

The Modern Class Action Suit
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by:
Martin H. Redish

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2. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71.
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Articles

SETTLEMENT CLASS ACTIONS, THE CASE-OR-CONTROVERSY REQUIREMENT, AND THE NATURE OF
THE ADJUDICATORY PROCESS

Martin H. Redish^{dt} Andrianna D. Kastanek^{ddt}

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I. Introduction

It would hardly be an overstatement to suggest that the nature of the litigation process has changed dramatically over the past forty years. Modern procedure has been altered to keep up with the significant changes over the same period in the governing substantive law, which has significantly expanded the scope of private responsibility and liability through the rapid expansion of both statutory and common law bases for suit. This is particularly true in the areas of civil rights, consumer protection, and products liability. Experts may reasonably debate whether the socioeconomic and political effects of these changes in substantive law are beneficial or harmful. But few would doubt the troubled state in which modern litigation procedure finds itself as a result, at least in large part, of the dramatic expansion of the scope of substantive liability. The procedural device routinely employed as the means of resolving the countless individual claims that may now be made against economically powerful defendants is the class action, authorized for use in the federal courts by [Rule 23 of the Federal Rules of Civil Procedure](#). Though the device finds its origins in ancient practice¹ and received codification in the original Federal Rules of Civil Procedure in 1938,² the practice assumed its modern form—dramatically different from its earlier structure—in the amendments of 1966.³ Although that alteration was designed to make the class action device capable of resolving the disputes to which the dramatic expansion in substantive liability was to give rise, the difficulties inherent in any attempt to resolve thousands of parallel, but not necessarily identical, claims in one proceeding could not have been foreseen. The sometimes overwhelming complications that inevitably accompany an attempt to litigate countless claims in one proceeding have proven to be more than the device is capable of handling.

Because of these seemingly insurmountable problems in litigating complex claims through the class action device, attorneys and courts have developed a new method of disposing of these thousands of potential suits in one fell swoop. That method is known as the settlement class action. While the name explicitly references the class action device and requires satisfaction of many of [Rule 23](#)'s requirements, in important ways the practice alters the very essence of the litigation process. It does so by having as its defining characteristic— from the proceeding's inception—the absence of any dispute to be litigated. Instead, both parties come to court with a conditional request for certification of a class: the "suit" is to be certified as a class only if the court approves the settlement that has been reached by the defendant and the attorneys for certain individual plaintiffs who seek to represent all of those similarly injured. The court may approve or disapprove that settlement, but either way there will never be any litigation of the class members' claims against the defendant. If the court approves, then the entire matter will have been resolved through nonlitigation means. If, on the other hand, the court disapproves, the parties are returned to the same position they were in prior to the institution of the proceeding. Thus, the so-called settlement class action is a good deal more settlement than action. When the dust settles, the device is nothing more than a nonlitigation means of resolving potential disputes. Yet the practice is approved and enforced through the federal courts.

Many courts and commentators have applauded the development of the settlement class action as a welcome means of

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resolving gigantic disputes without incurring the burdens of extended litigation—if, indeed, such mass litigation were even feasible.⁴ Not surprisingly, then, the growth of settlement class actions as a means of disposing of modern complex claims has been meteoric.⁵ The Supreme Court itself has eased the way for use of the practice in the lower federal courts by holding that the class need not satisfy what is often the most difficult hurdle to class action certification: the requirement of [Rule 23\(b\)\(3\)](#) that litigation of the class be manageable.⁶

A number of respected courts and scholars, however, 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.⁷ Scholars have therefore proposed a number of reforms, designed to reduce the potential harms to which the settlement class action gives rise.⁸ Indeed, congressional concern over the use of the settlement class action has resulted in Congress's commission of a study by the Federal Judicial Conference to investigate the problems it poses.⁹ Neither those who approve nor those who disapprove of the settlement class action device, however, have fully recognized the most serious—and fatal—problem with the settlement class action: because by its nature it does not involve any live dispute between the parties that a federal court is being asked to resolve through litigation, and because from the outset of the proceeding the parties are in full accord as to how the claims should be disposed of, there is missing the adverseness between the parties that is a central element of Article III's case-or-controversy requirement. The settlement class action, in short, is inherently unconstitutional. But because class action scholars have mistakenly viewed the device—both positively and negatively—in a constitutional vacuum, they have uniformly failed to recognize the problematic impact of the settlement class action when it is placed within the broader framework of the nation's constitutional structure.

On the most basic analytical level, the unconstitutionality of the settlement class action should be obvious, purely as a matter of textual construction. There is simply no rational means of defining the terms “case” or “controversy” to include a proceeding in which, from the outset, nothing is disputed and the parties are in complete agreement. Moreover, from both historical and doctrinal perspectives, Supreme Court decisions could not be more certain that Article III is satisfied only when the parties are truly “adverse” to one another,¹⁰ which, at the time the relevant proceeding is undertaken in a settlement class action, they are not.

In light of the dispositive textual and doctrinal problems to which the settlement class action is subject, one might reasonably wonder why neither courts nor scholars have given the Article III concerns anything more than passing attention.¹¹ One possible answer is that modern constitutional analysis has often refused to focus on matters of textual interpretation. In the area of separation of powers in particular, the Supreme Court has at times openly employed a countertextual, functionalist balancing test to resolve constitutional challenges. One may question the legitimacy of such an approach as a matter of constitutional interpretation.¹² In any event, in-depth theoretical analysis reveals that the adverseness requirement imposed by Article III is justified by far more than merely a textualist rationale. Instead, it is dictated by the foundations of American political theory and an understanding of the judiciary's proper role within that framework.

If one were to search for an explanation of what sociopolitical purposes are served by Article III's imposition on the federal judiciary of the prerequisite that the parties to litigation be adverse, one would likely be surprised to discover that neither courts nor scholars have devoted significant attention to the question. This is so, despite the requirement's unambiguous existence in Supreme Court doctrine. This Article therefore has two intersecting purposes: first, to provide textual, doctrinal, and theoretical analyses of the adverseness requirement of Article III; and second, to test the settlement class action in terms of those three criteria. The ensuing conclusions tell us much about both Article III and the settlement class action. In addition to the conclusion that the text, history, and doctrine of Article III clearly demand that the parties to litigation be truly adverse, our analysis reveals that the adverseness requirement is dictated both by precepts of liberal democratic theory and separation of powers.

On what we refer to as a “private” level, the litigant adverseness requirement is designed to ensure that those who litigate will adequately protect those absent individuals who will be significantly impacted, either legally or practically, by the outcome of the litigation. We describe this as a private concern because it focuses on the private interests of individual litigants. The need to allow individuals to protect and advance their own personal interests through litigation grows out of foundational precepts of liberal democracy from which the adversary system has evolved. Absent the assurance of litigant seriousness of

purpose that the adverseness requirement seeks to guarantee, the results of litigation could significantly undermine the ability of future litigants to protect their personal interests, due to the controlling impact of the resolution of the initial litigation on their subsequent legal actions. Where future litigants are legally bound through *res judicata* by the results of the initial litigation, as where subsequent litigants are in privity with litigants in the first case or are members of a class action brought in the initial suit, the impact will be legally imposed. Even where subsequent litigants are not formally bound, however, in numerous situations—for example, where *stare decisis* or claims to limited funds apply—they may nevertheless be bound as a practical matter by the outcome of the initial suit.

On what we describe as a “public” level, absence of the adverseness requirement could seriously disrupt the federal judiciary’s place in the delicately structured system of separated governmental powers. As the one branch not representative of or accountable to the populace, the judiciary may threaten core democratic values unless its actions are tied to performance of the traditional judicial function of dispute resolution. To allow the judiciary to act in any other manner threatens to usurp the lawmaking and law-enforcing powers of the other two branches of the federal government. Moreover, given the judiciary’s inherently passive role in the adversary system, absent the incentives to compile and present evidence and argument created by the adverseness requirement, we cannot be assured that a court will have sufficient information to enforce the laws fashioned by the other branches. As a result of this judicial underenforcement, the federal courts undermine Congress’s legislative goals. Thus, Article III’s adverseness requirement serves as a fulcrum of performance of the judiciary’s proper role within our governmental framework.

Application of these constitutional insights to the settlement class action reveals that device to be the poster child for the dangers to which violation of the adverseness requirement gives rise. First, on a purely textual level, there is no means by which the settlement class action may be deemed a truly adverse litigation. At the time the class action proceeding is begun, there exists absolutely no dispute between the parties before the court; rather, they both seek the same outcome. Neither the word “case” nor the word “controversy” may—either definitionally or historically—be deemed to include such a proceeding. Moreover, the practice is inconsistent with controlling Supreme Court doctrine. Indeed, the only difference is that the unconstitutional collusion is considerably more open in the case of the settlement class action than in some of the Court’s earlier decisions.

Far beyond the textual and doctrinal difficulties to which the settlement class action is subject, the practice’s inherent lack of litigant adverseness contravenes the foundational precepts of American political and constitutional theory that underlie the adverseness requirement. Initially, the practice undermines the private goals fostered by the requirement of adverseness, by threatening the seriousness with which either side takes the litigation. Absent true adverseness between named class plaintiffs and the party opposing the class, it is impossible to ensure that the question of the class’s certifiability will be fully explored by the parties. From the outset, the party opposing the class is, after all, in complete accord with the named plaintiffs about the appropriateness of certification because that party’s interests will be furthered by class-wide settlement in accord with the terms of the prelitigation agreement. The court, as a purely passive adjudicator, will therefore have, at best, limited ability to assure itself of the appropriateness of class certification. As a result, absent class members will be bound by the terms of the settlement, regardless of whether a truly adversarial adjudication of the certification issue would have resulted in a different conclusion.

Because of the fear of secret collusion between the named plaintiffs and the party opposing the class, several scholars have suggested reforms of the settlement class action procedure that are designed to reduce this danger.¹³ Although such reforms are surely commendable purely as a matter of class action policy, they fail to satisfy the constitutionally dictated adverseness requirement because they confuse two very different types of collusion. In the class action context, the term “collusion” is used to refer to a secret, unethical agreement between the named plaintiffs and the party opposing the class.¹⁴ For purposes of Article III’s adverseness requirement, however, the term has a far broader meaning. It includes any suit in which, from the outset, the parties are in agreement as to the outcome. It includes fully open prelitigation agreements between the parties, and those that are not, on their face, deemed to be unethical or unfair. Article III proceeds on the assumption that a showing of a lack of adverseness at the outset of a suit automatically establishes the improperly collusive nature of the suit. Article III adopts lack of adverseness as an *ex ante*, categorical basis on which to find inadequate representation of the interests of future litigants who are similarly situated. This is to be contrasted with the more flexible, case-by-case approach to the finding of

unfair collusion advocated by would-be reformers of the settlement class action.

To be sure, use of the rigid approach adopted by Article III will, on occasion, result in overprotection. But resort to such objective standards, untied to the specifics of individual litigation, reflects a choice in favor of overprotection of absent and future litigants, rather than the assumption of the risks of underprotection inherent in any case-by-case approach. Even adoption of the reforms proposed by class action scholars designed to avoid secret and unethical collusion in the individual case would not equal Article III's ex ante categorical protection of litigant seriousness of purpose.

At the same time, the settlement class action gives rise to the systemic dangers designed to be avoided by Article III's adverseness requirement. The class action, it should be recalled, is a procedural device, designed to implement and enforce preexisting substantive legal rights. To the extent that lack of adverseness leads to a lack of seriousness or good faith on the part of one or both of the litigants (and, it should be remembered, Article III categorically equates lack of adverseness with the unacceptable danger of such a risk), then use of the settlement class action gives rise to an unacceptable danger of underenforcement of the social and economic goals embodied in the underlying substantive law. In this way, the practice threatens to disrupt attainment of legislative goals and policies. Moreover, by authorizing a federal court to redistribute resources as a means of enforcing legislative directives absent adversarial adjudication, the settlement class action effectively transforms the court into an administrative body, which is more appropriately located in the executive branch. In this manner, the device improperly transfers powers reserved to the executive branch to the federal judiciary, in clear contravention of separation-of-powers dictates.

The only seriously arguable defense of the settlement class action's constitutionality is a resort to naked functionalism—the argument that the settlement class action should be deemed constitutional, despite its departure from the textual dictates of Article III and its negative impact on the purposes served by the adverseness required by Article III, simply because it serves a valuable social function. Absent the settlement class action, the argument proceeds, the nation would be left with a Hobson's choice between burdening the judiciary with countless individual lawsuits and denying a remedy to numerous injured victims. But although on occasion the Supreme Court has resorted to functionalist analysis in separation of powers matters,¹⁵ the approach's use in the interpretation of Article III's case-or-controversy requirement is generally not to be found. Acceptance of a functionalist justification for ignoring separation-of-powers dictates in the context of the adverseness requirement would effectively destroy the prophylactic function that this categorically framed protection is designed to establish. Moreover, even if one were to assume the validity of a functionalist analysis, there appears to be no reason that Congress could not remedy the problem by establishing a form of administrative remedial structure in the case of particular categories of suit, as has been done in the contexts of worker's compensation and black lung disease. The fact that it might be more convenient for Congress to ignore unambiguous constitutional dictates surely cannot satisfy the requirements of a reasonable functionalist approach.

Part II of this Article explains the concept and practice of the settlement class action. In the course of this exploration, we consider judicial reaction to the device, as well as scholarly criticisms and proposals for reform. Part III explores the textual and theoretical foundations of the adverseness requirement—an inquiry that, surprisingly, has never before been undertaken by jurist or scholar, despite the undoubted recognition of the requirement in Supreme Court doctrine. Then, Part IV applies the constitutional framework we have developed to the settlement class action, concluding that the practice is, at its core, constitutionally invalid because it contravenes both the text and purposes served by Article III's case-or-controversy requirement. Finally, Part V argues that the Court's current functionalist approach to settlement class actions is inconsistent with Article III's mandate.

The Article is designed to serve two important functions, neither of which has yet been attempted in the literature or judicial decisions. First, it provides a detailed examination of the textual and normative groundings of the adverseness requirement that the Supreme Court has regularly gleaned from the case-or-controversy requirement. Second, it explores the fatal constitutional difficulties created by the settlement class action device. It is time for commentators on class actions to move beyond the constitutional vacuum in which they traditionally view the procedure and instead consider it within the much broader constitutional and political framework of which it is only a small part.

II. The Settlement Class Action: Concept and Practice

A. Judicial Recognition of the Settlement Class Action

In a settlement class action, the would-be class representatives and the parties opposing the class seek certification of a class, on the condition that the district court approve a proposed settlement between them.¹⁶ For purposes of the settlement class, it does not matter whether the requested settlement and certification occur when the initial complaint is filed or subsequent to the filing. For purposes of the commencement of the class action proceeding, the two are identical: in both situations, certification of the class proceeding is requested simultaneously with the request for approval of the settlement, and in both, judicial approval of the settlement is a necessary condition for the requested certification. Although [Rule 23](#) on its face neither authorizes nor prohibits the practice, courts that have employed the device assume that the rule at the very least authorizes use of the settlement class. Although numerous cases in the lower federal courts consider the nature of the settlement class, by far the most important case on the issue is the Supreme Court's decision in *Amchem Products, Inc v Windsor*.¹⁷ *Amchem* involved an asbestos class action that, prior to certification, requested certification for settlement-only under [Rule 23](#).¹⁸ The circuit courts were split on whether a settlement class had to fulfill the [Rule 23\(a\) and \(b\)](#) requirements applicable to a litigated class.¹⁹ The Court in *Amchem* resolved their disagreement, holding that [Rule 23](#)'s requirements apply equally to all certification decisions, although a settlement class action need not satisfy the [23\(b\)\(3\)](#) manageability prerequisite because it will never be litigated.

The plaintiffs in *Amchem* included “hundreds of thousands, perhaps millions” of persons with past exposure to asbestos products.²⁰ The defendants were twenty large asbestos manufacturers. The complaint, answer, stipulation of settlement, and request for class certification for the purposes of settlement-only were filed on January 15, 1993. In these documents, the class was defined to include all persons who had been “exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos for which one or more of the Defendants may bear legal liability,” but who had not yet filed a complaint in federal or state court.²¹ The agreement would have compensated those class members suffering from malignant conditions, albeit subject to caps on the number of claims payable in any given year.²²

Two weeks later, the district court conditionally certified the class for settlement.²³ Objectors intervened, arguing, among other things, that the settlement violated Article III's case-or-controversy requirement.²⁴ The district court ultimately rejected the objectors' claims. The Third Circuit reversed. The court refused to address the constitutionality of the settlement class, holding that the appropriateness of class certification should be considered prior to jurisdictional challenges under Article III.²⁵ On the certification question, the Third Circuit held that the district court had erred in holding that the fairness of the settlement determined its suitability for certification: [Rule 23](#)'s requirements “must be satisfied without taking into account the settlement.”²⁶ The asbestos class, as defined, did not meet [Rule 23\(b\)\(3\)](#)'s prerequisites, given the existence of individualized questions. Additionally, “intra-class conflicts precluded this class from meeting the adequacy of representation requirement” of [Rule 23\(a\)\(4\)](#).²⁷

The Supreme Court affirmed the dismissal, also on nonconstitutional grounds. The Court initially held that [Rule 23](#) requirements—including predominance, typicality, and commonality²⁸—“demand undiluted, even heightened, attention in the settlement context.”²⁹ However, “a district court need not inquire whether the case, if tried, would present intractable management problems,”³⁰ given that there will be no trial.

Even though it rejected the *Amchem* class for its failure to satisfy the predominance requirement, the Supreme Court implicitly approved the concept of the settlement class as an alternative form of dispute resolution. The Court, in dictum, effectively fashioned a new category of class actions: nonadjudicated classes in which the underlying substantive claims, as well as the procedural issue of the suitability of class treatment, are fully resolved by the parties prior to coming to court. Implicitly relying on the canon of constitutional avoidance, under which courts will dispose of a suit on nonconstitutional grounds whenever possible, the Court reserved for a later date the question of whether the settlement class presents a justiciable case or controversy.³¹ Because the Court found that the class did not satisfy [Rule 23](#)'s requirements, there was no need to address the constitutionality of settlement-only certification. The Court's avoidance of the constitutional issue

effectively authorized lower courts to continue using the device despite its possible constitutional infirmities.

B. Dealing with the Problems of the Settlement Class

Existing scholarly criticisms of the settlement class are generally of the subconstitutional variety, falling primarily under three headings. First, a number of scholars have argued that the negotiations that precede the development of a settlement class improperly serve as a vehicle for opportunistic behavior. A second group has argued that the average amount of damages distributed to absent class members in a typical settlement class is insufficient, as shown by the prevalence of coupon settlements and similarly inadequate compensation strategies up to this point. A third area of scholarship has attacked the judiciary's ability to properly assess the fairness of a settlement agreement.³²

1. The settlement class and opportunistic behavior.

In a traditional class action, courts are on watch for “a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims’ actual worth.”³³ The opposite is true of the settlement class. Stephen Yeazell has summarized the defendant’s motivations underlying the creation of a settlement class:

As a rational economic actor the defendant wants a single, comprehensive, predictable settlement, one that will enable it to pay out claims in the knowledge that it has paid all claims and can move on with its institutional life. Above all, it wants to avoid multiple rounds of escalating claims. Yet [the defendant] would have no way—outside bankruptcy—to control the amount of those damages. Enter the settlement class. From the defendant’s standpoint, it is a business planner’s dream [T]he “plaintiff” class has, in effect, become a defendant’s class.³⁴

In light of these motivations, the most dominant criticism of the settlement class is that “[it] is a vehicle for settlements that primarily serve the interests of defendants—by granting expansive protection from lawsuits—and of plaintiffs’ counsel—by generating large fees gladly paid by defendants as a quid pro quo for finally disposing of many troublesome claims.”³⁵ Numerous scholars have noted that in settlement class actions, opportunistic behavior prevails, all too frequently “advanc[ing] only the interests of plaintiffs’ attorneys, not those of the class members.”³⁶

John Coffee has explained the bargaining process that precedes the creation of a settlement class, focusing on what he labels “structural collusion”: “suspect settlements” that stem from “the defendants’ ability to shop for favorable settlement terms.”³⁷ He argues that the settlement class practice was once dominated by fee shopping, whereby the class attorney bargained for a lump sum and, with the defendant’s consent, divided it unequally between herself and the class, resulting in disproportionately high attorneys’ fees and low class recovery.³⁸ This technique no longer dominates the market.³⁹ Instead, Coffee has identified a number of “new” forms of opportunistic behavior plaguing the settlement class, two of which are relevant to our analysis: the reverse auction and the inventory settlement.⁴⁰

A “reverse auction” is a technique by which the defendant solicits a settlement—ordinarily in the large-claim mass tort context where, in the absence of a class, individual litigation would likely devastate the defendant financially⁴¹—by organizing individual settlement negotiations with various plaintiffs’ attorneys.⁴² Pursuant to these negotiations, plaintiffs’ counsel compete against one another to secure position as class counsel, motivated by the attorney’s fees that will accompany settlement.⁴³ The lowest bid for the value of the class’s claims wins. This practice has been widely thought to deprive class members of the fair value of their claims.⁴⁴ An inventory settlement, in contrast, involves a plaintiffs’ attorney who represents a large number of individual plaintiffs with claims pending against a single defendant. For the purpose of gaining leverage in the settlement of these individual claims, plaintiffs’ counsel offers to independently file, request certification of, and settle the claims of a class of future plaintiffs.⁴⁵ The class is then drawn to exclude currently pending claims. In this scenario, class counsel has little or no incentive to haggle over the price of settlement for the class. Rather, she uses the class as a bargaining

chip to secure separate, more favorable settlements for her current inventory of clients. This technique seriously threatens the right of future plaintiffs to adequate representation and their interest in the fair value of their claims.⁴⁶

2. Scholarly proposals for reform of the settlement class device.

In response to the numerous problems posed by the settlement class practice, a number of scholars have recommended changes to the operation of Rule 23's procedural safeguards. The proposals for reform fall into three general categories: (1) heightened standards governing selection of class counsel; (2) enhanced monitoring of attorney conduct, for the purpose of identifying and regulating conflicts of interest; and (3) creation of criteria to identify signs of opportunistic behavior.⁴⁷ Professor Coffee has specifically identified three needed reforms. First, to prevent the defendant from handpicking plaintiffs' counsel, he would "require the court to oversee the selection of the plaintiffs' counsel, after adequate notice was first given to the specialized bar handling the specific mass tort that certification of a settlement class was contemplated."⁴⁸ Second, he proposes using "broad and representative steering committees, deliberately chosen to mirror the composition of the plaintiffs' bar," which would ratify the settlement before it could be submitted to the court for approval.⁴⁹ Third, he recommends banning classes "defined exclusively in terms of future claimants," noting they are "silent and passive, and thus cannot monitor their attorneys."⁵⁰

Professor Yeazell, "reflecting on the medieval experience with representative litigation," has also suggested that, when the interests of absent class members are at stake, the court should prohibit the defendant from "approach[ing] a lawyer (and certainly not a lawyer already representing a plaintiff with interests adverse to those of defendant)."⁵¹ Instead, the defendant, if she wishes to initiate class-wide settlement negotiations, must approach "unrepresented parties and offer them terms, on behalf of the class, notifying them that they would have to obtain representation."⁵² According to Yeazell, this scheme would create a market in "plaintiffs' claims," "precipitat[ing] a frenzy of lawyers' bidding for the representative rights,"⁵³ which, in turn, would produce settlement terms "better [for the class members] than that originally proposed."⁵⁴

3. The unexplored link between unconstitutional nonadverseness and opportunistic behavior.

As demonstrated by this brief survey of the literature, there are numerous changes that could be made to the settlement class device, as well as to the procedures that govern settlement-only certification and settlement approval, to make it more fair and effective. Class action scholars have generally done an excellent job of pinpointing the problems with the settlement class and offering suggestions for internal reform. Nevertheless, the purpose and intended scope of these suggestions are far too narrow to rectify the fundamental problems posed by the settlement class.

Current proposals for reform have been of the subconstitutional variety, focused on the rules and regulations that govern the settlement class. As a result, they fail to address the root cause of the problems to which they have pointed: the nonadverseness of the parties. The lack of disagreement between the defendant and class counsel as to the desired outcome of the suit ultimately renders ineffective or inadequate all proposed reforms, which rely on individualized inquiries to assess the legitimacy of the settlement class in the specific case. When the plaintiffs and the defendant agree on settlement terms and the desirability of certification prior to coming to court, neither party has the incentive to ask such important questions as whether class representation is "adequate" or whether the claims are "typical" of the class as a whole. This inherently deprives the court of the benefit of adversarial litigation concerning the satisfaction of Rule 23's requirements, thereby seriously limiting its ability to protect absent class members.⁵⁵ Imposing additional burdens on the parties—over which there will also be no disagreement between them, given that both seek the same outcome—is likely to be no more effective than are current requirements in preventing or remedying opportunistic behavior, because of the inherent lack of adverseness between the parties.

Moreover, even if the proposed reforms were to prove successful in remedying the settlement class's subconstitutional defects, they nevertheless fail to address the practice's inherent unconstitutionality. This failure is reflected in the scholarly approach towards "collusion," or the opportunistic behavior that so often accompanies the development of a settlement

class.⁵⁶ As noted previously, settlement class action courts have defined “collusion” narrowly, to require a secret, unethical agreement between two parties to a suit.⁵⁷ Civil procedure scholars have echoed this approach. A review of the literature indicates that most, if not all, scholars currently writing in this area assume that in order to be illegitimate, the settlement class must involve secret, unethical, or criminal cooperation between the plaintiff and the defendant, designed to defraud absent class members, in the individual case.⁵⁸

In contrast to the case-by-case focus employed by class action scholars, Article III employs a far more categorical and prophylactic conception of “collusion.” Article III makes an *ex ante* categorical judgment that a nonadversarial suit is inherently collusive and therefore is in violation of constitutional norms. As the Court in *Poe v Ullman*,⁵⁹ construing Article III, explained:

[The case] may not be “collusive” in the sense of merely colorable disputes got up to secure an advantageous ruling from the Court. [But t]he Court has found unfit for adjudication any cause that “is not in any real sense adversary,” that “does not assume the ‘honest and actual antagonistic assertion of rights’ to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court.”⁶⁰

This distinction underscores the fundamental inadequacy of reforms proposed by such eminent class action scholars as Coffee and Yeazell. To be sure, these reforms may assist the court in identifying, on a case-by-case basis, conspiracies or attempts to criminally defraud absent class members (behavior that is likely to be present in only a handful of settlement classes). However, they are incapable of addressing the settlement class’s fundamental constitutional defect, given that all settlement classes—not merely those involving unethical attorney behavior—are, by definition, nonadversarial. An adversarial dispute, according to the text, jurisprudence, and purposes of Article III, cannot be said to exist at the time the settlement class action proceeding begins. At that point, the litigants differ over absolutely nothing. They have agreed on the terms of both certification and settlement prior to the filing of the class proceeding. In fact, the only conceivable reason that class counsel in this position files a complaint and request for certification with the court, rather than simply embodying the terms of their private agreement in an enforceable contract, is to bind absent class members to a settlement negotiated in their absence.

This Article picks up where current courts and scholars have left off: with the constitutional implications of Article III and the adverseness requirement. This analysis demonstrates that the settlement class action is, at its core, inconsistent with the text, history, and purposes of Article III’s case-or-controversy requirement.

III. Adverseness and the Case-or-Controversy Requirement

A. Adverseness and Constitutional Text

To understand the constitutional implications that flow from the settlement class’s lack of adverseness, one must engage in an analysis of the foundations of Article III’s adverseness requirement. Article III, § 2 extends federal judicial power solely to the adjudication of “cases” or “controversies.” Certain categories of suits, particularly those falling within the federal courts’ diversity jurisdiction, must involve a “controversy.” The remainder, primarily concerning federal question suits, must qualify as “cases.”

The definition of the term “controversy” is straightforward, having been construed consistently throughout the centuries. A current-day legal dictionary defines the word as a “disagreement or a dispute.”⁶¹ A nonlegal dictionary offers a similar definition: a “controversy” is “a dispute, especially a public one, between sides holding opposing views.”⁶² This modern interpretation is consistent with the meaning given the term by dictionaries at the time of the Constitution’s Framing.⁶³ For example, “controversy” was defined by a 1755 English dictionary as a “debate” or “dispute,”⁶⁴ a definition that mirrors the word’s etymology. The root of “controversy” is Latin, from *controversus*, which means “disputed.”⁶⁵ From these definitions, one can fairly conclude that the word “controversy” plainly requires a substantial disagreement between parties as to the

suit's preferred outcome.⁶⁶

The term "case" is arguably more ambiguous. For example, a current-day dictionary includes eleven different definitions of the word, including the broad description of "case" as "an instance of something."⁶⁷ However, when one takes into account textual context and circumstance, the term's meaning when used in Article III becomes readily apparent. For example, current-day legal dictionaries define "case" as a justiciable "action or suit,"⁶⁸ or an "argument."⁶⁹ Eighteenth century dictionaries suggest a similarly narrow reading of the word in the legal context. A legal dictionary from 1773 contains no entry for "case."⁷⁰ Nevertheless, it references—seven times—the phrase "adverse party" in the course of defining related legal terms such as "demurrer," "duces tecum," and "interrogatory,"⁷¹ suggesting a strong focus on adverseness at the time of the Framing.

Even if a textualist analysis were not enough, standing alone, to establish unambiguously the outer perimeters of a constitutionally permissible "case," more than three hundred years of legal practice and tradition establish a presumption that the word "case," like the word "controversy," requires an adversarial suit.⁷² Initially, the early English common law system mandated an adversarial relationship between litigants, with few exceptions.⁷³ While not conclusive evidence of the Framers' intent, this history indicates that, in adopting a legal system based largely on the English common law system, the Constitution's drafters likely sought to incorporate a focus on litigant adverseness. Second, nothing in the Framers' records supports a substantive distinction between the words "case" and "controversy" for purposes of adverseness.⁷⁴ Indeed, the Framers' deliberations indicate that they were committed to the proposition that "jurisdiction given [to the judiciary] was constructively limited to cases of a Judiciary Nature."⁷⁵ A "case[] of a Judiciary Nature," in turn, was defined by early American practice and tradition as excluding feigned, nonadversarial suits.⁷⁶ Third, since the late nineteenth century, the Court has conflated the terms "case" and "controversy,"⁷⁷ holding that any difference in their meaning is neither supported by historical practice nor the Framers' intent.⁷⁸ In light of such history, there is a heavy burden on anyone who suggests that the word "case" was designed to have a far broader reach than the word "controversy."⁷⁹

B. Adverseness in Supreme Court Doctrine

The Court has widely held that the case-or-controversy language of Article III mandates litigant adverseness.⁸⁰ For a suit to be justiciable, according to the Court, the parties must maintain "adverse legal interests" throughout, and their dispute must be "definite and concrete."⁸¹

The leading decision on the subject is *Muskrat v United States*,⁸² where the Court considered two suits by Cherokee citizens to determine the constitutionality of the Act of Congress of April 26, 1906. That Act accomplished two things. First, it increased the number of persons, primarily children whose parents had enrolled as members of the Cherokee tribe post-1902, entitled to share in the distribution of Cherokee lands. Second, it limited the ability of Cherokees, postdistribution, to dispose of their lands. Both suits were initiated under an Act of Congress, passed in 1907, which provided that the specific individuals involved could litigate the constitutionality of the 1906 Act in the Court of Claims.⁸³

The Court concluded that federal jurisdiction could not constitutionally extend to the case, despite the express grant of jurisdiction by Congress. The suit constituted "neither more nor less than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress," rather than an actionable, adversarial dispute.⁸⁴ Although the Cherokees did possess a legal interest in the lands and were allegedly injured by the 1906 Act, the defendant in the case—the Government—had "no interest adverse to the claimants."⁸⁵ Even if the government does have an abstract interest in establishing the constitutionality of a federal statute, the Court held that this interest was *de minimis* and was insufficient to establish federal jurisdiction.⁸⁶

The Court's conclusion that the government was not truly adverse to the plaintiffs has been questioned.⁸⁷ Nevertheless, its constitutional reasoning, as an abstract matter, has never been seriously doubted. The Court relied on the existence of an adverseness requirement, embodied by Article III's case-or-controversy language:

[T]he exercise of the judicial power is limited to "cases" and "controversies." By cases and controversies

are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom [and] the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.⁸⁸

According to the Muskrat Court's logic, in any suit where no adverse legal interests are at stake, the judiciary has no authority to reach the merits of the underlying issues.

The Court has consistently cited Muskrat for the proposition that adverseness plays an essential role in an adversary system, and in appropriately restraining judicial power, and it has applied its logic to a variety of fact patterns.⁸⁹ For example, in *United States v Johnson*,⁹⁰ the Court dismissed a nonadversarial suit, finding it to be in violation of the dictates of Article III. Unlike Muskrat, where the parties' nonadverseness flowed from a lack of disagreement as to the desired outcome, the parties in Johnson explicitly arranged to bring a nonadversarial case to the court, to further the defendant's economic interests.⁹¹ The plaintiff, a friend of the defendant, had no role in the proceedings. He did not pay the lawyer who appeared in his name, never saw the complaint, and did not learn of the lower court's decision until reading about it in the newspaper.⁹² The Court refused to reach the merits of the plaintiff's claims. There was no "genuine adversary issue between the parties" as required by Article III, it held, given that the parties agreed on the desired outcome, as well on the underlying facts of the case.⁹³

One arguable aberration is the Court's decision in *Swift & Co v United States*,⁹⁴ where the government simultaneously filed a complaint, citing violations of the Sherman Antitrust and Clayton acts, and a prenegotiated consent decree enjoining the violations. The district court approved the decree and held that it would retain jurisdiction to take all action "necessary or appropriate for the carrying out and enforcement of this decree."⁹⁵ Four years later, two motions to vacate the decree were filed by two separate defendants in the case. Among other things, they alleged that the Court lacked jurisdiction because "there was no case or controversy within the meaning of Article III."⁹⁶ The Court rejected this argument, holding that, despite the concurrent filing of the complaint and decree, the district court had Article III authority to approve the decree.

The Court in Swift did not believe its conclusion was inconsistent with its earlier holdings on adverseness. It is difficult, however, to understand the Court's logic. First, the Swift Court distinguished the consent decree from precedents in which the Court had held a nonadversarial dispute to be nonjusticiable, such as *Lord v Veazie*.⁹⁷ A consent decree, unlike the private contract involved in *Veazie*, "deals primarily, not with past violations, but with threatened future ones."⁹⁸ Under this rule, the Swift case was justiciable because of the credible threat of impending adverseness, stemming from future statutory violations.⁹⁹ Even accepting this interpretation, however, the settlement class does not present a comparable threat: the conflicting interests of the parties to the suit are resolved at the time of settlement.¹⁰⁰ Except for execution of the agreement, there is no remaining area of potential disagreement.

Under precedent such as Muskrat and Johnson, the facts in Swift constitute a paradigmatically unconstitutional scenario: the parties are nonadversarial at the time that they decide to involve the court, having mooted the critical issues in dispute between them. The only reason that they seek judicial involvement is to codify their private agreement in a court-sanctioned contract. Under the prophylactic adverseness rule adopted in cases such as Johnson and Muskrat, which requires litigant adverseness as a preemptive protection against the judicial exercise of nonjudicial functions, the prenegotiated consent decree falls far beyond the scope of a court's Article III powers. Because the Swift Court purported to adhere to the Court's earlier holdings adopting adverseness, and because Swift is inherently inconsistent with the logic of those decisions, it is Swift, rather than the earlier decisions, that should be deemed invalid.

C. Going beyond the Text: The Sociopolitical Purposes Served by the Adverseness Requirement

1. The two levels of constitutional purpose.

According to both textual and doctrinal interpretations of Article III, the case-or-controversy requirement unambiguously

mandates the existence of an adversarial relationship between opposing litigants. However, neither constitutional text nor case law offers anything approaching an adequate explanation of the purposes served by this restriction on judicial authority. Thus, we now face a more difficult question: why, purely as a normative matter, is adverseness an important element in the nation's constitutional democratic structure? This is a particularly pressing inquiry, given the lack of scholarly attention to the issue.¹⁰¹ A thorough search of the literature indicates that no scholar has yet even attempted to comprehensively evaluate either the individual or systemic interests served by adverseness. In light of this silence, exploration of this issue is an important undertaking. Many scholars of separation of powers reject what they deem the overly formalistic emphasis on textual interpretation, even where the text appears unambiguous.¹⁰² At the very least, the argument proceeds, textual directives may be overcome by social needs.¹⁰³ It is only if we are able to articulate truly compelling normative rationales underlying the adverseness requirement, then, that we can comprehend the vitally important role that it serves. It is possible, we believe, to employ a form of reverse engineering to infer the normative goals to be fostered by the requirement. It is to this effort that we now turn.

Initially, litigant adverseness serves as an essential ingredient in the protections and incentives upon which the adversary system depends, including the creation of a well-balanced, well-developed record to facilitate informed judicial decisionmaking. These incentives, in turn, function as a necessary part of the liberal democratic model, which posits that an individual can be bound—legally or practically—by a judgment only when she has had the opportunity to advance her own interests in litigation, employ an advocate to do so, or, at the very least, have her interests represented by one possessing a strong incentive to advance the position.

The adverseness requirement also serves a larger, systemic purpose—that of limiting the judiciary's role in relation to its two coequal branches. First, the lack of adverseness disrupts Congress's underlying assumptions in choosing a private remedy as the appropriate method by which to punish and deter statutory violations, including that statutory rights will be litigated in a traditional adversary proceeding. When Congress creates a private compensatory remedy for violation of a statutorily dictated behavioral standard, it is seeking simultaneously to accomplish two goals: to compensate the victim, and to deter future violations. Thus, a private compensatory remedy is appropriately viewed as a hybrid of both private and public goals. The judiciary would undermine the legislative goal of creating a private remedy were it to permit a nonadverse litigant to underenforce the substantive public goals embodied in federal law. Second, with respect to judicial-executive relations, the judicial distribution of private resources absent litigant adverseness constitutes the judicial exercise of an inherently administrative function, threatening the separation of powers. Each of these three values will be further explored below.

2. Private concerns: the litigant-oriented interest in adverseness.

The requirement that litigants on opposite sides have “adverse” legal interests for a suit to be justiciable is appropriately viewed as a logical outgrowth of the nation's commitment to an adversary system. Both the adverseness requirement and the adversary system of which it is a part flow from a recognition that the “adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity.”¹⁰⁴ Indeed, adverseness and the adversary system depend on one another: in the absence of litigant adverseness, the very DNA of the adversary system, which relies on the parties' competitive incentives to investigate the facts and to research and analyze the governing law that grows out of the party's adverseness to her opponent, is transformed. That transformation, in turn, threatens the core assumptions and values on which our legal system depends—primarily the protection of the interests of individuals who may be bound, legally or practically, by the court's judgment. Particularly in group litigation, where individual participation in court proceedings is impractical and the outcome will have formal *res judicata* impact on absent litigants, the required adverseness between litigants serves as an essential safeguard. It ensures that the group representative has the necessary incentive to seek an outcome that embodies the legal interests of absent but bound individuals. By contrast, when, from the outset of the litigation, the in-court representative seeks the same outcome as the opposing party, she lacks incentive to disclose information to the court that may reflect negatively on the joint, nonadversarial agreement, hindering the court's ability to protect individuals who will—practically, if not legally—be bound by its judgment.

a) The adversary system: a brief examination. The adversary system can be characterized by its two main features: (1) party control over evidence production and argumentation,¹⁰⁵ and (2) a passive adjudicator who acts on the basis of the information presented by the parties.¹⁰⁶ The former, according to Lon Fuller, is the adversary system's "distinguishing characteristic."¹⁰⁷ "[I]t confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."¹⁰⁸ With regard to the latter, Judge Marvin Frankel has explained: "The plainest thing about the advocate is that he is indeed partisan, and thus exercises a function sharply divergent from that of the judge [I]t is [the judge's] assigned task to be nonpartisan and to promote through the trial [procedures] an objective search for the truth."¹⁰⁹

The adversary system may be contrasted with the civil law or "inquisitorial" systems in place in various Latin American and European nations.¹¹⁰ The two systems vary in both ends and means. First, the inquisitorial system is unqualifiedly focused on "ascertain[ing] the truth of the contested matter for itself," a goal that justifies active court involvement in the development of a case's factual and legal foundations.¹¹¹ This obligation "has no counterpart in American courts," which are instead focused on party-oriented procedural guarantees.¹¹² In fact, "[e]mployed by interested parties, the [adversarial system] often achieves truth only as a convenience, a byproduct, or an accidental approximation."¹¹³

On a procedural level, the two systems also differ in important ways. As a general matter, the inquisitorial court "has primary responsibility for investigating the facts, a load borne primarily by litigants in the United States through both the formal discovery process and informal investigation."¹¹⁴ This affects the roles performed by both the litigant and the court. While litigants in an inquisitorial system play a minimal role in the substantive development and disposition of the case, the adversary system is far more democratic,¹¹⁵ placing responsibility over the substantive disposition of the case in the hands of the parties. Moreover, while "inquisitorial trials are conducted by the state's representative"—the judge—"in the adversary system, the judge is a relatively passive party who essentially referees investigations carried out by attorneys."¹¹⁶ As a result, the American legal system depends heavily on an adversarial relationship between litigants for the resolution of difficult factual and legal questions.¹¹⁷ The federal courts were constitutionally constructed as passive entities, and thus "need help to adjudicate properly," including a proper, adversarial "context in which to consider the principles they are called upon to expound."¹¹⁸

A comparative analysis of the benefits and disadvantages of these two systems is beyond the scope of this Article.¹¹⁹ Suffice it to say that American judges, trained in and accustomed to an adversary structure, are "ill-equipped for effective inquisitorial judging."¹²⁰ Not only is an investigatory or managerial judicial role incompatible with the highly entrenched adversarial norms and customs in the U.S. legal system,¹²¹ but American judges lack the investigatory resources available to judges in an inquisitorial system. The federal judiciary operates on a limited budget and with restricted factfinding powers, limiting its capabilities outside the context of an adversarial dispute.¹²² Moreover, even if inquisitorial judging techniques were technically compatible with current legal structures, as we subsequently demonstrate, they are not desirable given the democratic premises on which the nation's adversary system is based.

b) Liberal democratic theory and the foundations of the adversary system. As noted by one scholar, the "system of adjudication we choose speaks volumes about our more general philosophy of government."¹²³ The adversary system finds its roots in liberal democratic theory. It flows logically from our societal commitment to self-determination and, to the extent feasible, individual autonomy. At the heart of liberal democratic theory are two visions of adversary theory. One is "self-protective" and conceptualizes the right to sue as a mechanism by which each individual can, as one of us has put it, "watch his back" because someone inevitably will attempt to insert a knife into it."¹²⁴ The second views individual consent as a vital part of all political activity, positing that "without an opportunity to participate in the regulation of affairs in which one has an interest, it is hard to discover one's own needs and wants."¹²⁵ These views are jointly premised on the theory that the best way to resolve conflict is "through the use of democratic [legal] processes."¹²⁶ A participatory form of adjudication "shifts power to those best equipped to use it: the individuals who will be affected by the decisions."¹²⁷

Although the concerns of liberal adversary theory are of course most intense when the private party's legal interests are formally impacted—for example, through the doctrines of claim or issue preclusion—it is important to recognize that the interests of nonlitigants will often be impacted significantly on a purely practical level by the results of litigation. This impact

may derive from a variety of sources. First, although not as legally binding as claim or issue preclusion, the doctrine of stare decisis will often have as virtually a dispositive impact on subsequent suits. This is particularly true in what might be described as “same situation stare decisis”—in other words, cases that give rise to an identical legal issue and involve the same set of factual circumstances as the initial case. Here, neither issue nor claim preclusion apply because of a lack of privity among the parties in the initial suit and those in the subsequent suits.¹²⁸ Nevertheless, as a practical matter it is highly unlikely, in such a situation, that the court in subsequent suits will reach a conclusion that differs dramatically from its decision in the initial case. Second, a decision in an initial suit could indirectly impact future litigants, by so altering circumstances or controlling resources that they are effectively—though not legally—precluded. In these situations, it would be infeasible to require that future litigants have a formal role in the initial suit. Indeed, in certain situations—for example, in product liability suits, where future plaintiffs have not, at the time of the initial suit, suffered any injury—such formal representation would be impossible. Nevertheless, the basic concern for the individual that characterizes both liberal democratic theory and the adversary system that flows from it dictates the need for the litigant in the initial suit to represent fully the position that similarly situated litigants would take in subsequent suits.

The adverseness requirement may appropriately be seen as a device designed to protect the interests of future litigants when those interests may in some sense be impacted by resolution of the initial action. Indeed, a lack of adverseness in the initial suit automatically gives rise to suspicions about the motivations of the litigants. After all, to the extent that all the parties wish to do is to legally codify their agreement or the already reached resolution of a prior dispute, they need merely embody their agreement in a legally enforceable private contract. There is absolutely no need to proceed to litigation—unless, of course, they wish to impact the legal interests of others. The very fact that both sides to a litigation are in agreement from the outset, then, renders the action inherently suspect.

It is conceivable that, in certain instances, the absence of adverseness will not actually imply suspiciousness of motivation. However, commitment to a prerequisite of litigant adverseness represents a choice in favor of an *ex ante* categorical approach, rather than a case-by-case inquiry into litigant seriousness of purpose. The choice of a categorically applied rule is a decision in favor of possible overprotection, rather than the risk of underprotection normally associated with a more elusive case-by-case inquiry, where there always exists the danger that a court will mistakenly fail to recognize the improper motivation of nonadverse parties. Because an absence of adverseness will, in the large majority of cases, signal the failure of one of the litigants to protect the interests of future litigants whose legal rights will be affected (if only as a practical matter), Article III is properly construed to employ the absence of adverseness at the outset of a suit as a rule of thumb by which to measure a litigant’s lack of seriousness or good faith.

A similar approach to a different aspect of Article III’s case-or-controversy requirement was suggested a number of years ago by Professor Lea Brilmayer.¹²⁹ She focused on the “unfairness of holding later litigants to an adverse judgment in which they may not have been properly represented,”¹³⁰ arguing that Article III’s case-or-controversy requirement—particularly the injury-in-fact inquiry—functions to ensure that the interests of those litigants are taken into consideration by the court issuing judgment.

Specifically, she identified ideological litigation, where the plaintiff challenges legislation “without the traditional personal stake” in the outcome, as a serious threat to future litigants.¹³¹ If courts were permitted to hear suits by uninjured plaintiffs, two negative effects would flow, she argued. First, the court’s judgment in that case may—as a practical matter, if not a legal one—bar future litigation by individuals actually harmed by the operation of the challenged statute. At the very least, it will create persuasive precedent that a future court may follow when the two situations are “indistinguishable.”¹³² Second, she asserted that the ideological litigant, because he is uninjured, lacks the incentive to serve as a champion for the cause. Absent the self-interest that flows from concrete injury, the plaintiff cannot effectively represent the interests of third parties not currently before the courts, who nevertheless will be affected by the court’s judgment. The injured individual, Brilmayer argued, is more likely to fight for the rights of all individuals similarly situated, now or in the future, as well as possess the incentive to invest both time and resources in the suit—not necessarily because of an altruistic desire to assist others, but because of the desire to protect or advance his own interests. Recognizing the role that such incentives play in the proper functioning of an adversary system,¹³³ Brilmayer advocated strict adherence to the injury-in-fact requirement of Article III.¹³⁴ This limitation “ensure[s] the accountability of representatives” by guaranteeing that “the individuals most affected by the

challenged activity will have a role in the challenge."¹³⁵

One may reasonably question the accuracy of Brilmayer's unsupported assumption that it is only injured plaintiffs who will fully and enthusiastically assert their interests. A plaintiff who has been injured only minimally will naturally lack incentive to argue her case to the fullest. In contrast, an uninjured plaintiff driven by ideological considerations who possesses substantial resources may well develop her case to the fullest.¹³⁶ For present purposes, however, that issue is beside the point. Like Professor Brilmayer, we glean from both Article III's case-or-controversy requirement and the political principles of liberal theory that underlie the adversary system a concern for protection of the interests of future litigants, and urge the shaping of the requirement's interpretation to protect those interests. This concern, in turn, leads to the conclusion that the case-or-controversy requirement demands true adverseness between opposing litigants at the outset of suit, because absent such adverseness we cannot be assured that the litigants will effectively protect the interests of affected individuals not currently before the court.

There are several conceivable problems with our argument that the adverseness requirement protects future similarly situated litigants by assuring litigant enthusiasm and good faith. Although there is a certain degree of truth to each of them, we believe that on balance, they do not undermine the essential elements of our analysis.

First, it might be argued that our theory proves too much, because litigants may always settle a suit at any point. Even certified class actions may be settled, subject to judicial approval.¹³⁷ If, as we assert, the absence of adverseness at the outset of a suit undermines the protection of future similarly situated litigants and therefore a rigid rule demanding adverseness must be imposed, then should not an absence of adverseness that necessarily comes with settlement at any point in the litigation process be prohibited?¹³⁸ Because prohibition of all settlement would be absurd, the argument proceeds, the absence of adverseness at the outset of suit should also logically be acceptable. It is not true, however, that the dangers to the interests of future litigants will always be as great from a lack of adverseness due to settlement in the midst of litigation as they will from a lack of adverseness at the outset of suit. For one thing, when a suit that is adverse at the outset settles during the course of litigation, we can be reasonably assured that the suit was not brought solely for the purpose of legally or practically binding future litigants. When a nonadverse suit is brought, in contrast, it is difficult to understand why the case has been brought to court in the first place, save for an attempt to bind future litigants. The inherent existence of this suspicious motivation automatically distinguishes the two situations. Moreover, when an ongoing suit is settled, it is highly unlikely that any binding legal precedent that might negatively impact similarly situated parties will be promulgated as a result. In contrast, when a nonadverse suit is brought, for reasons already discussed, it is likely that it is filed for the very reason of obtaining some form of binding declaration as to the state of the law; again, why else file suit in the first place? In addition, significant social benefit flows from the settlement of adverse litigation, if only from the reduction in the expenditure of judicial resources. No such benefit may be derived from allowing nonadverse suits to be filed.

A second argument that might be fashioned is that the constitutional guarantee of due process already assures protection of absent parties whose interests will be affected by the outcome of suit, rendering the adverseness requirement unnecessary for this purpose. But although due process is, in fact, designed to protect the interests of affected parties to a limited extent, by no means does it adequately perform the protective function designed to be achieved by Article III's adverseness requirement. Initially, due process protects only those who are legally bound by the decision in the initial suit. The adverseness requirement, on the other hand, should be deemed to also protect those practically affected by resolution of the initial action, whose interests do not fall within the protective umbrella of due process. Moreover, the due process protection of absent parties involves a case-by-case determination of the adequacy of the representation of absent parties by a litigant to an ongoing suit. It is certainly conceivable that the litigant could be found to satisfy the objective indicia of adequacy—for example, interests identical to those of absent but affected parties or possession of adequate resources—yet still not possess the incentive or intent to advocate his position to the fullest.¹³⁹ Because it will be all but impossible to ascertain existence of this intent in the individual case, the adverseness requirement imposes an *ex ante* categorical approach, in lieu of such an individualized inquiry.

Of course, it is conceivable that a litigant may outwardly present all the indicia of adverseness, yet in reality be secretly acting in consort with his opponent. In such a situation, it is up to the court in the individual case to attempt to ascertain the

validity of the asserted adverseness, and it is certainly conceivable that it will fail in that endeavor. But recognition of this possibility in no way leads to a lack of concern for the absence of adverseness when it is recognized from the outset.

Finally, one might argue that adverseness does not necessarily guarantee that an in-court representative will protect the interests of those who may be affected, legally or practically, by the court's judgment, given that there are a number of other factors that affect the quality of representation. However, adverseness is only the first of many categorical hurdles in establishing Article III jurisdiction. If the parties are adverse, they will still need to satisfy other constitutional requirements, including standing, ripeness, and mootness. Additionally, in most suits, where the in-court litigant seeks the same outcome as the group who will be affected by the court's judgment, and a different outcome from the adverse party, their interests will be one and the same: to secure maximum recovery, monetary or otherwise, from either the same or a similar wrongdoer. In that situation, the representative has an incentive, rooted in her own self-interest, to utilize all available tools to advocate for the interests of the affected individuals. While adverseness may not always be a sufficient condition of adequate representation, then, it is always a necessary condition.

3. Public concerns: the systemic interests in adverseness.

Not only does the adverseness requirement function to protect the interests of absent parties, but it also plays an indispensable political role within our system of separated powers. The structural concerns implicated by the adverseness requirement are two-fold. First, Congress, in setting forth a private remedy as a statutory enforcement mechanism, legislates against an "adversarial backdrop."¹⁴⁰ It assumes that a private remedy simultaneously serves as an effective tool for the punishment of civil wrongdoing and the deterrence of future statutory violations, primarily because the private right will be litigated in the traditional adversary form, with all of its attendant incentives and protections. In asserting jurisdiction over a suit seeking a private remedy in the absence of adverseness, the judiciary risks the undercompensation of victims and the transformation of the underlying substantive law.

Second, adverseness serves a critical function in distinguishing between the roles constitutionally intended for the judiciary and those to be exercised by the executive branch. In addition to adjudicating cases or controversies, administrative agencies that perform executive functions are solely responsible for distributing private resources in the absence of an adversarial dispute. These agencies, when legislatively empowered to do so, may function as administrators, deciding in the individual situation whether claimants are entitled to compensation for their claims, even in the absence of a formal adversary proceeding. When a federal court, from the outset of a suit, does nothing more than supervise and administer the redistribution of assets dictated by an agreement previously reached by the parties, it is effectively operating as an administrative entity, appropriately found within the executive branch. When an Article III court takes cognizance of a nonadversarial suit, then, it steps into a sphere expressly committed by the Constitution to the discretion of the executive department, threatening the separation of powers.

a) The hybrid model: the intersection of private adversarial litigation and public goals. The legislative decision to make available a private remedy assumes that the statutory provision of monetary damages will motivate the initiation of private litigation in the event of civil wrongdoing, incidentally advancing the statute's social goals. An injured individual, given her interest in compensation, is assumed to have the natural incentive to identify and prosecute wrongdoing, for the purposes of making herself "financially whole."¹⁴¹ Although compensatory awards are first and foremost intended to reimburse the victim for injury, they are, as one of us has previously argued, "simultaneously and incidentally [designed to] punish[] and deter[] lawless, harm-inducing conduct by requiring the defendant to bear the financial burden of providing that compensation."¹⁴² Adoption of a private damage remedy, then, is premised on the assumption that the private individual will functionally assume the role of a quasi-private attorney general, especially in the context of the class action where the private remedy enables one person to bring suit on behalf of a large portion of the general population.¹⁴³ Though both the victim and her attorney may be primarily or even exclusively motivated by considerations of personal economic gain, this view deems private litigation to be integrally intertwined with attainment of the statute's social goals. The empowerment of private individuals as quasi-private attorneys general "protect[s] the public interest by enforcing the public policies embodied in controlling statutes."¹⁴⁴

By assuming jurisdiction of a nonadversarial suit, the court runs the risk of underenforcing legislative schemes. Specifically, litigant nonadverseness disrupts the incentives and protections upon which the legislative choice of a private remedy is founded, thereby threatening achievement of the underlying goals of the legislation. It is conceivable, of course, that private litigants will choose not to enforce private compensatory rights vested in them by Congress. Alternatively, they may seek to enforce those remedies, yet ultimately agree to settle their claims for far less than they are objectively worth. In this sense, resort to a private compensatory remedy as a means of enforcing substantive social policies is likely not to be as reliable as, for example, administrative or criminal enforcement.

Nevertheless, for reasons already discussed, these dangers are far less than those presented by nonadverse litigation. Initially, at least where the economic and physical harm is sufficiently great to justify resort to litigation, the likelihood that a large percentage of victims will choose not to sue should be small. Additionally, where truly adverse litigation is brought, the legal impact of settlement on similarly situated victims is likely to be limited due to the absence of legally controlling conclusions by the court. Finally, because of the inherent suspiciousness of nonadverse litigation in the first place, there is greater reason to trust the incentive structure in operation when truly adverse litigation is settled.

b) The administrative compensation model.

i) The role of adverseness in defining judicial and executive tasks. The Constitution defines the executive role in part by means of the Take Care Clause, which provides that the Executive ensure “that the Laws be faithfully executed.”¹⁴⁵ Typically, this responsibility consists of the “alteration of social relations or individual status in a specific fact situation divorced from an adversarial adjudication.”¹⁴⁶ In contrast, the jurisdiction of Article III courts “is limited to cases and controversies in such form that the judicial power is capable of acting on them” and does not extend to “administrative or legislative issues or controversies.”¹⁴⁷ For example, among other things, the executive branch is responsible for initiating public litigation and creating executive agencies that regulate private behavior. In the narrow instance where a dispute arises over the application of the underlying substantive law to a particular state of affairs, the court takes over enforcement responsibility from the executive branch. For those parties, the judiciary controls the decision of how to best “execute” the law.

The point at which responsibility shifts from the executive to the judiciary is defined by the case-or-controversy element of Article III, including the adverseness requirement. This bright line was first introduced in *United States v Todd*,¹⁴⁸ in which the Court addressed the Article III implications of the congressional revision of the Act struck down two years earlier in *Hayburn’s Case*.¹⁴⁹ An individual had applied for pension benefits in the New York Circuit Court. That court held that Article III judges could legitimately act as administrative commissioners in their individual capacities—as opposed to “as a Circuit Court”—and issued an opinion that “Todd ought to be placed on the pension list.”¹⁵⁰ The Supreme Court reversed. It held that the Act “could not be construed to give [authority] to the judges out of court as commissioners.”¹⁵¹ Addressing whether pension administration was a proper function for the Circuit Court sitting in its Article III capacity, the Court answered in the negative: the decision of whether individuals are entitled to pension benefits is not the exercise of “judicial power within the meaning of the Constitution,” but rather is the type of power typically exercised by administrative “commissioners,” such as the Secretary of the Treasury.¹⁵²

There do exist two prominent instances in which the Supreme Court has upheld legislative schemes that seemingly contravened the case-or-controversy requirement by vesting in the hands of Article III judges certain functions that do not directly involve the adjudication of adversarial suits. In *Mistretta v United States*,¹⁵³ the Court approved the required participation of Article III judges on the Federal Sentencing Commission, whose function was to promulgate sentencing guidelines for federal crimes. In *Morrison v Olson*,¹⁵⁴ the Court upheld the performance of what appeared to be nonadjudicatory functions of a special Article III court in the appointment and supervision of independent counsel. One may question the wisdom of one or both of these decisions.¹⁵⁵ Nevertheless, both involved obviously unique situations, and therefore may be distinguished from the vesting of nonadjudicatory jurisdiction, as a general matter, in the federal courts. *Mistretta* concerned not the vesting of nonadjudicatory jurisdiction in an Article III federal court, but rather the use of individual Article III judges for executive purposes, a fact expressly noted by the Court.¹⁵⁶ *Morrison*, too, involved rather unique circumstances. Although, unlike *Mistretta*, the case did involve the use of a special Article III court, its administrative

functions were tied to a truly unique process that could well lead to subsequent adversarial litigation. That these cases are, rightly or wrongly, viewed by the Court as presenting very special, and therefore limited, circumstances is made clear by its continued unwavering adherence to the adjudicatory requirements of Article III in all other contexts. At no point have subsequent decisions construed these cases as in any way affecting the constitutional requirements of standing, ripeness, mootness, or adverseness. Indeed, in reaching its conclusions in these decisions the Court expressly adhered to its venerable precedents prohibiting the Article III judiciary from performing nonadjudicatory executive functions.¹⁵⁷

ii) The implications of the judicial exercise of functions constitutionally reserved for executive agencies. A number of policy-based arguments support construing Article III to prohibit judicial cognizance of all nonadversarial compensation schemes. Most important, while the judiciary is constitutionally constrained by the case-or-controversy requirement, the executive branch is instead constrained by electoral accountability.¹⁵⁸ When the unelected judiciary exercises executive power by taking cognizance of a nonadversarial suit, it operates without either the adverseness limit imposed by the case-or-controversy requirement or electoral restraint, contrary to the fundamental checks and balances of our constitutional system.

IV. Viewing the Settlement Class through the Lens of Article III

A. Textualism: The Nonadverseness of the Settlement Class

To the extent that one believes that the Constitution should be interpreted in accordance with its plain text, one should be able to conclude without much difficulty that the settlement class violates the case-or-controversy requirement of Article III. In order for the court to have jurisdiction under Article III, a settlement class that alleges violation of state law must definitionally constitute a “controversy”; a settlement class that alleges violation of federal law must fulfill the definition of a “case.” This Part begins the discussion of the settlement class’s unconstitutionality by drawing on the plain-meaning analysis of the terms “case” and “controversy” presented earlier to argue that the inherent nonadverseness of the settlement class—whether the underlying claims involve state or federal law—renders it nonjusticiable.

Insofar as the word “controversy” mandates an adversarial dispute between two or more parties, as we have argued that it does, any settlement class alleging only violation of state law contravenes the plain meaning of Article III.¹⁵⁹ The only conceivable jurisdictional basis for such suits is the diversity clause, which extends federal judicial power solely to such “controversies.” Parties to the settlement class are definitionally nonadverse.¹⁶⁰ At the time of class certification—the point at which the class action proceeding commences as a distinct suit—they do not seek diverse outcomes, and thus do not present a live “dispute” to the court.¹⁶¹ Instead, prior to seeking certification and often even before filing a complaint with the court, the parties have agreed on terms of settlement, which usually consists of a privately ordered, quasi-administrative distribution scheme that distinguishes among claimants based on type and severity of injury. They then agree to seek—or at least not oppose—class certification, which, if granted, will have the effect of binding all absent class members to the private contract between named plaintiffs and the defendant. The district court is asked to certify the class if and only if it approves settlement; in other words, if the settlement agreement were to be rejected by the court, the class is not eligible to be litigated.

By way of analogy, imagine a case in which, prior to the filing of litigation, opposing parties negotiate a contractual agreement. At that point, they file suit, seeking a judicial declaration that their agreement is valid. It is inconceivable that a federal court would deem this a constitutionally valid adversarial suit. Yet the situation is directly analogous to the settlement class action.

The definition of “case” is arguably broader than that of “controversy,” and one might contend that, where jurisdiction is premised on a federal question, the nonadverseness of the parties to a settlement class, at least from the textualist perspective, is immaterial. However, even if it were true that the word “case” permits nonadversarial adjudication, it would only mean that settlement classes arising under federal law—which are relatively few and far between—are constitutional. Settlement classes premised on diversity jurisdiction—the large majority of settlement classes heard in federal court—would still be

beyond the court's Article III authority. Moreover, no federal court has ever suggested that the "case" requirement permits nonadversarial suits, nor would such a position be defensible. History, Framers' intent, and the Court's jurisprudence all support reading the terms "case" and "controversy" synonymously, to require adverseness in diversity and federal question suits alike.

One might argue that if the settlement class's nonadverseness violates Article III's textual dictates, the same must also be true of both the traditional, nonclass settlement and the postcertification class settlement. There are, however, critical distinctions between these three types of settlements based on the timing and nature of their pretrial resolution. In *U.S. Bancorp Mortgage Co v Bonner Mall Partnership*,¹⁶² the Supreme Court addressed the scope of federal jurisdiction after a suit is rendered nonjusticiable by a consensual settlement. There, after bankruptcy and district court proceedings disputing the terms of a reorganization plan and after the Supreme Court had granted certiorari, the parties reached agreement on the key elements of the plan. The Court noted that, as a general matter, parties to a case are free to settle at any time before or after they file a complaint with the court. However, freedom to settle does not mean that there still exists a justiciable, adversarial dispute postsettlement. For example, this case, given the resolution of all underlying claims on appeal, lacked a requisite dispute, barring Article III consideration of the suit's merits. Nevertheless, the Court could "make such disposition of the whole case as justice may require,"¹⁶³ including the use of any judicial practice "'reasonably ancillary to the primary, dispute-deciding function' of the federal courts."¹⁶⁴

In traditional, nonclass litigation, the Bancorp rule provides the court the requisite authority to dismiss the suit with or without prejudice when the parties settle. Although the act of dismissal is, per se, an exercise of the court's Article III authority in the absence of a continuing adversarial dispute, it is appropriately viewed, in a commonsense manner, as incidental to the underlying adversarial presettlement proceedings. Similarly, a court's ability to enter a consent decree that resolves previously adversarial litigation is appropriately viewed as ancillary to the adjudicatory process. In contrast, the settlement class requires the court to act beyond the scope of its Bancorp authority. Where the settlement, request for certification, and complaint are all filed at the same time, there is no in-court adversary proceeding to which the settlement can be deemed ancillary. From the minute that the parties file with the court, they seek the same outcome. The court is never privy to competitive adversarial proceedings, distinguishing settlement-only certification from the court's "primary, dispute-deciding" responsibilities discussed in Bancorp.

A settlement class where the request for settlement is filed after the original complaint but at the same time as the request for certification is similarly illegitimate. The court's decision of whether to certify a class cannot be considered "reasonably ancillary" to an underlying adversarial case. The certification request marks a "new case" with new parties, not previously before the court. When the complaint is filed, and up until the point of certification, the court has legal authority over only the named parties to the suit—the individuals named in the complaint itself. All precertification proceedings bind only those individuals.¹⁶⁵ Certification, on the other hand, marks the exercise of a broader judicial authority; the court gains jurisdiction over all absent class members, who were not privy to the original adversarial proceeding.

In comparison, judicial dismissal following a class settlement, where settlement is reached after the court grants class certification, is a constitutionally legitimate exercise of judicial authority.¹⁶⁶ First, the suit is adversarial both when filed and certified, and therefore constitutes a valid "case" or "controversy." The same reasoning would seem to apply to the required judicial approval of a postcertification settlement of an adversarial class action. Even though the court must conduct a [Rule 23\(e\)](#) fairness hearing after the parties have agreed on the desired outcome of the case,¹⁶⁷ this fairness inquiry—and the accompanying dismissal of the case—can reasonably be viewed as ancillary to the resolution of the adverse dispute in the very sense contemplated in Bancorp.

The Fifth Circuit has reasoned that because the parties to a settlement class occupied "adversarial positions before settlement negotiations" concluded, and would return to such positions "if the settlement is not approved," the use of the settlement class device in the case did not violate the textual dictate of Article III, but rather resolved a "truly" adversarial dispute.¹⁶⁸ This argument misinterprets the limits on judicial authority set forth by the case-or-controversy requirement. The text of Article III imposes a categorical limit on the court's jurisdiction, mandating that there be a live, adversarial dispute between plaintiff and defendant at the time they request judicial intervention,¹⁶⁹ as well as at all times during the suit.¹⁷⁰ This line is

rooted in the Court's application of Article III's mootness doctrine in the context of the adverseness requirement. There are a number of cases in which the Court has dismissed a suit as nonadversarial due to settlement while appeal was pending.¹⁷¹ If the Fifth Circuit were correct, it would be impossible to determine at exactly what point prior to suit the parties would need to be adverse. One year? Five years? One need only recall our hypothetical about the parties who have settled their differences by entering into a contract, and then sue in federal court for a declaration of the contract's validity. Clearly, there would be no Article III jurisdiction, because the parties are not adverse—at the very least—at the time of suit. Yet under the Fifth Circuit's approach, presumably Article III jurisdiction would exist in this hypothetical, because at some point prior to their request for judicial intervention the parties were truly adverse. Such a conclusion, however, would be unambiguously incorrect under established Article III jurisprudence. The settlement class action is no different: at the time the class proceeding is brought, adverseness is completely absent.

B. The Settlement Class and the Purpose of the Adverseness Requirement

The plain meaning of Article III, supported by the Court's case-or-controversy jurisprudence, conclusively establishes the inherent unconstitutionality of the settlement class. One need look no further than these sources to demonstrate the fatal constitutional flaw in certification of a class for settlement only, given that the parties no longer seek diverse outcomes. However, to shed light on the values underlying the adverseness requirement, as well as to demonstrate the harm in permitting the settlement class to operate unobstructed within an adversary system, we move beyond these arguments. The settlement class practice undermines the values fostered by the adverseness requirement, including the private interest in protecting the individual litigant and the public interest in maintaining constitutional qualifications on the federal judiciary.

An exploration of the effect of the settlement class on the purposes served by adverseness yields three specific conclusions. First, on a private level, the settlement class threatens the interests of absent class members by binding absent class members to a judgment rendered without the protections and incentives that traditionally accompany an adversarial suit. Second, on a public level, the settlement class seriously threatens achievement of legislative goals in choosing a private remedy as an enforcement mechanism. The legislative selection of a private remedy is premised on the assumption that the availability of private damages will incentivize the private individual to act as a quasi-private attorney general, who, in the course of obtaining compensation for her injuries, simultaneously furthers the law's public goals by punishing and deterring civil wrongdoing. The settlement class, given its nonadverseness, disrupts the background assumptions against which this selection was made, including the supposition that private plaintiffs who seek to enforce the law will be motivated by the natural competition-driven incentives that accompany an adversary system. Lastly, due to its quasi-administrative nature, the settlement class involves the federal court in the performance of the task of an executive commissioner—that of distributing private resources in the absence of a live adversarial dispute between two parties. Judicial exercise of this exclusively executive power not only threatens the constitutional separation of powers, but demeans the judiciary by jeopardizing its integrity.

1. Private concerns: the settlement class and the litigant-oriented interest in adverseness.

A typical class action is legitimate because the interests of the plaintiff and defendant are adverse. In that scenario, the monetary interests of class counsel, which are contingent on class recovery, are aligned with the absent class members' interest in maximum redress, incentivizing a presentation of the issues that benefits both similarly. These incentives break down in the context of the nonadversarial settlement class. Because class counsel seeks the same outcome as the defendant, she has no reason to formulate her clients' arguments or to destroy her opponent's case. Particularly, she lacks incentive to present to the court evidence that may shed unfavorable light upon the nonadversarial agreement, even though that evidence may reveal critical details about the effect of the settlement on absent class members.

Most courts and commentators have viewed this breakdown in incentives as solely a subconstitutional problem, looking at it through the lens of the [Rule 23\(a\)\(4\)](#) adequacy of representation requirement. We take the argument one step further, conceptualizing the link between the settlement class, the constitutional requirements of Article III, and the broader goals of

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the adversary system. Specifically, we employ the settlement class to demonstrate the importance of the prophylactic nature of Article III's ban on nonadversarial litigation. Although the adequacy of representation inquiry, as well as other [Rule 23](#) requirements, offers protection to litigants on a case-by-case basis, it is far more vulnerable to mistakes than is a categorical, ex ante rule that nonadversarial suits are nonjusticiable.

a) The settlement class, adversary protections, and evidence production. The parties to a settlement class agree, before requesting class certification, on the desired outcome of the suit. They no longer seek diverse outcomes, and thus do not—and in fact, have a disincentive to—dispute the satisfaction of [Rule 23](#)'s certification requirements or the fairness of settlement and compensation terms. Two interrelated factors explain the disincentive to create a concrete record for the court's appraisal: the jointly held intent to bind absent class members; and the resultant lack of an economic or structural incentive to present the court with information that would jeopardize court approval of the precertification settlement. First, the sole motive of class and defense counsel in bringing to the court their settlement agreement, negotiated privately, is to bind the interests of absent class members.¹⁷² If this were not so, counsel would presumably draft a private contract, enforceable under state law, embodying the terms of their agreement. By instead filing a request for certification with the court, these parties have decided that their private agreement, standing alone, is insufficient to meet their needs. Instead, the negotiating parties, by seeking class certification for settlement only, request the court's assistance in affecting the rights of third parties, over whom the negotiating parties otherwise have no control. The rationales are two-fold. For the defendant, binding absent class members to the settlement is necessary to protect it against the threat of future individual litigation, which is likely to be costly in terms of both time and money. For class counsel, the circumstances surrounding the creation of a settlement class are full of temptations that conflict with the interests of absent class members. Because of market competition for position as class counsel and other countervailing interests such as the settlement of pending nonclass suits against the defendant, class counsel has a pressing interest in certification, as well as in excluding the voice of other participants—objectors and absent class members alike—who may discourage settlement approval.¹⁷³

Accompanying the incentive to bind the rights of absent class members is a disincentive to protect their interests—a fact that holds particular import where the judiciary is structurally passive. In a traditional case, the parties have a natural incentive to produce evidence in favor of their adverse positions, thus providing the court with a well-balanced view of the issues in the case. In the settlement class, however, not only do the named plaintiffs and defendants lack motivation to produce a well-balanced record to assist judicial decisionmaking, they actually have a disincentive to produce such evidence, given that it would disrupt the accomplishment of their jointly sought goal: to effectuate the terms of the settlement agreement by way of class certification. Instead, they only present to the court information supporting approval of the desired outcome, resulting in an acute information deficit.¹⁷⁴

It may be true that, in any given case, some absent class members would support the terms of settlement. However, there is no way to make this determination in the individual case. Nonadverseness is a structural deficiency that affects the inner working of representative litigation in an adversary system: when they are nonadverse, the in-court representatives lack any motivation to determine whether it is, in fact, true that the suit satisfies the requirements of [Rule 23](#). The implications are two-fold. First, an incomplete record can have a detrimental effect on the class certification process. In *In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation*,¹⁷⁵ the Third Circuit explained that in the settlement class, “the issue of certification is never actively contested.”¹⁷⁶ As a result, “the judge never receives the benefit of the adversarial process that provides the information needed to review propriety of the class and the adequacy of settlement.”¹⁷⁷ Second, the information deficit can influence settlement approval. Because there is not a “fully developed evidentiary record,” the court “is incapable of making the independent assessment of the facts and law required in the adjudicatory context,”¹⁷⁸ including whether the settlement fairly reflects the value of class claims.

One could argue that the litigant-oriented harms that flow from the settlement class also plague the postcertification class settlement, given that in both scenarios, the parties are nonadversarial at the time that the court conducts the [Rule 23\(e\)](#) fairness hearing. Postcertification nonadverseness, the argument might proceed, limits the court's access to necessary information about the fairness of settlement, in much the same way that precertification nonadverseness affects the certification and settlement approval process. The postcertification class settlement, however, is far less susceptible to the problems recognized by the Brillmayer representation model. First, unlike the settlement class, the interests of class counsel in

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a postcertification settlement are not dependant on binding the rights of third parties to a private agreement negotiated in their absence. Class counsel in a postcertification settlement need not compete with other attorneys for the right to file the class,¹⁷⁹ and the definition of the class has been already drawn so that she cannot trade the class's claims for those of her inventory clients.¹⁸⁰ Thus, class counsel's interests closely resemble those of the traditional attorney—for example, maximum attorney's fees. These fees are contingent on class recovery, producing an incidental incentive to advance the interest of absent class members in securing a favorable judgment and maximum redress.

Second, postcertification settlement terms are more likely to reflect a fair value of the class's claims than are precertification settlement terms. Due to the ubiquitous risk that she will lose her bid as class counsel, the plaintiffs' attorney in precertification negotiations enjoys minimal bargaining power, therefore making it less likely that she will be able to secure for the class a fair value for members' claims.¹⁸¹ In contrast, in settlement negotiations involving a class that has already been certified for litigation, power is distributed relatively equally among the parties. Because the class has already been approved for trial, class counsel will always have the option to walk away from negotiations and threaten to litigate. This option increases the probability that settlement terms are the result of fair negotiation and economics,¹⁸² rather than a one-sided power struggle.

Third, the postcertification settlement is consistent with the prophylactic rule that only when structural adversarial incentives are present is a suit justiciable. Not only does class counsel enjoy an adversarial relationship with the defendant at the time that she files the class complaint, but adverseness defines the relationship between the plaintiff and defendant throughout the process of certification. Specifically, in a postcertification settlement, by the time that the suit becomes nonadversarial, the court will have already held full hearings on whether the class definition and the quality of class representation satisfy applicable [Rule 23\(a\) and \(b\)](#) requirements. Because the parties have not yet consented to settle, and the defendant has no guarantee that settlement will be reached before trial, it is in the defendant's best interests to challenge fulfillment of certification requirements.¹⁸³ This adversarial dispute gives the court in a postcertification class the benefit of the parties' time and resources on the question of whether the class and its representatives will fulfill the needs of absent class members,¹⁸⁴ a benefit that the settlement class court does not enjoy.¹⁸⁵

One could argue that the court can counteract the information deficit that flows from precertification settlement by encouraging objectors.¹⁸⁶ However, as one recent study found, “[a]ttempts to intervene in cases filed as class actions occurred relatively infrequently.”¹⁸⁷ This may be because conditions unique to the settlement class discourage objectors, by making it difficult to file and defend opposition motions:

Objectors are often required to file their opposition motions before class counsel and defendants file their motions in support of settlement. This timing, combined with the limits on objector discovery, leaves objectors at a disadvantage because they must develop their objections without the information possessed by class counsel and defendants.¹⁸⁸

b) The settlement class and the passive judiciary. The lack of litigant adverseness has a significant impact on the court's traditional role in resolving private disputes. In light of the party disincentive to produce evidence challenging the accuracy of certification, the court has two options. First, it could engage in independent factual investigation, without the benefit of an adversarial presentation of the issues, to inform itself of the correctness of certification. Second, the court could approve the settlement class despite the information deficit, absent independent investigation. Under this alternative, fairness hearings often last less than a day, without either expert testimony or the opportunity for cross-examination.¹⁸⁹ This alternative, and judicial passivity in the context of the nonadversarial settlement class generally, threatens the very core of a liberal democratic system. In representative litigation, the absent class member depends on three actors to guard her interests: class counsel, the named plaintiff, and the court, as a type of guardian ad litem. The protection offered by the first two actors is neutralized by the suit's nonadverseness. Class counsel, in deciding to seek the same outcome as the opposing party, loses the natural incentive to advance the interests of absent parties. And the named plaintiff has no real influence in a settlement class, given that he is usually, if not always, named at the time of filing, after a settlement agreement is reached.¹⁹⁰ The only actor remaining is the district judge, who, if satisfied to clear the court's dockets and approve the settlement regardless of its impact on the interests of absent class members and its legitimacy under the certification requirements, breaches her

obligation to persons bound by the court's judgment.

