Note

The Good, the Bad, and the Unconstitutional: State Attempts to Solve the Defendant Class Action Problem

Tyler Blackmon∗

While the overwhelming majority of class action lawsuits filed in this country are plaintiff class actions—with named plaintiffs representing larger classes of plaintiffs—Rule 23 of the Federal Rules of Civil Procedure technically permits plaintiffs to sue a named defendant representing a class of defendants as well. However, such suits are exceptionally rare—so much so that they have been described as "as rare as unicorns." Still, when defendant classes emerge, they create two distinct problems. First, defendant classes cause both federal district courts and their state counterparts severe administrative headaches. Second, defendant classes trample on the due process rights of the defendants who are bound by their judgments.

At least partially in response to these administrative and due process concerns, states have experimented with fixes to the defendant class action device in their equivalent class action rules. This Note categorizes and analyzes those variations on Federal Rule 23. It shows that Maryland's solution of plaintiff-only classes is good; Mississippi and Virginia's solution of nixing class actions altogether is bad; and Iowa, New Hampshire, and North Dakota's solution of barring opt-outs from defendant class actions is quite clearly unconstitutional.

Ultimately, this Note concludes that—given the due process issues deeply embedded in the defendant class action device—

∗ J.D. Candidate 2024, University of Minnesota Law School; Articles Editor, *Minnesota Law Review* Volume 108. Thank you to Professors Kristin Hickman and Brad Clary, and to *Minnesota Law Review* editors and staff for providing helpful substantive and technical feedback for this Note. I am also grateful to my husband, Kevin Vargas, who has patiently supported me throughout law school and who, upon trying to describe the topic of this Note, still incorrectly refers to them as "reverse class actions."

other states and the federal judiciary should follow the lead of Maryland and abrogate defendant classes altogether. However, in the alternative, it argues that, at the very least, state statutes and rules barring a defendant from opting out of a defendant class violate the Fourteenth Amendment's Due Process Clause, and the Supreme Court should intervene as soon as a case comes to its attention.

INTRODUCTION

In May 2022, 1.6 million Illinois residents woke up to news that seemed too good to be true: Facebook had sent them $397 via check or PayPal.[1] Though these happy consumers had no way of knowing it, the checks were the result of years of litigation over Facebook's violation of the Illinois biometric data law and represented a triumph of the efficiency and efficacy of the plaintiff class action device. While the overwhelming majority of class action lawsuits filed in this country are plaintiff class actions[2]—with named plaintiffs representing larger classes of plaintiffs—Rule 23 of the Federal Rules of Civil Procedure also technically permits plaintiffs to sue a class of defendants, stating, "[o]ne or more members of a class may sue *or be sued* as representative parties."[3]

This quirk in the federal rule opens the door for the exact opposite scenario of Facebook's surprise money in your mailbox. Imagine, instead, that Netflix had sued its millions of users across the country for breach of contract and, following a settlement with a named defendant Netflix chose, sent every user in the country not a check for hundreds of dollars—but a bill. Such is the perverse nightmare that remains possible under the federal rules' provision for defendant class actions.

This problem is not merely theoretical. Indeed, the handling of a recent case certifying a defendant class action, *Yang v. G & C Gulf Inc.*,[4] so upset legal practitioners in Maryland that the state eventually took the drastic measure of nixing defendant class actions altogether.[5] In *Yang*, a plaintiff class of car owners

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1. David Ingram & Elliott Ramos, *Facebook Checks for $397 Hit Illinois Bank Accounts*, NBC NEWS (May 18, 2022), https://www.nbcnews.com/tech/tech-news/facebook-checks-397-hit-illinois-bank-accounts-rcna29280 [https://perma.cc/RXZ9-X88S].

2. For example, in an empirical study of four federal district courts in 1996, of the 152 certified classes, only one was a defendant class. Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, FED. JUD. CTR. 41 (1996), https://www.uscourts.gov/sites/default/files/rule23_1.pdf [https://perma.cc/8NXY-4GRT].

3. FED. R. CIV. P. 23(a) (emphasis added).

4. Yang v. G & C Gulf Inc., No. 403885-V (Md. Cir. Ct. Jan. 16, 2018).

5. Jason R. Scherr, *Defendant Class Action Rule Change Is Welcome News for Maryland Businesses*, 1 MD. B.J. 144, 145 (2019) ("Recognizing the concerns driving these decisions, Maryland chose to foreclose defendant class actions altogether.").

who had their vehicles towed from Maryland businesses sought damages from a defendant class of business owners who had allegedly illegally ordered their tows.[6] The plaintiff class covered 16,329 tows, and the defendant class consisted of 511 parking lot owners.[7] Plaintiffs singled out a single parking lot owner—Bruce Patner—and forced him to carry the burden of defending the entire class as the named defendant.[8] The court forbade defendants from opting out of the class,[9] mailed defendants a postcard about the pending litigation,[10] and eventually approved a settlement of $390 *per tow*.[11]

Still, such suits are admittedly exceptionally rare—so much so that they have been described as "as rare as unicorns."[12] But when they do emerge, as in *Yang*, two distinct problems arise. First, defendant classes cause both federal district courts and their state counterparts severe administrative headaches.[13] Most potently, absent defendants have a strong financial incentive to simply opt out of the class, causing an implosion of the defendant class that nullifies the very efficiency that prompted its use in the first place.[14] Second, defendant classes trample on the due process rights of the defendants who are bound by their judgments. While the class action device has always been a compromise between due process and efficiency, absent defendants are particularly vulnerable because of what is at stake for them.[15] Unlike absent plaintiffs, who risk only failing to recover,

6. *Yang*, No. 403885-V, at 5 (opinion certifying both plaintiff and defendant classes and approving settlement).

7. *Id.* at 11.

8. *Id.* at 34 ("Unlike named plaintiffs, who volunteer, Patner was essentially 'conscripted' when the plaintiffs made him the named defendant. He neither sought nor acquiesced in his role.").

9. *Id.* at 4 n.3 ("The defendant litigation class certified by the court in November 2016, [sic] was a non-opt out class.").

10. *Id.* at 17 ("Notice to these class members was sent by first class mail."); Order, Case No. 403885-V (Md. Cir. Ct. May 9, 2016) ("The Court approves the postcard notice and finds that said form complies with the requirements of Rule 2-231 of the Maryland Rules of Civil Procedure[] and due process.").

11. *Yang*, No. 403885-V, at 5.

12. CIGNA HealthCare of St. Louis, Inc. v. Kaiser, 294 F.3d 849, 853 (7th Cir. 2002), *as amended* (July 31, 2002) (quoting John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 388 (2000)).

13. *See infra* Part II (describing the principal criticisms of class actions).

14. *See infra* Part II.A.

15. *See infra* Part II.B.

absent defendants risk a court ordering them to pay out damages in a suit in which they never participated and about which they may not even have had notice.

At least partially in response to these administrative and due process concerns, states have experimented with fixes to the defendant class action device in their equivalent class action rules.[16] Some of these experiments have improved upon the federal rule. For example, in response to the *Yang* litigation, Maryland simply ditched defendant class actions altogether and preserved the federal treatment of plaintiff class actions.[17] However, other states have not fared quite as well. Virginia and Mississippi have caustically thrown out class actions altogether, and New Hampshire, North Dakota, and Iowa have aggravated the due process issues with defendant classes in a manner that almost certainly implicates defendants' Fourteenth Amendment rights.[18]

Part I of this Note provides a background on defendant class actions by giving an overview of the federal rule and noting their most common usage in litigation. Part II introduces the two main critiques of defendant class actions: administrability and due process concerns. Part III does the most work by categorizing the solutions state legislatures have proposed to mitigate the issues currently plaguing defendant class actions, evaluating the extent to which those state solutions have actually solved the administrability and due process issues, and concluding that Maryland's approach stands above the rest. Finally, Part IV provides a blueprint for implementing plaintiff-only classes in state and federal rules ahead of any constitutional challenge. In the alternative, it argues that, at the very least, state statutes and rules barring a defendant from opting out of a defendant class violate the Fourteenth Amendment's Due Process Clause, and that the federal judiciary should intervene as soon as a case comes to its attention.

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16. *See infra* Part III (categorizing the state experiments with class action rules as good, bad, and unconstitutional responses to the defendant class action problem).

17. Scherr, *supra* note 5; *see infra* Part III.A (extolling the virtues of the Maryland solution).

18. *See infra* Parts III.B–C (discussing the "No Class Action" states of Virginia and Mississippi and the Mandatory Defendant Class states of Iowa, New Hampshire, and North Dakota).

I. DEFENDANT CLASS ACTIONS AND RULE 23: AN AWKWARD FIT

We cannot understand how states have experimented with defendant classes without understanding their muse: Federal Rule 23.[19] To provide a baseline for state experimentation with defendant classes, this Part first walks through the mechanics of certifying a defendant class in federal court via Rule 23, the same rule that applies to plaintiff classes. This Part then highlights categories of litigation where federal courts have typically found defendant classes useful. Each of these two Sections aim to tease out why courts have traditionally been skeptical of defendant classes and why several states have begun to depart from the federal regime.

A. CERTIFYING DEFENDANT CLASSES VIA FEDERAL RULE 23

The Federal Rules of Civil Procedure allow defendant class actions in Rule 23, which states that "[o]ne or more members of a class may sue *or be sued* as representative parties on behalf of all members."[20] Despite the major differences in practice between plaintiff and defendant classes, the rest of Rule 23 proceeds without making any facial distinction between the two.[21] Therefore, just like plaintiffs in a plaintiff class, defendants may be sued as a class if the class clears two key hurdles outlined in Rule 23.

1. Rule 23(a) Requirements

First, the class must meet all four of the 23(a) requirements of numerosity, commonality, typicality, and adequacy. For most class actions, numerosity under Rule 23(a)(1) is satisfied if a class contains at least forty members and is an easy hurdle to clear.[22] Indeed, many courts have taken the position that with

19. FED. R. CIV. P. 23 (federal class action rule).

20. *Id.* 23(a) (emphasis added).

21. *See generally* FED. R. CIV. P. 23.

22. *See* 2 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 5:6 (6th ed. 2022) ("While the defendant cases tend to retain the familiar guideposts of 20 or less needing further justification, and 40 or more creating a presumption that the requirement is met, courts will typically certify defendant classes in the middle of that range." (footnotes omitted)).

defendant class actions, the number of members may be fewer than the number required for a plaintiff class.[23]

Rule 23(a)(2) requires that "there [be] questions of law or fact common to the class."[24] Courts analyze commonality for a defendant class no differently than for a plaintiff class.[25] Historically, this was a low bar[26] and asked only if "some issue or some component of the central claim . . . [could] be resolved uniformly" for all defendants.[27] However, the Supreme Court may have heightened the standard in *Wal-Mart Stores, Inc. v. Dukes*, in which it held that the common issue must "touch and concern all members of the class."[28] There, the Court reversed certification of a plaintiff class of women who brought Title VII claims against their employer for sex discrimination, holding that the class did not even meet the usually low bar of commonality in Rule

23. *Id.* ("[A] number of courts have held that fewer class members are required to meet the numerosity requirement for a defendant class than for a plaintiff class."); *see, e.g.*, Dale Elecs., Inc. v. R.C.L. Elecs., Inc., 53 F.R.D. 531, 538 (D.N.H. 1971) (certifying a defendant class of only thirteen in a patent case because defendants were located throughout the United States, which made joinder impracticable); Abt v. Mazda Am. Credit, No. 98 C 2931, 1999 WL 350738, at *4 (N.D. Ill. May 19, 1999) (certifying a defendant class of twenty-five car dealerships but recognizing that "defendant classes normally are composed of fewer class members than one customarily finds in a plaintiff class"); Sebo v. Rubenstein, 188 F.R.D. 310, 318 (N.D. Ill. 1999) ("[T]he number required to satisfy numerosity [for defendant classes] is customarily lower than it is for plaintiff classes.").

24. FED. R. CIV. P. 23(a)(2).

25. *See, e.g.*, RUBENSTEIN, *supra* note 22, § 5:9 ("Courts analyze Rule 23(a)(2) in the same manner for a defendant class as for a plaintiff class."); *Sebo*, 188 F.R.D. at 318 ("The analysis [of commonality for a defendant class] is similar to the finding of commonality for the plaintiff class.").

26. *See* Reich v. ABC/York-Estes Corp., No. 91 C 6265, 1997 WL 321699, at *7 (N.D. Ill. June 6, 1997) (noting "the commonality requirement [is] a 'low hurdle' which is easily surmounted" (quoting Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 185 (N.D. Ill. 1992))). *But see, e.g.*, Rexam Inc. v. United Steel Workers of Am., AFL-CIO-CLC, No. 03-2998 ADM/AJB, 2005 WL 1260914, at *5 (D. Minn. May 25, 2005) (denying certification for a defendant class on commonality grounds because "individualized differences" in retirement plans frustrated Rule 23(a)(2)'s commonality requirement).

27. RUBENSTEIN, *supra* note 22, § 5:9.

28. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 n.10 (2011) (overturning certification of a class of employees alleging Title VII discrimination against Wal-Mart because the intricacies of each individual employment decision frustrated Rule 23's commonality requirement).

23(a)(2) because there was no "glue holding together the alleged *reasons*" for their treatment in the workforce.[29]

Rule 23(a)(3) requires "that the claims or defenses of the representative parties [be] typical of the claims or defenses of the class."[30] Typicality often goes hand in hand with commonality, but focuses more on whether the named defendant in the case is typical of the absent class of defendants.[31] Here, a court wants to be assured that the named defendant, when defending her own claims, will by definition defend the claims of the absent defendants.[32] Typicality can become particularly difficult in bilateral class actions—those involving both plaintiff classes and defendant classes—because the named plaintiff must "have a cause of action against each and every defendant," not just the named defendant.[33]

Finally, Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."[34] As discussed in more detail in Part II, this requirement likely provides the most substantial hurdle for defendant classes because, unlike the named plaintiff in a plaintiff class action, named defendants are typically unwilling participants in the litigation and have much less incentive to offer up a spirited defense of other class members' claims.[35] The adequacy

29. *Id.* at 352.

30. FED. R. CIV. P. 23(a)(3).

31. *See* RUBENSTEIN, *supra* note 22, § 5:10 ("Where commonality is easily found, typicality is likely to be as well—the more common the issues, the more likely it is that the representative's issues are typical of the class's.").

32. *See id.* ("[T]he inherent logic of the typicality requirement is that a class representative will adequately pursue her own claims, and if those claims are 'typical' of those of the rest of the class, then her pursuit of her own interest will necessarily benefit the class as well."); Weinman v. Fid. Cap. Appreciation Fund (*In re* Integra Realty Res., Inc.), 179 B.R. 264, 270 (Bankr. D. Colo. 1995), *aff'd*, 354 F.3d 1246 (10th Cir. 2004) ("The typicality requirement is satisfied so long as there is a nexus between class representatives/claims or defenses and common questions of fact or law which unite the class. Only where there is a unique defense that will consume the merits of the case is the Court required to refuse to certify a class due to a typicality." (citation omitted)).

33. *In re* Itel Sec. Litig., 89 F.R.D. 104, 118 (N.D. Cal. 1981).

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

35. *See infra* Part II.A (discussing the tendency of defendant classes to implode, especially for cases involving damages); Bell v. Brockett, 922 F.3d 502, 511 (4th Cir. 2019) ("Rule 23's adequacy requirements provide critical safeguards against the due process concerns inherent in all class actions. But they

requirement is complemented by Rule 23(g)(4), which requires that the attorneys who represent the named defendant must themselves "fairly and adequately represent the interests of the class."[36]

2. Rule 23(b) Requirements

Once all four 23(a) requirements are met, the court must then certify the class under one of three options found in Rule 23(b). These categories are not mutually exclusive, and a court could certify a defendant class (like a plaintiff class) under multiple parts of Rule 23(b).[37] Federal courts have responded to administrative and due process concerns with defendant classes differently depending on the type of class asserted under Rule 23(b).

23(b)(1) classes are really two distinct types of classes. 23(b)(1)(A) classes are appropriate when separate adjudications might create a risk of inconsistent or incompatible rulings.[38] Rule 23(b)(1)(B) classes are appropriate when a limited amount of money is available, and the court needs to divide up the money in one adjudication so as not to create prejudicial rulings.[39] In both cases, notice to the absent class members and the ability of

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are especially important for a defendant class action where due process risks are magnified. In defendant class actions, an unnamed class member can be brought into a case, required to engage in discovery and even be subjected to a judgment compelling the payment of money or other relief without ever being individually served with a lawsuit." (citations omitted)). *But see, e.g.*, Regal Ent. Grp. v. Amaranth LLC, 894 A.2d 1104, 1110 (Del. Ch. 2006) (finding adequacy was satisfied because the named defendant "has a large stake in the answer, has aggressively advocated a position contrary to that of Regal, and has retained experienced and well-regarded counsel to advance its position").

36. FED. R. CIV. P. 23(g)(4).

37. *See* RUBENSTEIN, *supra* note 22, § 5:26 ("[C]ourts occasionally certify a case under more than one provision of Rule 23(b), often labeling the dual certification a 'hybrid' class action." (footnotes omitted)).

38. *See* FED. R. CIV. P. 23(b)(1)(A); RUBENSTEIN, *supra* note 22, § 5:20 ("As with plaintiff class actions, for a defendant class to be certified under Rule 23(b)(1)(A), its proponent must demonstrate that (1) multiple individual suits (2) will create a risk of incompatible standards of conduct for the adverse party." (footnotes omitted)).

39. *See* FED. R. CIV. P. 23(b)(1)(B); RUBENSTEIN, *supra* note 22, § 5:21 ("The limited fund class action is Rule 23(b)(1)(B)'s 'paradigm suit.' In a limited fund situation, many litigants have claims against a single asset, and the asset's total value is unlikely to satisfy all of the claims. If the claims are adjudicated one by one, the fund will run out before the claimants do." (footnote omitted)).

a member to opt out of the class are not required under the federal rules.[40] However, courts will occasionally require notice at their discretion to assuage any due process concerns.[41] The text of Rule 23(b)(1) itself shows it contemplates defendant classes, stating that courts should use class actions under this subsection to avoid inconsistent "actions by *or against* individual class members."[42]

23(b)(2) classes are appropriate for injunctive[43] relief when the opposing party has wronged members of the putative class in similar ways.[44] Like 23(b)(1) classes, the federal rules require neither notice nor opt-outs in 23(b)(2) classes.[45] While courts might sometimes find notice is necessary for due process, they again do not see it as a requirement under either the federal rules or the Constitution.[46]

Scholars have spilled much ink on the question of whether the text of Rule 23(b)(2) allows defendant class actions. Rule 23(b)(2) allows a class to be certified when "*the party opposing the class* has acted or refused to act on grounds that apply generally to *the class*, so that final injunctive relief or corresponding

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40. FED. R. CIV. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class." (emphasis added)).

41. *See, e.g.*, Lynch Corp. v. MII Liquidating Co., 82 F.R.D. 478, 483 (D.S.D. 1979) ("Though FRCP 23(c)(2) only Requires [sic] notice in cases maintained under FRCP 23(b)(3), subdivision (d)(2) of Rule 23 allows this Court in its discretion to provide for notice in other cases.").

42. FED. R. CIV. P. 23(b)(1) (emphasis added). *But see* Robert E. Holo, Comment, *Defendant Class Actions: The Failure of Rule 23 and a Proposed Solution*, 38 UCLA L. REV. 223, 237 (1990) (arguing that defendant class actions are effectively prohibited for Rule 23(b)(1)(A) classes).

43. *Black's Law Dictionary* defines an injunction as: "A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted." *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

44. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.").

45. FED. R. CIV. P. 23(c)(2)(A).

46. *See, e.g.*, Redhail v. Zablocki, 418 F. Supp. 1061, 1067 (E.D. Wis. 1976), *aff'd*, 434 U.S. 374 (1978) ("An ironclad rule requiring individual notice to members of a (b)(2) class would significantly frustrate use of (b)(2) class actions.").

declaratory relief is appropriate respecting *the class* as a whole."[47]

The language thus implies that "the class" is the injured party and "the party opposing the class" is the wrongdoer.[48] But in defendant class actions, "the class" is the wrongdoer and "the party opposing the class" is the injured party—exactly the opposite of what the text of the rule suggests.[49] Courts have recognized this obvious flaw when attempting to certify a defendant class under Rule 23(b)(2) and have struggled to maneuver around it.[50] It is for this reason Judge Richard Posner, sitting on the Seventh Circuit, found that defendant class actions can never be certified under Rule 23(b)(2).[51] At best, this makes defendant class actions an awkward fit as a 23(b)(2) class.[52] To date, however, only the Fourth, Sixth, and Seventh Circuits have explicitly held that defendant class actions are disallowed under Rule 23(b)(2).[53]

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47. FED. R. CIV. P. 23(b)(2) (emphasis added).

