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#rule23 #classaction #notice: Using Social Media, Text Messaging, and Other New Communications Technology for Class Action Notice and Returning to Rule 23(c)(2)(B)'s "Best Notice Practicable" Standard

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#RULE23 #CLASSACTION #NOTICE: USING SOCIAL MEDIA, TEXT MESSAGING, AND OTHER NEW COMMUNICATIONS TECHNOLOGY FOR CLASS ACTION NOTICE AND RETURNING TO RULE 23(C)(2)(B)'S "BEST NOTICE PRACTICABLE" STANDARD

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I. INTRODUCTION

The "best notice that is practicable under the circumstances" standard in Federal Rule of Civil Procedure 23(c)(2)(B) is often a source of disagreement between parties, or between a party and the court, in class action litigation.[1] Over time, some agreement, or at least some standard practices, regarding communication methods have evolved: mail and print publication are the traditional means of effecting notice.[2] However, as this Comment will argue, in a society where many, even most, people use the internet and other newer communication technologies,[3] those traditional practices do not necessarily meet the standard as articulated in the rule.[4] Courts often seem to rely principally on precedent when determining what constitutes adequate notice[5] instead of focusing on the language of the rule, which, by specifically pointing to "the circumstances," suggests that the standard of "best notice practicable" is different in each case.[6] While compliance with Rule 23(c)(2)(B) may seem like a minor procedural issue, compliance is in fact critical: a class member's constitutional rights can be violated if notice is ineffective or inappropriate in the circumstances.[7] For this reason, courts must adhere more thoughtfully and faithfully to Rule 23(c)(2)(B)'s "best notice that is practicable under the circumstances" standard.

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1. *See, e.g.*, Bauer v. Kraft Foods Glob., Inc., 277 F.R.D. 558, 564 (W.D. Wis. 2012) (certifying the class and setting a deadline for the parties to settle disagreements about the proposed notice); Jermyn v. Best Buy Stores, L.P., No. 08 Civ. 00214(CM), 2010 WL 5187746, at *4–9 (S.D.N.Y. Dec. 6, 2010) (describing and entering order regarding defendant's objections to plaintiff's proposed notice plan).

2. NEWBERG ON CLASS ACTIONS § 8:30, Westlaw (database updated Sept. 2015); *see infra* Section III.A.

3. *See infra* Section III.B.

4. *See infra* Part IV.

5. *See infra* Part III.

6. *See infra* Section IV.A.

7. *See infra* Section II.C.

The issue of courts' comfort with the communication technologies of today's world was highlighted in a series of court orders trying to resolve disputes over notice in *Mark v. Gawker Media LLC*.[8] This case generated much interest in the legal world for allowing the use of social media sites or accounts for notice in a collective action,[9] which is not the same as a class action.[10] However, the arguments of the parties and the orders of the court illustrate the competing views on the proper role of new communication technologies in class action notice. While the *Gawker* court ultimately denied class certification and granted summary judgment to the defendants,[11] the allowance of notice via social media may be influential in future class actions.

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8. Mark v. Gawker Media LLC, No. 13 Civ. 04347, 2015 WL 2330274, at *1–2 (S.D.N.Y. Apr. 10, 2015) (approving notice through social media with the limitations that plaintiffs must "unfollow" potential plaintiffs who do not respond on Twitter by a deadline and must not "friend" potential plaintiffs on Facebook); Mark v. Gawker Media LLC, No. 13 Civ. 04347, 2015 WL 2330079, at *1–2 (S.D.N.Y. Mar. 5, 2015) (rejecting plaintiff's notice plan because of overbreadth and an appearance of attempting to punish Gawker rather than to provide notice, including rejecting postings on certain Reddit and Tumblr pages and general tweets or public postings on Twitter, Facebook, and LinkedIn); Mark v. Gawker Media LLC, No. 13 Civ. 04347, at *2 (S.D.N.Y. Feb. 13, 2015) (denying any request by plaintiffs to provide notice through media additional to those already approved, such as through Xbox live); Mark v. Gawker Media LLC, No. 13 Civ. 04347, 2014 WL 5557489, at *3–7 (S.D.N.Y. Nov. 3, 2014) (granting conditional certification and court-authorized notice, including finding that posting notice on Gawker's website and blogs would be overbroad, but allowing use of social media because "the vast majority [of potential collective members] likely have at least one such account," and directing the parties to submit a plan for proposed social media postings and any disputes about them).

9. *See* Y. Peter Kang, *Gawker Interns Can Notify Class of Lawsuit Via Social Media*, LAW360 (Apr. 13, 2015, 3:53 PM), http://www.law360.com/articles/642415/gawker-interns-can-notify-class-of-lawsuit-via-social-media; Shari Claire Lewis, *Tech Tools Are Increasingly Used to Disseminate Notice; Internet Issues/Social Media*, N.Y. L.J., Feb. 17, 2015, LEXIS.

10. *See* SAM J. SMITH & CHRISTINE M. JALBERT, CERTIFICATION—216(B) COLLECTIVE ACTIONS V. RULE 23 CLASS ACTIONS & ENTERPRISE COVERAGE UNDER THE FLSA 1–23 (2011), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/084.authcheckdam.pdf (describing the certification process for each type of action and noting differences between them).

11. Mark v. Gawker Media LLC, No. 13 Civ. 04347, 2016 WL 1271064 (S.D.N.Y. Mar. 29, 2016).

This Comment will first introduce class action notice,[12] then summarize the history of class actions in general[13] and of class action notice under Rule 23(c)(2)(B)[14] in order to highlight the issues of justice and constitutional rights implicated by class action notice. This Comment will then review courts' sanction and use of what is here categorized as "traditional," or pre-internet, means of notice under Rule 23—namely, physical mail, print newspaper publication, television, and radio.[15] Then, courts' use of more current means of notice will be reviewed, from the older and more common technologies of email and websites[16] to the newer and less common means of social media[17] and text messaging.[18] This Comment will then discuss the implications of notice practices in today's world in terms of compliance with Rule 23(c)(2)(B)'s "best notice that is practicable under the circumstances" standard, concluding that the language and history of Rule 23(c)(2)(B), in connection with constitutional due process imperatives, require courts to use newer communication technology methods in most cases and to explicitly base all notice scheme decisions on the standard given in Rule 23(c)(2)(B)'s language.[19] Additionally, courts must be more active in evaluating notice plans and protecting the constitutional rights of class members.[20]

II. HISTORY OF CLASS ACTION NOTICE UNDER RULE 23(C)(2)(B)

A. Introduction to Class Action Notice and Its Constitutional Implications

Before reviewing the history of class actions and class action notice, it is helpful to have an understanding of what class actions are and how they implicate constitutional rights. Class actions are a unique subset of litigation: litigating as a class does not give parties any substantive rights,[21] but instead puts them on a procedural path

12. *See infra* Section II.A.
13. *See infra* Section II.B.
14. *See infra* Section II.C.
15. *See infra* Section III.A.
16. *See infra* Section III.B.1.
17. *See infra* Section III.B.2.
18. *See infra* Section III.B.3.
19. *See infra* Section IV.A.
20. *See infra* Section IV.B.
21. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE

with steps in addition to those in litigation between individuals, such as certification[22] and notice.[23]

Federal Rule of Civil Procedure 23 sets forth specialized rules for class action litigation.[24] Class actions allow "[o]ne or more members of a class [to] sue or be sued as representative parties."[25] One of the unique aspects of class action litigation is notice to class members, as given in Rule 23(c)(2)(B): "For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[26] The rule goes on to detail what the notice must state, including "the binding effect of a class judgment on the members under Rule 23(c)(3)."[27]

The subdivision referred to in Rule 23(c)(2)(B), 23(b)(3), became the only classes for which notice is mandatory.[28] These actions "are money damages class actions."[29] Rule 23(b)(3) gives the requirements to maintain one of the three types of class actions; in addition to the prerequisites given in 23(a), for a class action under (b)(3), it must be the case that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[30] The "best notice practicable" language—which the court *must* do for 23(b)(3) class actions—contrasts with the rule for 23(b)(1) and (2) class actions, in which "the court *may* direct *appropriate* notice to the class."[31]

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§ 1755, Westlaw (database updated Apr. 2015).

22. FED. R. CIV. P. 23(c)(1).

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

24. FED. R. CIV. P. 23.

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

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

27. FED. R. CIV. P. 23(c)(2)(B)(vii). Such a judgment must "include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members." FED. R. CIV. P. 23(c)(3)(B).

28. *See infra* notes 69–88 and accompanying text (explaining 1966 and 2003 amendments to Rule 23 that resulted in the promulgation of Rule 23(c)(2)(B)).

29. WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:47, Westlaw (database updated Dec. 2015).

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

31. FED. R. CIV. P. 23(c)(2)(A) (emphasis added); *see also* RUBENSTEIN, *supra* note 29, § 8:1 (mapping Rule 23's notice provisions).

This Comment only examines notice under 23(c)(2)(B). However, many of the same issues discussed here—especially complying with constitutional due process requirements through notice—would be relevant to a court weighing whether to use its discretionary power to direct notice, as well as what would constitute "appropriate" notice. Class actions can also occur in state courts, even when class members are non-residents, and state court rules covering notice are usually very similar to, or even the same as, the federal rule;[32] class actions under state court rules are also beyond the scope of this Comment.

Notice in class actions is particularly important because of notice's constitutional implications. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"[33] and the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[34] Judgments and settlements in class actions bind the entire class,[35] even if a class member never knew of the litigation.[36] This seems to undermine the member's constitutional due process rights:

> Because the Constitution's due process clauses are generally construed to assure that an individual's legally protected rights cannot be adjudicated without providing her with a day in court, there would seem to exist at least a prima facie conflict between the dictates of procedural due process and the collectivist goals of the class action procedure.[37]

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32. ABA PUBLISHING, AM. BAR ASS'N, FIFTY-STATE SURVEY: 2014–2015: THE LAW OF CLASS ACTION ix (Elizabeth J. Cabraser & Fabrice Vincent eds., 2015).

33. U.S. CONST. amend. V.

34. U.S. CONST. amend. XIV, § 1.

35. Smith v. Bayer Corp., 564 U.S. 299, 315 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23.").

36. *See, e.g.*, Moralez v. Whole Foods Mkt., Inc., 897 F. Supp. 2d 987, 1000 (N.D. Cal. 2012) ("Due process does not require that a class member actually receive notice.").

37. MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 135 (2009) (footnote omitted); 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789.1 (3d ed.), Westlaw (database updated Apr. 2015).

This grounding in constitutional rights is critical to the history of the class action, and specifically to the use of class notice, as a procedural mechanism.

B. History of Class Action Litigation

While this Comment will not give an extensive history of class action litigation, a brief history to supplement the introduction above[38] is helpful in understanding that the constitutional due process issues implicated in class action notice techniques—who may be in the litigation and who may be bound—are the issues that have plagued class action jurisprudence since the beginning.

The idea of group litigation has a long history: while "it would be a mistake to speak of an unbroken and unified eight-century tradition," there are medieval English antecedents of group litigation, the understanding of which require understanding the social context and ideas about representation.[39] More directly, the modern class action can be traced to seventeenth century English legal developments.[40] Further developments in legal procedure in England continued the attempt to address issues of practicality—for example, issues of judicial resources created by many suits centered on the same facts and justice, and, in cases involving groups of litigants, issues of whether to bind parties whose interests were affected by a case.[41] By the early nineteenth century, though "developed on an *ad hoc* basis, rather than from one general uniform principle," "the pressure of one set of rigid rules and principles . . . and practical concerns . . . forged a relief valve and the class action device was thus activated."[42]

U.S. Supreme Court Justice Joseph Story was instrumental in incorporating class action suits into the legal system in the United

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38. *See supra* Section II.A.

39. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38–40 (1987) (footnote omitted).

40. William Weiner & Delphine Szyndrowski, *The Class Action, from the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?*, 8 WHITTIER L. REV. 935, 936 (1987) (discussing the Bill of Peace, which gave litigants an option outside of rigid joinder rules); *see also* YEAZELL, *supra* note 39, at 24–25 (discussing the usual conclusions of scholars and lawyers about the history of the modern class action, and arguing that ending the inquiry at the seventeenth century for its origins "form[s] an incomplete and deceptive picture").

41. Weiner & Szyndrowski, *supra* note 40, at 936–54.

42. *Id.* at 954.

States during the first half of the nineteenth century.[43] Like the English legal system, Justice Story wrestled with issues of who could or should be bound by the outcome of litigation, implicating the interests of parties not before the court.[44] In 1842, the Supreme Court enacted Federal Equity Rule 48, which provided for group representative litigation.[45] However, the language of the rule itself and the cases that followed contained contradictions about the answers to questions of when such litigation could be used and who was bound by it.[46]

The history of class action procedural rules and case law took more twists and turns[47] before the original version of Federal Rule of Civil Procedure 23 was promulgated in 1938.[48] The original Rule 23 provided for three types of classes.[49] However, once again, the procedure of class action litigation "was beset with difficulties: (1) obscure and uncertain definitions of categories; (2) the inadequacy of the rule in dealing with the binding effect of judgments; and (3) the failure of the rule to address measures assuring procedural fairness."[50]

Rule 23 was therefore significantly changed in 1966[51] to describe "in more practical terms, the occasions for maintaining class actions."[52] The 1966 rule included three subsections in Rule

43. *Id.* at 955; YEAZELL, *supra* note 39, at 216.

44. Weiner & Szyndrowski, *supra* note 40, at 955–58; YEAZELL, *supra* note 39, at 216–20.

45. Weiner & Szyndrowski, *supra* note 40, at 958–59; YEAZELL, *supra* note 39, at 221.

46. Weiner & Szyndrowski, *supra* note 40, at 958–69; YEAZELL, *supra* note 39, at 221–24. "[G]roup litigation entered the twentieth century as an oddity that even the most learned did not profess to understand. . . . [T]he class suit, as it had come to be called, was clearly good for something, even if no one could quite figure out what." YEAZELL, *supra* note 39, at 224.

47. Weiner & Szyndrowski, *supra* note 40, at 969–77; YEAZELL, *supra* note 39, at 225–29.

48. FED. R. CIV. P. 23 (1938); Weiner & Szyndrowski, *supra* note 40, at 977 (quoting the original text of the rule in full).

49. FED. R. CIV. P. 23(a) (1938); John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705, 706–07 (1997).

50. Weiner & Szyndrowski, *supra* note 40, at 979–80 (footnotes omitted).

51. *Id.* at 990; YEAZELL, *supra* note 39, at 238.

52. Weiner & Szyndrowski, *supra* note 40, at 990; *see also* 39 F.R.D. 69, 94–107 (1966) (containing the text of the superseded rule, the text of the rule as amended, and the Advisory Committee's Note, discussing the difficulties with the original rule).

23(b), each detailing situations in which representative litigation is appropriate.[53] "The unstated implication of Rule 23(b) is that there are cases that satisfy the Rule 23(a) criteria—numerous individuals with common questions whose rights are being pursued by an adequate class representative with typical claims—but that are unworthy of class certification on those grounds alone."[54] While the 1966 rule has not been free from problems or criticism,[55] it remains the core of the rule as it stands today.[56]

The concept and general structure of modern class actions have been the objects of much criticism and controversy;[57] one scholar described the commentary on the rule as "professional heat."[58] Despite several sets of amendments to Rule 23, in addition to the updates that rule made to its predecessors, "the same problems that plagued class actions during its inception continue to haunt the field."[59] Scholars acknowledge the positive aspects of class actions, but find much to condemn.[60]

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53. FED. R. CIV. P. 23(b); NEWBERG ON CLASS ACTIONS § 4:1, Westlaw (database updated Dec. 2015).

54. NEWBERG ON CLASS ACTIONS § 4:1, Westlaw (database updated Dec. 2015).

55. Weiner & Szyndrowski, *supra* note 40, at 992 ("The cases and commentators support the fact that the 1966 revision is beset with its own difficulties, perhaps not unlike those found in the original rule."); YEAZELL, *supra* note 39, at 238.

56. *See* FED. R. CIV. P. 23 (providing the Advisory Committee Notes, outlining each change made, for each amendment since 1937).

57. *See* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 4–6 (2000) (outlining various groups of critics of class actions and common criticism, while noting groups of supporters and their reasons); REDISH, *supra* note 37, at ix ("I critique the class action procedure from historical, political, and constitutional perspectives. . . . I find it seriously wanting on all counts.").

58. YEAZELL, *supra* note 39, at 238 ("Unlike its predecessors, however, the new rule has generated a great deal of professional heat: enormous fights occur over the subclassification into which a particular class action falls; academic writers engage in hyperbolic praise and denunciation of the device; and factions of professional associations debate whether class actions should be curtailed or expanded.").

59. Jade Brewster, *A Kick in the Class: Giving Class Members a Voice in Class Action Settlements*, 41 W. ST. U. L. REV. 1, 3 (2013).

60. REDISH, *supra* note 37, at 1–2 ("The potential benefits of the class action, to both litigants and the legal system as a whole are substantial. . . . [But] the modern class action may give rise to as much harm as good; if not properly controlled it may wreak havoc on the legal system and the values that underlie it. Some have charged that the class proceeding has often been employed as a form

Settlement class actions, a newer development[61] where both parties come to court with a request for certification of a class conditional upon approval of an already reached settlement,[62] are especially controversial. "A number of respected courts and scholars . . . have sounded cautionary notes about the practice, suggesting that the settlement class action brings with it serious risks of collusion and unfairness that ultimately disadvantage absent class members."[63] Settlement class actions have become very common,[64] so the possibility of unfairness in them is an important issue in modern class action jurisprudence. This possibility of unfairness recalls the possibility of constitutional problems that all class actions carry.[65]

From its conception in English group litigation to its current state as embodied in Rule 23 and as practiced with newer methods like the settlement class action, the class action has stumbled in its attempt to accommodate the various interests present in any dispute and the unique difficulties of adjudicating the claims of a group while trying to protect the constitutional rights of all.[66] These difficulties are especially apparent in the history of class action notice.[67]

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of legalized blackmail. . . . Others have pointed to the danger of a perverse kind of 'race to the bottom.'").

61. *Id.* at 177.

62. Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 546 (2006).

63. *Id.* at 547; *see also* REDISH, *supra* note 37, at 177; Brewster, *supra* note 59, at 3 (proposing "a solution to the potential for unfairness under the current procedures for approving settlements in the class action context").

64. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 819 (2010), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_aba_annual/12_6.authcheckdam.pdf (finding that settlement classes constituted sixty-eight percent of federal class action settlements in 2006 and 2007).

65. *See supra* notes 33–37 and accompanying text.

66. *See supra* Section II.B; *infra* Section II.C.

67. *See infra* Section II.C.

C. History of Class Action Notice

Since the notice requirements of Rule 23(c)(2)(B) are, in the grand scheme of legal history, relatively new,[68] there is much less history behind class action notice than behind class actions in general. However, even the short history of class action notice is significant since it shows the centrality of constitutional due process principles in class notice.

While there was no notice requirement for classes involving unknown parties prior to 1966, notice in such cases does have history beyond the promulgation of the amended rule, and even beyond its predecessor 1938 rule.[69] There was no discussion of notice in nineteenth-century American or early English cases,[70] but in 1908, the Supreme Court expressed concern about binding judgments against persons who were not aware of the litigation:

> The allegation that the suit is brought in behalf of all who should join and share in the expense cannot make the judgment binding on those who do not join. Some . . . , possibly, had never heard of the pendency of the suit. It is clear if such suits . . . could have the effect here claimed for them, and the judgments in them were binding in all courts against all other persons of the same class, that injustice might result."[71]

Despite the Supreme Court's recognition of the possibility for injustice to those bound by group litigation, there was no notice requirement for some years.[72]

Direction to provide notice first appeared in the 1938 Rule 23, in which notice of dismissal or compromise was required for the "true" category of class actions, but the court had discretion over what notice would entail.[73] For the other categories, notice was given only if the court required it.[74] Since this notice rule provided

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68. *See supra* Section II.B.

69. *Compare* FED. R. CIV. P. 23 (1938), *with* FED. R. CIV. P. 23 (1966).

70. Weiner & Szyndrowski, *supra* note 40, at 963 n.177.

71. Wabash R. Co. v. Adelbert Coll. of W. Reserve Univ., 208 U.S. 38, 58 (1908).

72. *Id.*; *see also* FED. R. CIV. P. 23(c) (1938) (providing a notice requirement).

73. FED. R. CIV. P. 23(c) (1938) ("If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.").

74. *Id.*

only for proposed resolutions of a suit, and only for certain kinds of resolutions—proposed dismissal or compromise, but not judgment—it therefore offered little opportunity for a potential class member to learn of and make a decision about individual action before the conclusion of the class action.[75] Considering the discretionary nature of notice for the other two types of classes under the 1938 Rule 23, the rule overall provided little protection against an individual having her interests litigated against her wishes.[76]

Soon after the 1938 introduction of Rule 23, a number of courts, including once again the Supreme Court,[77] raised concerns about due process.[78] As the Second Circuit noted, scholars were showing "strong support" for the idea that class action suits could have "more decisive and binding effect" but still meet constitutional due process principles if there had been "adequate steps to notify and bring in all those in interest."[79]

These concerns were finally addressed in the 1966 amendments to Rule 23. In the Advisory Committee Notes, the Committee stated:

> [N]otice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2),[80] together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject.[81]

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75. *See id.*

76. *See id.*

77. *See supra* note 71 and accompanying text (quoting *Wabash*, 208 U.S. at 58).

78. FED. R. CIV. P. 23(c) advisory committee's note to 1966 amendment (citing cases, beginning with *Hansberry v. Lee*, 311 U.S. 32 (1940)); *see also infra* notes 87–92 and accompanying text.

79. Dickinson v. Burnham, 197 F.2d 973, 979 (2d Cir. 1952).

80. The "best notice practicable under the circumstances" standard was first codified in Rule 23(c)(2). FED. R. CIV. P. 23(c) advisory committee's note to 1966 amendment. The 2003 amendments resulted in the notification requirements for classes certified under Rule 23(b)(3), becoming the present Rule 23(c)(2)(B). FED. R. CIV. P. 23(c) advisory committee's note to 2003 amendment; *see also infra* note 82 and accompanying text.

81. FED. R. CIV. P. 23(c) advisory committee's note to 1966 amendment.

The 2003 amendments to the rule, when Rule 23(c) became the present Rule 23(c)(2)(B), recognized the differing notice needs of the different types of classes.[82]

The Supreme Court addressed the 1966 notice requirements in Rule 23(c)(2) in *Eisen v. Carlisle & Jacquelin*.[83] The Court rejected the notice plan adopted by the district court and held that individual notice was required for the 2,250,000 class members whose names and addresses were known or easily ascertainable.[84] The Court pointed to the Advisory Committee's description of Rule 23(c)(2) as "not merely discretionary" and its concern about fulfilling requirements of due process.[85] The Court took note of the Advisory Committee's reference to *Mullane v. Central Hanover Bank & Trust Co.*[86] and highlighted that case's statement "that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process."[87] The Supreme Court went on to quote *Mullane*'s strong statement about notice: "But when notice is a person's due, process which is a mere gesture is not due process. . . . The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected."[88] The Supreme Court's discussion of notice in *Eisen* solidifies that any method chosen for class action notice must be justifiable against constitutional due process standards.

Forty years after *Eisen*, however, concerns remain about whether class notice is meeting the standards of due process.[89]

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82. FED. R. CIV. P. 23(c) advisory committee's note to 2003 amendment ("For several reasons, there may be less need for notice [in a (b)(1) or (b)(2) class action] than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.").

83. 417 U.S. 156 (1974).

84. *Id.* at 175.

85. *Id.* at 173 (quoting FED. R. CIV. P. 23(c) advisory committee's note to 1966 amendment).

86. 339 U.S. 306 (1950).

87. *Eisen*, 417 U.S. at 174 (citing *Mullane*, 339 U.S. at 314).

88. *Id.* (citing *Mullane*, 339 U.S. at 315).

89. Stephanie J. Bowser, *Collateral Attacks Upon Class Action Judgments: Ending the Scope of Review Debate by Addressing the Underlying Notice Problems*, 13 ROGER WILLIAMS U. L. REV. 631, 647 (2008) ("[The] broad language [of Rule 23(c)(B)(2)

"There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case."[90] Rule 23(c)(2)(B)'s standard is supposed to be flexible yet obedient to the Constitution;[91] the rule's "practicable under the circumstances" language allows accommodation of the particularity of each case while the language specifying that it must be the "*best* notice" gives notice the import that a procedure so closely tied with constitutional due process rights requires.[92]

III. CLASS ACTION NOTICE IN PRACTICE

A. Traditional Means of Notice

Rule 23(c)(2)(B) does not tell courts how notice should be given; instead, it gives the "best notice that is practicable under the circumstances" standard.[93] This Comment will now review the

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and interpreting Supreme Court cases] leaves substantial room for interpreting what satisfies due process. The least demanding and least protective of absentee class members' right to notice standard has since generally prevailed."); Todd B. Hilsee et al., *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359, 1360 (2005) (arguing that "a great number of notices and notice programs leave class members without adequate notice of their rights, and defendants without the res judicata effect desired"). *See generally* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1786, Westlaw (database updated Apr. 2015).

90. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1090 (2d Cir. 1971).

