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## Superiority as Unity

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## SUPERIORITY AS UNITY

*Jay Tidmarsh*

**ABSTRACT**—One of Professor Redish’s many important contributions to legal scholarship is his recent work on class actions. Grounding his argument in the theory of democratic accountability that has been at the centerpiece of all his work, Professor Redish suggests that, in nearly all instances, class actions violate the individual autonomy of litigants and should not be used by courts. This Essay begins from the opposite premise: that class actions should be grounded in the notion of social utility rather than autonomy so that class actions should be used whenever they achieve net social gains. This idea of “superiority” presents some difficulties, not the least of which is the capacity of a court to determine whether a class action is indeed superior to other forms of dispute resolution. The Essay proposes a series of presumptions that give effect to superiority and make an inquiry into superiority easier for courts to conduct. When the results obtained by these presumptions are examined, they do not result in the near-absolute position against class actions that Professor Redish favors, but surprising convergences in the autonomy and utility approaches emerge.

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## INTRODUCTION

Marty Redish’s book, *Wholesale Justice*,<sup>1</sup> is the Cassandra of class action literature. Its prophetic call for a significant scaling back of Federal Rule of Civil Procedure 23 and comparable state court counterparts<sup>2</sup> has not (or at least not yet) caught on among the commentators on class actions. Even though the Supreme Court has also signaled in recent years its discomfort with adventuresome uses of litigation, settlement, or arbitral class actions,<sup>3</sup> it has so far failed to heed Professor Redish’s arguments about why class actions should be narrowly constrained.<sup>4</sup>

In this Essay, I engage Professor Redish’s arguments in detail. I have great sympathy with the core of Professor Redish’s concern: that class actions in many circumstances undermine democratic accountability because they undercut the autonomy of individual litigants. I also admire the Redishian sophistication in the book’s central move, which argues that litigant autonomy is protected under the Due Process Clause.<sup>5</sup> This move allows Professor Redish to assert that the government can impinge on this autonomy only when a compelling interest exists and that, except in a

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<sup>1</sup> MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009).

<sup>2</sup> For a compendium of state court class action rules or statutes, see ABA CLASS ACTIONS & DERIVATIVE SUITS COMM., *THE LAW OF CLASS ACTION: FIFTY-STATE SURVEY 2011–2012* (Elizabeth J. Cabraser et al. eds., 2012) [hereinafter *THE LAW OF CLASS ACTION*].

<sup>3</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (litigation class action); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (arbitral class action); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (settlement class action); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (settlement class action).

<sup>4</sup> Among these arguments is the claim, see REDISH, *supra* note 1, at 16–17, 27, 169, that Rule 23 exceeds the delegation of authority given to the Supreme Court in the Rules Enabling Act to promulgate “general rules of practice and procedure,” 28 U.S.C. § 2072(a) (2006), but only when those rules do “not abridge, enlarge or modify any substantive right,” *id.* § 2072(b). The Supreme Court has recently rejected that argument, at least on the broad plain on which Professor Redish pitched it. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442–48 (2010) (plurality opinion); *id.* at 1448 (Stevens, J., concurring).

<sup>5</sup> To an extent, Professor Redish also grounds the right of litigant autonomy in the First Amendment right of association—or, in the case of class actions, the right of nonassociation.

narrow range of cases, American class action rules fail to meet this stringent standard.<sup>6</sup>

The difficulty with the argument, as Professor Redish acknowledges with his characteristic honesty,<sup>7</sup> is that the Due Process Clause has not been construed to protect litigant autonomy against government interference in such a strong form. Indeed, the dominant approach to due process analysis allows a court to trade off losses in litigant control against social gains (in particular, reductions in the expense of litigation) achieved from less adversarial processes.<sup>8</sup> Using such a metric, it might seem obvious that class actions both are constitutional and should be widely available, at least as long as the efficiencies realized by class treatment exceed the intangible loss of autonomy.

In fact, that conclusion is far from obvious. Indeed, this Essay analyzes the question of the proper scope of class actions by starting at precisely the opposite point from Professor Redish—from the point of social welfare rather than individual autonomy. Put differently, this Essay treats seriously the idea that class actions should be used only when they advance social welfare. Adopting this “superiority principle” leads the law of class actions, I will argue, to an endpoint not so very distant from the point at which Professor Redish arrives.

The Essay proceeds in two parts. First, the Essay analyzes *Wholesale Justice*’s argument about the proper scope of class actions, as well as the difficulties that this argument encounters under the present case law. Second, the Essay examines the proper reach of class actions if the superiority of class actions on a social-welfare basis were the touchstone. I propose a novel principle—which I call the “superiority as unity” principle—as a workable way to implement a class action built on a social-welfare foundation. Class actions constructed around a workable superiority principle, rather than an individual-autonomy principle, would require a significant restructuring of present American class action law. Although the restructuring that the superiority as unity principle requires is not the trimming of class action law that Professor Redish advocates, surprising convergences emerge from a comparison of the two approaches.

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<sup>6</sup> See REDISH, *supra* note 1, at 228–32.

<sup>7</sup> See *id.* at 137–40.

<sup>8</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (noting that due process “generally requires consideration of three distinct factors”: “the private interest that will be affected”; “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and “the Government’s interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”).

## I. DEMOCRATIC ACCOUNTABILITY, AUTONOMY, AND THE LIMITED ROLE OF CLASS ACTIONS

Like much of Professor Redish's work, the starting point for *Wholesale Justice* is political and democratic theory. Professor Redish believes passionately in individual integrity, individual autonomy, the right of individuals to participate in the democratic process as a means of protecting their interests, and the necessity of holding government institutions accountable to legislative and constitutional will. Many people believe these things, of course. But few have ever analyzed and defended the legal implications of liberal democratic theory with Professor Redish's sophistication and technical virtuosity. Professor Redish's class action scholarship is a small corner of this entire body of work, but it stands as a wonderful synthesis of the ideas that cut across his work in constitutional law, federal courts, and civil procedure.<sup>9</sup>

To understand Professor Redish's concerns with class actions, we can begin with two basic propositions. First, the class action is a device by which one person (or a group of people) acts as the representative(s) of a larger group (or class) with similar claims. Second, in modern American law, the result achieved by the class representative(s) is binding on the members of the class as long as the representation is adequate; class members lose the ability to prosecute or defend the claims in their own right.<sup>10</sup>

Given Professor Redish's intellectual commitments, it is easy to understand his unease with class actions. Class actions turn the adversarial system, which strongly protects the autonomy of individual litigants,<sup>11</sup> on its head. Individual members of the class lose the ability to decide whether, when, where, with whom, and against whom to file suit. They also lose the

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<sup>9</sup> For examples of Professor Redish's use of liberal democratic theory, see Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (abstention); 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) (preclusion); and Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303 (2009) (First Amendment).

<sup>10</sup> See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) ("[T]he judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.").

<sup>11</sup> For the classic defense of the adversarial system, which grounds the system normatively in the right of individuals to participate in the process by which their rights are determined, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). For other discussions, see STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 33-39 (1988), and Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377 (2008).

ability to choose their own lawyers.<sup>12</sup> These decisions fall to class representatives or to class counsel. Although a majority of American class actions are opt-out class actions<sup>13</sup>—meaning that class members can in theory exit the class and protect their interests according to their own lights—opt-out rates are in fact very low.<sup>14</sup> By setting the default rule to require that class members opt out rather than opt in, even opt-out class actions intrude significantly on litigant autonomy.

But class actions can pose difficulties beyond formal interference with an individual's ability to protect his or her legal rights. One practical problem is identifying the class members' interests. Adequate representation does not require a perfect correspondence between the interests of class members and those of the class representative; rather, common questions, typical claims, a lack of conflicting interests, and a capacity and willingness to represent similar claims are enough.<sup>15</sup> Because class actions are typically composed of hundreds or thousands of members, neither the class representative nor class counsel is likely to have met most of them. Thus, it requires an exercise of imagination even to know what the interests of absent members are. The interests of the class representatives can be used as proxies for the interests of individual class members, or the class can be conceived of as an entity with a collective interest different from the interests of its members.<sup>16</sup> But if we begin with a focus on

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<sup>12</sup> In an adversarial system, the ability to choose counsel is one of the defining aspects of individual litigation. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 441 (1985) (Brennan, J., concurring) (“A fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings.”); see also *id.* at 442 (Stevens, J., dissenting) (“Everyone must agree that the litigant’s freedom to choose his own lawyer in a civil case is a fundamental right.”).

<sup>13</sup> See THOMAS E. WILLGING ET AL., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS* 21 (1996) (stating that 61% of the class actions contained in a study were certified under Rule 23(b)(3), which permits class members to opt out; 39% were certified under Rules 23(b)(1) or (b)(2), which do not permit opting out).

<sup>14</sup> *Id.* at 52 (noting that in the study, a median of 0.1% to 0.2% of class members opted out of a case, and that in 75% of the cases studied, fewer than 100 class members opted out).

<sup>15</sup> Commonality, typicality, and adequacy (understood to mean a lack of conflicting interests or other disabling reasons why a class representative or class counsel cannot protect the interests of class members) are the touchstones of the constitutional demand for adequate representation. See *FED. R. CIV. P. 23(a)(2)–(4)*; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (“The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.”); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *Hansberry*, 311 U.S. 32 (holding that the Fourteenth Amendment requires adequate representation in order for a class judgment to bind class members). The Court has noted that these specific requirements in Rule 23(a) are designed to determine “whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence”; thus, they “tend to merge” with each other. *Gen. Tel. Co.*, 457 U.S. at 157 n.13.

<sup>16</sup> For an excellent treatment of this latter approach, see David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *NOTRE DAME L. REV.* 913 (1998).

individual autonomy, as Professor Redish does, these solutions are obviously inadequate.<sup>17</sup>

Class actions can also create incentives that threaten class members' interests. One problem is that class representatives may use the claims of class members as bargaining chips to enhance the value of their own claims, sacrificing the interests of those they represent in the process.<sup>18</sup> Similarly, in many negative-value cases,<sup>19</sup> neither the class representatives nor the class members have a large incentive to monitor the work of class counsel; hence, the lawyers have an opportunity to collude with the defendant or otherwise to enrich themselves at the expense of the class.<sup>20</sup> The frequency with which "sellouts" or collusion occur is debatable. What is not debatable is that (except for negative-value cases, in which the loss of class members' autonomy is functionally nil) the distance between the individual and class counsel makes the adversarial ideal of vigorous representation of each individual's interests difficult to achieve.

The threat that class actions pose to democratic accountability does not end with the potential undermining of litigant autonomy. In various ways class actions also affect substantive law. First, class actions have the potential to skew litigation outcomes in comparison to individual litigation.<sup>21</sup> Second, class actions threaten in some cases to impose massive "bet the company" liability that may force defendants to settle claims that

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<sup>17</sup> See REDISH, *supra* note 1, at 115–20.

<sup>18</sup> For a discussion of how a self-interested class representative or class counsel has an incentive to use the claims of class members to leverage a greater recovery or fee, see Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1149–51 (2009).

<sup>19</sup> In a negative-value—or large-scale, small-claim—case, the costs of individual litigation for a plaintiff exceed the value of the claim, essentially making the claim worthless. Class actions, which aggregate many such claims, can make the case financially worthwhile. See 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, 8–11 (1991).

<sup>20</sup> For two well-known discussions of this possibility, 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 (1987), and Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1048 (1995) (describing "collusion between class counsel and the defendants" in mass tort class action settlement).

<sup>21</sup> That skewing is most evident with negative-value claims, which would remain unfiled absent an aggregation mechanism. But the skewing effect of aggregating claims has been experimentally demonstrated in positive-value cases as well. See Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209, 225–26 (1988); see also Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. APPLIED PSYCHOL. 909, 914, 917 (2000) (reporting experimental data showing that the likelihood of recovery increases as more plaintiffs are aggregated but that the average damage award decreases if more than four plaintiffs are aggregated).

lack merit.<sup>22</sup> Third, the law created to resolve a class action can be sui generis; rather than respecting the preexisting allocation of legal rights and remedies, some courts instead have crafted unique rules for resolving class actions.<sup>23</sup> Fourth, because most members of a class never make a conscious decision to sue and because the largest potential beneficiary of most class actions is class counsel, class actions create a situation in which the delivery of remedial compensation to individuals can become an afterthought to, rather than the point of, adjudication.<sup>24</sup> Fifth, in light of the failure of individual compensation, class actions act more as regulatory mechanisms with class counsel serving as private attorneys general. Such an approach may work at cross purposes with the regulatory stance taken by the government toward the defendants' behavior.<sup>25</sup>

In all these ways, class actions in effect change the substantive law—not at a formal level but at the practical level of its enforcement. These changes, brought about by judicial procedure, arguably fail to respect the role of the legislature or other lawgivers in our democracy.<sup>26</sup> This failure is a particular problem at the federal level because the Rules Enabling Act delegated to the Supreme Court only the power to promulgate “rules of practice and procedure”<sup>27</sup> that do not “abridge, enlarge or modify any substantive right.”<sup>28</sup> Rule 23, which was adopted pursuant to this directive, arguably oversteps the boundaries of this congressional delegation, thus usurping the legislative function to prescribe the rules by which federal courts adjudicate controversies.<sup>29</sup>

A final difficulty exists with a particular subset of class actions known as “settlement class actions.” These cases involve prefiling negotiation and

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<sup>22</sup> See *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) (Posner, J.); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (Easterbrook, J.); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (Posner, C.J.). *But see* *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996) (noting that this rationale “does not appear to be in line with the law of this circuit”); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 460 (D. Wyo. 1995) (stating that the “bet the company” rationale “is not a legal basis to deny class certification”).

<sup>23</sup> See Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 152–53, 181–82 (2003).

<sup>24</sup> See REDISH, *supra* note 1, at 24.

<sup>25</sup> See *id.* at 23–24.

<sup>26</sup> See *id.* at 21–56.

<sup>27</sup> 28 U.S.C. § 2072(a) (2006).

<sup>28</sup> *Id.* § 2072(b).

<sup>29</sup> See REDISH, *supra* note 1, at 16–18; Nagareda, *supra* note 23, at 154, 189–91. The Court has noted the tension between Rule 23 and the Rules Enabling Act on three occasions and has consequently, on each occasion, adopted a reading of Rule 23 that was more constrained. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). On the other hand, the Court has held that for purposes of the *Erie* doctrine, Rule 23 is a procedural rule that passes muster under the Enabling Act. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion).



settlement of class members' claims. A lawyer, purporting to act on behalf of a putative class, strikes a deal with the defendants to resolve the claims and then files a case asking the court to certify a class and approve the settlement. Neither the purported class representatives nor the defendants intend to litigate the case; in effect, the purported class counsel promises to sell, and the defendants agree to purchase, the right of class members to sue.<sup>30</sup> Both sides come to court seeking a judicial imprimatur on the deal; they are not adverse to each other. As such, settlement class actions pose a potential constitutional difficulty: it is not clear that the matter before the court presents a justiciable case or controversy within the meaning of Article III of the United States Constitution.<sup>31</sup>

As I have developed the story until now, class actions seem unsuited for use in any circumstance. In fact, class actions can also yield significant benefits. For instance, they are a useful procedural mechanism for resolving rights held as a group or class—although such group rights are fairly rare in the modern world.<sup>32</sup> They also promise, at least in some cases, an efficient vehicle for the enforcement of individual rights, an ability to deter unlawful behavior fully, and a mechanism to equalize litigation-investment incentives of individual plaintiffs and defendants.<sup>33</sup> For purposes of appreciating Professor Redish's argument, it is not necessary to dwell on these advantages at length. The important point is that these potential benefits set up two procedural choices: whether to allow class actions at all, and if so, under what constraints.

Professor Redish's significant contribution to the class action debate arises from the way in which he answers these questions. The standard answer toward which most scholars in the debate gravitate balances the costs against the benefits; although different scholars weigh the costs and benefits differently (and hence come to different conclusions about the proper breadth of modern class actions), the methodology is the same: whether and when to use class actions are policy choices largely unconstrained by constitutional fetters.<sup>34</sup> Professor Redish begins in a

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<sup>30</sup> See Nagareda, *supra* note 23, at 159–63.

<sup>31</sup> See U.S. CONST. art. III, § 2; see also *Amchem*, 521 U.S. at 612–13 (raising but not deciding justiciability concerns for settlement class actions).

<sup>32</sup> Providing for the enforcement of such rights was the original purpose of class actions and related representative-litigation devices in English law. See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 39–41 (1987); see also Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1858–78 (1998) (discussing the rise of class actions in England).

<sup>33</sup> See, e.g., David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000).

<sup>34</sup> This statement is a bit of a reach. All scholars must acknowledge certain constitutional markers that limit the scope of class actions. For instance, the requirement of adequate representation is grounded in the Due Process and the Full Faith and Credit Clauses. See *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). The requirements that absent class members seeking monetary relief be afforded an

different place: with the Constitution. He argues that settlement class actions filed in federal court violate the case-or-controversy requirement of Article III—that they fail to present the requisite adverseness demanded by the liberal adversary theory that underpins the case-or-controversy requirement.<sup>35</sup>

Of far broader significance, however, is Professor Redish's second argument: that the autonomy of individuals to make litigation choices—including the choice whether to bring suit—is a constitutionally protected right. For years, the Supreme Court has paid occasional homage to the “day in court” ideal,<sup>36</sup> which holds that the Due Process Clause gives each person the right to present his or her individual claim to a judge or jury. Pushed to its limit, the day in court ideal also places adversarial process, under which litigants present proofs and reasoned arguments,<sup>37</sup> on a constitutional foundation. Although the Court has sometimes intimated that adversarial process enjoys constitutional status,<sup>38</sup> the Court and scholars<sup>39</sup> have declined to read most aspects of the adversarial system into the Due Process Clause.<sup>40</sup> On the contrary, the Court's present view about constitutionally adequate process is decidedly instrumentalist: departures from adversarial process are permissible when the savings that a

opportunity to opt out and that each class member entitled to opt out be given the best practicable notice of this right also have their origin in the Due Process Clause. See *Wal-Mart Stores*, 131 S. Ct. at 2559; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 & n.3 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Given these constitutional markers, however, nearly all scholars treat the exact circumstances in which class treatment is appropriate as questions of law and policy rather than a question of constitutional right.

<sup>35</sup> See REDISH, *supra* note 1, at 176–83, 206–27.

<sup>36</sup> See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (noting that a court's inability to bind nonparties to a prior judgment “is part of our ‘deep-rooted historic tradition that everyone should have his own day in court’” (quoting 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4449 (1981))).

<sup>37</sup> See Fuller, *supra* note 11, at 363.

<sup>38</sup> See *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) (“[A] common law trial is and always should be an adversary proceeding.”); *McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.) (“The history of liberty has largely been the history of observance of procedural safeguards.”); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring) (“The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.”); *supra* note 12.

<sup>39</sup> E.g., Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) (discussing the historical limits on the day in court ideal).

<sup>40</sup> The arguable exceptions are the related rights of notice and opportunity to be heard. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). But such rights are not unique to an adversarial approach to adjudication. See *ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* princs. 5.1–8 (2004). In any event, *Mullane* indicates that even these rights are subject to the balancing of individual and governmental interests. 339 U.S. at 314 (“Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment.”).

nonadversarial procedure realizes exceed the expected costs of erroneous deprivations that individuals incur as a result of the nonadversarial procedure.<sup>41</sup>

Professor Redish tackles this standard wisdom head-on. His argument, which should prove to be one of the most significant of his many, many insights on law, begins with American liberal democratic theory. Liberal democratic theory is ultimately grounded in our country's "normative commitment to self-determination and individual rights."<sup>42</sup> Professor Redish carries over the "autonomy principle"<sup>43</sup> at the heart of democratic theory from the political to the judicial realm. In particular, he argues that, "[a]t the very least the individual must have autonomy in his efforts to participate in the processes of government, where democracy operates."<sup>44</sup> The Bill of Rights—especially the First Amendment—and the Fourteenth Amendment give constitutional force to the autonomy principle,<sup>45</sup> and the "procedural due process guarantee is appropriately viewed as a constitutional outgrowth of democracy's normative commitment to such process-based political autonomy."<sup>46</sup> Elsewhere, Professor Redish argues that liberal democratic theory leads logically to a "liberal adversary theory" that entrusts to individuals decisions about how best to protect their interests and to participate in the judicial aspect of democratic self-governance.<sup>47</sup>

My brief summary of Professor Redish's argument does not do justice to its sophistication. But it should be evident that the argument affects the permissible scope of class actions. The scope of class actions is no longer simply a matter of policy preference.<sup>48</sup> Rather, if litigation autonomy and adversarial process are of constitutional stature, then class actions face constitutional difficulties. As mentioned, class actions remove the ability of individual litigants to decide whether and how to litigate their claims and instead place these decisions in the hands of surrogates.<sup>49</sup> As Professor Redish points out, it would surely violate the First Amendment if the government paternalistically forbade people from petitioning the legislative

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<sup>41</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (discussed *supra* note 8). For recent invocations of *Mathews v. Eldridge*, see *Turner v. Rogers*, 131 S. Ct. 2507, 2517–20 (2011), using the three balancing factors from *Mathews* to determine that counsel need not be provided to indigent civil litigants facing jail time for contempt as long as other safeguards to reduce erroneous incarcerations are in place, and *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–35 (2004), using the *Mathews* factors to determine the process due to detainees attempting to challenge their designation as enemy combatants.

<sup>42</sup> REDISH, *supra* note 1, at 136.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 142.

<sup>45</sup> *Id.* at 142–43.

<sup>46</sup> *Id.* at 143.

<sup>47</sup> *Id.* at 197–98.

<sup>48</sup> See *supra* note 34 and accompanying text.

<sup>49</sup> See *supra* notes 11–12 and accompanying text.

or executive branch and instead appointed representatives to do so on their behalf.<sup>50</sup> Is it any less a constitutional offense when a particular government official—a judge—appoints a class representative and class counsel to present individuals’ grievances to another branch of government, the judiciary?<sup>51</sup> Likewise, if the First Amendment’s freedoms of expression and association guarantee a right of nonassociation,<sup>52</sup> then how can the government force class members to associate with each other in a class action?<sup>53</sup>

Professor Redish recognizes that cloaking litigant autonomy and adversarial process in constitutional robes is not the end of the inquiry. Constitutional rights are not absolute. But the government shoulders a heavy burden to show “a truly compelling competing interest” when it deprives individuals of these rights.<sup>54</sup> In running the present law of class certification through the compelling interest analysis, Professor Redish finds that most, albeit not all, American class actions fall short. At the risk of reducing nuanced arguments to simplistic bullets, I can synthesize Professor Redish’s proposals to scale back the breadth of American class actions as follows<sup>55</sup>:

- Due to Article III justiciability concerns, federal courts should not certify settlement class actions.
- Litigation class actions should be permitted in the (albeit rare) circumstances in which they were historically available: to enforce a group’s jointly held legal rights.<sup>56</sup>
- With respect to the more common situation of individually held claims:
  - Mandatory class actions should be allowed only in cases in which it would be impossible or extraordinarily burdensome for a defendant to comply simultaneously with separate orders in two or more cases that putative class members might bring.<sup>57</sup>

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<sup>50</sup> See REDISH, *supra* note 1, at 135–36, 142–44.

<sup>51</sup> See *id.* at 136.

<sup>52</sup> See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977).

<sup>53</sup> See REDISH, *supra* note 1, at 160.

<sup>54</sup> *Id.* at 137; see also *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (“Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest.”).

<sup>55</sup> I derive this synthesis from discussions throughout *Wholesale Justice*, but a nice summary of the main recommendations can be found in the concluding chapter. See REDISH, *supra* note 1, at 230–31.

<sup>56</sup> See *supra* note 32 and accompanying text.

<sup>57</sup> This standard is essentially the same as the standard for mandatory class treatment already in place in Rule 23(b)(1)(A). See REDISH, *supra* note 1, at 163–65, 231. What Professor Redish would eliminate are mandatory class actions in limited-fund cases, see FED. R. CIV. P. 23(b)(1)(B), and in cases (other than those encompassed by Rule 23(b)(1)(A)) in which parties seek injunctive or declaratory relief, see FED. R. CIV. P. 23(b)(2). See generally REDISH, *supra* note 1, at 165–69 (discussing why mandatory class actions should not be permitted in the (b)(1)(B) and (b)(2) situations).

- Opt-out class actions should be allowed only in negative-value suits in which the size of the claim is so small that “the constitutional interest in litigant autonomy is de minimis.”<sup>58</sup>
- Otherwise, only opt-in class actions—class actions in which putative class members consent to be part of the class—should be permissible.<sup>59</sup>

Turning as it does on the related values of democratic theory and litigant autonomy, Professor Redish’s proposal cogently provides principled boundaries for the use of class actions. It is brilliant work. It demonstrates a breadth of vision not often seen in the scholarship on class actions, which often focuses on more specific aspects of Rule 23. Still, the proposal is not without a few weaknesses. Let me mention three, very quickly, as a setup to the following Part.<sup>60</sup>

First, the connection between democratic theory and litigant autonomy is not airtight. It may be, as Professor Redish asserts, that the basis of democracy is the promotion of individual self-determination and autonomy. But in the end, democracy bends the autonomy of the individual to the will of the majority. Autonomy is not protected in any absolute sense.

Second, the claim that litigants enjoy a *constitutional* right to exercise a high degree of autonomous influence over their claims is debatable. Thus far, the Supreme Court has never declared that such a right exists, and such a claim seems suspect, at least in a strong form, in light of the various ways

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<sup>58</sup> REDISH, *supra* note 1, at 172. In an exception to this rule, Professor Redish would not permit negative-value class actions when the amount at stake is so small that putative class members would not even bother to file a claim. Such suits operate as “bounty hunter” suits that benefit only the lawyers and are functionally *qui tam* actions unauthorized by statute. *Id.* at 131–32.

<sup>59</sup> In effect, opt-in class actions (known as “spurious class actions”) were provided for in Rule 23(a)(3) of the original Federal Rules of Civil Procedure promulgated in 1938 and remained available until the 1966 amendments to Rule 23 changed Rule 23(b)(3) to an opt-out provision. *See* 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1752 (3d ed. 2005). In modern practice, opt-in class actions are not authorized under Rule 23, and the opt-in process is used only in certain Fair Labor Standards Act cases known as collective actions. *See* 29 U.S.C. § 216(b) (2006).

<sup>60</sup> In addition, although I do not agree with either of them for reasons whose full explication would distract me from the focus of the Essay, two of Professor Redish’s other critiques of class actions are not insurmountable. First, the concern that settlement class actions violate the case-or-controversy requirement of Article III, *see supra* note 35 and accompanying text, is a problem unique to federal courts and to those state courts with similar constraints on their judiciary. *But see* MASS. CONST. pt. 2, ch. 3, art. II (amended 1964 by art. LXXXV) (permitting courts to issue advisory opinions); Charles M. Carberry, Comment, *The State Advisory Opinion in Perspective*, 44 *FORDHAM L. REV.* 81, 81 n.3 (1975) (listing ten states that allow advisory opinions). Second, the concern that judicially created class action rules unduly affect the substantive law enacted by the legislature, *see supra* notes 26–29 and accompanying text, is readily addressable: a class action rule can be enacted by the legislature, as indeed some legislatures have done, *see, e.g.*, N.Y. C.P.L.R. 901–909 (McKinney 2006 & Supp. 2013). Here, I examine only Professor Redish’s most sweeping claim—that class actions are, for the most part, illegitimate in any liberal democracy.

in which our procedural system constrains individual autonomy.<sup>61</sup> Even if the right exists, it is not clear why those interests are entitled to the highest level of protection—the strict scrutiny level that requires a compelling government interest to justify a deprivation. For instance, we all enjoy due process and equal protection rights against government interference with our economic interests, but the government can typically overcome these rights by showing that it has a rational basis for doing so.<sup>62</sup> If the same rational basis review were applied to Rule 23, it would surely pass muster because the present structure of Rule 23, while perhaps permitting more class actions than some might wish, is hardly irrational.

Third, and relatedly, the extant test for procedural due process allows the individual's interest in adversarial adjudication of claims to be traded off against society's interest in more efficient and streamlined forms of process.<sup>63</sup> Professor Redish's view about the permissible scope of class actions, which is based on a view of the primacy of litigant autonomy and adversarial procedure, would require a significant reorientation of the present, widely shared understanding of the Due Process Clause.

In a sense, all three of these criticisms come to the same point. If we grant Professor Redish his assumption about the primacy of litigant autonomy and adversarial process, his conclusions follow naturally.<sup>64</sup> But the assumption is contestable. Many would start from the opposite point: that the aim of democracy is to give effect to the majority's will. The fight in any liberal democracy is then over the dividing point between those areas in which individual aspiration must bend to the will of the majority and those areas in which the individual can live free of majoritarian interference. In this debate over which aspects of human endeavor or existence should be cabined off from the will of the majority, few people, I suspect, would place litigant autonomy, adversarial process, or freedom from becoming class members (in most situations) on the side of those rights with which a democratically elected government may tinker only in compelling cases.

Indeed, any theory grounded in autonomy must wrestle with autonomy's dark underside: the freedom that autonomous individuals enjoy to cause harm to others when it is in their self-interest to do so. Wherever

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<sup>61</sup> To take a simple example, in most circumstances a defendant must assert a compulsory counterclaim in the lawsuit filed against it by the plaintiff. See FED. R. CIV. P. 13(a). The Federal Rules deprive a defendant of the autonomy to bring the counterclaim as a separate claim in a forum of its own choosing.

<sup>62</sup> See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding a statute regulating opticians' practices against due process and equal protection challenges on rational basis review).

<sup>63</sup> See *supra* notes 8, 38–41 and accompanying text.

<sup>64</sup> Indeed, given his premises, Professor Redish may be too generous in permitting class actions; a good argument could be made that to the extent that the guiding principle is individual self-determination, opt-out suits should not be permitted even if the value of the claim, and therefore the loss of autonomy, is *de minimis*. See *supra* note 58 and accompanying text.

we might draw the line for purely private behavior that harms others, it seems entirely appropriate to deny individuals the use of social institutions like courts when the individuals' actions threaten to inflict avoidable harms on others or avoidable costs on society. And the impulse that unites the four types of class actions found in Rules 23(b)(1)(A), (b)(1)(B), (b)(2), and (b)(3) is the desire to prevent individuals, by means of separate litigation, from inflicting avoidable harms and costs.<sup>65</sup> Far from being an impermissible affront to litigant autonomy, class actions are an appropriate response to the harmful effects of unbridled self-interest in litigation.

## II. THE "SUPERIORITY AS UNITY" PRINCIPLE

Let me therefore start from the premise Professor Redish rejects: that class actions should be permitted when they yield the greatest good for the greatest number.<sup>66</sup> Under this approach, the only limit on using class actions is their capacity to achieve more utility (or less harm) than other litigation mechanisms. If some other mechanism or combination of mechanisms can be expected to yield more utility, then a class action may not be certified. On the other hand, if the class action can be expected to yield more social benefit, then it may be certified.

"Superiority" is inherently a comparative inquiry: the class action must be compared to other options that a government has established to resolve disputes over legal rights. A range of alternatives can exist. One option for the government is to do nothing and let harm lie where it falls. Another is direct government intervention, either through regulating behavior *ex ante* or pursuing civil or criminal actions *ex post*. A third is to allow parties to resolve disputes privately—through arbitration, settlement, or the like. A fourth is private litigation, with the government, through its court system, hosting and resolving claims presented to it.

Under the private-litigation option, various suboptions for resolving wide-scale disputes exist. One is individual litigation, with a separate case brought by each affected person. Another is group litigation, in which victims voluntarily join together or courts consolidate their individually filed cases.<sup>67</sup> Yet another is a bellwether process, in which the claims of

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<sup>65</sup> See Tidmarsh, *supra* note 18, at 1146–47.

<sup>66</sup> Professor Redish calls this approach the "utilitarian justice model." REDISH, *supra* note 1, at 107. For his critique of the model, see *id.* at 107–15. This utilitarian principle is not, of course, precisely in tune with democratic theory: a majority, each with a small interest in a matter, can outvote a minority whose collective interests are more sizable. But if we hypothesize that some members of the minority (those with the larger stake) will "bribe" some members of the majority (those with the smaller stake) to switch their vote, society as a whole will be better off. Cf. THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW 4–6* (2004) (discussing Pareto superiority, Pareto optimality, and potential Pareto optimality as ways to define social utility).

<sup>67</sup> See FED. R. CIV. P. 20(a)(1) (allowing plaintiffs to join together when their claims are transactionally related and they present a common question of law or fact); FED. R. CIV. P. 42(a)

some victims receive a full hearing and the claims of other victims are determined or settled on the basis of these decisions.<sup>68</sup> Any of these processes may be married to a preclusion process in which (by consent or judicial fiat) the findings or results attained in early cases bind other victims. A government may make available some of these suboptions and not others, and the available suboptions may overlap with each other. The American litigation system, for example, sets individual litigation as its default position, but it also offers all of the litigation alternatives—although it severely constrains the use of the preclusion option.<sup>69</sup>

To satisfy the principle of superiority, a class action must be capable of achieving a better outcome than any combination of these options and suboptions. Determining whether a class action is “better” involves the familiar cost–benefit calculation: the net benefit (calculated as gross benefits minus costs) of using a class action must exceed the net benefit of each alternative or combination of alternatives.

Because this definition of superiority balances expected benefits against expected costs, understanding what constitutes a “benefit” or a “cost” of class actions and their alternatives is critical. Benefits and costs must be calculated on a global basis, not just on the benefits or costs to the parties.<sup>70</sup> Not every class action generates the same benefits or creates the same costs. A positive-value class action, in which class members’ recoveries are large enough to make individual actions viable, can reduce one cost component: litigation expenses. On the other hand, a positive-value class action causes, as a cost, a loss of autonomy for individual class members who no longer control their claims—a point that Professor Redish

(allowing a court to consolidate cases filed in the same federal district); *see also* 28 U.S.C. § 1407(a) (2006) (permitting pretrial consolidation of cases filed in different federal districts).

<sup>68</sup> *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997).

<sup>69</sup> For an extended examination of the available mechanisms for aggregating related cases, as well as their limits, see JAY TIDMARSH & ROGER H. TRANGSRUD, *MODERN COMPLEX LITIGATION* 59–340, 1033–88 (2d ed. 2010). On the limits of preclusion by judicial fiat, see *Taylor v. Sturgell*, 553 U.S. 880 (2008).

<sup>70</sup> Except in some settlement class actions, a court makes the decision to certify a class action before the outcome of the case is known. Hence, in making a determination of superiority, a court must compare the expected benefit of class and nonclass alternatives. The expected benefit of a class action is calculated by multiplying the social benefits that the class action will yield (call it  $L$ ) by the probability that the action will yield that outcome (call it  $P$ ), and then subtracting the expected costs of the class action (call them  $C$ ); thus, the net social value of a class action is determined by the formula  $(P \times L) - C$ . *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.4, at 598 (7th ed. 2007) (“[T]he plaintiff’s net expected gain from litigating is the judgment if he wins discounted by his estimate of the probability that he will win, minus his litigation costs.”); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 57 (1982) (discussing how risk-neutral parties make valuations based on expected value, “discounting possible outcomes by their probabilities”). The expected net benefit for each nonclass alternative is calculated in a similar fashion, although the probability term ( $P$ ) must include not only the likelihood of an alternative yielding a benefit but also the likelihood that an individual or group will pursue that alternative.



has made eloquently.<sup>71</sup> Conversely, a negative-value class action, which creates a lawsuit where otherwise there would be none, invariably increases litigation expenses, but also achieves as a benefit the deterrence of illegal behavior.

The same is true with respect to calculating the benefits and costs of alternatives to class actions. For instance, individual litigation may impose no loss of autonomy but may yield less deterrence than a class action.<sup>72</sup> The same benefit-and-cost vectors—the degree of deterrence and compensation that each alternative or combination of alternatives achieves, the alternatives’ ability to ensure similar treatment for similarly situated class members, their cost to implement, their fit with concerns for autonomy and democratic accountability, and so on—apply to any alternative to class actions.

This definition of superiority contains corollaries and limitations. Let me highlight two of particular significance.<sup>73</sup> First, a court system may possess a patchwork of responses to wide-scale harm—perhaps some before-the-harm regulation, some after-the-fact individual litigation, some enforcement of parties’ agreements to arbitrate disputes that arise, and so on. To be superior, a class action must not be just an improvement over any single legal strategy, but must also yield a benefit in relation to the sum total of nonclass responses that we can expect interested players to assay. Second, to be superior, the class action does not need to yield a greater net benefit for each member of the class than an alternative strategy, it does not need to include every victim of wrongdoing, and it does not need to yield a greater net benefit than other potential class actions that could have been brought. Superiority compares only the aggregate expected net benefits achieved through a proposed class action and through nonclass alternatives.<sup>74</sup>

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<sup>71</sup> See *supra* notes 42–47 and accompanying text.

<sup>72</sup> See *supra* note 33 and accompanying text.

<sup>73</sup> Other corollaries, of less significance to the present discussion, include: (1) the requirement that that court has the ability to reevaluate its initial determination on class certification based on new information; (2) a class action must yield a positive expected benefit for class members ( $P \times L > C$ ); (3) in making the superiority calculus, a court should consider surgical uses of class actions in combination with other nonclass methods; and (4) in determining the superiority of a class action, a judge may not reevaluate utility calculations entrusted to other actors in the legal or political process (e.g., the judge may not decide that the statute on which the class claim is based is bad social policy and refuse to certify a class on that basis). I thank Mike Dorf for this last refinement.

<sup>74</sup> I do not suggest that concerns for fair treatment of individuals within the class or for optimal class size are insignificant issues—only that they cannot be addressed through the idea of certifying class actions that are superior to nonclass alternatives. For discussions of how these other principles might be structured, see David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 GEO. WASH. L. REV. 542 (2011), providing an economic account of the optimal size of a class action, and Tidmarsh, *supra* note 18, at 1175–89, proposing an adequacy-of-representation principle to protect individual class members.

The superiority principle fits neatly into the present calculus for procedural due process: permit departures from the adversarial ideal when the gains from the departure exceed the costs.<sup>75</sup> In one sense, demanding superior performance from a class action is hardly a radical notion. The idea that class actions exist to provide a better way to avoid injustices that a multiplicity of suits can create dates back centuries.<sup>76</sup> The superiority principle also fits within the general structure of the present Rule 23; superiority is one of two explicit elements in Rule 23(b)(3) class actions,<sup>77</sup> and the superiority (indeed, even the necessity) of class actions in comparison to nonclass methods of adjudication is the idea that underlies the mandatory class actions of Rules 23(b)(1) and (b)(2). Indeed, in some states a class action's superior capacity to fairly and efficiently adjudicate a dispute is the singular touchstone (aside from such foundational matters as numerosity, commonality, and adequacy of representation) for class certification.<sup>78</sup>

At the same time, insisting that the class action be superior in fact is a very radical notion. Federal courts often duck the superiority analysis demanded by Rule 23(b)(3), instead applying four factors that Rule 23(b)(3) suggests as guides for resolving predominance and superiority issues. Most of these factors are so vague that they can be manipulated to cut either for or against class treatment.<sup>79</sup> Of the four factors, the fourth—

<sup>75</sup> See *supra* notes 8, 38–41, 63 and accompanying text.

<sup>76</sup> See, e.g., 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 854, at 148–49 (Boston, Hilliard, Gray & Co. 1836).

<sup>77</sup> Class certification can be maintained under Rule 23(b)(3) if “the court finds . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3). The other element is “predominance”: the “questions of law or fact common to class members” must “predominate over any questions affecting only individual members.” *Id.* As will become clear in the following discussion, I do not believe that predominance (as understood in the present Rule 23) is an essential feature of a utility-based class action rule, although some aspects of the present predominance inquiry are certainly relevant to the proper working of a utility-based class action rule. See *infra* notes 95–96 and accompanying text.

<sup>78</sup> See, e.g., N.Y. C.P.L.R. 901(a)(5) (McKinney 2006) (permitting a class to be certified if, in addition to meeting the requirements of numerosity, commonality, typicality, and adequacy, the “class action is superior to other available methods for the fair and efficient adjudication of the controversy”); see also *id.* 902(1)–(5) (listing additional factors for a court to consider in deciding whether to certify a class action). Michigan has a comparable structure, albeit with slightly different factors used to determine superiority. See MICH. COURT RULE 3.501. In North Carolina, superiority is similarly “[t]he overriding factor which courts . . . impose prior to the certification of a class.” See THE LAW OF CLASS ACTION, *supra* note 2, at 429. The Model Class Actions Rule imposes, in addition to numerosity, commonality, and adequacy requirements, only the requirement that the class action must aid “the fair and efficient adjudication of the controversy.” MODEL CLASS ACTIONS [ACT] [RULE] § 2(b)(2), 12 U.L.A. 98 (2008); see also *id.* § 3, 12 U.L.A. 99–100 (providing additional criteria to assist the court in determining whether a class action advances “the fair and efficient adjudication of the controversy”). North Dakota is one state that has adopted the Model Class Actions Rule. See N.D. R. CIV. P. 23.

<sup>79</sup> The four factors are “the class members’ interests in individually controlling the prosecution or defense of separate actions”; “the extent and nature of any litigation concerning the controversy already begun by or against class members”; “the desirability or undesirability of concentrating the litigation of

manageability—has become the most important, but this factor switches the question from whether a class action is the best mechanism to whether it is not a disaster to manage.<sup>80</sup>

Some courts eschew the four factors and address superiority head-on. But these courts have tended to give meaning to superiority through cut-and-dried rules. For instance, a class action that applies multiple substantive laws is not superior, nor is a class action that aggregates positive-value claims.<sup>81</sup> Such rules can frustrate certification of class actions that are superior to their alternatives.

Courts' desire for clear rules is, however, understandable. One of the telling criticisms of the *Mathews v. Eldridge* approach to procedural due process, which balances the costs of additional process against the gains in accuracy that the additional process is expected to generate, is its indeterminacy.<sup>82</sup> In the administrative law context that gave rise to the balancing approach, it has proven difficult to value accurately any of the three components of the balance: the probability of an erroneous deprivation, the cost of the erroneous deprivation, or the savings to the government from nonadversarial procedure.<sup>83</sup> Moved to the law of class

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the claims in the particular forum"; and "the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3)(A)–(D). Rule 23(b)(3) does not say how much weight is to be given to any factor, nor how they cut. For instance, the existence of other litigation could be seen as a reason to certify a class (to avoid the transaction costs of repetitive litigation) or as a reason not to certify a class (to vindicate the autonomy of litigants to bring their own suits).

<sup>80</sup> See *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1304–07 (9th Cir. 1990) (upholding certification after examining only issues of manageability); see also *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191 (3d Cir. 2001) (noting that a class action must be the "best" method for resolving the dispute but in fact analyzing superiority almost exclusively in terms of the class action's manageability); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 491 (E.D. Cal. 2006) ("Whether a case is manageable as a class action can be an overriding consideration in determining superiority." (internal quotation marks omitted)). But see *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (noting that the "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored"), *overruled in part by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). Nebraska's class action rule also relies heavily on manageability. See NEB. REV. STAT. § 25-319 (2008); *Kosowski v. City Betterment Corp.*, 249 N.W.2d 481, 483 (Neb. 1977) (denying class certification in part because of the difficulty and impracticability of distributing a remedy to class members); THE LAW OF CLASS ACTION, *supra* note 2, at 371 ("A class action [in Nebraska] must be manageable or [certification] will be denied.").

<sup>81</sup> See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746–51 (5th Cir. 1996). For other cut-and-dried rules that act as a surrogate for superiority, see *supra* note 22 and accompanying text, discussing the bet-the-company (or overdeterrence) argument, and *infra* note 98, discussing the immaturity-of-litigation argument.

<sup>82</sup> See *supra* note 8; see also Robert G. Bone, *The Story of Connecticut v. Doeher: Balancing Costs and Benefits in Defining Procedural Rights*, in CIVIL PROCEDURE STORIES 159, 186 (Kevin M. Clermont ed., 2d ed. 2008) ("The *Mathews* balancing test is far too open-ended to generate precise results.").

<sup>83</sup> See Margaret G. Farrell, *Doing unto Others: A Proposal for Participatory Justice in Social Security's Representative Payment Program*, 53 U. PITT. L. REV. 883, 924–29 (1992); Jerry L.

actions, this problem of correctly weighing benefits and costs becomes impossible in practice due to informational and valuation difficulties. Courts lack the information necessary to assess accurately the likelihoods, amounts, and costs of recovery for all putative class members across all of the potential class and nonclass aggregation scenarios that enter into the superiority principle's calculus. To compound this difficulty, some of the variables in the calculus—such as democratic accountability and autonomy, to name just two—lack ready markets, so that courts must compare monetizable apples to nonmonetizable oranges in the valuation process.

Therefore, although clear rules are useful, they must hew more closely to the actual costs and benefits of class actions and their alternatives than the present Rule 23(b)(3) guidelines do. Furthermore, because the idea of superiority is not limited only to Rule 23(b)(3) class actions, these rules must also address whether class actions are superior in the circumstances presently handled by (b)(1) and (b)(2) class actions. In creating a way of reducing the superiority principle to a set of clear principles that balance the benefits and costs of class actions better than other “superiority surrogates” presently on offer, I begin with the historical reach of class actions. Until modern times, class actions were allowed only when class members had a joint interest in suing or being sued.<sup>84</sup> This joint interest ran along three dimensions: a unity of legally relevant facts among all class members, a unity of the legal theories asserted by (or against) all class members, and a unity of the remedy sought by (or against) all class members. Whatever differences in interest that class members may otherwise have had with respect to their desire to prosecute (or defend) the lawsuit, the legally relevant facts, the legal theories, and the remedies were identical for all.

If class members are united across all three of these dimensions of a claim, the superiority of a class action is evident. The right or liability of one is truly the right or liability of all. It makes no sense for each individual to sue (or be sued), clogging courts with matters identical to matters previously determined or contemporaneously being determined elsewhere.

But requiring an identity across all three elements of a claim is also highly restrictive; unlike in the Middle Ages, when the rights of individuals were often bound up with the rights of groups to which they belonged,<sup>85</sup> few such claims exist in the modern legal world.<sup>86</sup> Thus, limiting class

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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, 37–46 (1976).

<sup>84</sup> See *supra* notes 32, 56 and accompanying text.

<sup>85</sup> See SUSAN REYNOLDS, *KINGDOMS AND COMMUNITIES IN WESTERN EUROPE, 900–1300*, at 1 (1st ed. 1984) (arguing that collective activity “was more important and more pervasive in medieval Europe” than previously recognized); YEAZELL, *supra* note 32, at 41–71 (applying this insight to the law of collective litigation in medieval England).

<sup>86</sup> The closest analogue in frequent use might be the shareholder derivative suit, in which each owner (shareholder) of the corporation can, within limits, assert claims that belong to the corporation.

actions only to cases involving a unity of facts, law, and remedy would leave out other cases in which class actions could be a superior means of resolving disputes. On the other hand, if class members enjoy an identity along none of these dimensions, it becomes more difficult to see how a class action is superior; the claims by or against class members diverge to a degree at each relevant aspect (the facts determining liability, the legal theory or theories of recovery, and the quantum of remedy obtainable), making an efficient resolution of the class action harder to achieve and raising concerns that the class representative(s) will not fairly and adequately protect all members of the class.

The solution is to create a presumption that all class members must possess a unity of interest along one of the three elements of a claim (facts, law, or remedy) and a substantial overlap of interest along the other two elements.<sup>87</sup> This superiority as unity principle requires three steps. First, a court must find that (1) the claim of every member of the class involves exactly the same facts regarding liability, including the facts relevant to any defenses that might be raised against class members; (2) the claim of every member of the class invokes exactly the same legal theories; or (3) if successful, the claim of every class member will result in precisely the same remedy for each person. Without that unity of interest along one of those three dimensions, a class action may not be certified. Second, a court must determine that there is substantial overlap among the claims of class members on the other two dimensions. “Substantial overlap” requires, in Rule 23 parlance, that there be commonality among the class members’ claims and that the claims of the class representative(s) be typical of those of the remaining class members.<sup>88</sup>

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*See* FED. R. CIV. P. 23.1 (providing for derivative suits when a corporation or association fails to enforce its rights); *see also* FED. R. CIV. P. 23.2 (providing for suits by or against members of unincorporated associations). But even here, the rights of the corporation are distinct from the rights of the individuals who own shares in the corporation.

<sup>87</sup> To this point, I have tried to use neutral language to hold open the possibility of either plaintiff class actions or defendant class actions. Most class actions involve plaintiff classes. *See* WILLGING ET AL., *supra* note 13, at 41 (reporting data showing that “defendant classes are not common”). For ease of grammatical expression, I henceforth describe only how the superiority as unity principle for which I advocate applies to plaintiff class actions. But the same idea can be applied equally to defendant class actions.

<sup>88</sup> *See* FED. R. CIV. P. 23(a)(2) (commonality), (3) (typicality); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550–57 (2011) (discussing the commonality requirement); Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 155–60 (1982) (discussing the commonality and typicality requirements as well as their interrelationship). In addition, the class representative and class counsel must adequately represent the class. *See* FED. R. CIV. P. 23(a)(4) (adequacy of the class representative), (g) (adequacy of the class counsel); *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940); *see also* Tidmarsh, *supra* note 18, at 1175–77 (proposing a single “do no harm” principle to determine the adequacy of the class representative and class counsel). One of the advantages of the superiority as unity principle is that by insisting on a unity of interest along the facts, the law, or the remedy sought, it reduces the number of ways in which the interests of class representatives, class counsel, and class members can diverge.

These first two steps create a presumption for or against class certification. The third step allows the party negatively affected by the presumption to rebut it. Thus, if superiority and substantial overlap have been shown, the burden shifts to the defendant to identify specific procedural mechanisms (or a combination of mechanisms) that would result in greater net social benefit than the class action; unless the defendant makes such a showing, the class must be certified. Conversely, if no unity is shown along any dimension of the case, or if substantial overlap does not exist along one of the other two dimensions, the burden shifts to the class representative to show that the class action is still superior to any other method for resolving the dispute.<sup>89</sup> The threshold to rebut the presumption generated by the first two steps should be high; an aggrieved defendant must identify clearly and specifically a nonclass alternative that is superior or an aggrieved plaintiff must identify why all such alternatives are inferior.

Examples of situations in which there is a unity of liability-relevant facts are a commercial-airliner crash or a Truth in Lending Act claim in which the credit card company engaged in the same conduct for each credit card holder.<sup>90</sup> In such cases, the fact that different laws might apply to judge the class members' recovery or that class members might be entitled to different amounts by way of recovery should not automatically bar class certification—unless the differences in law or remedy are substantial or the defendant can prove that a specific alternative to class treatment will lead to a greater net social benefit.

Unity in legal theory is tricky. People with very different factual claims—for example, all patients in a state injured by doctors' malpractice—are united in the law they wish applied to their cases,<sup>91</sup> but it is evident that a class action of all medical malpractice victims is not a superior way to resolve the claims. In such situations, tight control over the substantial overlap requirement becomes a critical control on the overuse of class actions.

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<sup>89</sup> With regard to overcoming this presumption, the superiority surrogates already used by some courts, *see supra* note 81 and accompanying text, could still function.

<sup>90</sup> It is possible to spin out hypotheticals that would destroy the necessary unity in such examples. For instance, in the airplane crash, one passenger may be a vacationing airline pilot who saw and was aware of some defect in the plane before takeoff but chose to encounter the risk anyway. The factual issues regarding the pilot-passenger's comparative negligence negate the factual unity required. Thus, the class representative would need to demonstrate that the class involved a unity of interest along another dimension of the case (which seems unlikely because the pilot-passenger's case would involve comparative negligence law inapplicable to other class members and because the remedy each passenger would receive is different) or would need to overcome the presumption of noncertification (which seems possible if only one victim presented a different factual scenario). *Cf.* FED. R. CIV. P. 23 advisory committee's note (1966) (noting that Rule 23(b)(3) is not "ordinarily" suited to the resolution of mass torts).

<sup>91</sup> I assume that none of the patients have peculiar defenses that involve the application of additional or different law to their cases.

Unity in remedy keys into the existing structure of Rule 23(b) to an extent but also operates somewhat differently. When every class member is entitled to exactly the same remedy if the suit is successful, unity exists. The classic example is class-wide injunctive relief, in which the defendant is required to engage in the same conduct with respect to each class member. Such relief already is the basis for class certification under Rule 23(b)(2). What unity in remedy also opens up is class certification in cases for identical monetary damage, such as cases involving statutory penalties in which no class member has a claim in excess of the statutory minimum.<sup>92</sup> On the other hand, a class seeking both a class-wide injunction and individualized monetary recovery does not meet the unity requirement.<sup>93</sup> Again, such unity is not itself sufficient to obtain class certification; substantial factual and legal overlap must also exist, and no nonclass alternative can lead to the same or better expected outcome at a lesser cost.<sup>94</sup>

This superiority as unity principle does not automatically deny class certification to multistate class actions,<sup>95</sup> nor does it reject class actions simply because class members are entitled to different amounts of remedy.<sup>96</sup> The presence of these factors does, however, affect the likelihood of class certification because their presence requires a putative class representative to find a unity of interest elsewhere. The principle also does not bar consideration of broad social policies, such as underdeterrence if a class is not certified,<sup>97</sup> overdeterrence<sup>98</sup> or losses of autonomy or democratic

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<sup>92</sup> See *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 413–14 (S.D.N.Y. 1972) (rejecting class certification under Rule 23(b)(3) when 130,000 class members were each entitled to the statutory penalty of \$100).

<sup>93</sup> See *Wal-Mart Stores*, 131 S. Ct. at 2557–61 (2011) (not permitting class members to seek individualized damage recovery under the aegis of a (b)(2) class action seeking injunctive relief for the class). Such a class action would either need to find unity along another dimension of the case (the liability-relevant facts or the law), or the class representative could bring a class action only for injunctive relief. See *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 873 (1984) (holding that the preclusive effect of a class action does not extend to individual claims of class members). *But see McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 283 (5th Cir. 2008) (holding that the failure to include monetary claims of individual class members rendered the class representatives inadequate); *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 697 (Tex. 2008) (holding that the preclusive effect of a class action extends to all claims of class members that arose from the same transaction or subject matter).

<sup>94</sup> It is of course possible that unity might exist along two dimensions of a case. For instance, in a statutory-penalty case, the same law and the same remedy might apply to each class member. In such cases, substantial overlap must still exist for the third dimension.

<sup>95</sup> See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741–44 (5th Cir. 1996) (denying class certification in part because variations in state law defeated Rule 23(b)(3)'s predominance requirement).

<sup>96</sup> See *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003) (holding that the award of individual damages in a small-stakes consumer class action did not defeat the predominance requirement of Rule 23(b)(3)).

<sup>97</sup> See *supra* note 33 and accompanying text.

<sup>98</sup> See *supra* note 22 and accompanying text; see also *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001); *Castano*, 84 F.3d at 747.

accountability<sup>99</sup> if the class is certified, or the absence of a track record of prior trials.<sup>100</sup> But such arguments are not trump cards that automatically gain or defeat class certification in the way that courts sometimes employ them. Instead, they enter into the debate at the third stage of the analysis, after a court has determined whether or not unity and substantial overlap exist, as potential trump on the presumption to certify (or not certify) a class action on the peculiar facts of a given case.<sup>101</sup>

Even though treating superiority seriously, as the superiority as unity concept does, reworks the law of class actions significantly, it is not likely to expand the scope of present class action law. The reason is the requirement of unity with respect to the liability-related facts, legal theory, or remedy. Unity—in other words, an identity of facts, law, or remedy for each and every class member—is difficult to demonstrate. But it is also almost always necessary if class treatment is to be deemed superior. Without unity along at least one dimension of a case, the aggregation of individuals is too ragged and too lacking in cohesion to justify legal recognition as a group capable of uniting together and being bound by the result achieved in a single courtroom. Unity also keeps alive the prospect that an entire aspect of the case (and perhaps the entire case itself) can be resolved in one fell swoop.

I could say more about the superiority as unity principle, but I have said enough to outline its shape and operation. Let me briefly compare this approach to the autonomy-centered approach of Professor Redish.<sup>102</sup> It is not surprising that a class action rule built on a foundation of individual autonomy will look different from a class action rule built on a foundation of social welfare. For instance, a superiority as unity approach would not automatically reject the possibility of settlement class actions, although the lack of any unity in facts, law, or remedy<sup>103</sup> would certainly require the rejection of class treatment for settlement class actions such as those

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<sup>99</sup> See *supra* notes 42–53 and accompanying text.

<sup>100</sup> See *Castano*, 84 F.3d at 747 (noting concerns with certifying class actions without a track record of prior trials).

<sup>101</sup> See *supra* note 89 and accompanying text.

<sup>102</sup> See *supra* notes 55–59 and accompanying text.

<sup>103</sup> The superiority as unity principle would require that the unity of interest involved precede the settlement. Thus, the fact that a settlement required an identical payment of, say, \$10 to every class member would not create a unity of interest on the remedy if, without the settlement, each class member were entitled to different amounts. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (noting that a common interest in a fair settlement could not create the commonality necessary to satisfy Rule 23(b)(3)'s predominance element).



presented in *Amchem Products, