

DUE PROCESS, CLASS ACTION OPT OUTS, AND THE RIGHT NOT TO SUE

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Over the past three decades, the Supreme Court has repeatedly insisted that due process requires that absent class members be given an opportunity to opt out of a class action seeking predominantly money damages. The Court's asserted justification for linking opt-out rights and due process focuses on absent class members' potential interest in seeking their own personal "day in court." But this day-in-court rationale provides a problematic basis for viewing opt-out rights as a categorical requirement of procedural due process. Perhaps most obviously, the day-in-court justification makes virtually no sense in the context of class actions involving only small-value, individual damages claims, which cannot feasibly be litigated outside the context of a class proceeding.

Recognizing the deficiencies of the standard day-in-court rationale, this Article approaches the connection between due process and class action opt-out rights from a different perspective. Rather than taking as its central case the condition of an individual class member wishing to pursue a separate, standalone litigation—the perspective implicit in the standard day-in-court account—this alternative perspective focuses instead upon the interests of those class members who prefer that their legal claims not be asserted at all.

Outside the class action context, ownership of a legal claim typically entitles claimholders to decide for themselves whether or not their claims will be asserted in litigation. Class actions extinguish this control right by transferring control over absent class members' claims to the class representatives and their attorneys. This transfer occurs without the claim owners' explicit consent and allows their claims to be used for purposes with which the owners of those claims might not agree, such as to punish a particular defendant or to enrich class action lawyers that the owner views as undeserving. Opt-out rights provide an appropriate procedural safeguard that protects objecting class members from having their control rights erroneously extinguished, thereby allowing them to decide for themselves whether or not their claims will be asserted.

Shifting the focus of due process analysis away from the interests of absent class members who wish to pursue individual litigation and

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toward the interests of class members who wish to avoid having their claims asserted at all sheds useful new light on a number of issues relating to the theory and practice of class action litigation, including: (1) the theoretical foundations for opt-out rights in cases involving so-called “negative value” claims, (2) the differential treatment of opt-out rights in equitable class actions as opposed to those seeking monetary relief, and (3) the relationship between opt-out rights and the underlying substantive law establishing the claimholder’s entitlement to sue.

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INTRODUCTION

A massive volume of ink has been spilled across the pages of the nation’s law reviews by scholars seeking to ascertain the relationship between class action litigation and the requirements of the Constitution’s two Due Process Clauses.¹ Neither the extensive body of scholarship de-

1. Even focusing on the past few years alone reveals an impressive range of scholarship addressing this relationship. See generally, e.g., Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 *Geo. Wash. L. Rev.* 577 (2011) [hereinafter Bone, *Puzzling Idea*] (discussing and critiquing idea that non-party preclusion based on adequacy of representation theory should be limited to class actions); Sergio J. Campos, *Mass Torts and Due Process*, 65 *Vand. L. Rev.* 1059 (2012) (contending mandatory class actions can be reconciled with due process in cases involving mass torts); Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 *Geo. Wash. L. Rev.* 798 (2014) (considering whether due process requires

voted to this relationship nor the still largely unsettled state of constitutional doctrine addressing the due process limits on class litigation is particularly surprising: Like J.L. Austin's evocative image of the exploding goldfinch,² the modern damages class action confronts decisionmakers with a contingency that was almost certainly unimagined—and most likely unimaginable—at the time the Due Process Clauses were included in the United States Constitution.

From its distant origins in thirteenth-century English law, the concept of due process has had in view the protection of some individual person threatened with an unlawful deprivation of a legally protected interest in life, liberty, or property.³ And the traditional incidents of procedural due process, such as entitlement to individualized notice and a day in court to present one's case, were originally organized around the paradigm of individualized litigation between a single plaintiff and a single defendant.⁴

Class action litigation departs from this individualized paradigm in many respects. Individual notice is formally required in only a subset of class actions and, even in those cases, notice is often practically available to only a subset of those whose legal rights may be affected by the proceeding.⁵ Participation rights for absent class members are severely constrained and such class members lack any practical control over the

notice and opt-out rights in actions certified under Federal Rules 23(b)(1)(A) and 23(b)(1)(B) that seek monetary relief); Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 *Loy. U. Chi. L.J.* 545 (2012) (discussing different conceptions of due process embedded in law of class actions); Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 *Utah L. Rev.* 319 (proposing new approach to class action defendants' due process rights); Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 *Geo. Wash. L. Rev.* 628 (2011) (discussing various approaches to reconciling group litigation and due process); Jay Tidmarsh, *Superiority as Unity*, 107 *Nw. U. L. Rev.* 565 (2013) (discussing relationship between due process, litigant autonomy, and social welfare in class action context).

2. See J.L. Austin, *Other Minds*, in *Philosophical Papers* 76, 88 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979) (“If we have made sure [an object is] a goldfinch, and a real goldfinch, and then . . . it does something outrageous (explodes, quotes [Virginia] Woolf, or what not), we don't say we were wrong to say it was a goldfinch, *we don't know what to say*. Words literally fail us . . .”).

3. See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *Yale L.J.* 408, 428–31 (2010) (discussing origins of concept of due process in Magna Carta and subsequent English legislation).

4. See, e.g., Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 *N.Y.U. L. Rev.* 296, 358 (1996) (observing “English and United States constitutional traditions initially made political commitments to due process within the framework of individual litigation” and “the relationship between process and individual participation” was therefore “straightforward”).

5. See, e.g., Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 *Fla. L. Rev.* 71, 92 (2007) (“[E]ven under the best of circumstances many class members might not receive actual notice of the class action litigation.”).

conduct of the litigation.⁶ And while there is general agreement that due process requires the adequate representation of class members' interests, the concept of adequacy necessarily differs in the class action context from its application in traditional litigation, where individual litigants can choose their own lawyers and exercise virtually plenary control over post-filing litigation decisions.⁷

To be sure, group litigation was not wholly unknown to the generations that framed and ratified the Fifth and Fourteenth Amendment Due Process Clauses. Equitable actions to enforce rights held in common by numerous individuals emerged early in English law and were familiar to Americans of the late eighteenth and early nineteenth centuries.⁸ But the damages class action is of decidedly more recent vintage, having emerged in its modern form with the 1966 amendments to the Federal Rules of Civil Procedure.⁹ Under the original version of Rule 23, adopted in 1938, class actions seeking money damages effectively operated on an opt-in basis, with a judgment treated as binding only upon those absent class members who affirmatively intervened in the case.¹⁰ The 1966 amendments introduced a new procedure—the so-called “opt out” class action authorized by Rule 23(b)(3)—which reversed the operative presumption of the original Rule by requiring class members to affirmatively request exclusion from the class in order to avoid being bound to the class judgment.

Since the 1966 amendments, the Supreme Court has suggested on multiple occasions that the provision of such an opt-out right is required by the Due Process Clauses.¹¹ But the Court has yet to explain the precise

6. See, e.g., Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 *Tex. L. Rev.* 571, 571 (1997) (“Unlike plaintiffs in ordinary litigation, [absent] class members are denied the right to make critical decisions about their claims, including the most crucial of all decisions: whether to settle or pursue their claims.”).

7. See, e.g., Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 *Tex. L. Rev.* 1137, 1139 (2009) (“[T]he reasons that class actions are thought to be necessary invariably generate the very conflicts of interest . . . that the traditional view of adequate representation forbids.”).

8. See generally Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987) (tracing evolution of group litigation in English and American equity courts).

9. See, e.g., Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 *U. Chi. Legal F.* 177, 185 (identifying “Rule 23(b)(3) class, commonly known as the ‘damage’ class action” as “innovative creation of the 1966 amendments”).

10. See 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1752 (4th ed. 2010) (explaining conception of class actions under original Rule 23).

11. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (“In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.” (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985))); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847–48 (1999) (citing *Shutts* for proposition that due process requires, at minimum, absent plaintiff be given opportunity

nature of the relationship between due process and the class action opt-out right or how that right fits within the broader framework of the Court's procedural due process doctrine.

The most common explanation for the link between due process and the right to opt out is grounded in a theory of litigant autonomy premised on the due process ideal of an individual's "day in court."¹² On this view, opt-out rights are valued principally because they enable unwilling plaintiffs to avoid the *res judicata* effect of a judgment in the class proceeding, thus preserving their ability to pursue their own separate, standalone litigation.¹³ But framing the connection between due process and the right to opt out in this way presents a number of conceptual difficulties. Among other challenges, this account of the relationship between due process and the class action opt-out right has difficulty explaining why opt-out rights should be required in the many class actions involving only small-value, individual damages claims that could not plausibly be litigated outside a class proceeding.¹⁴ And even in cases involving more significant individual damages figures, it is far from clear that requiring a categorical right to opt out would be consistent with the flexible balancing approach that typifies procedural due process analysis in other contexts.¹⁵

There is, however, another perspective from which to view the relationship between due process and the right to opt out. Rather than taking as its central case the situation of an absent class member who wishes to pursue a separate, standalone litigation, this alternative perspective focuses on the interests of those class members who, for whatever reason, wish to refrain from having their legal claims adjudicated at all. In other words, rather than focusing myopically on the ideal of an individualized day in court, the due process analysis may benefit by focusing greater

to opt out of class); see also *infra* Part I.A (describing current opt-out rights jurisprudence).

12. See, e.g., *Ortiz*, 527 U.S. at 846–47 (suggesting “inherent tension between representative suits and the [due process] day-in-court ideal is . . . magnified if applied to damage claims gathered in a mandatory class” because “legal rights of absent class members . . . are resolved regardless of either their consent, or . . . their express wish to the contrary”); see also *infra* notes 74–75 and accompanying text (discussing relationship between opt-out rights and day-in-court ideal).

13. See, e.g., 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:29, at 256 (4th ed. 2002) (suggesting primary rationale of opt-out right in Rule 23(b)(3) class actions is to protect “strong interest” of “small segment of class members” in pursuing individual litigation); 7AA Wright et al., *supra* note 10, § 1787, at 518 (“[T]he opt-out procedure preserves the right of potential class members who feel that their interests are in conflict with or antagonistic to the other class members to bring their own actions . . .”).

14. See *infra* notes 84–86, 93–95 and accompanying text (discussing weakness of day-in-court rationale as support for opt-out rights in cases involving only small-value claims).

15. See *infra* notes 87–90 and accompanying text (discussing reasons for questioning whether opt-out rights are needed to protect holders of even high-value claims).

attention on the interests of prospective class members who wish to keep their legal claims *out* of court entirely.

This alternative perspective starts from the observation that an individual's right of action constitutes a property interest that is protected by the Due Process Clauses.¹⁶ Like virtually all property, this property interest entails a right to exclude others from unauthorized use.¹⁷ Compelled adjudication of claims in a mandatory class proceeding deprives individuals of this right to exclude by allowing their property (i.e., their legal claims) to be used by someone else (i.e., the class representatives and their attorneys) without their consent and for a purpose with which they may not agree. In many cases, of course, absent class members may be indifferent toward or even appreciative of class counsel's efforts on their behalf, particularly in actions involving so-called "negative value" claims that cannot be economically litigated on a standalone basis.¹⁸ But even in the negative-value context, absent class members may have reasons for not wanting to see their legal claims asserted in a class proceeding.¹⁹ For example, absent class members may object to the use of their claims to punish a defendant for conduct they do not view as wrongful or which they do not believe caused them any harm.²⁰ Such class members might also object to having their claims used to enrich class action lawyers they view as undeserving. The available evidence suggests that a significant number of opt-out decisions are driven by precisely such concerns.²¹

Shifting the focus of due process analysis away from the interests of absent class members who wish to pursue individual litigation and toward the interests of class members who wish to avoid having their claims adjudicated at all has several important implications for the ongoing debate regarding the relationship between due process and the class action opt-out right. First, focusing on the right not to sue provides a

16. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); see also *infra* Part II.A (explaining property interest in unadjudicated legal claims).

17. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (describing right to exclude as "fundamental element of the property right"); Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 *Harv. J.L. & Pub. Pol'y* 593, 596 (2008) ("The idea of exclusion, in one form or the other, tends to inform almost *any* understanding of property, whether private, public, or community.").

18. See Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 *Notre Dame L. Rev.* 1057, 1059–60 (2002) [hereinafter Issacharoff, *Right to Opt Out*] (describing concept of negative-value claim).

19. See *infra* notes 179–195 and accompanying text (surveying reasons for plaintiff opt outs).

20. See *infra* Part II.D (providing examples of plaintiffs' desire to opt out to avoid litigation of claim entirely).

21. See *infra* notes 179–184, 187 and accompanying text (discussing evidence from reported judicial decisions regarding absent class members' reasons for opting out).

more satisfactory basis for viewing a generalized right to opt out as a core requirement of procedural due process. Importantly, unlike the standard day-in-court justification for the due process opt-out right, protecting the right not to sue provides a plausible explanation for why due process can be understood to require an opt-out right even in the negative-value context, where absent class members have no realistic interest in pursuing individual litigation.

Second, focusing on the right not to sue can help to identify when a due-process-based opt-out right should be understood to attach. As a practical matter, the individual interest in not having one's legal claim asserted has significance only where there is a plausible connection between the assertion or nonassertion of a particular claim, on the one hand, and the potential scope of the defendant's remedial obligation on the other.²² Where no such connection exists, an individual's property interest in controlling the disposition of his or her claim is negligible because the practical result of the litigation will be the same whether or not the class member's claim is asserted. This observation may help to explain the longstanding practice of insisting on opt-out rights in most actions seeking money damages while withholding such rights in suits seeking only injunctive relief. At the same time, however, focusing on the right not to sue suggests that the distinction between equitable remedies, on the one hand, and monetary remedies on the other may be too crude to address the due process concerns underlying the recognition of a constitutionally grounded opt-out right. Taking seriously the right of absent class members to control whether or not their claims will be asserted may require that opt-out rights be extended to all situations in which the inclusion or noninclusion of a class member's claim has the potential to affect the scope of a defendant's remedial obligation—even where the action seeks only injunctive relief.²³

Finally, focusing on the right not to sue sheds useful new light on the relationship between the due-process-based right to opt out and the underlying substantive law authorizing a particular claimholder's right of action. As noted above, the right not to sue stems from the status of a legal claim as a property interest protected by the Due Process Clauses. But it is black-letter law that the Constitution itself does not create such property interests, nor does it define their scope or extent.²⁴ It follows that those responsible for creating the relevant property interests may exercise some degree of control over the nature and incidents of such

22. See *infra* notes 242–247 and accompanying text (discussing cases in which individual opt outs have no impact on remedy).

23. See *infra* notes 248–260 and accompanying text (discussing distinction between divisible and indivisible remedies).

24. See, e.g., *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .”).

property, which may also affect the nature and extent of the constitutional protections that attach as a matter of procedural due process. This observation, in turn, suggests that those responsible for structuring legal entitlements—paradigmatically, legislatures at the state and federal levels—may be able to structure legal rights in such a way as to avoid the opt-out entitlement in cases where allowing opt outs would interfere with the policy goals of the underlying substantive law.²⁵

This Article proceeds in three Parts. Part I provides a general overview of the Supreme Court's existing case law discussing the relationship between due process and the class action opt-out right and of the ongoing academic debate regarding opt-out rights and their relationship to due process. Part II develops the argument for recognizing the right not to sue as a constitutionally protected interest falling within the protection of the Due Process Clauses and for viewing some form of opt-out mechanism as a requirement of procedural due process in most categories of damages class actions. Part III considers the potential practical implications of shifting the focus of due process analysis away from viewing the opt-out right as principally concerned with preserving the option of pursuing separate, standalone individual litigation and toward viewing the opt-out entitlement as a mechanism that also protects the right *not* to sue.

I. DUE PROCESS AND OPT-OUT RIGHTS: AN OVERVIEW

A. *Due Process and the Right to Opt Out Under Current Law*

Uncertainty regarding the relationship between the requirements of procedural due process and the notice and opt-out procedures contemplated by Rule 23(b)(3) is almost as old as Rule 23(b)(3) itself. The 1966 amendments to Rule 23 identified three distinct settings in which courts could grant class certification.²⁶ But only in those actions certified under Rule 23(b)(3)—the provision designed to deal with most money-damages actions—did the rulemakers expressly require that absent class members be given notice of the action and an opportunity to request

25. See *infra* notes 266–279 and accompanying text (discussing link between opt-out rights and substantive law creating underlying rights of action).

26. See Fed. R. Civ. P. 23(b)(1) (providing for certification where allowing multiple adjudications would pose substantial risk of subjecting defendant to “incompatible standards of conduct” or could “substantially impair or impede” ability of prospective class members to protect their own interests); Fed. R. Civ. P. 23(b)(2) (providing for certification where “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 declaratory relief is appropriate respecting the class as a whole”); Fed. R. Civ. P. 23(b)(3) (providing for certification where common questions of law or fact “predominate” over strictly individual questions and where class action would be “superior to other available methods for fairly and efficiently adjudicating the controversy”).

exclusion.²⁷ An Advisory Committee note explaining the 1966 amendments suggested a possible link between due process and the right to opt out,²⁸ and certain early courts concluded that due process required provision of notice and opt-out rights in virtually all class actions involving claims for money damages.²⁹ Other courts, however, concluded that opt-out rights were solely a creation of Rule 23 itself and were not required by the Constitution.³⁰

In *Phillips Petroleum Co. v. Shutts*,³¹ decided in 1985, the Supreme Court seemed to come down squarely on the side of viewing opt-out rights as constitutionally required, at least in those actions seeking “predominantly” money damages.³² “[W]e hold,” declared the *Shutts* Court, “that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”³³ But despite the seeming clarity of this pronouncement, the scope of the Court’s constitutional holding was rendered obscure by the case’s somewhat unusual procedural setting.

Shutts involved a multistate class action brought in Kansas state court. On appeal, the petitioners, the defendants who had lost in the

27. See Fed. R. Civ. P. 23(c)(2)(B) (providing “[f]or any class certified under Rule 23(b)(3),” court must direct that notice be provided and that such notice inform each notified class member that “court will exclude him from the class if he so requests by a specified date”).

28. See Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment (explaining notice requirement was designed “to give the [class] members . . . an opportunity to secure exclusion from the class” and indicating such notice was necessary “to fulfill requirements of due process”).

29. See, e.g., *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983) (holding due process requires provision of opt-out rights in action seeking both equitable and monetary relief).

30. See, e.g., *Laskey v. UAW*, 638 F.2d 954, 956–57 (6th Cir. 1981) (“[F]ailure to notify [Rule 23(b)(2)] class members of the right to opt out of the class is not a violation of due process.”); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 254–55 (3d Cir. 1975) (holding due process does not require provision of notice or opt-out rights in action certified under Rule 23(b)(2) seeking both injunctive relief and money damages).

31. 472 U.S. 797 (1985).

32. The *Shutts* Court expressly limited its holding “to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments” and made clear that the Court “intimate[d] no view concerning other types of class actions, such as those seeking equitable relief.” *Id.* at 811 n.3. The Court has repeatedly refrained from deciding whether due process requires the provision of opt-out rights in actions where monetary claims do not predominate but has recently alluded to the “serious possibility” that this might be the case. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (“While we have never held [absence of the opt-out right violates due process] where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.”); cf. *infra* Part III.C (discussing relationship between opt-out rights and remedial relief).

