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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

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INTRODUCTION

Much ink has been spilled over the class action device. Commentators have thoroughly analyzed both the plain language and intent behind the federal rules authorizing the aggregation of claims in a single lawsuit as well as the policy implications of the class action in both theory and practice. Seldom does a work break new ground in a field that has been plowed as often as that of class actions. Martin Redish's *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* is the rare exception.

In *Wholesale Justice*, Professor Redish provides a thorough analysis of the constitutional implications of the class action mechanism. Unlike prior commentators and courts, which have focused mainly on limited constitutional issues arising in class action cases, Professor Redish's analysis sweeps more broadly. In the process, he brings to bear principles of constitutional law that have long lain dormant in the field of class action practice. His insights demonstrate that more than mere practical or policy concerns arise when class action procedures are used. Rather, they implicate—and often infringe—fundamental principles of constitutional law.

Part I of this review discusses Professor Redish's thesis that the class action procedure as applied today is profoundly troubling from a constitutional perspective. Professor Redish observes that class action procedures under Rule 23 often infringe the due process right to individual autonomy by sweeping large numbers of individuals into litigation—either through mandatory class action procedures under Rule 23(b)(1) and (b)(2) or through the opt-out procedure embodied in Rule 23(b)(3)—without explicit consent. Yet, as Professor Redish correctly notes, the Supreme Court has

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long recognized the plaintiff's fundamental right under the Due Process Clauses both to choose whether and how to bring litigation and to control its direction. Professor Redish argues that these constitutional concerns are compounded by the fact that the class action procedure effectively changes substantive law by allowing the pursuit of claims that otherwise would not be pursued as individual actions. This, in turn, raises profound separation of powers and federalism concerns, which Congress itself acknowledged in the Rules Enabling Act.[1]

Part II discusses proposals for reform that Professor Redish believes will help mitigate some of these constitutional concerns. First, Professor Redish argues that courts should be required to scrutinize proposed class actions to weed out so-called "faux" class action cases—*i.e.*, cases in which individual class members are unlikely to receive significant compensation and only plaintiffs' counsel stand to benefit from class certification. According to Professor Redish, such cases represent a significant infringement on the right to individual autonomy, and therefore warrant mandatory scrutiny under Rule 23 rather than the discretionary scrutiny currently authorized under the Rule. Second, Professor Redish argues that the opt-out mechanism under Rule 23(b)(3) should be abandoned in favor of an opt-in mechanism that requires absent class members to take some affirmative action before being swept into a class action. Redish argues that allowing due process rights to be waived simply by inaction, as under the current version of the rule, does not sufficiently protect such constitutional rights. Finally, Professor Redish offers additional criticisms of settlement class actions. Professor Redish argues that such classes are inherently flawed because they lack the "case" or "controversy" necessary to confer federal jurisdiction under Article III.

Part III discusses other ways in which Professor Redish's theories may be applied in practice or in which the constitutional concerns he identifies may already be recognized, at least implicitly. As Professor Redish acknowledges, the Supreme Court has recognized the due process right to autonomy on occasion, including in its decision rejecting class certification in *Ortiz v. Fibreboard Corporation*.[2] There, the Court expressly invoked the autonomy interest Professor Redish discusses to constrain the application of Rule 23(b)(1)(B).[3] The constitutional concerns Professor Redish raises, moreover, may have implicitly influenced courts in imposing other limitations on the use of the class action device, including in certain categories of class action cases, such as nationwide class actions, or mass tort and product liability class actions. Such decisions provide a foundation for a broad-

[1] The Rules Enabling Act directs that federal procedural rules may not effect any change in underlying substantive law. 28 U.S.C. §§ 2072(b) (2006) (link).

[2] 527 U.S. 815, 846 (1999) (link).

[3] *Id.* at 846–47.

er judicial recognition of the constitutional concerns Professor Redish identifies.