2. The settlement class, the prophylactic adverseness requirement, and alternative safeguards.

Both courts and scholars have argued that a number of individualized safeguards—including Rule 23's requirements governing class certification and settlement approval—are capable of protecting the interests of absent class members in a settlement class. Although this may be true in the typical class action, the lack of adversarial litigation in the fulfillment of governing requirements neutralizes the effectiveness of Rule 23's safeguards in the context of the settlement class.

a) **Rule 23(a)(4)**: adequacy of representation. A number of courts have held that the **Rule 23(a)(4)** adequacy of representation inquiry effectively protects the interests of absent class members.¹⁹¹ This view is misguided in the context of the nonadversarial settlement class. Even if Rule 23's adequacy requirement were, in the abstract, sufficient to protect the interests of absent class members, the settlement class threatens the conditions upon which this procedural safeguard relies. In contrast to the postcertification settlement, where the court enjoys the benefit of adversarial litigation on the satisfaction of Rule 23's certification requirements, the settlement class removes the adversarial context of Rule 23's operation. Given that they seek the same outcome—class certification and settlement approval—neither the plaintiff nor the defendant has incentive to provide the court with evidence challenging the adequacy finding or revealing a conflict of interest between the class members and their attorney. Additionally, without the benefit of an adversarial presentation of the issues, the court is ill-equipped to engage in independent factual investigation of (a)(4) issues, hindering its ability to protect the interests of absent class members.

Moreover, what exactly **Rule 23(a)(4)** requires of the class representative is unclear, making impossible a conclusion concerning the abstract effectiveness of the adequacy inquiry. There are currently three distinct approaches to (a)(4) adequacy in the context of the settlement class.¹⁹² A first group of courts employs the “collusion approach,” looking at whether the representative “failed to prosecute the class action with due diligence and reasonable prudence” and whether the “opposing party was on notice of facts making that failure apparent.”¹⁹³ A second group uses the “fairness” of settlement as a proxy to assess adequacy of representation.¹⁹⁴ A third group analyzes typicality, asking whether “the named representative” has “common interests with unnamed members of the class.”¹⁹⁵

In contrast to (a)(4), the adverseness required by Article III constitutes an ex ante categorical determination that the absence of adverseness, in and of itself, constitutes unconstitutional collusion. In this context, it matters not at all whether the collusion is secret, as it was in most of the Supreme Court decisions applying the adverseness requirement,¹⁹⁶ or totally open, as it is in the settlement class action. Nor does it matter whether or not the court has been able to find anything improper in the specific case before it. As is the case for all ex ante categorical rules, Article III's adverseness requirement is designed to turn not on whether a showing of impropriety has been made in the specific case, but rather automatically equates failure to satisfy the requirement of the categorical rule with a finding of impropriety. This is due to the fact that the Constitution employs categorical rules in a prophylactic manner: because we are not willing to take the risk that a more individualized inquiry will fail to unearth hidden impropriety in a specific litigation, we make the ex ante choice to risk overprotection rather than underprotection. Thus, a categorical rule necessarily assumes the possibility that cases will arise in which no real danger to absent parties exists, even in the absence of litigant adverseness.

The difference between the operation of a categorical rule and an individualized inquiry is similar in many respects to the difference between a “stop” sign and a “yield” sign. Although the latter requires a driver to come to a full stop only if traffic requires, the former demands a full stop, no matter what traffic conditions are. Thus, it will be little defense to a ticket for failing to stop at a stop sign to argue that there was, at the time, no need to stop because there was no cross traffic. Stop signs are placed in locations where authorities have concluded that the dangers of undetection in the individual case are so great as to justify overprotection—that is, a requirement that cars come to a full stop when in reality there is no need to do so—rather than risk the disaster of underprotection.

Much like the stop sign, Article III's adverseness prerequisite imposes a rigid requirement that the parties to a federal

litigation be truly adverse at all times, until the case is resolved one way or another. Both due process and [Rule 23\(a\)\(4\)](#)'s adequacy requirement, in contrast, involve exclusively a far more individualized inquiry. This does not mean that either due process or (a)(4) is superfluous. Both may perform an extremely important individualized inquiry to protect absent class members, once a finding of adverseness has been made. But surely, neither inquiry can—even in the abstract—perform the salutary protective function performed by Article III's adverseness requirement.

b) [Rule 23\(e\)](#): the fairness inquiry. It also has been suggested that the [Rule 23\(e\)](#) fairness hearing sufficiently protects absent class members from unfair preclusion.¹⁹⁷ Under that provision, the court is intended to function as a type of fiduciary, conducting discovery on the terms of settlement and the content of settlement negotiations.¹⁹⁸ The information deficit that inherently plagues this process, however, renders it a questionable means of policing the settlement class. First, at the point of settlement the parties themselves lack any incentive to produce information supporting a finding that the settlement is inadequate. Second, the court lacks the requisite resources or training to unearth such information on its own, especially in a scenario where the parties have an active incentive to shield this information from discovery. Without access to information about the class, the formation of the settlement, and the conditions that may have led to a reverse auction or inventory settlement, the judge cannot “effectively monitor for collusion, individual settlements, buy-offs and other abuses.”¹⁹⁹ Finally, while there always exists the possibility that members of the absent class will object to the fairness of the settlement, the inertia and transaction costs inherent in this process render this, too, an unreliable means of policing.

It is true that, at least to a certain extent, the very same problems plague the [Rule 23\(e\)](#) fairness hearing held following settlement of a traditionally litigated class. But, once again, for a number of reasons the dangers of abuse are far greater in the settlement class. First, as previously noted, the settlement of a litigated class occurs only after the court has had the benefit of an adversarial dispute concerning the merits of certification. This is by no means merely a technical difference. When the defendants have the incentive to challenge certification, we may assume that the class representatives who participate in the settlement process are truly adequate champions on behalf of absent class members. This is not true of the settlement class. Second, where settlement occurs following certification, class representatives are necessarily in a far better bargaining position than in the case of the settlement class, where the threat of actual litigation if the settlement process fails is far more theoretical than real. Finally, because many plaintiffs' attorneys enter into settlement class actions with the incentive of disposing of inventory claims and because the process is often plagued by the problem of the reverse auction, the dangers of a court approving an unfair settlement are far greater in the case of a settlement class than in approval of a settlement of a litigated class action.

c) [Rule 23\(c\)\(2\)](#): the opt-out right. In recognition of the potential problems posed by class-wide resolution of an individual's claims, [Rule 23\(c\)\(2\)](#) provides absent class members in a (b)(3) class the right to “opt out” of, or exclude themselves from, the class. One could argue that the availability of this opportunity ensures that no individual will be bound to a settlement agreement, whether pre- or postcertification, absent her consent. If the absent class member removes herself from the class, the argument goes, she will be neither bound by *res judicata* because she is not part of the class, nor by *stare decisis* because the settlement has no precedential effect. In contrast, the failure to opt out constitutes assent to be represented by a third party in a nonadversarial setting.²⁰⁰

There are a number of problems with reliance on an opt-out right to remedy the litigant-based harms of the settlement class. First and foremost, even if the failure to opt out does constitute consent to inadequate recovery, it does not constitute consent to nonadversarial dispute resolution. The decision to opt out is made against the background assumption of an adversary system, which includes the presupposition that the claim was resolved in a traditional adversary context and that the class representative had the incentive to advance the rights of absent class members. The absent class member faced with the decision of whether to opt out of a settlement class is not told that her advocate did not act within the confines of the traditional adversary system and had no incentive to present the court with sufficient information from which to assess whether the compensation promised each class member under the settlement was fair. These factors render the opt-out decision in a settlement class inherently uninformed.

Second, the opt-out device suffers from numerous procedural flaws. As a general matter, “inertia, the complexity of class notices, and the widespread fear of any entanglement with legal proceedings” renders notice and opt-out ineffective in many

cases.²⁰¹ Although these problems plague both the settlement class and the postcertification class settlement, the latter contains a structural safeguard absent in the former scenario—the newly amended [Rule 23\(e\)\(3\)](#).²⁰² The amendment provides that when settlement occurs after certification, the court must issue two separate notices: one at the time of certification; one at the time of settlement. This additional opt-out opportunity significantly increases the effectiveness of the right to opt out. The amended [Rule 23\(e\)\(3\)](#), according to the Advisory Committee, “reflects concern that inertia and a lack of understanding may cause many class members to ignore the original exclusion opportunity,” while the second notice, “identify[ing] [] proposed binding settlement terms[,] may encourage a more thoughtful response.”²⁰³

Third, simultaneous notice of certification and settlement often skews the opt-out calculus. The settlement offer holds significant persuasive power, regardless of whether it represents a fair value of the class claims, therefore deterring opt-out:

[E]ven if [absent class members] have enough information to conclude the settlement is insufficient the mere presentation of the settlement notice with the class notice may pressure even skeptical class members to accept the settlement out of the belief that, unless they are willing to litigate their claims individually—often economically infeasible—they really have no choice.²⁰⁴

3. Public concerns: the settlement class and the systemic interest in adverseness.

Most cases involving the judiciary’s interference with one of its coequal branches consist of situations in which the court makes law or declares a statute unconstitutional absent a justiciable controversy.²⁰⁵ The settlement class does neither of these things. Unlike *Muskraat*, where the parties asked the Court to find a legislative compensation scheme unconstitutional in the absence of an adversarial dispute, and *Johnson*, where the parties sought an advisory opinion on the constitutionality of portions of the Emergency Price Control Act, the parties to a settlement class do not request that the court assess either the constitutionality or legitimacy of congressional action. In fact, from a legal perspective the settlement class is inherently nonsubstantive. It is concerned not at all with the interpretation of underlying substantive law; the rights of absent class members are resolved without legal exposition. Instead, the settlement class court oversteps its Article III authority far more subtly: first, by altering the adversarial context in which the legislature assumed the underlying substantive law was to be enforced; and second, by effectively assuming the role of an executive commissioner, who is responsible for the distribution of funds in the absence of an adversarial case or controversy.

a) The hybrid model: the settlement class, nonadversarial litigation, and underlying public goals. Even though the settlement class does not require the court to issue an advisory opinion or expound upon the state of the law, it nevertheless represents a substantial intrusion into the inner workings of the state or federal legislative branches that fashion underlying substantive law. In a suit for damages, where substantive law specifies enforcement by way of a private remedy, the underlying goal is to provide a mechanism by which to simultaneously compensate victims and punish wrongdoers. The decision to place responsibility for statutory enforcement in the hands of victims and their private attorneys is wholly dependent on the assumption that these individuals will have the necessary tools and incentives to prosecute their claims vigorously. When two parties seek divergent outcomes, the individual plaintiff is presumed to possess a competitive interest in developing her own case, and presenting facts to the court that shed favorable light on her position. Congress must be deemed to presume the existence and effectiveness of this typical adversarial arrangement when empowering the victim to make use of the legal system to enforce the proscriptions contained in the underlying statute.²⁰⁶

The conditions upon which the legislative selection of a private remedy is based break down in the context of the settlement class. In a nonadversarial suit, the plaintiffs’ attorney lacks the incentive to be a champion for the victims’ cause or to facilitate accurate judicial decisionmaking through the creation of a balanced record. By altering the context in which the statute was intended to be enforced, the settlement class functionally “transforms that [underlying] private remedial model into a qualitatively different form of remedy that was never part of that substantive law.”²⁰⁷

It might be argued that the settlement class action actually furthers underlying legislative policies. Absent the settlement class, the argument proceeds, it would often be impossible to attain legislative goals. In many instances, it might be thought,

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the class could not satisfy traditional [Rule 23](#) certification criteria, and individual claims are often so small as to make individual suit infeasible. Thus, without the settlement class action, there would be no enforcement at all of substantive policies.

Though perhaps superficially appealing, this reasoning must ultimately be rejected. Initially, to the extent that resort to the settlement class device effectively circumvents the certification criteria of [Rule 23](#), it is nothing more than a cynical and lawless perversion of the Rule. Moreover, it is by no means clear that a truly adversary class could not, in many instances, satisfy accepted certification criteria, yet use of the settlement class precludes the bringing of such an action by attorneys and named plaintiffs who are actually adverse to the defendants. Nor will it always be clear—particularly in mass tort contexts—that individual suits would be financially infeasible. Finally, to the extent private enforcement of legislative policies is infeasible, the legislature should be made aware of that fact so that it may consider alternative enforcement mechanisms, such as the use of criminal penalties or administrative regulation.

b) The administrative compensation model: the nonadversarial settlement class as an exercise of executive authority. The distinction between the activities of the judicial and executive branches has become increasingly blurry in recent decades, given the overlapping responsibilities of the judiciary and non-Article III agencies that exercise adjudicatory power. Nevertheless, one model comprehensively explains the constitutional division between the tasks performed by an Article III court and those reserved for administrative agencies within the executive branch: the Article III adverseness requirement. While existence of an adversarial dispute between litigants may not constitute a sufficient condition for the exercise of judicial authority over an issue, it is always a necessary condition. The judiciary has no authority, under any circumstance, over the distribution of resources in a purely nonadversarial context. Thus, if and when the court assumes jurisdiction over such claims, it performs a function expressly reserved for executive agencies, in violation of separation of powers dictates.

The settlement class is a paradigmatic example of such a scenario. The settlement class court functions as a type of administrative “commissioner,” under the guise of Article III adjudication. Insofar as the settlement class court assumes an active or supervisory role in the postcertification, postsettlement formulation of distribution and compensation procedures,²⁰⁸ it performs the executive tasks of “adjust[ing] [private] claims,” in the absence of an adversarial relationship between two parties.²⁰⁹ The nonadverseness of the parties to the settlement class thus strips the Article III court of its traditionally umpireal role. It is true that the court in the settlement class neither makes substantive policy decisions nor issues binding legal holdings, but instead merely serves as a legal conduit for private ordering by self-interested parties. This fact, however, makes the settlement class court function more, rather than less, like an executive commissioner. The settlement class court does not receive evidence, engage in legal exposition, or supervise adversarial litigation on the substantive requirements of the underlying law. Rather, it is left to perform nothing more than a wholly nonjudicial, administrative function—that of making distributive arrangements, and in some circumstances, actually issuing individual compensation decisions pursuant to the nonadversarial scheme.

The same is not true of the postcertification class settlement, despite the fact that the parties are nonadversarial at the time that the [Rule 23\(e\)](#) fairness hearing is conducted. In a settlement of a traditional class action, the suit is adversarial up to the point of settlement. When the suit settles, it does so after certification, such that the court already has jurisdiction over all absent class members. Given the underlying legitimacy of the class proceedings presettlement, judicial approval of the settlement is merely ancillary to resolution of an adversarial proceeding,²¹⁰ and thus falls on the judicial side of the judicial-executive divide.²¹¹

Judicial exercise of this type of executive function has a number of implications. First and foremost, it invades a sphere constitutionally reserved for the executive branch. Performance of executive tasks and utilization of executive weapons are textually reserved for the executive branch, regardless of whether those tools currently lay dormant. Insofar as “the Article II Vesting Clause designates, identifies, and describes the President as the only proper recipient of executive power,”²¹² judicial cognizance of a settlement class violates the constitutionally mandated separation of powers. Moreover, the case-or-controversy requirement of Article III expressly limits the scope of the judiciary’s adjudicatory function, implicitly leaving suits that do not qualify as “cases” or “controversies”—including nonadversarial dispute resolution—for the court’s coequal branches.²¹³

On a normative level, judicial exercise of an executive function is similarly unacceptable. Unlike an executive agency, which is subject to both congressional and executive supervision, judicial distribution of resources absent an adversarial case or controversy suffers from a lack of oversight or accountability—checks that are necessary to control the unfettered exercise of administrative authority.²¹⁴ Additionally, given the judiciary's lack of inquisitorial resources or training, judicial exercise of an executive function is likely to be inefficient and ineffective.²¹⁵

To aggravate matters, the settlement class action gives to the federal court the worst of both worlds. Unlike a court adjudicating an adversarial dispute, the settlement class action court receives no adversarial argument or evidence from the parties. But unlike an executive agency, the court lacks both the formal tools to unilaterally seek out relevant argument and evidence, as well as executive or legislative oversight.

V. The Incompatibility between Pragmatic Balancing and Article III's Adverseness Requirement

The preceding discussions demonstrate that the settlement class is unambiguously inconsistent with both the textual directive of Article III and the protective functions performed by Article III's adverseness requirement. Several scholars and members of the judiciary, however, have advocated use of a balancing approach to justify the settlement class under Article III. This approach contrasts the litigant-oriented benefits of the settlement class with its detrimental effects in order to determine the practice's constitutionality. This balancing test could assume one of two forms. First, one could argue that the court should weigh the benefits of imposing the Article III adverseness requirement, including the private values served by adverseness under the Brilmayer representation model, against a competing social concern, such as the public value in clearing crowded court dockets of mass tort claims and assuring that individual claimants receive some compensation for their injuries. Second, with respect to the public purposes of the adverseness requirement, one could argue that the court should invalidate judicial exercises of nonjudicial authority only when as a result the court unduly aggrandizes its power, at the expense of another branch.

These two versions of the balancing test have in common resort to a case-by-case, entirely pragmatic approach to the question of adverseness. Instead of viewing adverseness as a categorical qualification on the judicial power, it would provide the court the authority, in the individual case, to assess the costs and benefits of assuming jurisdiction of a settlement class. Such an approach is not only contrary to the textual dictate of Article III, but it also seriously frustrates achievement of the purposes served by litigant adverseness in the first place, including the protection of absent but bound individuals and the preservation of a constitutional constraint on the judiciary, in relation to its coequal branches.

A. Balancing of Private Harms

Several courts and scholars have noted that the settlement class provides a unique method by which to compensate victims en masse and clear court dockets of millions of individual suits. For example, Justice Breyer, dissenting in *Amchem*, deemed it relevant that:

[t]he District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses [I]t suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects.²¹⁶

Justice Breyer would require that in each case, the court analyze whether the pragmatic interests served by the settlement class—whether those benefits flow to the plaintiff, the defendant, or the court—are sufficient to waive the limits imposed by Article III on the court's authority.

Not only is such an analysis entirely subjective and therefore hopelessly unpredictable,²¹⁷ but purely as a textual matter, it fails to comport with Article III's case-or-controversy requirement. The plain meaning of the terms "case" and "controversy" in Article III permits no compromise based on the costs and benefits of requiring litigant adverseness.²¹⁸ The Court has long held that the constitutional requirements embodied in Article III, including the adverseness requirement, in the words of one scholar, "state[] a limitation on judicial power, not merely a factor to be balanced."²¹⁹ This choice between the case-or-controversy requirement as a prophylactic versus individualized rule has been made long since, in favor of the former. As the Court has explained:

Article III is not merely a troublesome hurdle to be overcome . . . it is a part of the basic charter promulgated by the Framers.

. . .

Implicit in the [respondent's position] is the philosophy that "cases and controversies" are at best merely convenient vehicles . . . and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme.²²⁰

Even if a balancing test were assumed to be a proper means by which to approach Article III, Justice Breyer's praise of the settlement class's ability to "make more money available for plaintiffs" and reduce transaction costs appears shortsighted when the practice is viewed in light of the litigant-oriented goals of the adverseness requirement. The pragmatic harms that are likely to result to the individual litigant from a nonadversarial case far outweigh its benefits. No litigant in a settlement class, given the class counsel's lack of adversarial incentives to advance the interests of absent class members, can be guaranteed that his recovery will be fair or adequate. In fact, in some cases, class members may receive far below market rate—if anything—for their claims, calling into question the accuracy of Justice Breyer's analysis. If it is truly the case that, absent a settlement class, victims will be unable to recover for cognizable harm, the option of replacing adjudication with an alternative scheme of administrative resolution is open to the relevant legislative body.

B. Balancing of Public Harms

Justice Breyer's discussion of the settlement class parallels the "functionalist" approach taken by the Court in a number of recent separation of powers cases. For example, in *Morrison, Commodity Futures Trading Commission v Schor*,²²¹ and *Mistretta*, the Court "winked at task commingling among institutions not because task divisions do not constitutionally exist, or do not constitutionally matter, but because [it] concluded that the commingling serves the goal of good government more than it undermines the goal of precise task-assignment."²²²

Under these precedents,²²³ even though the judicial activity in question—like the settlement class—violated Article III, it was found not sufficient to threaten the essential functions of the judiciary's coequal branches. Instead, the Court will "invalidate only those overlaps of authority which either undermine one branch's successful performance of its essential function or accrete too much power to one of the branches."²²⁴ In the context of the settlement class, the argument might go, neither the hybrid nor the administrative compensation model poses a sufficient threat to the inner workings of the legislative or executive branches as to outweigh the benefits promised by settlement-only certification.

Use of a functionalist approach in dealing with the public harms posed by the settlement class is seriously flawed. First, it undermines the Constitution's fundamental goal in imposing a system of separation of powers. As one of us has argued, "Madison described the very accumulation of all power in the hands of one body or individual as the essence of tyranny."²²⁵ In his view, "'tyranny' is not limited to the misuse of [another branch's] power, or even to its exercise. [] [I]t is the very fact of its accumulation that [he] equated with tyranny."²²⁶ As a result, the Framers chose not to define "case" or "controversy" by the functional impact of judicial activity on the operations of other departments or by reference to a balancing test. Rather, the case-or-controversy language itself was their determination of how far the judicial branch could insert itself into the actions and policies of the other branches. On their view, as evidenced by their definition of "judicial power" in Article III,

the vesting of any legislative or executive authority in the judicial branch unduly accretes power to the judiciary.

Second, a functionalist approach to Article III neglects the importance of viewing the adverseness requirement as an element of the proper separation of powers, as a prophylactic tool. As a general matter, the division of responsibility among branches is designed to “prevent[] a situation in which one branch [] acquire[s] a level of power sufficient to allow it to subvert popular sovereignty and individual liberty.”²²⁷ It is functionally impossible to determine precisely when the judicial exercise of a legislative or executive function has reached a “danger” point.²²⁸

Turning to the specific justifications for a prophylactic rule in the context of adverseness, the adverseness requirement creates the necessary conditions for accurate, passive judicial decisionmaking, in a context that gives proper respect for the assumptions of the legislature in enacting a private remedy to be enforced within an adversary system. One cannot evaluate the accomplishment of this two-fold purpose on a case-by-case, ex post basis, looking solely to whether the nonadversarial settlement class accretes undue legislative or executive power. The risks posed by the settlement class are incremental. Over time, the harms of the nonadversarial suit will accumulate, such that the court will be permitted to openly perform the executive function of distributing private resources outside the context of an adversarial case or controversy, and in direct contravention of legislative purpose in empowering the court to grant private relief. The adverseness requirement is necessarily devised to prevent such “damage to the political framework before the truly serious harm intended to be avoided can occur.”²²⁹

VI. Conclusion

The lower federal courts have willingly embraced the settlement class action practice for its ability to offer victims compensation and clear dockets en masse. In assuming jurisdiction over such suits, however, these courts have neglected their fundamental Article III obligation to hear only cases or controversies—an obligation rooted in the text, jurisprudence, and values served by the adverseness requirement. This Article has sought to critique current practice, by viewing it through the lens of a new articulation of the values underlying Article III’s adverseness requirement. Although a number of scholars have called for revisions in settlement class practice, none has recognized that the settlement class is based on fundamentally flawed constitutional foundations, a fact that becomes all too clear once one acknowledges the practice’s inherent nonadverseness. This recognition should, in turn, move us toward appreciation of the constitutional invalidity of precertification class settlement.

Footnotes

^{d1} Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law. The authors would like to thank Dennis Murashko of the Class of 2007 at Northwestern Law School for his valuable research assistance.

^{dd1} B.A. Northwestern University, 2001; J.D. Northwestern University, 2005; Law Clerk to the Honorable Kenneth Ripple, United States Court of Appeals, Seventh Circuit.

¹ See Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action 4-7* (Yale 1987) (giving an overview of the origins of class actions in medieval representative litigation). See also Harry Kalven, Jr., and Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U Chi L Rev 684, 721 (1941).

² 28 USC App (1934) (original version of [Rule 23](#), effective Sept 1, 1938).

³ 28 USC App (Supp V 1964) (1966 version of [Rule 23](#), effective July 1, 1966).

- ⁴ See, for example, Herbert B. Newberg and Alba Conte, [2 Newberg on Class Actions § 11.09 at 11-13 \(Shepard's/McGraw-Hill 3d ed 1992\)](#) (noting that the settlement class action offers substantial savings in litigation expenses to both plaintiffs and defendant). See also note 216 and accompanying text.
- ⁵ See, for example, In re [The Prudential Insurance Co of America Sales Practices Litigation](#), 148 F3d 283, 289-90 (3d Cir 1998) (upholding a district court's certification of a settlement class of more than eight million policyholders in an insurance settlement); In re [Cincinnati Radiation Litigation](#), 1997 US Dist LEXIS 12960, *7-9 (SD Ohio) (denying certification of a settlement class because of a failure to meet the commonality requirement, but allowing the parties to renew their motion for certification); Howard Erichson, [Mass Tort Litigation and Inquisitorial Justice](#), 87 *Georgetown L J* 1983, 1999-2000 (1999) (discussing cases in which the settlement class action was praised as a "viable approach to resolving mass tort litigation"); Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 9*, 35 (Federal Judicial Center 1996) ("Willging study") (finding that, of the class actions studied, 39 percent were certified for settlement purposes only). See also Minutes, Advisory Committee on Civil Rules (Nov 9-10, 1995), online at <http://www.uscourts.gov/rules/Minutes/min-cv11.htm> (visited Mar 26, 2006) (summarizing the Willging study).
- ⁶ See [Amchem Products, Inc v Windsor](#), 521 US 591, 620 (1997) (holding that an absence of a trial excuses a district court from examining the manageability of a class, but necessitates "heightened" attention to the other specifications of [Rule 23](#)).
- ⁷ See, for example, In re [General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation](#), 55 F3d 768, 788 (3d Cir 1995) (citing the dangers of a "premature, even a collusive, settlement" when settlement is reached precertification, and noting that "[e]ven some courts successfully using these devices to achieve settlements apparently recognize these dangers since they certify these actions more cautiously than ordinary classes"); In re [Diet Drugs](#), 2000 US Dist LEXIS 12275, *136-37 (ED Pa) (discussing the incentive to reach "any settlement agreement," instead of "the best possible settlement," resulting from inventory settlements specifically); In re [Ford Motor Co Bronco II Products Liability Litigation](#), 1995 US Dist LEXIS 3507, *23 (ED La) (noting that the "non-existence of formal discovery" suggested a collusive settlement); [Bowling v Pfizer](#), 143 FRD 141, 152-55 (SD Ohio 1992). See also [FRCP 23\(a\)\(4\)](#) (requiring that the class representatives "fairly and adequately protect the interests of the class").
- ⁸ See Part II.B.2.
- ⁹ See Class Action Fairness Act, S 1751, 108th Cong, 1st Sess (Oct 17, 2003), in 149 Cong Rec S 12737 (Oct 16, 2003).
- ¹⁰ See [United States v Johnson](#), 319 US 302, 305 (1943) (per curiam) (holding that a court may dismiss a case when adversity is lacking); [Muskrat v United States](#), 219 US 346, 361 (1911) (holding that a lawsuit brought "to obtain a judicial declaration of the validity of the act of Congress" is not a case or controversy to which the judicial power alone extends).
- ¹¹ See Part II.B.3 (surveying the academic literature on settlement class actions).
- ¹² See, for example, Martin H. Redish and Elizabeth J. Cisar, [If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory](#), 41 *Duke L J* 449, 490-91 (1991) (criticizing the Court for recent separation of powers decisions and proposing the use of "pragmatic formalism" in deciding separation of powers cases).
- ¹³ For examples of proposed reforms that are designed to enhance the effectiveness or fairness of the settlement class, see Stephen C. Yeazell, [The Past and Future of Defendant and Settlement Classes in Collective Litigation](#), 39 *Ariz L Rev* 687, 702 (1997) (proposing a requirement that defendants negotiate with class representatives rather than class attorneys); Roger C. Cramton, [Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction](#), 80 *Cornell L Rev* 811, 830-36 (1995)

(proposing limits on future classes); Susan P. Koniak, [Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.](#), 80 *Cornell L Rev* 1045, 1117, 1120 (1995) (arguing that courts should adopt a presumption against settlement class approval, requiring parties to make an unambiguous showing of the lack of collusive activity).

¹⁴ See John C. Coffee, Jr., [Class Wars: The Dilemma of the Mass Tort Class Action](#), 95 *Colum L Rev* 1343, 1367 (1995).

¹⁵ See [Redish and Cisar](#), 41 *Duke L J* at 450 n 4 (cited in note 12), citing [Morrison v Olson](#), 487 US 654, 685-96 (1988) (holding in part that the Ethics in Government Act does not violate the separation of powers principles because, pursuant to the Act, Congress does not increase its own power at the expense of the executive branch).

¹⁶ Under [FRCP 23\(e\)](#), no certified class action may be settled absent approval of the court.

¹⁷ [521 US 591](#) (1997).

¹⁸ Under the current version of [Rule 23](#), for a class to be certified, it must meet all 23(a) requirements—numerosity, commonality, typicality, and adequacy of representation—and fit within one of the three categories under 23(b). Almost all settlement classes request damages and thus, as a matter of practice, seek certification under [Rule 23\(b\)\(3\)](#). [Rule 23\(b\)\(3\)](#) requires that common questions of law or fact “predominate” over questions affecting individual class members and that the class is “superior to other available methods” for adjudicating the controversy.

¹⁹ Compare, for example, [In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation](#), 55 F3d 768, 778 (3d Cir 1995) (“Settlement classes must satisfy the [Rule 23\(a\)](#) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirements.”), [Amchem Products, Inc v Georgine](#), 83 F3d 610, 617 (3d Cir 1996) (applying the General Motors rule to the 23(b)(3) settlement class), with [White v National Football League](#), 41 F3d 402, 408 (8th Cir 1994) (“[A]dequacy of class representation [] is ultimately determined by the settlement itself.”), [In re A.H. Robins Co, Inc](#), 880 F2d 709, 740 (4th Cir 1989) (giving [Rule 23](#) a “liberal construction” as applied to the settlement class and holding that “settlement should be a factor” in “determining certification”). See also [In re Asbestos Litigation](#), 90 F3d 963, 975 (5th Cir 1996) (finding that the terms of a settlement are crucial to the certification inquiry).

²⁰ [521 US](#) at 597.

²¹ [Id](#) at 602 n 5. The stipulation of settlement excluded the claims of persons who had filed suit for “asbestos-related personal injury, or damage, against the Defendant(s)” before January 15, 1993, thus allowing plaintiffs’ counsel to separately negotiate “inventory” settlements: nonclass settlements of the excluded persons’ anticipated claims against the defendants. [Id](#) at 600-02 & n 5.

²² [Id](#) at 603-04. See also [Coffee](#), 95 *Colum L Rev* at 1394 (cited in note 14) (criticizing the “substantive terms of the [Amchem] settlement,” given that it did not recognize a number of compensable state law claims); Brief for the Respondents George Windsor, et al, [Amchem](#), No 96-270, *5 (S Ct filed Jan 15, 1997) (available on Westlaw at [1997 WL 13208](#)) (“[A]pproximately half the claims that are filed in state and federal court would not [have] qualif[ied] for payment under the exposure and medical criteria contained in the [Amchem] settlement.”).

²³ See [Georgine v Amchem Products, Inc](#), 157 FRD 246 (ED Pa 1994).

²⁴ Objectors included the Windsor Group, the New Jersey White Lung Group, the Cargile Group, and Margaret Balonis, whose husband had been fatally exposed to asbestos in the workplace. See [Amchem](#), [521 US](#) at 612 (summarizing the objectors’

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arguments).

²⁵ [Amchem](#), 83 F3d at 623 (“[T]he jurisdictional issues in this case would not exist but for the certification of [the] class action.”).

²⁶ [Id](#) at 626.

²⁷ [Id](#) at 630 (focusing on the conflict between the representative plaintiffs and unnamed class members rather than the question of attorney-class conflicts).

²⁸ The [Amchem](#) decision primarily affects the 23(b)(3) class. Neither “a ‘limited fund’ class action under [Rule 23\(b\)\(1\)\(B\)](#) nor an equitable class action under [Rule 23\(b\)\(2\)](#) must satisfy the ‘predominance’ requirement,” the primary obstacle that [Amchem](#) imposes on settlement-only certification. Sofia Adrogué, [Mass Tort Class Actions in the New Millennium](#), 17 *Rev Litig* 427, 438 (1998) (presenting a survey of mass tort litigation and concluding that potentially viable judicial mechanisms exist to curtail any abuses that may surface).

²⁹ [Amchem](#), 521 US at 610 (holding that [Rule 23\(a\)](#) and [\(b\)](#)’s class-qualifying criteria function to ensure that all class members receive fair and equal treatment). Ultimately, the Court agreed with the Third Circuit that the application of these factors to the facts of the case required rejection of the request for class certification. The class members’ common interest in receiving compensation was insufficient to establish that common questions predominated over disparate individual issues. See [id](#) at 611-13.

³⁰ [Id](#) at 620. “The manageability inquiry under [Rule 23\(b\)\(3\)\(D\)](#) concerns ‘such matters as the size or contentiousness of the class, the onerousness of complying with the notice requirements, the number of class members that may seek to intervene and participate, or the presence of special individual issues.’” Christopher J. Willis, [Collision Course or Coexistence? Amchem Products v. Windsor and Proposed Rule 23\(b\)\(4\)](#), 28 *Cumb L Rev* 13, 25 (1998), quoting Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, 7A *Federal Practice and Procedure* § 1780 (West 2d ed 1986) (articulating matters to be considered by the Court in adjudicating a 23(b)(3) claim). As such, it overlaps substantially with the predominance inquiry: individual issues that render a class unmanageable also often mean that common issues do not predominate, suggesting that the scope of the [Amchem](#) decision is broader than it appears on the surface.

³¹ See [Amchem](#), 521 US at 612-13 (noting, however, that “[Rule 23](#)’s requirements must be interpreted in keeping with Article III constraints”).

³² There are a number of other criticisms of the settlement class that fall beyond the scope of this Article. For example, Professors Carrington and Apanovitch argue that the certification of class actions for the limited purpose of settlement “is replete with substantive consequences” in violation of the Rules Enabling Act—for example the alteration of “the substantive rights of state governments to enact and enforce their own laws governing such matters as standards of care, measures of damages, statutes of limitations, and the law of judgments,” the displacement of “not only the states’ laws of torts, but also the states’ laws of conflict of laws,” and the “establishment of a fictional contract of employment between members of the class and class counsel.” Paul D. Carrington and Derek P. Apanovitch, [The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated under Federal Rule 23](#), 39 *Ariz L Rev* 461, 464-66 (1997). See also Note, [The Rules Enabling Act and the Limits of Rule 23](#), 111 *Harv L Rev* 2294, 2309 (1998) (arguing that the settlement class violates the Rules Enabling Act by, among other things, undermining the individual’s substantive right to “control [his own] causes of action,” as well as the right to “have [his] causes of action resolved through litigation at all”).

³³ [In re General Motors Corp](#), 55 F3d at 784-85.

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- ³⁴ Yeazell, [39 Ariz L Rev at 701-02 \(cited in note 13\)](#) (internal citations omitted).
- ³⁵ [In re General Motors Corp, 55 F3d at 778.](#)
- ³⁶ Coffee, [95 Colum L Rev at 1348 \(cited in note 14\)](#) (suggesting, however, that the possibility of opportunistic behavior and collusive settlements is not a sufficient basis for rejecting mass tort class actions).
- ³⁷ [Id at 1354, 1373-82](#) (discussing the ethically complicated problem of “structural collusion” in mass tort class actions).
- ³⁸ [Id at 1367.](#)
- ³⁹ See Willging, Hooper, and Niemic, *Empirical Study of Class Actions* at 11 (cited in note 5) (finding that fee-recovery ratios were within a normal range in most class actions studied). “We did not find any patterns of situations where (b)(3) actions produced nominal class benefits in relation to attorneys’ fees The fee-recovery rate exceeded 40% in 11% or fewer of settled cases.” *Id.*
- ⁴⁰ See [Coffee, 95 Colum L Rev at 1371-73 \(cited in note 14\)](#) (describing the reverse auction); [id at 1373-75](#) (describing the inventory settlement).
- ⁴¹ Professor Coffee dismisses the potential for a reverse auction in a small-claim class action. [Id at 1352](#) (“In ‘small claimant’ class actions, defendants tend to resist class certification (because plaintiffs have no realistic alternative), whereas in ‘large claimant’ classes, defendants increasingly prefer class certification for a variety of reasons.”). We disagree. It is true that in a large-claim class, the defendant has significant incentive to settle the claims prior to certification, given the litigation expenses at stake. But a similar level of risk is involved in the small-claim class. Even though absent class members are less likely to bring individual suit, the probability of certification is higher. Because small-claim classes are not mass torts, they involve fewer individualized questions—for example, differences in severity or timeframe of injury. One could persuasively argue that the defendant’s decision to settle precertification is determined not by the likelihood of individual opt-out, but rather by the likelihood of certification, given the litigation expenses that flow from certification hearings and related proceedings. Thus, a defendant confronted with a small-claim class has an equal, if not greater, incentive to solicit precertification settlement than a defendant confronted with a large-claim class.
- ⁴² Empirical studies confirm the prevalence of this practice. See Willging, Hooper, and Niemic, *Empirical Study of Class Actions* at 8 (cited in note 5) (“Multiple filings of related class actions might indicate a race by counsel to the courthouse, perhaps to gain appointment as lead counsel At least one form of multiple filing occurred in 20% to 39% of the class actions in the four districts.”).
- ⁴³ But see Class Action Fairness Act, [28 USC § 1713](#) (Supp 2005) (regulating attorneys’ fees by requiring that, for any settlement “under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member,” the court “make[] a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss”). It has yet to be determined what effect the Class Action Fairness Act will have on the reverse auction. However, two factors suggest that the effect will be minimal. First, even though absent class members receive only minimal monetary benefit from most settlement classes, it is rare that they actually have to pay attorneys’ fees out-of-pocket. Instead, the small net recovery distributed to each class member is what remains after the fees have been deducted from the net settlement. This type of distribution arrangement would not fall under the Act’s terms. Second, the Act includes a significant loophole, enabling courts to approve a settlement even when absent class members will suffer a net loss. See also notes 4 (detailing the role that docket burdens have in influencing approval of settlement classes), 48, and accompanying text.
- ⁴⁴ See, for example, [Coffee, 95 Colum L Rev at 1372 \(cited in note 14\)](#) (explaining that a reverse auction often results in “suboptimal

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outcome[s]” for class members).

⁴⁵ *Id* at 1373-74 (explaining how the inventory settlement benefits both defendant and class counsel).

⁴⁶ See Cramton, 80 *Cornell L Rev* at 831 (cited in note 13) (emphasizing that individuals who have similar claims against the same defendant should receive even-handed treatment). See also Coffee, 95 *Colum L Rev* at 1394 (cited in note 14) (noting that the “substantive terms of the [Amchem] settlement clash sharply with the contemporaneous inventory settlements reached by the same plaintiffs’ attorneys”). See also generally Todd W. Latz, *Who Can Tell the Futures? Protecting Settlement Class Action Members without Notice*, 85 *Va L Rev* 531 (1999) (proposing an enhanced application of Rule 23’s prerequisite that all bound class members have adequate representation).

⁴⁷ For other proposals that fall beyond the scope of this Article, see Kent A. Lambert, *Class Action Settlements in Louisiana*, 61 *La L Rev* 89, 129-33 (2000) (suggesting that the court should ban inventory settlements and classes consisting exclusively of future plaintiffs, as well as hold collateral estoppel inapplicable to legal malpractice suits against class counsel for inadequate representation); Nikita Malholtra Pastor, *Equity and Settlement Class Actions: Can There Be Justice for All in Ortiz v. Fibreboard?*, 49 *Am U L Rev* 773, 819-21 (2000) (advocating the reform of ethical standards); Greg M. Zipes, *After Amchem and Ahearn: The Rise of Bankruptcy over the Class Action Option for Resolving Mass Torts on a Nationwide Basis, and the Fall of Finality?*, 1998 *Detroit Coll L Rev* 7, 10 (arguing that the bankruptcy system “may become more prominent in the mass tort arena by default,” because it has inherent structural safeguards that are not present in the normal federal system—for example, a group-rights model and the preapproval of creditors’ counsel). See also Joseph F. Rice and Nancy Worth Davis, *The Future of the Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 *SC L Rev* 405, 410 (1999) (“Preferring chapter 11 over settlement class actions [as a way to solve the problems with the settlement class] this early in the evolution of each method threatens to limit the proper application of both.”).

Professors Macey and Miller advocate the adoption of a closed-bid, court-regulated auction of the right to litigate the class’s claim. See Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 *U Chi L Rev* 1, 105-16 (1991). See also Randall S. Thomas and Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 *Nw U L Rev* 423, 424-26 (1993) (outlining criticisms of Macey and Miller’s auction model); Jonathan R. Macey and Geoffrey P. Miller, *Auctioning Class Action and Derivative Suits: A Rejoinder*, 87 *Nw U L Rev* 458, 470 (1993) (responding to criticisms of their initial analysis). They describe their proposed solution as follows:

A lawsuit is filed containing class or derivative allegations, or containing allegations that clearly support class relief. At this point the judge can make an initial investigation of the case to determine whether it would be appropriate for auction treatment. The judge would then cause notice to be posted in suitable newspapers and other periodicals announcing that the claim will be auctioned off and setting forth bidding procedures. The most workable bid procedure would seem to be a standard sealed-bid protocol with the claim going to the highest bidder. The judge, at her discretion, might state a minimum bid in order to prevent an excessively low sale price. [T]he judge would [then] award the claim to the highest bidder. That bidder, not necessarily an attorney or law firm, would then pay the bid amount to the court.

Macey and Miller, 58 *U Chi L Rev* at 106-07. The highest bidder would then “succeed to the rights of the plaintiffs who have not opted out,” including the right to either settle or litigate the claims. *Id* at 108. Although Macey and Miller do not directly discuss the settlement class, this procedure would functionally amount to banning the settlement class practice; the auction presumably occurs after certification, which would prohibit settlement prior to the court-regulated auction of the right to control the class’ claims. Insofar as this is true, we concur with the result.

⁴⁸ Coffee, 95 *Colum L Rev* at 1454 (cited in note 14) (noting, however, that this requirement could be easily abused by a court that wanted to clear its dockets by facilitating settlement: it could merely pick a plaintiffs’ attorney willing to negotiate).

⁴⁹ *Id* at 1455 (noting, however, that there is a potential for deadlock on the committee).

⁵⁰ *Id* at 1455-56. Coffee also offered a fourth recommendation: that courts align the standards governing the class action and the settlement class. See *id* at 1456 (arguing that when a class is certifiable for settlement but not litigation, the plaintiffs’ attorney

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“lack[s] negotiating leverage and may accept recoveries far below what the plaintiffs could receive in individual actions”). The Supreme Court has already adopted this suggestion, at least in part. See [Amchem](#), 521 US at 620 (requiring the settlement class to meet all 23(a) requirements and applicable 23(b) requirements, with the exception of manageability).

51 Yeazell, [39 Ariz L Rev at 702 \(cited in note 13\)](#).

52 Id.

53 Id. Professor Yeazell also notes the problems with his suggested approach:
How would [the] defendant select these ‘class’ representatives? How many would it have to notify to rid itself of the suspicion that it had merely substituted gullible parties for hungry lawyers? Moreover the defendant would be notifying previously quiescent plaintiffs not only that they had claims but that the defendant thought these claims viable.
Id.

54 Id.

55 This is especially true given that the court lacks the institutional capacity to investigate such facts on its own.

56 See text accompanying note 14 (distinguishing between Article III collusion and opportunistic behavior).

57 See id.

58 For example, Professor Coffee has defined “collusion” as “essentially [] an agreement—actual or implicit—by which the defendants receive a ‘cheaper’ than arm’s length settlement and the plaintiffs’ attorneys receive in some form an above-market attorneys’ fee.” Coffee, [95 Colum L Rev at 1367 \(cited in note 14\)](#).

59 [367 US 497 \(1961\)](#).

60 Id at 505 (internal citation omitted), quoting [United States v Johnson](#), 319 US 302, 305 (1943) (per curiam).

61 Black’s Law Dictionary 354 (West 8th ed 2004).

62 The American Heritage Dictionary of the English Language 400 (Houghton Mifflin 4th ed 2000).

63 As a result, we need not address the potential dispute between textual meaning and originalism that often arises in other contexts.

64 Nathan Bailey, *An Universal Etymological English Dictionary* 210 (Neill 16th ed 1755). See also Thomas Blount, *A Law-Dictionary and Glossary* 42 (Eliz, Nutt & Gosling 3d ed 1717) (in the context of defining the phrase “batable ground,” using the terms “in debate” and “controversy” interchangeably—although not separately defining the word “controversy”). Early American dictionaries, however, do not contain an entry for the word “controversy.” See, for example, John Bouvier, *1 Law Dictionary* (1st ed 1839). “Controversy” was not separately defined in an American dictionary, according to our search, until

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around 1848, at which time it was described as “a dispute arising between two or more persons; it differs from case, which includes all suits criminal as well as civil; whereas controversy is a civil and not a criminal proceeding.” John Bouvier, 1 A Law Dictionary 337 (Johnson 3d ed 1848). See also John Harrison, [The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III](#), 64 U Chi L Rev 203, 222 n 47 (1997) (summarizing early American definitions, in the context of arguing that “controversies” are limited to civil proceedings, while “cases” include suits of both civil and criminal variant). Despite the absence of entry in American dictionaries, one could argue that an English definition of “controversy” from the pre-Framing era provides persuasive evidence of the Framers’ assumptions when using the word to define judicial power in Article III.

⁶⁵ See Webster’s New International Dictionary 490 (Merriam 1912).

⁶⁶ See also [In re Asbestos Litigation](#), 90 F3d 963, 988-89 (5th Cir 1996) (noting that Article III plainly “requires that the parties be truly adverse”).

⁶⁷ American Heritage Dictionary at 288 (cited in note 62).

⁶⁸ Merriam-Webster Dictionary of Law 66-67 (Merriam-Webster 1996).

⁶⁹ Black’s Law Dictionary at 228 (cited in note 61).

⁷⁰ See generally Giles Jacob, A New Law-Dictionary (James Williams 10th ed 1773).

⁷¹ Id at 272-73, 297, 505-06. A thorough search of early American dictionaries turned up entries for the word “case” in two different sources. A 1792 publication defined it as a situation where “the party injured is allowed to bring a special action according to the peculiar circumstances of his own particular grievance.” Richard Burn, 1 A New Law Dictionary: Intended for General Use, as Well as for Gentlemen of the Profession 143 (London, printed by authors 1792). An 1860 publication offered this definition: “That form of action which is adopted for the purpose of recovering damages for some injury resulting to a party from the wrongful act of another.” Editors of the Law Chronicle, The Modern Law Dictionary 91 (1860). Although neither of these definitions explicitly mentions adverseness, the focus on both injury and causation suggests a strong emphasis on those conditions necessary for a successful suit within a traditional adversary legal system.

⁷² Additionally, even if we were to concede the ambiguity of the word “case” as a textual matter, settlement classes are invariably diversity suits, controlled by the word “controversy.”

⁷³ See Colin Croft, Note, [Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community](#), 67 NYU L Rev 1256, 1298 n 270 (1992) (“Adversariness has played an influential role in American law and society since its adoption from English common law.”).

⁷⁴ The scholarly literature indicates that one can parse numerous distinctions between the terms “case” and “controversy,” although none is immediately relevant to this discussion. For example, it has been suggested that the term “controversy” is less comprehensive than the term “case,” in that it includes only “suits of a civil nature,” whereas “case” is an umbrella, encompassing civil and criminal actions alike. [Aetna Life Insurance Co v Haworth](#), 300 US 227, 239 (1937); William A. Fletcher, [Exchange on the Eleventh Amendment](#), 57 U Chi L Rev 131, 133 (1990) (tracing the distinction between “cases” and “controversies” to St. George Tucker). But see Robert J. Pushaw, Jr., [Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts](#), 69 Notre Dame L Rev 447, 460 (1994) (arguing that had the Framers intended a criminal/civil distinction, they would have used the term “civil cases” instead of “controversies” and noting the conspicuous lack of eighteenth century discussion of such a distinction). Additionally, Akhil Amar argues that the use of the word “all” before Article III’s reference to the three types of

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“cases” indicates that the Court’s jurisdiction over those subject matters is mandatory, whereas the omission of “all” before references to the six party-defined “controversies” proves that the Court’s jurisdiction in that context is permissive. Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 BU L Rev 205, 244 n 128 (1985). But see Martin H. Redish, [Text, Structure, and Common Sense in the Interpretation of Article III](#), 138 U Pa L Rev 1633, 1636 (1990) (criticizing Amar’s approach as analyzing a “few selected words in a vacuum,” contrary to “any reasonable textual construction” and the Framers’ intent). Neither of these distinctions, however, is relevant to the narrow question of whether the definition of “controversy” as an adversarial dispute also extends to the definition of “case.”

⁷⁵ Max Farrand, 2 The Records of the Federal Convention of 1787 430 (Yale 1911) (Madison arguing that federal jurisdiction should be limited to cases of a judicial nature).

⁷⁶ For nineteenth century cases where the Court held a nonadversarial suit to be nonjusticiable, see, for example, [Chicago & Grand Trunk Railway Co v Wellman](#), 143 US 339, 345 (1892) (affirming the dismissal of a case that was brought as a “friendly suit” to test the constitutionality of a law); [Wood-Paper Co v Heft](#), 75 US (8 Wall) 333, 336 (1869) (granting a motion to dismiss because the complainant had purchased the patents that were the subject of the case); [Cleveland v Chamberlain](#), 66 US (1 Black) 419, 425 (1862) (dismissing an appeal because a friend of the defendant purchased the debt owned from the plaintiff, making the defendant “both appellant and appellee”).

⁷⁷ See, for example, [Smith v Adams](#), 130 US 167, 173 (1889) (jointly defining the “meaning given to the terms ‘cases and controversies’”); [Virginia v Rives](#), 100 US 313, 336 (1880) (Field concurring) (using the phrase “case or controversy” to define the judicial power granted by the Constitution). See also [In re Pacific Railway Commission](#), 32 F 241, 255 (ND Cal 1887) (explaining that the only distinction that can be parsed between the terms “case” and “controversy” is that the latter includes only suits of a civil nature; otherwise, the terms are interchangeable).

⁷⁸ Lower courts have followed suit. See [New Jersey v Heldor Inc](#), 989 F2d 702, 706 (3d Cir 1993) (holding that “[a]lthough it is possible to parse distinctions between a ‘controversy’ and a ‘case’, the records of the Framers supports the more common modern practice to merge the terms, as Justice Frankfurter did in [Joint Anti-Fascist Refugee Committee v McGrath](#)”). Consider [Joint Anti-Fascist Refugee Committee v McGrath](#), 341 US 123, 150 (1951) (Frankfurter concurring) (finding that “[t]he jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a ‘case or controversy’”).

⁷⁹ Professor Robert Pushaw has attempted to carry this burden. He argues that the Framers intended that a “case” would permit a more expansive judicial role than a “controversy.” The word “case,” he argues, refers to the public, law-espousing function of the courts and thus, unlike a “controversy,” does not mandate that the parties claim adverse legal interests. Pushaw, 69 [Notre Dame L Rev](#) at 481-83 (cited in note 74). Pushaw’s theory has been criticized as inconsistent with the history of the Framing. See, for example, David E. Engdahl, [Intrinsic Limits of Congress’ Power Regarding the Judicial Branch](#), 1999 [BYU L Rev](#) 75, 149 n 278 (critiquing Pushaw’s analysis of the word “controversy”). In any event, there can be no doubt that the Court has never accepted the argument.

⁸⁰ See [Flast v Cohen](#), 392 US 83, 95 (1968) (noting that a question must be presented in an “adversary context and in a form historically viewed as capable of resolution through the judicial process”); [United States v Johnson](#), 319 US 302, 302 (1943) (per curiam) (finding no adverseness between the parties and dismissing the claim); [Muskrat v United States](#), 219 US 346, 356-57 (1911); [Chicago & Grand Trunk Railway Co](#), 143 US at 345 (noting that the articulation of adverse rights must be “real, earnest and vital”); [Lord v Veazie](#), 49 US (8 How) 251, 255 (1850) (noting that if the parties’ interests are “one and the same,” they do not present a “case” capable of judicial resolution). Compare Susan Bandes, [The Idea of a Case](#), 42 [Stan L Rev](#) 227, 227-28 (1990) (arguing that the Court’s doctrine reveals no consistent “overarching definition of a case” and that instead, it has treated the case-or-controversy requirement as a receptacle, filling it with specific doctrines as the need arises). Professor Bandes, however, does not address the adverseness requirement specifically, or the Court’s treatment of it.

⁸¹ [Aetna Life Insurance](#), 300 US at 240-41 (noting that there must be a real and substantial controversy admitting specific relief in

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order for a case to be justiciable). See also [Veazie](#), 49 US (8 How) at 255.

82 [219 US 346 \(1911\)](#) (holding that petitions must be presented in the form of a “case” or “controversy” to be justiciable).

83 [Id at 349-50](#). This Act, which was part of the Indian appropriation bill, is the authority for the maintenance of the two suits.

84 [Id at 361](#).

85 [Id at 361-62](#).

86 See [id](#) (finding that if it were to accept that the government always has an “adverse interest” in upholding the constitutionality of the legislation it passes, “the result will be that this court will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning”).

87 See, for example, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 122-23 (Bobbs-Merril 1962) (classifying [Muskrat](#) as a decision “in which adjudication of the merits was declined despite the presence of an adequately concrete and adversary case”). This portion of the [Muskrat](#) holding, however, is generally irrelevant to the decision’s importance as a general statement of Article III’s adverseness requirement. Nor does it undermine the relevance of the adverseness requirement as applied to the settlement class.

88 [Muskrat](#), 219 US at 356-57.

89 See, for example, [Moore v Charlotte-Mecklenburg Board of Education](#), 402 US 47, 48 (1971); [Johnson](#), 319 US at 304. See also [CIO v McAdory](#), 325 US 472, 475 (1945) (holding that a city’s agreement not to enforce the Act in question deprived the suit of a justiciable case or controversy, by rendering the parties nonadversarial). But see generally [Swann v Charlotte-Mecklenburg Board of Education](#), 402 US 1 (1971) (finding appropriate adversariness in a companion case to [Moore](#) and deciding the issue fully).

90 [319 US 302 \(1943\)](#).

91 [Id at 303-04](#). The plaintiff’s complaint alleged that, under the Emergency Price Control Act of 1942, the defendant’s rental property was within the statutorily defined “defense rental area” and thus that the rent collected by the defendant “was in excess of the maximum fixed by the regulation.” [Id at 302-03](#). In turn, the defendant argued that the Emergency Price Control Act of 1942 was unconstitutional because it delegated authority to the Price Administrator without setting forth comprehensible standards to guide price-setting. [Id](#).

92 Also, the parties did not disclose their connection to the court. However, aside from this omission, the pleadings and other documents filed with the court contained no “false or fictitious” facts. [Id at 304](#).

93 [Id](#).

94 [276 US 311 \(1928\)](#).

⁹⁵ [Id at 320-21.](#)

⁹⁶ [Id at 325.](#)

⁹⁷ [49 US \(8 How\) 251 \(1850\).](#)

⁹⁸ [Swift, 276 US at 326.](#)

⁹⁹ See Richard A. Nagareda, [Turning from Tort to Administration](#), 94 Mich L Rev 899, 928 n 115 (1996) (citing the prospective nature of a consent decree as a key element of its Article III justiciability).

¹⁰⁰ See Ralph E. Avery, [Article III and Title 11: A Constitutional Collision](#), 12 Bankr Dev J 397, 410 (1996) (“Swift marks the outer limits of what parties may do to memorialize private agreements by way of court orders. Parties whose negotiations have carried them so far as to give them coincident interests ought not to be permitted to ‘record their contract’ by way of a consent judgment.”). The facts of Swift are easily distinguished from a consent decree that is entered after the government files a complaint with the court. That scenario is analogous to a class settlement, where proceedings are adversarial from their inception and the case later settles. There, an Article III court has the jurisdiction to enter any order—including dismissal or settlement approval—that is incidental or ancillary to the underlying, justiciable proceedings. See text accompanying notes 162-66 (discussing the Bancorp ruling).

¹⁰¹ See [United States Parole Commission v Geraghty](#), 445 US 388, 402 (1980) (calling for “reference to the purposes of the case-or-controversy requirement,” given “Article III’s ‘uncertain and shifting contours’ with respect to nontraditional forms of litigation”) (internal citations omitted); Bandes, [42 Stan L Rev at 276 \(cited in note 80\)](#) (lamenting the lack of cohesive treatment of the case-or-controversy requirement and noting that “[r]easoned application of the case limitation requires interpretation of the case requirement’s underlying principles and their implications for the scope of federal judicial power”).

¹⁰² See, for example, [Redish and Cisar](#), 41 Duke L J at 454 n 19 (cited in note 12).

¹⁰³ See, for example, John M. Breen, [Statutory Interpretation and the Lessons of Llewellyn](#), 33 Loyola LA L Rev 263, 277 (2000), quoting William N. Eskridge, Jr., and Phillip P. Frickey, [Statutory Interpretation as Practical Reasoning](#), 42 Stan L Rev 321, 359 (1990) (arguing that the Court will adopt a holding contrary to the plain meaning of the text where current values weigh in favor of that holding).

¹⁰⁴ [Poe, 367 US at 503.](#)

¹⁰⁵ This also encompasses control over legal argumentation in the case: Through vigorous advocacy each party helps the court to perceive and to respond properly to weaknesses in the presentations made by the other parties. In addition, vigorous advocacy can illuminate facets of a case that are not immediately apparent and might not otherwise be considered by the court. These benefits of vigorous advocacy serve as the foundation of the adversarial system, and appear to be deeply and permanently rooted in our legal system. Girardeau A. Spann, [Expository Justice](#), 131 U Pa L Rev 585, 650 (1983) (internal citations omitted).

¹⁰⁶ [Id at 588.](#)

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- ¹⁰⁷ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv L Rev 353, 364 (1978).
- ¹⁰⁸ *Id.*
- ¹⁰⁹ Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U Pa L Rev 1031, 1035 (1975). One commentator has paraphrased Fuller to say that this objective search depends on three interrelated conditions: (i) The adjudicator should attend to what the parties have to say. (ii) The adjudicator should explain his decision in a manner that provides a substantive reply to what the parties have to say. (iii) The decision should be strongly responsive to the parties' proofs and arguments in the sense that it should proceed from and be congruent with those proofs and arguments. Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 Harv L Rev 410, 411-12 (1978). See also Christopher J. Peters, *Adjudication as Representation*, 97 Colum L Rev 312, 375 (1997) (discussing Fuller's theories on the relationship between court and litigant).
- ¹¹⁰ See *Erichson*, 87 Georgetown L J at 2005-10 (cited in note 5) (making this comparison in the context of discussing the effect of the settlement class on judicial decisionmaking). See also Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 Judicature 109, 109 (1993).
- ¹¹¹ Strier, 76 Judicature at 109 (cited in note 110).
- ¹¹² *Erichson*, 87 Georgetown L J at 2007 (cited in note 5). See also Frankel, 123 U Pa L Rev at 1032 (cited in note 109) (arguing that "our adversary system rates truth too low among the values that institutions of justice are meant to serve").
- ¹¹³ Frankel, 123 U Pa L Rev at 1037 (cited in note 109). See also Dean Robert Gilbert Johnston and Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 John Marshall L Rev 147, 147-48 (2002) ("The underlying theory [of an adversary system] is that the truth is best served by placing the responsibility on the parties themselves to formulate their case and destroy the case of their adversary.").
- ¹¹⁴ *Erichson*, 87 Georgetown L J at 2006 (cited in note 5).
- ¹¹⁵ See Peters, 97 Colum L Rev at 347 (cited in note 109):
Most judicial decisions are to a very great extent products of a process of participation and debate among the parties to the case that greatly restricts the decisional options available to the court. In this sense, judicial decisions resemble the decisions made by a democratic legislature after debate and a fair hearing at which all relevant views have been aired.
- ¹¹⁶ Strier, 76 Judicature at 109 (cited in note 110).
- ¹¹⁷ Specifically, adverseness "optimize[s] the likelihood that [judicial] exposition will be well-informed and that the power to expound will be exercised prudently." Spann, 131 U Pa L Rev at 632 (cited in note 105).
- ¹¹⁸ *Id.* at 647. This principle is reflected in the Court's Article III jurisprudence. The Court in *Baker v Carr*, 369 US 186 (1962), for example, framed the Article III standing question as follows: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult [] questions?" *Id.* at 204. See also *GTE Sylvania, Inc v Consumers Union of the United States*,

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[Inc.](#), 445 US 375, 382 (1980) (“The purpose of the case-or-controversy requirement is to ‘limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.’”) (internal citation omitted); [Butz v Economou](#), 438 US 478, 513 (1978) (holding that the agency proceedings in question were legitimate because they enjoyed the adversarial “safeguards” available “in the judicial process”: “The proceedings [were] adversary in nature. They [were] conducted before a trier of fact insulated from political influence. A party [was] entitled to present his case.”) (internal citations omitted).

¹¹⁹ For scholars who have criticized the adversary system and advocated the American adoption of a system similar to that used in civil law countries, see Ellen E. Sward, [Values, Ideology, and the Evolution of the Adversary System](#), 64 *Ind L J* 301, 302-03 (1989) (extolling the nonadversarial elements in modern complex litigation); John H. Langbein, [The German Advantage in Civil Procedure](#), 52 *U Chi L Rev* 823, 830 (1985) (arguing that the German civil law system is far more precise and efficient than the American adversary system: the German court “investigates the dispute in the fashion most likely to narrow the inquiry,” minimizing the expenses associated with “full pretrial and trial ventilation of the whole of the plaintiff’s case”); Hein Kötz, [The Reform of the Adversary System](#), 48 *U Chi L Rev* 478, 486 (1981) (proposing the development of alternative methods of resolving disputes to improve the adversary system, most notably comparative law). But see generally Ronald J. Allen, et al, [The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship](#), 82 *Nw U L Rev* 705 (1988) (critiquing Langbein’s arguments).

¹²⁰ [Erichson](#), 87 *Georgetown L J* at 2011 (cited in note 5). See also [Frankel](#), 123 *U Pa L Rev* at 1042 (cited in note 109) (“Because the parties and counsel control the gathering and presentation of evidence, we have made no fixed, routine, expected place for the judge’s contributions.”).

¹²¹ See [Erichson](#), 87 *Georgetown L J* at 2011-12 (cited in note 5) (arguing that “U.S. judges for the most part continue to behave in accordance with deeply ingrained notions concerning the judicial role,” a self-image that presents a formidable “barrier to effective inquisitorial judging”). Additionally, countries with inquisitorial systems view the judicial profession as a career path that is entirely distinct from legal practice, and as a result, provide “institutionalized training” for their court officials. In contrast, in the United States, one typically enters the judiciary after a number of years practicing law, without specialized judicial training. See [id](#) at 2014; [Strier](#), 76 *Judicature* at 109 (cited in note 110). The lack of an American “career judiciary” has been criticized as endowing the judicial branch with an intractable adversarial ethic. See, for example, [Frankel](#), 123 *U Pa L Rev* at 1033 (cited in note 109) (“Reflective people have suggested from time to time that qualities of detachment and calm neutrality are not necessarily cultivated by long years of partisan combat [as trial lawyers].”).

¹²² See Sol Wachtler, [Judicial Lawmaking](#), 65 *NYU L Rev* 1, 20-21 (1990) (discussing the principles of justiciability as a foundation for legitimate judicial lawmaking). See also Part III.C.3 (discussing the difference between judicial tools on one hand, which are dependant on adversarial presentation by the parties, and executive and legislative tools on the other, which enable independent factfinding).

¹²³ [Peters](#), 97 *Colum L Rev* at 350 (cited in note 109).

¹²⁴ Martin H. Redish, [The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971](#), 51 *DePaul L Rev* 359, 368 (2001).

¹²⁵ [Id](#) at 369-70 (cited in note 124), citing David Held, [Models of Democracy](#) 89 (Stanford 1987) (associating this theory with John Stuart Mill).

¹²⁶ [Redish](#), 51 *DePaul L Rev* at 369-70 (cited in note 124).

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¹²⁷ Peters, 97 Colum L Rev at 332 (cited in note 109).

¹²⁸ Consider Restatement (Second) of Judgments § 1 (1982).

¹²⁹ See Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement, 93 Harv L Rev 297, 302 (1979) (examining the theoretical underpinnings of the case-or-controversy requirement, namely the injury-in-fact requirement, and arguing that justiciability rules are appropriate as tools of constitutional jurisprudence). For criticism of Professor Brilmayer’s thesis, see Bandes, 42 Stan L Rev at 297-98 (cited in note 80) (arguing that Brilmayer’s approach “sweep[s] too broadly,” in that it “exclude[s] nontraditional cases in which sufficient concrete adversity exists,” and proposing that courts instead “assess [] concreteness and adversity in [the] individual case”); Martin H. Redish, The Passive Virtues, the Counter-Majoritarian Principle, and the “Judicial-Political” Model of Constitutional Adjudication, 22 Conn L Rev 647, 651, 667 (1990) (arguing that “imposition of the injury-in-fact prerequisite on litigants,” as Brilmayer strongly advocates, “is not an essential element of the judicial aspects of the federal judiciary’s function, and may well undermine performance of its important political function,” as well as noting that Brilmayer cites no “empirical, psychological or anthropological evidence” in support of her argument that an injured plaintiff is a better advocate than an ideological plaintiff); Mark V. Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 Harv L Rev 1698, 1706 (1980) (arguing that Brilmayer’s distinction between the ideological and traditional plaintiff is inconsistent with the “sociological realities of litigation”). For scholars making arguments similar to Brilmayer’s, see Amy Coney Barrett, Stare Decisis and Due Process, 74 U Colo L Rev 1011, 1012-13, 1016-28 (2003) (examining the due process implications of stare decisis, including the preclusive effects that flow from its application); Peters, 97 Colum L Rev at 426-28 (cited in note 109) (contending that ideological plaintiffs prevent the court from being able to limit its decisions to “specific facts applied to specific people,” and thus require broader decisions, binding more later litigants than necessary).

¹³⁰ Brilmayer, 93 Harv L Rev at 302 (cited in note 129).

¹³¹ *Id* at 306. Brilmayer further distinguishes the ideological plaintiff from the traditional plaintiff by way of this example: [I]magine a citizen in a town that has recently enacted an ordinance prohibiting the posting of campaign signs on residential property. Assume he believes it is unconstitutional to restrict political expression this way, but has posted no campaign signs himself. What can he do? First, he might initiate litigation by alleging the ordinance infringes the first amendment rights of others. His neighbor would put up signs but for the ordinance. Second, he might attempt to show that his own future first amendment rights are threatened. Next year, he may wish to post campaign signs. *Id* at 298. Brilmayer believes that neither the first nor the second option should create a justiciable case under Article III’s ripeness and injury-in-fact requirements, whose function is to prevent merely concerned citizens from “litigat[ing] abstract principles of constitutional law when the precedent established will govern someone else’s rights.” *Id* at 308.

¹³² *Id* at 307.

¹³³ See also Part IV.B.1.a.

¹³⁴ Brilmayer, 93 Harv L Rev at 298-300 (cited in note 129).

¹³⁵ *Id* at 310. Unlike this Article, Brilmayer focuses on the “due process problems” created by the preclusive effects that flow from ideological litigation. But see text accompanying note 139 (explaining that the problem need not rise to a due process violation in order to constitute an encroachment on the rights upon which a liberal democratic system is founded).

¹³⁶ See Redish, 22 Conn L Rev at 667 (cited in note 129). But see Brilmayer, 93 Harv L Rev at 306 (cited in note 129) (pointing out “the fairness problems that would arise if an ideological challenger—a challenger without the traditional personal stake—were

permitted to litigate a constitutional claim”).

¹³⁷ See [FRCP 23\(e\)](#).

¹³⁸ This may be especially true of adverse class actions that settle. For this reason, one might argue that allowing the settlement class action gives rise to no greater dangers than does allowing settlement of any class action, even those that were adverse at the outset. For reasons we will explain, however, there are significant differences in the degree of danger to absent class members in the two situations. See text accompanying notes 162-67.

¹³⁹ The converse is also true. In some instances, due process will not be satisfied, even where the adverseness required by Article III exists, because of inadequate representation in the individual case.

¹⁴⁰ [In re Fibreboard Corp](#), 893 F2d 706, 710-11 (5th Cir 1990) (finding that the statutory provision of private remedies “reflect[s] the very culture of the jury trial and the case and controversy requirement of Article III”).

¹⁴¹ Martin H. Redish and Andrew L. Mathews, [Why Punitive Damages Are Unconstitutional](#), 53 *Emory L J* 1, 16 (2004) (explicating the fundamental constitutional difficulty with awarding punitive damages, namely that it creates a system in which those who exercise what is inherently the state’s power to impose punishment possess improper private financial and personal interests in the success of their efforts).

¹⁴² *Id.*

¹⁴³ The term “private attorney general” is generally used to refer to an attorney in a case where it is clear that “‘the law’ should be implemented or enforced—so that we do not need to ask at whose behest or on whose behalf.” Jeremy Rabkin, [The Secret Life of the Private Attorney General](#), 61 *L & Contemp Probs* 179, 179, 181 (1998) (noting that “[w]ith sympathetic nurturing from courts and Congress,” the private attorney general “form of legal advocacy seemed for a time to be a powerful engine of public policy”). See also Trevor W. Morrison, [Private Attorneys General and the First Amendment](#), 103 *Mich L Rev* 589, 599-606 (2005) (surveying the history of the private attorney general, including the rise of citizen-suit provisions and *qui tam* suits). Although this does not translate perfectly into the class action context, given that the class, not the public at large, is the specified beneficiary of the court’s judgment, the functions played by the two groups of plaintiffs, and their attorneys, are similar. In general, the private attorney general litigates to vindicate the public good. The class action plaintiff litigates for the purpose of collecting compensation for her injuries, but with the same effect as the private attorney general—that of deterring and punishing wrongful conduct. One difference between the private individual in the hybrid model and the private attorney general is the relief sought. Although this Article focuses on private damages, most private attorneys general instead tend to seek broad nonmonetary relief: “[R]ather than seeking redress for discrete injuries, private attorneys general typically request injunctive or other equitable relief aimed at altering the practices of large institutions.” Morrison, 103 *Mich L Rev* at 590.

¹⁴⁴ Martin H. Redish, [Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals](#), 2003 *U Chi Legal F* 71, 77. See also *id* at 80 (explaining the history of bounty hunters, who, “[m]otivated by personal greed,” “effectively furthered the public interest by seeking to promote their own personal economic interests” by apprehending criminals and wrongdoers). The key difference between the hybrid model and this bounty hunter model is the source of the incentive to litigate. In the hybrid model, the incentive to monitor and punish wrongdoing is natural: it flows from the personal interest in compensation for one’s injuries. In the bounty hunter model, the incentive is artificial: it is the manufactured result of the availability of a reward for apprehending wrongdoers. The bounty hunter, at least in most cases, has suffered no personal injury and thus has no independent interest in the prosecution of wrongdoing. See also Morrison, 103 *Mich L Rev* at 590 (cited in note 143) (defining the private attorney general as a “plaintiff who sues to vindicate public interests not directly connected to any special stake of her own”).

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145 [US Const Art II, § 3.](#)

146 Martin H. Redish, Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta, 39 DePaul L Rev 299, 315 (1989).

147 [Keller v Potomac Electric Power Co](#), 261 US 428, 444 (1923) (holding that the judicial branch cannot be granted appellate or original jurisdiction over the valuation of public utilities).

148 (1794) (unreported). Todd was summarized in [United States v Ferreira](#), 54 US (13 How) 40, 52-53 (1852).

149 2 US (2 Dall) 409 (1792), which arose when the Circuit Courts for the districts of New York, Pennsylvania, and North Carolina all refused to perform the functions delegated to them by the Act of 23d of March, including the examination of soldiers' pension claims. The Court held that pension administration was not a proper judicial function, primarily because the courts' decisions were subject to revision by the executive branch. In response, Congress amended the law, setting forth a nonjudicial mode of taking testimony but nevertheless providing a method through which to obtain "an adjudication of the Supreme Court 'on the validity of [the pension] rights.'" [Ferreira](#), 54 US (13 How) at 52 (discussing [Todd](#)) (internal citation omitted).

150 [Ferreira](#), 54 US (13 How) at 53.

151 *Id.*

152 *Id.*

153 [488 US 361](#) (1989).

154 [487 US 654](#) (1988).

155 Indeed, one of us has seriously questioned the wisdom of both decisions. See Redish, 39 DePaul L Rev at 303 (cited in note 146).

156 [488 US](#) at 402.

157 See *id* at 394 n 20. Morrison and Mistretta both discussed a number of nonadjudicatory functions traditionally performed by Article III courts, including the issuing of search warrants and the supervision of grand juries. See [Mistretta](#), 488 US at 390 n 16; [Morrison](#), 487 US at 681 n 20. However, these functions are easily distinguished from the nonadversarial administrative functions rejected in Todd and Ferreira. The issuing of a search warrant and supervision of a grand jury alike are incidental to underlying adversarial proceedings between the state and criminal defendant, and in furtherance of the adjudication of an adversarial case. The same cannot be said of claim administration. See Redish, 39 DePaul L Rev at 315 (cited in note 146) (noting that the hiring of law clerks—another nonadjudicatory function discussed by the Morrison and Mistretta Courts—is a function “ancillary to the effective performance of the adjudicatory function that lead[s] to no direct, legally binding effect on society”).

It could be argued that a similar situation arises in the context of bankruptcy proceedings, given that, like the claims proceedings in Ferreira, most Title 11 actions are uncontroverted. See [Avery](#), 12 Bankr Dev J at 400 (cited in note 100) (arguing that the Bankruptcy Code “frequently give[s] rise to cases that fail to comply with the case or controversy requirement of Article III”); Douglas G. Baird and Thomas H. Jackson, Cases, Problems and Materials on Bankruptcy 1 (Little, Brown 2d ed 1990) (“The legal

proceeding [in bankruptcy] of the typical individual who asks for a discharge is an uncontested affair. There is nothing to fight over.”). See also [Kilen v United States](#), 129 BR 538, 542 (Bankr ND Ill 1991), citing 28 USC § 151 (explaining that although bankruptcy judges are not Article III judges, they “are statutorily deemed to be ‘unit[s] of the district court’” and thus must meet Article III requirements). Given the complexity of the subject matter and the fact that the Supreme Court has not spoken directly on this question, the constitutionality of bankruptcy proceedings reaches far beyond the scope of this Article. It suffices to note that the bankruptcy scheme is a narrow exception to the adverseness requirement. Surely no one would argue that this exception consumes the general rule that, in order for a suit to be justiciable, the parties must enjoy an adversarial relationship. Similarly, the Court has never suggested that the presence of bankruptcy distribution in the federal courts somehow voids the adverseness requirement in other contexts or affects its adverseness jurisprudence as a whole. Moreover, the unique nature of bankruptcy, as distinguished from other nonadversarial litigation like the settlement class, has been recognized by courts and scholars alike. In bankruptcy, the presence of adverseness is a case-by-case inquiry. Because the creditor is always a possible adverse party, some bankruptcy cases will be adversarial while others will not, rendering any ex ante determination as to adverseness impossible. See Susan Block-Lieb, [The Case against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis](#), 62 *Fordham L Rev* 721, 773 n 301 (1994); Thomas Galligan, Jr., [Article III and the “Related To” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction](#), 11 *U Puget Sound L Rev* 1, 39-40 n 145 (1987) (analogizing bankruptcy to the fact pattern in [Tutun v United States](#), 270 US 568, 577 (1926), where the Court held naturalization proceedings to be justiciable because the United States is always a “possible adverse party”). The same is not true of the settlement class: all settlement classes are, by definition, nonadversarial, given that the parties agree on the desired outcome before coming to court.

¹⁵⁸ Steven G. Calabresi, [Some Normative Arguments for the Unitary Executive](#), 48 *Ark L Rev* 23, 67 (1995) (explaining that “[b]ad poll ratings, unfavorable results in special or midterm elections, and negative constituent feedback all have a way of rapidly pulling presidents and their unelected aides and subordinates back onto the majority coalition’s electoral bandwagon”).

¹⁵⁹ This is true regardless of whether the settlement class was preceded by a reverse auction or an inventory settlement. Although the courts that have addressed the constitutionality of the settlement class have focused on whether settlement negotiations were “collusive,” or alternatively, conducted at arm’s-length, see [In re Asbestos Litigation](#), 90 F3d 963, 988-89 (5th Cir 1996), this position is inherently flawed. It assumes that Article III bans merely criminal fraud or conspiratorial cooperation between plaintiff and defendant, whereas in reality its reach is far broader. By its plain language, Article III bans all suits that—at the time that they are presented to the court—have already been resolved by the parties. Article III, *Poe* reminds us, renders unfit for adjudication “any cause that ‘is not in any real sense adversary,’ that ‘does not assume the ‘honest and actual antagonistic assertion of rights’ to be adjudicated—a safeguard essential to the integrity of the judicial process.” 367 US at 505-06, citing [Johnson](#), 319 US at 305. See note 14 and accompanying text (discussing the distinction between the term “collusion” as employed by civil procedure scholars and as defined by Article III).

¹⁶⁰ See [Carrington and Apanovitch](#), 39 *Ariz L Rev* at 463 (cited in note 32): [T]he proposed rule [Rule 23(b)(4)], which would have authorized certification of a class for settlement-only] applies only to matters that will never be the subject of litigation in a federal court. It has nothing to do with the Article III mission of deciding cases or controversies, but is instead a means of promoting and endorsing putative private dispositions by lending them the imprimatur of the court, thus garbing contracts in the dress of judgments.

