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THE INTERSECTION OF CONSTITUTIONAL LAW AND CIVIL PROCEDURE: REVIEW OF WHOLESALE JUSTICE—CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (PART II)

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(RE) INTRODUCTION

In the first portion of this Essay, I reviewed Professor Martin Redish's theory that the application of Federal Rule of Civil Procedure 23 in modern class action practice is unconstitutional.[1] Professor Redish argues that modern class action procedures violate absent class members' due process rights by sweeping large numbers of individual plaintiffs into litigation without their explicit consent. I then set forth Professor Redish's proposals for reform, including increased scrutiny of class actions to weed out "faux" class actions that benefit lawyers but not class members, abandonment of the opt-out procedure under Rule 23 in favor of an opt-in procedure that would require absent class members to take some affirmative action before being swept into a class action, and prohibition of settlement classes, which Professor Redish believes are often subject to abuse. The second portion of this Essay explores further implications and applications of Professor Redish's theories.

I. POTENTIAL ADDITIONAL IMPLICATIONS OF PROFESSOR REDISH'S ANALYSIS

The reforms Professor Redish proposes would not only further protect the due process and other constitutional rights that he identifies, but also would likely have a beneficial effect on modern class action practice from a policy standpoint. The "misuses" of Rule 23 he identifies that tend to lead to constitutional violations at the same time lead to the sorts of undesirable

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[1] Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice—Constitutional Democracy and the Problem of the Class Action Lawsuit*, 104 NW. U. L. REV. COLLOQUY 319 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/9/LRColl2010n9Smith.pdf (link).

practical consequences that other commentators have identified. Nonetheless, there may be ways in which Professor Redish's analysis could be extended even further. Already, there are various aspects of class action practice that may serve to limit the use and abuse of the class action device. Importing the concepts of due process Professor Redish identifies into these areas may further bolster the effectiveness of class action procedures. Although the proposals discussed below—such as consideration of due process concerns as a factor in the certification decision, early resolution of the class certification question, liberal appellate review, and more extensive use of notice procedures—are less sweeping than the reforms Professor Redish proposes, they may be more feasible. Moreover, the concerns Professor Redish identifies may, to some extent, explain the limitations courts already impose in restricting application of the class action device. While such concerns may not always be explicit, they may be implicit, or may provide an additional unexplored ground for the limitations imposed to date.

Certainly such a mode of analysis would not be unprecedented. The Supreme Court has long recognized that statutes and rules should be construed in a manner that avoids potential constitutional problems.[2] Thus, for example, the Court has observed that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[3] This doctrine of constitutional avoidance does not apply solely where an asserted constitutional question indisputably has merit, but rather is intended to "allow[] courts to *avoid* the decision of constitutional questions."[4] Accordingly, the doctrine applies where one interpretation of a statute or rule "engenders constitutional issues" while "a reasonable alternative interpretation" avoids those constitutional questions.[5] Indeed, the Supreme Court has often applied the avoidance canon in situations where it later rejected the alleged constitutional deficiency.[6]

Nor are the specific constitutional concerns Professor Redish identifies entirely foreign to the federal courts in the context of Rule 23. In this regard, Professor Redish's contention that "at no point has the Supreme Court, in either its due process or class action jurisprudence, . . . fully acknowledged the existence of the litigant autonomy interest" may be something of an overstatement.[7] As Professor Redish himself observes, in *Ortiz*

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[2] *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 381–82 (2005) (link); Jones v. United States, 526 U.S. 227, 239–40 (1999) (link); Gomez v. United States, 490 U.S. 858, 864 (1989) (link).

[3] *Jones*, 526 U.S. at 239 (quoting U. S. *ex rel.* Att'y Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)) (link).

[4] *Clark*, 543 U.S. at 381 (link).

[5] *Gomez*, 490 U.S. at 864 (link).

[6] *See* Adrian Vermuele, *Saving Constructions*, 85 GEO. L.J. 1945, 1960–61 (1997).