91. NEWBERG ON CLASS ACTIONS § 8:12, Westlaw (database updated Dec. 2015) (concluding that courts have read Rule 23(c)'s requirements to enable some flexibility and pointing to the "oft-cited" case of *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1104 (5th Cir. 1977)); *see also* Jennifer Mingus, Note, *E-Mail: A Constitutional (and Economical) Method of Transmitting Class Action Notice*, 47 CLEV. ST. L. REV. 87, 102 (1999) (describing due process as a flexible concept).

92. *See* FED. R. CIV. P. 23(c)(2)(B) (emphasis added). *But see* Frank L. Maraist & T. Page Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 TEX. L. REV. 1, 14 (1970) (arguing that, among other due process problems, the standard in the 1966 Rule 23(c)(2) "directs the attention of the court away from the requirements of due process and towards the illogical consideration of the ease or difficulty that will be encountered in giving actual notice").

93. *See* FED. R. CIV. P. 23(c)(2)(B). Note, however, that the rule does specify what the notice must contain, including, among other details, the binding nature of a judgment on class members. FED. R. CIV. P. 23(c)(2)(B)(vii). These

traditional methods of providing notice and how those methods have, or have not, changed since Rule 23(c)(2)(B) was promulgated. The societal context and costs of these methods will also be described.

Though *Mullane* was decided before the 1966 Rule 23 amendments, because both *Mullane* and *Eisen* indicated approval of notice consisting of first-class mail to class members identifiable by reasonable efforts and newspaper publication, these methods became established as sufficient to satisfy the Rule 23(c)(2)(B) standard and therefore as the traditional notice methods.[94] Television and radio use is also regularly approved.[95] Yet, despite the popularity of television in the United States and its widespread use for notice, it is not accepted by courts as widely as print media.[96] Physical mail and newspaper publication are still used and easily accepted by the courts.[97]

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requirements were part of the 2003 amendments to Rule 23(c). Like the standards for notice means, the requirements of what information must be included, especially the statement about the binding nature of judgments, have due process implications. *See* Hilsee et al., *supra* note 89, at 1365 ("[M]any class action notices do not adequately explain concepts that are foreign to average people.").

94. *E.g.*, Wolfert *ex rel.* Estate of Wolfert v. Transamerica Home First, Inc., 439 F.3d 165, 176 (2d Cir. 2006) ("[U]se of first-class mail [as opposed to other classes of mail] to send a required notice has regularly been upheld."); Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985) ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirements of both [Federal Rules of Civil Procedure, Rule] 23 and the due process clause.").

95. *See, e.g.*, *In re* Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891, 939 (E.D. La. 2012) (finding that the notice program including local radio and television advertisements, among other communications, satisfied Rule 23(c)(2)); *In re* Black Farmers Discrimination Litig., 856 F. Supp. 2d 1, 14 (D.D.C. 2011) (describing and approving notice that included advertisements on "two national radio stations with large African-American audiences and 52 local radio stations located in areas with high concentrations of African-American farmers"); *see also* NEWBERG ON CLASS ACTIONS § 8:30, Westlaw (database updated Dec. 2015) ("[C]ourts continue to approve notice programs that include advertisements aired on television and radio.").

96. Jordan S. Ginsberg, Comment, *Class Action Notice: The Internet's Time Has Come*, 2003 U. CHI. LEGAL F. 739, 750 (2003).

97. *See, e.g.*, Badia v. HomeDeliveryLink, Inc., No. 2:12-CV-07097, 2015 WL 5666077, at *7 (D.N.J. Sept. 25, 2015) (finding that Rule 23(c)(2), as well as Rule 23(e), notice requirements were met by sending forms to class members appearing in defendant's corporate records and publishing notice of the settlement in English and Spanish New Jersey newspapers, but including no discussion of why those notice methods were superior to others under the

However, the importance of these media in U.S. society has waned. Weekday newspaper circulation has dropped significantly in the last decade: "[N]ewspapers, after an unusual year of small gains in 2013, saw both daily and Sunday circulation fall another 3% in 2014, declines that were felt across papers of all sizes. Newspaper weekday circulation has now fallen 19% since 2004."[98] First-class mail volume has also declined from 98.1 billion in 2005 to 63.6 billion in 2014.[99] The effectiveness of newspaper and other print media publication notice has been questioned several times since the advent of the internet.[100]

Traditional notice means can also have high costs.[101] Cost is not part of the Rule 23(c) notice standards, and in *Eisen*, the Supreme Court specifically rejected dispensing with individual notice of identifiable class members when the notice would be very expensive.[102] However, even though the Supreme Court noted that "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs,"[103] cost of notice is still a factor when courts evaluate a

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circumstances (citing Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985))).

98. Amy Mitchell, *State of the News Media 2015*, PEW RES. CTR. JOURNALISM & MEDIA (Apr. 19, 2015), http://www.journalism.org/2015/04/29/state-of-the-news-media-2015/.

99. *A Decade of Facts and Figures*, U.S. POSTAL SERV., https://about.usps.com/who-we-are/postal-facts/decade-of-facts-and-figures.htm (last visited May 7, 2016). A decline in the use of mail does not necessarily mean that mail is less likely to reach intended recipients, but it does indicate that it is not the preferred method of communication in as many circumstances as it used to be, calling into question its utility as the "best notice practicable" in many circumstances.

100. Robert H. Klonoff, Mark Herrmann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 731–33 (2008) (describing problems with mail, newspapers, and television for notice purposes); Brian Walters, *"Best Notice Practicable" in the Twenty-First Century*, 2003 UCLA J.L. & TECH. 4, 28 (2003) ("While technology and the ability to send notice in better ways moves forward, many courts continue to look backward and adhere to conceptions of notice that are technologically outdated."); Ginsberg, *supra* note 96, at 753 ("Courts mistakenly assume, without engaging in a thorough analysis of statistical data, that print media publication is the most accessible, fair, and efficient means of appealing to a large group of geographically diverse individuals. The numbers, however, do not bear out that assumption.").

101. Ginsberg, *supra* note 96, at 753–55, 759–60 (detailing the costs, as of 2003, of national print media and television advertising).

102. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175–76 (1974).

103. *Id.* at 176.

notice plan.[104] Most often, a plaintiff class bears the cost of notice,[105] therefore expensive notice schemes can significantly reduce the recovery available to class members and even the desire of class members to pursue the litigation.[106]

Despite the decline in, and problems associated with, notice by mail, newspapers, radio, and television,[107] courts continue to use these communications methods without seriously evaluating and explicitly showing how they meet the "best notice practicable under the circumstances" standard.[108] If courts are considering and rejecting other notice methods, their orders often do not reflect those conclusions.[109]

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104. Larson v. AT&T Mobility LLC, 687 F.3d 109, 128 (3d Cir. 2012) (comparing cost per class member of individual notice with such costs in Supreme Court cases examining notice); *In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1099 (5th Cir. 1977) ("[R]easonableness [in undertaking notice] is a function of anticipated results, costs, and amount involved."); Ginsberg, *supra* note 96, at 751 (contrasting cases where cost of notice, especially in relation to the anticipated recovery for the class, was a factor in the courts' determinations of appropriateness of proposed publication notice).

105. *Eisen*, 417 U.S. at 178–79 ("The usual rule is that a plaintiff must initially bear the cost of notice to the class . . . the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit."). The Supreme Court later held that, while the plaintiff is usually responsible for notice and the principle from *Eisen* remains, there are cases where defendants should be responsible for performing and paying for notice tasks, and district courts may properly exercise their discretion over allocation of such decisions. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356–59 (1978).

106. Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1169 (2009) (noting that the expense of class notification can be a deterrent, for both class representatives and class counsel, to pursuing class action claims); William Weiner, *The Class Action, the Federal Court and the Upper Class: Is Notice, and Its Consequent Cost, Really Necessary?*, 22 CAL. W. L. REV. 31, 33–35 (1985) (observing that if the class representative must pay for the notice and the cost is high, only wealthy litigants and those with large claims will pursue claims, and describing the result in *Eisen* as unfair); Ginsberg, *supra* note 96, at 751–52.

107. *See supra* Section III.A.

108. *See* Badia v. HomeDeliveryLink, Inc., No. 2:12-CV-07097, 2015 WL 5666077, at *7 (D.N.J. Sept. 25, 2015); *see also* Hilsee et al., *supra* note 89, at 1360 (stating that weak notice "programs are presented to and approved by courts without evidence").

