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Are Mandatory Class Actions Unconstitutional

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NOTES

ARE MANDATORY CLASS ACTIONS UNCONSTITUTIONAL?

I. INTRODUCTION

In 1985 in *Phillips Petroleum Co. v. Shutts*,[1] the Supreme Court considered the due process rights of plaintiffs seeking money damages in a class action. The majority of the plaintiffs in *Shutts* lacked minimum contacts with the forum, and the Supreme Court held that due process entitled these plaintiffs to a right to opt out of the class.[2] The scope of this holding was unclear. In a footnote, the Supreme Court expressly limited the holding of *Shutts* to claims for monetary relief, leaving open the issue of due process rights in equitable class actions. Furthermore, the Court did not clarify whether due process guaranteed opt-out rights only to absent plaintiffs or to all class action plaintiffs seeking monetary relief.

In 1993 and again in 1996, the Supreme Court granted writs of certiorari to cases confronting the questions left open by *Shutts*.[3] Un-

1 472 U.S. 797 (1985).

2 To "opt out" is to withdraw voluntarily from the class in order to bring claims independently.

3 The Supreme Court granted writs of certiorari in *Ticor Title Insurance Co. v. Brown*, 510 U.S. 810 (1993), and in *Adams v. Robertson*, 117 S. Ct. 37 (1996).

In *Ticor*, plaintiff groups brought antitrust claims against Ticor Insurance Company in federal court seeking treble damages and injunctive relief. The parties settled, but a few plaintiffs argued that they were not bound by the settlement since the court had not provided them a right to opt out. The Ninth Circuit read *Shutts* as requiring a due process right to opt out if monetary claims are involved. Consequently, it held that plaintiffs should be able to relitigate the monetary, though not the injunctive, claims. *See* Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992).

The Supreme Court granted a writ of certiorari to review the Ninth Circuit's decision, *Ticor*, 510 U.S. at 810, but then dismissed the writ as improvidently granted. *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994). The Court held that the certified question was of no general consequence because whether or not absent class members have a constitutional right to opt out of the action for monetary relief, they have a right to do so under the Federal Rules of Civil Procedure. Consequently, there

fortunately, the Supreme Court ultimately dismissed both writs as improvidently granted due to procedural and prudential concerns.[4] When dismissing the second writ, however, the Court made clear that it has a "continuing interest" in resolving the *Shutts* issue.[5] It will likely not be long before the Court is presented with another opportunity to decide whether mandatory class actions, regardless of whether they bind resident or non-resident plaintiffs, violate the Due Process Clause and are therefore unconstitutional, or whether there are some instances in which fairness to the class as a whole and to the public authorizes unitary disposition.[6]

This Note examines the three approaches the Supreme Court may employ to decide the constitutionality of mandatory class actions: the Court may look solely to precedent; it may look to the purpose of adjudication; or it may adopt a test which balances efficiency and constitutional concerns in individual cases.

Part II discusses the role of precedent, namely the facts and applicability of *Shutts* to the mandatory class issue. The Note shows that in the future, the Court may interpret its opinion in *Shutts* to guarantee a due process right to control one's own litigation or, alternatively, only to protect absent plaintiffs from the dangers of distant forum abuse. *Shutts* does not clearly resolve whether mandatory class actions by defi-

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was no need to reach the constitutional question, and the question presented was hypothetical to everyone but the actual litigants. *See id.*

In *Adams*, a nationwide class sued Liberty National Life Insurance Company for fraudulently inducing policyholders to exchange old cancer insurance policies for new ones. The parties reached a settlement which precluded class members from suing Liberty National for fraud based on its insurance policy program. *See* Adams v. Robertson, 676 So. 2d 1265 (Ala. 1995). Some objectors to the settlement appealed. The Supreme Court granted certiorari on the question of whether the certification and settlement of claims for both monetary and equitable relief, without an opportunity to opt out of the class, violated the Due Process Clause of the Fourteenth Amendment. *Adams*, 117 S. Ct. at 37. After oral argument, the Supreme Court dismissed the writ as improvidently granted because the petitioner failed to properly present the certified question to the Alabama Supreme Court. *See* Adams v. Robertson, 117 S. Ct. 1028 (1997).

4 *See supra* note 3.

5 *Adams*, 117 S. Ct. at 1032 n.6.