[7] MARTIN REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 136 (2009) (link). The constitutional concerns regarding individual auton-

v. Fibreboard Corp., the Supreme Court specifically noted the due process interest in individual autonomy in constraining the use of the Rule 23(b)(1)(B) mandatory class action device.[8] There, the Court observed that "the Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale."[9] In doing so, it specifically noted the due process concerns inherent in binding absent class members:

> [M]andatory class actions aggregating damages claims implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), it being "our 'deep-rooted historic tradition that everyone should have his own day in court.'"[10]

In addition, the Court observed that these concerns were further magnified "in settlement-only class actions" where "the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting."[11]

A similar recognition of the important constitutional concerns raised by the application of Rule 23 may be applied to other aspects of class action

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omy are also recognized, albeit to a limited extent, in the American Law Institute's draft *Principles of the Law of Aggregate Litigation*. *See* A.L.I., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION: PROPOSED FINAL DRAFT § 2.07 cmt. b, at 144 (Apr. 1, 2009) ("Constitutional due process . . . underlies the need to protect the interests of participants in aggregate proceedings."); *id.* cmt. e, at 149–50 ("[A]n individual's ability to control the manner of adjudicating that individual's claim is important and should not lightly be curtailed. . . . Considerations of constitutional due process may call for an opportunity to exit, but, nonetheless, leave open the precise mechanics of that opportunity."); *id.* cmt. f, at 152 ("The opportunity to appear in the aggregate proceeding stands as an application of the general principle that individuals must have an opportunity to be heard in proceedings that stand to alter their rights, a principle well established in the due-process treatment of administrative proceedings, for example.").

[8] *See* REDISH, *supra* note 7, at 158–59 (citing Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)) (link). The Supreme Court's recognition of the due process concern goes back at least to *Hansberry v. Lee*, 311 U.S. 32 (1940) (holding that landowners who were not parties to prior litigation could not be bound by the decision) (link). *See also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) ("minimal procedural due process protection" includes "notice plus an opportunity to be heard and participate in the litigation" as well as "an opportunity to remove himself from the class") (link).

[9] *Ortiz*, 527 U.S. at 845 (link).

[10] *Id.* at 846 (citation omitted). As the Court observed, "both the Rules Enabling Act and the policy of avoiding serious constitutional issues counsel against leniency in recognizing mandatory limited fund actions in circumstances markedly different from the traditional paradigm." *Id.* at 864. *See also id.* at 847 ("The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary.") (link).

[11] *Id.* at 847 (citation omitted) (link).

procedure. Such a mode of analysis would have the beneficial effect of constraining Rule 23 so that it more closely adheres to constitutional requirements without necessitating formal amendment of the rule or some form of official congressional action. Indeed, many of the recent decisions constraining the use of the class action device may be viewed as implicitly recognizing such concerns—perhaps not as constitutional dictates, but at a minimum, as prudential concerns that deserve consideration in applying the Federal Rules of Civil Procedure.

A. The Applicable Standard for Class Certification: Rigorous Scrutiny

Such an analysis may be incorporated as part of the standard applied in determining whether to certify a class. Recognizing the potential practical pitfalls of a certification decision (if not the significant constitutional concerns), the Supreme Court has made clear that courts should undertake a "rigorous analysis" under Rule 23 before a class action is certified.[12] As part of this analysis, courts could easily incorporate an inquiry into the effects of class certification on absent class members' due process rights and whether application of the class action device in the particular case would implicate a change in substantive law.

Indeed, the Supreme Court in *Ortiz* seemed to be inviting such an analysis in specifically interpreting Rule 23(b)(1)(B) with an eye toward its broader constitutional implications.[13] The Court cautioned against the "adventurous" use of the class action device for precisely this reason, specifically invoking the doctrine of constitutional avoidance as a canon of construction applicable to Rule 23.[14] While *Ortiz* addressed the mandatory class action, there was no language in the opinion limiting its analysis to a particular category of class action case, and indeed its analysis would seem to be one of general applicability.

B. Early Resolution of Class Certification Questions

The constitutional concerns that Professor Redish raises could also be considered in determining the appropriate timing of the class certification decision. The fundamental nature of the rights involved counsel in favor of an early resolution of the class certification question. Already, Rule 23(c)(1)(A) directs that a decision on class certification should occur "[a]t an early practicable time after a person sues or is sued as a class representative."[15] Local federal rules give context to this command; in certain in-

[12] Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (link).

