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## An Opt-In Option for Class Actions

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# AN OPT-IN OPTION FOR CLASS ACTIONS

Scott Dodson\*

*Federal class actions today follow an opt-out model: absent an affirmative request to opt out, a class member is in the class. Supporters defend the opt-out model as necessary to ensure the viability of class actions and the efficacy of substantive law. Critics argue the opt-out model is a poor proxy for class-member consent and promotes overbroad and ill-defined classes; these critics favor an opt-in model. This bimodal debate—opt out vs. opt in—has obscured an overlooked middle ground that relies on litigant choice: Why not give the class the option to pursue certification on either an opt-out or an opt-in basis? This article explores such an opt-in option. It considers the effects of opt-in classes’ enhanced cohesiveness and representational character on the ease of class certification, the logistical challenges of opt-in mechanisms and the technological advances that can mitigate those challenges, the doctrinal feasibility of allowing an opt-in option, and the potential pitfalls the option presents. The article concludes that the opt-in option has positive potential, and it offers specific proposals for rulemakers to consider.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	172
I. THE OPT-OUT CLASS . . . . .	175
A. <i>Historical Development</i> . . . . .	175
B. <i>The Opt-Out/Opt-In Debate</i> . . . . .	184
1. The Opt-Out Position . . . . .	184
2. The Opt-In Position . . . . .	186
II. THE OPT-IN OPTION . . . . .	187
A. <i>Why an Option</i> . . . . .	188
B. <i>Certification Effects</i> . . . . .	190
1. Ascertainability . . . . .	190
2. Numerosity . . . . .	191
3. Adequacy . . . . .	192
4. Superiority . . . . .	193
5. Other Certification Requirements . . . . .	194
III. ANCILLARY IMPLICATIONS . . . . .	195
A. <i>Notice</i> . . . . .	195
B. <i>Personal Jurisdiction</i> . . . . .	196
C. <i>Preclusion</i> . . . . .	197
D. <i>Class Settlement</i> . . . . .	199

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E. <i>Anonymity</i> .....	202
IV. LOGISTICS .....	202
A. <i>Option Mechanics</i> .....	202
B. <i>Opt-In Mechanics</i> .....	203
C. <i>Hybrid Mechanisms</i> .....	205
V. FEASIBILITY .....	206
A. <i>Legal</i> .....	206
B. <i>Political</i> .....	208
CONCLUSION .....	212
APPENDIX .....	213

### INTRODUCTION

Class actions have been a staple of American litigation for decades, but controversy seems always close behind.<sup>1</sup> Debates about class actions are generally bimodal: people either love them or hate them. Supporters see a thriving class mechanism as a crucial vehicle for enabling litigation of negative-value (often public-interest or consumer-rights) claims and for offering important efficiencies for positive-value claims.<sup>2</sup> Critics emphasize the risk of strike suits whose high stakes pressure defendants to settle low-merit cases and in which class counsel can sacrifice class interests for quick and large fees.<sup>3</sup>

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1. See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 811–12 (2010) (“Class actions have been the source of great controversy in the United States.”); Bruce Hay & David Rosenberg, *“Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000) (“[C]lass actions are without doubt the most controversial subject in the civil process today.”).

2. See Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, 64 L. & CONTEMP. PROBS. 137, 137 (2001).

Class actions for damages can provide compensation for modest but non-trivial losses suffered by widely dispersed but similarly positioned persons as a result of negligence or illegal behavior of others, allowing recovery for losses that cannot practically be achieved through individual litigation. In this way, damage class actions can deter such injurious behavior and thereby supplement regulatory enforcement by administrative agencies that are under-funded, susceptible to capture by the subjects of their regulation, or politically constrained. Damage class actions also may provide efficient management and resolution of large numbers of similar claims when individual litigation is feasible, but its costs would be extraordinarily high.

*Id. But cf.* Alon Klement & Keren Weinshall-Margel, *Cost-Benefit Analysis of Class Actions: An Israeli Perspective*, J. INSTITUTIONAL & THEORETICAL ECON. (forthcoming 2016) (manuscript at 1), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2702925](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2702925) [<https://perma.cc/9GXZ-QNY7>] (finding that that Israeli class actions “did not substantially facilitate access to courts and compensation” and “had limited success in realizing law enforcement and deterrence”).

3. Hensler & Rowe, *supra* note 2, at 138 (“To avoid litigation costs and small risks of large judgments, some defendants are willing to settle even very weak claims for their nuisance value.”). The criticisms have been described as “sweetheart” deals and “blackmail” settlements. See Hay & Rosenberg, *supra* note 1, at 1377–78.

These positions lead to predictable policy advocacy. Supporters of class actions favor the enhancement of class actions and an easier path to certification, while opponents favor the narrowing of class actions and more stringent certification requirements. Reflecting this tug of war, the class action's utility has waxed and waned over the years.<sup>4</sup>

This great tension has dictated the possible methods of determining who is a class member in a nonmandatory class. Two general models are possible<sup>5</sup>: In an "opt-out" class, any person within the scope of the class definition is a class member by default unless she affirmatively excludes herself from the class and preserves her right to litigate individually. In an "opt-in" class, by contrast, a person within the scope of the class definition is by default not a class member unless she affirmatively joins the class.

The expected effects of these two models reinforce the same bimodal debate about class actions generally. The empirical evidence strongly suggests that opt-out classes are much larger than opt-in classes and that individual litigation by excluded class members is rare. Accordingly, those who favor class actions see the opt-out model as a crucial feature of maintaining a strong and effective class mechanism, while those who disfavor class actions see the opt-in model as an important vehicle for restricting them.

Some scholarly contributions focused on the rights of absent class members cross the bimodal divide. Their fear that the opt-out mechanism inadequately protects absent class members leads to (sometimes reluctant) support for an opt-in model to better protect class members' rights.<sup>6</sup>

This conversation about opt-in and opt-out mechanisms is rich, energetic, and seemingly intractable. But it has overlooked the implications of two crucial insights that, together, suggest a workable and beneficial solution. The first insight is that not all nonmandatory class actions have the same needs. The one-size-fits-all premise of the class-action debate ignores

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4. See Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2247 (2008); Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 665–68 (1979); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 98–99 (2009); Judith Resnik, *From "Cases" to "Litigation"*, 54 L. & CONTEMP. PROBS. 5, 25–36 (1991).

5. This Article focuses on the nonmandatory classes articulated in Federal Rule of Civil Procedure 23(b)(3). Others have probed the features of "mandatory classes," in which a person fitting within the scope of the class is automatically a class member and receives no choice to be excluded from the class. Compare, e.g., David Rosenberg, Response, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002), with Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 354, 410–14 (2003) (noting the issue for punitive damages), and John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3 (1983) (recognizing that the ability to opt out is necessary to protect individual litigation autonomy). For simplicity, I use the term "class actions" in this Article to refer to nonmandatory class actions, unless otherwise specified.

6. See, e.g., Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 441 (2014) (advocating for the opt-in principle "to anchor class litigation in principles of participatory democracy and litigant autonomy").

the reality that some class actions might warrant an opt-out mechanism, while others might warrant an opt-in mechanism.

The second insight is that the greater cohesion and stronger representational qualities of opt-in classes necessarily affect the certifiability of class actions. In a nutshell, opt-in classes ought to meet the certification requirements more easily than opt-out classes simply because their class members have affirmatively opted in.

These two insights lead to the following solution: give the class the option to proceed on an opt-in basis with the prospect of easier certification.<sup>7</sup> An opt-out class faces daunting certification hurdles. It likely will be bigger but riskier. An opt-in class, by contrast, necessarily goes some distance toward the certification requirements. It likely will be smaller but safer. With an opt-out/opt-in option, the class can elect which approach to take in order to secure a mechanism that is best for that particular class.

This litigant-choice mechanism for nonmandatory class actions requires authorization.<sup>8</sup> Read permissively, Rule 23 already allows for opt-in classes that should more easily meet the existing certification requirements, so efforts could focus on informing lawyers and judges in the trenches. But because some courts have refused to read Rule 23 so permissively, and because of the virtues of deliberate rulemaking, rule amendment is the wiser course.

This Article contributes to the prominent literature on class actions and their class-determination mechanisms by offering and exploring an opt-in option. Part I lays the backdrop of the development of the opt-out mechanism in Rule 23 of the Federal Rules of Civil Procedure and the debates surrounding opt-out and opt-in classes, focusing especially on the bimodality of current class-action conversations. Part II argues that this bimodality obscures the reality that both types of classes have virtues depending upon the type of class at issue, and it offers a novel solution: the opt-in option. The Part then assesses the impact of the opt-in option on certification requirements, especially ascertainability, numerosity, adequacy, and superiority, and it concludes that the opt-in option offers a significant carrot: easier certification. Part III excavates some ancillary implications of the opt-in option on notice, personal jurisdiction, preclusion, settlement, and anonymity. Most of these considerations are positive, supporting the opt-in option, but some cut in contrasting ways, helping to inform the class's decision to proceed as an opt-out or opt-in class. Part IV then considers the logistics of this

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7. I speak of the "class" as holding the choice, by which I mean the class representatives will exercise the choice on behalf of the class. Others may dispute that the class exercises any real control and that, instead, class counsel is pulling the strings. That is possible as a practical matter (though surely not a formal matter), but two other considerations undermine whatever worries attend counsel's participation. First, the rules already offer the class a host of protections from overbearing counsel. And, second, the greater class-member participation and oversight expected in an opt-in class should alleviate some fears of undue influence by counsel.

8. See Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1 (2014) (arguing that only the law can authorize party choice).

option, the opt-in mechanism, and the hybridization of the option with subclasses and issue classes. Finally, Part V evaluates the feasibility of the opt-in option and its implementation.

## I. THE OPT-OUT CLASS

This Part details the development of the opt-out mechanism in the context of the evolving story of federal class actions, and it frames the current debate between opt-out and opt-in proponents.

### A. *Historical Development*

Although the class action has ancient roots,<sup>9</sup> its American manifestation began when Joseph Story imported English class actions in the early 1800s.<sup>10</sup> Story put his own spin on them: the class action was an exception to the rigid rules of necessary parties to cover situations

where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole . . . .<sup>11</sup>

Soon after, the Supreme Court, with Story writing, allowed a group of Lutheran parishioners to collectively sue heirs who threatened to evict them from their church; the Lutherans could be joined because they had voluntarily associated and chosen their litigation representatives, and all held the same interest.<sup>12</sup>

A few years before Story died, the Supreme Court adopted Federal Rule of Equity 48, which broadened Story's class-action scope:

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.<sup>13</sup>

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9. See generally STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

10. See Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1859–60, 1878 (1998).

11. *West v. Randall*, 29 F. Cas. 718, 722 (C.C.D.R.I. 1820) (No. 17,424) (Story, J.). A more detailed class-action typology can be found at JOSEPH STORY, 3 *COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA* §§ 98–135 (Boston, C.C. Little & Brown 1844).

12. See *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566 (1829).

13. See FED. R. EQUITY 48 (repealed 1912).

Equity Rule 48 implicitly endorsed class actions for individuals who were not all members of an externally defined group, and this prospect raised representational concerns that had not dominated class-action thought or practice.<sup>14</sup>

The few class actions pursued in practice, however, were primarily organizational suits, such as suits by trade unions, in which members voluntarily associated and delegated litigation rights to organizational representatives.<sup>15</sup> Consent of the members was crucial, but the expansion of groups led to the realism that specific consent was often ephemeral.<sup>16</sup> Accordingly, in the 1920s, the Supreme Court shifted away from consent and focused instead on interest commonality.<sup>17</sup> The common interests of the class members were enough to aggregate their claims, even if they did not all consent.<sup>18</sup>

Rule 23 was part of the original 1938 Federal Rules of Civil Procedure. Primarily drafted by Professor James Wm. Moore,<sup>19</sup> Rule 23 was meant to encourage the use of class actions.<sup>20</sup> It was based on Equity Rule 38 but attempted to provide clarity about when a class judgment was binding—a pervasive problem in the courts.<sup>21</sup> Rule 23 distinguished among three types of class actions: “true” (joint or common right), “hybrid” (several rights to a specific property), and “spurious” (several rights having commonality).<sup>22</sup>

The first two types—true classes and hybrid classes—were precursors of the so-called mandatory classes and therefore lacked a mechanism for class members to join or defect at their option.<sup>23</sup> But the third—the new category of spurious classes—was a creation designed to facilitate permissive joinder among unorganized members who shared a common interest and, rather than depending upon members’ ex ante consent, required post hoc consent in the form of an opt-in mechanism.<sup>24</sup>

14. See *id.*; YEAZELL, *supra* note 9, at 198–99.

15. See YEAZELL, *supra* note 9, at 222–23; Richard Marcus, *Once More Unto the Breach? Further Reforms Considered for Rule 23*, 99 JUDICATURE no. 1, 2015, at 57, 58.

16. YEAZELL, *supra* note 9, at 223–24.

17. See *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 382–83 (1922); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

18. YEAZELL, *supra* note 9, at 227–28.

19. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 377 (1967).

20. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1752 (3d ed. 2005) [hereinafter WRIGHT & MILLER]. It is not clear how successful the original Rule 23 was in this goal. See Arthur R. Miller, Keynote Address, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294 (2014) (reporting that class actions were invoked infrequently until after the 1966 amendments).

