authority of a state vis-à-vis other states (which analytically should remain distinct from the considerations of individual liberty embodied in the Due Process Clause). The argument made by this Note, however, serves as a limitation on a state's power in relation to the rights of individual class members, a traditional concern of due process.

[44] The Supreme Court in *Shutts* distinguished the burdens on plaintiffs from those on defendants. See infra text accompanying notes 60-61. In *Shutts*, though, class members had the right to opt out and retain the full set of rights accorded to individual plaintiffs. In a situation where plaintiffs are forced into a mandatory class, the burdens class members face arguably exceed those on defendants. Both have similar monetary interests at stake: as an economic matter, an affirmative claim extinguished is no less an economic loss than a judgment against a defendant. Unlike defendants, however, class members who are forced to partake in litigation are not allowed to make basic decisions regarding choice of counsel and settlement negotiations.

[45] 311 U.S. 32 (1940).

unless they are made parties to the litigation.[46] Although courts can bind absent class members[47] without making them formal parties, this Part argues that it is fundamentally unfair to bind nonresident class members who lack minimum contacts with the forum in a mandatory state court class action. This Part asserts that such nonresidents have received no benefits from the forum and thus should not be obligated by a determination made against their will in the foreign state. Where a state wishes to bind nonresidents lacking minimum contacts with the forum, due process requires the granting of opt out rights to establish consent of the class members to the court's adjudicatory jurisdiction. If a unitary adjudication is necessary, but state courts cannot meet the demands of minimum contacts analysis, the national government can provide a federal forum when it deems one essential to a fair and efficient resolution of claims.[48]

A. Shutts *and Subsequent State Court Actions*

Phillips Petroleum Co. v. Shutts[49] remains the main source of guidance on the issue of jurisdiction in state court class actions. This Part briefly summarizes *Shutts* and then examines its interpretation by state courts.

1. Phillips Petroleum Co. v. Shutts

Shutts involved an action brought in Kansas state court on behalf of a class of royalty owners who received payments from Phillips Petroleum in exchange for the right to extract gas.[50] Royalty payments were tied to the resale prices of the gas. When Phillips raised resale prices, it paid royalties to the class based on the old rate until it obtained approval from the Federal Power Commission for the rate increase.[51] If the agency approved the new rates, Phillips then paid, without interest, the royalties due on the previously unapproved in-

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46 See id. at 41.

47 "Absent class members" refers to class members who did not instigate the action; the filing parties are called "named class members."

48 See infra note 113 (discussing possible federal solutions). This preference for a national solution does not entail a presumption that state courts are inferior forums. Instead, this Note simply argues that state courts are courts of limited powers when they seek to bind class members lacking minimum contacts with the forum state. To overcome these limitations, state courts must offer opt out rights to gain the consent of nonresidents.

49 472 U.S. 797 (1985). For reactions to the *Shutts* decision, see John E. Kennedy, The Supreme Court Meets the Bride of Frankenstein: *Phillips Petroleum Co. v. Shutts* and the State Multistate Class Action, 34 U. Kan. L. Rev. 255 (1985); 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 (1986).

50 See *Shutts*, 472 U.S. at 799.

51 See id. at 799-800.

crease in price.[52] The named plaintiffs filed suit on behalf of all royalty owners (who consisted of residents of all fifty states) seeking interest on the withheld payments.[53]

The state court certified the class under the state's version of Rule 23(b)(3)[54] and provided members with the right to opt out. After a trial on the merits, the court rendered judgment in favor of the class.[55] The Kansas Supreme Court affirmed.[56] Phillips appealed to the United States Supreme Court, arguing that Kansas lacked personal jurisdiction over those in the class who were residents of states other than Kansas and who lacked minimum contacts with Kansas.[57]

The Supreme Court rejected Phillips's argument.[58] The Court reasoned that because the absent class members' claims were a "recognized property interest possessed by each of the plaintiffs," such claims were protected by the Due Process Clause.[59] The Court then noted, however, that the burdens placed on an absent class action plaintiff are smaller than those placed on an absent defendant[60] and held that because a plaintiff class member can "sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection," the Due Process Clause does not afford a class member as much protection from assertions of jurisdic-

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52 See id. at 800. Phillips did pay royalties immediately on the higher price charged, but only if the owners provided Phillips with a bond or indemnity and agreed to pay interest in the event that the price increase was not approved. See id. Royalty holders who did so were not included in the class. See Shutts v. Phillips Petroleum Co., 679 P.2d 1159, 1165 (Kan. 1984), aff'd in part, rev'd in part, 472 U.S. 797 (1985).

53 See *Shutts*, 472 U.S. at 800.

54 Under the Kansas class action rule, opt out rights were discretionary. See Kan. Stat. Ann. § 60-223(c)(2) (1983).

55 See *Shutts*, 472 U.S. at 801.

56 See *Shutts*, 679 P.2d at 1159-60.

57 See *Shutts*, 472 U.S. at 806. Phillips's concern was that, absent adjudicatory jurisdiction, Kansas could not bind class members to an adverse judgment and nonresidents could simply relitigate their claims in another forum. See id. at 805. Additionally, Phillips argued that the court could assert jurisdiction only if the absent class members affirmatively consented to jurisdiction by filing an opt in form with the court. See id. at 811.

58 The Court decided at the outset of the opinion that Phillips had standing to challenge jurisdiction on behalf of the plaintiff class. See id. at 803-06. For a brief history of personal jurisdiction over plaintiffs, see Linda S. Mullenix, Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation, 28 U.C. Davis L. Rev. 871, 887-95 (1995).

59 *Shutts*, 472 U.S. at 807.

60 See id. at 808. The Court noted that class members "were not haled anywhere to defend themselves" and that named representatives and court approval of settlements protected their interests. Id. at 809. The Court added that plaintiffs need not hire counsel or appear, are "almost never" subject to counterclaims, cross-claims, or fees, and are "not subject to coercive or punitive remedies." Id. at 810.

tion as it does a defendant.[61] The Court stated that "[a]ny plaintiff may consent to jurisdiction" and that notice, "with an explanation of the right to 'opt out,' satisfies due process."[62] Thus, the Court held that the opt out right offered to class members was sufficient to gain the consent of the class to adjudicatory jurisdiction in Kansas.[63]

Shutts was a nonmandatory (b)(3) action seeking monetary damages. In a footnote, the Supreme Court expressly reserved judgment on other types of class actions: "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief."[64] Thus, the Court left unanswered questions regarding adjudicatory jurisdiction in (b)(1) and (b)(2) actions.

2. *Mandatory Class Actions in State Courts after* Shutts

After the Supreme Court's expressly limited holding, state courts were left to interpret the due process requirements that applied to mandatory class actions after *Shutts*.[65] States have taken different ap-

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[61] Id. at 810-11. This Note accepts the Court's endorsement of balancing burdens and benefits in adjudicatory jurisdictional analysis and argues that for class members lacking minimum contacts with the forum, opt out rights provide a minimal level of legitimacy to state court class actions and should be required as a matter of fundamental fairness. Such a balancing of benefits and burdens in the jurisdictional analysis also should argue that fewer contacts with the forum state are required to bind absent class members than are required to establish adjudicatory jurisdiction over defendants.

[62] Id. at 812.

[63] Some have criticized the Court's consent analysis. See, e.g., Kennedy, supra note 49, at 278-84; Miller & Crump, supra note 49, at 16-19. The Court's opinion in *Shutts* can be interpreted in two different ways: as a case about distant forum abuse or as a case about individual control of litigation. See id. at 52-55. To the extent that the Court's analysis was driven by concerns about Kansas's assertion of jurisdiction over claims of nonresidents, the case only requires the granting of opt out rights to class members who lack minimum contacts with the forum. This Part deals with this implication. If, however, the Court's due process analysis rested upon an effort to preserve access to the courts for individual litigants, due process may require that the procedural protections of opt out rights extend to all class members, including residents of the forum state. Part III of this Note addresses this issue.

[64] *Shutts*, 472 U.S. at 811 n.3. This language is similar to that found in the advisory committee's note to Fed. R. Civ. P. 23 (1966): "subdivision [23(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." If by using this language the Court was trying to carve out an exception only for (b)(2) actions and not (b)(1) actions, lower courts have not picked up on this. See infra Part II.A.2.

[65] The *Shutts* decision immediately sparked a debate over whether any mandatory class actions survived. See, e.g., Miller & Crump, supra note 49, at 52 (noting that "[t]here is no neat and logical means of resolving the question whether mandatory actions survive *Shutts*" and discussing circumstances under which mandatory actions probably still could be maintained); Diane P. Wood, Adjudicatory Jurisdiction and Class Actions, 62 Ind. L.J. 597, 602-05 (1986-1987) (arguing that actions patterned on representational model, as op-

proaches but generally agree that different adjudicatory jurisdictional standards apply to actions seeking equitable relief. The experiences of Delaware and New York courts illustrate two approaches to mandatory class actions that states have taken after *Shutts*.

Delaware courts have limited *Shutts* largely to its facts. A review of the Delaware courts' extensive experience with mandatory class actions reveals two broad conclusions concerning opt out rights in class actions that involve nonmonetary relief. First, in actions where monetary damages predominate, Delaware courts find that *Shutts* requires opt out rights only when the court lacks another basis for personal jurisdiction over class members.[66] Thus, when class members file a separate individual action in Delaware based on the same transaction as the class action,[67] or when the members purchase stock in a Delaware corporation,[68] they may be found to have consented to adjudicatory jurisdiction. Second, if the relief sought in an action is primarily nonmonetary, Delaware courts hold that due process does not require opt out rights for residents and nonresidents alike,[69] even if monetary

posed to those patterned on mass joinder model, do not require opt out rights to bind absent class members).

[66] See, e.g., In re Mobile Communications Corp. of Am., Inc., Consol. Litig., CIV. A. No. 10607, 1991 WL 1392, at *15 n.18 (Del. Ch. Jan. 7, 1991) (stating that because objectors were subject to court's jurisdiction, "the strict holding of Shutts[] has no direct application here"), aff'd, 608 A.2d 729 (Del. 1992).

[67] See, e.g., id. ("Since the objectors are the non-settling plaintiffs, they are plainly before the court, having consented to this court's jurisdiction by filing suit here . . . .").

[68] See Hynson v. Drummond Coal Co., 601 A.2d 570, 579 (Del. Ch. 1991) (holding that Delaware courts have specific jurisdiction over nonresident stockholders who bought stock in Delaware corporation and reasoning that it is "not unreasonable—not inconsistent with traditional notions of fairness . . . —to conclude that the law has long put the buyer of corporate stock on notice that corporate rights attaching to stock ownership may be adjudicated in a single proceeding in . . . the corporation's state of incorporation"). One challenge to such an assertion of jurisdiction was denied. See Grimes v. Vitalink Communications Corp., CIV. A. No. 92—2722, 1993 U.S. Dist. LEXIS 3653, at *1 (E.D. Pa. Mar. 1, 1993) (rejecting jurisdictional challenge and dismissing case based on release approved as part of Delaware mandatory class action settlement), aff'd, 17 F.3d 1553 (3d Cir. 1994). On appeal in *Grimes*, the Third Circuit upheld jurisdiction on the basis of both stock ownership and purposeful availment of Delaware law by surrendering shares in response to a tender offer with the knowledge of one's status as a class member in a pending action in Delaware. See Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1558-60 (3d Cir. 1994). The assertion of jurisdiction based on stock ownership has not gone without criticism. See Stephen E. Morrisey, Note, State Settlement Class Actions That Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation, 95 Colum. L. Rev. 1765, 1786 n.137 (1995) (arguing that *Hynson* defies Shaffer v. Heitner, 433 U.S. 186 (1977)). The Supreme Court's suggestion in *Shutts* that due process reflects to some extent a balancing of benefits and burdens, see supra notes 60-61 and accompanying text, however, may suggest that the minimum contact requirements for class members may be less stringent than those for defendants.

[69] See, e.g., Nottingham Partners v. Dana, 564 A.2d 1089, 1098 n.19 (Del. 1989) ("Following *Shutts*, the Court of Chancery has consistently held that there is no due process

damages claims are either asserted in the action or waived as part of a settlement agreement.[70] Additionally, the cases express a preference to certify classes as mandatory for a variety of reasons, including fairness to the defendant[71] and efficiency.[72]

In comparison to Delaware, New York may afford a greater opportunity to opt out. In *Woodrow v. Colt Industries, Inc.*,[73] the semi-

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right to opt out of a Rule 23(b)(2) class action, in which the plaintiff seeks equitable relief, exclusively or predominantly.").