¹⁶¹ One could argue that the absent class members are still adverse to the defendant, despite the fact that agreement as to the case’s desired outcome is reached between class and defense counsel. However, until certification, there is no “class”—while absent parties may have potential claims against the defendant, prior to certification they have sued no one and are legally not parties to the suit.

¹⁶² 513 US 18 (1994).

¹⁶³ *Id* at 21, quoting [Walling v James V. Reuter, Inc](#), 321 US 671, 677 (1944).

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- ¹⁶⁴ [Bancorp](#), 513 US at 22, quoting [Chandler v Judicial Council of the Tenth Circuit](#), 398 US 74, 111 (1970) (Harlan concurring) (finding that various supervisory tasks of the Judicial Council were appropriate under Article III). See also [Avery](#), 12 Bankr Dev J at 409 (cited in note 100) (“[Under Bancorp, a]s a general rule, all settled issues in a case are moot. Although the court lacks jurisdiction to decide the merits of any issue which has been settled, it retains jurisdiction to enter a judgment, dismiss or take any other action necessary to dispose of the case.”).
- ¹⁶⁵ See [Glidden v Chromalloy American Corp](#), 808 F2d 621, 626-27 (7th Cir 1986) (explaining that absent class members are not bound by judgments issued prior to certification).
- ¹⁶⁶ Of course, merely because the class settlement is, as a general matter, constitutional under the Article III adverseness requirement does not mean that all class settlements are legitimate. The class settlement may still pose structural difficulties, wholly apart from its adverseness, which are beyond the scope of this Article.
- ¹⁶⁷ See [FRCP 23\(e\)\(1\)\(A\)](#).
- ¹⁶⁸ [In re Asbestos Litigation](#), 90 F3d at 988-89. See also [In re Orthopedic Bone Screw Products](#), 176 FRD 158, 172 (ED Pa 1997) (finding no violation of Article III because until the time of certification and settlement, the parties were adverse).
- ¹⁶⁹ See [Muskrat](#), 219 US at 357 (“[Case or controversy] implies the existence of present or possible adverse parties.”) (emphasis added).
- ¹⁷⁰ See, for example, [Lake Coal Co v Roberts & Schaefer Co](#), 474 US 120, 120 (1985) (dismissing the case on appeal due to the “complete settlement of the underlying causes of action”).
- ¹⁷¹ See, for example, [Cleveland v Chamberlain](#), 66 US (1 Black) 419, 425 (1862) (dismissing the case on appeal after finding that the parties to the initial dispute had settled and that the appellant was merely attempting “to obtain[] a decision injurious to the rights and interests of third parties”).
- ¹⁷² In this way, the settlement class strongly resembles the fact pattern in [Cleveland](#), where the Court rejected as nonjusticiable a suit in which the plaintiff bought out the defendant, such that the interests on both sides of the dispute were one and the same. [66 US \(1 Black\) at 426](#). The Court held that the plaintiff’s only remaining interest in the outcome of the suit was to bind the interests of third parties not before the court. “It is plain that this is no adversary proceeding,” the Court wrote. “Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interests of persons not parties to the pretended controversy.” *Id.*
- ¹⁷³ Moreover, because absent class members are inherently passive in the negotiation and certification process, they do not have a chance to assert their own interests. See Part IV.B.2.c (explaining why the right to opt out of the (b)(3) class does not fully protect the interests of the individual litigant).
- ¹⁷⁴ For courts that have recognized the information deficit that flows from the settlement class’s nonadverseness, see, for example, [Plummer v Chemical Bank](#), 668 F2d 654, 657 (2d Cir 1982) (holding that the trial court record was insufficient to “support a responsible finding that the settlement was fair, reasonable, and adequate” and suggesting that the nonadverseness of the settlement class was to blame for the information deficit).
- ¹⁷⁵ [55 F3d 768 \(3d Cir 1995\)](#).

176 [Id at 789.](#)

177 [Id](#) (explaining that the information deficit is far worse in a settlement class, where the “motion for certification and settlement are presented simultaneously,” than in a postcertification class settlement).

178 [Pettway v American Cast Iron Pipe Co, 576 F2d 1157, 1169 \(5th Cir 1978\).](#)

179 See notes 41-44 and accompanying text (describing the reverse auction).

180 See notes 45-46 and accompanying text (describing the inventory settlement).

181 [Amchem](#) exacerbated this situation by drawing a distinction between settlement and litigation classes, holding that the former did not need to meet manageability standards to be certified. See [521 US at 620](#). Because many mass torts actions, given their size and the presence of individualized questions, present a problem of manageability, they are certifiable for settlement-only, preventing the plaintiffs’ attorney from being able to threaten to litigate the class claim—even when the defendant’s settlement offer is well below expected market value.

182 See [Leandra Lederman, Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?, 75 Notre Dame L Rev 221, 228-29 \(1999\)](#):
Economic models of settlement assume that the parties derive a settlement amount from the likely amount the court will award if the case is tried. In other words, if the two parties to a case were to agree, for example, that after trial the court will definitely award the plaintiff \$20,000, but it will cost each side \$4000 to bring the case to trial, then the parties could save time and money by settling for somewhere between \$16,000 (what the plaintiff would net from trial) and \$24,000 (what the defendant would spend in damages plus litigation costs).
But see [George L. Priest and Benjamin Klein, The Selection of Disputes for Litigation, 13 J Legal Stud 1, 4-5 \(1984\)](#) (arguing that economic models of settlement are distorted by party optimism and other estimation errors).

183 See [In re General Motors Corp, 55 F3d at 790](#) (“Because certification so dramatically increases the potential value of the suit to the plaintiffs and their attorneys as well as the potential liability of the defendant, the parties will frequently contest certification vigorously.”).

184 See Part III.C.2.a. The same argument applies equally to other motions and briefs, including but not limited to those that accompany certification. When a suit is adversarial at its inception, the court benefits from the multiple formal filings that precede settlement, which enable it to evaluate the underlying legitimacy of the claims and defenses in the case. This ultimately allows the judge to more accurately assess whether the settlement represents a fair estimation of the worth of the class’s claims. See also [Rhonda Wasserman, Dueling Class Actions, 80 BU L Rev 461, 480 \(2000\)](#) (noting that the information deficit stemming from dueling class actions is “less severe when the parties reach a settlement after having engaged in some adversarial proceedings before the court”).

185 See [Willging, Hooper, and Niemic, Empirical Study of Class Actions at 62](#) (cited in note 5).

186 See [Wasserman, 80 BU L Rev at 475, 483](#) (cited in note 184) (noting that objectors are likely to alleviate some of the “informational deficiencies inherent in class action settlements,” although speaking in the context of dueling federal/state classes where there is a disincentive “to take discovery on the facts underlying the federal claims”).

- ¹⁸⁷ Willging, Hooper, and Niemic, *Empirical Study of Class Actions* at 10 (cited in note 5). See *id.* at 56 (“[Rates of participation by absent class members were] 11%, 0%, 9%, and 5% of the cases in the four districts. In all four districts, a total of six nonmembers of an alleged class attempted to intervene.”). This low level of participation pervaded fairness hearings as well. See *id.* at 57 (“[N]onrepresentative parties were recorded as attending the settlement hearing infrequently, with 14% in E.D. Pa. being the high mark and the other three districts showing 7% to 11% rates of participation.”).
- ¹⁸⁸ Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 *Ind L Rev* 65, 85 (2003) (internal citations omitted). The availability of objectors is a critical distinction between the settlement class and postcertification class settlement. Insofar as the quick pace of and lack of public information available in most settlement classes discourages objectors, when settlement occurs postcertification, objectors have an opportunity to compile a motion for intervention and to provide the court with critical information on the benefits and disadvantages of the class format.
- ¹⁸⁹ See, for example, *Walker v Bayer Corp.*, 1999 US Dist LEXIS 10060, *7-8 (ND Ill) (finding that, if the petitioner could not with reasonable effort gather evidence to qualify for the class payment, he may still be entitled to proceed with an individual action).
- ¹⁹⁰ See *In re General Motors Corp.*, 55 F3d at 788, citing *In re Joint E & S District Asbestos Litigation*, 129 BR 710, 802 (E & SD NY 1991) (“[In a settlement class] [t]here is in fact little or no individual client consultation.”). See also *Macey and Miller*, 58 *U Chi L Rev* at 5 (cited in note 47) (offering a general criticism of relying on named plaintiffs: “The named plaintiff does little—indeed, usually does nothing—to monitor the attorney in order to ensure that representation is competent and zealous.”).
- ¹⁹¹ Specifically, for courts that have noted that collusive behavior in the settlement class raises [Rule 23\(a\)\(4\)](#) adequacy issues, see *Amchem*, 521 US at 625 (“The adequacy inquiry under [Rule 23\(a\)\(4\)](#) serves to uncover conflicts of interest between named parties and the class they seek to represent.”); *In re Diet Drugs*, 2000 US Dist LEXIS 12275, *136-40 (ED Pa) (“Unlike *Amchem*, the named class representatives’ interests are closely aligned with those of the class, such that fair and adequate representation of the class is ensured.”); *In re Ford Motor Co Bronco II Products Liability Litigation*, 1995 US Dist LEXIS 3507, *23 (ED La) (“One of the dangers inherent in class actions settlements is that class counsel ‘is potentially an unreliable agent of his principals’ and may try to ‘sell out’ the class in exchange for substantial attorneys’ fees.”) (internal citation omitted).
- ¹⁹² See G. Chin Chao, *Securities Class Actions and Due Process*, 1996 *Colum Bus L Rev* 547, 565-74 (summarizing these approaches and providing examples of each).
- ¹⁹³ *Id.* at 570-71.
- ¹⁹⁴ *Id.* at 572-74.
- ¹⁹⁵ *Id.* at 565-70.
- ¹⁹⁶ See *Johnson*, 319 US at 304 (dismissing the suit for “absence of a genuine adversary issue between the parties”). See also text accompanying notes 89-93.
- ¹⁹⁷ See, for example, Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 *Wm & Mary L Rev* 1, 33 (2000) (arguing that due process problems that flow from binding unrepresented absent class members to a class agreement can be remedied through [Rule 23](#) judicial supervision over the formulation and operation of the class action).

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- ¹⁹⁸ There are some examples of “active” courts that, because of the absence of information on the terms and fairness of settlement, have rejected the settlement class after a fairness hearing. See, for example, [Plummer](#), 668 F2d at 657 (concluding that the record was insufficient to “support a responsible finding that the settlement was fair, reasonable, and adequate” and remanding for further development of the record). However, even the rejection of a settlement class can be problematic. Specifically, it implicates the hybrid model, under which the decision to address the fairness of the settlement outside the confines of an adversarial dispute works a change in the foundation of underlying substantive law. It also implicates the litigant-oriented interest in being free from unfair preclusion: even when the settlement is rejected, the court’s judgment regarding the unacceptability of class certification is binding on class members, evoking concern about the class representative’s proper advancement of the interests of absent but bound individuals.
- ¹⁹⁹ [In re General Motors Corp](#), 55 F3d at 786.
- ²⁰⁰ Compare [Phillips Petroleum v Shutts](#), 472 US 797 (1985) (holding that failure to opt out is consent to jurisdiction in a particular forum). But see [Commodity Futures Trading Commission v Schor](#), 478 US 833, 849-51 (1986) (holding that while the individual interest in impartial adjudication can be waived, the structural guarantees of Article III cannot); [Brilmayer](#), 93 Harv L Rev at 298 (cited in note 129) (noting that Article III’s case-or-controversy requirement is not waivable: if there is no case or controversy, “courts are without power to proceed, regardless of the wishes of the parties”).
- ²⁰¹ See Edward H. Cooper, [The \(Cloudy\) Future of Class Actions](#), 40 Ariz L Rev 923, 936 (1998). See also [Redish](#), 2003 U Chi Legal F at 94-103 (cited in note 144) (arguing that inertia warrants a rule requiring affirmative “opt-in” instead of “opt-out”). For example, opt-out requires the class member to take a number of affirmative steps: she must open her mail, fill out a form, and then send it back. Each required step lessens the probability that the individual will actually seize the opportunity to exclude herself from the class.
- ²⁰² Rule 23(e)(3) is inapplicable to the settlement class, given that certification and settlement approval occur simultaneously. See [FRCP 23](#), Advisory Committee Notes to the 2003 Amendments (“[Rule 23(e)(3) does not apply when the] class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication.”).
- ²⁰³ *Id.*
- ²⁰⁴ [In re General Motors Corp](#), 55 F3d at 789. This is especially true in small claim classes, where maximum possible recovery on the claim is often less than the cost of bringing individual suit, rendering the right to opt out futile.
- ²⁰⁵ See, for example, [Johnson](#), 319 US at 305; [Muskrat](#), 219 US at 362-63.
- ²⁰⁶ See [In re Fibreboard Corp](#), 893 F2d 706, 710-11 (5th Cir 1990) (“[The] adversarial backdrop” against which Congress legislates is a “way[] of proceeding [that] reflect[s] far more than habit. [It] reflect[s] the very culture of the jury trial and the case and controversy requirement of Article III.”).
- ²⁰⁷ [Redish](#), 2003 U Chi Legal F at 82 (cited in note 144) (discussing the manner in which class actions threaten to transform the remedial method provided for in the underlying substantive law).
- ²⁰⁸ One could argue that in some settlement classes, the court plays only a minimal role in the creation and implementation of a distribution scheme—tasks that are instead performed by the private parties. For example, in [Amchem](#), the parties proposed that the administrative compensation scheme would be run by the conglomeration of defendants, and that this group would, on the basis

of information provided by individual claimants, make all final determinations as to the claimant's level of injury and corresponding level of compensation. 521 US at 599-600. Despite the semiprivate nature of this scheme, it nevertheless poses constitutional difficulty. First, the court still supervises the distribution of resources, which constitutes judicial exercise of an executive function. Second, even if this is not true, and instead private parties are actually responsible for all distribution decisions in the absence of court supervision, the settlement class effectively concedes executive authority to private parties. The implementation of a nonadversarial administrative compensation scheme is the exclusive responsibility of the executive branch. Giving government sanction to the settlement agreement and terms of implementation, the court transfers authority that rightfully belongs to another branch to private persons, jeopardizing the liberal democratic system. Specifically, private individuals lack the "objectivity and accountability" necessary to control the exercise of the power of resource allocation, threatening the interests of both absent class members and the public at large:

[In taking on a purely public power,] private actors do not simultaneously assume the constitutional and political restrictions traditionally imposed on those who exercise pure public power. Instead, the private actors remain free to ground all of their decisionmaking—both strategic and formal—on their assessment of how best to advance their own private interests, free from the ethical, political, and constitutional constraints imposed on public actors.

Redish and Mathews, 53 Emory L J at 4 (cited in note 141). One could argue that, in this regard, the settlement class is no different from a traditional settlement, where the distribution of resources pursuant to their private agreement would also be left to the private parties, to be carried out as they saw fit. However, the purely private nonclass settlement does not receive judicial sanction. Rather, upon settlement, the court merely dismisses the suit; the implementation of the agreement is an exercise of a purely private power, regulated by state contract law. In contrast, the settlement class is a governmental directive. The parties choose to bring their nonadversarial agreement to the court to secure Article III approval of the distribution arrangement. And once the court certifies the class for settlement, the settlement requires government approval to bind the thousands of absent class members whose interests are at stake. The terms of settlement are then embodied in a court order—a judicially mandated administrative compensation scheme that does considerably more than govern the rights of those immediately before the court.

²⁰⁹ [United States v Ferreira](#), 54 US (13 How) 40, 48 (1852).

²¹⁰ See Part IV.A (summarizing the Bancorp rule).

²¹¹ See Part IV.B.1.a (explaining that adversarial litigation on [Rule 23](#) prerequisites is one manifestation of the parties' adverseness in a postcertification class settlement).

²¹² Steven G. Calabresi and Kevin H. Rhodes, [The Structural Constitution: Unitary Executive, Plural Judiciary](#), 105 Harv L Rev 1153, 1189 (1992) (noting that [Article II](#) may reserve executive power exclusively for the executive branch, "just as [some argue that] the Article III Vesting Clause designates, identifies, and describes the Supreme and inferior Article III courts as the only proper recipients of federal judicial power"). See generally Steven G. Calabresi and Saikrishna B. Prakash, [The President's Power to Execute the Laws](#), 104 Yale L J 541 (1994) (making a textual case for a unitary executive).

²¹³ Additionally, even if one were to conclude—despite clear evidence to the contrary—that the settlement class does not trample on the executive sphere, it nevertheless does not constitute a "judicial function," given its nonadverseness in violation of Article III. See Redish, 39 DePaul L Rev at 310 (cited in note 146) (criticizing the Morrison opinion as conflating the analysis of whether the "Special Division[] substantially interfered with executive discretion" with the more important inquiry of whether the function was "related to adjudication of a live, adversarial 'case'").

²¹⁴ See Part III.C.3.b. See also Richard J. Pierce, Jr., [Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions](#), 41 Vand L Rev 301, 307-08 (1988) ("Because agencies are more accountable to the electorate than courts, agencies should have the dominant role in policy making when the choice is between agencies and courts."); Spann, 131 U Pa L Rev at 636 (cited in note 105) (explaining that the judiciary is "insulated purposely from immediate political accountability").

²¹⁵ See Calabresi, 48 Ark L Rev at 65 (cited in 158) ("Even leaving aside conflicts of interest, it is inherently difficult for one person

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to do two jobs. Yet, that is what is demanded if we rely on members of Congress or judges to perform the executive tasks that the Constitution leaves to the President and his agents.”).

- 216 521 US at 633, 636-39 (Breyer dissenting in part) (concluding that any problems with regard to conflicts of interests among class members were endemic to “toxic tort cases,” and that the likelihood of some type of compensation under the terms of the settlement agreement—compensation that was unlikely in the absence of settlement—rendered the agreement inherently “fair[.]”).
- 217 See John A. Siliciano, [Mass Torts and the Rhetoric of Crisis](#), 80 *Cornell L Rev* 990, 994 (1995) (arguing that the threat posed by mass torts to the court system—in terms of docket pressures—is greatly overblown; indeed, the “perception that mass tort cases present ‘special’ problems may arise not from the cases themselves, but from the threshold decision [how] to view them”).
- 218 Consider [In re Joint E and S District Asbestos Litigation](#), 14 F3d 726, 733 (2d Cir 1993) (rejecting the argument that proceeding by way of a 23(b)(1)(B) class was far more efficient than filing in a bankruptcy court, given that the latter was statutorily mandated: “the function of federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges”); [In re Fibreboard Corp.](#), 893 F2d 706, 712 (5th Cir 1990) (rejecting the argument that statistical sampling is the “only realistic way of trying [the class action]” as irrelevant).
- 219 Gene R. Nichol, Jr., [Ripeness and the Constitution](#), 54 *U Chi L Rev* 153, 160 (1987) (addressing the constitutional limits on the power of the federal courts under Article III), citing [Valley Forge Christian College v Americans United for Separation of Church and State, Inc.](#), 454 US 464, 475 (1982). See also [Whitmore v Arkansas](#), 495 US 149, 161 (1990): [P]etitioner argues next that the Court should create an exception to traditional standing doctrine for this case. The uniqueness of the death penalty and society’s interest in its proper imposition, he maintains, justify a relaxed application of standing principles. The short answer to this suggestion is that the requirements of an Art. III “case or controversy” [are] not merely a traditional “rule of practice,” but rather [are] imposed directly by the Constitution. It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case.
- 220 [Valley Forge](#), 454 US at 476, 489.
- 221 478 US 833 (1986).
- 222 Laura S. Fitzgerald, [Cadenced Power: The Kinetic Constitution](#), 46 *Duke L J* 679, 705 (1997). This position reflects a “functionalist” approach towards the separation of powers. See also [Mistretta](#), 488 US at 381 (finding that only when “the whole power of one department is exercised by the same hands which possess the whole power of another department” are “the fundamental principles of a free constitution subverted”), quoting *Federalist No 47* (Madison), in *The Federalist* 325-26 (Wesleyan 1961) (Jacob E. Cooke, ed). Functionalism can be contrasted with formalism, which “posits perfect identity between the three ‘categories’ of ‘powers’ and the Constitution’s three decisionmaking institutions,” and “tolerates no task-sharing among them.” Fitzgerald, 46 *Duke L J* at 708. See also [Mistretta](#), 488 US at 426 (Scalia dissenting) (“In designing [the constitutional] structure, the Framers themselves considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document.”); Redish and Cisar, 41 *Duke L J* at 474 (cited in note 12).
- 223 The Court’s doctrine in this area, however, reflects a certain amount of eclecticism, given its contemporaneous application of both the formalist and the functionalist approach to separation of powers. For explanations of how to reconcile the Court’s jurisprudence in this area, see Matthew James Tanielian, Comment, [Separation of Powers and the Supreme Court: One Doctrine, Two Visions](#), 8 *Admin L J Am U* 961, 999-1000 (1995) (noting that when the “challenged action ‘encroaches upon a power that the text of the Constitution commits in explicit terms to [another branch],” the Court applies a formalist approach, but when “the power at issue was not explicitly assigned by the text of the Constitution,” the Court applies functionalism) (internal citation omitted); Timothy Hui, Note, [A “Tier-ful” Revelation: A Principled Approach to Separation of Powers](#), 34 *Wm & Mary L Rev* 1403, 1404-05 (1993) (explaining that the Court consistently applies a formalist analysis when Congress is overreaching, and applies functionalism when

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judicial or executive self-aggrandizement is in question). But see Ronald J. Krotoszynski, On the [Danger of Wearing Two Hats: Mistretta and Morrison Revisited](#), 38 *Wm & Mary L Rev* 417, 480 (1997) (critiquing the Court's distinction between legislative aggrandizement on the one hand and judicial or executive aggrandizement on the other, arguing that "[t]he Court has it precisely backwards").

²²⁴ Redish, 39 DePaul L Rev at 306 (cited in note 146).

²²⁵ Redish and Cisar, 41 *Duke L J* at 463-64 (cited in note 12).

²²⁶ Id.

²²⁷ Id at 463.

²²⁸ Id at 465.

²²⁹ Redish, 39 DePaul L Rev at 303 (cited in note 146).

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CLASS ACTIONS AND THE DEMOCRATIC DIFFICULTY: RETHINKING THE INTERSECTION OF PRIVATE
LITIGATION AND PUBLIC GOALS

Martin H. Redish¹

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Though on its face the class action appears to be nothing more than an elaborate procedural joinder device, in recent years it has become the focal point of much political and legal debate. Courts have noted “the intense pressure to settle”¹ caused by the very filing of a class action, while others believe the procedure amounts to “judicial blackmail.”² Those who take a more positive view of the class action consider it to be an effective means of policing corporate behavior and an assurance that injured victims will be compensated in the most efficient manner.³

Adopted as Rule 23 in the original Federal Rules of Civil Procedure in 1937, the federal class action device was dramatically revised in 1966, when it largely assumed its current format.⁴ Since the early 1990s, the Rules Advisory Committee has considered, but for the most part declined to implement, a number of *72 significant structural changes in Rule 23’s format.⁵ The Committee continues to struggle with the possibility of more far-reaching amendment of the Rule.⁶ Scholars have also devoted substantial attention to the class action issue, particularly its increasing use in the mass tort context.⁷

*73 Much of the scholarly commentary has been highly critical of the modern class action.⁸ Despite this widespread judicial and scholarly attention, neither courts nor scholars appear to have recognized a fundamental problem with the modern class action: in all too many cases, the modern class action has undermined the foundational precepts of American democracy. It has done so by effectively transforming the essence of the governing substantive law that the class action has been created to enforce. This transformation has come about even though the class action device is not structured for the purpose of altering the underlying law. Thus, controlling substantive law is not transformed through the democratic process of legislative amendment, where the electorate may measure its chosen representatives by how they voted on the proposed revisions of existing law. Rather, this dramatic alteration in governing substantive law arises from, essentially, a form of indirection and subterfuge, by use of a procedural device whose sole legitimate function is the considerably more modest *74 one of implementing and facilitating the enforcement of existing substantive law.⁹

In considering the modern class action’s problematic impact on American democracy, it is important to keep in mind a central fact often ignored in modern procedural scholarship: the class action was never designed to serve as a free-standing legal device for the purpose of “doing justice,” nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds or as a mechanism by which to redistribute wealth.¹⁰ Both its structure and description, rather, make clear that it is nothing more than an elaborate procedural device designed to facilitate the enforcement of pre-existing substantive law. A class action suit, after all, does not “arise under” [Rule 23 of the Federal Rules of Civil Procedure](#). If no pre-existing substantive law vests a cause of action in plaintiff class members, they cannot bring a class action suit. *75 Moreover, because, like virtually all of the [Federal Rules of Civil Procedure, Rule 23’s](#) class action device is inherently “transsubstantive,”¹¹ its use should not vary based upon differences in the nature of the substantive claim. Thus, unlike administrative interpretation and application of a particular statute, invocation of the class action device in no way authorizes

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creative interpretation or application of the particular substantive law in a case.

The substantive laws enforced by use of the class action device--for example, the federal antitrust laws,¹² federal consumer protection laws,¹³ federal securities laws,¹⁴ or, in cases falling within the federal courts' diversity jurisdiction,¹⁵ state tort laws--all contain two fundamental elements: the proscription or regulation of an actor's "primary behavior"¹⁶ and the provision of a remedy or remedies by which these behavioral regulations are to be enforced. For the most part, these laws enforce their behavioral proscriptions by establishing claims for damages for private victims of the proscribed behavior.¹⁷ These provisions are designed to make the private victim whole by obtaining compensation from those who have caused them harm. Moreover, as the statutory provision for treble damages in the antitrust laws illustrates,¹⁸ such damage remedies may also include punitive, as well as compensatory awards. In each of these cases, the assertion of private rights to compensation through the mechanism of litigation may well have the incidental effect of advancing the public interest by *76 punishing, deterring, and halting law violations on the part of defendants. In this sense, the private plaintiffs may be viewed as a type of "private attorney general."¹⁹ This is so, even if we presume that the motivation of the litigants who bring suit to enforce their compensatory rights under the relevant substantive law is solely the desire to improve their own personal economic position. But under that law no plaintiff is ever required to enforce his private compensatory right. To the contrary, the substantive law vests that choice exclusively in the individual victim. Thus, in such situations, any incidental benefit to the public interest is wholly contingent upon the private victim's decision to seek to judicially enforce her substantively created remedy.

Where the government wishes to deter or punish unlawful behavior in a more direct and reliable manner, it has several options available to it. Instead of, or in addition to, the private compensatory remedy, a legislature may utilize any permutation or combination of a variety of conceivable remedial models, including criminal enforcement, civil penalties, and administrative regulation. For purposes of democratic theory, there are several key points to note about the substantive law's choice of remedial model. To be sure, a legislative choice of behavioral proscription may be of enormous political import. Normative issues of social policy often turn on the legislative selection of specific acts to be prohibited or restricted. But also of potentially great social and political significance is the legislative choice of how to implement and enforce those directives--for example, whether a judicially enforceable compensatory remedy will be created, whether relief will be confined to the imposition of criminal penalties, or whether civil fines will also be authorized. Unless a particular substantive law authorizes enforcement through private victim compensation, the entire structure of private rights compensatory adjudication is generally rendered irrelevant.²⁰ On the other *77 hand, where a statute provides for enforcement exclusively through victim compensation, enforcement of the statute's behavioral norms by any other method inevitably and profoundly alters the statute's substantive directives.

Careful examination of both the structure of and practice under [Rule 23](#) demonstrates that all too often the device permits the transformation of the remedial enforcement model expressly adopted in the underlying substantive law from a victim's damage award structure into an entirely distinct form not contemplated in the underlying substantive law.²¹ In such cases, the suits are not, in any realistic sense, brought either by or on behalf of the class members. The class members neither make the decision to sue at the outset nor receive meaningful compensation at the end. Instead, in these suits, as a practical matter, it is the private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations. In effect, the promise of substantial attorneys' fees provides the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior. Thus, what purports to be a class action, brought primarily to enforce private individuals' substantive rights to compensatory relief, in reality amounts to little more than private attorneys acting as bounty hunters, protecting the public interest by enforcing the public policies embodied in controlling statutes.

In these "faux" class actions, most members of the class never make a conscious choice to seek judicial enforcement of their substantive right to pursue private damages.²² Indeed, because membership in a [Rule 23\(b\)\(3\)](#) class is established merely by the class *78 member's failure to opt out of the class (rather than her decision to affirmatively opt in),²³ MANY MEMBERS of the class quite probably never focus upon, recognize, or understand the notification of the class suit. At the very least, it is impossible to be certain of the contrary assumption. Thus, it is quite conceivable that many class members are even unaware that they are parties to a lawsuit. Moreover, when the litigation dust settles, even in cases in which the plaintiff class prevails (either by means of judgment or settlement), often the overwhelming majority of class members never receive anything

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approaching meaningful compensation for the defendants' violation of their substantive rights. Instead, they are frequently "awarded" the opportunity to receive some form of discount coupon for purchase of a product or service already provided by the defendant in the normal course of business.²⁴ This relief is provided even though the discount is often for products or services likely to be of little or no use to the overwhelming majority of class members.²⁵ Despite such virtually non-existent benefit to the class and non-existent loss to the defendant, courts have regularly approved such class settlements.²⁶ Of course, one might ask, if the absent class members have so little interest in the outcome of the class action, why should the fact that they receive no meaningful compensation really matter? The answer is not that we should be concerned about the individual class members as much as we should be concerned about the fundamental transformation of the underlying substantive law through the purely procedural device of the class action. As a result of the class action procedure, what purports to be a substantive compensatory framework has been furtively transformed into a structure in which no one receives compensation through enforcement of the underlying substantive law. We never know whether the public would approve such a transformation, because it is never informed that such a transformation has been made. It is, then, the impact on the democratic process, rather than the impact on individual class members, that gives rise to concern.

***79** Even where meaningful compensation is obtained on behalf of the class as a whole, in many of these cases individual class members cannot receive compensation without a class member's affirmative filing of a complex claim form. This is so despite the fact that, under the opt-out procedure established in [Rule 23](#), the class member becomes a class member by the failure to take any affirmative act. One cannot readily assume that a class member who entered the class passively is likely to exercise his right to relief by now affirmatively filing a claim.²⁷ The only individuals receiving significant financial awards in these faux class actions are the class's lawyers. When these class actions settle, the amount of the attorneys' award is determined by reference to the abstract financial "value" of the discounted coupons that the class members are offered as part of the settlement.²⁸

For all practical purposes the classes in these suits are reminiscent of the life-sized celebrity cardboard cutouts that occasionally appear on large city street corners, accompanied by a photographer anxious to snap a tourist's picture standing alongside. Much like the cutout's appearance in the photograph, at first glance the class appears to exist, but closer scrutiny reveals that it is little more than a two-dimensional, cardboard version of a real class of plaintiffs.

It does not automatically follow that such actions are inherently invidious, immoral, or illegal. Nor does it automatically follow that such actions will necessarily fail to foster the public interest by enforcing the substantive law's proscriptions on defendant's primary behavior.²⁹ To the contrary, it is not unreasonable to predict that the public interest in assuring corporations' compliance with legislatively-imposed restrictions on their primary behavior might be significantly advanced by the creation of economic inducements to private individuals to ferret out and seek judicial relief for violations of those proscriptions. The point, rather, is that these faux class actions seek to advance and protect the substantive law's behavioral norms by resort to a "bounty ***80** hunter" remedial model that is very different from the one established in the substantive law being enforced in the class action.³⁰

The concept of the bounty hunter holds a venerable position in our nation's history. In the Old West of the second half of the nineteenth century, law enforcement agencies were generally understaffed, especially relative to the high level of criminal activity. One means of augmenting public authorities' resources was resort to partial reliance on private bounty hunters.³¹ Rewards were offered for the apprehension--often, dead or alive--of wanted criminals. Motivated as much or more by considerations of personal greed than civic responsibility, bounty hunters made a career out of apprehending these criminals, thereby qualifying for the rewards.³² In this manner, the bounty hunters effectively furthered the public interest by seeking to promote their own personal economic interests.

In the faux class actions, the class attorneys function in a manner strikingly parallel to the Old West's bounty hunters: as a reward for their efforts in ferreting out illegal corporate behavior, these private advocates receive substantial attorneys' fees, either negotiated as part of a settlement or awarded by a court after judgment. Thus, as was the case with the Old West's bounty hunters, the pursuit of private gain motivates private individuals to expose illegal activity, thereby supposedly furthering the broader public interest in having the corporate world adhere to the broad behavioral proscriptions set by governmental authorities.³³ But the bounty hunters of the Old West furthered the public interest not by redistributing illegally

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held wealth to the *81 poor--one should not anachronistically confuse the bounty hunters of the Old West with Robin Hood, but rather by apprehending those who threatened the public peace. Even when a class's attorneys bring an action that lacks any real plaintiffs, the suit may nevertheless further the public interest, if in so doing it exposes, punishes, and deters illegal corporate behavior. The problem, however, is that these suits are not structured to be bounty hunter suits, but rather private compensatory damage suits, which they often are not. The two forms of enforcement are by no means identical from legal, social or political perspectives.³⁴

The closest legal analogy to the bounty hunters of the Old West has traditionally been the venerable *qui tam* action,³⁵ in which private individuals, not claiming to have suffered personal injury as a result of specified illegal behavior against the government, may nevertheless bring suit to remedy that behavior. Though the bulk of the damage award obtained as a result of a successful *qui tam* action goes to the government in order to compensate it for loss suffered as a result of the defendant's illegal activity, the private litigant is rewarded with a specified percentage of the total damage award. In this manner, government creates private incentives in unharmed individuals to discover and expose behavior that illegally harms the government.³⁶ The problem with reliance on *qui tam* actions, however, is that they have been explicitly authorized by congressional statute; class action bounty actions have not.

In its current form, the faux class action constitutes a wholly improper and unacceptable departure from the fundamental precepts of American democracy, and thus gives rise to what can be described as "the democratic difficulty." The sources of the serious (and ultimately fatal) problems of democratic theory to which the faux class action gives rise are two-fold: (1) Such actions are not what they purport to be--namely, compensatory damage suits--and (2) in any event these disguised bounty hunter actions have never been authorized by the underlying substantive law that such actions purport to enforce. In effect, then, these actions constitute a form of procedural shell game, in which a procedural device that has been designed to do nothing more than facilitate the enforcement of the substantive law's authorization of private *82 damage suits³⁷ transforms that private remedial model into a qualitatively different form of remedy that was never part of that substantive law.³⁸ If the substantive law is to authorize a bounty hunter remedial model as a supplement to or replacement for the pre-existing private damage remedy, the change may not properly be effected through the operation of a procedural device such as [Rule 23](#). Such a dramatic modification of the substantive law through resort to an avowedly procedural device contravenes the fundamental democratic notions of representation and accountability, because the process effectively deceives the electorate. As a result of this deception, the electorate is unable to judge its elected representatives by examining how they voted on these important modifications of enforcement models, because those representatives have never been asked to vote on the issue. The democratic process is substantially undermined as a result.

In light of the insights of this democratic critique of the modern class action, one might be tempted to conclude that, as presently structured, [Rule 23](#) violates the separation of powers protections of the United States Constitution, or at the very least the statutory directive of the Rules Enabling Act that a procedural rule may not abridge, enlarge, or modify a substantive right.³⁹ Ultimately, these attacks are likely to fail.⁴⁰ It does not follow, however, that there exists no recourse. The implications of the democratic critique of [Rule 23](#) make clear that the present situation is intolerable as a matter of the normative precepts of American democracy. It is therefore both necessary and appropriate for the Advisory Committee and the Supreme Court to reconsider and substantially modify [Rule 23](#) in order to remedy this troubling situation.⁴¹

I should emphasize that my argument does not represent an attack on class actions in the abstract. Nor am I suggesting that, as an empirical matter, every class action currently filed should necessarily be viewed as an invocation of a pure bounty hunter remedial model, rather than merely as the procedural collectivization of private compensatory rights.⁴² The problem is that, as *83 currently structured, [Rule 23](#), at the very least permits and condones what are pure bounty hunter actions in everything but name. The question then becomes how to modify the adjudicatory structure established by the Rule in order to permit the pure class action without authorizing the faux class action.⁴³ This Article will argue that substantial amendment to [Rule 23](#) is necessary in order to assure that the class action device does nothing more than achieve its stated purpose of facilitating the adjudication of claims authorized by pre-existing substantive law. Toward that end, the Article will seek to fashion specific proposals for revision of the rule that would replace the existing opt-out procedure with an opt-in structure and that would substantially restrict the certification of class actions where there exists doubt that truly compensatory relief could ever be fashioned.⁴⁴

Proponents of the modern class action would no doubt respond that such amendments to [Rule 23](#) would inevitably gut the effectiveness of class actions as a means of policing corporate misdeeds. It is true that many of the class actions currently in existence would be rendered invalid under the amended [Rule 23](#) proposed in this Article. However, the affected actions do not fit within the private rights adjudicatory model in which [Rule 23](#) is supposed to function.⁴⁵ In some cases, private rights adjudication would no longer function as an effective means of furthering the public interest by policing illegal corporate behavior, because the individual claims are so small that maintenance of a true class action and the distribution of compensatory relief are rendered infeasible. In such an event, however, it is the legislature's responsibility to consider alternative options by which private activity may be tapped as a means of protecting the public interest. Certainly, express legislative adoption of a bounty hunter model or other qui tam-like actions might provide such an alternative, though consideration of the constitutionality of such alternatives exceeds the scope of my inquiry. In a democratic society it is the legislature's responsibility to take such action overtly, rather than covertly--through use of the disguise of a procedural rule *84 that purports to do nothing more than implement the existing substantive law's private compensatory rights structure. It is only then that the electorate may meaningfully perform its essential function of making informed choices about those who seek to represent it.

In exploring the interaction between modern class actions and democratic theory, Part I of this Article initially considers the more general question of how the pursuit of private goals and the advancement of the public interest intersect. Part I also examines this intersection in the specific context of class actions, by exploring how the modern class action is thought to further the public interest as a type of private attorney general action.⁴⁶ Part II details the manner in which the current version of [Rule 23](#) effectively transforms the essential nature of the underlying substantive law that the class action procedure is designed to implement.⁴⁷ Part III explores the problematic impact of this transformation on fundamental principles of democratic theory.⁴⁸ The final section describes a series of amendments to [Rule 23](#) that, this Article suggests, would go a long way toward remedying the problematic intersection of the modern class action and American democracy.⁴⁹

I. Democratic Theory, Private Litigation, And Public Goals

There are two ways in which the modern class action impacts foundational precepts of democratic theory. One way, raised traditionally in the debates between advocates of communitarianism or civic republicanism on the one hand and pluralism or individualism on the other,⁵⁰ concerns the manner in which the pursuit of narrow self-interest impacts the advancement of the broader public interest in a democratic society. In the litigation context, this issue presents itself primarily in the shaping of the so-called "private attorney general" concept. The other way in *85 which democratic theory and class actions intersect concerns the manner in which the modern class action subverts the fundamental democratic precepts of representation and accountability by bringing about a disguised transformation of the underlying substantive law. In order to fully understand the nature of the latter's impact, however, one must initially grasp the essence of the first intersection. For it is only when one comprehends the subtle but significant distinctions, for purposes of democratic theory, in the applications of the private attorney general theory that one can fully understand how the modern class action improperly transforms the essential structure of pre-existing substantive law.

Much of the modern scholarly debate about the scope of democratic theory has focused upon the extent to which the concept of the public interest represents something apart from the mere summing of the citizens' individual private interests. At the extremes of this theoretical debate are the modern version of the theory of civic republicanism, which advocates "the subordination of private interests to the public good,"⁵¹ and the theory of "possessive individualism," in which "society is presumed to consist of relations among independent owners, and the primary task of government is to protect owners against illegitimate incursions upon their property and to maintain conditions of orderly exchange."⁵² While these two theoretical extremes are surely oversimplifications of what is a considerably more complex issue,⁵³ they underscore the fundamental tension between the primacy of the individual's interest in advancing her narrowly focused private interests and the need to have citizens "escape private interests and engage in pursuit of the public good."⁵⁴

*86 For present purposes, one need not attempt to resolve this long-standing debate. The key point to note, rather, is that at

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some level, most in our society have placed value simultaneously on both individual autonomy and civic-mindedness. Indeed, in a number of ways, society has sought to harness the drive for personal advancement in order to advance the public interest. By providing personal incentives to those who are in a position to better the community as a whole, our system has been able to advance the public interest. For example, drug companies develop new medicines, presumably not for altruistic purposes, but rather out of the traditional capitalist-based motivation of profit maximization. Yet the development of those drugs substantially advances the community's interests.

In a number of ways, our legal system has even asserted a preference for the pursuit of private gain, rather than communitarianism or altruism. For example, Article III's so-called "injury-in-fact" requirement is clearly premised on the notion that individual litigants may resort to the federal judicial system only when seeking to advance their personal interests.⁵⁵ Would-be plaintiffs who are motivated exclusively by altruistic or ideological concerns may not, as a constitutional matter, invoke the federal judicial process.⁵⁶ Unless the plaintiff has suffered some form of personal injury traceable to the defendant's violation of law and remediable by judicial action, she constitutionally lacks the standing necessary to invoke the federal courts' jurisdiction.⁵⁷ It surely does not follow, however, that federal adjudication is incapable of advancing social, economic, or political interests that extend well beyond the personal interest of the individual litigant. It means, simply, that whatever impact federal adjudication may have on the public interest must come as an incident to the assertion and adjudication of narrower, personal interests.

On occasion, the legislature may create a private statutory right to damages, at least in part for the purpose of advancing the public interest. Private litigation may often do the government's work for it, by deterring and punishing violations of law. By seeking to benefit the individual litigants, then, adjudication may have the incidental impact of advancing the public interest. As Professor Coffee has written, "(p)robably to a unique degree, *87 American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies."⁵⁸ Coffee further notes that "(t)his system of enforcement . . . is most closely associated with the federal antitrust and securities laws and the common law's derivative action, but similar institutional arrangements have developed recently in the environmental, 'mass tort,' and employment discrimination fields."⁵⁹ This, in short, describes the concept of the "private attorney general."⁶⁰

If a suit brought to vindicate a single individual's private right can be thought to foster the public interest by deterring and punishing violations of law, it would seem to follow logically that a class action brought on behalf of numerous victims could geometrically increase the litigation's beneficial impact on the public interest. Thus, it is not surprising that respected commentators have recognized that "(p)ivate class actions for money damages can yield significant social benefits."⁶¹ According to Professor Yeazell, the modern view of the private class action as a type of private attorney general finds its origins in the 1941 scholarship of Professors Kalven and Rosenfeld, who saw class litigation as:

(A) supplement to governmental regulation of large, diffuse markets . . . reflect(ing) a consensus that the old, ordinary forms of liability were not functioning to discipline their operations In (Kalven's and Rosenfeld's) view the representative suit would serve to supplement regulatory agencies both by requiring wrongdoers to give up their ill-gotten gains and by ferreting out instances of *88 wrong that might have escaped the regulators' observance.⁶²

Yeazell notes that "(t)his concept . . . has become a leading justification for the modern class action" and that "it links (the) concept of the interest class . . . to the general task of law enforcement."⁶³

Though at first glance the intersection of private litigation and public goals appears to be both simple and straightforward, closer examination of the role of the modern private class action in the service of the public interest reveals that both empirical and conceptual ambiguities exist about the nature of the public-private interaction. The former have already been noted by others, while the latter appear to have been completely overlooked. On an empirical level, questions have been raised concerning the extent to which the private class action effectively fosters the public interest as a supplement to out-manned and out-gunned governmental agencies. Many class actions come in the form of what have been called "coattail" classes--in other words, class actions that follow successful governmental litigation on either the civil or criminal fronts, and

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feed off of the fruits of the governmental agency's efforts.⁶⁴ In such situations, the class action does not itself ferret out illegal corporate behavior, spurred by the private economic incentive provided by the creation of damage remedies. To the contrary, the government has already brought such illegality to light and successfully imposed punishment. The *89 private action simply basks in the light of the government agency's efforts.⁶⁵ While some have criticized the coattail class action,⁶⁶ it does not necessarily follow that class actions are pointless in coattail situations. The class action may well justify its existence, merely by performing the extremely valuable function of compensating large numbers of victims in a relatively efficient manner.⁶⁷ Moreover, even coattail classes may advance the public interest by adding to the deterrence of corporate wrongdoing.⁶⁸ The fact remains, however, that coattail class actions obviously fail to perform the classic function of privately generated exposure of unlawful behavior traditionally facilitated by the private-attorney general concept.

It is not entirely clear whether the majority of private class actions are of the coattail variety.⁶⁹ For present purposes, however, one need not resolve that empirical question. We may assume, solely for purposes of argument, that most modern class actions actually perform the private attorney general function as it has been traditionally understood, by reinforcing otherwise overwhelmed governmental policing agencies in the pursuit of corporate illegality. Serious analytical problems nevertheless continue to exist, because significant conceptual ambiguities exist in the private attorney general concept that both courts and scholars have failed to recognize, much less resolve. Close scrutiny of these ambiguities highlights the manner in which the modern class action has largely transformed the remedial model that plays a central role in the design of the underlying substantive law.

Scholars have already recognized one dichotomy within the broader concept of the private attorney general. Commentators *90 have contrasted what they describe as the "Lone Ranger" and "bounty hunter" forms of private attorney general.⁷⁰ The "lone ranger" refers to the private litigant who is motivated in his attempt to serve the public interest primarily, if not exclusively, by idealistic or communitarian concerns. Of course, in light of the constitutional requirement of injury in fact,⁷¹ even these plaintiffs must be able to assert some form of personal injury and private right which they seek to vindicate by the pursuit of judicial action. But for these plaintiffs, such injury serves for the most part as a means to a broader, idealistic end. The "bounty hunter," on the other hand, refers to the private litigants who care little for broader concerns of public interest but are instead focused exclusively upon the pursuit of their own private interest. As already noted, however, even litigants falling within this latter category may serve the public interest as an incident to their pursuit of their own private rights.⁷² For this reason, recognition of this dichotomy within the category of private attorney general actions may have more sociological than legal import.

What no one appears to have recognized, however, is the legally and theoretically significant dichotomy that exists within the concept of what have been described, somewhat overinclusively, as "bounty hunter" class actions.⁷³ As already noted, this category is thought to include those actions brought exclusively for the purpose of personal gain, rather than for broader public interest concerns. But there exist two very different subcategories of such "personal interest" litigation. One is properly described as "compensatory" litigation. In these cases, one can readily presume that those bringing suit--both plaintiffs and their attorneys--are motivated exclusively by considerations of narrow self-interest: the plaintiffs seek to make themselves economically *91 whole by obtaining compensation for their injuries caused by the defendants, and the attorneys serve as "hired guns," doing nothing more than receiving compensation for performing a service on behalf of a client. Such suits may nevertheless be categorized as private attorney general actions, because they may well have the incidental impact--perhaps even intended by the legislative creation of the private right--of exposing and punishing law violations. In this sense, private litigation serves the public interest, regardless of the motivation of those bringing suit.

The "self-interest" litigation category of private attorney general actions includes an additional subcategory, also appropriately described as "bounty hunter" litigation. But it is important to distinguish this narrow subcategory from the primary category of "personal interest" litigation itself. Neither in the Old West nor in more recent times has a bounty hunter acted on behalf of the interests of specific private individuals, nor have they sought compensation for injury caused to themselves by others.⁷⁴ Bounty hunters, instead, have sought to serve the interests of the community by apprehending (and sometimes punishing) those who disturb or threaten the public peace. In exchange, the community has rewarded them. It is reasonable to assume that invariably it was the reward, rather than a sense of civic-mindedness, that has traditionally driven the bounty hunters (though of course the two motivations are by no means mutually exclusive). It is therefore probably fair to

say that the work of the bounty hunters effectively illustrates the intersection of self-interest and public interest. But this intersection does not involve the additional purpose of simultaneously compensating the victims of the apprehended wrongdoer. Thus, the appropriate litigation analogy to the bounty hunters is not the private compensatory action, for the simple reason that the work of bounty hunters has never been thought to include efforts to obtain compensation for private victims.

A more appropriate legal analogy to the bounty hunter is the *qui tam* action. In its modern form, the *qui tam* action is embodied in the False Claims Act, which authorizes private citizens (referred to as “relators”) to bring suit against defendants who have knowingly defrauded the United States government.⁷⁵ In order to induce such private action, the Act authorizes the private plaintiff *92 to recover a percentage of the proceeds from the action.⁷⁶ In this manner, “the *qui tam* provision works to provide an incentive for private litigants to expose the fraud and benefit from the recovery.”⁷⁷ Commentators have noted that “the number of *qui tam* suits filed is accelerating each year and recoveries are steadily trending upward.”⁷⁸ The *qui tam* plaintiff has suffered no personal injury at the hands of the defendant that she is seeking to remedy through adjudication. Rather, the plaintiff’s apparent motivation is to obtain the reward offered by the government for ferreting out and judicially punishing fraud against the government.⁷⁹ In this sense, the *qui tam* action represents an adjudicatory parallel to the actions and motivations of the Old West’s bounty hunter.⁸⁰

Once one understands the subtle but important distinctions among the categories and subcategories of private attorney general actions, it is appropriate to examine the modern class action in light of this background. Such an examination reveals that in its present form, the modern class action includes cases that fall within all three of the relevant categories: idealistic, self-interested, and its two sub-categories, private compensatory and *93 bounty hunter. The problem is that the substantive law that the class action purports to enforce invariably fails to authorize private attorney general actions of the bounty hunter variety.⁸¹ Moreover, at no point does anyone acknowledge the true character of those class actions that properly fall within the bounty hunter category. Rather, such actions are universally described, quite inaccurately, to be of the private compensatory variety. This is so despite the fact that in many such actions the only individuals involved in and financially motivated by the possibility of recovery are the attorneys, who have never suffered a legally cognizable and compensable injury at the hands of the defendants. The following section provides a detailed examination of the modern class action’s legal structure, in an effort to explain how what purports to be a private compensatory action and what legally is permitted to be nothing more than a private compensatory action in reality transforms itself into a disguised bounty hunter action.

II. The Modern Class Action As A Bounty Hunter Suit

If one seeks to determine exactly how the modern class action fits within the framework of private attorney general actions, it is first appropriate to distinguish between the civil rights class action, in which the class seeks primarily injunctive relief, authorized by [Rule 23\(b\)\(2\)](#),⁸² and those class actions brought primarily in order to compensate a class of victims.⁸³ The former largely fall *94 under the “idealistic” heading,⁸⁴ while the latter generally fall within the “self-interested” category. Of course, even a damages class action may be motivated in part by ideological concerns on the part of both class members and class attorneys. For example, individuals who firmly believe that big business must be curbed for the betterment of the community may eagerly pursue an action for damages as much to bring their political principles into reality as to acquire compensation. We nevertheless may draw this dichotomy because the distinction will be accurate more often than not and, in any event, at this level the implications of the distinction are purely sociological, rather than legal. What may well have significant legal consequences, however, is the distinction between the two different subcategories of self-interested litigation: private compensatory and bounty hunter. Yet as presently structured, [Rule 23](#) effectively authorizes both forms.

A. The Effect of Opt-Out on the Modern Class Action

By establishing membership in the class through the inherently passive procedure of opt-out,⁸⁵ [Rule 23](#) creates a framework for litigation that undermines the essential premises of the private compensatory model of adjudication. Pursuant to the private compensatory model, the substantive law simultaneously proscribes specified behavior on the part of a category of

actors and vests in the victims of that behavior the individual right to sue the wrongdoer in order to be made whole. None of the laws in question draws any distinction between individual and class injuries. To the contrary, they do nothing more than vest compensatory rights in individual victims. Thus, in its pre-litigation state, the right to sue belongs solely to the individual victim. Rule 23 permits those individual claims to be aggregated in a single action in order to bring about litigation convenience and provide a viable procedural means of vindicating the underlying substantive claims. Yet because the rule transforms individual victims into class members solely on the basis of their failure to remove themselves from the class, rather than by manifestation of their *95 affirmative assent to participate, it virtually invites the creation of a class in which, as a practical matter, numerous class members have not only not assented to suit, but are completely unaware that they are even suing. The upshot of this process, then, is that quite probably numerous plaintiffs--the individuals in whom the cause of action has been vested in the first place--are made members of the class without the slightest awareness of the suit.⁸⁶

One may fashion several conceivable responses to this attack on opt-out. Initially, scholars have suggested that the class is more appropriately viewed as an "entity," rather than as an aggregation of single individuals. If one accepts this conceptual characterization, a right of opt-out makes no sense: as a small cog in the entity's wheel, the individual plaintiff logically possesses no individual right to decide for herself whether or not to bring suit.

David Shapiro is the leading scholarly advocate of the "entity" model of the modern class action.⁸⁷ Shapiro first notes that "in the foreground of any discussion of the class action . . . is the continuing debate between advocates of individual autonomy in litigation and the proponents of what has been praised as 'collective' justice."⁸⁸ He adds:

The principal focus of the debate has been the extent to which the class action . . . should be viewed as not involving the claimants as a number of individuals, or even as an "aggregation" of individuals, but rather as an entity in itself for the critical purpose of determining the nature of the lawsuit.⁸⁹

Shapiro concludes that "the 'class as entity' forces should ultimately carry the day."⁹⁰ He argues that:

*96 This conclusion is not quite so radical as it may seem at first, since the idea of the collectivity as an entity is a familiar one in other settings. Thus, a whole range of voluntary private associations--congregations, trade unions, joint stock companies, corporations--and on a less "voluntary" level, municipalities and other governmental entities, have long been recognized as litigants in their own right--entities whose members may have at best only a limited say in what is litigated, in who represents the organization, and on what terms the controversy is ultimately resolved.⁹¹

Shapiro concedes that:

The analogy is not perfect of course. Shareholders in a corporation, for example, have chosen to become a part of the corporation for a variety of reasons A member of a class that exists only for the purposes of a litigation may be dragged kicking and screaming into a lawsuit he does not want, or at least would prefer to conduct on his own.⁹²

He responds to his own criticism of the entity theory, however, by pointing out that "some of these entities are not so 'voluntary' after all."⁹³

In anticipating and responding to criticism of the entity theory, Professor Shapiro effectively underscores the extent to which his entire analysis focuses upon an analytical perspective that is completely beside the point in deciding on the validity of the modern class action. Shapiro, recall, sees the debate as one between individual autonomy and collective justice. He attempts to fight off anticipated attacks on the entity theory that are grounded exclusively in basic autonomy rights of the individual to control his own litigation by pointing to numerous examples of existing entities in which individual members lack autonomy. But the fundamental problem with his analogies is not so much that, unlike the class, membership in these organizations is usually *97 voluntary, but that these organizations are themselves the creations of substantive law that directly regulates private individuals' primary behavior. In contrast, the class action exists as a procedural device designed to implement

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pre-existing legal regulations of citizens' primary behavior. If the laws establishing these regulations vest compensatory rights not in an entity of plaintiffs but rather in individual victims, then to view the class as an entity effectively transforms the essence of the pre-existing private right.

The most significant problem with the entity theory, then, is not that it undermines some abstract value of individual autonomy, but rather that it allows the class action procedure to transform the "DNA" of the underlying substantive law that it is seeking to enforce. There can be little question that in most current plaintiff class actions, the underlying substantive law does not create a cause of action in an entity, but rather in the individual victims. After all, the substantive law enforced in a class action generally draws no distinction between the compensatory rights asserted by a plaintiff in an individual suit and those asserted by a class of plaintiffs. Thus, to view the debate surrounding the entity model as a conflict of process-based theories, as Shapiro does, overlooks the true political harm to which adoption of an entity model gives rise.

In any event, there is no basis in the text of [Rule 23\(b\)\(3\)](#) to support the view that the Rule was somehow intended to transform the nature of the substantive rights being enforced from those vested in the individual plaintiff to rights vested in some ethereal entity of plaintiffs. Indeed, while I criticize the Rule for its use of an opt-out procedure,⁹⁴ if the Rule's drafters had some form of entity model in mind, they presumably would not have permitted opt-out at all. Instead, the entity of the class would have been permitted to act as the unitary force that it inherently is.⁹⁵ To describe the class as an entity, then, represents nothing ***98** more than a convenient, after-the-fact rationalization for what is largely a political effort to facilitate the successful operation of the modern class action. Whatever one concludes about the normative social issues implicated by the modern class action, it is clear that those conclusions should not enable the judiciary to contravene the essential nature of the underlying substantive rights.⁹⁶ Adoption of an entity view of the class action, however, does just that.

A less abstract response to my attack on the use of opt-out, in preference to opt-in, focuses on the realities of the modern class action. This argument posits that the opt-out procedure provides more than sufficient protection against the inclusion of unwilling class members, because it is predictable, *ex ante*, that as a general matter class members would have no reason not to include themselves in the class. Scholars have argued that under an opt-out procedure, at least where the individual claims are not sufficiently large to justify the costs of a separate suit, an individual plaintiff notified of the class action:

has a choice between two courses of action. She can do nothing, in which case she will receive a check in the mail if the suit is successful and will incur no costs if the suit fails. Or she can go to the trouble of opting out of the action, in which case she will receive nothing whether or not the suit is successful. Such a decision is not hard to make. Nearly everyone who understands the nature of this choice will elect to do nothing and thereby remain part of the class action.⁹⁷

Although this argument was not fashioned specifically in the context of the opt-in/opt-out debate,⁹⁸ one could reasonably rely on it ***99** to support a preference for opt-out. Because of the overwhelming likelihood that a reasonable class member would choose to include herself in the class, one may appropriately proceed on this presumption, unless and until the class member affirmatively tells us otherwise.

Despite its superficially appealing nature, this argument is fundamentally flawed, because it ignores the structural context in which the question about class members' intent is asked in the first place. Initially, it is important to point out that under the private rights model of adjudication, associated with the private compensatory remedial model, the question is not whether a plaintiff has any objection to suit, but whether a plaintiff affirmatively desires to sue. A private compensatory damage remedy is qualitatively different from a "guardian" model, under which the state or a specified private individual or entity is vested with legal authority to protect an individual or class of individuals deemed, for one reason or another, incapable of protecting their own interests. When a legislature provides for a private damage remedy, it presumably understands that the remedy is not triggered unless and until the injured victim decides that the injury is of sufficient magnitude to overcome inertia against suit. To be sure, the availability of the class action procedure makes suit for small claims more feasible, by reducing the costs and burdens of suit through the process of the aggregation of similar claims. But it does not follow that because of the class action procedure, the plaintiff who exercises her substantively vested compensatory remedy need no longer make the choice to sue.

An advocate of opt-out might respond, however, that the logical implications of the presumption concerning class members' intent are not merely that the individual plaintiffs have no objection to suit, but that they affirmatively desire to sue. In support of this contention, one may reason that a class member presented with the option would choose to sue, for the simple reason that she would have nothing to lose by suing. A class member who sues could never be in a worse position than if she had failed to sue, and may actually be placed in a better position, if only minimally, by ultimately receiving some form of compensation for her injuries, regardless of how small or useless.⁹⁹

***100** At best,¹⁰⁰ this argument works in the context of what Professor Coffee has labeled "Type B" class actions, in other words "those in which no claim would be independently marketable."¹⁰¹ In Professor Coffee's "Type A" category, which includes those classes "in which each claim would be independently marketable even in the absence of the class action device,"¹⁰² an individual plaintiff may well have a great deal to lose by remaining in the class, because in doing so he waives his due process right to control his own litigation,¹⁰³ and the possibility of such an individual suit is substantial. In virtually no other context are constitutional rights deemed waived by nothing more than a litigant's failure to act.¹⁰⁴ Yet that is exactly the result of the use of opt-out in these "Type A" class actions.

Even in Professor Coffee's "Type B" class actions, where individual claims are presumed to be too small to justify individual suit,¹⁰⁵ it is by no means clear that the argument that plaintiffs have nothing to lose justifies a presumption that absent class members will affirmatively wish to sue. At least as likely is that he will simply have no interest in the possibility of suit, one way or the other, for the simple reason that even under a best case scenario, he is not likely to be materially better off by suing than ***101** by not suing. Harm or benefit classified as *de minimis*, and therefore deemed legally and practically irrelevant, is a concept well established in the law. Similarly, a small claim is, as a general matter, likely to be viewed by a potential plaintiff as *de minimis* and therefore not worthy of legal action, even absent any litigation costs or burdens. To be sure, the potential class member may not actually oppose suit; quite probably, he just does not care. But the litigation inertia inherent in the private compensatory model of the governing substantive law requires the victim to exercise his right to sue. A litigant not even willing to complete and mail a simple "yes-or-no" form could hardly be said to have chosen to exercise his right to sue. Thus, one cannot properly presume, even in a "Type B" class action, that absent plaintiffs would necessarily choose to become members of the class.

Opponents of opt-in have argued that it would have a negative impact on minority and low-income individuals, who "might be disproportionately affected by an opt-in requirement."¹⁰⁶ Evidently, the reasoning is that minority and low-income individuals are less likely to be able either to understand a class action notice or to make a sound decision about the suit if they do understand it. Such paternalism, however, is inconsistent with the basic premises of a democratic system because it proves too much. The same reasoning would seem to lead to the conclusion that those who "know better" should be able to exercise the vote for those citizens who are unable to perceive their own interests. Obviously, such logic flies in the face of foundational normative premises of democratic theory, grounded in respect for the individual's ability to decide for herself what her best interests are. Selective paternalism for minority individuals is even more offensive to the premises of democracy, which are grounded in assumptions of equality.

On occasion, government, acting as *parens patriae*, may choose to intercede in order to protect the interests of its citizens.¹⁰⁷ Such situations occur when, due to high informational or transaction costs, individuals are unlikely to be able to perceive or protect their own legal interests. It is conceivable that in ***102** particular areas Congress could choose to create a semi-*parens patriae* action, allowing individual plaintiffs to opt out under specified circumstances. But these situations clearly involve substantive policy choices that generally have not been made in the governing substantive law enforced in modern class actions. Those laws, instead, create a compensatory right in individual victims, to be asserted by those victims in their discretion. To allow a rule that purports to do nothing more than create a procedural mechanism to transform pre-existing private compensatory rights into a crude form of *parens patriae* action is to abuse the rules of procedure.¹⁰⁸

Close examination of the 1966 Advisory Committee's rationale for adopting an opt-out procedure demonstrates the manner in which the Committee's choice was designed to subvert the essential remedial structure of the governing substantive law. According to Judge Levi, the Committee apparently had in mind small-claim, consumer class actions in which no one class

member would have a sufficient interest to litigate an individual claim and in which the forces of inertia might be greater than a potential class member's desire to participate, given the small stakes involved.¹⁰⁹ Benjamin Kaplan, who served as Reporter for the 1966 Committee, wrote that for the "small people" who may be prevented from affirmatively opting in due to "ignorance, timidity, (or) unfamiliarity with business or legal matters," the class action "serves something like the function of an administrative proceeding where scattered individuals are represented by the Government."¹¹⁰ But no matter how small the individual claims, their very existence derives from the substantive law's vesting of those rights in the individual victim. According to governing substantive laws, those rights may be judicially enforced only if individual victims choose to exercise them. If the individual injuries recognized by the substantive law are so small as not to justify the individual victim's decision to enforce them, then the rights will not be enforced.

Procedural rules may have the effect of making suit more attractive by reducing adjudicatory transaction costs through an *103 increase in the fairness or efficiency of the litigation process. However, unless the substantive law establishes some form of public guardian empowered to sue on behalf of injured victims the choice to sue remains in the victim. Indeed, Professor Kaplan's analogy of the class action to an administrative proceeding reveals his understanding that the small-claim class action is designed to transform the private compensatory remedy provided for in the governing substantive law into a wholly different concept.

B. The Effect of Meaningless Relief on the Modern Class Action

The second element in the ominous "bookends" of [Rule 23\(b\)\(3\)](#) class actions is the relief ultimately provided by the litigation. While in theory a small-claim 23(b)(3) class action may ultimately give rise to the award of compensatory relief to absent class members, as a practical matter this result is highly unlikely, if not virtually impossible. The practical problems are twofold. First, even if monetary damages have been awarded to the class,¹¹¹ in many situations individual plaintiffs are able to recover their awards only upon the filing of complex claim forms.¹¹² It is unrealistic, to say the least, to expect that absent plaintiffs, made members of the class purely by their passivity, will have the incentive to overcome the severe transaction costs to filing a claim in order to obtain an award that was not large enough to justify the relatively simple act of opting into the class in the first place.¹¹³ That fact does not matter, however, because no one realistically understands the purpose of the small-claims class action to be the compensation of class members.

Moreover, it is a practical reality today that relatively few class actions proceed to judgment, and it is also a practical reality *104 that many defendants refuse to agree to any settlement that requires them to pay money to class members. Instead, for the most part, these cases are settled by the use of coupon settlements, where, in the words of Professor Leslie, "defendants eliminate their legal liability in exchange for issuing coupons to class members redeemable for savings on a subsequent purchase of the defendant's goods or services."¹¹⁴ According to Professor Leslie, "(c)oupons are in fact often worthless despite their deceptively high value. In many cases, the coupons are laden with restrictions intended to make redemption difficult."¹¹⁵ He further notes that "(c)lass counsel do not prevent these value-reducing restrictions in settlement coupons because the attorneys are paid in cash, while judges usually focus on the face value of the coupons, not the restrictions on their use."¹¹⁶

One might respond that [Rule 23](#) already provides adequate means to prevent settlements that mistreat class members in this way. Under [Rule 23\(e\)](#), the court must approve the fairness of every class action settlement.¹¹⁷ Where a settlement provides class members with a virtually non-existent benefit, one would expect a reviewing court to function as an adequate safety net. But the terms of the Rule provide a reviewing court with absolutely no guidance in determining a proposed settlement's fairness. It is not unlikely that, in making its fairness ruling, the court is often driven more by the desire to avoid the costs and burdens of a class action's adjudication than the need to assure itself that class members have been truly compensated.¹¹⁸ The *105 problem appears to have reached even greater heights in a group of cases in which courts have approved settlements that effectively provided absent class members with virtually nothing at all while simultaneously awarding class counsel significant attorneys' fees.¹¹⁹

This is not necessarily to imply that in all class actions, absent class members receive no meaningful relief.¹²⁰ For purposes of

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argument, I will presume that in a number of modern class actions the class members actually receive the relief to which they are legally entitled, or at least meaningful compensatory relief. The fact remains, however, that a not insignificant number of modern class actions are resolved without class members receiving what could rationally be deemed real compensation. As presently structured, [Rule 23](#) allows such a result to take place.

In making these points about the structure of [Rule 23](#) and the troubling trend to which it has given rise, it is important to recall the theoretical context in which these issues are raised. The goal of this discussion has not been to make a point about plaintiff class action lawyers' failure to satisfy their obligations to their clients. Nor has it been to criticize the economic inefficiency of the class action device. The point, rather, is that, in all too many class action suits, there is no class being represented--at least not in any realistic sense of the term. Instead, the attorneys themselves are the real parties in interest.

***106** One possible response to this argument is that the constructive non-existence of a class is far different from the class's technical non-existence. In suits here described as constructively non-existent, it might be argued that at least certain class members do, in fact, know they are plaintiffs in a class action, and at least certain class members actually receive a compensatory benefit from the class action's resolution. This differs significantly, the argument would proceed, from a case being described as a class action where literally no class exists at all. From this perspective, the existence of something resembling a class, no matter how feeble, suffices to satisfy the dictates of the compensatory remedial model provided for by the substantive law. But rarely is modern legal analysis satisfied by reliance on technicalities. Where an examination of practical reality demonstrates that plaintiff class members neither chose to sue nor receive meaningful compensation as a result of suit, the problems of democratic theory that I raise are triggered. My argument thus turns on the assumption that where the relief awarded to a class will rarely be acquired by individual class members or is of little practical use to the overwhelming majority of class members, it is reasonable, for purposes of both legal and political analysis, to characterize the plaintiff class in such a suit as non-existent.

A second response to my criticism of modern class action structure and practice is that, as Professor Hensler has argued, "if the primary goal is regulatory enforcement, carefully matching damages to losses is not a great concern. As long as defendants pay enough to deter bad behavior, economic theorists tell us, it does not matter how their payment is distributed."¹²¹ But a response to a critique grounded in democratic theory that derives from precepts of economic theory amounts to an analytical non sequitur. An exclusive focus on achieving the goal of deterrence ignores the often fundamental political differences in the means chosen to accomplish that goal. Attaining deterrence by resort to one remedial model may give rise to socio-political consequences that differ significantly from those caused by another remedial model. It is just that transformation, I submit, that modern class action procedure has brought about, or at least permitted to develop. Examination of the nature of remedial models and the manner in which the political selection among them implicates the concerns of democratic theory establishes that the mere fact ***107** that a class action may achieve deterrence does not automatically resolve the problems of democracy raised by the modern class action.

III. Remedial Models, Bounty Hunter Suits, And The Democratic Difficulty

A. The Political Consequences of the Choice of Remedial Model

The legislative decision as to what behavior on the part of the citizenry is to be proscribed or restricted quite naturally answers only some of the normative issues of social policy implicated by legislative action. The abstract prohibition of behavior, even if it comes from government, will be nothing more than hortatory unless the legislation imposing that prohibition enforces it in some meaningful way. This choice, too, may implicate serious issues of political and social policy.

As already explained, in many instances the governmental choice to prohibit behavior is legislatively implemented by means of a private compensatory remedial model, which seeks simultaneously to compensate those who have been harmed by that behavior and to punish and deter the behavior by those who have engaged in it or are considering doing so.¹²² Government, however, has available to it alternative means of enforcing its prohibitions, especially when the effectiveness of the

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compensatory remedy as a punishment or deterrent is in doubt. This situation will arise where the transaction costs in judicially enforcing compensation remedies are likely to be high, where injured victims may lack the sophistication to bring suit, where either the existence or determination of damage is in doubt, or where the prohibited behavior is deemed sufficiently culpable as to justify punishment, untied to compensation.

When this occurs, government may: (1) replace actual damages with a statutorily determined measure of damages; (2) supplement actual damages with either statutorily determined penalties or an authorization of the judicial award of punitive damages; (3) punish the behavior criminally; (4) authorize the imposition of civil fines; (5) create a system of administrative enforcement; or (6) establish a public guardian to act on behalf of the *108 victims. Also, as the discussion of qui tam actions shows,¹²³ in rare cases government has employed a “bounty hunter” model, by providing a non-compensatory reward to private individuals to encourage them to assist in enforcing legal regulation of behavior deemed harmful to the public interest.

It is conceivable that different methods of enforcement would give rise to different reactions from the electorate. A private compensatory remedy may have the greatest appeal because it has a two-fold purpose: to compensate injured victims and to deter unlawful behavior. At the other end of the scale, the electorate may be more suspicious of a bounty hunter remedy, because it places the enforcement of public policy in the hands of individuals who are neither representative of nor accountable to the electorate and who are likely motivated primarily, if not exclusively, by considerations of personal gain. Thus, the legislative selection of a remedial model is potentially of great political significance.

B. The Foundations of Democracy

My argument, it should be recalled, is that class action suits brought on behalf of what is, for all practical purposes, a non-existent class amount to the use of a bounty hunter model, rather than the private compensatory remedial scheme provided for in the law being enforced in the class action. In this sense, the argument proceeds, the procedure has transformed the essence of that substantive law.¹²⁴ To this point, however, a key question about the nature and force of this argument remains largely unanswered: exactly how does this process of transformation undermine fundamental notions of democratic theory? To answer that question, I need first to posit a basic structural framework of democratic theory. To be sure, political theorists have argued endlessly about the structural and normative contours of democratic theory. Hence in shaping abstract precepts of democratic theory it will be necessary to bring democracy down to its lowest common denominators--elements that without which, virtually all would agree, the concept of democracy is rendered meaningless at best and Orwellian at worst. I must then explain how the modern class action’s transformation of the pre-existing remedial model contravenes those precepts. In addition, it is appropriate to explore whether the problems to which I point do nothing more *109 than raise normative issues of political theory, or whether they also give rise to statutory and/or constitutional violations.

1. Democracy as representation and accountability.

Any attempt to discern foundational precepts of democracy should start with the concession that democratic theorists have generally agreed on relatively little. Debates between individual autonomy theorists on the one hand and civic republicans and communitarians on the other continue to rage.¹²⁵ The views of theorists who believe that democracy flourishes when members of the community are encouraged to participate as much as possible in governmental decisionmaking differ substantially from those of scholars who believe the electorate’s role in the political process should be severely restricted.¹²⁶

All scholars who express a foundational belief in democracy, however, must agree on at least one key point. In the words of constitutional and political theorist Alexander Meiklejohn, the ultimate normative premise of democratic theory is that “(g)overnments . . . derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers.”¹²⁷ It is certainly true that the American governmental system is far from a pure democracy, grounded exclusively on the value of popular sovereignty. Our society also has a counter-majoritarian constitutional system, which imposes significant limitations on popular sovereignty, both procedurally and substantively. Concern about the unpredictability and danger of decision-making by uncontrolled masses played an important role in the minds of those who

shaped the American Constitution.¹²⁸ *110 Thus, the President is elected, not directly by the people but by an intermediary body.¹²⁹ For many years, United States Senators were elected, not by the people but by the state legislatures.¹³⁰ Federal legislation is promulgated by means of a complex process that requires the assent of both houses of Congress and, usually, acceptance by the President.¹³¹ It is thus possible, if not likely, that much legislation favored by a majority of the electorate will not be enacted.¹³² But all that these facts demonstrate is that majoritarianism, in a technical sense, is not the focal point of American constitutional democracy. It surely does not follow that the normative foundations of the nation's political structure are free of any commitment to the notion of ultimate sovereignty in the people. Indeed, a system lacking such a foundational commitment would, as a definitional matter, amount to an authoritarian state, which is anathema to a society that from its inception rejected the notion of taxation without representation.¹³³ Even democratic theorists who lack general respect for the intelligence or abilities of the electorate, such as Joseph Schumpeter, believe that, in a democracy, "the people have the opportunity of accepting or refusing the men who are to rule them."¹³⁴

*111 The keys to the form of democracy adopted in the United States, then, are not principles of majoritarianism, but rather--at least for policy choices not controlled by the counter-majoritarian Constitution¹³⁵--THE AXIOMS OF representation and accountability. In other words, those who make basic, sub-constitutional choices of social policy must (1) have been chosen by the electorate, and (2) be accountable to the electorate if they wish to continue in office. Focus upon commitment to these basic principles of democratic theory at some level moots one of the primary dilemmas of democracy. Both historically and politically, democratic theorists have wavered between the urge to value widespread participatory democracy--what political scientist James Morone refers to as "the democratic wish"¹³⁶--and the simultaneous "dread of government."¹³⁷ By selecting those who govern, the electorate contributes to its own governing.¹³⁸ At the same time, representative government protects liberty by serving as a check on potentially despotic leadership that has been freed from any accountability to the people.¹³⁹

2. Attacks on the representation-accountability rationale.

This does not mean that modern commentators, particularly in the legal field, have universally adopted an unquestioning commitment to these foundational precepts of democracy, on either normative or empirical levels.¹⁴⁰ My colleague Robert Bennett, for example, has argued that, as a practical matter, the individual's vote is invariably meaningless in choosing elected officials.¹⁴¹ Therefore the primary value of democracy is neither "representativeness" *112 nor accountability of elected officials. It is, instead, the incidental benefits to be derived from the democratic conversation to which the governing process gives rise.¹⁴² But while Professor Bennett's point about the meaninglessness of the individual vote is no doubt accurate, the generalization of this insight to the entire electoral process is fundamentally flawed, because it effectively renders a benevolent dictatorship morally indistinguishable from a democracy. Moreover, if the electoral process itself is largely meaningless, what is the point of encouraging conversations about that process among members of the electorate? Thus, it is both logically and practically impossible to separate the developmental values of democracy from commitment to the foundational principles of representation and accountability.

Another attack on the representation/accountability version of democratic theory might be that those goals cannot realistically ever be reached, because legislators vote on a multitude of bills, not just one. Thus, it is quite possible that a citizen will agree with her legislator's vote on one bill, but disagree on another. Yet that citizen will be called upon to vote yea or nay on that legislator's retention. Whichever way she votes on that issue, her choice will not fully reflect her views on all of the issues that come before the legislature. To a certain extent, the criticism is of course accurate. It does not automatically follow, however, that providing citizens with a vote on retention fails to achieve any of the representational goals of democratic theory. This point is best comprehended by contrasting the representative system, with all of its imperfections, to an authoritarian state. In an authoritarian state, the citizens have absolutely no say in the choice of governmental decision-makers. In contrast, under a representative system at least the citizens may make their choices by consideration of the candidates' positions or votes on the issue or issues he deems of primary importance.

Modern civic republican theorists, such as Cass Sunstein, have urged acceptance of a political theory that seems at odds, on fundamental levels, with the basic tenets of democracy.¹⁴³ Sunstein has suggested that, in the pursuit of "the common good," society should be guided, at least in part, by a principle of "universalism" that posits the possibility of "substantively right

answers.” *113¹⁴⁴ But it is unclear who, exactly, gets to determine the content of these “substantively right answers.” In any event, such reasoning is fundamentally inconsistent with the substantive epistemological humility inherent in any commitment to a democratic system: a society that values democracy only to the extent that it reaches externally derived, predetermined normative conclusions is no more a democracy than Iran was under the Ayatollah Khomeini or the Eastern European Communist states were during the Cold War period. Thus, to the extent modern civic republicans posit the existence of a “good,” derived by means external to the will of the populace, that is to legally bind society, they are rejecting democracy, rather than defining it.

Certainly, there exist almost countless permutations and combinations of democratic systems from which a society could choose in deciding how to govern itself. It is appropriate to conclude, however, that if history and language are to mean anything, a society cannot be considered “democratic” in any meaningful sense unless the bulk of sub-constitutional policy choices are made, directly or indirectly, by those who are representative of and accountable to the electorate.

