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THE HYBRID CLASS ACTION AS JUDICIAL SPORK: MANAGING INDIVIDUAL RIGHTS IN A STEW OF COMMON WRONG

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INTRODUCTION

The federal courts are increasingly bedeviled by a set of cases that seem to warrant collective resolution, yet do not fit easily into any of the class action categories of Federal Rule of Civil Procedure 23(b). In these "mixed cases," a class of people challenges a defendant's ongoing practice that is alleged to cause — and to have caused — harm to the class. The suit thus seeks both class-wide injunctive relief *and* damages that vary among class members.

Ordinarily, cases asserting that the defendant's coherent, class-directed conduct warrants injunctive relief are paradigmatic for certification under Rule 23(b)(2), a structure for naturally cohesive classes that does not permit class members to opt out of the suit. In contrast, cases in which the defendant's challenged conduct has ceased and class members seek damages in compensation for the individual harm they have suffered are conventionally certified under Rule 23(b)(3), a less cohesive structure requiring that notice be provided and opt-out rights be granted. The federal courts of appeals and commentators are split as to how to manage these mixed cases containing not only common core issues going to injunctive relief, but also individual issues going to damages that radiate out from that core.

The federal courts of appeals have split into two main camps, clustered around two leading employment discrimination cases: the Second Circuit's decision in *Robinson v. Metro-North*

* Associate Professor, Seton Hall University School of Law. I would like to thank the participants in Seton Hall's work-in-progress lunch series for their useful feedback (I am confident they did not attend solely for the stale cookies and warm soda), and Howie Erichson, Tim Glynn, Tristin Green, Ed Hartnett, and Charlie Sullivan for their particularly helpful suggestions. Research assistants Justin Caso, Brendan Day, and Kyle Rosenkrans provided able and willing support.

Commuter Railroad Co.,[1] and the Fifth Circuit's decision in *Allison v. Citgo Petroleum Co.*[2] Driving this split is a divergent interpretation of the "predominance" criterion under Rule 23(b)(2), which precludes certifying under (b)(2) an otherwise-eligible suit seeking class-wide injunctive relief when the "final relief relates exclusively or predominantly to money damages."[3]

The *Robinson* camp certifies mixed cases under (b)(2), stretching (b)(2) a bit to accommodate a case that does not quite fit. *Robinson* does this by addressing the common, injunctive issues under (b)(2), then treating the damages stage of the case *as if* it were certified under (b)(3), providing full notice and opt-out rights after the common issues have been resolved. The *Allison* camp, on the other hand, refuses to certify mixed cases under (b)(2) when the class seeks any damages that vary among class members. *Allison* holds that suits involving any variable damages simply cannot be certified under (b)(2) because they are not perfectly cohesive and thus do not quite fit the (b)(2) model.

The same set of concerns plays out not only in employment discrimination cases, but in many other factual contexts in which courts struggle with whether mixed cases can be certified under 23(b)(2), including consumer and securities fraud, product liability, and some mass torts. For example, in *Coleman v. General Motors Acceptance Corp.*,[4] the plaintiffs alleged that GMAC was liable for lending fraud because it allowed car dealers to tack on an increased finance charge, above the rate at which GMAC was actually willing to fund the loan, if the dealer thought it could get away with it. These upcharges had a significant disparate impact on African-American car buyers who financed through GMAC. The gravamen of the suit was that GMAC's lending program, which allowed and indeed encouraged the discriminatory upcharge, was therefore liable to the class of African-American borrowers whose loan rate was bumped up more than that of the average white buyer. Plaintiffs sought uniform injunctive relief enjoining continued operation of the program and continued collection of the discriminatory upcharge fees, and sought what could readily be thought of as restitutionary relief in the form of disgorgement of unjust profit from previously collected discriminatory fees. Nonetheless, the *Coleman* court followed *Allison* in rejecting (b)(2) certification of the class, holding that individual issues existed going to the extent of each class member's upcharge, and thus the class could not be certified under 23(b)(2) because class members' interests were not sufficiently

1. 267 F.3d 147 (2d Cir. 2001).
2. 151 F.3d 402 (5th Cir. 1998).
3. FED. R. CIV. P. 23(b)(2) and FED. R. CIV. P. 23(b)(2) advisory committee's note.
4. 296 F.3d 443 (6th Cir. 2002).

coherent to justify a mandatory (b)(2) class without notice and opt-out rights. If *Coleman* had followed the *Robinson* model, it would have held that the class could be certified under (b)(2), but that the (b)(2) class would be treated as if it were a (b)(3) class, with notice and opt-out rights, when the court turned to issues involving individual monetary relief.

This Article argues that these two leading approaches are both mistaken: *Robinson* is too lax and *Allison* too procrustean. The proper approach is neither the "yes" of *Robinson* nor the "no" of *Allison*, but rather the baby bear's porridge approach of a hybrid (b)(2)/(b)(3) class action. Mixed cases such as *Robinson*, *Allison*, and *Coleman should* be certified under 23(b)(2) — but *only* as to the first stage of the case, in which the common issues going to injunctive relief are resolved. The second stage of the case, in which individual issues going to damages are addressed, should be certified under the broader (b)(3) category, which preserves autonomy rights.

The hybrid (b)(2)/(b)(3) approach reformulates the mixed case problem to expand the range of possible solutions in a manner fully consistent with justice, Rule 23, and the Constitution. The hybrid (b)(2)/(b)(3) class action responds to society's interest in the fair and efficient collective resolution of mixed cases — *and* with absent class members' interest in protecting their autonomy.

The central insight of the hybrid class is that mixed cases are composed of discrete bundles of distinct issues — and that courts are specifically empowered to manage those issues flexibly under the vitally important but "little used"[5] power to treat different issues in a class action differently under Rule 23(c)(4)(A). Mixed cases comprise an initial stage ("stage I") addressing common issues relating to the propriety of class-wide injunctive relief, in light of the defendant's general liability for its coherent, class-directed conduct. Mixed cases also comprise a subsequent stage ("stage II") addressing the individual issues necessary to determine liability to particular class members, and the damages award to which each class member is entitled.

Thus, a court need not determine whether it can shoe-horn the entirety of a mixed case into a class certified solely under (b)(2), or whether it must entirely abandon the (b)(2) paradigm that is so useful for resolution of claims for class-wide injunctive relief. Instead of an up-or-down decision as to a Rule 23(b)(2) class action, courts considering mixed cases should assess the propriety of the intermediate structure of the hybrid (b)(2)/(b)(3) class action.

Perhaps a visual model — oversimplified as it is — will help. The (b)(2) class (fig. 1) can be thought of as a congruent whole, with the (b)(3) class cluster (fig. 2) considerably more variegated.

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5. MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.17 (1995).

Both the *Robinson* and *Allison* paradigms recognize that mixed cases include a common, injunctive (b)(2) core — but with some individual issues going to damages thrown into the mix, radiating out from the edges of the (b)(2) core (fig. 3). Those individual issues thereby render the mixed cases not quite able to fit into the round (b)(2) hole, but considerably more coherent than the (b)(3) cluster.

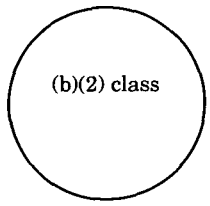

FIGURE 1

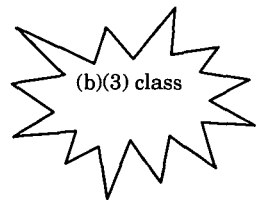

FIGURE 2

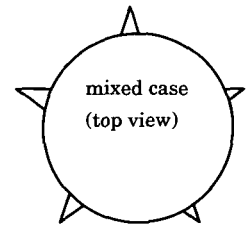

FIGURE 3

The hybrid model is predicated on the insight that the mixed case is not actually a jumble of common and individual issues, as it looks in figure 3 when viewed from the top (as in *Robinson* and *Allison*). Instead, looked at from the side (fig. 4), the mixed case bridges two distinct stages: the stage I set of common issues going to the defendant's class-directed conduct that really is entirely coherent, and the subsequent stage II issues that may be as variable as a (b)(3) class.[6]

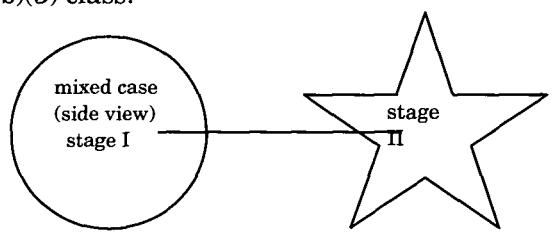

FIGURE 4

The (b)(2)/(b)(3) hybrid therefore operates on the understanding that the distinct stages in a mixed case can and should be managed distinctly. The hybrid applies (b)(2) mechanisms to the common, injunctive portion of the case, stage I (most notably, by limiting notice and precluding opt-out), and

6. Though beyond the scope of this Article, it is worth noting for clarity that (b)(3) classes, when viewed from the side, are also composed of distinct stages. There is an initial stage in which common issues going to the defendant's liability are addressed, with a subsequent stage addressing individual class members' entitlement to damages. Stage I (and sometimes stage II) of a (b)(3) class is simply less cohesive than the corresponding stage of a hybrid (b)(2)/(b)(3) class action, though sufficiently cohesive to satisfy (b)(3) predominance and warrant class certification.

applies individualized (b)(3) mechanisms to the varying damages portions of the case, stage II, by providing full notice and opt-out rights. The hybrid class thus functions as a judicial spork,[7] if you will, crafted to manage both the common stew and the individual elements therein.

The hybrid class is not merely a more elegant way to describe the *Robinson* approach to notice and opt-out so as to sidestep *Allison's* cavils. There are two significant practical consequences that arise from hybrid (b)(2)/(b)(3) certification of mixed cases: a set of certification criteria that bear more resemblance to *Allison* than to *Robinson*, and a scope of notice and opt-out that bears more resemblance to *Robinson* than to *Allison*. Most obviously, cases such as *Robinson*, *Allison*, and *Coleman* would have come out differently, and far more sensibly: rather than a contorted (b)(2) class, or no (b)(2) class at all, those cases — and a large and increasingly important set of other mixed cases — would be certified as (b)(2)/(b)(3) hybrids.

The practical ramifications of hybrid certification come in two distinct arenas. First, the criteria for certifying a hybrid (b)(2)/(b)(3) class must be established, consistent with the requirements of (b)(2) and (b)(3), and of the logic, structure, and language of Rule 23 generally. Second, the most salient advantage of a hybrid class is that the scope of notice and opt-out rights for absent class members need not be uniformly narrow (as in a (b)(2) class action) or broad (as in a (b)(3) class action). Instead, individual autonomy rights will be relatively narrow in the common, injunctive (b)(2) stage when the interest in collective resolution is at its highest and the individual autonomy interest quite low. Individual autonomy rights to notice and opt-out, however, will be fully protected in the (b)(3) portion of the case, when the issues concerning damages diverge among class members, and autonomy interests begin to rise.

Though no court of appeals has yet affirmed certification of a (b)(2)/(b)(3) hybrid, there is a surprising amount of recent support for use of some kind of hybrid certification from courts on both sides of the (b)(2) predominance divide. Even unexpected proponents, such as Judge Frank Easterbrook, in *Jefferson v. Ingersoll International, Inc.*,[8] have spoken approvingly of hybrid (b)(2)/(b)(3) class actions:

> Divided certification . . . is worth consideration. It is possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3), achieving both consistent

7. "Spork: Blend of sp(oon sb. + f)ork sb. A proprietary name for a piece of cutlery combining the features of a spoon, fork, (and sometimes, knife). 'Spork' is the colloquial term for 'Runcible Spoon.'" Sporks, http://www.spork.org/ (last visited Nov. 25, 2005).

8. 195 F.3d 894 (7th Cir. 1999).

> treatment of class-wide equitable relief and an opportunity for each affected person to exercise control over the damages aspects.[9]

Equally importantly, the 2003 amendments to Rule 23, and the accompanying advisory committee notes, have recently placed the hybrid class action on solid footing, grounding what may have previously seemed an intriguing but perhaps chimerical thought experiment. The notes direct that "[i]f a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements [requiring full notice and opt-out rights] must be satisfied as to the (b)(3) class."[10] The advisory committee has thus given its imprimatur to hybrid certification that permits lesser autonomy rights for the common, injunctive (b)(2) portion of a hybrid class.

The moment for the hybrid Rule 23(b)(2)/(b)(3) class action thus seems to be upon us. Yet, as the hybrid class action waits in the wings, preparing to take center stage in contemporary complex litigation, it has met with a fierce counter-attack from a prominent commentator, Professor Linda Mullenix. Mullenix warns:

> The Seventh Circuit's recognition and creation of the new "hybrid" class in Jefferson seems to be one of the most insidious inroads on clear thinking, let alone clear pleading. It is an open invitation to game the system. The Jefferson option represents the ultimate assault on distinct class action categories, and is a boon to lazy, imprecise, or overly clever pleaders.[11]

This Article hopes to provide a just-clever-enough response to Professor Mullenix by applying some precise and clear thinking to the hybrid (b)(2)/(b)(3) class. I agree with Professor Mullenix that determining whether courts may resolve mixed cases through a hybrid (b)(2)/(b)(3) class is one of the most "truly pressing class action issues"[12] that we face, and one that has been entirely under-examined, both in its theoretical underpinnings, and in the specification of the exact scope of the constraints imposed by Rule 23 and the Constitution.

Professor Mullenix is correct that neither courts nor commentators have provided a fully coherent explication of the justification for, or, even more saliently, the implementation of, a hybrid (b)(2)/(b)(3) class action. Nor have they adequately grappled with the predominance criterion of Rule 23(b)(2). Because mixed equitable and legal cases have a foot in both Rule 23(b)(2) and Rule 23(b)(3), they provide a particularly useful

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9. *Id.* at 898.

10. FED. R. CIV. P. 23(c)(2) advisory committee's note.

11. Linda S. Mullenix, *No Exit: Mandatory Class Actions In The New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 215 (2003).

12. *Id.* at 178.

mechanism for determining the proper dividing line between those two subdivisions of Rule 23(b) — a dividing line that, this Article argues, actually spans the heretofore hazily explored zone of the hybrid (b)(2)/(b)(3) class.

Part I.A. of the Article introduces the basic criteria and structure of Federal Rule of Civil Procedure 23. Parts I.B. and I.C. focus on the 23(b)(2) and 23(b)(3) categories of class certification, respectively, exploring the theoretical justification for each category. Part I.D. then focuses on the theory underlying the hybrid (b)(2)/(b)(3) class, and how it operates to preserve the benefits of both (b)(2) and (b)(3) class actions by applying them selectively to the corresponding stages of a mixed case.

Part II canvasses the history of the hybrid class action. Part II.A. discusses commentators' general support for some form of hybrid class action in the decades following the 1966 enactment of the modern version of Rule 23. Part II.B. then discusses developments in case law in the last decade or so, in which mixed cases have become increasingly prominent, and the judicial drumbeat of support for the hybrid class has correspondingly crescendoed — without, it must be noted, any parallel development in explication of the hybrid class.

Part III then examines the hybrid (b)(2)/(b)(3) class in some detail. Part III.A. specifies the criteria that must be satisfied to warrant certification of a hybrid (b)(2)/(b)(3) class; here, the Article maps out what has been an analytical wilderness. The first necessary criterion for certification is that the proposed hybrid (b)(2)/(b)(3) class meet the relatively simple test set forth in the text of (b)(2): the class must present a legitimate request for class-wide injunctive relief, based on the existence of defendant's ongoing, class-directed conduct.

The next criterion — (b)(2) predominance — is the most important, and the one that has driven judicial assessment of mixed cases thus far. The first prong of the (b)(2) predominance test examines whether there is a critical mass of common, injunctive issues such that resolving those issues collectively would materially advance resolution of the entire suit. A critical mass of common, injunctive relief requires, at a minimum, that — putting aside damages — the class would reasonably seek the injunctive relief, and the court would find such relief to be reasonably necessary and appropriate for class recovery. The second part of the (b)(2) predominance test looks to whether there is a critical mass of individual issues that precludes the proposed scope of (b)(2) certification. That is, looking to the full set of issues in the case, does the scope of the autonomy interests implicated by the individual issues preclude denying full notice and opt-out rights to all class members for the portion of the suit proposed to be resolved under (b)(2)?

A key element of the proper approach to (b)(2) predominance is that the (b)(2) predominance test must be applied to the case as a whole to determine if a pure (b)(2) class can be certified. Then, if the entire case cannot be certified under (b)(2), the (b)(2) predominance test must be applied to stage I of the case to determine if that stage alone can be certified under (b)(2); if so, a (b)(2)/(b)(3) hybrid may be proper.

If the (b)(2) predominance test is satisfied (as to the entire case, or as to stage I alone), the (b)(3) predominance test is necessarily also satisfied, so there need not be any independent application of (b)(3) predominance. This is because the (b)(2) predominance test is parallel to, though narrower than, the (b)(3) predominance test. This also means that if a case can be certified under either 23(b)(2) or 23(b)(3) — i.e., more than one category along the increasingly broad spectrum of the pure (b)(2), hybrid (b)(2)/(b)(3), and pure (b)(3) classes — certification should be granted under the category providing the narrowest scope of notice and opt-out.

Next, the role of (b)(3) superiority is addressed, which is to determine whether cases in which stage I is properly certified under (b)(2) should be certified as (b)(2)/(b)(3) hybrids, i.e., are such cases better resolved as a partial (b)(2) class limited to common issues, or should the individual claims for damages be certified under (b)(3) because hybrid (b)(2)/(b)(3) certification is superior to a partial (b)(2) class.

Part III.B. discusses the role and scope of notice and opt-out in the hybrid class. Full notice and opt-out rights must be provided for any class (or portion thereof) certified under (b)(3). For any class (or portion thereof) certified under (b)(2), the court has discretion to provide appropriate notice, and has available a broad range of measures to protect the autonomy interests of absent class members, shy of full notice and opt-out.

Part IV of the Article recognizes that even if the (b)(2)/(b)(3) hybrid is justified, both in theory and under Rule 23, it must still pass constitutional muster. Part IV.A explains why Due Process does not stand in the way of a properly structured hybrid (b)(2)/(b)(3) class. Part IV.B then explains why the Re-Examination Clause and Trial by Jury Clause of the Seventh Amendment also present no impediment.

Finally, Part V responds to recent, ardent criticism of the hybrid (b)(2)/(b)(3) class action. Professor Mullenix has written an impassioned and detailed critique of the hybrid class. One of Mullenix's central concerns is that judicial approval of the hybrid class has been more in the form of vague support for an amorphous notion than in the form of a precise, detailed specification of the (b)(2)/(b)(3) hybrid's certification requirements and implementation structure. This Article, however, responds to

that concern by specifying the precise contours of the (b)(2)/(b)(3) hybrid. So specified, the hybrid class does not suffer from any of the infirmities that Mullenix suggests, including her core theoretical contention, that the discrete categories of 23(b)(2) and 23(b)(3) simply cannot be coherently conjoined into a viable hybrid.

I CLASS ACTIONS UNDER RULE 23(B)

In order to better understand why the hybrid class action is so useful, it is necessary to understand the justification for the (b)(2) and the (b)(3) class action structures, and how each is so aptly suited to resolving certain kinds of class action cases. There are significant advantages to certification under both Rule 23(b)(3) and 23(b)(2), depending on the context; the hybrid is well-suited to preserving the advantages of each within a single suit by applying (b)(2) to the (b)(2) stage of the suit and (b)(3) to the (b)(3) stage of the suit.