Delaware courts frequently find that nonmonetary damages predominate. See, e.g., Steiner v. Sithe—Energies, L.P., No. 9511, 1988 WL 36133, at *3 (Del. Ch. Apr. 18, 1988) (noting that monetary relief was ancillary to equitable relief and thus no opt out was required); see also Grant, supra note 28, at 242 (noting that courts favor certification of mandatory classes). Nonmonetary damages, however, do not always predominate. See, e.g., Raskin v. Birmingham Steel Corp., Civ. A. No. 11365, 1990 WL 193326, at *7-*8 (Del. Ch. Dec. 4, 1990) (finding that weak state claims did not predominate over stronger claim for monetary damages arising under federal law and holding that court was unable to approve settlement that sought to release federal claim without opt out rights), settlement subsequently approved, Civ. A. No. 11365, 1991 WL 29961, at *3 (Del. Ch. Mar. 4, 1991) (approving settlement of state claims in mandatory action after parties agreed to exclude federal claims from scope of release).

[70] Typical Delaware settlement agreements contain language that release all claims arising out of the same transaction:

> "All claims, rights, causes of action, suits, matters and issues, known or unknown, that arise now or hereafter out of, or that relate to, or that are, were or could have been asserted in connection with [the underlying factual events] by any member of the Class or by Vitalink, either directly, individually, derivatively, representatively or in any other capacity against any of the defendants in the Consolidated Action . . . shall be compromised, settled, released and discharged . . . ."

Grimes, 17 F.3d at 1555 n.1 (quoting language from settlement agreement). Even the waiver of exclusive federal claims does not require opt out rights according to Delaware courts. See, e.g., *Nottingham Partners*, 564 A.2d at 1101 (approving settlement with release that bars Securities Exchange Act claims pending in federal court); In re Mobile Communications Corp. of Am., Inc., Consol. Litig., CIV. A. No. 10607, 1991 WL 1392 (Del. Ch. Jan. 7, 1991) (same), aff'd, 608 A.2d 729 (Del. 1992). The Supreme Court in Matsushita Electric Industrial Co. v. Epstein, 116 S. Ct. 873, 878 (1996), held that federal courts must give such releases full faith and credit under 28 U.S.C. § 1738 (1994). For an excellent summary of the case and its ramifications, see Kahan & Silberman, supra note 10.

[71] See, e.g., *Nottingham Partners*, 564 A.2d at 1101 (holding that opt out rights in hybrid action were discretionary and that court "must balance the equities of the defendants' desire to resolve all claims in a single proceeding against the individuals' interest in having their own day in Court").

[72] See, e.g., Wacht v. Continental Hosts, Ltd., Civ. A. No. 7954, 1994 WL 525222, at *10 (Del. Ch. Sept. 16, 1994) ("[T]he Court must keep in mind its limited judicial resources and attempt to pursue the most efficient course of action. . . . The possibility exists of other litigation similar or identical to plaintiff's, which compels me to attempt to resolve that litigation at one time, if possible. Certifying plaintiff's suit as a class action pursuant to . . . Rule 23(b)(1)(B) accomplishes that purpose.").

[73] Woodrow v. Colt Indus., Inc. (In re Colt Indus. Shareholder Litig.), 566 N.E.2d 1160 (N.Y. 1991). The case arose out of a corporate merger agreement in which Morgan Stanley agreed to make a tender offer to purchase outstanding shares of Colt, and Colt agreed to compensate Morgan Stanley if the merger was not effectuated. See id. at 1161. In a con-

nal New York case on opt out rights after *Shutts*, the New York Court of Appeals noted that mandatory class actions survived *Shutts*,[74] but the court was troubled by the settlement's inclusion of a release of claims purporting to extinguish actions for damages. It held that the trial court erred "by seeking to bind an absent plaintiff with no ties to New York State to a settlement that purported to extinguish its rights to bring an action in damages in another jurisdiction."[75] The court reasoned that *Shutts* requires opt out rights in actions seeking "both substantial monetary relief and equitable relief" and that the settlement agreement (which required the class to waive all claims for monetary damages) transformed the action into just that.[76]

The Delaware and New York decisions illustrate a general agreement that *Shutts* does not disturb mandatory actions seeking nonmonetary relief. In cases where a court finds that monetary relief predominates over equitable relief, it affords opt out rights if adjudicatory jurisdiction is otherwise lacking. If the court finds that equitable relief predominates, it likely will deny opt out rights. Thus, the due process rights of class members frequently turn on a "predominance" determination that is virtually unquantifiable[77] and subject to

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solidated action in New York state court, the parties reached a settlement agreement in which Morgan Stanley agreed to reduce the amount that Colt would have to pay if the merger agreement were terminated. See id. at 1162. In exchange, class members had to agree to a release of all claims related to the offer and merger. See id. The trial court certified the class and enjoined class members from filing suits in other jurisdictions based on the same factual basis. See id.

In response to the publication notice, the James S. Merritt Co. of Missouri filed an action in federal district court and requested exclusion from the New York action. See id. Merritt asserted that it lacked minimum contacts with New York and that due process required the opportunity to opt out of the settlement. See id. At the settlement hearing, the trial judge rejected Merritt's opt out request and enjoined all class members from conducting further litigation related to the merger. See id. at 1162-63.

[74] See id. at 1164-65. The Court of Appeals noted that actions seeking "predominantly equitable relief" could be maintained as mandatory actions binding class members, "whatever their ties to the forum State." Id. at 1166. The court reasoned that in such cases, judgments benefit the class as a whole, and interests in individual control are "outweighed by the importance of obtaining a single, binding determination." Id.

[75] Id. at 1167.

[76] See id. at 1168. The opinion is unclear as to whether the holding extends to all unnamed class members or is restricted to those who lack minimum contacts. Similarly, the court did not indicate whether monetary damages merely had to be "substantial" or whether they must predominate.

[77] Rare exceptions do exist. See *Robertson I*, No. CV-92-021 (Ala. Cir. Ct. May 26, 1994) (quantifying value of both equitable and monetary relief at not less than $55,000,000), aff'd and reprinted in *Robertson II*, 676 So. 2d 1265, 1287 (Ala. 1995), cert. dismissed, 117 S. Ct. 1028 (1997) (per curiam). Comparing the value of the equitable relief with that of the monetary relief, however, remains difficult. First, where the relief granted to each class member varies based upon the individual injury, the result of a predominance calculation may differ for different class members. Second, one must question the entire enterprise of comparing the value of the equitable relief with that of the monetary relief

extraordinary discretion where no well defined set of considerations exist.[78] If the holding of *Shutts* is limited to cases seeking predominantly monetary damages, the opt out rights of class members lacking minimum contacts with the forum will depend upon determinations as to which type of relief predominates.

B. Requiring State Courts to Meet the Demands of Minimum Contacts in Equitable Class Actions

A narrow reading of *Shutts* has no implications for jurisdiction in mandatory actions maintained under Rule 23(b)(1) or (b)(2). In a sense, the Supreme Court merely has reserved judgment on these actions by "intimat[ing] no view" on actions that are not "wholly or predominately" for monetary damages.[79] Lower courts, however, ascribe great meaning to the Court's reservation and hold that actions that fit the (b)(1) or (b)(2) categories need not satisfy any jurisdictional requirement.

1. The Money-Equity Distinction

One should consider whether the money-equity line is the correct one to draw if some actions will not be subject to the limits on power provided by a minimum contacts analysis. Discernible policy reasons supporting a distinction based upon the nature of the relief sought are lacking.[80] For instance, assume that class representatives in *Shutts*

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because the two forms of relief are frequently exchangeable in settlement negotiations. Inasmuch as providing an equitable solution represents a quantifiable cost to the defendant, the defendant should be indifferent as to whether it provides the nonmonetary solution or whether it simply pays damages equal to the costs it would incur complying with an equitable judgment. Thus, when the predominance test is used to determine whether opt out rights should be granted, parties to settlement negotiations may manipulate the nature of the relief to the detriment of class members seeking to opt out. Courts seeking to avoid such manipulation may instead look to the relief requested in the complaint, but parties will likely respond by manipulating the pleadings.

[78] See Howard M. Downs, Federal Class Actions: Diminished Protection for the Class and the Case for Reform, 73 Neb. L. Rev. 646, 679 (1994) ("Such ambiguity within the rule has led to category games, which seriously jeopardize notice, appearance, and opt-out rights."); Miller & Crump, supra note 49, at 39 n.269 (noting that abuse may be problem). This problem of certification choice is common. See Safranek, supra note 30, at 270 ("Most class actions that seek injunctive or equitable relief also seek monetary damages."). Many courts may prefer mandatory actions to limit the risks of inconsistent determinations or to reap gains in administrative efficiency. See supra notes 71-72.

[79] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985); see also text accompanying note 64.

[80] If one reads the distinction drawn in *Shutts* as more than mere silence on the issue of class actions seeking equitable relief, a couple of considerations may support treating equitable class actions differently from those seeking monetary damages. First, the distinction between actions for monetary damages and those for equitable relief may help harmonize the *Shutts* Court's application of principles of adjudicatory jurisdiction to class members

sought an injunction to force the payment of interest on all future withholdings of royalty payments instead of just seeking compensation for past interest payments. Why should a state not have to establish adjudicatory jurisdiction on these facts? The same rights to interest payments are at stake. Further, the interests of the class in this action for injunctive relief are arguably greater because the suit for prospective relief seeks to determine the rights to interest for all time. The same unfairness is present when a distant forum asserts authority to bind nonresident class members who have no contacts with the forum regardless of the type of relief sought. Moreover, the adequacy of representation is not enhanced by the change in relief sought. In both *Shutts* and this hypothetical, the named representatives are likely to represent the class equally well. This altered version of *Shutts* illustrates the difficulty with the distinctions courts have drawn after *Shutts* between cases seeking monetary relief and those requesting equitable relief: the nature of relief sought is not related to the importance of the claims at stake in this example and the distinction does not alleviate the basic unfairness of a foreign court determining without consent the rights of class members who have no connection with the forum.

Although the nature of relief does provide a bright line rule, this bright line dims when applied to hybrid actions. Imagine a second variation on the facts of *Shutts* where the plaintiff class seeks both monetary restitution of interest and relief enjoining the future nonpayment of interest. Which form of relief predominates? More importantly, why should it matter? This second hypothetical presents the same controversy that was at the heart of *Shutts*: whether interest must be paid on the withheld payments. The form of the relief a court finds to predominate in this controversy should not determine the due process rights of the class members. If a court is required by *Shutts* to provide notice and grant opt out rights to nonresident class members in an action for small damage claims, why should these fairly substan-

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with the historical equity practices of state courts in class actions. The distinction helps ensure that the application of jurisdictional principles to class members is not inconsistent with well established state practices. This Note argues that such a distinction is not required for harmonization because state court traditional assertions of power in class actions are generally consistent with modern notions of adjudicatory jurisdiction. See infra Part II.C.

Alternatively or additionally, the *Shutts* distinction between actions seeking equitable remedies and those seeking money may be aimed at preserving state court authority in those cases where unitary adjudications are preferred. As explained below, however, the money-equity distinction is overinclusive. See infra text accompanying note 81. Moreover, such necessity justifications for jurisdiction generally disregard the limitations on state court power to bind nonresidents. See infra note 92.

tial protections be defeated by increasing the stakes of the litigation through a request for prospective relief? Under this logic, when claimants have small amounts of property at stake, they have the most protection and control (through opt out rights); as the value of the property at stake increases,[81] they lose those rights. The distinction between monetary and equitable relief fails to distribute opt out rights to the cases where the plaintiffs have the greatest interest in controlling the course of litigation. Beyond this interest in control, the distinction drawn after *Shutts* fails to recognize that state courts are instruments of states with limited powers to bind those lacking minimum contacts with the forum. Other arguments, however, may support mandatory classes despite the failure of the forum to establish minimum contacts with the class. Part II.B.2 examines these arguments in favor of mandatory class actions in cases involving equitable relief.

2. *Rationales Supporting Mandatory Class Actions in the Absence of Minimum Contacts*

This Part discusses two arguments that support exempting equitable class actions from the requirements of minimum contacts—adequacy of representation and historical equitable practices. Although both rationales offer strong support in favor of mandatory classes, neither overcomes the basic unfairness that results when a court seeks to bind nonresidents lacking minimum contacts with the forum state against their will. In short, a state having no relationship of reciprocal rights and responsibilities with class members lacks a legitimate basis for the power to bind class members against their will.

a. Adequacy of Representation. Some courts and commentators have suggested that adequacy of representation is all that due process requires.[82] *Shutts*, however, failed to recognize this position

[81] The assumption here is that prospective relief which seeks to bind Phillips in all future rate increases is more valuable and thus would predominate over the relief for unpaid interest on a past rate increase.