21. 7A WRIGHT & MILLER, *supra* note 20, § 1752; James Wm. Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 555–63 (1938).

22. FED. R. CIV. P. 23(a)(1)–(3), 308 U.S. 663, 689 (1939) (amended 1946).

23. 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, 255–256 (1985).

24. See 3B MOORE’S FEDERAL PRACTICE, § 23.30 (Matthew Bender 3d ed.).

The 1938 version of Rule 23 was less successful than its drafters had hoped.<sup>25</sup> Critics immediately and repeatedly assailed the distinctions as confusing and unworkable.<sup>26</sup> Courts inconsistently certified classes under different categories,<sup>27</sup> and lawyers attempted to manipulate the rule.<sup>28</sup> At the same time, class theory took a dramatic turn. Harry Kalven and Maurice Rosenfield wrote an influential article arguing that class actions could serve as a crucial adjunct to governmental regulation, especially where small stakes rendered individual wrongs economically unlitigable.<sup>29</sup> The view of class actions as an economizing, permissive-joinder device gradually began to share the stage with the view of class actions as a powerful agent for sociolegal change.

Sensing the need for change, the Advisory Committee on Civil Rules substantially revised Rule 23 in 1966, resulting in its modern iteration.<sup>30</sup> The Committee was committed to retaining a class mechanism but desired a “more functional attitude”<sup>31</sup> to encourage classes as a way of furthering the civil rights agenda and enabling low-value claims.<sup>32</sup> The Committee assigned four “well-agreed” elements required of all class actions—the familiar numerosity, commonality, typicality, and adequacy prerequisites of Rule 23(a).<sup>33</sup> The Committee also identified three types of class actions in Rule 23(b) roughly derived from the 1938 version: “mandatory” classes; group-remedy classes; and economy-based, common-interest classes.<sup>34</sup>

The Rule 23(b)(1) mandatory classes have generated “little excitement.”<sup>35</sup> The other two types, however, have generated plenty. Rule 23(b)(2), in particular, which allows for class-based relief for class-based wrongs, “was a central focus” of the 1966 drafters as a new vehicle for encouraging civil rights litigation, and it has largely fulfilled its promise.<sup>36</sup>

Rule 23(b)(3) has generated controversy for different reasons. Intended to replace the “spurious” class, this class “[wa]s not as clearly called for” but was implemented where class actions “may nevertheless be convenient and

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25. See Kaplan, *supra* note 19, at 380 (“In the wash of more than a quarter-century’s experience, rule 23 did not come out very well.”).

26. See, e.g., ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 257 (1950).

27. 7A WRIGHT & MILLER, *supra* note 20, § 1752; Kaplan, *supra* note 19, at 380–85.

28. Kaplan, *supra* note 19, at 381–84.

29. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

30. FED. R. CIV. P. 23.

31. Marcus, *supra* note 15, at 58.

32. See Miller, *supra* note 20, at 294.

33. See Kaplan, *supra* note 19, at 387.

34. See FED. R. CIV. P. 23 advisory committee’s note to 1996 amendment.

35. Edward H. Cooper, *Federal Class Action Reform in the United States: Past and Future and Where Next?*, 69 DEF. COUNS. J. 432, 432 (2002).

36. See *id.*; Kaplan, *supra* note 19, at 389 (explaining that Rule 23(b)(2) “buil[t] on experience mainly, but not exclusively, in the civil rights field”).



desirable,<sup>37</sup> and it came with additional requirements, including predominance and superiority.<sup>38</sup> Although the Committee envisioned only sparing use of the Rule 23(b)(3) class,<sup>39</sup> the Rule 23(b)(3) class rule “was invented in a moment of inspiration,” and several Committee members reported “that they had not the slightest idea what it would become.”<sup>40</sup> The most that can be said is that the drafters desired a catchall provision that offered a compromise between the efficiencies of aggregate litigation and the representational concerns of unaffiliated claimants.<sup>41</sup>

Because the drafters aimed to clarify that class adjudication was preclusive of individual members’ claims, and because the Supreme Court’s decision in *Hansberry v. Lee* made clear that preclusive representative suits implicated due process concerns,<sup>42</sup> the rulemakers codified oversight protections for absent class members to ensure that their interests were adequately represented and their legal rights adequately protected. Rule 23(b)(3) in particular, which relied upon a far weaker justification for class treatment (efficiency), and which required no external group identity to serve as a proxy for consent, raised significant due process concerns.<sup>43</sup> To palliate those concerns, the rulemakers updated Rule 23 to add notice requirements and opt-out rights.<sup>44</sup>

During the rulemaking process, the Committee published for comment a proposal that included a provision allowing a court to certify a mandatory Rule 23(b)(3) class with no opt-out right, but the Committee ultimately withdrew the proposal in response to negative comments.<sup>45</sup>

The Committee also considered making Rule 23(b)(3) classes subject to class-member opt in, much like the rule’s 1938 predecessor did with the spurious class. Benjamin Kaplan, the primary draftsman for the 1966 version of Rule 23, later wrote about the Committee’s deliberations:

It is unfair to a defendant opposing [an opt-out] class, so the argument goes, to subject him to possible liability toward individuals who remain passive after receiving notice or who may, indeed, have had no notice of

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37. FED. R. CIV. P. 23, advisory committee’s note to 1966 amendment; *see also* Kaplan, *supra* note 19, at 389–90.

38. Kaplan, *supra* note 19, at 390–91.

39. *See* John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 340 (2005) (noting “the committee’s confidence that courts would certify only a few actions as (b)(3) class actions”).

40. Cooper, *supra* note 35, at 432.

41. FED. R. CIV. P. 23, advisory committee’s note to 1996 amendment (“The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.”).

42. 311 U.S. 32 (1940).

43. *See* FED. R. CIV. P. 23, advisory committee’s note to 1996 amendment.

44. *See* Kaplan, *supra* note 19, at 391–94.

45. *See* Rabiej, *supra* note 39, at 344–45.

the proceeding: under the previous law, some, perhaps many, of those persons might simply have foregone any claims against the defendant; they might in fact have remained ignorant of having any possible claims. Running through this argument was the idea that litigation should be a matter for distinct action by each individual.<sup>46</sup>

But the drafters rejected the opt-in mechanism precisely because of the inertial risk that class members with small claims simply would not pursue them.<sup>47</sup> Kaplan wrote:

[R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable.<sup>48</sup>

The rulemakers instead adopted a new opt-out mechanism. Viewing the typical Rule 23(b)(3) class like “an administrative proceeding where scattered individual interests are represented by the Government,” Kaplan wrote, “it seems fair for the silent to be considered as part of the class.”<sup>49</sup>

Opt-out classes had the additional virtue of avoiding the problem in pre-1966 spurious classes of class members waiting until the meritorious nature of the class was established before deciding to opt in.<sup>50</sup> Opt-out rights also enabled class members who developed conflicts with the class to defect to individual actions without destroying the class action for the remaining members.<sup>51</sup>

The result of the 1966 deliberations was to offer a new class-action rule that divided the types of class actions into instrumental goals of fairness, remedy, and economy but retained vestiges of the external-constraint/process-based model of class actions.<sup>52</sup> And in designing the new Rule 23(b)(3), the drafters replaced the old opt-in mechanisms with a novel opt-out model.

The Committee did not appreciate the changes in litigation that would occur over the next few decades, as federal legislation expanded and courts and legislatures enhanced consumer-protection laws.<sup>53</sup> Almost immediately,

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46. Kaplan, *supra* note 19, at 397–98.

47. See Rabiej, *supra* note 39, at 340.

48. Kaplan, *supra* note 19, at 397–98.

49. *Id.* at 398.

50. 7AA WRIGHT & MILLER, *supra* note 20, § 1787.

51. *Id.* (“[Opt out] assures that differences of opinion within the class will not necessitate a dismissal of the action itself.”).

52. See Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 670–73 (2014) (arguing that the 1966 rulemakers were concerned with process as well as functionality).

53. See DEBORAH HENSLER ET AL., RAND INST. FOR CIV. JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN EXECUTIVE SUMMARY 1 (1999), [https://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2005/MR969.1.pdf](https://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR969.1.pdf) [<https://perma.cc/J75T-BB6U>]; Miller, *supra* note 20, at 295 (“The Committee obviously could not predict

class practice flourished, and the corporate community began criticizing the Rule 23(b)(3) mechanism as allowing “Frankenstein monsters” that resulted in “legalized blackmail.”<sup>54</sup> In some instances, the characterization was apt. As Arthur Miller has reported, “the procedure fell victim to overuse by its champions and misuse by some who sought to exploit it for reasons external to the merits of the case.”<sup>55</sup> But there is no denying that many other class actions dramatically enhanced the litigation power of consumer-rights, civil-rights, securities-fraud, and discrimination victims.

In the 1960s and 1970s, during the so-called rights revolution,<sup>56</sup> courts construed Rule 23 liberally to promote class actions for their functional purposes.<sup>57</sup> This was especially notable in the “across the board” class actions before 1982, used aggressively to eradicate workplace discrimination.<sup>58</sup> Other “adventurous” class litigation developed,<sup>59</sup> and the “settlement only” class became commonplace.<sup>60</sup>

Alarmed at the capacity of the class device to bring the most powerful businesses to their knees, defense groups in the 1970s began calling for reform and spearheaded a political counterrevolution to scale back civil litigation generally, with class actions as a prime target.<sup>61</sup> The government was also watching. In 1979, the U.S. Department of Justice formally proposed new congressional legislation and a draft bill to replace Rule 23(b)(3) with two alternatives: (1) a *parens patriae* “public” action for negative-expected-value claims whose primary goal was deterrence and which would be a mandatory class with neither an opt-out nor an opt-in mechanism, and (2) a class action for higher-value claims whose primary goal was compensation

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the great growth in complicated federal and state substantive law that would take place in such fields as race, gender, disability, and age discrimination; consumer protection; fraud; products liability; environmental safety; and pension litigation . . .”).

54. Cooper, *supra* note 35, at 432–33.

55. Miller, *supra* note 4, at 678.

56. See Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Reform*, 65 DEPAUL L. REV. (forthcoming 2016) (manuscript at 2), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2598753](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2598753) [<https://perma.cc/YD38-GSL8>].

57. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736 (2013); David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 626–43 (2013).

58. See Marcus, *supra* note 57, at 641–43.

59. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

60. See THOMAS E. WILLGING ET AL., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES* 61–62 (1996).

61. See Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation* 3–4, 10–11 (U. Pa. Law Sch., Pub. Law Res., Paper No. 15-12), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2622201](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622201) [<https://perma.cc/2DAT-LJ6X>]; see Cooper, *supra* note 35, at 433. The counterrevolution’s focus on rulemaking and the federal bench is consistent with other specific rules and doctrines. See Burbank & Farhang, *supra* note 56, at 3–4.

and which gave the court discretion to certify an opt-out or an opt-in class.<sup>62</sup> The proposal noted “widespread support for comprehensive revision of Rule 23(b)(3)” from judges, businesses, lawyers, and academics.<sup>63</sup> Nevertheless, Congress and the Advisory Committee—perhaps wishing to observe how the 1966 amendments played out in the courts—declined to pursue reform.

The courts were not shy. After a brief initial period of expansive application of Rule 23, the courts began an era of retrenchment that continues to this day. In 1982, for example, the Supreme Court decided *General Telephone Co. of the Southwest v. Falcon*,<sup>64</sup> casting Rule 23 as “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only”<sup>65</sup> and noting the due process concerns of representational litigation.<sup>66</sup> Given these concerns, the Court held that a promotion-discrimination plaintiff could not represent a class of hiring-discrimination claimants without proof of discrimination that affected both applicants and employees in the same way.<sup>67</sup> “[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable,”<sup>68</sup> the Court noted, and a class action “may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”<sup>69</sup>

In 1986, the ABA Section on Litigation made a specific proposal for Rule 23 amendments. The proposal would have invested the judge with greater discretion to craft a class-action mechanism for each specific case, including discretion to require either an opt-out mechanism or an opt-in mechanism.<sup>70</sup> The Advisory Committee specifically considered these proposals but was concerned that discretionary opt-in might allow judges to effectively defeat class actions involving issues or claims they disfavored.<sup>71</sup> Accordingly, the Committee again declined to revisit class-action reform.

But the political pressure to curb a perceived abuse of litigation, especially in mass-tort actions, continued, and, in 1991, the Judicial Conference

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62. UNITED STATES DEPARTMENT OF JUSTICE OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, BILL COMMENTARY: THE CASE FOR COMPREHENSIVE REVISION OF FEDERAL CLASS DAMAGE PROCEDURE *in* 6 CLASS ACTION REPORTS 12 (Jan.–Feb. 1979) [hereinafter U.S. DEP’T OF JUSTICE: THE CASE FOR COMPREHENSIVE REVISION OF FEDERAL CLASS DAMAGE PROCEDURE].

63. *Id.* at 9.

64. 457 U.S. 147 (1982).

65. *Falcon*, 457 U.S. at 155.

66. *Id.* at 156 (“We have repeatedly held that ‘a class representative must be part of the class and possess the same interest and suffer the same injury’ as the class members.”) (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

67. *Id.* at 157–58, 159 n.15.