33. *Shutts*, 474 U.S. at 812.

state court below, argued that the Kansas court had lacked personal jurisdiction over absent class members from other states and therefore lacked legal authority to adjudicate those class members' claims.³⁴ The petitioners argued that the opt-out procedure employed by the Kansas court, which was similar to the procedure authorized by Rule 23(b)(3), was insufficient to establish personal jurisdiction and that the court should have instead required absent class members to affirmatively opt in by consenting to the inclusion of their claims in the class.³⁵ The Supreme Court rejected the petitioners' argument, holding that the opt-out procedure employed by the Kansas court was sufficient to afford nonresident class members the "minimal procedural due process protection" that would justify that court's exercise of jurisdiction over their claims.³⁶

Because the branch of the Supreme Court's due process jurisprudence dealing with limits on state-court jurisdiction "has never fit comfortably into the standard paradigms of 'due process' analysis,"³⁷ it was not immediately clear whether or to what extent *Shutts*'s due process holding would apply in cases where personal jurisdiction was not in question. Several commentators interpreted *Shutts* as speaking solely to the question of a state court's adjudicatory jurisdiction over the claims of absent, nonresident class members.³⁸ Others, however, interpreted the case more broadly, as requiring the provision of notice and opt-out rights in virtually all class actions seeking money damages.³⁹

34. *Id.* at 799–801.

35. *Id.* at 811.

36. *Id.* at 811–12.

37. Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Pa. L. Rev. 2035, 2080 (2008).

38. See, e.g., *id.* at 2078 ("[T]he doctrinal holding in *Shutts* has no direct application in those cases where a court has the power to exercise adjudicatory jurisdiction over absent class members without having to resort to a solicitation of consent through the issuance of individualized opt-out notice."); see also Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148, 1168 (1998) (interpreting "*Shutts*'s opt-out right" as "limited to contexts in which [the forum] would not otherwise have a basis for *in personam* jurisdiction" (emphasis added)).

39. See, e.g., Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. Mich. J.L. Reform 347, 381–87 (1988) ("An application of *Shutts* to Rule 23(b)(2) class actions demonstrates that the minimum due process requirements of notice and the opportunity to opt out are conspicuously absent. The Rule therefore violates due process."); Brian Wolfman & Alan B. Morrison, *What the Shutts Opt-Out Right Is and What It Ought to Be*, 74 UMKC L. Rev. 729, 733 (2006) ("In our view . . . the teaching of *Shutts* . . . is that . . . notice, adequate representation, and an opportunity to opt out—must be accorded to *all* class members who were not named as plaintiffs, not just those lacking jurisdictional contacts, before those class members can be bound."); cf. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 52 (1986) (observing "[t]here is no neat and logical means of resolving the question whether mandatory actions survive

On two separate occasions in the 1990s, the Supreme Court granted certiorari for the specific purpose of clarifying *Shutts's* constitutional holding. But on each occasion, the Court identified procedural flaws in the presentation of the issue and declined to reach the merits, leaving ambiguous the precise nature and scope of the opt-out right recognized in *Shutts*.⁴⁰ Since that time, the Court has not had occasion to conclusively resolve the ambiguities left open by its *Shutts* opinion. It has, however, repeatedly hinted at an understanding of the constitutional foundations of the opt-out right that is not limited to the personal jurisdiction context.

In its 1999 decision in *Ortiz v. Fibreboard Corp.*, the Court approvingly cited *Shutts's* due process language in the course of rejecting a settlement-only class action involving personal injury claims asserted against an asbestos manufacturer.⁴¹ The district court had granted certification under Rule 23(b)(1)(B), which does not require that absent class members be given the right to opt out.⁴² In rejecting the lower court's certification rationale, the *Ortiz* Court observed that "mandatory class actions aggregating damage claims" implicate core due process concerns—including the longstanding principle "that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."⁴³ The Court pointed to *Shutts* as a case in which it had "raised the flag on this issue of due process" in what the Court described as "related circumstances" and described that case as having recognized "that before an absent class member's right of action was extinguishable due process required . . . 'at a minimum . . . an absent plaintiff . . . be provided with an opportunity to remove himself from the class.'"⁴⁴

In two more recent decisions, the Court again cited *Shutts* in a manner that suggests a broader understanding of the case's constitutional holding. In *AT&T Mobility LLC v. Concepción*, the Court approvingly cited *Shutts* for the proposition that "a class-action money judgment" could only "bind absentees in litigation" if the absent class members are

Shutts" and "answer depends upon the view one takes of *Shutts* itself and of the need for mandatory classes").

40. See *Adams v. Robertson*, 520 U.S. 83, 85 (1997) (concluding writ of certiorari was improvidently granted where petitioners had failed to raise federal due process argument in state-court proceedings below); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120–22 (1994) (concluding certiorari was improvidently granted where procedural posture of case prevented Court from considering possibility that mandatory class had been improperly certified under Rule 23 independent any potential constitutional violation).

41. 527 U.S. 815, 848 (1999).

42. See *id.* at 828–30 (discussing district court's "limited fund" rationale for certification under Rule 23(b)(1)(B)).

43. *Id.* at 846 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (internal quotation marks omitted).

44. *Id.* at 847–48 (second alteration in *Ortiz*) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).

“afforded notice, an opportunity to be heard, and a right to opt out of the class,” and assumed that similar procedures would be necessary to accord binding affect to the results of a class arbitration.⁴⁵ In its much anticipated decision in *Wal-Mart Stores, Inc. v. Dukes*, decided the same term as *Concepción*, the Court characterized *Shutts* as having held that “[i]n the context of a class action predominantly for money damages . . . absence of notice and opt-out violates due process.”⁴⁶ Based on this understanding, the Court adopted a narrowing construction of Rule 23(b)(2)—which allows for certification of injunctive relief classes without the provision of notice or opt-out rights—thereby severely limiting lower courts’ ability to certify so-called “hybrid” class actions seeking both equitable and monetary relief.⁴⁷ Although the *Wal-Mart* Court acknowledged that *Shutts* had not specifically answered the question of whether due process required the provision of notice and opt-out rights in cases “where the monetary claims do not predominate,” the Court concluded that “the serious possibility that it may be so” provided support for its decision to read Rule 23(b)(2) narrowly.⁴⁸ Notably, this portion of the majority opinion in *Wal-Mart* was joined by all nine presently serving Justices.⁴⁹

Taken collectively, the opinions in *Ortiz*, *Concepción*, and *Wal-Mart* clearly reflect the view of a majority (and perhaps all) of the Court’s current members that the due-process-based opt-out right is not confined to the personal jurisdiction setting in which the *Shutts* Court first recognized that right. The Court has not, however, provided a clear explanation for why a right to opt out should be considered a general requirement of procedural due process. Nor has it attempted to situate the opt-out right within the broader framework of its procedural due process jurisprudence. The Court’s failure to clearly explain the basis for its view that due process requires that absent class members be given a right to opt out gives the requirement something of an *ipse dixit* character and frustrates efforts to predict how the requirement might apply in new pro-

45. 131 S. Ct. 1740, 1751 (2011).

46. 131 S. Ct. 2541, 2559 (2011).

47. *Id.* at 2557 (holding Rule 23(b)(2) could not be used to certify claims for money damages, “at least where . . . the monetary relief is not [merely] incidental to the injunctive or declaratory relief” being sought).

48. *Id.* at 2559.

49. A majority of the Justices also concluded that the plaintiffs had not satisfied the threshold certification requirement of Rule 23(a)(2), which would preclude certification of their claims under *either* Rule 23(b)(2) or 23(b)(3). *Id.* at 2551–57. Four Justices refused to join in this portion of the majority’s opinion. *Id.* at 2561, 2567 (Ginsburg, J., concurring in part and dissenting in part). The dissenters did, however, join in the portion of the majority’s opinion in which the *Shutts* language appeared. See *id.* at 2561 (acknowledging dissenters’ agreement with majority’s analysis with respect to certifiability under Rule 23(b)(2)).

cedural settings not clearly addressed by the Court's prior precedents.⁵⁰ This lingering uncertainty regarding the nature and scope of the due-process-based opt-out right is troubling because, as the next section explains, the presence or absence of opt-out rights can matter greatly to the practice of class action litigation.

B. *The Significance of Opt-Out Rights*

Opt-out rights matter. If they did not, they would not be such a recurrent focus of litigation. Nor would class counsel—and, in the settlement context, defendants—go to such elaborate lengths to avoid the prospect of opt outs.⁵¹

In general, class counsel are likely to disfavor the availability of opt-out rights. One obvious basis for this preference stems from the fact that attorneys' fees are generally calculated as a proportion of the aggregate class recovery, and allowing class members to opt out tends to diminish the aggregate value of the class's claims.⁵² Opt-out rights also tend to limit the ability of class counsel to spread the costs of litigation across the broadest possible pool of litigants, thereby allowing for optimal economies of scale.⁵³ Where the class action involves high-value individual damages claims, opt-out rights may diminish the negotiating leverage of class counsel by limiting their ability to extract a "peace premium" from defendants who wish to secure a complete release from all future litigation.⁵⁴ And to the extent the provision of opt-out rights requires individualized notice in order to render the right effective,⁵⁵ the costs of providing such notice will tend to diminish the funds that can be made

50. Cf. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *Notre Dame L. Rev.* 913, 938 (1998) (observing right to opt out was "constitutionalized . . . on the basis of the briefest of discussions (and essentially in dictum) in the *Shutts* case").

51. See, e.g., Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 *Colum. L. Rev.* 149, 207–19 (2003) (discussing efforts by plaintiffs' lawyers and settling defendants to structure class settlements that would deter opt outs); Wolfman & Morrison, *supra* note 39, at 734–41 (describing efforts by plaintiffs' lawyers and settling defendants to characterize class claims seeking money relief as appropriate for certification under one of the mandatory provisions of Rule 23).

52. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 *Colum. L. Rev.* 370, 421 (2000) ("Class counsel will . . . be unhappy with any proposed reform that increases the number of opt-outs because opt-outs potentially reduce their likely fee award.").

53. See, e.g., Campos, *supra* note 1, at 1104 (arguing opt-out rights in mass tort context may "destroy the economies of scale necessary to put the class on equal footing with the defendant").

54. See, e.g., D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 *Vand. L. Rev.* 1183, 1193–96 (2013) (discussing role of "peace premiums" in aggregate settlements).

55. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (interpreting Rule 23 as requiring "each class member who can be identified through reasonable effort [to] be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately").

available to class members (and to pay class counsel's fees) in the event of a judgment or settlement.⁵⁶

Defendants, too, will often prefer a mandatory class action in order to ensure that the preclusive effect of any resulting judgment or settlement will be as broad as possible.⁵⁷ This preference for obtaining "global peace" with all similarly situated potential plaintiffs is likely to be particularly strong in cases involving high-value individual damages claims, where the threat of follow-on litigation by opt-out plaintiffs is real.⁵⁸ Even in the small-claims context, where the threat of individual litigation is negligible, the costs of providing notice may drive a wedge between the amount the defendant is willing to pay and the amount class counsel is willing to accept, thereby reducing the "bargaining zone" within which settlement might occur.⁵⁹

Though academic opinion regarding opt-out rights is divided, "[e]ven those commentators who criticize opt-out rights . . . generally agree about the importance of the procedure . . ." ⁶⁰ The disagreement among academics regarding the desirability of opt-out rights corresponds roughly to a closely related debate regarding two competing conceptual models of class litigation: the "aggregation model" and the "entity model," respectively.⁶¹ The aggregation model conceives of the class action as essentially a joinder device that allows for the aggregation of class members' preexisting legal claims.⁶² On this model, ultimate control over the included claims remains with the individual class members

56. See, e.g., Owen M. Fiss, *The Political Theory of the Class Action*, 53 *Wash. & Lee L. Rev.* 21, 28 (1996) (observing that forcing class counsel to bear costs of individualized notice "makes the pursuit of the claim less attractive to the enterprising lawyer" and may sometimes "be a decisive impediment to bringing the suit at all").

57. See, e.g., *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) (observing that settling "[d]efendants attempting to purchase res judicata may prefer certification under [Rule 23](b)(2)," which does not allow opt outs, "over (b)(3)," which does).

58. See Rave, *supra* note 54, at 1193–95 (describing defendant desire for global peace).

59. See generally Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 *Geo. L.J.* 1789, 1792–1816 (2000) (describing importance of defining mutually acceptable bargaining zone in facilitating settlement).

60. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 *Vand. L. Rev.* 1529, 1540 (2004).

61. The distinction between the aggregation and entity theories of the class action is most closely associated with the work of Professor David Shapiro, who first popularized the dichotomy. See Shapiro, *supra* note 50, at 918–19 (explaining differences between both models); see also, e.g., Alexandra D. Lahav, *Two Views of the Class Action*, 79 *Fordham L. Rev.* 1939, 1939–40 (2011) (describing aggregation and entity models as the "two dominant views of the class action's structure").

62. Shapiro, *supra* note 50, at 918; see also Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* 154 (2009) (describing Rule 23 as "simply a joinder device for the aggregation of multiple pre-existing claims").

and class procedure should strive to preserve individual autonomy to the maximum extent possible.⁶³ The entity model, by contrast, views the class as a distinct legal entity, similar to a corporation or labor union, with its own separate legal existence and identity.⁶⁴ Under the entity model, individual autonomy and control interests are attenuated and the interests of particular class members may sometimes be sacrificed where doing so would maximize the interests of the class as a whole.⁶⁵

Unsurprisingly, proponents of the aggregation model tend to view opt-out rights more favorably than do proponents of the entity model. If class actions are viewed as merely a special kind of joinder device that enables class members to vindicate their preexisting legal rights, a plausible case can be made for allowing class members to forgo the putative benefits of joinder and “go it alone” by maintaining their own separate actions.⁶⁶ Indeed, some have gone so far as to argue that opt-out rights do not do enough to protect litigant autonomy and that the preclusive effect of class judgments should therefore be limited to those absent class members who affirmatively opt in to representation by class counsel.⁶⁷

Scholars who view the class proceeding as bringing into being a distinct legal entity, by contrast, tend to view opt-out rights more skeptically. For example, in his seminal article describing the entity theory of the class action, Professor David Shapiro cautioned that adopting the entity model would require that both “the need for, and scope of, the opt-out right . . . be reconsidered.”⁶⁸ Assuming adequacy of representation, Shapiro questioned why courts and rulemakers should allow the “substantive interests of the class as a whole” to be “severely undermined and potentially destroyed” by recognizing an opt-out right, which could “destroy the integrity of the class or deprive it of some or all of its strongest members.”⁶⁹ To similar effect are the criticisms offered by Professor David Rosenberg, who worries that the provision of opt-out rights in cases involving mass torts will threaten the regulatory efficacy of

63. Shapiro, *supra* note 50, at 918.

64. *Id.* at 919–23.

65. *Id.* at 934–42.

66. See, e.g., Redish, *supra* note 62, at 127 (arguing class actions should be viewed “as a tool for aiding the individual’s pursuit of his own interests and as a means of furthering process-based autonomy by providing individuals with *the option* of . . . [a] collectivist strategy for maximizing their claims” (emphasis added)); Coffee, *supra* note 52, at 380–85, 419–22 (critiquing “entity” model and defending opt-out rights as useful mechanism enabling class members to protect their own interests).

67. See, e.g., Redish, *supra* note 62, at 135–75 (discussing role of litigant autonomy in competing theories of class actions and arguing opt-in requirement is sometimes needed to protect autonomy); Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 *BYU L. Rev.* 1079, 1118–25 (arguing preclusive effect of class judgments should be limited to class members who opt in to representation by class counsel).

68. Shapiro, *supra* note 50, at 937.

69. *Id.* at 955.

the underlying substantive law.⁷⁰ Rosenberg and like-minded critics contend that opt-out rights exacerbate the problem of asymmetric stakes between plaintiffs and defendants that lead plaintiffs as a group to underinvest in proving their claims, resulting in socially suboptimal levels of aggregate deterrence and compensation.⁷¹ Writing from a slightly different perspective, Professors Jay Tidmarsh and David Betson argue that opt outs should be disallowed even in cases involving only small-value claims where a proposed class would allow for a welfare-maximizing level of cost spreading among similarly situated plaintiffs.⁷²

A common theme uniting these various critiques of opt-out rights is the belief that it is both permissible and desirable to bar class members from excluding themselves from a class—even where doing so is in the actual or perceived best interests of the particular class members seeking exclusion—in order to further the collective interests of the class as a whole. For proponents of the entity model, the fate of each class member is best seen as inextricably linked to that of the class, such that each class member “must tie his fortunes to those of the group with respect to the litigation, its progress, and its outcome.”⁷³

C. *Opt-Out Rights and the Due Process Day-in-Court Ideal*

Despite such disagreement regarding the practical value and desirability of opt-out rights, there is one proposition on which virtually everyone agrees—namely, that the principal due process value that the opt-out right protects involves the so-called “day in court” ideal.⁷⁴ According to this theory, opt-out rights are valuable primarily because, and to the extent that, they enable absent class members to avoid having their claims extinguished in the class proceeding, thereby enabling them to

70. David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 *Harv. L. Rev.* 831, 840–66 (2002).

71. See *id.* at 840 (contending “only mandatory-litigation class action enables the aggregation and averaging of claims that maximizes benefits from scale economies” and “achieve[s] optimal deterrence and insurance from mass tort liability”); see also, e.g., Campos, *supra* note 1, at 1082–85 (summarizing problem of asymmetric stakes in mass tort cases and endorsing Rosenberg’s mandatory-class-action recommendation).

72. David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 *Geo. Wash. L. Rev.* 542, 569–74 (2011).

73. Shapiro, *supra* note 50, at 919; see also, e.g., Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 *Wash. U. L. Rev.* 753, 795 (2007) (characterizing entity theory as “transform[ing] individually held claims into a communitarian framework” in which “rights of the individual are viewed as inseparable from the needs and interests of the community as a whole”).

74. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–47 (1999) (observing opt-out rights help mitigate “inherent tension between representative suits and the day-in-court ideal”); Mark Moller, *The Checks and Balances of Forum Shopping*, 1 *Stan. J. Complex Litig.* 107, 157–58 (2012) (characterizing “due process right to a ‘day in court’” as supplying “orthodox objection to” use of mandatory damages class actions).

bring their own separate, individual actions.⁷⁵ A class member's failure to opt out, by contrast, can be taken to signify consent to representation by class counsel and the class representatives.⁷⁶ Such putative consent, in turn, provides the standard justification for allowing the judgments in a class action to bind absentees notwithstanding the "deep-rooted historic tradition that everyone should have his own day in court"⁷⁷ and the closely related "general rule that 'one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."⁷⁸

But this way of framing the relationship between due process and the right to opt out raises several difficulties for viewing a categorical opt-out right as a core requirement of procedural due process. The Supreme Court's standard framework for assessing whether a challenged procedure satisfies the requirements of due process focuses on the balancing test first articulated in *Mathews v. Eldridge*,⁷⁹ as refined by the Court's later decision in *Connecticut v. Doehr*, which specifically addressed the requirements of procedural due process in the context of civil litigation.⁸⁰ The *Mathews/Doehr* framework instructs courts to assess the constitutionality of a challenged procedure by balancing: (1) "the private interest that will be affected by the official action,"⁸¹ (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,"⁸² and (3) "the interest of the [opposing] party . . . with . . . due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing

75. See, e.g., Richard Frankel, *The Disappearing Opt-Out Right in Punitive-Damages Class Actions*, 2011 Wis. L. Rev. 563, 574 (identifying "constitutional concern about preserving plaintiff control" over litigation as "primary justification[] for allowing plaintiffs to opt out of class actions"); John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 Ariz. L. Rev. 3, 79 (1983) ("The creation of the class member's . . . right to opt out[] is a formal recognition of a person's interest in selecting counsel and through this choice, in controlling one's own litigation."); Rosenberg, *supra* note 70, at 863–66 ("The 'day in court' concept implies that plaintiffs should have the freedom to opt out from a class action and to exercise individual control over the litigation—essentially, to go it alone."); cf. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 964 (1995) ("[O]pt-out provisions furnish a kind of market test of a settlement's fairness and adequacy . . .").

76. See Bone, *Puzzling Idea*, *supra* note 1, at 592 (noting inferred consent resulting from failure to opt out is standard basis for precluding absent class members); see also, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812–13 (1985) (connecting opt-out rights to absent class members' presumed consent to representation).

77. *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)).

78. *Id.* at 893 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

79. 424 U.S. 319 (1976).

80. 501 U.S. 1 (1991).

81. *Mathews*, 424 U.S. at 335.

82. *Id.*

greater protections.”⁸³ A finding of unconstitutionality implies that the use of a challenged procedure would pose a risk of erroneously sacrificing the interests asserted by the challenger that outweighs the combined interests of both the government itself and the other parties to the litigation.

This framework seems difficult to reconcile with the day-in-court conception of the opt-out right’s constitutional foundations, at least as conventionally understood. If the threatened deprivation is measured in strictly economic terms—i.e., by reference to “the probability that the plaintiff will receive less as a member of the class than she would receive in individual litigation”⁸⁴—it seems unlikely that there will be any plausible claim of deprivation in many of the types of actions for which the Court has suggested the opt-out right is constitutionally required. This is easiest to see in the context of so-called “negative value” claims of the type at issue in *Shutts* itself.⁸⁵ Because such claims, by definition, can only be expected to have positive net economic value when litigated *within* a class proceeding,⁸⁶ depriving class members of the opportunity to litigate such claims on a standalone basis poses no plausible threat of economic deprivation.

Even class members with potential high-value individual claims may have difficulty proving that their claims would have a higher expected value if litigated on an individualized basis rather than through a mandatory class action. Individual litigation is costly, especially against a well-financed and determined opponent. Inclusion of one’s claims in a class action allows for economies of scale in proving common issues, which may allow for a higher net recovery on each claim than would be possible through multiple individual actions.⁸⁷ Class treatment might also avoid

83. *Doehr*, 501 U.S. at 11. As originally articulated in *Mathews*, which involved a challenge to an administrative deprivation of social security benefits, the balancing test identifies the relevant interest to be weighed against the risk of erroneous deprivation as solely that of the government. 424 U.S. at 335. *Doehr*, which involved a challenge to a statute allowing prejudgment attachment of a civil defendant’s assets, refined the *Mathews* test for the civil litigation context by recognizing that the interests of other parties to the litigation must be considered alongside those of the government itself in assessing constitutionality. 501 U.S. at 11.

84. Patricia Anne Solomon, Note, Are Mandatory Class Actions Unconstitutional?, 72 Notre Dame L. Rev. 1627, 1642–43 (1997) (assuming such threatened economic loss constitutes “probability of erroneous deprivation” in mandatory-class-action context); see also Steven T.O. Cottreau, Note, The Due Process Right to Opt Out of Class Actions, 73 N.Y.U. L. Rev. 480, 517 (1998) (assuming primary “risk of erroneous deprivation” is risk plaintiff’s claim will be undervalued).

85. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 801 (1985) (noting average claim of each class member was worth only \$100).

86. See Issacharoff, *Right to Opt Out*, supra note 18, at 1059–60 (describing criteria of negative-value suit).

87. See, e.g., Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 Stan. L. Rev. 1475, 1519 (2005) (“[C]omplex tort litigation is so expensive to prosecute, even for plaintiffs with ‘high value’ serious injury or death claims, that the cost-sharing opportunity

the risk that a defendant's limited resources will be exhausted prematurely, leaving late-filing plaintiffs with nothing.⁸⁸ A class action may also facilitate the creation of a "settlement premium" resulting from class counsel's ability to promise the defendant global peace—something that no individual plaintiff acting alone could offer.⁸⁹ It might very well be the case, therefore, that a mandatory class proceeding will sometimes leave no particular class member materially worse off than they would have been had they pursued separate litigation.⁹⁰

It might be argued that the *Mathews/Doehr* framework, with its myopic focus on error costs, fails to account for other important due process values, such as litigant autonomy and participation.⁹¹ And the Supreme Court itself has cautioned that *Mathews* and *Doehr* do not set forth "an all-embracing test for deciding due process claims."⁹² But even if autonomy concerns warrant a departure from the strictly consequentialist balancing framework contemplated by the *Mathews/Doehr* test in certain circumstances, it is far from clear that such concerns could support a general constitutional right to opt out of all class actions seeking money damages.

Again, the negative-value class action provides a useful illustration. As noted above, the real-world alternative to classwide litigation of negative-value claims is not separate individual litigation but rather that such claims will not be litigated at all.⁹³ The interest of any particular class member in maintaining a separate individual suit—the interest putatively at stake under the day-in-court conception of the opt-out

of collective presentation, and the reduction in trial delay, remain attractive."); David Marcus, *Some Realism About Mass Torts*, 75 U. Chi. L. Rev. 1949, 1983 (2008) (book review) (observing high "transaction costs may thwart solo efforts to vindicate even abstractly valuable rights to sue").

88. Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 96–97 (1997) (discussing common-fund problems in class actions).

89. See *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) ("From a practical standpoint . . . achieving global peace is a valid, and valuable, incentive to class action settlements.").

90. See, e.g., David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. Rev. 695, 704 (1989) (arguing collective processing of mass tort claims provides access to greater compensation resources and more competent legal counsel and thus renders "possibility that an individual will fare worse under a damage schedule than in a separate action . . . minute").

91. See, e.g., Redish, *supra* note 62, at 144–45 (arguing *Mathews* test accords inadequate weight to litigant autonomy); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 49–50 (1976) (contending *Mathews* insufficiently protects dignitary interests in "personal participation").

92. *Dusenbery v. United States*, 534 U.S. 161, 168 (2002).

93. See *supra* note 86 and accompanying text; see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[M]ost of the plaintiffs would have no realistic day in court if a class action were not available.").

right's function—is thus likely to be “no more than theoretic.”⁹⁴ It is difficult to see how insisting on notice and opt-out rights to preserve such a purely theoretic individual interest meaningfully furthers litigant autonomy.⁹⁵ And even in cases involving more significant potential individual damages figures, alternative procedures might be posited that could preserve some measure of litigant autonomy. For example, class members with significant claims might be given the opportunity to intervene and present arguments relevant to their own individual claims *within* a mandatory class proceeding itself.⁹⁶ The day-in-court ideal, at least as currently conceived, thus seems poorly suited to the task of justifying the Supreme Court's case law attributing constitutional significance to opt-out rights.

II. DUE PROCESS AND THE RIGHT NOT TO SUE

The seeming mismatch between the principal asserted justification for the constitutionally grounded opt-out right and the actual operation and effect of that right presents something of a puzzle. One possible solution to this puzzle—and one favored by many academic commentators—would be to resolve the tension by repudiating the language in *Shutts* and subsequent cases suggesting that due process requires the provision of opt-out rights.⁹⁷ But such a resolution seems unlikely as a practical matter. As noted above, the view that due process requires the provision of opt-out rights in most damages class actions finds support in Supreme Court precedent extending back more than two decades and has been endorsed by all nine members of the current Court.⁹⁸ Absent a significant change in Supreme Court membership or a significant

94. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 391 (1967); see also, e.g., *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (observing “only a lunatic or fanatic” would prosecute small-value damages claim outside class action).

95. See, e.g., Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1008 n.17 (2005) (assuming autonomy interests carry little or no weight where “economic value of plaintiffs' claims is small relative to the defendant's aggregate stakes in the litigation, such that plaintiffs would likely be unable to litigate . . . outside of a class action”); Marcus, *supra* note 87, at 1990 (contending claims that cannot be economically litigated outside class action context “may not deserve or even enjoy the sort of due process protection that places a premium on individual autonomy”).

96. See, e.g., Campos, *supra* note 1, at 1111–12 (contending “participation can still be fairly well accommodated in most cases,” within class proceeding itself “and thus satisfy dignitary and legitimacy values, without giving plaintiffs control over their claims”).

97. See, e.g., Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. Mich. J.L. Reform 1097, 1120 (2013) (urging rulemakers to adopt mandatory class procedure in small-claims class actions in hopes of spurring Supreme Court to reconsider the issue); see also Betson & Tidmarsh, *supra* note 72, at 574 (arguing against due-process-based opt-out right); Shapiro, *supra* note 50, at 938 (same).

98. See *supra* notes 31–50 and accompanying text (discussing such precedents).

rethinking of the due process foundations of the opt-out right by multiple presently serving Justices, it seems likely that the Due Process Clauses will be construed as requiring some form of opt-out right for the foreseeable future.⁹⁹

Nor is it entirely clear that the link between due process and the class action opt-out right *should* be abandoned. The seeming inadequacy of the day-in-court justification does not foreclose the possibility that mandatory class proceedings may implicate other due process concerns for which an opt-out right of the type envisioned by *Shutts* and its progeny might be an appropriate solution. This Part focuses on one such interest that has heretofore received insufficient consideration in the literature surrounding the class action opt-out right—namely, a claimholder’s potential interest in keeping her claims out of the litigation process entirely.

The argument for protecting claimholders’ right to withhold consent starts from the status of a legal claim as a constitutionally protected property interest. As Part II.A explains, the Supreme Court has long acknowledged that unadjudicated legal claims constitute a form of property falling within the protection of the Due Process Clauses. Part II.B focuses on the nature of this constitutionally protected property interest and demonstrates that a claimholder’s ownership interest in her legal claims encompasses more than the right to assert those claims in court. It includes as well the right to exercise all the rights that such ownership confers, including, characteristically, the right to decide *not* to prosecute the claims at all. As Part II.C shows, mandatory class actions deprive claimholders of this ownership interest by granting class representatives and their attorneys the authority to assert the claims of absent class members without their explicit consent. Part II.D considers the reasons that claimholders might have for valuing their right not to sue and argues that the decision to opt out of a negative-value class action may be far more rational than many commentators tend to assume. Finally, Part II.E demonstrates that opt-out rights provide an appropriate procedural safeguard to ensure that claimholders are not deprived of their right to control their legal claims based on an erroneous inference of consent.

A. *Legal Claims as Due Process “Property”*

If the Supreme Court is to be taken at its word, the status of rights of action as a constitutionally protected form of “property” should be considered settled by prior precedent.¹⁰⁰ The Court has repeatedly reaf-

99. Cf. Alexandra D. Lahav, *Bellwether Trials*, 76 *Geo. Wash. L. Rev.* 576, 613 (2008) (“The right to opt out is firmly entrenched in our legal system and it is highly unlikely that courts will dispense with the opt-out requirement . . .”).

100. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (“[A] cause of action is a species of property protected by the Fourteenth Amendment.”).

firmed that unadjudicated legal claims constitute a property interest falling within the protection of the Constitution's Due Process Clauses.¹⁰¹

This classification of unadjudicated legal claims as a form of constitutional property has deep roots in American law, extending back at least to the middle portion of the nineteenth century (before the Fourteenth Amendment's enactment in 1868).¹⁰² Such a classification also makes sense as a matter of the Supreme Court's broader constitutional property doctrine. In the due process context, for example, the Court has described the "hallmark" of a constitutionally protected property interest as being "an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"¹⁰³ As the Court itself recognized, legal claims fit comfortably within this paradigm, reflecting government-created legal entitlements that typically cannot be extinguished except through an adjudicatory proceeding determining either an absence of legal right or some act of forfeiture on the part of the plaintiff.¹⁰⁴ More recently, the Court has emphasized the "implicit[]" requirement in its procedural due process case law that a legal entitlement "have some ascertainable monetary value" to be considered property¹⁰⁵ and has also suggested the "right to exclude" as an additional significant criterion for assessing whether an asserted interest should be understood to qualify as property.¹⁰⁶ Again, legal claims display the necessary characteristics. Unadjudicated rights of action typically have economic value that can be monetized in various ways, including by "selling" the claim to the defen-

101. See, e.g., *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988) ("Little doubt remains that [a cause of action] is property protected by the Fourteenth Amendment."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs."); *Logan*, 455 U.S. at 428 (recognizing cause of action as property interest); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (same); *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933) (same); *Pritchard v. Norton*, 106 U.S. 124, 132 (1882) (same).

102. See, e.g., *Griffin v. Wilcox*, 21 Ind. 370, 373 (1863) (holding "chose in action" to be property); *Terrill v. Rankin*, 65 Ky. (2 Bush) 453, 461 (1867) (same); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 362 (Little, Brown & Co. 1868) ("[A] vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.").

103. *Logan*, 455 U.S. at 430 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11–12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975); *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972)).

104. *Id.* at 430–31 (noting legal claims have characteristics of constitutionally protected property interests).

105. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766–68 (2005).

106. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). But see *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998) (holding property with no "economically realizable value to its owner" may sometimes merit constitutional protection because "possession, control, and disposition are nonetheless valuable rights that inhere in the property").

dant pursuant to a settlement.¹⁰⁷ And as will be explored further in the following section, the bundle of legal rights individuals possess in their unadjudicated rights of action typically include entitlements that map reasonably closely to the traditional property law concept of a “right to exclude.”¹⁰⁸

B. *The Right Not to Sue as an Incident of the Property Right in Legal Claims*

As with most ownership interests, ownership of a legal claim confers upon its owner a cluster of legal entitlements that correspond to the familiar property law metaphor of the “bundle of rights.”¹⁰⁹ This bundle conception of property draws upon the work of early twentieth-century legal theorist Wesley Hohfeld, who famously posited that generic references to legal rights could be parsed into eight more precisely defined “jural relationships” between individuals.¹¹⁰

For example, ownership of a legal claim almost invariably encompasses a remedial right on the part of the claimholder to recover damages (or other appropriate relief) from the prospective defendant for the violation of some primary legal duty. In Hohfeldian terms, it establishes a right–duty relationship between the claimholder and the prospective defendant, with the claimholder possessing the right to recover and the defendant owing a correlative duty to make recompense.¹¹¹ In many traditional accounts, this primary right–duty relationship was characterized as encompassing the entirety of what a cause of action entailed.¹¹²

107. See, e.g., Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 988–89 (2000) [hereinafter Merrill, *Landscape*] (“[A]n unadjudicated cause of action . . . can be settled before trial for consideration.”); Ari Dobner, *Comment, Litigation for Sale*, 144 U. Pa. L. Rev. 1529, 1537–38 (1996) (“In settlement negotiations between a plaintiff and a defendant, the defendant attempts to ‘buy’ or settle the plaintiff’s claim, and the plaintiff seeks to ‘sell’ the claim to the defendant.”).

108. See *infra* notes 117–129 and accompanying text.

109. On the origins of the “bundle of rights” or “bundle of sticks” conception of property rights, see, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357, 363–66 (2001).

110. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913) (outlining framework for analyzing rights incident to property ownership). Though Hohfeld himself did not use the “bundle of rights” metaphor to describe property, his theories “provided the intellectual justification for th[e] metaphor, which became popular among the legal realists in the 1920s and 1930s.” Merrill & Smith, *supra* note 109, at 365.

111. See Hohfeld, *supra* note 110, at 30–32 (discussing correlative relationship between rights in the strict sense—which he also refers to as “claim rights”—and duties).

112. See, e.g., Charles E. Clark, *The Code Cause of Action*, 33 Yale L.J. 817, 828 (1924) (defining “cause of action” as “series of acts or events, which gives rise to one or more legal relations of right–duty enforceable in the courts”); Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 How. L.J. 73, 78 (2008) (“Traditional interpretations equated a cause of action with a . . . Hohfeldian . . . ‘right–duty relation.’”).

But as early twentieth-century legal realist scholar Walter Wheeler Cook perceptively observed, “[a] little reflection . . . shows us that this” primary right–duty relationship “by no means constitutes the whole of” what “ownership’ of or ‘title’ to” a cause of action entails.¹¹³ For example, the owners of legal claims also typically possess what Hohfeld referred to as legal “powers”—i.e., a secondary legal entitlement authorizing individuals to bring about changes in their first-order legal relationships.¹¹⁴ Most obviously, the claimholder possesses the legal power to initiate a judicial proceeding and reduce the claim to a binding legal judgment.¹¹⁵ The owner of a claim also possesses the legal power to bring about the extinguishment of the claim in other ways, such as by agreeing to a settlement or by delivering a valid release.¹¹⁶

These legal powers are further insulated by a set of two additional types of legal relationships that Hohfeld described as “privileges” and “immunities,” respectively. Privileges in Hohfeld’s schema represent the jural opposite of legal duties and correlate to an absence of legal rights (i.e., no rights) on the part of third parties.¹¹⁷ To say that the owner of a legal claim possesses a privilege with respect to the exercise of a power that such ownership confers (such as the power to bring a suit) is thus equivalent to saying that the owner owes no legal duty to third parties to either exercise or refrain from exercising that particular power.¹¹⁸ Hohfeldian immunities reflect the jural opposite of liabilities and correlate to the absence of power (which Hohfeld termed a “disability”) on the part of third parties.¹¹⁹ The immunities comprised within ownership of a legal claim thus correlate to the absence of legal power on the part of third parties to exercise the powers that ownership confers, such as suing on, settling, or releasing the claim.

With this picture of the analytic structure of a right of action in view, the right not to sue comes into sharper focus. The right not to sue—or,

113. Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 *Harv. L. Rev.* 816, 819–20 (1916) [hereinafter *Cook, Alienability*].

114. Hohfeld, *supra* note 110, at 44–54 (discussing such legal powers); see also *Cook, Alienability*, *supra* note 113, at 819–820 (same).

115. See *Cook, Alienability*, *supra* note 113, at 819 (defining relationship between legal power to “extinguish” legal obligation via “judgment”); see also, e.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 137 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“A right of action is a species of power It is a capacity to invoke the judgment of a tribunal of authoritative application upon a disputed question about the application of preexisting arrangements and to secure, if the claim proves . . . well-founded, an appropriate official remedy.”).

116. *Cook, Alienability*, *supra* note 113, at 819.

117. Hohfeld, *supra* note 110, at 32.

118. *Cook, Alienability*, *supra* note 113, at 820; see also, e.g., Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *Vand. L. Rev.* 1, 81 (1998) (“A private right of action is . . . not only a power of individuals to act against others, it is also a Hohfeldian ‘privilege’ to act against others.”).