C. The Political Commitment Principle As a Logical Outgrowth of Democracy

If one accepts the principles of representation and accountability as the foundations of democracy, it logically follows that laws enacted by the electorate’s representatives ought not be kept secret. Nor would it logically be possible for legislators to vote by secret ballot. There is little point in allowing the public both to choose and retain its governing representatives, if the public is unaware of how those representatives voted on legislation, both proposed and enacted. Moreover, it would be even more harmful to democratic interests were government to purport to adopt “Law A” while secretly enacting “Law B” or “Law Not A.” At least when legislators’ votes on legislation are kept secret, the public is on notice to pursue alternative avenues of assuring itself of the political views of its chosen representatives. When legislators *114 publicly proclaim their support (or opposition) to “Law A,” but in reality the legislature has enacted a different or contrary law, the public has been effectively defrauded. Indeed, it is difficult to distinguish such political fraud from a candidate’s obtaining money from union workers on the basis of the false assertion that he has actively participated in union activities. Such deceptive lawmaking is far more harmful to democracy than secretive legislation--as problematic as such legislation is--because in such a situation the public is deceived into believing that democracy is actually working.

It is true that as a practical matter, much modern law is made by government officials not directly accountable to the populace. Courts, whose judges--at least at the federal level--do not stand for election, on occasion fashion common-law principles, and administrative agencies, in applying legislation, have traditionally exercised enormous discretionary power. To a certain extent, from the perspective of democratic theory, both assertions of power may well be deemed problematic, for the very reason that those making the decisions do not satisfy the requirements of representation and accountability.¹⁴⁵ Neither situation, however, is as systemically invidious as the process whereby governing law is surreptitiously transformed into a different or contrary law. In the context of judicial lawmaking, presumably the representative agencies of government have either failed or refused to act on the issue at hand, and a court must fill that vacuum, if only to perform its function within the private rights adjudicatory model: the court must determine governing law, simply to determine who wins. The existence of administrative decision-making, in contrast, effectively concedes that generally framed legislation cannot possibly anticipate every conceivable application. Therefore, someone must intercede to perform that function. Moreover, administrative agencies can be considered indirectly accountable--at least to the extent they are considered part of the executive branch. Finally, to the extent legislators cede to administrative agencies fundamental lawmaking power, it is arguable that an electorate unhappy with such open-ended delegation may hold those legislators accountable at the next election.¹⁴⁶ None of these *115 arguably ameliorating factors exists in the context of the surreptitious transformation of governing legislation.

The response might be fashioned that as a general matter, the public is likely to be unaware of and uninterested in either the content or structure of substantive law or the lawmaking process. A majority of the public, the argument proceeds, generally cannot tell the difference between “Law A” and “Law Not A,” and therefore little of practical import turns on the openness and candor of the legislative process. In many instances, this assertion would no doubt be accurate. But it most certainly will not be true in all instances. Many segments of the public become energized by one type of law or another, from abortion regulation to welfare standards to international trade policy, to name only a few.¹⁴⁷ Once this point is conceded, however, it

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becomes impossible to determine, ex ante, which laws will, in fact, engender public interest and concern, and which will not. Therefore, it is necessary to proceed on a general assumption that in order for democracy to function properly, we should presume that all laws stimulate public interest.

One might further argue that it is common knowledge that most laws do not actually mean what they purport to say, because in reality most laws are the outgrowth of a cynical process of bartering among competing special interests--a fact that no legislator is likely to want to make public. This argument basically encapsulates the essence of the argument fashioned by "public choice" theorists.¹⁴⁸ But whatever the truth of this assertion as a matter of legislative process, it is misplaced in the present context. The laws to which public choice theorists refer accomplish just what they claim to. At most, what is kept secret is the true motivation for enactment of the law and how specific special interests will benefit as a result of its adoption. This is by no means the same thing as enacting a law that in reality effects changes diametrically opposed to the results that that law purports to bring about.

***116 D. Applying the Political Commitment Principle to the Modern Class Action**

All too often, the class action device has been viewed as something other than what it was created to be--"a practical rule of joinder where joinder was otherwise impractical."¹⁴⁹ For example, George Priest suggests that "there has been little effort to explain why class litigation should be made to resemble individual litigation beyond the fact that individual litigation is regarded as the norm and class litigation, the exception."¹⁵⁰ The individual litigation ideal, thus, appears to be "little more than preference for the known and accepted status quo."¹⁵¹ Professor Priest's argument effectively views the class action in a political and constitutional vacuum. He thereby completely ignores the political framework within which the class action device is intended to operate. Priest totally disregards the vitally important fact that the class action was created as--and to this day, purports to be--nothing more than a procedural mechanism by which to enforce pre-existing substantive rights. Yet substantive law generally establishes only individual compensatory rights. None of the statutes enforced by the class action rule distinguishes between individual and class rights. Indeed, all that they create are individual rights--the very rights that are aggregated for purposes of a class action. The class action rule, of course, creates no rights of its own. To view class litigation as something fundamentally different from the aggregation of the individual rights created by substantive law, then, would allow the procedural rule to transform the essence of the substantive law it was designed to enforce. The reason that the class action is modeled on the basis of the individual litigation model is not, as Professor Priest suggests, simply adherence to the "status quo."¹⁵² The basis for the intertwining of the class action and the individual litigation model is, rather, the democratic need to prevent avowedly procedural devices from surreptitiously altering the essence of substantive law that has been enacted by those selected by and accountable to the electorate. So furtive an amendment process undermines the electorate's ability to exercise the fundamental *117 democratic function of selecting its governmental representatives on the basis of their legislative choices.

It might be suggested that even if my view of the modern class action is assumed to be correct, the foundational precepts of democracy are not significantly impacted by the subtle shift from private compensatory remedial model to bounty hunter remedial model. The public has neither the sophistication nor interest to comprehend this shift, and therefore could not reasonably be expected to judge its elected representatives on the basis of their views or votes on the question. I seriously doubt the accuracy of this perception of the public's attitude. For example, the lack of public understanding of all of the nuances of the recent corporate accounting scandals did not prevent a public outcry over the matter and the scurrying of politicians to curry favor with the electorate on the issue. Similarly, it would defy reality to suggest that issues of tort reform have not appeared high on the nation's political agenda in recent years.¹⁵³ Moreover, public attitudes about plaintiffs' class action lawyers have often been strongly negative over that same period.¹⁵⁴ Indeed, at times attitudes among some sectors of the populace toward trial lawyers have been so negative that candidates vying for political office have sought to benefit from an opponent's affiliation with plaintiffs' lawyers.¹⁵⁵ Additionally, *118 the judiciary itself has, on more than one occasion, expressed disdain for plaintiff class action attorneys.¹⁵⁶

It should be kept in mind that all of these criticisms have been made while plaintiffs' attorneys were operating under the rubric of what purports to be a private compensatory damage class action framework. While many have pointed critically to

the willingness of plaintiff class attorneys “to subordinate the interests of class members to the attorney’s own economic self-interest,”¹⁵⁷ the public may temper this negative view with its assumption that at the very least, these individuals are serving a valuable public function by facilitating the compensation of victims injured by corporate wrongdoing. Full public recognition of the fact that, in numerous class actions today, (1) injured victims are usually unaware that suit has been brought on their behalf; (2) plaintiffs generally receive no meaningful compensation as a result of the suit; and (3) the only ones meaningfully rewarded for the judicial punishment of corporate misdeeds are those very same plaintiffs’ attorneys who are so widely disdained and mistrusted, may lead to widespread public outrage.

The response might be made that the public is, in fact, already aware of this information. After all, criticism of modern class actions on the grounds that “class action attorneys are the prime beneficiaries” of damage class actions¹⁵⁸ is already widespread. Thus, public outrage should not be expected to increase were the legal reality to be transformed into formal legal rule. But it is dangerous to assume general public understanding of this issue. The class actions in question are, at least superficially, brought to enforce private compensatory rights established by pre-existing substantive law, and injured victims are often paraded as part of the suits. At the very least, then, the existing legal framework likely gives rise to substantial public confusion on the matter. One might further respond that reliance on democratic principles as a basis for criticizing modern class actions *119 makes little sense when many of the substantive laws being transformed, such as the antitrust laws, were enacted long before any current citizens were even alive and by legislators who have long passed from the scene. But many of the substantive laws invoked in modern class actions, such as consumer protection or environmental protection, are of much more recent vintage.

In any event, such a response misses the fundamental point because it ignores the manner in which [Rule 23](#) shifts the substantive inertia. Imagine, for example, proposed federal legislation expressly authorizing qui tam-like suits by plaintiff class action attorneys that reward them for bringing corporate wrongdoers to justice, sans victims or compensatory damages. It is difficult to believe that, given the already skeptical attitude that pervades the public view of plaintiff class action attorneys, the proposal of such legislation would fail to engender widespread public debate, if not outrage. At the very least, no one could reasonably predict that this would not be the result. Yet, if my description of current class action structure and practice is largely accurate, that description is very close to the current situation-- although the public may not be aware of it, due to the superficial adherence to the traditional framework. Thus, it is reasonable to conclude that the current class action framework has serious implications for the foundational democratic principles of representation and accountability.

Conceivably, one could challenge my application of the political commitment principle to class actions on the grounds that it proves far more than I am suggesting. According to the political commitment principle, one could reasonably challenge all of the federal rules of procedure or evidence promulgated under the Rules Enabling Act on the grounds that they circumvent the democratic process. Vesting the rulemaking power in the Supreme Court, then, should logically be deemed an improper delegation of legislative power. Quite frankly, as a purely theoretical matter, such a non-delegation argument may indeed be persuasive.¹⁵⁹ But one need not reach that conclusion in order to condemn the structure and practice of the modern class action on grounds of democratic theory. As a general matter, the Rules of Civil Procedure deal with issues of overwhelmingly procedural concern, whose impact on the shaping of substantive rights is at most indirect *120 and incidental. My argument is that this is far from the case with the modern class action. A rule, promulgated by an unrepresentative and unaccountable body such as the Supreme Court¹⁶⁰ that effectively transforms an essential element of the underlying substantive law is, I submit, on an entirely different level.

E. The Constitutional and Statutory Implications of the Democratic Difficulty

To this point, the analysis has focused largely on the implications of political theory for the structure and operation of the modern class action. It is reasonable to ask, however, whether these considerations of political theory, in turn, have significant implications for issues of constitutional or statutory interpretation. Put in the most concrete terms, one should ask whether the criticisms of the class action that I have made logically lead not only to a need for substantial revision of [Rule 23](#), but also to the judicial invalidation of the Rule or its operation on statutory or constitutional grounds, regardless of any action taken by the Advisory Committee. It may well be possible to fashion arguable constitutional and statutory critiques of

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modern class action operation. Ultimately, however, it is likely that neither legal basis would support judicial invalidation of any part of [Rule 23](#), for both practical and conceptual reasons.

It is nevertheless a helpful exercise to explore the potential statutory and constitutional concerns to which the operation of [Rule 23](#) gives rise, in order to augment the uneasiness that one should already be feeling about the modern class action in light of the democratic concerns previously discussed. Taken as a whole, these concerns probably do not justify the extreme remedy of judicial invalidation. Nevertheless, relevant statutory and constitutional concerns come sufficiently close as to underscore and augment the purely normative problems of democratic process to which the modern class action gives rise. Consideration of statutory and constitutional issues therefore dictates the need for substantial revision of the Rule, in order to prevent--or at least reduce--these legal and theoretical dangers.

***121** 1. Statutory implications.

On a statutory level, the argument that a procedural rule substantially alters pre-existing substantive law would seem to suggest that such a rule violates the Rules Enabling Act's directive that a Federal Rule not "abridge, enlarge or modify any substantive right."¹⁶¹ It is certainly true that, as Geoffrey Hazard has argued, "the function of procedure would be unintelligible if it were not to have substantive consequences."¹⁶² Thus, the fact that use of the class action device--or any other joinder device, for that matter--accelerates or facilitates the enforcement of substantive law, thereby enabling that law to have a more significant substantive impact than it would otherwise have had, cannot automatically render a Federal Rule a violation of the Rules Enabling Act, if the Rules are to have any coherence or meaning. The question, however, should be, as the Supreme Court asked in *Burlington Northern Railroad Co v Woods*,¹⁶³ whether the rule only "incidentally affect(s) litigants' substantive rights" and is "reasonably necessary to maintain the integrity of (the) system of rules."¹⁶⁴ If the Rules Enabling Act's directive is not to be rendered meaningless, where the rule has been structured specifically for the purpose of altering pre-existing substantive law, the Act's prohibition on alteration of substantive rights must be deemed violated.¹⁶⁵

***122** From one perspective, [Rule 23](#)'s use of an opt-out procedure arguably satisfies the Rules Enabling Act's directive, since it is obviously concerned with the procedure by which the class action is initiated. But in light of the critique fashioned here,¹⁶⁶ there can be little question that the rule's choice of opt-out was heavily influenced by the way it affects individually-granted substantive rights enforced under the private rights model. As a result of that process, individuals in whom private rights have been substantively vested bring suit, no doubt often without any awareness that they are doing so. Is that dramatic impact on substantive law properly classified as "incidental"? I suppose that at first glance one might argue that this is so--as long as the opt-out procedure is viewed in a vacuum, rather than as one element in an organic process that transforms a compensatory remedial model into a bounty hunter model. Even from this myopic perspective, however, reference to the Advisory Committee reporter's own words suggest that the procedure's impact on substantive rights was far from incidental. Professor Benjamin Kaplan wrote at the time of [Rule 23](#)'s adoption that opt-out was part of a broader plan to employ the class action as a type of administrative guardian, rather than simply as a means to facilitate, through use of an aggregative process, pre-existing individual compensatory rights.¹⁶⁷

It is nevertheless extremely difficult to predict a successful Enabling Act attack on the opt-out provision of [Rule 23](#), for several reasons. Initially, any such attack on a federal rule faces a significant uphill battle, because of the Supreme Court's strong presumption in favor of the Rules' validity under the Enabling Act. The Court has indicated that "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court . . . give the Rules presumptive validity under both the constitutional and statutory constraints."¹⁶⁸ Secondly, ***123** at least when the opt-out provision is viewed in a vacuum, it is difficult to deny its significant impact on the process of class organization--an unambiguously procedural matter.

Even less vulnerable to a Rules Enabling Act attack is the second of the ominous bookends of the modern class action: the settlement or adjudication of a class action suit in which class members effectively receive no relief. The obvious problem is that such a result is nowhere dictated by the explicit text of [Rule 23](#). Indeed, it is certainly possible, under [Rule 23](#) as currently written, to conduct a class suit that satisfies all of the requirements of the private compensatory remedial model contemplated in the underlying substantive law. This category would include any suit in which (1) meaningful and useful

relief is made available to class members, and (2) it is realistic to believe that class members will receive that compensation. Thus, there is nothing explicit in [Rule 23](#) that could be directly challenged under the Rules Enabling Act. In effect, one would be seeking to challenge the [Rule 23](#)'s failure to preclude class actions that did not fall in this legitimate category. It is therefore difficult to imagine how a Rules Enabling Act challenge would even be framed in this context.

It does not necessarily follow, however, that the concerns manifested in the Rules Enabling Act should have no influence on those charged with the duty to consider revisions of the Rules. Though traditionally the Rules Enabling Act's directive on substantive rights had its primary impact on cases involving federal enforcement of state substantive rights,¹⁶⁹ in recent years scholars have adopted the position "that in granting a limited power to promulgate rules, Congress was concerned more about protecting its own prerogatives as an elected national legislature than about the danger that the rules would run afoul of the powers of the states as expressed in the Rules of Decision Act."¹⁷⁰ As Professor Shapiro has correctly noted, "procedure," as used in the Rules [*124](#) Enabling Act, performs the "subordinate role" of "acting as the means of determining substantive rights and liabilities."¹⁷¹ The Rules Enabling Act's restriction of the Rules to procedural matters, then, surely does not authorize a rule that both permits and condones the creation of a form of litigation that completely transforms the remedial model established in the underlying substantive law.

2. Constitutional implications.

The constitutional inquiry considers the situation on the assumption that Congress intended to delegate to the rule makers, as part of their grant to promulgate rules of procedure, the authority to promulgate rules designed to modify pre-existing substantive remedies. Such an examination is purely hypothetical, since Congress in the Rules Enabling Act quite clearly chose to retain exclusive authority to alter pre-existing substantive law. Nevertheless, it is instructive to conduct an inquiry into the constitutional implications of the theoretical critique, because it helps to demonstrate the stark inconsistency of modern class action procedure with our constitutional tradition.

Though in important respects the situation is not identical to the present one under consideration, it is interesting to note that, under established separation of powers doctrine, Congress may not require the Article III federal courts to enforce a procedural or evidentiary rule that alters pre-existing substantive law, unless Congress itself simultaneously alters that substantive law.¹⁷² Though Congress possesses broad power to regulate the jurisdiction of the federal courts,¹⁷³ it may not require those courts to act in an unconstitutional manner.¹⁷⁴ To require the federal [*125](#) courts to enforce a procedural rule that effectively transforms the governing substantive law would make the federal courts complicit in the commission of a fraud on the electorate, and thereby undermine the courts' integrity.¹⁷⁵

In the class action context, of course, it is not Congress that has required the federal courts to enforce a procedural rule facilitating the transformation of otherwise unchanged substantive law. Rather, the Supreme Court itself has promulgated such a rule. Hence, in this context, the concern over preservation of the separation of powers protections of federal judicial integrity is naturally rendered irrelevant.¹⁷⁶ But it is important to recognize the manner in which the two situations do overlap: in both, a rule that is expressly labeled procedural effectively transforms the essence of substantive law. After all, it is the essentially anti-democratic nature of the sub rosa transformation that renders such a congressional directive to the courts a threat to judicial integrity in the first place. When the manipulation comes, not from the representative body but from the unrepresentative agent, in a certain sense the threat to democracy actually increases.

F. Pragmatism, Class Actions, and the Democratic Difficulty

In criticizing the modern class action as a circumvention of the democratic process, I have attempted to link a hard dose of pragmatism to a considerably more abstract analysis, grounded in political theory. I have focused on pragmatic considerations, looking behind technicalities and appearances and determining whether or not a real class exists by assessing practical realities. [*126](#) I have also focused on issues of abstract political theory, by condemning class actions on the grounds that they often circumvent the democratic process. I have developed this theoretical critique, however, without regard either to the impact of my analysis on the viability of the modern class action or to the arguably positive social benefits performed

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by the modern class action. Both aspects of my approach arguably leave me vulnerable to attack.

1. Class actions, political theory, and social consequences.

If one accepts my argument that all too often the modern class action contravenes fundamental precepts of democracy and therefore needs to be restructured in order to prevent that result, there can be little question that the class action as we have come to know it in recent years could not survive. To be sure, the class action procedure, properly structured, could remain an extremely important joinder device. But it would be disingenuous to suggest that, under this revised structure, class action lawyers would have nearly the same incentives to act that they presently have. Those who favor class actions as they currently exist would no doubt argue that this result is socially and politically unacceptable. Injured victims would be denied an effective procedural means of gaining compensation, and an important deterrent to corporate wrongdoing would be lost.

Such an argument is seriously flawed, on both empirical and conceptual grounds. Initially, it ignores much of the point of my critique: with its current structure, the class action too often fails to provide meaningful compensation to injured victims. It is true that this failure does not alter the use of class actions as a deterrent to illegal corporate behavior. But the exclusive focus of class action defenders on the procedure's deterrence value is itself misguided. Initially, it suffers from what I describe as "the fallacy of the free-standing class action." Scholars who would make such an argument operate under the fallacious assumption that the class action procedure itself provides a free-standing check on corporate illegality. As already noted, however, it is the underlying substantive law, rather than a procedural rule, that establishes both the standards of corporate illegality and the means of enforcing those standards.¹⁷⁷ If the class action enforces those standards by resort to a remedial model that differs from the remedial *127 model adopted in the substantive law. It is no defense of the class action to suggest that it deters illegal corporate behavior.

It may well be that in the case of many substantive restrictions on corporate behavior, the private compensatory remedial model provides an ineffective means of enforcement and deterrence, for the simple reason that individualized damages are too small to justify the transaction costs of even the class action procedure. An individual plaintiff's damages may be so small that she is unwilling even to take the relatively minimal effort required either to opt in to a class at its start or to file a claim at its close. In such cases, it is incumbent on the governing legislative body to find alternative methods of deterring corporate illegality. If criminal, civil, and administrative enforcement mechanisms are deemed insufficient, the legislature may wish to consider creation of a form of bounty hunter-private attorney general action, despite its potential constitutional problems. But surely, a Federal Rule of Civil Procedure may not implement such a change, if the protections inherent in the democratic process are to function properly.

2. Pragmatism and class actions: the problem of categorization.

It could be suggested that my pragmatic analysis simultaneously ignores class actions' compliance with the technical requirements of the procedural rule and the reality that at least some class members are both aware of and in agreement with the suit and some class members actually benefit, on an individual basis, from the award. For example, in a class action that has been settled in exchange for defendant's agreement to make discount coupons available to class members, it is likely that at least a minimal number of class members will, in fact, make use of and benefit from the coupons they receive. In some cases, perhaps the number will not be all that small. In other cases, a significant number of class members may well file claim forms, despite either the limited amount of individual damage suffered or the burdens incurred in completing the form. In yet other cases class members' individual claims may be satisfied without the filing of a claim form, because individual damages are easily determinable and the defendant possesses business records listing all class members. Hence, it could be argued that my critique paints with *128 far too broad an empirical brush, thereby effectively destroying real class actions in an effort to ferret out faux class actions.

The anticipated argument brings to light what could be called the problem of categorization. Closer examination reveals that it is in reality a combination of two distinct yet related issues: the problems of both inter-class categorization and intra-class categorization. Inter-class categorization refers to the overbroad nature of any of the remedies I might suggest, because those remedies are likely to sweep both real and faux class actions within their reach. Intra-class categorization, in contrast,

describes the problems caused by my willingness to classify an entire class as faux, even where some minimal number of class members will likely be aware of the suit and/or receive meaningful compensation--for example, where a small number of class members actually take advantage of and benefit from discount coupons. The two concerns are linked by their emphasis on the practical difficulty inherent in any attempt to categorize conceptually class actions that realistically defy such categorization. While it is certainly reasonable to raise such concerns about my critique, ultimately they should not present serious difficulties for remedying the problem I have perceived in the modern class action.

On one level, at least, the categorization concern is unresponsive to my critique. To the extent one accepts my contention that the plaintiff passivity inherent in [Rule 23\(b\)\(3\)](#)'s opt-out procedure forms an essential element in the transformation from private compensatory model to bounty hunter model,¹⁷⁸ categorization is rendered irrelevant: all [Rule 23\(b\)\(3\)](#) class actions fall subject to that criticism. Even if the use of the opt-out procedure, in and of itself, were deemed insufficient to bring about this impermissible transformation, the categorization criticism is overstated, in both the inter-class and intra-class contexts. As for the inter-class concern, nothing in my critique logically dictates abandonment of the class action procedure. In suits in which class members have expressed the conscious decision to exercise their substantive rights by participating in the class action, and meaningful relief to those class members appears to be a realistic possibility at the outset of the case, use of the class action procedure ***129** may well improve the efficient and effective enforcement of substantive rights.¹⁷⁹

The intra-class concern is no more legitimate. At least since the legal realist revolution of the early twentieth century, rarely are legal decisions grounded in technicalities that do not reflect social reality. At a certain point, so few class members actually benefit from a class settlement, relative to the number that do not so benefit, that the number should be deemed de minimis. In these cases, especially when the passivity inherent in use of opt-out is added to the mix, these class suits are constructively transformed from the private compensatory remedial model to the bounty hunter remedial model. One could nevertheless ask how we are to determine, ex ante, which classes deserve this description. The answer, I believe, is that one need never make that determination in an individual case. Rather, the goal should be to deal with the problem in a prophylactic manner, by establishing certification standards that will reduce the likelihood of the problem ever arising.

The pragmatic questions raised in the preceding discussion, concerning the most effective means of avoiding the problems of democratic theory to which the modern class action gives rise, sets the stage for a thorough examination of specific proposals for reform. The fact that, despite these difficulties, a realistic constitutional or statutory challenge to [Rule 23](#) is highly unlikely renders the need for revision that much more compelling.

IV. Avoiding The Democratic Difficulty: Recommendations For The Revision Of [Rule 23](#)

A. The Permutations of Reform

As already noted, the democratic difficulty is created by a synthesis of the ominous bookends of the [23\(b\)\(3\)](#) class action--its start and its close. At its start, the inherent passivity brought about by the use of opt-out sets the groundwork for an entirely comatose class of plaintiffs, who have never chosen to enforce their private rights and are even unaware that a suit has been brought on their behalf.¹⁸⁰ At its close, even a successful class action may fail to vindicate class members' private rights by providing ***130** meaningful compensation--a result easily predictable at the outset of the suit, because of the inherent impossibility of translating a class-based award into concrete, individualized damage awards to class members.¹⁸¹ In one sense or another, both of the bookends contribute to the ultimate transformation of the class action from an aggregative private compensatory action into what amounts to a pure bounty hunter action. Before one can properly consider specific reform proposals, then, it is appropriate to examine the way to combine the reform of the two problem areas.

There appear to be four such conceivable permutations: (1) revise neither one; (2) revise both; (3) revise only the method of initiation; or (4) revise only the method of resolution. I have already rejected option one, for reasons that should by now be obvious. Thus, we are left to choose among the final three options. It quite probably would be unwise to rely solely on option three. While revising opt-out would undoubtedly do much to bring the class action back to the private compensatory rights

remedial model expressly adopted in the governing substantive law, it would be unwise to rely exclusively on such a mode of revision. To alter the problematic aspects of initiation while leaving the constructive non-compensatory/bounty hunter remedial phase that pervades modern damage class actions unchanged would be to leave much of the problem unaffected. Indeed, it is the transformation at the remedial stage from private compensatory to the bounty hunter model that gives rise to the most significant difficulties of democratic theory. Thus, if one were forced to choose between the two stages as the focus of reform, it would seem to make sense to center attention exclusively on the resolution phase, what I have labeled option four. Since there is no logical reason why both ends of the litigation process could not be reformed, however, perhaps the best solution would be to reform both the initiation and the resolution stages--what I have labeled option two.

B. Initiation Reform

If one decides to protect against the democratic difficulty at the initiation stage of a 23(b)(3) class action, the strategy would seem to be clear: simply replace opt-out with opt-in. It is true, of course, that such an amendment would not resolve the question of exactly at what point in the litigation process notice must be *131 sent to class members, but neither would it appear to make that issue any more difficult than it already is. Arguably more troubling are the possible implications of the democratic critique for 23(b)(1) and 23(b)(2) class actions. After all, one could reasonably argue that the very same democratic considerations that render suspect the use of opt-out, rather than opt-in, raise questions, a fortiori, about class actions in which class members may not even opt out. In both situations, rights vested in the individual victim under governing substantive law are being exercised, even when the individual has not made the decision to exercise them. Because of this fact, it would seem to make sense to abandon the mandatory nature of at least 23(b)(1) class actions.¹⁸² If particular substantive actions are to be deemed mandatory (subject, of course to procedural due process limitations), it is appropriate for that choice to be made by Congress.

Class actions brought pursuant to [Rule 23\(b\)\(2\)](#) present somewhat more complex issues, since these actions are brought predominantly for the purpose of acquiring injunctive relief, rather than damages.¹⁸³ Moreover, such classes are often brought on behalf of racially or ethnically defined groups, and the idea of individual notice and opt-in would render such classes practical impossibilities. Perhaps a persuasive argument could be made that such actions are therefore distinguishable from other categories of class actions. True, even injunctions may flow out of the violation of individually held rights. However, at least in civil rights class actions brought primarily for injunctive relief, it might be contended that the rights are actually held by the group, rather than the individual.

In considering the impact of the democratic critique on mandatory 23(b)(2) classes, it is important to keep in mind the context *132 in which the argument is raised. Recall that I am not contending that use of opt-out violates either statutory or constitutional limitations.¹⁸⁴ The issue, rather, is largely one of policy, to be resolved by the Advisory Committee. Hence it is conceivable that the Committee, drawing a type of policy balance, could decide that neither opt-out nor opt-in is dictated when the predominant relief sought is injunctive, rather than in the form of damages, and therefore leave the procedure for the initiation of 23(b)(2) classes unchanged.

C. Resolution Reform

Reform at the resolution stage would likely be considerably more difficult to implement than initiation reform. This is so even though the need for resolution reform is more compelling. The difficulty is that, unlike in the initiation context, the text of [Rule 23](#) does not directly give rise to the democratic difficulty. The problem, rather, is that the Rule allows particular class actions to be resolved in a manner that gives rise to democratic concerns. The goal in reforming the Rule, then, should be to determine an effective means to prevent that result.

The response could be made that there is no need for reform of [Rule 23](#) in order to ensure against the furtive transformation of the case into a pure bounty hunter action, because courts have more than sufficient power under the current version of [Rule 23](#) to prevent class actions in which the only real parties in interest (other than the defendants) are the class attorneys. Under

[Rule 23\(e\)](#), no settlement of a class action may be made absent a judicial determination that the settlement is fair.¹⁸⁵ This mechanism clearly empowers the court to prevent coupon settlements or any other settlement where it finds that no meaningful relief is to be awarded to individual class members. The problem, however, is not that the current version of [Rule 23](#) prevents courts from avoiding transforming a class action into a bounty hunter action, but that it does not require courts to prohibit such a transformation. Controlled only by the hopelessly vague directive to assure that a settlement is “fair,” class action courts have approved numerous settlements that amount to virtually pure bounty hunter *133 actions in everything but name.¹⁸⁶ The task, then, is to insert language into [Rule 23](#) that will prevent such a result.

In approaching this task, there are two conceivable structural approaches to reform: insertion of categorical directives and insertion of situation-specific directives. Categorical directives are those that concededly sweep within their reach situations that do not present the danger to be prevented, as well as those that do. They do so because of the expected high transaction costs involved in attempting to distinguish between the two situations, and the serious risks that would flow from making an incorrect assessment in a particular case. Situation-specific directives, in contrast, provide a generalized directive that is designed to separate the two types of situations on a case-by-case basis, and it is expected that a court charged with implementation will apply them correctly to specific fact situations. In order to prevent the serious danger of bounty hunter actions within the rubric of class actions, I recommend inclusion of both forms of restrictions, with situation-specific limitations to be added at the outset of the case and categorical limitations to be inserted at the settlement approval stage.

Initially, at the certification stage, the certifying court should be directed to take into account as an important element of its decision the reasonable likelihood that individual members of the class will actually receive meaningful compensation as the result of a successful verdict or a settlement. This inquiry would not, it should be emphasized, focus on the likelihood of success on the merits, but rather on the eventual feasibility of getting damage or settlement awards transmitted to individual class members, assuming such success. Thus, where individual claims are small and the award of payments to individual class members depends on the filing of complex claim forms, a certifying court should be reluctant to certify the class. Even if ultimately successful, such a case is highly likely to turn out to be a bounty hunter action, rather than the private compensatory action that the governing substantive law has made it.¹⁸⁷

*134 Perhaps one could respond that insertion of such a textual requirement is unnecessary, because certification of a 23(b)(3) class already takes into account considerations of manageability.¹⁸⁸ But the ease of conducting a case is not necessarily the same thing as certainty of payment to individual class members. Indeed, it is likely that the ability to resolve a case through a method that contemplates payment to relatively few class members makes a case appear to be more manageable to many federal judges. Without insertion of this express directive, there is little reason to hope that a majority of federal judges would concern themselves with this question in making a certification decision. Because this directive asks a reviewing court to apply its general standard to specific fact situations, this recommended reform constitutes a situation-specific rule. In this sense, it would leave room for judicial mistake and manipulation. But there would appear to exist no practical alternative, and express emphasis in the Rule’s text on the need to assure feasibility of individualized awards to class members would undoubtedly go far toward restoring the class action as the aggregative compensatory action it must be, under the terms of the substantive laws that it purports to enforce.

At the close of the action,¹⁸⁹ when the court is asked to review the fairness of a proposed settlement, adoption of a more categorical approach is required, for the simple reason that such categorical rules appear to be readily available and can effectively insure against the practices most likely to bring about the improper transformation of a class action into a bounty hunter action. Initially, an amendment to [Rule 23](#) dictating that attorneys’ fees be measured by reference to the value of the total number of class member claims actually filed, rather than the total amount of settlement or potential claims, would go far toward deterring pure bounty hunter class actions.¹⁹⁰ Moreover, use of coupon settlements *135 generally contributes to the improper transformation into bounty hunter actions, since invariably such coupons will be of little use to the vast majority of class members, even if they are willing to overcome the strong inertia against filing claim forms to obtain such coupons in the first place.¹⁹¹

Are there cases in which coupons, given as part of a settlement, actually benefit class members up to the face value of the coupons? Perhaps. But then the question arises whether it is feasible, in the individual case, to distinguish coupons that (1)

are likely to be obtained by a substantial number, if not a majority, of class members, and (2) are likely to provide a real economic value to the class members that is roughly equivalent to the coupon's face dollar value. The answer to this question requires thorough empirical investigation that does not appear to have been conducted. If, without the relevant empirical data, one does not feel comfortable predicting that it will be possible for a court to make this judgment accurately in an individual case and, on the basis of anecdotal or casual information, one believes it far more likely than not that the answer to both questions is "no," then the only alternative is to adopt an express categorical rule prohibiting the use of discount coupons in class action settlements.¹⁹²

Such a proposal would no doubt be met by the response that a blanket prohibition on coupon settlements would overwhelm the courts with the burdensome adjudication of complex class actions that would otherwise have settled.¹⁹³ But if the use of coupon settlements renders the portrayal of the class action as a *136 compensatory device a sham, effectively transforming it into a legislatively unauthorized qui tam-like bounty hunter action, then practical concerns should not persuade us to continue the lie. In any event, it is far more likely that considerably fewer class actions would be brought, because of the enormous difficulties in ultimately transmitting individual small-claim payments to class members. If it is found that such a result undermines effective enforcement of congressional regulation of corporate behavior, Congress has available to it the option of expressly establishing bounty hunter actions, in which uninjured plaintiffs are rewarded for exposing unlawful corporate behavior.¹⁹⁴

It is arguable that a blanket prohibition on the use of discount coupons in class action settlements goes too far.¹⁹⁵ Perhaps it is possible to fashion less sweeping, more contingently framed restrictions that would nevertheless go far toward preventing the harms to which coupon use currently gives rise. For example, [Rule 23\(e\)](#), directing the court to review proposed class settlements for fairness, could be amended to create a strong presumption against the use of coupon settlements. Under this approach, a court in a particular case would have available a safety valve if it determines that coupons would have real value to individual class members.¹⁹⁶ However, because reviewing courts are generally concerned primarily with the goal of avoiding burdensome litigation, the amended rule would need to provide that the only way the presumption could be overcome would be on the basis of a clear and convincing showing that individual class members are *137 likely to benefit from the coupons. Any approval of the use of coupons should, moreover, be contingent on the filing of claim forms by a majority of class members. Class attorneys and defendants would likely be deterred from entering into bounty hunter settlements under these circumstances.

One potential difficulty with this situation-specific approach is that it would leave reviewing courts with too broad a discretion to continue their rubber stamp approval of proposed settlements that are coupon-based. This would be a particularly serious concern, in light of the fact that neither side to the settlement would be presenting the court with counter evidence. Nevertheless, it is clear that such an approach would bring about a situation no worse, and probably significantly better, than the current operation of [Rule 23](#).

Conclusion: Democratic Theory And Legal Apathy

In one sense, given the intense scholarly controversy over and substantial judicial attention to questions about class actions in recent years, the virtually total silence about the ways in which the modern class action impacts the essential democratic precepts of accountability and representation is surprising. In another sense, however, such apathy in the legal world toward the relevance of even foundational issues of democratic theory is not all that unexpected. Numerous commentators, focused primarily on their own normative policy goals, have been willing to cast aside values of self-determination--at least where that process is likely to produce conclusions that differ from their own normative goals.¹⁹⁷ But engaging in legal analysis divorced from its grounding in foundational precepts of American democracy--even when those precepts may not be directly derived from the Constitution--becomes theoretically incoherent at best and invidiously manipulative at worst. And if there are any such precepts, they necessarily embody the value of popular sovereignty, implemented and protected by the principles of representation and accountability for sub-constitutional decisions of public policy.¹⁹⁸

*138 All too often, the modern 23(b)(3) class action has surreptitiously transformed the governing substantive law, which

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unambiguously embodies a private compensatory remedial model as the exclusive, primary, or secondary means of enforcing legislative restrictions on primary behavior, into an entirely distinct “bounty hunter” remedial model—one that has not been enacted as part of the substantive law. Pursuant to this approach, uninjured private individuals are rewarded for ferreting out and judicially punishing corporate illegality, much in the manner that classic *qui tam* actions historically have.¹⁹⁹ It has done so, even though the class action exists solely as a procedural device designed to facilitate implementation of existing substantive law. Such a furtive transformation of governing law undermines the principles of accountability and representation that are so essential to any political system that views popular sovereignty as an important element.

The class action achieves this result through the initiation process of opt-out and the resolution process of settlements in which no meaningful compensation is received by an overwhelming portion of the class. When combined, these two elements render the class little more than a figment of the class lawyers’ imaginations, leaving those attorneys as the only real parties in interest and virtually the only private individuals who stand to benefit financially from successful prosecution of the action. This situation arises even though those attorneys need not be (and generally are not) themselves injured victims.

While it is at best uncertain that a persuasive constitutional or statutory challenge could be mounted against current practice,²⁰⁰ it is both appropriate and necessary for the Advisory Committee to reform modern class action practice, if only on normative grounds of social policy and political theory. The proposals for reform that I have suggested,²⁰¹ for the most part, do not represent dramatically new suggestions. For example, the argument that opt-out should be replaced by opt-in has been made at least since the time I was a law student. The contribution I hope to have made in this Article, however, is the development of an entirely different theoretical perspective on the modern class action and the provision of an entirely new set of justifications, *139 grounded in fundamental notions of democratic theory, for those proposed revisions.

Perhaps it is proper to include within my goals in writing this Article the desire to shift the focus of at least a portion of the scholarly debate on the class action issue. All too often, scholars have approached the class action issue as if it were a self-contained device to control illegal corporate behavior.²⁰² To be sure, several respected scholars have sought to shape the class action inquiry by reference to principles of economic analysis.²⁰³ But none seems to have recognized that the class action operates within a broader political framework, and that how the device interacts with the substantive law it purports to enforce can have dramatic consequences for the viability of the American democratic system. Other commentators may well disagree with my assessment of those consequences, but any scholarly consideration of the issue would represent a significant improvement, and provide hope for the future of American democracy.

Footnotes

^{a1} Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law. The author would like to thank Christopher Leslie, John McGinnis, and Mark Rosen for valuable comments on earlier drafts. He would also like to thank Kate Bennett and James Metzger of the class of 2004 at Northwestern University School of Law and Alexandra Rosenbaum of the class of 2004 at Northwestern University for their valuable research assistance.

¹ [In re Rhone-Poulenc Rohrer Inc](#), 51 F3d 1293, 1298 (7th Cir 1995).

² Richard L. Marcus, et al, *Civil Procedure: A Modern Approach* 309 (West 3d ed 2000).

³ See, for example, Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* 1-14, 163-71 (Northwestern 1995) (emphasizing the need for the tort system to compensate harmed plaintiffs and to provide an indirect deterrent effect as well); David Rosenberg, [Class Actions for Mass Tort: Doing Individual Justice By Collective Means](#), 62 *Ind L J* 561, 567 (1987) (arguing that “bureaucratic justice implemented through class actions provides better opportunities for achieving individual justice than does the tort system’s private law, disaggregative processes”).

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- ⁴ See [FRCP 23](#). The rule remained unchanged until 1987 when subdivision (c) was amended to eliminate all gender-specific language. In 1998, [Rule 23\(f\)](#) was added to permit courts of appeal to exercise discretion to hear interlocutory appeal of orders granting or denying class certification. In April 2003, [Rule 23](#) was amended in several ways. See Moore's Federal Rules Pamphlet 2001 214 (Lexis 2000). See also note 5. None of those amendments, however, in any way moots the propositions in this article.
- ⁵ "(In 1991 . . . the Judicial Conference asked the (Advisory) Committee to begin a reconsideration of the Rule in light of the upheaval in modern civil litigation since adoption of the Rule." David F. Levi, Memorandum to the Civil Rules Advisory Committee: Perspectives on [Rule 23](#) Including the Problem of Overlapping Classes 4 (Apr 24, 2002), available online at <<http://www.lfcj.com/articles/display.asp?artnum=70>> (visited Aug 25, 2003). Judge Levi further notes that "(a)t the beginning, the Committee developed a comprehensive re-draft of the Rule. In 1992, Judge Pointer, Chair of the Committee . . . prepared a revision that . . . provided for opt-in classes at the court's discretion . . ." Id. The Committee recommended, and ultimately the Supreme Court promulgated, the new [Rule 23\(f\)](#), effective December 1, 1998, which authorized a court of appeals, in its discretion, to permit an appeal from an order of a district court granting or denying class action certification. See [FRCP 23\(f\)](#); [FRCP 23\(f\)](#) Advisory Committee's Note, 1998 Amendments. For an approving commentary on the addition of [Rule 23\(f\)](#), see Linda S. Mullenix, [Some Joy in Wholeville: Rule 23\(f\), a Good Rulemaking](#), 69 *Tenn L Rev* 97 (2001). Far-reaching additional reforms were proposed, but ultimately not promulgated, in 1996. For a general discussion of the 1996 proposed reforms of [Rule 23](#), see George L. Priest, [Procedural Versus Substantive Controls of Mass Tort Class Actions](#), 26 *J Legal Stud* 521, 537-39 (1997). Reforms to [Rule 23](#) were also proposed in 2001. See Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil and Criminal Procedure and the [Rules of Evidence](#), 201 *FRD* 560, 586-657 (2001).
- ⁶ Advisory Committee officials recently indicated that "(t)here are several areas that may yet deserve additional attention and that have not received definitive answers . . ." Levi, Memorandum to the Civil Rules Advisory Committee at 7 (cited in note 5). In particular, the Committee "may . . . reconsider the opt-in/opt-out question. The 1966 Committee adopted an 'opt-out' provision but did not foresee the consequences of doing so." Id at 7-8. In 1992, a Committee draft recommended providing the trial court with discretion to certify the class as an opt-in or opt-out class, but the recommendation was "then withdrawn on the Standing Committee's advice that further consideration would be required before such a sweeping proposal could be published for public comment." Id. That recommendation "might provide a starting point" for the current Committee's reconsideration of the issue. Id. In his memorandum, Judge Levi writes: "In the years since that time, we have engaged in (the further consideration called for by the Standing Committee), and can now appreciate how prescient and sophisticated that first effort was." Levi, Memorandum to Civil Rules Advisory Committee at 5 (cited in note 5). For a detailed examination of the opt-out issue and a recommendation for an amendment replacing opt-out with opt-in, see text accompanying notes 82-106. For a recommendation for dramatic revision in the current opt-out procedure, see Part IV B.
- ⁷ See, for example, sources cited in note 3. See also John C. Coffee, Jr., [Class Wars: The Dilemma of the Mass Tort Class Action](#), 95 *Colum L Rev* 1343 (1995) (examining the development of the mass tort class action and proposing remedies to protect the interests of future claimants); Kenneth S. Abraham, [Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform](#), 73 *Va L Rev* 845 (1987) (arguing that mass tort actions pose a responsibility dilemma and suggesting non-tort solutions). These citations, it should be noted, are only a few of a considerably longer list.
- ⁸ Pre-existing scholarly critiques of the class action differ substantially from my own. Professor Coffee has pointed to "three distinct themes" of academic criticism that have been leveled at class actions: first, "that the legal rules governing the private attorney general have created misincentives that unnecessarily frustrate the utility of private enforcement;" second, "that the incentive to litigate may be inherently excessive, in large part because the parties to an action do not bear its public costs," leading to a "failure to internalize the full cost of litigation, including the costs of the judicial systems," resulting in an artificial inflation in the demand for litigation as a "public subsidy equal to these costs, and the private incentive to litigate exceeds the social incentive," causing "an excessive reliance on law and lawyers;" and finally, that "the social benefits of litigation brought by private attorneys general" should be discounted because "rational, well-informed plaintiffs might bring an action that has no chance of success at trial in order to extort a recovery from the defendants." John C. Coffee, Jr., [Understanding the Plaintiff 's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions](#), 86 *Colum L Rev* 669, 671-72 (1986). See also [Coffee](#), 95 *Colum L Rev* at 1345-49 (cited in note 7). In contrast to these economic critiques, my analysis focuses exclusively on criticisms derived from the perspective of American political theory. Nor is my critique based on concerns about agency problems growing out of plaintiffs' attorneys' alleged failure to

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satisfy their attorney-client obligations to the class members. Finally, I am not arguing, as Judge Friendly did many years ago, that “the benefits to the individual class members are usually minimal” while lawyer compensation “seems inordinate.” Henry Friendly, *Federal Jurisdiction: A General View* 119-20 (Columbia 1976). See also Edward J. Ross, [Rule 23\(b\) Class Actions--A Matter of “Practice and Procedure” Or “Substantive Right”?](#) 27 *Emory L J* 247, 249 (1978) (commenting that “recovery from the settlement of a class action does not necessarily inure to the allegedly damaged class members; the real reward is often to their lawyers”). My concern, rather, is with the all-too-frequent situation in which, for all practical purposes, the class is simply irrelevant to the suit because class members effectively receive no meaningful relief.

⁹ In the American political system, certain counter-majoritarian constitutional principles also limit policymaking by representative and accountable governmental bodies. For present purposes, however, I proceed on the assumption that the legislative action does not violate any constitutional constraint.

It is also true, of course, that in our post-New Deal society, many policy choices are made by administrative agencies, which are neither representative nor accountable--at least directly. As a theoretical matter, this fact arguably gives rise to serious constitutional problems for the operation of such agencies. See Martin H. Redish, *The Constitution As Political Structure* 135-65 (Oxford 1995). However, as a practical matter, a certain level of administrative discretion is required in implementing general statutes, because enforcement requires that the statutes be applied to specific circumstances. Moreover, such agency action may usually be attributed to the executive, who is both representative of and accountable to the electorate. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J L, Econ, & Org* 81, 95-99 (1985). In any event, as noted in more detail in Part III, the class action device neither interprets nor amends specific substantive laws, while administrative agencies at least purport to be interpreting and enforcing specific legislative directives. Thus, modification of the underlying substantive law by use of the neutral class action device is completely indefensible as a matter of democratic theory. See Part IV.

It should be noted that in 1995, Congress did deal with class action representation issues (in the narrow context of securities litigation) when it enacted the Private Securities Litigation Reform Act [Pub L No 104-67](#) 101, 109 Stat 737 (1995), codified at [15 USC § 78u-4 \(2000\)](#). However, enactment of this legislation in no way moots the democratic concern to which this Article points. Initially, the Act focuses exclusively on aspects of securities class actions, and thus has no relevance to any other area in which class actions are brought. Secondly, by imposing a variety of criteria that named plaintiffs in securities class actions must satisfy, Congress actually evinced its desire to preserve the private rights nature of this category of class actions. Thus, it is only by means of the misleading argument that congressional action in the securities area necessarily implies congressional satisfaction with all other areas that one can conclude that Congress has “spoken.” Even if this assertion were true as a matter of congressional understanding (a highly unlikely scenario in any event), it completely ignores the constitutional requirements of bicameralism and presentment for the enactment of legislation.

¹⁰ I refer to such a mode of thinking as “the fallacy of the free-standing class action.” See Part III F 1.

¹¹ “The transsubstantive philosophy dictates that procedural rules are to be interpreted and applied in the same manner, regardless of the substantive nature of the claim at issue.” Edward J. Brunet, et al, *Summary Judgment: Federal Law and Practice* 222 (West 2d ed 2000). See also [Robert Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules](#), 84 *Yale L J* 718, 718 (1975) (referring to procedural rules “generalized across substantive lines” and noting the “trans-substantive achievement of the Federal Rules of Civil Procedure”); Paul Carrington, “[Substance](#)” and “[Procedure](#)” in the Rules Enabling Act, 1989 *Duke L J* 281, 303 (noting that general sets of rules unrelated to substance put courts in the desirable position of “avoiding ‘interest group’ politics”).

¹² [15 USC §§ 1, 2, 15 \(2000\)](#).

¹³ See, for example, Truth in Lending Act, [15 USC §§ 1601-93 \(2000\)](#) and Cable Television Consumer Protection and Competition Act, [47 USC § 521 \(2000\)](#).

¹⁴ [15 USC § 78j \(2000\)](#).

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15 28 USC § 1332 (2000).

16 See Henry Hart, *The Relations Between State and Federal Law*, 54 Colum L Rev 489, 489 (1954); *Hanna v Plumer*, 380 US 460, 474-75 (1965) (Harlan concurring) (commenting that federal and state tort systems control the “primary activity of citizens”).

17 In certain substantive laws the legislature chooses to enforce proscriptions on primary behavior by resort to a synthesis of a variety of remedial models, including, among others, criminal enforcement, civil penalties, or administrative enforcement, in addition to private compensation. See Part IV F.

18 15 USC § 15 (2000).

19 See Part II.

20 Under limited circumstances, the Supreme Court has been willing to infer a private damage remedy when Congress has not expressly provided for one. See *J.I. Case Co v Borak*, 377 US 426, 431-34 (1964) (inferring an “implied” damage remedy from the Securities Exchange Act of 1934, 15 USC § 78n(a), based upon Congressional purpose). More recently, however, the Court has severely restricted this practice. See, for example, *Thompson v Thompson*, 484 US 174 (1988) (holding that the Parental Kidnapping Prevention Act of 1980 was intended for use in adjudicating custody disputes and not to create an entirely new cause of action). For a criticism of the practice of implied remedies, see Martin H. Redish, *The Federal Courts in the Political Order* 39 (Carolina Academic 1991) (“The facts that the damage remedy may be thought to foster the beneficial purposes served by the statute or that the legislature may not have foreseen the severity of the problem matter little because the damage remedy was not subjected to the formal requirements of the legislative process . . .”) (internal citations omitted). But see Richard Stewart and Cass Sunstein, *Public Programs and Private Rights*, 95 Harv L Rev 1193, 1229 (1982) (rejecting criticism of implied remedies as unduly formalistic).

21 Not all modern 23(b)(3) class actions are properly described as “faux” class actions in the sense described here. In a number of cases, attorneys may obtain meaningful relief on behalf of the class members. See Deborah R. Hensler, et al, *Class Action Dilemmas: Pursuing Public Goals For Private Gain* 427-39 (Rand Institute for Civil Justice 2000) (noting that average payments in the mass tort cases studied ranged from \$1,400 to \$100,000 and that some actions resulted in meaningful nonmonetary relief such as changes in laws or removal of harmful products from the market). But see Part III A (questioning validity of opt-out procedure).

22 Note that substantive statutes providing for private damage remedies generally do not distinguish between individual and group rights. Invariably, such statutes create only a damage remedy vested in the individual. Thus, any class action brought to enforce those rights must properly be viewed as nothing more than a procedural conglomeration of individually granted rights. See text accompanying note 151.

23 See *FRCP 23(c)(2)*; Part II A.

24 See Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L Rev 991, 994 (2002) (noting the “increasing popularity of coupon settlements”).

25 See *id* at 995 (noting that in coupon-based settlements, “many class members are left uncompensated”). See also Part II B.

26 See *id* at 1052-54 (noting that many courts approve coupon-based settlements even though they possess the power to reject them as unfair).

27 See text accompanying note 114.

28 See text accompanying note 117.

29 Purely as an empirical matter, however, this question appears to be an open one. Evidence exists to support the proposition that many private class action lawyers do not actually ferret out previously unknown corporate law violations, but merely “tag along” after successful government criminal or civil proceedings. See text accompanying notes 66-71.

30 It appears that Professor Coffee was the first commentator to employ the term “bounty hunter” in describing class action plaintiffs’ lawyers. See John C. Coffee, Jr., [Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working](#), 42 Md L Rev 215, 218 (1983). However, as subsequent discussion will make clear, Professor Coffee’s use of the term was overbroad. See text accompanying notes 74-75.

31 The use of bounty hunters as an auxiliary to law enforcement continues to this very day through the use of the private bail bondsman system. See, for example, [State v Covington](#), 2002 WL 1592704, *1 (Tenn Crim App); [People v Brewton](#), 2002 WL 1486572 (Cal App).

32 In the mid-twentieth century, actor Steve McQueen broke onto the national scene as a bounty hunter in the Old West in a half-hour black-and-white prime time network television series entitled “Wanted, Dead Or Alive.”

33 It should be noted that I do not purport to make psychological judgments about plaintiffs’ lawyers’ personal motivations. The desires to pursue personal gain and serve the public interest are not mutually exclusive, and it is at least conceivable that certain plaintiffs’ lawyers are motivated simultaneously by both considerations. My point is, simply, that even a bounty hunter motivated by nothing more than personal gain may well advance the public interest in her pursuit of personal gain.

34 See Part II.

35 See [Vermont Agency of Natural Resources v Stevens](#), 529 US 765, 774 (2000) (pointing to “the long tradition of qui tam actions in England and the American colonies”).

36 See text accompanying note 75.

37 See Rules Enabling Act, [28 USC § 2072 \(2000\)](#) (prescribing that Federal Rules may not abridge, enlarge, or modify a substantive right). See also Part III A.

38 See Part II.

39 [28 USC § 2072\(b\)](#).

40 See Part III E.

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41 See Part IV.

42 But see Part II A (discussing the inherently problematic nature of the opt-out procedure).

43 See Conclusion.

44 See *id.*

45 In class actions in which individual claims are sufficiently large both to concern the individual class member and to justify even the minimal effort required to affirmatively become a class member, it is quite conceivable that the class action procedure would remain viable. Thus, as a practical matter, adoption of my proposed amendments would at most cause a substantial reduction in class actions in which individual claims are relatively minimal. See Part IV.

46 See Part I.

47 See Part II.

48 See Part III.

49 See Part IV. I should note at the outset that I do not plan in this Article to reinvent the wheel by providing a normative basis to support the nation's historically established commitment to the basic framework of a democratic system. Perhaps, at the most abstract level, one could fashion persuasive normative arguments to prefer a benevolent dictatorship, a monarchy, or anarchy in lieu of constitutional democracy. But those arguments are for another day. In this Article, I assume the positive and normative value of at least some basic level of societal self-determination through resort to the representative process.

50 Consider Jane J. Mansbridge, ed, *Beyond Self-Interest* (Chicago 1990).

51 Cass Sunstein, [Beyond the Republican Revival](#), 97 *Yale L J* 1539, 1540 (1988). See also Richard Fallon, [What Is Republicanism, and Is It Worth Reviving?](#), 102 *Harv L Rev* 1695, 1698 (1989) (noting that modern civic republicanism reflects the classical version of the theory in positing "that there exists an objective public good apart from individual goods . . .") (internal citation omitted).

52 Joseph H. Carens, *Possessive Individualism and Democratic Theory: Macpherson's Legacy*, in Joseph H. Carens, ed, *Democracy and Possessive Individualism: The Intellectual Legacy of C.B. Macpherson 2* (SUNY 1993).

53 For a more detailed discussion of these questions, see Martin H. Redish, [The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971](#), 51 *DePaul L Rev* 359 (2001) (examining the role of adversary theory as an essential part of modern liberal democratic theory and the way in which it interacts with the civic-republicanism (progressive individualism debate).

54 Cass Sunstein, [Interest Groups in American Public Law](#), 38 *Stan L Rev* 29, 31 (1985).

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- 55 See, for example, [Sierra Club v Morton](#), 405 US 727 (1972).
- 56 See, for example, *id* (noting that an ideological plaintiff lacks the injury in fact required for standing).
- 57 See *id*.
- 58 Coffee, 86 Colum L Rev at 669 (cited in note 8).
- 59 *Id*.
- 60 *Id*. See also Michael L. Rustad, [Smoke Signals From Private Attorneys General in Mega Social Policy Cases](#), 51 DePaul L Rev 511, 511 (2001) (encapsulating the articles written for a symposium on tort law and social policy that “reflect the reality that tort law has been transformed from compensating private individuals to private law that empowers often disadvantaged individuals with a public purpose”). The term was coined by Judge Jerome Frank in [Associated Industries of New York State, Inc v Ickes](#), 134 F2d 694, 704 (2d Cir 1943) (“Such persons, so authorized, are, so to speak, private Attorney Generals.”), vacd as moot, 320 US 707 (1943). See also Coffee, 42 Md L Rev at 215 n 1 (cited in note 30). Professor Coffee notes, however, that “(t)he issue in Associated Industries was one of standing in an administrative law dispute, and no question of private damages was involved.” *Id*. Nevertheless, it is quite clear that today the label is employed for private damage actions. Consider *id*.
- 61 Deborah R. Hensler and Thomas D. Rowe, Jr., [Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform](#), 64 L & Contemp Probs 137, 137 (2001).
- 62 Stephen C. Yeazell, [From Medieval Group Litigation to the Modern Class Action](#) 232 (Yale 1987) (referencing Harry Kalven, Jr. and Maurice Rosenfeld, [The Contemporary Function of the Class Suit](#), 8 U Chi L Rev 684, 721 (1941)).
- 63 Yeazell, [From Medieval Group Litigation](#) at 232 (cited in note 62).
- 64 See Howard M. Erichson, [Coattail Class Actions: Reflections On Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation](#), 34 UC Davis L Rev 1, 5 (2000) (defining “coattail class action” as “a class action that follows government litigation, seeking to benefit from the government’s work”). See also Bryant Garth, Ilene H. Nagel, and S. Jay Plager, [The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation](#), 61 § Cal L Rev 353, 376 (1988) (explaining an empirical study demonstrating that in modern class actions, “private attorneys tended to ‘piggyback’ their cases on governmental investigations, even to the extent of copying the government’s complaint”) (internal citation omitted); Coffee, 42 Md L Rev at 220-23 (1983) (cited in note 30) (“(T)he available empirical evidence does not provide much support for the thesis that the private attorney general significantly supplements public law enforcement by increasing the probability of detection (A) recurring pattern is evident under which the private attorney general simply piggybacks on the efforts of public agencies . . . in order to reap the gains from the investigative work undertaken by these agencies. As a result, the private attorney general does not seem to broaden the scope of law enforcement, but rather only intensifies the penalty.”) (internal citations omitted).
- 65 Professor Erichson notes that “(t)he chance of successful private litigation rises dramatically when government litigation paves the way.” Erichson, 34 UC Davis L Rev at 5 (internal citation omitted) (cited in note 64).
- 66 See *id* at 3 (“(S)ome observers object to the easy ride that plaintiffs and their lawyers get by piggybacking on government actions.”). Professor Erichson points to an editorial in the Wall Street Journal labeling class counsel in the Microsoft class actions

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as “tort parasites” and a reference in the Washington Post to class action lawyers as “predatory” and the class actions, themselves, as “simple buzzardry.” *Id* (internal citations omitted).

67 See *id* (noting that coattail class actions “offer a relatively fair and efficient mechanism for extending the benefits of government legal work to provide redress to injured citizens”).

68 See also [Coffee](#), 42 *Md L Rev* at 224 (cited in note 30) (“This phenomenon of ‘free riding’ by the private plaintiff on governmental enforcement efforts is by no means without social utility . . .”).

69 But see [Erichson](#), 34 *UC Davis L Rev* at 5 (cited in note 64) (“Coattail class actions are a common feature of mass litigation.”).

70 Garth, Nagel, and Plager, 61 § *Cal L Rev* at 353-54 (cited in note 64) (noting that sometimes the private attorney general is considered a “Lone Ranger” and at other times, a “bounty hunter”).

71 See text accompanying notes 57-59.

72 See text accompanying notes 34-35.

73 Professor Coffee, for example, has written that “the private attorney general is someone who sues ‘to vindicate the public interest’ by representing collectively those who individually could not afford the costs of litigation; and as every law student knows, our society places extensive reliance upon such private attorneys general to enforce the federal antitrust and securities laws, to challenge corporate self-dealing in derivative actions, and to protect a host of other statutory policies.” [Coffee](#), 42 *Md L Rev* at 216 (internal citation omitted) (cited in note 30). As I will demonstrate, however, this description of the private attorney general concept improperly mixes compensatory suits and those brought solely due to governmentally created economic incentives.

74 See text accompanying notes 32-35.

75 31 *USC* §§ 3729, 3730(b) (2000).

76 The size of the percentage depends on whether or not the government intervenes in the action. 31 *USC* § 3730(d). The Act gives the government sixty days from the filing date of the suit to investigate the relator’s claim and decide whether or not to intervene and assume primary responsibility. 31 *USC* § 3730(c)(1).

77 Gretchen L. Forney, Note, [Qui tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act](#), 82 *Minn L Rev* 1357, 1364 (1998) (internal citation omitted). The same commentator points out that “Congress amended the (False Claims Act) in 1986 with the stated intent of generating more private suits. The 1986 Amendments strengthened the position of the qui tam plaintiff in three ways: (1) qui tam plaintiffs were given more power to initiate and prosecute claims, (2) financial incentives were enhanced, and (3) protections against employer retaliation reduced the risks inherent in exposing one’s employer.” *Id* at 1366-67 (internal citations omitted).

78 Marc S. Raspanti and David M. Laigaie, [Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act](#), 71 *Temple L Rev* 23, 43 (1998) (charting the increasing number of qui tam filings from 1987 to 1997 according to Justice Department figures).

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79 Once again, I should emphasize that I am making no judgments about the personal motivations of individual relators. It is, of course, conceivable that a particular relator is motivated as much or more by personal concern about fraud against the government as by the percentage of the proceeds that he expects to obtain as a result of the qui tam action. As a rough rule of thumb, however, it is fair to predict that the financial incentive is, at the very least, a significant element in the relator's motivation. Apparently the government, in offering the reward, is proceeding on such an assumption.

80 The qui tam analogy may not be a perfect one, since the qui tam relator does more than simply expose private illegality. In addition, she seeks to obtain restitution on behalf of the government. However, the relator is not seeking compensatory damages for private victims, and, unlike the plaintiff class action lawyers, the relator is considered to be a real party in interest.

81 See text accompanying notes 74-75 (describing commentators' overbroad definition of "bounty hunter" concept to include both private compensatory and true bounty hunter actions).

82 [FRCP 23\(b\)\(2\)](#) (authorizing class actions where the party opposing the class has acted in a manner generally applicable to the class, thereby justifying injunctive relief). The Advisory Committee Notes to the 1966 Amendments indicate that the modern civil rights class action served as the inspiration for this category, though by its terms the category is not substantively confined to civil rights claims. See [FRCP 23; Amendments to Rules of Civil Procedure, 39 FRD 69, 102 \(1966\)](#). [Rule 23\(b\)\(2\)](#) class actions may be brought even if damages are sought, as long as injunctive relief remains the primary relief sought. [Charles Alan Wright, et al, Federal Practice & Procedure § 1775, at 463-70 \(West 2d ed 1986\)](#).

83 Compensatory class actions may fall either within the (b)(1) or (b)(3) categories. The former category, which does not necessarily require individual notice to class members and in which class members do not have the option of removing themselves from the class, exists when either the individual class members or the party opposing the class would be placed in a legally or practically precarious position absent the existence of the class action. See [FRCP 23\(b\)\(1\)\(A\)-\(B\)](#). The latter category, which requires individual notice and provides class members with the right to opt out of the class, includes cases in which the rationale for class treatment is confined largely to the closely parallel nature of the facts and claims. [FRCP 23\(b\)\(3\)](#). For the most part, my analysis applies to cases falling within the (b)(3) category.

84 It is important not to confuse "idealistic" with "altruistic," or to assume that an action is not motivated by self-interest merely because one finds that self-interest to be ideologically appealing. Even seemingly idealistic class actions often are motivated by self-interest, as where African-Americans seek to enjoin continued discrimination. Indeed, in light of our system's injury-in-fact requirement, such actions cannot be brought absent at least some level of self-interest. See text accompanying notes 57-58.

85 [FRCP 23\(c\)\(2\)](#).

86 See Robert Mauk, *Lawsuit Abuse: Public's Welfare Hurt When Lawyers Help Themselves*, *Charleston Gazette* 5A (Apr 28, 1997) ("Many people probably aren't aware of this but, under current rules, you may already be part of a class-action lawsuit and not even know it (S)uch suits are like those record and book clubs your parents warned you about--until you say stop, you are automatically included as a member.").

87 The term "entity" appears to have been coined by Professor Cooper. See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 *NYU L Rev* 12, 26 (1996).

88 David L. Shapiro, *Class Actions: The Class As Party and Client*, 73 *Notre Dame L Rev* 913, 916 (1998) (internal citation omitted).

89 *Id* at 917. See also *id* at 921 (finding the entity model "the more appropriate in the class action setting"). Professor Shapiro

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acknowledges, however, that “substantial institutional problems remain when it comes to implementation.” [Id at 917](#).

⁹⁰ [Shapiro, 73 Notre Dame L Rev at 917 \(cited in note 88\)](#).

⁹¹ [Id at 921](#).

⁹² [Id](#).

⁹³ [Id at 921-22](#). In particular, Professor Shapiro notes that trade union members may not be free to withdraw from litigation pursued by the union--which represents all workers, whether they voted for the union or not-- without leaving the job entirely. Similarly, residents of a municipality cannot freely withdraw from it without the extreme action of moving home and family.

⁹⁴ See text accompanying notes 180-81.

⁹⁵ Perhaps a stronger argument can be fashioned that the drafters did, in fact, intend classes certified pursuant to either 23(b)(1) or 23(b)(2) to constitute entity-based classes, since no provision for the right of opt-out, or even of required notification, was made for these classes. See [Shapiro, 73 Notre Dame L Rev at 925-26 \(cited in note 88\)](#) (arguing that “the knowledge that these actions generally involve the group as an entity may well have led the rulemakers in 1966 to make such classes ‘mandatory’”). On the other hand, arguably the lack of opt-out rights in these classes could be justified by the pragmatically-based compelling need to resolve the entire matter in a single proceeding, because of the harmful impact on either absent class members or the party opposing the class in the absence of class treatment. Such reasoning, however, does not respond to my critique grounded in the undermining of the substantive-procedural balance brought about by the denial of opt-out when the underlying substantive law creates only individual rights. The Supreme Court has cast doubt on mandatory classes under certain circumstances, because of their negative impact on litigants’ procedural autonomy and therefore construed the scope of the mandatory categories narrowly. See [Ortiz v Fibreboard Corp, 527 US 815, 842-43 \(1999\)](#) (stating that a limiting construction of the [Rule 23\(b\)\(1\)\(B\)](#) mandatory class “avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims”).

⁹⁶ See Part II.

⁹⁷ Jonathan R. Macey and Geoffrey P. Miller, [The Plaintiffs’ Attorney’s Role In Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U Chi L Rev 1, 28 \(1991\)](#) (internal citations omitted).

⁹⁸ Professors Macey and Miller, it should be noted, developed the argument in support of the position that individualized notice in small claim class actions should not be required. See [id](#). They were not specifically focusing upon the opt-out question. See generally [id](#).

⁹⁹ See John C. Coffee, Jr., [The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U Chi L Rev 877, 906 \(1987\)](#) (“Consider the position of a plaintiff whose claim faces either serious problems of factual proof or legal adequacy or who has suffered relatively minor damages. Rationally, such a plaintiff should gravitate to the class action because she has no alternative.”).

¹⁰⁰ But see text accompanying notes 106-07.

¹⁰¹ [Coffee, 54 U Chi L Rev at 905 \(cited in note 99\)](#). See also [Shapiro, 73 Notre Dame L Rev at 923-24 \(cited in note 88\)](#) (defining

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small claim class actions as “those cases in which the claim of any individual class member for harm done is too small to provide any rational justification to the individual for incurring the costs of litigation”). Professor Shapiro points, as an example, to “a claim on behalf of many purchasers that defendants have engaged in a price-fixing conspiracy to violate the federal antitrust laws. The case would easily fit the small claims category if, even after damages are trebled, the amount due any single purchaser would not exceed, say, \$100.” [Id at 924](#).

¹⁰² [Coffee, 54 U Chi L Rev at 904 \(cited in note 99\)](#).

¹⁰³ See Marcus, et al, [Civil Procedure at 1174 \(cited in note 2\)](#) (“The concept of privity is rooted in due process, as a non-party should not be found by a judgment unless he had an opportunity to be heard.”).

¹⁰⁴ Compare [Edelman v Jordan, 415 US 651, 673 \(1974\)](#) (pointing out that “constructive consent is not a doctrine commonly associated with the surrender of constitutional rights”). The one exception that comes to mind is a default judgment, where a judgment is entered against a defendant who has taken absolutely no action. However, such a result may be justified on the grounds that any other treatment of a defendant’s failure to respond would effectively transform a notice of suit into an R.S.V.P.

¹⁰⁵ See [Coffee, 54 U Chi L Rev at 905 \(cited in note 99\)](#). Professor Coffee also describes “Type C” class actions, “in which there are both marketable and unmarketable claims.” [Id at 905-06](#). He notes that “(a)lthough Type B suits correspond most closely to the traditional rationale for class actions, Type C actions are probably much more common.” [Id at 906](#) (internal citation omitted).

¹⁰⁶ Hensler, et al, [Class Action Dilemmas at 476 \(cited in note 21\)](#). They describe this result as “a worrisome possibility.” [Id](#). This concern provided at least a partial motivation for the 1966 Advisory Committee’s decision to use opt-out. See [Amendments to Rules of Civil Procedure, 39 FRD at 102-04](#).

¹⁰⁷ See, for example, [United Food and Commercial Workers Union Local 751 v Brown Group, Inc, 517 US 544, 557 \(1996\)](#) (referring to representative litigation, brought by state governments in their capacity as *parens patriae*).

¹⁰⁸ It should be noted that the modern class action does not constitute a classic *parens patriae* action, since it is private attorneys, not chosen by or representative of the electorate, who both make the decision to sue on behalf of individuals in need of special protection and conduct the suit.

¹⁰⁹ Levi, [Memorandum to the Civil Rules Advisory Committee at 2-3 \(cited in note 5\)](#).

¹¹⁰ Benjamin Kaplan, [Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I, 81 Harv L Rev 356, 398 \(1967\)](#).

¹¹¹ But see text accompanying notes 114-117 (discussing coupon settlements).

¹¹² See Gail Hillebrand and Daniel Torrence, [Claims Procedures In Large Consumer Class Actions and Equitable Distribution of Benefits, 28 Santa Clara L Rev 747, 747 \(1988\)](#) (“Settlements and judgments in class action cases have often required class members to submit claims in order to share in the proceeds of the recovery. Recent cases suggest that claims procedures are ill-suited to consumer class actions in which the class size is very large and the amount of damages per class member is relatively small. These cases are characterized by very low claims rates.”).

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- ¹¹³ It is thus not surprising that in her empirical study of class actions, Professor Hensler found that “class members do not always come forward to claim the full amount defendants make available for compensation.” Hensler, et al, *Class Actions Dilemmas* at 459 (cited in note 21) (noting that in cases where settlement required class members to come forward to claim modest amounts of compensation, the fraction of compensation funds actually disbursed was modest to negligible).
- ¹¹⁴ See [Leslie, 49 UCLA L Rev at 993 \(cited in note 24\)](#). According to the same commentator, “(c)oupon-based settlements most commonly appear in antitrust and consumer class actions.” *Id.* at 995. Professor Leslie notes that “(c)oupon settlements appear to be increasing in popularity.” *Id.* (internal citation omitted).
- ¹¹⁵ *Id.*
- ¹¹⁶ [Leslie, 49 UCLA L Rev at 993 \(cited in note 24\)](#). Other commentators have reacted with greater outrage in their assessment of the widespread use of coupon settlements. See Victor E. Schwartz, Mark A. Behrens, and Leah Lorber, [Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform, 37 Harv J on Legis 483, 483 \(2000\)](#) (“Consumers are being taken for a ride by a renegade legal practice that often compensates them nominally--for example, with coupons-- while their lawyers take home millions of dollars in fees.”) (internal citations omitted).
- ¹¹⁷ [FRCP 23\(e\)](#) (“A class action shall not be dismissed or compromised without the approval of the court . . .”).
- ¹¹⁸ See, for example, [In re Mexico Money Transfer Litigation, 267 F3d 743, 748 \(7th Cir 2001\)](#) (upholding approval of a coupon settlement), cert denied, [535 US 1018 \(2002\)](#). Not all reviewing courts have blindly accepted the fairness of proposed coupon settlements, however. See, for example, [In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F3d 768, 803 \(3d Cir 1995\)](#) (rejecting lower court approval of a class action settlement, because “a number of factors militate against the conclusion that the class’s interests were sufficiently pursued”). The Third Circuit found that the settlement arguably did not maximize the class members’ interests. Every owner received a coupon whose value could only be realized by purchasing a new truck. Significant obstacles existed to the development of a secondary market in the transfer certificates given that the transfer restrictions and the certificates’ limited lifespan minimize the value of the transfer option. *Id.* The court also noted that “class counsel effected a settlement that would yield very substantial rewards to them after what, in comparison to the \$9.5 million fee, was little work.” *Id.*
- ¹¹⁹ An organization in Southern West Virginia, Citizens Against Lawsuit Abuse, has catalogued some of the most abusive examples, though it should be noted that some (but not all) of them occurred in state court. See [Mauk, Lawsuit Abuse, Charleston Gazette at 5A \(cited in note 86\)](#).
- ¹²⁰ Professor Hensler, discussing her empirical study of class actions, notes that “(t)he wide range of outcomes that we found in the lawsuits contradicts the view that damage class actions invariably produce little for class members, and that class action attorneys routinely garner the lion’s share of settlements.” Hensler, et al, *Class Action Dilemmas* at 427 (cited in note 21). She points out, however, that “class counsel were sometimes simply interested in finding a settlement price that the defendants would agree to-- rather than in finding out what class members had lost, what defendants had gained, and how likely it was that defendants would actually be held liable if the suit were to go to trial.” *Id.*
- ¹²¹ *Id.*
- ¹²² See Part I.

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- ¹²³ See text accompanying note 26.
- ¹²⁴ See Part III.
- ¹²⁵ See sources cited in notes 53-55.
- ¹²⁶ Compare Benjamin Barber, *Strong Democracy* (California 1984) (favoring heavy involvement of the citizenry in the democratic process) with Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (Harper 1942) (urging an extremely limited role for the electorate in the democratic process).
- ¹²⁷ Alexander Meiklejohn, *Political Freedom* 9 (Harper 1960). See also Henry Mayo, *An Introduction to Democratic Theory* 103 (Oxford 1960) (“(E)verything necessary to (democratic) theory may be put in terms of (a) legislators (or decision-makers) who are (b) legitimated or authorized to enact public policies, and who are (c) subject or responsible to popular control at free elections.”); J. Roland Pennock, *Democratic Political Theory* 310 (Princeton 1979) (“Elections are thought to constitute the great sanction for assuring representative behavior, by showing what the voters consider to be their interests by giving them the incentive to pursue those objectives.”).
- ¹²⁸ See Randy E. Barnett, [Constitutional Legitimacy](#), 103 *Colum L Rev* 111, 128 (2003) (“Despite their rhetorical commitment to ‘popular sovereignty,’ by the time the Constitution was written its framers were pretty well convinced that pure majority rule or democracy was a bad idea.”); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 203-43 (Vintage 1997).
- ¹²⁹ [US Const Art II, § 1, cl 2](#); Amend XII (establishing the manner in which the electoral college representatives will be selected and the procedure that the electors will use to elect the President).
- ¹³⁰ [US Const Art I, § 3, cl 1](#). This process of Senatorial election was subsequently changed to a direct electoral process by amendment. See [US Const Amend XVII](#).
- ¹³¹ See [US Const Art I, § 7, cls 2, 3](#) (presentment clauses); Art I, §§ 1 and 7, [cl 2](#) (bicameralism requirement). See also [INS v Chadha](#), 462 *US* 919 (1983) (holding that a federal immigration statute allowing the House to overrule the Attorney General on deportation decision failed to meet the constitutional requirements for legislative actions of bicameralism and presentment).
- ¹³² See Robert W. Bennett, [Counter-Conversationalism and the Sense of Difficulty](#), 95 *Nw U L Rev* 845, 847-48, 854-71 (2001) (emphasizing that separation of powers and interest group power complicate the majoritarian assumption).
- ¹³³ See James A. Morone, *The Democratic Wish* 33 (Yale 2d ed 1998) (“Americans broke from England expressing a democratic wish.”). See also *id* at 39 (“When Parliament imposed taxes on the colonies . . . the Americans charged that their own assemblies had not approved the levies--taxation without representation.”).
- ¹³⁴ Schumpeter, *Capitalism, Socialism, and Democracy* at 285 (cited in note 126). See also *id* at 246 (proposing “government approved by the people”); *id* at 285 (suggesting that a criterion for “identifying the democratic method” is “competition among would-be leaders for the vote of the electorate”). According to democratic theorist Peter Bachrach, Schumpeter thought “it is absurd to believe that ‘the people’ have rational views on every issue and that the function of their representatives is to carry out their views in the legislative chamber.” Peter Bachrach, *The Theory of Democratic Elitism: A Critique* 20 (University 1967). Thus, according to Schumpeter, “the people must understand that they cannot take political action between elections. Even ‘bombarding’

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representatives with letters and telegrams, Schumpeter argued, ought to be banned.” *Id* at 21 (internal citation omitted). For a rejection of a “vote-centered” model of democracy, consider Bennett, *Counter-Conversationalism* (cited in note 132).

¹³⁵ Even the Constitution, it should be recalled, is not completely insulated from control of the people, since it is subject to amendment, albeit through resort to a complex and difficult process. See [US Const Art V](#).

¹³⁶ Morone, *The Democratic Wish* at 1 (cited in note 133).

¹³⁷ *Id* at 2.

¹³⁸ See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *§ Ct Rev* 245, 255 (arguing that the electorate is the true governor, and that those selected to govern are merely agents of that true governor).

¹³⁹ See David Held, *Models of Democracy* 93 (Stanford 2d ed 1996) (pointing out that Madison “conceived of the federal representative state as the key mechanism to aggregate individuals’ interests and to protect their rights”).

¹⁴⁰ For an earlier response to what I have described as “democracy bashing” by a number of modern legal scholars, see Martin H. Redish, *Judge-Made Abstention and the Fashionable Art of “Democracy Bashing,”* 40 *Case Western L Rev* 997 (1990).

¹⁴¹ Bennett, *Counter-Conversationalism* (cited in note 132).