68. *Id.* at 160.

69. *Id.* at 161.

70. See Rabiej, *supra* note 39, at 346 & n.103.

71. See *id.* at 348 & n.111.

asked the Advisory Committee to study whether Rule 23 was up to the challenges posed by mass-tort litigation.<sup>72</sup> Committee deliberations ran the gamut and included opt-in possibilities. In 1993, for example, the Committee considered an amendment that would have granted discretion to the court to “determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class.”<sup>73</sup> The Committee expected opt-in classes to be rare and limited to defendant classes or dispersed mass-tort plaintiff classes in which notice would be difficult or ineffective.<sup>74</sup> But fractured practitioner reactions caused the Committee to retract the proposal.<sup>75</sup> Accordingly, revision of the opt-out requirement never became a formal part of any proposal.<sup>76</sup>

Meanwhile, the Supreme Court continued to stress the structural protections in Rule 23(a) as necessary to protect the representational quality of class actions. In the 1997 case *Amchem Products, Inc. v. Windsor*,<sup>77</sup> the Court held that although a “settlement only” asbestos-injury class need not show trial manageability for superiority purposes under Rule 23(b)(3), the class nevertheless must satisfy Rule 23(a) and the other requirements of Rule 23(b) in order to be certified.<sup>78</sup> “Subdivisions (a) and (b),” the Court explained, “focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.”<sup>79</sup> Because the class and proposed settlement failed these rules, the Court overturned the settlement and denied class certification.<sup>80</sup>

Two years later, the Court overturned another settlement-only asbestos class in *Ortiz v. Fibreboard Corp.*<sup>81</sup> Again noting the tension between the

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72. See *Proposed Rules*, 167 F.R.D. 535, 536 (1996). For a fuller history of the attempt to amend Rule 23 in the 1990s, see Rabiej, *supra* note 39, at 328–68.

73. WILLGING ET AL., *supra* note 60, at 94.

74. *Id.* at 97.

75. Cooper, *supra* note 35, at 433; Rabiej, *supra* note 39, at 367 (“The defense bar was split. Some parts supported the proposals because they offered an opportunity to achieve ‘global peace’ . . . [while] [o]ther parts of the defense bar opposed the proposals precisely because they could lose all claims in a single action. . . . The plaintiff’s bar was equally fractured. Class-action specialists supported the amendments, . . . [while] litigation specialists favored individual litigation and opposed aggregation procedures.”); *id.* at 363–64 (reporting that some defendants preferred whole-class resolution and feared successive-class tactics).

76. Indeed, even the “relatively modest” formal proposals generated such voluminous and vocal opposition from clashing visions of class actions that the Committee abandoned all but the present Rule 23(f). See Cooper, *supra* note 35, at 433–34; see also Hensler & Rowe, *supra* note 2, at 139; Marcus, *supra* note 15, at 59.

77. 521 U.S. 591 (1997).

78. *Amchem*, 521 U.S. at 620 (stating that requirements “designed to protect absentees by blocking unwarranted or overbroad class definitions[ ]demand undiluted, even heightened, attention in the settlement context” because a court “will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold”).

79. *Id.* at 621.

80. *Id.* at 622.

81. 527 U.S. 815 (1999).

strong due process value of individual representation and the representative nature of class actions,<sup>82</sup> the Court overturned the settlement and class certification on Rule 23(a)(4) and 23(b)(1) grounds.<sup>83</sup>

After *Ortiz*, the Advisory Committee again studied possible class-action reform but ultimately proposed only minor procedural amendments to the timing and content of certification orders, settlement-approval criteria and procedures, rules for class counsel, and regulations for attorney's fees.<sup>84</sup> The proposals from the Advisory Committee did not include changes to the opt-out procedure.<sup>85</sup>

Since then, the Court has continued to interpret the certification requirements of Rule 23 in a restrictive manner. A recent opinion involving a class of 1.5 million women suing for gender discrimination in employment, *Wal-Mart Stores, Inc. v. Dukes*,<sup>86</sup> began by reiterating the mantra that the class device is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”<sup>87</sup> With that tenor in mind, the Court erected several new hurdles for certification.

First, the Court interpreted Rule 23(a)(2)'s commonality requirement to mean that class member claims “must depend upon a common contention . . . that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”<sup>88</sup> Second, the Court held that “Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.”<sup>89</sup> And, third, the Court unanimously concluded that backpay was inappropriate under 23(b)(2) because “claims for individualized relief (like the backpay at issue here) do not satisfy

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82. *Ortiz*, 527 U.S. at 846–47.

83. *Id.* at 852–57.

84. See Marcus, *supra* note 15, at 59–60.

85. For a detailed discussion of the Advisory Committee's proposals, see Cooper, *supra* note 35, at 435–37.

86. 131 S. Ct. 2541, 2547 (2011).

87. *Dukes*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

88. *Id.* at 2551. Commentators have recognized that *Dukes* gives new, restrictive meaning to commonality. See Klonoff, *supra* note 57, at 774–75; David G. Savage, *Wal-Mart Bias Case Tossed Out; High Court Makes Filing Class-Action Discrimination Suits Much More Difficult*, BALT. SUN, June 21, 2011, at 7A (“Columbia University law professor John Coffee said the Wal-Mart ruling all but sounds the death knell for class-action lawsuits that seek money from employers.”). *But see* Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After Wal-Mart v. Dukes*, 48 AKRON L. REV. 803, 804 (2015) (reporting anecdotally “that courts are proceeding much as they did prior to the Supreme Court decision”). In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Court appeared to expand upon this holding of *Dukes* to suggest that Rule 23(b)(3) classes require classwide proof of damages. *Id.* at 1433.

89. *Dukes*, 131 S. Ct. at 2551 (emphasis in original).

the Rule.”<sup>90</sup> According to the Court, “individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2).”<sup>91</sup>

Today, the class mechanism has fallen into disfavor, and certification of most classes is harder to achieve than ever before.<sup>92</sup> Some have even predicted the end of class actions.<sup>93</sup> Others, while harboring grave concerns, nevertheless are hopeful that creative and tenacious lawyering will find new ways to keep class actions alive.<sup>94</sup> What appears not to have changed, however, despite a pervasive undercurrent of discontent, is the class action’s commitment to the opt-out mechanism. The following section addresses that undercurrent.

### B. *The Opt-Out/Opt-In Debate*

Ever since the 1966 amendments (and before), the mechanism for preserving individual autonomy in a nonmandatory but preclusive class action has been hotly debated. The two primary mechanisms involve allowing putative class members to either opt out of or opt in to class membership. This section frames that debate.

#### 1. The Opt-Out Position

Opt-out classes, which include all members who do not opt out, tend to be more inclusive than opt-in classes, which include only members who affirmatively opt in. Because of inertia, an opt-in regime would result in “drastically reduce[d]” numbers of class members.<sup>95</sup> An older empirical study from 1974 suggested that an opt-in mechanism would result in class

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90. *Id.* at 2557 (emphasis omitted); *id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part) (“The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2).”).

91. *Id.* at 2558 (majority opinion).

92. See generally Klonoff, *supra* note 57 (exhaustively documenting this trend). See also John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002–2007 The Future of Class Actions*, in CLASS ACTION LITIGATION 2008: PROSECUTION AND DEFENSE STRATEGIES 195, 195–96 (2007) (“[F]or better or worse, it is today clear that the tide has turned against class certification, and new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic.”); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 104–34, 145–48 (2011). Some types of cases—securities fraud and wage-and-hour claims—persist as robustly eligible for class treatment. See Klonoff, *supra* note 57, at 825–26.

93. E.g., Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015).

94. E.g., Miller, *supra* note 20, at 306.

95. John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 906, 909 (“[P]eople simply do not reply to notice letters.”).

sizes from around 40–70% smaller than opt-out classes.<sup>96</sup> More recent studies have confirmed that an overwhelming percentage of class members—near 99%—follows the default in opt-out classes, often making for very large classes.<sup>97</sup>

Size matters for all kinds of reasons. The economies of scale are greater in large classes, making smaller-value claims more viable and saving all parties and the courts from duplicative litigation.<sup>98</sup> Large classes help level the litigation playing field when brought against the largest or most well-heeled defendants. Large classes involving claims with a public dimension are more likely to raise public awareness. Class counsel might prefer large classes because large classes tend to generate higher fees, more efficient costs, and greater prestige.<sup>99</sup>

Size also matters for certification under Rule 23. A small class with a low opt-in rate might fail the numerosity requirement of Rule 23(a)(1) or call into question the superiority of class treatment under Rule 23(b)(3), thus leaving class members no alternative but to sue individually, and these hurdles might discourage the use of an opt-in class mechanism in other contexts.<sup>100</sup>

In addition, the default mechanism matters for individual claims. Individual claimants may decline to exercise options for any number of reasons, including lack of notice, lack of understanding, or lack of courage.<sup>101</sup> Because these reasons may have nothing to do with the merits of the claims, some opt-in opponents fear not small classes but the exclusion of class

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96. See Bruce I. Bertelsen et al., Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1150 (1974).

97. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1548 (2004).

98. 7AA WRIGHT & MILLER, *supra* note 20, § 1787 (“[The class action] assures that small claimants who would be unable to protect their rights through separate suits can take advantage of the judgment in the class action without the burden of actually participating.”).

99. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 380, 421 (2000).

100. See Joshua P. Davis et al., *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 871–72 (2014) (“An opt-in procedure would be fatal to many class actions. Too few potential class members might act to create the economies of scale necessary for effective litigation. The procedure would cause some proposed class actions to fail and, as a consequence, discourage others. The opt-in class, then, would deprive potential class members of a meaningful choice whether to participate in class litigation. The result would be that these potential class members would have only two options: to pursue litigation individually or not to pursue it at all.”) (emphasis omitted); see also Debra Lyn Bassett, *Class Action Silence*, 94 B.U. L. REV. 1781, 1792–93 (2014) (noting these problems).

101. See Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 936 (1998) (“Inertia, the complexity of class notices, and the widespread fear of any entanglement with legal proceedings will lead many reluctant class members to forgo the opportunity to opt out, and likewise will deter many willing class members from seizing the opportunity to opt in.”).



members with meritorious claims from the very advantages of the class proceeding that make their claims economically viable.<sup>102</sup> If individual claims have negative value, some commentators contend, then “[a]n opt-in class leaves the claimant with no meaningful choice at all.”<sup>103</sup>

Thus, proponents of opt-out classes tend to devalue individualized litigant autonomy.<sup>104</sup> They prioritize instead the efficiencies, equalizing features, and claim-enabling nature of class actions.

## 2. The Opt-In Position

Proponents of opt-in classes, by contrast, focus on protecting absent class members and defendants. Class members give up their rights to individual litigation when they join a preclusive class, and, accordingly, some indication of consent is important. Many commentators criticize the opt-out mechanism as a poor proxy for consent because most class members—perhaps for the same reasons of inertia or misunderstanding or lack of notice—will decline to exercise an opt-out right whether they want to remain in the class or not.<sup>105</sup> Further, class counsel is motivated to disincentivize class members from opting out because fees are often proportional to the size of the class.<sup>106</sup> Opt-in classes, however, ensure true consent.<sup>107</sup>

Proponents of opt-in classes who seek to protect absent class members are especially forceful in class-settlement contexts, when the adversarial relationship between class counsel and defense counsel devolves into a joint effort to resolve the dispute. Settlement presents a heightened risk of so-called “sweetheart deals,” in which the defendant offers a high fee award to class counsel to induce class counsel to sell a less-than-warranted settlement

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102. Hensler & Rowe, *supra* note 2, at 140 (disfavoring an opt-in requirement because it “might screen out as many meritorious suits as non-meritorious suits (if not more)”).

103. Davis et. al., *supra* note 100, at 872; *see also* Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (“The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”).

104. *See, e.g.*, Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1007, 1008 & n.17 (2005) (questioning the practical value of litigant autonomy); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 925, 934 (1998) (arguing that individual participation has little practical value).

105. Bassett, *supra* note 100, at 1783 (arguing that “the most sensible interpretation of class members’ silence is confusion, not consent”); Mullenix, *supra* note 6, at 441 (calling the opt-out system an “artifice of implied consent”); *see also* MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 137, 173–75 (2009) (advocating for solicitude for class members’ rights).

106. Bassett, *supra* note 100, at 1793.

107. Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 89 (2003) (“When an opt-in procedure is provided, consent is no longer implied or fictitious.”).

package to uninformed class members.<sup>108</sup> In those cases, some commentators urge, only informed and express consent can protect absent class members' rights.<sup>109</sup>

Large classes also affect defendants. Business and defense interests see class actions as “judicial blackmail” waged largely by clientless plaintiff’s attorneys seeking leverage for settlement of weak claims;<sup>110</sup> the larger the class, the larger the pressure on defendants. The Supreme Court has endorsed this fear.<sup>111</sup> And, even when class claims are strong, defendants rationally might prefer smaller classes to limit their damages exposure.<sup>112</sup> Accordingly, to relieve the pressure that large class actions present, businesses advocate for smaller, opt-in classes.<sup>113</sup>

Thus, opt-in proponents tend to highly value individualized litigant autonomy.<sup>114</sup> They also focus on protecting absent class members and defendants.