119. Hohfeld, *supra* note 110, at 55.

to be somewhat more precise, the right to decide *whether or not to sue*—reflects a set of important and closely associated legal entitlements that make up the overall bundle of the claimholder’s ownership interest. The decision not to sue involves the exercise of a particular type of legal power to bring about the extinguishment of a legal claim, either through some affirmative act (like delivering a formal release to the defendant) or by inaction (for example, by doing nothing and allowing the limitations period to lapse). This power, like other legal powers possessed by the claimholder, is insulated by a Hohfeldian privilege deriving from the absence of legal duties owed to third parties. Thus, for example, a claimholder typically owes no legal duty to assert her claim in litigation, and an action typically will not lie against her, either for an injunction compelling her to litigate or for damages resulting from her failure to do so.¹²⁰ The right not to sue is also typically protected by a Hohfeldian immunity correlating to the legal disability of any third party to bring suit on the claim or take other action resulting in its extinguishment without the claimholder’s consent.¹²¹

This entitlement of the claimholder to control the decision regarding whether or not to bring suit is reflected in various legal rules governing standing and preclusion doctrines. In the context of federal jurisdiction, for example, the Supreme Court has long adhered to the principle that a party “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”¹²² The Court has defended this prudential limitation on its own jurisdiction based in part on its recognition that “the

120. Cook, *Alienability*, supra note 113, at 819–20; see also Walter Wheeler Cook, *The Alienability of Choses in Action: A Reply to Professor Williston*, 30 Harv. L. Rev. 449, 457 n.30 (1917) (identifying “privilege not to enforce the claim by suit and thus to permit the statute of limitations to run” as among characteristic privileges possessed by claimholder).

121. See Cook, *Alienability*, supra note 113, at 820 (discussing legal immunities of rightsholder).

122. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); see also, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (“It is axiomatic that the judicial power conferred by Art. III may not be exercised unless the plaintiff shows ‘that he personally has suffered some actual or threatened injury’ It is not enough that the conduct of which the plaintiff complains will injure *someone*.” (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979))); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (holding plaintiff had to assert injury to self to have standing).

The Court has acknowledged a limited prudential doctrine of third-party standing, which allows certain parties who have been injured by governmental action to invoke the constitutional rights of others as a basis for challenging the government’s conduct. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991) (explaining requirements for third-party standing); *Craig v. Boren*, 429 U.S. 190, 193–96 (1976) (“[Appellant] is entitled to assert those concomitant rights of third parties that would be ‘diluted or adversely affected’ should her constitutional challenge fail and the statutes remain in force.” (citation omitted)). For an argument that such cases are best understood as involving the complaining party’s own personal right not to be punished except in accordance with a constitutionally valid legal rule, see Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 289–90 (1984).

holders of th[e] rights” in question may “not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not.”¹²³ A similar principle imbues the more prosaic concept of “substantive standing,” i.e., the general rule that a “private right of action is not available to just anyone who wishes to bring suit” but rather is only available to those who have had their legally protected interests violated by the defendant.¹²⁴

Preclusion doctrines reflect a similar and complementary set of principles that protect claimholders’ legal powers of ownership. Whereas standing doctrines aim to ensure that the party before the court is seeking to enforce his or her own rights rather than those of someone else, preclusion doctrines help to ensure that such an exercise of the asserting party’s own rights does not bring about the involuntary extinguishment of rights belonging to some unrelated third party. The Supreme Court has repeatedly reaffirmed that, with the exception of a handful of narrowly drawn exceptions, “[a] judgment or decree among parties to a lawsuit . . . does not conclude the rights of strangers to those proceedings.”¹²⁵

These twin protections of standing and preclusion doctrines thus confer upon owners of legal claims one of the most characteristic features of a property right—the right to exclude others from unauthorized use. The Supreme Court has waffled between characterizing the right to exclude as merely “one of the most essential sticks in the bundle of rights

123. *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976); see, e.g., Eugene Kontorovich, *What Standing Is Good For*, 93 Va. L. Rev. 1663, 1666 (2007) (arguing “standing protects people’s ability to individually determine the best use of their rights,” including by either asserting them in litigation themselves or waiving them); see also Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 Harv. L. Rev. 297, 311–13 (1979) (contending “doctrine of ‘standing to sue’ . . . reflects the ideal of self-determination” and implicit rejection of paternalism).

124. Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 Wm. & Mary L. Rev. 1873, 1891–92 (2011); see also, e.g., Zipursky, *supra* note 118, at 4 (emphasizing role of “substantive standing” as “fundamental feature of tort law”); cf. Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 Okla. L. Rev. 89, 91 (2009) (discussing concept of “statutory standing,” which “asks whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action”).

125. *Martin v. Wilks*, 490 U.S. 755, 762 (1989); see also, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (concluding “person who was not a party to a suit generally has not had a ‘full and fair opportunity to litigate’ the claims and issues settled in that suit” and thus usually cannot be precluded from bringing suit on those claims); *Chase Nat’l Bank v. City of Norwalk*, 291 U.S. 431, 441 (1934) (“Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered [in a suit to which that person is a stranger] will not affect his legal rights.”). The limited exceptions to this general rule are usually justified by reference to some practical “hindrance to the third party’s ability to protect his or her own interests” and the existence of a “close relation” between the third party and the party asserting that person’s rights. *Powers*, 499 U.S. at 410–11.

that are commonly characterized as property”¹²⁶ and characterizing it as the defining “hallmark” of a constitutionally protected property interest.¹²⁷ These alternative characterizations mirror a similar debate in the academic literature regarding the role of exclusion as an organizing principle in property law more generally.¹²⁸ But whichever formulation is preferred, something like a right to exclude seems central to many conceptions of what makes a legal entitlement “property.”¹²⁹

Of course, recognizing a right to exclude as a hallmark of property raises a further set of questions, including “a right to exclude from *what?*”¹³⁰ Many property theorists have argued that the right to exclude is most accurately and usefully described as the right to exclude others from the unauthorized use of or control over a particular resource.¹³¹ Owners of legal claims possess precisely such an entitlement. The twin protections afforded by standing and preclusion doctrines ensure that no third party may use the legal claims belonging to someone else—whether by prosecuting, settling, releasing, or exercising any of the other legal powers that ownership of a legal claim characteristically confers—without first obtaining the claimholder’s consent.¹³² To borrow from Sir William Blackstone’s famous description of what the common law meant by a property right, these entitlements ensure that owners of legal claims possess that “sole and despotic dominion which one man claims and

126. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

127. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999).

128. Compare, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 *Neb. L. Rev.* 730, 730 (1998) [hereinafter Merrill, *Right to Exclude*] (“[T]he right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the *sine qua non*.”), with, e.g., Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 *U. Toronto L.J.* 275, 277 (2008) (“[O]wnership . . . is an exclusive position that does *not* depend for its exclusivity on the right to exclude others from the object of the right.”).

129. See *supra* note 17 and accompanying text (explaining relationship between property ownership and right to exclude).

130. Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 *Ariz. L. Rev.* 371, 396 (2003); cf. James Y. Stern, *Property’s Constitution*, 101 *Calif. L. Rev.* 277, 301 (2013) (“It is a bit unnatural to say Sally ‘excluded’ Bob from her briefcase when Sally told Bob he could not borrow it from her.”).

131. See, e.g., Katz, *supra* note 128, at 290 (“Ownership’s defining characteristic is that it is the special authority to set the agenda for a resource.”); Mossoff, *supra* note 130, at 396 (“The analytical and normative fulcrum for property is not exclusion, but rather the use of things in the world.”); Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 *Seattle U. L. Rev.* 617, 618 (2009) (book review) (observing some property theorists now “prefer to conceive of property as a right exclusively to determine a thing’s use”).

132. Cf. Merrill, *Right to Exclude*, *supra* note 128, at 751 (“[T]he law of theft (together with its cognate civil actions) gives the holders of interests in choses in action the right to exclude others from interfering with the exchange value of these interests, and that is all one needs to give them the status of property.”).

exercises over the external things of the world, in total exclusion of the right of any other individual.”¹³³

C. *Mandatory Class Actions as a “Deprivation”*

To implicate the protections of the Due Process Clauses, something more must be shown than the mere existence of a constitutionally protected property interest. There must also be a deprivation of that interest by some official governmental act.

At first blush, the requisite deprivation in the mandatory class action context seems easily satisfied. After all, the entire purpose of the class action device is to provide a state-created mechanism for bringing about the extinguishment of individual claims, either through entry of a final judgment or (more typically) a settlement.¹³⁴ A class proceeding does not, however, extinguish all legal interests that ownership of a right of action entails. Most importantly, absent class members retain a claim to a proportionate share of any common fund created by virtue of a monetary recovery on the class’s behalf (less attorneys’ fees and any other expenses common to the class as a whole).¹³⁵ In other words, while a mandatory class action extinguishes absent class members’ “control entitlement”—i.e., their right to exercise control over their respective rights of action—such individuals retain rights with respect to what might be thought of as the beneficial interest the claim represents.¹³⁶

This tendency of class actions to cleave apart the distinct ownership interests represented by the control entitlement and the beneficial interest, respectively—extinguishing the former while leaving the latter intact—implicates the difficult problem of “conceptual severance.”¹³⁷ Stated briefly, the problem of conceptual severance—which is sometimes discussed “using the related nomenclature of the ‘denominator problem’”¹³⁸—stems from the fact that “property can be conceptually subdivided into physical fractions of different sizes or into bundles of rights composed of different sticks or strands.”¹³⁹ Therefore, the question of whether a particular governmental interference with property rights

133. 2 William Blackstone, *Commentaries* *2.

134. See, e.g., Issacharoff, *Right to Opt Out*, *supra* note 18, at 1058 (“A class action is simply, when all else is stripped away, a state-created procedural device for extinguishing claims of individuals . . .”).

135. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (discussing common-fund rationale for fee awards).

136. Cf. Campos, *supra* note 1, at 1092 (distinguishing between these two types of entitlements).

137. The term “conceptual severance” was coined by Professor Margaret Radin. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1667, 1676 (1988).

138. Michael A. Heller, *The Boundaries of Private Property*, 108 *Yale L.J.* 1163, 1207 (1999).

139. Merrill, *Landscape*, *supra* note 107, at 899.

risers to the level of an actionable deprivation or taking may depend greatly on whether the relevant property interest is conceived of as the entire bundle of property interests to which the government's action relates or, rather, as the particular strands or sticks within that bundle that are most directly affected by that action.¹⁴⁰

Though the Supreme Court has recognized the problem of conceptual severance, it has yet to articulate a clear set of guidelines for determining when the relevant property interest will be conceived of as the larger bundle of property interests as opposed to individual entitlements contained within that bundle.¹⁴¹ It is clear that not every incidental interference with an individual's use of, or control over, a particular property entitlement will constitute a deprivation or taking for constitutional purposes.¹⁴² But at the same time, it seems equally apparent that the protections of the Due Process and Takings Clauses may be invoked against certain governmental intrusions that stop short of extinguishing every last stick contained within a preexisting bundle of property rights. In the takings context, for example, the Court has recognized a diverse array of conceptually severed property interests as warranting constitutional protection, including the air rights over a parcel of land,¹⁴³ the right to transfer property by devise or intestacy,¹⁴⁴ the right to receive interest on monetary funds,¹⁴⁵ the right to exclude members of the pub-

140. See *id.* (“[C]onceptual severance makes it more likely that a court will find a government regulation is a taking.”).

141. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (“[If] a regulation requires a developer to leave 90 percent of a rural tract in its natural state, it is unclear whether . . . the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or . . . has suffered a mere diminution in value of the tract as a whole.”); see also, e.g., Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 *Tex. L. Rev.* 2015, 2019 (2013) (“Despite the Court’s recognition of this crucial problem more than twenty years ago [in *Lucas*], it has—to date—never explained the reasons for its choices or otherwise attempted to resolve this issue.”).

142. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 331 (2002) (rejecting claimants’ “conceptual severance” argument as “unavailing”); *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (“[A] claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable.”).

143. See, e.g., *Griggs v. Allegheny Cnty.*, 369 U.S. 84, 89–90 (1962) (holding government overflights of private land constitute compensable taking of “air easement”); *United States v. Causby*, 328 U.S. 256, 264–65 (1946) (same); cf. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922) (holding routine firing of artillery by U.S. military over private property constituted taking).

144. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 712–17 (1987) (holding escheat provision of federal law constituted taking of plaintiff’s property).

145. See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 171–72 (1998) (holding interest income is private property of principal owner for purposes of takings analysis); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164–65 (1980) (holding government appropriation of interest constituted taking).

lic from access to physical property,¹⁴⁶ easements,¹⁴⁷ liens on real property,¹⁴⁸ and the right to develop and improve land.¹⁴⁹

The problem of conceptual severance has received less explicit attention in the procedural due process context. But, as in the takings context, it is plain that at least some intrusions that fall short of a wholesale extinguishment of a preexisting bundled property interest can be found to constitute a constitutional violation. Consider, for example, *Connecticut v. Doehr*,¹⁵⁰ one of the foundational cases articulating the procedural due process standard for civil litigation.¹⁵¹ The alleged deprivation in that case consisted of a statutorily authorized prejudgment attachment of the plaintiff's real estate.¹⁵² The challenged attachment did not deprive the plaintiff of all legal interests conferred by his ownership—he retained, for example, the rights of possession and use. The attachment did, however, “impair[]” the exercise of other important rights of ownership, including “the ability to sell or otherwise alienate the property.”¹⁵³ The *Doehr* Court concluded that this impairment of legally protected property rights was sufficient to constitute a “deprivation” warranting due process scrutiny notwithstanding the fact that the impairment fell short of a wholesale extinguishment of the plaintiff's ownership interest.¹⁵⁴

Though the confusion that plagues the Supreme Court's constitutional property jurisprudence necessarily warrants caution in any assessment of conceptual severability, there is a reasonably strong basis for viewing the right to exercise control over a legal claim as a conceptually severable property interest, the deprivation of which would be sufficient to trigger due process scrutiny. The entire thrust of the Supreme Court's procedural due process jurisprudence emphasizing litigant autonomy and the centrality of the day-in-court ideal seems to presuppose the con-

146. E.g., *Dolan v. City of Tigard*, 512 U.S. 374, 395–96 (1994) (holding compelled creation of public easement over privately owned property constituted taking); *Kaiser Aetna v. United States*, 444 U.S. 164, 178–79 (1979) (holding regulation creating “navigational servitude” that provided public access to privately owned inland waterway constituted a taking).

147. E.g., *Panhandle E. Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613, 618 (1935) (noting Fourteenth Amendment, in some cases, prevents uncompensated taking of easements).

148. E.g., *Armstrong v. United States*, 364 U.S. 40, 45–46 (1960) (holding interference with lienholder's ability to enforce lien on property constituted taking).

149. E.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020 (1992) (holding deprivation of “all economically beneficial uses” of property constituted taking).

150. 501 U.S. 1 (1991).

151. See *supra* notes 79–83 and accompanying text (discussing *Doehr/Mathews* due process paradigm).

152. *Doehr*, 501 U.S. at 4.

153. *Id.* at 11.

154. *Id.* at 12.

trol entitlement as the core constitutional interest at stake.¹⁵⁵ As multiple commentators have observed, a strong commitment to the day-in-court ideal seems difficult to justify if the only constitutional interest at stake is the need to ensure an accurate valuation of a plaintiff's legal claims.¹⁵⁶ Rather, the commitment to an individualized day in court seems to assume that individuals' ability to participate in, and exert some measure of control over, their own litigation destiny has intrinsic value that is distinct from any consequent effect such participation may have on the outcome of a suit.¹⁵⁷ Judicial recognition of such an autonomy-based right to seek vindication of one's legal claims in court seems to strongly support the existence of a corollary autonomy-based right to refrain from asserting those claims as well.¹⁵⁸

Ironically, the day-in-court conception of the opt-out right and the vision of litigant autonomy it assumes tend to obscure the true value of the right to exercise control over a legal claim. If one presupposes a desire on the part of a claimholder to litigate, then the control entitlement itself seems virtually indistinguishable from the due process "right to be heard."¹⁵⁹ And when the value of the control entitlement is conceived of in this way, the existence of practical obstacles standing in the way of the claimholder's ability to prosecute her claim on an individual basis might plausibly be viewed as rendering the entitlement itself practically valueless.¹⁶⁰

But as the preceding section demonstrated, the right to exercise control over a legal claim is not reducible to the right to bring suit. Rather, the right to bring suit is merely one particular strand in a larger

155. See, e.g., Campos, *supra* note 1, at 1112 ("[L]itigant autonomy . . . is nothing more than the control entitlement.").

156. See, e.g., Bone, *Puzzling Idea*, *supra* note 1, at 581–82 (arguing if accuracy were sole criterion for assessing legitimacy of third-party preclusion doctrines, nonparties should only be allowed to relitigate issues decided in prior proceeding "if doing so is likely to reduce the error risk compared with [the original] suit"); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 *Geo. Wash. L. Rev.* 1683, 1812 n.557 (1992) ("[T]he Due Process Clause has been far more protective of adversarial procedure than an efficiency-driven model of procedure would allow.").

157. See, e.g., Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 *NYU. L. Rev.* 193, 205 (1992) ("[T]he day in court ideal has always been tied in an essential way to a process-oriented theory of participation . . . that values freedom of strategic choice apart from its impact on outcome quality." (emphasis omitted)).

158. See Joseph Blocher, *Rights to and Not to*, 100 *Calif. L. Rev.* 761, 801–03 (2012) (observing autonomy-based constitutional rights are usually construed as "permit[ting] the rightsholder to choose whether to do or not do . . . the various actions encompassed by the right").

159. See Campos, *supra* note 1, at 1113 ("What is the 'opportunity to be heard' other than the opportunity to assert one's claim?").

160. See *supra* note 95 and accompanying text (discussing view that practical impediments to litigation render claimholders' autonomy interests negligible).

bundle of legal entitlements that ownership of a legal claim represents.¹⁶¹ Such entitlements ordinarily include, at a minimum, the right *not* to assert a claim in litigation and the corresponding right not to have someone else assert that claim without the claimholder's consent. The Supreme Court's day-in-court rhetoric might thus be better understood as a kind of metonym or synecdoche in which one particularly salient facet of a claimholder's control entitlement—i.e., the right to assert the claim in court—is singled out as standing for the larger bundle of interests that the control entitlement represents.¹⁶² But such rhetorical metonymy should not obscure the fact that individuals may value the decisionmaking authority conferred by ownership of their legal claims for reasons that have nothing to do with a desire to pursue their own individual day in court. As the following section will show, the available evidence suggests that a significant portion of opt-out decisions may be driven by absent class members' desire that their legal claims be kept *out* of court.