[13] *Ortiz*, 527 U.S. at 846 (link).

[14] *Id.* at 845 (link).

[15] FED. R. CIV. P. 23(c)(1) (link).

stances, these rules require that a motion seeking class certification be filed within a specified number of days after a class action complaint.[16]

The constitutional concerns that Professor Redish identifies further support early determination of class certification. To the extent a lawsuit threatens to drag in parties who did not file the litigation, a determination that impacts such parties' due process rights to avoid inclusion in the litigation should be resolved early in the proceedings. Such principles may be invoked to prevent attempts to draw out or postpone the class certification decision. Likewise, they may support a party's efforts to have class certification decided early in the proceedings without discovery, via a motion to strike or dismiss the class allegations.[17] Again, Rule 23(d)(1)(D) specifically authorizes such procedures by directing that courts may "require that the pleadings be amended to eliminate allegations about representation of absent persons."[18] Courts also have an independent obligation to determine whether a class is properly certified and may do so *sua sponte*.[19]

C. Immediate Appellate Review

Constitutional concerns may also play a role in determining the timing of appellate review of a class certification decision. Under Rule 23(f), a federal appellate court has discretion to accept an immediate appeal of a decision on class certification.[20] However, even before this provision was enacted, courts had accepted interlocutory appeals of class certification decisions under 28 U.S.C. § 1292(b) or reviewed such decisions by way of a writ of mandamus, recognizing that such decisions could have significant implications for the litigation.[21] Rule 23(f) liberalized the review of such

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[16] Local Rule 23.1(c) of the Northern District of Ohio is representative:

[T]he party or parties asserting a class action shall, within ninety (90) days after the filing of a pleading asserting the existence of a class or within such other period of time mandated by controlling statute, move for a determination under Fed R. Civ. P. 23(c)(1), whether the action is to be maintained and, if so, the membership of the class.

N.D. Ohio Local Rule 23.1(c) (link). *See also* McCarthy v. Kleindienst, 741 F.2d 1406, 1411 (D.C. Cir. 1984) ("Indeed, this court has noted that Local Rule 1-13(b) 'implements the policy' behind the already extant requirement of Fed. R. Civ. P. 23(c)(1) that class certification decisions be made 'as soon as practicable.'" (citation omitted)) (link).

[17] *See, e.g.*, Barabin v. Aramark Corp., 210 F.R.D. 152, 162 (E.D. Pa. 2002) (rejecting class allegations on face of complaint); Baum v. Great W. Cities, Inc., 703 F.2d 1197, 1210 (10th Cir. 1983) (upholding trial court decision striking and dismissing class claims); Thornton v. State Farm Mut. Auto Ins. Co., No. 1:06-cv-00018, 2006 WL 3359482, at *4 (N.D. Ohio Nov. 17, 2006) (granting defendant's motion to strike class allegations and rejecting plaintiffs' request for further discovery).

[18] FED. R. CIV. P. 23(d)(1)(D) (link). Such motions might also be brought under Fed. R. Civ. P. 12(f) or 12(b)(6) (link).

[19] *See* McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981).

[20] FED. R. CIV. P. 23(f) (link). *See also* MANUAL FOR COMPLEX LITIGATION, § 21.28, at 282 (4th ed. 2004) ("Whether to grant an interlocutory appeal lies within the discretion of the court of appeals.") (link).

[21] *See In re.* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1295 (7th Cir. 1995) (noting that "[m]andamus has occasionally been granted to undo class certifications," citing *In re* Fibreboard Corp.,

orders by dispensing with the requirement that the district court certify the order for interlocutory review under § 1292(b) or that the party seeking review meet the more stringent requirements necessary to obtain a writ of mandamus.