109. Under Rule 23, the *judgment* order need not review the details of approvals or rejections of notice schemes that occurred during the course of the litigation, but "the judgment in a class action must: . . . (B) for any class certified under Rule 23(b)(3), include and specify or describe to whom the Rule23(c)(2) notice was directed. . . ." FED. R. CIV. P. 23(c)(3). Judges may detail the reasoning

B. Use of Newer Communication Technologies in Class Action Notice

While continuing to rely heavily on traditional notice means in class action suits,[110] courts have used newer communication technologies as well. Current communication technologies include email, websites, social media, and text messaging. The level of judicial comfort with these technologies, however, varies greatly within and among various technologies.

1. Email and the Internet

Over just two short decades, the use of the internet has become the norm for American adults, eighty-four percent of whom use the internet.[111] Email is also widely used: as of 2011, ninety-two percent of online adult Americans, and seventy percent of all Americans, use email.[112]

Websites, for notice purposes, can mean two types of sites. First, there are sites created specifically and exclusively to provide information about the class action litigation.[113] Second, advertisements may be placed on existing websites in order to

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behind approval and rejection of notice plans in orders specifically related to approving notice. However, courts approving a class action *settlement* must find that the settlement is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). "To determine whether a settlement is fair, reasonable, and adequate . . . courts must conclude that notice was adequate under Federal Rules of Civil Procedure 23(c)(2) and 23(e)." *Badia*, 2015 WL 5666077, at *4.

110. *See supra* Section III.A.

111. Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000–2015*, PEW RES. CTR. (June 26, 2015), http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/ (showing internet use rising from fifty percent of American adults in 2000 to eighty-four percent in 2013 to 2015).

112. Kristin Purcell, *Search and Email Still Top the List of Most Popular Online Activities*, PEW RES. CTR. (Aug. 9, 2011), http://www.pewinternet.org/2011/08/09/search-and-email-still-top-the-list-of-most-popular-online-activities/. While most Americans use the internet, certain demographic groups—such as the elderly, African-Americans and Hispanics, people in rural areas, and people in low household incomes—have lower rates of internet use. Monica Anderson & Andrew Perrin, *15% of Americans Don't Use the Internet. Who Are They?*, PEW RES. CTR. (July 28, 2015), http://www.pewresearch.org/fact-tank/2015/07/28/15-of-americans-dont-use-the-internet-who-are-they/.

113. *See, e.g.*, VIBRAM FIVEFINGERS CLASS ACTION, https://www.fivefingerssettlement.com/ (last visited May 7, 2015) (including sections with basic case information, including a chart on "Your Legal Rights and Options," frequently asked questions, case documents, tools to file a claim, and contact information).

effect publication notice, much like advertisements placed in print media.[114]

The first use of the internet for class action notice was in 1997.[115] The use of email and websites in class action notice plans is now fairly common practice.[116] These internet communications are often combined with more traditional means of notice,[117] but may be used alone.[118]

However, some cases do not incorporate such electronic methods, instead using only traditional means. Some do so without explaining why those means were the "best," and thus better than electronic means, under Rule 23(c)(2)(B).[119] On the other hand,

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114. *See, e.g.*, Jermyn v. Best Buy Stores, L.P., No. 08 Civ. 00214, 2010 WL 5187746, at *8 (S.D.N.Y. Dec. 6, 2010) (approving notice on Best Buy's website, in part because it "is similar to publishing notice in a nationwide newspaper"); *In re* Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 385 (E.D. Penn. Apr. 22, 2015) (approving settlement of class action where notice included advertisements on "popular" websites, including CNN, Facebook, Weather.com, and Yahoo!).

115. Ginsberg, *supra* note 96, at 741 n.16.

116. *See* Palma v. Metropcs Wireless, Inc., No. 8:13-CV-698-T-33MAP, 2014 WL 235478, at *2 (M.D. Fla. Jan. 22, 2014) ("A number of courts have determined that email is an inexpensive and appropriate means of delivering notice of an action to a class."); Theodore Z. Wyman, Annotation, *Sufficiency of Legal Notice Provided by Online Publication or Electronic Mail in Class Action Suits*, 84 A.L.R. Fed. 2d 103, pt. I §§ 1–2 (2014) ("The creation and implementation of dedicated class action litigation or class settlement websites have become a common and essential part of modern class action notification programs. . . . A large group of decisions have ratified class notification plans . . . that include an element of online publication . . . often part-and-parcel with more traditional publication notice."); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.311 (2004) ("Many courts include the Internet as a component of class certification and class settlement notice programs.").

117. *See, e.g.*, Morey v. Louis Vuitton N. Am., Inc., No. 11cv1517 WQH, 2014 WL 109194, at *3–4 (S.D. Cal. Jan. 9, 2014) (finding notice that included emailed notice, mailed notice, website publication, and newspaper publication complied with Rule 23).

118. *In re* Pool Prods. Distrib. Mkt. Antitrust Litig., 310 F.R.D. 300, 307 n.34 (E.D. La. Aug. 31, 2015) (approving notice plan using email, along with publication in newspapers and on websites, and concluding that, in this case, mailed notice to additional possible class members was "impracticable and unreasonable given the total amount of the settlement").

119. *See, e.g.*, *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 385 (approving notice via first-class mail and noting that it was well settled that such mail usually fulfills the requirements of Rule 23 and constitutional due process, but not discussing why email was not used or why first-

some cases provide explanations for rejecting the use of email or for subordinating it to first-class mail: explanations include concerns about email being "disruptive" and invasive of privacy;[120] concerns about an email communication's trustworthiness;[121] and lack of showing that email would be better than mail.[122] Overall, the use of email, especially when proposed as a substitute to traditional notice means, has been more controversial than the use of websites for publication.[123]

Websites and email are also useful for other aspects of class action litigation, particularly participation by class members.[124] Both email and websites can be used to facilitate communication between parties and attorneys that goes beyond the notice mandated by Rule 23(c)(2)(B) or directed by courts.[125] Websites are used as claims administration tools[126] and could also be used as

class mail was the "best" notice in the circumstances); Dick v. Sprint Commc'ns Co. L.P., 297 F.R.D. 283, 292 (W.D. Ky. 2014) (finding that notice through direct mailings, as part of a larger notice scheme, satisfied Rule 23(c)(2)(B) without discussing why email was not considered for notice).

120. Hart v. U.S. Bank NA, No. CV 12-2471-PHX-JAT, 2013 WL 5965637, at *6 (D. Ariz. Nov. 8, 2013); *see also* Lewis v. Huntington Nat'l Bank, No. C2-11-CV-0058, 2011 WL 8960489, at *2 (S.D. Ohio June 20, 2011) (ordering email notice to former employees, but not for current employees because defendant likely had accurate addresses for those potential class members, making disclosure of their email addresses an unnecessary intrusion on privacy).

121. *See* Karvaly v. eBay, Inc., 245 F.R.D. 71, 91 (E.D.N.Y. 2007) (concluding that "notification by electronic mail creates risks of distortion or misleading notification that are substantially reduced when first-class mail is used" (citing Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 630–31 (D. Colo. 2002)). *But see Lewis*, 2011 WL 8960489, at *2 (concluding that the concern in *Karvaly* and *Reab* about distortion of email is unpersuasive).

122. Minter v. Wells Fargo Bank, N.A., 283 F.R.D. 268, 274 (D. Md. 2012) (denying notice via email through defendant's billing system because plaintiffs had not shown that email would be less difficult and expensive compared to direct mail, and because defendant likely only had "email addresses for a minority of class members").

123. *See* 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 8:30, Westlaw (database updated Dec. 2015).

124. *See generally* Klonoff, Herrmann & Harrison, *supra* note 100, at 730 (offering proposals for "integrating the internet into virtually every aspect of the class action process"). "The internet has become entrenched in the American way of life and provides a mechanism through which absent class members' right to participate meaningfully in class action litigation can be realized." *Id.* at 729.

125. *Id.* at 762–68.

126. *Id.* at 751–52.

a federally designated repository of class action information.[127] Courts could also webcast class action proceedings.[128]

2. Social Media

Social media[129] began just under twenty years ago,[130] but it has become very popular: in only ten years, the percentage of American adults using social networking sites went from seven to sixty-five percent.[131] Social media sites generally allow users to display their own content, view others' profiles and content, and publish reactions to what other users are doing.[132] Many social media sites allow users to send and receive private messages in a manner similar to email,[133] and many also display advertising.[134]

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127. *Id.* at 756.

128. *Id.* at 757–62.

129. "[M]ost people define [social media] as the ability to use the internet to share and communicate instantly with others, even across great distances." Keith Terrell, *The History of Social Media*, HISTORY COOPERATIVE (June 16, 2015), http://historycooperative.org/the-history-of-social-media; *see also* Susan C. Hudson & Karla K. Roberts (Camp), *Drafting and Implementing an Effective Social Media Policy*, 18 TEX. WESLEYAN L. REV. 767, 769 (2012) ("[N]o standard definition exists because the forums and applications change so rapidly. Though there is no standard definition, it is generally agreed that social media is a form of electronic communication that allows user-generated interaction between the media's creator and the user.").