Most notably, the hybrid permits the fair and efficient collective resolution of issues going to common, injunctive relief without requiring robust notice and opt-out rights that would undermine that fairness and efficiency. Then, at the stage of the suit when the presumption of class cohesivity breaks down because of the existence of varying individual issues going to damages, the full safeguards of obligatory notice and opt-out protect the heightened autonomy rights of absent class members at that stage.

It is crucial to recognize that the existence of those varying individual issues at stage II of the case does not necessarily implicate a sufficient enough autonomy interest at stage I of the suit to require the full scope of notice and opt-out required of a pure (b)(3) class action. Absent class members have a strong interest in controlling adjudication of issues affecting their claims when their interest in relation to those issues differs materially from those of other class members; they do not have a strong interest in controlling adjudication of issues that they share in common with an entire, adequately represented class simply because there are other issues in the suit that will come up later as to which they do have a strong autonomy interest. Of course, sometimes the divergence of class members' interests at stage II of a case will be so significant as to undermine class cohesivity even at stage I, thereby precluding a hybrid class. But that assessment is built into the (b)(2) predominance criterion that is the primary benchmark for the hybrid (b)(2)/(b)(3) class.

Rule 23 was amended in 1966 to its modern form, which requires that a class seeking class certification satisfy each of the four criteria of Rule 23(a), and fit into at least one of the categories

of Rule 23(b) in order to be certified.[13] The four criteria mandated under Rule 23(a) are numerosity, commonality, typicality, and adequacy of representation.[14] Subdivision (b) sets forth three categories of class actions, one or more of which must be satisfied for a class action to be certified.

A. The Subdivisions of Rule 23(b)

Rule 23(b) establishes three categories of class action, two of which are of direct relevance here.[15] Subdivision (b)(2) applies when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[16] It does not apply when the "appropriate final relief relates exclusively or predominantly to money damages."[17]

Certification under Rule 23(b)(3) of classes seeking variable damages arising from a common wrong, though "not as clearly called for" as the naturally cohesive (b)(2) class, "encompasses those cases in which a class action would achieve economies of

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13. "Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition" if one of the three categories of subdivision (b) is satisfied. FED. R. CIV. P. 23(b).

14. FED. R. CIV. P. 23(a) reads:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. Analysis of these criteria is beyond the scope of this Article, because any case that arguably warrants certification under Rule 23(b)(2) or (b)(3) readily satisfies the 23(a) criteria (or fails to do so for reasons not relevant here).

15. The third category, subdivision (b)(1), applies in the following situations:

> the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

FED. R. CIV. P. 23(b)(1). Class actions under Rule 23(b)(1) are largely beyond the scope of this article. Though they share notable similarities with Rule 23(b)(2) classes because they are not subject to the obligatory notice and opt-out of Rule 23(b)(3), they are not so readily hybridized with Rule 23(b)(3) — and to the extent that they are, the same general principles apply as under 23(b)(2).

16. FED. R. CIV. P. 23(b)(2).

17. FED. R. CIV. P. 23(b)(2) advisory committee's note.

time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[18] Rule 23(b)(3) employs two textual criteria, "predominance" and "superiority." The subdivision is applicable when "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[19]

Rules 23(b)(2) and (b)(3) differ, not only as to the criteria for certifying a class, but also as to the consequences for having done so — whether class members must be afforded notice of the class suit's existence, and whether they must be afforded the right to opt out of the class suit if they so desire. Because the (b)(3) class is not necessarily cohesive, the scope of notice and opt-out protecting absent class members' autonomy interests is correspondingly broad. "For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[20] Moreover, the notice must explain that (b)(3) class members have an absolute right to opt-out of the entire case, if they so desire.[21]

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18. FED. R. CIV. P. 23(b)(3) advisory committee's note.

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

> The matters pertinent to the findings [of predominance and superiority] include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

20. FED. R. CIV. P. 23(c)(2)(B).

21.

> The notice [in an action under (b)(3)] must concisely and clearly state in plain, easily understood language:
> • the nature of the action,
> • the definition of the class certified,
> • the class claims, issues, or defenses,
> • that a class member may enter an appearance through counsel if the member so desires,
> • that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
> • the binding effect of a class judgment on class members under Rule 23(c)(3).

Id. The 2003 revisions to Rule 23 explicitly grant the district court discretion to permit opt-out at more than one stage of a case. *Id.*

The scope of notice and opt-out is more variable for a (b)(2) class action, but is in any event narrower than the obligatory notice and opt-out under (b)(3). First, Rule 23 now states explicitly that, as a matter of discretion, "the court may direct appropriate notice to the [(b)(2)] class."[22] As the advisory committee notes to the 2003 amendments to Rule 23 explain, the proper scope of notice and opt-out rights for a (b)(2) class may well be much narrower than that for a Rule 23(b)(3) class (even when the (b)(2) class is certified in conjunction with the (b)(3) class, a practice the advisory committee notes expressly condones):

> The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.[23]

B. The Theory of the Rule 23(b)(2) Class Action

There are important advantages to the (b)(2) class action that make it undesirable in mixed cases to jettison (b)(2) entirely in favor of a pure (b)(3) class. Members of a (b)(2) class are entitled to a narrower scope of notice and opt-out rights than members of a (b)(3) class because of the fairness and efficiency arising from uniform resolution of a case that, in the main, seeks class-wide injunctive relief. Unlike the inflexible requirements that a (b)(3) class receive the best notice practicable (whether appropriate or not) and receive the absolute right to opt-out, the court has discretion with a (b)(2) class to provide the scope of notice and opt-out it determines best balances the collective and individual interests in play. Indeed, the benefit of permitting a court to narrow notice and opt-out rights when appropriate to do so meant that, until quite recently, courts and commentators almost universally asserted that if a class could be certified under either (b)(2) or (b)(3), certification under (b)(2) was preferable, given the paramount Rule 23 concerns of efficiency and fairness.[24]

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22. FED. R. CIV. P. 23(c)(2)(A). The advisory committee notes explicitly recognize "the court's authority—already established in part by Rule 23(d)(2)—to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. . . . Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice." FED. R. CIV. P. 23(c)(2) advisory committee's note.

23. FED. R. CIV. P. 23(c)(2) advisory committee's note.

24. *See, e.g.*, Eubanks v. Billington, 110 F.3d 87, 92-93 (D.C. Cir. 1997) (citing 7A CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND

As to efficiency, the benefits of limiting notice and opt-out are manifest. Notice is expensive, and the additional litigation brought by those who choose to opt out is inefficient. In a case with no or limited opt-out rights, the parties and the judicial system resolve a dispute in a single proceeding — albeit a complex one — rather than through repeated litigation that, cumulatively, consumes far more of society's and the parties' resources. The efficiency of the (b)(2) class action is thus fairly plain.

Less obviously, fairness in many ways also counsels in favor of the more limited notice and opt-out rights in a (b)(2) class — even from the perspective of absent class members. First, as to notice, the expense and difficulty of providing "the best notice practicable" required under 23(c)(2) for (b)(3) classes can often spell the death knell of a class action in which the expense of such notice would require a large up-front expenditure by class counsel.[25] This barrier was erected by (or, depending on one's perspective, recognized in) the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*,[26] which held that personal notice must be provided to absent (b)(3) class members whenever it is possible to do so. This obligation applies even when it does not make sense to so require from the perspective of the absent class members themselves, i.e., in circumstances in which the cost of such notice will effectively preclude the case from being prosecuted as a class action at all.

The up-front expense of providing perfect notice under (b)(3) can preclude socially beneficial litigation in two situations: first, when the ratio of the cost of notice to the scope of damages makes the game not worth the candle for class counsel (when the only potential victory is a pyrrhic one, the battle is not worth fighting); and, second, when the absolute size of the cost of notice is sufficiently large that class counsel have difficulty fronting — or even borrowing — that sum, regardless of the relative size of the potential eventual payoff.[27] Thus, a (b)(2) class can provide absent

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PROCEDURE § 1772, at 425-26, § 1775, at 491-92 (2d ed. 1986); 3B JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 23.31[3], at 23-236 (2d ed. 1996); *In re* A.H. Robins Co., 880 F.2d 709, 728 (4th Cir. 1989); First Fed. of Mich. v. Barrow, 878 F.2d 912, 919 (6th Cir. 1989); Kyriazi v. W. Elec. Co., 647 F.2d 388, 393 (3d Cir. 1981); Laskey v. United Auto. Workers, 638 F.2d 954, 956 (6th Cir. 1981); Reynolds v. Nat'l Football League, 584 F.2d 280, 284 (8th Cir. 1978); Robertson v. Nat'l Basketball Ass'n, 556 F.2d 682, 685 (2d Cir. 1977)). *But see Jefferson*, 195 F.3d at 899 ("Ortiz . . . says in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible.").

25. *See* 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4:35 (4th ed. 2002) (highlighting the potential consequences of the prohibitive cost of the notice requirement under 23(c)(2)).

26. 417 U.S. 156 (1974).

27. This is particularly true in civil rights class actions, where class counsel may be motivated as much by public interest goals as by a monetary outlay

class members reasonable and adequate notice (not necessarily the best practicable, but, e.g., likely to reach all class members, and highly likely to reach any class member who cares enough about his or her autonomy interest to realistically contemplate opting out). Such imperfect notice under (b)(2) is preferable to a (b)(3) class in which class members' theoretical autonomy interest in receiving perfect notice effectively precludes a class suit and thus precludes the opportunity to receive even imperfect compensation.

Next, and perhaps even more counter-intuitively, the right to opt out can also undermine fairness. Most obviously, the defendant's interests are seriously undermined when class members are permitted to opt out. For cases that are litigated, the defendant's transaction costs from having to engage in repeated litigation would eat up the defendant's assets to a far greater extent than if all class members' claims were litigated in a single proceeding. A very high percentage of class actions, if they are not dismissed as a matter of law, are settled,[28] and in the settlement context, defendants' interests go at least as strongly toward global peace. Global peace provides certainty, much desired by stockholders, and allows the defendant to go about its business without the shadow of uncertain future litigation and liability. Furthermore, societal interests in allocating judicial resources efficiently, and in seeking fairness through consistency of outcome, also counsel in favor of limiting the number of times the same common issues are resolved in multiple cases.

What, then, about absent class members' interests in opting out, about which overwhelming fairness concerns have been expressed? Absent class members' interests must be adequately represented for collective resolution to be fair — but fairness does not necessarily require opt-out. Counter-intuitively, in many ways the absent class members are better off with mandatory aggregation of their interests, without a right to opt out, given the enormous collective action problem.[29] The class as a whole is, *ex ante*, far better off if their interests are mandatorily aggregated than if each is given the right to free ride, hold out from, or otherwise attempt to extract a disproportionate share of the class recovery (recovery that likely would not have been available but

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that counsel considers to be an investment toward an ultimate recovery of attorneys' fees that will more than compensate.

28. *See, e.g.*, Amchem Prods., Inc v. Windsor, 521 U.S. 591, 618 (1997) (citing THOMAS E. WILLGING, LAURAL L. HOOPER, & ROBERT NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61-62 (1996)) (discussing the "'settlement only' class [that] has become a stock device" in a "large number of cases").

29. *See* David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit* 2003 U. CHI. LEGAL F. 19, 27-30 (2003) (summarizing the collective action problem facing plaintiff classes).

for the existence of the class). The latitude for each class member to engage in this kind of gamesmanship eats up transaction costs through these intra-class contests, thereby undermining the class's overall recovery, and thus the potential recovery available for each class member. The prospect is similar to that of a prisoner's dilemma game in which each prisoner would gladly give up the right to defect (i.e., to refuse to cooperate) in exchange for similarly restricting his fellow prisoners.

A second indirect, but nonetheless important, advantage to class members of mandatory coordination and cooperation is the significant premium that defendants place on global peace, and thus defendants' willingness to provide a significantly greater overall settlement sum to the class when opt-out rights are limited. Given this "global peace dividend," absent class members will likely be harmed when opt-out is permitted and class members are allowed to defect from a group that furthers their common interests.[30] Even if the mandatory class might not be so much better for the entire class as to be pareto optimal for every class member — i.e., there may be some small subset of class members who would have been better off defecting from a non-mandatory class and extracting a disproportionately large share of a reduced overall sum — the interest in preserving the rights of those would-be defectors is not deserving of protection.

Absent class members are thus in many ways best served by limiting their ability to opt out (assuming, of course, that their actual interests are aligned, as is required by the certification criteria of a (b)(2) or hybrid (b)(2)/(b)(3) class). Indeed, courts have repeatedly recognized the

> concern that under a flexible approach [providing broad opt-out rights,] class members with individual monetary claims found to merit additional procedural protection would routinely opt out of class-wide settlements, and "defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately." Mindful that in the Title VII context as elsewhere public policy favors settlement of claims, [courts] do not treat this concern lightly.[31]

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30. *See* Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847, 1875 (2000) (stating that if "[n]otice and opt-out rights would attach" to the liability portion of a suit, "[c]ompanies may not offer equally desirable settlements because they face the frightening possibility of an inordinate and unpredictable number of separate suits."); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiff's Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1500-06 (1998) (discussing holdouts and collective action problem).

31. *Eubanks*, 110 F.3d at 95 (citations omitted) (quoting Kincade v. Gen.

This is not merely a concern that judicial dockets will be clogged if opt-out is allowed because defendants will not be inclined to settle — a legitimate concern, certainly, but not one that is sufficient to trump absent class members' autonomy rights. Instead, it is a concern that permitting opt-out will result in a collective action problem for class members such that they all (or virtually all) will be made worse off if the class is permitted to fracture, given the sharply differing incentive structure for defendants if some class members defect. The exercise of opt-out rights will clog the courts — a significant burden on society in general and a source of potentially disparate and thus unfair results, particularly in the injunctive context when defendants might be ordered to behave differently toward members of a similarly situated group; more to the point, it will also likely significantly undermine the scope of class members' potential recovery, both through the defendant's lessened willingness to pay for only partial peace, and through what will undoubtedly be the greater costs the plaintiffs incur in the aggregate to litigate their claims. Indeed, even the Supreme Court opinion in *Ortiz v. Fibreboard Corp.* — perhaps the high water mark for concern about class members' autonomy interests — speaks uncritically (albeit in passing) of the idea that "certifying a mandatory class" seeking damages might be legitimate in certain circumstances:

> [S]ome members of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members," . . . thus warranting mandatory class certification "to prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members.[32]

There is a concern that class members who choose to opt out will "free ride" on the class portion of the case, hoping to engage in a back-door route to "one-way intervention" through the offensive use of issue preclusion against the defendant if the class is

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Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981)). *Accord* Holmes v. Cont'l Can Co., 706 F.2d 1144, 1153 (11th Cir. 1983) (affirming that sound public policy directs that class members need not be provided an option to opt out in a Rule 23(b)(2) class action); Stewart v. Rubin, 948 F. Supp. 1077, 1092-93 (D.D.C. 1996) (verifying that the policy against providing class members an option to opt out flows from the concern that defendants would be unlikely to settle when class members with stronger claims have been permitted to opt out).

32. Ortiz v. Fibreboard Corp., 527 U.S. 815, 861 n.35 (1999) (quoting *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992)). *Drexel Burnham* was certified under 23(b)(1)(B) as a mandatory class because, in the absence of a class proceeding — or in the presence of a class permitting opt-out — class members' ability to protect their own interests would be impaired.

successful.[33] There is no legitimate interest in securing a right to opt out for this reason, i.e., to game the system and in the process undermine the legitimate collective interest in recovery of the class as a whole.[34] There is a similar concern that counsel for individual class members who opt out will free ride on the substantial investment of class counsel.[35]

Yet another concern, surfaced by a leading commentator, Robert Bone, is that permitting notice and opt-out may result in inordinate delay, and thus a "fair regard" for the vast majority of class members who do not wish to opt out of a suit seeking significant damages may warrant a mandatory class: "At least when individual litigation creates a substantial risk that deserving plaintiffs will receive less than minimally fair recovery due to inordinately high delay costs, a general principle of fair regard might support certification of even a mandatory class in order to assure fair treatment of comparably situated persons."[36] Similarly, class counsel, or more competent class counsel, or class counsel more willing and able to expend substantial resources, are more likely to be drawn to a suit in which class members do not have full opt-out rights, and this attraction for class counsel thereby benefits the class.[37]

Finally, David Rosenberg has employed economic principles to argue that absent class members' autonomy interests deserve far

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33. *See, e.g.*, Steve Baughman, Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 TEX. L. REV. 211, 224 (1991) (discussing why many of plaintiffs' incentives to pursue individual litigation do not warrant individual due process consideration).

34. *Id.*

35. *Id. Cf.* David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 859-60 (2002) (arguing in favor of mandatory classes). Rosenberg suggests that efforts to aggregate class members informally is doomed to fail because "free-rider problems plague voluntary joint ventures," given that

> [m]uch of a lawyer's work product in litigation falls into the public domain, often through court records and leaks from insiders, creating an incentive for other attorneys who hold similar claims simply to exploit that work product rather than to pay the full economic price of developing or buying it.

Id.

36. Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 107 (1994). *Cf.* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 957-58 (1998) (arguing for a view of the class as an entity, and suggesting that this model may warrant precluding or limiting opt-out rights, even in some circumstances currently governed by Rule 23(b)(3)).

37. *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 369-70 (1999) (reasoning that parallel actions undercut the incentive of lawyer-entrepreneurs to act as class counsel by reducing the opportunity for a reasonable return on their investment).

less respect than provided under current doctrine, and he has thus repeatedly criticized the notice and opt-out dictated by Rule 23(b)(3). Rosenberg explains that his own writings

> develop the argument for adjudicating mass tort cases collectively by mandatory-litigation (no exit and no opt-out) class action rather than by class action with an opportunity to opt out or by the standard process of separate actions. The argument relies on the normative premise that the law should promote individuals' well-being, that is, their welfare or utility. Consequently, the law should seek to minimize the sum of accident costs — specifically, the total costs of precautions against accident, unavoidable harm, risk-bearing, and administration of the legal system.[38]

In order to achieve those goals, Rosenberg argues, class members should be restricted in their opt-out rights, given what not only society generally but each class member would rationally prefer — *before* he knew his own particular circumstances that might induce him to wish to opt out: "Ex ante, everyone . . . understands that for mass tort liability to achieve optimal deterrence and insurance, individuals must act collectively; in particular, they must pool their litigation resources and forgo exploiting tort law to maximize personal wealth" by opting out of the suit.[39] Thus, the benefits of a non opt-out regime are accentuated the more one understands the legal system as directed to furthering society's interests in prospectively shaping optimal behavior. Mandatory regimes also appear more attractive the more one understands opt-out as punctiliously protecting a class member's idiosyncratic wish to exclude himself from an efficient, collective process to determine the existence and extent of his harm, even though his individual interests would be adequately represented in that collective process.

One need not be willing to go so far as Rosenberg to recognize the significant downside of mandating notice and opt-out for the entire scope of a mixed case. Certifying a case entirely under Rule 23(b)(3) — even for the cohesive stage I of the case — places undue emphasis on the theoretical autonomy rights of absent class members at the expense of society, of defendants, and of the strong countervailing interests of the absent class members themselves in actually receiving (even-imperfect) compensation.