## II. THE OPT-IN OPTION

The opt-in/-out debate has assumed a dichotomous character—an either-or, bimodal framework.<sup>115</sup> But things need not be so uncompromising. This Part charts a novel middle road by giving the class the option to proceed as an opt-out or an opt-in class, and it discusses the certification implications of that choice.

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108. See Hay & Rosenberg, *supra* note 1, at 1377–78.

109. See Bronsteen, *supra* note 95, at 903 (arguing for an opt-in requirement for settlements); see also Bassett, *supra* note 100, at 1793 (arguing that both class and defense counsel have incentives to discourage opt outs at the settlement stage); Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687 (2004) (worrying that the other structural protections do not adequately protect class members’ due process rights).

110. See Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 25 (2009) (“[B]usiness interests fear class actions, especially trans-substantive opt-out class actions for money damages . . .”).

111. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–61 (2007) (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases.”).

112. See Thomas H. Barnard & Amanda T. Quan, *Trying to Kill One Bird with Two Stones: The Use and Abuse of Class Actions and Collective Actions in Employment Litigation*, 31 HOUSTON LAB. & EMP. L.J. 387, 397 (2014) (explaining that in an opt-in regime, “there are often fewer plaintiffs involved, and thus, potentially lower damages for defendants”).

113. See Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 410–11 (2002) (“Insurance and business interests have signaled a major campaign to change the ‘opt-out’ provisions in the class action rules to require an affirmative act to ‘opt in.’”).

114. See, e.g., Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 804, 807 (2007) (relying on “the normative force of process-based individualism” to restrict class actions).

115. One elegant exception is Bronsteen, *supra* note 95, at 906–07 (arguing for opt-out litigations but opt-in settlements).

### A. *Why an Option*

Both opt-out proponents and opt-in proponents have good arguments. But their debate is framed as a rigid dichotomy of one-size-fits-all models. The reality is that different classes demand different conditions.

Compare two classes: One is a class of individuals personally injured by a defective airbag. The other is a class of persons who hold stock in the company that manufactures the airbag, stock which depreciated significantly after the airbag defects were made public.

In the personal-injury class, assume the circumstances of the claimants' injuries are quite different but that the claims generally have a high expected value. The claimants prefer to litigate in various forums around the nation—perhaps their hometowns—rather than in a single forum. For this class, perhaps the claims' high value and individualized nature of proof suggests deference to claimant autonomy. The high expected value might also suggest that claimants will be less immobilized by inertia. An opt-in class might therefore be a good fit for this class. Those who want to opt in are likely to do so, and the class then will be composed of only those claimants who have expressly consented to aggregate litigation. The class will be small but strong—it will not be diluted by unknown claimants with claims of unknown strength, and the defendant need not fear an overbroad class of faceless plaintiffs.

In the securities class, assume that there are many shareholders with a wide range of claim values. Some small shareholders may have experienced only pennies' worth of depreciation. Large, institutional investors perhaps experienced significant depreciation. Location and other individualized litigation choices matter far less—there is a stronger commonality that unites these class members. This class may prefer an opt-out class, one in which inertia works in favor of small stakeholders by keeping them in the class while allowing large stakeholders to overcome that inertia, if they wish to opt out and litigate their claims on an individual basis.<sup>116</sup> At the same time, the commonality binding the class members renders individualized litigant autonomy less important.<sup>117</sup>

The takeaway of these two illustrations is that a uniform opt-out regime will work well for some classes but poorly for others, just as a uniform opt-

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116. See REDISH, *supra* note 105, at 131 (noting that the force of inertia is inversely proportional to the expected value of the claim); Davis et al., *supra* note 100, at 871 (“To be sure, class members with large claims, particularly if they are sophisticated litigators, may be capable of opting out of class proceedings and litigating on an individual basis. To that extent, if they do not like classwide recoveries, they may avoid them. Class members with small claims, however, generally will not opt out of a class action or object to how it proceeds. These absent class members are apt to lack the understanding, time, or resources to engage actively in litigation.”).

117. See Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 610–14 (2011) (arguing that the more cohesive the class, the weaker the need for individualized day-in-court rights).

in regime will work well for some classes but poorly for others. The problem is that a rigidly uniform system will not fit all cases well.

The solution is to allow flexibility through choice. But whose choice should it be? Some jurisdictions and past proposals have given the courts discretion to choose whether a class should proceed on an opt-out or opt-in basis.<sup>118</sup> But there are significant downsides to giving courts the choice. Judges might choose a model based on the expected outcome, prefer the opt-out model because of its familiarity, or overselect the opt-in model for its stronger consent basis.<sup>119</sup> In addition, the uncertainty of judicial selection would promote forum shopping, spawn litigation over the “proper” judicial choice, and adversely affect class attorneys’ initial case-selection practices.<sup>120</sup>

The better course is to give the class the choice. The class itself is in the best position to know its needs and the mechanism that best suits it.<sup>121</sup> Further, granting the class the choice helps assuage the great tension between litigant autonomy and the paternalistic oversight accompanying representative aggregation.

In the example classes above, then, an opt-in option would allow the personal-injury class to proceed as an opt-in class and allow the securities class to proceed as an opt-out class. Each class would then proceed with the mechanism that is the better fit for its individual needs.

Why would a class ever choose to proceed on an opt-in basis if opt-in classes generally exhibit reduced economies of scale and exert weaker litigation pressures? The primary reason is that an opt-in class presents a much easier certification hurdle than an opt-out class.<sup>122</sup> In essence, the option presents a tradeoff: a small but more certifiable class or a larger but less certifiable class. The following subpart explains why.

118. See, e.g., PA. R. CIV. P. 1711(b) (Pennsylvania Rule of Civil Procedure); LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT 236 (1996) (English proposal); Vince Morabito, *Opt In or Opt Out? A Class Dilemma for New Zealand*, 24 NEW ZEALAND U. L. REV. 421, 422 (2011) (New Zealand proposal); Klement & Weinshall-Margel, *supra* note 2 (Israel Class Action Law); CIVIL JUSTICE COUNCIL, “IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS”: DEVELOPING A MORE EFFICIENT AND EFFECTIVE PROCEDURE FOR COLLECTIVE ACTIONS—FINAL REPORT 146 (John Sorabji et al. eds., Nov. 2008) (English and Welsh proposals).

119. Similar objections were lodged against foreign proposals to move away from opt-in mechanisms and toward opt-out mechanisms. See Morabito, *supra* note 118, at 435–36.

120. Cf. ALBERTA LAW REFORM INSTITUTE, CLASS ACTIONS 98 (2000). But see LAW REFORM COMMISSION OF IRELAND, MULTI-PARTY LITIGATION §§ 2.24–25 (2005), [http://www.lawreform.ie/\\_fileupload/reports/report%20multi-party%20litigation.pdf](http://www.lawreform.ie/_fileupload/reports/report%20multi-party%20litigation.pdf) [<https://perma.cc/RD E6-9DLV>].

121. The “class” is an amalgam of class members, class representatives, and class counsel. Although the ultimate decision to proceed as an opt-in or opt-out class may be made by class counsel or the class representatives, their decisions are legally made on behalf of the class. See FED. R. CIV. P. 23(a)(4) (allowing class certification only if “the representative parties will fairly and adequately protect the interests of the class”); FED. R. CIV. P. 23(g)(4) (imposing a duty on class counsel “to fairly and adequately represent the interests of the class”).

122. A possible secondary reason is that an opt-out class may be so wholly undesirable to high-value, individual-minded claimants that they would opt out at such a rate as to cause the class to fail the numerosity requirement of an opt-out class.

## B. Certification Effects

Rule 23 imposes requirements testing the efficiency and representational quality of class treatment before an action can be certified as a class action. Opt-in classes by definition start closer to certification than opt-out classes because opt-in classes present fewer ascertainability, cohesiveness, and representational concerns. I discuss each below.

### 1. Ascertainability

Although it does not expressly appear in Rule 23, a growing body of federal precedent requires class members to be “ascertainable.”<sup>123</sup> Ascertainability, in the words of one commentator, is “an objective and administratively feasible way to determine exactly who is in the class.”<sup>124</sup> Ascertainability goes to concerns about how to provide adequate notice, how to understand the effects of preclusion, and how to efficiently manage the litigation.<sup>125</sup> Both courts and prominent treatises have supported the ascertainability requirement for certification, especially in Rule 23(b)(3) classes,<sup>126</sup> and that support has led to refusals to certify such proposed classes as “Snapple purchasers” and “Marlboro smokers.”<sup>127</sup>

Ascertainability can be a difficult problem for opt-out classes in which those who remain in the class are by definition unidentified. But opt-in membership, by contrast, goes quite a distance toward alleviating some ascertainability issues. Opt-in class members are all, by definition, identified. And the very goals of ascertainability—the identification of class members for notice, process, and preclusion purposes—apply most strongly when class members are unidentified. In opt-in classes, however, class members are identified by their affirmative conduct, and that affirmative conduct lays

123. Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 *YALE L.J.* 2354, 2357 (2015); see also Klonoff, *supra* note 57, at 762 n.186.

124. Shaw, *supra* note 123, at 2358.

125. See *id.* at 2360; see also *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (stating that ascertainability “eliminates ‘serious administrative burdens [of paying prevailing class members] that are incongruous with the efficiencies expected in a class action’ ” (quoting *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446 (E.D. Pa. Mar. 2, 2000))); *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 396 (S.D.N.Y. 2008) (“Identifying class members is especially important in Rule 23(b)(3) actions, in order to give them the notice required by Rule 23(c)(4) so that they may decide whether to exercise their right to opt out of the class.”).

126. See *MANUAL FOR COMPLEX LITIGATION* § 21.222 (4th ed. 2004) (emphasizing that class definability, based on objective factors, is important to determine who is in the class, subject to notice, and bound by the judgment); *supra* note 125 (citing cases). *But see Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657–58 (7th Cir. 2015) (holding ascertainability an invalid certification prerequisite because of its lack of textual support and because of the controls already built into Rule 23), *cert. denied*, 136 S. Ct. 1161 (2016); Shaw, *supra* note 123 at 2366 (arguing that ascertainability is not a legal basis for rejecting certification). Among the states, only Louisiana makes ascertainability an explicit requirement of certification. Thomas D. Rowe, Jr., *State and Foreign Class-Actions Rules and Statutes: Differences from—and Lessons for?—Federal Rule 23*, 35 *W. ST. U. L. REV.* 147, 152 (2007).

127. Shaw, *supra* note 123, at 2365.

a direct conduit to each class member. Opt-in identification facilitates easy notice, streamlines litigation management, and alleviates some preclusion uncertainty. Opt-in classes, therefore, ought to present few ascertainability problems.<sup>128</sup>

The Third Circuit, however, has endorsed a particularly strong form of ascertainability by holding that class-member self-identification through affidavits is not enough, by itself, to establish ascertainability.<sup>129</sup> As commentators have pointed out, the Third Circuit's strong form of ascertainability seems unwarranted and unwise,<sup>130</sup> and no other circuit has followed its approach.<sup>131</sup> However, even under the Third Circuit's view, self-identification surely is *relevant* to ascertainability.<sup>132</sup> After all, self-identification largely meets the principal goals of ascertainability. And self-identification in an opt-in class in which only those who opt in are potentially included in the class gives both the court and the defendant an effective opportunity to determine whether those who have opted in really do fit within the class definition.<sup>133</sup> The gap between self-identification and ascertainability, if it exists at all, should be narrow and, at the least, far easier to bridge than the gap facing opt-out classes.

## 2. Numerosity

Rule 23(a)(1) requires the class to demonstrate that the membership is sufficiently numerous that joinder would be impracticable.<sup>134</sup> In the past, numerosity has not generally been a difficult criterion to satisfy, often because common sense suggested that the likely number of class members meeting the class definition exceeded the numerosity requirement.<sup>135</sup> But in today's age of stringent attention to the certification requirements, including the Supreme Court's admonition that the class must offer "significant

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128. See *id.* at 2391 ("If the drafters had . . . gone for opt-in, we would not be debating ascertainability doctrine today.")

129. See *Carrera v. Bayer Corp.*, 727 F.3d 300, 306–12 (3d Cir. 2013) (finding proposed class-member affidavits too unreliable to satisfy ascertainability); see also *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 356 (3d Cir. 2013) (stating in dictum that a "petition for class certification will founder if the only proof of class membership is the say-so of putative class members").

130. See generally *Shaw*, *supra* note 123.

131. See, e.g., *Mullins*, 795 F.3d at 661–72 (rejecting the Third Circuit's approach).

132. Even the Third Circuit concedes that the evidence required for ascertainability "will vary based on the nature of the evidence." *Carrera*, 727 F.3d at 308; accord *Karhu v. Vital Pharm. Inc.*, 621 F. App'x. 945, 948 (11th Cir. 2015) (appearing to allow self-identification methods to satisfy ascertainability if "administratively feasible and not otherwise problematic").

133. Cf. *Mullins*, 795 F.3d at 668–69

134. FED. R. CIV. P. 23(a)(1).

135. *Klonoff*, *supra* note 57, at 768 ("Until recently, the so-called 'numerosity' requirement rarely posed a roadblock to class certification, and defendants frequently stipulated to this element.").

proof” of compliance,<sup>136</sup> a number of courts have required proof of numerosity beyond what common sense might otherwise suggest.<sup>137</sup> In an opt-out class, in which the class members are not identified, that proof may be more difficult because the exact number of class members is unknown.

