University of Michigan Journal of Law Reform

Volume 21

1988

Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions

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PRECLUSION AND PROCEDURAL DUE PROCESS IN RULE 23(b)(2) CLASS ACTIONS

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The latest nontechnical amendments to Rule 23 of the Federal Rules of Civil Procedure, the Rule that governs class actions, appeared in 1966. One of the amendments provided that judgments in class actions are binding on all unnamed class members whether the class wins or loses the case.[1] Another amendment instituted the subdivision (b)(2) class action,[2] and provided that the court in such an action does not have to issue any sort of notice to the class, either before or after adjudication, unless the

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1. "The judgment in an action maintained as a class action . . . whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class." FED. R. CIV. P. 23(c)(3). Because the amended Rule includes the class members' claims in the judgment of the case, res judicata bars the members of the class from attempting to obtain a better result in any subsequent action. The Advisory Committee Note on the revised Rule states:

> Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. . . . Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class . . . .

FED. R. CIV. P. 23 advisory committee's note, *reprinted in Proposed Amendments to the Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 105-06 (1966) [hereinafter Rule 23 Notes] (emphasis in original); *see* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974) ("The 1966 amendments were designed, in part, specifically . . . to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments."); 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.02-1 (2d ed. 1987) ("Subdivision (c)(3) makes clear that a judgment rendered in any type of class suit—(b)(1), (b)(2), or (b)(3)—is to have res judicata effect as to all members of the class, except as to those in the (b)(3) type who have opted out.").

2. Subdivision (b)(2) comprises actions where the opponent of the class "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2). The entirety of Rule 23(b)(2) is quoted *infra* in text accompanying note 19.

case is settled.[3] Thus, one provision of the current Rule binds all members of the class to the result in a subdivision (b)(2) action, barring them forever by res judicata from bringing a subsequent case, while the other dispenses with mandatory notice, so that the class members who are bound by the judgment may never learn of the pendency of the case. The juxtaposition of these provisions is striking. Together the provisions cause individuals to be bound by res judicata by cases they never knew existed. This situation seems patently unfair.

The pre-1966 Rule permitted nonbinding class suits, called "spurious" class actions.[4] The named plaintiff could sue on behalf of the class and obtain a decision in the class's favor. Class members could then opt in to get relief from the court.[5] If the named plaintiff lost the case, the result did not bind the class members, who were free to file later lawsuits on the same claim, and win or lose on the merits without any application of res judicata against them.[6] But the 1966 amendments to the Federal Rules abolished this procedure and made judgments in all class actions binding on the entire class.[7] Although one amendment required the court give written notice of the pendency of the suit to absent class members in cases predominantly for money damages,[8] no provision was made for any mandatory notice in cases for injunctive and declaratory relief.

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3. FED. R. CIV. P. 23(b)(2), (c)(3). This permissive notice scheme also applies to subdivision (b)(1) cases, where separate, nonclass actions either would create inconsistent adjudications and incompatible standards of conduct for the opponent of the class or would as a practical matter preclude potential class members. By contrast, subdivision (b)(3), applying in cases where the relief sought relates "predominantly to money damages," requires the court to send written notice to all identifiable class members before class certification. FED. R. CIV. P. 23(b)(3), (c)(2).

4. Moore & Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 555-56 (1938).

5. Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1962), *cert. dismissed*, 371 U.S. 801 (1963).

6. Fox v. Glickman Corp., 355 F.2d 161, 163 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966).

7. Rule 23 Notes, *supra* note 1, at 105.

8. FED. R. CIV. P. 23(b)(3), (c)(2). For reasons that will become apparent, this Article has no criticism of the preclusive effect that attaches to class action judgments in cases brought under Rule 23(b)(3). For various criticisms of Rule 23(b)(3), see Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97; Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1056-58 (1986). This Article also places to one side the issues of defendant class actions, treating the plaintiff class action as the important case for application of Rule 23(b)(2). Subdivision (b)(2) may even be literally inapplicable to defendant class actions. Henson v. East Lincoln Township, 814 F.2d 410 (7th Cir.) *cert. granted*, 108 S. Ct. 283 (1987); *see infra* note 220. *But see* Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371, 1376-78 (1984) (arguing that the language of subdivision (b)(2) can apply to plaintiff's own conduct). In any event, it will be argued that the reform pro-

This Article examines whether Rule 23(b)(2) violates the procedural due process[9] rights of absent class members by binding them to the judgment in a class case without notice of the suit. It concludes that the Rule almost certainly violates due process and proposes a reform that would permit nonbinding class actions similar to the old "spurious" class suits.

Part I of the Article considers the contemporary function of the Rule 23(b)(2) class action. It first examines in detail the particular types of cases currently being brought under the subdivision. It then discusses the necessity for class action treatment of these cases and considers the role that preclusion of class members plays in some class suits. Part II describes how, under current case law, the protections of procedural due process extend to intangible interests such as class members' unfiled causes of action for injunctive relief. Part III of this Article contrasts the apparent expectations of the framers of the 1966 amendments with the present state of practice under Rule 23(b)(2) and the present state of procedural due process law.

Part IV of this Article argues that the individual class member's cause of action is indeed protected by due process under the standards that the Supreme Court has come to apply. It then discusses the question of what process is due. It describes two possible ways of answering that question. The first approach looks to due process minima established by the Supreme Court for an unnamed class member's cause of action for damages in a recent case. Application of this analogy demonstrates that subdivision (b)(2) violates due process. The second approach looks to a balancing of the individual's interests, the value of existing safeguards as opposed to other possible safeguards, and the value of preserving the status quo. The answer here is somewhat equivocal because the cost of the alternative safeguard of

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posed here is beneficial if subdivision (b)(2) is applied to defendant classes. *See infra* note 220.

9. The fifth amendment to the United States Constitution provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. This duty has two dimensions. The first, procedural due process, requires that the government, in making adjudications and other particularized decisions whose effect is the deprivation of life, liberty, or property, must meet standards of fairness in the hearings or other processes that it uses. The second, substantive due process, prohibits the government from taking life, liberty, or property without adequate justification, irrespective of the procedures it employs. Thus procedural due process has to do with the fairness of decisions in the courts and administrative agencies, and substantive due process has to do with the police power or other rational justification for statutory or executive acts that curtail rights. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 321-25 (3d ed. 1986) (explaining distinction and discussing illustrative cases). This Article concerns only procedural due process, not substantive due process.

mandatory notice may well be elimination of subdivision (b)(2) in those cases where it serves the most important social function. Still, because the Rule affords no protection whatsoever to class members' rights to individualized hearings, the conclusion emerges that the Rule violates due process.

Part V of this Article proposes a reform of the Rule that would eliminate the binding of class members who have no notice of the pendency of the case. It describes the origins and operation of nonbinding class actions under the pre-1966 Rules. It answers the objection to spurious class suits that led to their abolition, that a suit that does not bind the class violates the principles of mutuality of estoppel. Finally, it sketches the application of nonbinding class suits to institutional cases, those in which a decree binding on the class serves an important function of judicial administration. It suggests that notice may be delayed in such cases until after a finding of liability and the costs of notice then properly shifted to the defendant.

I. THE CONTEMPORARY FUNCTION OF THE RULE 23(b)(2) CLASS ACTION

In its twenty-two years of existence, subdivision (b)(2) has contributed to the revolutions in civil and welfare rights that have marked the legal history of an era.

A. The Explosion of Civil Rights and Antipoverty Litigation

The 1966 amendments to Rule 23 arrived when the civil rights and antipoverty movements were at their peaks. Congress authorized federally funded legal services for the poor in 1966.[10] The new poverty lawyers saw class action cases as a major vehicle for reforming the law to benefit the poor,[11] just as lawyers

10. Economic Opportunity Amendments of 1966, Pub. L. No. 89-794, § 215, 80 Stat. 1451, 1462 (repealed 1981). By the end of 1967, there were nearly 2000 lawyers in these programs. S. LEVITAN, THE GREAT SOCIETY'S POOR LAW 179 (1969). Restrictions on federally-funded legal aid lawyers' activities under the Nixon administration resulted in a further shift in antipoverty legal efforts away from organizing demonstrations and political actions by welfare, tenant, and other groups and towards more strictly "legal" activity designed to further antipoverty goals, such as class action civil cases. *See* Legal Services Corporation Act of 1974, 42 U.S.C. § 2996e(b)(5) (1982). *See generally* Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970) (arguing that, to be effective, poverty lawyers must engage in organizing demonstrations and similar activities).

11. F. PIVEN & R. CLOWARD, REGULATING THE POOR 307 (1971).

working for equality for blacks saw the potential for class actions to change the laws and practices by which invidious racial discrimination operated.[12] As the antiwar and environmental movements gathered momentum in the late sixties and early seventies, the lawyers at work in these campaigns also saw class actions as a useful means to vindicate their clients' rights.[13] By limiting removal jurisdiction in criminal cases, and by expanding the abstention doctrine in cases to enjoin criminal prosecutions, the Supreme Court may have contributed to a shift of civil rights efforts from criminal proceedings to mass civil cases such as class actions brought under Rule 23(b)(2).[14] In the 1970's, Congress passed a variety of fee-shifting statutes.[15] The enhanced availability of attorneys' fees provided a further incentive to bring major litigation such as class actions to further the goals of client groups.[16]

The Rule 23(b)(2) class action was ideal for civil rights and antipoverty litigation. Indeed, the framers of the subdivision used civil rights actions as the main illustration of Rule 23(b)(2)'s use.[17] Subdivision (b) provides:

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12. Note, *Class Actions: A Study of Group-Interest Litigation*, 1 RACE REL. L. REP. 991 (1956).

13. *See* Zwicker v. Boll, 270 F. Supp. 131 (W.D. Wis. 1967) (class action suit against prosecution of antiwar protesters for disorderly conduct), *aff'd*, 391 U.S. 353 (1968); *cf.* R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 316 (2d ed. 1978) (discussing environmental class action litigation).

14. *See* Younger v. Harris, 401 U.S. 37 (1971) (requiring abstention where prior state criminal case is pending); City of Greenwood v. Peacock, 384 U.S. 808 (1966) (limiting criminal removal jurisdiction).

15. *E.g.*, Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, § 505(b), 92 Stat. 2982, 2983 (codified at 29 U.S.C. § 794a (1982)); Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (codified as amended at 42 U.S.C. § 1988 (1982)).

16. Even before the passage of fee-shifting statutes, class actions were an exception to the general rule against the awarding of attorneys fees to successful plaintiffs. *See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939). The exception applied most clearly to class actions where the relief preserved or created a common fund, because the fees came from the fund itself. *Id.* Some decisions under fee award statutes increase the award on the basis of the significance or complexity of the case, for instance, where the case is a class action. *E.g.*, Stenson v. Blum, 512 F. Supp. 680, 685 (S.D.N.Y.), *aff'd mem.*, 671 F.2d 493 (2d Cir. 1981), *aff'd in part and rev'd in part*, 465 U.S. 886 (1984). The Supreme Court indicated, however, that classwide relief alone does not justify increasing a fee award. 465 U.S. at 900.

17. Rule 23 Notes, *supra* note 1, at 102 ("Illustrative of actions under subdivision (b)(2) are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."). The Advisory Committee Note also gives hypothetical examples of the subdivision's use in a commercial context, but without explaining why plaintiffs in such cases would wish to bar themselves from relief that is "predominantly . . . money damages." *Id.*

> *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a)[18] are satisfied, and in addition:
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> . . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.[19]

Civil rights and antipoverty litigation fit the subdivision (b)(2) mold when a defendant's illegal conduct affects large numbers of the poor or of a disfavored racial group. Plaintiffs in such actions hope to eliminate these policies and practices. They may also be interested in monetary relief, but in many cases, such relief can be characterized as equitable, and thus fits literally into the term "injunctive relief."[20] Declaratory and injunctive relief, moreover, are often all the relief that is available because the courts have applied sovereign immunity and other doctrines to restrict monetary relief in cases against the government.[21] In these cases, the subdivision (b)(2) suit provides an attractive means of redress.

By contrast, there are strong practical disincentives to framing the action as one under subdivision (b)(3). Subdivision (b)(3) requires the court to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," requirements that do not apply to subdivision (b)(2) class actions. Subdivision (b)(3) also re-

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18. FED. R. CIV. P. 23(a) lists four prerequisites:

> (1) [T]he 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.

19. FED. R. CIV. P. 23(b).

20. For example, an award of unlawfully withheld welfare benefits may be characterized as equitable restitution. Jordan v. Weaver, 472 F.2d 985, 993 (7th Cir. 1973), *rev'd sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974). Back-pay awards in employment discrimination actions provide another example, because they are considered restitution, not damages. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

21. *See* United States v. Mitchell, 445 U.S. 535 (1980) (applying federal sovereign immunity); Edelman v. Jordan, 415 U.S. 651 (1974) (applying eleventh amendment immunity); *see infra* text accompanying notes 34-38.

quires named plaintiffs to notify the absent class members of the proposed class action and of their right to be excluded from it.[22] The Supreme Court ruled in 1974 that a district court could not shift the cost of notice in a subdivision (b)(3) case to the defendant upon a showing of likelihood of success in the action.[23] If the class representative is indigent—a common situation in antipoverty or civil rights cases—there will be no way to pay the postage, printing, and distribution costs. In contrast to subdivision (b)(3), subdivision (b)(2) does not require notice before class certification. The only notice that is likely to be required is notice of a proposed settlement, if one is reached.[24] In that event, the parties can agree to shift the cost as part of the settlement.

B. Types and Functions of Rule 23(b)(2) Class Actions

Antipoverty and civil rights cases continue to be among the most frequently filed class actions.[25] As a practical matter, Rule 23(b)(2) class actions, whether antipoverty, civil rights, or others, now fall into two categories.[26]

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22. FED. R. CIV. P. 23(c)(2):

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

23. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). For a fuller discussion of *Eisen*, see *infra* text accompanying notes 182-89.

24. "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e).

25. Civil rights actions constituted the largest category of federal class cases filed in 1985, with 28.5% of the total, a decline from 37.3% in 1984. 1985 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 555. These figures do not divide class actions into those brought under subdivision (b)(1), (b)(2), or (b)(3). Other major categories of class actions include securities and commodities actions (14.4%) and contract actions (21.7%). *Id.* Because of the likelihood of monetary relief in these latter kinds of actions, it stands to reason that they are largely subdivision (b)(3) actions. By the same token, a higher proportion of civil rights actions are probably subdivision (b)(2) actions.

26. This breakdown draws upon various commentators' descriptions of categories of injunctive relief, *e.g.*, O. FISS, THE CIVIL RIGHTS INJUNCTION 8-12 (1978); Laycock, *Injunctions and the Irreparable Injury Rule* (Book Review), 57 TEX. L. REV. 1065, 1073-75 (1979), as well as other commentators' descriptions of modern complex litigation, *e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

1. Public policy cases— The first category is the public policy case, where the plaintiffs challenge a legal rule or an administrative policy or practice and seek to have it declared contrary to supervening constitutional provisions, statutes, or regulations. Many antipoverty cases fit into this group. An example would be an action seeking injunctive and declaratory relief against a proposed cut in welfare benefits on the theory that the cut violates a federal statute.[27] All the relief needed in such a case is a simple prohibitory injunction against the proposed policy of the defendant.

Some public policy cases have an added dimension. They seek not only an injunction against a policy of the defendant, but also significant monetary relief, or relief that will have some other individual benefit for the people harmed by the policy. An example of such a case would be one challenging a state's practice of delaying decision on applications for federally assisted welfare benefits beyond the deadlines established in federal regulations.[28] Here, the plaintiffs would seek an injunction prohibiting delay of decision on the applications beyond the federal deadlines and requiring that the persons who had lost benefits because of illegal delays either be paid them or at least be notified of their right to claim them through state administrative or judicial procedures.[29] Another example would be an employment discrimination action against a private employer, where the

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27. *E.g.*, Illinois Welfare Rights Coalition v. Miller, No. 81-C-7118 (N.D. Ill. Dec. 28, 1981) (order granting preliminary injunction). The Food Stamp Act, 7 U.S.C. § 2017b (1982), prohibits states from taking the receipt of food stamps into account in computing welfare grants. In *Illinois Welfare Rights Coalition*, the evidence indicated that the state welfare department had calculated a standard of subsistence for welfare recipients, subtracted the food stamp amount to which the recipients were entitled, and reduced welfare benefits for the recipients to that level. The court found a likelihood of success on plaintiffs' claim that this policy violated the Food Stamp Act and issued a classwide preliminary injunction.

28. *E.g.*, Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973), *rev'd sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974).

29. *E.g.*, Quern v. Jordan, 440 U.S. 332 (1979). In the *Quern* litigation, plaintiffs originally asked that defendants be ordered to calculate and pay the amounts that the welfare recipients would have received if their applications had been decided within the deadlines. But in 1974, the Supreme Court ruled that the eleventh amendment to the United States Constitution prohibits a federal court from ordering the director of a state agency to make retroactive welfare payments. Edelman v. Jordan, 415 U.S. 651 (1974).

Though monetary relief as such is barred, the Court, six years after *Edelman*, ruled that it was permissible to enter an injunction requiring the state to notify all the class members of their right to make a claim for the benefits by use of state administrative and judicial procedures. *Quern*, 440 U.S. at 347. Accordingly, in cases challenging existing welfare or other state governmental policies that have resulted in class members being deprived of monetary benefits, it is common to ask that a defendant protected by eleventh amendment immunity be ordered to notify all members of the class of the

plaintiffs seek a prospective injunction against the discriminatory practices, as well as retroactive promotions, back pay, and other retrospective equitable remedies for past discrimination against the class members.[30]

The function of the class action status of these cases is far from obvious. On first glance, it seems that if individual cases were to challenge government policy on statutory or constitutional grounds, a change in policy would occur by the stare decisis effects of the individual decision. Government administrators frequently disregard the results of individual challenges to government policy, however. An individual action may achieve relief for the plaintiff and create precedent, but fail to change the policies or general practices of government.[31]

The most celebrated recent instance of this practice involved the Secretary of Health and Human Services, who would "nonacquiesce" in unfavorable court decisions regarding Social Security benefits. "Nonacquiescence" refers to the refusal to obey a court's decision except in the individual case that the court has decided. The practice achieved notoriety when the Court of Appeals for the Ninth Circuit denounced it as conduct placing the Social Security Administration above the law.[32]

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means by which they can seek monetary relief through state administrative procedures. Courts ordering such notice may order the defendant to include a mail-in claims form. *Quern*, 440 U.S. at 336, 349.

30. *E.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

31. *See generally* Kamp, *Adjudicating the Rights of the Plaintiff Class: Current Procedural Problems*, 26 ST. LOUIS U.L.J. 364, 375-77 (1982) (discussing practical and personal reasons behind litigants' filing of class actions); Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U.L. REV. 597, 599-600 (1983) (same).

32. Lopez v. Heckler, 725 F.2d 1489, 1500-03 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984). The Secretary's practice has been challenged in several class actions where classes have sued to obtain court orders running in favor of all similarly situated Social Security claimants to prevent the Secretary from disregarding legal interpretations favorable to them. Courts hearing these cases have entered class injunctive relief. *E.g.*, *id.*; Polaski v. Heckler, 585 F. Supp. 1004, 1016-19 (D. Minn. 1984); Hyatt v. Heckler, 579 F. Supp. 985, 1002 (D.N.C. 1984), *vacated*, 757 F.2d 1455 (4th Cir. 1985). Under the pressure of the class action cases, the Secretary has ceased nonacquiescence of some individual decisions. The principal instance was the Secretary's failure to use court-imposed standards for redetermining eligibility for disability benefits. Although the Secretary ceased using her former standards for these cases, this change was spurred by legislative action as well as by court decisions. *See* Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 2, 98 Stat. 1794, 1794-96 (codified at 42 U.S.C. §§ 423(f), 1382c(a)(5) (Supp. IV 1986)). The policy of nonacquiescence nevertheless remains available for use by the Secretary in other contexts. The continued availability of nonacquiescence despite the Secretary's actions is discussed in Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts and the Perils of Pluralism*, 39 VAND. L. REV. 471, 531 (1986), and Note, *Social Security Administration in Crisis: Nonacquiescence and Social Insecurity*, 52 BROOKLYN L. REV. 89, 91 (1986). *See generally* Stieberger v. Heckler, 615 F. Supp. 1315, 1370 (S.D.N.Y. 1985) (briefly discussing new policy).

The nonacquiescence practice of the Secretary of Health and Human Services is hardly an isolated instance of governmental disregard of individual case precedent. This conduct abounds in such fields as welfare law and education administration[33] and might be thought of as a predictable backlash against some of the legal thrusts of the civil rights and antipoverty movements. There should be no surprise that an administrator who defended a practice in one individual challenge would want to continue it as long as possible. The administrator can always argue that the court was wrong, and that the administrator did not appeal the adverse judgment because of a decision not to expend the resources, rather than because of agreement with the court's decision. Various contemporary legal rules allow administrators to nonacquiesce formally or informally with complete impunity.