C. The Theory of the Rule 23(b)(3) Class Action

In contrast to the (b)(2) class, the (b)(3) class does not focus predominantly upon common issues going to the defendant's class-directed conduct. Instead, the focus is not only on common issues going to liability, but also on significant individual issues concerning each class member; those issues are necessary to

38. Rosenberg, *supra* note 35, at 831-32.
39. *Id.* at 832.

resolve whether that class member has been harmed by the defendant's wrongful conduct — and, if so, the extent of the harm suffered, and thus of the damages warranted. The Rule 23(b)(3) class action was an "adventuresome innovation" in the 1966 amendments to Rule 23, intended to reach cases that were not covered by the previous categories of class action that existed prior to 1966, but that nonetheless appeared to warrant collective resolution.[40] The advisory committee notes explain, that under Rule 23(b)(3),

> class-action treatment is not as clearly called for as [with subdivisions (b)(1) or (b)(2)], but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.[41]

Because the reach of Rule 23(b)(3) is broader than that of (b)(2), so are the restrictions imposed. In order to certify a class under (b)(3), the court must determine that common issues predominate over individual issues and must determine that the proposed class is superior to other potential means of resolving the dispute. Moreover, the court must provide significantly heightened notice and opt-out rights to absent class members.[42] Given the presence of variable individual issues, and the possibility that there may not be a natural cohesion of interest among class members throughout the suit, the autonomy interests of absent class members warrant greater protection than in a (b)(2) suit.[43] This heightened autonomy interest is manifested in the form of the strict requirements of 23(c)(2), which imposes a particularly robust form of obligatory notice and absolute opt-out rights for (b)(3) classes.

As will be obvious to anyone who has read scholarly commentary or case law in the last decade, despite the existence of the advantages to the (b)(2) class detailed above, concern has grown about mandatory class actions precluding opt-out when individual monetary damages are asserted. The Supreme Court flagged the issue a decade ago in *Ticor Title Insurance Co. v. Brown*,[44] in which the Court (without reaching the issue) suggested "at least a substantial possibility" that "actions seeking monetary damages . . . can be certified only under Rule 23(b)(3)." The

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40. *Amchem*, 521 U.S. at 614 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

41. FED. R. CIV. P. 23(b)(3) advisory committee's note (1966).

42. *See supra* Part I.B.

43. *See, e.g.*, *Amchem*, 521 U.S. at 614-17.

44. 511 U.S. 117, 120-21 (1994) (per curiam) (dismissing certiorari as improvidently granted).

Court's more recent decisions in *Amchem Products, Inc. v. Windsor*,[45] and *Ortiz*,[46] have reinforced the importance of absent class members' autonomy interest in controlling litigation that seeks substantial damages.[47] These cases reflect "the Court's growing concerns regarding the certification of mandatory classes when monetary damages are involved."[48]

The concern is that mandatory classes — i.e., classes under Rule 23(b)(1) or (b)(2) in which no right to opt out is granted — are problematic, insofar as they seek substantial, varying monetary damages, for at least two reasons. First, the existence of individualized damages warrants a greater degree of autonomy for absent class members than when relief flows uniformly to the class as a whole. Straightforwardly enough, the individual's interest in controlling resolution of issues particular to his own personal monetary recovery is heightened, whereas there is a correspondingly weakened interest in the fairness and efficiency of a uniform process of collective resolution. Second, issues concerning individual liability and the scope of individual damages will vary among class members, thus presenting the possibility that the class representatives and class counsel will not have the proper incentives to litigate in the best interest of each of the absent class members.

Moreover, these concerns about mandatory classes grow as the size and variability of the alleged damages increase.[49] Particular concern has been expressed about mandatory settlement classes in which class counsel, defendants, and courts all have incentives to enter into a global settlement that pays class counsel handsomely, provides global peace to defendants, and clears the judicial docket — all, potentially, at the expense of absent class members who have insufficient knowledge or opportunity to police the size of the settlement, or its apportionment between the class and class counsel.[50]

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45. *Amchem*, 521 U.S. 591.

46. *Ortiz*, 527 U.S. 815.

47. *See, e.g.*, Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 833 (1997) (stating that *Amchem* "reinforces the importance of at least preserving the forms of individual participation - - most critically, a meaningful right to opt out of class actions").

48. Molski v. Gleich, 318 F.3d 937, 948 (9th Cir. 2003).

49. *See, e.g., id.* ("[W]e have held that certain minimal procedural safeguards, such as notice and the right to opt-out, must be provided to bind absent class members when substantial monetary damages are involved." (citing Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed as improvidently granted by* Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (per curiam)).

50. *See, e.g.*, *Ortiz*, 527 U.S. 815 (counseling caution as to mandatory class actions in the 23(b)(1) context); *Amchem*, 521 U.S. 591 (discussing concerns about mandatory class actions in the settlement context).

Thus, despite the factors favoring limited notice and opt-out, as in a (b)(2) suit, as explained above, there are also legitimate concerns pushing toward heightened notice and opt-out, as in a (b)(3) suit, when monetary damages are significant and variable enough that the cohesivity of class members' interests begins to fracture.[51]

D. The Theory of the Hybrid (b)(2)/(b)(3) Class Action

The attentive reader will by now have spotted the means to reconcile the apparently difficult choice between (b)(2) and (b)(3) certification of a mixed case, given the compelling justifications for each: put the peanut butter and the chocolate together into an even more compelling hybrid. By applying Rule 23(b)(2) to the common, injunctive stage of the suit, and Rule 23(b)(3) to the resolution of issues going to individual damages, virtually all of the advantages of the (b)(2) and (b)(3) class actions can be preserved because those benefits are largely distinct to the different stages of the suit.

A (b)(2)/(b)(3) hybrid operates by applying differing mechanisms to those differing stages. In the (b)(2) portion, class members have no right to opt out of stage I, the common, injunctive, cohesive portion of the suit (though the court as a matter of discretion may provide notice); for stage II, the individual portions of the suit in which their interests begin to materially diverge, each class member has the full panoply of notice and opt-out protections under 23(b)(3) and (c)(2). Happily, the 2003 amendments to Rule 23 apparently contemplate just such a hybrid. The advisory committee notes to the 2003 amendments now explain that "[i]f a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class" — but not, *a fortiori*, to the (b)(2) class, thus undermining any suggestion that if part of a class is certified under (b)(3), opt-out rights must be provided throughout the entire suit.[52]

Objections might be lodged against the management of each stage of this two-tiered hybrid. First, some, such as Professor Rosenberg, might prefer certification of many mixed cases as pure (b)(2) classes rather than as a (b)(2)/(b)(3) hybrid that permits opt-

51. This is true, at the least, in the absence of a strong countervailing interest. *Cf. Ortiz*, 527 U.S. at 815 (discussing, and not implying any disagreement with, *Drexel Burnham*). In *Drexel Burnham*, the court upheld the district court's certification of a mandatory (b)(1)(B) class without opt-out, notwithstanding the assertion of significant damages, because permitting those who believed they had particularly meritorious claims to opt out might "unfairly diminish[] the recovery" of other class members. *Drexel Burnham*, 960 F.2d at 292.

52. FED. R. CIV. P. 23(c)(2) advisory committee's note.

out as to the portions of the suit going to individual damages. Whatever the wisdom of Rosenberg's suggestions as a policy matter, those who peek out from behind the Rawlsian veil of ignorance will recognize that his proposals are exceedingly unlikely to carry the day as to amendment or judicial interpretation of Rule 23, and thus can safely be set aside.[53]

Less radically, there is a significant amount of case law that upholds pure (b)(2) certification of mixed cases. Some of these cases jerry-rig under (b)(2) what is in operation functionally equivalent to a (b)(2)/(b)(3) hybrid by providing full notice and opt-out rights at stage II of the case, but some do not, accepting certification of pure (b)(2) classes with little or no opt-out rights.[54] Although such mandatory certification may well be plausible for instances in which damages are relatively small and there is little variability in issues going to individual liability, there is growing appreciation over the last several years of the wisdom of providing opt-out if — and, most notably, when — class members' interests begin to materially diverge. Thus, for at least a broad range of mixed cases, a (b)(2)/(b)(3) hybrid is preferable to a pure (b)(2) class with no opt-out rights because the hybrid better protects absent class members' legitimate autonomy interests in litigating their own individual issues at stage II. A hybrid (b)(2)/(b)(3) is also preferable to a pure (b)(2) class with jerry-rigged hybrid opt-out rights because the hybrid (b)(2)/(b)(3) accurately captures the proper certification criteria.[55]

Second, some might prefer certification of mixed cases as pure (b)(3) classes, contending that it is improper that class members with significant damages claims are denied full opt-out rights even in stage I, the common, injunctive portion of the suit. They would argue that class members seeking substantial damages (or recovery substantially different from other class members) are necessarily entitled to full control over every issue in their suit, or at least any issue that might foreclose or impair their eventual recovery.

The advisory committee note authorizing a different scope of notice for (b)(2) and (b)(3) classes certified in the same suit rebuts this bright-line argument. Moreover, even the argument that damage claimants will at least quite often require opt-out rights throughout the suit is, on reflection, inaccurate. Unless a class member's interest in resolution of the *common, injunctive issues*

53. *Cf.* Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1554 (11th Cir. 1986) (upholding hybrid class action certified entirely under Rule 23(b)(2) permitting opt-out at stage II, but rejecting propriety of ever permitting opt-out as to the initial, common stage of the litigation because doing so would unduly undermine the efficiency and consistency of the result).

54. *See infra* Part II.B.

55. *See infra* Part III.A.

materially diverges from that of the rest of the class, the class member's interest in prevailing on those stage I issues is adequately represented by the class. In order for the hybrid class to be certified, of course, the requirements of 23(a), including adequate representation, and of 23(b)(2) predominance, must have been satisfied.

The mere fact that a class member with a substantial claim to damages might be required to remain in a class that could potentially lose on a threshold common issue does not deny him any rights to which he is — or should be — entitled. If his interests do not materially diverge from the class until stage II, then an idiosyncratic wish to defect from the class at stage I is trumped by the benefits of collective resolution of the common issues going to the propriety of the defendant's class-directed conduct.

At stage I, the interest in efficient, coherent resolution of an ongoing class-wide problem, and in a defendant's avoiding being subjected to inconsistent injunctive relief, is paramount, thus justifying a mandatory (b)(2) class for the management of the common, injunctive portion of the case. In some mixed cases, of course, class members' interests will diverge so much at stage II that their interests cannot be said to be sufficiently coherent to satisfy (b)(2) predominance, even for the common, injunctive issues in stage I of the case. In such cases, a (b)(2)/(b)(3) hybrid cannot be certified and the class, if there is to be one, must be certified under (b)(3). These cases, however, are relatively unusual.

In comparison to the (b)(3) class, the hybrid benefits not only societal interests and the plaintiff class, but also defendants. Although the defendant in a hybrid class action does not necessarily get the complete global peace through litigation (or, more realistically, settlement) of a single case as in a (b)(2) class, the defendant retains much of the benefits of a fully mandatory class. In many circumstances, if the defendant wins at stage I of the hybrid case, the entire class action disappears, without costly satellite litigation. Even if the defendant's victory at stage I does not end the case — e.g., because individual claims could prevail even if no pattern or practice of class-directed unlawful conduct existed — the number and scope of likely individual claims is sharply constrained.

Moreover, settlement of a hybrid class with a mandatory stage I is, as a practical matter, likely to result in what is at least very nearly global peace. Settlement of a hybrid class requires "back-end" notice and opt-out for class members to review the ultimate terms of the settlement, because it includes waiver of the further right to seek damages. The number of opt-outs, however, is likely to be relatively low for a settlement that is actually adequate to induce class members to remain in the class. Thus,

for many mixed cases in which class cohesivity is present in stage I but not in stage II, both plaintiffs' and defendants' legitimate interests are better protected in a hybrid suit than in a (b)(2) or (b)(3) suit alone.

As explained further in Part III.A.2., there is a deep split among courts and commentators about the propriety of a pure (b)(2) case that seeks substantial damages. Doubters contend that there is necessarily a breakdown in the cohesiveness of a (b)(2) class when any non-incidental damages come into play, thus precluding (b)(2) certification; believers suggest that significant damages may be recovered in a pure (b)(2) case so long as the common, injunctive relief sought is relatively more important than the damages. Whatever one's position is in the debate as to the proper criteria for a pure (b)(2) class for mixed cases, the hybrid class sidesteps the problem almost entirely. Precisely when the presumptive cohesiveness of the (b)(2) class breaks down — wherever one draws that line — the class can no longer be certified under (b)(2), and instead must comply with the heightened requirements protecting autonomy under Rule 23(b)(3).

The discussion above has focused on the advantages of a hybrid opt-out structure, explaining why providing opt-out in stage I of a mixed case or denying opt-out in stage II is problematic, and why the (b)(2)/(b)(3) hybrid is the baby bear's porridge of class action management structures. There are parallel advantages for the hybrid class as to notice. The difficulty with notice in a pure (b)(3) suit is that *Eisen* requires the best notice practicable, which, as explained above, may actually impair class members' interests. The existence of the hybrid class mitigates much of the perceived burden of *Eisen*: in a world in which every class claim to damages requires pure (b)(3) certification, *Eisen* is a formidable obstacle; in a world in which many classes seeking damages are certified as hybrids, with lessened notice obligation until damages are actually at issue, the barrier is far less significant.

The advantages of notice in a hybrid class, as compared to a pure (b)(2) suit, present the flip side concerns. Members of a pure (b)(2) class may not receive adequate notice of the class proceeding to be able to protect their autonomy interests that do exist (shy of opt-out) concerning the individual issues in the suit in which their interests are not in fact cohesive. Members of a pure (b)(2) class in a mixed case may thus be denied not only the opportunity to litigate their individual entitlement to damages (given the absence of opt-out rights), but also denied the notice necessary to contest effectively the fairness of a settlement awarding and apportioning damages. The hybrid often best resolves the notice conundrum in a mixed case by (1) recognizing the district court's discretion to

direct the proper extent of notice to the class prior to resolution of the common, injunctive portion of the suit — thereby avoiding the *Eisen* death knell by not necessarily requiring the best notice practicable at stage I, and (2) requiring notice (including notice of the right to opt out) prior to resolution of individual damages (whether by litigation or by settlement). Hybrid certification requires notice — but only at stage II, when autonomy interests are significant enough to warrant notice.

Moreover, the obligation to provide notice only after the defendant's liability to the class has been determined has important advantages. As Herbert Newberg explained:

> Hybrid certification has the advantage of deferring notice and opt-out until a finding of liability has been made. Shifting the costs of notification to the defendant may be possible at that stage, since liability has been established. Thus, many suits may be feasible that plaintiffs' attorneys would have found too cost-prohibitive to bring under 23(b)(3) otherwise.[56]

Newberg's plausible suggestion is that the district courts would have discretion, as a component of equitable relief, to require defendants who have been found to have acted unlawfully toward the class to pay some or all of the costs of providing the class with notice of the right to seek damages. Settlement of a hybrid case could build in the defendant's contribution to the costs of notice.

Even apart from the defendants' monetary contribution, class counsel would in any event have a much easier time securing a loan to cover the cost of notice in a hybrid rather than in a (b)(3) suit, given the finding of class-directed liability prior to the duty to provide the best practicable notice. "Another advantage" to a hybrid suit, explains Newberg, "is that injunctive and declaratory relief may be available under 23(b)(2) in order to stop the defendant's challenged practices immediately, before the issue of damages is determined."[57]

Thus, hybrid class actions benefit the judicial system — and therefore society generally — and benefit defendants by providing an efficient mechanism to resolve large disputes, arriving at a

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56. 2 NEWBERG & CONTE, *supra* note 25, § 4.14; *See also* George Rutherglen, *Better Late than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 275 (1996) (arguing that plaintiffs are able, directly or indirectly, to shift the cost of notice to the defendant if the plaintiff class is successful in demonstrating that the defendant has engaged in ongoing harm to the class warranting injunctive relief).

57. 2 NEWBERG & CONTE, *supra* note 25, § 4.14. *See also* Thomas R. Grande, *Innovative Class Action Techniques — the Use of Rule 23(b)(2) in Consumer Class Actions*, 14 LOY. CONSUMER L. REV. 251, 252 (2002) (describing several advantages of various forms of hybrid class actions).

(relatively) rapid and consistent result. Hybrid classes, less obviously, also benefit absent class members. Resolution of stage I of a mixed case under (b)(2) increases the size of the available pie because it overcomes the collective action problem among plaintiff class members and provides defendants with a far greater incentive to put greater assets toward settlement. Resolution of stage II under (b)(3) grants class members full autonomy in proving the slice of that larger pie to which they are entitled. With the (b)(2)/(b)(3) hybrid, the plaintiff class need not halve its pie in order to eat it, too.

II. THE HISTORY OF THE HYBRID CLASS ACTION

The idea of meshing the advantages of the (b)(2) and the (b)(3) class action is not a new concept. Indeed, the hybrid class has been lauded, in some form, by numerous courts and commentators for many years. The key, though, is "in some form." Support for the hybrid class has been quite wide, but the depth of analysis has been exceedingly shallow, and the specification of the certification criteria and the scope of notice and opt-out for a hybrid class extraordinarily thin.

There has been, until recently, a fair amount of general support for the notion of some kind of hybrid class action that is neither strictly a (b)(2) nor strictly a (b)(3) class. Recently, as the importance of mixed cases has become increasingly prominent, there have been two reactions. First, several courts of appeals have explicitly noted their openness to some form of hybrid class action, though the form of these suggested hybrids has varied widely between cases — and even within each case, these courts have usually mentioned several different structures that a hybrid class might take. Second, a smaller but far more direct backlash has arisen expressing aversion to the hybrid class action, in large part because the prior favorable assessments of the hybrid class have been so hazy and amorphous, and because the (b)(2) and (b)(3) classes are perceived to be so categorically distinct as to be immiscible.

Part II canvasses the prior academic and judicial assessments of hybrid class actions, hazy and amorphous though they may be. Part III then explicates the nuts and bolts of the hybrid (b)(2)/(b)(3) class, specifying criteria for certifying such a class, and for managing a class so certified. Fortified with that detailed specification, Part IV addresses constitutional concerns under the Due Process Clause and the Seventh Amendment. Part V then responds to the critics of the hybrid class — most notably, Professor Mullenix — by rebutting the theoretical objections they raise.

A. Academic Assessment of the Hybrid Class Action

Prior to the 1966 amendments to Rule 23, "hybrid" class actions existed in name, but were an entirely different animal from the hybrid class described here.[58] The "hybrid" class prior to 1966 was part of the complex taxonomy of class actions involving so-called "true," "hybrid," and "spurious" classes, categories that "in practice . . . proved obscure and uncertain."[59]

In 1966, Rule 23 was promulgated in its modern form. Although Rule 23 and the advisory committee notes did not explicitly endorse or repudiate the possibility of a hybrid class action, in short order the three leading treatises uniformly spoke approvingly of some form of hybrid class — albeit in passing and rather breezily. Professors Wright and Miller argue in quite general terms that when classes seeking injunctive relief also assert claims for monetary damages, the injunctive claims can proceed under (b)(2), and the monetary claims can often be certified under (b)(3), with the court using Rule 23(c)(4)(A) to sever such mixed cases into separate stages, and with each stage treated according to the nature of the issues it encompasses.[60]

Professor Newberg similarly argues that when injunctive relief is an integral part of the overall relief requested by a class, the case should be certified under Rule 23(b)(2); if additional claims for individual monetary damages are also asserted, he explains, courts can employ at least four mechanisms to address those individual issues, including deferred, partial, and hybrid (b)(2)/(b)(3) certification.[61] Similarly, the 1995 third edition of the

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58. *See* Mullenix, *supra* note 11, at 181 ("The concept of the 'hybrid' class — once a distinct analytical category under the original 1938 rule—now describes various types of proposed class actions, and has assumed many meanings, depending on the setting.").