Among the factors that appellate courts consider in determining whether to grant interlocutory appeal of a certification decision are (1) whether the order presents the "death knell" of litigation for plaintiffs or defendants; (2) whether it shows a "substantial weakness, amounting to an abuse of discretion"; and (3) whether interlocutory appeal is necessary to "resolve an unsettled legal issue that is central to the case and intrinsically important to other cases but is otherwise likely to escape review" absent an immediate appeal.[22] However, this analysis could well incorporate the danger that certification poses to fundamental rights. Does the certification decision threaten to undermine the due process rights of absent class members or effect an improper change in substantive law? If so, immediate review is arguably warranted to avert such constitutional violations.

D. The Right to Object

Finally, the ability of individuals to object to class certification where the defendants and the named plaintiffs have jointly sought such a result provides an important safeguard and potential guarantor of constitutional rights.[23] As Professor Redish himself acknowledges, it is unlikely that settlement classes will be completely abolished. Nonetheless, objectors may make many of the arguments Professor Redish outlines in opposition to certification of particular classes. They may argue, for example, that class members do not stand to benefit, while the lawyers may receive significant fees or that a class settlement should be disallowed.[24] Indeed, the objectors in *Ortiz* raised many of the same constitutional concerns Professor Redish identifies. While the Court did not articulate a *per se* rule against settlement classes or mandatory class actions, it did take such concerns into account in holding that class certification was inappropriate under the particular circumstances before it and cautioning that the class action device should not be used in an "adventurous" manner.[25]

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893 F.2d 706 (5th Cir. 1990)) (link); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (reviewing certification decision under 28 U.S.C. § 1292(b)) (link).

[22] MANUAL, *supra* note 20, § 21.28, at 283 (citing Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000) (link); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000); Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999); *but cf.* Isaacs v. Sprint Corp., 261 F.3d 679 (7th Cir. 2001)).

[23] *Cf. id.* § 21.643, at 326 ("Objectors can play a useful role in the court's evaluation of the proposed settlement terms.") (link).

[24] *See id.* (noting that "an organization's objection in one case transformed a settlement from one in which the lawyers received a majority of the funds to one that primarily benefited class members" (citation omitted)) (link).

[25] Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (link).

One might argue that the objector mechanism functions imperfectly where the value of each individual claim is small and there is little incentive for absent class members to object. However, objectors may be entitled to receive attorney fees, which could increase the likelihood of objections.[26] Moreover, there may be ways to bolster the objector mechanism as a means of safeguarding constitutional rights. Where no objectors come forward, the court could appoint a neutral representative to analyze whether class treatment is appropriate.[27] Likewise, public interest litigators may file objections to certification in cases where they believe that constitutional rights are in danger.[28] In any event, the possibility of objection to proposed class certification decisions represents a potential mechanism by which the constitutional concerns Professor Redish raises may be vindicated—at least to some extent.

E. More Liberal Use of Notice Procedures

Another potential way in which these constitutional concerns may come into play is in the consideration of what types of notice must be given to absent class members. Under Rule 23, notice is required under certain specified circumstances, including to inform absent class members that they have the ability to opt-out of a Rule 23(b)(3) class or that the court has been asked to approve a class settlement.[29] Even beyond the required notice provisions, however, the rules authorize federal courts to require the parties to provide absent class members notice in other circumstances. Thus, for example, Rule 23(d)(1)(B) authorizes the court to require notice "to protect class members and fairly conduct . . . any step in the action; the proposed extent of the judgment; or the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise to come into the action."[30]

In determining whether additional notice is appropriate, courts could take constitutional concerns into consideration.[31] Courts might require the

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[26] *See* MANUAL, *supra* note 20, § 21.643, at 326 ("An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the 'common-fund' theory.") (link).

[27] *See id.* § 21.644, at 329 (discussing the role of magistrate judges, special masters, and other judicial adjuncts) (link).

[28] *See* Center for Class Action Fairness, http://centerforclassactionfairness.blogspot.com/ (last visited Mar. 25, 2010) (discussing the work of the Center for Class Action Fairness, a public interest law firm that files objections to class action settlements) (link).

[29] *See* FED. R. CIV. P. 23(c)(2), (d), (e)(1), (h)(1) (link).

[30] FED. R. CIV. P. 23(d)(1)(B) (link).