6 The Supreme Court may even address this issue as early as next term. The intervenors in *Ahearn v. Flanagan*, 90 F.3d 963 (5th Cir. 1996) have petitioned the Court for a writ of certiorari to resolve the question: Is a class action properly certified as a mandatory, non opt-out proceeding when that proceeding seeks to resolve tort claims for damages? 65 U.S.L.W. 3611 (1996). In *Ahearn*, the Court of Appeals for the Fifth Circuit upheld a mandatory class settlement of asbestos claims. The trial court had certified the class as a Rule 23(b)(1)(B) class on the theory that the defendant's assets constituted a limited fund. *See infra* text accompanying note 54.

nition offend due process and are therefore unconstitutional in all cases. Part III examines the debate about the purpose of adjudication and the shift from our tradition of "individual rights" to an increased focus on "group interests." In deciding the fate of the mandatory class action, the Court will prioritize our procedural values with respect to private and public interests. Part IV introduces two balancing tests which the Supreme Court might use to determine the constitutionality of mandatory classes in individual cases. These balancing tests consider efficiency concerns in relation to the tension between individual and group interests and allow judges to determine the amount of process due to plaintiffs on a case-by-case basis. Using efficiency as a baseline provides an alternative to holding mandatory class certification constitutional or unconstitutional in every instance; depending on the costs and benefits involved, denying a right to opt out may or may not deny a litigant due process. Finally, Part V concludes that the Supreme Court should hold mandatory classes unconstitutional in all cases. Ultimately, the constitutionality of mandatory class actions is a choice between group fairness and individual rights. Our constitutional guarantee of due process, which ensures individual liberty in the face of contrary collective action, compels the Supreme Court to leave control of an individual's chose in action, a cognizable property interest, with the individual.

II. *SHUTTS* AS PRECEDENT

To decide the constitutionality of mandatory class actions, the Supreme Court will likely first revisit *Phillips Petroleum Co. v. Shutts*.[7] In *Shutts*, the Court considered how much due process protection a state court must afford a member of an opt-out class before adjudicating her rights. In footnote three of this decision, however, the Court limited the holding to class actions "wholly or predominantly for money judgments";[8] it gave no guidance concerning other types of class actions, including those for equitable relief. Consequently, whether *Shutts* speaks to the constitutionality of mandatory class actions depends upon how one interprets the Supreme Court's opinion.

A. *The Facts of* Shutts

In *Shutts*, gas company investors commenced a class action in Kansas state court to recover interest due on suspended royalties. Only a small minority of the class members were Kansas residents; the

7 472 U.S. 797 (1985).

8 *Id.* at 811 n.3.

remaining plaintiffs lived throughout all fifty states and several foreign countries. Similarly, only a small fraction of the affected lands were in Kansas; the majority of the affected lands were in Oklahoma and Texas, and eleven states were represented in the lease holdings.[9]

The trial court preliminarily certified the class as an opt-out class under Rule 23 of the Kansas Rules of Civil Procedure, which is identical to the corresponding Federal Rule. After the class was certified, the class representatives provided each class member with notice through first class mail in accordance with Rule 23(c). The notice described the action and informed each class member that she could appear in person or by counsel; otherwise, she would be represented by the named plaintiffs. The notices also stated that class members would be bound by the judgment in the class action unless they opted out of the lawsuit by executing and returning a "request for exclusion" that was included with the notice.[10] After an appropriate period of time had passed, the trial court certified the final class, the case went to trial, and the trial court held Phillips Petroleum liable for prejudgment and postjudgment interest on the suspended royalties.[11]

On appeal, Phillips Petroleum argued that the Kansas trial court did not have personal jurisdiction over absent plaintiff class members as required by *International Shoe*.[12] It argued that the opt-out notice to absent class members, which forced them to return the request for exclusion in order to avoid the suit, was insufficient to bind class members who were not residents of Kansas or who did not possess "minimum contacts" with Kansas.[13]

The Kansas Supreme Court reasoned that because the absent class members were plaintiffs, not defendants, the traditional minimum contacts analysis of *International Shoe* did not apply. Instead, the court held that due process only entitled nonresident class-action

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9 *See id.* at 799–801.

10 *Id.* at 801.

11 *See id.* at 801–02.

12 International Shoe v. Washington, 326 U.S. 310 (1945). *International Shoe* held that for a court to assert personal jurisdiction over an absent defendant, due process requires only that the defendant have certain minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.* at 316.

Phillips Petroleum had standing to challenge the court's jurisdiction over the plaintiff class because it had a "direct and substantial personal interest" in ensuring that the plaintiffs would be bound by the court's decision. If Kansas did not possess jurisdiction over the plaintiffs, Phillips could be subject to numerous individual suits in addition to any judgment rendered in the class action. *Shutts*, 472 U.S. at 805.

13 Shutts v. Phillips Petroleum Co., 679 P.2d 1159, 1170 (Kan. 1984), *rev'd*, 472 U.S. 797 (1985).

plaintiffs to adequate notice, an opportunity to be heard, an opportunity to opt out of the class, and adequate representation by the named plaintiffs. Because these procedural due process minima were met, the court held that Kansas could assert jurisdiction over the plaintiff class and bind each class member with a judgment on her claim.[14] Phillips Petroleum petitioned the United States Supreme Court for a writ of certiorari, and the Court granted review.