48. *See id.*

49. *See id.*

50. *E.g.*, Mudd v. Busse, 68 F.R.D. 522, 530 (N.D. Ind. 1975), *on reconsideration*, 437 F. Supp. 505 (N.D. Ind. 1977), *aff'd*, 582 F.2d 1283 (7th Cir. 1978) ("The wording of Rule 23(b)(2) is awkward in application to any defendant class.").

51. Henson v. East Lincoln Township, 814 F.2d 410, 414 (7th Cir. 1987) ("Always it is the alleged wrongdoer, the defendant—never the plaintiff (except perhaps in the reverse declaratory suit)—who will have 'acted or refused to act on grounds generally applicable to the class.'").

52. *See Mudd*, 68 F.R.D. at 530 ("Certainly, a defendant class justified on such grounds does not appear to be fairly intended by the rule. The wording of Rule 23(b)(2) is awkward in application to any defendant class. The rule seems to contemplate injunctive relief as running against the party opposing the class. This conclusion would render it inapplicable to any defendant class." (citations omitted)); *see also* Holo, *supra* note 42, at 223 n.4 ("The only portion of the rule which, by its language, appears to preclude the use of defendant classes is 23(b)(2).").

53. *See* Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980) (explaining that proceeding with a defendant class action under 23(b)(2) would frustrate the language of the rule); Thompson v. Bd. of Educ., 709 F.2d 1200, 1204 (6th Cir. 1983) ("[T]he language in this rule contemplates certification of a plaintiff class against a single defendant, not the certification of a defendant class."); *Henson*, 814 F.2d at 416 ("If as we doubt there is a great need for defendant classes in Rule 23(b)(2) suits, we do not doubt that the Advisory Committee on the Federal Rules of Civil Procedure will repair the gap left by our interpretation [of] the present rule.").

Finally, 23(b)(3) classes require both that common questions of law or fact predominate and that the class action is a superior device.[54] These are appropriate classes in the classic damages actions in which the small amount of money per class member makes filing suit unworkable without a class action.[55] Here, unlike the other two categories, the federal rules require that the court provide the best practicable notice to class members and the ability to opt out of the class.[56] Because opt-outs are required under the federal rules, courts often grapple with *both* the administrability of binding a class of defendants who may simply opt out of the judgment *and* due process concerns of anyone who did not actually receive the notice.[57]

In all, despite the acute practical problems it eventually causes, shoehorning defendant classes into a procedural device meant primarily for plaintiff classes is, at the very least, textually possible.

B. IN PRACTICE, DEFENDANT CLASSES ARE ALIVE AND WELL

Defendant classes predate the 1966 codification of Rule 23 and trace their origin to English common law.[58] In fact, some

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

55. *Cf. id.*

56. *Compare id.* 23(c)(2)(B) ("For any class certified under Rule 23(b)(3) . . . the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."), *and id.* 23(c)(2)(B)(v) ("[T]he court will exclude from the [(b)(3)] class any member who requests exclusion."), *with id.* 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class."). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810–11 (1985) (explaining the typical notice procedures of class actions).

57. *See, e.g.*, Kline v. Coldwell, Banker & Co., 508 F.2d 226, 238 (9th Cir. 1974) (Duniway, J., concurring) ("What member of a class of defendants who is in his right mind, and who is told that, if he does not elect to be excluded, he may be liable for $750,000,000 plus very large attorneys' fees and costs, will fail to opt out?"); Clark v. McDonald's Corp., 213 F.R.D. 198, 224 (D.N.J. 2003) (denying certification of a 23(b)(3) defendant class because the "opt out of defendant class members . . . would render the certification of a damages subclass . . . a futile exercise" (internal quotations omitted)); *In re* Arthur Treacher's Franchise Litig., 93 F.R.D. 590, 595 (E.D. Pa. 1982) ("The Court completely agrees with defendants' argument that the proposed defendant-class members would undoubtedly opt out of the class thus rendering a (b)(3) certification, even if otherwise appropriate, a pointless judicial exercise.").

58. *See* RUBENSTEIN, *supra* note 22, § 5:2 (tracing the earliest defendant class action lawsuits to the seventeenth-century English chancery courts).

scholars have suggested the defendant class served as the original impetus for the class action device as a whole.[59] But even in modern times, the problems bound up in defendant class actions are not merely academic. Though the prevalence of the defendant class action indisputably pales in comparison to its plaintiff counterpart, defendant classes still rear their ugly head in constitutional challenges, securities litigation, general damages cases, patent litigation, and antitrust cases.[60]

Civil rights cases often ask for injunctive relief against a class of local officials for violation of constitutional rights.[61] By their nature, these are necessarily Rule 23(b)(2) classes because they involve injunctive relief rather than damages.[62] Perhaps most famously, the plaintiff in *Zablocki v. Redhail* successfully sued all Wisconsin county clerks, claiming their refusal to allow people with outstanding child support debt to obtain a marriage license violated citizens' Fourteenth Amendment substantive due process right to marry.[63] In this case, the district court actually certified a class on both sides: a class of plaintiffs including "all Wisconsin residents who had been refused a marriage license pursuant to § 245.10(1) by one of the county clerks in Wisconsin" and a class of defendants including "all county clerks in the State."[64] However, despite this rare appearance of a defendant class in front of the Supreme Court, the Court used a footnote to deliberately avoid ruling on the question of whether

59. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 24–25 (1987) (surveying writings and suggesting the earliest class actions involved landed lords from the seventeenth and eighteenth centuries suing a class of defendant tenants to more efficiently resolve land disputes); *see also* Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515, 523–24 (1974) (unearthing a case from as early as 1565 that treated defendants as a class).

60. *See* Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73, 83 tbl.1 (2010) (estimating defendant class actions to be over fifty percent constitutional and securities suits, ten percent damages cases, four percent antitrust cases, and four percent patent cases); *cf.* RUBENSTEIN, *supra* note 22, § 5:2 ("Defendant classes most often appear in securities litigation, patent and copyright infringement cases, and actions against local officials in challenges to state law.").

61. Holo, *supra* note 42, at 262–63 (discussing defendant class actions' common application in challenging state laws).

62. *Id.* (using *Doss v. Long*, 93 F.R.D. 112 (N.D. Ga. 1981), to illustrate the typical civil rights case involving a 23(b)(2) defendant class).

63. Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

64. *Id.* at 378–79.

certification of a defendant class would itself violate the Constitution's Due Process Clause.[65]

Following civil rights cases against state and local officials, securities litigation is the second mostly likely place to find a defendant class.[66] Most commonly, these are brought by securities purchasers under sections 11 and 12 of the Securities and Exchange Act against a class of directors, partners, experts, and underwriters who facilitated a false registration statement with the SEC.[67] As they seek damages, these cases typically attempt to certify the defendant class under Rule 23(b)(3).[68] However, securities cases sometimes come under 23(b)(1) in order to avoid inconsistent adjudications among members of the defendant class.[69]

Third, and separate from the securities category, a defendant class often comes up under Rule 23(b)(3) when a plaintiff or class of plaintiffs seeks general damages from a class of defendants.[70] For example, when a Ponzi scheme created a group of net winners and net losers, the net losers sued in federal court to recover their losses from the net winners of the scheme.[71] Maryland's *Yang* case, involving victims of an alleged towing scheme, seems to have begun as a 23(b)(1) and 23(b)(2) case "for litigation purposes," but it ultimately settled as a 23(b)(3) case for damages "for settlement purposes."[72] Scholars estimate such general

65. *Id.* at 380 n.6 ("[A]ppellant has not asserted that he was injured in any way by the maintenance of this suit as a defendant class action. Indeed, appellant never filed a brief in the District Court in opposition to the defendant class, despite being invited to do so . . . .").

66. Shen, *supra* note 60, at 83 tbl.1 (estimating that 17.5% of defendant classes arise in securities litigation whereas 35.6% arise as constitutional challenges).

67. *See* Holo, *supra* note 42, at 245–49 (explaining defendant class actions in the securities litigation context).

68. *Cf. id.* at 249 ("[C]ourts have little problem certifying section 11 claims pursuant to 23(b)(3). However, courts are divided as to what subsection of rule 23 is applicable to section 12(2) claims when certifying a defendant class of underwriters.").

69. *See, e.g.*, Equitable Life Assurance Soc'y of U.S. v. Shapira (*In re* PharMor, Inc. Sec. Litig.), 875 F. Supp. 277, 280 (W.D. Pa. 1994) (certifying the defendant class under Rule 23(b)(1)(B)).

70. Shen, *supra* note 60, at 83 tbl.1 (estimating 10.2% of defendant class actions form to collect damages).

71. Bell v. Brockett, 922 F.3d 502, 504 (4th Cir. 2019).

72. Yang v. G & C Gulf Inc., Case No. 403885-V, at 16 (Md. Cir. Ct. Jan. 16, 2018).

damages cases represent roughly one-tenth of defendant class actions.[73]

Patent attorneys also often try to shoehorn their litigation into defendant classes to avoid inconsistent enforcement of patent rights.[74] In particular, patent attorney Donald Burton has championed using defendant class actions in patent cases because of their usefulness in *Markman* hearings[75] and creating collateral estoppel for other patent claims.[76] First, he argues that without defendant classes, a *Markman* hearing that clarifies the meaning of terminology in a patent would create inconsistent adjudications for patent holders.[77] Second, he argues that defendant classes simplify patent litigation because a court that declares a patent valid cannot prevent a future court from declaring that same patent invalid without binding all potential defendants in a class.[78] As Robert Holo argued as a student in his comment for the *UCLA Law Review*, patent cases are most appropriately brought as a 23(b)(2) class if they can limit their request for relief to mere injunctive or declaratory relief.[79]

Finally, plaintiffs sometimes sue a class of defendants in an antitrust context when alleging a conspiracy among defendants too numerous to litigate separately or join together in one

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73. Shen, *supra* note 60, at 83 tbl.1.

74. *See* Holo, *supra* note 42, at 249–50 (introducing the use of defendant classes of patentees to achieve consistent enforcement of patent rights).

75. *Markman* hearings emerged from *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 984–85 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996), in which the Federal Circuit—much to the chagrin of federal judges since—required district court judges to define the scope of patentee's rights as a matter of law before submitting the question of fact of a patent's infringement to a jury.

76. *See* Donald E. Burton, *The Metes and Bounds of the Defendant Class Action in Patent Cases*, 5 J. MARSHALL REV. INTELL. PROP. L. 292, 292–96 (2006).

77. *Id.* at 293–95.