Finally, Part IV offers a brief conclusion. Professor Redish's book is likely to provide ample ground for further academic study of the class action device as well as give policymakers and courts grounds for questioning the current application of these procedures. Indeed, his book has appeal for a much broader audience: members of the public who recognize that there is something wrong in our modern civil litigation system, but are unsure as to the precise source of such problems. The denial of fundamental due process rights Professor Redish identifies and, in turn, the erosion of democratic values in the application of the class action device is one aspect of our judicial system deserving of such public scrutiny.

I. PROFESSOR REDISH'S THESIS

As Professor Redish observes, there are many reasons to be concerned with the class action procedure as a matter of policy. For one thing, a class action may prejudice the interests of absent class members. If a class is certified and the class representatives are unsuccessful, the absent class members' claims will be "legally obliterated" by the result of the litigation, even though they did not actively participate in the suit.[4] Likewise, as many have observed,[5] a class action can reduce the input any particular plaintiff has in the conduct of the case. Where thousands are represented in a single lawsuit, it is simply impossible for them to have the same level of input regarding the prosecution of their claims. Moreover, conflicts among class members inevitably emerge, rendering the class action mechanism an imperfect means of resolving large-scale litigation.

The potential downside of the class action procedure for defendants is also significant. Certification of a class may bring pressure to settle weak or frivolous claims.[6] Indeed, it may increase the filing of dubious claims.[7]

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[4] MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 1 (2009) (link).

[5] *See, e.g.*, Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 380–81 (1988) (noting that there is "very little if any active attempt by lawyers to organize class members to participate in the suit"); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 125 (2003) (arguing that "active class member participation is impossible and more than likely undesirable in Rule 23(b)(3) class actions").

[6] *E.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.") (citations omitted) (link); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995) (noting that defendants "will be under intense pressure to settle," and that "the risk of bankruptcy" may force them "to settle even if they have no legal liability") (link).

[7] *E.g.*, *Castano*, 84 F.3d at 746 ("Class certification magnifies and strengthens the number of unmeritorious claims."); *see also In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 150 (2d Cir. 1987)

The risk associated with bringing the case to trial is increased commensurably when a class is certified: "Aggregation of claims . . . makes it more likely that a defendant will be found liable and results in significantly higher damage awards."[8] Furthermore, the ability to defend against weak claims is reduced where weaker claims are aggregated with claims of greater merit. As Professor Redish observes, these dynamics can often lead to a situation where the class action is "employed as a form of legalized blackmail, by which an unscrupulous group of plaintiffs' attorneys effectively extort money from large companies by threatening their very existence with business-crushing class awards."[9]

In the settlement context, the class action device may have equally perverse effects. Settlements may be the result of collusive deals among the defendants and certain plaintiffs, designed to achieve peace for defendants while extracting fees for the plaintiffs' attorneys. Such agreements potentially prejudice the interests of the class as a whole or at least those of certain class members.[10] These practical dangers of the settlement class are well-known and were fully explored in the Supreme Court's twin decisions in *Amchem* and *Ortiz*. There, the Court examined in detail the potential conflicts that may emerge among different groups of plaintiffs and their lawyers in the context of mass tort settlement classes and ultimately held that the classes under review could not be certified.[11]

Professor Redish's contribution to this debate is his recognition that the concerns with the class action device are not merely prudential. Rather, there are profound constitutional concerns with the use of class actions that have gone largely unaddressed by both courts and commentators.[12] Professor Redish sets out to examine "the class action device from the broader perspectives of constitutional [and] political theory."[13] In the process, he identifies a number of fundamental constitutional concerns that have received comparatively little attention in the debate over class action procedure.

("The class certification and settlement caused the number of claimants and the variety of ailments attributed to Agent Orange to climb dramatically") (link).

[8] *Castano*, 84 F.3d at 746.

[9] REDISH, *supra* note 4, at 2.

[10] *Id.* at 177.

[11] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (link); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (link).