D. *Valuing the Right Not to Sue*

The preceding sections have focused on explicating the nature of claimholders' constitutionally protected property interest in their legal claims, including the right to decide whether those claims may be asserted and by whom, as well as the tendency of mandatory class proceedings to deprive individuals of those control rights. But even if one concedes the formal legal status of such rights, one might reasonably inquire as to the practical significance of such control rights in the typical class action setting. Empirical studies suggest that opt-out rates, as a proportion of overall class membership, tend to be quite low.¹⁶³ Some scholars have pointed to such studies as evidence that "opt-out rights are not highly valued by class members," and that "the decision to structure a case as a mandatory rather than an opt-out class would" therefore not typically cause class members any real, significant "harm."¹⁶⁴ Other scholars have gone further, suggesting that the decision to opt out of a small-value class action is inherently "irrational."¹⁶⁵ Such arguments, however,

161. See *supra* Part II.B (arguing ownership interest in legal claims encompasses more than right to assert claims in court).

162. Cf. Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 *UCLA L. Rev.* 75, 105–07 (1998) (discussing use of rhetorical tropes such as synecdoche and metonyms in judicial opinions).

163. See, e.g., Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 *Vand. L. Rev.* 1529, 1546 (2004) (reporting results of empirical study of reported decisions indicating average opt-out rate of approximately 0.1% of overall class membership); see also *id.* at 1541 (discussing prior empirical studies reporting similarly low opt-out rates).

164. *Id.* at 1565.

165. See *infra* notes 198–199 and accompanying text (providing examples of scholarly views on "irrationality" and opt outs).

overlook the significant nonmonetary incentives class members might have for affirmatively choosing to withhold consent for the prosecution of their legal claims against a particular defendant or by a particular set of self-designated representatives. Looking to the reasons class members themselves give for choosing to exercise their opt-out rights suggests that their reasons for doing so are often far from irrational.¹⁶⁶

That the vast majority of class members typically do not exercise their right to opt out is hardly surprising. Opting out is not costless. In addition to receiving and opening the court-directed notice of class certification (rather than simply discarding it along with her other junk mail¹⁶⁷), an absent class member wishing to opt out must also invest sufficient time in reading the notice to be able to understand both her entitlement to opt out and the steps she must take in order to exercise that right. Such notices are often written in complex and impenetrable legal jargon, suggesting that this initial step alone may require some non-trivial level of effort.¹⁶⁸ Once she is made aware of her right to opt out, the class member must then follow through by taking whatever steps are specified in the notice to ensure that her claims are, in fact, excluded.¹⁶⁹ Typically, these steps will need to be completed within a relatively short period ranging from (at most) a few weeks to mere days after the notice is received in order to ensure that the exclusion request is not rejected as untimely.¹⁷⁰

Assuming a putative class member is able to successfully navigate this process and secure exclusion from the class, her only “reward” in most

166. See *infra* notes 176–187 and accompanying text (critiquing “irrationality” view of opt outs).

167. Cf. Wolff, *supra* note 37, at 2089 (“The mailing in a small-stakes class action is unlikely to be any more salient than the ubiquitous junk-mail marketing materials that we all receive regularly . . .”).

168. See, e.g., Thomas E. Willging et al., Fed. Judicial Ctr., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 51* (1996), available at <https://bulk.resource.org/courts.gov/fjc/rule23.pdf> (on file with the *Columbia Law Review*) (observing “[m]any, perhaps most . . . [class action] notices present technical information in legal jargon” and concluding such notices “are not comprehensible to the lay reader”).

169. Rule 23 does not specify any particular method by which class members must request exclusion and courts typically allow opt-out requests to be registered by either completing a form or mailing a letter to the court. 3 Conte & Newberg, *supra* note 13, § 9:46 (discussing Rule 23 class-management mechanisms). Some courts, however, have imposed more burdensome requirements on the exercise of opt-out rights. See, e.g., *In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 263, 292–93 (D. Kan. 2010) (noting mailed notice required class members to provide proof of purchase in order to opt out); *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 235 (S.D. W. Va. 2005) (approving notice requesting that absent class members wishing to opt out describe “nature of [their] alleged Serzone-related injuries and the name and address of [their] counsel”).

170. See Leslie, *supra* note 5, at 96–97 (noting impact of time constraints and administrative hurdles on effectiveness of opting out).

circumstances will be retention of control over a nonprosecutable claim and the concomitant inability to share in any recovery the class might obtain.¹⁷¹ By contrast, a class member who does nothing typically gives up an economically valueless legal claim and receives in return at least a chance at securing some economically valuable benefit should the class succeed in obtaining a judgment or settlement.¹⁷²

Given these incentives, most commentators assume that the opt-out decision should not be a difficult one. The conventional wisdom regarding how one should expect a “rational” class member to behave is aptly summarized by Professors Samuel Issacharoff and Geoffrey Miller:

In the case of opt-outs, the path of inertia—doing nothing—is also the path of rationality. It is nearly always in the class member’s interest not to opt out of class cases. If the class member opts out, he gains virtually nothing but loses the right to participate in whatever benefit the class litigation may generate—a small benefit, perhaps, but still one that confers some value. Conversely, if the class member does nothing, he loses nothing other than an essentially worthless right to bring his own lawsuit, but he gains the right to participate in the proceeds of the litigation. A rational class member will not opt out.¹⁷³

If the decision to opt out of a negative-value class action is truly as “irrational” as many scholars assume, one might well expect that opt outs would be rare—not only as a proportionate share of overall class membership but in absolute terms as well. And yet, opt outs remain a familiar feature of class litigation.¹⁷⁴ Indeed, it is not difficult to find instances of absent class members exercising their right to opt out in droves. Even in cases involving miniscule individual damages figures that could not plausibly justify individualized litigation, courts routinely see opt-out requests numbering in the hundreds or even thousands.¹⁷⁵

171. See Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 *Vand. L. Rev.* 179, 204 (2009) (“If the class member opts out, he gains virtually nothing but loses the right to participate in whatever benefit the class litigation may generate . . .”).

172. *Id.*

173. *Id.*; see also, e.g., Betson & Tidmarsh, *supra* note 72, at 568 (“[N]o rational class member who stands to gain (or at least not lose) from class treatment would instead opt for a world in which he or she gained nothing.”); John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 *Colum. L. Rev.* 288, 305 (2010) (“[O]pting out (at least in the case of negative value claims) is generally irrational.”).

174. Willging et al., *supra* note 168, at 45–54 (reporting in empirical study of all class actions in four federal district courts over two-year period “percentages of certified (b) (3) class actions with one or more opt outs” at either certification or settlement stage “ranging from 42% to 50% in the four districts”).

175. See, e.g., *In re Skechers Toning Shoe Prods. Liab. Litig.*, No. 3:11-MD-2308-TBR, 2013 WL 2010702, at *3, *7 (W.D. Ky. May 13, 2013) (noting 1,072 claimants opted out from class action settlement providing for recovery of between \$20 and \$89 per purchase); *In re Netflix Privacy Litig.*, No. 5:11-CV-003379 EJD, 2013 WL 1120801, at *5, *8 (N.D. Cal.

What accounts for such striking levels of seemingly “irrational” behavior on the part of absent class members? It is, of course, possible that some opt-out decisions are driven by simple misunderstandings regarding the practical consequences of remaining in the class.¹⁷⁶ It is also conceivable that some class members may opt out in the (perhaps mistaken) belief that they will be able to prosecute their claims individually or in order to avoid the possible preclusive effect of the class judgment on a separate high-value claim.¹⁷⁷ But explanations of this sort do not account for the full range of reasons a class member might have for exercising her right to opt out.

The widespread perception that opting out of a negative-value class action is “irrational” reflects a set of implicit assumptions regarding the reasons absent class members are likely to have for valuing their legal claims. On this view, the right to sue holds value primarily because, and to the extent that, it can be used to secure an award of money damages or some other economically valuable relief. Rational plaintiffs should therefore be expected to approve of any procedure that increases their anticipated recovery and to view claims that cannot be monetized as practically worthless.

But this is plainly not the only way one might think about the value of a legal claim. A right of action is not simply a potential right to receive payment should the litigation succeed in its stated goals. Rather, a right of action is a state-created entitlement that empowers a particular plaintiff to recover from a particular defendant, typically as a means of securing redress for some past injury caused by the defendant’s conduct. Nor is this entitlement equivalent to a mere right to the proceeds of any penalty the state itself might choose to extract from the wrongdoer. It includes as well the claimholder’s entitlement to *decide* whether or not the defendant should be made to pay for the particular act that caused

Mar. 18, 2013) (indicating high number of opt outs from settlement class that provided solely injunctive and cy pres relief likely would have resulted in “de minimis monetary payments to Class members in the event of a litigation victory”); *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 470–71 (W.D. Va. 2011) (acknowledging 12,259 exclusion requests from class settlement providing for monetary payments of between \$2 and \$100 per class member); *Parker v. Time Warner Entm’t Co.*, 631 F. Supp. 2d 242, 257–58 (E.D.N.Y. 2009) (indicating 1,076 requests for exclusion were made in connection with settlement providing \$5 per class member); *In re W. Union Money Transfer Litig.*, No. CV-01-0335 (CPS), 2004 WL 3709932, at *4–*5 (E.D.N.Y. Oct. 19, 2004) (noting 3,335 opt out requests in connection with antitrust class action settlement providing coupons worth between \$3.25 and \$4.00 per transaction); *Schlesinger v. Ticketmaster*, No. BC304565, slip op. at 31 (Cal. Super. Ct. Sept. 26, 2012), 2012 WL 4739283 (reporting receipt of 6,105 opt-out requests from class action settlement in which plaintiff’s expert estimated average per-class-member damages at \$8.47).

176. See, e.g., 5 Conte & Newberg, *supra* note 13, § 16:16 (asserting “many, perhaps most, opt-outs simply do not understand what they are doing”).

177. Cf. *In re Skechers*, 2013 WL 2010702, at *3–*4 (reporting and rejecting objector’s concern that settlement of false-advertising class action might bar future personal-injury claims based on use of defendant’s products).

the injury. The function of a right of action is thus not merely to punish wrongdoing by the defendant nor to ensure compensation to victims. It is also a means by which the law empowers particular individuals by conferring upon them a degree of decisionmaking authority regarding whether or not a particular defendant will be held accountable for its actions.¹⁷⁸

Though judicial opinions rarely discuss absent class members' reasons for choosing to exclude themselves from a class,¹⁷⁹ the limited available evidence suggests that many absent class members do, in fact, view opt-out rights as a means of retaining their right to decide whether their claims may be used to punish a particular defendant. Consider, for example, the district court's opinion in *In re Cuisinart Food Processor Antitrust Litigation*, which approved a settlement of an antitrust class action alleging that the defendant had engaged in unlawful resale price maintenance agreements, resulting in class members being overcharged for its food processors.¹⁸⁰ The court reported that, of the "approximately 1.5 million class members," only eighty-nine had requested exclusion "expressly for the purpose of avoiding the settlement's *res judicata* effect."¹⁸¹ By contrast, 825 absent class members had "opted out for other reasons," including "111 because they were satisfied with their . . . products and did not wish to pursue a cause of action against" the defendant.¹⁸² The *Cuisinart* case demonstrates that the desire to seek an individualized day in court may sometimes be a less significant driver of opt-out decisions than a belief on the part of absent class members that they were not wronged by the defendant's conduct and thus see no reason why the defendant should be made to pay. Nor is this an isolated example. Absent class members routinely identify satisfaction with a defendant's products or services, or a general view that the litigation

178. This special function of the private right of action as a mechanism for empowering individuals lies at the center of the much discussed civil recourse theory of tort law. See Zipursky, *supra* note 118, at 70–88 (introducing civil-recourse theory of tort law and emphasizing centrality of private rights of action to that theory); see also, e.g., Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 *Duke L.J.* 1109, 1123 (2013) ("Civil recourse takes as central components of private law that the plaintiff both decides whether to bring the case and prosecutes the case herself."); cf. John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 *Fla. St. U. L. Rev.* 341, 349 (2011) ("Civil recourse . . . is . . . a broad concept that can and does encompass not only torts, but contracts and other domains of private law.").

179. Unlike objectors, individuals who request exclusion from a class are not required to specify any reason for opting out. And even where they do so, courts may see no need to discuss such reasons, as those who have opted out will not be bound by the resolution of the class's claims and thus presumably have no further need of the court's protection. See, e.g., Eisenberg & Miller, *supra* note 60, at 1543–44 (discussing distinction between opt-out rights and objection rights and observing, in general, these two rights are mutually exclusive of one another).

180. 38 *Fed. R. Serv.* 2d (Callaghan) 446, 454 (D. Conn. 1983).

181. *Id.*

182. *Id.*

lacks merit as a basis for their decisions to opt out of¹⁸³ (or object to¹⁸⁴) the inclusion of their claims in a class action.

Absent class members may also object to the inclusion of their claims in a class action on more general political or philosophical grounds. It is no secret that class actions are deeply controversial. As Professor Martin Redish and Nathan Larsen observe:

The so-called tort reform movement has focused much of its political fire on the “bounty hunter” class action, in which greedy plaintiffs’ lawyers engage in legalized blackmail against large corporations, thereby leading to economic waste, unfair wealth redistribution, and generally higher prices for products and services. It could hardly be controverted that many private citizens find such lawsuits to be politically unwise, economically reckless and morally offensive.¹⁸⁵

Regardless of one’s views as to the merits of such criticisms,¹⁸⁶ it seems difficult to deny their influence on the attitudes of a large sector of

183. See, e.g., *In re Bluetooth Headset Prods. Liab. Litig.*, No. 07-ML-1822 DSF (Ex), 2012 WL 6869641, at *8 (C.D. Cal. July 31, 2012) (“[T]he vast majority of potential class members who opted out, or otherwise communicated with the Court, did so because they wanted to express their views about the settlement—which ranged from annoyance to outrage that the litigation had been filed at all.”); *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 49 (D.D.C. 2010) (“Several of the individuals seeking exclusion from the settlement class indicated that they enjoyed their experience at the [defendant’s] Conferences and did not want to be a part of this litigation”); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1081 (C.D. Cal. 2010) (“The majority of the [584] class members who opted-out and provided comments . . . cited their satisfaction with the gas mileage they were receiving from their HCHs, or otherwise opposed the merits of the suit.”); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 537 n.61 (D.N.J. 1997) (“Over 700 of those who opted out, more than twice the amount of policyholders who objected to the Proposed Settlement’s terms, wrote to indicate that they do not feel they were misled . . . , are satisfied with their policies, and do not want to participate in the action against Prudential.”).

184. See, e.g., *In re Skechers Toning Shoe Prods. Liab. Litig.*, No. 3:11-MD-2308-TBR, 2013 WL 2010702, at *3 (W.D. Ky. May 13, 2013) (reporting eight out of eleven written objections received from individual class members had “express[ed] satisfaction with their purchases” and opined defendant “should not enter into the settlement because it [had] provided a valuable product that performed as promised”); *Domonoske v. Bank of Am.*, N.A., 790 F. Supp. 2d 466, 471 (W.D. Va. 2011) (reporting “[m]ost” of fifty-nine objections received “voiced general disagreement with the case as frivolous”); *Spark v. MBNA Corp.*, 157 F. Supp. 2d 330, 335 (D. Del. 2001) (“In corresponding to the court, a number class members [sic] wrote thoughtful letters objecting to the settlement, reporting that the litigation and settlement was frivolous, silly and evidence of what is wrong with our system for civil justice.”).

185. Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 *Calif. L. Rev.* 1573, 1601–02 (2007) (footnote omitted).

186. Compare, e.g., Redish, *supra* note 62, at 50–53 (criticizing “bounty hunter” model of class actions), with, e.g., Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 *U. Pa. L. Rev.* 103, 104–05 (2006) (arguing class action lawyers’ compensation serves socially useful functions).

the lay public. Courts routinely encounter objections and opt-out requests from absent class members reflecting generic complaints about class litigation in general and class action lawyers in particular.¹⁸⁷

It is important to recognize that such generalized objections to class actions are distinguishable from, and at least potentially independent of, the objection to holding a particular defendant accountable for a particular act of alleged misconduct. Even absent class members who believe that they were or may have been wronged by a defendant's actions may nonetheless view a class action as an inappropriate mechanism for holding the defendant accountable. Public hostility to the class action device is driven in substantial measure by the perception that class actions exist primarily to enrich plaintiffs' attorneys, rather than to compensate injured class members.¹⁸⁸ Such sentiments find voice among objecting and opt-out class members, who criticize class action attorneys as "shysters"¹⁸⁹ and "leaches,"¹⁹⁰ whose only goal is to "line their pockets' with as much money as possible at the expense of the class."¹⁹¹ Individuals who hold such views are unlikely to view class action attorneys as legitimate agents to exact retribution from the defendant, even if those

187. See, e.g., *McLennan v. LG Elecs. USA, Inc.*, No. 2:10-cv-03604 (WJM), 2012 WL 686020, at *8 (D.N.J. Mar. 2, 2012) (reporting two class members "object to the notion of classwide relief and compensation for Class counsel, generally" and considering it "well-established that such generalized objections should be overruled"); *Cerbo v. Ford of Englewood, Inc.*, No. BER-L-2871-03, 2006 WL 177586, at *20-*21 (N.J. Super. Ct. Law Div. Jan. 26, 2006) (quoting multiple general objections to class actions and role of class action lawyers); cf. *Plaintiffs' Reply Memorandum in Support of Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees, Expenses, and Incentive Award at 13*, In re *Netflix Privacy Litig.*, No. 5:11-cv-00379-EJD (N.D. Cal. Nov. 28, 2012), 2012 WL 8502887 ("These types of 'philosophical' objections are inevitable in large class actions . . .").

188. See, e.g., Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 *Am. U. L. Rev.* 1429, 1433 (1997) ("Among critics, the contention that class members have received too little in a class settlement almost always is accompanied by the corresponding charge that the class counsel has received too much . . ."); Third Circuit Task Force Report on Selection of Class Counsel, 74 *Temp. L. Rev.* 689, 692 (2001) ("[T]here is a perception among a significant part of the non-lawyer population and even among lawyers and judges that the risk premium is too high in class action cases and that class action plaintiffs' lawyers are overcompensated for the work that they do.")

189. See, e.g., In re *TD Ameritrade Account Holder Litig.*, No. C 07-2852 SBA, 2011 WL 4079226, at *12 (N.D. Cal. Sept. 13, 2011) (reporting absent class member's request to be excluded from class based on belief claims asserted in litigation were "unjustified, frivolous and fostered by opportunistic shysters with a low sense of morality").

190. See, e.g., *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *7 (N.D. Cal. Jan. 26, 2007) (quoting objector's letter expressing view "people involved in bringing this action should try to . . . earn an honest living . . . instead of sucking of[f] others like a leach").

191. *O'Brien v. Brain Research Labs, LLC*, No. 12-204, 2012 WL 3242365, at *16 (D.N.J. Aug. 9, 2012) (quoting letter from absent class member objecting to proposed settlement); see also, e.g., Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 *U. Pa. L. Rev.* 2043, 2043 (2010) ("Class action lawyers are some of the most frequently derided players in our system of civil litigation.").

same individuals might willingly assent to the defendant being held accountable in some other way.¹⁹²

A perception that one's legal claims are being used to secure an overly generous fee award for class action lawyers may also give rise to unpleasant feelings of exploitation.¹⁹³ Empirical psychological research tends to confirm that exploitation provokes deeply aversive psychological reactions and that individuals are often willing to go to considerable lengths to avoid feeling exploited.¹⁹⁴ In experimental settings, for example, research subjects routinely display a willingness to forgo a wealth-maximizing payout in order to avoid an unfair distribution that would disproportionately benefit an undeserving third party.¹⁹⁵ Given the massive disparities between per-class-member recoveries and attorneys' fee awards in most class actions, it is hardly surprising that some class members who take an unfavorable view of class action lawyers would be willing to forgo whatever (slight) benefits might flow from their continued inclusion in the class in order to avoid complicity in, and to signal their disapproval of, the perceived inequity.