[82] See, e.g., In re Louisiana-Pacific Corp. Derivative Litig., 705 A.2d 238, 240 (Del. Ch. 1997) (Allen, Ch.) ("[U]nder Rule 23(b)(1) or (2) the close identity of interests of the absent class members with those of the members before the court and satisfaction of the Subsection 23(a) criteria are sufficient to satisfy due process of law . . . ."); Andrea R. Martin, Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, 25 Hastings L.J. 1411, 1432-35 (1974) (arguing that procedural due process rights of notice and adequate representation are sufficient to bind class members). Some support for this proposition is found in Hansberry v. Lee, 311 U.S. 32, 42 (1940) ("[T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted[] fairly insures the protection of the interests of absent parties who are to be bound by it.").

with regard to actions seeking predominantly money damages;[83] the Supreme Court held that opt out rights establish adjudicatory jurisdiction by consent.[84] The requirement of a basis for adjudicatory jurisdiction should extend to cases seeking equitable relief because the same unfairness to class members lacking minimum contacts with the forum remains: the forum has no reciprocal relationship with these class members such that it is fair to compel them to have their rights adjudicated in the forum state's proceeding. Although adequacy of representation may address some procedural fairness concerns embodied in due process, it fails to provide any justification for a state compelling the determination of the substantive rights of class members with whom the state has no relationship.[85]

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[83] Had the argument been presented, *Shutts* would have been somewhat of an ideal case to recognize the proposition that adequacy of representation could satisfy due process without another basis for adjudicatory jurisdiction. Few class actions engender greater confidence in the class mechanism: in *Shutts*, the class attorney did not compromise the action and won a complete victory after a trial on the merits.

[84] See supra text accompanying notes 60-63; see also *Shutts*, 472 U.S. at 812 ("[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' . . . .").

[85] Judge Diane Wood provides a variation on the adequacy argument suggesting that jurisdictional requirements should vary depending upon the cohesiveness of the class and the representational nature of the particular litigation, and not solely upon the classification under Rule 23. See Wood, supra note 65, at 598-99. In her view, class actions conform to one of two conceptual models: "those following a joinder approach, and those following a representational approach." Id at 599. Some class actions function as a mass joinder device, essentially meeting just the Rule 20 joinder standards and bringing together a minimally cohesive class. See id. at 602-03; see also Hutchinson, supra note 23, at 459. For such actions, Judge Wood would require an opt in procedure. See Wood, supra note 65, at 603. Class actions following a representational approach further divide into two subcategories. "Quasi-representational" actions, such as most of the common-question (b)(3) actions, are those where the class representative's interests coincide perfectly with those of the class. See id. at 603-04. In such actions, Judge Wood recommends that class members still have the right to opt out, but not as a justification for jurisdiction. See id. In pure representational cases, the substantive interests of all class members are identical—it is impossible to decide the representative's claim without deciding the claims of absentees. See id. at 604-05. Judge Wood argues that pure cases require nothing more than adequate representation (no opt out rights) to meet the demands of due process. In both the pure and quasi-representational actions, the class members are deemed "present" through their representative and thus subject to the jurisdiction of the court. See id. at 603-04.

Judge Wood's thoughtful approach avoids the potential problems of a post-*Shutts* approach that looks to the nature of the relief to determine the level of protection class members receive. This approach, however, like other models based upon adequacy, is undermined by the *Shutts* decision. See id. at 622 ("*Shutts* has probably foreclosed for the time being the possibility of classifying either state or federal court small claim damage actions as purely representational, no matter what can be said for this approach in principle."). Absent a rethinking of *Shutts* by the Supreme Court, the application of Judge Wood's framework would still produce the strange distinctions between monetary and injunctive relief discussed supra Part II.B.1. This would lead to further incentives to manipulate pleadings to avoid procedural protections. More importantly, what right does a state court lacking minimum contacts with a class member have to deem that member "present"

b. Historical Exception. A second argument in favor of state court adjudicatory jurisdiction in equitable class actions rests upon historical practice. The argument is that because courts have long asserted their equitable powers in class actions, such powers cannot now be deemed to violate traditional notions of fair play. The English tradition from which modern practices grew,[86] however, never was subject to the limitations on sovereign power that states within a federal system are: in England judgments were enforced where there was power to enforce them.[87] Many a state court, once finding that an action is predominantly for equitable relief, makes no attempt to justify its authority by finding a basis for adjudicatory jurisdiction.[88] Such a practice derives support from the Supreme Court's distinction in *Shutts* and from language in *Hansberry v. Lee*: "to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it."[89]

The problem with state courts failing to find a basis for adjudicatory jurisdiction based upon the practices of the equity courts that created class actions is that the latter, unlike the former, did not operate under the constraints imposed by a federal system. In the United States, the powers of a state to affect the rights of another state's residents are limited. Here the historical analogy fails to endow states with wide-ranging equitable power. The powers of the rendering state, like those of England, can only affect the persons and property that have a connection with the state. Most traditional uses of the

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when the class member wishes to opt out? A justification for state court power should be required in all actions. Equitable class actions should have to meet the same jurisdictional hurdles that individual actions and monetary class actions must meet because the same unfairness exists. What right does a forum state have to determine the value of a compelled litigant's claim? Without consent or a preexisting relationship with the litigants, a state should have no such right, despite the fact that the interests of the class are aligned such that the foreign forum is in a better position to adjudicate those rights. Competency should not imply authority.

[86] See, e.g., John E. Kennedy, Digging for the Missing Link, 41 Vand. L. Rev. 1089, 1101-12 (1988) (reviewing Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987)) (summarizing origins of group litigation).

[87] See, e.g., 1 Dan B. Dobbs, Law of Remedies § 2.2 (2d ed. 1993) (tracing equity's origins from King's Chancellor who asserted power throughout realm and noting that equitable judgments were "personal and there were echoes in it of the king's political power of an earlier era"); see also Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 Harv. L. Rev. 718, 723-24 (1979) (comparing jurisdictional dilemma of states to that of federal courts binding residents of other nations).

[88] See, e.g., *Robertson II*, 676 So. 2d 1265, 1271 (Ala. 1995), cert. dismissed, 117 S. Ct. 1028 (1997) (per curiam).

[89] 311 U.S. 32, 41 (1940).

class action mechanism arguably meet such a requirement.[90] Many modern expansions of class actions, however, especially those involving mass tort claims, reach far beyond the boundaries of the forum state.[91] Such state actions do not find much support in historical class action practices. The traditional uses of the class action mechanism are, by and large, consistent with the requirement of minimum contacts.[92]

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90 The term "traditional" denotes the early examples of class litigation as described in the advisory committee notes to Rule 23. For a short description of class actions under Rule 23 prior to the 1966 amendments, see infra note 98. The court in *Hansberry*, in discussing the propriety of a state court action, noted that the class suit enables a decree where joinder is impossible because "some are not within the jurisdiction." Id. at 41. On its face, this statement seems to offer support for unleashing the power of states to bind those who lack minimum contacts with the forum, but *Hansberry* was an adjudication determining the validity of a covenant running with the land. See id. at 37-38. State courts have always had the power to render judgments in rem.

91 With regard to this expansion, some commentators have asserted that adjudicatory jurisdiction simply is not a concern in class suits provided that those suits adhere to the requirements of modern Rule 23. See, e.g., Patricia M. Noonan, Note, State Personal Jurisdictional Requirements and the Non-Aggregation Rule in Class Actions, 1987 U. Ill. L. Rev. 445, 462 ("[T]he new rule [23] was intended to make class actions an exception to the traditional personal jurisdictional requirements."). Adjudicatory jurisdiction in federal courts may be based on class members' minimum contacts with the relevant "sovereign"—the United States. (The impediment to federal courts asserting such jurisdiction would not be a due process limitation, but instead a statutory or rule-based one. See infra note 113.) Jurisdiction based upon contacts with the United States should not suffice for state court jurisdiction. In the context of interstate interpleader, Chief Justice Traynor took issue with the notion that state courts are subject to different rules than federal courts, asserting that "[a] remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead." Atkinson v. Superior Court, 316 P.2d 960, 966 (Cal. 1957). Professor Brilmayer has pointed out the flaw with this position: "The fallacy is that where the issue is one of sovereignty, there are things that may constitutionally be done by the federal government but not by a State." Brilmayer, supra note 15, at 109; see also Feldman v Bates Manuf. Co., 362 A.2d 1177, 1179-80 (N.J. App. Div. 1976) ("[T]he limitation on our jurisdiction over the members of the class here is one peculiar to state courts. . . . [A]s a consequence of the territorial limitations of state power, the Due Process Clause of the Fourteenth Amendment limits the judicial power of the states."). The basis for this limitation is not a concern that states will intrude upon the powers of other states; instead, the due process limits stem from the lack of reciprocal relationships of rights and responsibilities between the forum state and the class members. See supra note 43 and accompanying text.

92 A few other arguments, also emphasizing the need for a single adjudication, attempt to reach similar results as this historical argument. Sometimes a necessity argument is made: when multiple suits risk inconsistent results and no forum has jurisdiction over all the necessary parties, the Constitution does not forbid a single adjudication. See Brilmayer, supra note 15, at 108. Professor Brilmayer notes that "the right to some forum . . . has an appealing ring." Id. at 109. The Restatement of Judgments is in accord: "A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process." Restatement (Second) of Judgments § 41(2) (1982); see also Kennedy, supra note 49, at 259 ("The American Law Institute simply assumed that necessity dictated jurisdiction and drew no distinction between mandatory and permissive class

3. *In Support of the Minimum Contacts Requirement*

Forcing the forum of a mandatory action to have a traditional basis of jurisdiction over class members has many benefits. First, such limitations place a check on state power that helps to ensure that the rights of absent members of a mandatory class are adjudicated by a sovereign with whom class members have established a reciprocal relationship of rights and responsibilities such that the exertion of authority by the state to force members into a single class is not arbitrary or unfair. Second, applying the same jurisdictional requirements to monetary and equitable class actions reduces the incentives for class counsel to manufacture jurisdiction through manipulative pleading and certification requests that emphasize nonmonetary remedies of little value to the class. Third, the availability of forum shopping is likely to be reduced because class representatives will have to pick a forum with which all class members have contacts.[93]

Applying the requirement of minimum contacts to all mandatory class actions, however, is not without costs. The main drawback involves disputes that make strong cases for unitary adjudication. A minimum contacts requirement may mean that no single court has adjudicatory jurisdiction to bind the entire class and multiple adjudications may frustrate legitimate interests of the defendant or of some class members. These costs will vary with the types of class actions that are inhibited by requiring a traditional basis for jurisdiction. The next Part briefly surveys class actions, identifying some types of actions that will be largely unaffected by the adjudicatory jurisdictional requirements proposed herein and some mandatory actions that will be difficult to maintain.[94]

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actions."). Such necessity justifications, however, entail unfairness to class members who will be bound by a distant state that asserts its coercive power in adjudicating their rights even though the state lacks a connection to those class members. This Note argues that where unitary adjudications cannot be maintained in state courts because of problems obtaining adjudicatory jurisdiction, Congress is free to provide a national solution. See infra notes 113-14 and accompanying text.

Another argument posits that states, because of their connection to the nation, gain the power to bind nonresidents to equitable judgments because all citizens impliedly consent to such practices of another state when justice so demands. Though it is not inconsistent with past practices to superimpose such a rationale on the past, the argument greatly stretches the notion of consent and ignores the fact that most of these historical uses are consistent with traditional bases of adjudicatory jurisdiction. See infra Part II.C.

[93] See Wood, supra note 65, at 622 ("A minimum contacts requirement would mean the demise of a certain amount of forum-shopping, but that is not such a bad thing."). If no single forum with minimum contacts with the class exists, this Note argues that multiple actions should be brought unless a federal solution exists. See infra notes 112-14 and accompanying text.

[94] The holding of *Shutts* cannot be stressed enough here: opt out rights suffice for consent to jurisdiction on the behalf of class members. Thus, the issue here is primarily

C. *The Impact of Requiring a Traditional Jurisdictional Basis*

The extension of the minimum contacts requirement[95] to mandatory class actions will undoubtedly prevent the maintenance of some (b)(1) and (b)(2) actions unless opt out rights are provided. Nevertheless, the mere existence of hardships caused by the inability to bring unitary actions[96] does not justify abdicating the requirement of state adjudicatory authority.[97] Beyond the individual fairness considerations that require a state to have a basis for adjudicatory jurisdiction, the imposition of a minimum contacts requirement may be a beneficial reform as a practical matter, depending upon the number and types of actions inhibited. This Part examines the consequences of requiring an adjudicatory jurisdictional basis for actions seeking equitable relief and argues that this requirement will not prohibit many mandatory class actions,[98] but will curtail some state court class actions that some commentators consider to be abusive uses of the class action mechanism.