[31] As the *Manual for Complex Litigation* observes, there are also prudential reasons for requiring expansive notice. Notice "provides the structural assurance of fairness that permits representative parties to bind absent class members . . . [as well as] an opportunity for class members to participate in the litigation, to monitor the performance of class representatives and class counsel, and to ensure that the predictions of adequate representation made at the time of certification are fulfilled." MANUAL, *supra* note 22, § 21.31, at 285 (link).

parties to communicate information to absent class members, such as the likelihood that they will actually receive compensation through a class action lawsuit or the steps being taken in the litigation. Likewise, they may require that class members be notified of their right and ability to actively participate in their own defense or object to the conduct of the action. While this additional notice is not without cost, technological innovations have helped reduce such expenses.[32]

F. Limitations of the Class Action Device in Certain Contexts Such as Mass Torts

There are other areas in which the class action device has been expressly limited and in which such constitutional concerns may be either implied or, at a minimum, may provide an alternative rationale for an existing judicial trend. For example, after the Supreme Court's decisions in *Amchem* and *Ortiz* it has become exceedingly difficult to certify a class in the context of a mass tort.[33] Indeed, even before these decisions, courts had recognized that there was a "national trend to deny class certification in drug or medical product liability/personal injury cases."[34] This resistance to certification in such cases can be traced to the 1966 amendments to Rule 23, which specifically noted that the class action device was "ordinarily not appropriate" in a "mass accident" case where there would be "significant questions . . . affecting the individuals in different ways."[35]

On their face, these decisions are based on the Rule 23 requirements.[36] There are myriad individual factual and legal differences among individual

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[32] *See* A.L.I., *supra* note 7, § 1.05 cmt. i, at 57 ("Technological advances have made it easier and less expensive for lawyers to communicate with clients and class members. Many lawyers now regard communicating by e-mail and via websites as standard practice techniques.").

[33] *See* MANUAL, *supra* note 22, § 22.7, at 413–14 ("After experimentation with class treatment of some mass torts during the 1980s and 1990s, the courts have greatly restricted its use in mass torts litigation.") (link); RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 72 (2007) ("As embodied in Rule 23 of the Federal Rules of Civil Procedure in 1966, the modern class action seemed on its face a device with little applicability to mass torts.") (link).

The American Law Institute's draft *Principles of the Law of Aggregate Litigation* summarizes the state of the law: "As a doctrinal matter, the class action has fallen into disfavor as a means of resolving mass-tort claims. This development reflects many factors, including concerns about the quality of the representation received by members of settlement classes, difficulties presented by choice-of-law problems, and the need for individual evidence of exposure, injury, and damages." (citation omitted). A.L.I., *supra* note 7, § 1.02, notes to cmt. b(1)(B), at 26.

[34] *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1089 (6th Cir. 1996) (link).

[35] FED. R. CIV. P. 23, Notes of Advisory Committee on Rules, 1966 Amend (link). *See also In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 164 (2d Cir. 1987) ("The comment to Rule 23(b)(3) explicitly cautions against use of the class action device in mass tort cases. Moreover, most courts have denied certification in those circumstances." (citation omitted)) (link).

[36] *See, e.g.*, *In re* Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 396 (S.D.N.Y. 2008) (recognizing that "[l]ower courts almost unanimously have rejected class certification in pharmaceutical products liability actions . . . because the proposed class actions failed to satisfy many of Rule 23's requirements"); Haley v. Medtronic, Inc., 169 F.R.D. 643, 652 (C.D. Cal. 1996) (noting that "most courts have found

claims in such cases that generally make class certification inappropriate.[37] Such individual differences make it impossible to demonstrate the typicality or adequacy necessary for certification under Rule 23(a). Likewise, they make it difficult to demonstrate that a class has the requisite "cohesiveness" for certification under Rule 23(b)(2) or that common issues "predominate" as required under Rule 23(b).[38]