78. *Id.* at 295–96. On the other hand, the inverse situation has already been preempted by the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). Once a court declares a patent *invalid*, a future court may not reverse course and declare that same patent valid. *Blonder-Tongue Lab'ys, Inc.*, 402 U.S. at 350.

79. *See* Holo, *supra* note 42, at 256 ("Therefore, as long as the patentee requests injunctive or declaratory relief, the court has power to bring the action within the purview of (b)(2)."). However, as noted in Part I.A, some circuits have now held that defendant classes violate the text of Rule 23(b)(2). *Supra* note 53 and accompanying text.

action.[80] Almost invariably, such cases involve a 23(b)(3) class because the plaintiffs (themselves typically a plaintiff class) are suing for damages.[81] However, the circuits are split on whether to allow plaintiffs to allege a conspiracy via a defendant class based on a so-called "membership ratification theory."[82] The Second Circuit has explained this theory as "whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate."[83] In other words, defendants are liable for the actions of the group merely by being members of that group.

One can see why a plaintiff alleging antitrust violations of an entire membership of a trade association would find the membership ratification theory useful.[84] If the plaintiff does not have to prove illegal conduct of each individual member of the association, the questions of law or fact suddenly become common to the entire defendant class, satisfying the commonality requirement of Rule 23(a)(2).[85] Questions of law and fact common to class members will also predominate over any individual questions for each member of the class, satisfying the predominance requirement of Rule 23(b)(3).[86] The convenience theory led the federal district court in *Thillens Inc. v. Community Currency Exchange Ass'n* to certify a defendant class based on their membership with the Community Currency Exchange Association of Illinois, where plaintiffs alleged members of the association were

80. Holo, *supra* note 42, at 257 ("Generally, defendant class actions are used in antitrust cases involving an alleged conspiracy among the defendants to violate the relevant antitrust laws.").

81. *See id.* at 257–58.

82. *See id.* at 259–60 (explaining the split between the Second and Ninth Circuits on allowing defendant class certification via membership ratification theory). *Compare* Phelps Dodge Refin. Corp. v. FTC, 139 F.2d 393, 397 (2d Cir. 1943) (accepting the membership ratification theory and granting certification to a defendant class of alleged conspirators), *with* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 236 (9th Cir. 1974) (rejecting the membership ratification theory in the antitrust context and refusing to certify a defendant class).

83. *Phelps*, 139 F.2d at 396.

84. Holo, *supra* note 42, at 259–60 (explaining that the membership ratification theory enables convenient legal presumptions for complainants).

85. *E.g.*, Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Ill., Inc., 97 F.R.D. 668, 677–78 (N.D. Ill. 1983) (discussing how such a class satisfies Rule 23(b)(3)).

86. *Cf., e.g.*, Holo, *supra* note 42, at 259–60 (noting that class-member defendants will be uniformly presumed liable, if a plaintiff can prove the truthful existence of his harm).

conspiring to restrain plaintiff's trade in violation of state and federal antitrust laws.[87] However, other courts have been more skeptical of what this theory means for a defendant's due process rights; the Ninth Circuit, for example, rejected this approach for defendant classes in *Kline v. Coldwell, Banker & Co.* because "membership liability is inherently an individual question"[88]—undermining the predominance over other issues required by Rule 23(b)(3).

Overall, federal district courts have mostly encountered defendant classes in civil rights, securities, damages, and antitrust litigation.[89] While defendant classes have proven somewhat useful in these contexts, courts have nevertheless approached defendant classes in each of these categories with trepidation due to the risk of administrability nightmares and due process violations—two concerns outlined in more detail in Part II.

II. CRITIQUES OF DEFENDANT CLASS ACTIONS

Despite the federal rules' clear allowance of defendant class actions, they have nevertheless become the scorn of judges and scholars for two reasons: administrability of the litigation and due process concerns for the absent defendants.[90] This Part develops those two primary critiques—which match similar criticism from the Maryland Court of Appeals when it ultimately nixed defendant classes altogether[91]—and shows why these concerns ultimately outweigh any potential benefits the defendant class brings to bear.

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87. *Thillens*, 97 F.R.D. at 677 ("It is sufficient for class certification that the common question be either of fact *or* law. Not all factual or legal questions raised in the lawsuit need be common so long as a single issue is common to all class members.").

88. Kline v. Coldwell, Banker & Co., 508 F.2d 226, 233 (9th Cir. 1974).

89. *See* Shen, *supra* note 60, at 83 tbl.1 (breaking down the quantities of defendant class actions seen in federal court as of 2010).

90. *See infra* Parts II.A–B.

91. *Notice of Proposed Rules Changes*, STANDING COMM. ON RULES OF PRAC. & PROC. 3 (Mar. 5, 2019), https://mdcourts.gov/sites/default/files/rules/reports/200threport.pdf [https://perma.cc/4XGA-YMD6] (noting its fear of "how an action against a defendant class could be administered in light of the different interests that members of a defendant class might have from a plaintiff class" and raising specific concerns about "(1) the ability to opt out of the class; (2) the manner in which a class representative is selected; and (3) the form of notice that is sent to class members and the method of service" (footnotes omitted)).

A. COURTS STRUGGLE TO ADMINISTER DEFENDANT CLASSES

For 23(b)(3) classes, district courts struggle to maintain defendant classes because defendants have a statutory right to opt-out of the class.[92] As a reminder, the court must direct the best practicable notice to every absent member of a 23(b)(3) class.[93] Indeed, the Supreme Court has clarified that the ability to opt out is constitutionally required to satisfy an absent class member's due process concerns.[94] But such a requirement only makes administrative sense in the context of a plaintiff class.[95] Take, for example, the Supreme Court case *Phillips Petroleum Co. v. Shutts*.[96] There, a class of plaintiffs alleged they were owed interest on royalties from a gas company.[97] After the lower court certified a plaintiff class of 33,000 members, that court successfully directed notice to all but 1,500 of them and received opt-out requests from 3,400.[98] Such a low opt-out rate makes financial sense for absent plaintiffs: each individual plaintiff had nothing to lose by staying in the class, and the worst-case scenario was simply losing the case and not receiving a payout.[99] Because plaintiff class actions are often taken on contingency, plaintiffs

92. Holo, *supra* note 42, at 240–41; *see also* FED. R. CIV. P. 23(c)(2)(B)(v) (requiring the court to "exclude from the class any member who requests exclusion").

93. FED. R. CIV. P. 23(c)(2)(B) ("[T]he court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."); *id.* 23(c)(2)(B)(v) ("[T]he court will exclude from the class any member who requests exclusion . . . ."); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810–11 (1985) (discussing the interactions between defendant class actions and the opt-in procedures).

94. *Shutts*, 472 U.S. at 798 ("The Due Process Clause requires notice, an opportunity to appear in person or by counsel, an opportunity to 'opt out,' and adequate representation. It does not require that absent class members affirmatively 'opt in' to the class, rather than be deemed members of the class if they did not 'opt out.'").

95. *See* Holo, *supra* note 42, at 240–41 ("When a group of plaintiffs is seeking certification as a class, there is no general incentive for a class member to opt out; after all, most class members' individual claims are relatively small and the named class representatives are doing all of the work.").

96. 472 U.S. 797 (1985).

97. *Id.* at 799.

98. *Id.* at 799–801.

99. *See* Holo, *supra* note 42, at 241.

also saved substantial attorney's fees by joining the class rather than opting out and litigating on their own.[100]

But those incentives are inverted for a defendant class. If presented with a choice, a defendant has a strong incentive to simply opt out of the judgment and avoid liability. In his comment on the topic, Holo illustrates well the win-win scenario an opting-out defendant faces:

> If the defendant class loses the action, the defendant who opted out is free from liability and will still have the opportunity to defend himself in later actions. But if the defendant class is ultimately successful, the opting-out defendant will at least have stare decisis on his side if the plaintiff then sues him individually.[101]

This reality has frustrated federal district court judges, one of whom has noted, "[m]assive opt-out undermines the breadth and finality of judgments, increases the possibility of duplicative litigation, and lessens the probability of giving plaintiffs full relief."[102] Even the state judge who ultimately certified Maryland's *Yang* case initially eschewed a 23(b)(3) defendant class certification because "the defendants can simply opt-out and effectively defeat class certification by heading for the door."[103] William Rubenstein, for his part, dismisses this concern, suggesting other financial incentives will prevent a mass opt-out from occurring, including the desire to consolidate the legal fees for the litigation.[104] But the fact remains that should defendants—who typically oppose their own class certification—exercise their opt-out rights, the defendant class action would necessarily be rendered

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100. *See* Tyler W. Hill, Note, *Financing the Class: Strengthening the Class Action Through Third-Party Investment*, 125 YALE L.J. 484, 487 (2015) ("Class actions are often expensive to litigate . . . . Class action attorneys agree to front litigation costs through contingency fee arrangements in which they receive a portion of the funds awarded to the plaintiffs.").

101. Holo, *supra* note 42, at 241.

102. Williams v. State Bd. of Elections, 696 F. Supp. 1574, 1577 (N.D. Ill. 1988).

103. Yang v. G & C Gulf Inc., Case No. 403885-V, at 21 n.77 (Md. Cir. Ct. Nov. 14, 2016).

104. RUBENSTEIN, *supra* note 22, § 5:25 ("Given the certainty of having to make a choice between remaining in a defendant class or defending individual litigation, the economies of a joint defense may outweigh those of defending an individual action, and defendant class members would have an incentive to remain in the class.").

useless.[105] Given the opt-out complications, it should come as no surprise that most plaintiffs' attorneys avoid seeking 23(b)(3) certification for putative defendant classes when a 23(b)(1) or (b)(2) certification route is available instead.[106]

Being able to hold together a defendant class is more of a policy problem, but some circuits see it as a legal problem as well. Though no such requirement exists in the text of the federal rules, some circuits have read an implied administrability (or "ascertainability") requirement into the Rule 23(b)(3) path to certification.[107] Such a requirement means plaintiffs would have to show a court could objectively distinguish between members of a class and non-members. Currently, the First, Third, and Fourth Circuits follow this approach, but the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh do not.[108]

B. DEFENDANT CLASSES MAGNIFY THE CLASS ACTION'S DUE PROCESS PROBLEM

Even if a district court could successfully administer a defendant class, binding absent defendants via Rule 23 presents significant due process concerns because of problems with notice, adequacy of representation, and personal jurisdiction.

1. Defendants Need Notice They Are Being Sued

A lack of notice to absent class members imperils defendants' due process rights in that they may find themselves bound

105. Robert R. Simpson & Craig Lyle Perra, *Defendant Class Actions*, 32 CONN. L. REV. 1319, 1332 (2000) ("Certification of a defendant class would be futile if all class members exercised their right to be excluded from the class.").

106. *See* Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1040 (2003) ("Certification under Rule 23(b)(3) is understandably rare, since the mandatory opt-out provision would shatter maintenance of the class. Few plaintiffs would seek certification under (b)(3) only to have most, if not all, defendants leave the class. Thus, certification of defendant classes most often occurs under (b)(1) or (b)(2), with (b)(2), at least traditionally, being the most common certification category." (footnotes omitted)).

107. *See, e.g.*, Byrd v. Aaron's Inc., 784 F.3d 154, 162 (3d Cir. 2015), *amended* (Apr. 28, 2015) ("Ascertainability functions as a necessary prerequisite (or implicit requirement) because it allows a trial court effectively to evaluate the explicit requirements of Rule 23. In other words, the independent ascertainability inquiry ensures that a proposed class will actually function as a class.").

108. For a survey of the circuits' positions, see *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021).

by litigation they did not even know was ongoing in the first place. Rules 23(b)(1) and (b)(2) do not require notice at all to members of a class.[109] And even 23(b)(3) classes, which could result in a defendant being responsible for damages at the conclusion of the litigation, only require courts to send class members the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[110] Such loose language leaves open the possibility that courts may bind absent class members who did not receive actual notice they were members of the class.[111]

2. Defendants Are Inadequately Represented by Their Named Defendants and Their Attorneys

Defendant classes often suffer from wholly inadequate representation. Rule 23(a)(4) attempts to protect absent class members' due process rights by requiring they have adequate representation by the named class member and asks the court to determine whether "the representative parties will fairly and adequately protect the interests of the class."[112] Rule 23(g) reinforces those due process protections by requiring the court to evaluate whether the class's attorneys themselves can "fairly and adequately represent the interests of the class"[113] and whether those attorneys can commit the kind of resources necessary to advocate for the class.[114]

But three issues emerge that are unique for defendant classes. First, unlike in plaintiff class actions, defendants typically oppose their own class certification.[115] That opposition puts

109. FED. R. CIV. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class." (emphasis added)).

110. *Id.* 23(c)(2)(B).

111. Indeed, this appears to be the case in the Maryland litigation that ultimately prompted Maryland to toss defendant classes altogether. *See* Scherr, *supra* note 5, at 144 (noting that despite an attempt at notice, "many [defendants] received no notice until after liability").

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

113. *Id.* 23(g)(4).

114. *Id.* 23(g)(1)(A)(iv) ("In appointing class counsel, the court . . . must consider . . . the resources that counsel will commit to representing the class.").

115. *See* RUBENSTEIN, *supra* note 22, § 5:1 ("Although a named defendant could move to certify a defendant class, in fact, defendant classes are called into being by the plaintiff who, in the first instance, sues a class of . . . . adversaries,

courts on notice that the defendants may not be willing—much less able—to mount a zealous defense for their class should the case proceed to trial.

Second, defendants suffer an ability-to-pay problem. Plaintiff class action litigation in this country thrives because a plaintiffs' firm may file a suit on contingency and collect a share of the payout on behalf of the plaintiff class.[116] But no such incentive exists for a firm to represent a defendant class, which, in the event of a loss or settlement, will have no pot of damages from which to pay the attorney's fees.[117] As these defendants—often individuals or small businesses—face the distinct possibility of having to pay out-of-pocket for both damages and attorney's fees, firms are unsurprisingly much more skeptical of taking cases for defendant classes than plaintiff classes.

Finally, unlike plaintiff classes, which typically select their own named plaintiff for the sake of litigation, in defendant class actions, the *plaintiff* typically chooses the named *defendant*.[118] This can lead to perverse incentives, such as a plaintiff intentionally choosing a weak or financially under-resourced adversary or even colluding outright with the defendant.[119]

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selects a representative for them, and, assuming that she can convince a court to certify the class, then imposes on that representative the obligation of litigating on behalf of a class of absent defendants."); *see also* Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 639 (1978) ("[I]n most class actions, the named defendant does not seek his representative status . . . .").

116. *Cf.* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 14 (2009) (going further to argue that class action plaintiffs' attorneys are the *only* beneficiaries of a plaintiff class action).

117. Debra J. Gross, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 EMORY L.J. 611, 622 (1991) ("In the event that the class is certified, the named representative has no choice but to bear the financial burden of defending the class because no feasible means yet exists to tax absent class members.").

118. *See id.* ("In a defendant class action, on the other hand, the named defendant is appointed by the plaintiff and approved by the court, but is usually vehemently opposed by the chosen representative."). Indeed, even the district court judge in *Yang* acknowledged the absurdity of this problem. Yang v. G & C Gulf Inc., Case No. 403885-V, at 34 (Md. Cir. Ct. Jan. 16, 2018) ("Unlike named plaintiffs, who volunteer, Patner was essentially 'conscripted' when the plaintiffs made him the named defendant. He neither sought nor acquiesced in his role. Given the unique posture of the case when he was named as a defendant, Patner had much to lose and almost nothing to gain from the litigation.").

119. *See* Note, *supra* note 115, at 642 ("Nevertheless, the defendant cannot invariably be relied upon to resist his representative role . . . .").

3. Defendant Classes Need Special Protections to Allow a Court to Have Personal Jurisdiction over Absent Defendants

The final due process issue for defendant classes is that of personal jurisdiction. At its core, personal jurisdiction is a doctrine that protects parties' constitutional due process rights by limiting courts' ability to enter judgment against them.[120] Although the bulk of constitutional jurisprudence centers on personal jurisdiction over *defendants*, the Supreme Court notably expressed concern about personal jurisdiction over absent *plaintiffs* in the class action context in *Phillips Petroleum Co. v. Shutts*.[121] There, the Court ruled that the Constitution requires that absent plaintiffs in a Rule 23(b)(3) class be given notice, the ability to opt-out of any proceedings, and adequate representation in the litigation before a court could bind absent plaintiffs and pay out damages to them.[122]

But if the Supreme Court is concerned about personal jurisdiction for absent plaintiffs—who, at worst, will simply lose the litigation and not receive a payout—it should be far more concerned about personal jurisdiction over absent defendants, who may have to pay substantial sums or be bound by injunctive relief.[123] Indeed, both scholars and courts have warned that absent defendants in a class action deserve special protection because of their unique vulnerability in class action litigation.[124] Any

120. *Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining personal jurisdiction as a "court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests").

121. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 798 (1985) (summarizing due process requirements for plaintiff class members).

122. *Id.* at 812 ("[T]he procedure . . . where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process.").

123. Note that in a plaintiff class action, most circuits have held that a court may maintain personal jurisdiction over absent class members so long as the court has personal jurisdiction over the named plaintiffs themselves. *See, e.g.*, Lyngaas v. Curaden AG, 992 F.3d 412, 433 (6th Cir. 2021); Mussat v. IQVIA, Inc., 953 F.3d 441, 447 (7th Cir. 2020); Molock v. Whole Foods Mkt. Grp., 952 F.3d 293, 300 (D.C. Cir. 2020). In other words, a court need not show personal jurisdiction over every single absent class member.

124. Note, *Personal Jurisdiction and Rule 23 Defendant Class Actions*, 53 IND. L.J. 841, 843 (1978) ("[C]ourts certifying defendant class actions in the absence of complete personal jurisdiction should be aware that they are seeking a

defendant demands due process scrutiny; an *absent* defendant deserves even more.

Of course, allowing defendants to opt-out of a defendant class would at least partially ameliorate any due process concerns. But therein lies the paradox. If a court allows opt-outs—as it is required to do in a 23(b)(3) case and occasionally chooses to do in a (b)(1) or (b)(2) case—the defendant class could fall apart administratively and become useless. But if the court does not allow opt-outs—as it may only do in a 23(b)(1) or (b)(2) case—it risks trampling on the absent class members' due process rights. District courts therefore face a catch-22 when tasked with certifying a defendant class, and some states have begun to take notice by departing from the federal regime.

III. TO SOLVE THE DEFENDANT CLASS ACTION PROBLEM, STATES HAVE EXPERIMENTED WITH THEIR RULES IN GOOD, BAD, AND UNCONSTITUTIONAL WAYS

Nearly every state has a statute or rule outlining procedures for class actions brought in state court, with most states generally matching the language of Federal Rule 23.[125] This Part categorizes those state rules and evaluates the merits of their approaches. Ultimately, it concludes that some states' solutions have been good, some bad, and some quite clearly unconstitutional.

As the vast majority of the literature on defendant class actions focuses on the federal rule, very few scholars have attempted to discern any particular patterns among—or lessons from—the states' treatment of defendant classes. The notable exception is Thomas D. Rowe, Jr., who identified five categories of

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compromise and that such a compromise requires that members of a defendant class be afforded special protections."); *see also* Bell v. Brockett, 922 F.3d 502, 511 (4th Cir. 2019) (arguing that a court's "safeguards against the due process concerns inherent in all class actions . . . . are especially important for a defendant class action where due process risks are magnified" because "[i]n defendant class actions, an unnamed class member can be brought into a case, required to engage in discovery and even be subjected to a judgment compelling the payment of money or other relief without ever being individually served with a lawsuit").

125. *Accord* Todd L. Nunn, *Preface* to MATTHEW G. BALL ET AL., STATE CLASS ACTIONS: PRACTICE AND PROCEDURE (2016) ("[T]he vast majority of states . . . have adopted a class action rule similar to Federal Rule of Civil Procedure 23."); *see, e.g.*, MINN. R. CIV. P. 23 (mirroring Federal Rule 23).

significant departure among the various state rules in 2007.[126] But both because Rowe's categories predate the Maryland changes to defendant classes and because they tend to view distinctions through the lens of a plaintiff class, this Part instead analyzes the state rules based on their treatment of defendant classes alone.

While most states have not significantly diverged from the federal treatment of defendant classes,[127] a minority of states have consolidated around three solutions: plaintiff-only classes in Maryland; full elimination of classes in Mississippi and Virginia; and mandatory defendant classes in Iowa, New Hampshire, and North Dakota.[128] These solutions are, respectively, good, bad, and unconstitutional.

A. THE GOOD: PLAINTIFF-ONLY CLASSES

Thus far, Maryland stands alone in allowing plaintiff classes but explicitly barring defendant classes. Though Maryland had previously allowed defendant class actions in following Federal Rule 23, it abruptly reversed course in 2019 as a direct result of Maryland's first and only certified defendant class.[129] In *Yang v. G & C Gulf Inc.*, the state district court certified both a plaintiff class of car owners who had their vehicles towed in various Maryland parking lots and a defendant class of parking lot owners who had ordered their tows.[130] A subsequent settlement between the classes' representatives meant that absent defendant class

126. Thomas D. Rowe, Jr., *State and Foreign Class-Actions Rules and Statutes: Differences from - and Lessons for? - Federal Rule 23*, 35 W. ST. U. L. REV. 147, 148–50 (2007). Rowe's categories, other than those that largely match the Federal Rule, were "No Class-Action Rule," "Field-Code Provisions," "North Carolina's Pre-1966 Federal Rule Language," "the Uniform Class Actions Act states, and Pennsylvania's Hybrid Rules." *Id.* Because I focus more narrowly on the differential treatment of defendant classes, and Rowe analyzed many other factors of variability, many of the distinctions he draws do not maintain their relevance for this Note.

127. *See generally* AM. BAR ASS'N, SURVEY OF STATE CLASS ACTION LAW (Elizabeth J. Cabraser & Fabrice N. Vincent eds., 2023) [hereinafter STATE SURVEY] (compiling comprehensive state laws for class action suits).

128. *See infra* Part III.C.

129. *Notice of Proposed Rules Changes*, *supra* note 91, at 1–2 ("The proposed amendment to Rule 2-231 emanates from such an action filed in the Circuit Court for Montgomery County (*Yang v. G & C Gulf, Inc.*, Case No. 403885V) . . . ."); *see also* Scherr, *supra* note 5, at 144 (praising this move).

130. Yang v. G & C Gulf Inc., Case No. 403885-V, at 15 (Md. Cir. Ct. Jan. 16, 2018).

members were liable for damages on claims they had no opportunity to challenge, and for which many received no notice until after liability.[131]

In response, the Standing Committee on Rules of Practice and Procedure of the Maryland Court of Appeals[132] decided to eliminate defendant classes altogether. Their March 5, 2019, report adopting the change gives an insight into their reasoning:

> The Committee was concerned, however, about how an action against a defendant class could be administered in light of the different interests that members of a defendant class might have from a plaintiff class. Several particular concerns were expressed, including: (1) the ability to opt out of the class; (2) the manner in which a class representative is selected; and (3) the form of notice that is sent to class members and the method of service.[133]

As a result, the Maryland class action rule now begins, "[o]nly plaintiff classes may be named in an action and certified by the court. Defendant classes shall not be named or certified."[134]

The elegance of Maryland's approach of preserving plaintiff classes while explicitly eliminating defendant classes stems from its simplicity. Many states and scholars have contorted themselves into knots to propose complex solutions that might preserve the defendant class in theory while claiming to minimize the administrability and due process issues the device inherently creates.[135] Rather than continuing that tortuous tradition, Maryland dared to do what no other state would: it simply nixed defendant classes altogether.

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131. Scherr, *supra* note 5, at 144 ("[A]n absent defendant class member stands to lose, or be held liable, without the opportunity to defend itself.").

132. Note that the highest court in Maryland, formerly known as the Maryland Court of Appeals, is now officially the "Supreme Court of Maryland" as of 2022. Press Release, Gov't Rels. & Pub. Affs., Voter-Approved Constitutional Change Renames High Courts to Supreme and Appellate Court of Maryland (Dec. 14, 2022), https://mdcourts.gov/media/news/2022/pr20221214 [https://perma.cc/J7C7-XF78]. Because the relevant changes occurred while that court was named the Maryland Court of Appeals, this Note will use that name in referencing Maryland's highest court.

133. *Notice of Proposed Rules Changes*, *supra* note 91, at 3 (footnotes omitted).

134. MD. R. 2-231(a).

135. *See, e.g.*, Holo, *supra* note 42, at 237 ("[A]ssuming that courts generally will adhere to the clear requirements of the rule, certification of defendant classes pursuant to 23(b)(1)(A) is extremely troublesome and will be the exception rather than the rule.").

Eliminating defendant classes solves the device's administrability and due process problems because certification simply is not possible. But Maryland's solution is also superior to those of other states in that it preserves the justice and judicial economy of the plaintiff class action. Plaintiff class actions return billions of dollars every year to injured parties.[136] And even outside direct damages, plaintiff class action suits serve as a major deterrent to corporate abuse by forcing corporations to pay a large price in the aggregate for harming many consumers individually.[137]

In contrast, to the extent defendant class actions have contributed to justice, advocates could achieve similar results through different means. As noted in Part I, defendant classes have proven useful in constitutional challenges, securities litigation, patent litigation, and antitrust cases.[138] For constitutional cases, while defendant classes may have been useful or even necessary at the time of *Zablocki*, the rise of the nationwide injunction in recent years has significantly undercut the need to certify defendant classes to enjoy complete relief in constitutional cases.[139]

In securities litigation, courts have cast doubt on whether defendant class actions are even appropriate for Section 11 or 12

136. *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 826 (2010) (finding, for example, that district courts approved $22 billion in awards from class actions in 2006 and $11 billion in 2007); Laarni T. Bulan & Laura E. Simmons, *Securities Class Actions Settlements*, CORNERSTONE RSCH. 3 fig.2 (2022), https://www.cornerstone.com/wp-content/uploads/2022/03/Securities-Class-Action-Settlements-2021-Review-and-Analysis.pdf [https://perma.cc/TSY4-MS46] (finding that securities class actions alone recovered $1.8 billion in settlements for injured plaintiffs in 2021).

137. Indeed, some have argued that deterrence is the *only* useful function of most plaintiff class actions. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010) (arguing deterrence is the "only function" that "small-stakes class actions serve").

138. *Supra* Part I.B (outlining the different contexts which defendant class actions typically arise in).

139. Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2148 (2017) ("Whatever one's view on the merits of a particular nationwide injunction, there is no denying that this exercise of judicial authority is an increasingly prominent feature of our legal system.").

litigation against underwriters.[140] But, even if they were to survive, modern near-universal indemnification by corporations of their agents make the necessity of using a defendant class much less potent. Selectively naming defendants with a stronger juridical link to the plaintiffs' injuries would result in the same result as certifying a defendant class: the corporation paying out damages.

In patent litigation, the administrability concerns are perhaps even more potent than other uses of the device—leading those who defend their use in patent litigation no choice but to admit that the current rules deeply undercut the effectiveness of defendant class actions for patent infringement.[141] Finally, in antitrust litigation, most defendant classes depend on the ratification theory, of which courts have increasingly grown skeptical,[142] and cutting off the defendant class action device would not prevent plaintiffs from simply naming each of the corporations they allege are conspiring to price-fix.

This is not to say that the total loss of defendant class actions would not frustrate some legitimate use of defendant classes.[143] But given modern alternatives, the marginal benefits that defendant class actions provide now pale in comparison to their administrative and due process costs. The Maryland solution, therefore, offers a promising path forward for states seeking to make their way out of the defendant class action thicket.

B. THE BAD: NO CLASS ACTIONS

Two states, Mississippi and Virginia, which I refer to as the "No Class Action" states, do not have a class action rule anywhere in their statutes or rules of civil procedure. In adopting

140. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 4:46 (19th ed. 2022) ("A recurring issue is whether defendant classes of underwriters may be certified in cases alleging claims under §§ 11 and 12(a)(2) of the Securities Act of 1933 . . . .").

141. Matthew K.K. Sumida, Comment, *Defendant Class Actions and Patent Infringement Litigation*, 58 UCLA L. REV. 843, 883 (2011) ("[A]lleged patent infringers have no reasonable incentive to remain in a class. Those who opt out may free ride off of any favorable judgments obtained by the representative defendants without assuming financial responsibility or risk.").

142. *See supra* Part I.B (summarizing the state of the modern defendant-class action lawsuit).

143. *Cf.* Shen *supra* note 60, at 76–77 (arguing that, in the pursuit of justice, the defendant class action should be more broadly used in certain fact permutations).

many of the Federal Rules of Civil Procedure, Mississippi explicitly omitted Rule 23.[144] The comment accompanying the omission gives some indication as to their reasoning: "Few procedural devices have been the subject of more widespread criticism and more sustained attack — and equally spirited defense — than practice under Federal Rule 23 and its state counterparts."[145] Virginia similarly does not mention class action suits in statute or in its federal rules.[146] The Virginia Supreme Court has confirmed this absence by stating that "Virginia jurisprudence does not recognize class actions."[147] That said, courts may consolidate six or more similarly situated civil cases under the Multiple Claimant Litigation Act.[148]

The No Class Action states are outliers in their total condemnation of class action lawsuits. However, signaling where defendant classes may be headed, Virginia legislators have proposed legislation to follow the Maryland model in permitting plaintiff classes and specifically prohibiting defendant classes.[149]

In contrast to Maryland's approach of preserving plaintiff classes and eliminating defendant classes, the No Class Action solution goes too far in solving the defendant class action problem. Like the Maryland solution, this approach similarly solves the administrability and due process concerns with defendant class actions outlined in Part II by eliminating defendant classes altogether. But in doing so, it throws the baby out with the bathwater. As noted above, plaintiff class actions put tens of billions of dollars back into the pockets of consumers every year from defendants that have wronged them.[150] Sacrificing such relief in

144. *See* MISS. R. CIV. P. 23 (omitted).

145. *See id.* 23 (omitted), cmt.

146. *See* STATE SURVEY, *supra* note 127, at 489–90.

147. Casey v. Merck & Co., Inc., 722 S.E.2d 842, 846 (Va. 2012).

148. Multiple Claimant Litigation Act, VA. CODE ANN. §§ 8.01-267.1 to -267.9 (2023).

149. S.B. 1180, 161st Gen. Assemb., 2d Sess. (Va. 2021), https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1180 [https://perma.cc/V62T-25K7]. *But see* Jimmie E. Gates, *State High Court Says No to Class-Action Lawsuits*, CLARION LEDGER (May 17, 2018), https://www.clarionledger.com/story/news/2018/05/17/mississippi-supreme-court-rejects-class-action-lawsuits/620646002 [https://perma.cc/9EHN-WAYF] (noting that the Mississippi Supreme Court doubled down on its rejection of class action rules in 2018 after a five-month notice-and-comment period).

150. *See supra* note 136 and accompanying text.

the name of solving the rare problems of a defendant class is a gross overcorrection.