59. FED. R. CIV. P. 23 advisory committee's note (1966) (citing, *inter alia*, ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 245-46, 256-57 (1950)). Perhaps the long-standing existence of the term "hybrid class action" has made the kind of (b)(2)/(b)(3) hybrid discussed in this article seem less of a Frankenstein's monster to federal courts that are often wary of class action innovation — but if so, that is merely a happy accident.

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> [I]f the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action should be certified under subdivision (b)(2) and those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental. As to handling the litigation, it is recognized that the court has the power in appropriate cases under subdivision (c)(4) to confine the class-action aspects of the case to those issues pertaining to the injunction and to allow damage issues to be tried separately.

7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1784.1 (3d ed. 2005). "In an appropriate case, various subclasses may be governed by different parts of Rule 23(b)." *Id.*

61.

> When the parties dispute which form of relief is predominant with

Manual for Complex Litigation noted that "[t]he court may . . . certify a (b)(3) class for certain claims, allowing class members to opt out, while creating a (b)(1) or (b)(2) class for other claims, from which opt-outs may not be permitted."[62] Notably, none of these suggestions provide any specifics about certification or implementation of a hybrid class, in effect merely noting the salutary possibility of hybrid opt-out.

More than 20 years ago, in the most focused take on the hybrid (b)(2)/(b)(3) class to date, Professor George Rutherglen discussed several Title VII cases, treated as some form of hybrid in the district courts, arising in the fifteen years following the 1966 amendments to Rule 23.[63] Rutherglen expressed support for the (b)(2)/(b)(3) hybrid:

> Because Title VII class actions fit partially under subdivision (b)(2) and partially under subdivision (b)(3), but not entirely under either, courts should certify them as hybrid class actions under both. Specifically, courts should certify claims for class-wide injunctive relief under subdivision (b)(2) and claims for individual compensatory relief under subdivision (b)(3).[64]

Rutherglen argued for a hybrid (b)(2)/(b)(3) approach generally similar to, but somewhat less attuned to autonomy

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respect to the appropriateness of Rule 23(b)(2) for any class certification, it is counterproductive for the court to expend time to try to resolve this largely discretionary question, which does not address the merits of the case. Rather, the court should conclude that when the Rule 23(a) prerequisites are satisfied and declaratory or injunctive relief is sought as an integral part of the relief for the class, then Rule 23(b)(2) is applicable regardless of the presence or dominance of additional prayers for damages relief for class members. With this approach, the court has at least four options for class certification. First, under Rule 23(c)(4)(A), the court could limit the Rule 23(b)(2) certification to certain issues only. Second, the court could certify the injunction claims under Rule 23(b)(2) and the damages claims under Rule 23(b)(3). Third, the court could certify the entire class initially under Rule 23(b)(2), bifurcate the trial so that the defendant's liability potentially for both forms of relief is determined initially, and reconsider the class certification category if the plaintiffs and the class are successful at the liability stage.

2 NEWBERG & CONTE, *supra* note 25, § 4.14.

62. MANUAL FOR COMPLEX LITIGATION, *supra* note 5, § 30.17.

63. George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 32 n.90 (1983) (citing Waldrip v. Motorola, Inc., 85 F.R.D. 349, 354 (N.D. Ga. 1980); Taylor v. Union Carbide Corp., 93 F.R.D. 1, 10 (S.D. W. Va. 1980); Greenspan v. Auto. Club, 22 Fair Empl. Prac. Cas. (BNA) 180, 182-83 (E.D. Mich. 1977); Branham v. Gen. Elec. Co., 63 F.R.D. 667, 670-71 (M.D. Tenn. 1974); Bell v. Auto. Club, 16 Fair Empl. Prac. Cas. (BNA) 1613, 1614 (E.D. Mich. 1974); Paddison v. Fid. Bank, 60 F.R.D. 695, 699 (E.D. Pa. 1973)); 3B MOORE ET AL., *supra* note 24, § 23.45[1], at 23-322 & n.46; Robert S. Phifer, Note, *The Class Action Device in Title VII Civil Suits*, 28 S.C. L. REV. 639, 672-82 (1977); Thomas H. Barnard, *Title VII Class Actions: The "Recovery Stage"*, 16 WM. & MARY L. REV. 507, 526 (1975).

64. Rutherglen, *supra* note 63, at 30.

concerns than, the form proposed in this Article. Rutherglen argued that "class members could not opt out of the (b)(2) subclass" because a strictly mandatory initial stage would best maintain uniformity and efficiency, and protect defendants from the burden of relitigating issues on which they had already succeeded.[65]

Proposed revisions of Rule 23 in the 1980's and 1990's also supported the notion of hybrid certification, pointing to the significance of mixed cases and the difficulties attendant to shoe-horning such cases into a single Rule 23(b) category. The American Bar Association's Section on Litigation issued the *Report and Recommendations of the Special Committee on Class Action Improvements,*[66] which advocated eliminating the three distinct categories under Rule 23(b), replacing them with a general category for class actions, with certification dependent on a superiority determination that considered a set of relevant principles drawing from (b)(1), (b)(2), and (b)(3).[67] A significant part of the Committee's rationale arose from its recognition of the importance of mixed cases. As the Committee explained:

> [The] three categories [of Rule 23(b)] are far from airtight and the complexities of modern litigation doom to failure efforts to insist that a given case must fit one, and only one, of the rule's subdivisions. For example, cases involving claims for both money damages and injunctive or declaratory relief present significant difficulties of classification. . . .
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> . . . .
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> It may be appropriate in such [mixed] cases to permit class members to exclude themselves from the action, especially at the stage in the proceeding when individual relief is determined.[68]

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65. *Id.* at 30, 34.

66. REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CLASS ACTION IMPROVEMENTS, *reprinted in* 110 F.R.D. 195 (1986).

67. The Report stated:

> We have concluded that the distinctions and procedural effects reflected in the presently trifurcated rule tend to blur the core values of the class action and to promote unnecessary, expensive and inefficient litigation over peripheral issues. Our recommendations are designed to refocus the certification inquiry upon the superiority of class action treatment for the particular dispute, eliminate unnecessary expense and delay in the maintenance and resolution of the action and facilitate attainment of important purposes of the modern class action.

Id. at 198.

68. *Id.* at 197. *See also id.* at 207 (advisory committee commentary subdivision (c)) (citing Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) and Penson v. Terminal Transp. Co., 634 F.2d 989, 993-94 (5th Cir. 1981)).

The ABA Section on Litigation's proposal was never approved by the full ABA, nor adopted by the advisory committee on civil procedure.[69] In 1996, however, the advisory committee did propose revisions for Rule 23 that were largely consistent with the Section on Litigation's prior proposal.[70] These proposals were never approved, given the lack of any consensus on which direction class action reform should take; moreover, commentators were understandably wary concerning the proposal to eliminate the 23(b) categories, because of the broad and quite unconstrained discretion it would afford district court judges, and the inconsistency that might well result, especially given the abuse of discretion standard of review.

In particular, Professor Bone, a commentator generally sympathetic to the hybrid class, suggested the need for clarification of hybrid certification in his critique of the advisory committee's proposed 1996 revisions to Rule 23.[71] Bone argued, quite reasonably, that if certification is to occur in some kind of hybrid outside the standard categories of (b)(2) and (b)(3), it is vital that there be careful specification of the certification criteria and structure of such hybrid classes — specification that a discretionary, gestalt standard did not and could not provide. This sort of specification, however, has been missing from commentators' analysis, and, as Point II.B., below, will demonstrate, from case law. This Article is intended as a corrective, crystallizing the general, hazy support for some form of a hybrid into a carefully specified, pragmatically workable and theoretically justified structure, by careful melding of the familiar (b)(2) and (b)(3) categories.

B. Judicial Assessment of the Hybrid Class Action

Within the past several years, the hybrid class action has grown to increasing prominence through almost uniformly approving statements in quite a few otherwise-conflicting court of appeals opinions. Some of these opinions accept and some reject the propriety of certifying a mixed case entirely under Rule 23(b)(2), but virtually all are supportive of some form of hybrid class, i.e., one melding rather than conforming to the traditional notions of either (b)(2) or (b)(3). But, as with commentators, this judicial approval is vague; it is almost always in the form of dicta,

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69. *See* Bone, *supra* note 36, at 82 n.10 (noting that the ABA failed to approve the proposal).

70. *Cf.* Rutherglen, *supra* note 56, at 271 n.55 (stating that the revisions dissolved the different categories found in subdivision (b) and replaced them with more reliance on the district court's discretion); Bone, *supra* note 36, at 82 & n.10 (discussing the Section of Litigation's proposal).

71. Bone, *supra* note 36, at 82-84, 96.

it is usually casually supportive of many potential forms of hybrid (without bothering to discuss the differences), and it is always short on details specifying the certification criteria and the scope of notice and opt-out.

A series of cases in the 1970's and 1980's in the Fifth and successor Eleventh Circuits developed an approach to employment discrimination cases that applied some aspects of hybrid certification, though under a pure (b)(2) regime. This line of cases held that the common, injunctive portion of the suits could be certified without problem under (b)(2), but that the subsequent stage of the case in which varying individual monetary relief was sought — even though limited to the "equitable" form of backpay — warranted greater protection of autonomy in the form of expanded notice and opt-out rights.[72]

The structure the Fifth and Eleventh Circuits applied to these mixed cases under a hybrid (b)(2) approach (generally, certifying the case entirely under (b)(2), but permitting opt-out at stage II) was inconsistent. The line of cases developed in a manner seemingly more driven by the equities (or, more to the point, inequities) of each particular case than by any overarching theory of hybridizing mixed cases — or at least any theory deeper than the observation that absent class members warranted the protection of notice and opt-out at the stage of a case implicating individual issues, especially when apportionment of settlement proceeds seemed questionable.

The current ferment concerning class certification of mixed cases was precipitated by the passage of the Civil Rights Act of 1991 ("CRA").[73] The CRA was drafted with the intention of aiding victims of discrimination by, among other things, expanding the scope of available remedies to include not only the traditional "equitable" remedy of monetary relief in the form of backpay compensating plaintiffs for lost wages, but also to permit limited recovery of actual and punitive damages.[74]

Ironically, this limited expansion of the scope of potential remedies has in many courts resulted in a dramatic contraction in the scope of actual relief. This is because employment discrimination cases that were previously certified as a matter of course under Rule 23(b)(2) — because they encompassed only

72. *See, e.g.*, *Cox*, 784 F.2d 1546; *Holmes*, 706 F.2d 1144; *Penson*, 634 F.2d 989; Johnson v. Gen. Motors Corp., 598 F.2d 432 (5th Cir. 1979); *Pettway*, 494 F.2d at 256-57; Bing v. Roadway Express, 485 F.2d 441, 447-49 (5th Cir. 1973).

73. 42 U.S.C. § 1981a(a)(1) (2000). *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 32.42 (2004) ("Class action certification of disparate treatment claims under Rule 23(b) has become more complicated since the 1991 amendments to Title VII.").

74. 42 U.S.C. § 1981a(a)(1). Either party may demand a jury trial on those monetary claims. § 1981a(c).

injunctive relief and the "equitable" remedy of backpay — now also include claims to varying individual damages. The common core issues remain: is the employer's class-directed conduct unlawful, thus warranting class-wide injunctive relief? But stray spokes now radiate out; even if defendants' class-directed conduct was unlawful, how, if at all, did that conduct harm each individual class member? The presence of these individual issues going to monetary damages now means that the cases cannot be slotted so easily into the relatively coherent 23(b)(2) class action form.

After the CRA, two main camps have evolved. The Second and Ninth Circuits in *Robinson,*[75] and *Molski v. Gleich,*[76] followed an approach generally in line with the earlier Fifth and Eleventh Circuit cases. That is, they upheld certification of mixed cases as pure (b)(2) classes, requiring notice and opt-out at stage II, as if that stage of the case were certified under (b)(3).[77]

The D.C. Circuit, also in this camp, though on the outskirts, has been perhaps the most explicit and specific in its support of the hybrid (b)(2)/(b)(3) class action — though, again, in dicta — with two prominent decisions in *Eubanks v. Billington,*[78] and *Thomas v. Albright.*[79] The D.C. Circuit's approach is particularly interesting in that it begins with the traditional presumptive certification of mixed employment discrimination claims under (b)(2), but "conclude[s] that when a (b)(2) class seeks monetary as well as injunctive or declaratory relief the district court may exercise discretion in at least two ways."[80] First, the court explicitly approves of hybrid (b)(2)/(b)(3) certification:

> The court may conclude that the assumption of cohesiveness for purposes of injunctive relief that justifies certification as a (b)(2) class is unjustified as to claims that individual class members may have for monetary damages. In such a case, the court may adopt a "hybrid" approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief, effectively granting (b)(3) protections including the right to opt out to class members at the monetary relief stage.[81]

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75. 267 F.3d 147.

76. 318 F.3d 937, 949 (9th Cir. 2003). *Cf.* Smith v. Univ. of Wash., Law Sch., 233 F.3d 1188, 1196 (9th Cir. 2000) (foreshadowing *Molski*).

77. *Robinson*, 267 F.3d at 172. *Cf. id.* at 162 n.7 (quoting Professor Newberg's and Conte's discussion of "four alternatives utilized by courts in Rule 23(b)(2) class actions seeking injunctive relief coupled with individual damage claims"). *Molski* largely tracked *Robinson* as to the propriety of a (b)(2) class seeking non-incidental damages, also speaking approvingly in dicta of three potential forms of hybrid class certification, including a (b)(2)/(b)(3) hybrid.

78. 110 F.3d 87.

79. 139 F.3d 227 (D.C. Cir. 1998).

80. *Eubanks*, 110 F.3d at 96.

81. *Id.* (citing *Holmes*, 706 F.2d at 1154-60; 1 NEWBERG & CONTE, *supra*

Second, if the class is sufficiently cohesive at stage II so as not to require a hybrid (b)(2)/(b)(3) class, but not so cohesive as to permit pure (b)(2) certification across the board, the court upholds the discretionary power of the district court to authorize opt-out for unusually situated class members within a pure (b)(2) suit: "Alternatively, the court may conclude that the claims of particular class members are unique or sufficiently distinct from the claims of the class as a whole, and that opt-outs should be permitted on a selective basis [within the (b)(2) class]."[82]

Interestingly, despite the explicit approval of the (b)(2)/(b)(3) hybrid, the holding in both D.C. Circuit cases actually resulted in certification of a pure (b)(2) class without *any* opt-out, even though both cases involved settlements involving fairly significant monetary relief. The D.C. Circuit affirmed such a certification in *Eubanks*,[83] and went so far as to reverse the district court's authorization of selective opt-out in *Thomas* as an abuse of discretion. [84] The D.C. Circuit thus approves in principle of (b)(2)/(b)(3) hybrid classes (if the entire class warrants opt-out at stage II), or of selective opt-out in stage II (if a subset of class members is unusually situated vis-à-vis the rest of the relatively coherent class). In practice, though, it has squelched autonomy rights even for settlements involving significant sums in the tens of thousands per class member.

In contrast to these cases, the Fifth Circuit's current approach is the most hostile to hybrid certification (though developments after the *Allison* panel's original opinion make the Circuit's approach significantly less antagonistic). The court's analysis of a mixed employment discrimination case in *Allison*[85] is unreceptive to both pure (b)(2) certification (with hybrid opt-out rights) and to hybrid (b)(2)/(b)(3) certification. *Allison* not only holds the availability of any individually variable damages under Title VII to preclude pure (b)(2) certification, but is also off-handedly dismissive of the possibility of hybrid (b)(2)/(b)(3) certification.[86]

After a lengthy discussion ultimately rejecting the propriety of a (b)(2) class, *Allison* opaquely rejects the possibility of a (b)(2)/(b)(3) hybrid in a three-paragraph section, with the only reasoning being a four-sentence recitation of the district court's

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note 25, § 4.14, at 4-51 to 4-52 (3d ed. 1992); Rutherglen, *supra* note 63, at 30).

82. *Id.* One interesting question, beyond the scope of this Article, is whether this practice of "selective opt-out" for a small subset of unusually settled members of a (b)(2) class should be available, in appropriate circumstances, for stage I of a (b)(2)/(b)(3) hybrid.

83. *Id.* at 91.

84. *Thomas*, 139 F.3d at 235. *Thomas* first held that *Eubanks* was not affected by the intervening 1997 Supreme Court decision in *Amchem*, which expressed general concerns about mandatory, non opt-out classes. *Id.* at 234.

85. *Allison*, 151 F.3d 402.

86. *Id.* at 418-19.

conclusions about the viability of a (b)(3) class serving as the apparent basis for rejecting the (b)(2)/(b)(3) hybrid.[87] *Allison* apparently follows the district court in holding that the same individual issues that preclude common, injunctive relief from predominating under (b)(2) also preclude common issues from predominating under (b)(3). The court reasons that determination of defendant Citgo's liability for damages could only occur through assessment of each class member's individual circumstances, and that this somehow precludes (b)(3) predominance of common issues. The court also suggests that the many plaintiffs and many issues in the suit would require multiple juries and would implicate manageability, efficiency, and Seventh Amendment concerns.[88]

Allison's marked skepticism about class certification of a mixed case as a pure (b)(2) hybrid or a (b)(2)/(b)(3) hybrid is not technically the holding, as the majority in *Allison* explicitly recognized in the statement it issued accompanying its denial of rehearing:

> The trial court utilized consolidation under rule 42 rather than class certification under rule 23 to manage this case. We review that decision for abuse of discretion and we find no abuse in this case. We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability issues that are common to the class and to certify for class determination those discreet [sic] liability issues.[89]

Though cryptic, this statement suggests that *Allison* did not definitively reject the propriety of a partial (b)(2) or hybrid (b)(2)/(b)(3) class; indeed, this is exactly how the Seventh Circuit interprets the statement.[90]

Another key development in the Fifth Circuit is the opinion of a divided panel in the recent case of *In re: Monumental Life Insurance Co.*[91] *Monumental Life*, while technically consistent with *Allison*, as a practical matter broadens *Allison*'s approach by approving certification of a pure (b)(2) class with hybrid opt-out rights, notwithstanding significant monetary claims, so long as the variability of individual damages does not turn on the subjective

87. *Id.* This section of the court's opinion, VI.A., may be intended as an introduction to some or all of the court's subsequent analysis, but if so, that analysis also focuses on (b)(3) certification rather than the analytically distinct (b)(2)/(b)(3) hybrid certification.

88. *Id.* at 419.

89. *Id.* at 434.

90. *See Jefferson*, 195 F.3d at 898 ("[T]he order [in *Allison* accompanying the denial of rehearing] appears to suggest the possibility of a partial or split class certification, just as we did above, so that a class under Rule 23(b)(2) could seek injunctive relief while notice and opt-out rights were preserved for damages issues.").