¹⁴² *Id* at 871-76.

¹⁴³ Sunstein, 97 *Yale L J* at 1541 (cited in note 51) (describing the four central principles of liberal republicanism).

¹⁴⁴ *Id* at 1554. See also Sunstein, 38 *Stan L Rev* at 31-32 (cited in note 54) (positing that “through discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good (T)his conception reflects a belief that debate and discussion help to reveal that some values are superior to others. Denying that decisions about values are merely matters of taste, the republican view assumes that ‘practical reason’ can be used to settle social issues.”).

¹⁴⁵ For a more detailed discussion of this view, see Redish, *The Constitution as Political Structure* at 135-61 (cited in note 9).

¹⁴⁶ See Mashaw, 1 *J L, Econ, & Org* at 87 (cited in note 9) (finding “it difficult to understand why we do not presently have exactly the ‘clowns . . . we deserve.’ The dynamics of accountability apparently involve voters willing to vote upon the basis of their representative’s record in the legislature. Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls. How is it that we are not being represented?”).

¹⁴⁷ For the application of this point specifically to the context of class actions and the surreptitious adoption of a bounty hunter remedial model, see Part III D.

¹⁴⁸ Consider Abner J. Mikva, *Symposium on the Theory of Public Choice: Foreword*, 74 *Va L Rev* 167 (1988); Steven Kelman,

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“Public Choice” and Public Spirit, 87 Pub Int 80 (1987).

¹⁴⁹ Levi, Memorandum to the Civil Rules Advisory Committee at 2 (cited in note 5).

¹⁵⁰ Priest, 26 J Legal Stud at 525 (cited in note 5).

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ See, for example, Michael Allen and Amy Goldstein, Bush Urges Malpractice Damage Limits; Plan Includes Goals Sought by Business, Wash Post A4 (July 26, 2002).

¹⁵⁴ See Hensler, et al, Class Actions Dilemmas, at 21 (cited in note 21) (“The ‘aroma of gross profiteering’ that many perceive rising from damage class actions troubles even those who support continuance of damage class actions and fuels the controversy over them.”). See also Coffee, 86 Colum L Rev at 724 (cited in note 8) (“(T)he plaintiff ‘s attorney in class and derivative actions has long been a controversial figure.”). A Third Circuit task force recently noted that “there is a perception among a significant part of the non-lawyer population and even among lawyers and judges . . . that class action plaintiffs’ lawyers are overcompensated for the work they do.” Chief Judge Edward R. Becker, Third Circuit Task Force Report on Selection of Class Counsel, 74 Temple L Rev 689, 692 (2001). For an example from the popular press, see Mauk, Lawsuit Abuse, Charleston Gazette at 5A (cited in note 86).

¹⁵⁵ See Nicholas Lemann, The Newcomer: Senator John Edwards is this season’s Democratic rising star, New Yorker 58, 82 (May 6, 2002) (“Within the Republican Party, it is axiomatic that trial lawyers are bad guys. The idea is that the old, unsavory ambulance-chaser type has now figured out how to get really rich, in a way that drives businesses into bankruptcy and makes worthwhile activities uninsurable. Talk to Republicans in politics, and you’ll get a lurid picture of top trial lawyers riding around in private planes and giving lots of money to Democratic politicians, in order to insure that there won’t be any legislative limits placed on their sky-high damage awards It would therefore be natural for Republicans to assume that the way to beat (North Carolina Senator) John Edwards is simply to point out that he is a trial lawyer.”). See also Morton Kondracke, Trial Lawyers As a Political Issue, San Diego Union & Trib G2 (July 28, 2002) (“Democrats often accuse Republicans of being the ‘party of special interests’ but the Democrats rarely get tagged as ‘the party of trial lawyers,’ which they are.”).

¹⁵⁶ See, for example, Coffee, 86 Colum L Rev at 670 n 3 (cited in note 8) (noting “the frequency with which judicial opinions favoring new restrictions on the availability of class actions or other remedies criticize the plaintiff ‘s attorney”).

¹⁵⁷ John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum L Rev 370, 371-72 (2000) (internal citation omitted). Professor Coffee further notes the “standard depiction (of the plaintiff class attorney) as a profit-seeking entrepreneur, capable of opportunistic actions.” Id.

¹⁵⁸ Hensler, et al, Class Action Dilemmas at 21 (cited in note 21).

¹⁵⁹ See Redish, The Constitution as Political Structure at 131-65 (cited in note 9) (urging a far more restrictive non-delegation doctrine than the post-New Deal Supreme Court has employed).

¹⁶⁰ It is true, of course, that Congress possesses the legislative power to overrule individual Federal Rules, see 28 USC § 2072, so its

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failure to do so could arguably be taken to represent legislative approval. But such a “legislation-by-inaction” method most assuredly fails to satisfy the Constitution’s bicameralism and presentment requirements for the enactment of legislation. See [INS v Chadha](#), 462 US 919, 946-51 (1983).

¹⁶¹ 28 USC § 2072(b).

¹⁶² Geoffrey B. Hazard, The Effect of the Class Action Device Upon the Substantive Law, in Class Actions: Excerpts from a Symposium before the Judicial Conference of the Fifth Judicial Circuit, 58 FRD 299, 307-12 (1973).

¹⁶³ 480 US 1 (1987).

¹⁶⁴ *Id* at 5.

¹⁶⁵ The argument could be made that as long as the rule deals in some way with the fairness and/or efficiency of the truth-finding process, it is appropriately characterized as purely “procedural” and therefore not in violation of the Act’s directive. See [Sibbach v Wilson & Co](#), 312 US 1, 10-11 (1941) (noting that a litigant’s concession that Rule 35(a), concerning mental and physical examinations as part of discovery process, affects procedure destroys the argument that the rule abridges substantive rights in violation of the Rules Enabling Act). This “mutual exclusivity” approach to the substance-procedure distinction was, in fact, adopted by the Supreme Court in [Hanna v Plumer](#), 380 US 460 (1965), as the basis for defining the scope of Congress’s constitutional power to establish the procedures employed in federal court. *Id* at 472-74 (holding that service of process under Rule 4(d)(1) is constitutional because, though it may fall within an uncertain area between substance and procedure, Congress has the constitutional power to make rules governing court practices that are at least arguably procedural). But the Rules Enabling Act’s directive has generally been construed to impose a more stringent limitation on the rulemaking power. See, for example, [Burlington Northern](#), 480 US at 5 (1987).

Note that, under the “incidental” standard of [Burlington Northern](#), the fact that a rule consciously alters the case’s outcome does not automatically render the rule an invalid modification of substantive rights. As long as the rule is designed primarily to affect the fairness or efficiency of the adjudicatory process, the fact that it employs the threat of dismissal or a variant of *res judicata* as a club by which to enforce its procedural directive does not necessarily mean that it abridges, enlarges, or modifies a substantive right.

¹⁶⁶ See Part II A.

¹⁶⁷ Kaplan, 81 Harv L Rev at 394-98 (cited in note 111); See also text accompanying notes 112-13.

¹⁶⁸ [Burlington Northern](#), 480 US at 6 (1987). But see Leslie M. Kelleher, Taking “Substantive Rights” (In the Rules Enabling Act) More Seriously, 74 Notre Dame L Rev 47, 100 (1998) (“It is equally unrealistic to assume that the Court, in transmitting proposed Rule amendments to Congress, has made a determination that the Rules are valid.”). See also *id* at 48-49 (noting that while “the Court has never found a Rule invalid for impermissibly affecting a substantive right,” it is also true that “(i)n several recent cases, the Court has signaled its willingness to take the substantive rights limitation seriously, treating it as a rule of construction in reading Rules narrowly, so as not to overstep the bounds of the Court’s rulemaking authority”) (internal citations omitted). It does not appear that such willingness on the part of the Court could have any relevance to the opt-out procedure, however, since that provision does not lend itself to narrowing interpretation. But see [Amchem Products, Inc v Windsor](#), 521 US 591, 612-13 (1997) (noting that Rule 23 must be interpreted in conjunction with the Rules Enabling Act).

¹⁶⁹ See, for example, [Burlington Northern](#), 480 US 1; [Hanna v Plumer](#), 380 US 460.

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¹⁷⁰ Shapiro, [73 Notre Dame L Rev 913 at 952](#) (internal citation omitted) (cited in note 88).

¹⁷¹ [Id at 929](#) (emphasis in original).

¹⁷² In [Seattle Audubon Society v Robertson](#), 914 F2d 1311 (9th Cir 1990), [revid on other grounds](#), 503 US 429 (1992), for example, the Ninth Circuit invalidated federal legislation that created an evidentiary presumption that, the court believed, had the impact of transforming the pre-existing substantive law. The Supreme Court reversed because it disagreed with the lower court's conclusion that Congress had not directly transformed the relevant substantive law. 503 US at 538. However, the Supreme Court did not reject the Ninth Circuit's statement of general legal principles. [Id.](#)

¹⁷³ See, for example, John Harrison, [The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III](#), 64 [U Chi L Rev](#) 203, 204 (1997) (commenting that the language of Article III of the Constitution supports the traditional view that Congress's authority over federal court jurisdiction is substantial).

¹⁷⁴ See, for example, [United States v Klein](#), 80 US (13 Wall) 128, 145-47 (1871) (acknowledging congressional power to limit the Supreme Court's appellate jurisdiction, but holding that the power does not extend to congressional vesting of jurisdiction in a manner that limits the Court's decision making independence). See also Henry Hart, [The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic](#), 66 [Harv L Rev](#) 1362, 1372-73 (1953) (noting that "the difficulty involved in asserting any judicial control in the face of a total denial of jurisdiction doesn't exist if Congress gives jurisdiction but puts strings on it," and arguing that "if Congress directs an Article III court to decide a case," the court could "easily read into Article III a limitation on the power of Congress to tell the court how to decide it") (emphasis in original).

¹⁷⁵ See Martin H. Redish, [Federal Judicial Independence: Constitutional and Political Perspectives](#), 46 [Mercer L Rev](#) 697, 714-15 (1995) (arguing that separation of powers prevents legislative branch from manipulating legislative ends through judicial process).

¹⁷⁶ In addition to separation of powers, one might also argue that due process guarantees a defendant's right to be judged under the substantive law as it exists at the time of suit. See Martin H. Redish, [Procedural Due Process and Aggregation Devices in Mass Tort Litigation](#), 63 [Def Couns J](#) 18, 22 (1996) ("Procedural due process assures that substantive laws enacted by representatives of the electorate and accountable to it are properly enforced."). However, detailed examination of this constitutional argument is beyond the scope of this Article.

¹⁷⁷ See Part II.

¹⁷⁸ See text accompanying notes 103-06.

¹⁷⁹ For a detailed discussion of my proposed reforms of [Rule 23](#), see Part IV.

¹⁸⁰ See text accompanying notes 88-89.

¹⁸¹ See text accompanying notes 123-24.

¹⁸² The Supreme Court has expressed uneasiness about mandatory damage class actions, though on grounds of procedural due process rather than separation of powers and accountability. See [Ortiz v Fibreboard Corp](#), 527 US at 842-43. It is arguable that in 23 (b)(1)(A) class actions, use of a due process balancing calculus adopted in [Mathews v Eldridge](#), 424 US 319, 334-35 (1976)

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(weighing the private interests that will be affected by an official action with the Government's interest in pursuing an action to determine whether due process has been met), could satisfy due process concerns, due to the arguably compelling governmental interest in protecting parties opposing the class from irreconcilable directives growing out of multiple suits. A similar argument, though probably not as strong, could be made to justify 23(b)(1)(B) classes against a procedural due process attack, due to the potentially negative impact on absent class members flowing from multiple suits. Neither rationale, however, is responsive to the concern grounded in considerations of political accountability and representation.

183 FRCP 23(b)(2).

184 See Part III E.

185 See FRCP 23(e).

186 See Part II.

187 A 2000 RAND study on class action suits recommended that "judges require settling parties to detail plans for disbursing benefits to eligible claimants and suggested that preference be given to automatic disbursement schemes, such as crediting accounts of eligible class members." Hensler and Rowe, *64 L & Contemp Probs at 150 (cited in note 61)*. While this proposal would no doubt represent an improvement, my recommendation is to include the inquiry at the certification stage, rather than solely the settlement stage. Of course, in the context of settlement class actions, whose frequency is increasing, the difference is moot.

188 FRCP 23(b)(3) (listing as one of the factors pertinent to the court's findings as to the maintainability of the action as a class action, "the difficulties likely to be encountered in the management of a class action").

189 Note that the dichotomy between the initial certification decision and subsequent approval of settlement assumes the classic form of the class action. In light of the dramatic development in recent years of the so called settlement class action, in many cases the two stages have been collapsed into one stage. However, the only impact of this change on my suggested reforms would be that both would necessarily take place simultaneously.

190 Such a proposal was made in Professor Hensler's RAND study, which suggested that "if judges approve coupon settlements . . . they (should) base fee awards on the monetary value of coupons redeemed, not offered." Hensler and Rowe, *64 L & Contemp Probs at 151 (cited in note 61)* (emphasis in original).

191 See notes 115-16 and accompanying text.

192 Professor Leslie, who expresses substantial concern about the use of coupon settlements, see note 116 and accompanying text, *supra*, rejects the idea of prohibiting all coupon settlements. He argues that such a "proposal's simplicity is illusory in that it may be difficult to determine what constitutes a coupon settlement. Some proposed coupon settlements include a coupon component in a much larger settlement structure." Leslie, *49 UCLA L Rev at 1076 (cited in note 24)* (internal citation omitted). But this argument appears to prove too much, at least if--as Professor Leslie appears to agree-- there is a need to do something to reduce the harms caused by coupon settlements. Whatever is done to reduce those harms would require one to determine what is meant by "coupon settlement." Indeed, making such determinations on the facts of an individual case is exactly the type of activity that courts engage in regularly. Moreover, the fact that coupons make up only part of a settlement does not seem to present any unique difficulties; a categorical rule prohibiting use of coupon settlements would presumably prevent all uses of coupons as part of a settlement.

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- ¹⁹³ See [id](#) at 1076-77. Professor Leslie is afraid that judicial rejection of any settlement with a coupon component will “deny concrete benefits to the class and force litigation in which every member of the class could wind up with nothing.” *Id.*
- ¹⁹⁴ It is not entirely clear whether such actions would satisfy the justiciability requirements of Article III, which require injury in fact, traceability of that injury to defendant’s behavior, and the possibility of judicial action to remedy that injury. When the only “injury” is the artificial one created by Congress for the very purpose of allowing a suit, the essential elements of private rights adjudication are arguably undermined. While the Supreme Court has upheld *qui tam* actions against Article III attack, [Vermont Agency of Natural Resources v Stevens](#), 529 US 765, 774 (2000), it did so in large part on the historical pedigree of the practice, something that such bounty hunter actions would of course lack. But if so, then the surreptitious creation of bounty hunter actions under the guise of the aggregation of classic private compensatory claims becomes even more problematic because they, of course, lack the historical pedigree that was so important to the Court in upholding *qui tam* actions.
- ¹⁹⁵ See Leslie, 49 UCLA at 1076 (cited in note 24) (“Some coupon settlements may be appropriate. Even critics of coupon settlements recognize the legitimacy of coupon settlements under certain conditions.”) (internal citations omitted).
- ¹⁹⁶ Professor Leslie has suggested another possible reform, “requir(ing) that class counsel be paid in the same currency as the class”—in other words, “the counsel shall receive its fees in coupons as well.” *Id.* at 997. However, as a practical matter such an approach is likely tantamount to the blanket prohibition of the use of discount coupons in settlement.
- ¹⁹⁷ See, for example, William N. Eskridge, Jr., [Dynamic Statutory Interpretation](#), 135 U Pa L Rev 1479, 1497-98 (1987) (arguing that statutory interpretation need not conform to the intent of Congress (and therefore, presumably the intent of the electorate) and recommending a dynamic approach to meet changing societal circumstances).
- ¹⁹⁸ See Parts IV B and IV C.
- ¹⁹⁹ See text accompanying note 79.
- ²⁰⁰ Part III E.
- ²⁰¹ See Part IV.
- ²⁰² See Part III F 1.
- ²⁰³ See, for example, [Coffee](#), 54 U Chi L Rev 877 (cited in note 99) (exploring the causes of the failure of the market for legal services in the class action context); Macey and Miller, 53 U Chi L Rev 1 (cited in note 97) (arguing against providing notice in small claims class actions).

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CLASS ACTIONS, LITIGANT AUTONOMY, AND THE FOUNDATIONS OF PROCEDURAL DUE PROCESS

Martin H. Redish^{FN1} Nathan D. Larsen^{FNdd1}

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Introduction

Literally hundreds of scholarly works have been written about the modern class action. While academic and judicial attention to the subject is unending, the controversy over class actions has also worked its way into America's mainstream political discourse.^{FN1} Surprisingly little of this wealth of discussion, however, has concerned the collectivist-individual tension that inheres in much of the class action framework. With the melding of multiple individual claims into a single class proceeding necessarily comes a dramatic reduction in an individual's ability to control her lawsuit--or, indeed, to decide whether to pursue her claim in the first place. Because the Constitution's Due Process Clauses^{FN2} 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.

To a limited extent, this tension has, in fact, been recognized. The Supreme Court has long noted the Due Process Clause's relevance as a *1574 constitutional limit on class actions.^{FN3} Moreover, on occasion, respected commentators have explored the scope of due process protection in the context of class actions.^{FN4} However, virtually all of this judicial and scholarly attention has focused on the paternalistic concern that the named parties adequately protect the interests of the absent class members. At no point has court or scholar recognized, much less focused upon, what we believe to be the theoretical foundation of the procedural due process guarantee: the individual litigant's autonomy in deciding whether to pursue her claim and if so, how best to conduct that litigation.^{FN5} The individual's autonomy to advance his interests in the manner he deems most advisable through resort to governmental processes--either political or judicial--grows out of the precepts of liberal democratic theory that appropriately underlie our nation's normative commitment to self-determination and individual rights.^{FN6} No one could reasonably doubt this autonomy principle in the political realm: Government may not paternalistically choose a candidate to support on behalf of a citizen; nor may it determine for an individual what he will and will not say on behalf of his political positions. Governmentally imposed paternalism should be no less acceptable when it comes to the individual's ability to resort to the judicial process in order to protect his interests.

This does not mean that litigant autonomy should necessarily be deemed an absolute. It has long been understood that the procedural due process inquiry triggers some form of weighing process that takes into account competing interests and values.^{FN7} It is truly amazing, however, that at no point has the Supreme Court, in either its due process or class action jurisprudence, even fully acknowledged the existence of the litigant autonomy interest, much less attempted either to understand the interest's role as an element and outgrowth of American political theory or to sift it through the filter of the constitutional balancing inquiry that is procedural due process.

In this Article, we undertake both inquiries. We conclude that litigant autonomy should be acknowledged as a logical outgrowth of the nation's commitment to process-based liberal democratic thought, and therefore a foundational element of procedural due process analysis. This is not, we should emphasize, because of some ideological commitment to a *1575 libertarian political philosophy.^{FN8} It is, rather, because of our belief in the centrality of individual autonomy when --and only when --the individual seeks to advance her interests or protect her rights by participation in the processes of government, either political or judicial. In other words, the autonomy we value is autonomy in the resort to democratic processes -- what might be called "meta-autonomy." In this important sense, the due process version of litigant autonomy grows out of the same constitutional grounding as the First Amendment right of free expression.^{FN9} Surely one may accept the importance of individual autonomy in the exercise of rights to participate in the governmental process without simultaneously committing oneself to libertarianism in every aspect of the individual's existence. The same should be true for the individual's protection or enforcement of her rights in the judicial process. As a result, in conducting the due process calculus the interest in litigant autonomy should be overcome only by a showing of a truly compelling competing interest.^{FN10}

Application of this constitutional analysis to the current class action framework dictates a dramatic alteration in that structure. Except in very limited circumstances, mandatory class actions, currently authorized by the Federal Rules of Civil Procedure in a variety of situations,^{FN11} should be found to be unconstitutional.^{FN12} More importantly, because the right to control one's own litigation possesses significant constitutional status, considerably more than total passivity on the part of the individual class member should generally be required to waive the right. Thus, the opt-out procedure established for Rule 23(b)(3) class actions, which irrefutably deems such total passivity on the part of absent class members to constitute waiver of the right of litigant autonomy, must--at least under certain circumstances-- also be deemed unconstitutional.^{FN13} Part I of this Article will explore the Supreme Court's current approach to procedural due process, explain its inadequacies and describe how it should be reshaped to take into account the foundational interest in litigant autonomy. Part II will consider the implications of our autonomy model of procedural due process for the current class action framework.

*1576 I

Procedural Due Process as American Political Theory: Towards an Autonomy Model

This Article, in part, seeks to establish the woeful inadequacy of the Supreme Court's current doctrinal framework for implementing foundational values underlying the constitutional guarantee of procedural due process. Nowhere is this conclusion better illustrated than in the application of the Court's due process framework to the modern class action. First, this Part will explore the Court's current doctrinal framework for procedural due process by pointing out its serious flaws, particularly its failure to recognize the vital role that the autonomy valve should play. Next it will explore the autonomy value's foundations in American constitutional and political theory. Finally, it will propose a revised due process calculus, designed to take into account the importance of litigant autonomy.

A. Procedural Due Process in the Supreme Court

1. The Mathews-Doehr Test

The Court's current procedural due process doctrine in the civil context finds its origins in its 1976 decision in *Mathews v. Eldridge*.^{FN14} The case involved the question whether the federal government's denial of a live hearing to a recipient of statutorily created entitlements in an agency proceeding to terminate those benefits violated procedural due process. In holding that this denial was constitutional, the Court fashioned a three-pronged balancing test that considered the private interest that is to be affected by the official action, the risk of an erroneous deprivation of that interest through use of the challenged process and the probable value, if any, of additional or substitute procedural safeguards, and, finally, the government's interest, including the fiscal and administrative burdens that those safeguards would entail.^{FN15} By "private interest," the Court referred to the stakes for the individual--what she ultimately has to gain or lose.^{FN16} In examining the

remaining two factors, the Court drew a balance between impact on accuracy and the costs and burdens entailed in implementing the sought-after procedure.

In its subsequent decision in *Connecticut v. Doehr*,^{FN17} the Court expanded the scope and reach of its Mathews test, by applying it to suits between private individuals, as well as to suits between a private individual and the government. As a result, the Court added examination of the level *1577 of the other private party's interest as a factor to be included in the balance.^{FN18}

Reiterating the oft repeated caveat that “[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,”^{FN19} the Court applied a balancing test adapted from Mathews. The Doehr test balances three potentially conflicting interests: (1) the private interest that will be affected by the prejudgment measure; (2) the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and (3) the interest of the party seeking the prejudgment remedy. In addition, as in Mathews, the balancing court is to give due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.^{FN20}

In assessing the risk of erroneous deprivation, the Court considered the ultimate goal of securing an award to the plaintiff that the defendant might not otherwise satisfy. In effect, the Court evaluated the statutory considerations of the plaintiff's likelihood of success on the merits to ascertain the increased risks of error in the absence of additional safeguards. Although the statute required probable cause, the Court noted an unresolved ambiguity suggesting a lesser standard. Aggravating the risk of error were the “one-sided, self-serving, and conclusory submissions” in both the affidavit and complaint that provided no basis for judicial review.^{FN21} The risk of mistaken deprivation was high since the underlying claim was a tort action not subject to documentary proof. The Court found few safeguards to alleviate this risk. The statute did provide for post-attachment notice and hearing and for a double damages action for commencement of suit without probable cause.

Finally, the Court considered the plaintiff's interests de minimis--nothing more than the plaintiff's desire to ensure availability of sufficient assets to meet the potential tort judgment award.^{FN22} There was no preexisting interest on plaintiff's part in the property, and the plaintiff had not alleged exigent circumstances that would render the property unavailable to satisfy the judgment. The Court found no additional state interest, specifically stating that the difference between pre-and post-deprivation hearings could mean little in terms of administrative or financial burdens.^{FN23}

*1578 2. Locating the True Defect in the Mathews-Doehr Test

Scholars have often attacked the Mathews-Doehr test for its narrowly utilitarian focus.^{FN24} They have argued that by considering exclusively concerns of efficiency, accuracy and practicality, the test fails to take into account what Professor Mashaw has described as “dignitary” values--values that focus on the preservation of the individual's dignity within the political system.^{FN25} Specifically, Mashaw refers to the individual's interests in participation, equality, predictability, transparency and rationality, which could conceivably be fostered by the use of procedures that will have only minimal impact on decision making accuracy.^{FN26} By failing to consider such largely non-instrumental factors, it is argued, the test improperly ignores due process's moorings in the values of liberal political theory.^{FN27} These criticisms are, on the whole, well grounded. However, they fail to take their focus on values of liberal democratic theory to its logical conclusion: a foundational belief in the value of allowing individuals to make fundamental choices about the judicial protection of their own legally authorized rights. It is, ultimately, the interest in self-determination and individual control that must stand, at the very least, as the presumptive normative foundation of procedural due process.^{FN28}

It is probably understandable that critics of the Court's due process test would fail to consider the implications of procedural due process for controlling litigation. In the large majority of contexts no external force seeks to grasp decision making control over litigation choice and strategy from the individual. Situations will arise where the individual prefers use of certain procedures that the government has chosen not to employ. But even where government has denied the individual the benefit of these procedures, the ultimate authority to decide how best to defend the individual's interests, within the procedural framework established by government, rests with the litigant herself. However, by recognizing how procedural due process is

implicated in the modern class action, we are able to see that both the Court in shaping the Mathews-Doehr test and the scholarly critics of that test ignored this vitally important aspect of the political theory of procedural due process.

***1579** In fashioning the litigant autonomy model of procedural due process, we do not intend to ignore the realities of modern litigation. It would, of course be unrealistic to suggest that—at least in the majority of cases—a litigant makes many litigation decisions beyond the initial choice of her attorney.^{FN29} But that situation differs little from the political process, where the individual chooses the officials who will make day-to-day choices of government, but generally has little, if any, role to play in the actual shaping of those decisions.^{FN30} No one, presumably, would argue that as a result the individual’s role in choosing those who make those decisions is anything but central to the precepts of democracy.

B. Recognizing the Paternalism-Autonomy Dichotomy

Neither the Court nor its critics have focused upon an important tension that illustrates the foundational liberal democratic battleground of procedural due process: what can be called the paternalism-autonomy dichotomy. “Paternalism” refers to the interest in having others protect the property interests of individuals who could conceivably be affected by the outcome of litigation.^{FN31} “Autonomy,” in contrast, refers to the individual’s interest in having power to make choices about the protection of her own legally authorized or protected rights through resort to the litigation process. The two, it should be noted, are not necessarily in conflict. Our legal structure could conceivably begin with recognition of the presumptive value of litigant autonomy, but nevertheless supplement that value with an infusion of paternalistic concern when it is simply infeasible to permit the effective exercise of individual autonomy. For example, it is conceivable that countless non-litigants could be affected by the stare decisis impact of a litigation’s outcome in parallel situations, as a practical matter undermining their ability to control their own litigations. However, it would often be infeasible to permit all of those non-litigants to protect their individual interests by intervening in the litigation itself. Even if such a course of action were feasible, many of the non-litigants would be unaware of or uninterested in the litigation and therefore unlikely to exercise their intervention right. Thus, Professor Brilmayer has argued that we construe the case-or-controversy requirement of Article III to require those who litigate on behalf of the same or similar interests to have ***1580** suffered injury in fact, as a means of insuring that they possess sufficient incentive to pursue those interests effectively on behalf of all future litigants who are likely to be practically impacted by the litigation’s resolution.^{FN32}

Another example of litigation-based paternalism is a state’s ability to assert *parens patriae* standing, under certain circumstances, on behalf of its citizens.^{FN33} Moreover, governmental consumer protection or anti-fraud programs which authorize government to seek judicial redress in order to protect its citizens can be appropriately viewed as a form of paternalistic litigation. In certain contexts, a court may appoint a guardian to represent the interests of outsiders who are unable to protect those interests themselves in the course of litigation.^{FN34} In all of these situations, the litigation system authorizes or commands individuals or entities, either in the private or public spheres, to protect the interests of those who do not themselves stand formally before the court, for the simple reasons that their interests need protection and it is not feasible or advisable to require them to protect those interests on their own.

Where, in contrast, it is feasible for the individual to employ the system of litigation to protect his own interests, paternalism is usually deemed an insufficient means of assuring procedural due process. For example, it would surely not satisfy due process, in the ordinary course, to appoint a guardian to represent a criminal defendant against that defendant’s wishes. This is true, even were we to assume, as an objective matter, that the chosen guardian would be more likely to assure an accurate result and protect the individual’s interests than would allowing the individual to protect his own interests through either the selection of his own representative or the conduct of his own defense.^{FN35}

***1581 C. Procedural Autonomy and Liberal Democracy**

We can understand this intuitive preference for litigant autonomy by extrapolating the situation to the political system writ large. At its definitional core, democratic theory is grounded in a societal commitment to the notion of self-determination. It

is certainly true that absent some form of societal anarchy total individual autonomy cannot exist. But regardless of the manner in which one ultimately balances the competing concerns of societal need and individual will, democracy must, at some level, be deemed to rest on a commitment to the value of self-determination. Normally, this interest in self-determination focuses on a form of collective, or societal autonomy: The electorate decides for itself who is to represent it, and has the power to hold those chosen accountable. However, commitment to collective self-determination is also appropriately seen as dictating recognition of a value in individual choice, for at its most basic level a democratic society is made of individuals who exercise their power of self-government in the voting booth. Even civic republican theorists have acknowledged that for communitarian democracy to function properly, individuals must possess a zone of individual autonomy.^{FN36} At the very least the individual must have autonomy in his efforts to participate in the processes of government, where democracy operates.

In a democratic society, government may not impose on society leaders who are unwanted by the electorate on the grounds that the electorate does not know what is good for it. At the very least, at some point in the process the electorate must retain the ultimate political power to replace those policy makers with governors whose views are more in line with those of the electorate. As democratic theorist Alexander Meiklejohn reasoned, in a democratic system the true governors are the citizens; elected officials are merely their agents.^{FN37}

While a societal commitment to democracy is a necessary condition for attainment of the goals of liberal theory, it is not a sufficient one. Thus, in addition to protections against tyrannical government, the Constitution *1582 seeks to assure individual dignity and a zone of individual autonomy through the guarantees of the Bill of Rights (Amendments I-VIII) and the Fourteenth Amendment. In particular it is the First Amendment's guarantee of free expression that synthesizes the self-determination and autonomy values of liberal democracy. Consistent with the premises of both autonomy and self-determination, government may not control the minds of its citizens. The First Amendment prohibits government from suppressing private expression on the grounds that it would lead society to make unwise policy choices.^{FN38} These are decisions we leave to the individual citizens to make for themselves. They are not to be made for the individual by external forces, ultimately unaccountable to the electorate, who have paternalistically decided what is and is not good for both the individual and the populace. Nor, under the First Amendment, may government require that individuals utter political messages with which they disagree.^{FN39}

The procedural due process guarantee is appropriately viewed as a constitutional outgrowth of democracy's normative commitment to such process-based political autonomy.^{FN40} Just as a commitment to democracy is normatively inconsistent with externally imposed and unwelcome paternalism in the areas of free expression and political choice, so too should such paternalism be deemed to be in tension with the values of procedural due process found in the litigation context, at least in situations where the individual is realistically in a position to make her own choices. Thus, the reason why we intuitively recoil at the notion that government could paternalistically control a criminal defendant's strategic choices in fashioning his defense or his choice of attorney is, for the most part,^{FN41} that the dignity and process-based power of self-determination that the individual must be afforded in a liberal democratic system is undermined by such a course of action.^{FN42}

*1583 Our society's commitment to the adversary system, in both criminal and civil contexts, is further evidence of our recognition of the value of a litigant's autonomy in protecting or pursuing her rights within the legal process. The adversary system is premised on the view that individuals, as one of us has written, "have both the moral right and the pragmatic need to resort to the . . . judicial processes to protect or advance their own or other selected interests," and "even in situations of identical or overlapping interest, individuals or groups should not be required to trust in or defer to the competence, resources, or enthusiasm of others in the protection or advancement of their chosen interest."^{FN43}

It might be argued that our concern with the need to preserve litigant autonomy is greatly overdone, because as a practical matter a litigant will influence day-to-day strategic litigation choices, at most, only rarely. Instead, it is the litigant's chosen representative, far more than the litigant herself, who makes such decisions. Thus, the argument might proceed, to take those choices away from the litigant would actually undermine litigant autonomy very little. While of course there is much practical truth in the insight, it would be a serious mistake, from the perspective of liberal democratic thought, to glean from the absence of such direct litigant involvement in strategic decision making a finding that the values of individual autonomy,

embodied in the Due Process Clause, are therefore irrelevant in the context of litigation control.

By way of analogy, the individual may often choose others to speak on her behalf. It surely does not follow that the individual lacks an important--and constitutionally protected--interest in making the choice of speaker. Indeed, the less likely the individual's ability or opportunity to speak for himself, the greater the constitutional value in assuring autonomy in making his choice of representative speaker, since it is only through exercising this choice that the individual's constitutional right is exercised. The same analysis should be deemed equally applicable to the individual litigant's constitutionally significant interest in choosing who will stand on her behalf as the litigant resorts to the judicial process to protect her property and liberty interests. Surely, government could not forcibly impose legal counsel on a criminal defendant. While the stakes may not be as high in a civil case, the same constitutional value in litigant choice should be deemed present.

***1584 D. The Paternalism-Autonomy Dichotomy and the Mathews-Doehr Test**

As the previous Section demonstrated, though it will arise in only limited circumstances the paternalism-autonomy dichotomy in procedural due process implicates many of the basic premises of American liberal democratic theory. One may search the Supreme Court's current procedural due process doctrine in vain, however, for any reference--explicit or implicit--to any recognition of the tension's existence, much less an attempt at its resolution.

The factors to be considered by the reviewing court as part of the balancing process under the Mathews-Doehr line of cases, it should be recalled, are (1) the extent to which the private parties' interests will be affected by the case's outcome, (2) the extent to which an accurate decision is threatened by use of the challenged procedures, (3) the extent to which an accurate resolution would be promoted by the use of the procedures urged by a private party but rejected by the government, and (4) the burdens and administrative costs that use of the procedure in question would impose upon the government.^{FN44} How would this test resolve a constitutional dispute over whether or not compelled litigation on behalf of an unwilling private individual, or forced external control of a private individual's litigation, violates the procedural due process guarantee? We suppose that the answer is that, given the presumptive constitutional validity of majoritarian branch action, such activity would have to be deemed constitutional, since there is nothing in the test that could possibly dictate a finding of unconstitutionality. More importantly, however, there is nothing in the test's terms that would even permit a reviewing court to ask the question; none of the factors even arguably implicates an inquiry into the constitutional interest in litigant autonomy. On this question, the Mathews-Doehr critics clearly have the edge, since they urge consideration of individual "dignitary" interests that arguably include the autonomy value in litigation control and decision-making. But if so, one would have to reach that conclusion by inference. Nothing in the anti-Mathews-Doehr dignitary model directly focuses on these foundational considerations.

It is our position that the value in litigant autonomy derives from the basic liberal democratic commitment to the values of political pluralism, self-determination and individual integrity, embodied in the synthesis of a commitment to representative government and the extensive guarantees of individual rights embodied in the Constitution. Moreover, recognition of the interest in litigant autonomy is consistent with the values derived from use of a process of reverse engineering applied to our long-standing commitment to the adversary system.^{FN45} It is both puzzling and distressing, *1585 then, that nothing in the Court's controlling due process jurisprudence even touches on, much less values, the interest in litigant autonomy.

Concededly, purely as a practical matter the interest in litigant autonomy will be threatened only rarely, since it is not often that government will authorize external forces to preempt litigant discretion or control. Moreover, the obvious--albeit indirect--impact of the denial of certain procedural rights will inevitably be some sort of limitation on litigant discretion. The autonomy interest is implicated not by such indirect or incidental restraints on litigant discretion, however, but rather by direct and compelled transfer of control over the conduct of a litigation in which individual property rights are at stake to forces external to, and beyond the control of, the individual litigant.^{FN46} Such forces may include an agency of the government itself, or other private individuals, groups or entities. But the fact that the autonomy value is impacted only rarely is beside the point. When that interest is, in fact, directly affected, it should be of great constitutional concern, as both a pragmatic and theoretical matter.

E. The Role of a Utilitarian Calculus in the Autonomy Model of Procedural Due Process

The fact that any proper due process analysis must take account of the foundational concern with litigant autonomy does not automatically imply that the autonomy interest will always prevail. Just as the procedural due process measurement structure has traditionally been thought to require a balancing process in which competing interests are weighed against each other, so too must the autonomy value be weighed against competing concerns. These concerns may involve purely pragmatic interests of cost or efficiency, or competing interests of procedural or substantive fairness on the part of other litigants or non-litigant third parties. Indeed, that our system does not deem the litigant autonomy value to be universally supreme is demonstrated by the provision for compulsory counterclaims^{FN47} and the existence of declaratory judgments.^{FN48} In both situations, a potential plaintiff may be forced to litigate her claim at a time and in a forum not of her choice. In both instances, however, the potential plaintiff's autonomy interest in exercising total control over the litigation of her claim is deemed to be outbalanced by the competing interests in either avoiding wasteful or repetitive litigation, or enabling a party to avoid committing itself to a *1586 course of behavior that may prove irretrievably harmful at a later point in time.^{FN49}

In the modern class action, the interest in litigant autonomy is potentially affected more invidiously than in either the compulsory counterclaim or declaratory judgment contexts. Not only is the litigant's choice of timing and forum controlled by external forces, but his control of the actual conduct of the litigation is also severely restricted. In the class action, absent parties traditionally remain passive, ceding the control of litigation strategy to those who serve as named parties. Even if an absent class member wishes to intervene in the action, his ability to make strategic choices concerning the control of the litigation is usually so diluted by the influence and control of other named parties as to be almost non-existent. Moreover, in the context of so-called "mandatory" class actions, the litigant does not even have the choice of whether or not to pursue his claim in the first place.

Thus, the class action illustrates a situation in which the valuable constitutional interest in litigant autonomy is seriously threatened. Yet at no point has the Court either understood the relevance of the foundational value in litigant autonomy to the modern class action or sought to include it in any sort of due process calculus. In the one instance in which the Supreme Court has even expressed unease concerning the constitutionality of mandatory class actions, it completely misunderstood the true nature of the constitutional concern.^{FN50} The reason for this failure, we surmise, is the widespread but unstated assumption that the procedural due process concern in the class action context is fully exhausted by invocation of what amounts to a purely paternalistic form of procedural due process analysis.^{FN51} In the following Part, we explore the scholarly and judicial failure to consider the role that litigant autonomy should properly play in measuring the constitutionality of the class action procedure, and what the nature of that role should be.

*1587 II

The Autonomy Model of Procedural Due Process and the Modern Class Action

A. Rule 23 and the Framework of the Modern Class Action

Much like an iceberg which shows only a small portion of its size above the water, the class action involves a proceeding in which a few named parties litigate on behalf of a large group of absent, and largely passive, class members. Paradoxically, the "absent" class members in one sense are absent and in another sense are present before the court. While they are passive participants who remain uninvolved in the day-to-day conduct of the litigation, they are deemed "parties", whose rights are bound through doctrines of res judicata and collateral estoppel, much as are fully active parties in any litigation.^{FN52}

Under modern federal standards, established largely by the 1966 revision of [Rule 23 of the Federal Rules of Civil Procedure](#), in order to be certified a class must meet all of the four requirements of [Rule 23\(a\)](#) and at least one of the requirements of [Rule 23\(b\)](#). [Rule 23\(a\)](#)'s requirements have been labeled, respectively, "numerosity" (the class is sufficiently large as to make joinder impractical), "commonality" (the named parties and absent class members share at least one common issue of law or

fact), “typicality” (the claims of the named parties are typical of those of the absent class members), and “adequacy” (the named parties adequately represent the interests of the absent class members).^{FN53}

These four requirements stand as necessary but not sufficient conditions for class certification. If and only if these four requirements are satisfied, the certifying court will determine whether the class falls within one of the four categories of **Rule 23(b)**: (b)(1)(A) (where the prosecution of separate actions by or against individual members of the class would create a risk of “inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class”), (b)(1)(B) (where separate suits would create a risk of adjudications that “would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests”), (b)(2) (where final injunctive or declaratory relief on behalf of the class against the party opposing the class is appropriate), or (b)(3) (where common questions of law or fact “predominate over any questions affecting only individual members,” and “a class action is superior to other *1588 available methods for the fair and efficient adjudication of the controversy”).^{FN54}

Especially relevant to the due process analysis is the procedural treatment afforded by the rule to the different forms of **Rule 23(b)** class actions. If a class is deemed a (b)(1)(A), (b)(1)(B), or (b)(2) class, it is “mandatory,” which means that if the class is certified, absent class members are not permitted to withdraw from the action. Their claims must be litigated as part of the class proceeding, with full res judicata consequences, even if the class members would prefer to litigate their claims separately, or not to litigate their claims at all.^{FN55} In contrast, members of a (b)(3) class may opt out of the proceeding, though their failure to act will lead to their inclusion in the class.^{FN56} Moreover, while **Rule 23** requires that absent class members in a (b)(3) class action receive the best notice practicable under the circumstances,^{FN57} notice to absent class members in the other categories falls entirely within judicial discretion.^{FN58} In the context of mandatory classes, then, the trial court has authority to decline to require notice of the proceeding to absent class members.

Both the mandatory nature of the (b)(1) and (b)(2) classes and the opt-out procedure for (b)(3) classes, we believe, give rise to serious constitutional problems under the autonomy model of procedural due process--problems which have, for the most part, been ignored by both courts and scholars.^{FN59} First, however, it is necessary to explore the due process structure which scholars and courts have deemed applicable to the class action. Both have misperceived the true nature and scope of the due process limitation.

B. The Current Due Process Framework for Class Actions

1. Due Process and the “Entity” Theory of Class Actions

A number of respected scholars have suggested that the Due Process Clause’s applicability to the modern class action must be restrained by a preliminary conceptualization of the individual claimant’s legal role in the class action. The protections of procedural due process are, of course, triggered only when the individual’s property or liberty rights are affected. Hence if absent class members have no individually held property rights that could be extinguished by the class action proceeding, then the requirements of procedural due process are rendered irrelevant as a *1589 protection of those absent class members. This is exactly the position that has been taken by some leading commentators, who have argued that at least in certain contexts, the individual claims of absent class members are transformed by the existence of the class proceeding into nothing more than an element of the newly created entity that is the class claim. As such, the argument goes, they do not trigger the due process guarantees as protection of the absent class members as separate individuals.

In order to provide a proper legal and conceptual backdrop for our critique of and response to this position, however, it is first necessary to describe the traditional understanding of the individual’s constitutionally protected property right in her claim. With that foundational understanding serving as an anchor, we will be able to see that the use of a procedural device, such as the class action, cannot legally transform those individual claims into a qualitatively distinct, amalgamated entity.

a. A Chose in Action as Property Protected by Procedural Due Process

Due process provides a floor of protection to the individual that government procedures must meet, in order to ensure that one is not unconstitutionally deprived of life, liberty or property. A legal claim has long been recognized as a form of property, albeit an intangible form. As such, a person's legal claim may not be extinguished by a state or the federal government without due process of law.^{FN60} The notion that a legal claim, or "chose in action," is a form of protected property is deeply rooted in Anglo-American jurisprudence.^{FN61} For example, it is settled that rights in ***1590** a chose of action are in many cases assignable.^{FN62} With the status of a chose in action as protected property settled, we would expect a consensus to have developed that deprivation of the rights associated with that property, through class action or otherwise, would have to survive meaningful due process analysis in order to be deemed constitutionally valid under the Due Process Clause. Not everyone agrees with our position.

b. Professor Issacharoff's "Entity" View

Despite the historically uncontroversial status of a chose in action as protected property, Professor Samuel Issacharoff believes that many of the individual legal claims that comprise modern class actions should not be thought of as individual property for purposes of the Due Process Clause.^{FN63} Issacharoff believes that under certain circumstances class action procedures transform or fuse individual causes of action into a cohesive group cause of action, thereby destroying the status of the chose as an individually possessed property right. By defining away the individually held property right in class litigation under **Rule 23**, class actions procedures are largely freed from the strictures of due process, at least as they relate to the individual class member.^{FN64} Thus untethered by any limits imposed by due process, class actions are stretched with more permissible uses, many of which would likely be problematic under traditional conceptualizations of due process.

In support of his view, Issacharoff argues that many class actions take on the form of an "entity," rather than an aggregation of individual claims.^{FN65} Issacharoff suggests that, under certain circumstances, an action ***1591** under **Rule 23** is no longer "simply an unaltered aggregation of individual claims."^{FN66} It is, rather, an entity, conceptually distinct from the individual claims that together comprise the class, and something far different from a simple aggregation of those individual claims. The newly created entity may be entitled to due process protections, but since a substantive individually held chose no longer exists, due process does not protect what were formerly individual causes of action. Issacharoff derives this notion of the class as an entity from the earlier writing of Professor David Shapiro.^{FN67} To Issacharoff and Shapiro, a plaintiff class generally constitutes a coherent entity, similar to private voluntary associations such as trade unions and partnerships, where the collectivity is a "litigant in [its] own right."^{FN68} The legal consequence of this view is that the class action plaintiffs, like the individual members of private voluntary associations, are seen as parts of "entities whose members may have at best only a limited say in what is litigated, in who represents the organization, and on what terms the controversy is ultimately resolved."^{FN69}

Likening class actions to private voluntary associations permits Shapiro and Issacharoff largely to avoid the due process inquiry, because where class actions are legally similar to voluntary private organizations, it is not the individual plaintiffs but rather the collectivity which seeks redress and is thus afforded due process protection. Issacharoff and Shapiro believe that their reconceptualization of the rights at stake in a class action defines away the tension between individual property rights and coercive collective action. Under the entity theory individual rights are not present in the context of a class action and, therefore, due process does not present a significant obstacle to class action procedures. To Issacharoff, class actions seeking injunctions against institutional conduct, those seeking recompense from a limited fund that will be exceeded by the total amount of the claims, and those for small individually held claims, appropriately receive such entity treatment.^{FN70} From his perspective, in these cases it is "difficult to identify an individual chose" and thus "difficult to conceptualize an individual right of autonomy" to which due process protections attach.^{FN71}

One type of class action that Issacharoff believes deserves entity treatment involves claims for injunctive relief against institutional conduct. In such cases, he believes, it would be nonsensical to claim that any plaintiff would have an autonomous right to an independent outcome of the litigation, since as a practical matter an injunction on behalf of one is an ***1592** injunction for all.^{FN72} A suit seeking an injunction against institutional conduct usually involves individuals suing a private corporation or government agency in an effort to stop the institution from engaging in some type of allegedly

unlawful, generally applicable conduct. An historic example is a suit brought by African American students against a school board, seeking an injunction ordering school desegregation.^{FN73} Issacharoff points to a school desegregation case as an example of a class action without an individual chose, since it is “nonsensical to claim that any one child has an autonomous right to an independent outcome of the litigation.”

c. Problems with the “Entity” View

A closer look at Issacharoff’s paradigm illustrates the fundamental defect in his analysis. He confuses the reality of externally imposed practical limitations on the individual’s ability to control his chose with the abstract, pristine nature of the chose itself. For purposes of the Due Process Clause, there is all the difference in the world between these two conceptualizations. The point may be illustrated by use of Issacharoff’s own example of school desegregation. First, let us assume that there is only one African American child in the school system. The substantive law creates a cause of action under which that child, acting alone, can sue for an injunction against the school’s allegedly unconstitutional conduct. Because, in this hypothetical, there is only one plaintiff, and therefore of course no basis on which to find existence of an entity, we must assume Issacharoff would agree that in this case there exists an individual chose created and conferred by the substantive law, to which due process rights attach. Now let us assume that there are two African American students in the school system. If Child I brings a desegregation challenge, the rights of Child II will, as a practical matter, likely be affected by the outcome of the litigation, even though Child II has filed no claim. In such a case, intervention under [Rule 24 of the Federal Rules of Civil Procedure](#) is likely to be available to Child II since the “disposition of the action may as a practical matter impair or impede the applicant’s ability to protect” his or her interest in the outcome of the litigation.^{FN74} Intervention under [Rule 24](#), however, does not transform the two individual claims into some type of entity or extinguish the pristine substantive rights of the parties to bring suit on an individual basis. It is simply a procedural device which permits Child II to protect his substantive rights that may well be impacted by adjudication of Child I’s claim. We would not expect Issacharoff to argue *1593 that the individual causes of action that make up this suit are not each afforded due process protection as a result of the intervention.

Now let us assume that there are one hundred African American children in the school system. In this situation it is likely that certification under [Rule 23\(b\)\(2\)](#) would be appropriate.^{FN75} In such a scenario, Issacharoff asserts that it is “difficult to identify an individual chose,” and therefore the pre-condition to invocation of the due process right has not been satisfied. But from the perspective of procedural due process, why is certification under [Rule 23\(b\)\(2\)](#) any different from intervention under [Rule 24](#)? Even though it is perhaps convenient to describe the children’s rights as collective rather than individual when more than fifty or a hundred are involved, it is simply incorrect, as a conceptual matter, to define away the individually held chose. Certification under [Rule 23](#) allows all one hundred children to protect their individually held substantive rights in a unified fashion. However, that does not change that fact that the class action is still nothing more than an aggregation of what are unambiguously pre-existing individually held claims. These pristine underlying rights constitute individual causes of action invested in the individual by the substantive law. In its pristine form, the substantive right is individual and exists whether there is one African American child or many African American children.^{FN76}

A second type of class action that Issacharoff believes to be deserving of entity treatment involves individual claimants seeking a portion of a so-called limited pie. In such a case, Issacharoff believes that the individual claimants do not possess an individual chose to which due process protections attach.^{FN77} A limited pie action is one in which the aggregate of all the potential plaintiffs’ claims exceeds the maximum amount of funds available to satisfy the judgment.^{FN78} In such a situation, a plaintiff will not *1594 receive full compensation for her damages. She will instead receive only a predetermined portion of the available resources. According to Issacharoff, in such a situation the plaintiff’s legal right is not simply an abstract independent right against a defendant; rather, it necessarily exists only in relation and comparison to the claims of the other claimants.^{FN79} For this reason, he contends, the plaintiffs should not be deemed to possess an individual chose, subject to due process protection. Instead, the inherent intertwining of the plaintiffs’ legal rights and the resulting limitation on their ability to collect full damages implies that the individual plaintiffs should be viewed as a collectivity or entity whose members, as a constitutional matter, are guaranteed at best only a limited say in how the controversy is to be adjudicated.

A typical form of limited pie action arises when an accident has occurred in which a number of individuals have been harmed, yet the available insurance funds are insufficient to pay all the claimants.^{FN80} If we posit this same scenario with one

claimant, the individual chose is, of course, easily identifiable. Let us assume that a car accident has taken place and the injuries to the victim exceed the maximum insurance coverage of the wrongdoer. Depending on the facts of the case and the law of the jurisdiction, the victim will most likely sue for common law negligence, seeking compensatory damages. Substantive common law is the source of the victim's individual cause of action. Under these circumstances, there can of course be no question that the victim's claim constitutes a chose, thereby qualifying as a constitutionally protected property interest. Now let us assume that two parties are harmed, rather than just one. Although each party's injuries are for less than the total liability coverage, their combined injuries exceed the policy's cap. If victim I sues and recovers, the ability of victim II to sue later and receive full compensation for his injuries will necessarily be compromised. Therefore, [Rule 24](#) intervention is available to victim II so that he can protect his interests in court. The claim of victim II does not arise under [Rule 24](#); rather, he has standing to sue solely because he possesses an individual chose--a claim for common law negligence. [Rule 24](#) does nothing more than allow him to intervene in the action and thus protect his legally recognized interest.

If numerous parties are injured in the accident and the insurance coverage is not sufficient to compensate them fully for their injuries, a [Rule 23\(b\)\(1\)\(B\)](#) class action would most likely be appropriate.^{FN81} In a manner parallel to the intervention process provided for in [Rule 24](#), [*1595 Rule 23\(b\)\(1\)\(B\)](#) permits class certification, when as a practical matter, the individual interests of those not a party to the suit would be decided by disposition of the current lawsuit.^{FN82} Again, the individual causes of action that comprise the class do not "arise under" [Rule 23\(b\)\(1\)\(B\)](#). Rather, their source is the common law of negligence. [Rule 23\(b\)\(1\)\(B\)](#) is simply a joinder device for the aggregation of multiple pre-existing claims. Its purpose is to allow multiple parties to protect their financial interests, not to create a distinct cause of action that alters the underlying DNA of the existing claims, or somehow to modify the underlying substantive law. Therefore, contrary to Issacharoff's assertion, class certification under a limited fund theory does not destroy or obscure the individual claimants' underlying pristine causes of action.

Issacharoff's third category of entity-based class actions include those comprised wholly of so-called "negative" value claims, i.e., claims which are so small as not to rationally justify individual litigation. For what he calls "strategic" reasons, whenever claims have a "negative value,"^{FN83} Issacharoff believes they are not a chose in the functional sense, since as a practical matter they are so small that they would never have been brought individually. A plaintiff class made up of negative value claims is appropriately characterized as an entity, he argues, because only the collectivity possesses the requisite incentives to pursue legal redress.

Consider the following example of a negative value class: In 1998, a class action was filed on behalf of all purchasers of a certain type of zipdrive, manufactured by the Iomega Corporation.^{FN84} The complaint alleged that the product was defective because the zipdrive would sometime cause a disk to be unreadable.^{FN85} No one consumer was damaged beyond the relatively small cost of the portable disk. Since product liability suits are usually discovery-intensive and expensive to litigate, it is irrational to expect any one consumer, or even a small group of consumers, to bring suit. Such a suit is rational if brought as a class action, however, since, if successful, the total damages for all consumers would far exceed the cost of litigating the claims. Because the claims would not have been brought individually, Issacharoff argues that "negative value" class actions [*1596](#) should not be thought of as an aggregation of individual choses but rather as a distinct, class-based entity.

Issacharoff's characterization of these claims as entity-based is unsatisfying because his analysis is predicated on a fundamental misconception. In all types of cases, the class action is inherently nothing more or less than an aggregation device. The class action device itself creates no causes of action--nor could it, without unambiguously violating the express dictates of the Rules Enabling Act.^{FN86} Instead, the class action is a procedural device which serves as a tool to aggregate pre-existing individual private rights created by substantive law. For example, while a class action permits plaintiffs injured in a mass accident to aggregate their claims, the legal basis for the class' claim is the substantive law of negligence. The right of action that grows out of and enforces that substantive directive is vested by the substantive law in the individual victim. If we were to accept the entity theory suggested by Shapiro and Issacharoff, then the class actions device would effectively transform pristine pre-existing individually held private rights into a kind of collective right, never conferred by the underlying substantive law.^{FN87} Therefore, the entity theory not only erodes the concept of individually created rights, but also works a serious harm to our democratic political system by transforming the nature of substantive law through resort to the procedural fig leaf of the Federal Rules.

It is certainly true that practical or procedural realities could conceivably develop following the substantive creation of the pristine individual rights, thereby giving rise to procedural difficulties in the individual's autonomous enforcement of those substantive rights. But that does not mean that those rights are not, in their pre-procedural form, anything other than individually held claims that qualify as property rights protected by the Due Process Clause.

Under any form of procedural due process that counter-balances the individuals' interests with competing utilitarian concerns, protected property rights may, on occasion, be forced to give way to competing practical or generalized fairness concerns. But while under a utilitarian balancing framework practical difficulties may factor into the due process calculus, such difficulties do not prevent the triggering of the due process *1597 inquiry itself. Issacharoff's mistake, then, is to assume that the class action procedure somehow transforms an autonomous substantive right, which may under certain circumstances be forced to give way to other considerations, into a substantively fused right that is not held individually. As a result, he has confused factors that may on occasion constitutionally justify restriction of the enforcement of otherwise pristine substantive rights on the one hand with the total absence of any due process protection for the individual claim, on the other. This position ignores both structural and substantive realities and, as a result, mistakenly circumvents the need to engage in the procedural due process analysis that is constitutionally required to assure vindication of those pristine pre-procedural substantive rights.

Issacharoff could conceivably respond to our argument in the following manner: because, by hypothesis, negative value claims are so small that they could not, as a practical matter, survive as individual claims, when these claims are combined in a class action their very essence has been transformed into entity form: The whole, then, is greater than the sum of its parts, because none of the individual claims, standing alone, would have led to a suit. Even in a negative value class, however, the relative size of the claims does not alter the fact that the action arises under the substantive law that confers an individual cause of action on each victim. But for the substantive law's creation of an individual chose in each claimant, even if it supposedly has a negative value, there could never have been a class action in the first place. If we assume that negative value claims satisfy standing requirements, the mystical transformation of these claims into entity-like group wide claims fails, purely as a foundational matter. Any other conclusion would lawlessly transform a procedural aggregation device into its own source of substantive right.^{FN88}

2. Due Process and Class Actions in the Courts

The "entity" theory has never been expressly adopted by the courts.^{FN89} To the contrary, judicial decisions appear to proceed on the implicit assumption that in all cases absent class members possess individual property rights that are fully protected by the Due Process Clause. On occasion, they have invalidated class action judgments on the grounds that they violate due process. While all of these cases probably fall in the category of "positive" claim damage class actions in that the individual claims were of such a nature as likely to have been able to stand on their own, at no point have the courts suggested a dichotomy for due process *1598 purposes between positive and negative claim class actions.^{FN90} Nor have they ever suggested that due process protection turns on any of the factors focused on by Issacharoff.

On occasion, the courts have been quite vigorous in their enforcement of due process limitations on class actions.^{FN91} For example, in the famed decision of *Hansberry v. Lee*,^{FN92} a state court class action not subject to the strictures of the Federal Rules, the Supreme Court held that while "members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present," due process prohibits those with "dual and potentially conflicting interests" to represent and bind absent class members.

The 1966 revision of [Rule 23](#) inserted the requirement that the named parties adequately represent absent class members^{FN93} for the express purpose of assuring compliance with due process protections, as set out in *Hansberry*.^{FN94} In all of these situations, however, the nature of the due process limit was purely paternalistic, rather than autonomy-based. In other words, the decisions have focused on the concern that those representing the interests of absent class members had failed to do so adequately, or possessed interests that were in conflict with those of absent class members, thereby threatening the adequacy of the representation. However, the courts' implicit assumption appears to have been that satisfaction of the paternalistic

element of the due process guarantee exhausts the constitutional concern (an issue that, admittedly, the courts need never have resolved in those individual cases). As a general matter these decisions have not involved the autonomy-based concern of due process that focuses on the individual litigant's interest in choosing whether to pursue his claim and if so how best to prosecute it. Hence as long as those formally representing the interests of the absent parties are doing so adequately and in good faith, nothing in the Court's class action-due process jurisprudence that has evolved to this point halts the usurpation of litigation control that, for reasons already explained, should be deemed to lie at the theoretical foundations of procedural due process.^{FN95}

*1599 3. Mandatory Class Actions and the Autonomy Model

It is not entirely clear why the revisers of [Rule 23](#) chose to make some class actions mandatory and others not. Commentators have suggested that in those classes that the rule makes mandatory, the interests of the class members are somehow more closely intertwined than in the (b)(3) category of classes, where opt-out by absent class members is possible.^{FN96} However, there is absolutely no basis on which to support this conclusion. Indeed, in (b)(1)(B) classes, where the claims of absent class members may exceed the total amount of a fund into which the claims are made, it would seem that the interests of the class members are inherently antagonistic to each other. Even if the asserted rationale were true, at most it would mean that the paternalistic branch of procedural due process was satisfied in those classes designated mandatory; it would in no way imply satisfaction of the autonomy interest in litigant control.

In two cases, the Supreme Court made at least some reference to the constitutionality of mandatory classes. In neither decision, however, did the Court either comprehend or deal with the true threat to litigant autonomy to which mandatory classes give rise. In *Phillips Petroleum Co. v. Shutts*,^{FN97} the Court considered a challenge to a Kansas class action in which many of the absent plaintiffs allegedly lacked minimum contacts with the forum. In upholding Kansas's assertion of jurisdiction over absent plaintiffs who had no contacts with the forum, the Court found that the state's provision of an opt-out option satisfied the due process requirements of personal jurisdiction.^{FN98} For absent plaintiffs, upon whom the Court assumed fewer burdens were placed than defendants, consent to the forum's jurisdiction could come through the absent class member's wholly passive failure to exclude oneself from the case. In a subsequent decision, the Ninth Circuit relied upon *Shutts* for the conclusion that all mandatory damage class actions violate due process.^{FN99} But such a reading of *Shutts* is surely too broad. The case was concerned exclusively with a narrow and unique form of due process, involving established constitutional limitations on a state's assertion of personal jurisdiction. The Court merely held that any constitutional objection to personal jurisdiction is subject to waiver, a well established precept of personal jurisdiction jurisprudence.^{FN100} The only arguably controversial aspect of the *Shutts* *1600 Court's holding was its conclusion that passive behavior on the part of absent class members could serve as the equivalent of an affirmative expression of consent, at least for absent class member plaintiffs who lack the requisite minimum contacts with the forum state. The decision tells us nothing about the constitutionality of mandatory class actions in cases in which minimum contacts are present and personal jurisdiction is therefore not an issue.

The second decision is *Ortiz v. Fibreboard Corporation*.^{FN101} In that case the Court invalidated a settlement class action under [Rule 23\(b\)\(1\)\(B\)](#) on the grounds that it did not satisfy the requirements of that provision, as narrowly construed. In so holding, the Court expressed unease over the mandatory nature of the proceeding, suggesting that it might undermine the so-called "day in court" ideal traditionally associated with procedural due process.^{FN102} Thus, while the Court's holding was ultimately grounded in construction of the rule, the Court made clear that its narrow interpretation of the provision was influenced, at least in part, by concern over potential constitutional problems to which a broader construction might give rise.^{FN103} But while it is true that the Court in *Ortiz* expressed unease over the constitutionality of mandatory class actions, it is apparent that the Court did not have a clue as to what the nature of that constitutional problem actually was. Surely it cannot be the threat to the "day in court" dictate of procedural due process--at least if one accepts the paternalistic model inherent in the modern class action concept itself. It is true that procedural due process is generally thought to require that before an individual's liberty or property may be taken away or abridged by government, he must receive the opportunity to present his side of the case to a neutral and objective adjudicator.^{FN104} But the underlying theory of the class action device is that the absent class member does, in fact, receive his "day in court" in the class proceeding, as long as the named parties adequately represent his interests.^{FN105} Otherwise, neither *res judicata* nor collateral estoppel could be invoked in later suits brought by or

against absent class members, since it is well established that--with extremely limited exceptions--neither res judicata nor collateral estoppel may be imposed on any litigant who has been denied her day in court. That the absent class member is denied the opportunity to withdraw from the proceeding, then, logically in no way undermines the day-in-court ideal, as viewed through the lens of class action theory. Yet the Court in Ortiz intimated that just such a constitutional non-sequitur underlay its narrow construction of ***1601 Rule 23(b)(1)(B)**. At no point in Ortiz did the Court ever suggest a recognition of the true constitutional difficulty with mandatory class actions: their necessary interference with a litigant's autonomous ability to control the nature and course of his own suit.

4. Litigant Autonomy, Mandatory Class Actions, and the Right of Non-Association

In addition to the traditional litigant autonomy concern that is threatened by any forced inclusion in a class proceeding, there exists an alternative form of autonomy concern that, under certain circumstances, could be implicated by the use of mandatory classes. Potentially problematic is not only the usurpation of strategic control of one's litigation choices, but also the very decision of whether or not to pursue one's individual claim in the first place. Of course, control of the decision to sue is, to a certain extent, grounded in the very notion of litigant autonomy, purely as a definitional matter. However, in certain instances, forced association with those who seek to pursue courses of action that the litigant finds economically, morally or politically offensive also threatens fundamental First Amendment dictates that can similarly be discerned from the values appropriately found to explain the procedural due process guarantee.

The Supreme Court has recognized, in other contexts, that the pursuit of litigation may well have political and associational implications, thereby triggering the First Amendment's protection of freedom of expression and association.^{FN106} Since the Supreme Court has wisely recognized a corresponding First Amendment right not to associate,^{FN107} it logically follows that there should also be recognized a corresponding First Amendment-like right not to be forced to litigate when to do so would be deemed politically or morally offensive by the litigant. This is not to suggest, it should be emphasized, that a potential plaintiff necessarily possesses a constitutional right to control all aspects of the timing or choice of forum for suit. The point, rather, is that at the very least a litigant should be recognized to possess a constitutional right to decide not to pursue his claim at all--a right inescapably denied by a mandatory class action.

The relevance of this First Amendment concern to the modern class action is potentially significant. While concededly the majority of class actions are brought solely for the purpose of seeking compensation, rather than to pursue socio-political ends, the two goals are not necessarily mutually exclusive. In fact, the very existence of class action suits is today a controversial political issue. The so-called tort reform movement has ***1602** 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.^{FN108} It could hardly be controverted that many private citizens find such lawsuits to be politically unwise, economically reckless and morally offensive. Yet when those citizens are made members of a mandatory class they are required, against their will, to be part of a legal mechanism whose very purpose is to employ the litigation process to achieve political and economic ends that they ideologically abhor. In many ways, this result contravenes the fundamental constitutional prohibition against forced political association.^{FN109}

There are, concededly, a number of potential problems with this argument. First, it is true that the large majority of compensatory class actions found politically, economically and morally offensive by many are of the (b)(3) variety, where those who find the process offensive are given the option of removing themselves from the class. However, for reasons to be subsequently explored, even the provision of an opt-out procedure raises serious constitutional problems, because it authorizes waiver of basic constitutional rights through an extraordinary and unprecedented form of litigant passivity.^{FN110} Moreover, not all damage class actions are classified as (b)(3) classes. Though in Ortiz the Court gave the (b)(1)(B) mandatory class category a limiting construction,^{FN111} it is still conceivable that a damage class action could fall into this category, where--unlike Ortiz--class members' claims are made into an identifiable and truly limited fund. Indeed, that mandatory (b)(1)(B) classes continue to exist is supported by examination of recent case law.^{FN112} Finally, the non-associational concern is also present in numerous (b)(2) injunctive class actions, which are usually brought to pursue civil rights claims.^{FN113} It is certainly conceivable that members of a (b)(2) class could be deeply opposed, on moral or

political grounds, to the goals sought to be achieved by the class action. Yet because (b)(2) classes are mandatory, these class members are forced to be a part of the proceeding, regardless of their wishes or their ideological preferences.

***1603** It might further be responded that in most situations the unwilling class member's presence in the class will have little or no discernible concrete impact on the actual outcome. This is especially true in the case of injunctive class actions, since if successful the action will invariably bring about class wide relief, whether a particular individual remains a member of the class or not. But the point of the First Amendment right of non-association is not to protect the individual from bringing about concrete effects that he finds offensive, but rather to avoid the ideologically and emotively demoralizing impact on the individual that the very fact of the forced offensive association may cause.^{FN14}

Finally, it might be responded that the First Amendment right of free expression is not itself directly implicated by forced inclusion in a class, because the conduct of litigation constitutes unprotected action, rather than protected expression. Thus, the argument proceeds, forced participation in the litigation process is not a form of forced expression. But even if this is true, the relevant constitutional prohibition that we are invoking is not against forced expression, but rather forced association, which inherently possesses both expressive and non-expressive elements. In any event, the issue need not be whether forced participation in a morally or politically offensive class action violates the First Amendment, but rather whether it contravenes the autonomy model of procedural due process. That concept may appropriately be deemed to subsume the values sought to be furthered by recognition of the First Amendment right of non-association, even when the protected activity cannot be properly characterized as pure expression.

C. Mandatory Class Actions, Due Process, and the Utilitarian Calculus

1. The Autonomy Model and the Utilitarian Calculus

Although on one level the autonomy value we describe could perhaps be characterized as Kantian, and therefore morally foundational, in nature,^{FN15} there is no inherent reason why even this morally foundational interest, once recognized, must be deemed a constitutional absolute. To the contrary, as the Mathews-Doehr test demonstrates, procedural due process has traditionally involved some form of balancing process, in which a variety of potentially competing interests are measured against one another. We have urged recognition of the autonomy model of procedural due process as a logical outgrowth of our nation's moral and political commitment to a system of liberal democracy. We have further suggested that there exists an inherent tension between this model and the entire notion of mandatory class actions. It does not necessarily follow, however, that as a result all mandatory class actions must automatically be deemed unconstitutional. It means only that one needs to begin the process of conducting a due process calculus in which competing interests are weighed. To date, no one has even begun this process, much less concluded it. It is to the shaping of this calculus that we now turn.

Before we can explore the competing interests to be included in the due process calculus, it is important to consider the weight that the autonomy value should receive as part of that balancing process. For reasons we have explained, the autonomy value should be recognized as a central element in that due process calculus. An individual should not be forced to cede control over his choice whether or not to resort to the judicial process to others except for truly compelling justifications. The same is true for a litigant's authority to choose the strategy for litigation of her claims, or to select who will do so. For this reason, we believe that the autonomy value, in the abstract, should be given a level of protection equivalent to that given fully protected free speech interests.

It might be argued that the weight given to the autonomy value in shaping the due process calculus should be gradated on the basis of the size of the individual litigant's interest at stake in the class proceeding. For example, if the litigant possesses only a minimal interest at stake, like what Issacharoff refers to as a negative value claim,^{FN16} one might reasonably suggest that a less powerful justification should be accepted for overriding the litigant autonomy interest. This result would be consistent with the Mathews-Doehr framework, which focuses on the level of competing private and governmental interests at stake.^{FN17} Whether this "interest gradation" approach should be accepted may depend on the extent to which one views the autonomy value as theoretically foundational, rather than merely as a utilitarian value. If one deems the interest in litigant autonomy to

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be foundational, the amount of the individual's claim should logically be deemed irrelevant. If the individual wishes to forego her right to control the conduct of her litigation because her claim is of only minimal value, the argument proceeds, then it is up to the individual to make that choice; for government to make the decision as to whether the autonomy value is significant is itself a violation of the autonomy value.

On the other hand, virtually never does there exist a private interest in the due process calculus deemed so powerful that it supersedes all competing pragmatic interests, no matter how compelling. While the *1605 abstract theoretical interest in litigant choice is surely important in and of itself, it is worth considering whether there exist any potentially competing interests that could be deemed overriding.

2. Exploring the Justifications for Mandatory Class Actions

As stated above,^{FN118} under the existing framework of Rule 23 there are three categories of mandatory class actions: (1) Rule 23(b)(1)(A) classes, where individual actions might result in imposing inconsistent obligations on the party opposing the class; (2) Rule 23(b)(1)(B) classes, where permitting individual actions might prejudice the interests of the absent class members; and (3) Rule 23(b)(2) classes, where the party opposing the class has acted in a manner generally applicable to the class, thereby justifying injunctive or declaratory relief against that party. The Advisory Committee that revised Rule 23 in 1966 never explained why these categories were made mandatory, so one must resort to a form of speculation or reverse engineering in order to hypothesize possible rationales for such treatment.

Least difficult to understand is perhaps the decision to make (b)(1)(A) classes mandatory. That provision reaches situations in which the party opposing the class can act only indivisibly towards the class members. For example, in the famed case of *Supreme Tribe of Ben-Hur v. Cauble*,^{FN119} the substantive legal issue was whether a fraternal benefit organization which had issued insurance policies to members could financially reorganize, a course of action which many policy holders opposed. Though the case was decided long before the 1966 revisions of Rule 23, the Advisory Committee in 1966 expressly pointed to the decision as an illustration of a situation justifying a (b)(1)(A) class action.^{FN120} By the very nature of the organization's proposed action, it would have been impossible to act differently towards different policy holders; either the organization financially reorganized, or it did not. Unlike in the case of aggregated damage actions, the organization could not provide relief to some class members but deny it to others. Thus, absent a class action, the fraternal benefit organization could potentially be subject to a form of inconsistent liability: It could be victorious in litigation against certain policy holders challenging the reorganization, but, because collateral estoppel may not constitutionally bind a party who did not have his day in court, those victories could not stop other policy holders from seeking to enjoin the reorganization. The result might be that according to one holding the *1606 benefit organization could financially reorganize while according to a separate holding it could not.

Of course, these holdings would not inexorably impose inconsistent liability on the party opposing the class in the traditional sense: there would be no holdings imposing inconsistent standards of behavior on that party so that no matter what it did it would be found liable to someone. Imposition of such inconsistent judgments has been found to violate due process.^{FN121} By contrast, in the *Ben-Hur* situation the party opposing the class could have avoided such a danger, simply by adhering to the holding denying it the right to reorganize. But then the party would lose the benefit of its victory in the litigation that upheld its right to reorganize. This should not be deemed an acceptable result.

It is easy to understand why the revisers of Rule 23 would authorize a class action under these circumstances. What is not as immediately clear, however, is whether that class action must be mandatory. The argument supporting the mandatory nature of a (b)(1)(A) class, presumably, is that if class members may choose not to participate in the proceeding and instead separately pursue their claims against the party opposing the class, the very danger sought to be avoided by use of the class action device in the first place would be might well come about. For then the party opposing the class might be subject to opposite findings in separate proceedings despite the continued existence of the class proceeding. Because of the inherent indivisibility of that party's behavior towards the opposing litigants, it could once again be subject to inconsistent behavioral standards growing out of different litigations.

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It is at least arguable that the interest in avoiding such inconsistent liability satisfies the compelling interest standard we have set out to justify the loss of litigant autonomy necessarily associated with mandatory class actions. To completely deny a litigant the benefit of its successful litigation imposes severe harm that should be avoided if at all possible. Unless the class proceeding is made mandatory, it is impossible to avoid this danger.

Not nearly as compelling are the likely justifications for the mandatory nature of the other class action categories. Though at no point has anyone satisfactorily explained why any class was made mandatory, the Advisory Committee suggested two rationales for existence of the (b)(1)(B) category, untied--at least explicitly--to the class' mandatory nature. The first is the so-called "limited pie" concern--the fear that the sum of the claimants' claims will exceed the amount available to pay those claims. In *Ortiz*, the Supreme Court gave an extremely narrow construction *1607 to this "limited pie" category of (b)(1)(B) classes.^{FN122} At the very least, all of the assets of the defendant would need to be included in the measurement of available funds for the purpose of determining whether the total amount of the claims exceed those funds. Moreover, it is arguable that the Court confined the category to "res"-like cases, where the claims were themselves made into an identifiable fund, rather than merely into the composite of defendant's assets.^{FN123} The second rationale mentioned by the Advisory Committee for the use of (b)(1)(B) class actions--though nowhere expressly referred to by the *Ortiz* Court--was what can be referred to as a "same situation stare decisis" concern. Under these circumstances, the absent claimants are so situated that while their claims will not be formally extinguished by an unsuccessful outcome in the initial action,^{FN124} as a practical matter the situations are so overlapping that it is all but inconceivable that the outcome in the initial action will not be dispositive of the subsequent actions.^{FN125}

It seems perfectly appropriate, as a matter of judicial administration policy, to authorize class proceedings in both situations. In both, there exists a danger that claimants could suffer prejudice unless permitted to participate in the initial action. It is not nearly as clear, however, that those proceedings must be made mandatory, thereby effectively gutting the fundamental due process interest in litigation autonomy. Particularly weak is the "same situation stare decisis" concern. If a member of the class wishes to exclude himself from the class in order to pursue the action on his own, any risk of same situation stare decisis flowing from the class adjudication is purely self-imposed. Moreover, when the class member wishes not to pursue his claim at all, there is of course no stare decisis danger to him whatsoever from the litigation proceeding without his inclusion.

The "limited pie" rationale is somewhat more complex. In this context, unlike the same-situation stare decisis instance, the harm suffered by the absent class member, were there to be no class action, is not self-imposed. That harm is that on a "first come, first served" basis the available funds will be consumed by the claimants who bring their claims to completion first, leaving the remaining claimants with little or nothing to show for their presumably valid claims. By forcing all of the claimants into a single proceeding, the (b)(1)(B) class action prevents this form of *1608 litigation Darwinism. Instead, it imposes what can be described as litigation socialism, in which winner does not take all. Instead, available funds are to be evenly divided among claimants, in a manner reminiscent of the bankruptcy system, without permitting the claimants to engage in a race to the courthouse to see which of them can consume the limited pie first.

All other things being equal, reasonable minds could probably differ over whether the Darwinist or socialist model of litigation is more appropriate. In support of the socialist model it can be argued that we should not allow the strong to prevail over the weak, when both claims are equally deserving. On the other hand, litigation often rewards the more aggressive litigant who possesses greater resources, and perhaps there is no reason why the limited pie situation should be any different. If certain claimants are quicker, faster, more resourceful and more effective and therefore able to bring their claims to judgment first, then so be it. That result is simply the foreseeable consequence of a litigation system that tolerates discrepancies in litigant abilities and resources. When the litigation autonomy factor is included in the analysis the situation takes on an entirely different look. It may be perfectly appropriate to allow claimants to band together in a single proceeding in order to ensure equal distribution of the defendant's limited assets. It is quite another to prohibit a litigant from choosing to control his own litigation in the manner he deems wisest and, indeed, to decide whether to pursue his claim at all. Because the use of the litigation socialism model necessarily leads to a rejection of the foundational due process precept of litigation autonomy, it should be deemed unconstitutional.

Even if one were to assume, for purposes of argument, that the goals of the litigation socialism model should be found to prevail, it is possible to achieve those goals without undermining the value of litigant autonomy in the manner caused by the mandatory class action. In the context of interpleader, for example, the Supreme Court has recognized that individual actions may proceed separately, with enforcement of any judgment enjoined until all individual claims have been litigated.^{FN126} In this manner, individual claimants are protected against preemptive judgments by other claimants, yet each litigant is permitted to exercise full control over her own litigation. There is no reason that a similar (though not identical)^{FN127} procedure could not be employed in place of a mandatory class action. It is conceivable that the delay in receipt of judgments in these circumstances would be unreasonable, arguably making this alternative *1609 impractical. Even so, at least it would provide the individual litigant with the choice whether or not to participate in the class proceeding or instead pursue his action separately and then await payment for a successful judgment until completion of the class proceeding. The important point is that no one, to this point, has even considered this possibly less invasive alternative, because no one has even recognized the harms to due process values caused by the loss of litigant autonomy resulting from use of mandatory class actions in the first place.