Of course, it might well be objected that a single class member cannot, by opting out, hope to alter the ultimate disposition of the class proceeding. Given the predictably low opt-out rates that tend to characterize class actions, it is highly doubtful that opt-out requests will make a meaningful difference in either the scope of the defendant's liability or the magnitude of class counsel's fee award in any but the most aberrational of cases. In such circumstances, it is probably not unreasonable to view a class member's decision to opt out as merely a form of "self-harming symbolic protest."¹⁹⁶ But if one takes seriously the view that rights of action are a form of personal property, it is not clear why either the putatively "self-harming" or the "symbolic" nature of the opt-out

192. Cf. Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. Rev. 1059, 1075–76 (2007) (observing crime victims "exhibit strong preferences about the identity of their agents of revenge, and about the mode and purpose of punishment").

193. See, e.g., Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 Mich. L. Rev. 71, 73 (2003) (observing "most individuals loathe being taken advantage of" and are therefore willing to take steps "to avoid feeling (or being) exploited").

194. See, e.g., Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 Vand. L. Rev. 1003, 1017–22 (2010) (summarizing recent psychological research regarding how individuals experience and respond to perceived exploitation).

195. See, e.g., Elizabeth Hoffman et al., *Preferences, Property Rights, and Anonymity in Bargaining Games*, 7 Games & Econ. Behav. 346, 367–68 (1994) (reviewing results of recent studies); Alvin E. Roth et al., *Bargaining and Market Behavior in Jerusalem, Ljubljana, Pittsburgh, and Tokyo: An Experimental Study*, 81 Am. Econ. Rev. 1068, 1068–69 (1991) (same); cf. Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 Nature 137, 137 (2002) (reporting results of study suggesting research subjects are willing to engage in costly punishment of exploitive behavior even where they themselves were not victimized by exploitation).

196. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 368.

decision should make much difference. Traditional property doctrines typically allow individuals to use their property for a wide range of purely symbolic or expressive purposes, even to the point of destroying the underlying property itself.¹⁹⁷ The available evidence suggests that some nontrivial number of class members do, in fact, value the right to opt out for precisely such expressive purposes.¹⁹⁸ Even if one views the class member's reasons for opting out as misguided or irrational, it is still possible to conclude that her ownership of the underlying legal claim entitles her to make such irrational decisions regarding the use and disposition of her own personal property.¹⁹⁹

E. *Opt-Out Rights as an Appropriate Procedural Safeguard*

The final step in the procedural due process analysis—after establishing the existence of both a constitutionally protected property interest and a threatened governmental deprivation—is to determine whether a proposed procedure provides an adequate means of safeguarding the underlying interest against erroneous deprivation. Under the *Mathews/Doehr* balancing framework, this last stage calls for balancing the claimholder's interest in not being deprived of her control entitlement against any competing interests of other litigants, as well as any ancillary interests the government itself might possess with respect to the proceeding.²⁰⁰

The first factor to be weighed under the *Mathews/Doehr* framework, the individual interest affected, consists of the nonconsenting class member's interest in maintaining her right to decide whether her claim will be asserted in litigation. The nature of this interest was surveyed in detail

197. See Lior Jacob Strahilevitz, *The Right To Destroy*, 114 *Yale L.J.* 781, 824–30 (2005) (discussing expressive value of property destruction).

198. This expressive dimension of the opt-out right has led some commentators to suggest that the First Amendment rights of freedom of speech and of association might provide an additional constitutional basis for protecting the right to opt out. See Redish, *supra* note 62, at 159–62 (presenting and critiquing such an argument); Maximilian A. Grant, Comment, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 *U. Chi. L. Rev.* 239, 247–73 (1996) (same).

199. As John Massaro observes:

To say that a person's choice [to opt out of a class action] is "irrational," . . . is really to say one of two things, each of which is unacceptable to the believer in individual autonomy: either the "irrational" person is consciously valuing certain variables more highly than the other individuals do, or the "irrational" person is incapable of valuing the relevant variables and in need of paternalistic protection. To the individual rights theorist, the first is an example of an individual appropriately exercising autonomy and the latter is a premise that is inconsistent with autonomy and therefore unacceptable.

John C. Massaro, *The Emerging Federal Class Action Brand*, 59 *Clev. St. L. Rev.* 645, 669 (2011).

200. See *supra* notes 79–83 and accompanying text (discussing *Mathews/Doehr* balancing framework).

above.²⁰¹ Because individuals may value such decisionmaking authority for a variety of purely noneconomic reasons, it is difficult to arrive at an objectively determinable value for this particular interest.²⁰² But the opt-out decision itself reveals certain information regarding the extent to which absent class members subjectively value retention of control over their legal claims.²⁰³ An absent class member who has gone to the trouble of opting out has demonstrated that she values the retention of her control entitlement more than she values the time and effort that was required to opt out as well as the forgone value of any economic recovery she may have been able to obtain by remaining in the class. To be clear, such revealed preferences merely establish a floor for the class member's subjective valuation of the control entitlement and do not preclude the possibility that some class members may place an even higher subjective valuation on that right.

The second factor to be considered under the framework prescribed by *Mathews* and *Doehr* consists of the risk that nonconsenting class members will be erroneously deprived of their control entitlement. With respect to class members who affirmatively express a desire that their claims not be included in the class, the risk of erroneous deprivation is effectively 100%. In other words, the effect of a mandatory class action is to establish an irrebuttable presumption of consent on the part of each prospective class member to representation by the class representatives and class counsel.²⁰⁴ Allowing class members to opt out effectively transforms this conclusive presumption into one that class members may rebut by submitting an exclusion request manifesting their denial of consent.

The remaining factors to be weighed under the *Mathews/Doehr* framework are the interests of other parties to the proceeding as well as any ancillary interests of the government itself that might be implicated by the particular procedures used. There does not seem to be any significant interest on the part of other absent class members that would be adversely affected by allowing a requesting class member to exclude her-

201. See *supra* Part II.A–D (exploring nature of legal claims).

202. This difficulty relates to a familiar critique of the *Mathews* framework—namely, that the framework often imposes on courts the difficult and inherently subjective task of metaphorically “balancing” factors that are not directly commensurable to one another. See, e.g., Gary Lawson, Katharine Ferguson & Guillermo A. Montero, “Oh Lord, Please Don’t Let Me Be Misunderstood!”: Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks, 81 *Notre Dame L. Rev.* 1, 22 (2005) (noting commensurability problem under *Mathews*); Edward L. Rubin, Due Process and the Administrative State, 72 *Calif. L. Rev.* 1044, 1138 (1984) (same).

203. Cf. Samuel Issacharoff, The Governance Problem in Aggregate Litigation, 81 *Fordham L. Rev.* 3165, 3191 (2013) (“In the private domain, the best indication of fairness comes with the revealed preferences of private exchange.”).

204. Cf. Wolff, *supra* note 37, at 2084–92 (discussing idea of “constructive consent” as a basis for binding absent class members based on judicial conclusion that such class members *should* be bound by class proceeding “as if they had ‘consented’ . . .”).

self from the class. Apart from the class action itself, neither class counsel nor any other class member would have standing to assert the legal claims belonging to the nonconsenting class member without her consent. Nor could any of the other class members, either individually or collectively, take any other action that would extinguish the nonconsenting class member's claim.²⁰⁵ The ability of the class representatives to bind nonconsenting class members to the effects of a judgment or settlement thus arises solely by virtue of the presumption of consent established by the class action procedure itself. Providing a more accurate mechanism for testing the validity of that presumption would in no way impair any preexisting legal right or interest that other members of the class possess.²⁰⁶

All that remains, therefore, is the question of whether the government itself possesses "any ancillary interest" in either "providing the procedure or forgoing the added burden of providing greater protections."²⁰⁷ This final consideration is famously amorphous and ambiguous—threatening to subsume all of the other categories identified as relevant to the *Mathews/Doehr* balancing framework.²⁰⁸ It seems reasonable to include in this category at least the direct administrative costs of the procedure to the government itself as well as any increased governmental burdens that are directly attributable to errors resulting from the alternative procedure.²⁰⁹ But while procedural due process does sometimes allow for facts to be established through conclusive presumptions where doing so furthers important governmental objectives,²¹⁰ the

205. See *supra* Part II.B (discussing claimholders' right to exclude others from exercising control over their legal claims).

206. To be sure, class counsel and other absent class members might sometimes find themselves benefited if opt outs are not allowed—for example, through increased economies of scale, larger fee awards, or greater negotiating leverage in settlement discussions with the defendant. See *supra* notes 52–56 and accompanying text (discussing class counsels' reasons for preferring mandatory class actions). But missing out on such benefits cannot be said to constitute cognizable harm to other class members because such individuals have no preexisting legal right to exercise control over the claims belonging to the persons requesting exclusion from the class. See, e.g., Nagareda, *supra* note 51 at 181 (noting class action confers "no roving authority" on courts "to alter unilaterally class members' preexisting bundle of rights").

207. *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991).

208. See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Approach*, 23 *J. Legal Stud.* 307, 374 (1994) (noting *Mathews's* third factor—government's interest—"includes everything and tells nothing" because "[p]resumably, even the first two elements are part of the government's interest").

209. *Id.* at 375.

210. See, e.g., *Weinberger v. Salfi*, 422 U.S. 749, 771–72 (1975) (concluding due process did not bar government from relying on irrebuttable presumptions in administering benefits program where challenged presumptions bore "sufficiently close nexus" with government's "underlying policy objectives").

case for a conclusive presumption of consent in the class action context seems weak.²¹¹

The administrative burdens involved in allowing opt outs are relatively minimal, requiring little more than maintaining a record of the names of absent class members who request exclusion and a notation of the fact of their exclusion from any resulting judgment issued by the court.²¹² The costs to the government itself from erroneous inferences of class-member consent seem similarly inconsequential. The government might claim a paternalistic interest in protecting some absent class members from erroneously excluding themselves based on incomplete or inaccurate information. But more appropriate mechanisms for protecting such individuals exist, including the provision of more complete and comprehensible notice and allowing generous opportunities for class members to cure erroneous opt-out decisions by requesting that their claims be added back to the class.²¹³ Foreclosing exit opportunities entirely seems too blunt an instrument to protect class members from themselves, especially since such individuals are clearly best situated to determine whether they do, in fact, consent.²¹⁴

211. See, e.g., *Vlandis v. Kline*, 412 U.S. 441, 451 (1973) (holding asserted “interest in administrative ease and certainty cannot, in and of itself, save” a “conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the state’s objective is premised”); *Hamby v. Neel* 368 F.3d 549, 563–64 (6th Cir. 2004) (concluding conclusive presumption used to determine eligibility for state health insurance benefits did not comport with procedural due process where there were “alternative reasonable and practical means by which” eligibility could be determined).

212. In large class actions, the court can further mitigate the administrative burden on itself by “arrang[ing] for a special mailing address and designat[ing] an administrator retained by counsel and accountable to the court to assume responsibility for” keeping track of information regarding exclusion requests. *Manual for Complex Litigation*, Fourth § 21.321 (2004).

213. Where significant individual damages claims are at stake, the government might also claim an interest in avoiding duplicative litigation of the same or similar issues in separate proceedings by opt-out plaintiffs. See, e.g., *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (certifying class of asbestos claimants based, in part, on belief that class action would avoid duplicative litigation and conserve judicial resources). But this interest is negligible in cases involving small-value individual claims, given the improbability that any but the most aberrational of opt-out plaintiffs would choose to litigate such a claim on a standalone basis. See *supra* notes 93–94 and accompanying text (discussing disincentives to individual litigation in small-claims context).

214. Professor David Shapiro argues that opt-out rights are unnecessary to protect the interests of absentees who disagree with the class action’s goals because such individuals have other ways of “register[ing] their disapproval,” including by either “objecting to certification” or “by not picking up their check if the class prevails.” Shapiro, *supra* note 50, at 924 n.26. But neither of these alternatives seems an adequate substitute for the provision of opt-out rights. Objections to class certification will only succeed in safeguarding an individual litigant’s control entitlement if the court denies certification, which may adversely affect the interests of other class members who support the litigation. Recognizing this fact, courts are loath to deny certification simply because some class members disagree with the class action’s goals. See *infra* note 257 (noting reluctance of

Mandatory class actions might also be claimed to further a potential governmental interest in the effective enforcement of substantive law. As discussed above, the potential for opt outs to impair the deterrence value of class actions is at the center of several prominent academic critiques of opt-out rights.²¹⁵ But even if one accords strong weight to the government's asserted interest in optimizing deterrence, it is far from clear that mandatory class actions are necessary to further that goal. As noted above, observed opt-out rates in damages class actions tend to be quite low as a percentage of overall class membership, particularly in actions involving small-value individual damages claims.²¹⁶ Allowing absent class members the opportunity to exclude themselves from such actions is thus unlikely to have a significant effect on aggregate damages awards or the resulting deterrent effects of the class action itself.²¹⁷ And as discussed in greater detail below, to the extent opt-out decisions do pose a genuine threat to the regulatory efficacy of substantive law, lawmaking

courts to deny certification based solely on intraclass disagreement regarding litigation's goals). Nor is the "self-help" option of refusing to claim the proceeds from a class judgment or settlement an effective means of preventing the unauthorized use of one's legal claims. There is no requirement that unclaimed proceeds of a class action judgment or settlement revert to the defendant and courts possess broad discretion to authorize the redistribution of such funds under the equitable doctrine of *cy pres*. See, e.g., Martin H. Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 653 (2010) (noting prevalence of such *cy pres* awards). Indeed, the recipients of such *cy pres* distributions may have goals or characteristics that particular absent class members find objectionable. In such circumstances, absent class members who are prevented from opting out and who fail to submit a claim might be doubly victimized—seeing both their control entitlement and the beneficial interest of their legal claims being put to unauthorized uses that they find personally objectionable.

215. See, e.g., Campos, *supra* note 1, at 1082–85 (“[O]pt-out rights allow plaintiffs to hold out for a greater share of recovery, in effect holding complete aggregation hostage for a payoff.”); Rosenberg, *supra* note 70, at 832 (“[F]or mass tort liability to achieve optimal deterrence and insurance, individuals must . . . pool their litigation resources and forgo exploiting tort law to maximize personal wealth.”).

216. See *supra* note 163 and accompanying text (discussing empirical studies of opt-out rates); see also Eisenberg & Miller, *supra* note 163, at 1545–48 (discussing results of opt-out rates study).

217. The concern that opt-out rights may undermine deterrence objectives carries its greatest force in mass tort and similar cases involving high-value individual damages figures. See Campos, *supra* note 1, at 1081–87 (“[A]fter the tort occurs, each plaintiff only cares about recovering as much as possible, rather than maximizing the defendant's expected aggregate liability.”); Rosenberg, *supra* note 70, at 832 (noting importance of collective action for deterrence purposes in mass tort class actions). But while there does seem to be a positive correlation between average claim value and opt-out rates, observed opt-out rates tend to be relatively low even in the mass tort context. See Eisenberg & Miller, *supra* note 163, at 1548 (reporting “median opt-out rate” observed in mass tort class actions “is 4.2 percent and the mean 4.6 percent”).

institutions may be able to address such concerns through appropriate design of the underlying rights of action themselves.²¹⁸

The procedural due process balancing test prescribed by *Mathews* and *Doehr* is famously “subjective and impressionistic,” allowing for different decisionmakers to strike different balances between competing interests.²¹⁹ The goal of this section is thus not to “prove” in some objectively verifiable sense that procedural due process compels recognition of a class action opt-out right. Rather, the goal is merely to show that the case for judicial recognition of such a right is far stronger—and provides a much more comfortable fit with the Supreme Court’s broader framework of procedural due process decisionmaking—than a myopic focus on the day-in-court ideal might suggest. Once one recognizes that individuals may value their ability to decide whether and by whom their claims may be asserted for reasons that have nothing to do with a desire to seek their own, personal “day in court,” the balance struck by the Supreme Court in *Shutts* and subsequent cases is hardly unreasonable.

218. See *infra* notes 274–279 and accompanying text (discussing paths lawmakers could take to avoid negative consequences of opt-out rights). The due process analysis becomes somewhat more complicated when the opt-out right is examined in conjunction with the closely related requirement that all class members be provided with adequate notice. Cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (identifying notice, as well as opt-out rights, as part of required “minimal procedural due process protection” to which each absent class member is entitled). Unlike opt-out rights themselves, notice can involve potentially significant administrative costs. See Eisenberg & Miller, *supra* note 163, at 1561 (“The cost of individual notice, which can be significant, represents both a loss to the class and a deadweight cost to society.” (footnote omitted)). In view of the significant costs involved in notifying absent class members, many commentators have argued that the Court’s due process precedents should be understood as allowing for something less than the type of direct, individualized notice that the Supreme Court has interpreted Rule 23 to require. See, e.g., 7AA Wright et al., *supra* note 10, § 1786, at 502–03 (“[T]o require individual notice demand[s] more than traditionally was required to satisfy due process.”); Arthur R. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 320 (1971) (“If the class action is to be a useful device for vindicating various Congressional policies . . . then the passage in Rule 23(c)(2) regarding individual notice cannot be read literally.”); Shapiro, *supra* note 50, at 937 & n.61 (“[T]o insist on the widest possible notice [of class members] is to use ‘due process’ notions as a method of effectively defeating a claim at the threshold and depriving the polity of any social value it might have.”). But cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (interpreting Rule 23 as requiring “each class member who can be identified through reasonable effort must” be provided direct notice). But even under the most generous interpretation of the governing case law, class counsel would still be required to make some reasonable effort to notify absentees of the action’s existence. And any absent class member who happens to learn of the proposed inclusion of their claims in the class proceeding, either through the court-directed notice or through some other means, could presumably take steps to request exclusion.

219. Mashaw, *supra* note 91, at 39.

III. IMPLICATIONS

The foregoing analysis has sought to shed new light on the constitutional foundations of the right to opt out of damages class actions. This Part examines some potential implications of this shift in focus for both the theory and practice of class action litigation. First, focusing on the right not to sue helps to illuminate the debate between the “aggregation” and “entity” theories of the class action and suggests reasons for questioning the entity model’s skepticism of opt-out rights even in cases involving only negative-value claims. Second, focusing on the right not to sue sheds useful new light on the structure of Rule 23 opt-out rights and the relationship between opt-out rights and the remedial relief sought on behalf of the class. Finally, understanding opt-out rights as a mechanism for protecting the right not to sue suggests a new framework for thinking about the connection between opt-out rights and the underlying substantive law establishing the claimholder’s entitlement to sue.