[12] As Professor Redish observes:

> On occasion, the Supreme Court has recognized that the due process clauses of the Fifth Amendment and Fourteenth Amendment impose restrictions on government's ability to employ the class action procedure. However, this concern has focused exclusively on the *paternalistic* concern that those representing absent class members do so fairly and fully. At no point has the Supreme Court provided any meaningful exploration of the autonomy interests of absent class members that are threatened by use of class procedures.

REDISH, *supra* note 4, at 5 (footnotes omitted).

[13] *Id.* at 2.

Most significantly, Professor Redish notes that the class action device, by its very nature, divests individual plaintiffs "either legally or practically" of their right to control the vindication of other rights through the legal process.[14] Indeed, as he observes, in situations where the claims of each class member are small, "[m]any class members are likely not even aware that they are plaintiffs in a major legal action, and the overwhelming majority will never even benefit directly from a successful prosecution."[15] He argues that this violates "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."[16]

At the same time, Professor Redish notes that the class action device, while purportedly purely procedural, often has the practical effect of making significant alterations in substantive law.[17] One way in which class actions essentially alter substantive rules is by effectively requiring absent class members to bring claims against a defendant.[18] Under traditional notions of substantive law, the choice as to whether to bring a claim is solely that of the plaintiff,[19] who is "master of the complaint."[20] In class actions, however, if a non-opt-out class is certified under Rule 23(b)(1) or 23(b)(2), absent class members are compelled to bring their claims as part of the litigation.[21] Likewise, even in opt-out classes certified under Rule 23(b)(3), there is an element of coercion given that inertia may lead absent class members to refrain from taking action to affirmatively opt-out of a class.[22] As a result, "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."[23] Professor Redish maintains that this "modification of

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[14] *Id.* at 3.

[15] *Id.* at 14.

[16] *Id.* at 135–36. As Professor Redish explains:

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 she will and will not say on behalf of her 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 her interests.

Id. at 136.

[17] *Id.* at 3. According to Professor Redish, "[t]he result—whether intended or not—is a form of confusion or even deception of the electorate, which is likely unaware that the essence of the governing substantive law has been altered because the alteration has occurred under the guise of procedural modification." *Id.*

[18] *Id.* at 23.

[19] *Id.*

[20] *E.g.*, Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831 (2002) (link); Caterpillar Inc. v. Williams, 482 U.S. 386, 398–99 (1987) (link).

[21] *See* REDISH, *supra* note 4, at 148 (citing FED. R. CIV. P. 23(c), (d)).

[22] *See id.* at 148 (citing FED. R. CIV. P. 23(c)(3)); *see also id.* at 36.

[23] *Id.* at 24.

the underlying substantive law by use of the supposedly neutral class action device is completely indefensible as a matter of democratic theory."[24]

Professor Redish finds this aspect of class action procedure particularly troubling given that it has been authorized by committee, outside the legislative process.[25] Under the Rules Enabling Act (which provides authority for the promulgation of Rule 23), an advisory committee is charged with fashioning the rules governing procedure in the federal courts.[26] While the Act expressly dictates that the rules make no change to the substantive law,[27] in practice Professor Redish believes that Rule 23 in fact violates this command as properly construed. He lays out an argument suggesting "the possibility that the Rules Enabling Act—at least as currently implemented—should be found unconstitutional," or that at a minimum, the courts should construe the act as requiring that certain procedural changes—those effecting important policy changes—be reserved to Congress.[28]

Professor Redish argues that these constitutional problems result from Rule 23's deviation from the traditional conception of aggregate litigation, which was characterized by "substantively cohesive and interconnected groups."[29] It was only in the context of "group-held rights" that such representative procedures traditionally were employed, and only in that context that they could have potential res judicata effect.[30] Thus, for example, the cases in which such procedural mechanisms historically were employed tended to involve "pre-litigation groups and cases involving separate claims into a common fund."[31] The device was not originally envisioned as encompassing situations in which what are essentially individual claims are bundled as a result of the litigation process.