In an opt-in class, however, much proof is already there. As long as the number of class members who opt in exceeds around forty,<sup>138</sup> and as long as joining them together would be impracticable, then the class will have met the numerosity requirement. Proof of numbers can be a simple matter of counting class members who have opted in, and proof of impracticability of joinder will be far easier having identified those who wish to be in the class.

There are two ways in which an opt-in class might actually complicate satisfaction of the numerosity requirement. First, inertia might produce too few class members. That risk is simply one that the class must weigh in determining whether to proceed as an opt-in or opt-out class. Second, the ability of class members to opt in might suggest that formal joinder is not impracticable. The rule requires, however, only that formal joinder be impracticable, not impossible, and a number of factors could support a finding that joinder of opt-in members is impracticable—including geographic dispersity, jurisdictional difficulties, and the inconvenience and expense of individual formal lawsuits.<sup>139</sup>

### 3. Adequacy

Rule 23(a)(4) requires the class representatives and class counsel to be adequate in representing the absent class members.<sup>140</sup> Adequacy “is the glue that holds a class together and ensures due process for absent class members,”<sup>141</sup> and it can be destroyed “if either the class representative or class counsel is incompetent, suffers from a conflict of interest, fails to assert claims with sufficient vigor, or suffers from other flaws that will detract from a full presentation of the merits.”<sup>142</sup> Adequacy is especially important in opt-out classes, where absent class members can only voice their concerns by exiting the lawsuit altogether; even if fully aware of potential adequacy

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

137. Klonoff, *supra* note 57, at 768; *see also* 7A WRIGHT & MILLER, *supra* note 20, § 1762 (“[M]ere speculation as to the number of parties involved is not sufficient”).

138. *See* RICHARD D. FREER, CIVIL PROCEDURE § 13.3, at 780 (3d ed. 2012) (“[T]here is no magic number. Some [courts], however, have espoused this rule of thumb: Generally, fewer than 21 members is insufficient, more than 40 members is sufficient, and the range in between varies depending upon other factors.”). For some data points from cases finding class membership sufficiently or insufficiently numerous, *see* 7A WRIGHT & MILLER, *supra* note 20, § 1762.

139. *See* 7A WRIGHT & MILLER, *supra* note 20, § 1762.

140. FED. R. CIV. P. 23(a)(4).

141. Klonoff, *supra* note 57, at 780.

142. *Id.*

problems (a big if), prospective class members may simply lack the will to exercise their exit rights through an opt out.<sup>143</sup>

Opt-in classes offer somewhat more security that adequacy exists. Opt-in claimants will usually exercise their choice after receiving some notice of the action, of the class definition, of the representatives, and of the class counsel. Notice can be presumed to be more effective for opt-in than for opt-out members, who may never receive notice in the first place. And the exercise of the opt in is an affirmative step overcoming the force of inertia, which signals stronger consent to the nature and arrangement of the class and its representatives. Further, having taken some ownership of class membership by opting in, claimants are likely to follow the case developments with closer scrutiny and perhaps even offer advice on conflicts or inadequacies that develop.<sup>144</sup> For these reasons, a court confronted with no concerns from opt-in members can take greater comfort that the class representatives and counsel are adequate.

I do not mean to say that adequacy is assured in an opt-in class, nor would I advocate for the elimination of independent court assessment of adequacy, for conflicts still can arise and escape attention. But I do mean to argue that opt-in membership is itself sufficiently probative that adequacy generally should be more easily satisfied in an opt-in class.

#### 4. Superiority

Rule 23(b)(3) requires a determination that the class mechanism be “superior to other available methods.”<sup>145</sup> The requirement forces a court to determine whether the benefits of class treatment really will be realized.<sup>146</sup> Alternatives include individual actions, test cases with preclusive effects, administrative proceedings, and consolidation of multidistrict litigation.<sup>147</sup>

Opt-in classes by their very nature approach superiority because they involve class members whose relationship to the class is less attenuated than in an opt-out class. Opt-in members’ rights are less likely to be prejudiced, which is a factor in considering superiority.<sup>148</sup> Further, opt-in classes approximate joined individual actions, lessening any advantage individual actions might hold. Finally, by affirmatively opting in, class members have signaled a more reliable preference for the class mechanism over alternatives.

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143. *But see* Coffee, *supra* note 99, at 419 (“[A] central contention of this Article is that ‘exit’ is more likely to be effective than ‘voice.’ . . . [But] exit and voice can be combined in ways that make each more effective.”).

144. *Cf.* 7B WRIGHT & MILLER, *supra* note 20, at § 1807 (noting in the context of FLSA opt-in collective actions that “each FLSA claimant has the right to be present in court to advance his or her own claim”).

145. FED. R. CIV. P. 23(b)(3).

146. 7AA WRIGHT & MILLER, *supra* note 20, § 1779.

147. *Id.*

148. *See id.* (“[The court] must compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is



Like adequacy, opt-in classes do not automatically meet the superiority requirement. Superiority remains an independent assessment that can work against certification of even an opt-in class. But the nature of the opt-in class does support the superiority of class treatment as against alternatives.

### 5. Other Certification Requirements

Rule 23(a)(2) requires a question of law or fact common to the class, Rule 23(a)(3) requires that the representative's claims be "typical" of the class, and Rule 23(b)(3) requires that common questions "predominate" over individual questions.<sup>149</sup>

Opt-in classes do not inherently support any of these requirements, but the opt-in process will affect all three requirements if the identification of class members more clearly establishes "significant proof" of commonality, typicality, and predominance. In an opt-out class, the court assesses these criteria at worst in a vacuum and at best against the class definition and anecdotal evidence from some—but not all—class members.<sup>150</sup>

By contrast, an opt-in class, where the class members are necessarily known and identified, allows clearer identification of common questions and more informed comparisons between common issues and individual issues, and between class claims and representative claims. Mechanistically, an opt-in class streamlines the adjudication of these certification requirements.

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The personal-injury class hypothesized above illustrates how an opt-in class can approach satisfaction of certification requirements more easily than an opt-out class. As an opt-out class, the personal-injury claimants could have difficulty meeting the ascertainability requirement (such as it is) and the numerosity requirement if many claimants were unknown and unidentified. Individualized characteristics would present representational concerns and superiority problems unassuaged by the idea that class member "consent" is presumed by a failure to opt out. And the uncertainty of what common issues exist, whether they predominate over the individualized issues, and whether class claims are typical of the representative's claims may all hinder "significant proof" of those Rule 23 requirements.

But an opt-in class would be inherently ascertainable and would facilitate easy determination of numerosity. The express willingness of its members to join the class would alleviate many of the representational and superiority problems that would plague the opt-out version. And the very

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necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court.").

149. FED. R. CIV. P. 23(a)(2), (a)(3), (b)(3).

150. See Klonoff, *supra* note 57, at 792 ("[I]n recent years, the courts have made it far more difficult to certify class actions under (b)(3) by summarily finding, after identifying significant individualized issues, that predominance cannot be satisfied. They do so without carefully *weighing* those individualized issues against the common issues.").

identification of class members would present easier access to the proof needed to establish commonality, typicality, and predominance. In short, the opt-in version would face much easier certification prospects.

Choice thus bridges the divide between opt-out proponents and opt-in proponents and harnesses the benefits of both by allowing the selection of the right mechanism for the class.

### III. ANCILLARY IMPLICATIONS

The opt-in option presents the class with a choice between a likely larger but less easily certifiable class and a likely smaller but more easily certifiable class. But the opt-in option affects other parts of the class-action mechanism, too, in ways relevant to both the class and the law. This Part considers the opt-in option's implications for notice, personal jurisdiction, preclusion, settlement, and anonymity.

#### A. Notice

Notice to unnamed class members is important to apprise class members of their rights and the opportunity to participate. Rule 23 requires the court to notify Rule 23(b)(3) class members of class certification and of any class settlement by using “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”<sup>151</sup> Rule 23 also allows the court to direct additional notices to the class when appropriate.<sup>152</sup> An opt-in option affects these notice requirements in two important ways.

First, it makes notice easier and more reliable because the opt-in process obliges class members to identify themselves and supply an effective means of future communication. This effect is a systemic good that enhances the efficacy of the class mechanism.

Second, it affects the cost of notice in cross-cutting ways. On the one hand, because Rule 23 demands “individual notice” to identified class members, notice to opt-in class members must be individualized and potentially costlier. On the other hand, the stronger presence of opt-in members suggests that discretionary notice in Rule 23(d) should be infrequent. In addition, more active opt-in class members could ultimately reduce notice costs through the use of technology.<sup>153</sup> If, for example, members opted in by registering on a website, then all notices could be electronic, automated, and

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151. See FED. R. CIV. P. 23(c)(2)(B); cf. FED. R. CIV. P. 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.”).

152. See FED. R. CIV. P. 23(d)(2)(B) (granting the court the power to give “appropriate notice” of, *inter alia*, “any step in the action”).

153. Cf. Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1570, 1650–51 (2016) (predicting that technological advances will simplify and cheapen class-action logistics, including using social media and email for notice of certification and settlement and other information, and referencing the many courts that have already used such techniques).

immediate.<sup>154</sup> An opt-in class, then, might ultimately be cheaper to maintain than an opt-out class.

### B. *Personal Jurisdiction*

The limits of personal jurisdiction apply to unnamed class members, even in a plaintiff class.<sup>155</sup> Several features of the class-action mechanism, however, render personal-jurisdiction requirements more relaxed in the class-action context, including the assurance of adequate representation, the lighter litigation burdens and risks borne by plaintiff class members (like hiring counsel, appearing, testifying, being liable for money damages, etc.), and the meaningful opportunity for class members to opt out of the class and retain individualized litigation rights.<sup>156</sup>

Opt-in classes supply a much firmer basis for establishing personal jurisdiction over class members. Opt-in classes naturally exhibit stronger internal controls on adequacy, adding to the assurance of adequate representation.<sup>157</sup> Opt-in class members really have no more litigation burdens than any opt-out class member except those that they choose to take on. And the opportunity for opt-in class members to litigate individually is stronger than the opportunity for opt-out class members because they need not do anything to retain their litigation rights.

Further, consent supplies a possible independent basis for personal jurisdiction. Personal jurisdiction can be consented to or waived by a party, including by a plaintiff,<sup>158</sup> and, generally, a plaintiff consents to personal jurisdiction by filing in that state,<sup>159</sup> even without sufficient minimum contacts.<sup>160</sup> In the class context, the Supreme Court has come close to holding that even notice plus a right to opt out establishes consent to personal jurisdiction.<sup>161</sup> Most commentators, however, are skeptical that opt-out rights are

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154. See Bassett, *supra* note 100, at 1806 (suggesting “a well-advertised website for non-individualized notices, perhaps even offering an online opt-in option” and pointing to the possibility of using social-media platforms).

155. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985). For an analysis of *Shutts* that parses out the personal-jurisdiction import and the separate due process implications, see Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2076–94 (2008).

156. *Shutts*, 472 U.S. at 808–12. *Shutts* essentially validated the Rule 23 protections. Bassett, *supra* note 107, at 59.

157. Cf. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 369 (arguing that due process in the class context has typically been measured by adequate representation).

158. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

159. See *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938).

160. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780–81 (1984).

161. See *Shutts*, 472 U.S. at 813–14. Some see consent as an express basis of *Shutts*. See, e.g., Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 766 n.3 (1998); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 580 n.38 (1997) (“*Shutts* construes a failure to opt out of a class suit as consent to personal jurisdiction.”).

reliable proxies for consent,<sup>162</sup> and some have questioned whether plaintiffs who are not U.S. citizens ought to be treated more protectively because of language barriers, legal/cultural differences, nationalism bias, and greater logistical difficulties of exercising opt-out rights.<sup>163</sup>

The exercise of an opt in manifests a much stronger basis for establishing consent to personal jurisdiction.<sup>164</sup> Deeming any class member (but especially a foreign class member) to have consented based on her failure to opt out is questionable because failure to opt out could be the result of any number of circumstances—lack of notice, lack of understanding, or inertia—that have nothing to do with consent. By contrast, an affirmative expression to opt in to class membership is a much clearer manifestation of informed consent.<sup>165</sup> Indeed, depending upon the notice and the particular opt-in mechanism, an opt in could amount to express legal consent.

For these reasons, classes proceeding on an opt-in basis rest upon a more stable foundation for personal jurisdiction. This security could affect how the class chooses to proceed (i.e., as opt in or opt out) and what additional due process protections courts believe might be warranted (such as for foreign class members).

### C. Preclusion

A lawsuit between the same parties based on the same underlying cause of action is preclusive of all claims that were or could have been asserted in the first proceeding.<sup>166</sup> Though preclusion has spawned a complicated and nuanced doctrine, the normal rule is that preclusion operates only against persons who were formal parties to the first proceeding.

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162. E.g., Eisenberg & Miller, *supra* note 97, at 1561 (“The data thus suggest that the *Shutts* notion of consent to jurisdiction based on failure to opt out is fictional.”).