Nonetheless, the more fundamental constitutional principles Professor Redish articulates may provide an alternative ground for such decisions. While under a literal interpretation of Rule 23 the type of case should be irrelevant for purposes of the constitutional analysis, as a practical matter, the autonomy concerns in a case involving personal injuries may be even more acute.[39] In mass tort cases, absent class members may have a particularly acute interest in personally determining whether to file litigation in the first instance and the course the litigation takes. This autonomy interest may be demonstrated in the fierce opposition generated by the nationwide asbestos settlement classes proposed in *Amchem* and *Ortiz*.[40] There, the concerns of individual litigants were so great that they pursued their objections all the way to the Supreme Court on multiple occasions. While the need for alternative grounds for objecting to certification under such circumstances may

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that product liability cases typically present issues of liability and damages that are highly individual and therefore rarely qualify under the requirements of Rule 23(a) and (b)" (citation omitted)).

[37] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624 (1997) (quoting the lower court's observation that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods," that "[s]ome class members suffer no physical injury or have only asymptomatic pleural changes, while other suffer from lung cancer, disabling asbestosis, or from mesothelioma," and that "[d]ifferences in state law . . . compound these disparities") (link); *In re Am. Med. Sys., Inc.*, 75 F.3d at 1081 (denying class certification because "[p]roofs as to strict liability, negligence, failure to warn, breach of express and implied warranties will . . . vary from plaintiff to plaintiff") (link).

[38] *See, e.g.*, Blain v. SmithKline Beecham Corp., 240 F.R.D. 179, 190 (E.D. Pa. 2007) ("Predominance poses a problem for certification in drug product liability cases." (citation omitted)); *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 461 (E.D. La. 2006) ("[C]ourts have almost invariably found that common questions of fact do not predominate in pharmaceutical drug cases." (citation omitted)); *In re* Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 74–75 (S.D.N.Y. 2002) (denying certification of Rule 23(b)(2) class that was not sufficiently "cohesive"); *see also* Barnes v. Am. Tobacco Co., 161 F.3d 127, 142–43 (3d Cir. 1998) (observing that "[w]hile 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive" and that "a (b)(2) class may require more cohesiveness than a (b)(3) class") (link).

[39] This concern has long been recognized. *See, e.g.*, Georgine v. Amchem Prods., Inc., 83 F.3d 610, 633 (3d Cir. 1996) (observing in asbestos context that "[e]ach plaintiff has a significant interest in individually controlling the prosecution of separate actions" and that "[p]laintiffs have a substantial stake in making individual decisions on whether and when to settle") (link); Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 572 (E.D. Tex. 1974) (finding that "members of the purported class have a vital interest in controlling their own litigation because it involves serious personal injuries and death in some cases," citing Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970)); *see also* NAGAREDA, *supra* note 32, at 233 (noting the "commitment to individual autonomy" that is "a central feature of the present, litigation-based view of mass torts") (link).

[40] *See Amchem Prods., Inc.*, 521 U.S. at 607 (1997) (observing that "[s]trenuous objections had been asserted regarding the adequacy of representation") (link).

not be great, the intensity of the individual autonomy interest may be an alternative explanation for fierce opposition to these settlements and the courts' rulings rejecting them.

G. Limitations on Nationwide Class Actions

Another area in which implicit constitutional concerns may have some explanatory power is in the courts' treatment of purported nationwide class actions. Again, the difficulty in obtaining certification of such classes has been significant, and, again, such difficulty implicitly may be due in part to the extent to which they threaten fundamental constitutional interests.[41] As in the case of mass tort class actions, the courts have focused on individual differences among the claims of absent class members in denying certification of nationwide classes. In the context of a nationwide class action where different states' laws may apply to individual claims, the problem regarding the unique nature of each claim becomes even more significant. As one federal court has observed, "[n]o class action is proper unless all litigants are governed by the same legal rules."[42] In a nationwide class action, however, this is exceedingly difficult, if not impossible.

Once again, the constitutional concerns Professor Redish raises may provide an alternative explanation or potential alternative ground for reaching the same result. While in theory it should not matter whether the due process rights of one or one thousand individuals are implicated when assessing the constitutionality of class actions, in practice the constitutional concerns regarding abridgement of individual autonomy become much greater as the size of the class expands and individual differences among the claimants proliferate. Under such circumstances, named class representatives cannot possibly be said to "represent" the interests of absent class members or serve as a safeguard in the face of a potential denial of fundamental constitutional rights. Accordingly, the tendency of courts to deny class certification in the context of a nationwide class action may be explicable in part by the potential threat such actions pose to fundamental constitutional rights. At a minimum, such concerns provide an additional basis to question the application—or narrowly construe the application—of Rule 23 to such cases.