C. THE UNCONSTITUTIONAL: MANDATORY DEFENDANT CLASSES

While Maryland chose to solve the due process and administrability issues inherent in defendant classes by eliminating them altogether, three other states—Iowa,[151] New Hampshire,[152] and North Dakota,[153] which this Note refers to as the "Mandatory Defendant Class" states—took a different approach by eliminating the possibility for an absent defendant class member to opt-out of the class. This is a significant departure from the federal rules, especially for a Rule 23(b)(3) class. In fact, the federal rules *require* a district court to provide the best practicable notice to absent members of a 23(b)(3) class with an acknowledgement "that the court will exclude from the class any member who requests exclusion."[154]

This change began with a recommendation from the National Conference of Commissioners on Uniform State Laws, which approved a model statute known as the Model Class Actions Act (MCAA) in 1976.[155] Among its several changes to the federal rule, the MCAA mandates that, unlike absent members of a plaintiff class, "[a] member of a defendant class may not elect to be excluded."[156] However, despite considerable time and effort put into the model act, only North Dakota and Iowa chose to move forward with the wholesale adoption of the act: North Dakota became the first state to adopt the model act in 1977,[157] and Iowa followed in 1980.[158]

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151. IOWA R. CIV. P. 1.267(4).

152. N.H. SUPER. CT. CIV. R. 16(f).

153. N.D. R. CIV. P. 23(h)(4).

154. FED. R. CIV. P. 23(c)(2)(B)(v).

155. *See* Rowe, *supra* note 126, at 150 (discussing the approval of the Uniform Class Actions Act/Model Class Actions Rule in 1976); Roland v. Annett Holdings, Inc., 940 N.W.2d 752, 768 n.7 (Iowa 2020) ("[T]he Uniform Class Actions Act was officially changed to a Model Act in 1987." (citing MODEL CLASS ACTIONS ACT, historical note (UNIF. L. COMM'N 1976))).

156. MODEL CLASS ACTIONS ACT § 8(d) (UNIF. L. COMM'N 1976).

157. N.D. R. CIV. P. 23; *see also* STATE SURVEY, *supra* note 127, at 370 (providing an overview of North Dakota's class action law).

158. *See* STATE SURVEY, *supra* note 127, at 173 (providing an overview of Iowa's class action law).

Independently, in 1984, the New Hampshire Superior Court established Rule 16, its general class action rule.[159] That rule departs from the federal rules in two relevant ways. First, it abolishes the distinction between 23(b)(1), (b)(2), and (b)(3) classes by using a combination of the federal 23(a) requirements (numerosity, commonality, typicality, and adequacy of representation)[160] and the federal 23(b)(3) requirements (predominance of common questions and superiority).[161] Second, it both expressly *allows* absent plaintiffs to exclude themselves from any class and expressly *prohibits* absent defendants from doing the same:

> Exclusion. Any member of the plaintiff class who files an election to be excluded in the manner and in the time specified in the notice, is excluded from and not bound by the judgment in the class action. A member of a defendant class may not elect to be excluded.[162]

Thus, to date, only North Dakota, Iowa, and New Hampshire have mandatory defendant classes in their state rules.

Unfortunately, the creative approach of the Mandatory Defendant Class states to eliminate the possibility of opt-outs from defendant classes is unconstitutional. On one hand, this category of states has admittedly solved the *administrability* problem of defendant classes. By prohibiting absent defendants from opting out of the litigation, courts in these states avoid the risk of the class collapsing in on itself and undermining the judicial economy of hearing all disputes in one unified proceeding.

But on the other hand, this category of states has made the *due process* issues decidedly worse. If a defendant feels they have inadequate representation—either by the named defendant or the attorney representing the defendant class—the defendant has no recourse to defend themselves in their own suit with their own legal representation. In fact, the MCAA (adopted by North Dakota and Iowa) goes further in allowing a court to force absent defendants to pay a portion of the legal fees from representation

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159. *See id.* at 313 (providing an overview of New Hampshire's class action law).

160. *Compare* FED. R. CIV. P. 23(a)(1)–(4) (requiring numerosity, commonality, typicality, and adequacy of representation, respectively), *with* N.H. SUPER. CT. CIV. R.16(a)(1)–(4) (requiring the same).

161. *Compare* FED. R. CIV. P. 23(b)(3) (requiring predominance of common questions and superiority), *with* N.H. SUPER. CT. CIV. R.16(a)(5)–(6) (requiring the same).

162. N.H. SUPER. CT. CIV. R. 16(f).

they did not even wish to receive.[163] Nor do any of the Mandatory Defendant Class states require actual notice, leaving open the same possibility as in the federal rules that an absent member may be bound by a judgment without any knowledge the suit was ongoing.[164] The MCAA only requires notice to a defendant if his liability is over $100 and "if his identity and whereabouts can be ascertained by the exercise of reasonable diligence."[165] And New Hampshire matches the federal notice language by requiring "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[166] Ultimately, an absent defendant in any of these states may not even know she is being sued in a class action, and even if she did, she would have no choice but to accept being part of the class and bound by the judgment of the court.

But the due process issue that becomes far worse in mandatory defendant classes is personal jurisdiction. In fact, following the Supreme Court's decision in *Shutts*, this approach is almost certainly unconstitutional. As discussed in Part II, *Shutts* held that states may only maintain personal jurisdiction over out-of-state absent class members in a 23(b)(3) plaintiff class if they afford those absent class members the ability to opt-out.[167] Mandatory Defendant Class states thus run into two problems.

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163. MODEL CLASS ACTIONS ACT § 16(b) (UNIF. L. COMM'N 1976) ("If a plaintiff is entitled to attorney's fees from a defendant class, the court may apportion the fees among the members of the class."). *But cf.* N.H. SUPER. CT. CIV. R. 16(h) (offering fee-shifting in the case of a prevailing plaintiff class but remaining silent on fee-shifting in the case of a defendant class).

164. *Cf.* MODEL CLASS ACTIONS ACT § 7(d) (UNIF. L. COMM'N 1976) (requiring mail notice to any class-member whose "potential monetary recovery or liability is estimated to exceed $100").

165. *Id.*; *cf.* N.D. R. CIV. P. 23(g)(4) (requiring notice under the same criteria); IOWA R. CIV. P. 1.266(4) (requiring the same).

166. N.H. SUPER. CT. CIV. R. 16(e).

167. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 798 (1985) ("The Due Process Clause requires notice, an opportunity to appear in person or by counsel, an opportunity to 'opt out,' and adequate representation. It does not require that absent class members affirmatively 'opt in' to the class, rather than be deemed members of the class if they did not 'opt out.'"); *see also supra* Part II.A (discussing *Shutts* and 'opt out' incentives in detail).

First, these rules destroy the distinction between 23(b)(1), (b)(2), and (b)(3) classes.[168] *Shutts* had limited its requirement of opt-outs to 23(b)(3) classes and seemed to leave in place the ability for courts to bar opt-outs from 23(b)(1) and (b)(2) classes.[169] But without delineating between the three types of classes, the Mandatory Defendant Class states make it more difficult to treat damages cases—23(b)(3) classes—with the special due process concerns that the Constitution demands.

Second, *Shutts* itself made clear that defendants were even more vulnerable than plaintiffs in class action litigation and deserved *more*, not less, due process protection:

> The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. . . . The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's fees. These burdens are substantial, and the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant.[170]

If the Due Process Clause requires opt-outs for absent plaintiffs, and the Due Process Clause demands even more protections for absent defendants than it does for absent plaintiffs, then, at the very least, the Due Process Clause must require the ability for absent defendants to opt-out of a 23(b)(3) class.

In their defense, each of the states taking this approach approved these rules just prior to the *Shutts* decision in 1985,[171] and the rarity of defendant classes have prevented any serious challenges to defendant class certification arising from these states. Still, following *Shutts*, the Mandatory Defendant Class

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168. *See* N.H. SUPER. CT. CIV. R. 16(a) (categorizing all class actions into just one class type); N.D. R. CIV. P. 23(a)–(b) (doing the same); IOWA R. CIV. P. 1.261–1.262 (doing the same).

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

170. *Id.* at 808; *see also id.* at 811 ("Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter.").

171. These statutes became law in 1977 (North Dakota), 1980 (Iowa), and 1984 (New Hampshire). *See* STATE SURVEY, *supra* note 127, at 370, 173, 313 (providing an overview of the class action laws of North Dakota, Iowa, and New Hampshire, respectively).

states may no longer plausibly claim their prohibition on opt-outs for any defendant class can survive Due Process Clause scrutiny, and an absent defendant bound by the judgment of defendant class action litigation in any of these states would have a strong constitutional case before the United States Supreme Court.

Though the unconstitutionality of these laws is evident, the federal courts have not yet had an opportunity to intervene because defendant class actions arising under state rules in the Mandatory Defendant Class states are rare. In fact, since revising their rules, New Hampshire and North Dakota have seen no such cases whatsoever.[172]

Iowa appears to have seen only two such cases following its adoption of its current rules, and neither were damages cases that barred opt-outs in direct violation of *Shutts*. The first, *Iowa Annual Conference of United Methodist Church v. Bringle*, involved a church suing 140 neighboring property owners to declare those properties were burdened with servitudes.[173] In *Bringle*, the Supreme Court of Iowa first acknowledged that their state rule "clearly contemplate[s] the use of the class action tool by a plaintiff in bringing a suit against a class of defendants."[174] But it ultimately upheld the trial court's denial of class certification because the class failed the state rule's commonality and adequacy requirements.[175] Nevertheless, even if the certification had been granted, the federal courts still would not have had a chance to apply *Shutts*'s admonition that class members must be able to opt out of damages cases.[176] As noted above, Iowa's rules abolish the distinction between the federal classes,[177] but if brought in federal court, a plaintiff would bring this

172. To confirm this, I ran a search for "defendant class" and "class of defendants" in Westlaw for New Hampshire and North Dakota state cases and found no relevant cases. This holds true as of February 2024.

173. Iowa Ann. Conf. of United Methodist Church v. Bringle, 409 N.W.2d 471, 473 (Iowa 1987).

174. *Id.* at 474.

175. *Id.* at 474–75 (agreeing with the lower court that "no common question exists and that a conflict of interest exists between members of the proposed class of defendants").

176. As a reminder, *Shutts*'s ruling was limited to damages cases arising under Rule 23(b)(3) or their state equivalents. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985).

177. IOWA R. CIV. P. 1.262(2) (outlining only a single path toward class certification).

claim under Rule 23(b)(2) because it seeks injunctive or declaratory relief.[178] As *Bringle* did not involve the kind of damages case the United States Supreme Court scrutinized under *Shutts*, the federal courts could not have relied on *Shutts* to strike down Iowa's bar on opt-outs of defendant classes.