163. See Bassett, *supra* note 107, at 64–66, 73–74; *id.* at 67 (arguing that the opportunity to be heard is ephemeral for a non-U.S. citizen located in a faraway country, in which “time zone differences, transportation expense, communication delays, and other difficulties” present formidable barriers); *id.* at 70 (“[T]here is a very real danger that if all class counsel are U.S. attorneys, class counsel will not fight hard enough for non-U.S. interests.”); cf. Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 114–16 (1999) (noting that U.S. personal-jurisdiction doctrine is unique); Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. COMP. & INT’L L. 157, 157–58 (2001) (“Only a few other nations have adopted the class action device even to a limited extent . . .”).

164. Debra Bassett argues that class members who are foreign plaintiffs should be given opt-in rights. See Bassett, *supra* note 107, at 87. I need not go so far. My point is only that opt-in classes offer a superior basis for deeming any class member to have consented to the forum state’s adjudicatory authority, and that that attribute has implications for the utility and viability of an opt-in option.

165. It is true that the Supreme Court specifically disavowed the requirement of an opt-in mechanism as a predicate for personal jurisdiction, but it did not disparage opt-in mechanisms in any way. See *Shutts*, 472 U.S. at 812–14.

166. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

The class action is an exception to the usual rule that preclusion operates only on parties.<sup>167</sup> This exception is crucial to the legitimacy of the class action by preventing class members from obtaining a free bite at the apple as a class and, having failed, then pursuing second bites of the same litigation on individualized bases. Of course, those who opt out of the class retain their rights to litigate individually. But to make the class action fair to defendants, class members who stay through judgment or settlement should generally be bound by the resolution of the class action. In 1940, the Supreme Court clarified that members of a class action “may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties.”<sup>168</sup>

Preclusion is not absolute, however. Some class members have attempted to avoid preclusion in a second lawsuit by asserting that class representation was inadequate.<sup>169</sup> Class members also could potentially avoid preclusion by claiming that the first court lacked personal jurisdiction over them.<sup>170</sup> And, as Tobias Wolff has argued,

[t]he level of sophistication that an absentee would have to exhibit in order to make an informed decision about the risk that preclusion doctrine poses to her individual claims, however, would make notice and opt-out poorly suited to the protection of those interests, even, or perhaps especially, if the notice were to include a detailed description of the nature of the doctrinal risk.<sup>171</sup>

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167. For some of the literature on class-action preclusion, see, for example, Samuel Is-sacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998); Edward F. Sherman, “*Abandoned Claims*” in *Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 485 (2011); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005).

168. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940); see also *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (“There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. Basic principles of *res judicata* (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply.” (citations omitted)). *But see* Wolff, *supra* note 167, at 727 (“[T]he *Cooper* Court permitted the individual class members to assert their discrimination claims in a subsequent proceeding, even though those claims arose out of the same series of transactions as did the class claim.”).

169. Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1870 (2015); Wolff, *supra* note 167, at 718 n.1 (citing *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257–61 (2d Cir. 2001) (explaining that inadequate representation in an earlier proceeding can allow a “future claimant” to escape the effects of a class settlement)).

170. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (“The only way a class action defendant . . . can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of *res judicata* in a later suit for damages by class members.”).

171. Wolff, *supra* note 167, at 785; see also *id.* at 787–88 (arguing that opt-out rights “are not well suited to operate as a proxy for robust expressions of litigant autonomy on complicated doctrinal matters like those associated with preclusive effects”).

The opt-in mechanism goes some distance toward alleviating these preclusion difficulties. Opt-in classes exhibit stronger representational quality, leading to firmer conclusions of adequacy-justified preclusion. As discussed above, opt-in mechanisms offer a stronger basis for personal jurisdiction, cabining the availability of jurisdictional defects to prevent preclusion. And, although opt-in expressions do not completely remove the concern that class members do not fully understand the preclusive effects of the class action they are joining, opt-in expressions at least alleviate that concern, while also providing a more reliable mechanism for the transmission of such information.

#### D. Class Settlement

Settlement presents both benefits and problems for class actions. Class settlement diminishes litigation-manageability issues, making a class resolution more likely to be a superior vehicle for resolution under Rule 23(b)(3)'s superiority requirement.<sup>172</sup> In addition, the other certification requirements that tend to promote efficiency—like commonality and predominance—are less important in the settlement context. Recognizing these differences, both the Supreme Court and the Rules Committees have embraced some lightened scrutiny on these certification criteria.<sup>173</sup>

Having reached an agreement, however, class counsel and the class representatives are no longer in an adversarial relationship with the defendants. The lack of adversity and the pressure to end the litigation increase the risk that the class counsel and representatives will collude with the defendants to shortchange the absent class members. Accordingly, both the Supreme Court and commentators have stressed that fairness to the absent class members demands focused protection of the quality of their representation in the class-settlement context.<sup>174</sup>

The risk of collusion is especially acute in opt-out classes, when the realities of inertia mean that few class members have actually consented to

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172. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

173. *Id.*; PROPOSED FED. R. CIV. P. 23(b)(4), 167 F.R.D. 523, 559 (1997) (proposing a new certification standard for settlement classes “even though the requirements of subdivision (b)(3) might not be met for purposes of trial”); *cf.* PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.06 (AM. LAW. INST. 2010) (proposing that settlement classes need not meet the predominance requirement but rather only that numerosity, “significant common issues exist”); *id.* § 3.06(b), at 212 (proposing changes to 23(b)(3) settlement-class certification akin to the changes considered by the committee in 1996, namely undoing *Amchem* to require only numerosity, “significant” common issues, and sufficiently defined and ascertainable class).

174. See *Amchem*, 521 U.S. at 621; Bronsteen, *supra* note 95, at 903; 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, 714 (1986); Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 953 (2014); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 805 (1997); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 4 (1991); Wolff, *supra* note 155, at 2039–40. How much collusion actually occurs is disputed and empirical evidence is lacking. See Wolff, *supra* note 155, at 2040.

the proceedings and the power of class members to monitor and control their agents is low.<sup>175</sup> That heightened risk has led at least one commentator to conclude that settlements should bind only those who opt in, even if certification previously proceeded on an opt-out basis.<sup>176</sup>

Existing mechanisms do add protections for absent class members in the settlement context. Rule 23(e) obligates the court to provide notice of the settlement terms to all class members, gives absent class members the opportunity to lodge objections to the settlement terms, and authorizes the court to refuse to approve the settlement unless class members are afforded a new opportunity to opt out of the settlement.<sup>177</sup> Rule 23(e) also directs the court to approve the settlement only after determining that it is “fair, reasonable, and adequate.”<sup>178</sup>

Courts have taken their settlement-oversight role seriously and have, on occasion, refused to approve settlements they believed shortchanged class members.<sup>179</sup> The efficacy of objectors and opt-out rights in safeguarding class members, however, is less certain. Objectors appear to be rare.<sup>180</sup> In fact, objectors and opt-out requests each total about or less than 1 percent of total class members, though rates vary by case type, with consumer cases having the fewest and mass torts having the most.<sup>181</sup> Even when lodged, most objections are unsuccessful because their litigation resources are dwarfed by the parties’ efforts.<sup>182</sup> As one study revealed: “about half of [all class action] settlements that were the subject of a hearing generated at least one objection” and “[a]pproximately 90% or more of the proposed settlements were approved without changes.”<sup>183</sup>

Of some concern is the encouragement of objector trolls, who leverage threats of objection and appeal of class settlements to extract a side payment. Evidence suggests a growing industry of such objectors,<sup>184</sup> and the opt-in option could enhance objector prevalence and leverage by granting

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175. See Erichson, *supra* note 174, at 967; Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 146 (2001); Macey & Miller, *supra* note 174, at 19.

176. Bronsteen, *supra* note 95, at 903 (“This article suggests changing the default rule [of opt out] so that class settlements include only those who expressly assent to the terms of the settlement by opting in.”).

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

178. FED. R. CIV. P. 23(e)(2).

179. See Edward S. Sledge IV & Christopher S. Randolph Jr., *Setting the Edges: Defending Against Plaintiff End Runs Around CAFA*, 80 DEF. COUNS. J. 178, 184 (2013).

180. See Eisenberg & Miller, *supra* note 97, at 1546.

181. *Id.* at 1532–33.

182. See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 72–73, 84–110, 114 (2007).

183. Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 140–41 (1996).

184. See Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1624–25 (2009). *But see* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F., 403, 438–42.

them greater access to information. One solution is the limiting or overruling of *Devlin v. Scardelletti*, which gives objectors a right to appeal a settlement order without formally intervening.<sup>185</sup> Eliminating this point of leverage would disempower objector trolls considerably but would also remove an important opportunity for class members with legitimate objections to have those objections be heard fully.<sup>186</sup>

In theory, an opt-in option for certification might mitigate some of the representational concerns in the settlement context. Opt-in members are likely to exert stronger control over and engage in closer monitoring of their representatives and attorneys, especially in the settlement context. Because opt-in classes suffer less from an agency deficit than opt-out classes, perhaps external judicial oversight is less warranted. The limited empirical evidence available to date does not support enhanced representational quality in certain opt-in aggregate regimes, however,<sup>187</sup> so more study is needed before making firm predictions about the salutary effects of an opt-in option on class settlements.

Opt-in membership cuts different ways. On the one hand, opt-in members approach party-equivalent status and thus have a stronger claim to the appellate rights that come with party status. An opt-in objector may therefore have a stronger claim to appellate rights than even *Devlin* acknowledged. On the other hand, the greater representational quality of an opt-in class undermines some of the justifications for giving objectors appellate rights in the first place, especially if objectors retain the option of opting out.

Perhaps opt-in options present opportunities for creative middle-road solutions. Rule 23(f) conditions certification appeal on permission from the court of appeals.<sup>188</sup> In that same spirit, an opt-in objector's right to appeal could be conditioned on district court review and approval.<sup>189</sup>

Another creative solution might track the American Law Institute's proposal, which would allow opt-in class members to bind themselves to a future settlement if the settlement is approved by supermajority vote.<sup>190</sup> The

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185. 536 U.S. 1 (2002). *Devlin* was a mandatory Rule 23(b)(1) class, and the Court emphasized the need for appellate rights when opt-out rights were unavailable. *Devlin*, 536 U.S. at 10–11.

186. Fitzpatrick, *supra* note 184, at 1658.

187. See Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 MISS. L.J. 443, 447, 458 (2010) (finding that plaintiffs fare poorly in FLSA opt-in collective-action settlements “because the opt in requirement does not function as a merits filter in the way that class action reformers predict” and because “the opt in requirement does not appear to control attorneys’ fees as expected by class action reformers”); Burch, *supra* note 169, at 1869 (“Without standards and formal supervision, recent nonclass settlements garnered through multidistrict litigation have suffered from self-dealing provisions. . . . So, although clients are not as absent as they are in class actions, their coerced ‘consent’ to these settlements does not legitimize the deal as it might in truly individual litigation.”).

188. FED. R. CIV. P. 23(f).

189. Fitzpatrick, *supra* note 184, at 1658.

190. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION, *supra* note 173, § 3.17(b).



idea, in one commentator's words, is to alleviate the "holdout problem" by "exchang[ing] consent to a settlement for consent to a process."<sup>191</sup>

Rulemakers could explore a district-court condition on opt-in objector appeals akin to Rule 23(f)'s appellate condition or allow opt-in notices to waive rights to appeal, as the American Law Institute proposes. These solutions would have to be weighed against the diminished protections that full objector appellate rights provide, but such conditions would enhance the attraction of the opt-in option for plaintiff classes.

#### E. *Anonymity*

A critical feature of the opt-in mechanism is that it forces class members to identify themselves. But some classes benefit from anonymity (or at least from plausible deniability), especially when the plaintiffs and defendants have ongoing relationships or interactions. The paradigmatic example is a class of current employees suing their employer. Some anecdotal evidence suggests that the fear of workplace retaliation dissuades employee opt ins.<sup>192</sup> Some mitigation devices might exist,<sup>193</sup> but there is no getting around the basic idea that an opt-in mechanism forces the class member to take an affirmative, and often open, step toward adversarial litigation. Strong class-member interest in anonymity or passivity might counsel against a class choice to proceed on an opt-in basis.

### IV. LOGISTICS

An opt-in option raises practical issues. When and how should the option be exercised? What is required of those who wish to opt in, and how will they know to do so? Can a class have both opt ins and opt outs? This Part considers some of these logistical questions.

#### A. *Option Mechanics*

The simplest way to allow the class to have the option would be to allow the class to define itself as a group of claimants who have opted or will opt in.<sup>194</sup>

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191. Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 507–08 (2011).

192. See, e.g., Laura Wides-Muñoz, *Guest Farmworkers Say Visa System Means Abuse*, THE NEWS-PRESS, June 3, 2007, at B7; cf. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 82–84 (2005) (reporting the widespread view).

193. A partial solution might be to use pseudonyms or number codes. See Alexander, *supra* note 187, at 486 (offering this suggestion as an anti-retaliation measure for employee classes).

194. As a practical matter, class counsel likely would draft the class definition, but Rule 23 specifically imposes a duty on class counsel to represent the best interests of the class. FED. R. Civ. P. 23(g)(4).