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whether the class action can go forth as a mandatory action, not whether claims can be litigated in class actions at all.

95 The minimum contacts required for a court to assert adjudicatory jurisdiction over class members are likely fewer or less significant than those required to bind defendants. See supra note 61 and accompanying text.

96 One particular concern about nonmandatory class actions seeking injunctive relief is that the relief won by the class suit will benefit all class members, not just those who agree to be bound by the suit. By opting out, class members preserve the opportunity for a second bite at the apple should the defendant prevail in the class action. In subsequent suits, the defendant cannot assert claim preclusion and will only have the benefit of stare decisis to protect it. Class members seeking to opt out also may hope to gain double recovery by bringing an individual suit for damages.

In other actions, the equitable relief can be restricted to specific individuals who remain in the class. For example, in *Robertson I*, No. CV-92-021 (Ala. Cir. Ct. May 26, 1994), aff'd and reprinted in *Robertson II*, 676 So. 2d 1265, 1293 (Ala. 1995), cert. dismissed, 117 S. Ct. 1028 (1997) (per curiam), where plaintiffs sought relief in a case involving insurance fraud, see infra Part IV.A, injunctive relief freezing premium rates or granting rescission of contract easily can be restricted to the members of the class that do not opt out. In such cases, the presence of equitable relief does not argue strongly for unitary adjudication.

97 See infra notes 112-14 and accompanying text.

98 Many actions with historical roots in the United States will be unaffected. For example, the actions maintainable under the Rule 23 in force from 1938 to 1966 (which attempted to codify the prevailing practice under Equity Rule 38, see Adolf Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 626-27 (1971)), are generally consistent with requiring a basis for adjudicatory jurisdiction. Rule 23(a)(1) class actions ("true" class actions) allowed suits involving joint, common, or secondary rights. Many of these rights related to property or to institutions over which a state court probably had in rem jurisdiction. Similarly, 23(a)(2) "hybrid" classes involved class members' individual interests in specific property or funds; again, a state court was likely to have in rem jurisdiction in such cases. Of course 23(a)(3) "spurious" classes would not necessarily meet the demands of minimum contacts, but these suits had "no conclusive effect on nonappearing members of the class." Id. at 627.

Many actions that demand a unitary adjudication will not require opt out rights because the forum will have minimum contacts with the class or the property at stake.[99] For instance, actions certified under Rule 23(b)(2), those seeking injunctive or declaratory relief, include civil rights actions against local governments[100] and adjudications of nuisances or riparian rights. Class members generally will satisfy the minimum contacts requirements in such actions because these actions commonly involve classes comprised solely of state residents or members who have minimum contacts with the forum state. Similarly, actions certified under Rule 23(b)(1)(A), involving circumstances that threaten to set up incompatible standards of conduct for the defendant,[101] generally satisfy the demands of minimum contacts. For example, in an action seeking to have a tax declared invalid, a class of all those subject to the tax has sufficient contacts with the taxing state such that a court within that state can assert adjudicatory jurisdiction over the class.[102] Finally, many of the cases where courts certify a class under Rule 23(b)(1)(B) to protect the interests of nonparties satisfy the demands of minimum contacts. For instance, cases involving determinations of corporate rights, such as compelling compliance with fiduciary duties in a freeze-out merger,[103] may be adjudicated in a mandatory action in the state of incorporation.[104] Further, in a case seeking to establish rights with regard to a common fund or trust, the situs of the asset in a state should be sufficient to allow a court of that

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99 The requirement of minimum contacts, however, may decrease forum choice. See supra note 93.

100 See, e.g., Goebel v. Colorado Dep't of Institutions, 764 P.2d 785, 788 (Colo. 1988) (asserting claims on behalf of "chronically mentally ill persons in northwest Denver").

101 Rule 23(b)(1)(A)

> takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting towards customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners).

Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 388 (1967) (footnotes omitted).

102 Many of the traditional examples of (b)(1)(A) actions (such as actions involving nuisances, riparian rights, and municipal bonds), because they seek injunctive relief, also fit comfortably within a (b)(2) framework. As discussed above, such actions frequently meet the demands of minimum contacts.

103 See, e.g., Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

104 See supra note 68 (noting Delaware courts' assertion of specific jurisdiction over stockholders in Delaware corporations); see also supra notes 60-61 and accompanying text (explaining Supreme Court's reasoning that due process affords plaintiffs less protection than defendants). Similarly, in a (b)(1)(B) action involving the reorganization of a fraternal benefit society, a suit may be able to proceed as a mandatory action in the state where the society is headquartered.

state to determine individual rights with respect to the property.[105] In sum, the requirement of a minimum contacts analysis will not prevent the maintenance of many mandatory actions.

Undoubtedly, however, a minimum contacts requirement will have an impact on class composition in some mandatory actions. The remainder of this Part examines mandatory actions which may be inhibited by a minimum contacts requirement. First, examples of (b)(2) actions that a minimum contacts requirement may impede include cases involving interstate nuisances and frauds. In any such case, no single state may have sufficient minimum contacts with all the members of the class allegedly injured by the defendant, thus preventing a mandatory, unitary adjudication of the controversy. Thus, multiple adjudications in different states may have to proceed separately. Such a problem, however, is no different from that frequently presented by multiple individual suits. For example, under Federal Rule 19, a federal court is unable to join parties who should be joined in the interests of justice because of the absence of personal jurisdiction.[106] A similar problem occurs under state joinder rules in state court actions. States are unable to cure the adjudicatory jurisdictional deficiency in cases where joinder is desirable; thus, nothing seems terribly amiss if the same problem cannot be cured in the mass joinder context.[107]

Second, some (b)(1)(A) actions may be prevented from being maintained in the absence of opt out rights. One example is of recent invention: the punitive damages overkill action.[108] Some courts certify such an action as mandatory where individual actions seeking punitive damages may result in the defendant being liable for an amount greater than that permitted by the Due Process Clause.[109] Assuming

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105 See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311-13 (1950) (noting that states have sufficient interests in trusts established by their own laws to exercise such jurisdiction over them regardless of how court classifies that adjudicatory jurisdiction). Some commentators argue that common fund cases "often present the most appealing situations for mandatory class joinder today." Miller & Crump, supra note 49, at 40. Although a class member's contacts with the situs may be slight, such contacts should be sufficient to satisfy the demands of due process in light of the limited burdens placed on class members. See supra notes 60-61 and accompanying text.

106 See Fed. R. Civ. P. 19(b) (outlining circumstances under which suit may proceed despite absence of necessary party).

107 Limitations in federal court are a matter of statute. Presumably Congress could authorize, if it wished, nationwide service of process for Rule 19 parties. The Due Process Clause of the Constitution, however, more severely restricts the ability of states to join parties.

108 See, e.g., *Robertson I*, No. CV—92—021 (Ala. Cir. Ct. May 26, 1994), aff'd and reprinted in *Robertson II*, 676 So. 2d 1265, 1274 (Ala. 1995), cert. dismissed, 117 S. Ct. 1028 (1997) (per curiam).

109 The acceptance by courts of the overkill rationale for mandatory certification has been mixed. See, e.g., Miller & Crump, supra note 49, at 43-49 & 43 n.296. Courts some-

that class members have a property interest in punitive damages protected by the Due Process Clause,[110] a unitary adjudication of punitive damage claims consistent with due process may not be possible. The defendant, however, will not be harmed irreparably; defendants who think that the due process limitations on punitive damage awards have been exceeded can appeal and seek reduction.[111]

Finally, some (b)(1)(B) mandatory classes will be destroyed by a minimum contacts requirement, despite the possible benefits of a unitary adjudication. For instance, minimum contacts are frequently lacking in the so-called constructive bankruptcy cases, where a defendant's potential liability exceeds its assets. To the extent that the assets of the defendant lack a situs in a single state and that class members lack minimum contacts with that state, such actions would be prevented from proceeding as mandatory actions. That federal bankruptcy proceedings offer relief to debtors and protections to creditors in such cases would seem to temper the importance of limitations on state courts' ability to provide judicial remedies in such situations.

In the end, the problems posed by requiring a traditional basis for adjudicatory jurisdiction are limited for a variety of reasons. First, a minimum contacts basis for adjudicatory jurisdiction (either in personam or in rem) is frequently available. Where minimum contacts exist, a state can adjudicate actions and approve settlements, subject

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times employ this rationale to certify the class under Rule 23(b)(1)(B) on the theory that limits on punitive damages prevent litigants who are not the first to litigate from recovering. See id. The Supreme Court's holding in BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1598 (1996) (holding that state court award of "grossly excessive" punitive damages violates Due Process Clause of Fourteenth Amendment) may encourage more attempts at punitive damage overkill certifications.

110 Some courts have suggested that because there is no individual property interest in receiving punitive damages, state courts are free to adjudicate such claims without running into due process requirements. See, e.g., *Robertson I*, No. CV-92-021, reprinted in *Robertson II*, 676 So. 2d at 1300 ("As a matter of law, the Court concludes that no plaintiff has a right to punitive damages."). Even if no such individual property interest exists after the events giving rise to the lawsuit occur, plaintiffs can argue that such an interest arises once they hire an attorney to file an individual action seeking punitive damages. Once parties are induced by the substantive law to file suit, a court may hold that some property interest in punitive damages arises, even though the purpose behind punitive damages is not remedial in nature. If punitive-damage-overkill mandatory class actions are permitted on the theory that no property rights are at stake, and thus the due process requirement of adjudicatory jurisdiction is inapplicable, such actions should not adjudicate or settle claims for compensatory damages unless the court has a basis for adjudicatory jurisdiction.

111 Of course, such limits may be imposed more efficiently through a single class suit, but adjudicatory jurisdiction, and all other due process rights for that matter, frequently are at odds with efficiency goals. States can help reduce this problem by giving a preference to class litigation as the superior method of awarding punitive damages. Such limitations make the most sense when punitive damages are awarded on a "pattern and practice" theory.

to the considerations outlined in Part III. Second, the inability of state courts to bind some class members to settlements does not always pose a significant problem for a variety of reasons: the court may lack jurisdiction over a small minority of the class; those class members who do not have minimum contacts with the forum may never collaterally attack the judgment in the class action; the benefits of the relief granted to the class can be restricted in a manner that does not benefit those who are not bound by the judgment; or the stare decisis effect of the class litigation may strongly influence the outcome of subsequent cases. Third, plaintiffs frequently have an incentive to remain members of an opt out class in order to take advantage of lower transaction costs, especially where the benefits of litigation can be restricted to those who participate in the litigation. Of course, the adjudicatory jurisdictional requirement proposed in this Note does not affect the overwhelming number of monetary damage actions; the opt out rights required in Rule 23(b)(3) actions serve to establish jurisdiction by consent under *Shutts*.

Some controversies, no doubt, make persuasive cases for a single adjudication. When the limitations on state court adjudicatory jurisdiction prove troubling,[112] the federal courts may assert jurisdiction over the entire class consistent with the demands of due process. The basis for such adjudicatory jurisdiction rests on the class members' minimum contacts with the national government.[113] Such a solution

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112 This Note maintains that the sheer need for unitary adjudication alone does not justify state mandatory actions in the absence of adjudicatory jurisdiction. "The world is full of imperfections, including the occasional (or maybe not so occasional) failure of Congress to legislate when federal legislation is appropriate. Our legal system requires judges to accept these imperfections." Larry Kramer, Choice of Law in Complex Litigation, 71 N.Y.U. L. Rev. 547, 550 (1996).

113 The federal government has provided solutions to problems that states lack the power to remedy. See, e.g., Fed. R. Civ. P. 4(k)(2) (authorizing nationwide service of process in federal question cases "to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state"). Professor Brilmayer argues that with congressional authorization, the federal courts could hear cases precluded from resolution in a single action because of adjudicatory jurisdiction problems in state courts:

> Cases in which there are personal jurisdictional issues invariably involve some diversity of citizenship, and Congress might therefore constitutionally create federal jurisdiction with nationwide service of process. . . . All citizens are subject to the authority of the federal government, and there are no sovereignty objections to its prescribing where suits may be brought or defended . . . .