One such rule prohibits awarding compensatory damages in actions over the failure to make government benefit payments. Damages awards and the threat of future damages awards are a powerful means to induce potential defendants to comply with legal rules established by precedent. For instance, if Social Security claimants whose benefits were illegally cut off could sue

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33. Eichel, *"Respectful Disagreement": Nonacquiescence by Federal Administrative Agencies in United States Courts of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463, 468-70 (collecting cases); Maranville, *supra* note 32, at 475-86 (collecting cases); *see, e.g.*, ITT World Communications v. FCC, 635 F.2d 32, 43 (2d Cir. 1980) (FCC failure to obey Second Circuit precedent); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969-70 (3d Cir. 1979) (NLRB refusal to follow Third Circuit precedent); Goodman's Furniture Co. v. United States Postal Serv., 561 F.2d 462, 464-65 (3d Cir. 1977) (Postal Service failure to obey precedent from Seventh and Eighth Circuits); Home Constr. Corp. v. United States, 439 F.2d 1165, 1169 (5th Cir. 1971) (IRS refusal to follow Fifth Circuit precedent).

An example of state government refusal to follow court precedent is Jamison v. Weaver, 30 Ill. App. 3d 389, 332 N.E.2d 563 (1975), where a welfare recipient, in an individual appeal from a cutoff of benefits, challenged the use of hearsay evidence in the appeal hearing. The Illinois Appellate Court ruled that though the technical rules of evidence do not apply in welfare hearings, the rule against hearsay was not technical, but fundamental. Upon objection, hearing officers were obliged to exclude such evidence. Years later, however, the manuals of the Illinois Department of Public Aid and its instructions to hearings officers remained unchanged, and individual litigants were still going to the Illinois courts on administrative review actions, complaining of invalid cutoffs because hearing officers did not sustain objections to hearsay evidence. *E.g.*, Galloway v. Quern, No. 78 L 5962, slip op. at 3 (Ill. Cir. Ct. Dec. 28, 1978); *see also* Parks v. Pavkovic, 557 F. Supp. 1280 (N.D. Ill. 1983), *aff'd in part and rev'd in part*, 753 F.2d 1397 (7th Cir. 1985), *cert. denied*, 473 U.S. 906, 474 U.S. 918 (1985); Parks v. Illinois Dep't of Mental Health & Developmental Disabilities, 110 Ill. App. 3d 184, 441 N.E.2d 1209 (1982); Note, *Judicial Review of Welfare Policy Under the Illinois Administrative Review Act*, 1986 U. ILL. L. REV. 199, 223 (discussing additional Illinois Department of Public Aid cases). *See generally* Kelly & Rothenberg, *The Use of Collateral Estoppel by a Private Party in Suits Against Public Agency Defendants*, 13 U. MICH. J.L. REF. 303, 306-09 (1980) (discussing additional state government nonacquiescence cases).

for the actual harm they suffered—loss of utility service for failure to pay the bill, eviction for inability to pay the rent, untreated illness for failure to pay medical expenses—the award might deter the Secretary from retaining standards for cutoffs that have been found illegal. But under existing legal doctrine, the availability of compensatory relief in these circumstances appears illusory. All that the claimant will obtain in the subsequent action will be retroactive payment of benefits.[34] The defendant would pay no more than if it had acquiesced. No deterrent effect exists.

A second legal rule that facilitates nonacquiescence is governmental immunity from monetary liability. Because eleventh amendment and other immunity doctrines eliminate even limited monetary remedies such as retroactive payment, defendants have even less reason to comply with individual case decisions in their future overall practices. These immunities create a financial incentive to delay obedience as long as possible. The Supreme Court's application of the eleventh amendment in the 1974 *Edelman v. Jordan*[35] case to bar an award of retroactive welfare benefits was seen as a significant reaction to the welfare rights movement of the 1960's. Whatever impact the immunity doctrine had on the movement, it had a strong impact on welfare lawyers, leading them to choose forms of litigation such as class actions for preliminary and permanent injunctive relief, which enable the greatest number of people to obtain remedies as early in the case as possible.[36] "Good faith" immunity provides an additional barrier to damages by permitting administrators to protect themselves from personal liability while asserting their disagreement with the courts. The Supreme Court held in 1975 that good faith immunity acts to bar damages in civil rights cases.[37] Finally, a 1981 Supreme Court decision established that punitive damages are unavailable from public agen-

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34. Schweiker v. Chilicky, 108 S. Ct. 2460, 2468-71 (1988) (requiring dismissal of action for damages beyond back benefits under Social Security Act). Similar rules apply in other contexts. *E.g.*, Burlington School Comm. v. Department of Educ., 471 U.S. 359, 374 (1985) (denying compensatory damages under Education for All Handicapped Children Act).

35. 415 U.S. 651 (1974).

36. *See* O. FISS, *supra* note 26, at 90. Other reasons, including the dire circumstances of typical welfare litigation plaintiffs, also induce lawyers to request immediate classwide injunctive relief in these cases. LaFrance, *Federal Litigation for the Poor*, 1972 LAW & SOC. ORDER 1, 111-12.

37. Wood v. Strickland, 420 U.S. 308 (1975). *See generally* Chilicky v. Schweiker, 796 F.2d 1131 (9th Cir. 1986) (applying good faith immunity to federal and state officials who participated in nonacquiescence policy), *rev'd on other grounds*, 108 S. Ct. 2460 (1988).

cies in civil rights cases.[38] Monetary remedies do not exist to deter the administrators' recalcitrance.

Even without the new legal rules noted here, if a defendant will not voluntarily apply the result of individual cases to the whole of the population with similar claims, the pure stare decisis effect of the first decision is of only limited value. Those who could take advantage of it must first learn about the original case, then obtain counsel to file an additional lawsuit. They must argue the case all over again and face the risk of losing if the case is assigned to a different judge or appealed to a higher court than the one issuing the first decision. The government will almost always have more resources to litigate than the individual, and if it cannot win, it can often wear out the plaintiff.[39]

Offensive collateral estoppel would seem to offer a means to obtain broad benefits from individual cases. Under the theory of offensive collateral estoppel, plaintiffs in actions following an individual case may prevent the same defendant from arguing that the practice challenged in the previous action was legal. Summary judgment would promptly follow in each instance.[40] A recent decision of the United States Supreme Court, however, throws doubt on the vitality of this approach. In *United States v. Mendoza*,[41] the Court ruled that nonmutual offensive collateral estoppel could not be applied to preclude relitigation of due process issues pertaining to the denial of naturalization status to a Filipino immigrant. The applicant for naturalization argued that relitigation was barred by a district court decision that the United States never appealed, which held that denial of naturalization to Filipino applicants in identical circumstances violated due process.[42] The *Mendoza* district court and the Court of Appeals for the Ninth Circuit approved the application of offensive collateral estoppel. The Supreme Court, however, reversed. The

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38. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

39. Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847, 855, 858 (1986). For the contrary view that individual suits can be effective in the public policy context, see Wilton, *supra* note 31. Professor Wilton's confidence in good faith compliance with precedent on the part of government officials appears unjustified in light of the prevalence of these officials' disobedience. Wilton emphasized, however, the significant fact that in some instances injunctive relief may be ordered in a nonclass action. *Id.* at 614-17. *See infra* note 45 (discussing this option). But Wilton does not acknowledge the barriers to the appealability of the denial of such relief. *See infra* text accompanying notes 46-47.

40. Wilton, *supra* note 31, at 613; *see* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

41. 464 U.S. 154 (1984), *rev'g* 672 F.2d 1320 (9th Cir. 1982).

42. *In re* Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975).

Court stressed such policy concerns as permitting the development of legal questions in successive cases and permitting the Solicitor General to conserve resources or make a political decision not to appeal a case without the adverse effect of having the unappealed judgment bind in subsequent actions. These concerns, it said, compelled the result, as long as no mutuality was present. Only if the parties in both cases were identical would the burden of repetitious litigation by the private party against the government, and the lessening of the bar to development of legal questions, require a different result.[43] Of course, mutuality will not exist in cases by individuals against illegal government policies. The nature of such a case means that the potential plaintiffs will not be the same persons or entities in the first case and the ones that follow it: a person who obtains relief in the first case will have nothing to sue over. His or her individual claim will be moot. Other persons in the same situation will still need relief, but since they were not plaintiffs in the first lawsuit, there will be no mutuality with respect to them. Under *Mendoza,* the potential plaintiffs will not be able to use offensive collateral estoppel.

By its facts and by the part of its reasoning that emphasizes the nationwide concerns of the Solicitor General, *Mendoza* applies only to federal government defendants. But any person framing a case against state or local government defendants must be sensitive to the risk that the rule might be applied to them as well. All governmental defendants can argue that an economic or political decision not to appeal an individual's lone victory should not bind the government in all cases, forever. If such an argument prevails, the strategy of reliance on offensive collateral estoppel fails. Of course, there is no way to know of the failure until the subsequent case, so the person seeking a broad change of policy bears a significant risk in choosing to rely only on offensive collateral estoppel.[44]

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43. *Mendoza,* 464 U.S. at 163; United States v. Stauffer Chem. Co., 464 U.S. 165, 173-74 (1984).

44. For a more comprehensive critique of *United States v. Mendoza,* see Note, *supra* note 39. Pre-*Mendoza* articles placing reliance on offensive collateral estoppel include George, *Sweet Uses of Adversity:* Parklane Hosiery *and the Collateral Class Action,* 32 STAN. L. REV. 655 (1980); Kamp, *supra* note 31, at 373-74; Kelly & Rothenberg, *supra* note 33; Note, *Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class Action,* 31 HASTINGS L.J. 1189 (1980). For treatments emphasizing the relation between the absence of offensive collateral estoppel against the government and government nonacquiescence, see Eichel, *supra* note 33, at 500-01; Maranville, *supra* note 32, at 509-13. Professor Maranville notes the desirability of class actions in light of the absence of offensive collateral estoppel against the government. *Id.* at 530 n.198.

Individual actions seeking broad injunctive relief are not an adequate substitute for class actions in public policy cases. When an individual files a case asserting the illegality of a governmental practice without making class action allegations and requests broad injunctive relief barring any application of the practice, the most frequently heard objections are that the individual lacks the "standing" to obtain such a broad remedial order, and that no one but the individual will be able to enforce the order in subsequent proceedings. Both these objections are dubious. The individual has standing, and any person in whose favor the order was made may enforce it.[45]

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45. The Supreme Court has made clear that the constitutional minimum of standing is simply personal injury of the plaintiff that is a result of the defendant's alleged violation of the law and that is likely to be remedied by some form of judicial relief. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976). As long as there is a likelihood of benefit to the plaintiff from the relief sought, the plaintiff has the standing to seek it. The plaintiff merely needs to allege that she was a victim of the continuing operation of the policy or practice against which the injunction is sought. Others will benefit from the injunction as well, but this will not affect the named plaintiff's standing to obtain it. For a contrary view, see Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 19 (1983). Professor Rutherglen, however, does not discuss the applicable precedents.

In Regents of the University of California v. Bakke, 438 U.S. 265, 270-71 (1978), the Supreme Court approved the entry of an injunction prohibiting the exclusion of anyone from the defendants' medical school on account of the affirmative action program that the court declared unlawful. The case was not a class action. A similar case is Honig v. Doe, 108 S. Ct. 592, 600 (1988). Lower court opinions establishing an individual's right to secure broad injunctive relief in a nonclass action suit include Evans v. Harnett County Bd. of Educ., 684 F.2d 304, 306 (4th Cir. 1982); Bailey v. Ryan Stevedoring Co., 528 F.2d 551, 557 (5th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719-20 (7th Cir. 1969); Potts v. Flax, 313 F.2d 284, 289-90 (5th Cir. 1963). *Contra* Zepeda v. United States Immigration & Naturalization Serv., 753 F.2d 719, 727-30 (9th Cir. 1985); McKinnon v. Patterson, 568 F.2d 930, 940 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). *See generally* D. LAYCOCK, MODERN AMERICAN REMEDIES 229-30 (1985) (discussing individual actions to secure broad injunctive relief); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1195-96 (1982) (same).

City of Los Angeles v. Lyons, 461 U.S. 95 (1983), is not to the contrary. There, the Court dismissed an individual claim for injunctive relief against any application of police chokehold policies on the ground that the plaintiff lacked standing. But the issue in *Lyons* was not the plaintiff's standing to obtain an injunction against the use of chokeholds on others; it was whether he had standing to obtain an injunction against the use of chokeholds at all, even as to himself. The Court held that there was insufficient probability shown that the conduct complained of would ever be repeated to justify the award of injunctive relief. The Court had earlier applied this same standard in a class action. O'Shea v. Littleton, 414 U.S. 488 (1974).

A second potential difficulty with nonclass actions seeking broad injunctive relief is connected with the ability to enforce the injunction if, after the conclusion of the litigation, the individual plaintiff's claims are mooted, or if that individual is otherwise unable to prosecute an enforcement action. But the Federal Rules of Civil Procedure permit nonparties to enforce a decree as long as they can show that it was made in their favor. FED. R. CIV. P. 71 ("When an order is made in favor of a person who is not a party to the

There is, nevertheless, an intractable practical problem with the use of the individual action for broad injunctive relief. The court may choose to enter an injunction only for the individual plaintiff and refuse to enter a broad decree against all enforcement of the challenged policy. Although the plaintiff may well argue that such a decision is a confusion of rights and remedies,[46] the individual plaintiff is no longer personally likely to benefit from the relief and thus would find it difficult to withstand a motion to dismiss on appeal.[47]

A final disincentive to reliance on stare decisis, offensive collateral estoppel, or an individual action for a broad injunction pertains to mootness. Mootness law has developed in a peculiar way in recent years, and the rule has emerged that, in class actions, and only in class actions, the case will not be moot although claims of the parties actually in court are moot and not capable of repetition with respect to those parties.[48] The rule applies as long as the mootness occurred after class certification and the claims of unnamed class members are still alive.[49] Moreover, if class certification is denied, that order may be appealed,

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action, that person may enforce obedience to the order by the same process as if a party . . . ."). No special relation to the plaintiff need be shown. *See* Ennels v. Alabama Inns Assocs., 581 F. Supp. 708, 710 (M.D. Ala. 1984) (desegregation case brought as class action, but apparently no certification; order forbidding discrimination nevertheless enforceable by any black person pursuant to FED. R. CIV. P. 71); United States v. Hackett, 123 F. Supp. 104 (W.D. Mo. 1954); Woods v. O'Brien, 78 F. Supp. 221 (D. Mass. 1948). Of course, enforcement is facilitated if a finding is made by the court in the individual case that the injunction has in fact been made in the favor of the entire group of persons threatened by the policy attacked in the suit. Cases in which uncertified class actions were settled by consent decrees which set out the class of beneficiaries who would subsequently be able to enforce include Alford v. Illinois Dep't of Rehabilitation Servs., No. 83 C 9301 (N.D. Ill. June 29, 1984) (consent decree); and John A. v. Gill, No. 81-C-2456 (N.D. Ill. Dec. 23, 1983) (consent decree).

46. Courts may actually confuse rights and remedies. Gregory v. Litton Sys., 472 F.2d 631, 633-34 (9th Cir. 1972); *see* Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619, 629 (1986).

47. *See supra* note 45. An argument might be made that the status of the individual seeking the relief that has been denied for others is no different from that of the named plaintiff in a class action appealing the denial of certification despite the fact that the named plaintiff's individual claim has become moot. *See generally* United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (finding no mootness in appeal of denial of class certification despite mootness of class representative's claim). The Supreme Court, however, appears reluctant to extend *Geraghty* irrespective of good policy reasons to do so. *See infra* note 50. A plaintiff would hardly stake major litigation on such a chance.

48. Franks v. Bowman Transp. Co., 424 U.S. 747, 755-57 (1976); Sosna v. Iowa, 419 U.S. 393, 399-402 (1975). *See generally* Note, *Class Standing and the Class Representative*, 94 HARV. L. REV. 1637, 1647-52 (1981) (discussing possible justifications for this rule).

49. Some courts extend the rule to situations where mootness occurred while the motion for class certification was pending, and the defendant appeared to be trying to moot the controversy. *E.g.*, DeBrown v. Trainor, 598 F.2d 1069, 1071 (7th Cir. 1979).

and, if reversed, class certification will be entered nunc pro tunc, despite the fact that the claims of the parties actually before the court have become moot after the denial of class certification.[50]

This risk of mootness in a case that is not a class action may not be quite as great as it appears, for even an individual case will not be moot if the mooting of the plaintiff's claims occurred because of voluntary cessation of the challenged activity, where the individual plaintiff would stand to be harmed if the activity were resumed.[51] The case, furthermore, is not moot even if it is not certified as a class action, if the conduct complained of is such that it is "capable of repetition, yet evading review," so long as the individual plaintiff is in the position of being a victim of the conduct again.[52] But in the absence of one of these factors, mootness of the individual plaintiff's claim will end the case, assuming that no other person is able or willing to substitute in for the plaintiff. The burden of substitution may not be difficult in some cases,[53] but in cases where individuals may fear reprisal for coming forward to sue, or where they are largely unaware of their rights, or where the group of persons sought to be benefited is scattered throughout the country, the burden of substitution will be difficult.[54] An obstinate defendant can increase the probability of these problems by delaying the case or filing frivolous appeals.[55]

Thus, a plethora of legal rules and predictable strategies based on them leaves the class action as the preferred means to enforce claims that statutes and administrative policies violate su-

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50. *Geraghty*, 445 U.S. 338. The Supreme Court expressly refused to apply this principle to nonclass action law reform litigation. East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 406 n.12 (1977); Board of School Comm'rs v. Jacobs, 420 U.S. 128, 129 (1975).

51. United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953).

52. Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). For discussion and additional authorities on this exception and that of voluntary cessation of illegal activity, see Wilton, *supra* note 31, at 629-33.

53. *E.g.*, Silva v. Vowell, 621 F.2d 640 (5th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981); Nichols v. Schubert, 71 F.R.D. 578 (E.D. Wis. 1976).

54. *See* R. KLUGER, SIMPLE JUSTICE 14, 199 (1976) (discussing reluctance of civil rights plaintiffs to file school desegregation cases because of fear of retaliation). Additional examples include transitory claims not capable of repetition with regard to the same person and claims of severely mentally ill persons or persons otherwise unlikely to realize their own interest in coming forward. *See* Christy v. Hammel, 87 F.R.D. 381, 393 (M.D. Pa. 1980) (permitting class action where class representative had mooted claim in a case relating to transitory incarceration of prisoners in state mental hospital).

55. *See* Kamp, *supra* note 31, at 375 (discussing mootness rules and other strategic advantages of class action procedure).

pervening law,[56] at least in the antipoverty and civil rights fields in which class action litigation has boomed in the past twenty years.

2. *Institutional cases*— The second category of class action cases under subdivision (b)(2) is the institutional case, where the plaintiffs challenge a pervasive set of conditions affecting all persons who are residents of or served by an institution. Examples include cases challenging conditions of confinement in prisons[57] or mental hospitals.[58] The relief sought typically would be the elimination of a variety of systemic practices, or, in some cases, the court-supervised abolition of the institution and its replace-

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56. To the extent that a class action provides a surer and more efficient mechanism for achieving relief when all that is desired is a prospective change, the class action is certain to be preferred when what is desired includes retroactive monetary relief as well. Even where a governmental body might observe precedent and change its policy for the future for everyone because of a result in an individual action, it may still be reluctant to compensate all those affected by the previous policy unless a court forces it to do so. The immunity cases cited *supra* notes 35, 37-38, demonstrate this fact. No voluntary payments have been forthcoming. Individual follow-up actions will be no easier than they would be in a plain public policy case. Mootness problems may be less important than in an ordinary public policy case because the individual plaintiff's claim for monetary relief might furnish a basis to keep the case alive despite a prospective change in governmental conduct. But if the government wants to moot the case, it can still relieve the individual from the effect of the policy, pay the individual's damages, and be free of the risk of a large judgment. *Cf.* DeBrown v. Trainor, 598 F.2d 1069, 1070 (7th Cir. 1979) (argument by defendants that case was moot because they paid class representatives' claims for public benefits two days after representatives filed class certification motion). What is needed is a court order that gives monetary or other retroactive relief to every person affected by the policy, ideally an order enforceable on any individual's application if the defendant does not fully comply, because the individual bringing the suit may lack the resources to continue to enforce the judgment after winning the case. In a class action, any class member may petition for contempt sanctions if the defendant disobeys the order. *See, e.g.*, New York State Ass'n for Retarded Children v. Carey, 551 F. Supp. 1165 (E.D.N.Y. 1982) (contempt proceeding in class action), *aff'd in part and rev'd in part*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). Nonparties, however, for whose benefit a decree is obtained in a case that is not a class action, may enforce the decree without the participation of the plaintiff in the case under FED. R. CIV. P. 71. *See supra* note 45.

57. *E.g.*, Hutto v. Finney, 437 U.S. 678 (1978).

58. *E.g.*, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981). School desegregation cases also fit into this category because they challenge a wide range of intertwined resource allocation decisions of a complex social institution. *E.g.*, Milliken v. Bradley, 433 U.S. 267, 272-73 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 7-8, 33 (1971); *see* Chayes, *supra* note 26, at 1298-99 n.80 (citing mental health, reapportionment, desegregation, and other cases as examples of similar types of complex litigation). An employment discrimination case that attacks a broad range of employer practices may also be institutional litigation of the type discussed here. The claims may be numerous and cover large numbers of different categories of persons. Relief may include drastic changes in work settings, hiring, discipline, promotion, and discharge procedures. *See, e.g.*, Russel v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

ment with alternative arrangements.[59] These lawsuits are premised on the claim that existing arrangements violate constitutional or statutory requirements. Usually, the claim is that the lawlessness is pervasive in the institution. In *Wyatt v. Stickney*,[60] one of the first cases challenging the overall conditions at a state mental institution, the plaintiffs contended that a whole range of operating conditions, procedures, and settings violated their rights to personal safety, education, and treatment of mental and physical illness. The plaintiffs in a case like *Wyatt* may seek a detailed injunctive decree covering all the challenged practices, or they may request that the court forbid the continued operation of the institution and order the creation of other means of accomplishing the social objective that the institution is designed to serve.[61] Alternatively, the court could order the institution closed unless the defendants "voluntarily" make an extensive number of changes in it.[62]

There is some cause to be skeptical of the need for class action procedures for this type of case. Any person affected by illegal conduct pervading an institution's practices should be able to sue individually and obtain an injunction forbidding the conduct. If the injunction entails reforming the entire institution, the individual plaintiff is entitled to precisely that remedy.[63] Even if individual relief might satisfy the plaintiff's claim, it would be economically impractical to create a special remedy just for the single victorious plaintiff. It makes no sense for the governmental defendant to build a state-of-the-art mental hospital for a single patient. This contrasts with a public policy case, where exceptions can be made economically to satisfy a remedial order in an individual action. For example, it is not difficult to continue to keep the one victorious Social Security claimant on the program while other persons similarly situated

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59. *Pennhurst*, 451 U.S. at 7-8.

60. 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

61. In a similar case, Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd*, 451 U.S. 1 (1981), *on remand*, 673 F.2d 647 (3d Cir. 1982) (en banc), *rev'd*, 465 U.S. 89 (1984), the plaintiffs, a class of persons at a state facility for the mentally retarded, requested that the institution be closed and that services be provided them in local communities.

62. *See* New York State Ass'n for Retarded Children v. Carey, 631 F.2d 162, 165 (2d Cir. 1980) ("In the face of constitutional violations at a state institution, a federal court can order the state either to take the steps necessary to rectify the violations or to close the institution.").

63. Rhode, *supra* note 45, at 1195-96; *see* cases cited *supra* note 45.

remain cut off.[64] Retaining only one claimant is cheaper than extending benefits to an entire class.

Nevertheless, procedural considerations still compel litigants interested in institutional reform to proceed by class action. The first problem with an individual action is that the case will become moot if the plaintiff is discharged from the institution or otherwise cannot carry on the litigation.[65] A second problem is enforcement of the judgment if, for similar reasons, the plaintiff is not able to initiate contempt proceedings.[66] One should not underestimate the willingness of governments charged with institutional wrongdoing to create arrangements that moot individual plaintiffs or satisfy judgments in their favor without changing institutions. In order to avoid desegregating public universities, southern states established programs that offered to pay tuition at northern institutions for the few blacks who applied to the southern schools and threatened to sue unless admitted.[67] One can imagine a state paying for private treatment of those few residents of the state mental institution who are willing to file suit to challenge the conditions to which they are subjected.

Beyond these procedural difficulties, however, lies a more fundamental problem with reliance on individual adjudications in institutional cases. The problem has to do with the nature of public institutions, both physical and social. There are two aspects to the problem: the variety of remedial options, and the variety of affected individuals.

Among the things that characterize cases challenging institutions is the wide range of items that a court might include in a remedial order entered after a finding of liability.[68] With an individual action, difficulties would arise if, after an extensive remedial order is entered at the behest of an individual plaintiff in one case, another plaintiff files an action. Typically, none of the feasible solutions will totally eliminate the unlawful conditions that led to the case, at least in the near future.[69] Citing the lin-

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64. *See* cases cited *supra* note 33 (examples of nonacquiescence refusal).

65. *See supra* notes 51-55 and accompanying text.

66. *But see supra* notes 40-45 and accompanying text (discussing the possibility of an individual injunctive decree enforceable by a class of persons under Rule 71).

67. R. KLUGER, *supra* note 54, at 189, 202; *see* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Pearson v. Murray, 169 Md. 478, 182 A. 590 (1936).

68. Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 428-29 (1977); *see* Chayes, *supra* note 26, at 1298-1302.

69. *See, e.g.*, Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244, 257-58 (1977) ("The question is . . . what degree of integration can be achieved at a cost which does not permanently cripple

gering effects of past unlawful activity despite the implementation of relief, the individual plaintiff might demand a different remedial option that would be perceived as better.

This problem is both more severe in its effects and more likely to occur in institutional cases than in public policy cases. In public policy cases, the remedial options are far fewer. If the purpose of the case is to stop a governmental policy or practice, a simple prohibitory injunction might well suffice. If it does not, there exists a well-worn path of contempt remedies to enforce the original injunction. Although more choices are present when additional monetary or other retrospective relief is requested, even then accepting the benefit might well be taken as consenting to the entirety of the arrangement, thereby foreclosing the right to file suit for additional relief.[70] In an institutional setting, however, acceptance of the court-ordered change is totally nonconsensual. Things have changed, and there is nothing the affected person can do, except possibly file a new action to achieve a different set of changes.[71] Moreover, in a public policy case seeking retrospective relief in addition to a prospective injunction, a remedy for a dissatisfied person typically is additive. If the person is dissatisfied with the terms of the retrospective relief given and successfully sues for more, the person either will get more money or get the right to challenge a determination for several years before the year for which others might obtain such a right. Implementation of this kind of relief, even for a large number of subsequent plaintiffs, does not entail the sort of disruption and expense entailed in reworking an already operational plan to reform an institution. But the choice of one or another remedial option in an institutional case is not one to make lightly. Changes in a mental hospital, prison, school system, or other institution cost money and effort that might otherwise benefit the people whom the lawsuit was supposed to help.

Problems also arise from the fact that within the group of people who might be affected by relief in an institutional case are the institution's clients or participants, any number of whom might be potential plaintiffs. Just as there is a wide variety of

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other educational programs and in a manner which avoids the sort of terrorism that has become synonymous with Pontiac and South Boston in recent years.").

70. *See* General Tel. Co. v. EEOC, 446 U.S. 318, 333 (1980) ("[W]here the EEOC has prevailed in its [nonclass, 'pattern or practice'] action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action.").

71. *See generally* Kamp, *supra* note 31, at 393-94 (explaining absence of opt-out right in subdivision (b)(1) and (b)(2) actions on this ground).

relief that any plaintiff could choose to seek, there are likely to be wide differences of interests within the group of potential plaintiffs. These differences might motivate members of the group to pursue different interests. The problem has become commonplace in class action litigation over school desegregation and mental institution conditions. Splits develop within and between minority organizations over the amount of bus transportation necessary to desegregate a school system.[72] Some groups of mental patients prefer greater degrees of reform of existing facilities, while others press for greater deinstitutionalization.[73] In employment discrimination cases seeking structural change in the workplace, the interests of rejected minority applicants and existing minority employees may diverge.[74] There is also a possibility of conflict among the various disfavored groups (women, blacks, Hispanics) who might all have experienced discrimination.[75] This divergence of interest, coupled with the wide range of conflicting remedial options, creates a specter of an unending series of suits and conflicting judicial decrees.

A class action under Rule 23(b)(2) avoids these problems. In a class action, the court can define the class broadly to include all potential plaintiffs who have the right to file individual actions. Many courts have approved the inclusion of persons who might have such a right in the future.[76] Because the final judgment in such a suit precludes the claims of all members of the class by the operation of res judicata, the risk of conflicting decrees in subsequent cases is eliminated. Courts are extremely reluctant to find judgments in class actions subject to later attack by class members, at least in the absence of inadequate representation by the named plaintiffs,[77] and courts do not find inadequacy if

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72. Chayes, *supra* note 26, at 1296 n.71 (discussing Norwalk CORE v. Norwalk Bd. of Educ., 298 F. Supp. 208 (D. Conn. 1968), *aff'd*, 423 F.2d 121 (2d Cir. 1970)).

73. *See* Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 109 (3d Cir. 1979) (en banc) (noting that groups within the class disagreed about the appropriate relief, with some members wanting Pennhurst closed and others wanting it to stay open but with improved conditions), *rev'd*, 451 U.S. 1 (1981); Rhode, *supra* note 45, at 1260 n.290.

74. Rutherglen, *supra* note 45, at 50-51; Note, *supra* note 46, at 632; *see* General Tel. Co. v. Falcon, 457 U.S. 147, 158-60 (1982).

75. *See* Martinez v. Bechtel Corp., 11 Fair Empl. Prac. Cas. (BNA) 898, 904 (N.D. Cal. 1975).

76. *E.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 254 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975); *see* Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 COLUM. L. REV. 397 (1985) (criticizing this practice).

77. *See, e.g.*, Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988); Williams v. Burlington Northern, Inc., 832 F.2d 100, 104 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1298 (1988).

there is a simple conflict in preferences between the representative and the disgruntled class member.[78] Where members of the class have discrete interests, and the likelihood of dissatisfaction with the remedy is therefore high, the court can certify subclasses with different named plaintiffs, and then either formulate a remedy based on their competing interests or encourage them to propose their own compromise plan.[79]

II. THE EMERGENCE OF A THEORY OF DUE PROCESS PROTECTION OF INTANGIBLE INTERESTS

Among the important results of the explosion of civil rights cases in the 1960's and 1970's, many of which were Rule 23(b)(2) class actions, was the emergence of a theory of due process protection of intangible interests. The now familiar pattern of decision in such cases is that the court first questions whether the interest that the plaintiff seeks to protect is a property or liberty interest that arises out of state law, the federal constitution, or some other source. If such an interest exists, due process protections apply. The court then considers whether any protections afforded by the challenged scheme are satisfactory to protect the interest.

Critical in the development of this theory was the recognition that protected interests exist in such things as welfare benefits and public employment. This "new property" need not be visible, eternal, or transferable. By the 1960's, new property had become, for much of the population, a source of livelihood and security comparable to that provided by land in the eighteenth century.[80] The Supreme Court, in a series of cases, gradually recognized that it deserved due process protection.

The extension of due process protection to interests other than traditional ones, such as tangible property and freedom from physical constraint, began with *Goldberg v. Kelly,* decided

78. *See, e.g.,* Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981) (finding that opposition to a settlement by several *named* plaintiffs did not prevent its entry).

79. *See* Hawkins v. Fulton County, 95 F.R.D. 88, 94 (N.D. Ga. 1982); Note, *supra* note 46, at 635-39; *see also* Armstrong v. Board of School Directors, 616 F.2d 305, 318 (7th Cir. 1980) (considering desirable settlements in civil rights cases where voluntary cooperation with relief would otherwise be difficult to achieve); Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation,* 1983 U. ILL. L. REV. 579, 598.

80. Reich, *The New Property,* 73 YALE L.J. 733, 738-39 (1964).

in 1970.[81] The Court in *Goldberg* found a protected interest in the continued receipt of welfare benefits. It held that due process required opportunity for oral hearing before termination. In rapid succession, the Court found protected interests in a right to obtain a divorce,[82] continued possession of a driver's license,[83] public employment in which some form of implied tenure existed,[84] a debtor's right to possession of household goods held subject to a chattel mortgage,[85] and the right to attend public school when threatened with a suspension of ten days' duration.[86] Faced with the argument that government, in granting the intangible property in which a protected interest exists, can limit the procedures that may be imposed to protect it, a majority of the Court ruled otherwise. It held that the questions of protected interest and degree of protection required are separate. The government cannot take away life, liberty, or property without due process, and the question of what process is due is an independent question of federal constitutional law.[87]

The expansion of protected interests proceeded somewhat unsteadily. Interests in personal reputation gave the Court difficulty. In 1971, it found a protected reputation interest in a case challenging governmental promulgation of a list of drunkards,[88] but in 1976, it found no protected interest in a case challenging

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81. 397 U.S. 254 (1970); *see* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 567 (11th ed. 1985). *Goldberg* did not spring on the scene without warning. In his concurrence to *Joint Anti-Fascist Refugee Committee*, Justice Frankfurter said that due process protected an organization's good name and ability to function free of being branded communist. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894, 896-98 (1961), suggested that a protected interest existed in employment at a government facility, but the Court ruled that this interest would not prevent dismissal for security reasons without a hearing or full statement of reasons in military or sensitive employment. Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969), found a protected property interest in the continued use of a stream of wages subject to prejudgment garnishment. But none of these cases stated the issue as clearly or explained the decision as fully as *Goldberg v. Kelly*. Regarding causes of action not yet filed in court, a form of intangible property recognized as protected by due process even earlier, see *infra* text accompanying notes 110-14.

82. Boddie v. Connecticut, 401 U.S. 371 (1971).

83. Bell v. Burson, 402 U.S. 535 (1971).

84. Perry v. Sindermann, 408 U.S. 593 (1972). *But see* Board of Regents v. Roth, 408 U.S. 564 (1972) (finding no property interest in renewal of contract for clearly untenured public academic employment).

85. Fuentes v. Shevin, 407 U.S. 67 (1972).

86. Goss v. Lopez, 419 U.S. 565 (1975).

87. Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring). *But see id.* at 151-58 (plurality opinion); *id.* at 166 (Powell, J., concurring) ("[T]he plurality would thus conclude that the statute . . . determines not only the nature of appellee's property interest, but also the extent of the procedural protections . . . .").

88. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

promulgation of a list of shoplifters.[89] Social Security benefits appeared not to be protected in light of a 1975 decision,[90] but the Court held a year later that they were protected, at least in the context of a cutoff of previously approved eligibility.[91] Transfers among prisons for nonpunitive reasons were held not to infringe protected interests, even if they caused significantly diminished freedom of activity.[92]

Nevertheless, with the limits and, at least with respect to reputational interests, the retrenchment that the Court imposed, the broad extension of due process to intangible interests is now an accomplished fact. Recent cases recognize protected interests in the right to continued service from a municipally-owned utility,[93] the right to remain in the general prison population rather than be transferred to a mental hospital,[94] and the right to continued possession of a horse trainer's license.[95] All of these holdings are part of the continuing development of the due process theory that first took shape in the 1970's.

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89. Paul v. Davis, 424 U.S. 693 (1976). The distinction appeared to hinge on the idea that the accused drunkards would be forbidden from purchasing liquor, while the shoplifters would not be forbidden from making purchases in stores. According to the court, liberty was not infringed upon in the latter case. *Id.* at 708-09.

90. Weinberger v. Salfi, 422 U.S. 749, 768 (1975) (failing to apply a due process test to a denial of benefits).

91. Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (applying a due process test to termination of benefits).

92. Meachum v. Fano, 427 U.S. 215, 216 (1976); *see also* Olim v. Wakinekona, 461 U.S. 238 (1983) (finding no protected interest infringed by transfer from Hawaii to mainland). *But see* Hewitt v. Helms, 459 U.S. 460 (1983) (finding protected interest against transfer to administrative segregation, but due process satisfied by existing procedures). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-10, at 698 (2d ed. 1988) (describing the Court's retreat from earlier cases as one in which the Court demands an explicit entitlement, rather than an implicit understanding, to find a protected interest).

Note also that the Court recently imposed limits on the reach of due process by holding that merely negligent destruction of a protected interest does not constitute a "deprivation" sufficient to violate the due process clause. *See* Daniels v. Williams, 474 U.S. 327, 328 (1986); Davidson v. Cannon, 474 U.S. 344, 347 (1986). These cases, however, do not weaken the basic proposition that intangible interests are protected by the due process clause. Additionally, they do not overrule or question the holding of Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982), that the operation of a rule or statute can effect a deprivation sufficient to violate the due process clause. *See infra* notes 114-19 and accompanying text.

93. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

94. Vitek v. Jones, 445 U.S. 480 (1980).

95. Barry v. Barchi, 443 U.S. 55 (1979).

III. CONTRASTS BETWEEN THE EXPECTATIONS OF THE FRAMERS OF SUBDIVISION (b)(2) AND THE PRACTICE AND DOCTRINAL DEVELOPMENTS FROM 1966 TO THE PRESENT

The framers of Rule 23(b)(2) did not predict the explosion in civil rights and antipoverty litigation that occurred in the late 1960's, and they could not anticipate the role that the Rule would play in it. The Advisory Committee Note and Benjamin Kaplan's 1967 article explaining the Advisory Committee's intentions in the 1966 revisions treat subdivision (b)(2) almost as an afterthought.[96] The Committee focused instead on the abolition of the existing terminology for the categories of class actions, the imposition of the principle that class actions should bind the class, and the technicalities of subdivision (b)(3).[97]

Nevertheless, subdivision (b)(2) serves admirably in civil rights and antipoverty cases because it defeats formal or informal governmental nonacquiescence. It is safe to say, however, that the framers of Rule 23(b)(2) had no conception of the problem of governmental nonacquiescence when they drafted the Rule. They were working in an era in which a highly respected authority had recently written that class actions were likely not to be superior vehicles to individual test cases for law reform because defendants would voluntarily apply the effects of the cases universally.[98] Even after the adoption of Rule 23(b)(2), respected judges denied class action status to cases against government defendants on the ground that government officials would certainly apply the result of any individual case to every-

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96. *See* Rule 23 Notes, *supra* note 1, at 102; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 389 (1967) (discussing briefly subdivision (b)(2) and emphasizing terminology, preclusion, and subdivision (b)(3)); *see also* Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1216 (1966) (emphasizing subdivision (b)(3)).

97. Rule 23 Notes, *supra* note 1, at 98-106; Cohn, *supra* note 96, at 1213-26; Kaplan, *supra* note 96, at 375-400. These features of the amendments were the ones that had drawn criticism at the time of their adoption. *See* Committee on Fed. Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Supplemental Report*, 37 F.R.D. 71, 76-77, 80-82, 91 (1965).

98. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 446 (1960) (cited in Rule 23 Notes, *supra* note 1, at 103). This idea survived long after 1966. *See, e.g.*, Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1118 (1980) ("We would not accept the spectacle of the government acting as a private litigant, wringing advantage from a concededly unlawful course of activity until other plaintiffs, using the principles laid down in the first case, sought judicial relief.").

one in the individual's position.[99] Although examples existed of National Labor Relations Board and Internal Revenue Service nonacquiescence,[100] no one seems to have anticipated that nonacquiescence might be adopted more widely, and that this would require plaintiffs to proceed by class action.

Of course, the various factors that make nonacquiescence so tempting today were not all present in 1966.[101] Significantly, the main example that the Advisory Committee gave for the use of the Rule 23(b)(2) class action was desegregation litigation. In these cases, many government and private defendants forcibly resisted the courts' decrees.[102] Thus, the Committee may have implicitly recognized the utility of a binding, easily enforced, classwide decree when defendants have a mind to resist.

Mootness law also induces plaintiffs to use class actions rather than individual litigation.[103] The Supreme Court did not fully articulate the exceptions to mootness doctrine for class actions until 1980,[104] and there is no mention of mootness doctrine in the discussions surrounding the adoption of subdivision (b)(2) in 1966.

An additional matter that is clear from examining materials from the period in which Rule 23(b)(2) was adopted is that the framers felt that one-way preclusion was unfair in not exposing both sides of the case to mutuality of risk of a binding negative judgment. That was the reason the new Rule required that all

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99. *E.g.*, Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973) (Friendly, J.), *cert. denied*, 417 U.S. 936 (1974); *see* Note, *The "Need Requirement": A Barrier to Class Actions Under Rule 23(b)(2)*, 67 GEO. L.J. 1211, 1220 (1979) (collecting cases).

100. *See supra* note 33.

101. Decisions in pre-1974 welfare benefits cases either ignored or overruled objections to monetary relief based on eleventh amendment immunity. *E.g.*, Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973), *rev'd sub nom.*, Edelman v. Jordan, 415 U.S. 651 (1974); Thompson v. Shapiro, 270 F. Supp. 331, 338 n.5 (D. Conn. 1967), *aff'd*, 394 U.S. 618 (1969). *See generally supra* note 29 (discussing eleventh amendment immunity). The Supreme Court, furthermore, had not fully developed the doctrine of good faith immunity, a fact that made disregard of any standing precedent a hazard. *See* Wood v. Strickland, 420 U.S. 308, 315 (1975) (collecting cases) ("The nature of immunity from awards of damages . . . is not a question which the lower federal courts have answered with a single voice.").

102. *See, e.g.*, Bailey v. Patterson, 323 F.2d 201, 205 (5th Cir. 1963), *cert. denied*, 377 U.S. 972 (1964) (cited in Rule 23 Notes, *supra* note 1, at 102); *see also* R. KLUGER, supra note 54, at 753-54 (1976) (discussing resistance to desegregation).

103. *See supra* text accompanying notes 48-55.

104. United States Parole Comm'n v. Geraghty, 445 U.S. 338 (1980); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980). Sosna v. Iowa, 419 U.S. 393, 397-403 (1975), ruled that a class action exception existed but left it undefined. In a separate opinion, Justice White argued that the prevailing view among the circuits recognized no such exception. *Id.* at 413 n.1. *See generally supra* text accompanying notes 48-55 (discussing mootness in relation to the need for class actions).

class members be bound by the result in the case, whether favorable to them or not. But the Committee limited its approach to the point of fairness. It did not consider the functional benefit that preclusion confers in institutional litigation—the protection of decrees providing one form of relief from challenges to institutional arrangements that demand conflicting institutional changes. Desegregation cases were the only institutional litigation on the Committee's mind; there is no indication that the Committee had any concern with differences in the types of relief that might be sought by different groups of plaintiffs in these cases.[105]

Just as there is no reason that the framers would have anticipated any of the subsequent developments in litigation or in legal doctrine, there is no reason that the framers of the 1966 amendments to Rule 23 would have anticipated the post-1966 development of due process theory. Charles Reich's seminal article on the subject did not even appear until 1964;[106] there was no sure way of knowing at the time that the Court would find its theory persuasive and apply it to due process cases. *Goldberg v. Kelly*,[107] decided six years later, was the first Supreme Court case to adopt Reich's theory.

If the framers had known how due process theory would develop, they probably would not have drafted Rule 23(b)(2) as they did.[108] The most consistent strain of class action theory

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105. *See* Rule 23 Notes, *supra* note 1, at 98-107.

106. Reich, *supra* note 80.

107. 397 U.S. 254, 262 n.8 (1970).

108. This is not to say that the framers necessarily had the distinction between tangible and intangible interests in mind when they provided for the due process protection of notice only in cases for monetary relief. Given the paucity of the materials relating specifically to subdivision (b)(2), the framers may have conceded the presence of interests protected by due process in subdivision (b)(2) cases but would have argued that the classes in these cases have greater cohesion and homogeneity, thus making safeguards other than notice adequate to satisfy due process. They may have viewed notice as too costly or impossible in subdivision (b)(2) cases.

The Advisory Committee's use of an action for specific relief for victims of consumer fraud as one of the hypothetical applications of subdivision (b)(2) supports this interpretation of the framers' view of notice. Rule 23 Notes, *supra* note 1, at 102. Even before the "new property" cases, no one would have distinguished such a case from a case for cash damages with respect to the applicability of due process protection. Further support lies in the fact that the Advisory Committee mounted such an extensive defense of subdivision (b)(3) against the anticipated argument that classes in such cases lacked adequate homogeneity to satisfy traditional class action standards. *Id.* at 102-04. Nevertheless, it seems anachronistic to attribute to the Advisory Committee a detailed multiple-step due process analysis with respect to subdivision (b)(2) in light of the fact that the Committee appears not to have given the subdivision very much thought altogether and that it had every justification to be satisfied with the assumption that due process protections did not apply.

contends that each member of the class has an individual cause of action and must have one in order to be included in the class.[109] A class action precludes this individual cause of action, preventing the individual involved from ever asserting the cause of action on his own.

The apparent due process problem with the 1966 Rule is that this binding res judicata effect extinguishes the class member's cause of action, yet there is no assurance that the class member will ever have heard about the action, much less have had influence over its litigation.

IV. THE RULE 23(b)(2) AND DUE PROCESS

To answer the question whether the apparent due process problem is real, it is necessary to apply the pattern of decision employed in due process cases. First, the court must determine whether an individual class member has a protected interest in injunctive or declaratory relief. Second, the court must evaluate the existing protection of that interest to determine if the protection is adequate.

A. The Applicability of Due Process Protection

It can be argued that there is no individual property right in a cause of action, at least not in a cause of action for injunctive or declaratory relief that the possessor has not personally filed in court. But as early as 1950, *Mullane v. Central Hanover Bank & Trust Co.*[110] foreshadowed the demise of this idea. *Mullane* held that due process protected the interest of beneficiaries of common trust fund accounts in a periodic action by a nominee of the

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109. *E.g.*, Weinberger v. Salfi, 422 U.S. 749, 764 (1975) (requiring each class member to meet jurisdictional prerequisites); Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (requiring each class member's claim to meet jurisdictional amount); *see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 803 (1985) (referring to each class member as a "plaintiff"). *But see* Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 503 (arguing that the Supreme Court has frequently not followed such a "joinder" model).

110. 339 U.S. 306 (1950). Forerunners of *Mullane* include Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) (applying due process considerations to interests of absentees in class action); Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933) (holding that vested cause of action is protected by due process); and Hassall v. Wilcox, 130 U.S. 493, 504 (1889) (holding that lien cannot be subordinated in judicial proceeding without at least constructive notice).

bank to settle all claims for improper management of the fund. The value of suits such as *Mullane* lies in their preclusion, by res judicata, of all potential claims over the accounts.

The analogy to the individual claims of members of a class could not be much clearer; the only possible distinction is that subdivision (b)(2) class members have claims for injunctive or declaratory relief rather than monetary relief.[111] The usefulness of the distinction for due process theory could hardly survive the "new property" revolution.[112] In 1971, in *Boddie v. Connecticut*,[113] the Supreme Court extended due process protection to

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111. This distinction might have been critical to the framers of the 1966 amendment to Rule 23. They established that in Rule 23(b)(3) class actions, those for monetary relief, class judgments could have preclusive effect only when all class members had been notified in the "reasonable" manner that *Mullane* demanded. This notification would take place at the time of class certification and would be accompanied by the right to opt out of the class action and the preclusive effect of its judgment. No such protection, however, was afforded subdivision (b)(2) class members.

112. Some commentators have located the origin of the distinction in the traditional division between law and equity, a basis that became anachronistic after the merger of law and equity by the Federal Rules of Civil Procedure in 1938. *See, e.g.*, Kamp, *supra* note 31, at 390. This analysis leaves open the question of why the drafters chose notice for law (damages), but not for equity (injunctions). It also fails to deal with the anomaly of the declaratory judgment, which seems to count as law, but for which there is no notice. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 509 (1959).

The first question may have an answer in the fact that the class action began as an equity device only, and generally lacked notice, while *Mullane* might have compared more closely to a proceeding at law. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 200 (1950) (suggesting that class actions have their origins in equity). But the *Mullane* proceeding, though statutory, was really more an equity action. It had to do with a trustee's equitable duty to the trust. In relief sought, it might be compared to an equitable bill of peace. If *Mullane* is compared to a declaratory judgment action, the provisions of Rule 23(b)(2) are even more of a mystery. This all suggests that the law/equity distinction played little role in the formulation of the 1966 Rule.

113. 401 U.S. 371 (1971). The Court appeared to limit *Boddie* two years later in United States v. Kras, 409 U.S. 434 (1973) (upholding $60 fee for bankruptcy filing), and Ortwein v. Schwab, 410 U.S. 656 (1973) (*per curiam*) (upholding $25 fee for filing case in appellate court for review of welfare reduction). The rationale for *Kras* is not entirely clear. It might be read as holding that due process did not apply because other, noncourt-oriented means existed to adjust the plaintiff's state of indebtedness, or it might be read to mean that the fee, because it was payable in installments, merely restricted, and did not deprive, the plaintiff of a protected interest. Alternatively, it might be read as conceding that a protected interest was being taken away but holding that a reasonable fee payable in low installments did not violate due process. *Ortwein v. Schwab* skirted the issue by admitting that the underlying interest in welfare payments was protected but holding that the administrative hearings that had already been given satisfied due process. Later cases considering fees that prevented poor litigants from pursuing legal rights openly acknowledged that protected interests were at stake and that the due process clause was applicable. When the costs were upheld, it was on the basis that they were reasonable enough to satisfy the requirements of due process. *Compare* Lassiter v. Department of Social Serv., 452 U.S. 18 (1981) (finding appointment of free counsel at parental status termination hearing not required by due process) *with* Little v. Streator, 452 U.S. 1 (1981) (finding waiver of fee for blood test in paternity case defense

the right of indigent persons to file divorce proceedings, holding that a filing fee that prevented the filing of the action violated due process. Eleven years later, in *Logan v. Zimmerman Brush Co.*,[114] the Court held directly that a state-created cause of action for injunctive relief was property protected by the due process clause. The cause of action in that case was an administrative claim for employment discrimination. The Court held that the cause of action could not constitutionally be terminated as a result of an inadvertent failure of a state agency to schedule a conference on time. The monetary nature of the claim was not an issue at all in *Logan;* indeed the cause of action was for reinstatement to a job and various other equitable relief in addition to back pay. The fact that this relief was injunctive was a key part of the Court's analysis of the deficiency, for purposes of the protections due process affords, of a post-termination tort remedy against the negligent state officer. Moreover, in *Logan,* as in *Boddie* and *Mullane,* the claim had not actually been filed as a lawsuit. It was still merely an administrative charge; no formal complaint had yet issued. As in *Boddie* and *Mullane,* the violation of due process was the failure to permit suit.

The definition of property that the *Logan* court used embraces a class member's individual cause of action for non-monetary relief. The Court said, "The hallmark of property . . . is an individual entitlement . . . which cannot be removed except 'for-cause.' "[115] The claim of any absent class member is a for-cause entitlement to a form of useful relief. If the person who is a class member had instead brought it before a court as an individual case, the court could dismiss it only for cause, either on its merits or because of some procedural failing properly charged to the filing party. The only way in which the claim can other-

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required by due process). It appears, from *Lassiter, Streator,* and particularly Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), that *Boddie* continues to extend due process protection beyond the narrow context of divorce proceedings to all unfiled causes of action. *See Logan,* 455 U.S. at 430 n.5 (discussing *Boddie* and *Kras* and concluding that, "while the right to seek a divorce may not be a property interest in the same sense as a tort or discrimination action, the theories of the cases are not very different"); *see also id.* at 437 (referring to filing fees as "reasonable procedural requirements").

114. 455 U.S. 422 (1982).

115. *Id.* at 430. In Hansberry v. Lee, 311 U.S. 32 (1940), involving the validity of a state court class decree, the Court never questioned the applicability of due process protection to the interests of absent class members in a class action to enforce a racially restrictive covenant. The Court held that the decree in the class action could not be enforced because the interests of the class representatives conflicted with those of some class members, thus vitiating the representative's adequacy and violating the due process rights of class members who opposed the decree.

wise be extinguished is in a Rule 23(b)(2) class action judgment against the class.

The fact that the representative's claim might lose does not contradict the existence of a property interest in the claims of the absent class members that go down with it. In *Mullane*, the whole purpose of the procedure was for the representative to lose and thereby foreclose through res judicata any future cases charging impropriety in the fund's management.[116] Any individual case might win, however, by bringing up arguments or evidence that the representative failed to put forward. Varying results in different jurisdictions on similar claims highlight the fact that litigative choices do matter: if absent class members had the chance to bring the case over again, they might win.[117]

Moreover, what the Court continually stressed in *Logan* was not the likelihood of the ultimate success of the individual's

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116. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311 (1950).

117. This situation seems to be the converse of nonacquiescence: plaintiffs, instead of defendants, hope for better results in a subsequent case. An illustration of a class action binding the class to an erroneous, losing result is Dixon v. Quern, 537 F. Supp. 983 (N.D. Ill. 1982). *Dixon* challenged a welfare department policy of terminating assistance under a state program for the disabled whenever a recipient of the program was found not disabled and denied eligibility under the federal Supplemental Security Income program. The court allowed the terminations and granted partial summary judgment to the welfare department. *Id.* at 989. Subsequently, a number of persons brought individual actions in state court challenging the termination of the assistance with respect to themselves, arguing only that the termination violated a state statutory provision. This provision had been brought before the court in *Dixon*, but the new plaintiffs contended that it had not been properly construed. The state courts ruled in favor of the new individual plaintiffs. *E.g.*, Johnson v. Quern, 90 Ill. App. 3d 151, 412 N.E.2d 1082 (1980), *appeal denied*, 83 Ill. 2d 570 (1981).

In *Johnson* and other early individual cases, the welfare department failed to raise *Dixon* and argue for the preclusive effect of rulings already entered against the claims of the class. In subsequent cases it did, but these cases all involved persons who had been terminated from the aid program after the date of the *Dixon* class certification. Because the class definition in *Dixon* read "all disabled persons whose assistance . . . has been denied or terminated," the courts ruled that the individual plaintiffs were not in the class, and so were not barred. *E.g.*, Macklin v. Miller, No. 82-L-592, slip op. at 1 (Ill. Cir. Ct. May 27, 1982); Baldwin v. Miller, No. 81-CH-2, slip op. at 2 (Ill. Cir. Ct. Jan. 14, 1982). Of course, if the *Dixon* definition had included future class members, or if the courts had construed it to do so, the results in the cases would have been different. The fact that individuals freed from a class decision by what looks like a technicality could win in a new series of actions in a different forum demonstrates that the initial class action result is not the single true result that can be reached in a legal controversy. Moreover, the class representatives in *Dixon* had no interest adverse to the class members. They were represented by competent, experienced counsel. Nevertheless, that was no protection from a result that would have operated to foreclose the rights of the class members to bring claims that would have been successful in a subsequent action. The individuals had to face the barrier of stare decisis from the *Dixon* decision, but they were able to overcome it. But for a litigative error by the defendant in the initial cases and fortunate timing of events in the others, they would have faced an insuperable res judicata bar.

claim, but rather the fact that the claimant had the right to use the power of the state to attempt to achieve such success. Due process protects this power: "The right to use the [state employment discrimination statute's] adjudicatory procedures shares these characteristics [of property]."[118] Although only a class member with a meritorious claim will suffer actual damage from having the claim fall with the class action, due process requires that when violations occur, at least some remedy must be given, even in cases with no actual damage.[119]

Some commentators deflect the due process question by comparing Rule 23(b)(2) cases to legislative proceedings.[120] Like legislation, the injunctive or declaratory relief awarded operates across the board, is often prospective only, and addresses generalized needs, not particular injuries. Thus, the argument goes, the class member has rights similar to those of the citizen in the legislative process: the right to find out about the proceeding, if

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118. *Logan*, 455 U.S. at 431 (emphasis added).

119. Carey v. Piphus, 435 U.S. 247, 266-67 (1978) (assessing nominal damages for failure to provide hearing where actual injury was not proven); L. TRIBE, *supra* note 92, § 10-7, at 666 (labelling this approach an "intrinsic" view of due process). An application of recent Supreme Court decisions regarding 42 U.S.C. § 1983 demonstrates the importance of this approach. In Daniels v. Williams, 474 U.S. 327, 328 (1986), and Davidson v. Cannon, 474 U.S. 344, 347 (1986), the Court ruled that negligent conduct by a government official does not constitute a deprivation of life, liberty, or property under the due process clause. The Court, however, did nothing to disturb the settled idea that intentional deprivation of the right to a hearing violates due process. Otherwise, no basis would remain, after *Daniels* and *Davidson*, to attack on due process grounds grossly unfair hearing procedures for compensating victims of governmental negligence. Thus, if a state had a tort claims act that allowed motorists to sue over negligently caused collisions with state vehicles but provided for payment to the judges based on the number of cases they decided in favor of the state, the scheme would violate due process because of the intentional deprivation, through established state procedure, of the right to a fair hearing. It would not be correct to apply *Daniels* and *Davidson* to the case and rule that because the deprivation—damage to person or property on the highway—was a result of a state agent's negligence in driving, there could be no violation of due process in the handling of claims arising from the deprivation. *See* Bandes, Monell, Parrat, Daniels and Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 146 (1986) (discussing established state procedure as a form of intent).

Justice Stevens, in his concurrence in *Daniels* and *Davidson*, suggested looking to the initial destruction of life or property, rather than rejecting the injury as something other than a deprivation simply because it resulted from negligence. He asked instead whether the state's procedures to compensate for the destruction satisfy due process. He found that the existence of a state tort claims remedy satisfied due process in *Daniels* and that the refusal to waive sovereign immunity for prisoner claims did not deny due process of law in *Davidson*. *Daniels*, 474 U.S. at 340-43 (Stevens, J., concurring).

120. *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1397 (1976). *See generally* Chayes, *supra* note 26, at 1297 (discussing legislative effect of group litigation); Kamp, *supra* note 31, at 394 n.150 (same); Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 890-91 (1977) (same).

he or she uses the public record, and the right to request to be heard, if the participants offer the citizen a hearing.

The analogy is flawed, however. First, no one has a right to legislation. There is no factual showing that, if made, will entitle someone to legislative relief. Precisely the opposite is true of the class member. If the class member can make a showing—in fact, the same showing that the class representative must make to the court—relief must be granted. This individual right, otherwise enforceable if brought into court apart from the class action, distinguishes the class member from the citizen approaching the legislature. Second, although it is fashionable to characterize court decrees as legislation, the characterization ignores the decree's remedial scope, which is determined by the violation of enforceable rights,[121] and its binding effect, which is determined by principles of res judicata. Legislative change can occur at the whim of the entity that made the original legislation; the judge entering a decree, however, cannot predetermine its res judicata effects and has only the clumsy tools of Rule 60 to use in an attempt to change it retrospectively.[122] Perhaps for these reasons, few commentators making the legislative analogy go so far as to say unequivocally that procedural due process does not apply to a Rule 23(b)(2) class member, while they might well unhesitatingly say that procedural due process does not apply to a citizen affected by legislation.[123]

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121. Milliken v. Bradley, 433 U.S. 267, 281-82 (1977).

122. FED. R. CIV. P. 60(b) (specifying conditions and times for modification of decrees). *See generally* Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020 (1986) (criticizing courts' inflexibility in modifying consent decrees).

123. It might also be argued that binding class action decisions need not carry due process protection for absent class members because the decree operates in the same fashion as stare decisis. Stare decisis negatively affects the cases of persons who are not before the decision maker. But no one would argue that those negatively affected persons have a due process right to be heard. *See* Rhode, *supra* note 45, at 1197; Weinstein, *supra* note 98, at 446; *Developments in the Law—Class Actions*, *supra* note 120, at 1349. Nevertheless, the difference of degree of negative effect is so great that it should entail due process protections. Res judicata forecloses all argument and all evidence. Stare decisis affects only issues of law and even then permits resort to a court parallel with or above that rendering the first decision. If the first decision is an unappealed trial court determination, it will have full res judicata effect but little stare decisis effect (unless the same judge is assigned to the subsequent case). Indeed, this reality is the basis of defendants' frequent disregard of adverse precedent. *See supra* text accompanying notes 32-39.

Moreover, the stare decisis argument proves too much. It implies that even in non-class action cases, due process protections need not be afforded when a prior case brought by a stranger has "determined" an issue adversely. In fact, the litigant is heard to argue that stare decisis should not be applied, and the litigant is permitted to go up the appellate ladder. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It

B. Due Process Requirements

If the interests of class members in Rule 23(b)(2) actions are property, there is still a question of what protections due process requires for them in the context of the class action. Two preliminary responses should be considered. The first is the argument that representatives bind others in legal claims in many contexts, so class representatives' binding of absent class members must be acceptable regardless of how few safeguards exist. Unions, guardians ad litem, and the United States Equal Employment Opportunity Commission all bind others in their lawsuits.[124] But in each of these cases, there is at least some form of consent, either actual or implied, for the representative to be doing the binding.[125] With respect to the executor whose suit binds afterborn heirs, the nature of the right is different. The conduct of the executor determines the nature of the estate to which the afterborn heir has a claim. By contrast, one heir would not presume to sue on behalf of another heir without the latter's consent. Self-appointed binding representation without mandatory notice and consent is found nowhere but in Rule 23(b)(2) class actions.[126]

A second argument is that the terms of Rule 23(b)(2) itself limit the procedural protections that due process requires. But Rule 23(b)(2) is the very procedure whose constitutionality is at issue. With respect to state procedural provisions, the Supreme Court has stated, "[B]ecause 'minimum [procedural] require-

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is a violation of due process for the judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

124. *See* Hutchinson, *supra* note 109, at 489 (arguing that such examples establish the due process of binding class actions under an interest, rather than a consent, theory).

125. Notice and at least tacit consent are present in EEOC and other governmental cases that bind third parties. *E.g.*, General Tel. Co. v. EEOC, 446 U.S. 318, 333 (1980). Some consider the preclusion of those with notice who do not come forward in pending litigation as equitable preclusion, which may be taken as a form of implied consent. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 651-52 (3d ed. 1985); *see also* Marino v. Ortiz, 108 S. Ct. 586 (1988) (affirming by an equally divided court the decision that a class of affected employers who knew of a pending discrimination suit but chose not to intervene could not collaterally attack the consent decree in the case).

126.

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . .
>
> To these general rules there is a recognized exception that . . . the judgment in a 'class' . . . suit . . . may bind members of the class . . . who were not made parties to it.

Hansberry v. Lee, 311 U.S. 32, 40-41 (1940).

ments [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' "[127] The minimum requirements of due process, therefore, must be arrived at independently, and the terms of the Rule place no barriers on what the law demands.

These arguments aside, one may turn to two leading cases, *Phillips Petroleum Co. v. Shutts*[128] and *Mathews v. Eldridge*,[129] to determine what due process requires in the context of a Rule 23(b)(2) class action.

1. Phillips Petroleum Co. v. Shutts— A first approach to the question does what the Supreme Court said it was not doing in the 1985 case of *Phillips Petroleum Co. v. Shutts*. Plaintiffs filed a class action in the Kansas state courts over Phillips' failure to make interest payments on royalties from mineral leases that the class members possessed.[130] The average class member's potential damages were about $100.[131] The Kansas Supreme Court affirmed a judgment against Phillips and in favor of the class against a challenge by Phillips[132] that the trial court's assertion of jurisdiction over the case violated due process.[133] The United States Supreme Court ruled that the Kansas courts did not violate due process by asserting jurisdiction, even though ninety-seven percent of the leaseholders were nonresidents of Kansas.[134]

The Court's discussion of due process focused on the territoriality issue. *Pennoyer v. Neff*[135] established in 1877 that due pro-

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127. Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980) (emendation in original)).

128. 472 U.S. 797 (1985).

129. 424 U.S. 319 (1976).

130. 472 U.S. at 799.

131. *Id.* at 801.

132. The United States Supreme Court ruled that Phillips had the ability to assert the objection. *Id.* at 803. For a criticism of this ruling, and of much of the remainder of the Court's opinion, see 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, 267 (1985).

133. Shutts v. Phillips Petroleum Co., 235 Kan. 195, 679 P.2d 1159 (1984).

134. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812-14 (1985). Articles critical of this decision include Kennedy, *supra* note 132, and Note, Phillips Petroleum Co. v. Shutts: *Multistate Plaintiff Class Actions: A Definite Forum, But Is It Proper?*, 19 J. MARSHALL L. REV. 483 (1986). Other articles discussing the case are Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986), and Note, Phillips Petroleum Co. v. Shutts, *Procedural Due Process and Absent Class Plaintiffs: Minimum Contacts is Out—Is Individual Notice In?*, 13 HASTINGS CONST. L.Q. 817 (1986) [hereinafter *Individual Notice*].

135. 95 U.S. 714 (1877).

cess was the governing principle in the application of restrictions on state assertions of jurisdiction over extraterritorial defendants. Nevertheless, the Court in *Shutts* did not restrict its holding to those due process concerns that govern territoriality. It stated flatly: "We therefore hold that the protection afforded the plaintiff class members by the Kansas statute satisfies the Due Process Clause."[136] The factors the Court assessed in deciding the territoriality issue are those one would expect the Court to use if it were assessing the due process of binding those class members for whom territoriality was not an issue. The holding then might be summarized: The decision of this case by the Kansas courts under the Kansas class action statute does not deprive absent class members who are not Kansas citizens of due process; a fortiori it does not deprive Kansas citizens of that right.[137]

The Court in *Shutts* had to decide whether the nonconsensual assertion of jurisdiction over nonresident plaintiffs implicates due process.[138] In a passage that recognizes the theory of due process that has evolved in the last twenty years, the Court first asked whether a property or liberty interest was at stake. The Court responded affirmatively: "[P]etitioner correctly points out that a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs [in the class]."[139] In a footnote, the Court was careful to restrict this holding to class actions for monetary relief.[140] But the new property analysis outlined above, if correct, would extend the Court's discussion to suits for injunctive and declaratory relief.[141]

In determining the due process adequacy of the protections that the Kansas courts afforded the absent nonresident plaintiff

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136. *Shutts*, 472 U.S. at 814.

137. This rationale raises the possibility that where no territoriality question is present, the flexible requirements of due process might bend even farther to uphold existing class action procedures. This Article argues against such an interpretation. *See infra* text accompanying notes 157-60.

138. Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), established that a plaintiff need not have minimum contacts with a state forum; but the situation in *Keeton* of an individual voluntarily filing suit in a distant forum suggests a waiver analysis not necessarily applicable to the situation of an absent plaintiff class member. The *Shutts* court cites *Keeton* for the proposition that personal jurisdiction objections may be waived. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

139. *Shutts*, 472 U.S. at 807 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)).

140. *Id.* at 811-12 n.3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.").

141. *See supra* text accompanying notes 110-19.

class members, the Court first distinguished the situation of these individuals from that of nonresident defendants. It said that the burdens of being forced to participate in the litigation and being vulnerable to individual liability were low or nonexistent for the class members.[142] The Court found that a "minimum contacts" requirement was inappropriate. The Court nevertheless did hold that there were due process minima for the absent plaintiff class member. To afford "minimal due process protection," the court hearing the class action must give each class member individual notice and an opportunity to participate in the litigation.[143] The court must also afford the right to opt out and guarantee adequate representation.[144] The Court held that due process did not require an "opt in" procedure.[145]

Apart from the citations to *Mullane*,[146] *Eisen*,[147] and *Hansberry*,[148] the Court gave no reasoning to support its conclusion that these due process minima apply. But the argument based on *Mullane* is easy to see. In *Mullane*, the Court found that notice and the opportunity to be heard are historically important characteristics of court adjudication. They are essentials of those court procedures that observers in the Anglo-American tradition consider fundamentally fair.[149] They are basic in the sense that no other procedural rights can be exercised unless one has the opportunity, and knowledge of the opportunity, to exercise

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142. *Shutts*, 472 U.S. at 810. The burdens on the defendant that a plaintiff class member escapes are the need to travel to and hire counsel in a distant forum, to participate in discovery, and to face liability for costs and possible attorneys fees if the case is lost. Plaintiff class members are also said to be free from cross- or counter-claims or any form of coercive, punitive, or damages remedies. *Id.*

143. *Id.* at 811-12.

> The plaintiff [class member] must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The notice should describe the action and the plaintiffs' rights in it.

Id. at 812 (citations omitted).

144.

> Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. (citing Hansberry v. Lee, 311 U.S. 32, 42-43, 45 (1940)).

145. *Id.*

146. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

147. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

148. Hansberry v. Lee, 311 U.S. 32 (1940).

149. 339 U.S. at 314.

them.[150] And the factual setting in *Mullane,* as noted above, is similar to the setting of a plaintiff class action.[151]

Eisen appears barely relevant. It upheld a requirement of individual notice for Rule 23(b)(3) classes, but did so as an interpretation of the Rule and in response to a challenge regarding the imposition of costs on the defendant, not in response to a challenge by an absent class member who had not been notified or by a person raising an objection on the class member's behalf.[152] In fact, the *Eisen* Court explicitly disavowed reliance on the due process clause in upholding the notice requirement. It chose instead to rely exclusively on Rule 23(b)(3).[153]

Hansberry supports the proposition that the failure to provide adequate representation violates due process if the adjudication binds an absent class member.[154] *Hansberry,* however, did not consider any requirement of notice and the right to opt out, thus leaving open the possibility that such a right might afford substitute protection.[155] The Court in *Shutts* appears to have answered this open question in the negative. Representative adequacy, notice, and the right to opt out are separate, minimum requirements.

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150. *Id.*

151. *See supra* text accompanying notes 110-17.

152. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176-79 (1974).

153. *Id.* at 177.

154. Hansberry v. Lee, 311 U.S. 32, 42-43 (1940), involved an action to enjoin a breach of a racially restrictive covenant. The covenant, by its terms, was not effective unless the owners of 95% of the frontage area covered by the covenant signed it. The blacks defending in the action argued that 95% had not signed. The trial court found that only 54% had indeed signed, but still held that the covenant was effective because in an earlier class action to enforce the covenant, representatives of a plaintiff class comprising all land owners had stipulated that 95% had signed, and the stipulation, though untrue, was not fraudulently or collusively made. The Illinois Supreme Court affirmed, but the United States Supreme Court reversed, holding that because of the conflict between the interests of the class representatives in the earlier suit and those of the defendants in the present, representation of the latter by the former did not satisfy the requirements of due process. The class representatives wanted to enforce the covenant; the defendants in *Hansberry* had "a substantial interest . . . in resisting performance." *Id.* at 46. "[R]epresentation in this case no more satisfies the requirements of due process than a trial by a judicial officer who . . . may have an interest in the outcome of the litigation in conflict with that of the litigants." *Id.* at 45. *See generally* Kamp, *The History Behind* Hansberry v. Lee, 20 U.C. DAVIS L. REV. 481 (1987) (discussing case).

155. *Hansberry,* in fact, merely says that due process operates to protect class members. *Id.* at 42. Some commentators have taken this to impose a notice requirement. Keeffe, Levy & Donovan, *Lee Defeats Ben Hur,* 33 CORNELL L.Q. 327, 344 (1948) ("Certainly the *Hansberry* case clearly indicates that no judgment will be binding on members of the class who do not receive notice of the pendency of the action."). That article also suggests that notice and the opportunity to participate in the litigation should be the only requirements for protection of class members in all class actions. *Id.* at 348-49.

The context of *Shutts*, as well as some, but by no means all, of its language, limits its analysis of due process to the situation of the out-of-state class member. Furthermore, the analysis is explicitly restricted to cases "concerning claims wholly or predominately for money judgments."[156] But the text provides little that would bar the analysis from the evaluation of the due process implications of binding absent class members in Rule 23(b)(2) class actions. Although the case stresses territoriality, and the United States District Courts are said to have unquestioned territorial jurisdiction over the entire United States,[157] the burden placed on plaintiff class members—specifically, the fact that "[a]n adverse judgment . . . may extinguish the chose in action forever through res judicata"[158]—is precisely the same in a federal as in a state class action. All those burdens associated with defending in a geographically remote forum disappear in the situation of a plaintiff class action, state or federal. Whether the class action is in state or federal court, "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[159] If the out-of-state plaintiff class member in a state case is nevertheless entitled to notice and the right to opt out, and to adequacy of representation, the member of a plaintiff class in the federal court should be entitled to the same protections.[160]

The expressed restriction in *Shutts* to cases involving monetary relief should yield to the analysis expounded above with re-

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156. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985); *see supra* note 140 and accompanying text.

157. F. JAMES & G. HAZARD, *supra* note 125, at 69. *But see* Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988) (suggesting that due process requires a restriction); Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. RICH. L. REV. 697 (1984) (same). *See generally* Mullenix, *supra* note 8, at 1065 (discussing territoriality objection to federal class action proceedings where opt out is not permitted).

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

159. *Id.* at 810.

160. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), does not reveal whether its notice analysis extends only to persons outside the forum state. The case challenged the territorial jurisdiction of New York: "We are met at the outset with a challenge to the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York." *Id.* at 311.

Though this language would limit the applicability of *Mullane* to territorial jurisdiction, the Court has applied it generally as the expression of the due process standards of notice and the right to be heard in any adjudication. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982); Fuentes v. Shevin, 407 U.S. 67, 82 (1972). Just as the significance of *Mullane* has expanded from due process in the assertion of territorial jurisdiction to due process in general, *Shutts* should too. *See generally* Keefe, Levy &

spect to due process protection of nonmonetary claims.[161] The Supreme Court has held that such claims are entitled to due process protection proportionate to the significance of the nonmonetary interest.[162] In many cases, the value of nonmonetary relief will far exceed the average $100 that class members had at stake in *Shutts*. The only questions that remain would be: (1) whether the class members' supposed unanimity in seeking the same sort of relief is a substitute due process safeguard; and (2) whether the supposedly legislative nature of Rule 23(b)(2) relief, apart from this consideration of unanimity of goal, implies either the absence of a protected interest or a reduced need for the protections of notice, the right to opt out, and adequacy of representation.

With respect to the first question, in many subdivision (b)(2) cases, predominantly but not exclusively institutional cases, there will be no unanimity with respect to the desired relief.[163]

Donovan, *supra* note 155, at 346 (arguing that notice and the right to be heard should be the fundamental concerns in due process doctrine regarding territorial jurisdiction).

Even Pennoyer v. Neff, 95 U.S. 714 (1877), the first case to assimilate territorial jurisdiction into due process, had a significant role in establishing notice and the right to be heard as due process standards, despite the fact that the case was decided essentially on principles of state sovereignty and international law and mentioned notice almost in passing. *See id.* at 726-27 (only two paragraphs in the middle of the opinion mentioning the function of notice in preventing oppression and fraud); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 101 (1985) (noting that *Pennoyer* was decided on grounds of public international law and that the due process discussion of *Pennoyer* was technically dicta because the fourteenth amendment was not in effect at the time of judgment in the trial court); *cf.* Z. CHAFEE, *supra* note 112, at 230 (citing *Pennoyer* as establishing due process minimum of notice).

Two commentators analyzing territorial jurisdiction issues in mass tort class actions have remarked on the absence of notice and the right to be heard in subdivision (b)(2) cases as a possible due process violation apart from territorial considerations. Mullenix, *supra* note 8, at 1065; Note, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 BROOKLYN L. REV. 517, 544 (1983).

One view of this controversy holds that notice and the right to be heard stand as due process requirements only in the absence of a territorial jurisdiction problem. Opt out may be denied on the ground that consent is needed only in territorial jurisdiction disputes, but not in other cases. Miller & Crump, *supra* note 134, at 31. *See generally Individual Notice*, *supra* note 134, at 831 (arguing that a notice and opt out scheme, but not individual notice, is the due process minimum, even in the absence of territorial jurisdiction concerns). This view, however, seems at war with the concepts of the framers of the 1966 amendments to Rule 23 who provided for the right to opt out despite the absence of territorial jurisdiction problems in the cases where the right applies.

161. *But see* Miller & Crump, *supra* note 134, at 28. This Article asserts that with respect to Rule 23(b)(2), the right to opt out is of fundamental importance to the class member but of significance to the adverse party and judicial administration only in institutional cases. *See infra* text accompanying notes 229-40.

162. *E.g.*, Goldberg v. Kelly, 397 U.S. 254, 261-64 (1970).

163. *See supra* text accompanying notes 68-79. Professor Wood seems to rely mostly on this idea and related concepts in contending that *Shutts* should not be extended to

By contrast, in monetary relief cases, the desires of the class members are likely to be clearer and more closely unanimous—more money.[164]

The answer to the second question is the same as the response to the argument that Rule 23(b)(2)'s "legislative effect" obviates the need for due process protection: the bar created by a class action adjudication is both harsher and more personal than a legislative decision.[165] An application of *Shutts* to Rule 23(b)(2) class actions demonstrates that the minimum due process requirements of notice and the opportunity to opt out are conspicuously absent. The Rule therefore violates due process.

2. Mathews v. Eldridge— An alternative approach to whether Rule 23(b)(2) affords adequate protection to absent class members is to consider the familiar calculus of due process set out in *Mathews v. Eldridge*.[166] According to *Eldridge*, a court should weigh the following factors: (1) the significance of the absent class member's interest and the finality of the deprivation; (2) the likelihood of erroneous deprivation of the class member's interest, given current safeguards and the benefit of alternative protections; and (3) any interest in maintaining the status quo, including the cost of additional or substitute procedures.[167] The procedure violates due process if it fails upon consideration of these factors. Relative weight of the factors is unclear, but comparisons may be drawn to other procedures that have been upheld or struck down.[168]

The significance of the absent class member's interest varies greatly from case to case. In a welfare class action, a change in procedures for contesting terminations of assistance may be the difference between life and death (or between life and a very

require notice and individual opportunity to be heard in all class actions. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597 (1987).

164. Yeazell, *supra* note 98, at 1111.

165. *See supra* notes 120-23 and accompanying text.

166. 424 U.S. 319 (1976).

167. *Id.* at 335.

168. *Eldridge* has been used to evaluate administrative procedures. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17-18 (1978) (administrative procedure for cutoff of service from municipally-owned utility company); Smith v. Organization of Foster Families For Equality & Reform, 431 U.S. 816, 849 (1977) (administrative procedure for removing children from foster families). *Eldridge* has also been applied to evaluate judicial procedures. *E.g.*, Lassiter v. Department of Social Serv., 452 U.S. 18, 27 (1981) (refusing to appoint counsel for indigent mother at court hearing on termination of parental rights). Commentators have criticized the *Eldridge* test, *e.g.*, Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976), but the Court still applies it; *see also* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 313 (1985); Santosky v. Kramer, 455 U.S. 745, 754 (1982).

death-like life). The fact that class members have not filed their own cases or joined as named plaintiffs may mean that the interest is not important, but it may instead mean that the class members are simply unaware of the interest or unable to afford lawyers. To the extent that the interest is merely the right to control the litigation that affects one's own rights, it may be less valuable than the underlying rights themselves. Such an interest, however, defies calculation and therefore is difficult to weigh in any judicial balance. The deprivation is quite final: Res judicata forever bars the class members from challenging the outcome of the class action.

The current safeguards that Rule 23(b)(2) provides for class members' interests are: (1) the court must find that the named plaintiff is a fair and adequate representative; (2) both court approval and mandatory notice must accompany all class settlements; and (3) the court may order notice when it deems notice appropriate. Although these safeguards have some value, they have weaknesses as well. These weaknesses appear whether the case results in an adjudicated victory, is settled, or loses.

The only mandatory protection in a case that is won through a litigated decision is representative adequacy. But even adequate representatives compromise the interests of some class members, even in cases where the class wins in court. In a successful public policy class action about welfare policies, for example, the usual litigated victory is a declaratory judgment and injunction against the welfare department practice and issuance of notice to all class members who can be reached, informing them of their rights to use state procedures to claim any past-due benefits. In many cases where a court resolves the merits, an agreement of the parties nevertheless decides the proposed relief.

In these situations, even a representative that any court would consider adequate may compromise the rights of some class members by agreeing to terms of injunctive or notice relief that will effectively exclude some class members from benefits of one sort or another. The reason the representative agrees is the representative's prediction that the court would otherwise order less favorable terms. There is nothing inadequate in the representative's performance, but legitimate, enforceable interests of class members are still being traded away. Partial settlement, either explicit or tacit, occurs in any instance where the named plaintiff does not press for everything that everyone in the class might possibly get, in order to appear reasonable or not risk losing credibility with the court. This form of settlement takes place with respect to individual aspects of a case on a daily ba-

sis.[169] Because notice and court approval must only accompany settlements of the entirety of a case, however, the safeguards of mandatory notice and a fairness hearing on a proposed settlement do not apply.[170]

The amount of protection afforded by the notice of settlement and fairness hearing is minimal for cases that are formally settled. The right the Rule gives a class member is merely to learn as much about the action as is contained in the notice and then have the court consider whether the member's individual objections are enough to upset the settlement of the class as a whole. The Rule gives no right to opt out if the class member remains dissatisfied. There is no hearing on the individual's suit against the defendant, merely a hearing on the fairness of the general settlement.

For a case that loses, there is an inevitable "settlement" without notice and the opportunity to be heard whenever the named plaintiff chooses not to appeal. The decision not to appeal forecloses the rights of class members to have the case reviewed. But conflicting interests color this choice, even for the most fair-minded representative. On the one hand, the representative must bear the litigation costs of an appeal and the outlook for success may well be grim. On the other, the absent class members have some possibility of gain from an appeal, and absolutely nothing to lose—they will be equally bound by a district court decision as by one from the Supreme Court. The representative will make a decision, but the class members will not participate, despite the fact that their interests are directly adverse to those of the representative.[171]

The analysis so far has been premised on the idea that the property interest at stake is the relief that the class member is lawfully entitled to from the court that hears the class member's cause of action. But if one considers the protected interest to be

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169. Professor Chayes notes how this process takes on an explicitly settlement-oriented character in the formulation of relief after a contest over liability. With respect to complex cases, Chayes notes:

> Each party recognizes that it must make some response to the demands of the other party, for issues left unresolved will be submitted to the court, a recourse that is always chancy and may result in a solution less acceptable than might be reached by horse-trading. . . . Indeed, relief by way of order after a determination on the merits tends to converge with relief through a consent decree or voluntary settlement.

Chayes, *supra* note 26, at 1299 (1976).

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

171. *Cf.* D. RHODE, CONFLICTS OF INTEREST IN EDUCATIONAL REFORM LITIGATION 17 (1982) (describing incentives for class counsel to prefer settlement to dubious appeal and for class members to prefer appeal).

the right to use the judicial system to adjudicate the individual's claim, irrespective of the claim's merits in actually entitling the class member to relief,[172] the analysis applies even more strongly. None of the existing safeguards affords the class member protection of this interest, because none affords the class member control over his or her individual claim. Representative adequacy does not suffice. Adequacy measures performance of the representative against the judge's expectations for reasonable performance. It bears no relation to any form of individualized consent. No one asks the class member to agree to the representative's taking charge of the case.[173] Hence, the situation compares to an unauthorized suit of any type. Where suit is brought without the plaintiff's authority, and there is even the slightest failure in getting all that the plaintiff might possibly ask for, it does no good to say that the unauthorized representative did an "adequate" and "fair" job. In any context but a class action, the plaintiff who did not give authorization would not be held to the judgment.[174] To hold a plaintiff to such a judgment would constitute deprivation without due process of a personal right to use a system of adjudication to obtain one's own decision. Just as representative adequacy does not protect the interest in control over one's case, the settlement rights to notice and a fairness hearing fail to protect this interest. The fairness hearing is not an individual adjudication under the class member's control. Instead, it is a general consideration of the fairness of the terms of settlement to the class as a whole.[175] Therefore, there are no existing safeguards to weigh in the *Mathews v. Eldridge* balance. Accordingly, the *Eldridge* step addressed to the adequacy of existing safeguards might dictate a finding of due process violation without any further consideration.

The value of the alternative safeguards of notice and the right to opt out are as difficult to calculate as the value of existing safeguards. Although few people now respond to opt-out notices

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172. *See supra* text accompanying notes 118-19, 172-75.

173. As early as 1941, two commentators noted the due process objection to binding adjudications without notice and the right to control one's own case. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 710 (1941).

174. *See* Clark v. Lomas & Nettleton Fin. Corp., 625 F.2d 49 (5th Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). Two recent cases, Williams v. Burlington Northern, Inc., 832 F.2d 100, 104 (7th Cir. 1987), *cert denied*, 108 S. Ct. 1298 (1988), and Hastings-Murtaugh v. Texas Air Corp., 119 F.R.D. 450, 456 n.4 (S.D. Fla. 1988), note in passing that representative adequacy, discretionary notice, and fairness hearings exist to ensure that class members receive adequate due process protection of their interests. Neither case, however, takes up the argument that the safeguards are in fact inadequate.

175. *See supra* text accompanying note 170.

in Rule 23(b)(3) cases, poor drafting of the notices may be the main cause.[176] Relatively few people appear at fairness hearings on class settlements now, and fewer still voice relevant concerns.[177] But the right to opt out is both easier to exercise and more likely to accomplish its immediate goal than the right to speak before a judge in an attempt to upset an agreement the litigants have endorsed. It would take experience under a rule that affords notice and the right to opt out to give a clear answer.

The interest that exists in preserving the status quo and the cost of the alternatives is the final factor to consider in applying the *Mathews v. Eldridge* test. One alternative is simply doing without Rule 23(b)(2). But the cost of that option is too high to pay. Subdivision (b)(2) is of critical importance in the enforcement of federally-secured rights, and no good alternative is available.[178] If the only alternative to the Rule is its invalidation, the Rule may pass muster under the final step of the *Eldridge* test, even though it does badly on the first two steps.[179] But the validity of this approach is doubtful, because the real interest at stake might be considered to be the ability to use judicial procedures. For a given class member, this interest is totally eliminated rather than merely burdened.[180] There are no protections at all for this interest in step two of the analysis, so under *Eldridge* even elimination of the procedure might be required to secure due process, in the absence of any alternative.[181]

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176. D. RHODE, *supra* note 171, at 32. Nevertheless, the large number of opt outs in *Shutts* (3400 of 33,000) should not be ignored. Good drafting may increase the opt out rate. The fact that the amount of attorneys fees may depend on the size of the class (particularly in Rule 23(b)(3) actions) creates a disincentive for plaintiffs to draft well and presents a need for the court to take an active role. Several absurd responses to class notices are collected in Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 332.

177. D. RHODE, *supra* note 171, at 32.

178. *See supra* text accompanying notes 31-79.

179. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460 (1983) (holding that informal, nonadversary procedure for placing prisoner in administrative segregation affords sufficient due process protection given strong state interest in prison order); Barry v. Barchi, 443 U.S. 55 (1979) (permitting summary suspension of horse trainer's license given magnitude of state interest in having means of acting swiftly about charges of drugging).

180. *See supra* text accompanying notes 118-19.

181. *See, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980) (holding that despite strong governmental interest in transferring mentally ill prisoners to mental hospital, absence of any notice and opportunity for hearing violates due process); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (holding that despite public utility's interest in cutting off service to delinquent customers, absence of any notice and opportunity for hearing violates due process).

An option that does not entail complete invalidation of the subdivision is to require that a Rule 23(b)(2) class be afforded precertification notice and the right to opt out, in line with the rights of a subdivision (b)(3) class. Here the social cost appears much lower. Rule 23(b)(2) remains available for use in public policy and institutional cases. But that appearance is deceiving because it still must be determined who will pay for the notice. If the cost cannot be shifted to the defendant, impecunious plaintiffs—the very people for whom subdivision (b)(2) was designed—will lose their ability to use it.

Eisen v. Carlisle & Jacquelin[182] would bar shifting the cost to the defendant. *Eisen*, decided in 1974, was a class action brought under Rule 23(b)(3) alleging violations of the antitrust and securities exchange laws. The named plaintiff sought damages on behalf of six million odd-lot stock traders against two brokerage firms that controlled ninety-nine percent of the odd-lot trading business for the relevant time period, 1962 to 1966. After a first interlocutory appeal, the district court held evidentiary hearings and ordered that the suit be maintained as a class action. Because the case was a Rule 23(b)(3) action, individual notice advising class members of the right to opt out was required under subdivision (c)(2). With respect to notice, the court found that 2.25 million of the class members could be identified by name and address with reasonable effort. Because notifying all these individuals would have cost at least $225,000, however, and because even a much lower cost would have forced the plaintiff to withdraw the action, the court devised a less extensive notice plan. The court provided for individual notice to New York Stock Exchange member firms, bank trust departments, odd-lot traders with numerous transactions, and 5000 other randomly selected class members, and publication notice in the *Wall Street Journal* and New York and California newspapers to the rest of the class. This plan was to cost about $21,700. The court also ordered that, in light of evidence adduced at a preliminary hearing showing that the plaintiff was "more than likely" to win at trial, the defendants had to pay ninety percent of the cost of the notice.[183]

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182. 417 U.S. 156 (1974).

183. The Court of Appeals ordered the suit dismissed as a class action on several grounds. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973). The Supreme Court vacated that decision and remanded, upholding the Court of Appeals' position that individual notice to all identifiable class members was required and that the cost could not be shifted to defendants, but stating that plaintiff might propose a smaller, redefined class. 417 U.S. at 179 n.16.

The Supreme Court ruled that subdivision (c)(2) means what it says, "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[184] Thus, the Court held that the class action had to be dismissed unless all class members whose names and addresses could reasonably be identified were given individual notice.

The Court further ruled that the district court erred in imposing the cost of notice on the defendants. The Court found no authority in Rule 23 to hold a preliminary hearing on the likelihood of success on the merits. In the absence of anything in the Rule authorizing cost shifting, the plaintiff had to bear the "ordinary burden of financing his own suit,"[185] which included any necessary notice. The Court buttressed its position with a number of observations: (1) the procedure unfairly benefited the plaintiff by giving him a preliminary finding on the merits of the case, which might prejudice the defendants unduly because it lacked the procedural protections of a trial; (2) the procedure prevented the court from determining class action status as soon as practicable after the commencement of the action, as required by Rule 23(c)(1); and (3) the procedure entailed a determination of the merits as part of the class certification process, which traditionally is forbidden.[186]

Due process requires individual notice to all reasonably identifiable class members in binding Rule 23(b)(2) actions as surely as *Eisen* required it in Rule 23(b)(3) actions. If the Court accepted this position as a matter of due process doctrine, there would still remain nothing in the text of Rule 23 permitting a district court to shift any of the cost of precertification notice to the defendants. Indeed, the various supplementary concerns mentioned by the Court in *Eisen* would serve to rule out a pre-

184. FED. R. CIV. P. 23 (c)(2). The Court pointed out that the Advisory Committee, following Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), believed that individual notice to all identifiable class members was a fundamental requirement of due process. *Eisen*, 417 U.S. at 173-74. The Court noted the due process consideration that the class action judgment binds class members even if unfavorable, and stated that the members therefore were entitled to request exclusion or fuller participation. *Id.* at 176. These comments could be considered dicta in light of the Court's primary reliance on the text of the Rule. When the plaintiff argued that the high cost of notice and the low value of the class members' claims should be considered, the Court replied curtly that subdivision (c)(2) made no exceptions: "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Id.*

185. 417 U.S. at 179.

186. *Id.* at 177-78.

liminary hearing on the merits in subdivision (b)(2) cases as well as in subdivision (b)(3) cases.

The problem of the Rule 23(b)(2) class action is that binding absent class members without giving them notice and the right to opt out violates due process. The problem is clear under the apparently applicable standards of *Phillips Petroleum Co. v. Shutts*.[187] Indeed, the only way in which the binding Rule 23(b)(2) class action might be seen not to be a violation of due process is if one follows *Mathews v. Eldridge* and weighs the harm to the interests of absentees with the cost of the alternative safeguard of notice and the right to opt out. If one concludes that because of *Eisen* the requirement of notice will eliminate the subdivision (b)(2) action in many areas in which it is most useful, the benefit of the alternative safeguard might be so costly that the current procedure will be taken to afford due process.[188] This analysis, however, works only if the interest at stake is not the right to an individual hearing, but only the underlying interest in the suit.[189] Nevertheless, even if such an approach did protect the present procedure from the charge that it violates due process, other procedures still might better protect the interests of all concerned.

V. A PROPOSAL FOR REFORM

Although one might press for a Rule revision that would permit the cost-shifting procedure the *Eisen* Court prohibited, it seems unlikely that the Court would overrule itself by rulemaking,[190] especially because *Eisen* received as much praise as con-

187. 472 U.S. 797 (1985); *see supra* text accompanying notes 156-65.

188. See *supra* text accompanying notes 169-79.

189. See *supra* text accompanying notes 180-81.

190. Regardless of the merits, such a proposal faces the immediate political obstacle that few rule revisions ever directly challenge a Supreme Court precedent. In general, they tend to build on Supreme Court decisions, as one might expect from the fact that any proposed revision must obtain Supreme Court adoption. *See, e.g.*, FED. R. CIV. P. 11 advisory committee's note (1983) ("The amended rule attempts to deal with the problem [of abuses in pleading] by building upon and expanding the equitable doctrine permitting the court to award expenses . . . ."); *cf.* 28 U.S.C. § 2072 (1982) (Supreme Court adoption of rules). Another drawback of such a proposal is its inevitable collision with the desire to determine class status independently of the merits and to do so early in the litigation. The proposal advocated by this Article will not delay class determinations but may delay determination of their binding effects. *See infra* text accompanying notes 214-22.

A 1985 proposal by the American Bar Association Section of Litigation to amend Rule 23 undoes *Eisen* in a less drastic way by keeping the costs where they fall but making notice in all cases permissive rather than mandatory. Section of Litig., American Bar

demnation.[191] The problem is the clash between the desire for inexpensive classwide relief and the necessity to afford notice and the right to be heard to all class members.

The solution to this problem may lie in the fact that it is not the two-sided clash that this phrasing suggests, but instead a three-sided conflict. The neglected third term is the rule of preclusion. The only reason that the absentees' interests are harmed is that res judicata bars their causes of action from being raised in later, separate actions. As noted above, the framers of the 1966 revision of Rule 23 imposed the res judicata bar because the previous procedure offended then current ideas of mutuality of estoppel.[192] Some courts had permitted nonbinding "spurious" class actions with post-decision opt-in by class members who wanted relief.[193] The solution to the due process problem lies in a revival of the pre-1966 "spurious" class action.

A. The Spurious Class Action

Thomas Atkins Street coined the term "spurious class action" in 1909 to refer to class actions that do not involve specific funds or property in which each class member has an interest.[194] He called common property or fund suits "true" class actions. The results in true class actions bound all class members by res judicata despite the existence of a federal equity rule saying that

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Ass'n, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 202 (1986). This proposal combines the worst of both worlds, permitting infringement of due process rights in some cases as well as causing litigants to forego class treatment due to inability to pay for notice in others. The apparent objective is a decree that will bind absentees, even though the Report concludes: "Post 1966 developments involving the the [sic] collateral estoppel effects of a prior judgment and modification of the common law mutuality doctrine raise difficulties not contemplated by those who drafted the [1966] rule." *Id.* at 199. In other words, the authors of the proposal acknowledge that the mutuality argument for having a decree binding all class members no longer holds. *See infra* notes 223-29 and accompanying text. *See generally supra* text accompanying note 105 (discussing framers' preoccupation with mutuality). For a discussion of the history of the ABA proposal, see *infra* note 219.

191. *E.g.*, Bennett, Eisen v. Carlisle & Jacquelin: *Supreme Court Calls for Revamping of Class Action Strategy*, 1974 WIS. L. REV. 801; Case Comment, *Federal Jurisdiction—Civil Procedure—Glass Actions—Solutions for Consumer and Environmental Wrongs Are Not Embodied in Federal Rule 23*, 28 RUTGERS L. REV. 986 (1975); Recent Development, *Federal Civil Procedure—Class Actions—Plaintiffs Must Bear Costs of Notice to Individual Class Members in Rule 23(b)(3) Class Actions As Required by Rule 23(c)(2)*, 19 ST. LOUIS U.L.J. 100 (1974).

192. *See supra* text accompanying notes 104-15.

193. *E.g.*, Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1962), *cert. dismissed*, 371 U.S. 801 (1963).

194. T. STREET, FEDERAL EQUITY PRACTICE 342 (1909).

decrees in class actions had no binding effect on absentees.[195] All other class cases concerned not a common fund or property, but a personal liability. "Here the suit is not a class suit in any proper sense. We may call it a spurious class suit."[196] Distinct from the "true" suit by its jurisdictional basis and the nature of relief sought, the spurious class action had a different res judicata effect. Street saw the paradigm of this case as the injunction against a striking union and stated with regard to the effect of a decree in such a suit:

> If relief is sought against an unincorporated association of individuals or against numerous defendants who are acting together, it is obvious that a decree entered in a suit against a few only cannot be effective against others who are not actually made parties, unless and until they are formally brought in and bound by the decree . . . .[197]

The idea of nonbinding spurious class actions persisted despite the deletion of the proviso about not binding absentees in

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195. *Id.*; *see* Federal Equity Rule 48 (1842) *reprinted in* J. HOPKINS, THE NEW FEDERAL EQUITY RULES 104-05 (8th ed. 1933).

> 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 interest 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.

Id.

The proviso in the Rule about the decree's being without prejudice to absentees was not applied in Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853), either on pragmatic grounds, as suggested in Z. CHAFEE, *supra* note 112, at 226-27, or on the grounds suggested by Street, specifically, that the Rule's proviso applied only to class actions that were not "true." For true class actions, Street argued that a universal binding effect applied as a matter of logic, notwithstanding the provisions of any rule.

Street's idea apparently relates to the idea of universally binding in rem judgments with respect to specific property or funds within the court's jurisdiction. *See generally* F. JAMES & G. HAZARD, *supra* note 125, at 77 (discussing in rem judgments). Nevertheless, old Rule 48's proviso was given effect in Wabash R.R. v. Adelbert College, 208 U.S. 38, 57 (1908) (involving multiple bondholders seeking to establish a lien against assets of a corporation, where the court had apparent in rem jurisdiction over the corporation's assets). *See* Z. CHAFEE, *supra* note 112, at 227.

196. T. STREET, *supra* note 194, at 342.

197. *Id.* at 345. Street also linked this result to the language of the Rule, though he placed greater emphasis on the inherent nature of the spurious suit. After describing the universal binding effect of the true suit, he stated: "But there is certainly one class of cases involving numerous parties in which the reservation of the equity rule is applicable in its full and literal sense. This is the spurious class suit, the suit brought by or against numerous parties in respect of a personal liability." *Id.*

the 1912 revision[198] of the Equity Rules. The original draft of the Federal Rules of Civil Procedure had no separate class action rule at all,[199] but, in 1937, James William Moore proposed a rule that divided class actions into three categories, with differing res judicata effects (as well as jurisdictional prerequisites) for each.[200] In commentary, he gave each category a descriptive name.[201] The "spurious" class action was one that did not in-

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198. Federal Equity Rule 38 (1912), *reprinted in* J. HOPKINS, *supra* note 195, at 240.

199. Rules 26 and 27 on joinder, however, included provisions for class actions. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570 (1937).

200. Moore's proposed rule merits quotation in its entirety:

> *Class Actions.*
>
> (a) *When Action May be Brought.* In the following situations, if persons are so numerous as to make it impracticable to bring them all before the court, such a number of them as will fairly insure the adequate representation of all may, on behalf of all, join as plaintiffs or be joined as defendants, when the character or rights sought to be enforced for or against the class is
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> (1) joint, or common, or derivative in the sense that the owner of a primary right neglects or refuses to enforce such right and the class thereby obtains a right to enforce the primary right;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action;
>
> (3) several, and there is a question of law or fact common to the several rights.
>
> (b) *Effect of Judgment.* The judgment rendered in the first situation is conclusive upon the class; in the second situation it is conclusive upon all parties and privies to the proceeding, and upon all claims, whether presented in the proceeding or not, insofar as they do or may affect specific property involved in the proceeding; and in the third situation it is conclusive upon only the parties and privies to the proceeding.
>
> (c) *Requisites of Jurisdiction.* Where jurisdiction is founded upon diversity of citizenship, the citizenship of only the original parties shall be looked to in the absence of collusion.
>
> Where a specified amount in controversy is a requisite of jurisdiction, the aggregate claim of or against the class in the first situation need only be equal to such specified amount; but in the second and third situations the several claim or claims of or against each member of the class made an original party shall not be aggregated, but each such claim must be equal to or in excess of the specified amount in controversy.

Id. at 571-72.

As noted in the text, the subsections on res judicata effects and jurisdictional requisites were deleted. The Advisory Committee approved the rest of rule with only two technical changes. Moore & Cohn, *supra* note 4, at 555-56.

201. Moore called the first category in the proposed rule the true class action, the second the hybrid. This classification drew on Street to the extent that it hinged on whether the multiple claims did or did not involve a specific property or fund. But it also drew on traditional concepts expounded by Joseph Story, tying the "true" class action to cases where, but for the class action device, an individual suing in equity would need to join all persons who might have a stake in the controversy in order to obtain relief on her own. *See* West v. Randall, 29 F. Cas. 718, 722 (C.C.D.R.I. 1820) (No. 17,424) (Story, Circuit Justice). These concepts looked to the relations among the members of the class bringing or defending the action, specifically, how they would be treated under conventional equity practice, which called for bringing into the action all persons whose legal

volve any common property or fund; it did not carry any res judicata effect on absent class members.[202]

Moore proposed to codify this res judicata effect, but the Advisory Committee, while adopting the rest of his proposal, deleted both the subsection on res judicata effect and the one on jurisdictional prerequisites.[203] Nevertheless, both Moore's proposed classification of res judicata effects according to the subdi-

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interests would be affected. If an individual in a traditional bill in equity would have been permitted to act alone to obtain individual relief, and others could do the same thing (or refrain from doing so), then that person's right was several. If not, it was either (1) joint, as with an unincorporated association, (2) common, as in a creditor's bill, where an equity court would award relief to all creditors from a limited fund to avoid unfair advantage to the few who filed the bill, or (3) derivative, as in a shareholder's derivative suit, where it was not the shareholders' right to assert at all, but a right that the shareholders as a group could assert on behalf of the corporation. Moore, *supra* note 199, at 572-74. Moore blended the jurisdictional ideas of Street with the "jural relations" ideas of Story and others. Moore & Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 314 (1937).

One scholar researching the early history of class actions has suggested that Story and Moore paid excessive attention to the nature of the individuals approaching the court and insufficient attention to the type of multi-party controversy that a court of equity might undertake to adjudicate. Yeazell, *supra* note 98, at 1088-91, 1100-02. Others have criticized Moore for failing to adopt a more contemporary, functional approach, saying that the emphasis on jural relations was outdated even in 1937 and failed to bear a sufficient relation to contemporary res judicata concepts. Z. CHAFEE, *supra* note 112, at 246. ("This tribute to the memory of Wesley Hohfeld would be more suitable in a law review article than in an enactment which is to guide the actions of practical men day in and day out." (footnotes omitted)); Kalven & Rosenfield, *supra* note 173, at 703-08; Keefe, Levy & Donovan, *supra* note 155, at 334; Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 822 (1946). Moore nevertheless had his supporters. Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 59 (1937); Pepper, *Letter to Arthur J. Keefe*, 33 CORNELL L.Q. 349, 350 (1948) (arguing that jural relations affect the fairness of asserting jurisdiction and so are tied to due process); Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 16 (1938) ("Rule 23 as to class actions is simple and intelligible, which is more than can be said of any rule that I know of heretofore promulgated either by statute or court rule."); VanDercreek, *The "Is" and "Ought" of Class Actions Under Federal Rule 23*, 48 IOWA L. REV. 273, 282 (1963).

202.

> *Spurious Class Action.* [Subdivision (a) (3)]
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> Assume that a railroad negligently sets fire to property, and widespread damage to many property owners ensues. Here there is a question of law or fact common to many persons. *A, B,* and *C* bring an action on behalf of themselves, and all others similarly situated, against the railroad. *A, B,* and *C* each must have a claim in excess of $3,000 and there must be diversity between them as plaintiffs on the one hand and the railroad on the other. Other persons who had been injured could intervene regardless of the amount of their claim, or their citizenship. The judgment would bind *A, B, C,* and privies, the railroad, all who had intervened, but would not bind others beyond the principle of *stare decisis,* which operates as to all judgments.

Moore, *supra* note 199, at 574-75.

203. Moore & Cohn, *supra* note 4, at 555-56. The Committee deleted these paragraphs because they considered res judicata and jurisdiction to be substantive issues, outside the rulemaking authority of the Supreme Court. *Id.* at 556.

visions of the Rule and his labels for the three types of class action stuck.[204]

Moore saw a limited role for the spurious class action,[205] but others saw it as an important vehicle for the enforcement of securities, consumer protection, and civil rights law.[206] At least one commentator noted a great increase in the filing of class actions in the decade following the enactment of Rule 23. He attributed the increase to the new prominence of the Rule and the fact that Moore had provided a full commentary on it in his treatise.[207] Others observed an increase in the use of class actions in specific contexts and linked this increase to the wide applicability of the spurious class action in dealing with current social ills.[208] In any event, courts widely approved of the spurious class action, declared that the decree in such cases did not bind absentees to their detriment,[209] and held that absentees could intervene after

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204. His prompt publication of an article and a highly influential treatise, both of which argued for the proposed res judicata effects and repeated the labels, probably caused this event. *See id.* at 561-63; 2 J. MOORE, FEDERAL PRACTICE ¶¶ 23.01-23.09 (1938).

205. Moore saw the spurious class action as a "permissive joinder device," useful primarily as a means to get around the federal jurisdiction requirements of complete diversity of citizenship and individual satisfaction of jurisdictional amount by each plaintiff's claim. Moore & Cohn, *supra* note 201, at 318-21. For him, the spurious class action grew out of existing trends towards more liberal joinder embodied elsewhere in the Federal Rules. *E.g.*, FED. R. CIV. P. 18-22.

Moore also conceived of a somewhat limited role for the other types of class actions. The frequency of true class actions apparently declined because states had enacted laws permitting unincorporated associations to sue and be sued in their own name. (Rule 17 applied these statutes to federal cases.) The hybrid class action, which covered creditors' bills, declined because of modern bankruptcy procedures. Moore & Cohn, *supra* note 201, at 314-17; *see supra* notes 200-01 (describing hybrid class actions).

206. Kalven & Rosenfield, *supra* note 173, at 684-86, 720-21; *see* Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577, 578-83, 592 (1953).

207. Z. CHAFEE, *supra* note 112, at 199. The increase may also have resulted from the enactment of New Deal legislation, which provided substantive bases for class action plaintiffs to sue. *See* Moore & Cohn, *supra* note 201, at 307-08 (noting increase in class action litigation in decade before 1938 and attributing it to recent federal legislation).

208. Kalven & Rosenfield, *supra* note 173, at 692; Comment, *supra* note 206, at 577 (linking increase to applicability of Rule 23 class actions in general); Note, *Class Actions: A Study of Group Interest Litigation*, 1 RACE REL. L. REP. 991 (1956) (same).

209. *E.g.*, Fox v. Glickman Corp., 355 F.2d 161, 163 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966); Schutte v. International Alliance of Theatrical Stage Employees, 183 F.2d 685, 687 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950).

a finding of liability,[210] even months or years after the liability proceedings,[211] to take advantage of relief.

The 1966 revision of the class action rules nevertheless abolished the spurious class action and its nonbinding feature. The framers of the revision believed that the 1938 Rule violated the fairness concerns embodied in the rule of mutuality of estoppel.[212] They objected to the one-way binding effect of the spurious class action, which bound the defendant to the judgment by res judicata without binding the plaintiff class.[213]

B. A Proposal

The proposal advanced here is the elimination of the binding effect of the Rule 23(b)(2) class action. In essence, this proposal would return the situation to that which existed before 1966, when the spurious class action was an available device for group litigation. This proposal removes the due process objection to the Rule 23(b)(2) class action. At the same time, it preserves the benefits of Rule 23(b)(2): the ability of a person suing on behalf of a class of unnamed persons to get an injunction against a public policy and obtain associated financial or other additional relief for all; to have all the relief easily enforceable through contempt proceedings by anyone affected by the policy; and to take advantage, if necessary, of the special rules against dismissal for mootness in class actions.

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210. *E.g.*, Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1962), *cert. dismissed*, 371 U.S. 801 (1963); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945); State Wholesale Grocers v. Great Atl. & Pac. Tea Co. 24 F.R.D. 510, 512 (N.D. Ill. 1959).

211. Foster v. City of Detroit, 254 F. Supp. 655, 669 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); *see* System Fed'n No. 91 v. Reed, 180 F.2d 991, 998-99 (6th Cir. 1950) (case decided ostensibly under Rule 23(a)(1)).

212. *See supra* notes 1, 105 and accompanying text. An additional reason was the confusion in deciding whether a case fit within the spurious case subdivision, and so lacked preclusive effect on absentees, or whether it could be classified instead as "true" or "hybrid" having preclusive effect. Rule 23 Notes, *supra* note 1, at 98. The awkward terminology that Moore adapted from Street may also have hastened the old Rule's end. Nearly everyone made fun of the term "spurious." *E.g.*, Kalven & Rosenfield, *supra* note 173, at 707 n.73 ("[T]he plaintiff must stubbornly insist that he has a spurious suit against the equally stubborn insistence of the defendant that it is not spurious . . . . [I]t is imperative that the class suit of sub-paragraph (a)(3) be saved from the damnation of the faint, faint praise carried by the word 'spurious.' ")

213. As most commentators noted, no member of a defendant class would use post-decision joinder to share in a judgment he would have opposed. *E.g.*, Z. CHAFFEE, *supra* note 112, at 278 n.53, 284.

The exact form in which the spurious class action should be revived merits some consideration. One possibility would be to leave Rule 23(b)(2) unchanged, but have courts refuse to give Rule 23(b)(2) unwanted preclusive effects on absentees in any case in which adequate notice and the opportunity to opt out had not been given. One court allowed a subsequent suit by a member of a class in a Rule 23(b)(2) employment discrimination action involving significant monetary relief. The court reasoned that the original case resembled a Rule 23(b)(3) class action and that more adequate notice should therefore have been given.[214]

In a variety of other cases, courts have simply refused to preclude individuals on the ground that there was no notice, without considering the contrary intention of Rule 23(b)(2).[215] The Rule itself does not use the word preclude, or the words res judicata, though the Advisory Committee Note and the associated commentary do. The Rule merely says that the judgment in a class "shall include and describe those whom the court finds to be members of the class."[216] Perhaps the Advisory Committee kept clearer language out of the text of the Rule because of lingering concern that specifying res judicata effects would overstep the boundary of procedure into substantive rights; this was the reason for the Committee's rejection of a subparagraph of the 1938 Rule 23 describing the res judicata effect of each subdivision.[217] In any event, an interpretation limiting the Rule to its innocuous language, "include and describe . . . members of the class," is available to a court anxious to avoid either violating the due process rights of absentees or declaring Rule 23 unconstitutional in whole or in part. The court could state its belief that no res judicata effect can apply without notice and the right to opt out, no matter who is included or described in the final judgment.

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214. Penson v. Terminal Trans. Co., 634 F.2d 989, 994-95 (5th Cir. 1981).

215. Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982); Johnson v. General Motors Corp., 598 F.2d 432, 437 (5th Cir. 1979); Bogard v. Cook, 586 F.2d 399, 408-09 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979); Gary A. v. New Trier High School, 1983-84 Educ. Handicapped L. Rep. (CRR) 555:376 (N.D. Ill. 1984), *aff'd in part and rev'd in part on other grounds*, 796 F.2d 940 (7th Cir. 1986).

216. *Compare* FED. R. CIV. P. 23(c)(3) *with* Rule 23 Notes, *supra* note 1, at 105. *See generally* 3B J. MOORE & J. KENNEDY, *supra* note 1, at ¶ 23.02-1 (2d ed. 1987) (stating that res judicata effect was intended by subdivision (c)(3)).

217. *See supra* note 203. This objection sounds odd today. It appears that the federal rules inevitably affect the application of res judicata. *See, e.g.*, FED. R. CIV. P. 13, 41. Significant new research may shed additional light on the substance/procedure dichotomy and Congress's original intentions regarding the coverage of the Federal Rules of Civil Procedure. *See* Burbank, *The Rules Enabling Act*, 130 U. PA. L. REV. 1015 (1982).

An alternative solution would be to amend the Rule.[218] The Rule is ripe for amendment, in light of twenty-two years of varied experience under it. As an amendment, the reform proposed here builds on existing interest in revision of the Rule and has the advantage of not attempting to challenge or overrule any direct, recent Supreme Court precedent.[219] The amendment might state directly that a judgment in a subdivision (b)(2) class action where notice and the right to opt out were not given would be without prejudice to the rights of members of the class who were not class representatives.[220] Or it might simply delete the language in subdivision (c)(3) making the favorable or unfavorable

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218. What is at issue here is an action that the Supreme Court should take in its legislative capacity of promulgating rules, rather than in its capacity of deciding concrete cases. *See* 28 U.S.C. § 2072 (1982) (giving power to Supreme Court to prescribe rules for practice and procedure of, *inter alia*, district courts, subject to reporting of rules to Congress 90 days before they take effect). Perhaps the Rule should be changed simply to enhance the protections of litigants, even if the existing procedures meet due process requirements.

219. In 1985, the American Bar Association Litigation Section proposed a comprehensive revision of Rule 23, but the revision failed to obtain full ABA approval. It was submitted to the Advisory Committee on Civil Rules, as was an adverse report from the ABA Antitrust Section. *See* Section of Litig., American Bar Ass'n, *supra* note 190, (text of proposal and commentary). *See generally supra* note 190 (discussing flaws in the proposal). There is other movement towards revision as well. *See, e.g.*, Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987); Mullenix, *supra* note 8 (proposing revisions); *Arthur Miller Describes Federal Rules Revision Process, Changes in Law School Environment*, THIRD BRANCH, Nov. 1986, at 1, 9-10 (describing time as ripe for revision).

220. The amendment thus might be to have subdivision (c)(3) read:

> (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2) shall describe those whom the court finds to be members of the class, but in all actions maintained as a class action under subdivision (b)(1) or (b)(2), the judgment, whether or not favorable to the class, shall be without prejudice to the rights of all unnamed class members who do not receive individual notice advising them that (A) the court will exclude them from the class if they so request by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any members who do not request exclusion may, if they desire, enter an appearance through counsel.

This amendment says approximately what the 1842 Equity Rule 48 said, but the greater specification of applicability, "in all actions maintained as class actions under subdivision . . . (b)(2)," would help prevent results like Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853). *See generally supra* note 195 (describing Equity Rule 48 and *Smith*). The "without prejudice" language borrows from FED. R. CIV. P. 41 and is presumably no more vulnerable to a challenge that it oversteps the boundaries of procedure than Rule 41, or for that matter, than the present Rule 23.

The notice language comes from the present Rule 23(c)(2), pluralized to permit the use of the word "all" in the without prejudice phrase. The rule withholds res judicata effect wherever the notice has not actually been received. The requirement of actual receipt may exceed the bare due process minimum. *See supra* note 140. This requirement is still consistent with practice under Rule 23(b)(3) and enhances fairness with only minor cost in terms of finality.

judgment "include" all class members.[221] This latter possibility would count on the courts to adopt the due process reasoning set forth above and to hold, as a matter of interpretation of the Rule consistent with due process, that no class member who does not receive notice and the right to opt out will be bound by the judgment in a Rule 23(b)(2) action.[222]

The language also covers Rule 23(b)(1) class actions, which are covered under the present subdivision (c)(3). These rare actions, which are outside the main scope of this Article, share some of the characteristics of Rule 23(b)(2) institutional cases and therefore should probably be handled in the same manner. *See, e.g., In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305-06 (6th Cir. 1984) (proof of limited fund required for subdivision (b)(1) to be applicable); LaMar v. H & B Novelty & Loan Co., 489 F.2d 461, 466-67 (9th Cir. 1973) (restricting use of subdivision (b)(1) to limited fund interpleader-type cases). *See generally* Mullenix, *supra* note 8, at 1053-54 (stating that the limited fund is necessary and that judicial controversy regarding limited fund and other issues renders subdivision (b)(1) difficult to use in mass tort cases).

The language of the proposed revision also covers subdivision (b)(2) defendant classes. Although some courts have found Rule 23(b)(2) inapplicable to cases naming defendant classes, *e.g.*, Henson v. East Lincoln Township, 814 F.2d 410, 416-17 (7th Cir.), *cert. granted* 108 S. Ct. 283 (1987); Thompson v. Board of Educ., 709 F.2d 1200, 1204 (6th Cir. 1983), others have permitted application of this subdivision, *e.g.*, Doss v. Long, 93 F.R.D. 112, 118-20 (N.D. Ga. 1981). Whether defendant class actions are consistent with the subdivision or not is beyond the scope of this Article. But to the extent that due process requires notice for a binding adjudication of the claims of absent plaintiff class members, requiring the same for absent defendant class members seems sensible. They have a protected interest at stake, as do plaintiff class members. Alternative safeguards are equally unreliable for them. In fact, these safeguards may be even less reliable, because the opposing party designates the class representative. For a contrary view, see Note, *supra* note 8, at 1398-99 (arguing that homogeneity of the defendant class ensures representative adequacy and that implied consent exists for representation if the representation is adequate; but not considering due process minimum standards beyond adequacy of representation and not considering *Mathews v. Eldridge* factors).

Consider also that the social utility of defendant class actions is not nearly as well established as that of plaintiff class actions. Therefore, if heightened due process protections limit the use of the procedure, it is less clear that on balance any loss will result. The proposal in this Article permits the parties to choose either a decree that does not bind the absent class members with no prejudgment notice, or a decree that does, if notice and the right to opt out are afforded. One of the parties could choose the notice option and voluntarily pay for it. The named defendant in a defendant class action has a strong incentive to do so if it fears entry of liability for plaintiff's attorneys fees and wants contribution from the other potential defendants. Moreover, the named defendant could be ordered to pay for notice after a finding of liability against it, if under the facts of the case, notice to the defendant class constitutes relief that will eliminate the effects of illegal conduct in which the representative itself engaged. *See infra* text accompanying notes 248-56 (discussing similar procedures for plaintiff classes in institutional cases). The difficulty of such a plan in a defendant class context is that everyone who understands the notice will probably opt out.

221. Revised in this way, subdivision (c)(3) would read: "(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2) shall describe those whom the court finds to be members of the class."

222. Like the 1938 Rule, neither of these alternatives explicitly allows or disallows post-decision intervention to take advantage of the relief. A court might rely on the precedent under the 1938-66 Rule 23 to permit it. But Rule 71 provides the easier route of enforcement of judgments by unnamed class members. It allows that "[w]hen an order is

1. The mutuality objection— The most obvious objection to this proposal, in any of its various forms, is that it undoes what the 1966 Rule did. It permits one-way binding results in class actions. But whatever power this mutuality argument had twenty-two years ago, it would not seem to have any now. For years, academics have challenged the reasons behind the mutuality doctrine,[223] and for the last forty-six of those years, courts have joined in the chorus. In 1942, in *Bernhard v. Bank of America*,[224] the California Supreme Court permitted nonmutual defensive collateral estoppel over the objection that it was not fair to have one party bound when the other party had never been at risk of being bound. The United States Supreme Court adopted this position in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[225] in 1971, and then followed, eight years later, with a decision calling for nonmutual offensive collateral estoppel. *Parklane Hosiery, Inc. v. Shore*[226] appears to have disposed completely of the objection that a judgment should never bind a defendant if the plaintiff in a second suit was not at risk of being bound. Even the *Restatement of Judgments* has fallen in line.[227] Indeed, mutuality continues to reign supreme only in Rule 23, where it was enthroned before the deposals elsewhere.[228]

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made in favor of a person who is not a party to an action, he may enforce obedience to the order by the same process as if he were a party." FED R. CIV. P. 71. The court's description of the class in the judgment can specify the persons in whose favor the order was made. *See supra* notes 45-46 and accompanying text; *infra* note 228. The proposed rule avoids the use of the "accursed label[]" spurious. Kalven & Rosenfield, *supra* note 173, at 707 n.73 (1941); *see supra* note 212.

223. *E.g.*, Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607, 611 (1926). Such challenges probably originated with Jeremy Bentham. *Id.* at 609 n.11; *see* J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, 7 THE WORKS OF JEREMY BENTHAM 171 (J. Bowring ed. 1843 & reprint 1962). This criticism extends to the class action context. *E.g.*, Kalven & Rosenfield, *supra* note 173, at 713; *Developments in the Law—Class Actions, supra* note 120, at 1395-96.

224. 19 Cal. 2d 807, 122 P.2d 892 (1942).

225. 402 U.S. 313 (1971) (approving the use of nonmutual defensive collateral estoppel in patent litigation where prior judgment existed adverse to patentee and patentee now sued another, unrelated defendant with identical allegations of infringement).

226. 439 U.S. 322 (1979) (applying offensive collateral estoppel in stockholders' class action over securities fraud where prior adjudication against defendants had been made in government's suit). *Parklane* did hold, however, that a district court retains some limited discretion to refuse to apply offensive collateral estoppel. *Id.* at 331.

227. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). Nevertheless, some state courts have rejected the application of nonmutual offensive collateral estoppel. *E.g.*, Standage Ventures, Inc. v. State, 114 Ariz. 480, 484, 562 P.2d 360, 364 (1977); Howell v. Vito's Trucking & Excavating Co. 386 Mich. 37, 52, 191 N.W.2d 313, 320 (1971).

228. Already, something of a guerilla movement exists to subvert the binding effect of Rule 23(b)(2) on class actions. There are two fronts to this assault.

Even characterizing this objection as one of "mutuality" gives away too much to the objector. The situation of the absent Rule 23(b)(2) class member and that of the adverse party are hardly "mutual." A fundamental difference exists between a litigant who knows about a case and participates in it and a "litigant" who has never even heard of the proceeding. The only thing mutual to the two parties is the binding effect of the current rule. The real unfairness is binding the person who has no knowledge of the case.[229]

A somewhat more specific mutuality objection may be made with respect to Rule 23(b)(2) class actions against the federal government. In *United States v. Mendoza*,[230] a 1984 decision,

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First, class representatives are waiting later and later in their cases to obtain certification. *See, e.g.*, Bieneman v. City of Chicago, 838 F.2d 962 (7th Cir 1988) (delaying certification more than three years); Gurule v. Wilson, 635 F.2d 782, 789 (10th Cir. 1980) (delaying certification until after judgment). In cases with no significant disputed issues of fact, the plaintiffs often submit to the court one combined motion for class certification and summary judgment in favor of plaintiff. Defendants, of course, oppose both. The class representative thus has a fair prospect that if the court finds for the defendant on liability, it will also find for the defendant on the class certification. The judgment then binds the class representative alone.

Second, many litigants settle cases at the precertification stage, even when the settlement runs in favor of the class as a whole. The named plaintiffs in such actions have standing on their own to obtain broad injunctive relief, the decrees obtained being enforceable by all those in whose favor the consent decree was made, namely, the uncertified class's members, under FED. R. CIV. P. 71, *see supra* notes 45, 222 and accompanying text. In these Rule 71 settlements, the consent decrees may contain elaborate provisions for the benefit of the persons who would have been class members. *E.g.*, John A. v. Gill, No. 81-C-2456 (N.D. Ill. Dec. 23, 1983) (consent decree); Alford v. Illinois Dep't of Rehabilitation Servs., No. 83-C-9301 (N.D. Ill. June 29, 1984) (consent decree). Under Rule 23(c)(3), a class action precludes the class members where the judgment defines and includes the class. When the final judgment involves no certification, it has no binding effect on any class. *See* Almond, *Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?*, 56 N.C.L. REV. 303, 303-05 (1978) (asserting that class representatives exploit absence of classwide effect to extort personal settlements before certification). The fact that defendants often agree to settlements of this type, which do not bind the class, suggests that the value of preclusion to defendants is overstated. Defendants realize that considerations of practical advantage induce potential class members to opt into already secured relief, even when they might prefer something more. Similar prudential concerns often apply in unsuccessful class actions, even without binding effect. Relatively few plaintiffs will have the temerity to sue when someone else has lost. *See generally* Dam, *supra* note 8, at 125 (arguing from this premise and that of the decline of the importance of mutuality that "it is therefore worth considering scrapping the 1966 amendment," at least regarding subdivision (b)(3)); Wilton, *supra* note 31, at 599-600. The current proposal, of course, protects the temerarious.

229. *See* Kalven & Rosenfield, *supra* note 173, at 713 ("[T]here is by no means complete symmetry between binding the defendant to a favorable decree and binding the absentee to an unfavorable decree. Clearly, the defendant has been afforded his day in court . . . . But it cannot be said that the absentee has had his day in court . . . .").

230. 464 U.S. 154 (1984). As noted above, some aspects of the *Mendoza* reasoning argue against offensive collateral estoppel of state and local governments. *See supra* text accompanying note 44. To the extent that these arguments carry, the objection to the

the Supreme Court created an exception to the *Parklane* rule for cases involving offensive assertion of nonmutual collateral estoppel against the federal government. The Court reasoned that nonmutual collateral estoppel was unwise given the geographic breadth of government litigation, the unique nature of some of the issues the government litigates, and the political aspect of decisions not to file appeals.[231] The Court thought that applying offensive nonmutual collateral estoppel might prevent the government from creating a conflict among circuits in order to obtain Supreme Court review of important legal questions, particularly those unique to the government, all perhaps because of a soon-disavowed political decision not to appeal.[232] Arguing from *Mendoza*, the government might contend that, just as it should retain the protection of mutuality of estoppel in general, it should retain it in the context of Rule 23.

It is doubtful that the absence of mutuality under the proposal advanced here would have any effect on the government's ability to develop the law in areas of special governmental concern. The Supreme Court has already approved the practice of certifying national classes in cases against the federal government.[233] Such a class would ordinarily include all individuals with an interest in litigating a particular issue. Accordingly, certification of a national class and entry of a binding final judgment that encompasses the government and all individuals stops the development of case law on the issue.[234] To the extent that any persons exist outside the class and in a different judicial circuit who still might litigate an issue, development of the law is possible under the current law as well as under the proposal advanced here.[235] In fact, the proposed amendment offers greater opportunities for development of the law, though in a manner

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reform proposal includes both state and federal governments. Nevertheless, the same responses to the objections apply whether or not the issue is exclusively one for the federal government.

231. 464 U.S. at 159-61.

232. *Mendoza* involved immigration, a topic in which the federal government has a unique interest. The government disavowed the political decision not to appeal. *Id.* at 157 n.2.

233. Califano v. Yamasaki, 442 U.S. 682, 703 (1979) (finding no abuse of discretion in certification of national class attacking procedures for recoupment of social security overpayments).

234. This issue constituted the thrust of the government's argument in *Yamasaki*. *Id.* at 701-02.

235. Nothing proposed here would permit persons outside the class to take advantage of class relief to any greater extent than they can today. The proposal merely eliminates the binding effect on class members who do not want to be bound. It retains the requirements for definition of the class currently in Rule 23.

that the government might not welcome. Under the current rule, if the class loses, no one in the class can develop the law by filing a separate action and taking appeals that the class representative did not take in the original case. Under the reform proposal, disgruntled class members may relitigate, just as the government wanted to do in *Mendoza,* with the same positive effect on legal development.[236] The only question, then, is whether the negative effect that class actions have on the development of the law is justified under the current rule of determinations binding the class and not justified under the proposed rule of determinations not binding the class.

In some contexts, mutuality raises an important fairness concern. In *United States v. Stauffer Chemical Co.,*[237] a case decided the same day as *Mendoza,* the Court ruled that the presence of mutuality justifies the application of defensive collateral estoppel against the federal government. It would have been unfair to drag the same litigant through a court case to establish something that that particular litigant has already gone through the process to establish. This fairness consideration thus imposes a limit on the reach of the government's protection from collateral estoppel. Fairness is a competing policy concern and prevails over the policies of freedom for political decision-making in litigation and of development of the law on unique governmental issues.

In the present inquiry, however, the only fairness consideration weighing in favor of mutuality is one that applies to the federal government. Given an inevitable hindrance to the development of the law, the enhanced fairness to the government of having the class take the gamble of being bound in one litigation does not justify the diminished fairness to absent class members of having their causes of action decided without notice and the

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236. This procedure entails a negative effect on judicial economy, but not one unique to the operation of the proposal in federal government cases. Moreover, the *Mendoza* rule, by permitting the government to relitigate issues, entails costs in judicial resources. The costs would grow even larger if the *Mendoza* holding were extended to assertions of defensive collateral estoppel against the government. *See infra* note 237.

237. 464 U.S. 165, 174 (1984). In *Stauffer,* the defendant challenged the Environmental Protection Agency's use of private inspectors who had not agreed to hold trade secrets confidential. After the company won that case, the Agency tried the same practice at a different factory of Stauffer's. The Court applied defensive collateral estoppel against the Agency. *Mendoza* was a case of offensive collateral estoppel. The holding appears limited to offensive collateral estoppel, though some language suggests application to nonmutual defensive collateral estoppel as well. United States v, Mendoza, 464 U.S. 154, 160, 163 (1984).

right to be heard.[238] In the first place, the government is at least aware of the situation from the outset. In any class action, it knows from receipt of the complaint that the result will have greater significance than that of an individual case.[239] It also knows that if the class is national or otherwise defined to encompass all potential litigants on one or more issues, there will be no second chance to win. Accordingly, it should allocate greater resources to the case. But the absent class member has no way of even knowing about the case, much less treating it as a chance that will never come again to assert a valuable legal right. Some tradeoff is inevitable. This one should be made to the individual's benefit.

It must also be remembered that the government can purchase additional fairness for itself by paying for prejudgment notice to the members of the class. Where the court provides notice and the right to opt out, the reform proposal would permit all class members so notified who do not opt out to be precluded by the result of the litigation.[240] The class members, ignorant of what is going on, are in no position to make such a purchase, even if they could afford it. If the representative were forced to make the purchase for them, absence of funds would defeat class actions in the very instances in which they are most valuable.[241]

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238. In this context, the term is actually misleading. It makes the absent class member and the defendant seem similarly situated when the defendant can in fact protect itself. *See supra* text accompanying note 229.

239. Indeed, the government's disregard of individual case precedent, due in part to the *Mendoza* restriction on application of offensive nonmutual collateral estoppel, is a major reason for use of Rule 23(b)(2) right now. *See supra* notes 41-44 and accompanying text.

240. The pre-1966 spurious class action made the same procedure available. *See* Kalven & Rosenfield, *supra* note 173, at 714 n.91 ("A possible solution, if the defendant wants to quiet claims by making the suit res judicata, would be to place on him the burden of notifying all absentees and thus affording them an opportunity to intervene . . . ."). Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), only presents an obstacle to placing the cost of notice on defendant involuntarily. The defendant can always agree to pay the cost of notice given under subdivision (d)(2) of Rule 23, which provides generally that the court may order that notice be given to class members whenever appropriate. FED. R. CIV. P. 23(d)(2). A difficulty arises if any of those receiving notice opt out. They would thus retain their ability to file subsequent actions. The defendants then have the options to sue those opting out for declaratory relief or to add them as parties needed for a just adjudication under FED. R. CIV. P. 19. *See infra* text accompanying notes 250-51.

For the view that the right to participate, not to opt out, is the due process minimum in class actions, see Keefe, Levy & Donovan, *supra* note 155, at 345-48 (asserting that this minimum applies where territorial jurisdiction is not otherwise established); Miller & Crump, *supra* note 134, at 31 (asserting that the minimum applies generally).

241. An additional reason for eliminating the preclusive effect on class members who do not receive notice lies in the possibility that misguided courts may bar claims for monetary relief by the result in the class action. The leading example of this is Interna-

2. *A specialized application: institutional cases*— In institutional actions brought under Rule 23(b)(2), preclusion of the class has a valuable function. In institutional cases, the plaintiffs seek to change a wide range of conditions that affect all persons caught up in a particular social setting, such as a school system, prison, mental hospital, or, in some instances, a place of employment.[242] In these cases, there are divergent interests among the many groups affected by the litigation; no single solution is likely to fulfill all the entitlements, much less all the desires, of every group. Compromise is thus necessary, and it is desirable to have a binding compromise that will not be attacked after significant costs are incurred to achieve and implement it.[243]

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tional Prisoners Union v. Rizzo, 356 F. Supp. 806 (E.D. Pa. 1973), where the court held that a class action filed by prisoners in state court to correct unconstitutional conditions of confinement operated by its final decree to foreclose individual prisoners' claims for monetary relief for mistreatment. The risk is that a court in a damages case subsequent to a subdivision (b)(2) action for policy changes or institutional reform may act in a similar manner and apply the class decree to bar the suit. On the face of the 1966 Rule, such a result is unwarranted. Subdivision (b)(2) is only meant for "injunctive relief or corresponding declaratory relief with respect to the class as a whole." Moreover, to the extent that the cause of action in the class case may include issues relating to damages claims among the issues that can be raised (and so may be barred), class certification would not be appropriate under subdivision (b)(2) for those issues. Under subdivision (c)(4) of the Rule, "[w]hen appropriate, . . . an action may be brought or maintained as a class action with respect to particular issues." Thus in any subdivision (b)(2) case, it seems sensible to interpret the scope of the certification to be restricted to the claims for monetary relief. *See* Bodensteiner, *Application of Preclusion Principles to § 1983 Damage Actions After a Successful Class Action for Equitable Relief*, 17 VAL. U.L. REV. 347 (1983).

Courts confronting cases of this type nonetheless have had a surprisingly difficult time finding a rationale for avoiding preclusion. Both the Fifth Circuit in Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), and the Seventh Circuit in Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982), have held that previous class actions for prospective relief do not bar prisoners' damages actions. Each court first reasoned that the prisoners had not been given adequate notice of any right either to adjudicate their damages claims in the class action or to request to be excluded from the class. This rationale forms an odd basis for the result, because under Rule 23(b)(2) the prisoners could not have been excluded from the class upon demand and had no right to notice except of settlement. The error in this reasoning permits future courts to reject the Fifth and Seventh Circuit cases as wrongly decided on the notice afforded by subdivision (b)(2) and then themselves make wrong applications of preclusion principles to bar class members' subsequent damages actions. The courts in *Bogard* and *Crowder* advanced far more persuasive alternative reasoning. The Fifth Circuit supplemented its discussion of notice by stating that the injection of monetary claims into the class action would have rendered it so complex as to have destroyed it. *Bogard*, 586 F.2d at 408-09. The Seventh Circuit stated that it would have been unfair to have required a prisoner to opt out of the classwide relief for the sake of a future damages action. *Crowder*, 687 F.2d at 1009. Unfortunately, a cursory reading of the opinions might miss these arguments altogether. The mere fact that the present rule can be misinterpreted may not itself justify the amendment of Rule 23. But ending erroneous preclusion of monetary claims is a significant side benefit of the proposed reform.

242. *See supra* notes 57-59 and accompanying text.

243. *See supra* text accompanying notes 68-79.

These factors make a binding determination imperative; additional factors make participation of the groups affected by the order an affirmative value in itself. Participation is especially important in the formulation of relief. Not only is relief the focus of the most divergent and strongly felt of interests, but it is the aspect of the case in which the court's activities are the most difficult. In order to formulate relief that will impose significant changes in an ongoing social institution without causing unnecessary disruption, the court may need to draw on the expertise of persons involved in the institution who have not previously been parties to the lawsuit.[244] These persons are likely to have their own concerns, and may not be as cooperative as they might be if they know that the proceeding in which they are participating will preclusively affect their own interests.[245] Moreover, both those people with essential information and many of those without it may be in a position to subvert whatever decree resolves the case. Unless they are made parties or otherwise subjected to injunctive relief under Federal Rule of Civil Procedure 65(d), they will be difficult to stop.[246] It is also possible that when their comments have been solicited, and interests at least partially accommodated, they may be less inclined to attempt to undermine the decree.[247]

All this does not mean that the entire list of affected groups has to participate actively in the proceeding from the very start. It is characteristic of institutional cases to have distinct liability and relief phases.[248] The liability phase is frequently uncontested.[249] Even where it is contested, liability can often be estab-

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244. Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 909 (1978) (collecting cases); *see* Rhode, *supra* note 45, at 1226; *Developments in the Law—Class Actions, supra* note 120, at 1308.

245. *See* Note, *supra* note 68, at 439.

246. Yeazell, *supra* note 69, at 257-59; Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474, 1478 (1982).

247. Special Project, *supra* note 244, at 910; Note, *supra* note 68, at 440.

248. Chayes, *supra* note 26, at 1282-83; Note, *supra* note 68, at 437-38.

249.

> [T]he finding of a constitutional violation is in a practical sense only the preliminary hurdle. The heart of the lawsuit is the remedial stage, where the parties struggle, often for years, over the scope and details of injunctive relief. Under such circumstances it is not uncommon for the parties to take no appeal from the initial liability determination . . . because they recognize the wisdom of husbanding their energy and resources for the true battleground.

Gautreaux v. Chicago Hous. Auth., 690 F.2d 601, 610 (7th Cir. 1982); *see also* Yeazell, *supra* note 69, at 257 (In institutional cases of some types, "the focus of litigation tends to shift: The question is less whether events have occurred which give rise to liability under the substantive rules of law than how a remedy is to be framed."); Rhode, *supra* note 45, at 1217 (addressing defendants' failure to raise adequacy of representation of

lished without the participation of the full range of persons affected by possible remedial options. In the relief phase, the need for participation becomes pressing.

Under the reform proposal, a court might handle institutional cases somewhat differently from policy cases. In the policy cases, the court would define the class before a finding of liability, and dissatisfied class members would retain the right to file a separate lawsuit after relief has been entered. Notice might be needed for the implementation of relief, particularly in cases where benefits are claimed by mailing in a claims form accompanying a notice. But the notice would be sent after completion of the remedial proceedings, as part of the implementation of the final judgment. Those who do not take advantage of the relief would not be bound.

In an institutional case, the court might provide notice as partial relief after an adjudication of liability but before a decision on the comprehensive, ultimate remedy. The class would be defined early in the case, but the definition itself would not have a binding effect. Instead, the notice would permit the class members to be bound by the end result. Where class members opt out upon receiving notice and there is realistic fear that these persons will file subsequent litigation that will disrupt the results of the current case, the class representatives or the defendant could use Rule 19 of the Federal Rules of Civil Procedure to join them as parties needed for a just adjudication.[250] Obviously, this strategy would work only if relatively few persons opt out. In instances where large numbers opt out, it might be necessary to define distinct subclasses and renotify those opting out, telling them of the formation of a new class to represent their interests and asking whether they still wish to be excluded. This refinement should reduce the number of objectors to a level where

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the plaintiff class: "In some desegregation and deinstitutionalization cases, defendants have depended on lawsuits to compel what they 'would *like* to do but lack the political courage to accomplish on their own'" (*quoting* Kirp, *The Bounded Politics of School Desegregation Litigation*, 51 HARV. EDUC. REV. 395, 402 (1981))).

250. FED. R. CIV. P. 19 (Joinder of Persons Needed for a Just Adjudication). This rule is based on the traditional equity principle that all parties to a controversy must be before the court before the case will proceed. The rule has been updated to permit a more practical approach than the old equity principle. C. WRIGHT, THE LAW OF FEDERAL COURTS 461-62 (4th ed. 1983).

The fact that Rule 19 provides the ultimate resolution when persons opt out of institutional class actions is somewhat ironic. Some commentators have traced the development of the class action as a circumvention of the traditional equity rule requiring joinder of all concerned in a case. *E.g.*, Z. CHAFEE, *supra* note 112, at 200-01. *But see* Yeazell, *supra* note 120, at 868-71 (disputing Chafee theory in general).

they can be individually joined or, perhaps, ignored as an insignificant threat to the finality of the proceedings.[251]

The fact that notice is ordered after a finding of liability distinguishes this procedure from the one disapproved in *Eisen v. Carlisle & Jacquelin.*[252] Because the defendant has been found to be liable after full hearing, there can be no objection to imposing on the defendant the cost of notice required to implement full relief. *Eisen* involved a preliminary and unauthorized finding of likelihood of liability.[253] The finding in *Eisen,* however, was not made after a complete hearing on liability, with plenary procedural rights for the defendant.[254]

Notifying all class members may induce some of them, particularly those whose interests are not aligned with the class representatives, to petition for intervention, and to threaten to opt out unless intervention is permitted. This may cause the court to certify subclasses of these intervenors. In this situation, and in situations where subclasses of previous opters-out are formed, the case will take on the polygonal aspect common to institutional litigation, if it has not done so already. Under these circumstances, the court may order notice to persons beyond those in the originally-defined class, soliciting intervention petitions or other requests for participation from all those in a position to facilitate or to obstruct final relief.[255] This entails the introduction of yet more testimony and otherwise drags out proceedings, but the dilatory effect will be less than that which might occur because of obstruction of the decree by nonparticipants affected by it.[256] Similarly, the effect will be less disruptive than what would happen if a class member not bound by the decree filed a separate suit for contrary relief after the original relief had been implemented. If the defendant fears a finding of liability and

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251. Because it only takes one objector to file a subsequent action, the parties might need to pay special attention to who the objectors are and why they may have chosen to opt out.

252. 417 U.S. 156 (1974).

253. *Id.* at 177.

254. *See* Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984) (approving shift of cost to defendant for discovery consisting of diagnostic examinations of victims of airplane disaster after entry of liability on summary judgment).

255. Allowing this kind of intervention may stretch traditional concepts of intervention by permitting the participation of those without traditional legal interests or those whose interests might seem to be represented by others. *See* Yeazell, *supra* note 69, at 255-60; Note, *supra* note 246, at 1484-88. A judge may also explore less formal participatory options, such as "litigating amici" who lack full intervenor status. *See* Yeazell, *supra* note 69, at 260 n.69.

256. *See* Yeazell, *supra* note 69, at 258.

wants to minimize protracted remedial proceedings, it might voluntarily pay for notice to the class and other affected parties before the trial of the liability phase of the case. The court might then entertain requests for intervention and the formation of subclasses and conduct a single trial on both liability and relief. If the parties wish to create a binding pretrial settlement of the case, the defendant might agree to pay for notice to all class members affording each the right to opt out. Where opting out occurs, the parties might add the dissidents under Rule 19. They could still object to settlement at that point, but only if they assumed responsibility for actively litigating.

CONCLUSION

A revision of either the language or judicial interpretation of Rule 23(b)(2) to eliminate its binding effect on class members preserves the due process interests of absent class members without imposing costly and self-defeating notice requirements. This reform permits subdivision (b)(2) to continue its important role in the world of public law litigation. A reform imposing mandatory notice would not. The mutuality objection to the reform proposed here is one whose time has passed. Mutuality of estoppel is no longer a hallmark of procedural fairness. It is instead an unnecessary encumbrance imposed by past doctrine. The only objection to the proposal based on modern concepts of fairness to the defendant relates to its weakening of the federal government's rights to preclusion. But mutuality here simply confers an unjustified litigative advantage on a defendant who can protect itself against unnamed plaintiff class members who cannot protect themselves in the same way.

In institutional cases, where there is some general benefit from preclusion of class members, the proposal permits preclusion, but only after class members' rights are protected by notice and the right to opt out. By delaying notice until after a finding of liability, the court in an institutional case can preserve the protected interests of the class members and still impose the costs of notice on the defendant without any unfair damage to its interests.

The proposal advanced here is not the only reform of Rule 23 vying for adoption. One committee has proposed elimination of

the classification of the three (b) subdivisions altogether.[257] Another commentator recently proposed significant revisions in subdivision (b)(3).[258] However, this reform proposal has the unique advantage of focusing attention on the problem of preclusion and its relevance to the class action practice of today under subdivision (b)(2). Without better justifications for the preclusive effects of class actions than those advanced by the Advisory Committee in 1966 or mentioned here as potential objections to this proposal, the preclusive effects of Rule 23(b)(2) class actions ought to be abolished under any new scheme. There is no reason to retain preclusion except in institutional cases, and the reasons to retain it there apply only to the relief phase of proceedings, where it is fair to place notice costs on the class's adversary.

257. Section of Litig., American Bar Ass'n, *supra* note 190. *See generally supra* notes 190, 219 (discussing ABA proposal).

258. Mullenix, *supra* note 8.