91. 365 F.3d 408 (5th Cir. 2004).

circumstances of each class member.[92] This is effectively the pure (b)(2) hybrid notice and opt-out structure of *Robinson*, though the Fifth Circuit authorizes this structure through a different, narrower set of certification criteria.[93]

The Seventh and Eleventh Circuits have followed the Fifth Circuit's narrow approach in *Allison* as to the scope of a purely (b)(2) class that precludes opt-out. Intriguingly, though, in contrast to *Allison*, those courts have repeatedly spoken approvingly of hybrid certification in some form, beginning with Judge Easterbrook's opinion in *Jefferson* — though, again, in dicta, in passing, and in multiple potential forms (including a (b)(2)/(b)(3) hybrid).

After rejecting certification of a mixed case as a pure (b)(2) class in *Jefferson*, Easterbrook ruminated:

> Divided certification also is worth consideration. It is possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3), achieving both consistent treatment of class-wide equitable relief and an opportunity for each affected person to exercise control over the damages aspects. . . . Instead of divided certification - perhaps equivalently to it — the judge could treat a Rule 23(b)(2) class as if it were under Rule 23(b)(3), giving notice and an opportunity to opt out on the authority of Rule 23(d)(2).[94]

Since *Jefferson*, the Seventh Circuit has reiterated its explicit support for the (b)(2)/(b)(3) hybrid class, even going out of its way to explain that such a class would not run afoul of the Constitution.[95]

The Eleventh Circuit, in *Murray v. Auslander*,[96] similarly embraced *Allison*'s narrow approach to pure (b)(2) certification, holding that a mixed case encompassing non-incidental monetary damages could not proceed as a pure (b)(2) class. As in *Jefferson*, though, the court approved of certifying the injunctive portions of the claim under (b)(2), and directed the district court on remand to consider whether the damages claims could be certified under (b)(3) — a process that, taken together, would result in a hybrid (b)(2)/(b)(3) class.[97] In addition to these court of appeals opinions, a few district courts have actually certified hybrid classes.[98]

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92. *Id.* at 416.

93. *Id.* at 417.

94. *Jefferson*, 195 F.3d at 898. Note that the second option would not, in fact, be equivalent to the first, because if the (b)(2) class were treated as if it were certified *entirely* under (b)(3), opt-out must be provided for *all* stages of the litigation, not merely stage II.

95. *See* Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 581 (7th Cir. 2000) (discussing divided certification).

96. 244 F.3d 807, 812 (11th Cir. 2001).

97. *Id.*

98. *See* Beck v. Boeing, 203 F.R.D. 459 (W.D. Wash. 2001) (granting

In sum, there has recently been a great deal of support for the general principle that mixed cases seeking both injunctive relief and damages can and should be certifiable, in some form, under some blend of 23(b)(2) and (b)(3). The courts of appeals have expressed this support in dicta, briefly mentioning various potential structures for such hybrid classes, sometimes under a pure (b)(2) class, and sometimes under a (b)(2)/(b)(3) hybrid. The last decade has thus brought about a surprisingly general consensus — woefully short on specifics, and often set forth in dicta in footnotes — that some form of hybrid sounds like a good idea. Part III is intended to crystallize that consensus into a particular form of (b)(2)/(b)(3) hybrid that is fair, efficient, and consistent with Rule 23 and the Constitution.

III. THE HYBRID (B)(2)/(B)(3) CLASS ACTION

Understanding how the (b)(2)/(b)(3) hybrid fully complies with both the theory and explicit criteria of Rule 23 requires working through the elements necessary for certification of a (b)(2)/(b)(3) hybrid class. Those elements are summarized as follows, and explicated in the remainder of Part III:[99]

A. The Criteria for Certifying a Hybrid (b)(2)/(b)(3) Class Action

1. (b)(2) Text: The class must be seeking final injunctive or declaratory relief that flows to the class as a whole, given the defendant's ongoing, class-directed conduct;

2. (b)(2) Predominance:

a. There must be a critical mass of common issues concerning the defendant's liability for injunctive relief such that resolution of those common issues would materially advance resolution of the entire lawsuit, and such that the class would reasonably seek and the court would reasonably award such class-wide relief, even in the absence of damages;

b. There must not be a critical mass of individual issues undermining class cohesivity for the portion of the case sought to be certified under (b)(2), whether only the

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certification for hybrid class), *vacated in part by* Beck v. Boeing, 60 Fed. Appx. 38 (9th Cir. 2003); Smith v. Texaco, 88 F. Supp. 2d 663 (E.D. Tex. 2000) (certifying a hybrid class action), *vacated by* 281 F.3d 477 (5th Cir. 2002) (vacating district court and panel opinion because parties settled while *en banc* review was pending); Beckmann v. CBS, Inc., 192 F.R.D. 608 (D. Minn. 2000) (holding that a hybrid class certification should be granted); Diaz v. Hillsborough County Hosp. Auth., 165 F.R.D. 689 (M.D. Fla. 1996) (concluding that the certification of hybrid class was proper).

99. The criteria also address the elements of a properly certified pure (b)(2) class in order to highlight the dividing line between a pure (b)(2) class and a (b)(2)/(b)(3) hybrid.

common, injunctive stage I of the case, or for both stage I and the individual damages stage II of the case. In particular, if the extent of individual issues going to damages so undermines class cohesivity as to require that full notice and opt-out rights be provided for every class member:

i. at both stage I and stage II of the case, then the class cannot be certified under (b)(2);

ii. at neither stage of the case, then the entire class can be certified as a pure (b)(2);

iii. at stage II of the case, but not at stage I, then stage I of the case may be certified under (b)(2) (and a (b)(2)/(b)(3) hybrid may be appropriate);

3. (b)(3) Predominance: This criterion is automatically satisfied if the more exacting (b)(2) predominance criterion has been satisfied.

4. (b)(3) Superiority: Assuming that the (b)(2) text and (b)(2) predominance criteria have been satisfied, but only for stage I of the suit, the court must determine, looking primarily to manageability concerns, whether it would be superior to certify a (b)(2)/(b)(3) hybrid class, or instead a partial (b)(2) class (in which issues going to common, injunctive relief would be resolved, but the suit would not address individual claims to damages and there is thus no stage II).

B. Notice and opt-out rights for (b)(2) portions of the suit: If a court has certified some or all stages of the case under (b)(2), it must decide the appropriate scope of notice and opt-out to provide class members for those stages, shy of the full notice and opt-out required under (b)(3).

A. The Criteria for Certifying a Hybrid (b)(2)/(b)(3) Class Action

1. The Text of 23(b)(2)

The first requirement that a hybrid (b)(2)/(b)(3) class must satisfy is the threshold criterion set forth in the text of 23(b)(2): "[T]he 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."[100] That is, the defendant must be engaged in coherent, class-directed conduct that — if unlawful — would warrant final, class-wide injunctive relief. This requirement is relatively straightforward; the only

100. FED. R. CIV. P. 23(b)(2).

serious issue concerns classes that seek "corresponding declaratory relief" in the nature of a declaration that the defendant is liable to the class, without any further relief contemplated other than recovery of damages that individual class members are able to prove. As the advisory committee notes clarify, "[d]eclaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief."[101] Thus, any hybrid class action requires a legitimate, ongoing dispute between the defendant and at least some class members such that the suit, if successful, could provide class members with meaningful injunctive relief — not merely a declaration of liability to be followed by an attempt to recover damages.[102]

2. 23(b)(2) Predominance

The federal courts are deeply split on the meaning of Rule 23(b)(2) predominance, which is the criterion stated in the advisory committee notes that a (b)(2) class action is improper when "appropriate final relief relates exclusively or predominantly to money damages."[103] The two leading cases are the Fifth Circuit's opinion in *Allison*,[104] which defines (b)(2) predominance quite narrowly, and the Second Circuit's opinion in *Robinson*,[105] which defines (b)(2) predominance relatively broadly. For different reasons, both of the leading cases are mistaken, though both are also in significant part correct; the proper analysis, appropriately enough, lies in a hybrid of the two approaches.

The (b)(2) predominance criterion is central to the (b)(2)/(b)(3) hybrid. Recall that (b)(2) predominance comes not from the text of Rule 23, but rather from the 1966 advisory committee notes, which

101. FED. R. CIV. P. 23(b)(2) advisory committee's note.

102. There are interesting issues at the border of what constitutes meaningful injunctive relief, but those are beyond the scope of this Article. These gray zone issues include: what percentage of the class, or what absolute number of class members, must have an ongoing relationship with the defendant such that injunctive relief directed to the class is meaningful? When can a class, particularly within but not limited to the civil rights context, encompass future members — those who will be subjected to the defendant's ongoing practices in the future — such that an injunction against the defendant will provide meaningful relief in that it will protect not only at least one named representative (necessary for standing), but also future class members (who may make the scope of the relief meaningful)? When should a request for a declaration of liability, plus class-wide, or readily calculable, disgorgement or restitution, be considered to be equitable relief? I have my personal opinions about where to draw these lines, but the larger point is that courts can and should make these determinations, and wherever the line is drawn, an entirely justified hybrid (b)(2)/(b)(3) class will result.

103. FED. R. CIV. P. 23(b)(2) advisory committee's note.

104. 151 F.3d 402.

105. 267 F.3d 147.

state that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[106] An argument superficially helpful to the (b)(2)/(b)(3) hybrid could be made that because (b)(2) predominance is not stated in the text of Rule 23, it is therefore not binding, or at least should be understood as less important and more flexible than a criterion set forth in Rule 23 itself. The logic and policy underlying Rule 23, however, cannot be understood coherently without careful application of (b)(2) predominance — both in assessing whether a pure (b)(2) class is properly certified (the debate between *Robinson* and *Allison*), and, of direct relevance here, in ensuring that a hybrid (b)(2)/(b)(3) class is properly certified. In order to understand how (b)(2) predominance should be analyzed in the hybrid context, it is necessary to review the proper measure of (b)(2) predominance in the context of a pure (b)(2) class.

Allison speaks approvingly of the "[c]ommentators [who] have taken the position that determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided."[107] Thus, quite wisely, *Allison*'s starting point in construing (b)(2) predominance is a functional analysis of the reasons for and consequences of such a finding, rather than an intuitive or dictionary understanding of "predominance."[108] *Allison* first notes that "because of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members."[109] Thus, unlike a (b)(3) class, in a (b)(2) class there is no absolute right for absent class members to receive notice of the suit, and no absolute right to opt out of the suit.[110]

Allison then reaches an initial conclusion that is entirely apt: "[M]onetary relief 'predominates' under Rule 23(b)(2) when its presence in the litigation suggests that the procedural safeguards of notice and opt-out are necessary . . . ."[111] In other words, the class cannot be certified under (b)(2) when individual issues going to damages are sufficiently weighty to require full notice and opt-out rights, i.e., when (b)(3) rather than (b)(2) is the proper route for certification. This is precisely the proper approach.

Allison's next step, however, is by no means obvious. It holds that the (b)(2) predominance line requiring full notice and opt-out

106. FED. R. CIV. P. 23(b)(2) advisory committee's note.
107. *Allison*, 151 F.3d at 412 (citing 7A WRIGHT ET AL., *supra* note 24, § 1775; NEWBERG & CONTE, *supra* note 25, § 4.14).
108. *Id.*
109. *Id.* at 413.
110. *Id.* at 412 (citing FED. R. CIV. P. 23(c)(2)).
111. *Id.* at 413.

rights is crossed "when the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each potential class member's case."[112] Thus, *Allison* holds, "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[113]

Allison thereby concludes that common, injunctive relief predominates over monetary relief only when monetary relief is "incidental" — i.e., when the class asserts no monetary claims other than those following mechanically from the very fact of liability. *Allison* thus effectively transmutes the assessment of whether common injunctive issues or individual damages issues predominate into an assessment of whether there are any individual damages issues at all. *Allison* provides no basis for its conclusion that when damages vary even minimally among class members who share an overwhelmingly important interest in injunctive relief the case cannot be certified in a pure (b)(2) class.

Whether *Allison* is correct on this issue is largely beyond the scope of this Article because its rejection of a pure (b)(2) class, whenever individual damages are sought, goes to the dividing line between a pure (b)(2) class and a (b)(2)/(b)(3) hybrid, and not to the general viability and wisdom of the hybrid class. It bears noting, however, that *Allison*'s conclusion is not particularly convincing. It would seem that a case with common, injunctive issues of overwhelming importance and non-incidental, individually variable damages of a few dollars — or likely even a few hundred dollars, or perhaps even a few thousand dollars — could properly be certified as a pure (b)(2) class with limited notice and opt-out rights rather, even, than a hybrid class.

More saliently for present purposes, *Allison* provides no basis for its apparent implicit conclusion that if an entire case cannot proceed under (b)(2) because full notice and opt-out rights are necessary at some point, then not even stage I of the case can be certified under (b)(2). *Allison* thus errs in effectively requiring that full notice and opt-out rights be provided at every stage of any suit in which such rights are required at any stage.[114]

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112. *Id.*

113. *Id.* at 415 (citation omitted).

114. The Seventh and Eleventh Circuits have adopted *Allison*'s narrow interpretation of pure (b)(2) predominance. *See Murray*, 244 F.3d at 812 (ruling that because plaintiff class's damages claim predominated over its injunctive claims, the damages should have been exempted from class treatment); *Lemon*, 216 F.3d at 582 (remanding district court's ruling because monetary relief was not incidental to equitable relief).

In contrast, the Second Circuit in *Robinson* specifically rejected *Allison*, holding that (b)(2) certification may be proper even when non-incidental, individually variable damages are sought, so long as the "positive weight or value" of the injunctive relief is greater than that of the monetary relief.[115] The *Robinson* court thus holds that the determination of (b)(2) predominance requires an "ad hoc," context-specific determination of the relative importance of injunctive and monetary relief sought by the class, instructing the district court to consider whether "'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed.'"[116] This is precisely the assessment of relative importance that *Allison* wisely rejects in favor of a functional analysis that looks to the reason for determining (b)(2) predominance.

The remainder of *Robinson*'s predominance analysis, however, is entirely proper, requiring that "class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy."[117] While not setting a bright line cut-off for (b)(2) predominance (in contrast to *Allison*), *Robinson* does set appropriate minimum criteria:

> Although the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case, before allowing (b)(2) certification a district court should, at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.[118]

Thus, while *Robinson*'s starting point is fundamentally flawed — in that it requires weighing the relative subjective importance of common, injunctive and individual damages relief — the principles it states to guide that analysis are entirely apt. Moreover, *Robinson*'s adoption of the hybrid opt-out structure by applying full notice and opt-out rights to a mixed case at stage II of a pure (b)(2) class is functionally wise, even though its decision to treat stage II of a pure (b)(2) class as if it were a (b)(3) class (rather than actually certifying stage II under (b)(3)) is analytically suspect.

The proper (b)(2) predominance requirement shares the central framing element of the analysis in *Allison*, and many of the

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115. *Robinson*, 267 F.3d at 164-65 (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)).

116. *Id.* at 164 (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)).

117. *Id.*

118. *Id.*

other elements of the analysis in *Robinson*. *Robinson* accurately captures the threshold notion of a critical mass of common, injunctive relief, i.e., injunctive relief that would materially advance the suit as a whole, that would be reasonable for a plaintiff class to seek, and that would be reasonably necessary and appropriate for a court to award, even in the absence of monetary damages.

Robinson missteps in framing its analysis by requiring some kind of unitary weighing of the common, injunctive relief versus the variable individual claims for damages.[119] In other words, *Robinson* mandates a direct comparison, on some metric, between the weight or value of the injunctive relief as opposed to the monetary relief sought by the plaintiff class. The metric is not clearly identified; it seems to be the subjective importance of the relief to the plaintiff class — a measurement that seems both impossibly mushy and manipulable, and, in any event, not the appropriate standard.

As *Allison* properly recognized, "[t]he Advisory Committee Notes make no effort to define or explain the concept [of predominance]. Interpreting the term literally, predominant means 'controlling, dominating, [or] prevailing.' But how that translates into a workable formula for comparing different types of remedies is not at all clear."[120] Commentators have long recognized that any attempt to measure (b)(2) or (b)(3) predominance on any unitary scale is incoherent and useless — an assessment adopted by *Allison*.[121] Rather than a weighing of common, injunctive versus individual damages issues — a

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119. *Id.* (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)).

120. *Allison*, 151 F.3d at 411-12 (citations omitted).

121. Professors Newberg and Conte generally agree, though go further by suggesting that courts ignore (b)(2) predominance in determining the propriety of certifying a hybrid (b)(2)/(b)(3) class:

> When the parties dispute which form of relief is predominant with respect to the appropriateness of Rule 23(b)(2) for any class certification, it is counterproductive for the court to expend time to try to resolve this largely discretionary question, which does not address the merits of the case. Rather, the court should conclude that when the Rule 23(a) prerequisites are satisfied and declaratory or injunctive relief is sought as an integral part of the relief for the class, then Rule 23(b)(2) is applicable regardless of the presence or dominance of additional prayers for damages relief for class members. With this approach, the court has at least four options for class certification. First, under Rule 23(c)(4)(A), the court could limit the Rule 23(b)(2) certification to certain issues only. Second, the court could certify the injunction claims under Rule 23(b)(2) and the damages claims under Rule 23(b)(3). Third, the court could certify the entire class initially under Rule 23(b)(2), bifurcate the trial so that the defendant's liability potentially for both forms of relief is determined initially, and reconsider the class certification category if the plaintiffs and the class are successful at the liability stage.

2 NEWBERG & CONTE, *supra* note 25, § 4.14.

misguided attempt to weigh incommensurables — the common issues must be measured against the functional criteria *warranting* (b)(2) resolution, and the individual issues must be measured against the criteria *precluding* (b)(2) certification.

Thus, as the Fifth Circuit has recently clarified, "*Allison* did not hold . . . that monetary relief predominates where it is the 'prime goal' or a mere bootstrap to injunctive relief. Instead, 'determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided.'"[122]

Rather than attempt to define predominance in terms of some comparison between the scope of injunctive relief and monetary relief on some unitary scale, *Allison* requires the proper functional analysis to determine when individual issues are of sufficient significance to preclude certification of a pure (b)(2) class, because class interests are sufficiently divergent to require the full notice and opt-out rights of a (b)(3) class.[123] *Allison* then appears to misstep in its application of this framing construct, concluding that, for a pure (b)(2) class, individual monetary relief predominates whenever it is present, unless it is "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances."[124] As explained above, this extremely narrow construction rejecting (b)(2) predominance in the presence of *any* individual damages is in considerable tension with the natural reading of "exclusively or predominantly to money damages,"[125] and thus not a particularly convincing place to draw a bright line precluding (b)(2) certification. Even more fundamentally, though, the problem with *Allison*'s approach is that there is no functional justification for drawing *any* bright line cut-off. As *Robinson* properly recognizes, the (b)(2) predominance assessment can only plausibly be case-specific. Though *Robinson* did itself no favors by characterizing its approach as "ad hoc," with the consequent seat-of-the-pants connotation, it wisely insisted on focusing on the particular common and individual issues in the suit, rather than imposing an inflexible, acontextual bright line rule that in every suit, any individual variability is too much.

The next key insight to (b)(2) predominance, which *Allison* entirely misses and *Robinson* only hints at, is that the (b)(2)

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122. *Monumental Life*, 365 F.3d at 415 (quoting *Allison*, 151 F.3d at 412) (citing 7A WRIGHT, ET AL., *supra* note 24, § 1775, at 470).