B. Shutts *in the United States Supreme Court*

In the Supreme Court Phillips again argued that under *International Shoe*, Kansas could not adjudicate the claims of out-of-state plaintiffs unless the plaintiffs had minimum contacts with the forum or the plaintiffs consented to jurisdiction.[15] Many of the plaintiffs had no minimum contacts with the forum, and Phillips argued that a failure to execute and return the "request for exclusion" form could not constitute affirmative consent. Consequently, Phillips claimed, by adjudicating the rights of out-of-state class members, the Kansas courts had violated the plaintiffs' due process rights.[16]

The Supreme Court disagreed with Phillips and affirmed the decision of the Kansas Supreme Court on this issue. The Court contrasted the "substantial" burdens imposed upon a defendant haled into an out-of-state forum with the fact that an absent class-action plaintiff is "not required to do anything" and "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[17] The Court concluded that "the Due Process Clause need not and does not afford [absent class plaintiffs] as much protection from state court jurisdiction as it does [absent defendants]."[18] Consequently, the requisite constitutional minima are met if an absent class plaintiff receives notice; an opportunity to be heard and participate in the litigation, whether in person or through counsel; "an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court"; and adequate representation by the named plaintiff at all times.[19]

The Supreme Court limited this holding to class actions which seek to bind known plaintiffs concerning claims wholly or predomi-

14 *See id.* at 1171.
15 *See Shutts*, 472 U.S. at 806.
16 *See id.*
17 *Id.* at 810.
18 *Id.* at 811.
19 *Id.* at 812.

nantly for money judgments. In footnote three of the *Shutts* opinion, the Court stated that it "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief."[20] This footnote, and ambiguous language as to whether the *Shutts* holding applies to plaintiffs who possess minimum contacts with the forum, have given rise to varying interpretations of the holding in *Shutts*.

C. *Two Interpretations of* Shutts

1. *Shutts* Guarantees a Due Process Right to Control One's Own Litigation

One way to read *Shutts* is as a case affirming an individual's due process right to control her own litigation in cases for monetary relief.[21] Under this interpretation, it is irrelevant that most of the plaintiffs in *Shutts* were absent plaintiffs lacking minimum contacts with the forum because *Shutts* protects the individual control of all plaintiffs seeking monetary relief, regardless of whether they have minimum contacts.

Some of the language of *Shutts* supports this "individual control" reading. In *Shutts*, the Court acknowledged the due process dangers inherent in mandatory class actions by pointing out that a "chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs,"[22] and that sometimes the claim will be "sufficiently large or important that he wishes to litigate it on his own."[23]

If the Court agrees that *Shutts* was a case about individual claim autonomy, it must then decide whether to extend its holding in *Shutts* to claims for equitable relief and prohibit mandatory classes altogether. Under the individual control reading of *Shutts*, the Court would likely take this extra step and extend *Shutts* because making a plaintiff's due process right to individual control contingent upon the type of relief she seeks would be inconsistent and unfair.

Still, an originalist like Justice Scalia might find *Shutts* applicable to the problem of mandatory classes and yet decline to extend its holding to claims for equitable relief.[24] Although *Shutts* under the

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20 *Id.* at 811 n.3.

21 *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum v. Shutts, 96 YALE L.J. 1, 54–55 (1986).

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

23 *Id.* at 813.

24 The originalist position rests upon the belief that judges must glean their interpretation of the Constitution from "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989). For Justice Scalia and other

"individual control" reading may mandate opt-out rights for plaintiffs seeking monetary relief, the history of the Fourteenth Amendment does not require such a right for plaintiffs seeking equitable relief.[25] The class action developed from the English equitable bill of peace which was a means of preventing multiple suits concerning common questions. If certain prerequisites were met, all parties, named and unnamed, were bound by the action; a group member could not exclude himself or opt out.[26] Justice Scalia and other originalists would likely interpret the Fourteenth Amendment in light of this history and conclude that because mandatory classes in equity comported with due process when the Amendment was passed in 1868, they remain constitutional today. Accordingly, originalists would decline to extend the "individual control" reading of *Shutts* to claims for predominantly equitable relief.

Shutts, then, may or may not provide an answer to the problem of mandatory classes. If the Supreme Court decides that its opinion in *Shutts* gave constitutional status to the right to opt out in all cases, not just when there is a danger of distant forum abuse, then in the interest of consistency and fairness the Court will likely overcome the originalist argument and extend the holding in *Shutts* to include equitable as well as monetary claims.

2. *Shutts* Protects Absent Plaintiffs from Distant Forum Abuse

The Supreme Court, alternatively, may decide that *Shutts* merely protects absent plaintiffs from distant forum abuse.[27] In *Shutts*, the Court rejected Phillips Petroleum's claim that Kansas could not exercise jurisdiction over the plaintiffs' claims unless they had sufficient minimum contacts with the state or consented to jurisdiction by opting into the class. The minimum contacts test, the Court reasoned,

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originalists, the text of the Constitution and its overall structure, along with the original understanding of the text, are the only sources of "theoretical legitimacy." *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). The originalists believe that history is the most "specific" level of generality and therefore best preserves the meaning of the Constitution. *Id.*

25 *See* 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1751 (2d ed. 1986).