Professor Redish faults the 1966 amendments to Rule 23 as liberalizing the use of aggregative methods in a way that abridges individual rights of autonomy and authorizes a fundamental change in substantive law.[32] Under

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[24] *Id.* at 22.

[25] *See id.* at 73–78 (discussing the constitutionality of the Rules Enabling Act).

[26] *See* 28 U.S.C. §§ 2072–73 (2006) (link).

[27] 28 U.S.C. § 2072(b) (Promulgated rules "shall not abridge, enlarge or modify any substantive right.") (link).

[28] REDISH, *supra* note 4, at 84; *see also id.* at 231 (arguing that, in light of structural concerns such as constitutional separation of powers, "the substantive-procedural dichotomy contained in the Act should be construed in a manner that reserves to Congress the exclusive power to fashion rules of procedure that significantly impact issues of policy beyond the four walls of the courthouse" and that Rule 23 is "the poster child of such rules").

[29] *Id.* at 5; *see also id.* at 6 (citing STEPHEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 41 (1987)).

[30] *Id.* at 7.

[31] *Id.* at 8.

[32] *Id.* at 5; *see also* MANUAL FOR COMPLEX LITIGATION § 21, at 243 (4th ed. 2004) ("Since 1966, when Federal Rule of Civil Procedure 23 was amended to add the damages class action under Rule 23(b)(3), class action litigation has greatly expanded.") (link).

Rule 23 as amended in 1966, the class action device may be used to aggregate claims that are individual in nature. The most obvious example of this aspect of the Rule is found in subsection (b)(3), which expressly authorizes courts to group together individual claims that may have a number of individual differences so long as common issues "predominate" and the class action device is a "superior" method for resolving the litigation.[33] However, Professor Redish argues that subsections (b)(1) and (b)(2) also sweep up individualized claims that are "linked by nothing more than substantive parallelism or procedural fortuity" and may at times actually be at odds with each other "as where claims exceed the limited funds available" in a (b)(1)(B) class.[34]

Professor Redish argues that drafters of the 1966 amendments did not fully consider the constitutional ramifications of these changes.[35] "Once the class action procedure was altered to permit—indeed, on occasion even require—the group adjudication of purely individually held rights, the stakes for both the political theory of liberal democracy and the constitutional theory of procedural due process were correspondingly altered in fundamental ways."[36] Moreover, he notes that since the revisions to Rule 23, the courts have remained relatively silent on the issue, only occasionally noting the tension between the class action procedure and the Constitution's guarantee of due process.[37] Accordingly, in Professor Redish's view, we have reached a state in which fundamental constitutional rights have been significantly eroded under the radar, so to speak. Innovation that had no real basis in historical precedent coupled with neglect from courts and commentators has resulted in an unrealized loss of liberty that affects nearly all citizens in some way.

II. PROFESSOR REDISH'S SPECIFIC PROPOSALS FOR REFORM

In order to address these unrecognized constitutional problems, Professor Redish offers some proposals for further limitations on the class action device. Arguing that the misuse of Rule 23 has led to a fundamental alteration of substantive law and the violation of democratic principles, he suggests that "substantial" modifications of Rule 23 are warranted to prevent such abuse and to preserve constitutional rights.[38]

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[33] FED. R. CIV. P. 23(b)(3) (link).

[34] REDISH, *supra* note 4, at 11.

[35] *Id.* at 12; *see also* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1164 (1998) ("The 'framers' of Rule 23 did not envision the expansive interpretations of the rule that have emerged[.]").

[36] REDISH, *supra* note 4, at 9.

[37] *Id.* at 135 (observing that although "[t]he Supreme Court has long noted the due process clause's relevance as a constitutional limit on class actions[,] . . . virtually all of the judicial . . . attention has focused on the paternalistic concern that the named parties adequately protect the interests of the absent class members").