123. This is completely consonant with the Supreme Court's explication of (b)(3) predominance in *Amchem*: "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

124. *Allison*, 151 F.3d at 415.

125. FED. R. CIV. P. 23(b)(2) advisory committee's note.

predominance test must be applied to the stage *or stages* of the case that plaintiffs seek to certify under (b)(2). Quite often, plaintiffs will plead in the alternative, seeking to certify a pure (b)(2) class, given the advantages of narrower notice and opt-out rights — or, if the court finds the class insufficiently cohesive to be certified entirely under (b)(2), plaintiffs will seek to certify a (b)(2)/(b)(3) hybrid. Thus, the court will determine if the scope of individual issues going to damages so undermines class cohesivity as to require that full notice and opt-out rights be provided to every class member (1) at neither stage of the case, in which event a pure (b)(2) class can be certified, (2) at both stages of the case, in which event the case cannot proceed to any extent under (b)(2), or (3) at stage II of the case, but those rights need not be provided at the more cohesive stage I, in which event stage I may proceed under (b)(2), thereby raising the possibility of a (b)(2)/(b)(3) hybrid.

An example of a case in the first category, i.e., one warranting certification under a pure (b)(2) class despite non-incidental individual damages, might be a civil rights class action on behalf of a few dozen inmates who have been housed for a few weeks on a particular cell block alleged to be severely overcrowded. Such a case might well involve compelling issues of injunctive relief, and very modest damages (against prison officials in their individual capacities), but those claims for damages might encompass some non-trivial variability among class members (e.g., as to the length of time on the cell block, and the particular deprivations suffered), but be relatively congruent despite the subjective variability, with the damages relatively small. In such circumstances, neither Rule 23 nor Due Process should require that every class member be permitted to opt out of any portion of the suit. Class members' autonomy interests in their individual issues of damages can be entirely adequately protected by measures short of the blanket, full opt-out required if (b)(2) certification were rejected in favor of (b)(3) certification.

An example of a case fitting into the second category, i.e., a case that cannot be certified under (b)(2) despite a common, injunctive set of issues, might be a class analogous to the one exposed to asbestos in *Ortiz*,[126] in which damages at stage II would be extremely large, and in which there would be wide variability in class members' interests at stage I given the extreme variability at stage II. Those class members with already manifested injuries, for example, have significantly different interests, even at stage I, than those class members who have not yet manifested injury because, e.g., the larger and stronger the damages claim, the more

126. 527 U.S. at 861. This example brackets the question of the extent to which sub-classing (and providing separate counsel) to those groups under Rule 23(c)(4)(B) would significantly mitigate the cohesivity concern.

risk averse the class member is likely to be at injunctive stage I.

Examples in the third category, i.e., cases in which stage I can be certified under (b)(2) but stage II cannot, would be many of the mixed cases discussed earlier in the Article. For example, *Robinson, Allison,* and *Coleman* were likely best structured in this manner. Common issues going to the defendant's liability for its class-directed conduct, and the need for and scope of injunctive relief would occur in stage I under (b)(2). It is possible that individual issues of backpay — historically considered "equitable" — could also be resolved in the (b)(2) stage of the case, as *Allison* itself holds that such claims can be part of a (b)(2) class.

In all likelihood, though, *Allison*'s concession to (b)(2) makes little sense, and is likely driven by the desire to adhere to the Fifth Circuit line of cases, prior to the CRA of 1991, in which employment discrimination cases in their entirety were certified under (b)(2). In cases such as *Allison*, though, the scope of individual issues needed to resolve backpay — e.g., would a class member have been promoted but for the problematically amorphous promotion process — vary tremendously among class members. *Allison* is incorrect in effectively holding that mixed employment discrimination cases cannot be certified post-CRA, but it should be credited for making clear that the universally accepted pure (b)(2) certification of such cases pre-CRA was likely untenable (notwithstanding *Allison*'s own unconvincing asides to the contrary).

So long as one concurs in this proposed structure for assessing (b)(2) predominance, there is no reason why one must agree with any particular assessment of where to draw the line in the pure (b)(2) predominance context in order to concur in the structure and certification criteria proposed for the hybrid (b)(2)/(b)(3) class. One could agree with *Allison* that pure (b)(2) classes may never include any non-incidental damages, and thus believe that the example of the inmate class seeking minor but non-trivial damages, may not be certified as a pure (b)(2), instead requiring certification as a (b)(2)/(b)(3) hybrid. Thus, agreeing with *Allison* on the scope of a pure (b)(2) class would not cause one to reject the propriety of the (b)(2)/(b)(3) hybrid, but rather to believe that the hybrid must occupy a greater expanse of the spectrum between a pure (b)(2) and a pure (b)(3) class action. Indeed, this is precisely the analysis that the Seventh and Eleventh Circuits have adopted — a narrow approach to pure (b)(2) certification, and a welcoming approach to hybrid (b)(2)/(b)(3) certification.[127]

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127. *See Murray*, 244 F.3d at 812-13 (suggesting that it would accept (b)(2) certification of claims for injunctive and declaratory relief, and remanding for a determination whether claims to damages could be certified under (b)(3), thereby implicitly expressing approval for some form of hybrid certification); *Jefferson*, 195 F.3d at 898 (expressly stating approval of hybrid (b)(2)/(b)(3)

3. 23(b)(3)Predominance

In order to understand the role of (b)(3) predominance in certification of a hybrid (b)(2)/(b)(3) class action — none at all — it is necessary to recognize that (b)(2) classes, hybrid (b)(2)/(b)(3) classes, and (b)(3) classes are a nested set. Though the argument is largely beyond the scope of this Article, understanding this nesting is necessary to understanding why (b)(3) predominance is irrelevant to the (b)(2)/(b)(3) hybrid.

Properly understood, pure (b)(2) classes are a subset of those class actions that could be certified as (b)(2)/(b)(3) hybrids, and hybrid (b)(2)/(b)(3) classes are a subset of those class actions that could be certified entirely under (b)(3). This is because these categories of class action are not fundamentally incompatible.[128] Instead, the narrower, more cohesive categories satisfy all the requirements of the broader categories. The greater the cohesivity of the class, the more stages of the case that can be certified under (b)(2) rather than (b)(3), because a narrower range of notice and opt-out can be provided while still respecting absent class members' autonomy rights. Thus, in line with the widely accepted principle for choosing a (b)(2) rather than a (b)(3) class action if a class can be certified under either,[129] if a class may be certified under more than one of the 23(b) categories, including a pure (b)(2), a (b)(2)/(b)(3) hybrid, and a pure (b)(3), it should be certified under the category authorizing the narrowest scope of notice and opt-out.

A (b)(3) class is the broadest category. This is because all classes certifiable under (b)(3) share the characteristic of having a predominate core of common issues, with a class action being the superior method of resolving the dispute. In a (b)(3) class that cannot be certified as a hybrid or a (b)(2) class, there are sufficiently varying individual issues so that full notice and opt-out rights must be provided for every class member as to the entire case; (b)(3) class members may exercise their autonomy interest by entirely opting out of the suit if they so desire, because their interests are not sufficiently congruent to those of the class as a whole to require them to remain in even the common portions of the suit.

Parallel to the nested set of class structures is the corresponding nested set of certification criteria. In particular, (b)(2) predominance is a subset of (b)(3) predominance. This

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certification).

128. *But see* Mullenix, *supra* note 11, at 187-88 (arguing that (b)(1) and (b)(2) classes are necessarily cohesive, and thus are fundamentally conceptually incompatible with (b)(3) classes, which are not).

129. *See id.* at 217 (noting the traditional rule that if a class can be certified under multiple provisions of Rule 23(b), the court should certify under the provision providing the narrowest scope of notice and opt-out rights).

means that when a particular proposed class structure satisfies (b)(2) predominance (for stage I or for both stages), the proposed class structure necessarily also satisfies (b)(3) predominance. This is because predominance under both (b)(2) and (b)(3) requires (1) the *presence* of a critical mass of common issues the resolution of which are sufficient to materially advance the case as a whole, and thus warrant collective resolution, and (2) the *absence* of a critical mass of individual issues that would preclude collective resolution of the particular proposed class structure.

As to both of these prongs, (b)(2) predominance requires everything that (b)(3) predominance requires, plus somewhat more. As to the presence of a critical mass of common issues, (b)(2) predominance mandates the additional requirement that those common issues be in the form of a claim for class-wide injunctive relief. As to the absence of a critical mass of individual issues sufficient to preclude the proposed scope of notice and opt-out rights as unduly intrusive on autonomy rights, (b)(2) predominance assesses the viability of narrower autonomy rights than in a (b)(3) class.

Thus (b)(2) predominance requires everything (b)(3) predominance requires, and somewhat more. For a (b)(2)/(b)(3) hybrid, the (b)(2) predominance criterion requires a finding that (1) resolution of common issues would materially advance resolution of the entire suit, *and* that (2) individual issues are *not* so significant as to require full notice and opt-out rights for stage I of the suit. Predominance under (b)(3) would require finding only that (1) resolution of common issues would materially advance resolution of the entire suit, and would be satisfied even if (2) individual issues *were* so significant that full notice and opt-out were required for stage I of the suit. Therefore, any set of individual issues that would permit certification of a hybrid class with opt-out rights limited to stage II could not possibly preclude certification of a (b)(3) class with full opt-out rights as to the entire case.

Because the hybrid (b)(2)/(b)(3) class requires satisfaction of (b)(2) predominance, it does not evade scrutiny for (b)(3) predominance; it is, however, redundant to apply a distinct (b)(3) predominance test to a hybrid (b)(2)/(b)(3) class that has already been determined to satisfy (b)(2) predominance (as to stage I, or as to the entire case). This is where *Allison* most fundamentally errs, in that its three-paragraph rejection of a (b)(2)/(b)(3) hybrid appears to turn on a rejection of (b)(3) predominance — a criterion that is simply not independently applicable to a potential (b)(2)/(b)(3) hybrid that has satisfied (b)(2) predominance as to stage I of the case.[130]

130. Several courts of appeals, including the Fifth Circuit, apply a (b)(3)

4. 23(b)(3) Superiority

Assuming that the (b)(2) text and the (b)(2) predominance tests have been satisfied for stage I (and not for stage II), that means that the common, injunctive portion of the suit should be certified under (b)(2). A final piece of the hybrid (b)(2)/(b)(3) certification analysis remains: should the individual issues going to damages be certified under (b)(3) (thereby certifying a (b)(2)/(b)(3) hybrid suit), or should those individual issues be severed from the suit (thereby certifying a partial (b)(2) class action)? This determination is made pursuant to the criterion of (b)(3) superiority, the final piece of the analysis for certifying a hybrid (b)(2)/(b)(3) suit.[131]

The (b)(3) superiority criterion does not apply independently to the (b)(2) component of the suit, the superiority of which is taken as a given based on the language and logic of Rule 23. The (b)(2) portion of the suit does not require a superiority determination under Rule 23 because the drafters of the Rule quite reasonably believed that any class (or portion thereof) certifiable under (b)(2) would necessarily be a superior manner of resolving the dispute, given the natural cohesivity among (b)(2) class members. The (b)(3) superiority criterion looks, then, to stage II of the case — the individual claims for monetary relief that cannot be certified under (b)(2). The two options to assess in determining superiority are either to certify a stage II under (b)(3), and thus to certify a hybrid (b)(2)/(b)(3) class action, or not to certify stage II at all, leaving stage I as a partial (b)(2) class action.[132]

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predominance test that I have argued elsewhere is analytically incorrect and unduly narrow. Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 276 n.108 (2002). Even if one disagrees with my assessment of (b)(3) predominance, however, this is not fatal to the hybrid (b)(2)/(b)(3) class; it merely makes the theory less elegant, and even more useful, in that cases could be certified under a hybrid (b)(2)/(b)(3) structure that could not be certified under a pure (b)(3) class. While I disagree, this is not incoherent, and indeed it is precisely the approach of the Seventh and Eleventh Circuits, which follow the Fifth Circuit on pure (b)(2) and pure (b)(3) predominance, but expressly (albeit in dicta) approve of the (b)(2)/(b)(3) hybrid.

131. The matters pertinent to the findings of both predominance and superiority include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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

132. In a partial (b)(2) class, any absent class members seeking damages would need to file a subsequent suit (with issue preclusion from the partial

This (b)(3) superiority determination turns largely on manageability (as is typical for (b)(3) superiority). If the court determines that it is able to resolve the varying individual issues of stage II within the scope of a single suit in a fair and efficient manner, (b)(3) superiority is satisfied, and the case should proceed as a hybrid (b)(2)/(b)(3) class action. If, instead, the court finds that it is unable to manage resolution of the individual issues in an effective manner, then it should not certify stage II under (b)(3), and a partial (b)(2) class will be superior.[133]

There is some disagreement among courts and commentators over the role that manageability concerns should play in the (b)(3) superiority determination. The stronger position seems to be that certification should rarely be denied on the basis that a class (or portion thereof) is unmanageable, because the proper criterion is not whether management of the class will be difficult, but rather whether it would be less difficult than if every class member were to bring an individual suit for damages — a position that, perhaps surprisingly, Richard Posner shares.[134] In any event, once again it is not necessary to take any particular position on where to draw the line on (b)(3) superiority and manageability in order to concur in the structure of the (b)(2)/(b)(3) hybrid, and the role of (b)(3) superiority in the certification determination.

B. Notice and Opt-Out in a Hybrid Class Action

As explained above, (b)(2) text, (b)(2) predominance, and (b)(3) superiority criteria comprise the requirements for certifying a (b)(2)/(b)(3) hybrid. These criteria leave open important issues concerning the implementation of such a suit. Most notably, there

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(b)(2) class action applying in favor of either the plaintiff class or defendants).

133. An example of the relatively rare case in which a partial (b)(2) might well be superior to a (b)(2)/(b)(3) hybrid is the enormous class action in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). There, the size of the class and the variability of the factual circumstances across the country might suggest that liability to the class and injunctive relief be resolved collectively at stage I, but that damages be determined in, e.g., statewide (or store-wide) (b)(3) classes in separate suits.

134. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 660-61 (7th Cir. 2004). The court stated:

> [A]lthough the district judge might have said more about manageability, the defendants have said nothing against it except that there are millions of class members. That is no argument at all. The more claimants there are, the more likely a class action is to yield substantial economies in litigation. . . . The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative — no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied — to no litigation at all.

Id.

are unresolved issues concerning the proper scope of notice and opt-out for the portions of the suit certified under Rule 23(b)(2).[135] The most serious potential criticism of the (b)(2)/(b)(3) hybrid is that restricting the scope of notice and opt-out in stage I of a hybrid is an undue intrusion into the autonomy interests of absent class members, at least those with substantial damages claims. Thus it is vital to explore the extent to which the district court in fact has the power to protect absent class members' autonomy interests in the (b)(2) portion of a hybrid suit, shy of the full notice and opt-out rights provided under (b)(3).

The district court retains tremendous flexibility under Rule 23(d) to enter orders that are highly protective of absent class members' autonomy interests, shy of complete opt-out. These methods include granting class members the right to intervene in the case, perhaps representing a distinct sub-class.[136] The district courts are similarly (perhaps equivalently) authorized to permit absent class members, even though they are required to remain within the lawsuit, to appear represented by separate counsel of their own choosing, more along the lines of mandatory aggregation than mandatory class membership.[137]

The district court may thus provide significant autonomy to class members who have a legitimate basis for seeking to control litigation of their individual issues going to damages. Although these class members are required to remain in a forum they might rather avoid, this sort of restriction does not generally present an insurmountable burden under Rule 23 or Due Process (at least if there is personal jurisdiction, or the class member is not seeking substantial damages), given judicial approval of mechanisms such as Multi-District Litigation. Multi-District Litigation allows cases with common issues, including class actions, to be transferred and

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135. In stage II — the remedial, (b)(3) stage of a hybrid (b)(2)/(b)(3) class action, in which individual issues vary and damages may be awarded — absent class members have the full set of rights to notice and opt-out under 23(c)(2) as they would in a case brought entirely under Rule 23(b)(3). "If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class." FED. R. CIV. P. 23(c)(2) advisory committee's note (2003).

136. *See* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 524 (1987) (discussing a party's intervention in order to recover for individual damages); *see also Eubanks*, 110 F.3d at 91 (upholding the district court's decision to allow an absent class member to intervene and be the sole representative of a sub-class, and to deny that class member the right to opt out of a (b)(2) settlement class).

137. *See* 2 NEWBERG & CONTE, *supra* note 25, § 4.1 (citing FED. R. CIV. P. 23(c)(2)) (stating that "alternatively, absent class members have the right to enter their appearance through counsel"); Sherman, *supra* note 136, at 557 (discussing opt-outs and concurrent trials); *Holmes*, 706 F.2d at 1154 (citing Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1220 (5th Cir. 1978)).

consolidated for pre-trial proceedings, despite the wishes of litigants who would rather stay put.[138]

Even beyond permitting class members to appear in the (b)(2) portions of the suit represented by separate counsel, the district court has other means by which to protect absent class members' autonomy interests shy of full opt-out. As the Seventh Circuit has recognized, in the settlement context this will often include presenting all class members (even members of a (b)(2) class) with notice of the proposed settlement, and providing a full right to participate in the Rule 23(e) fairness hearing that determines whether the settlement will be approved, and granting an opportunity to object to the terms of settlement.[139] The D.C. Circuit has similarly recognized that granting such rights to members of a (b)(2) class provides significant protection of their autonomy interests, even when those class members are not permitted to opt out of a (b)(2) settlement resolving claims for non-trivial damages.[140] The district court's power to grant

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138. 28 U.S.C. § 1407 establishes the Judicial Panel on Multidistrict Litigation to improve the management of justice in federal trial courts. Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1001-02 (1974). Under § 1407, the Judicial Panel may temporarily transfer civil actions with common questions of fact, pending in different district courts, to a single court for consolidated pretrial procedures. *Id.* at 1001. Although the Supreme Court has held that § 1407 does not authorize the transferee court to retain the cases for trial, that is a matter of statutory interpretation, rather than Due Process imperative. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 33-43 (1998)

139. Williams v. Burlington N., Inc., 832 F.2d 100, 103 (7th Cir. 1987). *Williams* held that the district court had adequately exercised its power to protect absent class members' autonomy interests because it

> gave all class members the opportunity to voice any objections to the proposed settlement. Further, he appointed a special master to deal with any objections to the settlement proposal. Finally, he held a final fairness hearing before he approved the consent decree.... From a practical standpoint, the opportunities to object in this case were tantamount to the protections envisioned by Fed. R. Civ. P. 23(c)(2). The district court employed measures that provided adequate protection from any potentially antagonistic interest between class members.

Id.

140. As the D.C. Circuit explained in *Eubanks*:

> We note that the district court afforded all class members substantial procedural protections. The settlement agreement provided that prior to its final approval, individual notice of the proposed settlement would be mailed to all potential class members of which the Library was aware or who could reasonably be identified. In addition, notice would be published in area newspapers and publications of the Library of Congress. Individuals who submitted claim forms received follow-up notices, advising them of the Settlement Committee's determination of the relief they were entitled to receive, and that they could contest any aspect of the award at a "fairness hearing" before the district court prior to the court's final approval of the settlement agreement.... Although the procedural protections they received may not have been precisely

discretionary notice for stage I of a hybrid can also, in appropriate circumstances, protect class members' autonomy to a significant extent, even if the scope of notice is somewhat less than would be mandated under *Eisen* for a (b)(3) class.