A. *The Right Not to Sue and “Negative-Value” Claims*

As discussed above, the academic debate regarding the value of opt-out rights corresponds roughly to a parallel debate regarding whether the class action is best conceived of as merely a method for aggregating preexisting individual claims or as calling into being a distinct legal entity.²²⁰ But the posited dichotomy between the aggregation and entity models of the class action is not necessarily as rigid as this framing might suggest. Certain scholars have suggested a more nuanced view under which the proper conceptualization of a particular class proceeding depends on the nature of the claims at issue. These scholars generally view the case for something like the entity model as being particularly strong in actions involving only negative-value individual claims while acknowledging that claims involving more significant individual damages figures might call for different treatment, including more robust protection of opt-out rights.²²¹

The most fully developed elaboration of this view is provided by Professor David Marcus, who urges a distinction between two types of substantive legal entitlements: (1) “realized” rights, for which there is “a procedural avenue for their attempted vindication,” and (2)

220. See *supra* notes 61–73 and accompanying text (explaining aggregation and entity models).

221. For works expressing broadly similar views (some of which do not employ the “entity” versus “aggregation” nomenclature), see Betson & Tidmarsh, *supra* note 72, at 568–74; Howard M. Erichson & Benjamin C. Zipursky, Consent Versus Closure, 96 *Cornell L. Rev.* 265, 313–14 (2011); Issacharoff, Right to Opt Out, *supra* note 18, at 1057–62; Marcus, *supra* note 87, at 1976–93; cf. Shapiro, *supra* note 50, at 923–24 (arguing “small claims’ class action” presents a particularly strong case for entity treatment and suggesting even “some others who would certainly not go beyond this point may well agree”).

“unrealized” rights, for which such a procedural avenue is lacking.²²² Marcus contends that because “[a]n unrealized right to sue lacks any procedural avenue for its attempted vindication, that is, a means to reach settlement or judgment,” such a right “lacks a characteristic often recognized as an essential component of a property right”—alienability.²²³ For this reason, Marcus suggests that “[t]he due process status of unrealized rights to sue is arguably quite tenuous.”²²⁴ He thus argues that Professor Shapiro’s entity theory provides the appropriate conceptual framework for thinking about class actions comprising such claims:

If the class action offers the only viable procedural avenue for an individual to realize her right to sue, then the individual owes some component of this right to the class If the class amounted to nothing more than the mere joinder of individuals, it would group together unrealized rights. Because the formation of the class makes realization possible, the class is more than the sum of its constituent parts. In other words, the class action has a transformative effect, one that is hardly mystical but instead a product of realities that make rights to sue unrealizable in individual suits.²²⁵

Focusing on the right not to sue reveals the fallacy underlying this argument for withholding opt-out rights, even with respect to cases involving only negative-value claims. The implicit premise of the argument is that rights to sue only have value to the extent such rights can be vindicated in court, either by securing a judgment or by using the threat of litigation to extract an economically valuable settlement. But because absent class members may value the entitlements conferred by ownership of their legal claims for other reasons—for example, because they do not believe that those claims should be used to punish a particular defendant or because they do not wish to see those claims used to benefit lawyers they view as undeserving²²⁶—this premise does not hold.²²⁷

222. Marcus, *supra* note 87, at 1979.

223. *Id.* at 1991.

224. *Id.* at 1990–91.

225. *Id.* at 1990; see also, e.g., Betson & Tidmarsh, *supra* note 72, at 574 (“[A] court should be able to deprive a class member of a right to pursue an individual remedy that is worth nothing when the social benefits are greater.”); Erichson & Zipursky, *supra* note 221, at 314 (arguing, in small-claims class action context, an “individual’s claim is, in an important sense, subordinate to the group claim” because such claims cannot practically be vindicated in court); Issacharoff, *Right to Opt Out*, *supra* note 18, at 1059 (suggesting, in negative-value context, there is “strategic reason to doubt the importance of the individual right to control one’s litigation destiny”).

226. See *supra* notes 179–195 and accompanying text (providing reasons class members exclude themselves from class actions).

227. It bears noting that in the takings context, the Supreme Court has explicitly rejected the analogous argument that only entitlements with a net-positive economic value warrant constitutional protection. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 169 (1998) (“We have never held that a physical item is not ‘property’ simply because it lacks a positive economic or market value.”).

Indeed, the negative-value nomenclature itself is potentially misleading because the true value of a legal claim cannot be assessed in the abstract. Rather, such value can only be determined in the context of a particular relational dynamic.²²⁸ Characterizing a claim as negative value typically signifies that litigation costs or other practical impediments stand in the way of vindicating one particular entitlement that ownership of such a claim confers—namely, the right to assert the claim against the defendant in litigation.²²⁹ A person who wishes to see her claim vindicated in this manner may well perceive the existence of such impediments as a significant impingement on her autonomy and welcome the class action as a mechanism for vindicating her rights. But as discussed in detail above, ownership of a right of action encompasses more than the power to sue.²³⁰ It includes both the power and privilege of *not* suing as well.²³¹ An individual wishing to vindicate this latter entitlement has no need of the class action's assistance. Indeed, without the class action, vindicating her right not to sue would be essentially costless. An individual with this latter preference may well perceive the forced inclusion of her claim in a mandatory class action as posing a far greater threat to her autonomy. The defense of the entity model of the class action—and the skepticism of opt-out rights with which that model is typically associated—thus cannot succeed, even in the negative-value context, without either ignoring the autonomy concerns of this latter type of claimholder or denying their existence.

B. *The Right Not to Sue and the Structure of Rule 23 Opt-Out Rights*

Focusing on the right not to sue may also shed useful light on the connection between due process and the structure of Rule 23 opt-out rights. As noted above, Rule 23 provides for opt-out rights in most actions involving only money damages but does not explicitly provide for such rights where the action seeks only equitable relief.²³² The Supreme Court has similarly taken pains to emphasize that its decisions suggesting the existence of a due-process-based right to opt out do not speak to the circumstance of a class action where money damages do not “predominate.”²³³ The principal uncertainty regarding the scope of this

228. See Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 Va. L. Rev. 1313, 1340–41 (2012) (demonstrating even “negative-value entitlements” may provide “effective protection if the cost faced by potential challengers is higher” than rightholder’s own cost of defending the right).

229. See *supra* note 18 and accompanying text (defining negative-value claims).

230. See *supra* notes 109–110 (identifying right of action as subset of property rights).

231. See *supra* Part II.B (discussing privileges and powers incident to property ownership).

232. See *supra* notes 26–27 and accompanying text (discussing relationship between Rule 23 and opt-out rights).

233. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985) (limiting holding to “class actions which seek . . . wholly or predominately . . . money judgments”).

right has focused on the question of “whether . . . any forms of ‘incidental’ monetary relief” may be recovered in a mandatory class action consistent with the requirements of the Due Process Clause.²³⁴ This careful framing of the opt-out right’s scope might reasonably be understood to imply that mandatory class actions seeking only equitable relief are per se permissible.²³⁵

But it is not clear why the lead plaintiff’s choice of either an equitable or a monetary remedy should determine the scope of absent class members’ opt-out rights. Rule 23’s “puzzling link between procedural rights and remedial choice” has long posed a challenge for both courts and scholars.²³⁶ Though various theories have been proposed to explain why due process might allow for mandatory class treatment of equitable claims while insisting on notice and opt-out rights where monetary relief is sought, none of these theories is entirely persuasive.²³⁷ For example, one common rationale for Rule 23’s structure is grounded in the notion that plaintiffs seeking only equitable relief share a degree of cohesion and unity of interests that is missing in class actions seeking money damages, allowing for a strong presumption of adequate representation in the former context that would be inappropriate in the latter.²³⁸ But as various scholars have observed, this theory has little basis in fact. Group divisions and conflicts of interest among members of an equitable class often equal or surpass those that exist within actions seeking only money damages.²³⁹

Nor does the conventional understanding of the day-in-court ideal lend much support to Rule 23’s distinction between equitable and money-damages class actions. A claimholder’s ability to choose her own lawyer, present her own evidence and arguments, and otherwise control

234. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560 (2011).

235. See, e.g., *Messier v. Southbury Training Sch.*, 183 F.R.D. 350, 355–57 (D. Conn. 1998) (concluding *Shutts* does not support right to opt out of class actions seeking injunctive relief).

236. David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 658 (2011) [hereinafter Marcus, *Flawed*].

237. See *id.* at 662–70 (collecting and critiquing theories of why money-damages claims might trigger additional protections).

238. See *id.* at 664 (describing theory that class members seeking injunctive relief have “harmonious interests”); see also, e.g., *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (“[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members.”).

239. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 505–11 (1976) (providing example of disagreement among class members seeking injunctive relief); Marcus, *Flawed*, *supra* note 236, at 664 (describing potential differences in goals among class members seeking equitable relief).

decisions that will affect her litigation destiny seems equally important whether equitable relief or monetary damages are at stake.²⁴⁰

In truth, the decision of the 1966 amenders to link the availability of opt-out rights to the plaintiff's choice of remedy is almost certainly better explained by reference to historical rather than theoretical considerations.²⁴¹ It is thus probably asking too much to expect any single theory to explain the pragmatically driven compromise reflected in Rule 23's structure. Nevertheless, focusing on the right not to sue illuminates a way in which the structure of Rule 23 at least approximates a coherent and theoretically defensible approach to determining when the due-process-based right to opt out should be understood to attach.

Oftentimes, in actions that seek only equitable relief, the scope of a defendant's remedial obligation will be the same whether the action is brought by a single individual or by a group of similarly situated individuals. Consider, for example, a taxpayer's action seeking to enjoin the government from erecting a religious monument on public property, or a landowner's nuisance action seeking to enjoin the polluting activity of a nearby factory. In cases like these, neither the ability of the plaintiff to assert the claim nor the scope of the prospective injunctive relief will depend on whether any other similarly situated plaintiffs consent to the action or join in seeking similar relief. Rather, in these types of actions, "one injunction is as effective as 100, and, concomitantly, . . . 100 injunctions are no more effective than one."²⁴²

But the position of a defendant facing the prospect of multiple claims seeking money damages is quite different. The defendant's potential exposure in such a case will usually be a direct function of the number of claims asserted against it and the monetary value of those claims. Such a defendant is thus likely to care very much about both the number of prospective plaintiffs who choose to assert their claims as well as the identities of those claimants, since some may possess more claims or more-valuable claims than others.²⁴³

To the extent the due-process-based right to opt out of class actions can be seen as driven in part by the need to protect absent class members' rights to decide whether or not their legal claims will be asserted, such concerns obviously loom much larger in the latter type of case than they do in the former. Where a similarly situated plaintiff could procure identical relief without asserting the claims of any nonconsenting class members, the provision of an opt-out right would be practically valueless.

240. See Solomon, *supra* note 84, at 1632 (arguing it would be "inconsistent and unfair" to make litigant-control rights turn on nature of relief sought).

241. See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 *Notre Dame L. Rev.* 1419, 1441 (2003) (contending linkage between opt-out rights and remedies in Rule 23 "is more an accident of history than a rationally defensible design").

242. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972).

243. *Id.* at 261-62.

Even as a purely formal matter, the inclusion of a nonconsenting class member's claim could make no practical contribution to the lead plaintiff's entitlement to relief and the exclusion of such a claim could have no practical effect on the scope of the defendant's remedial obligation.²⁴⁴

To be sure, some absent class members might still prefer to have the option of excluding themselves for tactical or strategic reasons—for example, because they disagree with class counsel's litigation strategy or because they wish to preserve their option of maintaining a separate action should the first litigation fail. But limits to this type of decisionmaking authority by certifying a mandatory class action are not meaningfully different from the limits placed on litigants' tactical control rights under existing procedural rules governing such issues as joinder, counterclaims, and venue.²⁴⁵ These relatively weak autonomy interests must be balanced against important countervailing interests, including the societal interest in avoiding duplicative litigation of the same issues in multiple proceedings and the defendant's potential interest in having all prospective claims seeking identical relief resolved in a single litigation.²⁴⁶ Prohibiting opt outs may also help to avoid strategic holdout problems that tend to impede socially desirable and mutually beneficial settlements of equitable claims.²⁴⁷

If all claims for equitable relief functioned in the manner described above, the case for categorically limiting opt-out rights in equitable actions would be reasonably strong. Unfortunately, the division between equitable claims on the one hand and monetary claims on the other is too crude to ensure that only actions fitting this description will receive mandatory class treatment.

A better approach is suggested by the American Law Institute's *Principles of Aggregate Litigation* (the ALI *Principles*), which recommend that the availability of opt-out rights should be determined by reference

244. See, e.g., *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 198 (D.D.C. 2013) (concluding individual protections afforded by Rule 23(b)(3) are unnecessary “[w]hen a class seeks ‘an individual [sic] injunction benefitting all its members at once,’” because “defendant will be enjoined whether or not any particular class member opts out” (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011)) (misquotation)).

245. See Bone, *Puzzling Idea*, *supra* note 1, at 616–22 (discussing various procedural rules limiting litigants' control over lawsuit timing, structure, and forum choice, including rules governing joinder, counterclaims, and venue transfer).

246. See generally Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 *Cardozo L. Rev.* (forthcoming 2015) (manuscript at 31–56), available at <http://ssrn.com/abstract=2542300> (describing potential adverse consequences of allowing claims seeking declaratory or injunctive relief against defendant's generally applicable policy or practice to be prosecuted outside class action context).

247. See, e.g., Rave, *supra* note 54, at 1242 (recognizing “[t]here is little value to the defendant in resolving injunctive claims with part of the group because the last plaintiff can obtain the same relief as the class as a whole” and allowing opt outs may therefore “create the potential for intractable holdout problems”).

to whether the relief being sought is “divisible” or “indivisible” in nature.²⁴⁸ By “divisible” remedies, the drafters of the *ALI Principles* mean to include “those that entail distribution of relief to one or more claimants individually, without determining in practical effect the application or availability of the same remedy to any other claimant.”²⁴⁹ “Indivisible” remedies, by contrast, are those where the “distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.”²⁵⁰ Because indivisible remedies, by definition, cannot practicably be awarded to one claimant without determining the defendant’s obligations with respect to other similarly situated claimholders, withholding opt-out rights in actions seeking such remedies seems unproblematic.

But while the conceptual distinction between divisible and indivisible remedies provides a sound criterion for determining when opt-out rights should exist, this approach raises a further question regarding which remedies are properly categorized as “indivisible.” The drafters of the *ALI Principles* suggest that all actions seeking injunctive or declaratory relief “with respect to a generally applicable policy or practice maintained by a defendant” necessarily call for indivisible remedies.²⁵¹ It is certainly true that an individual plaintiff or group of plaintiffs challenging a “generally applicable” policy or practice may sometimes be entitled to broad “structural” injunctive relief of the type that would effectively determine the rights of other, similarly situated claimholders.²⁵² But it will often be possible for courts to craft a narrower equitable remedy that affords complete relief to the particular plaintiff or plaintiffs appearing before it that would not affect the defendant’s obligations with respect to other similarly situated individuals.²⁵³

The Supreme Court has cautioned that “injunctive relief should be no more burdensome to the defendant than necessary to provide

248. Principles of the Law of Aggregate Litig. § 2.04(b) (2010).

249. *Id.* § 2.04(a).

250. *Id.* § 2.04(b).

251. *Id.* § 2.04 cmt. a.

252. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1939 (2011) (finding injunctive remedy in prison overcrowding suit not impermissibly overbroad simply because relief would benefit prisoners not included in plaintiff class); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969) (holding injunctive relief in action challenging employment discrimination should be “made available to all who were . . . damaged [by discriminatory policy] whether or not they filed charges and whether or not they joined in the suit”); *Potts v. Flax*, 313 F.2d 284, 288 (5th Cir. 1963) (recognizing single plaintiff entitled to injunctive relief requiring integration of segregated public school).

253. See, e.g., *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (determining injunction compelling defendant to readmit wrongfully discharged plaintiff to military would provide plaintiff complete relief without requiring defendant to stop enforcing challenged policy against other similarly situated individuals); *Redish & Larsen*, *supra* note 185, at 1609 (observing not all actions for injunctive relief are necessarily indivisible).

complete relief” to the particular plaintiffs before the court.²⁵⁴ Recognizing this principle, multiple federal circuit courts have held that district courts abuse their discretion by fashioning injunctions that are broader than necessary to afford complete relief to the parties before them.²⁵⁵ These courts generally view the presence or absence of a certified class as a critical determinant of the permissible scope of injunctive relief. Because the injunctive relief necessary to award complete relief to all similarly situated class members will typically be much broader than would be necessary to completely protect an individual litigant, these courts generally assume that such “classwide” relief is only appropriate where class certification has been granted under Rule 23(b)(2).²⁵⁶

But from the perspective of a nonconsenting absent class member, it is difficult to see any meaningful distinction between a mandatory class action seeking such divisible equitable relief and a mandatory class action seeking only money damages. In both contexts, the individual class member is deprived of her right to decide whether or not to allow her claim to be asserted in litigation. And in both circumstances, the inclusion or noninclusion of the class member’s claims, along with those of other, similarly situated individuals, may matter greatly to the scope of relief the court will deem permissible. Nothing in Rule 23(b)(2) requires that all members of an injunctive class agree with the litigation’s goals, and courts and commentators generally agree that “[a]ll the class members need not be aggrieved by or desire to challenge the defendant’s conduct in order for some of them to seek relief under Rule 23(b)(2).”²⁵⁷ Where a lead plaintiff seeks an equitable remedy that is

254. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

255. See, e.g., *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664–65 (9th Cir. 2011) (holding district court abused its discretion by issuing nationwide injunction against enforcement of agency rule where narrower injunction would have afforded plaintiff complete relief); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) (“The injunction issued by the district court is overly broad in that the class wide focus is completely unnecessary to provide the named plaintiffs the relief to which they are entitled . . .”); *Brown v. Trs. of Bos. Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (holding district court abused its discretion by enjoining defendant from engaging in sex-based discrimination against any faculty members where narrower injunction would “provide[] [plaintiff] with the outer limit of the relief to which she is entitled”); *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d 875, 888 (3d Cir. 1986) (“In the absence of a certified class action, [plaintiff] was only entitled to relief for itself.”).

256. See, e.g., *L.A. Haven Hospice*, 638 F.3d at 664 (asserting rule against overbroad injunctions “applies with special force where there is no class certification”); *Sharpe*, 319 F.3d at 273 (“While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an *individual suit*, such broad relief is rarely justified . . .”); *Brown*, 891 F.2d at 361 (“Ordinarily, classwide [injunctive] relief . . . is appropriate only where there is a properly certified class.”).