26 *See id.*

27 *See In re* Drexel Burnham Lambert Group, 960 F.2d 285, 292 (2d Cir. 1992) (stating that *Shutts* requires only "that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff"); *see also* NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 1.15, at 1-41 (1992) (stating that *Shutts* determines the level of process due "in order for a court to exercise personal jurisdiction over nonresident and absent class members").

protects a defendant from being haled into an out-of-state forum to defend herself upon pain of a default judgment; in contrast,

> an absent class action plaintiff is not required to do anything. [S]he may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection. . . . Because States place fewer burdens upon absent plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter.[28]

Yet the conclusion that absent plaintiffs are entitled to less protection than absent defendants does not mean they are left without any protection from the dangers of distant forum abuse. Justice Rehnquist pointed out that

> [t]he Fourteenth Amendment does protect "persons," not "defendants" so absent plaintiffs are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims. . . . [D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt-out" or "request for exclusion" form to the court.[29]

This specific reference to the rights of absent plaintiffs may imply that the opt-out requirement in *Shutts* merely protects absent plaintiffs from the dangers of distant forum abuse. Reading *Shutts* in this limited way, however, will prevent the Court from relying on the case as precedent regarding the constitutionality of mandatory classes in general. The Court, instead, will have to look for other sources of authority, and it will likely turn to the purpose of litigation in our country and our procedural values for guidance.

III. THE PURPOSE OF ADJUDICATION

Much has been written about the dangers of mass trials in mass tort cases. Prior to the 1950s courts uniformly refused to certify class actions, largely out of concern that the interests of the individual would be trampled in a large-scale proceeding. The advocates of aggregative techniques, however, have increasingly gained ground against the defenders of individual litigant autonomy.[30] "[A] mass of claims, attorneys with divided loyalties who are buffeted by conflicting incentives, and judges who try to administer a kind of bureaucratic

28 *Shutts*, 472 U.S. at 810–11.

29 *Id.* at 811–12.

30 *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344–45 (1995).

justice"[31] have replaced individual claims, private attorneys, and traditional judging.

Whether mandatory classes are a constitutional and appropriate procedural tool for complex civil litigation depends upon which procedural values one privileges.[32] The Supreme Court's analysis of the shift from traditional two-party disputes to "masses of claims" and "bureaucratic justice" will eventually determine the fate of the mandatory class action.

A. The Purpose of Adjudication Is to Protect the Rights of Individuals

Advocates of "individual control" derive support for a right to opt out from a number of sources. One source is our tradition of individual rights which dates back to the founding of our country and is rooted in the Declaration of Independence. A second source of support for individual claim autonomy is the ideal of participation urged by Professor Lon Fuller.

1. Liberty and Democracy

Our political tradition establishes individual claim autonomy as an important personal right and responsibility.[33] This ideal of individual control originated in the larger political and social commitment to autonomy and freedom which characterized the founding of our nation. Thomas Jefferson, the principal author of the Declaration of Independence, profoundly believed that government should be based on popular consent and that its purpose was to secure the "inalienable" rights of man.[34] Under Locke's social contract theory, to which Jefferson enthusiastically subscribed, all people have the right to resist a ruler when she manifestly abuses her power (that is, fails to adhere to the principles of the natural law).[35] Jefferson relied upon Lockean

31 Roger H. Transgrud, *Conflict of Laws and Complex Litigation Issues in Mass Tort Litigation: Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 86.

32 *See* Jerry L. 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).

33 *See* Transgrud, *supra* note 31, at 74.

34 *See* GARRETT WARD SHELDON, THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON 142 (1991).

35 *See* LORD LLOYD, LLOYD'S INTRODUCTION TO JURISPRUDENCE 103 (M.D.A. Freeman ed., 6th ed. 1994). Jefferson borrowed extensively from John Locke, a proponent of the idea of the "social contract" and "natural rights." Locke believed that men existed in an idyllic natural state of freedom governed only by a "law of nature" "writ in the hearts of all mankind." *Id.* According to Locke, men were willing to give up part of this idyllic liberty, join a civil society, and submit to a sovereign in return for

principles when he articulated in the Declaration of Independence a vision of "freedom from arbitrary, tyrannical government" and a government defined by "free, equal, and independent individuals possessed of natural rights who must legitimately submit only to limited authority to which they consent in order to protect their material self-preservation."[36]

This moral presupposition of individual dignity, and its political counterpart, self-determination, permeated all social and political institutions, including the law.[37] For example, the founders guaranteed a right to due process in the Bill of Rights to ensure individual liberty:

> To accord an individual less [than a right to a "hearing" or "to be heard"] when his property or status is at stake requires justification, not only because he might contribute to accurate determinations, but also because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.[38]

Notions of liberty and autonomy not only influenced the development of substantive law, but also served as the ideological foundation for our procedural system. Our tradition of individual autonomy is present in our most bedrock procedural decisions. One example of this commitment to individual control in our procedural system is the "master of the complaint rule" which Justice Holmes articulated in *The Fair v. Kohler Die & Specialty Co.*[39] That case states the fundamental procedural rule that "a party who brings a suit is master to decide what law he will rely upon."[40] While notions of liberty originated in political and social thought at the time of the founding, they transcended politics to influence the most basic principles of our legal system.