Several commentators have suggested still other ways in which some form of limited or partial opt-out rights could be granted to absent class members. These opt-out rights, though subject to certain conditions intended to further fairness and efficiency, would be sufficient to protect class members' autonomy rights, but would be less broad than the absolute opt-out right currently required under (b)(3).[141] Whatever one's take on any of these specific proposals, the fundamental point is this: the (b)(2)/(b)(3) hybrid structure can be quite protective of class members' autonomy interests, even at stage I, if circumstances so warrant. It is the rare mixed case in which interests diverge so materially at stage II that the very broad autonomy protections available in stage I of a hybrid (b)(2)/(b)(3) class are insufficient.

IV. CONSTITUTIONAL OBJECTIONS

Even assuming the hybrid (b)(2)/(b)(3) class action as described above is fully consistent with the mandates of, and policies underlying, Rule 23, the next question is whether the

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> equivalent to the rights accorded to (b)(3) class members, appellants point to nothing that would indicate that they did not have a meaningful opportunity to present the merits of their individual claims.

Eubanks, 110 F.3d at 97 n.15 (citing *Williams*, 832 F.2d at 104).

141. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 958 (1998) ("In (b)(1) or (b)(2) cases, conditional or limited opt out rights may also make sense in the context of a negotiated or litigated outcome . . . ."); Sherman, *supra* note 136, at 553 (discussing "the desirability of shaping hybrid forms of opt-out rights which do not necessarily conform to a rigid distinction between mandatory and nonmandatory class actions"). Sherman further contends:

> It is true that such proposals have been unsuccessful thus far. . . . [But this does not undermine the] attractiveness of hybrid opt-out rights and raise[s] the question whether opt-out rights need necessarily be all or nothing. There would seem to be nothing in the definition of the three Rule 23(b) classes to prevent the attachment of hybrid opt-out conditions; indeed those definitions make no reference to the manner in which the duplicative litigation problem will be handled.

Id.; Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 258-61 (1991) (discussing "a number of 'hybrid opt-out rights' which could be devised to balance individual protection with group needs, depending on the particular situation"); *see also Eubanks*, 110 F.3d at 96 n.15 (asserting that although the appellants of a (b)(2) class were not given rights equivalent to that of a (b)(3) class, they were still afforded an adequate opportunity to present the merits of their particular claim); *cf.* Bone, *supra* note 36, at 108-11 (proposing a revised Rule 23 that would provide the courts with guidance with respect to class actions, but also allow modifications dependent on the specific facts of each case).

hybrid class passes constitutional muster. Courts have expressed concerns about hybrid classes under both the Due Process Clause and the Seventh Amendment. Though some forms of hybrid class actions might violate the Constitution, careful implementation of the hybrid (b)(2)/(b)(3) class proposed above, and as further described below, ensures constitutional compliance.

A. Due Process

Due Process concerns may arise in mixed cases when absent class members' autonomy interest in controlling their right to recover damages is unduly hampered because they are confined to a mandatory class with no opt-out right. The Supreme Court has left unresolved (a) whether Rule 23 permits certification of a class seeking monetary damages other than under 23(b)(3), and (b) if so, whether the absence of opt-out rights would accord with Due Process.[142]

These concerns are squarely presented in mixed cases certified entirely under Rule 23(b)(2) without any right to opt out. Thus, it may be that those courts of appeals such as the D.C. Circuit that have approved settlement of pure (b)(2) cases awarding damages without granting class members the right to opt out stand on shaky constitutional footing.[143] Whether that is so or not, the hybrid (b)(2)/(b)(3) class action satisfies Due Process, even assuming the narrowest plausible resolution of the issues left open by the Supreme Court: that damages claims must be certified under 23(b)(3), and that Due Process requires opt-out for all classes seeking damages. This is because the hybrid (b)(2)/(b)(3) class effectively sidesteps Due Process concerns by granting full notice and opt-out rights under 23(b)(3) at stage II, when class members' individual interests in damages are in fact at issue.

Courts and commentators have almost universally recognized that the hybrid opt-out structure comports with Due Process.[144]

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142. *See, e.g.*, *Ortiz*, 527 U.S. 815; *Ticor*, 511 U.S. 117; Adams v. Robertson, 520 U.S. 83 (1997); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 & n.3 (1985).

143. Though beyond the scope of this Article, it would seem that neither Rule 23 nor Due Process would require full opt-out rights under (b)(3) for every class seeking damages. At a minimum, opt-out should not be required in a negative value suit — i.e., for claims that as a practical matter owe their existence to the viability of the class form.

144. It is of course possible to conceive of a hybrid (b)(2)/(b)(3) class with such divergent interests that the inability to opt out of even stage I would violate Due Process. But those are precisely the cases that could not be properly certified as (b)(2)/(b)(3) hybrids because they would fail the (b)(2) predominance criterion. In other words, the certification criteria for a (b)(2)/(b)(3) hybrid are at least as protective of autonomy as is the Due Process Clause. *But see* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 510 (2003) (suggesting that there are due process concerns for absent class members in hybrid cases seeking

George Rutherglen has argued that when a court engages in "certification of claims for class-wide injunctive and declaratory relief under subdivision (b)(2) and certification of claims for individual compensatory relief under subdivision (b)(3) . . . the court . . . avoid[s] the constitutional question whether individual notice is required by the due process clause."[145] Although it may be overstating it a bit to suggest that the due process question may be entirely avoided by a hybrid (b)(2)/(b)(3) class, the answer to that question is clear: due process does not stand in the way of the hybrid (b)(2)/(b)(3) class.

Similarly, Samuel Issacharoff explains:

> What remain unexplored [by the Supreme Court] are those cases in which there are elements that raise collective injunctive claims for relief and potential individual damages claims by absent class members. The logic of Shutts would indicate that in such cases a due process right to opt out is a prerequisite for a binding judgment as to the damages claims, but not as to the injunctive component.[146]

In other words, the hybrid (b)(2)/(b)(3) class is structured precisely so as to satisfy Due Process, as numerous courts of appeals have so held.[147]

Even the courts of appeals with the narrowest approach and the greatest concern for Due Process would find the (b)(2)/(b)(3) hybrid to be constitutional. The Ninth Circuit's decision in *Brown v. Ticor Title Insurance Co.*,[148] which surfaced the Due Process concerns that the Supreme Court noted but did not resolve in *Ticor*, found no Due Process violation in binding class members to the injunctive portion of a mixed case certified and settled without any opt-out rights, though it found a Due Process violation in failing to provide opt-out as to damages.[149] This holding logically

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significant monetary damages, because "the denial of any opt-out (at least until the damage phase) would deny individual plaintiffs control over a suit in which they have very large stakes").

145. Rutherglen, *supra* note 63, at 32-33.

146. Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1066 (2002). *See also id.* ("The effect of focusing on the preclusive nature of the judgment is to disaggregate the two components of the case and to allow a binding judgment on some claims, but not others.").

147. *See* Grimes v. Vitalink Commc'ns Corp., 17 F.3d 1553, 1560 & n.8 (3d Cir. 1994) (concluding that the "due process protections as articulated in *Shutts* are sufficient to bind absent class members who had sufficient minimum contacts with the forum"); *In re* E.& S. Dist. Joint Asbestos Litig., 78 F.3d 764, 778 (2d Cir. 1996) (discussing the due process holding articulated in *Shutts*).

148. *Brown*, 982 F.2d 386.

149. *See id.* at 392 ("Because Brown had no opportunity to opt out of the . . . litigation, we hold there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*."). The court further held that "Brown will be bound by the injunctive relief provided by the settlement . . .,

entails the constitutionality of the hybrid class structure, with no Due Process impediment to a mandatory stage I, notwithstanding downstream damages.

The Seventh and D.C. Circuits have gone the furthest in finding that Due Process presents no obstacle to certifying mixed cases without any opt-out rights, so long as adequate representation is provided. Both courts explicitly endorse the propriety of the (b)(2)/(b)(3) hybrid class action. The Seventh Circuit held:

> [t]he district court could certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages. This avoids the due process problems of certifying the entire case under Rule 23(b)(2) by introducing the Rule 23(b)(3) protections of personal notice and opportunity to opt out for the damages claims.[150]

Indeed, pre-CRA, the Seventh Circuit went so far as to hold that Due Process was satisfied in an employment discrimination action seeking monetary relief certified without opt-out rights because the district court provided notice and provided "all class members the opportunity to voice any objections to the proposed settlement . . ., appointed a special master to deal with any objections to the settlement proposal, [and] held a final fairness hearing before he approved the consent decree."[151] These protections, asserted the court, "provided the appellant with the equivalent due process protection that would be accorded to a Rule 23(b)(3) class member."[152] The D.C. Circuit similarly held that Due Process permits a non-opt-out suit certified and settled entirely under (b)(2), notwithstanding the existence of substantial damages.[153]

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and foreclosed from seeking other or further injunctive relief in this case, but *res judicata* will not bar Brown's claims for monetary damages against Ticor."

150. *Lemon*, 216 F.3d at 581.

151. *Williams*, 832 F.2d at 104.

152. *Id.* *Williams* plainly goes too far in saying that the safeguard of being able to object to settlement in the damages stage of a pure (b)(2) class action is the functional equivalent of the safeguards available under a (b)(2)/(b)(3) hybrid; they are simply not equivalent. The safeguards for absent class members' autonomy interests are far greater in a (b)(2)/(b)(3) hybrid, easily surpassing any Due Process requirements, whatever one's position is as to the constitutionality of mandatory, non-opt-out (b)(2) classes seeking damages. The statement nonetheless helps demonstrate that the far less intrusive hybrid structure is well within Constitutional bounds.

153. *See Eubanks*, 110 F.3d at 97 n.15 (holding that due process is satisfied in the (b)(2) context by less than full notice and opt-out rights, even when monetary damages are sought).

> Although the magistrate judge never conducted individualized hearings, Shaw had an opportunity to file an individual claim with the Settlement Committee, and to challenge the Committee's determination at the fairness hearing before the district court. In due process terms, this

In sum, there is a split of authority between courts holding that Due Process requires opt-out at stage II of a mixed case — as provided in a hybrid (b)(2)/(b)(3) class — and those that do not find it necessary. Both sides of the divide find no Due Process problem at all with hybrid certification.[154] The propriety of the (b)(2)/(b)(3) hybrid, not only under the Constitution, but as a policy matter, is thus highlighted by the fact that it is so plainly up to the task of protecting class members' autonomy interests, while providing virtually all of the benefits of the more autonomy-constraining non-opt-out approach.

B. The Seventh Amendment

The Seventh Amendment presents two further potential constitutional hurdles to a hybrid (b)(2)/(b)(3) class action. The Reexamination Clause dictates that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," and the Trial by Jury Clause guarantees the right to a jury "in Suits at common law."[155]

First, and more simply, the Reexamination Clause does not preclude a hybrid (b)(2)/(b)(3) class action (or, more broadly, any bifurcated class action) even when different juries may hear overlapping evidence at different stages of the litigation, so long as no issues — i.e., specific factual determinations — are reexamined by a subsequent jury.[156] In a multi-stage class action, the Reexamination Clause concern can be avoided entirely if a single jury resolves each of the stages of the case.[157] Even if separate juries are employed for separate stages of the case (or even if

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procedure was equivalent to the 'individualized hearings' that the court had previously contemplated.

Id. at 97-98.

154. The petition for certiorari in *Crystian v. Tower Loan of Mississippi, Inc.*, 125 S. Ct. 972 (2005), raised many concerns with a mandatory class precluding opt-out from a settlement resolving substantial claims for damages; however, petitioners stated that they would not object if the non-opt-out portion of the case had been limited to common issues going to injunctive relief.

155. U.S. CONST. amend. VII. The Amendment also prohibits bifurcation of issues when doing so would cause "confusion and uncertainty." Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931).

156. *See, e.g.*, Romberg, *supra* note 130, at 323-26 (stating that only those cases that fail Rule 23's superiority test violate the Seventh Amendment, and therefore the Seventh Amendment imposes no greater a hurdle than Rule 23(b)(3) itself); Wolf, *supra* note 30, at 1868, 1877-78 (stating that under the Reexamination Clause, the same jury is not required to hear every stage of litigation).

157. Although the Seventh Amendment concern is gone, this may present a potential issue of manageability, relevant under the (b)(3) superiority determination, if the same jury must sit for too long to function adequately. However, this fear seems to be greatly exaggerated, as juries (and certainly grand juries) regularly sit (capably, if imperfectly) for long periods of time.

multiple juries are required for subsets of class members at stage II), it is not difficult to avoid a Reexamination Clause problem, so long as the court is careful. *Allison*, the case suggesting the greatest Seventh Amendment concerns, acknowledges that:

> [t]he existence of common factual *issues* is to be distinguished from the existence of overlapping *evidence*. For purposes of the Seventh Amendment, the question is whether factual issues overlap, thus requiring one trier-of-fact to decide a disputed issue that must be decided by a subsequent jury, not whether the two fact-finders will merely have to consider similar evidence in deciding distinct issues.[158]

Thus, as the Second Circuit explained in *Robinson*, any Reexamination Clause problem can be avoided by carefully crafted questions directed to the first jury, and careful instructions to the second jury that they are bound by the factual findings of the first jury:

> Trying a bifurcated claim before separate juries does not run afoul of the Seventh Amendment, [even though] a "given [factual] issue may not be tried by different, successive juries. . . ." [A]voiding this calls for sound case management, not [outright] avoidance of the procedure. . . . First, the court needs to carefully define the roles of the two juries so that the first jury does not decide issues within the prerogative of the second jury. Second, the court must carefully craft the verdict form for the first jury so that the second jury knows what has been decided already. If the first jury makes sufficiently detailed findings, those findings are then akin to instructions for the second jury to follow.[159]

The district court must take care in structuring a (b)(2)/(b)(3) hybrid, for this and other reasons, but this is no reason not to employ the device.

The more serious Seventh Amendment question concerns the Trial by Jury Clause. The Fifth Circuit, in *Allison*, suggested that

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158. *Allison*, 151 F.3d at 423 n.21.

159. *Robinson*, 267 F.3d at 169 n.13 (citing Blyden v. Mancusi, 186 F.3d 252, 268 (2d Cir. 1999)). *See also* Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 736-37 (2000) (asserting that federal courts can avoid the risk of re-examination by taking two precautions); Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 542 (1998) (arguing that the Reexamination Clause does not forbid the separate trial of overlapping issues, but merely requires that later juries follow the first jury's formal findings); *cf.* Mullen v. Treasure Chest Casino, 186 F.3d 620, 628 (5th Cir. 1999) (holding that "[t]he Seventh Amendment does not prohibit bifurcation of trials as long as the judge [does] not divide issues between separate trials in such a way that the same issue is reexamined by different juries," and thus upholding a purely (b)(3) class in which common issues would be resolved first, and issues individual to class members would be resolved by a different jury in a subsequent stage of the case) (citations and internal quotations omitted).

the Trial by Jury Clause would likely pose a barrier to resolving equitable relief prior to resolving damages in a mixed case (at least in the post-1991 CRA employment discrimination context), thus suggesting a potentially insurmountable hurdle to certification of a (b)(2)/(b)(3) hybrid. In order to understand why the hurdle is entirely surmountable — and why no court of appeals other than the *Allison* court has found the Trial by Jury Clause to preclude a (b)(2)/(b)(3) hybrid — it is necessary to understand the specific question before the *Allison* court (at least as that court perceived it).

Allison arrived at its Seventh Amendment conclusion by considering whether plaintiffs' claim of disparate impact (which authorizes back pay, but not compensatory monetary damages, and thus does not require a jury) could be litigated in a bench trial under Rule 23(b)(2), with the district court reserving the question of whether the disparate treatment pattern-or-practice claim (which does authorize compensatory and punitive damages, thus requiring a jury) could potentially be certified for subsequent resolution under Rule 23(b)(3).[160] *Allison* held that the Seventh Amendment precluded first litigating the equitable claims under (b)(2) in a bench trial, with potential subsequent jury resolution of the legal claims under (b)(3).[161]

The *Robinson* court explained:

> [O]nce the right to a jury trial attaches to a claim, it extends to all factual issues necessary to resolving that claim. Where a legal and equitable claim in a suit share a common factual issue, trial of the equitable claim first to a judge would foreclose the later presentation of the common issue to a jury, and thereby violate the trial-by-jury guarantee.[162]

This is true, as far as it goes. This requirement, however, does not stand in the way of hybrid (b)(2)/(b)(3) certification because a court that considers a hybrid (b)(2)/(b)(3) class in advance — unlike the deferred consideration of stage II certification of damages claims contemplated in *Allison* — can structure the case to avoid trial-by-jury concerns.[163] The court can

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160. *Allison*, 151 F.3d at 422-25.

161. *Id.* at 423.

> When claims involving both legal and equitable rights are properly joined in a single case, the Seventh Amendment requires that all factual issues common to these claims be submitted to a jury for decision on the legal claims before final court determination of the equitable claims. . . . As a result, each factual issue common to these claims, if any, must be decided by the jury before the district court considers the merits of the disparate impact claim and whether the plaintiffs are entitled to any equitable relief.

Id.

162. *Robinson*, 267 F.3d at 170.

163. In *Allison* itself, the Fifth Circuit rejected the specific structure of

do so by ensuring that any issues common to the equitable and legal claims are tried to a jury. The Seventh Circuit, for example, in *Jefferson*,[164] held that hybrid (b)(2)/(b)(3) certification does not violate the Trial by Jury Clause; it merely "require[s] the district judge to try the damages claims first, to preserve the right to jury trial, a step that would complicate the management of separate classes," but would not preclude the suit.[165] As the Seventh Circuit later reaffirmed:

> [s]ince the Civil Rights Act of 1991 entitles the parties to a jury trial on claims of intentional discrimination . . . a district court [can] proceed[] with divided [(b)(2)/(b)(3)] certification [but] must adjudicate the damages claims first before a jury to preserve the Seventh Amendment right to a jury trial, even if adjudication of these claims decides the equitable claims as well.[166]

The Second Circuit, in *Robinson*, adopted precisely the same analysis, explaining in more detail how a hybrid class can be structured to avoid Trial by Jury Clause concerns, so long as the legal claim is resolved first, and thus a jury decides any factual issues common to the legal and equitable claims.[167] Thus, the majority of courts have held that *Allison*'s concerns can be avoided by careful case management resolving legal claims first — an option artificially precluded by *Allison*'s contemplation of the district court deferring part of its certification decision till mid-suit.

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resolving issues common to the equitable and legal claims in an initial bench trial; it is not apparent why the court of appeals did not consider the propriety of a properly constructed hybrid class in which all overlapping factual issues would be resolved by a jury.

164. 195 F.3d 894.

165. *Id.* at 898 (holding that hybrid certification in this context "means, as a practical matter, that the damages claims and the Rule 23(b)(3) class would dominate the litigation—but the damages-first principle holds even when there is a single class under a single subdivision of Rule 23.") (citing Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) and Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)).

166. *Lemon*, 216 F.3d at 581-82.

167.