One potential issue with giving the class the ability to define itself as an opt-in class is the availability of restrictive prelitigation agreements. Prelitigation agreements—which include arbitration clauses—are ubiquitous in a host of areas, including consumer contracts, employment contracts, and services contracts.<sup>195</sup> These agreements modify the rules of future litigation between the signatories, and courts have, by and large, upheld the enforceability of these agreements, including agreements that affect class-action practice.<sup>196</sup>

Prelitigation contracts could direct a signatory to refrain from joining any class action. In an opt-out world, a court would have to construe such an agreement as imposing an affirmative duty to exercise an opt out. And, conceivably, a class member who receives insufficient notice might not violate the agreement even if remaining in the class. But the agreement has much clearer applicability to an opt-in class. The inherent difficulties of inducing class members to take an affirmative step to opt in to a class, coupled with the potential prevalence of prelitigation agreements that prohibit such a step, may decimate the numbers of persons who could opt in.

In general, however, the opt-in option probably has less to say about prelitigation agreements than one might initially suppose. That is because peddlers of prelitigation agreements who care about class-action practice can easily extract a blanket waiver of all class actions, which should affect both opt-in and opt-out classes equally. Thus, prelitigation agreements that affect only opt-in classes are likely to be quite rare indeed.

### B. *Opt-In Mechanics*

More rigorous, formal, and clear opt-in procedures more accurately reflect individual class-member consent, raise representational quality, and reduce the opportunity to challenge opt-in exercises in satellite litigation. But such procedures might also raise the barrier to effective opt ins, thus reducing the size of the class and potentially excluding those who wished to be included.

In considering a mechanism that balances these effects, courts and rulemakers can look to existing analogues. Rule 23 offers no guidance on

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195. Some studies estimate that approximately 50% of all credit-card agreements contain arbitration clauses with class-action waivers. See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 22, 37 (Dec. 12, 2013), [files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](https://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf) [<https://perma.cc/Q6M5-U28H>] (finding that 50.2% of credit card contracts have arbitration clauses and that 93.9% of those clauses also contain a class action ban).

196. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); cf. Fitzpatrick, *supra* note 93, at 175–79 (arguing that almost all prospective class-action defendants have the opportunity to constrain class liability via prelitigation agreements); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 487 (2002) (“Courts have had little difficulty enforcing standard terms offered in electronic format.”). For the view that prelitigation agreements by their own force constrain only parties and not the law or courts, see Scott Dodson, *Atlantic Marine and the Future of Party Preference*, 66 HASTINGS L.J. 675 (2015).

how to manage the existing opt-out process, but commentary takes the position that no formal legal document is required and, while recognizing that “too much informality might pose problems of authenticity and ambiguity,” it suggests that “any written evidence of that desire should suffice.”<sup>197</sup> Opt-out deadlines are usually 30-60 days after notice is given, though the court usually can exercise discretion to allow untimely opt outs before final judgment.<sup>198</sup>

Collective actions under the FLSA and related statutes have followed a court-created process of conditional certification, notice and opt-in receipt, and final certification.<sup>199</sup> The opt in must take the form of written consent filed with the court,<sup>200</sup> but no specific form is mandated; any consent made in writing bearing the person’s signature and evidencing an intent to join is valid “regardless of its form.”<sup>201</sup> The Supreme Court has opined that conditional certification produces no independent legal entity of aggregated individuals; rather, the individuals “become parties to a collective action only by filing written consent with the court.”<sup>202</sup>

These proposals and existing practices suggest that any written expression of intent should suffice as an effective opt-in notice, though the court should retain some discretion to require more formal opt-in notices, either generally or on a member-specific basis, if circumstances warrant.<sup>203</sup>

As for timing, the earlier opt-in notices are filed, the more meaningful they are to certification requirements and class-definition choices. A class opting to proceed on an opt-in basis likely has some knowledge of the identity of many members at the outset. Informed decisionmaking, however, depends upon effective notice,<sup>204</sup> so opt-in elections should take place after notice of some of the details of the class action—including the class definition, the representatives, the class counsel, the defendants, and the claims.

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197. 7AA WRIGHT & MILLER, *supra* note 20, § 1787.

198. ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 202 (West 4th ed. 2012).

199. See, e.g., *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995); *Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009). See generally 7B WRIGHT & MILLER, *supra* note 20, § 1807.

200. See *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989); *Opt-in Requirement*, in 3 EMPLOYMENT DISCRIMINATION COORDINATOR ANALYSIS OF FEDERAL LAW § 120:65 (2016).

201. *Proper Form of Opt-in Consent*, in 3 EMPLOYMENT DISCRIMINATION COORDINATOR ANALYSIS OF FEDERAL LAW, *supra* note 200, § 120:66.

202. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013).

203. The Pennsylvania rule governing opt-in classes, for example, “does not adopt the procedure for filing a claim” but supposes that “prothonotaries will have the responsibility, under court direction, of establishing adequate records and dockets proving easy access to and identification of those members of the class electing to opt out or opt in pursuant to the direction of the certification order.” PA. R. CIV. P. 1711 explanatory cmt. The New Zealand proposal would direct the court Registrar to open a “class register” that records the opt ins, which are offered by a request to join via a form prescribed by the court. See *Morabito*, *supra* note 118, at 424.

204. See *Hoffmann-La Roche*, 493 U.S. at 170.

Analogous to the established conditional-certification procedure in the collective-action context, a notice-approval process seems reasonable for opt-in classes: the class representatives and class counsel file the action as an opt-in class action under Rule 23, along with a proposed notice to class members. The defendant may file pre-answer motions. If the complaint survives to the defendant's answer, then the court can approve of the notice,<sup>205</sup> which then is sent to class members (perhaps after some discovery regarding the identity of the class members), who have 30–60 days—subject to extension in the discretion of the court—to submit a written opt-in notice.<sup>206</sup> Upon the closing of the opt-in window, the court will rule on class certification.

I see no reason to bar class counsel's contact with putative class members before notice approval, as some courts have done in collective actions.<sup>207</sup> But to ensure informed opt-in consent, the details of the class action described in the notice should be preapproved by the court to ensure accuracy and immutability, and only opt ins submitted in response to the court-approved notice should be included.

### C. Hybrid Mechanisms

The opt-in option I propose already is a hybrid mechanism because it defines the class based on those who have opted in but still allows opportunities to opt out at certification, at settlement, and at other times authorized by the court. I would be open to a pure opt-in option that lacks any opt-out rights, but that is a more difficult and dramatic case that I leave for another day.

Yet other hybrids could exist. For example, a class could proceed with an opt-in subclass and an opt-out subclass, thereby capturing everyone who does not affirmatively opt out.<sup>208</sup> The certification standards would apply

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205. Commentary has expressed caution about the neutrality of the contents of the notice. See 7AA WRIGHT & MILLER, *supra* note 20, § 1787 (“[I]n order to avoid use of the notice to solicit claims, some courts have included a cautionary paragraph stating that the recipient should not interpret the notice as an expression by the court as to the merits of the claims or defenses being asserted. This is thought to be a useful way to minimize the risk that an absent member might view the notice as officially validating the class claim.”); 7B WRIGHT & MILLER, *supra* note 20, § 1807 (stating that the court should appear neutral and avoid endorsing the action).

206. Cf. *Hoffmann-La Roche*, 493 U.S. at 169–71 (noting that in a collective action, the district court has authority to order discovery of “similarly situated” potential class members to facilitate the notice-and-opt-in process).

207. See Carl Engstrom, Note, *What Have I Opted Myself Into? Resolving the Uncertain Status of Opt-In Plaintiffs Prior to Conditional Certification in Fair Labor Standards Act Litigation*, 96 MINN. L. REV. 1544, 1555 (2012). Of course, rules of professional responsibility would apply.

208. Cf. Coffee, *supra* note 99, at 421 (suggesting that, in a traditional opt-out class, “those who opt out could potentially bring an opt-out class action or sue on a consolidated basis”). For consideration of subclasses in the context of the certifiability of the whole case, see Scott Dodson, *Subclassing*, 27 CARDOZO L. REV. 2351 (2006).

differently to each subclass because the opt-in subclass has stronger certification appeal, but as long as separate counsel represents each subclass, there should be no bar to such a hybrid.<sup>209</sup> Issue classes present another nuance.<sup>210</sup> Indeed, if the use of issue classes can assist with the commonality and predominance requirements,<sup>211</sup> perhaps issue certification could work in tandem with the opt-in option to lessen nearly all certification requirements.<sup>212</sup> I do not mean to explore these opportunities in detail here—that would put the cart before the horse. I mean only to identify them as adding to the possibilities that an opt-in option reveals.

## V. FEASIBILITY

This Part considers the legal and political feasibility of the opt-in option.

### A. Legal

Current Rule 23 could be interpreted to permit a class to proceed as an opt-in class. Nothing in Rule 23 expressly prohibits opt-in classes or constrains the definition of the class, and nothing prevents a court from taking the opt-in status of class members into consideration when assessing certification. Rule 23 states only that a certification order “must define the class and the class claims, issues, or defenses.”<sup>213</sup> Accordingly, the class could write the class definition to include only those claimants who have affirmatively opted in, or perhaps who have entered an appearance.<sup>214</sup> Of course, those class members would still be able to request exclusion from a Rule 23(b)(3) class if they wished.<sup>215</sup> But the class definition would effectively prevent those who have not opted in from becoming a member.

In addition, Rule 23(d) gives district courts authority to address “procedural matters” for “[c]onducting the [a]ction.”<sup>216</sup> One of Rule 23(d)’s specific grants of authority is to “giv[e] appropriate notice to some or all class

209. Cf. Barnard & Quan, *supra* note 112, at 404–05 (reporting that courts often hear Rule 23 opt-out class actions that have been joined with opt-in collective actions).

210. For commentary on issue classes, see, for example, Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 95–96 (1994); Burch, *supra* note 169; Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567 (2004); Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003); Shapiro, *supra* note 104, at 955.

211. See Burch, *supra* note 169, at 1885–90.

212. Although issue classes are relatively rare at present, see Klonoff, *supra* note 57, at 807, the availability of an opt-in option might invigorate their use.

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

214. The Rule specifically countenances members entering appearances. FED. R. CIV. P. 23(c)(2)(B)(iv) (“[A] class member may enter an appearance through an attorney if the member so desires . . .”); cf. Kaplan, *supra* note 19, at 392 n.137 (“The class member may doubtless enter an appearance pro se rather than by counsel . . .”).

215. FED. R. CIV. P. 23(c)(2)(B)(v) (directing the court to “exclude from the class any member who requests exclusion”).

216. FED. R. CIV. P. 23(d).

members of . . . the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action."<sup>217</sup> Rule 23(d)'s authorization could be read to allow a court to invite opt ins in a Rule 23(b)(3) class. Courts have interpreted Rule 23(d)'s general grant of authority broadly, extending it to include the power to require the defendant to bear the cost of notifying class members<sup>218</sup> (despite the general rule that the class bears that cost)<sup>219</sup> and to the power to grant opt-out rights to class members of ostensibly "mandatory" classes certified under Rule 23(b)(1) and Rule 23(b)(2) (despite the lack of such express authorization in Rule 23).<sup>220</sup> Rule 23(c) and Rule 23(d) could be broad enough to allow and manage a class definition restricted to those who affirmatively include themselves in the class.

I do not mean to suggest that the current rule would permit the replacement of the opt-out right in a Rule 23(b)(3) class with an opt-in requirement. There is no doubt that the elimination of an opt-out right in a Rule 23(b)(3) class is contrary to the deliberate choices of the 1966 drafters<sup>221</sup> and to the express language of Rule 23(c), which requires the court to notify such class members of their opt-out rights.<sup>222</sup> But nothing in Rule 23 expressly prevents the addition of an opt-in procedure—such as a class definition with language requiring affirmative consent—even if class members also have a right to opt out.<sup>223</sup> And a class comprised only of members who do affirmatively consent, make an appearance, or otherwise opt in has, for my purposes, the exact same advantages of an opt-in class,<sup>224</sup> which a court should take into consideration.

Nevertheless, federal appellate courts have rejected the power of district judges to certify opt-in classes under Rule 23. The leading case is *Kern v. Siemens Corp.*,<sup>225</sup> in which a district court certified a class whose definition

217. FED. R. CIV. P. 23(d)(1)(B).

218. See KLONOFF ET AL., *supra* note 198, at 444–50.

219. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 349 (1978).

220. See, e.g., *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997). See generally KLONOFF ET AL., *supra* note 198, at 453–54.

221. See *supra* Section I.A.

222. FED. R. CIV. P. 23(c).

223. Having both an opt-in obligation and an opt-out right for the same class is not so strange. Most circuits have allowed, for example, claimants to be members of both an opt-in collective action and an opt-out class action in the same lawsuit. See, e.g., *Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012); *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234 (2d Cir. 2011); *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971 (7th Cir. 2011); *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743 (9th Cir. 2010); *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416 (D.C. Cir. 2006). *But see* 7B WRIGHT & MILLER, *supra* note 20, § 1807 (“Joining them in one action creates serious management issues and the possibility of confusion relating to the notice.”).