130. *See* Terrell, *supra* note 129; *see also* Drew Hendricks, *Complete History of Social Media: Then and Now*, SMALL BUS. TRENDS (May 8, 2013), http://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html ("The first social media site that everyone can agree actually was social media . . . lasted from 1997 to 2001.").

131. Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RES. CTR. (Oct. 8, 2015), http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015. "Social media" and "social networking" are not precisely the same, but the differences are not important to the discussion in this Comment. *See* Hudson & Roberts (Camp), *supra* note 129, at 769 (citing Lon S. Cohen, *Is There a Difference Between Social Networking and Social Media?*, COHENSIDE (Mar. 3, 2009), http://cohenside.blogspot.com/2009/03/is-there-difference-between-social.html).

132. *See, e.g.*, *What Is a Facebook Page?*, FACEBOOK HELP CTR., https://www.facebook.com/help/174987089221178 (last visited May 7, 2016) (describing the purpose of a Facebook page for an organization); *What Is My Profile?*, FACEBOOK HELP CTR., https://www.facebook.com/help/133986550032744 (last visited May 7, 2016) (describing a Facebook profile); *New User FAQs*, TWITTER HELP CTR., https://support.twitter.com/articles/13920 (last visited May 7, 2016) (describing how users communicate using Twitter).

133. *See* Nitin Bhandari, *The Rise of the Private Message on Social Media*, SOCIOBITS.ORG (Sept. 6, 2015), http://www.sociobits.org/2015/09/the-rise-of-the

Many sites also have tagging features that aid users in finding information.[135]

Despite the popularity of social media[136] and the fact that at its core, social media—like mail, television, and newspapers—is a means of communication,[137] courts have been hesitant to allow use of its full capabilities for class action notice purposes. Even when social media is used, it is somewhat common for courts to view social media sites in the same way as websites—where sites display passive, general advertisements—by listing traditional websites and social media sites together when describing a notice plan, thus grouping the two categories together as the same type of communication.[138] It is not clear if such notice publication is utilizing targeted advertising and other sophisticated tools based on the large amounts of personal data that the sites collect.[139]

In contrast, some cases have used social media tools that allow for more targeted contacting of potential class members, such as in

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-private-message-on-social-media/3472.

134. *See* Shea Bennett, *Social Media Ad Spending: Statistics & Trends [INFOGRAPHIC]*, ADWEEK BLOG NETWORK (Dec. 9, 2014), http://www.adweek.com/socialtimes/social-ad-spend-stats-trends/503712 (noting that "[s]ocial media advertising is big business" and that Facebook and Twitter are more popular with marketers).

135. *See* Rebecca Hiscott, *The Beginner's Guide to the Hashtag*, MASHABLE (Oct. 8, 2013), http://mashable.com/2013/10/08/what-is-hashtag/#RsGfrJGbeuqT (explaining that "the pound sign (or hash) turns any word or group of words that directly follow it into a searchable link" and discussing six social media platforms that support its use).

136. *See supra* note 131 and accompanying text.

137. *See supra* note 129 and accompanying text (defining social media as a way to communicate).

138. *See, e.g.*, Johnson v. Gen. Mills, Inc., No. SACV 10-00061-CJC, 2013 WL 3213832, at *4 (C.D. Cal. June 17, 2013) (approving settlement where the notice plan included, among other aspects, "hundreds of highly trafficked websites including Facebook.com and Yahoo.com"); *In re* Imprelis Herbicide Mktg., Sales Practices & Prods. Liab. Litig., 296 F.R.D. 351, 363 & n.6 (E.D. Pa. 2013) (finding that the notice program satisfied Rule 23 and noting that, in addition to the "[n]early 69,000 potential class members [who] received direct notice of the settlement, . . . tens of thousands of others were notified by publication," including through advertisements on "AOL, Facebook, Yahoo!, Google, and other sites," and "108,416 unique visitors had viewed the [s]ettlement website").

139. See *Johnson*, 2013 WL 3213832, at *4 and *In re Imprelis Herbicide Mktg*, 296 F.R.D. at 363 n.6, for an example of two cases that do not describe whether a notice plan that included use of Facebook used advertisements targeted to particular categories of users.

Kelly v. Phiten USA, Inc.[140] In *Kelly*, "[n]otice was displayed on Phiten's Facebook page, which delivered individual e-mail notification to its more than 75,000 fans and also appeared on each fan's Facebook homepage."[141]

Though it did not reach the stage of being a Rule 23 class action suit, *Mark v. Gawker Media LLC* took a novel step that may have class action implications when it allowed plaintiffs to "follow" potential opt-in plaintiffs on Twitter, though they could not "friend" them on Facebook.[142] Earlier in the litigation, Gawker argued that Twitter should not be used since there was no evidence that potential collective members would receive notice that way, but the court was unconvinced: "the Court finds it unrealistic that Defendant's former interns do not maintain social media accounts; the vast majority likely have at least one such account, if not more."[143] At least one other case has acknowledged the potential utility of social media for contacting potential class members directly.[144]

Courts seem more comfortable using newer technologies when the suit itself has some kind of relationship to use of the technology. An early example of this type of reasoning supporting use of notice via email appeared in a class action suit against the website PayPal.[145] Despite previous reservations about using email as

140. 277 F.R.D. 564 (S.D. Iowa 2011).

141. *Id.* at 569. The success of these notifications is not assured; Facebook users can control whether or not Facebook can send email and text messages at all, and, to some extent, which notifications are allowed. *Notification Basics & Settings*, FACEBOOK HELP CTR., https://www.facebook.com/help/327994277286267 (last visited May 7, 2016).

142. Mark v. Gawker Media LLC, No. 13 Civ. 04347, 2015 WL 2330274, at *1–2 (S.D.N.Y. Apr. 10, 2015); *see also* Kang, *supra* note 9.

143. Mark v. Gawker Media LLC, No. 13 Civ. 04347, 2014 WL 5557489, at *4–5 (S.D.N.Y. Nov. 3, 2014).

144. *See* Angell v. City of Oakland, No. 13-CV-00190 NC, 2015 WL 65501, at *4, 11 (N.D. Cal. Jan. 5, 2015) (approving notice plan that included directly contacting class members who were unresponsive to a mailed communication, such as phone, email, Facebook, and Twitter). Another interesting issue, similar to that of using social media for class notice, is the utility and appropriateness of using social media for service of court papers. *See* Jacob Gershman, *Plaintiff Can Use Facebook to Notify Ex-Wife of Lawsuit*, WALL ST. J. (Jan. 22, 2016, 4:58 PM), http://blogs.wsj.com/law/2016/01/22/plaintiff-can-use-facebook-to-notify-ex-wife-of-lawsuit.

145. Farinella v. Paypal, Inc., 611 F. Supp. 2d 250, 257 n.10 (E.D.N.Y. 2009).

the primary method for notifying class members, the court found that notice by email was appropriate:

> [T]he Court is satisfied that potential class members in this case are uniquely suited for email notification because (1) their interactions with the defendants have exclusively or predominantly been via email and over the internet and (2) while the email addresses associated with their PayPal accounts have been verified by the defendants, their mailing addresses have not.[146]

Similarly, when a party to a class suit is itself a social media platform, using the communication options in that platform can be a large part of providing notice.[147] In *Evans v. Linden Research, Inc.*, a suit involving a class of individuals who participated in the internet virtual-world Second Life, the court approved a notice plan that included notice "on Facebook targeting individuals who have expressed an interest in Second Life."[148]

While some cases indicate a willingness to accept use of social media, the limited number of cases and the limited ways that some of those cases used social media indicate that such platforms are far from being a standard part of the class action notice toolbox.

3. Text Messaging

Text messaging has become a popular method of communication: eighty-five percent of American adults own a cell phone, and eighty percent of cell phone owners use their phones to send or receive text messages.[149] Text messaging may be

146. *Id.*

147. *See* Lane v. Facebook, Inc., 696 F.3d 811, 818 (9th Cir. 2012) (approving settlement of class action where, with Facebook as the defendant, the class consisted of Facebook users, and Facebook provided notice through email to individual class members and posting "notice of the settlement in the 'Updates' section of members' personal Facebook accounts," in addition to publishing notice in *USA Today*).