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[41] *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 742 n.15 (5th Cir. 1996) (observing that it is "difficult to fathom how common issues could predominate" in a nationwide class "when variations in state law are thoroughly considered") (link); *In re American Med. Sys., Inc.*, 75 F.3d at 1085 ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action." (citation omitted)) (link); James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1975 (2004) ("In the class action context . . . diversity preserves the conflicting bodies of state law that make the certification of nationwide class actions virtually impossible today in federal court.").

[42] *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1015 (7th Cir. 2002) (link).

H. Scrutiny of Class Definition

Finally, the due process concerns Professor Redish raises may potentially explain the emphasis many courts have given to the issue of class definition. Typically, a proposed class cannot be certified unless it is adequately defined and clearly ascertainable under objective criteria.[43] Courts have observed that an adequate class definition is "crucial" because "the outcome of a class action suit is *res judicata* as to all unnamed class members."[44] Where a plaintiff fails to present a workable class definition, the class allegations are properly stricken or dismissed as a matter of law.[45]

The requirement of an objectively defined class that makes determination of class membership feasible is often raised in precisely the sorts of cases that present acute due process concerns. Thus, for example, "[s]everal decisions denying class certification in pharmaceutical products liability and medical monitoring cases have found that class membership is not feasibly ascertainable where it hinges on myriad medical factors individual to each class member."[46]

It is precisely this sort of case in which the constitutional concerns Professor Redish raises may be particularly significant, given that where it is impossible to define who exactly will be bound by a class determination, there are obvious concerns regarding due process. Absent class members will not be able to determine whether they must assert their right to opt out of a proposed class where the class definition is vague. Accordingly, they may be held to have effectively waived any due process right not only merely through inaction, but where their objection to inclusion is rendered effectively impossible due to a vague class definition.

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[43] *See* Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977) (reviewing the requirements for class certification) (link); Clay v. Am. Tobacco Co., 188 F.R.D. 483, 490 (S.D. Ill. 1999) (rejecting class definition that included "all persons in the United States who, as children, purchased and smoked cigarettes" sold by defendants, noting that "[t]he actual number of potential class members is enormous and, more importantly, amorphous" and that "[a]t no time during this case would the exact membership of this class be ascertainable"); MANUAL, *supra* note 22, § 21.222, at 270 ("Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under Rule 23(c)(2) to the 'best notice practicable' in a Rule 23(b)(3) action.") (link).

[44] *Alliance to End Repression*, 565 F.2d at 977 n.6 (link).

[45] *See, e.g.*, Earnest v. Gen. Motors Corp., 923 F. Supp. 1469, 1473 (N.D. Ala. 1996) (holding that plaintiffs' failure to set forth an adequate class definition "entitles a court to dismiss the class allegations and proceed with the action on an individual basis" (citation omitted)) (link).

[46] *In re* Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 397 (S.D.N.Y. 2008) (citation omitted); *see also* Gevedon v. Purdue Pharma, 212 F.R.D. 333, 335–37 (E.D. Ky. 2002) (declining to certify class in products liability action based on plaintiff's failure to define identifiable class); *In re* Aredia & Zometa Prods. Liab. Litig., No. 3:06-MD-1760, 2007 WL 3012972, at *2 (M.D. Tenn. Oct. 10, 2007) (rejecting "open-ended" class definition based on "myriad individual differences within the proposed plaintiff class").

CONCLUSION

Wholesale Justice is a signally important work, one that has important consequences for policymakers, the judiciary, practitioners, and indeed the public at large. By articulating the important constitutional concerns inherent in the class action procedure as applied in current practice, Professor Redish provides a valuable basis for needed reforms. His contribution demonstrates that such reforms are needed not merely to curtail abuses that have negative policy implications, but also to protect fundamental rights that to date have largely been ignored.