224. Cf. 7AA WRIGHT & MILLER, *supra* note 20, § 1787 (“Whatever its precise effect may be, the appearance provision assures adequate representation because it keeps the absentee fully informed as to each step of the proceeding, thereby providing a basis for taking whatever action is necessary to protect the absentee’s rights.”).

225. 393 F.3d 120 (2d Cir. 2004).

specifically included only those members who had affirmatively consented to inclusion in the class.<sup>226</sup> Consent was needed, the district court reasoned, because the class action would extinguish all other claims the class members had, and many class members had potentially viable claims in foreign courts.<sup>227</sup> The Second Circuit reversed, reasoning that Rule 23(c)'s express opt-out provision implicitly prohibits an opt-in class.<sup>228</sup> Other courts have held similarly,<sup>229</sup> and, likewise, the most respected treatises reject opt-in classes under Rule 23.<sup>230</sup>

I am skeptical of this conclusion. But because of these authorities and because empowering party choice warrants clear legal authorization,<sup>231</sup> the better course is to authorize the opt-in option by rule amendment. Rulemaking offers the additional virtues of democratic participation, expert deliberation, and transparency.<sup>232</sup> And judicial management of an opt-in option would benefit from *ex ante* clarity in its details and consistency in its application. Accordingly, the rulemakers should take up the opt-in option, and the Appendix below sets out a proposed amendment to Rule 23 to serve as a starting point for conversation.<sup>233</sup>

### B. *Political*

The conversation will go nowhere without a realistic hope for adoption, however, so in this Section, I take up the feasibility of my proposal. The feasibility of rule amendment hinges upon the willingness of the rules committees (the Standing Committee and the Advisory Committee) and the amenability of various interest groups.

As for the rules committees, the time seems as ripe as ever. Since 1991, the Advisory Committee has repeatedly put class-action reform on its

226. *Kern*, 393 F.3d at 122–23.

227. *Id.* at 126.

228. *Id.* at 124; *see also id.* at 128 (“Rule 23 offers the *exclusive* route to forming a class action.”).

229. *See, e.g., Ackal v. Centennial Beauregard Cellular, L.L.C.*, 700 F.3d 212 (5th Cir. 2012) (relying on *Kern*); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir. 1974) (“[T]he requirement of an affirmative request for inclusion in the class is contrary to the express language of Rule 23 . . .”).

230. 5 MOORE’S FEDERAL PRACTICE, *supra* note 24, § 23.104[2][a][ii] (“There is no authority for establishing ‘opt-in’ classes in which the class members must take action to be included in the class.”); 7AA WRIGHT & MILLER, *supra* note 20, § 1787 (asserting that an opt-in requirement “is directly contrary to the [opt-out] philosophy”).

231. *See Dodson*, *supra* note 8.

232. *See Burbank & Farhang*, *supra* note 56, at 6–8; *Marcus*, *supra* note 15, at 57 (stating that class-action rule reform “is a project that must be approached carefully and deliberately”).

233. I have relegated the proposed amendment to an appendix because the primary thrust of my Article is to endorse the concept of the opt-in option, not to get into the weeds of precise language. Nevertheless, because the devil is often in the details, I include a draft amendment in the Appendix to help start that conversation.

agenda.<sup>234</sup> As recently as August 2016, the Standing Committee approved for notice and comment proposed amendments to Rule 23.<sup>235</sup> Although the published proposals do not include amendments to the existing opt-out requirement, the Rule 23 Subcommittee of the Advisory Committee discussed the opt-out mechanism in its deliberations and has expressed a willingness to return to it.<sup>236</sup> The opt-out mechanism is not a new topic; the Advisory Committee has, on a number of occasions, considered various approaches to opt-in classes, though it has never considered establishing the mechanism at the class's option.<sup>237</sup> For these reasons, the Advisory Committee should be receptive to considering an opt-in option.

There is even reason to be hopeful that the Advisory Committee would react favorably to an opt-in option. The rules committees are composed primarily of federal district and appellate judges, who tend to support flexibility in the federal rules.<sup>238</sup> As mentioned above, district judges have attempted to certify opt-in classes, and although appellate judges have rejected those attempts, their rejections have been based on the structure of Rule 23, not on policy grounds.<sup>239</sup>

And as a practical matter, the Advisory Committee would not have to create an opt-in option out of whole cloth. Models abound. The spurious class action under the 1938 version of Rule 23 was an opt-in model. Several federal statutes currently permit opt-in aggregation, including the Fair Labor Standards Act,<sup>240</sup> the Age Discrimination in Employment

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234. See Rabiej, *supra* note 39, at 348–86 (documenting the Advisory Committee's attention to Rule 23 from 1993 to 2006); see also COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 211–32 (Aug. 2016) [hereinafter PRELIMINARY DRAFT OF PROPOSED AMENDMENTS], <http://www.uscourts.gov/file/20163/download> [<https://perma.cc/F9F4-WCQK>] (publishing proposed Rule 23 amendments deliberated by the Advisory Committee since 2012); AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 532–33 (Oct. 30–31, 2014) [hereinafter AGENDA BOOK], <http://www.uscourts.gov/file/15487/download> [<https://perma.cc/8LEW-2SWW>] (documenting the Judicial Conference's 1991 directive to the Advisory Committee to study class-action reform).

235. See PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, *supra* note 234, at 211–32.

236. See AGENDA BOOK, *supra* note 234, at 551 (identifying opt-in mechanisms as a continuing topic of interest).

237. Cooper, *supra* note 35, at 439 (“The Advisory Committee has studied several versions of an opt-in rule. The most aggressive approach would be to convert all Rule 23(b)(3) actions to opt-in classes, discarding the opt-out approach. A more moderate approach would authorize creation of opt-in classes when the requirements for certifying a (b)(3) opt-out class are not met.”).

238. See Report of the Advisory Committee on Civil Rules (Dec. 11, 2015), in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 189, 195–201 (Jan. 7–8, 2016) <http://www.uscourts.gov/file/19086/download> [<https://perma.cc/2CJK-ANKZ>].

239. See *supra* notes 225–230 and accompanying text.

240. 29 U.S.C. § 216(b) (2012) (authorizing a private cause of action against an employer “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated”). It is true that the Supreme Court recently expressed skepticism that class-certification standards could be imported to the collective-action context, see *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 n.1 (2013), but, indeed, that is part of my



Act,<sup>241</sup> the Equal Pay Act,<sup>242</sup> and the Securities Litigation Uniform Standards Act.<sup>243</sup> Aggregate settlements in multidistrict-litigation cases operate through an affirmative-consent procedure,<sup>244</sup> and non-MDL courts have devised opt-in procedures for nonclass, aggregated settlements.<sup>245</sup> The 1979 DOJ proposal included an opt-in option (though at the court's option).<sup>246</sup> The American Law Institute has proposed an opt-in mechanism for class actions.<sup>247</sup> Several states offer opt-in models.<sup>248</sup> And the European Union favors opt-in mechanisms,<sup>249</sup> as do several foreign countries.<sup>250</sup>

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point: an opt-in class should be easier to certify because of its opt-in nature. *Cf.* Church v. Consol. Freightways, Inc., 137 F.R.D. 294, 305–06 (N.D. Cal. 1991) (stating that opt-in collective-action plaintiffs are in “less need of Rule 23’s protection”).

241. 29 U.S.C. § 626(b) (2012).

242. 29 U.S.C. § 206(d) (2012).

243. 15 U.S.C. § 77p(d)(2)(A) (2012) (preserving the existing authority of state pension plans to sue “as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action”).

244. See generally Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2215 (2008) (describing a common provision requiring individuals to enroll to participate in a global settlement). For a history of the MDL statute’s conception, drafting, and passage, see Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. (forthcoming).

245. See Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. TIMES (Nov. 19, 2010), <http://www.nytimes.com/2010/11/20/nyregion/20zero.html> [<https://perma.cc/U3RD-WVUF>]. For reports from the trenches on some of the challenges of mass nonclass settlements, see Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127 (2012). For a criticism of the judge’s purported authority to reject nonclass settlements, see Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015 (2013).

246. See U.S. DEP’T OF JUSTICE: THE CASE FOR COMPREHENSIVE REVISION OF FEDERAL CLASS DAMAGE PROCEDURE, *supra* note 62, at 21.

247. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION, *supra* note 173, § 2.10, at 176–78 & reporter’s note to cmt. a (encouraging opt-in aggregation in certain cases and “provid[ing] courts with authority to create opt-in mechanisms for voluntary aggregation of claimants by their affirmative consent”).

248. See, e.g., PA. R. CIV. P. 1711(b) (“[If] the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation” or if “other special circumstances exist,” then “the court may state in its order that a person shall not be a member of the plaintiff class or subclass unless by a specified date the person files of record a written election to be included in the class or subclass.”).

249. Commission Recommendation No. 396/2013 of 11 June 2013, On Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, art. 5, 2013 O.J. (L 201) 60, 64 (EU).

250. See Denmark Civil Procedural Code, Rpl, § 254 e (default opt-in regime); Norway Code of Judicial Procedure in Civil Cases, ch. 35, §§ 6,–7 (same); *cf.* Morabito, *supra* note 118, at 437 (reporting that Australia provides an opt-in model for governmental class members); Rowe, *supra* note 126, at 167 (reporting that British Columbia requires opt-in for nonresidents to alleviate jurisdictional concerns). Of course, there are benefits and pitfalls of emulating

Even Rule 23 itself sanctions an opt-in mechanism as a practical matter for establishing individual entitlements for certain settlement funds. Courts have permitted, ostensibly under Rule 23(d), a soft opt in—such as the filing of a proof of claim, for claimant participation in an aggregate judgment or settlement fund.<sup>251</sup> The argument is that an opt-in mechanism will help aid the identification of who is a class member, clarify the size and scope of the class, obviate additional notice, and minimize scheduling and logistical issues.<sup>252</sup>

With the extensive interest-group lobbying that now dominates the amendment process, acceptance among interest groups is crucial to successful rule amendment. Happily, interest groups should welcome an opt-in option.

Plaintiff-friendly groups lose nothing and gain an additional option that would come with an easier certification process. This option ought to be especially welcome in an era of increasing scrutiny of class-action certification by the Supreme Court and Congress.<sup>253</sup>

Defendant-friendly groups might express some resistance if they believe that they are winning the class-action war, but their long advocacy for opt-in requirements puts them in a bind because the opt-in option offers exactly that mechanism. True, the option belongs to the plaintiffs. But if that option induces some classes that otherwise would have been opt out to proceed as opt in, then defendants should celebrate.

And, last, due process advocates—those who neither inherently favor nor oppose class actions but rather strive to ensure fairness to absent class members—should rejoice, for the opt-in option offers far greater autonomy and representation of absent class members' rights.

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foreign models. See Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 138–43 (2008).

251. See 7AA WRIGHT & MILLER, *supra* note 20, § 1787 (“[A] few courts in actions involving extremely large plaintiff classes seeking a damage recovery have held that the court may demand that those class members who do not opt out under subdivision (c)(2) take some affirmative action to remain in the class as a condition of participating in the award.”).

252. *Id.* (“It also may be justified as an aid in determining who should be included in the class for purposes of scheduling the various phases of the action, particularly the handling of damage issues. This is important because some knowledge of the size and membership of the class is necessary in order to make certain orders during the course of the proceedings and to give everyone some idea of the dimension of the litigation.”). Interestingly, *Kern*, the appellate decision holding opt-in certification unlawful under Rule 23, appeared to approve of settlement-claim opt in because it has no bearing on who is a class member. See *Kern v. Siemens Corp.*, 393 F.3d 120, 126–27 (2d Cir. 2004).

253. For example, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2015, H.R. 1927 (reported favorably to the House of Representatives by the House Judiciary Committee) would require class-action plaintiffs “seeking monetary relief for personal injury or economic loss” to “affirmatively demonstrate[ ] that each proposed class member suffered the same type and scope of injury as the named class representative.” As of December 1, 2015, GovTrack.us gives the bill a 21% chance of being enacted. See *H.R. 1927: Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016*, GOVTRACK <https://www.govtrack.us/congress/bills/114/hr1927> [<https://perma.cc/K2ND-L7EG>].

## CONCLUSION

Feasibility is important, but the real virtue of the opt-in option is that it makes available the right mechanisms for the right classes. For historical, political, and inertial reasons, the current system offers only an opt-out class, leaving opt-in proponents to press for a very different system. There is room for compromise: an opt-in option to class litigants, who best know the needs of their particular class. The resulting advantages would benefit plaintiffs, defendants, judges, and the system as a whole.

## APPENDIX

*Proposed Amendment to Rule 23*

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

*In considering whether these prerequisites are satisfied, the court shall take into consideration the extent to which the putative class members have affirmatively and individually consented to be members of the class.*

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if: . . .

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action; *and*
- (E) *the extent to which the putative class members have affirmatively and individually consented to be members of the class.*

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order. . . .*

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g). *The class definition may restrict membership to those who*

*have consented or who will consent affirmatively and individually to be a member.*

(2) *Notice. . . .*

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) *if the class definition is restricted to those who affirmatively and individually consent to be a class member, that anyone who otherwise meets the class definition will not be included in the class absent affirmative and individual consent to be included as a member;*
- (vi) that the court will exclude from the class any member who requests exclusion;
- (vii) the time and manner for requesting *inclusion or exclusion*; and
- (viii) . . . .