The mandatory nature of (b)(2) injunctive/declaratory class actions gives rise to a somewhat different set of constitutional concerns. To the extent the injunctive action seeks to challenge behavior on the part of the defendant that is indivisible among the class members, then the issue appears to be identical to the one that arises in the context of Rule 23(b)(1)(A) mandatory class actions, previously discussed, and should likewise be deemed constitutional.^{FN128} However, not all (b)(2) class actions necessarily concern such indivisible behavior. For example, a class may complain that a defendant employer is engaging in racial discrimination in hiring and therefore seek injunctive relief requiring the use of remedial job promotion standards designed to rectify those discriminatory practices. While the defendant's behavior may well satisfy the (b)(2) requirement that the party opposing the class have acted in a manner generally applicable to the class, thereby justifying injunctive or declaratory relief, it does not necessarily follow that the defendant will be incapable in all cases of treating different class members differently. For example, if a class member were to choose to remove herself from the class, any injunction requiring the use of remedial promotion measures need not apply to her; there is no reason, legally or physically, why such different treatment could not be given. On the other hand, were the class to be unsuccessful, a class member who had removed herself would not be bound by *res judicata* or collateral estoppel principles and could subsequently pursue her own individual action for injunctive relief, at least as a theoretical matter.^{FN129} Perhaps more of a concern in the (b)(2) context would be the forced ideological association that would push together members of a group who share the goals and values of the named plaintiffs with those who may vehemently oppose them. For example, in a civil rights action brought on *1610 behalf of African Americans to enforce affirmative action, such famed African American opponents of affirmative action as sociologist Harry Edwards and conservative Republican politician Alan Keyes would necessarily be forced to be included in the class. It is quite conceivable that all of the harms of forced association, transposed into an element in the litigant autonomy model of procedural due process, would result. Whatever are the due process harms that flow from the mandatory nature of a (b)(2) class, it is difficult to perceive any need for such mandatory treatment that is specific to the (b)(2) category. There is simply no reason that a class must include every injured party in order to achieve the aims of the (b)(2) class.

There are several non-specific procedural harms that are arguably avoided by use of mandatory class actions. For example, if class members are permitted to withdraw from a class,^{FN130} presumably they would have to receive notice of the class action's existence, along with some administrative means for determining who ultimately ends up in the class and who does not. Both would inevitably result in imposition of serious additional costs and delays. But when a class is mandatory, no procedure for withdrawal need be provided for, and, in the exercise of the trial judge's discretion, no notice need be required.^{FN131} However, it is dubious whether due process is satisfied by any class proceeding where at least some form of reasonable notice is not provided to class members.^{FN132} Even if the class member is not allowed to remove himself from the class, he should be permitted to monitor the actions of those who represent his interests. Indeed, this is an even more compelling interest when he has had effectively little or no say in the selection of who does pursue his interests on his behalf. Whatever additional administrative costs may result from the need to make a record of who is and who is not ultimately a member of the class would seem to be nothing more than a "cost of doing business" of our constitutional commitment to a system of procedural due process.

One commentator has suggested that mandatory class actions are required to prevent disruption of settlements that are

valuable to the majority of claimants.^{FN133} But this argument puts the cart before the horse: A class that is constitutionally defective from its inception is incapable of settlement. To argue on the basis of the importance of the settlement is ***1611** logically to beg the question of the class proceeding's validity in the first place. Another commentator asserts that the absence of mandatory class proceedings can be antithetical to the foundational purposes of a class action, namely to achieve a socially desirable level of deterrence of defendant misconduct.^{FN134} But this argument perversely transforms a procedural aggregation device that may have the incidental benefit of deterring future illegal conduct into a dictate of pre-litigation substantive law. This conclusion is inconsistent not only with the express directives of the Rules Enabling Act^{FN135} but with the essence of democratic theory, which requires that substantive policy choices are not made in a manner that fundamentally deceives the electorate.^{FN136}

On balance, then, there appears to be only one existing category of mandatory class action that likely satisfies a compelling interest standard: the (b)(1)(A) category. Absent a class proceeding in these situations, the party opposing the class could conceivably be placed in an untenable position due to inconsistent judgments in separate suits brought by different class members combined with the indivisibility of his behavior in relation to all class members. In no other context, however, should competing interests be deemed to override the fundamental due process interest in litigant autonomy.

The saddest and most puzzling element of the mandatory class situation is not that the courts have upheld the use of mandatory classes against a due process challenge grounded in considerations of litigant autonomy. It is, rather, that they have never even recognized the possibility that such a challenge could be made.

D. Litigant Autonomy and the Opt-Out Procedure

Classes brought pursuant to [Rule 23\(b\)\(3\)](#) are not mandatory; under [Rule 23\(c\)](#), absent class members must receive notice and the opportunity to opt out of the action. If one accepts our conclusion that the autonomy value lies at the normative core of procedural due process, obviously this opt-out procedure is constitutionally preferable to the mandatory procedure imposed by [Rule 23\(b\)\(1\) and \(2\)](#). Indeed, respected scholars have pointed to its centrality to the preservation of litigant choice.^{FN137} It does not ***1612** necessarily follow, however, that the provision of an opportunity to opt out of the class proceeding satisfies procedural due process.

One of us has previously written that a process that requires absent claimants to affirmatively opt into a class proceeding is preferable to an opt-out procedure, purely as a matter of democratic theory. Adopting an inference of inclusion in the class on the basis of purely passive behavior on the part of the absent class member has the effect of creating a “faux” class which does not truly represent aggregation of willing plaintiffs as much as a comatose grouping of absent class members who know little or nothing of the proceeding and are unlikely to pursue whatever relief the proceeding makes available to them on an individual basis. As a result, the class proceeding is often transformed into a “bounty hunter” action in which the only interested parties are the class attorneys, thus effectively transforming the underlying substantive law into something other than what it purports to be—namely, a compensatory remedial action.^{FN138} Here, we conclude that the opt-out procedure in addition raises potentially serious constitutional problems as a matter of procedural due process.

At first this conclusion may seem puzzling since, as previously noted, purely as a technical matter an opt-out procedure does not violate a constitutional prohibition on mandatory class proceedings: any party who wishes to remove herself from the class proceeding is free to do so. However, when one recognizes that opt-out effectively amounts to a form of waiver of the constitutional right not to be included in a class proceeding against the individual's will, the inherent passivity of the opt-out procedure becomes problematic. It is well accepted that individuals may waive their personal constitutional rights. However, in both civil and criminal contexts the Supreme Court has unequivocally held that “the courts indulge in every reasonable presumption against waiver of constitutional rights.”^{FN139} On a number of occasions, the Court has rejected implied waiver in the civil context. In *Fuentes v. Shevin*, the Court stated that “the waiver of constitutional rights in any context must, at the very least, be clear.”^{FN140} In another context, the Court wrote that “constructive consent is not a doctrine commonly associated with the surrender of constitutional rights”^{FN141}

It is true that the Court has not always adhered to its own highly protective standard. On occasion, waiver may be effected unintentionally, through a failure to act. For example, the Seventh Amendment right to jury trial in civil cases may be waived by failure to raise it at the correct point in the litigation.^{FN142} A due process right to individual notice may be waived by *1613 means of the signing of a boilerplate contract,^{FN143} as may a constitutional objection to lack of personal jurisdiction.^{FN144} In a federal judicial proceeding, a party may waive the personal jurisdiction defense by failure to raise it within the proper time frame or in conjunction with other motions.^{FN145} In certain state proceedings, traditionally the constitutional objection to personal jurisdiction is waived, simply by the litigant's discussion of the case's merits. But generally an individual who has not previously been made a litigant is not deemed to have waived her constitutional right by total and utter passivity. The one possible exception concerns default judgment: A defendant may be subjected to a default judgment, thereby waiving her constitutional right to have her day in court, simply by failing to respond to service of a complaint. In this one situation, then, total failure to take action of any sort is effectively treated as a waiver of one's constitutional right to a day in court. However, under any sensible version of a due process balancing test such a conclusion makes perfect sense; a party of course may not be permitted to avoid a lawsuit, merely by failing to respond. A lawsuit is not an R.S.V.P. It is by no means clear, however, that in any other context a constitutional right should be deemed waivable by nothing more than total passivity on the part of the rightholder when the rightholder has not himself filed suit or been made a defendant in an ongoing suit.^{FN146} It is doubtful that we would accept such a constitutional loophole when other significant rights are involved--for example, the free speech right or the right to counsel. If, as we believe, the value of litigant autonomy, embodied in the Due Process Clause, is of great importance to the foundations of American constitutional and political theory,^{FN147} then it should not be so easily lost.

One other possible example of totally passive waiver that arguably complicates our argument is the statute of limitations. In a certain sense, the statute of limitations is the mirror image of the default judgment: a plaintiff who fails to take action by a certain date has waived whatever property right he possessed in his cause of action. In two ways, however, we believe that the statute of limitations fundamentally differs from the *1614 waiver-through-total passivity that characterizes opt out. First, statute of limitations are inherently non-transsubstantive. They are always tied to a specific substantive cause of action, and thus effectively a part of that cause of action. By contrast, both the opt-out and default judgment rules are fully transsubstantive; they are both agnostic to the specific substantive claim being waived. In this important sense, the statute of limitations is, at the outset, an inherent part of the plaintiff's substantive claim. Viewed in this manner, the statute of limitations does not act as a waiver of a pristine substantive claim, but rather as an *ex ante* element of that substantive claim. Loss of a claim through violation of the statute of limitations, then, does not operate as a procedural waiver of an otherwise unencumbered substantive claim; it is part of the claim, and therefore operates as an inherent qualifier of the property right that is protected by due process in the first place.

Secondly, even were one to view the statute of limitations--incorrectly, we believe--as a form of procedural waiver, there can be no doubt that the strong interests protected by the statute of limitations outweigh even a compelling interest in avoiding totally passive waiver. We do not believe that opt-out in [Rule 23\(b\)\(3\)](#) class actions could prevail under a classically utilitarian due process calculus. Our primary point, however, is that at the very least, opt-out must be tested by such a due process utilitarian calculus, a test that to date has never been performed. Were a court, following application of a careful, detailed and thoughtful utilitarian calculus, to determine waiver-through-opt-out to be constitutional, we would deem the very conduct of such a traditional due process analysis to be a significant moral victory.

It might be suggested that our concern over passive waiver of a constitutional right is overblown. Under an opt-out procedure a potential class member who does not wish to be part of the class, the argument might proceed, need only take the relatively minimal time and effort required to send in the form indicating her choice not to be a class member. But the enormous impact of inertia will inevitably cloud any inference that might reasonably be drawn from a class member's failure to take such affirmative action. Imagine, for example, a process whereby a notice is sent to voters, clearly indicating that if they neither go to the polls on election day nor send in a form indicating their desire to vote for the Republican candidate they will be deemed to have voted for the Democrat. Presumably, no one would assume the constitutionality of such a law, even though any burden imposed on the voter by the opt-out procedure is no less minimal than the burden imposed on the absent class members. The same is true, we believe, of opt-out.

*1615 It may be that when absent class members' rights are relatively minimal, as in Issacharoff's "negative value"

claims^{FN148}--the constitutional interest in litigant autonomy is de minimis, and, at the very least, should be deemed waivable through use of an opt-out procedure that is triggered by the claimant's simple failure to act. The strongest defense of this position would be that, as long as the individual claims are sufficiently large to justify claimant effort to file a claim in any settlement fund or damage award, it is reasonable to assume, ex ante, that a self-interested claimant would, more likely than not, wish to be a member of the class. In light of this reasonable presumption, inertia should lie in favor of inclusion, though this presumption may be rebutted in the individual case through the affirmative act of opt out.^{FN149} In all other contexts, however, the presumption of inclusion that inheres in the opt-out rule is inconsistent with both the autonomy model of procedural due process and the traditional precepts of constitutional waiver. Thus, at the very least a due process right to litigant autonomy should be recognized in so-called positive value class actions, and such a right should not be deemed waivable by utter passivity on the part of claimants. Because [Rule 23\(c\)](#) currently draws no distinction between positive and negative value classes for purposes of opt-out, the provision should be deemed unconstitutional.

There has long existed debate and controversy over the wisdom of opt-out rights.^{FN150} Most of that controversy, however, has focused on the choice between opt-out and mandatory class actions.^{FN151} Rarely has it concerned the choice between opt-out and opt-in procedures. Our position is that while of course opt-out is constitutionally preferable to mandatory participation, in many situations the inertia brought about by the opt-out procedure must be reversed: absent expression of an affirmative choice to participate in a class proceeding, the potential absent class member must be deemed not to have waived his right to control the litigation of his claim. This conclusion flows logically from recognition that litigant autonomy constitutes a core element of the procedural due process right. Because neither court nor scholar to date has focused on the litigant autonomy factor,^{FN152} no one has previously viewed the opt-out procedure for [*1616 Rule 23\(b\)\(3\)](#) class actions through the lens of the waiver of constitutional rights. Recognition of the relevance of the jurisprudence of constitutional waiver dictates a rejection of opt-out procedure, in favor of one requiring opt in.

Conclusion

In writing this Article, we have sought to achieve two goals. First, we have sought to demonstrate that the ability of a litigant to control the conduct of his litigation and to make the decision whether or not to litigate--what we have called "litigant autonomy"--grows out of liberal democratic theory's commitment to the principles of self-determination and individual integrity. It should therefore be recognized as a foundational element in the theory and structure of procedural due process, a constitutional protection that itself grows out of those very same principles of liberal democratic thought. By completely ignoring this concern in the shaping of its modern procedural due process calculus, the Supreme Court has failed to provide procedural due process the depth and scope required for it to perform its function within American constitutional and political theory.^{FN153}

Second, while we have acknowledged that litigant autonomy will be implicated by governmental procedural restrictions only relatively rarely, we have shown that the increasingly important area of class actions illustrates all too well the harms that flow to this fundamental constitutional value when the applicable due process analysis ignores the litigant's autonomy interest in control of the judicial process for the adjudication of his legal rights. Although both [Rule 23](#) and Supreme Court doctrine seek to protect the due process rights of absent class members, at no point have either the Rule's drafters, the Justices or procedural scholars recognized that what has been implemented is purely a paternalistic form of due process--i.e., the concern that those who represent the interests of the absent litigants enforce and protect those litigants' rights enthusiastically and in good faith.^{FN154} Under certain circumstances--for example, where, for legal or practical reasons, the absent party is unable to involve herself in decision making concerning the enforcement of her rights--this paternalistic concern constitutes an appropriate element of the due process analysis. It is important, however, not to confuse this necessary condition with one that, standing alone, is sufficient to satisfy [*1617](#) due process. Where it is feasible, under the circumstances, to allow the individual party to make her own decisions about the protection of her own rights through resort to the judicial process, the values of procedural due process cannot be satisfied merely by paternalistically assuring "adequate" representation by some external force not chosen by the litigant herself. Surely we would not accept such governmentally imposed paternalism in the political process; it is, according to basic tenets of liberal democratic thought, the individual who is to determine how to exercise his self-governing function when participating in the political process. No less

should be demanded when a private individual seeks to enforce his rights in the judicial process. Thus, where class actions are deemed mandatory, as specified categories of [Rule 23](#) are, there exists at least a prima facie conflict between the class action rule and the litigant autonomy value.

Where a truly compelling need can be established, a due process calculus may appropriately require that the litigant autonomy interest give way. Unfortunately, neither Court nor scholar has even recognized the collectivist-individual tension that inheres in the mandatory class action concept, much less undertaken a due process inquiry that takes concerns about that tension into account. In preparing such a calculus, we determine that only one of the three existing categories of mandatory class actions even arguably justifies requiring inclusion in the class: [Rule 23\(b\)\(1\)\(A\)](#) classes, where, absent the class action, the party opposing the class risks inconsistent judicial directives from individual actions where the party's behavior vis-à-vis all class members is indivisible.^{FN155} While the rationales for the remaining mandatory class actions may reasonably be thought to justify class treatment when absent class members are willing, they cannot overcome the strong constitutional interest in preserving litigant autonomy. Therefore they do not thereby justify mandatory treatment, as a constitutional matter. In all cases, however, no interest justifies a failure to provide the best notice practicable to absent class members, though currently [Rule 23](#) requires notice only in (b)(3) class actions.^{FN156}

Our constitutional concern does not directly reach the most widely employed category of class actions, the (b)(3) category, because litigants are, by rule, provided the opportunity to opt out of such classes. However, if one deems the right not to be forced to be included in a litigation in which one does not have full control over the conduct of one's own action to be a significant constitutional right, then the opt-out procedure must be seen as a form of waiver of that right. In virtually no other context may constitutional rights be formally waived by such total passivity on the part of the rightholder when the rightholder has himself neither brought an action nor been made a defendant in an action. For this reason, we *1618 conclude that an opt-in procedure is constitutionally required to assure some basic level of knowing waiver on the part of absent class members. When the individual plaintiffs' claims are sufficiently large to justify active efforts to pursue the claim in a settlement fund or damage award, but insufficiently large to justify individual suit, it may be reasonable to presume, ex ante, an interest in participating in the class, rebuttable by exercise of opt out.^{FN157} At the very least, however, affirmative opt-in should be constitutionally required when the plaintiffs' individual claims are "positive"--i.e., sufficiently large to justify individual suit.

It is likely that acceptance of our constitutional arguments would have a dramatic impact on the class action process. There can be little doubt that the class procedure could not operate in the manner it does currently under our suggested framework. However, in *Ortiz* the Supreme Court gave a relatively narrow construction to the primary category of mandatory class actions, those brought under [Rule 23\(b\)\(1\)\(B\)](#), so its current reach is likely to be fairly limited. It is true that other class actions would undoubtedly be impacted by a transformation from an opt-out to an opt-in procedure. However, it begs the question to assume, conclusorily, that this would necessarily be an unwise or morally unacceptable development. Where valuable constitutional interests are recognized and protected, on balance the developments we advocate are properly deemed an advance, rather than a retreat, in procedural jurisprudence.

Footnotes

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FNd1

Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law. The authors express their thanks to Gary Lawson for his extremely helpful comments on an earlier draft, and Alexis Garmey of the class of 2008 at Northwestern University School of Law for her valuable research assistance. Portions of this Article will be reproduced in Professor Redish's book, *Class Actions And Constitutional Democracy*, to be published by Stanford University Press.

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- FNdd1 B.S. DePaul University, 2000; J.D. Northwestern University, 2006.
- FN1 The thirteenth and fourteenth questions of the October 5, 2004 vice-presidential debate between John Edwards and Dick Cheney regarded the issues of tort reform and Edwards' career as a trial attorney. See Nathaniel L. Bach, [Trial Lawyer on the Ticket: Electoral Rhetoric and the Depiction of Lawyers in the 2004 Presidential Campaign](#), 19 *Geo. J. Legal Ethics* 317 (2006).
- FN2 U.S. Const. amend. V, cl. 4; amend. XIV, §1, cl. 3.
- FN3 See, e.g., [Hansberry v. Lee](#), 311 U.S. 32 (1940); see discussion infra at Section II.B.2..
- FN4 See, e.g., Richard A. Nagareda, [Administering Adequacy in Class Representation](#), 82 *Tex. L. Rev.* 287 (2003).
- FN5 Another commentator has also argued that for the most part, mandatory class actions are due process violations. However, at no point does he recognize or explore either the foundational nature of the autonomy factor or its relevance to the due process analysis as applied to class actions. See Steven T.O. Cottreau, Note, [The Due Process Right to Opt Out of Class Actions](#), 73 *N.Y.U. L. Rev.* 480 (1998).
- FN6 See discussion infra at Section I.B.; I.C.
- FN7 See discussion infra at Section I.A.
- FN8 In this sense, we seek to distinguish ourselves from a critique of class actions grounded in a more sweeping form of libertarianism. See generally *Natural Rights Liberalism From Locke to Nozick* (Ellen Frankel Paul, Fred D. Miller & Jeffrey Paul eds., 2004).
- FN9 See discussion infra at Section I.C.
- FN10 See discussion infra at Section I.D.
- FN11 [Fed. R. Civ. P. 23\(b\)\(1\)\(A\), \(b\)\(1\)\(B\), \(b\)\(2\)](#). See discussion infra at Section II.B.3.
- FN12 See discussion infra at Section II.C.2. It is thought by some that in [Phillips Petroleum Co. v. Shutts](#), 472 U.S. 797 (1985), the Court held all mandatory class actions to violate due process. See, e.g., [Brown v. Ticor Title Ins. Co.](#), 982 F.2d 386 (9th Cir. 1992); cert. granted, 510 U.S. 810 (1993); cert. dismissed as improvidently granted, 511 U.S. 117 (1994). However, this is a clear misreading of Shutts. See discussion infra at 97.
- FN13 [Fed. R. Civ. P. 23\(e\)](#); see discussion infra at Section II.D.
- FN14 424 U.S. 319 (1976).

FN15 [Id. at 334-35.](#)

FN16 The Court found that the social security claimant's interest was minimal, because a relatively small amount of money was involved. [Id. at 340-41.](#)

FN17 [501 U.S. 1 \(1991\).](#)

FN18 [Id. at 10-11.](#)

FN19 [Id. at 10 \(quoting Mathews, 424 U.S. at 334 \(quoting Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895 \(1961\)\)\)](#).

FN20 [Doehr, 501 U.S. at 10.](#)

FN21 [Id. at 13.](#)

FN22 [Id. at 16.](#)

FN23 [Id.](#)

FN24 [Jerry Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28 \(1976\); Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the Value of Procedural Due Process, 95 Yale L.J. 455 \(1986\).](#)

FN25 [Mashaw, supra note 24, at 899.](#)

FN26 [Id. See also Redish & Marshall, supra note 24, at 481-83.](#)

FN27 [Mashaw, supra note 24, at 899.](#)

FN28 We refer to this value as the "presumptive" foundation, because we fully acknowledge that, under sufficiently compelling circumstances, this presumption of an individual's control of the protection of her own interests may be rebutted. See discussion *infra* at Section II.D.

FN29 See Martin H. Redish, [Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights](#), 36 UCLA L. Rev. 329 (1988). See also discussion *infra* at Section I.C.

FN30 Democratic theorists have differed over the role that the individual should play in government, beyond the selection of governing officials. The most extreme of the theorists in support of a narrow role was Joseph Schumpeter. See generally Joseph Schumpeter, *Capitalism, Socialism and Democracy* (1942).

- FN31 On the general issue of paternalism, see David L. Shapiro, [Courts, Legislatures and Paternalism](#), 74 Va. L. Rev. 519 (1988).
- FN32 See Lea Brilmeyer, [The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement](#), 93 Harv. L. Rev. 297 (1979).
- FN33 See, e.g., [Hawaii v. Standard Oil of Cal.](#), 405 U.S. 251, 258 (1972); [Missouri v. Illinois](#), 180 U.S. 208 (1901).
- FN34 See, e.g., [Mullane v. Cent. Hanover Bank & Trust Co.](#), 339 U.S. 306 (1950) (statutory provision for appointment of guardian to represent interests of beneficiaries of common trust fund).
- FN35 [Powell v. Alabama](#), 287 U.S. 45 (1932) (“It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.”). But see [United States v. Walters](#), 309 F.3d 589, 592 (9th Cir. 2002) (“The Sixth Amendment grants criminal defendants a qualified constitutional right to hire counsel of their own choice but the right is qualified in that it may be abridged to serve some ‘compelling purpose’”) (quoting [United States v. D’Amore](#), 56 F.3d 1202, 1204 (9th Cir. 1999)). See also [United States v. Panzardi-Alvarez](#), 816 F.2d 813, 816 (1st Cir. 1987) (“A criminal defendant’s exercise of this right cannot unduly hinder the fair, efficient and orderly administration of justice.”).
The right to defend oneself pro se has also been recognized in the courts. See, e.g., [Faretta v. California](#):
It is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts.... The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of “that respect for the individual which is the lifeblood of the law.”
[422 U.S. 806, 834 \(1975\)](#) (citation omitted).
- FN36 See Frank I. Michelman, [Law’s Republic](#), 97 Yale L.J. 1493, 1533-36 (1988). For a more detailed exploration of the grounding of the commitment to individual autonomy in liberal political theory, see generally Martin H. Redish & Clifford Berlow, [The Class Action as Political Theory](#), 86 Wash. U. L. Rev. (2008) (forthcoming).
- FN37 Alexander Meiklejohn, [Political Freedom](#) 9 (1960) (“So far ... as our own affairs are concerned, we refuse to submit to alien control.”). We fully recognize, of course, that in a constitutional democracy certain choices are excluded from simple majoritarian choice. Unless the concept of accountable government is to be lost completely, however, the bulk of decisions must be made by those responsive to public will.
- FN38 The Supreme Court has stated that “there is no such thing as a false idea.” [Gertz v. Robert Welch, Inc.](#), 418 U.S. 323, 339 (1974).
- FN39 See, e.g., [Wooley v. Maynard](#), 430 U.S. 705 (1977) (Jehovah’s witnesses may not be required to display state slogan, “Live Free or Die” on their license plate).
- FN40 By “process-based” autonomy we refer to an individual’s autonomous right to protect his interests through participation in the governmental process. This is to be contrasted with a right to exercise total control over all aspects of one’s life—a power that is infeasible, even in a democracy. The concept may also be described as “meta-autonomy,” because it refers to the individual’s autonomy to make choices as to how he participates in the processes of self-government.

- FN41 Of course, if the very same unit of government that was prosecuting the defendant were permitted to choose his representative and/or direct the nature of his defense, additional constitutional problems would develop. However, the intuitive problem we have with this course of action is present, even if we posit that the branch or level of government making the choices as to defense strategy is wholly distinct from the branch or level involved in the prosecution.
- FN42 In [Phillips Petroleum Co. v. Shutts](#), 472 U.S. 797 (1985), the Court assumed that a plaintiff's property rights in her chose in action is somehow more diluted than is a defendant's constitutionally protected interest in avoiding judgment. *Id.* at 812.. Like much in the Shutts decision, however, this conclusion is wholly unsupported with logic or reason, and is surely not intuitive:Both plaintiffs and defendants have a great deal to lose or gain as the result of litigation. Moreover, this suggestion of a gradation in the relative interests of plaintiffs and defendants is inconsistent with clearly established prior Court doctrine that the Shutts Court in no way purported to affect. See [Schlagenhauf v. Holder](#), 379 U.S. 104 (1964). In any event, as a bottom line matter, it is clear that the Court in Shutts recognized in plaintiff claims a constitutionally protected interest, sufficient to trigger the due process guarantee.
- FN43 Martin H. Redish, [The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest:The Tobacco Wars, 1953-1971](#), 51 DePaul L. Rev. 359, 366 (2001).
- FN44 See discussion supra at Section I.A.1.
- FN45 See discussion supra at Section I.C. For a more detailed exploration of this reverse engineering process in the context of the adversary system, see generally Redish, supra note 43.
- FN46 It is true, of course, that when government seeks, for example, to protect consumer interests through administrative or criminal enforcement of consumer protection laws, protected individuals do not possess a due process right to control the litigation. See discussion supra at Section II.B. However, in such cases the individuals do not have constitutionally protected property interests--a necessary trigger to the guarantees of procedural due process--at stake. See discussion infra at Section II.B.1.a.
- FN47 See [Fed. R. Civ. P. 13\(a\)](#) (providing for compulsory counterclaims where a counterclaim arises out of same transaction or occurrence as the primary claim).
- FN48 See the Declaratory Judgment Act, [28 U.S.C. §§ 2201, 2202](#).
- FN49 Purists might suggest that attempting to mix utilitarianism, which traditionally cared not at all for the interests of the individual, with a formalistic commitment to individualism is equivalent to incongruously mixing oil and water. However, from a real world perspective there exists no a priori reason why recognition of the value of individual autonomy cannot be tempered by pragmatic concerns. See generally Redish & Berlow, supra note 36.
- FN50 [Ortiz v. Fibreboard](#), 527 U.S. 815, 845, 847-48 (2001); see discussion infra at Section II.B.3.
- FN51 See discussion infra at Section II.B.2.
- FN52 See, e.g., [Cooper v. Fed. Reserve Bank of Richmond](#), 467 U.S. 867, 874 (1984).

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FN53 Fed. R. Civ. P. 23(a)(1)-(4).

FN54 Fed. R. Civ. P. 23(b)(1)-(3).

FN55 Fed. R. Civ. P. 23(c); (d).

FN56 Fed. R. Civ. P. 23(c)(3).

FN57 Fed. R. Civ. P. 23(c)(2)(B).

FN58 Fed. R. Civ. P. 23(d)(2).

FN59 See discussion *infra* at Section II.B.2. It should be noted that while after *Ortiz* the scope of Rule 23(b)(1)(B) class actions has been limited, this category of class actions is still employed. See, e.g., *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

FN60 See U.S. Const. amend XIV, § 1; U.S. Const. amend. V.

FN61 See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (“The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.”); *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 439 (1951) (“There is no fiction ... in the fact that choses in action ... held by the corporation, are property.”); *Sentry Ins. v. Sky Management, Inc.*, 34 F. Supp. 2d 900 (D. N.J. 1999) (“A chose in action is an item of intangible personal property.”); *Commonwealth v. Ky. Distilleries & Warehouse Co.*, 136 S.W. 1032, 1036 (Ky. Ct. App. 1911) (“The term ‘property’ ... include[s] ... choses in action.”); *Gibbes v. Nat’l Hosp. Serv.*, 24 S.E.2d 513, 515 (S.C. 1943) (“[I]t said that the word property, is of very extensive meaning, and includes choses in action.”) (internal citations omitted); *Hutton v. Autoridad Sobre Hogares De La Capital*, 78 F. Supp. 988, 994 (D. P.R. 1948) (“A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference, and whether it springs from contract or from the principles of the common law, the legislature may not take it away.”) (internal citations omitted); *Halling v. Indus. Comm. of Utah*, 263 P. 78, 81 (Utah 1927) (not allowing a widow to bring cause of action against husband’s employer for wrongful death, even though husband had unsuccessfully brought wrongful death cause of action, would, given Utah’s Constitutional scheme, deprive “applicant of property without due process of law.”); Mark Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. Mich. J.L. Reform 347 (1988) (making the argument that there is an individual property right in a cause of action, including those causes of action for injunctive or declaratory relief that the possessor has not personally filed in court).

Issacharoff characterizes the discussion of property rights in a chose as a “return to an older, more formal conception of a legal claim.” Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 *Notre Dame L. Rev.* 1057, 1058 (2002). Although this pejorative characterization is probably meant to imply that the notion of a chose as property is outdated, federal and state courts continue to consistently and explicitly recognize a property right in a cause of action. See cases cited in note 61, *supra*. It is worth noting that the modern trend has been to recognize new property rights for which due process rights attach, rather than to reject traditional definitions of property. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (giving procedural due process protections to welfare recipients). See generally Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733 (1964). Similarly, an assertable defense is also a form of property protected by the Due Process Clause. See *Baltimore & O.S.W. Ry. Co. v. Read*, 158 *Ind.* 25, 62 *N.E.* 488, 490 (1902) (“The law recognizes that a vested right of defense to an action is, in a sense, property,—as much so as is a vested right of action,— and is equally protected as is the latter against an attempt of the legislature to destroy or take it away.”); *Logan*, 455 U.S. at 429.

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- FN62 See Best Practices for Gatekeepers Emerging Communications, Inc. Shareholders Litigation Opinion, in the Court of Chancery of the State of Delaware in and for New Castle County, 1530 PLI/Corp 167, 249-50 (2006) (“[I]t is established Delaware law that choses in action that survive the death of the victim are validly assignable”).
- FN63 Issacharoff, *supra* note 61.
- FN64 Even proponents of such a view probably agree that an individual cannot be bound to a judgment unless he was adequately represented by the class proceeding. See discussion *infra* at Section II.B.2.
- FN65 Issacharoff, *supra* note 61, at 1060. To a similar effect, see David L. Shapiro, [Class Actions: The Class as Party and Client](#), 73 *Notre Dame L. Rev.* 913, 917 (1998) (“[T]he notion of class as entity should prevail over more individually oriented notions of aggregate litigation.”).
- FN66 See also Shapiro, *supra* note 65.
- FN67 *Id.*
- FN68 *Id.* at 921.
- FN69 *Id.*
- FN70 *Id.* at 1058-61.
- FN71 *Id.* at 1060.
- FN72 Shapiro, *supra* note 65, at 1058-1059. At least as a technical matter of collateral estoppel, however, rejection of an injunction does not decide future cases.
- FN73 See, e.g., [Brown v. Board of Educ.](#), 347 U.S. 483 (1954).
- FN74 [Fed. R. Civ. P. 24\(b\)](#) (permissive intervention).
- FN75 Certification under [Rule 23\(b\)\(2\)](#) is appropriate where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” [Fed. R. Civ. P. 23\(b\)\(2\)](#). Illustrative of class actions appropriately certified under [Rule 23\(b\)\(2\)](#) “are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.” 39 *F.R.D.* 69, 102 (1966) (listing numerous appellate court decisions finding a proper class action in school desegregation and public accommodation cases).
- FN76 The same holds true if there are fifty children but only one decides to sue. It does not necessarily follow, of course, that due process will always require that substantively pristine rights be enforced free from limitation; due process usually requires

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- FN89 We have nevertheless given the theory so much attention because it clearly constitutes the most detailed theoretical argument against litigant autonomy.
- FN90 In one instance, the Supreme Court, in a footnote, cryptically suggested a due process dichotomy between damage and injunctive claims. [Phillips Petroleum Co. v. Shutts](#), 472 U.S. 797 (1985). However, it is our belief that the decision was intended to be confined to the highly limited due process context of constitutional limits on personal jurisdiction. See discussion *infra* at Section II.B.3.
- FN91 See, e.g., [Hansberry v. Lee](#), 311 U.S. 32 (1940); [Stephenson v. Dow Chemical Co.](#), 273 F.3d 249 (2nd Cir. 2001), *aff'd* by equally divided court, 539 U.S. 111 (2003). See also [Amchem Prods., Inc. v. Windsor](#), 521 U.S. 591, 625-26 (1997) (recognizing importance of avoiding conflict between interests of class representatives and absent class members).
- FN92 311 U.S. 32 (1940).
- FN93 Fed. R. Civ. P. 23(a)(4).
- FN94 Proposed Amendments to Rules of Civil Procedure of the United States District Courts, 39 F.R.D. 73, 107 (Advisory Committee Note to [Rule 23\(c\)\(2\)](#)).
- FN95 See discussion *supra* at Section I.C.
- FN96 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, [Federal Practice and Procedure, Civil §1786](#) (3d ed. 2005).
- FN97 472 U.S. 797 (1985).
- FN98 *Id.* at 812.
- FN99 [Brown v. Ticor Title Ins. Co.](#), 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994). See generally 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 (1986).
- FN100 Fed. R. Civ. P. 12(b)(1).
- FN101 527 U.S. 815 (1999).
- FN102 *Id.* at 846.
- FN103 Note that if *Shutts* had, in fact, found all mandatory damage class actions unconstitutional, the narrow construction given to [Rule 23\(b\)\(1\)\(B\)](#) in *Ortiz* would have been mooted.

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- FN104 See, e.g., [Nat'l Ass'n for Advancement of Colored People v. Button](#), 371 U.S. 415 (1963).
- FN105 [Hansberry v. Lee](#), 311 U.S. 32 (1940).
- FN106 See, e.g., [Nat'l Ass'n for Advancement of Colored People v. Button](#), 311 U.S. 32 (1940).
- FN107 See, e.g., [Abood v. Detroit Bd. of Educ.](#), 431 U.S. 209 (1977); [Democratic Party of U.S. v. Wis. ex rel. La Follette](#), 450 U.S. 107 (1981).
- FN108 See Redish, *supra* note 87, at 116-18.
- FN109 For a detailed examination of the First Amendment right of non-association, see generally Martin H. Redish & Christopher McFadden, [HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association](#), 85 *Minn. L. Rev.* 1669 (2001).
- FN110 See discussion *infra* at Section II.D.
- FN111 [527 U.S. at 838-39](#). See also discussion *supra* at Section II.B.3.
- FN112 See, e.g., [In re Enron Sec., Derivative & ERISA Litig.](#), 228 F.R.D. 541 (S.D. Tex. 2005); [In re Syncor ERISA Litig.](#), 227 F.R.D. 338 (C.D. Cal. 2005); [Thomas v. Smithkline Beecham Corp.](#), 201 F.R.D. 386 (E.D. Pa. 2001).
- FN113 Proposed Amendments to Rules of Civil Procedure of the United States District Courts, 39 F.R.D. 73, 102 (Advisory Committee Note to [Rule 23\(b\)\(2\)](#)).
- FN114 See Martin H. Redish, [The Logic of Persecution](#) 147-48 (2005).
- FN115 See generally Immanuel Kant, [Foundations of the Metaphysics of Morals](#) (Lewis White Beck trans., Bobbs-Merrill 1959) (1785). In a similar vein, a respected modern democratic theorist has argued that liberal democracy “assumes that the individual will is the cause of all actions, individual and collective and ... ascribes decisive epistemic and hence moral authority to the individual over his actions, on the grounds that he has privileged access to the contents of his own mind.” Ian Shapiro, [The Evolution of Rights in Liberal Theory](#) 275 (1986). Democratic theory, Shapiro asserts, further assumes that “individual consent ... [is] vital to the whole idea of political activity.” *Id.*
- FN116 See discussion *supra* at 83.
- FN117 See discussion *supra* at Section I.A.
- FN118 See Section II.A, *supra*.

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- FN119 [255 U.S. 356 \(1921\)](#).
- FN120 Proposed Amendments to Rules of Civil Procedure of the United States District Courts, 39 F.R.D. 73, 100 (Advisory Committee Note to [Rule 23\(b\)\(1\)](#)).
- FN121 [W. Union Tel. Co. v. Pa., 368 U.S. 71 \(1961\)](#) (state denied due process when it escheated unclaimed property held by Western Union because the state could not guarantee that no other state would make a conflicting and duplicative escheat claim).
- FN122 [527 U.S. at 838-40](#).
- FN123 *Id.*
- FN124 This would be due to the fact that parties who have not had their day in court cannot legally be bound by either res judicata or collateral estoppel.
- FN125 Proposed Amendments to Rules of Civil Procedure of the United States District Courts, 39 F.R.D. 73, 100-01 (Advisory Committee Note to [Rule 23\(b\)\(1\)\(B\)](#)):“This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter.”)
- FN126 [State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 \(1967\)](#).
- FN127 In the case of a class action, where there are potentially countless claimants, it would be impractical to delay enforcement of judgment until all claims have come to judgment. It would therefore make more sense to set up some type of time limit on awards as a control device.
- FN128 See discussion supra at Section II.B.2.
- FN129 Even though neither res judicata nor collateral estoppel would apply to the class member who had removed herself from the class, the problem of same situation stare decisis would remain a very significant concern. Moreover, given the modern demise of the mutuality of estoppel doctrine, it is conceivable that an absent class member who chose to opt out of the class could nevertheless invoke collateral estoppel against the party opposing the class in a subsequent individual proceeding. However, the Supreme Court has recognized as a possible limitation on the modern breach of mutuality those situations in which the litigant not participating in the first suit has consciously chosen to “sit on the sidelines.” [Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331-32 \(1979\)](#).
- FN130 At this point, we take no position on the exact manner in which a class member would be permitted to withdraw. See discussion infra at Section II.D.
- FN131 [Fed. R. Civ. P. 23\(d\)\(2\)](#).
- FN132 See [Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 \(1950\)](#) (due process requires the best notice practicable under the circumstances). In the case of far-reaching (b)(2) classes, of course, anything approaching individual notice

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would be impossible. That does not mean, however, that, under Mullane, notice reasonably designed to publicize the existence of the class could not be required.

- FN133 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, 143-44 (1997).
- FN134 David Rosenberg, [Adding a Second Opt-Out to Rule 23\(b\)\(3\) Class Actions:Cost Without Benefit](#), 2003 *U. Chi. Legal F.* 19, 23 (2003).
- FN135 [28 U.S.C. §2072](#) (prohibiting Federal Rules from modifying, enlarging or abridging substantive rights).
- FN136 See generally Martin H. Redish & Christopher R. Pudelski, [Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein](#), 100 *Nw. U. L. Rev.* 437 (2006).
- FN137 Richard A. Epstein, [Class Actions:Aggregation, Amplification, and Distortion](#), 2003 *U. Chi. Legal F.* 475.
- FN138 See generally Redish, *supra* note 87.
- FN139 [Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio](#), 301 U.S. 292, 307 (1937) (“We do not presume acquiescence in the loss of fundamental rights.”).
- FN140 [407 U.S. 67, 95](#) (1972).
- FN141 [Edelman v. Jordan](#), 415 U.S. 651, 673 (1974).
- FN142 See, e.g., [United States v. Moore](#), 340 U.S. 616 (1951).
- FN143 See, e.g., [Nat'l Equip. Rental v. Szukhent](#), 375 U.S. 311 (1964).
- FN144 See, e.g., [Carnival Cruise Line v. Shute](#), 499 U.S. 585 (1991).
- FN145 [Fed. R. Civ. P. 12\(h\)\(1\)](#).
- FN146 This is especially true in the context of class action opt-out. Professors Eisenberg and Miller have noted, based on their empirical study, that “[o]pt-outs from class participation and objections to class resolutions are rare: on average, less than 1 percent of class members object to classwide settlements.” Theodore Eisenberg & Geoffrey Miller, [The Role of Opt-Outs and Objectors in Class Action Litigation:Theoretical and Empirical Issues](#), 57 *Vand. L. Rev.* 1529, 1532 (2004). These “trivially small percentages” of opt-outs, *id.* at 1566, arguably demonstrate absent class members’ uncertainty or ignorance about their opt-out rights. See also Thomas E. Willging et al., [An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges](#), 71 *N.Y.U. L. Rev.* 74, 134 (1996) (“Many, perhaps most, of the notices [in federal court class actions] present technical information in legal jargon. Our impression is that most notices are not comprehensible to the lay reader.”).

- FN147 See discussion *supra* at Section I.C.
- FN148 Issacharoff, *supra* note 61. See also discussion [supra](#) at 83.
- FN149 For a detailed exploration of the nature and basis of this presumption, see Redish & Berlow, *supra* note 36.
- FN150 See Eisenberg & Miller, *supra* note 146, at 1538-39, for a catalogue of the existing scholarship.
- FN151 See *id.* at 1538-40 nn.34-48.
- FN152 The only exceptions appear to be Richard A. Epstein, [Class Actions:Aggregation, Amplification, and Distortion](#), 2003 U. Chi. Legal F. 475, 510 (“the control of one’s own litigation cannot be regarded as a small detail within the overall scheme of civil procedure.”) and John E. Kennedy, *Class Actions:The Right to Opt Out*, 25 Ariz. L. Rev. 3, 79 (1983) (recognizing the right to control one’s own litigation). However, neither of these sources provides an extensive theoretical or constitutional analysis of the litigant autonomy right as an outgrowth of the democratic process, and neither recognizes that recognition of this constitutional interest necessarily implies the constitutional inadequacy of opt-out procedures. Instead, both view opt-out as satisfying the constitutional interest in litigant autonomy.
- FN153 See discussion *supra* at I.D.
- FN154 See discussion *supra* at I.D.
- FN155 See discussion *supra* at II.C.
- FN156 See discussion *supra* at II.A.
- FN157 While this may be true as a matter of procedural due process, whether opt out is permissible as a matter of macro democratic theory is beyond the scope of this Article. For a discussion of that issue, see generally Redish, *supra* note 87.

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Articles

CY PRES RELIEF AND THE PATHOLOGIES OF THE MODERN CLASS ACTION: A NORMATIVE AND
EMPIRICAL ANALYSIS

Martin H. Redish¹ Peter Julian² Samantha Zyontz³

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I. Introduction: Cy Pres and the Problems of Fashioning Class-Wide Relief

The purpose of the modern class action, a procedural aggregation device authorized by [Rule 23 of the Federal Rules of Civil Procedure](#), is to collectivize individual claims into a single proceeding, with the overwhelming majority of the plaintiffs assuming a purely passive role in the proceeding. The procedure is thereby designed to assure efficient resolution of claims too numerous to be joined and too burdensome to be litigated individually. As worthwhile as this concept may sound in theory, however, the harsh realities of the modern class action have demonstrated that its implementation has been far from simple in practice.

In many class actions, the claims of the individual class members are extremely small. Of course, one might argue that it is for exactly such claims that the class action procedure is so well suited, for the very reason that individual suit in such cases would be infeasible.¹ The serious complicating factor, however, is that notifying individual class members of their right to file a claim into a class-wide settlement or award fund will often prove to be both difficult and inefficient. Moreover, even when individual class members have received notification of their rights to compensation from a general fund, their claims will often be so small that their size fails to justify the effort and expense of pursuing those claims on an individual basis. Finally, since generally individual class members will have become part of the class not by affirmatively choosing to enter it but rather by failing to opt out of the class,² the court can never be certain that the absent class members are even fully aware of their inclusion in the class in the first place. This is so despite the fact that they likely received formal notification of the suit.

If, for these reasons, a large majority of claimants never receive compensation for the harm defendants have inflicted, courts might fear that even defendants who have been found liable may never have to pay for their violations of the law. Courts, plaintiffs' attorneys, and class action scholars have therefore struggled to come up with radical ways in which defendants in class actions can be forced to pay for their violations of the law.³ The desire to fashion such relief may be understandable, given the available alternatives to these creative remedial developments. Absent resort to such radical fashioning of relief, four alternatives would appear to exist: (1) having the remainder of the unclaimed fund revert to the defendant, who, presumably the court has already determined, has violated the law; (2) allowing the unclaimed portion of the damage fund to escheat to the state, much as most unclaimed property does after a specified period of time; (3) increasing the pro-rata share of the class members who do file claims until the remainder of the damage fund is consumed; or (4) refusing to authorize the class proceeding in the first place. Under alternatives 1 and 4, whatever deterrent effect the substantive law was designed to have will either be completely defeated or at the very least seriously diluted. Alternative 2 may well achieve the substantive law's goal of deterrence, since the defendant is still forced to pay fully for the harm it has caused. However, it will likely not come close to compensating or aiding the victims who have been injured by the defendant's unlawful behavior. Finally, alternative 3 amounts to an unjustified windfall to the plaintiffs who have filed claims, since they will receive considerably more than their properly allotted damages.

In place of what many perceive to be unsatisfying alternatives, courts and scholars have proposed a variety of radical methods to determine and administer class-wide relief. Usually, the terms used to describe these radical methods are “fluid class recovery” or “cy pres,” with the two concepts on occasion being treated by courts and commentators as fungible.⁴ While a broad definition of both concepts does render them largely equivalent, it is important to discern subtle but significant differences. As an abstract matter, both concepts refer to efforts to provide the “next best” form of relief in cases where it is impractical or impossible to directly compensate the injured class members. In more recent times, however, the term cy pres has generally referred to an effort to provide unclaimed compensatory funds to a charitable interest that is in some way related to either the subject of the case or the interests of the victims, broadly defined. In contrast, “fluid class recovery,” in the sense in which we use the term here, refers to efforts to fashion relief to those who will be impacted by the defendant in the future, in an effort to roughly approximate the category of those who were injured in the past. Thus, both concepts involve some form of “second best” relief. However, in the sense we employ the terms (and as modern courts often, though not always, employ them) fluid class recovery represents a far more disciplined effort to indirectly compensate injured victims (through future approximations of who those victims were) than does cy pres, which in its modern form demands merely some generic link of the proposed recipient charity to the nature of the suit.⁵

Today, of these alternative methods, cy pres relief appears to be the one most often employed by federal class action courts. While there has been a fair bit of legal controversy over fluid class recovery,⁶ there has been only occasional concern expressed, either by courts or scholars, about the dramatic turn in modern class actions toward the use of cy pres relief. Though it is difficult to know for certain why the practice’s growth has gone nearly unnoticed, much less criticized, by the scholarly world, we can postulate a number of possible explanations. First, unlike fluid class recovery, the cy pres concept has venerable origins in the law, having roots in the law of estates and trusts as far back as Roman times and reaching its zenith in the period following the Middle Ages.⁷ Second, unlike its biggest remedial competitor, fluid class recovery, which is expressly designed as a means for determining damages for an injured class, cy pres relief is purportedly invoked merely as a means of disposing of unclaimed property. Traditionally, the disposition of unclaimed property has been considered to be wholly distinct from the underlying substantive law on which the proceeding giving rise to the award was grounded.⁸

There are significant problems with both rationales for giving class action cy pres a virtual free pass. Initially, while it is true that the doctrine finds its origins in the ancient law of trusts, that historical grounding in no way logically justifies its extension to the radically different context of modern class action adjudication. In fact, this radical extension did not occur until as recently as the 1970s-and even then solely by resort to strained analogy.⁹

Secondly, though it is generally true that treatment of unclaimed awards is considered conceptually distinct from the substantive merits of the litigations that led to those awards,¹⁰ class action cy pres presents a dramatically different situation from the normal unclaimed property context. In the normal case, when an award is made or settlement established, the reasonable expectation is that the plaintiffs who have actively pursued that award by affirmatively choosing to file suit will claim it once they have won their suit. In the relatively rare case where that does not happen, it is perfectly reasonable to treat the unclaimed funds as the law would treat any other unclaimed property (which usually means escheat to the state). In the class action context, in contrast, for reasons we will discuss, there is no such reasonable expectation.¹¹

It is easy to grasp the role that cy pres is designed to play in implementing and vindicating the modern class action. In its modern form, cy pres relief is uniquely and intentionally designed to bridge the often enormous gap between a finding of liability and the distribution of damages in a class action. Indeed, in many class actions it is solely the use of cy pres that assures distribution of a class settlement or award fund sufficiently large to guarantee substantial attorneys’ fees and to make the entire class proceeding seemingly worthwhile. Absent the possibility of a sizable award to charity created by cy pres, plaintiffs’ attorneys and courts might reasonably fear that many of these class proceedings would be widely perceived as failing either to punish the wrongdoer or compensate the victims. Absent a public perception of success, class action advocates could reason, the viability of the modern class action as a weapon against corporate illegality could be seriously undermined. Therefore, class action attorneys and supporters might believe that with cy pres, the class proceeding still punishes the wrongdoer and that even if it fails to compensate actual victims, at the very least it uses the wrongdoer’s money for worthy purposes. In this important sense, use of cy pres represents an integral- indeed, often essential-element of the class

action process, rather than merely a neutral method of unclaimed property disposition that happens to be applied in the class action context.

It is this integral role of cy pres that renders it so troubling a part of the modern class action. In a variety of ways, use of cy pres threatens to create or foster “pathologies” of the modern class action. By the term “pathology,” we refer to three different harms to the interests of the nation’s constitutional democracy which the modern class action can be distorted to bring about: a use of the class proceeding that is either (1) inconsistent with the limits of the procedure’s legal source—i.e., the Federal Rules of Civil Procedure, as well as the Rules Enabling Act,¹² which authorizes and limits creation of those rules; (2) a perversion or distortion of the underlying substantive law being enforced in the class proceeding; or (3) a violation of the constitutional dictates that control and limit the procedure. These “pathologies” derive from threats to the case-or-controversy requirement of Article III,¹³ the dictates of separation of powers that inhere in the Constitution’s limited grants of authority to each branch of federal government, and the Due Process Clause of the Fifth Amendment.¹⁴ Thus, the “pathologies” of the modern class action, then, refer to all the ways in which the class action has been structured or applied to exceed the bounds of the limitations legally placed upon it in order to preserve both constitutional democratic values and the rule of law.

Cy pres furthers the pathologies of the modern class action in two important ways— what can appropriately be labeled “intrinsic” and “instrumental.” The former term concerns pathologies to which use of cy pres inherently gives rise, while the latter involves ways in which cy pres facilitates or provides cover for political and constitutional pathologies associated with the modern class action itself. In both contexts, cy pres gives rise to serious problems of constitutional law and democratic theory. By awarding defendant’s money to a charity, cy pres introduces into the class adjudication an artificially interested party who has suffered no injury at the hands of the defendant. In so doing cy pres contravenes the adversary “bilateralism” constitutionally required by the adjudicatory process embodied in Article III’s case-or-controversy requirement.¹⁵ Use of cy pres simultaneously violates the constitutional dictates of separation of powers by employing a Federal Rule of Civil Procedure to alter the compensatory enforcement mechanism dictated by the applicable substantive law being enforced in the class action proceeding. It has somehow become common practice among many courts, scholars, and members of the public to view the modern class action as a free-standing device, designed to do justice and police corporate evildoers.¹⁶ As nothing more than a Federal Rule of Civil Procedure, however, the class action device may do no more than enforce existing substantive law as promulgated either by Congress or, in diversity suits, by applicable state statutory or common law. Yet in no instance of which we are aware does the underlying substantive law sought to be enforced in a federal class action direct a violator to pay damages to an uninjured charity.

In addition to evincing its own inherent constitutional pathologies, cy pres simultaneously facilitates the flaws and defects in general class action jurisprudence, and in this sense operates instrumentally. Cy pres creates the illusion of class compensation. It is employed when-and only when-absent its use, the class proceeding would be little more than a mockery. To be sure, the defendants would still gain the protections of res judicata and collateral estoppel, and the class attorneys would most assuredly still get at least some fees. But in cases in which cy pres is deemed necessary it is very likely that the bulk of the class of victims will go uncompensated. This is due to the simple fact that, purely as a practical matter, in at least certain situations there simply exists no way that a class proceeding can effectively aggregate and satisfy the small claims of individual right holders. Yet when the class action court introduces a wholly extraneous but sympathetic charitable actor into the suit, purportedly on the basis of its authority under a procedural rule, the redistributive goals of the substantive law are somehow assumed to be satisfied. But the substantive law authorizes no such relief; no legislative body has expressly chosen to abandon its compensatory enforcement mode in favor of some directive of a charitable contribution as punishment for a defendant’s unlawful behavior. Cy pres, then, is far more than the neutral disposition of unclaimed property that it is thought to be.

The remainder of this Article is divided into four parts. Part II explores the origins of cy pres in the law of trusts, and its transformation—in a radically different form—in the modern class action. Part III then considers the serious structural and constitutional problems to which use of cy pres gives rise, in both the intrinsic and instrumental senses. Part IV examines the available empirical evidence concerning the use of cy pres in the modern class action. Because of the limited data available we make no claim that our empirical findings provide scientific support for our conclusions. They nevertheless provide valuable insights into the manner in which class action cy pres fosters the pathological aspects of the modern class action.

Part V contrasts a fluid class recovery model with cy pres. Our analysis leads to the ultimate conclusion that resort to cy pres in the class action context contravenes important constitutional and procedural limitations, and must therefore be rejected. Indeed, we conclude that use of cy pres threatens core notions of our constitutional democratic system. Its use in the modern class action must therefore be rejected.

II. The Evolution of Cy Pres: From Charitable Trusts to Class Actions

A. The Origins of Cy Pres

The term “cy pres” derives from the French expression “cy pres comme possible,” which means “as near as possible.” Cy pres developed originally in the law of trusts, where it is deeply rooted.¹⁷ It was only by way of recent analogy that cy pres was introduced into the area of class actions.¹⁸ After class action practice was revolutionized by the amendments to [Rule 23](#) developed by the Rules Advisory Committee and adopted by the Supreme Court in 1966,¹⁹ large damage classes with large numbers of small claims held by claimants who had made no affirmative choice to participate in the class proceeding became a relatively common occurrence. Both courts and attorneys quickly became aware that there would be serious problems actually getting awards or settlements from defendants to their victims, or, in the alternative, at least finding some worthwhile way to dispose of those funds. By the early 1970s, scholarly commentary began to suggest drawing an analogy to cy pres in the law of trusts for these purposes, and it was expressly adopted by a number of state and federal courts starting in the mid-1970s and 1980s.²⁰ Wholly apart from the serious practical and conceptual problems to which the use of cy pres in the class action context gives rise,²¹ one may reasonably question the very basis for the analogy between cy pres in the law of trusts and cy pres in the class action context. In numerous ways, the trusts and class actions contexts are the equivalent of apples and oranges. To understand the logically faulty nature of the analogy, however, it is first necessary to explore the origins and development of cy pres in both contexts. This Part will trace the history of cy pres, first in the law of trusts, and then its development in class actions.

1. The Development of Cy Pres in Trust Law

Pursuant to cy pres in its original context of trust law, when a valid charitable trust specified a charitable gift that had been rendered impossible or impractical because of exigent circumstances, courts would attempt to give effect to the testator’s intent by putting the funds to the next closest use.²² For example, if a testator designated funds for a school for orphans in Chicago, but no such school existed, then a court may give the funds to a school for orphans in nearby Cicero in an effort to find a charity that is closest to the testator’s intent.

The origins of cy pres are obscured by time, but it appears that the precursor of the modern form of cy pres originated in sixth century Rome.²³ Justinian’s Digest contained a passage directing that a charitable gift given to celebrate games that had since become illegal be put to a legal use to keep the deceased’s memory alive. In more modern times, much of cy pres’ development in England derives from a combination of the special place held by charitable gifts in history and the historical connection between trusts and the church.²⁴ In fourteenth century England, it was understood that a dying man would often discuss with his priest where he wanted to be buried and how he wanted to distribute his estate, which the church was responsible for administering.²⁵ The man frequently made a charitable bequest because of “his own concern for the future of his soul.”²⁶ The church established a custom that any property left without a specific designation would be used “pro salute animae” - “for the good of the testator’s soul.”²⁷ From this premise, it was only a relatively short step to the classic doctrine of cy pres: where the testator’s dying designation could not reasonably or legally be achieved, authorities would seek out the closest feasible alternative.

Scholars have suggested two theories to explain why England adopted cy pres. The first asserts that cy pres derives from society’s preference for charities above all other institutions.²⁸ Because of this preference, courts gave charitable gifts special treatment and began to give gifts to charities the same consideration as gifts to persons.²⁹ Accordingly, a gift to a charity that

was rendered impossible was to be accomplished in another way, much like a gift to a person who had died might pass to the person's heirs.³⁰ Under this theory, cy pres developed naturally out of the law that provided charities special status.

A second possible theory for English trust law's adoption of cy pres is grounded in the relationship between the church and the courts.³¹ Following the reformation, charities were controlled by the chancellor,³² who was a legal official deemed heir to ecclesiastical knowledge, including the Roman law that provided for ensuring that charitable trusts do not fail in order to ensure the perpetuation of the testator's memory.³³ In the Middle Ages, individuals purchased their salvation through indulgences from the church.³⁴ If a testator's charitable intent was motivated in part by the desire to purchase an indulgence, church officials may have reasoned that allowing the trust to fail, thereby failing to give effect to the testator's intent, would unjustly deprive the deceased of salvation. This would have been considered an especially unjust result, since the loss of salvation under these circumstances would not have been the fault of the deceased.³⁵ Even if the original motivation for the trust's creator was not receipt of an indulgence, the church may have reasoned that denying a person an improved chance at salvation was unjust. Under this theory, scholars hypothesize, because the chancellor simultaneously served as an official of the church, he would have had the twin incentives of saving the person's soul and keeping the funds within the church.³⁶ This combination of piety and greed may have prompted the creation of cy pres in the English law.³⁷ Thus, while the precise path that led to the adoption of cy pres in England has been lost to the ages, both theories concur that the adoption was motivated by a historical presumption favoring charity.

2. Two Forms of Cy Pres in England

In England, cy pres took two forms: judicial and prerogative.³⁸ Judicial cy pres was exercised exclusively by the chancellor, who would examine the underlying intent behind a filed charitable trust whose directive could not, for whatever reason, be implemented.³⁹ Once the chancellor had determined that intent, he would designate the trust's corpus to a charity or worthy project that most closely approximated the testator's intent behind the original gift.⁴⁰ For example, if a testator designated a gift to an astronomy department at a college, but the department had closed before the testator's death, the chancellor would attempt to determine the testator's intent behind the gift. If he concluded that the intent had been to give the funds to astronomy research, then he would donate the funds to an astronomy department at another college. If, on the other hand, he decided that the intent was to give the funds to the particular college, then he would donate the funds to another department at the same college.

The other form of the doctrine, prerogative cy pres, was exercised by the king as *parens patriae*.⁴¹ Unlike the narrow discretion afforded the chancellor under judicial cy pres, under prerogative cy pres the king could, in his discretion, appropriate failed charitable gifts and designate the funds to other, usually marginally related purposes.⁴² Later, the chancellor assumed the King's prerogative, acting as his proxy.⁴³ Prerogative cy pres was invoked when no option was available that would approximate the testator's intent or the intent was to donate to an illegal activity.⁴⁴ An example is the case of *Da Costa v. De Pas*.⁴⁵ There a decedent had, during his life, designated a sum of money to establish a yeshiva (a Jewish religious school) in England.⁴⁶ At the time of the decedent's death, no gift could be given to any religious institution other than the Church of England.⁴⁷ The chancellor, acting as a proxy for the king, appropriated the gift for the purpose of instructing boys in the Christian religion at a foundling hospital.⁴⁸

3. Cy Pres in American Trust Law

The adoption of cy pres in America was restrained by a fear that it would vest too much power in the judiciary.⁴⁹ This perception was inspired in large part by the perceived abuses associated with prerogative cy pres,⁵⁰ and some were concerned that courts would change wills and bequests for mere convenience.⁵¹ The slow pace of adoption of cy pres in America was also due in part to the fact that American courts misconstrued the impact of the English Statute of Charitable Uses on cy pres.⁵² This statute codified the English cy pres common law, but many early American legal scholars mistook it for the exclusive source of the cy pres doctrine in English law.⁵³ Eventually, in *Trustees of the Philadelphia Baptist Ass'n v. Hart's Executors*, the Supreme Court incorrectly resolved confusion over whether cy pres was an equitable doctrine independent of

the Statute of Charitable Uses.⁵⁴ The Court held that the doctrine was grounded only in the statute.⁵⁵ A number of states based their decision to reject cy pres on the Court's decision in *Hart's Executors*,⁵⁶ while other states rejected the law of charitable trusts in their case law.⁵⁷ In later years, states began slowly to "judicially affirm[]" cy pres.⁵⁸ Currently forty-six states and the District of Columbia have codified judicial cy pres.⁵⁹ Eighteen of those states adopted the Uniform Trust Code version of cy pres⁶⁰ (and three of the four states which codified cy pres previously had such statutes).⁶¹

States generally require that three factors be established before courts may invoke cy pres in the enforcement of charitable trusts: (1) the gift must constitute a valid charitable trust; (2) the specified gift must be impossible or impractical; and (3) the testator must have a charitable intent in making the gift.⁶² The first element must satisfy two requirements: first, a charitable trust must have been created, and second, the trust must be valid.⁶³ A trust is invalid if the language makes it impossible to determine who the recipient is supposed to be, if execution of the trust would require the legislature pass or repeal a law, or if the trust would violate a law.⁶⁴ For the second element, a court may not find a trust impractical or impossible merely because its execution would be inconvenient, or the number of beneficiaries is declining, or for any other reason that unnecessarily distorts the testator's intent.⁶⁵ A court may attempt to carry out the trust until the gift becomes impossible, or it may invoke cy pres immediately upon its realization that the goal of the trust will inevitably become impossible or impractical to achieve.⁶⁶ The third element, that the testator must have a charitable intent, is the most controversial of the three because it requires judges to engage in an exercise akin to mind reading.⁶⁷ Generally, courts will find this requirement not met if the gift is made for a non-charitable purpose.⁶⁸ Because of the difficulties in applying the third element, some states have limited or discarded it.⁶⁹ In Pennsylvania, the charitable intent requirement was legislatively removed from the state's cy pres requirements, and in Connecticut the state supreme court did away with the requirement.⁷⁰ Massachusetts has a strong presumption that the requirement is satisfied, unless another intent is expressed in the bequest.⁷¹

B. Application of Cy Pres to the Class Action Context

1. The Origins of Class Action Cy Pres

In its original form and for centuries thereafter, the cy pres doctrine was never thought to have anything to do with the structuring of relief awarded against a defendant who had been judicially found in an adversary proceeding to have violated the legal rights of the plaintiff. Its context, rather, was confined exclusively to the law of trusts and estates; it played no role in the adjudication of legal claims in an adversary setting. It most assuredly was never associated with either group litigation or the class action procedure. Thus, while the doctrine of cy pres has a venerable history in its original format, use of a venerable label cannot hide the practice's radical nature in the class action context.

In 1966, [Federal Rule of Civil Procedure 23](#) was amended to dramatically revise and expand the class action procedure.⁷² The drafters recognized that, largely due either to inertia or confusion, many potential class members would fail to respond to notification of a class action. However, they reasoned that class members' silence did not necessarily reflect a choice not to participate in the suit. Therefore the amended rule provided that in non-mandatory classes,⁷³ absent class member inaction would lead to inclusion in, rather than exclusion from, the class.⁷⁴

In cases in which a class-wide award is made or a class-wide settlement fund created, individual class members must be compensated out of the damage fund that has been established. On some occasions this will be more difficult than others. For example, where it is difficult to find the class members, or the amounts of their claims are too small or the paperwork required too burdensome to justify the effort required for them to collect from the fund, much of the fund will likely remain unclaimed. Courts therefore faced the problem of what to do with the unclaimed funds.⁷⁵ Traditionally, such funds would revert to a defendant—often an unpopular result because reversion of the funds undermines the deterrent effect of the suit and leaves the defendant largely with the benefit of his illegal activity.⁷⁶ This concern, combined with the desire to avoid compensating only a small percentage of class members who responded to notifications about class actions, led courts and commentators to seek to develop innovative ways to compensate injured class members. Only by doing so could they avoid allowing unlawful behavior to go unpunished.

Use of the cy pres doctrine in the class action context can be traced largely to a pioneering student Comment, published in the University of Chicago Law Review in 1972.⁷⁷ There it was argued that “[w]hen distribution problems arise in large class actions, courts may seek to apply their own version of cy pres by effectuating as closely as possible the intent of the legislature in providing the legal remedies on which the main cause of action was based.”⁷⁸ The writer saw three general ways in which traditional cy pres could be applied in the class action context as a means of disposing of uncollected damages: “(1) distribution to those class members who come forward to collect their damages, (2) distribution through the state in its capacity as *parens patriae* or by escheat, and (3) distribution through the market.”⁷⁹ The first option meant that the share of those plaintiffs who did file claims could be proportionally increased to consume the uncollected funds. The second option provided that either the unclaimed funds could simply escheat to the state or instead be utilized in a form of “conditional escheat,” meaning that the funds could go to the state on the condition that the state agreed to use the funds for the general benefit of citizens in the position of the plaintiff class members. The third option described what we call “future approximation fluid class recovery”: the judicial direction of future price reductions in an effort to provide relief to future users and thus, approximately capture the injured class members on the assumption that future users are likely to roughly include most past users.⁸⁰

The Comment acknowledged that the first option, increasing the share of the class members who made claims, may provide the next best solution because it would ensure that the recipients of the funds were individuals who had suffered similar harm to that suffered by the uncompensated absent class members, and avoid reducing the deterrent effect on the defendant or unjustly enriching him.⁸¹ Yet there are significant concerns with this form of distribution.⁸² “[T]his method expressly contemplates that silent class members will not receive any compensation, even indirectly,” and the class members who made claims would be unjustly enriched at the expense of the absent class members.⁸³ Furthermore, use of this approach could create a perverse incentive among victims to bring suits where large numbers of absent class members were unlikely to make claims. It might also create an incentive for the represented class members to keep information from the absent class members.⁸⁴

Under the second option—distribution through the state⁸⁵—the court would direct the unclaimed funds to be given to the state, to be used for the benefit of the citizens generally or for a designated social purpose.⁸⁶ An example of a court giving the funds to the state for a designated purpose, what could be termed “conditional escheat,” is the decision in *West Virginia v. Chas. Pfizer & Co.*⁸⁷ In that case, the notice by publication to consumer members of the class stated that if they failed to make an individual claim in ninety days, “that [failure] will constitute an authorization to the Attorney General [or other government official] to utilize whatever money he may recover as your representative for the benefit of the citizens of your State in such manner as the Court may direct.”⁸⁸ The attorney general recommended using the funds to establish public health projects.⁸⁹ Despite the fact that the underlying action was an antitrust suit involving the drug tetracycline, the suggested projects included “drug abuse programs, community health clinics, and lead poisoning and sickle cell anemia research, which the attorney regard[ed] as areas of need for which adequate funding is not politically feasible.”⁹⁰

The Comment recognized that putting the funds to a use that would more directly benefit the absent class members would provide a better analogy to a cy pres remedy.⁹¹ Nonetheless, it argued that when a close approximation of the actual class is unavailable, “there is sufficient flexibility in the cy pres doctrine to permit the state to allocate the funds to other programs designed to maximize public benefit.”⁹² The Comment also acknowledged that directing the use of funds for a specific purpose may give rise to objection because any additional benefits to the absent class members may be “quite remote,” and of no more direct benefit than general escheat to the state.⁹³ Finally, problems exist concerning oversight of the use of the funds to ensure they are used for the benefit of the class.⁹⁴

2. Development of the Modern Form of Class Action Cy Pres

Under the version of class action cy pres originally proposed in the University of Chicago Law Review Comment in 1972, the acceptability of a cy pres remedy was to be measured by “(1) the extent to which the injured class receives the damages, (2) the [administrative] cost of applying the remedy, and (3) the equitability of the distribution with respect to the potential of

windfalls for nonclass members.”⁹⁵ Also, as originally contemplated, cy pres would be used only in large classes with unclaimed remainders.⁹⁶

Although the initial scholarly suggestion of some form of class action cy pres came in 1972, at that time no thought seems to have been given to creation of the current version of the doctrine. In its original context of trusts and estates, it should be recalled, cy pres was employed in an effort to find the “next best” means of achieving the testator’s or benefactor’s charitable purpose when enforcement of his original directive had become infeasible. In one sense or another, each of the three alternatives originally proposed in 1972 sought to find the “next best” means of compensating absent class members when it was impractical or impossible to compensate them directly. However, in 1987 two student Notes argued that remainders from class actions should be donated to charitable purposes, even where such a donation was, at best, only remotely designed to benefit the injured class members.⁹⁷ Both Notes conceived of cy pres as a freestanding alternative to class action remedies in “small claim consumer class actions.”⁹⁸ Under this form of cy pres, funds would be used to create a charitable trust, and that trust would be used either to create a charitable foundation or donate to a pre-existing charitable organization related in some way (however loosely) to the subject of the class action suit.⁹⁹ The benefit of charitable trust cy pres, according to these notewriters, is that the defendant is fully disgorged of his unlawful gains, the distribution costs do not devastate the recovery fund, and the disgorged funds are used for beneficial purposes related in some way to the harm caused by the defendants.¹⁰⁰

At this later stage of its development, class action cy pres began to take on a subtly altered tone. The “next best” relief was no longer focused wholly on finding an alternative means of indirectly compensating victims who could not feasibly be compensated directly, but rather simply on seeking a beneficial use of the compensatory funds exacted from the defendant. This transformation makes all the difference in the world in determining the current practice’s legitimacy and constitutionality. As modified, cy pres improperly transforms the legal DNA of both the underlying substantive law being enforced in the class proceeding and the structural framework of the adversary process imposed by Article III of the Constitution.¹⁰¹ Before we can effectively explore the serious-and ultimately fatal-pathologies of class action cy pres, however, it is first necessary to understand the manner in which the original form of cy pres, established in the law of trusts, has been misused by federal class action courts.

3. Judicial Development of Class Action Cy Pres

In its current form as used in the federal courts, cy pres relief in class actions has involved the donation of a portion of the settlement or award fund to charitable uses which are in some loose manner connected to the substance of the case. Courts seem to feel no need to find a form of relief that will ultimately have the effect of indirectly compensating as-yet uncompensated class members.

The earliest judicial use of some form of cy pres in the class action context came in 1974 in the Southern District of New York’s decision in *Miller v. Steinbach*.¹⁰² The suit was brought on behalf of the owners of 4,167,302 shares of Baldwin-Lima-Hamilton Corporation (BLH) stock against a company with which the shareholders’ company had merged. The complaint alleged that the terms of the merger had been unfair and that the securities laws had been violated.¹⁰³ In approving a proposed class settlement, the court noted that

[i]n view of the very modest size of the settlement fund and the vast number of shares among which it would have to be divided, the parties have agreed instead . . . to pay the fund to the Trustee of the BLH Retirement Plan, applying a variant of the cy pres doctrine at common law.¹⁰⁴

The court reasoned that “while neither counsel nor the Court has discovered precedent for the proposal,” neither had it “been made aware of any precedent that would prohibit it.”¹⁰⁵ Concluding that “no alternative is realistically possible,” the court deemed the settlement “fair and reasonable.”¹⁰⁶

Miller provides a valuable illustration of the important dichotomy we draw between charitable cy pres relief-the category in which virtually all of the recent uses of cy pres in class actions fit-and creative efforts to find alternative or indirect means of

compensating absent class members when direct compensation is infeasible. In the former category, the cy pres award of unclaimed damage funds is made to a charitable institution that has, at best, some loose connection to the subject matter of the suit. No effort is made to assure the court that by donating to that charity it will be indirectly benefiting the absent class members who had not been directly compensated. In contrast, under fluid class recovery the measure of the chosen relief is the extent to which it actually approximates through future relief those who had been injured in the past.¹⁰⁷

It is clear that courts in the cy pres cases make no such effort. In *Miller*, for example, the court made no effort to assure itself that by donating unclaimed funds to the BLH retirement fund, the settlement's award was likely to indirectly compensate members of the injured class. For the settlement to have achieved that end, the court would first have had to find that most BLH shareholders were in fact BLH employees who would benefit from the retirement fund, and correspondingly that most BLH employees (those who would benefit from an award to the retirement fund) were BLH shareholders. While for all we know this might well have been the case, no finding to this effect was explicitly made by the court, nor did the answer to that question seem to be of any importance to the court. In this manner, *Miller* illustrates the focus of the courts that have employed the charitable award version of cy pres in the class action context: putting the defendant's funds to valuable and worthwhile use, rather than necessarily compensating the absent class members.

Another example of the charitable version of cy pres is the California state court decision, *Vasquez v. Avco Financial Services*.¹⁰⁸ There, pursuant to a settlement order the majority of the settlement funds were donated to an organization that educated consumers on credit transactions. The court reasoned that such a distribution would provide a greater benefit to the class plaintiffs than would individual distributions.¹⁰⁹ The fact remains, however, that such a "benefit" to the class represented a far more attenuated form of "compensation" than would individual distributions.

An even stronger illustration of the attenuated connection between the direct interests of the class members and the charity receiving the cy pres award is the federal district court decision in *In re Compact Disc Minimum Advertised Price Antitrust Litigation*.¹¹⁰ There the court in a compact disc advertised price antitrust litigation authorized a cy pres award to the National Guild of the Community School of the Arts.¹¹¹ There was no way that the designation even arguably compensated injured victims, directly or indirectly, in any recognizable way. Similarly, in a class suit concerning infant formula a cy pres award was made to the American Red Cross Disaster Relief Fund.¹¹² Along the same lines are the decisions in *In re Wells Fargo Securities Litigation*,¹¹³ where a federal district court made a cy pres award to the Stanford Law School Securities Class Action Clearinghouse,¹¹⁴ and in *Jones v. National Distillers*,¹¹⁵ where the court awarded a cy pres award from a securities fraud suit to a legal aid society because it was more related to the subject matter of the suit than would be "a dance performance or a zoo."¹¹⁶ In none of these decisions did the charitable designation in any way constitute even a feeble attempt to indirectly compensate victims.

Although district courts usually look favorably upon the use of cy pres in class actions, appellate courts have not always been as receptive to the practice. Indeed, on occasion appellate courts have expressly recognized its potential for abuse.¹¹⁷ For example, one appellate court overturned a cy pres distribution when the district court had failed to consider whether the unclaimed funds could have instead been distributed as treble damages to class members in an antitrust case.¹¹⁸ Another appellate court did so because the large amount of the cy pres settlement was merely punitive rather than compensatory.¹¹⁹ Yet another did so because the defendants would have been required to pay an amount disproportionate to the harm to class members.¹²⁰ The fact remains, however, that cy pres has played an important-indeed, arguably vital-role in assuring the widespread use of the class action device.¹²¹

4. Why Cy Pres in the Class Action Context?

With such widespread use, we may question what, exactly, are the parties and courts seeking to accomplish by borrowing for use in class actions a doctrine developed in entirely different substantive and procedural contexts. It is likely that the relevant motivation comes down to the simple fact that, in the minds of advocates of enhanced use of the class action device, absent resort to cy pres relief generally no acceptable alternative remedial framework exists. It is therefore probably accurate to surmise that in the view of class action supporters, no alternative remedy would effectively punish and deter unlawful

behavior while simultaneously dedicating defendants' money to what are deemed socially beneficial purposes.

The point can best be understood by considering what would happen to unclaimed funds if cy pres relief were unavailable to a class action court. One conceivable alternative would be reversion of the unclaimed funds to the defendant. The Supreme Court indicated in *Boeing Co. v. Van Gemert*¹²² that the claim of a defendant to reversion of unclaimed awards is, as a legal matter, at least colorable.¹²³ This alternative has been attacked because it is thought to amount to "unjust enrichment" of the defendant.¹²⁴ However, this characterization appears to misperceive the underlying basis of the reversion concept. Presumably, unclaimed funds would revert to the defendant on the theory that defendant's money remains its own unless and until it has been awarded as damages to and claimed by the plaintiff. The legal inertia, in other words, is presumed to be in favor of the status quo until both of these events take place. Of course, advocates of cy pres may respond that when funds awarded as the result of litigation are unclaimed, the money is no longer the defendant's; rather, it has been judicially determined to be damages for illegal behavior. But under the nation's private rights model of adjudication,¹²⁵ damage awards are not made "in the air." Instead, they are awarded to a specific plaintiff, who has presumably brought suit to vindicate his substantive right which the defendant has allegedly violated.¹²⁶ Until that plaintiff recovers the funds, this argument proceeds, if only due to legal inertia the money remains the property of the defendant. To be sure, it may trouble us that a defendant who has been judicially determined to have violated the law gets to retain money that rightly should have been transferred to its victims. But in light of the underlying theoretical framework of the judicial process, reversion to the defendant has at least an arguable foundation when the victim, authorized to recover by governing substantive law, has for whatever reason failed to claim his award.