[38] *Id.* at 28.

A. Limiting "Faux" Class Actions

One of Professor Redish's proposals is directed at class actions that benefit lawyers but not the actual class members who ultimately receive little or no compensation—what he calls "faux" class actions.[39] Professor Redish criticizes such actions on the ground that they effectively represent a transformation of the substantive law under Rule 23: "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 it is quite possible that virtually no victim receives compensation through enforcement of the underlying substantive law."[40] While he acknowledges that such a suit may "further the public interest" if it "exposes, punishes, and deters illegal corporate behavior,"[41] he nonetheless finds that such suits violate fundamental constitutional rights.

Professor Redish suggests requiring courts to undertake an analysis to determine whether "it is reasonable to predict that meaningful compensatory relief to individual class members would result from successful prosecution of the class proceeding."[42] As he notes, there is presently nothing in Rule 23 prohibiting such an analysis. However, he believes that it would be wise to *require* courts to undertake such an analysis to "avoid[] transforming a class action into a bounty hunter action."[43] Along the same lines, he suggests that "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 by the total amount of settlement or potential claims, would go far toward deterring pure bounty hunter class actions."[44]

Such proposals for reform go against the recommendations of many academic commentators, who argue that one of the primary benefits of the class action is that it facilitates litigation that otherwise would not be brought because the value of individual claims is so small that it is not eco-

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[39] *Id.* at 14–15.

[40] *Id.* at 25.

[41] *Id.* at 26. Professor Redish further notes that many class actions—which he dubs "coattail" class actions—are based on prior government regulatory action:

> 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 feed off the fruits of the governmental agency's efforts. 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.

Id. at 32 (footnotes omitted).

[42] *Id.* at 15, 231; *see also id.* at 59–60 (clarifying that such an inquiry "would not 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 success").

[43] *Id.* at 58.

[44] *Id.* at 60.

nomically feasible to bring individual lawsuits.[45] Such "negative value" claims may be feasible only when grouped in a class action, where the overhead of bringing the lawsuit is shared among all class members. Even if the class members do not ultimately receive much in the way of compensation, such lawsuits can have value in deterring conduct that is harmful to society, or at least that is what some commentators argue. Professor Redish, however, maintains that the constitutional concerns with such suits plainly outweigh any pragmatic arguments. Even if there were always some societal value in such suits (which he disputes), they cannot be brought at the expense of fundamental individual rights.

B. Establishing Class Membership Through An Opt-In Procedure

Professor Redish suggests replacing the opt-out procedure embodied in Rule 23(b)(3) with an opt-in procedure for similar reasons.[46] Under the proposed opt-in procedure, putative members of a class would have to take some affirmative action to join the litigation.[47] This reform would eliminate the possibility that plaintiffs could be included in a class based on nothing more than inertia.[48] As Professor Redish notes, excusing oneself from a class is not worth the effort in many instances.[49] Moreover, despite requirements regarding the notice that must be given to absent class members, there is always the possibility that many class members will not receive notice of the litigation or that such notice will be insufficient to fully inform them of their rights, thereby depriving them of any meaningful opportunity to opt-out.

Indeed, Professor Redish suggests that the 1966 amendments to Rule 23 may have been purposefully "designed to subvert the essential remedial structure of the governing substantive law" by facilitating class actions in cases where consumers would not take action to litigate themselves.[50] Professor Redish notes that "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

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[45] *See, e.g.*, Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 834 (1985) (arguing that a class action is appropriate in "cases involving numerous small claims" because each "individual litigant has a smaller interest in controlling his own claim" and because "the claim might not be viable outside a class action").

[46] *See* REDISH, *supra* note 4, at 36–42, 57–58. Similar proposals have been made in the past. *See, e.g.*, Georgine v. Amchem Prods., Inc., 83 F.3d 610, 634–35 (3d Cir. 1996) (suggesting that "[t]he Rules Committee . . . should minimize due process concerns" and that "it might address them via opt-in classes, or by classes with greater opt-out rights, so as to avoid possible due process problems") (link).