148. Evans v. Linden Research, Inc., No. C-11-01078 DMR, 2013 WL 5781284, at *3 (N.D. Cal. Oct. 25, 2013).

149. Maeve Duggan & Lee Rainie, *Cell Phone Activities 2012*, PEW RES. CTR. (Nov. 25, 2015), http://www.pewinternet.org/2012/11/25/cell-phone-activities-2012/. Globally, seventy-five percent of those who own a cell phone regularly use text messaging. *Global Digital Communication: Texting, Social Networking Popular Worldwide*, PEW RES. CTR., http://www.pewglobal.org/2011/12/20/global-digital-communication-texting-social-networking-popular-worldwide/ (last updated Feb. 29, 2012).

displacing other forms of communication, such as voice calls[150] and email.[151]

Like courts' infrequent use of social media's capabilities beyond general banner advertisements,[152] courts have rarely used text messaging. In *In re Penthouse Executive Club Compensation Litigation*, while notice was sent via first-class mail, the claims administrator also sent two text messages to class members.[153] However, in some cases where the phone numbers of class members were likely known, since the litigation itself centered on phone calls, text messaging was not used, and the court did not offer any comment on the possibility of using text messaging for notice.[154]

In sum, even when courts allow use of email, websites, social media, and text messaging, there are often still traditional components to the notice plan. Notice plans that otherwise rely heavily on internet advertising and email may still include physical mail and more traditional publication notice, and there may be little discussion of why each component is necessary.[155]

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150. Hope Yen, *Popularity of Texting Edges Out Cell Phone Calls*, HUFFINGTON POST, http://www.huffingtonpost.com/2009/12/15/popularity-of-texting-edg_n_392721.html (last updated May 25, 2011) (noting the increase in text-messaging, especially among teens, and the decrease in the length of phone calls).

151. Alex Mindlin, *The Decline of Web-Based E-Mail*, N.Y. TIMES (Feb. 6, 2011), http://www.nytimes.com/2011/02/07/business/media/07drill.html?_r=0 (reporting that young internet users are communicating through text messaging and Facebook rather than email).

152. *See supra* Section III.B.2.

153. *In re* Penthouse Exec. Club Comp. Litig., No. 10 CIV. 1145 KMW, 2014 WL 185628, at *7 (S.D.N.Y. Jan. 14, 2014).

154. *See* Reed v. 1-800 Contacts, Inc., No. 12-CV-02359 JM BGS, 2014 WL 29011, at *1 (S.D. Cal. Jan. 2, 2014) (approving settlement where notice to class of persons whose confidential phone calls had been intentionally recorded included physically mailed notices and publication in newspapers in relevant geographic areas); Spillman v. RPM Pizza, LLC, No. CIV.A. 10-349-BAJ, 2013 WL 2286076, at *2 (M.D. La. May 23, 2013) (noting that a testifying notice expert considered giving direct notice to a class of persons who received automated telephone calls ("robo-calls") to their cellular phone numbers through the "reverse appends" method, where names and addresses associated with known phone numbers are sought, but concluded it was too costly and ineffective and instead used a notice plan including press releases and ads on general interest websites).

155. *See, e.g.*, Fleisher v. Fiber Composites, LLC, No. CIV.A. 12-1326, 2014 WL 866441, at *9 (E.D. Pa. Mar. 5, 2014) (approving settlement of class action involving purchasers of defective decking material where notice included direct notice via email and direct mail using information in defendant's records, as well

IV. DOES RULE 23(C)(2)(B) REQUIRE USE OF NEWER TECHNOLOGIES LIKE SOCIAL MEDIA?

Even though social media and text messaging are now undeniably very popular, when considering whether they should be used for class action notice, the directive of the rule remains paramount. The directive of Rule 23(c)(2)(B) is such that it often requires use of newer technologies. The scarce use of newer technologies, however, suggests that courts do not adequately assess notice plans' compliance with the standard in the rule. This appears to be in part because courts lack meaningful measurements of best notice. Therefore, courts need to take better control of notice plans and more carefully police compliance with the rule.

A. Rule 23(c)(2)(B), by Its Plain Language, Often Requires Use of Newer Communications Technologies

"Does Rule 23(c)(2)(B) require use of newer technologies like social media?" Of course not. Rule 23(c)(2)(B) requires that class members be sent "the best notice that is practicable under the circumstances."

However, courts' continued reliance on physical mail and publication in print media means that courts are not always doing what Rule 23(c)(2)(B) requires. Relying heavily on direct mail, newspaper publication, and other traditional publication avenues cannot often be the best notice practicable with the ubiquity of social media and text messaging,[156] not to mention email and general internet use,[157] in the United States. This is especially true given the problems that were associated with those traditional communications means before the rise of the internet.[158]

If potential class members are likely to include many people in demographic groups that use social media or text messaging at especially high rates,[159] those methods of communication are

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as publication on the websites of certain, in some cases deck-focused, magazines, and in print editions of *USA Today* and the *Wall Street Journal*, but not detailing why each component was necessary).

156. *See supra* Sections III.B.2–.3.

157. *See supra* Section III.B.1.

158. *See supra* Section III.A.

159. *See* Perrin, *supra* note 131 (summarizing trends in social media use between demographic groups).

especially likely to constitute the best notice under the circumstances. Identifying these demographic differences between methods of communication recognizes that physical mail, and other traditional notice means, may be the best practicable under the circumstances for classes including, among others, many elderly people and rural residents.[160]

Creative use of social media offers similar opportunities; while not every class will lend itself to an easily identified, already established social media presence that can be used like Phiten's Facebook page,[161] searching for pages and groups on Facebook—both official and unofficial[162]—and for groups on LinkedIn, could reveal avenues to disseminate notice. While there have been some instances of using text messaging,[163] courts also miss opportunities to put this technology to use to easily reach many likely class members.[164] The cases using new technologies[165] indicate at best inconsistency between courts and judges about what is required under Rule 23(c)(2)(B). At worst, these cases indicate a lack of attention to what notice would be best, instead relying on tradition and possibly failing to fulfill the imperative in Rule 23(c)(2)(B).

What is missing from many court orders and appellate decisions approving class action notice plans is an explicit finding that physical mail and publication are *better* than other available notice means.[166] While the subject matter of a suit may have no specific link to the internet or a particular communication technology—the kind of detail that seems to prompt courts to use newer communication technologies for notice[167]—the suit most

160. *See* Purcell, *supra* note 112.

161. *See* Kelly v. Phiten USA, Inc., 277 F.R.D. 564 (S.D. Iowa 2011); *supra* notes 140–41 and accompanying text.

162. *See* Eric Eldon, *Facebook Creates New Kind of "Unofficial" Community Pages*, ADWEEK BLOG NETWORK (Apr. 1, 2010, 7:53 PM), http://www.adweek.com/socialtimes/facebooks-creates-new-kind-of-unofficial-community-pages/237934 (describing different types of Pages on Facebook).

163. *See supra* Section III.B.3.

164. *See supra* note 154 and accompanying text (citing cases where class members' phone numbers were known and text messaging may have been possible for notice).

165. *See supra* Section III.B.

166. *See supra* note 119 and accompanying text (reviewing cases that do not explicitly analyze and draw conclusions about why the notice means used were better than others, and therefore the best).

167. *See supra* notes 145–47 and accompanying text.

often has no specific link to mail, newspapers, television, or radio, either.[168]

B. Courts Do Not Adequately Assess Notice Plans Under Rule 23(c)(2)(B)

Considering the low use for class action notice of some of the most popular communications platforms in the United States, it seems that courts do not adequately assess notice plans under Rule 23(c)(2)(B). Instead, the courts rely on incomplete information and/or an incomplete understanding of the information they have and how it shows, or does not show, that the methods chosen or proposed are the best practicable under the circumstances.

1. Meaningful Measurements of Best Notice Are Lacking

One reason courts may fail to direct the best notice practicable is that they may not look to meaningful measures of whether or not a particular notice method is effective. Courts take note of how many "impressions" online advertisements or a suit's dedicated website received,[169] but the number of people seeing a website does not necessarily correlate to the right people—members of the class—seeing the site. This echoes concerns that publication in widely circulated newspapers is meaningless if the individuals who should receive notice are not likely to read that paper.[170]

Measurements of impressions would likely be more meaningful if the notice was published in targeted places that made sense in the context, or, to recall Rule 23(c)(2)(B)'s direction, the circumstances, of the suit. If a Facebook advertisement, for example, is displayed specifically on the pages of interest groups or other things related to the suit, or on the pages of users who have indicated an interest in something related to the suit[171] or who list relevant geographic areas as where they live, a

168. *See supra* Section III.A (discussing cases on a variety of subject matter, none of which specifically center on mail, newspapers, television, or radio).