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rights to property, with property defined as any piece of nature with which a man mixes his labor. Because the community merely transferred the power to enforce the natural law to a sovereign, the right of the sovereign to govern was contingent upon adherence to the natural law and to consent by the governed. "The fundamental law of Nature being the preservation of mankind, no human sanction can be good or valid against it." *Id.*

36 SHELDON, *supra* note 34, at 142. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

37 Mashaw, *supra* note 32, at 49–50.

38 *Id.* at 50.

39 228 U.S. 22 (1913).

40 *Id.* at 25.

2. Participation

A second argument in favor of individual claim autonomy is the ideal of participation urged by Professor Lon Fuller. Traditionally our legal system has encouraged injured parties to participate in their lawsuits because this seemed the best way to achieve substantive justice. Two examples of procedures designed to encourage individual party participation are (1) the rule that an injured party must assert her own claim and (2) the adversarial model of adjudication.

An injured individual is, in virtually all cases, solely responsible for asserting her own claim; neither the government nor some third person may assume this responsibility. Professor Fuller in his article *The Forms and Limits of Adjudication* articulates the two important reasons for this requirement.[41] First, proceedings initiated by an arbiter are tainted with preconceptions about what happened and what the consequences should be. Justice is best served when the arguments of counsel suspend the case between two opposing interpretations of it, leaving the arbiter time to explore all the nuances of the case before reaching a decision. If the arbiter initiates the proceedings, the effectiveness of the adversary presentation, and the litigants' participation, is diminished.[42] The second reason injured parties must initiate their own claims is that legal actions often adjudicate the rights of people with respect to agreements or contracts whereby each benefits from the other. The interpersonal nature of most claims dictates that the claimant herself initiate the adjudication. Personal responsibility for one's claim, therefore, both furthers substantive justice and accommodates the inherently personal nature of most claims.[43]

A second example of our procedural system privileging individual claim autonomy is our traditional paradigm of adjudication: the two-party adversarial system. The adversarial system is the primary way we preserve an individual's right to be heard and encourage participation. Professor Fuller identifies the "distinguishing characteristic of adjudication . . . [as] the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."[44] For Fuller, optimal adjudication consists of two partisan advocates presenting arguments to a neutral arbiter and asking her to decide their dispute. The now-emerging nature of complex civil litigation, where the

41 *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

42 *See id.* at 383, 387.

43 *See id.* at 387.

44 *Id.* at 364.

party structure is amorphous and the judge plays an active role rather than being a neutral arbiter, contradicts Fuller's view of adjudication. He predicted the difficulties this new structure would present: "Failure generally attends the attempt to dispense with the distinct roles traditionally implied in adjudication."[45]

The nature of mandatory class actions would offend Professor Fuller's notion of adjudication still further. Although mandatory class plaintiffs participate in the litigation as class members, denying them a right to opt out prevents them from presenting their particular facts and reasoned arguments to the court and from choosing an advocate best able to represent them in the adversary process. Although a mandatory class plaintiff may get *a* day in court, it is not *her* day in court. As Professor Fuller points out, "[w]hatever destroys the meaning of [the affected party's] . . . participation [in the decision by proofs and reasoned arguments] destroys the integrity of adjudication itself."[46]

Advocates of individual claim autonomy use the individual rights tradition and the benefits of participation in the adversary system to argue against mandatory classes. They believe that mandatory classes violate not only basic tenets of our legal system, but also the core beliefs that form the foundation of American society—liberty and democracy.[47]

B. The Purpose of Adjudication Is Group and Public Fairness

If mandatory classes offend the foundational principles of our country and risk violating due process, why were they created and why have they survived?

As previously mentioned, until the mid-1950s the traditional adversarial model remained in force: courts, out of concern for individual interests, refused to certify mass tort class actions. However, proponents of the mandatory class action have gained ground because of the increasingly widespread belief that our traditional model fails in complex cases. Class action cases today may involve tens of thousands of plaintiffs and even more relevant issues and facts; for

45 *Id.* at 383.

46 *Id.* at 364.

47 The equitable bill of peace, which courts have used throughout history to collectively adjudicate the rights of individuals, *see supra* text accompanying notes 25–26, seems to undermine the premise that our procedural tradition privileges individual claim autonomy. Acknowledging, however, that at times judges have developed procedural shortcuts, does not discredit the argument that our political and legal tradition, on the whole, requires that the goal of adjudication be to protect individual rights.

each of these plaintiffs to bring her own claim would overwhelm our judicial system. As discovery begins, more issues yield more facts which in turn yield more issues; the result is an infinite geometric expansion. Meanwhile, as time passes, both public and private resources are lost to this abyss.