Brilmayer, supra note 15, at 109 (footnote omitted). As a matter of personal jurisdiction, federal courts could assess the minimum contacts of each class member with the United States. See Howard M. Erichson, Note, Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4, 64 N.Y.U. L. Rev. 1117, 1140 (1989) ("A majority of the circuit courts that have considered the issue have held that the defendant's aggregate contacts with the entire United States provide the measure of minimum contacts necessary for

preserves the legitimacy of state court action while enabling a fair adjudication of the controversy.[114]

With or without a federal court solution, state courts considering certification of mandatory classes should inquire into their jurisdictional bases of power. Where minimum contacts are lacking with class members, those class members should be permitted to opt out.[115] The analysis for determining when to grant opt out rights does not end

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personal jurisdiction in the federal courts in those cases where nationwide service of process is provided.").

Although the federal courts could assert adjudicatory jurisdiction consistent with due process, that is only half the story; the other half is legal authorization to do so. Generally speaking, federal courts sitting in diversity adopt the state rules authorizing adjudicatory jurisdiction. See, e.g., Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963) (en banc) (Friendly, J.) ("There thus exists an overwhelming consensus that amenability . . . to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits . . . ."). Presumably, the scope of such state law authorization is circumscribed by the limitations on state power contained in the Fourteenth Amendment. This doctrine of adopting the limitations of state court adjudicatory jurisdiction in diversity cases, however, is not constitutionally mandated. See id. at 226 ("[W]e fully concede that the constitutional doctrine announced in [*Erie*] would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction . . . in an ordinary diversity case although the state court would not . . . ."). Thus, the question is whether Congress's "rule-making delegate" implicitly authorized such an assertion of jurisdiction in Rule 23(b)(1) and (b)(2) actions or whether further rule or statutory authorization is required before federal courts have adjudicatory authority over nationwide mandatory classes. This remains an open question.

Regarding subject matter jurisdiction, presumably minimal diversity is present; otherwise, the state of common citizenship of the parties would be able to assert jurisdiction over the entire class. Congress could provide for diversity jurisdiction in these circumstances by providing an exception to the rule of complete diversity and by relaxing the limitations imposed by the amount in controversy requirement. Alternatively, Congress probably could provide national substantive law to govern multistate torts. For such a proposal, see, e.g., Linda S. Mullenix, Complex Litigation Reform and Article III Jurisdiction, 59 Fordham L. Rev. 169, 184-91 (1990). Whether such law is wise and whether Congress can muster the will to pass such law are other matters.

[114] Any expansion of the caseloads of the federal courts requires careful consideration. The desirability of a unitary adjudication should be weighed against the costs. Bringing such actions in state courts risks fairness to absent class members who lack a reciprocal relationship with the forum. Shifting the adjudication of these controversies into federal court entails disadvantages that accompany growth which may prove too costly. See generally J. Harvie Wilkinson III, The Drawbacks of Growth in the Federal Judiciary, 43 Emory L.J. 1147 (1994).

[115] Whether or not the rendering court inquires into its basis for jurisdiction, absent class members lacking minimum contacts with the forum who have not submitted to the jurisdiction of the court will not be bound. These absent class members, like defendants in individual actions, can collaterally attack the binding effect of a judgment rendered without jurisdiction. Such a class action may become in effect an "opt in" class action: class members over whom the court lacked jurisdiction can take the relief granted by the court or they can file their own suits and collaterally attack the prior judgment on the basis of no jurisdiction. Defendants, however, may be able to "force" a court to consider whether it has a basis for jurisdiction. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 803-06 (1985) (holding that defendant has standing to challenge jurisdiction over class).

there, however. As discussed below in Part III, courts also should analyze whether due process requires opt rights as a matter of procedural fairness unrelated to adjudicatory jurisdiction.

III
BEYOND JURISDICTION: WHEN PROCEDURAL FAIRNESS REQUIRES OPT OUT RIGHTS

Once a court has adjudicatory jurisdiction over a class, the right to opt out becomes less certain. This Part examines opt out rights in class actions where the court has a basis for adjudicatory jurisdiction over the class[116] and argues that although the jurisdictional considerations outlined in Part II are a necessary component of due process, they are not sufficient. Instead, due process requires opt out rights in some class actions where no jurisdictional concerns exist. To determine whether due process requires opt out rights as a matter of procedural fairness, courts should apply a balancing test.[117] Unlike the framework discussed in Part II, which primarily operates as a constraint on state courts (federal courts with proper authorization under a federal rule or statute could assert jurisdiction based upon class members' contacts with the United States), the opt out rights analysis set forth in this Part applies in a similar fashion in both state and federal courts.

If *Shutts* was a case that concerned individual control over litigation,[118] then due process concerns apart from jurisdictional considerations may guarantee the right of all class members to opt out of some class actions. Certainly, individual control of litigation is an important value embodied in the Due Process Clause.[119] The Supreme Court has recognized the "'deep-rooted historic tradition that everyone

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[116] The remainder of this Part assumes that the forum possesses minimum contacts with the class members or the property at stake, thus isolating considerations of procedural due process ("fundamental fairness") from concerns of adjudicatory jurisdiction.

[117] Courts and commentators frequently criticize balancing tests for their malleability and unpredictability. Although this criticism is largely warranted, the same criticism applies to many aspects of class litigation: courts possess enormous discretion in certifying a class and approving settlements. Balancing tests are useful in examining opt out rights because they offer flexibility to approve settlements that provide benefits to the class while forcing the court to focus on interests that otherwise might go unconsidered. Additionally, some bright lines do shine in this analysis. See infra text accompanying notes 126-27 (describing two questions which approximate results of balancing test). But see infra note 164 (noting that balancing test must be used in hybrid class actions).

[118] The competing interpretations of *Shutts* (as a case concerning distant forum abuse and, possibly, individual control of litigation) are set forth in Miller & Crump, supra note 49, at 52-53.

[119] Other commentators have canvassed the competing values. See supra note 29.

should have his own day in court.'"[120] Individual pursuit of claims serves important individual ends and systemic goals.[121] For these reasons, the American judicial system generally begins with a presumption in favor of individual actions and deviates only when exceptional circumstances make it prudent to do so.

The proposition that courts may withhold opt out rights in most (b)(1) and (b)(2) actions is well established.[122] Rule 23 explicitly requires opt out rights only in (b)(3) actions.[123] Once a court establishes adjudicatory jurisdiction, does the Constitution impose additional restrictions on the use of mandatory class litigation? An expansive reading of *Shutts* suggests that limitations on mandatory actions may exist. In announcing the due process protections that courts must offer class members, the Supreme Court did not narrowly confine its language to apply only to nonresident class members.[124] If the court was announcing a general right to opt out of claims for monetary dam-

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120 Richards v. Jefferson County, 116 S. Ct. 1761, 1766 (1996) (quoting 18 Charles Alan Wright et al., Federal Practice and Procedure § 4449, at 417 (1981)).

121 For example, a state may rely upon individual actions in tort to encourage wealth maximizing behavior. To the extent that class attorneys fail to secure damage awards comparable to those gained in individual litigation (either because of agency problems or the superior bargaining power stemming from the ability to plaintiff shop, see Kahan & Silberman, supra note 10, at 238-39), underdeterrence of suboptimal behavior may be a concern. (Of course, class actions solve some underdeterrence problems caused by a defendant who causes small harms to many parties.) A second systemic value undercut by mandatory class actions involves social cohesion and commitment to societal institutions. When courts decide the rights of class members in their absence, the role for individuals is minimal. Participation in litigation may serve to enhance support for legal and governmental institutions in ways that mass joinder fails to accomplish.

122 Mandatory actions dominate the history of class litigation. See sources cited supra note 23. Federal Rule 23 is silent on the issue of opt out rights in (b)(1) and (b)(2) actions. Some courts have held that they have discretion to grant such rights. See supra note 25.

123 See Fed. R. Civ. P. 23(c)(3). The Supreme Court has yet to hold that opt out rights are required as a constitutional matter in all (b)(3) actions. The Court in *Shutts* simply held that opt out rights in (b)(3) actions provided a basis for adjudicatory jurisdiction. See supra note 63 and accompanying text. Thus, the right currently exists for resident class members only as a requirement of the procedural rule. States, however, can alter rights lacking constitutional pedigree. See, e.g., supra note 20 (describing Kansas class action rule).

124 The Court stated:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that *due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class* by executing and returning an "opt out" or "request for exclusion" form to the court. Finally,

ages, such a proclamation largely has fallen on deaf ears.[125] Although many of the justifications for mandatory actions are compelling once adjudicatory jurisdiction has been established, due process may still compel a court to offer opt out rights, despite certification of the class under Rule 23(b)(1) or (b)(2).

This Note argues that a general multifactor analysis, developed originally in the administrative law context,[126] can guide courts in determining when due process requires the granting of opt out rights even where adjudicatory jurisdiction over the class exists. The balancing test is described below, although the results of the test can be roughly approximated by asking two questions. First, the court should ask whether it can restrict the benefits of a judgment in favor of the class to the class members who do not opt out (such that those who opt out receive no substantive benefits from the class litigation).[127] If it cannot restrict the benefits, the state and the defendant generally have compelling interests in denying opt out rights. Second, if the benefits from relief can be restricted to the class, the court then should ask whether the action involves the traditional concerns of unfairness that argue strongly for Rule 23(b)(1) treatment (such as risks of inconsistent determinations or substantial impairment of class members' in-

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> the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (emphasis added) (citations and footnote omitted) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314—15 (1950)).

125 See, e.g., Miller & Crump, supra note 49, at 31 ("If all class members have an affiliation with the forum, the court can compel appearance, and the inference of consent is unnecessary. Notice and an opportunity to be heard probably still would be required as independent due process guarantees, but the right to opt out presumably could be denied." (footnotes omitted)). The petitioners in Adams v. Robertson, 117 S. Ct. 1028 (1997) (per curiam), argued for this expansive reading in their brief. See Brief for Petitioner at 17-21, *Robertson* (No. 95-1873).

126 See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). The application of a test with its origins in the administrative law context to the class action context is not as anomalous as it may seem since courts and commentators have compared class actions to administrative proceedings. See *Shutts*, 472 U.S. at 809 (noting that "from the plaintiffs' point of view a class action resembles a 'quasi—administrative proceeding, conducted by the judge'" (quoting 3B James Moore & John Kennedy, Moore's Federal Practice ¶ 23.45 [4.-5] (1984))); Kaplan, supra note 101, at 398 (noting that "the class action serves something like the function of an administrative proceeding").

127 Courts should treat equitable relief that is individual in nature (that is, relief the benefits of which the court can restrict to those class members who do not opt out), such as rescission of an individual contract, in a manner similar to the way they treat monetary relief for the purposes of due process. See supra Part II.B.1 (discussing similarity of equitable and monetary damages in some contexts). On the other hand, courts should permit other forms of equitable actions, ones with a special need for a unitary adjudication, to proceed as mandatory actions, provided that adjudicatory jurisdiction exists. The framework proposed in this Part will not bar such actions.

terests). The presence of such concerns establishes a presumption against permitting opt out rights. If the benefits of relief can be restricted to the class and the traditional (b)(1) concerns are not present, due process considerations strongly support granting opt out rights.

A. The Mathews-Doehr *Test*

The Court in *Shutts* recognized that a chose in action is a constitutionally protected property interest.[128] A court, therefore, must provide procedures consistent with due process to protect that interest.[129] In some cases, the adjudication of claims without opt out rights may be so fundamentally unfair that it violates due process.[130]

The Supreme Court has developed a four-factor procedural due process balancing test in other contexts that provides a suitable framework for analyzing when due process requires the granting of opt out rights. The Court set forth the first three factors in *Mathews v. Eldridge*,[131] a case involving the termination of Social Security disability benefits. In considering whether the procedures followed by the agency comported with the demands of due process, the Court noted that three factors should guide the determination: the private interests affected, the risk that the procedures employed will lead to erroneous decisions, and the government's interests.[132] In *Connecticut v. Doehr*,[133] the Court considered whether an ex parte attachment proceeding violated due process. In the process of holding the procedure was a violation, the Court considered a fourth factor applicable to actions between private parties: the interests of the party-opponent who opposes the granting of the procedure in question.[134] In private actions, the interests of the government were deemed "ancillary."[135] These four factors set forth in the decisions in *Mathews* and *Doehr*

128 See *Shutts*, 472 U.S. at 807.

129 See U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

130 The Supreme Court has noted that due process "'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)). Instead, the Court has noted that due process "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24 (1981).

131 424 U.S. 319 (1976).

132 See id. at 335.

133 501 U.S. 1 (1991).