A second Iowa case, *Cedar Rapids Community School District v. Parr*, involved a pregnancy discrimination complaint by a class of Cedar Rapids teachers, who were situated as a class of defendants in the suit opposite the school district as plaintiffs. There, the district court certified the class of defendants without any analysis under the state rule,[179] which failed to preserve it for review at the Supreme Court of Iowa.[180] But yet again, while the case eventually involved some collateral backpay for the named defendants,[181] defendants sought injunctive and declaratory relief, so the *Shutts* opt-out requirement did not apply.[182] Therefore, the question is no longer whether these statutes are unconstitutional but how long it will take the courts to intervene.

States in these categories—Plaintiff-Only Classes, No Class Actions, and Mandatory Defendant Classes—each recognize the potent administrability and due process problems bound up in the defendant class action.[183] But their diverging solutions offer a natural experiment for other states and the federal judiciary to observe before proposing their own fixes. While academics have proposed various solutions that, in theory, would preserve the defendant class action while mitigating its worst

178. *See* FED. R. CIV. P. 23(b)(2) (allowing certification of a class when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole").

179. *See generally* Cedar Rapids Cmty. Sch. Dist. v. Parr, No. 97858, 1973 WL 2702 (Iowa Dist. Ct. May 25, 1973), *aff'd in part, rev'd in part*, 227 N.W.2d 486 (Iowa 1975) (neglecting entirely to acknowledge that the case in front of it is a class action).

180. Cedar Rapids Cmty. Sch. Dist. v. Parr, 227 N.W.2d 486, 491 (Iowa 1975) ("Since no request was made for a specific ruling on defendants' class action motion that matter is not presented for review.").

181. *Id.* at 499 (affirming backpay and sick leave benefits for the teachers who were unlawfully terminated pursuant to the discriminatory policy).

182. It is worth noting that the procedural posture of this case is particularly strange, in that it paradoxically resulted in damages for the defendants rather than the plaintiffs, and defendants were the ones seeking declaratory relief. The most constitutionally suspect case under *Shutts* would be a damages case that bound absent defendants and barred their ability to opt-out.

183. *See supra* Parts II.A–C.

problems,[184] none of those theoretical fixes have been tested. This Note therefore takes the position that of the state-based solutions that are actually in effect, Maryland's route of preserving plaintiff classes while eliminating defendant classes altogether rises above the rest. Though Maryland pioneered this class action regime, its success can provide a roadmap for other states (and the federal judiciary) seeking to untangle themselves from the defendant class action problem.

IV. HOW TO KILL THE DEFENDANT CLASS ACTION

This Note began in Part I with a background on Federal Rule 23 and its application to the rare defendant class action device. In Part II, it then introduced defendant classes' two primary critiques: administrability of the class and due process concerns for absent defendants. In Part III, it showed that states have responded to those issues by experimenting with various fixes in their class action rules. In evaluating state-based solutions, it concluded that—of the various fixes proposed by states—Maryland's decision in 2019 to abrogate defendant classes altogether while preserving plaintiff classes was the best approach. With Maryland's solution as its north star, this Note ends with a blueprint to guide states and the federal judiciary in the mechanics of implementing plaintiff-only class action rules.

The Maryland solution to the defendant class action problem may spur interest from other states and the federal judiciary in implementing that change. Implementing the Maryland solution could follow either of two routes. First, states and the federal judiciary could preemptively codify the Maryland solution into law ahead of any constitutional challenge. Second, advocates of the Maryland solution could wait and challenge the constitutionality of defendant class actions on Fifth and Fourteenth Amendment grounds in the federal judiciary when appropriate cases arise.

184. *See, e.g.*, Gross, *supra* note 117, at 612 ("[T]he time has come to effect the much-needed revision to Rule 23 that one faction of both courts and commentators has supported for decades, namely, requiring mandatory notice in all defendant class actions.").

A. THE FEDERAL JUDICIARY AND THE STATES CAN PREEMPTIVELY PROTECT DEFENDANTS BY CODIFYING PLAINTIFF-ONLY CLASSES

For the federal judiciary, the Supreme Court could modify the Federal Rules of Civil Procedure to explicitly bar defendant class actions. The Rules Enabling Act of 1934 entrusted the Supreme Court with promulgating the Federal Rules of Civil Procedure after a notice-and-comment period.[185] The Supreme Court has since delegated that power to the Judicial Conference[186] and more specifically to that conference's Standing Committee on Rules of Practice and Procedure, which is composed of state and federal judges, law professors, and other relevant practicing attorneys.[187] By May 1 every year, the Supreme Court must submit any proposed amendments to the federal rules emerging from that process, which will then take effect by December 1 unless rejected by Congress.[188]

The Judicial Conference could choose to amend the federal rules with the same language as Maryland by creating a new Rule 23(a) that reads, "(a) Permitted Classes. Only plaintiff classes may be named in an action and certified by the court. Defendant classes shall not be named or certified."[189] Each of the subsequent sections would need to be renumbered, and then the Judicial Conference would need to clean up any later implicit references to defendant classes. Those references include striking "or be sued" from Rule 23(a),[190] "or against" from Rule 23(b)(1),[191] and "or is sued" from Rule 23(c)(1)(A).[192] This approach makes crystal clear defendant classes have no place in federal court.

Alternatively, the Judicial Conference could skip the creation of a new Rule 23(a) and proceed straight to the cleanup language. Paired with a clear legislative history, this change is

185. 28 U.S.C. §§ 2071–2072.

186. *Id.* § 2073.

187. *See Committee Membership Selection*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection [https://perma.cc/T7FN-9QTS] (describing the process of appointing, and providing a list of, committee members).

188. 28 U.S.C. § 2074(a).

189. MD. R. 2-231(a).

190. FED. R. CIV. P. 23(a).

191. *Id.* 23(b)(1).

192. *Id.* 23(c)(1)(A).

likely strong enough on textual grounds to make it clear that defendant classes are no longer permitted. Aesthetically, this solution also preserves the familiar nomenclature of 23(b)(1), (b)(2), and (b)(3) classes, which in Maryland have now become 2-231(c)(1), (c)(2), and (c)(3) classes.[193]

Each state, of course, has its own process for amending its state court rules. For example, the Virginia State Senate passed legislation allowing class actions only from "a plaintiff on behalf of multiple similarly situated persons," though this legislation later stalled in the State Assembly.[194] Maryland, by contrast, came to its current plaintiff-only rule through its highest court.[195] Whatever the process, states may and should begin to shift their state court rules to disallow defendant classes to preempt constitutional challenges—especially the Mandatory Defendant Class states of New Hampshire, North Dakota, and Iowa.

B. THE SUPREME COURT CAN INTERVENE VIA JUDICIAL REVIEW

If states and the Judicial Conference refuse to act preemptively, the Supreme Court should take the opportunity to protect absent defendants' constitutional rights via judicial review. When reviewing lower federal court decisions, a few federal appellate courts have definitively rejected the idea that defendant class actions are inherently unconstitutional in all circumstances.[196] But those cases never reached the Supreme Court, which would have to review a decision on the constitutionality of state-based defendant classes directly on appeal from a state supreme court rather than allowing a federal court of appeals to weigh in first.[197] While the United States Supreme Court has

193. *Compare id.* (b)(1)–(3), *with* MD. R. 2-231(c) (mirroring the federal rule's form and structure).

194. S.B. 1180, 161st Gen. Assemb., 2d Sess. (Va. 2021), https://lis.virginia.gov/cgi-bin/legp604.exe?211+ful+SB1180+pdf [https://perma.cc/V62T-25K7].

195. Scherr, *supra* note 5, at 144 (summarizing the emergence of Maryland's defendant class action rule).

196. *See, e.g.*, Kerney v. Fort Griffin Fandangle Ass'n, 624 F.2d 717, 721 (5th Cir. 1980) ("The defendants also contend that a court could not, consistently with due process, impose individual liability on members of a defendant class. Essentially, they would contend that a defendant class action is unconstitutional. We disagree.").

197. This is true because of the *Rooker-Feldman* doctrine, derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *D.C. Court of Appeals v.*

granted certiorari to a handful of cases involving defendant class actions,[198] it has never addressed their constitutionality head-on, so it is free to take up such a case as a matter of first impression.

Ideally, the Supreme Court should look at the full weight of evidence against defendant classes and simply declare the device unconstitutional based on the Fifth and Fourteenth Amendment's due process protections. But at the very least, it should intervene to overturn rules in the Mandatory Defendant Class states that bar any opt-outs for defendant classes. Though each of these policies were enacted prior to the Supreme Court's ruling in *Shutts*, such mandatory defendant classes are now unquestionably unconstitutional on personal jurisdiction grounds.

CONCLUSION

When Maryland abruptly changed its policy on defendant class actions, it reinvigorated a once-sleepy debate about the practicality and constitutionality of defendant class actions. Rather than contorting itself to devise a fix that would be administratively feasible and properly protect absent defendants' due process rights, Maryland came up with a simple and elegant solution that should be the envy of other states and the federal judiciary: ending defendant class actions altogether.

States considering changes to their class action rules should capitalize on the momentum of Maryland's changes and end defendant classes altogether while preserving their plaintiff counterparts. At the very least, however, they should avoid the dangers of states like Mississippi and Virginia—which have caustically thrown out class actions of any stripe—as well as states like New Hampshire, North Dakota, and Iowa—which have violated absent defendants' due process rights by prohibiting opt-outs from any defendant class.

Feldman, 460 U.S. 462 (1983), which limit federal courts other than the Supreme Court from sitting as courts of appeal on state judicial cases. Such was the procedural posture of *Shutts*, in which the Supreme Court reviewed directly on appeal from the Kansas Supreme Court. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799 (1985).

198. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); ASARCO Inc. v. Kadish, 490 U.S. 605, 610 (1989) (reviewing an Arizona case involving a defendant class "of all present and future mineral lessees of state lands" but not addressing the defendant class's constitutionality directly).

As suggested in Part III, significant variation exists in how states treat plaintiff classes—even among the largest category of states that have chosen to permit class actions and treat defendant and plaintiff classes the same. This Note is agnostic as to the merits of those plaintiff class variations. Rather, this Note takes the more limited position that both states and the federal judiciary should follow Maryland's lead in permitting some flavor of plaintiff classes and take the simple approach of eliminating defendant classes altogether.

The federal judiciary should take heed of the lessons from state experimentation with defendant classes, as well. Eventually, the Judicial Conference should also follow Maryland's lead in nixing defendant classes, making clear in the federal rules that district courts may not certify a defendant class. But in the meantime, the courts themselves should at the very least be on notice that a defendant class certified under New Hampshire, North Dakota, or Iowa rules likely violates the Fourteenth Amendment to the United States Constitution.