The inadequacy of the adversarial model in massive, complex cases gave rise to a new litigation model which Professor Abram Chayes termed "public law litigation."[48] A "sprawling and amorphous" party structure which negotiates and mediates at every step, and a judge who is not neutral, but rather the dominant figure in organizing and guiding the case, have replaced the traditional paradigm of two partisan advocates representing two parties before a neutral arbiter.[49]

The evolution of public law litigation has led to a new definition of fairness. Judge Newman, Circuit Judge for the United States Court of Appeals for the Second Circuit, calling for "a fundamental rethinking of what we are trying to accomplish" articulated the goal: "a broadened concept of fairness—one that includes fairness not only toward litigants in an individual case but also to all who use or wish to use the litigation system and to all who are affected by it."[50] Rather than merely serving individuals, attorneys and judges should seek substantive justice for group interests and the public good.

Mandatory class actions are essential to achieve this broader concept of fairness. Class actions in which there is a risk of inconsistent results cannot be adjudicated any other way: it is impossible to both merge and keep separate two organizations or to distribute uniform bonuses according to conflicting plans.[51] Also, as Professors Miller and Crump have noted, "[b]y definition it is impossible to resolve separately individual claims involving common rights or limited funds."[52] The distribution of a limited insurance fund illustrates the need for unitary disposition: to use the fund in one way in one state and a second way in another would destroy policyholders' mutual rights.[53]

Seeking greater fairness for classes as a whole, judges have expanded the limited fund theory into a theory of "constructive bankruptcy" so that it now applies in virtually any complex case with the

48 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

49 *See id.* at 1284.

50 Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985).

51 *See* Miller & Crump, *supra* note 21, at 41.

52 *Id.* at 40.

53 *See id.* at 40–41.

potential for large recoveries. If aggregate potential recoveries threaten to exceed a company's net worth, its assets are often considered to be a limited fund.[54] Without a mandatory class, the first few plaintiffs to reach the courthouse could collect huge damage awards and deplete the defendants' assets, leaving the majority of the plaintiffs unable to recover for their injuries. Similarly, courts have also developed a "punitive damage overkill theory."[55] Because state law or constitutional doctrines such as the Eighth Amendment and the Due Process Clause may limit the amount of punitive damages a court can levy against a defendant, the first plaintiffs to receive judgments might exhaust all available punitive damages. In constructive bankruptcy and punitive damage overkill cases, advocates of mandatory classes argue that individual fairness results in no fairness at all.

Public law litigation, then, responds to the inadequacies of the traditional adversarial model. It transforms never-ending cycles of fact-finding and issue development into cases with cognizable parameters. It strives for fairness to all parties involved and to the public and the judiciary who bear the costs of overwhelming complex litigation. The traditional adversarial model preserves autonomy and individual participation while the new public law model aims for Judge Newman's "broader conception of fairness" by protecting group and public interests.

IV. EFFICIENCY

In addition to the academic debate about the merits of individual autonomy versus group fairness, the Supreme Court must consider the practical impediments to adjudicating enormous complex cases. Efficiency issues often collapse into concerns about "group" or "system" fairness, as adjudicating the rights of one class is usually more efficient than adjudicating the rights of many individuals. In some cases, however, individual control may best promote efficiency;[56]consequently, this Note addresses efficiency concerns sepa-

54 *See In re* Drexel Burnham Lambert Group, 960 F.2d 285, 292 (2d Cir. 1992); Miller & Crump, *supra* note 21, at 41–42.

55 *In re* Diamond Shamrock Chems. Co., 725 F.2d 858, 861–62 (2d Cir. 1984); *In re* "Agent Orange", 100 F.R.D. 718, 728 (E.D.N.Y. 1983).

56 Parties who maintain control over their claims will be motivated to litigate more effectively than those who are removed from (and thus indifferent to) the transactions; ownership fosters responsibility and accountability. Leaving control of claims to injured parties prevents victims from being harassed by those seeking to buy the right to litigate the claims. Also, economic decisions are best made by the true owner of property rather than by any other person. Finally, parties often litigate or settle claims based on a variety of personal considerations; if plaintiffs retain control over

rately. This section introduces two balancing tests which weigh the strengths of competing interests such as individual autonomy, group fairness, and efficiency. These tests offer a third, more flexible way for the Court to resolve the mandatory class issue: it could adopt one of these tests and leave judges to determine, depending on the costs and benefits in particular cases, when a mandatory class does or does not offend due process.