The primary alternative to reversion of unclaimed funds to the defendant, absent resort to cy pres, is escheat to the state.¹²⁷ Under the theory of this approach, once the money has been awarded in the form of damages as part of a judgment, ownership of the money automatically transfers to the plaintiffs. If the money goes unclaimed, the theory goes, it is appropriately treated in the same manner as all unclaimed property is usually treated: it escheats to the state.¹²⁸ But once again, this mode of disposition understandably leaves many unsatisfied, since we cannot be assured that the award will necessarily be used by the state for socially valuable purposes related to the subject matter of the suit.

The third alternative mode of disposition of unclaimed funds, absent resort to cy pres, is an increase in the pro rata share of claiming plaintiffs. But as commentators have noted, such an approach necessarily results in an undeserved windfall for those plaintiffs, who have already been compensated for the harm they have suffered.¹²⁹

There is, of course, a fourth alternative that often seems to go unnoticed: simply denying class certification on the grounds that such a proceeding would be unmanageable. Where compensation of individual victims in a manner contemplated by the underlying substantive law through use of the class action device is infeasible, the inexorable conclusion must be that resort to the class action procedure is improper. Its use in such contexts would be the equivalent of insertion of a procedural square peg in a substantive round hole. Those who wish to see widespread corporate or governmental misbehavior punished, however, understandably find this alternative unsatisfactory. Nevertheless, as nothing more than a rule of procedure the class action device cannot rise above the substantive law it is designed to enforce. If existing substantive remedies are deemed inadequate as a means of enforcing the law's behavioral prohibitions, the task of altering the remedial framework is one for the authority that created the substantive law in the first place. Resort to cy pres when existing remedies cannot effectively be invoked by use of the class action device, then, improperly distorts the remedial structure through use of a nakedly procedural device.

Beyond putting defendant's funds to valuable and worthwhile use, there may also exist an additional dynamic at work in favor of the use of cy pres in the class action context. Empirical research has shown that, whether class attorneys are compensated by use of a percentage-of-the-fund method or by a lodestar method (which measures fees on a calculation of the amount of work the attorney put into the suit),¹³⁰ the actual fee, on average, generally amounts to one third of the fund-the size of which always includes the funds distributed to a designated charity through cy pres.¹³¹ If cy pres did not exist, the fund-and, of course, the size of the attorneys' fee-might well be far smaller. This is especially true when the cy pres relief is established by judicial order or class settlement ex ante. Thus, it is surely reasonable to speculate that one of the primary effects, if not purposes, of class action cy pres is to inflate the size of class attorneys' fees. Whether intended or not, it surely

has that effect.

Plaintiff class attorneys may have even stronger motivations for use of cy pres relief. As already noted, in a number of situations individual claims of absent class members will be too small, too difficult to prove, or too expensive or difficult to distribute. Thus, in many cases it will not be all that difficult for a certifying court to determine at the outset that it is highly unlikely that resolution of the suit would result in significant transfer of damages from defendant to its victims. If the only practical alternatives are reversion to defendant or escheat to the state, a certifying court may well be unwilling to certify the class. The availability of a possible cy pres award to a worthy charity might well alter the situation sufficiently, in the court's mind, to justify certification.¹³²

III. The Pathologies of Class Action Cy Pres

A. The Unconstitutionality of Class Action Cy Pres

By criticizing judicially authorized donations to worthy charities, one naturally risks subjecting oneself to the most unattractive labels of “Grinch” or “Scrooge.” Nevertheless, there is little doubt that use of cy pres in the class action context is improper as a matter of both democratic theory and constitutional law. As an intrinsic matter, cy pres suffers from three key constitutional flaws. First, the doctrine unconstitutionally transforms the judicial process from a bilateral private rights adjudicatory model into a trilateral process. Second, the practice violates separation of powers because through the wholly improper mechanism of a purely procedural device, the substantive law is effectively transformed from a compensatory remedial structure to the equivalent of a civil fine. Finally, from a litigant-oriented perspective, the very possibility of a cy pres award threatens to undermine the due process rights of both defendants and absent class plaintiffs. In addition to its own intrinsic failings, cy pres is also deserving of criticism due to the instrumental role it plays in disguising some of the serious problems of constitutional law and political theory that plague the modern class action even absent use of cy pres. By creating the illusion of compensation, cy pres effectively facilitates the litigants' ability to certify classes where all involved should know from the outset that the plaintiff class exists in theory only.

In the discussions that follow, we explore each of these serious constitutional concerns. Any one of them, standing alone, should provide a sufficient basis for the total abandonment of the use of cy pres in the class action context. When taken together, however, they underscore the serious and fatal threats posed by the use of cy pres to the nation's constitutional and procedural foundation.

B. Trilateralization of the Bilateral Adjudicatory Process

When courts invoke cy pres in a class action, they introduce a non-party into the litigation as a legally significant actor. In this manner, cy pres transforms what begins as an adversary bilateral dispute (in accord with constitutional dictates) into a less-than-fully-adversary trilateral process, wholly unknown to the adjudicatory structure contemplated by Article III. It achieves this result by ordering or authorizing an award to an uninjured private entity which had no involvement whatsoever in the legally relevant events that gave rise to the suit.¹³³ Awarding “damages” to an uninjured third party effectively transforms the court's function into a fundamentally executive role, because no longer is the court functioning as a judicial vehicle by which legal injuries suffered by those bringing suit are remedied. Instead, the court presides over the administrative redistribution of wealth for social good. As a result, the practice violates both the constitutional separation of powers and the case-or-controversy requirement of Article III.

Under Article III of the Constitution, the role of the federal courts is confined to the resolution of live cases and controversies.¹³⁴ Supreme Court doctrine has long made clear that both the case-or-controversy requirement and liberal democratic theory demand that actions of the unaccountable judicial branch be confined to the redress of actual injuries suffered by the party bringing suit.¹³⁵ Thus, according to established Supreme Court doctrine, the constitutional dictate of

justiciability requires findings of injury-in-fact, traceability, and redressability, and thus, the plaintiff must have suffered concrete injury that is traceable to the defendant's unlawful behavior and that can be remedied by judicial action.¹³⁶ If any one of these three factors is not satisfied, the Court has made clear, adjudication violates the case-or-controversy requirement. The justification for these justiciability requirements is grounded in a proper understanding of the unaccountable judiciary's role in a constitutional democracy. As the only unrepresentative branch of the federal government, the judiciary's sole justification for action is performance of its function as adjudicator of live disputes and enforcer of legal rights.¹³⁷ Judicially authorized charitable donations that are neither recognized nor required by controlling substantive law lie well beyond the scope of the constitutionally ordained judicial function.

It may not at first be obvious that class action cy pres contravenes the constitutional and political purposes served by the case-or-controversy requirement. After all, cy pres relief involves neither issuance of advisory opinions nor the judicial promulgation of controlling law untied to resolution of a live dispute. Nevertheless, more careful examination reveals the manner in which cy pres contravenes both the letter and spirit of Article III's case-or-controversy requirement. Cy pres rests at the opposite pole from impermissible judicial legislation: While judicial creation of generally applicable law untied to resolution of a live controversy violates Article III, so, too, does judicial alteration of the legal topography of a specific situation, imposed by a court absent the resolution of a real dispute between the litigants. Thus, even where a federal court makes no statement about general legal precepts, its ordering of the transfer of money from one private actor to another private actor whose rights have in no way been violated inescapably contravenes Article III's case-or-controversy requirement.

Compounding this constitutional violation is the inherently deceptive manner in which it is achieved. What makes cy pres so deceptive is the superficial appearance of the resolution of a live dispute: the plaintiff class is presumably made up of those who claim to be victims and whose rights are alleged to have been violated by the defendants. The constitutional problem, however, is that requiring the defendant to donate to an uninjured charitable recipient amounts to a remedial non-sequitur. The recipient has sued no one-and with good reason, since its legal rights have presumably been violated by no one. Ordering the transfer of defendants' funds to the charitable third party thus remedies no violation of anyone's legally protected rights. The charitable third party and the defendant are in no way adverse to each other when the suit begins. Despite the superficial resemblance of the cy pres litigation to a live case or controversy, a cy pres award fails to satisfy any of the foundational requirements of Article III. The fact that the amount paid to the charitable recipient equals a portion of the harm suffered by the plaintiff class members as a result of defendants' illegal actions is irrelevant for Article III purposes. Damages are not determined in the air; unless they are imposed as a means of redressing a legally recognized injury, they do not satisfy the justiciability requirements imposed by Article III.

While this constitutional analysis appears to be indisputable in cases in which the class action court coercively orders payment of cy pres relief to a charitable recipient unrelated to the litigation, it might be argued that it is irrelevant when cy pres relief is included as part of a class action settlement that has been voluntarily agreed to by the parties. When cy pres relief is voluntarily imposed by the parties themselves, the argument proceeds, it is not properly attributable to the class action court and therefore Article III's requirements are not implicated. Pursuant to this argument, the parties may voluntarily enter into a private contractual agreement in which plaintiff agrees to drop her suit, with prejudice, in consideration for defendant's donation to the Red Cross, the Salvation Army, or any other recognized charity.

This argument may well have force in non-class action litigation: it is difficult to see how Article III would be in any way implicated by such a settlement agreement as long as the court is in no way involved in its administration, since under these circumstances presumably the parties may voluntarily enter into virtually any agreement they wish as a means of resolving their private dispute. The resolution of a class action by means of settlement, however, represents a wholly different situation. Unlike the settlement of a non-class proceeding, settlement of a class action requires court approval, following the conduct of a fairness hearing.¹³⁸ Thus, the federal judiciary is necessarily and substantially involved in every class settlement. Moreover, no defendant would be placed in the position of having to settle a class-wide proceeding-often thereby avoiding having to "bet" its company¹³⁹-unless the federal court has, either prior to or at the time of settlement, certified the individual plaintiff's suit as a class. Thus, a defendant may be willing to accept the idea of cy pres relief as part of a settlement only because of its awareness that such a form of relief is likely to be employed by a class court in imposing coercive relief

following adjudication. It is therefore impossible to view use of cy pres in the course of class settlements as untied to the federal courts' exercise of the judicial power.¹⁴⁰

C. Transformation of the Underlying Substantive Law

Another pathological consequence of the trilateralization of the bilateral adversary process caused by cy pres is the illegitimate transformation of the underlying substantive law from a compensatory framework into the practical equivalent of a civil fine. It must be remembered that a class action suit does not "arise under" [Rule 23 of the Federal Rules of Civil Procedure](#). Rather, it arises under the substantive law being enforced; [Rule 23](#) merely facilitates that enforcement procedurally. As a matter of both constitutional separation of powers and the terms of the Rules Enabling Act,¹⁴¹ a court may not employ a rule of procedure to alter the essence of the underlying substantive right being enforced. It is therefore constitutionally inappropriate for a court, under the guise of the class action procedure, to alter the underlying structure of the substantive law that the class procedure is intended to enforce.

Substantive laws necessarily contain two elements: a behavioral proscription and an enforcement mechanism.¹⁴² The proscription regulates an actor's primary behavior, while the enforcement mechanism provides either consequences for violating the proscription or some directly coercive means of enforcing that proscription. The enforcement mechanism may compensate a party injured by the actor's wrongdoing or provide for punitive remedies such as treble damages or criminal or administrative penalties.¹⁴³ It is therefore understandable that the specific remedial choices made by the law-giver will often be politically controversial. Alteration of that remedial choice, then, may not be made under the guise of a rule of procedure without seriously risking the deception of the electorate.

In addition to its serious systemic threat, use of cy pres also threatens the absent individual claimants' right to due process by judicially revoking their substantive right to compensatory relief. Lawmakers often enact laws that enforce their substantive directives by means of a compensatory remedial model, under which victims are provided a private right of action against the wrongdoer to make them whole after they have suffered a legal wrong. By seeking to enforce her private right, an individual may also incidentally further the public interest, but the right remains fundamentally the individual's.¹⁴⁴ In their pristine substantive form, these rights have been invested by the lawmaking authority (legislature, common law court, or Constitution) in the individual victim. The class action procedure established by [Rule 23](#) allows the aggregation of these individual substantive claims for purposes of procedural convenience; it does not (and legally could not) transform the nature of the substantive law's remedial framework from a compensatory model into a civil fine. In a democracy, if such a dramatic alteration in controlling substantive law is to be made, it must be through the democratically authorized and monitored legislative process.

It is true that cy pres relief is not formally the equivalent of a civil fine. Whereas a civil fine is normally paid to the state, pursuant to cy pres the court transfers defendants' money to a private charitable entity not directly involved in the particular litigation. Moreover, whereas the amount of a civil fine can be determined in a variety of ways, cy pres relief normally approximates the amount of unclaimed damages suffered by the victim class. Yet in its contrast to the classic compensatory remedial model, cy pres is strikingly similar to the generic civil fine. Unlike a compensatory model, both the civil fine and cy pres coercively transfer the defendant's money not as a form of compensation for injuries suffered but as a form of punishment. The fact that one transfers it to an uninjured private third party while the other transfers it to the state in no way alters the fundamental difference separating both procedures from a remedial model requiring victim compensation. Most important is the fact that both forms of remedy differ dramatically from the victim compensation expressly dictated in the substantive law being enforced in the class proceeding. Thus, the class action device may no more legitimately transform a substantively dictated compensatory model into cy pres relief than it may transform it into a civil fine.¹⁴⁵

It could conceivably be responded that, rather than transform the remedial element of the underlying substantive law into a civil fine, cy pres is instead properly viewed as relevant solely to the traditional question of how to dispose of unclaimed property. By viewing cy pres through the lens of unclaimed property disposition, it is arguably possible to divorce the question of cy pres relief from the underlying substantive law being enforced in the class proceeding. If, on the other hand,

one were to consider the question more holistically as one of how to enforce that underlying substantive law through resort to the class action device, then how a federal court treats the unclaimed property issue may well have significant legal implications extending far beyond the procedural context.

Whether the disposition of unclaimed funds is, as a general matter, to be deemed part and parcel of the “substantive” law is usually answered in the negative. Instead, courts traditionally consider the disposition of unclaimed property to a present legal issue wholly distinct from the substantive law enforced in the suit that gave rise to the unclaimed award in the first place. In *Wilson v. Southwest Airlines, Inc.*,¹⁴⁶ for example, the Court of Appeals for the Fifth Circuit treated the issue purely as a matter of the federal court’s inherent equitable discretion, ignoring the possibility that Texas escheat law applied.¹⁴⁷ Like the Fifth Circuit, “other federal courts have treated the issue of the disposition of unclaimed funds in class actions as a matter of judicial administration, committed to the discretion of the district court under [Rule 23](#) and unconstrained by state law.”¹⁴⁸ On one level, it is tempting to accept this conclusion. After all, one might reasonably expect that cy pres would usually be employed in the class action context only after all claimants have been given a reasonable opportunity to file claims into the post-judgment award or settlement fund.¹⁴⁹ At that point, one might argue, the remainder of the fund can reasonably be characterized as the unclaimed property of the remaining unknown claimants. How one disposes of such property, it could be further argued, is not an issue implicating the underlying substantive law, but rather one purely of judicial administration. More careful examination, however, reveals that to view class action cy pres as merely a matter of the substantively neutral administration of unclaimed property grossly and misleadingly oversimplifies the relevant legal dynamics. To the contrary, invocation of cy pres in the class action context alters substantially the DNA of the underlying substantive law, without any legitimate substantive authorization for making such a change.

To disingenuously conceptualize the radical non-compensatory damage disposition methods as nothing more than the trans-substantive disposal of unclaimed property is to place form over substance. The likely difficulties in distribution of relief will almost always be easily recognizable by both court and litigants at the class proceeding’s certification stage.¹⁵⁰ Thus, when the federal court chooses to certify the class, it must be presumed to be aware that a significant portion of the awarded funds cannot feasibly be distributed in a compensatory manner, as designated by the substantive law being enforced.¹⁵¹ From the outset, however, the potential availability of cy pres makes the class concept viable. It is clear, then, that class action cy pres is designed for the very purpose of enabling the class action procedure in a situation in which otherwise the substantive law would have the effect of preventing it. Therefore when the court certifies the class it must be deemed to be knowingly employing [Rule 23](#) as a means to radically alter the compensatory remedial model invariably embodied in the underlying substantive law being enforced in the class proceeding. This is simply too big a dog for the small tail of [Rule 23](#) to wag.

It is important to note that this concern applies far beyond the traditional issues surrounding choice of law when state law and federal adjudication overlap. The Rules Enabling Act, under which the Federal Rules are promulgated, explicitly provides that a rule may “not abridge, enlarge or modify any substantive right.” Because even when the underlying right is federally created, the enforcement mechanism is necessarily an important element of the substantive right; use of [Rule 23](#) to authorize radical modification in the mode of penalization or enforcement is itself a violation of the Enabling Act’s restriction.

No more helpful to the argument that judicial discretion controls under [Rule 23](#) would be a general appeal to a court’s inherent equitable discretion.¹⁵² Initially, it is wholly anachronistic to seek to justify the radically new practices of class action cy pres on the basis of an appeal to historically authorized equity practice.¹⁵³ More importantly, [Rule 23](#) purports to vest in the class action court no special equitable authority to fashion final relief in any manner it deems appropriate, regardless of the underlying substantive law’s directives-nor could it, without blatantly violating the limits imposed by the Rules Enabling Act. The nature of the remedy for violation of substantive law is as substantive as the primary behavioral prohibition itself. As already noted, it involves issues of social, moral and economic policy that go well beyond the interests of the judiciary. Equity cannot exceed the limits of either the Rules Enabling Act or the Constitution, and for a court to rely on the support of the class action rule to justify its replacement of substantively sanctioned relief is to ignore both.

D. Cy Pres and the Facilitation of Class Action Pathology¹⁵⁴

Cy pres' effective transformation of class-wide compensatory damages into the equivalent of a civil fine is indicative not merely of the practice's intrinsic invalidity. It is also problematic in an instrumental sense because, when used in this manner, cy pres helps to conceal the most invidious of the modern class action's pathologies: the "faux" class action.¹⁵⁵ The term refers to suits brought as class actions where the individual damages are, on the whole, so minimal and the barriers to filing claims so high that as a practical matter the function of the suit as a means of compensating injured victims is all but completely undermined. In these suits, it is the class attorneys, who presumably have suffered no injury at the hands of the defendant, who are the ones financially rewarded for bringing the wrongdoer to justice. In effect, the faux class action transforms a compensatory class into a qui tam action, in which an uninjured party is incentivized to bring suit by receiving a portion of the damages for its successful prosecution. In this manner, the faux class action transforms the DNA of the substantive remedial model from a compensatory framework to what can be called a "bounty hunter" framework.¹⁵⁶

Cy pres facilitates this wholly improper remedial transformation by creating the illusion of compensation, thereby diluting or obscuring the starkly illegitimate nature of the bounty hunter remedial model. By forcing class defendants to pay at least a portion of the class-wide relief to a sympathetic charity having some loose connection to the subject matter of the suit, cy pres relief makes the attorneys' fees seem less the central goal of the proceeding and more the ancillary facilitator of victim compensation. But the charity was not a victim; its legal rights were not violated, nor was the suit filed for the purpose of their vindication. Thus, any payment it receives serves no compensatory purpose. In effect, by means of cy pres relief, one procedural illusion is created to disguise another: the illusion of victim compensation, designed to prevent the realization that a real class of plaintiffs seeking and expecting compensation, in reality does not exist.

Cy pres has also facilitated the other ominous class action pathology: the so-called settlement class action. Under this procedure, the parties agree to a settlement prior to seeking certification, and seek certification solely on the condition that the court approve the settlement.¹⁵⁷ Under no circumstances will the suits be litigated; the federal courts' authority is exercised over a case in which the parties are in full agreement from the outset of the suit. The certification decision is made without the benefit of the adversary process. As our empirical research demonstrates,¹⁵⁸ the use of cy pres has grown substantially in recent years, and understandably so. It should not be difficult to conclude that the availability of cy pres makes the certification of a settlement class far simpler, since it assures the certifying court that defendants will be made to pay, and that that money will be put to good use.

Perhaps the strongest intuitive basis on which to support cy pres relief is the deterrent effect this form of relief is assumed to have on unlawful behavior. Absent resort to cy pres, the argument proceeds, wrongdoers would never be forced to pay for the harm they have caused in those situations in which large numbers of individual victims cannot feasibly be found or compensated. As a result, advocates of cy pres might well argue, there would exist no civil mechanism by which to deter similar unlawful behavior-either by the same or other wrongdoers-in the future. But whatever one thinks about this argument purely as a normative matter, it is clear that a Federal Rule of Civil Procedure-even a rule as important as the one authorizing class actions-is a legally inappropriate device through which to solve the problem. In a democracy, if the existing remedial model provided for in the governing substantive law has proven unsatisfactory, any alterations must come from the same government organs that promulgated the substantive law in the first place.

E. Cy Pres and the Due Process Rights of Absent Class Members

In addition to the serious constitutional and political problems which we have already described, use of cy pres relief in class actions also gives rise to fatal violations of procedural due process. By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members. In this manner, the practice unconstitutionally undermines the due process obligation of those representing absent class members to vigorously advocate on their behalf and defend their legal rights.¹⁵⁹ It brings about this constitutionally troubling result by ensuring that the size of the settlement or award fund will remain constant, regardless of the likelihood or actuality of compensating injured victims. Because as a practical matter the size of attorneys' fees will be tied, directly or indirectly, to the size of the class-wide award,¹⁶⁰ where the size of that award included the cy pres relief the class attorneys' financial interest will be wholly divorced from their efforts to compensate individual class members. This does not

necessarily mean that in every case in which cy pres is awarded, class attorneys will fail to fashion effective mechanisms of class relief. But due process may be violated even in situations in which no prejudice is actually demonstrated. It is sufficient, in order to establish a violation of due process, to establish the existence of a temptation to the reasonable person to ignore her constitutionally dictated responsibilities to the litigants.¹⁶¹ There can be little doubt that by assuring class attorneys of the same pay whether absent class members receive compensation or not, use of cy pres threatens to undermine their constitutionally imposed obligations.

The most likely response to the due process attack on cy pres is that the constitutional dangers to which we point are by no means confined to the use of cy pres. Indeed, any measure of class attorneys' fees that does not restrict those fees to a percentage of the amount actually claimed, rather than the amount awarded class wide,¹⁶² would seem to give rise to the very same danger. But the fact that other methodologies—for example, escheat to the state of unclaimed funds or increase in the size of amounts paid to those class members who do file claims—give rise to the same constitutional problems in no way avoids the fatal constitutional flaw in cy pres. In any event, because, as previously noted, cy pres provides the illusion of compensation by awarding class funds to a charity connected— if only loosely—to the general subject matter of the law suit, its availability likely makes class certification a far more attractive prospect than if cy pres were unavailable. No other method of treating unclaimed class-wide funds creates this illusion. In this manner, cy pres provides a uniquely effective shield for the constitutional pathologies of the class action.

One might also respond to the due process critique that the options available to class attorneys to improve the administration of class compensation are in reality quite limited, so as a practical matter absent class members are not likely to suffer substantially due to cy pres's availability. It is difficult to know whether this will be true in the individual case, but the fact remains that class attorney incentives to find ways to assist class members will inevitably be impacted by the extent to which their own compensation is tied to the amounts actually recovered. Indeed, it is this very form of incentivization that lies at the heart of the contingent fee process. Thus, rather than make the wholly unsupported ex ante assumption that attorney ingenuity will be of no help in fostering class member recovery in the individual case, it makes more sense to employ a measure of class relief that encourages, rather than discourages, an attorney's creative use of such ingenuity.

IV. Empirical Analysis of Cy Pres Awards in Federal Class Action Cases

To further study the use and possible consequences of class action cy pres awards, we examined a set of federal class action cases with such awards. A series of searches conducted using Westlaw, LEXIS, JSTOR, and Google revealed 120 federal class action cases from 1974 through 2008 where the court either included a cy pres award as part of a judgment or approved a cy pres distribution as part of a settlement.¹⁶³ The compiled dataset of 120 cases provides a factual backdrop for some of the legal and pathology concerns discussed in earlier parts of this Article.

The dataset informs several important questions related to class action cy pres awards, including:

- What is the prevalence of class action cy pres awards from their first use in 1974 through 2008?
- To what extent are cy pres awards associated with settlement class and faux class actions?
- How often are cy pres awards granted ex ante, i.e., before absent class members have the opportunity to make claims?
- How large are cy pres awards in class actions?
- What impact might class action cy pres awards have on the amount of fees granted to plaintiffs' attorneys?

A. The Prevalence of Class Action Cy Pres Awards

In light of the serious constitutional concerns raised about use of class action cy pres, it is important to understand the trend in the growth of such awards over time. Over the last three decades, the number of class action cy pres awards in the dataset has increased, especially after 2000 (Figure 1).¹⁶⁴

From 1974 through 2000, federal courts granted or approved cy pres awards to third party charities in thirty class actions, or an average of approximately once per year. Since 2001, federal courts granted or approved cy pres awards in sixty-five class actions, or an average of roughly eight per year. Hence, the use of class action cy pres awards by federal courts has increased since the 1980s and has accelerated sharply after 2000.

Figure 1

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B. Cy Pres Awards in Settlement Class and Faux Class Actions

As mentioned earlier, cy pres awards may be used by parties to conceal problematic types of class actions, such as settlement class actions¹⁶⁵ and faux class actions,¹⁶⁶ where the class action procedure is used primarily for the benefit of participants in the process other than the absent claimants.¹⁶⁷ Absent the availability of cy pres awards, it is at least possible these cases would not have proceeded past the certification stage. One important question, then, is the extent to which the observed increase in the use of cy pres awards is associated with a corresponding increase in the use of settlement class actions over time. As can be seen in Figure 2, the percent of class actions in the dataset that were certified for the purposes of settlement has increased both over time and relative to the cases that have settled post-certification or been adjudicated on the merits.¹⁶⁸

Figure 2

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Prior to 2001, eight of the cases were settlement class actions. Over the same time period, seventeen cases were either decided by the courts on the merits or were settled post-certification and five cases did not have sufficient information to determine whether the case was adjudicated on the merits, was settled post-certification, or was a settlement class action. Thus, eight out of thirty (or 26.7%) cases were clearly settlement class actions and most of the eight cases did not appear until the end of the time period. After 2000, thirty-four cases were clearly settlement class actions, thirty cases were adjudicated or settled post-certification, and one case did not provide sufficient information to determine whether the case was adjudicated on the merits, was settled post-certification, or was a settlement class action. The percent of settlement class actions after 2000 increased to thirty-four out of sixty-five cases (52.3%). Since 2000, then, over half of the class action cy pres awards occurred in settlement class actions.

A second related question is the extent to which the increase in the use of cy pres awards is associated with an increase in faux class actions over time. Much like settlement class actions, cy pres awards also have a positive relationship with faux class actions (Figure 3).

Figure 3

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Before 2001, eleven of thirty cases (or 36.7%) were faux class actions. Likewise, after 2000, twenty-four out of sixty-five cases (or 36.9%) were faux class actions. Generally, over a third of class action cy pres awards are associated with faux class actions.

Combining the results from Figures 2 and 3, it is clear that cy pres awards have a positive and increasing relationship with both settlement and faux class actions (Figure 4).

Figure 4

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Prior to 2001, fourteen of thirty cases (or 46.7%) were settlement or faux class actions but after 2000, forty-two of sixty-five cases (or 64.6%) were such cases. Further, over the entire time period, twenty-one cases were both settlement and faux class actions. Sixteen of these cases occurred after 2000. As such, settlement class and faux class actions went from representing less than half of the class actions with cy pres awards before 2001 to about two-thirds after 2000. Thus, from 1974 to 2008 not only is there an increasing number of class actions with cy pres awards in the dataset, but the increase is associated with both settlement and faux class actions. Specifically, based on the data available, since 2000 over half of the class action cy pres awards occurred in settlement class actions, over one-third of class action cy pres awards occurred in faux class actions, and approximately two-thirds of class action cy pres awards occurred in either settlement or faux class actions.

C. Ex Ante Cy Pres Awards

In some instances, courts also name the charitable recipient of the cy pres award in anticipation of a remainder, allocating an award amount up front, rather than waiting to see what funds remain unclaimed. That courts occasionally designate cy pres awards ex ante before attempting to compensate absent members, illustrates the transformative nature of cy pres awards.¹⁶⁹ Ignoring temporarily the pathologies of cy pres, at least one could consider a court to be acting “reasonably ancillary” to resolving a dispute when it makes a cy pres award out of unclaimed funds after giving absent class members notice of the fund and a chance to make a claim.¹⁷⁰ The presence of ex ante awards indicates that the court recognizes from the outset that overwhelmingly, plaintiffs will not receive compensation from the suit and is thus not acting in a manner that is “reasonably ancillary” to the dispute. As Figure 5 shows, federal courts awarded cy pres ex ante¹⁷¹ thirty times out of 120 cases (or in 25% of the cases).

Figure 5

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Of those thirty ex ante cy pres awards, two were given as part of a court-ordered award.¹⁷² Of the cases with ex ante cy pres awards that settled, thirteen were from post-certification settlements, fourteen were from settlement class actions, and one had an unclear disposition based on the available information.

The use of ex ante cy pres awards underscores the federal judiciary’s reliance on cy pres to transform the underlying substantive law’s compensatory remedial model into a wholly distinct civil fine model. By distributing the funds to charities before even providing absent class members with an opportunity to redeem their individual claims from a damage or settlement fund, the courts are making clear that the award is not really intended to compensate the plaintiffs, but solely to punish the defendant. Indeed, this has occurred in a noticeable number of cases. In a quarter of cy pres class actions, the amount and recipient of the cy pres award were determined prior to giving absent class members the opportunity to make claims on the awarded class-wide fund.¹⁷³

Figure 6

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D. The Magnitude of Class Action Cy Pres Awards

Since the data show cy pres award usage is increasing, especially in settlement class and faux class actions, the next reasonable inquiry is into the size and proportions of class action cy pres awards. Figure 6 shows the dollar amounts of class action cy pres awards as well as these awards' relationships to total compensatory damages.¹⁷⁴

In the forty-seven cases where compensatory damage, attorneys' fee, and cy pres award amounts were separately identifiable, the average cy pres award was \$5.8 million and reached as high as \$75.7 million. Further, cy pres awards averaged 30.8% of the total compensatory damages awarded and ranged from 0.1% to a 100.0%. Interestingly, there are ten cases where the cy pres award was 75.0% or more of the total compensatory damages. All ten of these cases were faux class actions with ex ante cy pres awards and six were also settlement class actions. As such, cy pres awards generally make up a non-trivial portion of total compensatory damages awarded, and in some cases comprise the entire compensatory award.

E. The Impact of Class Action Cy Pres Awards on Attorneys' Fees

Faux and settlement class actions with cy pres awards are problematic if they misuse class actions for the benefit of attorneys rather than for the plaintiffs. One potential source for such abuse may be evident when considering attorneys' fees that are determined by reference to these non-trivial cy pres awards.¹⁷⁵

Generally, in class actions, attorneys' fees equal approximately one third of the total fund.¹⁷⁶ As Figure 7 shows, in the sixty-three cases¹⁷⁷ where it was possible to separately determine both the total recovery and the attorneys' fees, the attorneys' fees averaged 35.9% of the total recovery, but ranged from as little as 0.4% to as much as 98.3%. The average attorneys' fee awarded was \$14.1 million.¹⁷⁸

Figure 5

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Although attorneys' fees as a percentage of the total recovery in cy pres class actions are similar to the percentage in class actions generally, the primary concern in cy pres class actions is the absolute amount of money awarded to the plaintiffs' attorneys.¹⁷⁹ Assuming that cy pres should not be awarded in the class action context, since it will not compensate the plaintiff classes, the absence of cy pres awards could possibly lead to a decrease in the size of the total fund awarded.¹⁸⁰ If the fund on which a percent of attorneys' fees is based decreases, then the actual amount of attorneys' fees will necessarily decrease as well. The percent, however, may remain the same in these situations. Further, if a case might not have been certified absent a cy pres award, then the plaintiffs' attorneys likely would not have received any fees for that case but for the availability of cy pres awards.

As an example, given that the average cy pres award was \$5.8 million and accounted for 30.8% of total compensatory damages and given that the average attorneys' fees as a percent of total recovery was 35.9%, such awards meaningfully increase attorneys' compensation without directly, or even indirectly, benefiting the plaintiff. Additionally, of the ten cases where the cy pres amount was 75.0% or more of the total compensatory damages, all of them are potentially questionable cases. This suggests that cy pres awards could further increase attorneys' compensation by allowing additional class actions that may not have been certified otherwise to continue.

Therefore, not only does the availability of cy pres awards have the potential to increase the total available fund only as a punishment to the defendant and legitimize cases where the class might not otherwise be certified, but it can also increase the likelihood and absolute amount of attorneys' fees awarded.

F. Conclusions

The available data provide several key answers to the questions posed in the beginning of this Part. First, the prevalence of class action cy pres awards has increased steadily by decade since the 1980s and has accelerated noticeably after 2000. Second, since 2000, the majority of class action cy pres awards are associated with cases that were certified solely for the purposes of settlement, over one-third of class action cy pres awards are associated with faux class actions, and approximately two-thirds of class action cy pres awards are associated with either settlement or faux class actions. Third, in a quarter of cy pres class actions, the amount and recipient of the cy pres award was determined ex ante, or prior to giving absent class members the opportunity to make claims on the fund. Fourth, the average cy pres award was \$5.8 million and accounted on average for 30.8% of total compensatory damages. Finally, not only do cy pres awards have the potential to increase the total available fund and legitimize cases where the class might not otherwise be certified, but they can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefiting the plaintiff.

V. Fluid Class Recovery and Cy Pres Contrasted

In contrast to cy pres, the fluid class recovery concept has had a most difficult time in the courts. This is puzzling, since while both alternatives have their problems, as a conceptual matter fluid class recovery represents a far more arguably legitimate approach than does cy pres.

One commentator defined "fluid class recovery" as a "three-step process: calculation of gross rather than individual damages, individual recovery from a damage fund upon authentication of claims by class members, and distribution of the remainder of the fund to the class as a whole or to an entity that will benefit the class as a whole."¹⁸¹ On occasion, courts have treated cy pres and fluid class recovery as fungible concepts.¹⁸² For purposes of both separation of powers and due process critiques, however, it is necessary to draw an important distinction between the two. As the term has been most often used, cy pres refers to the designation of a portion of unclaimed damage or settlement funds to a charitable use that is in some way related to the subject of the suit. As employed here, fluid class recovery applies to an effort—either in a class settlement or as part of a class award—to approximate the injured class of consumers through the provision of relief to future consumers. The assumption is that the class of future users will likely substantially overlap with the injured class of past consumers.

A classic illustration of this form of fluid class recovery came in the California state class action, *Daar v. Yellow Cab Co.*¹⁸³ There a taxicab customer brought a class action to recover excessive charges by the defendant company for use of its taxicabs over a four-year period. The trial court approved a settlement that, instead of paying past cab users, lowered future fares for a specified period for the benefit of future riders. Since individual claims by past taxicab users would obviously have been infeasible, the only alternative to such fluid class recovery would have been to allow the defendant to escape payment for its unlawful behavior.

In the federal courts, future approximation fluid class recovery has had something of a checkered history. In the well-known case of *Eisen v. Carlisle & Jacquelin*,¹⁸⁴ the Court of Appeals for the Second Circuit overturned the district court's use of fluid class recovery in a complex and controversial antitrust suit brought by an odd-lot stock trader (i.e., transfers involving less than a hundred shares) against the major odd-lot dealers on the New York Stock Exchange. The class consisted of approximately six million traders whose damages were relatively minimal (the named plaintiff's claim was for \$70). Finding them, notifying them, and then getting them to go the trouble of filing individual claims were all highly unlikely.¹⁸⁵ Hence the district court fashioned a scheme in which the amount of a class-wide damage fund remaining after individual claims were filed was "to be used for the benefit of all odd-lot traders by reducing the odd-lot differential 'in an amount determined reasonable by the court until such time as the fund is depleted.'"¹⁸⁶ A skeptical Second Circuit stated that it was "at a loss to understand how this is to be done, but it is suggested that it 'might properly be done under SEC supervision or at least with SEC approval'"—something that the court suspected was not legally authorized.¹⁸⁷ Continuing with its obvious skepticism, the Second Circuit wrote: "All the difficulties of management are supposed to disappear once the 'fluid recovery' procedure is adopted. The claims of the individual members of the class become of little consequence."¹⁸⁸ The Eisen court categorically

rejected the district court's fluid class recovery plan, concluding that

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure.¹⁸⁹

The court therefore held "the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."¹⁹⁰

The Courts of Appeals for the Fourth and Ninth Circuits relied on Eisen to disallow fluid class recovery distribution methods in class actions.¹⁹¹ However, perhaps because the Second Circuit's sweeping rejection of fluid class recovery was so lacking in anything even approaching persuasive supporting reasoning, courts have on occasion accepted the practice despite that court's well-known refusal to recognize it. For example, in *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*,¹⁹² the D.C. Circuit, in dictum, noted that the future price reduction version of fluid class recovery "is 'particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals.'"¹⁹³ The court noted that "[s]tate courts, in particular California, have been more hospitable to fluid recovery in class actions."¹⁹⁴

Even the Second Circuit itself subsequently authorized a form of fluid class recovery. For example, in *In re "Agent Orange" Product Liability Litigation*,¹⁹⁵ although that court rejected—on the basis of Eisen—Judge Weinstein's establishment of a class assistance foundation to fund projects and services that would benefit the entire class of servicemen allegedly made ill by exposure to the defendants' chemical defoliant in Vietnam, it allowed use of a portion of the settlement fund "to provide programs for the class as a whole."¹⁹⁶ Eisen was distinguishable, the court held, because "the class that will benefit from the district court's distribution plan is essentially equivalent to the class that claims injury from Agent Orange."¹⁹⁷ In contrast, "[i]n Eisen, the proposed recovery scheme would primarily have benefitted not the class of persons who claimed injury from prior odd-lot transactions but instead a class of persons who would engage in such transactions in the future."¹⁹⁸ In effect, the court was saying that the only thing wrong with the fluid class recovery scheme in Eisen was its failure to have the future class adequately "mirror image" the injured class. It was in no way rejecting the approach as an abstract matter. Similarly, in the recent decision in *In re Fresh Del Monte Pineapples Antitrust Litigation*,¹⁹⁹ the Southern District of New York rejected a proposed fluid class recovery scheme on the grounds that it was not clear that a future price reduction would actually benefit the injured purchaser class.²⁰⁰ Thus, despite Eisen's sweeping categorical rejection of the practice, it is conceivable that at least a disciplined form of future approximation fluid class recovery could today be acceptable.

This disciplined effort to reflect in the group of future beneficiaries the bulk of the class of injured victims arguably distinguishes this form of fluid class recovery from the charitable award version of cy pres. The latter unconstitutionally triangulates the bilateral adjudicatory process contemplated in Article III by insertion of a non-injured party, effectively transforms the DNA of the underlying substantive law by improper means, and threatens to undermine the due process rights of absent class members by externalizing their interests. In contrast, the former appears to represent a creative effort to compensate the class of victims which would otherwise be impossible. The problem for future approximation fluid class recovery, of course, is that the devil is in the details. It will often be difficult to say with any assurance that the two are likely to basically match up. Absent such assurance, the practice suffers from virtually all of the defects and pathologies that afflict cy pres.

VI. How to Treat Unclaimed Funds

Since we have rejected use of cy pres as a means of disposing of unclaimed class funds, we are left with the question of exactly what to do with those funds. In many cases, this question should have been answered at the start of the case, rather than at its close. We conclude that the proper way to deal with a situation in which there remain significant unclaimed funds in a class action is to avoid the situation in the first place, by simply not certifying the class. A federal court asked to certify a class suit should always demand that the party (or, assuming settlement class actions continue to exist, "parties") seeking

certification establish that meaningful relief will be provided to the large majority of the class members.

Even if the federal courts, however, follow this front-loaded recommendation, cases will no doubt arise in which a portion of the award or settlement fund will remain unclaimed-albeit in far smaller amounts than under current practice. It is, perhaps, arguable that in these narrower circumstances, cy pres relief would be appropriate. However, we remain skeptical. Cy pres relief always gives rise to the danger of seductively leading all involved to believe that the purposes of the substantive law have been vindicated-when, in reality, the failure to compensate victims will always represent a failure in those situations in which the substantive law provides such relief as the sole remedy for law violation. The unclaimed funds, then, should be treated in a manner that reveals to all the failure (if only partial) of the remedial process.

With cy pres excluded as a possibility, two conceivable alternatives remain: first, escheat to the state; and second, retention by the defendant. The argument for escheat would proceed as follows: once the court has entered judgment, the awarded funds become the property of the plaintiff. If that plaintiff fails to collect the award, the unclaimed funds should be treated in the same manner that any unclaimed property is treated-it escheats to the state. Alternatively, it could be argued that in an adversary system premised on a notion of private rights adjudication, unless and until the plaintiff actually claims the award, it remains the property of the defendant. To take defendant's money solely for purposes of escheat to the state effectively turns the private compensatory model (which, we assume for present purposes, constitutes the sole enforcement mechanism contained in the underlying substantive law) into the equivalent of a civil fine. Neither the Rules Enabling Act nor dictates of democratic theory permits this result. Thus, while resolution of this issue is beyond the scope of our critique of class action cy pres, a strong argument can be made in favor of retention of unclaimed funds by defendant. This approach would presumably have the added advantage of confining plaintiffs' attorneys' fees to the funds actually claimed, since it would be incoherent to award to the attorneys a percentage of funds retained by the defendant.

VII. Conclusion

Surprisingly, the federal courts' growing use of cy pres relief in the modern class action has-up to now-somehow managed to escape the scathing scholarly critique it so richly deserves. While litigants may use cy pres to conceal the more generally acknowledged concerns with class actions, cy pres exhibits numerous pathologies of its own. Cy pres performs unconstitutional alchemy by effectively transforming the underlying substantive law from a compensatory remedial model into a civil fine by means of nothing more powerful than a procedural joinder device. Cy pres also improperly transforms a bilateral dispute into a trilateral proceeding by introducing into the adjudicatory mix an uninjured third party who has no legitimate interest in the disposition of the suit. In addition, cy pres threatens to undermine the due process interests of absent class members by disincentivizing the class attorneys in their efforts to assure the class-wide compensation of victims of the defendant's unlawful behavior. Finally, cy pres fosters the pathological aspects of modern class action jurisprudence, including unconstitutional settlement classes and highly dubious "faux" class actions.

Use of cy pres in the modern class action, without principled justification, undermines the valid use of the class action process and contravenes core constitutional dictates. It must therefore be abandoned by the federal courts.

Footnotes

^{al} Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law. The authors would like to thank Paige Feldman of the Class of 2010 at Northwestern Law School for her valuable research assistance. We are also indebted to Geoffrey Lysaught for his valuable comments and Elise Nelson of the Searle Center at Northwestern University School of Law for her very helpful assistance in preparing the empirical data. This Article was prepared with the support of the Searle Center at Northwestern University School of Law. However, the views expressed are solely those of the authors.

^{a2} Searle Fellow; A.B., University of New Mexico; Candidate for J.D., Northwestern University School of Law, 2010.

^{a3} Research Associate, Searle Center, Northwestern University School of Law. B.A. College of William and Mary; M.S. Managerial Economics and Strategy, Kellogg School of Management, Northwestern University.

¹ Such suits are usually referred to as “negative value” or “Type B” claims. In contrast, class claims large enough to stand on their own are referred to as “Type A” claims. See Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* 131-32 (2009).

² [Fed. R. Civ. P. 23\(c\)\(2\)](#) (requiring notice and the right of absent class members to opt out in [Rule 23\(b\)\(3\)](#) classes). In class suits falling within the [Rule 23\(b\)\(1\) and \(b\)\(2\)](#) categories, opt-out is not permitted. *Id.*

³ For a discussion of one of these alternative methods, so-called “fluid class recovery,” see *infra* Part V. Note that often these creative methods are employed as part of a settlement between the parties, rather than as part of a coercive judicial award against a defendant. However, our criticisms of these creative damage alternatives draw no distinction between the two contexts, for three reasons. First, any settlement agreed to by a class defendant is entered into in the shadow of controlling substantive and procedural law that would likely be applied were the suit to be litigated. Thus, a defendant’s agreement to use of an alternative method of collective relief cannot be deemed a purely voluntary act if one assumes that a court possesses the legal authority to impose such relief coercively on a defendant as part of a fully litigated action. At the very least, then, before such a settlement could be accepted as a truly voluntary agreement by a defendant, it would need to be firmly established that such relief would be unavailable as court ordered litigation relief. Second, in any event, under [Rule 23\(e\)](#) a court must supervise and approve any settlement of a class action. Thus, unlike a settlement of an individual suit where the parties have totally free reign to enter into an extra-judicial contract as a means of resolving the action, in settlement of a class suit the court’s inherent and pervasive involvement effectively renders the settlement an action of the court, rather than merely a voluntary agreement entered by the parties. Finally, even in the settlement context the due process rights of absent class members are implicated, and for reasons that will be discussed, most of these alternative compensation methodologies will present serious threats to those rights. See *infra* Part IV.C.

⁴ See, e.g., [In re Folding Carton Antitrust Litig.](#), 744 F.2d 1252, 1254 (7th Cir. 1984) (“It was appropriate for the district court to consider the cy pres doctrine or Fluid Class Recovery to achieve an equitable disposition of the reserve fund.”).

⁵ While beyond the scope of our inquiry, it is worth mentioning that in addition to cy pres and fluid class recovery, two other methods of dealing with the impracticalities of class-wide relief have been suggested or employed, albeit with at best limited success: (1) determination of class-wide damages through adjudication of individual suits chosen scientifically by methods of statistical sampling combined with class-wide extrapolation of the average findings; and (2) “liability-only” determinations in the class proceeding itself, with damage determinations left for post-class individualized suits.

⁶ See *infra* Part V.

⁷ See *infra* Part II.A.

⁸ See *infra* Part II.B.

⁹ *Id.*

¹⁰ See *infra* Part IV.B.

11 See *infra* Part II.B.4.

12 28 U.S.C. § 2072 (2006).

13 U.S. Const. art. III, § 2.

14 U.S. Const. amend. V.

15 U.S. Const. art. III, § 2; see *infra* Part III.B.

16 See, e.g., David L. Shapiro, [Class Actions: The Class as Party and Client](#), 73 *Notre Dame L. Rev.* 913, 916-18 (1998) (arguing that classes should be conceptualized as the equivalent of business associations).

17 See *infra* Part II.A.

18 See *infra* Part II.B.

19 [Fed. R. Civ. P. 23](#).

20 See *infra* Part II.B.

21 See *infra* Part III.

22 Edith L. Fisch, *The Cy Press Doctrine in the United States* § 1.00 (Matthew Bender 1950).

23 *Id.* § 1.02.

24 Hamish Gray, *The History and Development in England of the Cy-Pres Principle in Charities*, 33 *B.U. L. Rev.* 30, 32 (1953).

25 *Id.*

26 *Id.* at 33.

27 *Id.*

28 Id. at 32.

29 Fisch, supra note 22, § 1.03; see Gray, supra note 24, at 30 (“One of the striking distinctions which the Law draws between the Private Trust and the Charitable Trust is found in the principle that in circumstances in which a Private Trust would be defeated a Charitable Trust is not allowed to fail.”).

30 Fisch, supra note 22, § 1.03.

31 Gray, supra note 24, at 32.

32 Id.

33 See id.

34 Fisch, supra note 22, § 1.03.

35 Id.

36 Id.

37 Comment, *A Revaluation of Cy Pres*, 49 Yale L.J. 303, 309 (1939).

38 Fisch, supra note 22, § 1.01.

39 Comment, supra note 37, at 304-05.

40 Id. at 305.

41 Fisch, supra note 22, § 2.03, at 56-57.

42 Id. This seems to foreshadow some of the marginally related uses of cy pres in the class action context. See *infra* Parts II.B.3, III.

43 Fisch, supra note 22, § 2.03, at 56-57.

44 Id.

45 Id. § 2.03, at 60.

46 Id.

47 Id.

48 Id.

49 Id. § 2.03, at 60-61. These concerns foreshadow some of the pathologies endemic to cy pres in the class action context. See *infra* Part III.

50 See *supra* text accompanying notes 38-41.

51 See Fisch, *supra* note 22, § 2.03, at 59-60.

52 Id. § 2.01, at 9-10.

53 Gray, *supra* note 24, at 36.

54 [17 U.S. 1 \(1819\)](#).

55 Fisch, *supra* note 22, § 2.01 at 12.

56 Id. §§ 2.01(a)-(e).

57 Id. §§ 2.01-2.03.

58 Id. § 3.00 at 92.

59 [Ala.Code § 19-3B-413 \(1975\)](#); [Ark. Code Ann. § 28-73-413 \(West 2009\)](#); [Cal.Prob.Code § 15409 \(West 2009\)](#); [Conn. Gen. Stat. Ann. § 45a-535e \(West 2009\)](#); [Del. Code Ann. tit. 12, § 3541 \(2009\)](#); [D.C. Code § 19-1304.13 \(2009\)](#); [Fla. Stat. Ann. § 1010.10 \(West 2009\)](#); [Ga. Code Ann. § 53-12-113 \(West 2009\)](#); [Haw. Rev. Stat. Ann. § 517E-6\(b\) \(West 2009\)](#); [Idaho Code Ann. § 33-5006 \(2009\)](#); [Ind. Code Ann. § 30-4-3-27 \(West 2009\)](#); [Iowa Code Ann. § 633A.5102 \(West 2009\)](#); [Kan. Stat. Ann. § 58a-413 \(2009\)](#); [Ky. Rev. Stat. Ann. § 273.570 \(West 2009\)](#); [La. Rev. Stat. Ann. § 9:2331 \(2009\)](#); [Me. Rev. Stat. Ann. tit.18-B, § 413 \(2009\)](#); [MD. Code Ann., Corps. & Ass'ns § 5-209 \(2009\)](#); [Mass. Gen. Laws Ann. ch. 214, § 10B \(West 2009\)](#); [Minn. Stat. Ann. § 501B.31 \(West 2009\)](#); [Miss. Code Ann. § 79-11-613 \(West 2009\)](#); [Mo. Ann. Stat. § 456.4-413 \(West 2009\)](#); [Mont. Code Ann. § 72-33-504 \(2009\)](#); [Neb. Rev. Stat. Ann. § 30-3839 \(West 2009\)](#); [N.H. Rev. Stat. Ann. § 498:4-a \(2009\)](#); [N.J. Stat. Ann. § 15:18-30 \(West 2009\)](#); [N.M. Stat. Ann. § 46A-4-413 \(West 2009\)](#); [N.C. Gen. Stat. Ann. § 36C-4-413 \(West 2009\)](#); [N.D. Cent. Code § 59-12-13 \(2009\)](#); [Ohio Rev. Code Ann. § 5804.12 \(West 2009\)](#); [Okla. Stat. Ann. tit. 60, § 76 \(West 2009\)](#); [Or. Rev. Stat. Ann. § 130.210 \(West 2009\)](#); [20 Pa.Cons. Stat. Ann. § 7740.3 \(West 2009\)](#); [R.I. Gen. Laws § 18-4-1 \(2009\)](#); [S.C. Code Ann. § 33-31-1107 \(2009\)](#); () [S.D. Codified Laws § 55-9-4 \(2009\)](#); [Tenn. Code Ann. § 35-10-206 \(West 2009\)](#); [Utah Code Ann. § 75-7-413 \(West 2009\)](#); [Vt. Stat. Ann. tit. 14, § 413 \(2009\)](#); [Va. Code Ann. § 55-544.13 \(West 2009\)](#); [W. Va. Code Ann. § 35-2-2](#)

(West 2009); Wis. Stat. Ann. § 701.10 (West 2009); Wyo. Stat. Ann. § 4-10-414 (2009). In re Estate of Vallery, 883 P.2d 24, 29 (Colo. Ct. App. 1993); In re Estate of Tomlinson, 359 N.E.2d 109, 112 (Ill. 1976); In re Estate of Rood, 200 N.W.2d 728, 735 (Mich. Ct. App. 1972); Conway v. Bowe, 116 N.Y.S.2d 182, 188 (N.Y. Sup. Ct. 1952); Moody v. Haas, 493 S.W.2d 555, 560 (Tex. Civ. App. 1973).

- 60 U.T.C. § 413 (2005), which provides as follows:
(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:
(1) the trust does not fail, in whole or in part;
(2) the trust property does not revert to the settlor or the settlor's successors in interest; and
(3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.
(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:
(1) the trust property is to revert to the settlor and the settlor is still living; or
(2) fewer than 21 years have elapsed since the date of the trust's creation.
- 61 Alaska Stat. § 34.27.010 (repealed 1994); Ariz. Rev. Stat. Ann. § 14- 10413 (repealed 2004); Wash. Rev. Code Ann. § 24.44.060 (repealed 2009).
- 62 Fisch, supra note 22, § 5.00.
- 63 Id. § 5.01.
- 64 Id. § 5.01(b). If only the particular gift is illegal, but the general purpose of the trust is legal, then this does not make the trust invalid. Id. § 5.01(b), at 136.
- 65 Id. § 5.02.
- 66 Id.
- 67 Id. § 5.03(b).
- 68 Id.
- 69 Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 Clev. St. L. Rev. 471, 476 (1998).
- 70 See generally *Yale Univ. v. Blumenthal*, 621 A.2d 1304 (Conn. 1993) (interpreting the Connecticut version of the Uniform Management of Institutional Funds Act).
- 71 Rudko, supra note 69, at 476.

72 [Fed. R. Civ. P. 23\(c\)](#).

73 Classes certified under [Rule 23\(b\)\(1\) or \(b\)\(2\)](#) are mandatory, meaning that class members do not have the choice to remove themselves from the class. It is only in classes certified under [Rule 23\(b\)\(3\)](#) that potential class members are given the right to opt out.

74 See Benjamin Kaplan, [Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure](#), 81 *Harv. L. Rev.* 356, 397-98 (1967); Martin H. Redish, [Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals](#), 2003 *U. Chi. Legal F.* 71, 101-03 (2003) (criticizing the role of inertia in class actions).

75 Kaplan, *supra* note 74, at 398.

76 See, e.g., Kerry Barnett, Note, [Equitable Trusts: An Effective Remedy in Consumer Class Actions](#), 96 *Yale L.J.* 1591, 1594-95 (1987); Stewart R. Shepherd, Comment, [Damage Distribution in Class Actions: The Cy Pres Remedy](#), 39 *U. Chi. L. Rev.* 448, 448 (1972). For an example of a case where the remainder reverted to the defendant, see [III. Bell Tel. Co. v. Slattery](#), 102 *F.2d* 58, 61-62 (7th Cir. 1939) (finding that a telephone company is entitled to keep \$1.69 million of damage fund that was not claimed).

77 See generally Shepherd, *supra* note 76 (discussing the cy pres remedy).

78 *Id.* at 452.

79 *Id.* at 453.

80 Unlike cy pres, where funds are awarded to a charitable third party, “fluid class recovery” is used to indirectly compensate class members when direct compensation is impracticable. For a detailed analysis of fluid class recovery and its relationship to cy pres, see *infra* Part V.

81 Shepherd, *supra* note 76, at 453.

82 *Id.*

83 *Id.*

84 The concern expressed in the Comment foreshadowed the problems of faux class actions, but failed to recognize the similar issues that would arise from the use of cy pres in class actions. See *infra* Part IV.B.

85 Shepherd, *supra* note 76, at 453.

86 *Id.* at 453-54.

87 [440 F.2d 1079 \(2d Cir. 1971\)](#).

88 [Id. at 1083](#) (quoting district court order).

89 [Shepherd, supra note 76, at 457](#).

90 [Id.](#)

91 [Id.](#)

92 [Id.](#)

93 [Id. at 458](#).

94 [Id. at 455](#). The Comment recognized that distribution of the funds to the state “would appear to be more like a fine or penalty than like compensatory damages.” [Id.](#) However, the Comment did not find these concerns sufficiently severe to warrant the rejection of cy pres distributions to the state. [Id. at 456](#).

95 [Id. at 464](#).

96 [Id.](#)

97 [Barnett, supra note 76, at 1600](#); [Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 732 \(1987\)](#).

98 [Barnett, supra note 76, at 1594](#).

99 [Id. at 1605](#); [DeJarlais, supra note 97, at 759](#).

100 [Barnett, supra note 76, at 1600](#); [DeJarlais, supra note 97, at 767](#).

101 U.S. Const. art. III, § 2 (requiring cases or controversies); see [infra Part IV.A](#).

102 No. 66 Civ. 356, [1974 WL 350, at *2 \(S.D.N.Y. Jan. 3, 1974\)](#).

103 [Id. at *1](#).

104 Id. (emphasis added).

105 Id. at *2.

106 Id.

107 See *infra* Part V.

108 No. NCC 11933 B (Los Angeles Super. Ct. Apr. 24, 1984).

109 Id. Yet another illustration is [Vecchione v. Wohlgemuth](#), 80 F.R.D. 32, 46 (E.D. Pa. 1978). [W]e are sufficiently impressed with the prospects of an agency system that we will apply the cy pres doctrine and order that the unclaimed Vecchione payback funds (now totalling some \$250,000) be applied to a pilot program testing the feasibility of an agency system. If the pilot project proves successful, we trust that the Commonwealth will move towards that system, even if only because it promises to be less expensive than guardianship. In [In re Folding Carton Antitrust Litig.](#), 744 F.2d 1252, 1254 (7th Cir. 1984), the court overturned a charitable cy pres award, directed by the district court, to establish a foundation to study antitrust law. However, the appellate court's concern appeared not to have been with the general idea of charitable cy pres but rather with the wisdom of the specific award. [E]stablishment of the proposed Foundation[, the court said,] would be carrying coals to Newcastle. There has already been voluminous research with respect to multidistrict antitrust litigation and the substantive and procedural aspects of the antitrust laws by judges, lawyer specialists, law schools, bar associations, Congressional committees, the Department of Justice and the Federal Trade Commission, and it is a continuing project of all those concerned. In our view, establishing an unneeded Foundation for these purposes from the reserve fund would be a miscarriage of justice and an abuse of discretion. Id. at 1254-55.

110 No. MDL 1361, [2005 WL 1923446](#) (D.Me. Aug. 9, 2005).

111 Id. at *1.

112 [In re Infant Formula Multidistrict Litig.](#), No. 4:91-CV-00878-MP, [2005 WL 2211312](#), at *1 (N.D. Fla. Sept. 8, 2005).

113 991 F. Supp. 1193 (N.D. Cal. 1998).

114 Id. at 1198; see also [West Virginia v. Chas. Pfizer & Co.](#), 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) (allowing the excess of settlement consumer fund to be distributed to states in proportion to their population to be used for benefit of consumers in a case involving price fixing allegations against major drug manufacturers).

115 56 F. Supp. 2d 355 (S.D.N.Y. 1999).

116 Id. at 359.

117 See, e.g., [Mirfasihi v. Fleet Mortgage. Corp.](#), 356 F.3d 781, 785 (7th Cir. 2004).

Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself? The settlement that the district judge approved sold these 1.4 million claimants down the river. Only if they had no claim—more precisely no claim large enough to justify a distribution to them—did they lose nothing by the settlement, and the judge made no finding that they had no such claim.

¹¹⁸ [Masters v. Wilhelmina Model Agency, Inc.](#), 473 F.3d 423, 435-36 (2d Cir. 2007).

¹¹⁹ [Mirfasihi](#), 356 F.3d at 784 (discussing Fair Credit Reporting Act case against telemarketers).

¹²⁰ [McLaughlin v. Am. Tobacco Co.](#), 522 F.3d 215, 232 (2d Cir. 2008) (concerning RICO suit against tobacco companies for misrepresenting the harmfulness of light cigarettes).

¹²¹ See *infra* Part IV.

¹²² 444 U.S. 472 (1980).

¹²³ *Id.* at 481-82. Though acknowledging the Supreme Court's recognition of the possibility of reversion to defendants, the court in [Powell v. Georgia-Pacific Corp.](#), 843 F. Supp. 491, 496, 499 (W.D. Ark. 1994), rejected that alternative under the facts of that case.

¹²⁴ [Shepherd](#), *supra* note 76, at 456.

¹²⁵ For a detailed discussion of the private rights adjudicatory model, see Martin H. Redish, *The Federal Courts in the Political Order* 90-103 (1991).

¹²⁶ Of course, a plaintiff may have motivations for bringing suit that are grounded in the public interest. Whatever plaintiff's underlying motivation, however, she may not bring suit unless she has suffered injury in fact caused by defendant's actions which can be redressed by judicial action. See, e.g., [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 563, 568 (1992).

¹²⁷ See [In re Folding Carton Antitrust Litig.](#), 744 F.2d 1252, 1258 (7th Cir. 1984) (Flaum, J., concurring in part and dissenting in part) ("Traditionally, unclaimed property escheats to the states."). There is serious question as to whether unclaimed funds in suits brought under federal law can escheat to the United States. Compare *id.* at 1255 (majority opinion) (finding "interim" escheat to federal government is "impermanent" and therefore "raises no unconstitutional taking"; it will remain available to pay late claimants who file), with *id.* at 1256 (Flaum, J., concurring in part and dissenting in part) (noting that escheat to United States is impermissible, and as a practical matter majority is authorizing escheat to United States).

¹²⁸ See *infra* Part VI.

¹²⁹ See generally [Shepherd](#), *supra* note 76 (discussing the reversion of funds to defendants).

¹³⁰ 4 [Alba Conte & Herbert B. Newberg](#), *Newberg on Class Actions* §§ 14:5- 6 (4th ed 2002).

- ¹³¹ Id. § 14:6, at 551 (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.”); see also *id.* (asserting that the fee is measured on the basis of the size of the common fund); *infra* Part IV.E.
- ¹³² This will especially be true in the so-called “settlement class action” situation, where the court is asked to certify on the condition that it accept a prearranged settlement agreed to by the parties. See generally 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 (2006) (discussing constitutional difficulties resulting from the settlement class action device).
- ¹³³ The court also leaves an injured party without compensation, as discussed *infra* Part IV.C.
- ¹³⁴ U.S. Const. art. III, § 2.
- ¹³⁵ For a detailed explanation of Article III’s case-or-controversy requirement, see generally Redish & Kastanek, *supra* note 132.
- ¹³⁶ See, e.g., [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560-61 (1992); [Allen v. Wright](#), 468 U.S. 737, 751 (1984).
- ¹³⁷ See generally Redish & Kastanek, *supra* note 132 (discussing the textual and normative groundings of the adversement requirement derived from Article III’s case- or-controversy requirement).
- ¹³⁸ [Fed. R. Civ. P. 23\(e\)](#).
- ¹³⁹ [In re Rhone-Poulenc Rorer, Inc.](#), 51 F.3d 1293, 1298 (7th Cir. 1995).
- ¹⁴⁰ On the relevance of Article III’s case-or-controversy requirement to class action settlements, see generally Redish & Kastanek, *supra* note 132 (providing textual, doctrinal, and theoretical analysis of the adverseness requirement of Article III). Because one of the authors has previously developed the framework for analyzing the adverseness requirement, this Article only reviews the elements necessary to address the pathologies of cy pres.
- ¹⁴¹ [28 U.S.C. § 2072\(b\)](#) (2006) (prohibiting a rule from abridging, enlarging, or modifying a substantive right).
- ¹⁴² Redish, *supra* note 74, at 75.
- ¹⁴³ *Id.* This punitive remedy may be additional civil penalties beyond compensation, or criminal sanctions.
- ¹⁴⁴ *Id.* at 86.
It surely does not follow, however, that federal adjudication is incapable of advancing social, economic, or political interests that extend well beyond the personal interest of the individual litigant. It means, simply, that whatever impact federal adjudication may have on the public interest must come as an incident to the assertion and adjudication of narrower, personal interests.
Id.; see John C. Coffee, Jr., [Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement](#)

of [Law Through Class and Derivative Actions](#), 86 Colum. L. Rev. 669, 669 (1986) (“Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.”).

¹⁴⁵ One might argue that in a case in which the underlying substantive law authorizes punitive damages, resort to a procedure resembling a civil fine is not problematic, since the purpose of such damages is to punish, not to compensate. However, there remain fundamental differences between the two remedial forms. Punitive damages are awarded as relief ancillary to the provision of victim compensation. They are a substantively authorized windfall to those who have been injured. In contrast, a civil fine (much like cy pres relief) is wholly divorced from the victim compensation so central to the underlying law.

¹⁴⁶ 880 F.2d 807 (5th Cir. 1989).

¹⁴⁷ *Id.* at 811.

¹⁴⁸ *In re Lease Oil Antitrust Litig. (No. II)*, MDL No. 1206, 2007 WL 4377835, at *14 (S.D. Tex. Dec. 12, 2007) (citing *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706-07 (8th Cir. 1997); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990); *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir. 1984).

¹⁴⁹ This is not always the case, however. In a number of cases, cy pres has been invoked in an ex ante matter, before claimants have had an opportunity to file a claim. See *infra* Part IV.C.

¹⁵⁰ Certain courts, recognizing these dangers, have refused certification. See, e.g., *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (“Given that any residue would be distributed to the class’s benefit on the basis of cy pres principles rather than returned to defendants, defendants would still be paying the inflated total estimated amount of damages arrived at under the first step of the fluid recovery analysis.”); see also *In re Fresh Del Monte Pineapples Antitrust Litig., No. 1:04-md-1628 (RMB)*, 2008 WL 5661873, at *10 (S.D.N.Y. Feb. 20, 2008) (rejecting certification because fluid class recovery plan would not assure compensation to injured class).

¹⁵¹ Cf. *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (rejecting statistical sampling method of computing damages in asbestos class action under Erie doctrine because Texas, which supplied the underlying cause of action, “has made its policy choices in defining the duty owed by manufacturers and suppliers of products to consumers”).

¹⁵² See, e.g., *In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091, 1105 (N.D. Ill. 1983) (“Faced with the more closely analogous problem of how to dispose of unclaimed portions of settlement funds, courts have the power and the responsibility to exercise equitable discretion to achieve substantial justice in the distribution of the funds.”). For an example of commentators citing the judiciary’s equitable powers as a basis for using cy pres, see 4 *Conte & Newberg, supra note 130*, § 10:16 (“[I]t has been recognized that this determination falls within the general equity powers of the court and that defendants lack standing to contest this issue once they have already been found liable for the aggregate damages.”).

¹⁵³ Recall that the doctrine of cy pres developed not in the class action context, but in the law of trusts. See *supra* Part II.A.

¹⁵⁴ For an explanation of the concept of class action “pathology,” see *supra* Part I.

¹⁵⁵ For detailed analysis and explanation of the faux class action, see Redish, *supra* note 1, at 21-85.

156 Id. at 25-26.

157 For a detailed analysis and critique of the settlement class action, see generally Redish & Kastanek, *supra* note 132.

158 See *infra* Part IV.

159 *Hansberry v. Lee*, 311 U.S. 32, 45-46 (1940); see also Fed. R. Civ. P. 24(a)(2) (requiring adequacy of representation).

160 See *supra* notes 131-32 and accompanying text.

161 *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259-61 (2009) (discussing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

162 See, e.g., *McLaughlin v. Am. Tobacco Co.*, 522 F.3d. 215, 222 (2d Cir. 2008).

163 The dataset was developed from searches of Westlaw, Lexis, JSTOR, and Google. Initially, in June 2008, the Westlaw ALLFEDS database was searched using the terms “class action!” and “cy pres.” This search was then supplemented in November and December 2008 using the Lexis, JSTOR, and Google search functions. The Lexis “Federal & State Cases, Combined” database was searched for “class action” AND (“cy pres” OR “fluid class recovery” OR “fluid recovery” OR “leftover award” OR “remaining award” OR “remainder award”). The same search string was used in both JSTOR’s Basic Search and in Google. Combined, these searches resulted in 657 cases. In many of these cases, the court mentioned cy pres only incidentally, or rejected a cy pres award. For purposes of this Article, only the cases where the court granted a cy pres award to a third party charity as part of a judgment on the merits or where the court approved a settlement agreement that included a cy pres distribution to a third party charity were included. The remaining 120 cases in the dataset are only in federal courts and are not duplicative. Quantitative legal research from databases such as Westlaw and Lexis may have inherent selection biases because they do not include every case, nor are the available cases randomly selected. The same is true of JSTOR and other publicly available mentions of cy pres awards. Therefore, caution must be exercised if extrapolating results to the broader population of cy pres cases.

164 The following analysis is based on ninety-five cases since an explicit cy pres award date for every case was not available.

165 When a court certifies a settlement class action, it violates the Article III requirement that it only adjudicate cases or controversies. See Redish & Kastanek, *supra* note 132, at 582. When the parties submit a settlement class action to the court, the parties agree on the desired outcome, and lack the requisite adverseness. *Id.* at 563. The only benefit of filtering the settlement through the court is to foreclose the rights of absent plaintiffs.

166 Faux class actions are class action suits where the damages are too small to incentivize an individual plaintiff to pursue the available funds. For the purposes of this analysis, a faux class action was defined as one where the mean award per plaintiff is likely to be less than \$100. In cases where calculations were necessary to determine whether the case was a faux class action, the mean award per plaintiff was calculated based on the total award and the number of anticipated plaintiffs in the class.

167 Ironically, the University of Chicago Law Review Comment originally advocated the use of cy pres in class actions in order to avoid making class actions an instrument that benefited only lawyers. Shepherd, *supra* note 76, at 449.

168 There are also six cases where it was not possible to tell from the information available whether the cy pres award was part of a

case that was adjudicated on the merits, that settled post-certification, or that was a settlement class action (“Unclear Class Action Disposition” in Figure 2).

¹⁶⁹ See supra Part III.B.

¹⁷⁰ See *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 21-22 (1994) (holding that a court “may make such disposition of the whole case as justice may require,” including the use of any judicial practice “reasonably ancillary to the primary, dispute-deciding function of the federal courts” (internal quotation marks omitted)).

¹⁷¹ “Ex ante,” for purposes of this analysis, is defined as a cy pres award that was designated as a part of a settlement agreement or judgment where: (1) an amount and at least one charity was named as a recipient of part of the fund from the outset and the charity’s receipt of the award was not contingent on there being remaining/unclaimed funds in the settlement fund, or (2) the entire award was given to at least one named charity with no attempt to compensate the absent class members.

¹⁷² Note that in the dataset of 120 cases, only thirteen were adjudicated.

¹⁷³ The variable “Cy Pres as a Percent of Compensatory Damages (Paired),” was derived from a distribution that included each case’s cy pres award as a percent of total compensatory damages. Thus, the percentages shown cannot be calculated from the information in Figure 6.

¹⁷⁴ For purposes of this analysis, total compensatory damages include all cy pres awards but specifically exclude attorneys’ fees and other costs.

¹⁷⁵ 4 *Conte & Newberg*, supra note 130, § 14:6, at 546-47. Newberg explains the reasoning behind awarding compensation off the entire fund as follows:

The common fund doctrine allows a court to distribute attorney’s fees from the common fund that is created for the satisfaction of class members’ claims when a class action reaches settlement or judgment. The doctrine is grounded in the principles of quantum meruit and unjust enrichment, in two senses. First, the doctrine prevents unjust enrichment of absent members of the class at the expense of the attorneys. It is meant to compensate the attorneys in proportion to the benefit they have obtained for the entire class (the fund), not just the representative members with whom they have contracted.

Id.

¹⁷⁶ *Id.* § 14:6, at 551 (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.”).

¹⁷⁷ The sets of cases in Figures 6 and 7 are not identical. However, there is some overlap between the sets.

¹⁷⁸ “Total Recovery” includes all monetary amounts awarded to the plaintiffs or cy pres recipients. This includes the total fund with cy pres awards and attorneys’ fees. The variable “Attorneys’ Fees as a Percent of Total Recovery (Paired)” was derived from a distribution that included each case’s attorneys’ fees as a percent of total recovery. Thus, the percentages shown cannot be calculated from the information in Figure 7.

¹⁷⁹ See supra Part II.B.4.

- 180 Technically this should hold for any awards that do not directly compensate the plaintiff class, not just cy pres awards.
- 181 Gregory A. Hartman, Comment, Due Process and Fluid Class Recovery, 53 Or. L. Rev. 225, 227 (1974).
- 182 See, e.g., [McLaughlin v. Am. Tobacco Co.](#), 522 F.3d 215, 231 (2d Cir. 2008); [Democratic Cent. Comm. of D.C. v. Wash. Metro. Area Transit Comm'n](#), 84 F.3d 451, 455 (D.C. Cir. 1996) (per curiam) (“In the context of class actions, the cy pres doctrine is referred to as ‘fluid recovery.’”).
- 183 [433 P.2d 732](#) (Cal. 1967).
- 184 [479 F.2d 1005](#) (2d Cir. 1973) (Eisen III), vacated on other grounds, [417 U.S. 156](#) (1974).
- 185 [Id.](#) at 1010.
- 186 [Id.](#) at 1011 (quoting the district court opinion).
- 187 [Id.](#)
- 188 [Id.](#) at 1017.
- 189 [Id.](#) at 1018.
- 190 [Id.](#)
- 191 [Windham v. Am. Brands, Inc.](#), 565 F.2d 59, 72 n.41 (4th Cir. 1977); [Kline v. Coldwell, Banker & Co.](#), 508 F.2d 226, 233-34 (9th Cir. 1974).
- 192 [84 F.3d 451](#) (D.C. Cir. 1996).
- 193 [Id.](#) at 455 (quoting [State v. Levi Strauss & Co.](#), 715 P.2d 564, 571 (1986)).
- 194 [Id.](#) at 455 n.2; see, e.g., [State v. Levi Strauss & Co.](#), 715 P.2d 564, 576 (1986).
- 195 [818 F.2d 179](#) (2d Cir. 1987).
- 196 [Id.](#) at 184.

¹⁹⁷ Id. at 185.

¹⁹⁸ Id.

¹⁹⁹ No. 1:04-md-1628 (RMB), 2008 WL 5661873 (S.D.N.Y. Feb. 20, 2008).

²⁰⁰ Id. at *6-7.

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Article

AVOIDING DEATH BY A THOUSAND CUTS: THE RELITIGATION OF CLASS CERTIFICATION AND THE REALITIES OF THE MODERN CLASS ACTION

Martin H. Redish^{al} Megan B. Kiernan^{am}

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***1660 Introduction**

The modern class action may be appropriately analogized to the invention of fire.¹ If used properly, it can significantly advance societal goals. If misused, however, it quickly degenerates into something that causes significant harm. In order to

promote the positive aspects of the class action while simultaneously controlling its negative tendencies, it is first necessary to understand the class action's true nature and the important ways in which it departs from more traditional forms of litigation. Unfortunately, neither scholars nor jurists have successfully undertaken this Herculean task. As a result, class action litigation gives rise to considerably more systemic harm than good.

In this Article, we will first discern the unique essence of the class action and then apply our insights to one of the thornier procedural pathologies brought about by the judicial system's failure to recognize the class action's unique status. The difficulty on which we focus our analysis is the serious problem of serial relitigation of class certification. In *Smith v. Bayer Corp.*, the Supreme Court was unsuccessful in its efforts to fashion a solution to this problem because it failed to recognize the unique procedural aspects of the class action.² Those aspects demand treatment that fundamentally differs from the manner in which the courts treat more traditional forms of litigation. In *Bayer*, the Supreme Court decided that a "federal [district] court [had] exceeded its authority under the 'relitigation exception' to the Anti-Injunction Act" when it enjoined an ongoing state judicial proceeding in order to "protect or effectuate" its earlier refusal to certify a class action.³ The Court held that the relitigation exception permitted only injunctions that implemented "well-recognized concepts" of *res judicata*, and the district court's injunction did not fall within this narrow category.⁴

The Court's decision in *Bayer* appears not to have been met with much criticism. Indeed, on the narrowest level, at least, there was not much to criticize. The Court merely clarified its interpretation of the relitigation exception to the Anti-Injunction Act. On its facts, the decision is correct.⁵ Despite the seemingly straightforward nature of its opinion, however, the *Bayer* Court clearly missed an important opportunity to devise a real solution to a very serious problem: the inefficiency, coercion, and general unfairness *1661 that invariably flow from serial attempts to relitigate the issue of the certifiability of a class action against the same defendant.

Normally, a defendant may invoke the family of doctrines encompassed within the concept of *res judicata*⁶ to prevent such harassment. Indeed, such avoidance is usually cited as the very purpose for development of *res judicata* in the first place.⁷ In the procedurally unique context of class action certification, however, *res judicata* is of little or no help in preventing the very injustice and inefficiency it was designed to avoid.

The problem arises because of an intersection of fact and law. While normally *res judicata* bars subsequent suits on the same claim by the same plaintiff or those in privity with her, any individual who is a member of the potential class may seek certification. While respected jurists have argued that an initial denial of certification should bind all potential class members regardless of which of them sought certification in the initial suit,⁸ the *Bayer* Court rightly rejected such an approach. It is well established that procedural due process guarantees each litigant her day in court;⁹ therefore, individuals may not be constitutionally bound by the resolution of a suit in which they were not parties or privies of those who were parties.¹⁰

Although the *Bayer* Court's conclusion was correct as a matter of constitutional law, it leaves the defendant opposing the class in an extremely difficult position. A denial of certification in the initial suit can invite an almost endless parade of potential class members seeking certification, freed from the burdens of the *res judicata* doctrine. Even if the defendant is successful suit after suit, a combination of the never-ending drain on its resources and the everlasting possibility that at some point one of those courts will certify the class effectively forces that defendant to settle, whether or not the merits dictate such a move. This is far from a systemically satisfactory result and the relatively meager alternative solutions which the *Bayer* Court offered defendants are less than comforting.¹¹

In this Article, we propose a solution to the dilemma that all but paralyzed the Court in *Bayer*. In doing so, we fashion a dramatically revised perception of class action litigation. While as a technical matter the class action is nothing more than an aggregation device--much like interpleader, *1662 impleader, or intervention--the indisputable realities of the class action make quite clear that the relationship between attorney and client is qualitatively different in the class context than in traditional litigation. For all practical purposes, class attorneys function as far more than class members' legal representatives: they act as quasi-guardians or trustees on behalf of the absent class members. This may or may not be a positive development.¹² But for good or ill, only the disingenuous or the naïve could seriously question the exceptionally powerful role attorneys play in class actions.