169. *See supra* note 138 and accompanying text (citing cases where courts pointed to large numbers of websites used or impressions of suit-specific websites, without discussing whether those numbers were meaningful in the specific circumstances of the case).

170. *See* Ginsberg, *supra* note 96, at 755–58.

171. Such use of Facebook recalls cases where notice has been accomplished through more targeted media than general interest newspapers and websites; in cases where a unifying trait or interest of the class is known, courts direct notice in media targeted to persons with that trait or interest. *See, e.g.*, *In re* Dairy Farmers of

smaller number of impressions of that advertisement could be more valuable than a larger number of impressions generated by an un-targeted ad.[172] Use of the internet and mobile devices generates large amounts of data that could be exploited for notice and allow information about class actions to reach the right people.[173]

2. *Courts Must More Actively Police Notice Instead of Leaving the Adequacy of Notice Up to Class Counsel*

Another source of possible problems with notice is the question of who polices whether notice complies with Rule 23(c)(2)(B) and due process rights. Courts are responsible for this under the rule.[174] However, when the class, or perhaps more precisely, the class' attorneys, proposes a notice scheme, judges may only have the information provided by the class and its attorneys. While judges should be able to trust class counsel to put

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Am., Inc. Cheese Antitrust Litig., No. 09-CV-03690, 2014 WL 1017515, at *2 (N.D. Ill. Mar. 17, 2014) (directing notice via print publications or the publications' websites, specifically: *Cheese Market News*, *Dairy Foods*, the *Cheese Reporter*, and *Hoard's Dairyman*). While classes of unascertainable members may still present significant difficulty where there is little that unites class members beyond the event that makes them class members, the way entities use tools, such as social media, can provide clues as to how notice could be more effective. One possible strategy is to mirror a company's advertising in the notice scheme; if a company buys Facebook ads that will be displayed on the accounts of users of certain genders, ages, occupations, or other characteristics, the parties could purchase ads using the same criteria.

172. It is possible that such targeted advertising is used in online notice publication. However, if that is the case, it may not be apparent from a court order. A court order stating that "[o]nline advertisements appeared on AOL, Facebook, Yahoo!, Google, and other sites" does not sufficiently describe what notice in that case truly entailed, so it is difficult to evaluate the adequacy of the court's treatment of notice, and thus the adequacy of that litigation's compliance with due process. *In re* Imprelis Herbicide Mktg., Sales Practices & Prods. Liab. Litig., 296 F.R.D. 351, 363 & n.6 (E.D. Pa. 2013).

173. Social media sites and others generate "big data," which has enormous potential value to advertisers and thus parallel potential for class notice. *Cf.* Lisa Arthur, *What Is Big Data?*, FORBES (Aug. 15, 2013, 8:17 AM), http://www.forbes.com/sites/lisaarthur/2013/08/15/what-is-big-data/ (defining "big data" as "a collection of data from traditional and digital sources . . . that represents a source for ongoing discovery and analysis"). A more thorough discussion of big data and its potential for class notice is beyond the scope of this Comment.

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

the interests—and financial recovery—of the class first, class counsel can be in danger of furthering their own interests when it comes to notice, since the payments flowing to class counsel are usually dependent on the amount of the judgment or settlement, not the success rate of class notice or recovery.[175] There may be additional information from an opposing party, if that party sees elements of the scheme as damaging to its interests, but parties adverse to the class are not likely to be a reliable source to police poor and inadequate notice, since fewer potential class members receiving notice could be to the advantage of parties adverse to the class.[176] A court, perhaps not having the resources nor the expertise to independently evaluate the sufficiency of a notice scheme,[177] likely relies heavily on the proposals of the parties and the parties' hired experts[178] without independently considering what notice would constitute the "best practicable under the circumstances."

175. *See, e.g.*, HENSLER ET AL., *supra* note 57, at 77–99 (describing common arrangements for attorneys' fees and the potential for class counsel to collude with opposing counsel and otherwise act against the interests of the class); REDISH, *supra* note 37, at 211 (describing the lack of adverseness among parties in settlement class actions and its potential to harm absent class members).

176. Fewer class members receiving notice could mean less for class action defendants to pay out, depending on the payment structure of the settlement or judgment. An adverse party might have an incentive to object to the notice plan if the plan was so inadequate that it seemed very likely to be an issue on appeal and result in additional expenses due to appeals, additional litigation, and/or settlement negotiations.

177. The use, or lack of use, of technology in class action notice is one criticism among many regarding the justice system's adoption of newer technology. "While the law has lagged behind technological developments in the past, the Internet seems to present challenges of an entirely different order." Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1279 (2002). If the Supreme Court can be described as not having "really gotten to email," it is not surprising that the judicial system is not a leader in understanding and using technology. *See Elena Kagan: Supreme Court Hasn't "Gotten To" Email*, CBS NEWS (Aug. 21, 2013, 12:07 PM), http://www.cbsnews.com/news/elena-kagan-supreme-court-hasnt-gotten-to-email (internal quotation marks omitted).

178. There is now an industry of private companies that are hired by attorneys to provide class action notice; "[a]s repeat players and repositories of knowledge, these notice companies have professionalized the provision of notice and, in so doing, have removed from the legal arena many of the operational questions. . . ." WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 8:27, Westlaw (database updated Dec. 2015); *see* Hilsee et al., *supra* note 89, at 1372 (noting use of experts on notice as well as the potential utility of experts on communication and marketing); *see also, e.g.*, *In re* Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891, 902 (E.D. La. 2012) (appointing

Courts must, however, be more active in policing whether the notice was or will be the best practicable, whether by independently considering and researching notice options or by requiring detailed justifications from the parties for why the notice meets Rule 23(c)(2)(B)'s standard and should be considered sufficient in light of absent parties' due process rights. It is the role of the courts to be the ultimate enforcer of compliance with procedural rules and protector of constitutional rights.[179]

While the hesitance of courts to rely more heavily on newer technologies for class action notice could be seen as a desire to use all means available and thus a tactic to protect class members, such a conclusion ignores the fact that courts frequently still confine notice to only a few tools or avenues, and when they do so, those avenues are the more traditional ones.[180]

V. CONCLUSION

The plain language of Rule 23(c)(2)(B), as well as its history and close connection with constitutional due process rights, requires that courts use newer technologies in some, perhaps even most, cases.[181] In all cases, notice must be based on circumstances of the case, per the language of the rule.[182] Given the problems with traditional means in terms of reaching potential class members, both ascertainable and unascertainable,[183] and the benefits of newer means,[184] courts must treat newer means as equally "practicable" as traditional means, and require the most appropriate, or best, means in each case.[185]

Hilsoft Notifications as Class Notice Administrator). However, even with the availability of such services, notice programs may not be as robust as they could be: "[l]eading notice experts have adopted the reach model for ensuring that notice programs reach substantial percentages of their class members based on documented audience statistics, but many notice programs still proceed without such data and can result in disaster." Hilsee et al., *supra* note 89, at 1373.

179. *See* Shannon R. Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 REV. LITIG. 53, 69 (2010) (calling on judges to be "standard-bearer[s] and stringently enforce Rule 23's requirements").

180. *See supra* Section III.A.

181. *See supra* Section IV.A.

182. *See* FED. R. CIV. P. 23(c)(2)(B); *supra* Section IV.A.

183. *See supra* Section III.A.

184. *See supra* Section III.B.

185. *See supra* Section IV.A.

The precedents set by cases using newer technologies mean that parties in certain types of cases—those that have a direct link to communications technologies—should expect newer technologies to be part of a notice scheme.[186] It should be universal that a case involving a transaction or activity that collects or uses contact information like emails, phone numbers, and online accounts will use that information for notice.[187]

Use of newer communications technologies, however, may make sense in cases that have no specific connection to the collection of personal information, since parties may have such information.[188] Parties in all cases, especially classes of plaintiffs, should evaluate what notice really makes sense, and try to convince the court by linking the notice scheme directly to the language of Rule 23(c)(2)(B) and due process concerns.[189] Similarly, courts must carefully evaluate the parties' proposals and base their decisions on the language and purpose of Rule 23(c)(2)(B).[190]

While social media and text messaging are the newer technologies of the moment that should be used more regularly and more wisely in class action notice, there will always be new communications technologies. Fortunately, the language of Rule 23(c)(2)(B) is extremely flexible. The courts and parties in class action suits must always be vigilant that notice means are based on the rule, not on tradition or convenience. Currently, this vigilance is lacking to the detriment of class members and their constitutional due process rights.

186. *See supra* notes 145–48 and accompanying text.
187. *See supra* Section IV.A.
188. *See supra* Section IV.A.
189. *See supra* Section IV.A.
190. *See supra* Section IV.B.2.