[47] REDISH, *supra* note 4, at 173, 175.

[48] *See id.* at 56 ("[T]he 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.").

[49] *See id.* at 41 (noting that injuries may be so minimal "as not to justify the individual victim's decision to enforce them"), 172 (noting the "enormous impact of inertia" on absent class members).

[50] *Id.* at 41.

inertia might be greater than a potential class member's desire to participate, given the small stakes involved."[51]

However, as Professor Redish observes, there are constitutional concerns with allowing fundamental due process rights to be waived in such a cavalier fashion.[52] Generally a waiver of constitutional rights requires some affirmative action on the part of an individual holding such rights.[53] However, the opt-out procedure allows waiver through inaction under circumstances in which inaction is highly likely—given that the effort it takes to affirmatively opt-out is outweighed by the marginal benefits of simply doing nothing.

C. Abolishing Settlement Classes

Finally, Professor Redish specifically criticizes settlement class actions for additional, independent reasons, arguing that they "undermine[] both the formalistic dictates of Article III and the important constitutional values underlying the requirement of adversary adjudication."[54] In such classes, the parties expressly make certification contingent on the entry of a settlement resolving the litigation. Thus, while settlement classes may have certain attractive aspects, such as reducing litigation expenses,[55] many of the traditional aspects of adversarial litigation are missing. As a result, according to Professor Redish, the settlement class is potentially the product of collusion among the parties: defendants who wish to rid themselves of the burden of litigation and plaintiffs' counsel who wish to receive immediate compensation.

Given that Article III expressly limits suits the federal courts may hear to "cases" or "controversies," Professor Redish finds this characteristic of the settlement class constitutionally fatal:

> 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 in-

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[51] *Id.* (citing Memorandum of David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure, to the Civil Rules Advisory Committee, *Perspectives on Rule 23 Including the Problem of Overlapping Classes 2-3* (Apr. 4, 2002)).

[52] *See id.* at 169–73; *see also id.* at 175 ("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.").

[53] *Id.* at 170 (citing Fuentes v. Shevin, 407 U.S. 67, 95 (1972); Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

[54] *See id.* at 19. He further observes that settlement classes have been the subject of criticism on policy grounds: "A number of respected courts and scholars . . . have sounded cautionary notes about the practice, suggesting that the settlement class action brings with it serious risks of collusion and unfairness that ultimately disadvantage absent class members." *Id.* at 177.

[55] MANUAL, *supra* note 32, at § 21.612.

> clude 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, which, at the time the relevant proceeding is undertaken, they are not in the case of the settlement class action.[56]

Accordingly, Professor Redish would abolish the practice on purely constitutional grounds.

In taking this position, he departs with other procedural scholars, who recognize some of the problems that may arise in settlement classes, but who do not go so far as to argue that they are constitutionally suspect. As Professor Redish observes, "[m]ost courts and commentators" have viewed the nonadversarial nature of the settlement class and the perverse incentives to which it gives rise as "solely a sub-constitutional problem, looking at it through the lens of the Rule 23(a)(4) adequacy of representation requirement."[57] Under Professor Redish's analysis, however, it is a more fundamental problem—one that cannot be remedied through additional reforms or procedural safeguards.

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[56] REDISH, *supra* note 4, at 178 (footnotes omitted). Professor Redish also argues that the settlement class violates the constitutional separation of powers principle, given that courts go beyond the powers delegated to the judicial branch when they make determinations in the absence of a legitimate "case or controversy":

> The Constitution's system of separation of powers is . . . undermined by so-called settlement class actions, where the class action court is asked not to resolve a real dispute between a litigant class and a party opposing that class, but rather merely to approve and implement a prearranged legal arrangement between the parties that was reached prior to the seeking of class certification.

Id. at 229.

[57] *Id.* at 211.