134 See id. at 11.

135 Id.

provide a useful framework to evaluate the due process rights of class members seeking to opt out of actions despite the fact that the court has adjudicatory jurisdiction over the class.[136]

B. *The* Mathews-Doehr *Factors Applied to Class Actions: When Opt Out Rights Are Required*

As was noted above, the results of the balancing test can be approximated fairly well by examining two factors. Presumptively, when the court cannot restrict the benefits of the class litigation to the members who remain part of the class, opt out rights are not required. Additionally, where opt out rights present risks of establishing incompatible standards of behavior or risks of double recovery, the interests of the state and the defendant generally trump those of the class members. These two considerations, however, are less persuasive in hybrid class actions or in settlements that include a global release of claims, including claims for monetary damages. Limiting settlements in mandatory class actions to the claims which support mandatory treatment in the first instance helps to tailor the procedural mandate of courts to their legitimate interests. Additionally, this limitation reduces the incentive to manipulate the pleadings to assert claims justifying nonmonetary relief that cannot be restricted, with the goal of later securing a settlement that releases the claims for monetary damages. In these cases, courts should examine the following four factors to determine whether opt out rights are required.

1. *Private Interests*

The first factor for a court to consider addresses the class members' private interests in acquiring opt out rights. Class members have two types of legitimate private interests: those that are monetary and those that are not.[137] The monetary interests of the class are fairly

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[136] In *Adams v. Robertson*, the petitioner argued that the *Mathews* factors should apply. See, e.g., Brief for Petitioner at 22-35, Adams v. Robertson, 117 S. Ct. 1028 (1997) (No. 95-1873). This is not the first attempt to invoke *Mathews* and apply its three factors to decisions regarding opt out rights. See, e.g., Brief for Respondents at 18-20, Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (No. 92-1988); Harvey Rochman, Note, Due Process: Accuracy or Opportunity?, 65 S. Cal. L. Rev. 2705, 2730-34 (1992) (discussing factors in mass tort context). The Court has never applied the *Mathews-Doehr* test to absent class members, but it has used the *Mathews* factors to judge the fairness of extinguishing a cause of action. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982) (holding that adjudicatory committee's failure to convene does not extinguish plaintiff's claim).

[137] Class members may have illegitimate interests in opting out. For example, the desire to opt out and bring an individual suit to collect a nuisance payment is illegitimate. See Baughman, supra note 29, at 224 (arguing some reasons to opt out are illegitimate). Courts should not factor such interests into the balance. Other interests often considered illegitimate are arguably legitimate. For example, a class member who has already hired an attor-

straightforward. Generally, the larger the claim at stake, the greater the interest.[138] In small damages actions, the class members' monetary interests argue weakly for the right to opt out. The private interests in opt out rights grow as the stakes increase.

Some practical difficulties do exist, however, in assessing the strength of the monetary interests. First, assessing the amount at stake can prove difficult. Pleadings are subject to manipulation, and even claims for high stakes may be predicated upon theories or facts that present a minute chance of success. Undoubtedly, courts will have trouble discounting the claims for probability of success. Second, the stakes in some actions are likely to vary dramatically across class members. For example, in shareholder litigation, damages may vary in proportion to the number of shares owned, and in tort suits, damages may vary with the injury inflicted.

Additionally, class members may have nonmonetary interests in opting out.[139] For instance, class members may have different private interests in the type of relief afforded, especially in mass tort suits. In cases where claims involve personal injuries, the private interests in vindication and autonomous prosecution may be stronger than in other actions.[140] Additionally, class members may have an interest in determining the structure of relief.[141] In the end, the court should consider both the monetary and nonmonetary interests to adequately determine the strength of the legitimate private interests in opting out.

2. *Defendant's Interests*

The second factor a court should consider involves the defendant's interests. Where class claims are meritless, defendants generally would prefer to avoid class certification altogether.[142] Where

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ney to bring an individual suit seeking compensatory and punitive damages legitimately may desire to opt out so that the lawyer may gain compensation for work done out of any punitive damages recovered. Such incentives are set up by the existing system of substantive law to ensure sufficient punishment and should not be considered illegitimate.

138 The Supreme Court has recognized that due process demands more as the stakes increase. See, e.g., *Doehr*, 501 U.S. at 11 (noting that property interest affected was "significant"). Thus, other things being equal, the larger the stakes, the stronger the argument for the procedural protection of opt out rights.

139 See, e.g., Grant, supra note 28, at 268-70 (noting that members may disagree with political objectives of litigation).

140 See Linda S. Mullenix, Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act, 64 Tex. L. Rev. 1039, 1070 (1986) ("[B]ecause individual claims in typical mass-tort litigation involve either personal injury or wrongful death, an individual claimant may desire maximum control over the litigation for tactical and psychological reasons.").

141 See supra note 34 and accompanying text.

142 Forcing members of a potential class to bring weak claims in individual actions may decrease costs to the defendant. Individual actions frequently entail higher transaction costs per plaintiff such that lawyers considering bringing such actions on a contingency fee

claims have merit, defendants may prefer a global settlement to reduce delay and transaction costs. Further, defendants may seek to deny opt out rights to avoid overcompensating the remaining members of the class. Opt outs may be exercised by class members with the strongest and largest claims[143] and hence defendants may be concerned that settlement will resolve only weak claims. Thus, defendants have an interest in preventing class members from opting out.[144] The strongest case against opt out rights, however, occurs in (b)(1)(A) or (b)(2) actions where individual actions could establish incompatible standards of conduct. In such cases, the defendant has a weighty interest in the denial of opt out rights. The presence of such concerns creates a strong presumption that opt out rights should be denied.[145]

An additional interest is properly weighed under this factor given the complexities of class litigation: the interests of class members in the denial of opt out rights. Some class members may favor mandatory actions where individual suits threaten the interests of class members. Such actions are generally suitable for certification under Rule 23(b)(1)(B).[146] Thus, an application of the defendant's interests factor to the class action context requires an examination of

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basis may face negative expected total returns. Of course, the same can be true of meritorious suits, although the probability of success is greater such that meritorious suits have a greater likelihood of yielding a positive outcome.

143 See supra note 29.

144 Some interests in denying opt out rights are illegitimate when they are the product of a desire to benefit from procedural defects in the class mechanism. For example, a defendant may prefer a mandatory action to take advantage of the bargaining power advantage it has with class counsel. Class counsel's fee is often dependent on the defendant's willingness to settle. The ability to engage in plaintiff shopping increases the defendant's bargaining power. Collusion in this context is a constant risk. See, e.g., Flanagan v. Ahearn (In re Asbestos Litig.), 90 F.3d 963, 988 (5th Cir. 1996) (affirming settlement that was reached before action was filed), vacated, 117 S. Ct. 2503 (1997).

145 See supra text accompanying note 127 (noting that presence of such concerns may help court to quickly determine that opt out rights should be denied). A court, however, should give careful consideration to opt out rights where such cases settle and include global releases of claims that do not implicate (b)(1)(A) concerns.

146 Rule 23(b)(1)(B) mandatory actions sometimes are justified by the need to protect class members whose interests would be impaired by allowing individual suits to go forth. In such circumstances, consideration of the interests of class members in the denial of opt out rights is appropriate. Less justifiable, however, are (b)(1)(B) actions whose mandatoriness is predicated upon the need to protect the interests of individuals who prefer to opt out. These individuals can protect adequately their own interests by remaining members of the class.

Additionally, in considering whether to grant opt out rights, the court should consider the possibility of less drastic means of dealing with this risk. Possibilities include conditioning opt out rights, see supra note 29, or certifying the class as mandatory only with regard to punitive damages, see, e.g., In re "Agent Orange" Prods. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (certifying mandatory class only for settlement of punitive damage claims), aff'd, 818 F.2d 145 (2d Cir. 1987).

both the interests of the defendant and those of the class members opposing opt out rights.

3. *Risks of Erroneous Deprivation*

The third factor of the *Mathews-Doehr* test examines the risks of erroneous deprivation if the court fails to provide the requested procedure. This factor attempts to gauge the practical impact of the requested right in order to determine if the right is worth granting. The application of the erroneous deprivation factor to mandatory class actions proves somewhat difficult.[147] Some settlements may undervalue claims. The true litigation value (the amount of damages sought discounted for risk of failure or partial success, minus the additional transaction costs of continuing the litigation) is difficult to quantify. For this reason, proxies for the risks of undervaluation—those indicating procedural defects—may be more helpful than case-by-case calculations of the merits. For example, where several actions have been filed, the risks to class counsel's ability to negotiate with a defendant who can plaintiff shop raises concerns about the resulting settlement.[148] Moreover, a class attorney who does not conduct discovery before agreeing to a settlement may lack sufficient knowledge to value the claims accurately.[149] Additionally, state court settlements that

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147 The Court formulated the erroneous deprivation factor in *Mathews*, where the issue was the continuance of a governmental benefit. See supra text accompanying notes 131-32. Courts have since applied this factor to other cases, such as those involving the termination of parental rights. See, e.g., Lassiter v. Department of Soc. Servs., 452 U.S. 18, 31-32 (1981). These cases generally yield judgments which are easier to classify as "erroneous" or not. In the class action settlement context, erroneous deprivation is frequently a matter of degree. One is left to guess if the undervaluing of class claims by 25% would constitute an erroneous deprivation. This Note uses the phrase "erroneous deprivation" loosely to refer to anything more than a de minimis deprivation. Obviously, the larger the "deprivations" are, the stronger the case for opt outs.

148 Plaintiff shopping may occur when several actions have been filed (frequently in different jurisdictions) on behalf of the same class. Defendants could reach a global settlement with any one of the class attorneys. In most cases, only the attorney that settles the action will be entitled to attorneys' fees. In such cases, a "reverse auction" is created where the attorney that puts forth the settlement most favorable to the defendant (and thus most *unfavorable* to the class) will be chosen by the defendant to settle the entire controversy. See John C. Coffee, Jr., The Corruption of the Class Action: The New Technology of Collusion, 80 Cornell L. Rev. 851, 853-54 (1995).

149 See, e.g., De Angelis v. Salton/Maxim Housewares, Inc., 641 A.2d 834, 838 (Del. Ch. 1993) (noting plaintiffs' attorney conducted no formal discovery and exhibited readiness to capitulate), rev'd sub nom. Prezant v. De Angelis, 636 A.2d 915 (Del. 1994).

The court's role in settlement approval provides critical protection against erroneous deprivation. See Fed. R. Civ. P. 23(e) (requiring court approval of dismissal or compromise of class actions). Unfortunately, the risk that the court may lack accurate information is always a concern. See, e.g., Richard A. Posner, Economic Analysis of Law 537 (3d ed. 1986) ("Although the judge must approve the settlement, the lawyers largely control his access to information . . . .").

seek to release exclusive federal claims may raise concerns about the bargaining process.[150] A court may decide to approve a settlement despite the risks posed by these procedural problems, but the presence of one or more of these situations should favor opt out rights.

In addition to considerations of agency and the bargaining process, courts may look to the unity of class interests to predict the likelihood of deprivation. Where class interests are aligned,[151] opt outs may not offer much additional protection against erroneous deprivations.[152] Some claims, however, may be more difficult to value because damages are unique to class members. Thus, in mass tort actions where damages are specific to each member of the class, the risk is acute that class members will not have their claims evaluated accurately. The opposite may be true in stockholder actions where damages will be identical on a per share basis. In general, the greater the heterogeneity of the class claims, the greater the likelihood of erroneous deprivation.

Finally, the risk of erroneous deprivation may result from an unfamiliarity with the substantive law that gives rise to the claims at stake. Although such risks are virtually nonexistent in cases where the forum applies its own law,[153] this risk may blossom when the fo-

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150 The incentive structure produced by federal court class litigation rules suggests that attorneys in state court actions may have less bargaining power than their federal court counterparts. See Kahan & Silberman, supra note 10, at 235-38 (discussing comparative bargaining power of class attorneys depending upon whether suit is brought in state or federal court).

151 This analysis of the class interests is similar to the adequacy of representation arguments offered in support of jurisdiction. Indeed, the Supreme Court in *Shutts* may have been attempting to draw adequacy-of-representation lines based upon Rule 23 categories. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985) (withholding judgment from actions seeking equitable relief). For the reasons discussed supra Part II.B.1, such lines inadequately capture the cohesiveness of the class. Instead, courts should adopt a more functional approach, such as the one offered by Judge Wood. See supra note 85. This Note rejects this approach as a method of establishing adjudicatory jurisdiction because it neglects to consider the limitations on state power, but categories, such as those provided by Judge Wood, may correlate with the degree of risk of erroneous deprivation.

152 Opt out rights provide two main safeguards against erroneous deprivation. First, the opt out rights in the settlement context provide members with a vote on the settlement proposal. This vote will be most accurate when the individual stakes are high enough that plaintiffs find it worthwhile to bear the costs of monitoring. See supra note 33. Many opt outs could cause a class to be decertified because the members remaining fail to satisfy the numerosity requirements of Fed. R. Civ. P. 23(a)(1). Second, where the stakes vary radically across the class, opt out rights can help to ensure that those at the greatest financial risk (and thus those with an incentive to monitor) are able to exclude themselves from actions posing significant erroneous deprivation threats.

153 The application of forum law often will also coincide with the presence other factors that minimize the risks of erroneous deprivation. The application of forum law likely reflects that at least some of the transactions in dispute occurred within the forum state, making it more likely that both court and counsel have ready access to the evidence. In

rum must apply the law of a foreign jurisdiction.[154] Courts should consider this unfamiliarity when deciding whether to grant opt out rights.

4. *Government's Interests*

The fourth and final factor a court should weigh involves the interests of the government. The Supreme Court in *Doehr* noted that the government's interests[155] count, but are "ancillary" when the government is not a party to the action.[156] Included among such interests are the administrative and financial burdens on the forum.[157] Thus, a forum's interests in avoiding a host of individual suits generally tip in favor of withholding opt out rights.[158] If few class members would exercise opt out rights, however, the forum's interest in reducing administrative costs are diminished.[159] Furthermore, the state's interests carry even less weight if the other suits are likely to be brought in

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many such cases, class members will be residents of the forum and will be faced with fewer obstacles if they wish to monitor or intervene in the proceedings. Under such conditions, court oversight of settlement pursuant to Rule 23(e) is likely to be more effective.

154 State courts may be most unfamiliar with federal claims over which federal courts have exclusive jurisdiction, see infra note 163, unless the claims are similar to existing state law claims. Although the Supreme Court has held that state court approval of settlements that extinguish these claims are entitled to full faith and credit in federal court, see supra note 70, state courts should consider whether unfamiliarity inhibits their ability to accurately value the federal claims, thus creating risks of erroneous deprivation.

155 The phrase "government's interests" tracks the language from *Doehr* and should not be confused with the phrase "governmental interests" in choice-of-law interest analysis.

156 See Connecticut v. Doehr, 501 U.S. 1, 11 (1991); see also supra text accompanying note 135.

157 See *Doehr*, 501 U.S. at 16 (observing that Connecticut lacked interest in part because "the State cannot seriously plead additional financial or administrative burdens").

A somewhat related argument—the greater-lesser or "bitter with the sweet" argument—posits that the power to create a substantive right (the cause of action) includes the power to condition that right upon the acceptance of limited procedural protections (the vindication of rights in mandatory class actions). The Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985), however, openly repudiated this argument: "[I]t is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee. . . . The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct."

158 Some courts have held that this interest is a compelling reason to certify an action for monetary damages as a (b)(1)(B) class action and deny opt out rights. See, e.g., Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 369 (Tex. Ct. App. 1994) (affirming trial court's use of "'better Texas rule' allowing mandatory certification [under (b)(1)(A)] when judicial economy so requires").

159 See supra note 10 (describing study finding that class members infrequently exercise opt out rights in federal court).

another forum.[160] If the subsequent individual suits will be filed in the forum's courts because of its favorable punitive damage laws or statutes of limitations, the proper response of the forum should be to deny certification of the class as mandatory where a judgment would foreclose compensatory claims; instead, the state should consider certifying a punitive damages only class or altering its choice of law and forum non conveniens doctrines.

Although the Court in *Doehr* only had occasion to consider the interests of the forum state, the application of the government's interests prong to class actions may require broadening the inquiry to consider the interests other governments may have in the litigation. Other states may have a procedural interest in certification of a mandatory action because their judicial systems may have to bear the administrative costs of individual actions. In addition, states whose substantive law could apply to the controversy may have an interest in the question of opt out rights because agency problems associated with the litigation may lead to underdeterrence of harmful conduct if the resulting settlement is unfair to the class. As a routine matter of choice of law, such interests are normally ignored and the choice of procedural rules (here, whether to grant opt out rights) is left to the forum. Class actions, however, present unique policy concerns that may justify unique treatment: class litigation can, with a single stroke, settle thousands of claims employing procedures that all too frequently cast doubt upon the fairness of the result.[161] These concerns regarding underdeterrence of other states are less pressing where the forum applies its own law,[162] and arguably at their greatest when ex-

160 This is not to argue that courts should ignore administrative costs on the judicial system as whole. Instead, the concern is that a forum will impose its preferences regarding resource allocation decisions on other jurisdictions with greater interests in the resolution of the claims.

161 See sources cited supra note 39. Concerns about overdeterrence, especially in the securities realm, are raised by strike suits and other actions designed to yield a nuisance payment, the bulk of which goes to the class counsel. Concerns about underdeterrence, especially in tort cases, are raised by agency and bargaining problems where the risk of "settling on the cheap" lurks. The uniqueness of states' interests in the class context may be best illustrated by the attempts of state attorneys general to intervene on behalf of their residents. See, e.g., In re Real Estate Title and Settlement Servs. Antitrust Litig., 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986) (noting that attorneys general of several states objected to proposed settlement), aff'd, 815 F.2d 695 (3d Cir. 1987). The interests of states in the fairness of settlements is recognized by a recent bill introduced in the United States Senate. See Class Action Fairness Act of 1997, S. 254, 105th Cong. (1997) (requiring notification of state attorneys general of class action settlements in state and federal court).

162 This is not to say that other states do not have interests—every time a true conflict of laws exists, a state other than the forum has an interest in the controversy. However, where the state applies its law to the bulk of class claims, the interests of other states are less likely to be paramount to those of the forum.

clusive federal claims are involved.[163] In the end, government interests probably tip the balance only in extraordinary cases.

In summary, the four factor balancing test focuses the court on the competing interests in the right to opt out. As outlined above, however, most requests for opt out rights from class members over whom the court has adjudicatory authority can be disposed of by considering two questions: whether the relief sought cannot be restricted to the members of the class who do not opt out and whether the granting of opt out rights would entail the unfairness traditionally supporting the certification of (b)(1) classes. If a court finds that the answers to these questions are negative, then a strong presumption should be erected in favor of opt out rights.[164] If a court, however, answers either question in the affirmative, it can deny opt out rights unless objectors can show that the four *Mathews-Doehr* factors support the granting of opt out rights.

IV
APPLICATION OF OPT OUT ANALYSIS

Parts II and III of this Note set forth a two-pronged approach to protect the due process right to opt out of class litigation. The analysis involves an evaluation of minimum contacts to satisfy the adjudicatory jurisdiction due process requirement[165] and a balancing test to satisfy

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163 Exclusive federal claims are those claims that arise under federal law and can be litigated only in federal court. That is, states do not have concurrent subject matter jurisdiction to hear such claims. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1994). State courts cannot hear exclusive federal claims but state class action settlements that release exclusive federal claims are entitled to full faith and credit under 28 U.S.C. § 1738 (1994). See supra note 70. States can have an interest in settling exclusive federal claims when the federal and state claims provide alternative theories of relief for full recovery and when double recovery is not permitted. In such cases, because the difference between the amount gained through settlement and the amount of total losses could still be recovered in an action in federal court, it is unlikely the parties will be able to settle without releasing federal claims. Here, settlement of the state action would provide no benefit to the defendant. See Kahan & Silberman, supra note 10, at 247. States, however, should exercise caution before approving these global settlements. See id. at 251-62 (proposing settlement framework). Congress could, if it wished, withdraw full faith and credit from state settlements of federal claims. See Matsushita Elec. Indus. Co. v. Epstein, 116 S. Ct. 873, 881-83 (1996) (examining federal substantive law for partial repeal of 28 U.S.C. § 1738 (1994)).

164 Such a simplified formulation to approximate the results of the *Mathews-Doehr* balancing test does not work for many "hybrid" class actions seeking monetary and nonmonetary relief. In many hybrid cases, the class seeks nonmonetary relief that produces a classwide benefit that cannot be tailored to benefit only those members who do not opt out. In such cases, a court should perform the balancing test set forth above, weighing the interests of the class members desiring classwide relief against the interests of those wishing to opt out to seek individual forms of relief.

165 See supra Part II.

more general notions of due process fairness.[166] In relatively uncomplicated cases, the analysis is straightforward.

For example, suppose a class action is filed in state court on behalf of local property owners seeking to enjoin a local chemical company's polluting operations. Class counsel moves to certify a mandatory class under Rule 23(b)(2) because the relief is injunctive. The court first should inquire whether it has adjudicatory jurisdiction to bind the class without granting opt out rights to gain their consent. Because all class members own property within the forum state, the court possesses the requisite minimum contacts to bind the class. The opt out rights of the class members will thus depend upon the balancing test set forth in Part III. In this case, the benefits of the litigation cannot be limited to those class members who remain in the class—the enjoinment of the company's operations will benefit all surrounding residents. Thus, the defendant's and government's interests are presumed to dominate. In the typical case, further analysis is warranted only if other claims are pleaded or settled. Here, the court should certify the class as a mandatory class under Rule 23(b)(2). Many cases, however, are more complex. This Note concludes by examining such a case: *Adams v. Robertson*.[167]

A. The Facts of Robertson

The dispute in *Robertson* arose out of a plan by Liberty National Life Insurance Company to switch the cancer insurance policies of approximately 400,000 policyholders.[168] When originally purchased, the policies provided for unlimited treatment and drug coverage and were renewable for the life of the policyholder.[169] Liberty National began a program to switch policyholders to a new policy with higher premiums that significantly limited cancer treatment and drug benefits, but contained some new benefits such as hospice care and dread disease benefits.[170] As a result of Liberty National's efforts, nearly half of the policyholders agreed to switch policies.[171]

A few years after the policy conversion program, Robertson and others filed a class suit in Alabama state court on behalf of those policyholders who switched to the new policies.[172] The class action as-

166 See supra Part III.

167 676 So. 2d 1265 (Ala. 1995), cert. dismissed, 117 S. Ct. 1028 (1997) (per curiam).

168 See id. at 1267.

169 See id.

170 See id.

171 See id. at 1267-68.

172 See id. at 1268. Two other class actions were filed in Alabama state court subsequent to the *Robertson* suit; both were stayed in deference to the previously filed *Robertson* action. See id. The court, however, allowed individual suits filed before class certification

serted "that those . . . who switched . . . did so based upon a pattern and practice of fraud perpetrated by Liberty National."[173] In essence, the complaint alleged that Liberty National represented the new policies as "better" while failing to adequately disclose the limitations on benefits.[174] The complaint as amended sought rescission as well as injunctive and declaratory relief. Further, the action sought punitive damages and monetary relief for the increased premiums paid by members.[175]

The Alabama state court preliminarily certified the class under Alabama's Rule 23(b)(2),[176] and soon thereafter the parties reached a compromise.[177] After a fairness hearing,[178] the court approved a modified settlement agreement and certified the class under Rule 23(b)(1) and (b)(2).[179] The settlement agreement included a variety of remedies (including restitution, reformation, and injunctive relief[180]) in exchange for the release of all claims of class members arising out of the policy exchange program.[181] The proposed settlement was mandatory.[182]

The court concluded that certification under Rule 23(b)(2) was appropriate because the "injunctive and other equitable relief is the

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to proceed. See *Robertson I*, No. CV—92—021 (Ala. Cir. Ct. May 26, 1994), aff'd and reprinted in *Robertson II*, 676 So. 2d 1265, 1286 (Ala. 1995), cert. dismissed, 117 S. Ct. 1028 (1997) (per curiam); see also, e.g., Boswell v. Liberty Nat'l Life Ins. Co., 643 So. 2d 580, 585 (Ala. 1994) (reversing rule 12(b)(6) dismissal in individual action for damages); Liberty Nat'l Life Ins. Co. v. McAllister, 675 So. 2d 1292, 1298-99 (Ala. 1995) (affirming judgment in favor of individual plaintiff).

173 *Robertson II*, 676 So. 2d. at 1267-68.

174 See *Robertson I*, No. CV-92-021, reprinted in *Robertson II*, 676 So. 2d at 1278.

175 See id., reprinted in *Robertson II*, 676 So. 2d at 1277.

176 The language of Alabama Rule of Civil Procedure 23 is identical to the corresponding federal rule. For the text of Fed. R. Civ. P. 23(b)(2), see supra note 21. Alabama has recognized federal precedent as persuasive authority for the interpretation of its own rule. See First Ala. Bank of Montgomery, N.A. v. Martin, 381 So. 2d 32, 34 (Ala. 1980).

177 See *Robertson I*, No. CV-92-021, reprinted in *Robertson II*, 676 So. 2d at 1281.

178 The practice of class action settlement approval is generally the same in both state and federal court. The court is required by Rule 23(e) to approve all compromises and dismissals. In discharging this duty, courts follow a two-step procedure that includes a preliminary evaluation of the settlement's fairness and then a fairness hearing where class members may raise objections. See Manual for Complex Litigation, Third 236-37 (1995).

179 See *Robertson II*, 676 So. 2d at 1270, 1272.

180 More specifically, the release provided for injunctive relief prohibiting future "exchange" programs without full disclosure, freezing premiums for one year, and requiring common pooling for rate-filing purposes. See id. at 1270. Additionally, the agreement provided for full restitution of benefits lost due to coverage elimination, reformation of the policies to eliminate the newly added benefit restrictions, reinstatement of lapsed policies, and a prohibition on the denial of claims based on the policy limits included in the challenged policies. See id.

181 See *Robertson I*, No. CV-92-021, reprinted in *Robertson II*, 676 So. 2d at 1296-97.

182 See id., reprinted in *Robertson II*, 676 So. 2d at 1295-96.

predominant relief."[183] Additionally, the court certified the class under (b)(1), believing that opt outs threatened the settlement. The court found that because some of the injunctive relief was punitive in nature, individual claims for punitive damages threatened to push the total amount of punitive damages beyond the limits of due process and "would result in the Settlement being declared a nullity, thereby depriving all class members of . . . substantial benefits."[184] Despite releasing claims for damages, the court dismissed jurisdictional objections to binding class members to a mandatory settlement by interpreting *Shutts* as not requiring an opt out in (b)(2) actions despite the absence of minimum contacts with the forum.[185] The Alabama Supreme Court affirmed.[186]

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[183] Id., reprinted in *Robertson II*, 676 So. 2d at 1299. Objectors to the settlement, relying on *Shutts*, claimed that the relief requested was primarily monetary and that they should be allowed to opt out of the action to seek compensatory and punitive damages for fraud. See *Robertson II*, 676 So. 2d at 1271-72. One policyholder brought an individual fraud action and won an award of $1,000 in compensatory damages and $1,000,000 in punitive damages (based upon a "pattern and practice" theory). See Liberty Nat'l Life Ins. Co. v. McAllister, 675 So. 2d 1292, 1294 (Ala. 1995).

The class members also objected to having to continue to do business with Liberty National in order to reap most of the settlement benefits. See *Robertson I*, No. CV-92-021, reprinted in *Robertson II*, 676 So. 2d at 1293. Approximately 1,000 class members objected to the settlement. See *Robertson II*, 676 So. 2d at 1268. The trial court dismissed these objections.

[184] *Robertson I*, No. CV-92-021, reprinted in *Robertson II*, 676 So. 2d at 1296. Additionally, the court openly worried that judgments in individual actions might deplete the assets of Liberty National and force the company into receivership or rehabilitation proceedings. See id., reprinted in *Robertson II*, 676 So. 2d at 1294-95. Though the court was not explicit, these reasons might have led the court to certifying the action under Rule 23(b)(1).

[185] See id., reprinted in *Robertson II*, 676 So. 2d at 1301. Slightly fewer than half of the policyholders did not have an Alabama address listed with the company. See id., reprinted in *Robertson II*, 676 So. 2d at 1297. Nothing in the Alabama court's opinion attempts to justify jurisdiction based upon a minimum contacts analysis. The court stated that opt out rights are not necessary when the "class is sufficiently cohesive, that there is a sufficient jural relationship between and among the members of the class, and that the claims of the class members are sufficiently homogenous." Id., reprinted in *Robertson II*, 676 So. 2d at 1299. This argument is similar to the adequacy of representation arguments discussed supra Part II.B.2.a.

[186] See *Robertson II*, 676 So. 2d at 1274. The court found that the trial court did not abuse its discretion by certifying the class under Rule 23(b)(1) and (b)(2) and stated that "[s]o long as the relief sought is *primarily* equitable or injunctive, a class action settlement that also includes money damages with a mandatory non-opt-out provision is proper." Id. at 1271. The court supported its conclusion that the settlement was "*primarily* equitable" by noting that only 700 of the 400,000 class members would receive money damages under the settlement. See id. Under the settlement terms, only those who had contracted cancer were entitled to direct monetary relief. See *Robertson I*, No. CV-92-021, reprinted in *Robertson II*, 676 So. 2d at 1281-82. Some class members objected to this conclusion and claimed that they should be able to seek compensatory damages for the increased premiums paid for the new policy. See *Robertson II*, 676 So. 2d at 1272. Such compensatory relief was recovered by at least one plaintiff who brought an individual suit. See Liberty

B. *Opt Out Rights and Due Process in* Robertson

The first step in determining whether to grant opt out rights is to evaluate the adjudicatory jurisdiction of the forum. Alabama probably did not have minimum contacts with many class members in this case. Alabama could assert in personam jurisdiction over class members who were residents (approximately half of the class[187]). The contacts of the remaining half of the class with Alabama were less certain. All class members did sign insurance contracts with Liberty National, which is headquartered in Alabama.[188] Further, premium notices were sent to class members from Alabama.[189] These contacts alone probably do not satisfy the demands of minimum contacts analysis. For nonresident class members without minimum contacts with Alabama, the court should have provided the right to opt out in order to obtain jurisdiction by consent. Those class members who lacked minimum contacts with the forum can collaterally attack the judgment because it was rendered by a court without adjudicatory jurisdiction.

In addition to jurisdictional arguments favoring opt out rights for nonresident class members, opt out rights should be given to both resident and nonresident class members when the *Mathews-Doehr* balancing test favors granting such rights.[190] In *Robertson*, the court offered two reasons for mandatory treatment. The first rationale involved the threats posed by individual actions for punitive damages. The judge noted that because the settlement provided relief that was punitive in nature, additional awards of punitive damages would violate due process, thus threatening to undo the entire settlement. Assuming both that punitive components of voluntary settlements are appealable and that appeals in cases litigated subsequent to settlement could erase or reduce all prior awards, and not simply erase the most recent awards that triggered a violation of due process (both of which seem like dubious assumptions), this rationale does not alone support mandatory class treatment of damage claims; it supports only a mandatory punitive damages class.

The second rationale for mandatory treatment involved the nature of the relief provided. Picking up on the distinction drawn in *Shutts*, the court found that mandatory treatment was warranted because the predominant relief was equitable relief. This Note rejects this distinction and opts for a better measure of when opt out rights

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Nat'l Life Ins. Co. v. McAllister, 675 So. 2d 1292 (Ala. 1995). The court noted that the settlement, which provided for a freeze on higher premiums, addressed these concerns.

187 See *Robertson I*, No. CV-92-021, reprinted in *Robertson II*, 676 So. 2d at 1297.

188 See id.

189 See id.

190 See supra Part III.

should be denied. Pursuant to the two-step approximation of the balancing test set forth above,[191] the court should first examine whether the relief offered by the settlement is individual in nature or whether it provides benefits to an entire group, such that the relief cannot be restricted to the class that remains after opt out rights are exercised. In this case, all of the relief except punitive damages—the enjoinment of future efforts to switch members, the rescission of the prior contracts to switch policies, and compensatory damages—could be restricted to the class that agreed to be bound by the judgment. When the relief is individual in nature, the court should then ask whether individual actions threaten harms traditionally justifying (b)(1) treatment. The court's argument regarding the disruptive effect of suits for punitive damages is tenuous at best and does not justify the settlement of compensatory claims. Thus, a presumption favoring opt out rights should attach, to be overcome only by a showing that the *Mathews-Doehr* factors favor the denial of opt out rights.

Examining the class members' interests under the first *Mathews-Doehr* factor, individuals who contracted cancer had significant claims for damages at stake. By contrast, the class members who did not develop cancer had smaller claims for recoupment of the higher premiums and for either damages or rescission of contract. All class members, however, have individualized interests in the nature of the compensation which argue here for opt out rights. Additionally, many had complaints about a remedy which forced class members to continue to do business with the defendant. The interests of the class members thus strongly support opt out rights.

The second *Mathews-Doehr* factor looks to the interests of the defendant. Liberty National's main aim, in all likelihood, was to avoid future awards of significant punitive damages. This interest, however, does not support mandatory treatment of all class claims. Additionally, the defendant probably desired to avoid the costs of defending individual suits for damages and settling with each plaintiff. This interest is offset by the fact that most claims would still have been resolved by class litigation: the vast majority of the plaintiff class did not have claims worth pursuing in individual actions and thus would not opt out of a fair settlement.[192] Thus, the defendant's interests only weakly oppose opt out rights.

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191 See supra note 164 and accompanying text.

192 The Alabama Supreme Court indicated that only 700 class members would be entitled to monetary damages beyond recoupment of increased premiums paid. See *Robertson II*, 676 So. 2d at 1271. The remaining 200,000 claims for recovery of premiums and rescission, however, are unlikely to be pursued outside of a class context without the possibility of collecting punitive damages.

Robertson illustrates the problem of applying the third *Mathews-Doehr* factor, the erroneous deprivation prong, to the settlement context: erroneous judged against what? Examining the case before settlement, the factual basis for recovery (oral fraud) does not present an easy case for class treatment without the dangers of wholesale justice. Class treatment of such claims poses a fair risk of undervaluing claims. Individuals who have strong claims or incurred large losses are at risk in a settlement that splits the differences between class members. Looking at the settlement as proposed and approved, however, the fairness of the settlement is mixed. The court noted that the statute of limitations may bar the claims of many class members.[193] For those class members, the settlement was somewhat of a windfall. Others received relief, but may have been able to settle for more if they had asserted their claims in individual actions. Thus, the legitimate concerns of some class members about the settlement of their claims support the right to opt out.

The fourth and final *Mathews-Doehr* factor looks to the interests of Alabama, here in reducing administrative costs of adjudicating the claims. The driving force behind most class members' desire to opt out is the possibility of receiving punitive damages. This problem, however, is primarily of Alabama's own making through its substantive law which allows "pattern and practice" punitive damage awards in individual suits after class litigation asserting such claims has been filed. Moreover, this concern about punitive damages extends only to the settling of punitive damage claims, not to claims for rescission and compensatory damages. The administrative expenses of hearing nonpunitive damage claims are likely to be small in light of the fact that most class members did not have claims that could be pursued profitably in individual actions. Thus, Alabama's concerns, as "ancillary" to those of the parties, do not provide compelling support for denying opt out rights.

Overall, a balancing of the *Mathews-Doehr* factors demonstrates that the class had a due process right to opt out of the *Robertson* litigation. Many class members had relatively large tort claims and their inclusion in a class with others with smaller claims posed significant risks that their claims would be undervalued. If the "'deep-rooted historic tradition that everyone should have his own day in court'"[194] is a weighty due process value, no other competing interests justify denying opt out rights in this case. The interests of the defendant and the

193 See *Robertson I*, No. CV-92-021, reprinted in *Robertson II*, 676 So. 2d at 1281-82.

194 Richards v. Jefferson County, 116 S. Ct. 1761, 1766 (1996) (quoting 18 Charles Alan Wright et al., Federal Practice and Procedure § 4449, at 417 (1981)).

government fail to provide a sufficient rationale to depart from the norm of allowing individual suits. The court should have permitted opt out rights.

CONCLUSION

This Note seeks to separate the two strands of due process which support the right to opt out of class actions. This Note argues that *Shutts* was rightly decided, but that the Court's attempt to narrow the holding to cases "wholly or predominately" for monetary damages has frequently led courts to ignore the due process rights of class members. The special dangers posed by class adjudication call for nothing less than a significant set of protections for class members. These protections more frequently should include the right to opt out.

This Note proposes that a court's decision to grant or deny opt out rights should proceed under a two-pronged analysis. Under the first prong, discussed in Part II, due process requires that courts afford class members the opportunity to opt out if the forum state lacks minimum contacts with the class members or property at stake in the litigation. Under the second prong, set forth in Part III, even when a court has adjudicatory jurisdiction, due process may require opt out rights. The court should employ the *Mathews-Doehr* balancing test to accommodate the competing interests in opt out rights. The results of the balancing test can be roughly approximated by asking two questions: whether the relief sought cannot be restricted to the members of the class who would not opt out, and whether the granting of opt out rights would entail the unfairness traditionally supporting the certification of (b)(1) classes. When both questions are answered in the negative, a court should presumptively grant opt out rights. Application of the two-part analysis presented in this Note strikes a fair balance between the interests favoring mandatory actions and the litigation rights of individuals.