257. *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1775 (2d ed. 1986)) (internal quotation marks omitted); see also, e.g., *Lanner v. Wimmer*, 662 F.2d 1349, 1357 (10th Cir. 1981) (“It is not ‘fatal if some members of the class might prefer not

divisible, mandatory class actions certified under Rule 23(b)(2) thus present the same risk that nonconsenting class members will be erroneously deprived of their control entitlement as is present in the case of mandatory class actions seeking only money damages.²⁵⁸

This similarity between money-damages actions, on the one hand, and equitable actions on the other, suggests a need for broadening the way in which the due-process-based opt-out right is presently conceived. Rather than drawing a sharp distinction between equitable claims and monetary claims, the determination of whether opt-out rights are required should turn instead on the relationship between the individual claims of absent class members and the scope of the defendant's remedial obligation.²⁵⁹ Where a particular class member's decision to assert her claim could have no possible effect on the relief to which the lead plaintiffs would otherwise be entitled, the case for an opt-out right is quite weak.²⁶⁰ Where, however, the assertion or nonassertion of absent

to have violations of their rights remedied.” (quoting *U.S. Fid. & Guar. Co. v. Lord*, 585 F.2d 860, 873 (8th Cir. 1978)); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968) (“The fact that some members of the class were personally satisfied with the defendants’ relocation efforts is irrelevant.”).

258. Professor Marcus helpfully suggests the example of a suit challenging a school district's race-conscious diversity plan. Though a white student “assigned to a school outside her neighborhood” might well be “made entirely whole” by an injunctive remedy “requir[ing] the neighborhood school to admit her and her alone,” the parent of such a student might well be able to “bring a [mandatory] class action under Rule 23(b)(2) on behalf of all similarly situated parents.” Marcus, *Flawed*, supra note 236, at 665 n.37. Presumably, such a class action would be maintainable even if some parents included in the class supported the diversity plan. See supra note 257 and accompanying text (discussing courts’ general unwillingness to withhold class certification based on intraclass dissensus regarding desired relief).

259. Such an approach would not necessarily render the current version of Rule 23 unconstitutional. As various lower courts have recognized, the language of Rule 23 is sufficiently flexible to allow courts to direct that notice and opt-out rights be provided, even where certification is granted under Rule 23(b)(2) rather than Rule 23(b)(3). See, e.g., *In re Monumental Life Ins. Co.*, 365 F.3d 408, 416–17 (5th Cir. 2004) (“[S]hould the [Rule 23(b)(2)] class be certified on remand, class members must be provided adequate notice, and the district court should consider the possibility of opt-out rights.”); *Jefferson v. Ingersoll Int’l, Inc.*, 195 F.3d 894, 898–99 (7th Cir. 1999) (“[C]lass members’ right to notice and an opportunity to opt out should be preserved whenever possible. It is possible to preserve those rights in this case.”); *Eubanks v. Billington*, 110 F.3d 87, 94 (D.C. Cir. 1997) (“[T]he language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions.”).

260. A similar line of reasoning could also support denial of opt-out rights in the other major category of class actions eligible for mandatory certification under Rule 23—the so-called “limited fund” class action. See Fed. R. Civ. P. 23(b)(1)(B); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838–41 (1999) (describing criteria for limited-fund actions). In cases of this type, the defendant's aggregate liability is effectively determined by the fixed pool of assets available to satisfy any judgment. The assertion or nonassertion of any particular class member's claim is thus exceedingly unlikely to affect the scope of the defendant's remedial obligation. Cf. *id.* at 841 (noting “limited fund theory” was historically “justified with reference to a ‘fund’ with a definitely ascertained limit, *all of which* would be distributed to satisfy” claims against it (emphasis added)).

class members' claims is likely to have a meaningful effect on the relief the court deems permissible, opt-out rights should be recognized regardless of whether the relief sought by the action is equitable or monetary in nature.

C. *The Right Not to Sue and Substantive Law*

Finally, focusing on the right not to sue as a foundation for due process opt-out rights helps to illuminate the relationship between opt-out rights and the underlying substantive law on which the claimholder's right of action is based. Most discussions of the due process foundations of the class-action opt-out right tend to conceive of the right in transsubstantive terms—that is, the individual interest in pursuing one's own day in court is conceived of in abstract terms that do not depend directly on the particular substantive law establishing the claimholder's entitlement to sue.²⁶¹ Thus, for example, scholars who place a high value on litigant autonomy tend to assume that such autonomy interests should receive strong constitutional protection regardless of the substantive basis for the plaintiff's suit.²⁶² Similarly, scholars who resist constitutionalizing opt-out rights tend to assume that the permissibility of mandatory class actions (at least as a constitutional matter) should not depend on the precise legal source of the claimholder's right of action.²⁶³

The argument for opt-out rights presented here, by contrast, is not transsubstantive but rather depends very much on the precise nature and legal source of the underlying right of action. As discussed above, the argument for viewing the provision of a class action opt-out right as a requirement of due process derives from the status of legal claims as a form of constitutionally protected property.²⁶⁴ Characteristically, ownership of such a claim confers on its owner sole decisionmaking authority with respect to whether or not to assert that claim. Opt-out rights provide

261. See Marcus, *Flawed*, supra note 236, at 670 (noting virtually all existing attempts to rationalize Rule 23's approach to notice and opt-out rights appeal to "a transsubstantive rationale"); see also David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 *DePaul L. Rev.* 371, 375–79 (2010) (discussing concept of transsubstantivity more generally).

262. See, e.g., Redish, supra note 62, at 137–47 (providing transsubstantive argument for autonomy-focused conception of procedural due process).

263. See, e.g., Betson & Tidmarsh, supra note 72, at 570 (arguing mandatory class actions should be permitted if such an action "yields greater net social benefits than other methods of aggregation"); Shapiro, supra note 50, at 938 (suggesting "unconditional opt-out 'right'" may be "inappropriate with respect to *any* issue or set of issues that is suitable for class treatment" (emphasis added)). But see Bone, *Puzzling Idea*, supra note 1, at 609–14 (contending permissibility of nonparty preclusion should be informed by nature of substantive right at issue).

264. See supra Part II.

a procedural mechanism for protecting this decisionmaking authority against the risk of erroneous deprivation.²⁶⁵

But recognizing that ownership of a legal claim “typically” or “characteristically” confers upon its owner ultimate decisionmaking authority with respect to the claim’s assertion or nonassertion is not the same as saying that all legal claims must invariably bear this characteristic. It is black-letter law that the Constitution itself is not the source of the property interests it protects and that the nature and scope of an individual’s property entitlement must therefore be “determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’”²⁶⁶ Determining the availability and scope of opt-out rights thus requires looking to the underlying substantive law establishing the claimholder’s right of action in order to ensure that the claimholder does, in fact, possess ultimate authority to decide whether or not her claim may be asserted.

Consider, for example, the structure of individual employees’ entitlement to bring suit for violations of the Age Discrimination in Employment Act of 1967 (ADEA).²⁶⁷ The ADEA empowers “[a]ny person aggrieved” by a violation of the Act to bring suit for legal or equitable relief but provides that such private rights of action “shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission.”²⁶⁸ Other federal statutes limit the availability of private rights of action in similar ways.²⁶⁹ Courts have generally viewed such provisions as constitutionally unproblematic, reasoning that the express terms of the statute providing for the extinguishment of private claims upon the filing of an Equal Employment Opportunity Commission (EEOC) action limit the scope of the claimholder’s property entitlement.²⁷⁰ A judgment or settlement obtained by the EEOC can thus effectively preclude a private action on the same claims—not because the affected private employees are presumed to consent to the EEOC’s

265. See *supra* notes 200–218 and accompanying text (discussing relationship between opt-out rights and due process rights).

266. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

267. 29 U.S.C. §§ 621–634 (2012).

268. *Id.* § 626(c)(1).

269. See, e.g., *id.* § 216(b) (“The right provided by this subsection to bring an action by or on behalf of any employee . . . shall terminate upon the filing of a complaint by the Secretary of Labor . . .”); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 *Harv. L. Rev.* 486, 537 n.236 (2012) (collecting federal environmental statutes placing similar limits on citizen suits).

270. See, e.g., *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1506–07 (9th Cir. 1990) (holding due process permits EEOC action to preclude private ADEA action); *Donovan v. Univ. of Tex. at El Paso*, 643 F.2d 1201, 1208 (5th Cir. 1981) (same as to FLSA action); *EEOC v. Consol. Edison Co. of N.Y.*, 557 F. Supp. 468, 473–74 (S.D.N.Y. 1983) (same as to ADEA action).

representation, but rather because their entitlement to bring suit individually simply ends when the EEOC's enforcement effort begins.²⁷¹

The relationship between a claimholder's control entitlement and the underlying substantive law establishing the right to bring suit has potentially significant implications for the availability of opt-out rights. As discussed above, many critics of opt-out rights have argued that allowing plaintiffs to exclude themselves from certain types of class actions will have detrimental effects on deterrence and other regulatory objectives of the underlying substantive law.²⁷² A particular concern expressed by these critics is the fear that allowing opt outs may result in lower aggregate class recoveries than would be possible if opt outs were disallowed, which, in turn, may prevent defendants from fully internalizing the costs that their behavior imposes on others.²⁷³

But to the extent lawmakers share such concerns, they have substantial flexibility in structuring the private rights of action they choose to recognize in ways that can avoid most of the potential negative consequences that critics have attributed to opt-out rights.²⁷⁴ Lawmakers might, for example, follow the example of the ADEA by vesting in individuals only a contingent right to sue that is subject to extinguishment in the event that a government agency or official files suit on their behalf. By the same reasoning, lawmakers might instead vest sole enforcement power in a private individual—for example, the first to file suit alleging a legal wrong—subject to a requirement that some portion of the proceeds of the litigation be distributed to those victimized by the offender's conduct.²⁷⁵ One could also imagine a hybrid regime in which all affected individuals are vested with individual rights of action but where those rights may be extinguished upon the occurrence of some future contingent event, such as the judicial

271. See, e.g., *Pan Am. World Airways*, 897 F.2d at 1505 (noting EEOC argument that “[o]nce the EEOC commences a[] . . . suit, the right to commence a private action . . . ceases to exist”); *EEOC v. Troy State Univ.*, 693 F.2d 1353, 1356 n.2 (11th Cir. 1982) (“Since the statute withdraws the right to sue itself, the rights of faculty members on whose behalf the suit was brought are extinguished . . . without regard to the normal rules of res judicata.”).

272. See *supra* note 71 and accompanying text (discussing concerns that opt-outs result in suboptimal deterrence).

273. See, e.g., Campos, *supra* note 1, at 1081–88 (arguing opt-out rights undermine goals of class actions); Rosenberg, *supra* note 70, at 832 (same).

274. Cf. Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 *Lewis & Clark L. Rev.* 637, 673 (2013) (urging legislatures, when structuring private-enforcement regime, to consider whether and in what circumstances “plaintiffs will be permitted to proceed on a representative basis”).

275. A somewhat similar mechanism is presently employed for private enforcement of certain regulatory regimes, such as the federal False Claims Act (FCA). See 31 U.S.C. § 3730(b)(1), (5) (2012) (authorizing private rights of action to enforce FCA but specifying after filing of first such action, “no person other than the Government may intervene or bring a related action based on the facts underlying the pending action”).

certification of a class action meeting requirements similar to those set forth in Rule 23.²⁷⁶

Even in cases involving mass torts and other high-stakes-individual damages claims—the context in which due process concerns over individual litigant autonomy are generally thought to be at their strongest²⁷⁷—current doctrine would seem to authorize substantial abridgement of individual litigants’ control rights. The Supreme Court has repeatedly insisted that the Due Process Clauses themselves are not “a font of tort law”²⁷⁸ and lawmaking institutions would thus seem to possess

276. For some, the suggestion that lawmakers might refashion litigants’ rights over their legal claims in the manner suggested in the text might call to mind the controversial “bitter with the sweet” theory, which holds “that the procedures prescribed by nonconstitutional law qualify the scope of” constitutionally protected property rights, such that mere “compliance with these procedures” would automatically satisfy due process. Merrill, *Landscape*, *supra* note 107, at 892. This approach to procedural due process attracted some adherents on the Court in the 1970s. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 151–54 (1974) (plurality opinion) (“[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.”), overruled by *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). But it never attained majority support and was later conclusively rejected by the Court. See *Loudermill*, 470 U.S. at 540–41 (rejecting *Arnett’s* reasoning). *Loudermill* and related cases rejecting the “bitter with the sweet” rationale are premised on the idea that where a state has conferred an entitlement satisfying the federal constitutional standard for recognition as due process “property”—i.e., one that is terminable only “for cause”—the state may not render that entitlement insecure by providing inadequate procedures for determining whether the requisite “cause” for termination exists. See, e.g., *id.* (“‘Property’ cannot be defined by the procedures provided for its deprivation any more than can life or liberty.”); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (“The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’”); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11–12 (1978) (“Because petitioners may terminate service only ‘for cause,’ respondents assert a ‘legitimate claim of entitlement’ within the protection of the Due Process Clause.” (footnote omitted)). By contrast, the suggestion here is that the state might expressly limit litigants’ control rights by providing for the termination of those rights in certain circumstances for reasons other than “cause.” Cf. *Atkins v. Parker*, 472 U.S. 115, 129 (1985) (“The procedural component of the Due Process Clause does not ‘impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.’” (quoting *Richardson v. Belcher*, 404 U.S. 78, 81 (1971))).

277. See Campos, *supra* note 1, at 1063 (“[A]lmost all courts and scholars disfavor the use of class actions in mass tort litigation because the class action device infringes upon each plaintiff’s autonomy over the tort claim.”).

278. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999) (refusing to recognize constitutional violation resulting from state entity’s unfair competition because doing so “would violate our frequent admonition that the Due Process Clause is not merely a ‘font of tort law’” (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976))); *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (“Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.”). But see John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *Yale L.J.* 524, 590–96 (2005) (arguing Due Process Clauses should be

a substantial degree of discretion in revising or reformulating the tort rights of action they choose to recognize in ways that would limit individual litigants' control rights.²⁷⁹

One might object that conceiving of the due process foundations of the class action opt-out right in this manner threatens to render the right itself practically meaningless. Why, after all, insist on opt-out rights to protect litigant autonomy if the autonomy interest itself exists purely as a matter of legislative grace? But such an objection could be asserted with respect to virtually any state-created right or entitlement to which due process protection attaches. An individual's right to exercise control over a legal claim is little different, in this regard, from a constitutionally protected property interest in the continuation of state employment, the right to continue receiving welfare benefits, or any of a variety of other state-created legal entitlements to which the Supreme Court has

understood as imposing obligation on governments to provide access to "law for the redress of wrongs").

279. Such discretion would be subject to at least three important qualifications. First, viewing the control entitlement as a constitutionally protected property interest would likely constrain *who* would possess the authority to limit or abrogate that entitlement. The decision regarding the extent to which litigants may exercise control over the assertion or nonassertion of their legal claims properly resides with the lawmaking institutions responsible for creating or recognizing the right of action in the first instance. Thus, for example, if a state statute creates a private right of action that does not limit the decisionmaking authority of persons authorized to bring claims under that statute, a federal court reviewing a request for mandatory class treatment of such claims would be bound by the legislature's decision and could not extinguish the individual claimholders' control rights without providing appropriate procedural safeguards (including, presumably, the provision of opt-out rights). Cf. *Taylor v. Sturgell*, 553 U.S. 880, 883 (2008) (holding while Congress might properly bar nonparties from relitigating issues previously determined in actions seeking information under federal Freedom of Information Act (FOIA), "it hardly follows that *this Court* should proscribe or confine successive FOIA suits by different requesters" under general principles of preclusion law).

Second, the control entitlement's status as constitutionally protected property would likely limit *when* lawmakers could limit or rescind that entitlement. In general, the Supreme Court's doctrine treats accrual—i.e., the point at which a legal right is capable of being asserted in court—as the point at which a constitutionally protected property interest conferred by a right of action comes into being. See Olivia A. Radin, Note, *Rights as Property*, 104 *Colum. L. Rev.* 1315, 1328 (2004) ("The case law establishes that accrual is the point at which the Court will find that property in the law can exist . . ."). Thus, a lawmaking body may have substantial flexibility in structuring private rights of action *ex ante* but may be substantially more limited in altering or extinguishing litigants' control rights once a right of action has accrued.

Finally, where the underlying interest sought to be vindicated through a litigation is itself subject to constitutional protection and where the government is the source of that interest's alleged infringement, courts and lawmakers may be substantially constrained in their ability to limit litigants' control rights. See *Richards v. Jefferson Cnty.*, 517 U.S. 793, 802–05 (1996) (holding state court could not preclude constitutional challenge to taxation by state entity based on judgment in prior state-court action in which plaintiff had not participated).

extended due process protection.²⁸⁰ Though governments are under no constitutional obligation to create such entitlements in the first instance, having recognized their existence, they may not deprive beneficiaries of those rights without observing the basic requisites of due process.

CONCLUSION

It should come as no surprise that judges, lawyers, and legal academics tend to view the world through a court-focused lens. American legal education and acculturation tends to prioritize court-centered activities and judicial decisionmaking as the principal subjects worthy of attention.²⁸¹ To individuals acculturated in this environment, it might seem natural to understand the value of legal claims in exclusively court-centered terms. On this understanding, the value of a legal claim derives exclusively from the opportunity it affords an aggrieved litigant to hale a defendant before a court and obtain a judicial resolution of the parties' respective rights and responsibilities. The Supreme Court's familiar day-in-court rhetoric that provides the conventional articulated foundation for the class-action opt-out right certainly resonates with this worldview.

But to individuals who do not take such a court-focused perspective, the value of a legal claim may be perceived much differently. The available evidence suggests that many, and perhaps most, holders of potentially valid legal claims have no interest in seeking vindication of their legal rights by pursuing their own individual day in court.²⁸² For such individuals, the conventional explanation for the class action opt-out right's constitutional foundation fails. Because they have no interest in pursuing separate litigation, such individuals would receive little practical benefit from preservation of a formal right to their own day in court. Were this the sole function of opt-out rights, the constitutional foundations of the opt-out right recognized in *Shutts* and subsequent cases would be open to serious question.

280. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (public schooling); *Perry v. Sindermann*, 408 U.S. 593 (1972) (public employment); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare rights).

281. See, e.g., Robin West, *Toward the Study of the Legislated Constitution*, 72 *Ohio St. L.J.* 1343, 1344–49 (2011) (discussing and critiquing court-centered focus of American legal education).

282. See, e.g., Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 *Ga. L. Rev.* 1049, 1096 (2000) (“The best available evidence indicates that most Americans who have been injured by the negligence of others do not file a tort suit.”); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-legal Analysis*, 59 *Brook. L. Rev.* 961, 1019 (1993) (reporting study results suggesting “fewer than one in five injured Americans even considered the possibility of obtaining compensation from others for their accidental injuries” and “less than three percent of” such individuals actually followed through by filing tort suit).

But opt-out rights do more than allow claimholders to preserve their right to seek an individual day in court. They preserve as well the claimholder's ability to *decide* whether or not their claims will see the inside of a court at all. Owners of legal claims who have no interest in pursuing individual litigation may nonetheless value their ownership rights precisely because such ownership entitles them to decide whether or not their claims will be litigated. Such decisionmaking authority constitutes a core component of the claimholder's ownership interest and, as such, can only be taken from her in accordance with procedures that comply with the requirements of the Due Process Clauses. Understanding opt-out rights as an appropriate procedural mechanism for protecting this decisionmaking authority sheds useful new light on the constitutional foundations of opt-out rights and of litigant autonomy more generally.