Recognition of the significant difference between traditional litigation and the modern class action should logically lead to the conclusion that, at least for purposes of res judicata of the denial of class certification, the named plaintiffs are not the only real parties in interest. The class attorneys should be deemed real parties in interest on the certification issue, and therefore the direct estoppel impact of a certification denial should bar subsequent certification attempts not only by the prior named plaintiffs, but also by the class attorneys. As a result, while individual members of the potential class may subsequently seek certification, they may not do so with the original class attorneys as their legal representatives.

Our proposed solution flows from a synthesis of the purposes served by the doctrine of res judicata and the practical realities of the modern class action. Because the driving force behind the class action is the class attorneys rather than the class members, it is very easy for the attorneys to circumvent the salutary goals of res judicata, simply by treating class members as fungible substitutes in the capacity of named plaintiffs. A myopic focus solely on who the named plaintiffs were in the initial suit permits the class attorneys to find within the protective reach of res judicata a hole big enough to drive a truck through. It is only by recognizing the realities of who is in charge of the class action and adjusting the doctrinal and conceptual scope of res judicata accordingly that the federal system can effectively bring about the efficiency and fairness for which res judicata was designed.

We recognize that our proposal would require a significant alteration in the classical form of the doctrine of res judicata. Up to this point, the fact that litigants have the same attorneys has never provided a basis for a finding of privity between those litigants for res judicata purposes.¹³ Nor have attorneys representing litigants, to our knowledge, ever been deemed real parties in interest for any purpose, much less for purposes of res judicata. But at least since 1966 when the Rules Advisory Committee dramatically *1663 revised the multi-party devices,¹⁴ procedure has been driven neither by rigid tradition nor by arid formalism, but rather by the dictates of pragmatism.¹⁵ Our proposed solution to the res judicata dilemma of serial class certification is driven by the same considerations.

We also candidly acknowledge that our proposal will not solve all of a potential class defendant's problems. In fact, our solution would not have helped the defendant in Bayer because the challenged attempt to certify came from a different group of attorneys, as well as a different set of named plaintiffs.¹⁶ But in attempting to solve the problem of serial certification attempts, we are not willing to ignore the foundational due process dictate that litigants have a constitutional right to their day in court.¹⁷

We recognize an additional limitation on our proposal, though it is a limitation that would have applied even to the more sweeping standard urged by Bayer and rejected by the Supreme Court. The direct estoppel derived from a denial of certification can apply only where the standards for certification are the same in the second case as they were in the first case. Thus, where the second forum is a state court that employs a standard different from that of Federal Rule 23 governing class certification, the first denial of certification will have no res judicata impact on the second suit.

Despite these limitations, we believe that acceptance of our proposal would almost certainly have a dramatic impact on the problem of serial certification attempts. Today, no one could seriously doubt that as a general matter, it is class action attorneys, and not class members, who stimulate class actions. If a denial of certification binds only the named plaintiffs, attorneys may easily substitute one named plaintiff after another, thereby rendering the direct estoppel branch of res judicata powerless to protect defendants against the very harassment that the doctrine is intended to prevent. By placing the deterrence where it belongs--squarely with the class attorneys who not only choose to engage in harassing relitigation, but also who have the most at stake financially--our proposal would achieve the goals of res judicata by taking account of the realities of the modern class action.

Part I of this Article examines Bayer and its implications for the problem of serial certification attempts. Part II describes baseline principles of res judicata in more detail. Part III explores the relitigation of class certification and the specific problems it poses. Part IV places the relitigation of class *1664 certification in the context of the development and realities of the modern class action. By doing so, it will establish that for a number of purposes (including the application of res judicata) the class attorneys, not just the named plaintiffs, should be deemed the real parties in interest. Part V assesses alternative

solutions proposed in response to the relitigation of class certification, including the solution suggested in Bayer, and explains why each of these alternatives fails. Part VI examines the methods by which our solution might be implemented.

I. Smith v. Bayer: A Tale of Two Class Actions

Smith v. Bayer Corp. concerned two class actions, one federal and one state.¹⁸ The first class action, brought in West Virginia state court, alleged that Bayer had violated the state's consumer-protection statute by selling an allegedly defective drug called Baycol.¹⁹ The second class action, also brought in West Virginia, made similar claims.²⁰ Both class actions requested certification under [West Virginia Rule of Civil Procedure 23](#).²¹

Although they alleged similar violations, the two class actions did not name identical defendants. The first class action asserted claims against several West Virginia defendants, while the second class action named only Bayer.²² Thus, Bayer was able to remove the second class action to federal district court under diversity jurisdiction while the first class action remained in state court.²³ The two class actions proceeded "at roughly the same pace" for six years.²⁴

The federal district court was the first to reach a decision and "declined to certify" the class.²⁵ In an effort to turn one victory into another, Bayer then asked the district court to "enjoin the West Virginia state court from" certifying the still-pending class action, arguing that the two classes were identical and that a state court decision certifying the class would interfere with the federal court's denial of certification.²⁶ "The [d]istrict [c]ourt agreed and granted the injunction."²⁷ The court grounded its decision in the Anti-Injunction Act's relitigation exception,²⁸ which allows federal courts *1665 to enjoin state proceedings in order to protect or effectuate the federal courts' judgments.²⁹ The appellate court affirmed.³⁰

The Supreme Court reversed, finding that the district court had exceeded its authority under the Act.³¹ The Court held that Congress intended the relitigation exception to implement "well-recognized concepts" of res judicata, and the district court's injunction did not fall within those bounds.³² Although the Seventh Circuit had recently granted a similar injunction of a state court certification proceeding in *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation (Bridgestone II)*,³³ the Supreme Court in Bayer expressly disavowed the Seventh Circuit's use of the relitigation exception.³⁴ According to the Court, the relitigation exception requires that the issues decided be the same and that the parties to the case be the same or fit into one of the narrow exceptions to the rule against binding nonparties.³⁵ The facts of Bayer, the Court held, met neither requirement because the individual plaintiffs in the state suit were different from the individuals who sought certification in the federal suit.³⁶

The Court's treatment of the relitigation of class certification may reflect the relatively benign nature of the relitigation at issue in that case. The relitigation in Bayer took the form of two parallel class actions filed by different and unrelated attorneys. One of those proceedings, although filed a month after the other, happened to reach a decision first.³⁷ Because there was no evidence that the second class action was intended to harass Bayer, the Court may have concluded that the relitigation of class certification in this particular case did not pose a significant problem or, if it did, that it was not one that involved harassment, abuse of judicial resources, or fundamental unfairness. The relitigation of class certification, however, is often more pernicious than the relitigation that took place in Bayer. As Bayer noted in its briefs, threats of relitigation frequently force defendants to choose between buying peace through settlements or facing successive suits *1666 intended to bleed them dry: litigation's version of death by a thousand cuts.³⁸ But while this does appear to have been the situation in Bayer, the Court did not limit its holding to the specific facts of the case, or even to cases where there is no evidence of harassment.³⁹ The Court intended its decision to apply to all duplicative motions for certification brought by different named plaintiffs--even those brought by the same attorneys and meant to coerce defendants into class-wide settlement. Thus, the Court not only left Bayer unprotected,⁴⁰ it also left all defendants facing the possibility of serial certification attempts out in the cold by giving them nothing more than an oversimplified response to a complex problem.

II. Res Judicata and the Problem of Serial Certification

As a matter of the well-established law of judgments, the Bayer Court was correct in reversing the district court's injunction. Judgments law has long recognized a due process limitation, binding only those litigants who either had their day in court in the first litigation or are in privity with those who did.⁴¹

The law of judgments includes both claim preclusion and issue preclusion-- collectively referred to as "res judicata."⁴² At the risk of oversimplification, claim preclusion prohibits the relitigation of a claim when a court's dismissal of that claim is both final and on the merits. The bar applies to the entire claim, without regard to whether the parties litigated all aspects of that claim. Issue preclusion, in contrast, does not prohibit future litigation of the entire claim; rather, it forecloses only the relitigation of issues that the parties already litigated and resolved in a prior litigation.⁴³ By precluding parties from arguing issues or bringing claims which they have already "had a full and fair opportunity to litigate," these two doctrines further the purpose of judgment law, namely, to "conserve[] *1667 judicial resources" and protect against "the expense and vexation [of] multiple lawsuits."⁴⁴

Claim preclusion applies only when a court's dismissal of a claim is both final and on the merits.⁴⁵ Therefore, when a court disposes of a case solely on the basis of a procedural issue, claim preclusion does not apply. Where a court disposed of the first suit on the basis of a procedural issue, however, the initial court's findings will bind future courts' resolution of that same issue in suits brought by the same plaintiff or one in privity with him. This is known as direct estoppel.⁴⁶ Thus, even though the second suit concerns the same claim as the first suit, the first suit does not preclude a second action; it only precludes the relitigation of decided issues.⁴⁷ In Bayer, the defendant sought application of direct estoppel on the issue of class certification, since the court disposed of the first suit solely because the class was not certifiable. As previously mentioned, for direct estoppel to apply--indeed, for any form of issue or claim preclusion to apply--the estopped party must have been a party to the first action because a person who was not a party to the first action did not have a full and fair opportunity to litigate the claims and issues that the action concerned.⁴⁸ However, as the Court in Bayer acknowledged, there are "a few discrete exceptions to the general rule against binding nonparties."⁴⁹ These include, for the most part, cases in which the nonparties were in "privity" with the party who litigated and lost the first suit. More specifically, these include nonparties who have preexisting substantive legal relationships with parties to the first action,⁵⁰ nonparties who were adequately represented in the first suit,⁵¹ and nonparties who later bring suit as the designated representatives of a party to the first suit. It also includes nonparties who assumed control over the first action⁵² or who otherwise agreed to be bound by the first court's *1668 determinations.⁵³ The plaintiffs in the state court class action in Bayer did not fall within any of these exceptions, and thus, purely as a matter of the traditional judgments law, the Supreme Court was correct in overturning the district court's injunction, on the basis of the well-accepted due process limitation on the reach of res judicata. The fact that serial class certification attempts do not run afoul of long established res judicata practice, however, does not alter the fact that such attempts often give rise to serious injustice and inefficiencies. Indeed, as already noted, these injustices and inefficiencies are the very same procedural harms that res judicata is designed to avoid in the first place. To the extent those harms differ at all, it is that in the class certification context harms are, metaphorically speaking, on steroids. While serial individual litigation may well give rise to harassment, waste, and coercion, those pathologies pale in comparison to the severity of the comparable harms in the class action context. Defendants facing the possibility of almost never-ending attempts to certify the same class proceeding in state after state, with the danger of a "bet-the-company" lawsuit awaiting them as soon as one court chooses to certify,⁵⁴ is the procedural equivalent of death by a thousand cuts--hardly a result that our procedural system should tolerate. The goal should be to devise a means to protect defendants against the coercion, waste, and manipulative gamesmanship caused by serial efforts to obtain class certification.

III. The Relitigation of Class Certification

The problems of serial certification may occur in one of two ways. First, the plaintiffs' attorneys in the initial case may simply substitute different members of the potential class for the putative class members who have already unsuccessfully sought certification. Second, wholly unrelated attorneys may seek certification in suits brought by different members of the putative class.⁵⁵

A leading example of the first method is *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation (Bridgestone I)*,

where the Seventh Circuit overturned the district court's certification of two nationwide classes--one for customers of Ford trucks and the other for customers of Bridgestone and Firestone tires.⁵⁶ After the Supreme Court denied the attorneys' petition for *1669 certiorari,⁵⁷ the attorneys decided to try again, using new named plaintiffs to file at least five additional motions for certification in different courts.⁵⁸ One state court certified a class the day the complaint was filed, "without awaiting a response from the defendants and without giving reasons" for its ruling.⁵⁹ In response, Ford and Firestone asked the federal court that had initially granted certification to enjoin the different state courts from certifying the class actions.⁶⁰ Although the district court denied the injunction, the Seventh Circuit granted it in *Bridgestone II*, noting that if the state courts were not barred from considering the subsequent motions for certification, the court would be "perpetuating an asymmetric system in which class counsel can win but never lose."⁶¹ If a denial of certification has no enduring effect, the court reasoned, plaintiffs' attorneys would be in a position to "roll the dice as many times as they please," thereby enabling them to manipulate the system until they got a result they wanted.⁶²

While the court in *Bridgestone II* correctly recognized the serious problem serial certification attempts cause, finding a satisfactory solution to those problems is another matter entirely. To this point, no one has proposed an adequate solution. In the Part that follows, we put forth a radically different solution to the problem, one grounded in the recognition of the important ways in which the modern class action differs from the traditional adversary proceeding.⁶³ After that, we explore the solutions implemented by the Seventh Circuit in *Bridgestone II* and by the Supreme Court in *Bayer*, as well as the approach proposed by the American Legal Institute, and explain the serious flaws in all three.⁶⁴

IV. Solving the Serial Certification Problem by Recognizing the Realities of the Modern Class Action

A. Traditional Res Judicata and Serial Certification: A Square Peg in a Round Hole

Even the Rules Advisory Committee has acknowledged the potential for abuse presented by "unfettered opportunities" to file the same class action in different courts.⁶⁵ However, scholars and courts have not always recognized *1670 plaintiffs' attorneys' considerable role in the relitigation. With few exceptions,⁶⁶ they have largely ignored the unique role class attorneys play in the entire process. Before we can explain how our reassessment of the class action ultimately leads to amelioration of the serious problem of serial certification attempts, we must first explore the reasons why traditional res judicata doctrine completely fails to achieve its goal in a class action context. Res judicata is designed to prevent litigants from creating unfairness, waste, or inefficiency by harassing defendants with multiple suits asserting the same claim or raising factual issues that the parties have already litigated. It has traditionally achieved this goal by barring a losing litigant from bringing suit twice or, on some occasions, relitigating overlapping issues of fact or mixed law-fact. But this traditional res judicata model is of no effect where the attorney, rather than the litigants, makes the strategic choices and has available a seemingly endless string of totally fungible potential named plaintiffs.⁶⁷ This is, of course, the exact situation in the overwhelming majority of class actions.

Compounding the problem is that the coercive impact of the multiple litigation threat exponentially increases in the class action context. In short, traditional res judicata fails in this setting because it is aimed at the wrong actors in the process. In all other contexts, of course, it makes perfect sense to surgically apply res judicata solely to those who were actual litigants in the first suit, because it is they alone who are the real parties in interest: they are the parties with the most at stake and the only ones with authority to bring multiple identical suits against the same defendant. But where, as in the class action context, the primary participant--the actor who both makes the strategic choices and financially has the most at stake--was not a formal litigant in the initial suit, it makes no sense to confine res judicata's reach solely to those formal litigants. The modern class action differs in significant ways from the traditional one-on-one or even multi-party action, and it is for that reason that it is appropriate to redefine the real party in interest in the class action context in order to enable res judicata to perform in class actions the salutary function it has long performed in traditional litigation.

*1671 B. The Realities of the Modern Class Action

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As a technical matter, at least, the class action is nothing more than an elaborate aggregation device established by the Federal Rules of Civil Procedure.⁶⁸ The reality, of course, is very different. In important ways, the modern class action differs dramatically from the traditional model of litigation, and nowhere is this truer than in terms of the relationship between attorney and client.

Consider the indisputable ways in which the attorney-client relationships differ in the class action context from that of the traditional litigation framework. Most importantly, in the class action context, class attorneys are invariably the starting and driving force creating the class and conducting the class proceeding. Indeed, in many class actions, widely referred to as “negative value” or “Type B” classes, the claims of individual class members are so small that they would not, standing alone, justify the filing of an individual suit.⁶⁹ It would be a rare negative-value class action where class attorneys are not the driving force behind suit. In these cases, it is left to the attorneys not just to construct the class but also to solicit the named plaintiffs. In the words of two respected scholars, “[t]hat such solicitation occurs on a regular basis is patently obvious.”⁷⁰

In some instances, this solicitation has taken the form of nationwide searches for eligible plaintiffs, as in the Agent Orange⁷¹ and Dalkon Shield⁷² cases. Class action attorneys have even “entered into agreements with labor unions and medical clinics to implement dragnet medical screenings and *1672 direct-mail solicitations,” which have yielded thousands of clients.⁷³ In the context of securities and derivative litigation, instead of repeatedly soliciting clients, some attorneys take advantage of “in-house” plaintiffs, “who are virtually satellites of a particular firm” and serve as class representatives in multiple actions.⁷⁴ This same practice occurs in mass-tort cases, where a named plaintiff in one action may serve as the named plaintiff in an entirely unrelated case.⁷⁵

Of course, some class actions involve “positive-value claims.” Unlike negative-value claims, positive-value claims do not depend on the class action device for viability. Instead, they allege injuries sufficiently serious and seek damages of a sufficient amount to justify the costs of individualized litigation. Because these claims are independently viable, plaintiffs have little incentive to bring them as a class.⁷⁶ Thus, if an individual with a positive-value claim brings the claim to an attorney, it is still the attorney who is left to construct the class and conduct the class proceeding. With both negative-value and positive-value class actions, then, it is invariably plaintiffs’ attorneys who seek out plaintiffs and construct the class. In no other established legal proceeding do attorneys play such a central--indeed foundational--role.

The class members’ general lack of involvement in the conduct of the proceeding further strengthens the class attorneys’ role. It is safe to assume that the overwhelming majority of individual class members have little or nothing to do with the conduct of the class proceeding. This is especially true in the context of negative-value classes, but likely applies for the most *1673 part to positive-value classes as well. The attorneys direct the suit and make all strategic decisions with little or no consultation with their “clients.”⁷⁷ Indeed, in some class actions, the attorneys never even notify the absent class members of the proceeding, and the class members have no choice as to whether or not to remain members of the class.⁷⁸ As Professor Coffee notes, in what may be something of an understatement, “the retainer agreement in such a context begins to resemble the traditional contract of adhesion.”⁷⁹ Even in situations in which attorneys notify class members they have the right to opt out, class attorneys will almost never have any personal contact with the overwhelming majority of the class.

In a number of situations, the class, as a practical matter, does not even exist in any real sense: while in theory there are injured victims, from the very outset of the proceeding all involved are fully aware that the class proceeding will never reach, much less compensate, the overwhelming majority of the victims. One important way in which the modern class action differs dramatically from the traditional attorney-client relationship is that in the class action context the clients for the most part remain faceless to the attorney representing the class. In contrast, in the traditional individual litigation attorney and client will often develop a bond through one-on-one interaction.

The dominant role class attorneys play is compounded by the fact that class members have limited ability to monitor their attorneys.⁸⁰ Because most litigation decisions are made outside of the clients’ supervision, those decisions are not readily observable. In some instances, especially in the case of negative-value class actions, few class members expect an award large enough to justify the burdens of monitoring their attorneys’ decisions.⁸¹ Indeed, when the class members consider the litigation relatively unimportant, they have no incentive to keep track of either their attorneys or the proceeding. This creates

a significant free-rider problem: no class member is willing to incur the costs of monitoring when he would receive such limited benefits.⁸² It is difficult to argue with the rationality of these choices. Of course, this assumes that the class members are even aware a case is pending; often, especially with negative-value claims, the class members are entirely unaware of the litigation, despite having received *1674 formal notice. Thus, the plaintiffs' attorneys inevitably retain a large amount of discretion over the case. Without class members to monitor them, the attorneys have even greater incentives and freedom to direct and control the litigation.⁸³

The structure of the class action, which ensures that the attorneys possess a far greater financial stake in the litigation than any individual member of the class, further enhances the stature and authority of plaintiffs' attorneys. For all of these reasons, it is surely not unreasonable, as a practical matter at least, to characterize the class attorneys as the real parties in interest. Of course, we do not mean to suggest that class attorneys should be deemed the real parties in interest in a formal sense; they could not, for example, assert Article III standing since they do not possess the substantive right being asserted.⁸⁴ But the practical realities of class action practice should not be ignored: in many important ways, it is the class attorneys who have the most at stake in the proceeding, and who have sweeping power to make strategic choices.

C. Implications of the Realities of the Modern Class Action: Capitalistic Socialism and the "Guardianship" Model

At this point it is appropriate to attempt to digest the realities of the modern class action and to glean from them an understanding of the class action's impact on American procedural theory. In certain ways, the theoretical framework of the class action amounts to something of an oxymoron. It is, at its core, a form of "capitalistic socialism."

The class action functions as a form of litigation socialism because, like the political theory of socialism, it is generally designed to redistribute wealth from large economic power centers (either government or corporations) to smaller entities and individuals who have been unlawfully injured. The practice is at the same time capitalistic, however, because the attorneys who bring the proceeding have as at least one of their motivations (if not their sole motivation) personal financial gain.

In theory, the practice illustrates the old capitalistic mantra that people can do well by doing good. There are obvious societal benefits derived from the capitalistic socialism dynamic that underlies the class action. Most *1675 important is the fact that the class action device is capable of circumventing the normal inertia and lack of knowledge that would otherwise render such suits impossible. At least in the case of negative-value classes, the individual claims of victims would never be heard and the perpetrator of the unlawful harm would go unpunished. Because the class attorneys function as a type of economically incentivized guardian, they are able to cut transaction costs and vindicate rights that would otherwise almost certainly go without remedy. For this reason, we characterize the modern class action as a "guardianship" form of litigation.

The most important point to recognize about the guardianship model is that capitalistic guardianship is not identical to altruistic or governmental guardianship.⁸⁵ Capitalistic guardianship, in contrast to the other two forms, is driven primarily, if not exclusively, by concerns of financial profit. That works fine when the capitalistic interests of the guardian are inherently intertwined with the interests of the "wards," but one should be able to recognize that this is not always the case in the modern class action. The class action device is vulnerable to a variety of externalities or perverse incentives, meaning that in a number of situations the guardian's profit incentive and the best interest of the wards (i.e., absent class members) may diverge. For example, a number of commentators have noted that in all too many situations, it is only the class attorneys, rather than their clients, who benefit financially from the modern class action.⁸⁶ For present purposes, however, the issue is not whether the guardianship litigation model manifested in the class action is good or bad for society. For good or ill, there can be little doubt that as a descriptive matter, at least, the guardianship model represents an accurate characterization of class action litigation. The task at hand, then, is to determine how recognition of the guardianship model as the theoretical core of the modern class action can help solve many of the problems caused by serial attempts at class certification.

D. Implications of the Guardianship Class Action Model for Res Judicata in the Context of Serial Certification Attempts

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The logical implications of the guardianship model dovetail perfectly with the logic of res judicata. Res judicata doctrine dictates that its bar *1676 extends to those who (1) have had their day in court on the relevant issues; (2) have the most to gain by relitigating the issues resolved in the first suit; and (3) exercise ultimate control over the strategic decision to seek relitigation. Unless the third factor is included in the res judicata calculus, the doctrine will have little restrictive or deterrent force and therefore fail in achieving its goal of preventing burdensome, wasteful, and harassing relitigation. In contrast, if the first factor is not satisfied, the due process rights of the new plaintiffs to their day in court will have been denied, rendering the application of res judicata unconstitutional.

In traditional litigation, it is relatively easy to apply these three criteria. The litigant herself satisfies all three. Because of the unique guardianship relationship of attorney and client in the class action, however, it is impossible to reach a similar conclusion on direct estoppel of the first court's denial of certification. Viewing class attorneys as profit-driven guardians of absent class members enables the court in the second action to accurately view the attorneys who brought the first action as the real parties in interest for purposes of direct estoppel on the issue of class certifiability. To be sure, the class attorneys cannot properly be deemed real parties in interest as a formal matter--for example, for purposes of the standing required by Article III's case-or-controversy requirement. For that purpose, only the injured victims themselves qualify.⁸⁷ But it is important to note that the primary purpose of the 1966 revision of Rule 23 (as well as many of the other multi-party joinder devices) was to make the procedures responsive to practical, as well as formalistic, concerns.⁸⁸ Viewing class attorneys as pragmatic real parties in interest solely for purposes of res judicata fits well with the multi-party joinder rules' modern focus on considerations of practicality.⁸⁹

It is important to understand the limited nature of our proposed solution to the serial certification relitigation problem. By focusing exclusively on the class attorneys (as well as the named plaintiffs) in the original action, we intentionally exclude from the reach of direct estoppel those who were absent members of the putative class in the initial action. We do so for the simple reason that these litigants have never had their day in court on the issue of class certifiability. To be sure, by extending direct estoppel to the attorneys in the initial action, there will inescapably be an incidental impact on those absent class members, since they will now be *1677 denied the opportunity to retain those attorneys to seek class certification on their behalf. But because they will still be free to retain any unrelated attorney and are not precluded from seeking certification, their due process right to their day in court will not be undermined as a result of this incidental impact.

Our solution represents the most appropriate resolution of the dilemma between preserving the due process rights of the absent members of the putative class on the one hand and protecting defendants against the burdens and harassment of serial recertification attempts, on the other hand. By focusing the restrictive reach of res judicata on the class attorneys as the effective real party in interest--that is, the actor with the most at stake and ultimate strategic decision-making power--our solution assures that res judicata will perform its intended function and protect defendants from manipulative and coercive serial certification attempts. Yet by excluding from the reach of direct estoppel those who have never had their day in court, our solution preserves the due process rights of those who have not had the opportunity to advocate in favor of class certification.

It is true that our solution is by no means optimal from defendants' point of view. They would no doubt prefer to have the initial denial of certification stand as the equivalent of a pure in rem action, binding the entire world. Our answer, bluntly, is that, for reasons already explained, the Due Process Clause simply does not permit such a result. However, one cannot underestimate the benefits of our proposed solution to class defendants. Its greatest contribution is that it prevents the manipulative gamesmanship class attorneys cause by simply substituting fungible members of the putative class as plaintiffs in a heretofore successful attempt to circumvent the intended purposes of res judicata.

Applying our solution to the facts of *Bridgestone II* clarifies how our proposal would work in practice.⁹⁰ Recall that at issue in *Bridgestone II* were two separately certified nationwide classes: one for customers of Ford trucks and one for customers of Bridgestone tires.⁹¹ However, the Seventh Circuit denied certification of both classes on appeal.⁹² In response to this denial, plaintiffs' attorneys petitioned the Supreme Court for certiorari. When that failed,⁹³ plaintiffs' attorneys filed at least five additional motions for certification of the same two classes in other forums.⁹⁴

Our solution would have precluded the plaintiffs' attorneys from filing additional motions of certification. However, it would not have precluded the absent class members from doing the same, as long as they were *1678 represented by attorneys unconnected to the attorneys responsible for bringing the initial suits. Thus, had the absent class members chosen to bring additional motions for certification, and enlisted the help of different attorneys, they would not have been precluded from doing so. Our solution would apply only if the same attorneys who had brought the original motion for certification also brought a motion for certification on behalf of the absent class members. Our solution operates against the plaintiffs' attorneys to ensure that, as the real parties in interest, they do not get more than one opportunity to litigate the question of certification.

V. Going Too Far and Not Going Far Enough: The Problems with Proposed Solutions to the Relitigation of Class Certification

Prior to our proposal, three solutions to the problem of serial class certification attempts emerged, one adopted by the Seventh Circuit in *Bridgestone II*, a second proposed by the Supreme Court in *Smith v. Bayer*, and a third proposed by the American Legal Institute ("ALI"). For reasons to be discussed, however, all three approaches are seriously flawed.

A. Going Too Far: The *Bridgestone II* Solution

The court in *Bridgestone II* precluded all class members and their attorneys from filing any additional motions for certification of the same nationwide classes.⁹⁵ The class members could still bring their claims either individually or as part of a different class action (such as one limited to a single state), but they could not bring them as part of a nationwide class. The court explained that its previous denial of certification in *Bridgestone I* was "binding in personam."⁹⁶ But a decision that binds thousands, if not millions, of unnamed class members who were never before the court can hardly be considered in personam. By precluding absent class members from bringing additional motions for certification, the court turned what should have been an in personam decision into the equivalent of a pure in rem decision: one that binds the entire world. This result, however, is inconsistent with well-established principles of both the law of judgments and the constitutional dictates of procedural due process.

The court reasoned that because unnamed class members benefit from favorable judgments, they should also be bound by unfavorable judgments,⁹⁷ and therefore it was fair to bind all absent class members to its denial of certification in *Bridgestone I*. But this argument overlooks the crucial distinction between certified and uncertified classes. Unnamed class members of an uncertified class do not receive the benefit of favorable *1679 judgments--at least not any more than any future litigant might benefit from collateral estoppel due to the now-accepted breach of mutuality.⁹⁸ It is only unnamed class members who are part of a certified class who receive formal benefit of those judgments. Unnamed class members who are part of an uncertified class (and thus are not really members of anything) cannot constitutionally be bound by a decision merely because they would have benefited from the decision if the class has been certified and a court rendered a favorable judgment. They have not had their day in court, nor are they in privity with those who have. Thus, the major problem with the court's solution was its failure to deal effectively with the due process concern triggered by binding a party, through direct or collateral estoppel, to a finding on which she did not have her day in court. Without certification of the class, absent parties have no connection to the named parties who litigated and lost on the certification issue. The court's argument that in denying certification the district court had explicitly found that the named parties adequately represented the absent claimants fails to justify its extension of estoppel to those absent claimants. It is black-letter judgments law that findings which were not necessary to the decision have no estoppel impact, either direct or collateral, in future litigation, even on litigants who did have their day in court.⁹⁹ This is true both because there can be no assurance that the fact finder devoted sufficient attention to an issue irrelevant to the case's ultimate resolution and because the litigant who lost on that issue but was victorious overall has no incentive to appeal the negative ruling.¹⁰⁰ Moreover, the absent claimants themselves did not have their day in court on the issue of whether they were in fact adequately represented by the named parties and therefore cannot be bound by that finding.¹⁰¹ In any event, following the Supreme Court's decision in *Taylor v. Sturgell*, the mere fact that absent claimants were "adequately represented" in a prior suit--at least without a more formalized connection to or relationship with the losing

litigant in that prior suit--does *1680 not mean that the findings in that suit may constitutionally bind those claimants.¹⁰²

In defense of the *Bridgestone II* court's decision to bind the absent claimants, we should acknowledge the relatively limited nature of the estoppel impact from the prior suit. Those claimants did not lose their substantive cause of action as a result of the earlier refusal to certify the class. Indeed, they did not even lose their opportunity to seek certification of a geographically limited class. All they were deprived of was the opportunity to seek certification of a nationwide class action because of the district court's earlier refusal to certify such an action. But while accurate as far as it goes, this argument does not alter the due process calculus. The fact remains that litigants who had no connection to a prior litigation are being bound by a finding in that litigation, and as a result the procedural options open to them are being limited. In some circumstances, the impact of the *Bridgestone II* court's solution would go even further: it would not only deprive absent class members of their right to participate in the litigation of their claims, it would also, as a practical matter, deprive them of their right to bring their claims at all. It is important to recall that class actions enable plaintiffs to bring claims that otherwise could not stand on their own.¹⁰³ Individually, these negative-value claims are too small to justify the costs of individualized litigation, but when many of these negative-value claims are combined into a single class proceeding their litigation becomes economically viable. Denying plaintiffs the right to bring negative-value claims as a class effectively precludes them from bringing negative-value claims at all.¹⁰⁴ Although several scholars have argued that plaintiffs have no right to the use of procedural devices separate from their right to bring the underlying substantive claim,¹⁰⁵ in the case of negative-value claims a plaintiff's right to the class action device is equivalent to her right to bring the underlying substantive claim itself.¹⁰⁶ By precluding *1681 absent class members from bringing additional motions for certification, plaintiffs may, in some circumstances, be precluded from bringing their claims at all. Moreover, unless litigants or their privies had their day in court in the litigation of a particular factual issue, due process precludes imposing any form of estoppel impact from the prior courts' findings. The mere fact that those litigants have not been deprived of their right to sue is of no consequence.

As already noted, the court in *Bridgestone II* was attempting to treat the initial denial of certification as a form of a pure in rem proceeding, which binds the entire world.¹⁰⁷ But there is no res involved in a proceeding to certify a class action. The only rights involved are purely personal rights, and the only litigants who can be bound by findings made in the denial of certification are those who had their day in court or who were in privity with those who did. As serious as the problem of serial certification is, it cannot constitutionally be resolved through resort to measures that undermine core dictates of procedural due process.

B. Not Going Far Enough: The Bayer Court's Solution

While the *Bridgestone II* court's solution goes too far, the Bayer Court's solution does not go nearly far enough. In declining to authorize a federal injunction to protect the earlier federal court's refusal to certify the class action, the Court in *Bayer* acknowledged the harmful consequences of its decision for the defendant, and then suggested a solution:

Bayer claims that this Court's approach to class actions would permit class counsel to try repeatedly to certify the same class simply by changing plaintiffs. But principles of stare decisis and comity among courts generally suffice to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. . . . And to the extent class actions raise special relitigation problems, the federal Class Action Fairness Act of 2005 *1682 provides a remedy that does not involve departing from the usual preclusion rules.¹⁰⁸

In other words, the Court was suggesting that defendants subjected to the relitigation of class certification persuade the second court, in the spirit of comity and stare decisis, to follow the first court's denial of certification.

The Court also suggested that, "to the extent class actions raise special problems of relitigation,"¹⁰⁹ the Class Action Fairness Act ("CAFA")¹¹⁰ would provide a remedy. CAFA significantly expanded federal jurisdiction over class actions by allowing defendants to remove to federal court, within specified boundaries, any class action with minimal diversity of citizenship and an amount in controversy exceeding five million dollars.¹¹¹ Although the Court did not explain exactly how CAFA provided a

remedy to potential victims of serial certification attempts, presumably it was suggesting that defendants faced with additional motions for certification in state court could use CAFA to remove those proceedings to federal district court and then persuade that court to adhere to the first federal court's denial of certification, purely as a matter of stare decisis. As a solution to the problem of serial certification, however, the Court's proposal leaves much to be desired.

We should emphasize that the concerns that motivated the Bayer Court to refuse to uphold the district court's injunction against the state class proceeding were legitimate. While the *Bridgestone II* solution was born out of concerns over gamesmanship and forum shopping on the part of class attorneys, the Bayer Court's decision was rooted in concerns for the rights of absent class members. The Court made clear that a denial of certification binds only the parties to a suit and those in privity with them, and that the exceptions to the rule against non-party preclusion are severely limited.¹¹² According to the Court, the federal court's denial of certification could not bind the state court plaintiff in Bayer because he had not been a party to the federal suit and did not fall under any of the limited exceptions to the rule against nonparty preclusion.¹¹³ The state court plaintiff was, with respect to the federal suit, an unnamed member of an uncertified class. He was neither a party to the first suit nor in privity with someone who was. While the Court acknowledged that in an earlier case it had held that an unnamed class member of a certified class could be considered a party for the purpose of appealing an adverse decision,¹¹⁴ it observed that "no one in that case was *1683 'willing to advance the novel and surely erroneous argument that a non-named class member is a party to the class-action litigation before the class is certified.'"¹¹⁵ The Court noted further that the state court plaintiff did not fall under any of the exceptions to the rule against non-party preclusion.¹¹⁶ More specifically, the Court held that Bayer's argued-for exception, that "nonparties can be bound in 'properly conducted class actions'" did not apply, because an uncertified class cannot be considered a properly conducted class action.¹¹⁷ While the Court was correct in placing the due process rights of absent class members above the concededly legitimate interests of the victims of serial certification attempts, its suggestion that these victims invoke removal under CAFA provides at best a band-aid for a very serious problem.

The first difficulty with the Court's solution is that CAFA does not apply to all class actions, and even when it does apply, CAFA grants district courts discretion to decline jurisdiction. In class actions lacking even minimal diversity or in class actions valued under five million dollars, CAFA fails to provide federal jurisdiction.¹¹⁸ In state court class actions where more than one-third but less than two-thirds of the class, as well as the "primary defendants," are from the state in which the claim is brought, CAFA gives district courts discretion to decline jurisdiction.¹¹⁹ In exercising this discretion, CAFA directs district courts to consider a number of different factors, including whether the class actions "involve matters of national or interstate interest"¹²⁰ and whether the class actions "will be governed by laws of the State in which the action was originally filed or by the laws of other States."¹²¹ Thus, CAFA effectively encourages the district court to decline jurisdiction when state court class actions assert claims that do not involve matters of national or interstate interest and are governed by the law of the forum state. While CAFA does suggest that district courts should be wary of class actions that have "been pleaded in a manner that seeks to avoid Federal jurisdiction,"¹²² which would include attempts to relitigate the question of certification once a federal court has denied certification, CAFA does not require district courts to assert jurisdiction over these actions. Thus, there will undoubtedly be instances where a defendant subject to the relitigation *1684 of class certification in state court will be unsuccessful in its attempt to remove serial certification attempts to federal court.

Further complicating the Court's reliance on CAFA is the fact that in certain circumstances, the statute actually requires district courts to decline jurisdiction. Under CAFA, when two-thirds or more of the members of a proposed class action, as well as the "primary defendants," are from the forum state, the district court cannot assert jurisdiction.¹²³ Similarly, when two-thirds or more of a proposed class action, as well as one defendant against whom significant relief is sought, are from the forum state, the district court is again required to decline jurisdiction.¹²⁴ In these situations, a defendant faced with the relitigation of class certification cannot rely on CAFA to remove state court proceedings to federal court. In addition, CAFA does not grant federal courts jurisdiction over state class actions where "the primary defendants are States, State officials, or other governmental entities"¹²⁵ or where the number of plaintiffs in the proposed class is less than one hundred.¹²⁶

By emphasizing the limitations on CAFA's reach we do not intend to understate the significant extension of federal jurisdiction in class action suits brought about by the statute. Certainly, defendants may now remove more class actions filed in state court to federal court than they could have prior to Congress's enactment of CAFA. We merely seek to underscore

the indisputable fact that federal jurisdiction under CAFA is by no means limitless.

More importantly, even where CAFA does authorize removal, it in no way automatically puts an end to the class defendants' problems. It is true, of course, that removal would necessarily moot any issue involving the relitigation exception to the Anti-Injunction Act,¹²⁷ since there would no longer be an opportunity for a federal court to consider enjoining an ongoing state proceeding.¹²⁸ But that fact in no way avoids the serious *1685 problems of res judicata to which the Supreme Court's decision in Bayer gave rise. Instead, it merely shifts the problem from the court that decided the first suit to the court hearing the second suit. The Court in Bayer was probably correct in predicting that in many instances the second federal court would defer to some extent to the first court's denial of certification in the prior suit. But it is impossible to be certain of this fact. After all, it should come as no surprise to careful observers to learn that federal courts across the nation on numerous occasions differ with each other on questions of both law and fact. Different federal judges appointed by ideologically different administrations may well have different views towards the appropriateness of class action. Moreover, attorneys representing different litigants may well differ in the persuasiveness and effectiveness of their arguments on behalf of certification. Unless the second federal court were to treat stare decisis as the rough equivalent of a form of collateral estoppel-- something it has no authority to do--these differences may well result in a different outcome on certification in the second case than it did in the first. Even assuming the best-case scenario from the defendants' perspective, in the absence of a finding of direct estoppel on the certification issue the second federal court would be shirking its responsibility to the new plaintiffs if it did not engage in its own independent examination of the merits of the arguments supporting certification. This could become especially burdensome for defendants in light of the post-Wal-Mart v. Dukes emphasis on preparation of a case's specific factual record prior to certification and the resulting need to provide putative class plaintiffs with an opportunity for merits-based discovery,¹²⁹ which presumably could not properly be confined to whatever discovery the prior plaintiffs had undertaken. In short, it would be naïve to assume that the class defendants would get res judicata-like summary dismissal of a second attempt to obtain certification when the court does not formally apply res judicata. Thus, the fact that, after CAFA, the second class suit will be in federal rather than state court will likely be of relatively limited strategic benefit to defendants in their effort to avoid the expense and burdens involved in battling serial attempts to certify the same class.

One possible reason why CAFA's expanded opportunities for removal of state class actions to federal court might be thought to avoid the serial certification problem is that once the state class action is removed it may be combined into a single multi-district action with the initial suit.¹³⁰ This would avoid the problem caused by the absence of direct estoppel on the issue of certification. But the multi-district litigation ("MDL") alternative is *1686 of absolutely no strategic value when the federal and state class actions are filed serially, rather than simultaneously. In such a situation, the second action is not filed until the first action has been already disposed of due to the denial of certification.¹³¹

For many of the same reasons, the ALI's proposed solution to the relitigation of class certification, which had been proposed prior to the decision in Bayer, should be of little comfort to class defendants. The ALI's solution is to create a rebuttable presumption against certification. The ALI proposed that a "judicial decision to deny aggregate treatment for a common issue or for related claims by way of a class action should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity."¹³² In other words, once one court denies certification of a class, a second court, considering certification of the same class, should presume that the first court's denial was correct. This presumption is grounded in the principle of comity, which the ALI has defined as "the authority of the subsequent court to exercise discretion in its aggregation decision so as to avoid, insofar as is possible, unnecessary friction between judicial systems."¹³³ Plaintiffs can overcome this presumption by affirmative showings, such as a demonstration of inadequate representation in the first suit or a demonstration that the basis for the initial denial of certification is no longer present.¹³⁴

Not surprisingly, the problems with the ALI's solution are similar to the problems with the Court's suggested solution in Bayer: it is not much of a solution at all. The ALI's rebuttable presumption is roughly equivalent to the Court's suggestion that defendants who face relitigation of class certification rely on the principles of stare decisis to convince the second court to follow the first court's denial of certification. Indeed, what is stare decisis if not a rebuttable presumption in favor of following another court's ruling? On the other hand, it is arguable that the ALI's proposal would amount to stronger medicine than simple stare decisis. Recall that the ALI would permit plaintiffs to rebut its presumption either by an affirmative showing that representation in the first suit was inadequate or that controlling circumstances have changed.¹³⁵ Note the

extremely important dog that is not barking here: there is no mention of the presumption being rebutted by *1687 a convincing showing that the first court had simply been wrong in its denial of certification. If it is in fact true that the ALI's proposal would deny the putative class plaintiff in the second suit the opportunity to challenge the first court's denial of certification on its own merits, then the proposal would indeed go well beyond the force of mere stare decisis. But if so, then for all practical purposes the ALI's proposal would be guilty of exactly what the ALI condemned others for: extending a type of impermissible "virtual representation" of plaintiffs in the second suit by plaintiffs in the initial suit.

The ALI's proposal, then, appears to reach a dead-end. On the one hand, class defendants have very legitimate concerns about strategic attempts to force them into settlements in what may well be wholly non-meritorious class actions through coercive and wasteful attempts at class certification in different courts. On the other hand, proposals made to date to solve these problems have been shown to be medicine that is either too strong (because they would violate the due process rights of potential class plaintiffs to their day in court), or too weak (because they would leave defendants vulnerable to many of the same dangers they faced at the outset).

At this point it is appropriate to explore our proposed solution to ameliorate the problem: treating the attorneys who brought the initial certification attempt (along with the named plaintiffs in that suit) as the real parties in interest for purposes of direct estoppel on the first court's denial of certification. In this way, the doctrine of res judicata would be modified to account for the realities of the class action by focusing on the actor responsible for the strategic decision to make multiple motions for certification and who had the most at stake in the certification decision. Our proposed solution does so without depriving individual litigants who were not formal parties in the first litigation of their opportunity to seek certification, if represented by attorneys lacking any formal or informal connection to the prior suit.

VI. Implementing the Solution

To this point, we have sought to establish that the only effective means of resolving the serial certification dilemma is to extend the reach of direct estoppel to include not only the putative class plaintiffs, but also the attorneys who brought the original proceeding.¹³⁶ The question thus arises as exactly how to implement this solution. The most likely methods, although not the only methods, are as a judge-made extension of direct estoppel, as an amendment to [Rule 23 of the Federal Rules of Civil Procedure](#), or as a freestanding federal statute.

The simplest method of implementation would be in the form of a judge-made extension of the reach of direct estoppel. Indeed, in a certain *1688 sense our solution is nothing more than the recognition, purely as a matter of common law doctrine, that in the case of the relitigation of class certification, direct estoppel should apply to both the technical parties in interest and the practical parties in interest, namely, the class attorneys. Courts' application of direct estoppel to class action attorneys would function in the same way as their application of direct estoppel normally does. First, the preclusive effect of the initial denial of certification would fall to the second court. There, the defendant would raise the issue of direct estoppel as an affirmative defense. The court would then determine whether the defendant established the requirements necessary for direct estoppel. The court would first determine whether the issues were the same, which would require an inquiry into whether the second motion for certification concerned the same plaintiff class, was brought by the same attorney,¹³⁷ and was based on the same legal standards.¹³⁸ The court would then determine whether the question of certification was "actually litigated" and was "essential" to a "valid and final judgment."¹³⁹ The plaintiff would then be able to contest these showings.¹⁴⁰ To be sure, delicate factual issues may arise in the course of the adjudication of the res judicata challenge. This is especially true when the first class action is in a federal court and the subsequent action is brought in a state court. Under these circumstances, either the federal court in exercising its authority under the All Writs Act¹⁴¹ combined with the relitigation exception to the Anti-Injunction Act¹⁴² or the state court invoking res judicata, will have to determine the extent of overlap between the standards. But this is simply a necessary by-product of the res judicata inquiry any time the doctrine comes into play. It is in no way unique *1689 to our proposed expansion of the concept of real party in interest in an effort to resolve the inherent unfairness, inefficiency, waste, and harassment caused by serial motions for certification.

An amendment to [Rule 23](#), unlike a judge-made extension of direct estoppel, would allow for more flexibility, because the

amendment could dictate the specific parameters of the estoppel. The Rules Advisory Committee, however, has already considered and rejected an amendment that would have given preclusive effect to a denial of certification.¹⁴³ The amendment would have lodged the power of preclusion in the first court, giving it the authority to prohibit absent class members from bringing additional motions for certification.¹⁴⁴ The Committee rejected the amendment based on its concern that the amendment might violate the Rules Enabling Act's prohibition on procedural rules that modify substantive rights.¹⁴⁵ Whether this conclusion flows from a proper reading of the Rules Enabling Act is an issue beyond the scope of this Article.¹⁴⁶

A freestanding federal statute would allow for considerably more flexibility than an amendment to the Federal Rules, since Congress possesses authority to supersede its prior enactments. A statute could specify not only which court would have the authority to determine the preclusive effect of a denial of certification, but also which parties had to make what, if any, affirmative showings to the court.¹⁴⁷ Like the other methods of implementation, however, an independent statute is not without its obstacles. It would require Congress to recognize that plaintiffs' attorneys *1690 are the real parties in interest. This may be difficult, given how politicized the issues surrounding class actions can be. However, in the right political climate, an independent statute precluding plaintiffs' attorneys from bringing additional motions for certification would be feasible.¹⁴⁸

We remain agnostic as to which method of implementation is best. The goal of this Article is to examine the realities of the modern class action and consider whether the law has responded to these realities. For all practical purposes, plaintiffs' attorneys are the real parties in interest, and the law has yet to acknowledge this. We suggest a response to this reality. For our purposes, little turns on which of the three alternatives is ultimately chosen as a method of implementation.

Conclusion

The problem of serial class certification attempts is a serious concern, and the Supreme Court's decision in *Bayer* did little to ameliorate it. In contrast, approaches like the one the Seventh Circuit employed in *Bridgestone II* go unacceptably far because they improperly transform an in personam litigation into a pure in rem action that binds the entire world. In so doing, the approach inescapably contravenes the due process rights of potential class members who never had their day in court. We propose to resolve the dilemma by recognizing the unique relationship between attorney and client in the modern class action. Invariably, class attorneys today generally function not as merely the class members' legal representatives but rather as their guardians. It is the class attorneys, not the class members, who ultimately make all strategic decisions and who have the most at stake, financially speaking. Since it is the class attorneys who make the strategic choice of when and where to sue, it is appropriate to modify the direct estoppel branch of *res judicata* doctrine to extend it to include class attorneys, as well as the putative named plaintiffs. We fully recognize that our proposal is by no means a panacea. But if adopted, it should avoid much of the unfairness, systemic inefficiencies, and waste associated with serial certification attempts. That would, we believe, represent a significant advance in the state of the law.

Footnotes

^{a1} Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law.

^{aa1} J.D. Candidate, Northwestern University School of Law, 2014; A.B., University of Pennsylvania, 2008.

¹ See Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit 1* (2009).

² *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).

- ³ [Id. at 2373](#) (internal quotation marks omitted). “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” [28 U.S.C. § 2283 \(2012\)](#).
- ⁴ [Bayer, 131 S. Ct. at 2375-76](#) (quoting [Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147 \(1988\)](#)) (internal quotation marks omitted).
- ⁵ See discussion *infra* Part I.
- ⁶ Res judicata has been said to refer “to the prohibition on relitigating a claim that has already been litigated and gone to judgment.” Richard L. Marcus, Martin H. Redish, Edward F. Sherman & James E. Pfander, *Civil Procedure: A Modern Approach* 1094 (5th ed. 2009). The term also “is sometimes loosely used to refer to the totality of preclusion doctrines.” *Id.*
- ⁷ See, e.g., [Federated Dep’t Stores, Inc. v. Moitie, 452 U.S. 394, 401-02 \(1981\)](#).
- ⁸ See [In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig. \(Bridgestone II\), 333 F.3d 763 \(7th Cir. 2003\)](#), abrogated by [Bayer, 131 S. Ct. 2368](#); discussion *infra* Part III.
- ⁹ See Martin H. Redish & William J. Katt, [Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma, 84 Notre Dame L. Rev. 1877 \(2009\)](#).
- ¹⁰ See [Taylor v. Sturgell, 553 U.S. 880, 904-07 \(2008\)](#).
- ¹¹ See discussion *infra* Part V.B.
- ¹² See discussion *infra* Part IV.C.
- ¹³ See, e.g., [Pollard v. Cockrell, 578 F.2d 1002, 1009 \(5th Cir. 1978\)](#). For a discussion of nonparty preclusion, see Marcus, Redish, Sherman & Pfander, *supra* note 6, at 1167-86.
- ¹⁴ Proposed [Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 98-99 \(1966\)](#) (proposed Rule 23 advisory committee’s note).
- ¹⁵ See [id. at 99](#) (“The amended rule describes in more practical terms the occasions for maintaining class actions” (emphasis omitted)).
- ¹⁶ Our proposal, however, would have helped defendants in at least one other prominent case: [Bridgestone II, 333 F.3d 763 \(7th Cir. 2003\)](#), abrogated by [Smith v. Bayer Corp., 131 S. Ct. 2368 \(2011\)](#). See discussion *infra* Part V.A.
- ¹⁷ See discussion *infra* Part V.

18 [Smith v. Bayer Corp.](#), 131 S. Ct. 2368, 2373 (2011).

19 Id. The action also alleged other violations of West Virginia state law. Id.

20 Id.

21 Id.

22 Id.

23 Id. at 2373-74.

24 Id. at 2374.

25 Id.

26 Id.

27 Id.

28 Id.

29 [Chick Kam Choo v. Exxon Corp.](#), 486 U.S. 140, 146 (1988); see also 28 U.S.C. § 2283 (2012) (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”).

30 [Bayer](#), 131 S. Ct. at 2374.

31 Id. at 2382.

32 Id. at 2375-76 (quoting [Chick Kam Choo](#), 486 U.S. at 147) (internal quotation marks omitted).

33 [Bridgestone II](#), 333 F.3d 763, 765 (7th Cir. 2003), abrogated by [Bayer](#), 131 S. Ct. 2368.

34 [Bayer](#), 131 S. Ct. at 2381.

35 Id. at 2376. These exceptions apply when the nonparties have some sort of legal relationship to the parties who litigated the first

suit--that is, when they are in privity with one another. For example, preceding and succeeding owners of property are typically considered in privity, as are trustees and their beneficiaries.

36 Id.

37 Id. at 2373-74.

38 Brief for Respondent at 1-2, [Smith v. Bayer Corp.](#), 131 S. Ct. 2368 (2011) (No. 09-1205).

39 See [Bayer](#), 131 S. Ct. at 2373.

40 The Court acknowledges that the Class Action Fairness Act (“CAFA”) “may be cold comfort to Bayer,” as it was enacted after the two class actions in Bayer were filed. [Id.](#) at 2382. But even if CAFA had been in force, it is not clear that it would have applied. See *infra* notes 118-27 and accompanying text for a discussion of CAFA, including the fact that it encourages district courts to decline jurisdiction when greater than one-third of the plaintiffs, but less than two-thirds, as well as the primary defendants are from the forum state.

41 See, e.g., [Restatement \(Second\) of Judgments § 34\(3\)](#) (1982).

42 Claim preclusion and issue preclusion are the modern replacements of the old judgment law lexicon: “Claim preclusion describes the rules formerly known as ‘merger’ and ‘bar,’ while issue preclusion encompasses the doctrines once known as ‘collateral estoppel’ and ‘direct estoppel.’” [Taylor v. Sturgell](#), 553 U.S. 880, 892 n.5 (2008).

43 See [Cromwell v. Cnty. of Sac.](#), 94 U.S. 351, 352-53 (1876) (explaining the difference between claim preclusion and issue preclusion and noting that issue preclusion prohibits relitigation only of those issues that were actually litigated and determined in the first suit).

44 [Montana v. United States](#), 440 U.S. 147, 153-54 (1979).

45 See Marcus, Redish, Sherman & Pfander, *supra* note 6, at 1095.

46 See *id.* at 1095 n.1.

47 *Id.*

48 See [Montana](#), 440 U.S. at 153-54.

49 [Smith v. Bayer Corp.](#), 131 S. Ct. 2368, 2371 (2011).

50 For example, preceding and succeeding owners of property have a substantive legal relationship to one another.

51 This includes suits brought by trustees, guardians, and other fiduciaries as well as certain forms of representative litigation. To the extent it applies to class actions, however, it only applies to “properly conducted class actions.” [Taylor v. Sturgell](#), 553 U.S. 880, 894 (2008). As the Court noted in [Bayer](#), a class that is denied certification cannot be considered a properly conducted class. [Bayer](#), 131 S. Ct. at 2380 (“If we know one thing about the [second] suit, we know that it was not a class action. Indeed, the very ruling that Bayer argues ought to be given preclusive effect is the District Court’s decision that a class could not properly be certified.”).

52 A nonparty who assumed control of the prior litigation had “the opportunity to present proofs and argument” and thus has already “had his day in court” even though he was not a formal party to the suit. [Restatement \(Second\) of Judgments § 39](#) cmt. a (1982).

53 For a more detailed discussion of these exceptions, see [Taylor](#), 553 U.S. at 893-95. Taylor also cites the existence of a “special statutory scheme” that expressly forecloses litigation by nonparties as an exception to the rule against nonparty preclusion. [Id.](#) at 895.

54 See [In re Rhone-Poulenc Rorer, Inc.](#), 51 F.3d 1293, 1297-98 (7th Cir. 1995).

55 However, in [Bayer](#), it should be recalled, the second class action was not filed as a response to the first class action, but rather by another attorney. See [Bayer](#), 131 S. Ct. at 2373.

56 [In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig. \(Bridgestone I\)](#), 288 F.3d 1012, 1019-21 (7th Cir. 2002).

57 [Gustafson v. Bridgestone/Firestone, Inc.](#), 537 U.S. 1105 (2003) (denying certiorari).

58 [Bridgestone II](#), 333 F.3d 763, 765 (7th Cir. 2003), abrogated by [Bayer](#), 131 S. Ct. 2368. One such case was [Shields v. Bridgestone/Firestone Inc.](#), brought in Texas state court. [No. B-170,462, 2004 WL 546883 \(Tex. Dist. Ct. Mar. 12, 2004\)](#).

59 [.Bridgestone II](#), 333 F.3d at 765.

60 [Id.](#)

61 [Id.](#) at 767.

62 [Id.](#)

63 See [infra](#) Part IV.

64 See [infra](#) Part V.

65 Memorandum from David F. Levi, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to Honorable Anthony J. Scirica,

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Chair, Standing Comm. on [Rules of Practice and Procedure](#) 34 (May 14, 2001), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2001.pdf>.

⁶⁶ See, e.g., Tobias Barrington Wolff, [Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action](#), 156 U. Pa. L. Rev. 2035, 2115 (2008) (describing the “single group of entrepreneurial lawyers” responsible for “seriatim attempts at class certification”).

⁶⁷ Some scholars believe that traditional res judicata rules do preclude absent class members from bringing additional motions for certification. Analogizing to the jurisdiction-to-establish-no-jurisdiction doctrine, Professor Clermont argues that just as a court’s finding of no jurisdiction is preclusive in other actions, a court’s finding of no authority to proceed as a class action is preclusive in other actions—even for absent class members. See Kevin M. Clermont, [Class Certification’s Preclusive Effects](#), 159 U. Pa. L. Rev. PENNumbra 203, 224-27 (2011).

⁶⁸ See [Fed. R. Civ. P. 23](#).

⁶⁹ John C. Coffee, Jr., [The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action](#), 54 U. Chi. L. Rev. 877, 905 (1987); see also [Castano v. Am. Tobacco Co.](#), 84 F.3d 734, 748 (5th Cir. 1996) (noting the superiority of the class action device in negative-value suits).

⁷⁰ Jonathan R. Macey & Geoffrey P. Miller, [The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform](#), 58 U. Chi. L. Rev. 1, 99 (1991).

⁷¹ See Peter H. Schuck, [Agent Orange on Trial: Mass Toxic Disasters in the Courts](#) 46-52 (1986) (describing the cross-country journey of the attorney who initiated the case to find veterans exposed to Agent Orange).

⁷² In the Dalkon Shield case, two class action attorneys solicited almost 900 plaintiffs in a fairly short period of time. See Paul Blustein, [How Two Young Lawyers Got Rich by Settling IUD Liability Claims](#), Wall St. J., Feb. 24, 1982, at 1. Other attorneys did the same. See Malcolm Gladwell, [Latest Fight in a Long Case: Attorney Fees; Victims’ Lawyers Getting Too Much, Critics Contend](#), Wash. Post, Jan. 22, 1989, at H1 (describing an attorney who represented over 1000 Dalkon Shield claimants and was still searching for more). This raised ethical questions about how much individual attention lawyers were actually able to give their clients. See Jack B. Weinstein, [A View from the Judiciary](#), 13 Cardozo L. Rev. 1957, 1963 (1992). As Judge Weinstein noted, “The system, as it works with large masses of cases, does not provide the kind of representation that we envisage when we think of Abraham Lincoln saying to the person coming in off the street, ‘I’ll fight for you, as your lawyer.’ It is quite different in mass torts.” Id.; see also Georgene M. Vairo, [The Dalkon Shield Claimants Trust: Paradigm Lost \(or Found\)?](#), 61 Fordham L. Rev. 617, 619 & n.9 (1992) (“Can one attorney or firm properly serve hundreds, let alone thousands, of clients?”).

⁷³ Coffee, supra note 69, at 886. As Professor Coffee notes, these specific solicitations do not offend ethical rules because they are initiated by the labor unions and medical clinics—not the attorneys. Id. Direct solicitation, however, does violate ethical rules. See Macey & Miller, supra note 70, at 5-6 (“[A]ttorneys are routinely forced to circumvent ethical restrictions on solicitation and maintenance in order to obtain named plaintiffs as their ticket into profitable litigation.”).

⁷⁴ Coffee, supra note 69, at 885. These are typically individuals with broad, but thin, security portfolios. One example is Harry Lewis, who “has been a ‘named plaintiff in several hundred ... class and derivative actions.’” Douglas M. Branson, [The American Law Institute Principles of Corporate Governance and the Derivative Action: A View from the Other Side](#), 43 Wash. & Lee L. Rev. 399, 400 n.8 (1986) (quoting Mr. Lewis’s affidavit).

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75 Coffee, *supra* note 69, at 885 n.16 (describing “the curious ‘underground railroad’ by which plaintiffs’ attorneys can locate and obtain the services of a valuable plaintiff who can establish standing, diversity jurisdiction, or some other important element of the case”).

76 Professor Coffee believes that it is “rational” for plaintiffs with positive-value claims to prefer the class action device to bringing their claims individually. *Id.* at 904. He argues that the class action device is preferable because it lowers transaction costs, “threatens risk averse defendants with greater liability,” and “avoids a ‘race to judgment’ among competing plaintiffs.” *Id.* We think plaintiffs with positive-value claims are more likely to be concerned with having a say in the litigation of plaintiffs’ rights than with transaction costs, threats to defendants, or races to judgment among plaintiffs. Admittedly, part of this concern with having a say in the litigation of their rights is obtaining the greatest possible award. But as Professor Coffee notes, “some empirical research supports the conventional wisdom that other things being equal, plaintiffs are likely to receive a higher recovery in an individual action than in a class action.” *Id.* at 915.

77 The situation will be different when certain absent class members are represented by attorneys. At that point, a determination of lead counsel will have to be made. See [Fed. R. Civ. P. 23\(g\)](#).

78 See *id.* at 23(b)(1)-(2).

79 Coffee, *supra* note 69, at 886.

80 *Id.* at 884; see also Macey & Miller, *supra* note 70, at 3 (noting that plaintiffs’ attorneys are “subject to only minimal monitoring by their ostensible ‘clients’ who are [both] dispersed and disorganized”).

81 Macey & Miller, *supra* note 70, at 19-20.

82 *Id.*

83 *Id.* at 3. This “self-interest” often includes negotiating settlements that are good for defense counsels’ clients. *Id.* at 21. Because class members do not pick their attorneys (but rather the attorneys pick the class members), plaintiffs’ attorneys have little incentive to build reputations that would attract class members. *Id.* They do, however, have significant incentives to build “reputations among the defense bar for ... [a] willingness to ‘deal’ by negotiating settlements that minimize the costs to defense counsels’ clients.” *Id.*

84 The technical party in interest is the party who actually possesses the substantive right being asserted. It is also the party in whose name the action is brought. See [Fed. R. Civ. P. 17\(a\)](#). Plaintiffs’ attorneys do not possess the substantive rights being asserted, nor are class actions brought in their name. However, they do stand to benefit far more from a favorable outcome than the “clients” they represent.

85 Altruistic guardians are private guardians who primarily operate not out of a desire for financial gain (which is usually fairly limited) but more out of concern for the needs of the less fortunate. Governmental guardians, while often motivated by the same concerns, are public guardians who hold government office. For example, the Office of the Cook County Public Guardian represents marginalized children and adults in Chicago. See Off. Cook County Pub. Guardian, <http://www.publicguardian.org> (last visited Mar. 21, 2014).

86 See, e.g., Redish, *supra* note 1, at 24-56; John H. Beisner & Jordan Schwartz, The Value of Class Action, in *The Am. Law Inst.*,

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Forum on Class Actions and Aggregate Litigation 249, 251 (2013); John H. Beisner, Matthew Shors & Jessica Davidson Miller, [Class Action “Cops”: Public Servants or Private Entrepreneurs?](#), 57 *Stan. L. Rev.* 1441, 1444-45 (2005).

87 See, e.g., [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560 (1992) (explaining that the first element of standing under Article III requires that “the plaintiff must have suffered an ‘injury in fact’”).

88 See supra notes 14-15 and accompanying text.

89 See [Fed. R. Civ. P. 24\(a\)](#) (focusing intervention on whether the disposition of action “may as a practical matter impair or impede the ... ability to protect” the intervener’s interest); *id.* at 19(a) (requiring parties to be joined where feasible, else risking a negative impact on the absent party “as a practical matter”).

90 See supra Part III.

91 [Bridgestone II](#), 333 F.3d 763, 765 (7th Cir. 2003), abrogated by [Smith v. Bayer Corp.](#), 131 S. Ct. 2368 (2011).

92 See *id.* (noting that [Bridgestone II](#) came after the denial of certification in [Bridgestone I](#)).

93 [Gustafson v. Bridgestone/Firestone, Inc.](#), 537 U.S. 1105 (2003) (denying certiorari).

94 [Bridgestone II](#), 333 F.3d at 765.

95 *Id.* at 769.

96 *Id.*

97 *Id.* at 768 (citing [Williams v. Gen. Elec. Capital Auto Lease, Inc.](#), 159 F.3d 266 (7th Cir. 1998)).

98 See [Parklane Hosiery Co. v. Shore](#), 439 U.S. 322, 326-27 (1979) (expanding breach of mutuality doctrine).

99 [Restatement \(Second\) of Judgments § 27](#) (1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” (emphasis added)); see also [Halpern v. Schwartz](#), 426 F.2d 102, 105 (2d Cir. 1970) (“It is well established that although an issue was fully litigated and a finding on the issue was made in the prior litigation, the prior judgment will not foreclose reconsideration of the same issue if that issue was not necessary to the rendering of the prior judgment, and hence was incidental, collateral, or immaterial to that judgment.”)

100 [Restatement \(Second\) of Judgments § 27](#) cmt. h.

101 [Stephenson v. Dow Chem. Co.](#), 273 F.3d 249, 260-61 (2d Cir. 2001) (explaining that a finding of adequate representation in a prior

proceeding cannot bind absent litigants in a present action because they did not have the opportunity to challenge the adequacy of representation), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

¹⁰² *Taylor v. Sturgell*, 553 U.S. 880, 904-06 (2008). See generally Redish & Katt, *supra* note 9.

¹⁰³ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”); see also *supra* notes 69-70 and accompanying text.

¹⁰⁴ *Phillips Petroleum Co.*, 472 U.S. at 809 (noting that, with small claims, “most of the plaintiffs would have no realistic day in court if a class action were not available”).

¹⁰⁵ See, e.g., Wolff, *supra* note 66, at 2104 (“[O]ur legal system treats even important procedural and remedial doctrines as matters as to which individuals have no constitutionally recognized prelitigation entitlement or expectation.”). We should note that even if one were to accept Professor Wolff’s assertion, it by no means follows that holding absent litigants to a denial of class certification would satisfy due process. Due process requires that a litigant be provided his day in court, even on factual or mixed law fact issues for which he has no independent constitutional right. One should not confuse the “constitutional fact” doctrine with a litigant’s due process right to her day in court.

¹⁰⁶ Professor Wolff acknowledges this possibility:

In a negative-value or small-stakes case, aggregate treatment is likely to be the only mechanism by which class members can obtain a recovery. In such a case, an injunction that broadly prevents any subsequent class action on a body of claims following a denial of certification would be the functional equivalent of an adverse judgment extinguishing those claims. In many cases, however, it will be possible to craft an order that enforces the denial of certification in the original lawsuit without foreclosing the possibility that a more narrowly defined class action could properly be certified in a subsequent proceeding.

Id. at 2105-06 (emphasis omitted) (footnote omitted). Wolff then argues that because it was limited to nationwide classes, the Seventh Circuit’s injunction in *Bridgestone II* was one of those “narrowly crafted injunction[s].” *Id.* at 2106. It is easy to imagine, however, instances where the class cannot be so easily narrowed, such as when the class action is already limited to one state.

¹⁰⁷ See Marcus, Redish, Sherman & Pfander, *supra* note 6, at 689.

¹⁰⁸ *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2372, 2381-82 (2011).

¹⁰⁹ *Id.* at 2381.

¹¹⁰ Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453 & 1711-1715 (2012).

¹¹¹ 28 U.S.C. § 1332(d)(2).

¹¹² *Bayer*, 131 S. Ct. at 2379-80.

¹¹³ *Id.*

114 [Id. at 2379](#) (quoting [Devlin v. Scardelletti](#), 536 U.S. 1, 7 (2002)).

115 [Id.](#) (quoting [Devlin](#), 536 U.S. at 16 n.1 (Scalia, J., dissenting)).

116 [Id.](#) at 2380.

117 [Id.](#) (quoting [Taylor v. Sturgell](#), 553 U.S. 880, 894 (2008)).

118 28 U.S.C. § 1332(d)(2) (2012).

119 [Id.](#) § 1332(d)(3).

120 [Id.](#) § 1332(d)(3)(A).

121 [Id.](#) § 1332(d)(3)(B). Although it is clear that a state court would be better at applying its own law than would a federal court, it is not clear that a federal court would be better at applying the other state's law than would the court in the forum state.

122 [Id.](#) § 1332(d)(3)(C).

123 [Id.](#) § 1332(d)(4)(B).

124 [Id.](#) § 1332(d)(4)(A). The single defendant must be one “from whom significant relief is sought by members of the plaintiff class” and “whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class.” [Id.](#) § 1332(d)(4)(A)(i)(II)(aa)-(bb). This section also requires that the “principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed” and that “during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.” [Id.](#) § 1332(d)(4)(A)(i)(III), (A)(ii).

125 [Id.](#) § 1332(d)(5)(A).

126 [Id.](#) § 1332(d)(5)(B).

127 [Id.](#) § 2283; see also [supra](#) note 3 and accompanying text.

128 Though a federal injunction against a collateral federal proceeding is theoretically possible, such an occurrence is highly unlikely. Cf. [Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.](#), 342 U.S. 180, 183-85 (1952) (recognizing broad equitable discretion in lower federal courts on the issue of inter-federal injunctions).

129 [Wal-Mart Stores, Inc. v. Dukes](#), 131 S. Ct. 2541, 2551 (2011) (“A party seeking class certification must affirmatively demonstrate his compliance with the Rule--that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common

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questions of law or fact, etc.”).

¹³⁰ See [28 U.S.C. § 1407](#).

¹³¹ It is conceivable that while the putative class action no longer exists, the individual actions of the named plaintiffs could continue. But if the plaintiffs’ attorneys are seeking to coerce defendants into settling by pursuing a strategy of serial certification attempts, it would make sense for them to drop any ongoing individual actions to prevent any possibility of an MDL proceeding.

¹³² Principles of the Law of Aggregate Litigation § 2.11 (2010).

¹³³ Id. § 2.11 cmt. b.

¹³⁴ Id. § 2.11 cmt. c.

¹³⁵ See id.

¹³⁶ See supra Part IV.

¹³⁷ Here, the court would also want to consider whether the same firm was bringing the suit, even if it was with a different attorney. The court might even consider the possibility that the attorney had set up a “shell firm” to distract the court from the fact that the attorney was still the real party in interest. The existence of a financial relationship would be telling.

¹³⁸ Although many states have adopted the text of the Federal Rules of Civil Procedure, they have not always adopted federal courts’ application of the Rules. The ALI suggested that this difference in procedural rules will often result in the application of different legal standards, which the ALI thought would be a problem for the application of issue preclusion. See [Restatement \(Second\) of Judgments § 27](#) cmt. b (1982). The Supreme Court agreed. See [Smith v. Bayer Corp.](#), 131 S. Ct. 2368, 2377-78 (2011) (noting that although West Virginia had adopted the text of [Rule 23](#), it had explicitly disavowed federal interpretations of it, suggesting that the standard by which a West Virginia court would evaluate a motion for certification was different than the standard by which a federal court would evaluate a motion for certification).

¹³⁹ [Restatement \(Second\) of Judgments § 27](#).

¹⁴⁰ A judge-made extension of direct estoppel would look different if the first court was federal, the second court was state, and the estoppel was effectuated through the relitigation exception to the Anti-Injunction Act. There, the first court would have the authority to determine the effect of its denial of certification.

¹⁴¹ [28 U.S.C. § 1651 \(2012\)](#) (authorizing the federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”).

¹⁴² Id. § 2283.

- ¹⁴³ The proposed amendment read:
A court that refuses to certify--or decertifies--a class for failure to satisfy the prerequisites of [Rule 23\(a\)\(1\) or \(2\)](#), or for failure to satisfy the standards of [Rule 23\(b\)\(1\), \(2\), or \(3\)](#), may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue. Memorandum from David. F. Levi to Honorable Anthony J. Scirica, *supra* note 65, at 40 (quoting proposed amendments to [Fed. R. Civ. P. 23](#)).
- ¹⁴⁴ See *id.* at 44.
- ¹⁴⁵ See [28 U.S.C. § 2072\(b\)](#) (stating the Federal Rules “shall not abridge, enlarge or modify any substantive right”); see also Memorandum from the Honorable David F. Levi, U.S. Dist. Judge, to the Civil Rules Advisory Committee 16 (May 7, 2002), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2002.pdf>.
- ¹⁴⁶ Compare Stephen B. Burbank, [Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach](#), 71 [Cornell L. Rev.](#) 733, 764 (1986) (“[T]he Federal Rules of Civil Procedure do not provide federal preclusion law, because the Rules Enabling Act does not authorize Federal Rules of preclusion.”), with Martin H. Redish & Dennis Murashko, [The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation](#), 93 [Minn. L. Rev.](#) 26, 92 (2008) (“[A] dismissal with prejudice is precisely the kind of substantive club by which courts can encourage litigants to heed procedural directives.”).
- ¹⁴⁷ Examples would include showings that the plaintiff’s attorney who brought the second motion for certification was in fact the same attorney that brought the first motion for certification.
- ¹⁴⁸ Indeed, a Republican Congress passed CAFA, which is undeniably pro-defendant. The possibility of an independent statute may simply depend on the political climate.

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Inside Straight: Torpedoing Class Actions

By MARK HERRMANN

In 2009, Professor [Martin H. Redish](#) of [Northwestern Law School](#) published a book arguing that class actions are in large part unconstitutional: [Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit](#) (Stanford Univ. Press 2009). Where is the practicing bar?



I understand that nobody reads law review articles or books published by an academic press. And I wouldn't condemn any practicing lawyer to reading any issue of a law review from cover to cover. But I don't think it's asking too much to insist that lawyers remain gently abreast of the academic literature in their field and deploy new ideas aggressively when scholars propose them. Redish's book shows why [in-house counsel](#) should demand more of their outside lawyers.

This post is a two-fer: I'm going both substantive — by summarizing Redish's argument about why many class actions are unconstitutional — and pragmatic — by criticizing law firms that ignore ideas springing up in the academy that should be used in litigation. (For me, drafting that two-fer is an unusual trick. As regular readers know, it's typically hard to find even a single thought tucked into one of my columns.)

What does Redish say about [class actions](#), and how have most law firms been derelict?

To learn what Redish says, read his book. If you can't be bothered, here's a [link to a book review](#) (by Professor [Alexandra Lahav](#) of Connecticut Law), which appeared in a recent issue of the Michigan Law Review. If you can't be bothered with even a book review, then you can read the next two paragraphs of this post.

In a misleadingly over-simplified nutshell: First, Redish argues that legislatures create substantive rights to be enforced by individuals. Federal Rule of Civil Procedure 23 improperly transforms those individual rights into collective rights that can be pursued in a class action. That transformation of an individual right into a collective one is a substantive change that oversteps the Supreme Court's rulemaking power, in violation of both separation of powers and the Rules Enabling Act. (It's true that Congress implicitly approves amendments to the Federal Rules by failing to act before the statutory deadline. Redish suggests that any such "legislation by inaction" violates the Presentment Clause.)

Second, Redish argues that opt-out class actions cause individuals to participate in classwide cases without having affirmatively consented to doing so, violating a litigant's right to freedom from association. Finally, Redish blasts [settlement class actions](#), for a host of reasons not particularly relevant to the screed that I'm about to lay out.

My gripe is this: Redish may be right, and he may be wrong; I'm not taking sides here. I haven't read the cases, and I don't exactly have any firmly-held beliefs about the nuances of the Presentment Clause (whatever the heck that is). But Redish is a smart guy. His ideas are surely plausible, and no law firm would be sanctioned for making these arguments in a brief. So where are the law firms? Why isn't every class action defense firm in America mentioning to clients that these arguments exist?

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Redish's arguments surely aren't meant to be raised in every case. Some judges would view arguments against the constitutionality of class actions as acts of desperation, and counsel would lose credibility by even raising the idea. Other judges will be intrigued (or amused, or impressed) by counsel's creativity, but will nonetheless reject the arguments, figuring that class actions have been implicitly accepted as constitutional since the Federal Rules began allowing them in 1966. But other judges, intellectually curious and perhaps concerned about perceived abuses of class actions, may well decide that Redish's arguments have not been definitively considered by the Supreme Court (so the issues remain open) and have merit (which would end a class action threat for a client). For the right case, before the right trial judge, sitting within the right circuit, these arguments might have traction. Once you get into the appellate courts, or the Supreme Court, who knows where this will lead? Redish's arguments, conceived in an ivory tower, deserve a hearing in appropriate courts.

What do I conclude? First, law firms have been derelict. They should have seized on this issue and started raising it with their clients the instant Redish's book was published. Firms haven't done this because they're generally a step too far removed from the academy. (Look around you: Who at your firm is likely to have been aware that Redish's book even exists? I rest my case.) (Okay, okay: Maybe Sidley, where Redish is Senior Counsel.) Second, in-house lawyers defending class actions must pick up the ball that outside lawyers have dropped. If your outside counsel hasn't mentioned to you that class actions are arguably unconstitutional, it's time to bring your lawyer up to speed. Finally, in a presumably scholarly profession, we should not embrace an anti-intellectual facade that hurts the quality of representation. I realize that I am sometimes personally guilty of this: What was my crack about the "Presentment Clause (whatever the heck that is)" if not anti-intellectualism? But this can be taken too far. I've heard trial lawyers say, for example: "We don't need to hire brainiacs at my firm. We just need plain-talking folks who know how to communicate with a jury."

Nonsense! Some people are able to walk and chew gum at the same time. Clients should insist that you hire those people. Clients should look for lawyers who are at least passingly engaged in the scholarship surrounding their field of law. Although much scholarship has little relevance to practicing lawyers, a small chunk of what's written in the ivory towers could do clients a world of good. Competent lawyers will embrace those ideas and deploy them to good use.

Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit [Amazon (affiliate link)]

Mark Herrmann is the Vice President and Chief Counsel – Litigation at Aon, the world's leading provider of risk management services, insurance and reinsurance brokerage, and human capital and management consulting. He is the author of The Curmudgeon's Guide to Practicing Law (affiliate link). You can reach him by email at inhouse@abovethelaw.com.

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