> Should the Class Plaintiffs prevail at the liability stage of the pattern-or-practice claim, the court can order class-wide injunctive relief and proceed to the remedial phase. Trial of the disparate impact claim could then be put off until the remedial phase is resolved, thus ensuring that any overlapping factual issues between the two claims will have first been tried to a jury in accordance with the Seventh Amendment. If, however, the Class Plaintiffs should prove unsuccessful at the liability stage with respect to the pattern-or-practice disparate treatment claim, the district court can proceed with a bench trial of the disparate impact claim, relying on answers to special interrogatories from the pattern-or-practice jury for any common factual issues.

Robinson, 267 F.3d at 170.

Second, and more fundamentally, there is a simpler and more effective way to avoid trial-by-jury concerns without, as the Seventh and Second Circuits contemplate, resorting to an awkward trial structure in which the entire set of legal claims is resolved first in a separate proceeding before a jury. Applying this simpler and more effective trial structure requires — as with the hybrid class action in general — reframing conventional understanding, and requires recognizing that cases are not composed of indivisible causes of action, but rather of numerous discrete issues that may be elements of more than one cause of action or claim.

The trial court thus has discretion to structure a hybrid (b)(2)/(b)(3) class action involving legal and equitable claims in whatever manner it thinks most wise — including resolving equitable claims in an initial (b)(2) stage — so long as the court requires that all disputed factual issues common to both equitable and legal claims are resolved by a jury. The district court can thus empanel the jury throughout the case, with the court resolving all purely equitable issues, and directing the jury, even at stage I, to resolve all issues common to both the equitable and legal claims. The court, bound by the jury's factual findings on common issues, determines whether to enter class-wide injunctive relief.[168] Legal claims can be resolved simultaneously with, or subsequent to, equitable claims, so long as all factual issues necessary to resolve those legal claims are resolved by a jury.

Indeed, one commentator has suggested that, as a practical matter, a similar process will often occur naturally in a mixed case, even when a court takes the conventional route of directing that legal issues be resolved first:

> [One] approach [to avoiding Trial by Jury concerns] is to try the legal issues first to a single jury and preserve the equitable issues for the second phase. One problem with this approach is that damage issues cannot be resolved without first establishing liability. Once liability is established, the equitable claims resolve themselves in most instances. Therefore, the court is merely proposing that there be one trial with one jury that resolves most of the class-wide issues.[169]

Finally, the Supreme Court decision in *Beacon Theatres, Inc. v. Westover*, a leading Trial by Jury Clause case, provides significant support for the propriety of the above approach.

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168. *See id.* (describing how the district court may exercise its discretion to award equitable relief based upon the jury's factual findings).

169. Robert M. Brava-Partain, Note, *Due Process, Rule 23, And Hybrid Classes: A Practical Solution*, 53 HASTINGS L.J. 1359, 1377-78 (2002). Although Brava-Partain may be somewhat exaggerating the similarity between the conventional solution and the solution proposed above, his observation does suggest that there is less of a gap than might be imagined.

Beacon, considering an anti-trust case involving a mix of issues going to injunctive and monetary relief, concluded that the district court could structure the case for resolution in a single suit in which a jury would resolve all legal issues, and the judge would enter appropriate injunctive relief based on the jury's factual findings:

> Whatever permanent injunctive relief [the plaintiff] might be entitled to on the basis of the decision in this case could, of course, be given by the court after the jury renders its verdict. In this way the issues between these parties could be settled in one suit giving Beacon a full jury trial of every antitrust issue.[170]

In support of this conclusion, *Beacon* relies on *Ring v. Spina*,[171] a Second Circuit case that even more strongly supports the viability of the structure proposed above. In *Ring*, the court held:

> Plaintiff's timely [jury] demand therefore entitles him to trial by jury . . . . And if the court so determines, it will be a simple matter, under the flexible procedure contemplated by the [Federal] rules [of Civil Procedure], for the judge presiding at the jury trial to decide any equitable issues at the same time without delay.[172]

Beacon — both on its own, and through its favorable citation to *Ring* — thus supports the propriety of structuring a mixed case for resolution in a single proceeding; the jury decides factual issues necessary to resolution of the legal claims, and the judge, bound by those factual determinations, decides equitable issues — "at the same time without delay."[173] Thus, although *Allison* is correct that a jury must resolve all factual issues implicated by any legal claim, that need not present any serious impediment to certification or management of a hybrid (b)(2)/(b)(3) class. The district court may structure a hybrid (b)(2)/(b)(3) class largely as it sees fit, including with equitable claims proceeding first, or proceeding simultaneously with legal claims, so long as the court provides for a trial by jury on all issues that are elements of legal claims, in whatever stage of the case in which those issues first arise.

V. THEORETICAL OBJECTIONS

Not all commentators, however, agree with this laudatory assessment of the (b)(2)/(b)(3) hybrid. Most notably, Professor Mullenix views the (b)(2)/(b)(3) hybrid with alarm. The criticism of the (b)(2)/(b)(3) hybrid falls into three main categories. First,

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170. *Beacon*, 359 U.S. at 508 (citing Ring v. Spina, 166 F.2d 546 (2d Cir. 1948)).

171. *Ring*, 166 F.2d 546 (2d Cir. 1948).

172. *Id.* at 550.

173. *Id.*

commentators argue that proponents of the hybrid class have repeatedly offered vague generalities, and have off-handedly suggested multiple possible approaches to hybrid certification, entirely failing to offer any precise, detailed explanation of what a hybrid (b)(2)/(b)(3) class is, or how it satisfies the policies underlying class actions, the actual requirements of Rule 23, and the Due Process Clause and the Seventh Amendment.[174] Point taken — but this Article is intended as a corrective.

Mullenix also suggests that the existence of the hybrid class permits plaintiffs to game the system by presenting the court with multiple forms of proposed certification. She contends that the hybrid class allows a kind of shell game in which the class action pea flits between the (b)(2) and (b)(3) walnut shells at the will of the nefarious class counsel, thereby evading legitimate attempts at scrutiny.[175] Professor Mullenix goes so far as to suggest that it is improper for plaintiffs in a mixed case to seek certification under a pure (b)(2) class, and to request that, if the court rejects pure (b)(2) certification, it certify a hybrid (b)(2)/(b)(3) class. Mullenix argues that this is improper because

> in this scenario, there is no downside risk to the pleader for the failure to clearly understand or define the true nature of the claims and remedies. The pleader never has to fish or cut bait. If the court determines that the class seeks a damage remedy that is not available under the 23(b)(2) category, the court will "fix" this problem by concurrently certifying both a 23(b)(2) and (b)(3) action. This possibility rewards the lazy, imprecise, or overly clever pleader, allows the plaintiff to have his cake and eat it too, and puts the court in the role of pleading or redefining the class.[176]

This criticism seems unfounded, as there is no apparent reason why a plaintiff class may not plead in the alternative. Of course, plaintiffs should not dump a mixed case into the court's lap, suggest that it has to be certifiable in some way, maybe through a pure (b)(2) class or, if not, maybe through some kind of hybrid, and leave it to the court to sort out the mess. But that is a matter of poor lawyering, and would seem to have nothing to do with either the propriety of a hybrid (b)(2)/(b)(3) class, or the propriety of careful pleading in the alternative. Plaintiffs should

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174. *See, e.g.*, Mullenix, *supra* note 11, at 216 ("The [Seventh Circuit's] Jefferson decision [195 F.3d 894, 898 (7th Cir. 1999)] informs us that it is perfectly legitimate to create and certify such 'hybrid' 23(b)(2) and (b)(3) classes."). "However, the Jefferson decision, and its progeny, have provided little or no guidance concerning the actual implementation of such a hybrid class action." *Id.*; *see also id.* at 181 ("The concept of the 'hybrid' class—once a distinct analytical category under the original 1938 rule—now describes various types of proposed class actions, and has assumed many meanings, depending on the setting.").

175. *Id.* at 215-16.

176. *Id.* at 216.

be able to argue that a particular case warrants certification as a pure (b)(2) class because it satisfies (b)(2) predominance as to the entire suit; or, in the alternative, if the court holds that (b)(2) predominance is satisfied for stage I but that full notice and opt-out rights must be provided at stage II, then to argue that the class should be certified as a (b)(2)/(b)(3) hybrid.[177]

Richard Epstein, in a vein somewhat similar to Mullenix, argues that hybrid class actions are improper because, in order for the (b)(2) portion of the case to proceed as a manageable class focused on common issues, the district court must improperly and unfairly restrain defendants' ability to introduce individual or anecdotal evidence at stage I.[178] Although this is not completely outside the realm of possibility, the danger is quite minimal. This is because at the time the certification decision is made, the district court must determine whether (b)(2) predominance is satisfied — i.e., whether there is a critical mass of individual issues, including those that defendant would wish to introduce, that preclude certification of stage I under (b)(2). The defendant is free to explain to the court at the time of the certification decision the individual evidence it must be permitted to introduce, and any consequences of such evidence for (b)(2) predominance; the court will then decide whether the certification criteria have been satisfied.

Even if the trial court makes a mistake and, as the trial plays out, the trial court recognizes that due process requires that defendants be permitted to introduce notably more individual evidence than the court had anticipated, the court must, of course, allow the defendant to do so, either by allowing the evidence in, even if it would make the class somewhat unwieldy, or even, conceivably, decertifying the case if it cannot be maintained consistent with due process. Thus, Professor Epstein's legitimate concern is already taken into account by (b)(2) predominance and the certification decision at the front end, and if the court later recognizes that its front-end assessment was erroneous, the problem can be rectified at the back end.

Mullenix further suggests what she believes to be another potential significant barrier to (b)(2)/(b)(3) hybrids: class members

177. Part of Mullenix's criticism of the hybrid is grounded on her apparent belief that the district court has no discretion to permit opt-out for a (b)(2) suit, or any portion of a suit certified under (b)(2) — a belief not shared by the numerous courts of appeals that have held otherwise. *See* Mullenix, *supra* note 11, at 181 & n.19 (reasoning that opt-out is not permitted).

178. *See* Epstein, *supra* note 144, at 510-14 (citing *Robinson*, 267 F.3d at 164-69) (discussing the difficulties and due process concerns surrounding certified classes when an individual plaintiff's anecdotal evidence is barred to preserve class cohesiveness).

may be precluded from bringing future claims for damages if they have been consigned to a hybrid class. She argues that:

> [T]he Jefferson line of cases has also not considered the claim-splitting, res judicata, or preclusive effects of hybrid class actions that are certified as combined 23(b)(2) and (b)(3) class actions. It is entirely possible that claims certified in a Jefferson hybrid 23(b)(2) class could create a res judicata effect that would not be cured by claims captured by the 23(b)(3) part of the action. In other words, the mandatory nature of the 23(b)(2) part of the class could serve as a bar to the pursuit of future claims, which preclusive effect might not be ameliorated by the 23(b)(3) presence of an opt-out right.[179]

Insofar as Mullenix suggests that those who choose to opt out of the (b)(3) portion of the case might somehow be claim precluded from seeking damages in a subsequent suit because they did not resolve their damages claims in the first (hybrid) suit, when they could have done so, that possibility seems far-fetched. If Due Process (or even Rule 23) require granting the right to opt-out, preclusionary law could not rationally make such a right worthless. Insofar as Mullenix suggests that a class member with a damages claim might be barred from recovery because the class might lose at stage I, that is in fact a possibility, as discussed earlier, but that does not thereby foreclose the viability of hybrid certification.

There is a somewhat more serious preclusion question if stage II of a hybrid class action sought (b)(3) certification of some but not all of absent class members' potential claims for damages; conceivably, those claims might be barred by claim preclusion from being raised in a subsequent individual suit. Even in such circumstances, though, there seems no plausible basis to argue that absent class members could be precluded from asserting those claims in subsequent individual cases they might file. Those claims to damages, by hypothesis, could not in fact have been recovered by absent class members in the prior hybrid class that did not encompass those claims. Those claims would thus not be subject to claim preclusion, which only forecloses relief in a subsequent suit when such relief was or could have been available in the prior suit.[180]

The most plausible preclusionary concern would involve damages claims that theoretically could have been certified in the

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179. Mullenix, *supra* note 11, at 217. *See generally* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 737-38 (2005) (discussing problems that arise when individual class members seek different kinds of remedies, and the impact of that situation on preclusion).

180. *See, e.g.*, Brown v. Felsen, 442 U.S. 127, 131 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were *previously available to* the parties, regardless of whether they were asserted or determined in the prior proceeding."). (emphasis added).

(b)(2)/(b)(3) hybrid, but that class counsel did not seek to certify in the course of providing adequate representation to class members — e.g., counsel feared that seeking to certify relatively variable claims might undermine the court's willingness to find (b)(2) predominance. Even as to these claims, the far stronger argument is that the absent class members did not in fact have the opportunity to recover such damages in the initial suit, because they had no right to insist that class counsel seek such damages.[181]

Mullenix next contends that hybrid certification conflicts with what has heretofore been the generally accepted principle that a class action certifiable under more than one category of Rule 23(b) should be certified under the category with the narrowest notice and opt-out requirements. She argues:

> [T]he Jefferson hybrid also makes no sense in light of the prevailing—and often quoted hornbook rule—that if a class action is pleaded under multiple provisions of Rule 23, including the 23(b)(3) provision, then the preference is to certify the class under the 23(b)(1) or 23(b)(2) provision. What the Jefferson court seems to be signaling is, if the plaintiff pleads his case under multiple provisions of Rule 23, including the 23(b)(2) and 23(b)(3) provisions, then the court can and should certify under them all.[182]

This criticism misses the mark. First, Mullenix herself actually believes that "[a]part from expressing a judicial preference for mandatory classes, these boilerplate rules make little sense."[183] It is thus not clear why she would require that a hybrid class be reconciled with a principle that she believes to be unwarranted, even though the principle is widely accepted.

Second, and more fundamentally, the principle is in fact both entirely warranted and entirely consistent with the hybrid (b)(2)/(b)(3) class action. The principle counsels that, when a case may be certified under more than one 23(b) category, it should be certified under the category providing the narrowest notice and opt-out rights. This is because, by definition, if the case may be certified under a particular 23(b) category, it is sufficiently cohesive for the scope of notice and opt-out provided under that category to adequately protect the autonomy rights of absent class members. Thus, if a case may be certified under more than one 23(b) category, the court should (at least in the absence of unusual circumstances dictating otherwise) select the narrowest 23(b) category available, because doing so will result in the greatest efficiency, without unduly compromising autonomy.

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181. The named representatives might well be precluded from seeking damages in a subsequent suit — but that would be entirely proper, as class counsel should seek to recover all such damages for the named representatives in individual proceedings following the class portions of the suit.

182. Mullenix, *supra* note 11, at 217.

183. *Id.* at 187.

This eminently sensible and widely accepted principle needs to be refined only slightly to apply in a world in which hybrid (b)(2)/(b)(3) certification is permissible. The relevant categories under Rule 23(b) now include not only (b)(2) and (b)(3) classes, but, in ascending order of notice and opt-out rights, the nested set of pure (b)(2) classes, hybrid (b)(2)/(b)(3) classes, and pure (b)(3) classes. Plaintiffs can and should be permitted to argue that certification is appropriate under any or all of these categories, and to assert a fallback position of certification under another category or categories requiring greater notice and opt-out. It is only by refusing to consider a hybrid (b)(2)/(b)(3) class to be a category under Rule 23(b) that there is any tension with the widely accepted principle that Mullenix recognizes, but rejects.

Finally, Mullenix's most fundamental criticism is more theoretical, and is at the heart of the question of the wisdom and viability of the (b)(2)/(b)(3) hybrid. Mullenix objects to what she believes to be discrete — and incompatible — categories of class action.[184] Her objection flows from the notion that a (b)(2) class is fundamentally cohesive, whereas a (b)(3) class is not: (b)(2) and (b)(3) classes are just different — while one may in fact be able to compare apples and oranges, one cannot hybridize such disparate forms.

Indeed, the title of Mullenix's Article complains of the "blurring of categorical imperatives" — presumably, the ethical imperative that (b)(2) is (b)(2) and (b)(3) is (b)(3) and never the twain shall meet. She argues:

> Courts have failed to recognize that mandatory . . . (b)(2) classes are conceptually different than the 23(b)(3) class, in that the former are intended to embrace homogeneous classes, while the latter is not. Hence, it is difficult to understand how courts can blithely announce that a class that satisfies the Rule 23(b)(3) criteria may simultaneously satisfy the mandatory [(b)(2)] class criteria, and prefer certification under the mandatory provisions.[185]

As explained in Part III.A.3., however, a class satisfying the criteria for a mandatory (b)(2) class simultaneously satisfies the (b)(3) criteria because the (b)(2) class is a subset of the (b)(3) class. The resolution to Mullenix's suggested conundrum is the insight

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184. *See, e.g., id.* at 181 ("[T]he courts' doctrinal incoherence has blurred the categorical distinctions among class categories that the Advisory Committee carefully promulgated in 1966. "Therefore the entire class action rule has been rendered analytically incoherent. It has become increasingly difficult to distinguish among the 23(b)(1), (b)(2), and (b)(3) class categories in any meaningful way." *Id. Cf.* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 235-41 (2003) (arguing, based on the "preexistence principle," that mandatory classes under (b)(2) should not encompass claims to damages, notwithstanding contrary language in the advisory committee notes).

185. Mullenix, *supra* note 11, at 187-88.

that just because (b)(3) classes *need not* be homogenous, nothing *prevents* them from being so.[186] Properly conceived, the form of hybrid (b)(2)/(b)(3) class proposed in this Article responds to all of the critics' concerns, occupying a measured, intermediate position in the range of options available to a district court deciding if and how it is to certify a mixed case.

CONCLUSION

This Article has attempted to provide a practically and ethically defensible groundwork for the hybrid (b)(2)/(b)(3) class.[187] The increasing practical necessity of resolving mixed cases presenting both significant equitable and legal issues has resulted in a recent groundswell of support for some form of hybrid class action. There is general agreement that mixed cases fall somewhere between pure (b)(2) and pure (b)(3) classes, and that some kind of hybrid approach to the dual elements of a mixed case will somehow fairly and efficiently address both the common, injunctive aspects and the individual, monetary aspects of these cases.

The problem, as critics have aptly recognized, is that no court or commentator has provided a coherent justification and explication for a particular, crystallized form of hybrid class that is fully protective of the fairness and efficiency interests of defendants, of absent class members, and of society in general. This Article is intended as a corrective, setting forth the theoretical justification for the hybrid (b)(2)/(b)(3) class, explaining the precise structure such a class should employ, and detailing the certification requirements that ensure such a class complies with the logic and dictates of Rule 23 and the Constitution.

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186. Consider a loose but potentially helpful analogy: a ((b)(3)-like) group of good athletes, and a (more homogenous, (b)(2)-like) group of good basketball players. The group of good basketball players is (loosely) composed of good athletes who are also tall. Thus, the more homogenous basketball player group also satisfies the criteria of the less cohesive good athlete group; even though one group is homogenous and the other is not, that does not prevent the homogenous group from being a subset of the more heterogeneous one.

187. *Compare* IMMANUEL KANT, THE MORAL LAW: KANT'S GROUNDWORK OF THE METAPHYSIC OF MORALS 22-23 (H.J. Paton trans., Hutchinson & Co. 1964) (1948) (discussing the ethical notion of the categorical imperative) *with* Mullenix, *supra* note 11, at 215 (discussing how a hybrid (b)(2)/(b)(3) class will encourage "gaming the system" that will reward "lazy, imprecise, or overly clever pleaders").