A. The Four-Factor Test

One possible way to address the policy concerns of advocates of both individual control and group fairness is to weigh the strengths of competing interests such as (1) efficiency, (2) equity, (3) the danger of distant forum abuse, and (4) the interest in individual control of the case. This four-factor test, proposed by Professors Miller and Crump, can help determine in individual cases when a court can certify a mandatory class without offending due process.[57]

The four factors reflect policies both for and against mandatory class certification. Efficiency and equity usually argue in favor of mandatory class certification. Mandatory classes promote efficiency because courts can adjudicate class claims less expensively and more quickly than they can adjudicate multiple individual lawsuits. They also prevent opt-outs from inefficiently "free-riding" on the investment of the other plaintiffs who remain in the class.[58]

Mandatory classes may also promote equity by ensuring that similar claims are adjudicated similarly and that a defendant's assets are spread equally among all injured plaintiffs. Denying individual plaintiffs a right to opt out often yields more consistent treatment for all members of the class: no one member can race to the courthouse to seek a personal judgment and deplete funds that might have been available to the class as a whole.

In contrast to efficiency and equity concerns, a danger of distant forum abuse will always weigh heavily against the certification of a mandatory class. If, as in *Shutts*, there is a danger of plaintiffs being

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the settlement or trial of their particular claim, they can obtain the outcome which best reflects their personal views. *See* Transgrud, *supra* note 31, at 75.

57 *See* Miller & Crump, *supra* note 21, at 55–56.

58 One common example of a class action free rider problem is potential plaintiffs who excuse themselves from a class suit to wait on the sidelines for a final decision on the merits. Then, if the judgment is favorable, the self-excluded class member can assert nonmutual offensive collateral estoppel and secure a judgment against the defendant without any effort, expense, or risk. If, on the other hand, the judgment was unfavorable to the class, the individual litigant can bring her own suit as she would not be bound by the judgment.

haled into a distant forum, it is likely that an individual's due process rights will outweigh considerations of efficiency and equity. A plaintiff's interest in individual control, determined by factors such as the uniqueness of her facts or her reasons for wanting her own counsel, will also weigh against mandatory class certification.

Because a party will always have an interest in individual control and the public will always have an interest in judicial efficiency, the factors of equity and distant forum abuse are likely to be the most helpful in using the four-factor test to determine whether mandatory class certification is appropriate. If there is a limited fund or a chance that individual suits could yield inconsistent adjudication in violation of mutual rights, equity concerns are great and mandatory class certification may be appropriate. Similarly, if a state is trying to exercise jurisdiction over absent plaintiff class members who lack minimum contacts with the forum, the danger of distant forum abuse may prevent mandatory class certification.

Ultimately, if the traditional concerns of judicial efficiency and equity weigh heavily in favor of class certification, and the additional requirement of sufficient contacts with the forum is met, then under the four-factor test the court is justified in overriding a party's right to individual control of her own litigation by certifying the class.[59] If however, as in *Shutts*, there is a danger of distant forum abuse and a loss of individual control of the litigation, most courts will decline to certify a class under one of the mandatory provisions.

B. Efficiency and the Mathews v. Eldridge *Test*

A second balancing test to determine the amount of process due to a class action plaintiff is the *Mathews v. Eldridge*[60] cost comparison. *Mathews* held that in deciding how much process is due to someone complaining that the government has deprived him of his property, the courts should consider the value of the property, the probability of erroneous deprivation because the particular procedural safeguard sought was omitted, and the cost of the safeguard.[61] In a mandatory class action, the property at stake is the individual's chose in action, a constitutionally recognized property interest. To prevent a litigant from pursuing her chose in action individually is to deprive her of the difference in value between what she could have recovered as an individual minus what she will recover as a class member ("the value of the right to opt out"). The probability of erroneous deprivation is the

59 *See* Miller & Crump, *supra* note 21, at 55.

60 424 U.S. 319 (1976).

61 *See id.* at 334–35.

probability that the plaintiff will receive less as a member of the class than she would receive in individual litigation. Finally, the cost of the safeguard is the risk of loss to the other plaintiffs that results from the individual being permitted to opt out of the class (more specifically, the possibility that the first few plaintiffs may collect all the punitive damages or exhaust the defendant's funds leaving the other plaintiffs with no chance to recover) and the increased private and public costs that accompany the individual adjudication of multiple claims.

Judge Posner points out that in Hand Formula terms, due process is denied when $B < PL$[62] where B is the difference in the value of the chose in action between individual and class litigation, P is the probability that the amount the plaintiff would recover as a class member is less than what she would recover in individual litigation, and L is the risk of loss and additional costs to the other plaintiffs and the public that accompany a class member's right to opt out. As with the Hand Formula itself, it is virtually impossible to quantify the terms in Posner's efficiency formula.[63] This equation, however, provides a useful way to balance the value of an opt-out right to a class member against (1) the cost of an opt-out right to other plaintiffs and the public, and (2) the danger that mandatory class certification will deprive the plaintiff of a chance to recover as fully as possible. Posner's use of efficiency as a baseline provides an alternative to holding mandatory class certification unconstitutional or constitutional in every instance; depending on the costs and benefits involved, denying a right to opt out may or may not deny a litigant due process.

In mandatory class cases, the value of the right to opt out, or the interest in individual control, is high; in a race to judgment, individual plaintiffs who reach the courthouse first might be able to recover the lion's share of the punitive damages and are assured that there will be funds available to pay compensatory damages. As a member of a mandatory class, however, the plaintiff would have to share both punitives and compensatory damages with the other class members, resulting in a much smaller recovery. Although the value of the right to opt out may be high if the plaintiff wins the race to judgment, the cost of the procedural safeguard—the other side of the equation—probably still outweighs the plaintiff's potential increase in recovery. Every additional dollar the plaintiff recovers will be a dollar subtracted from the amount left for distribution to the class. Therefore the cost of the procedural safeguard, the right to opt out, is at least as high as the

62 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 549–50 (4th ed. 1992).

63 *Id.*

plaintiff's increased recovery. In addition, individual litigation increases both the public and private costs of adjudication.

In cases where punitive damages are not available and the potential recovery for plaintiffs is small regardless of whether they sue as individuals or as members of the class, the value of the right to opt out is significantly reduced. In these cases, Posner's other two factors, the costs of the procedural safeguard and the probability that a plaintiff will be denied the true value of his claim, almost certainly outweigh the value of the right to individual control. The costs of the right to opt out include the reduction or elimination of the ability of the rest of the class members to recover for their injuries. Also, the individual lawsuits brought by opt-outs may increase the costs of litigation for the plaintiffs and the defendants and increase the burden on the court.

Finally, the probability that a person wishing to opt out will be deprived of the full value of her claim (her property interest) by being forced to remain in the class is difficult to ascertain: whether a person will recover more fully by being permitted to opt out depends upon her place in the race to judgment. If an opt-out is first to the courthouse, she may recover more fully than she would have as a class member. On the other hand, if she is not first, she may recover less than she would have as a class member because the right to opt out has permitted fellow opt-outs to deplete available assets.

V. Conclusion: Preserving Individual Liberty in the Face of Contrary Collective Action

The constitutionality of mandatory class actions will depend upon which procedural values the Supreme Court chooses to privilege. The language of *Shutts* provides no clear answer as to whether the Due Process Clause requires that litigants be given an opportunity to opt out of a class. The Court may choose to read *Shutts* as a guarantee of the right to control one's own litigation or, alternatively, it may find the case largely inapposite.

In the absence of precedent, the Court will turn either to the purpose of adjudication in our country or to an efficiency analysis to decide the fate of mandatory class actions. Between these two options, the Supreme Court should look to the purpose of adjudication and privilege the tradition of individual autonomy. It should hold mandatory classes unconstitutional in all cases.

The efficiency approach is inadequate because it fails to properly safeguard an individual's constitutional rights. If judges properly apply either the four-factor test or the *Mathews v. Eldridge* test, they should, in every instance, find mandatory classes unconstitutional.

The cost of depriving an individual of her right to control her chose in action, that is, adjudicating her rights without allowing her to have *her* day in court, outweighs any pragmatic benefits of a mandatory class action. Efficiency, the weighing of costs and benefits, though, is often confused with expediency. The Court, to foreclose the possibility that judges will sacrifice individual rights for the sake of expediency must adopt a per se rule prohibiting mandatory class certification. As Professor Mashaw has suggested, principles of individual dignity, equality, and tradition are better value theories for due process than efficiency: "it is not clear that the utilitarian balancing analysis asks the constitutionally relevant questions."[64]

If, to avoid the dangers of judicial discretion, the Supreme Court decides to adopt a per se rule regarding mandatory classes, it must decide whether the purpose of adjudication is to protect individual rights or to further group fairness. It is ironic that the best argument in favor of mandatory class actions is "system" fairness; as John Rawls argues, through obedience to system, and the subjugation of individual interests (the pursuit of "formal" rather than "individual" justice), we hope to treat similar cases similarly and achieve more consistent, fair results overall.[65] The irony is that Professor Fuller, perhaps the strongest advocate of the traditional, adversarial two-party model, also privileges "system"; Fuller, however, argues that a lawyer owes a duty to the adversarial system, the integrity of the adjudicative process itself.[66] He characterizes lawyers as guardians of due process, one of the fundamental processes of self-government "upon which the successful functioning of our society depends."[67]

While a commitment to the protection of individual claim autonomy will increase the number of lawsuits, and in some cases lead to similar plaintiffs being treated differently, we must look for ways other than depriving litigants of their right to control their chose in action to remedy this problem. Ultimately, the constitutionality of mandatory class actions is a choice between pragmatism and individual rights. To further group or public justice at the expense of an individual's right to control her own chose of action threatens the

64 Mashaw, *supra* note 32, at 48.

65 *See* JOHN RAWLS, A THEORY OF JUSTICE 58, 235–39 (1971).

66 *See* Fuller, *supra* note 41, at 382–85.

67 *Id.* at 384.

purpose of the due process guarantee: to ensure "individual liberty in the face of contrary collective action."[68]

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68 Mashaw, *supra* note 32, at 48.

* J.D. Notre Dame Law School 1997.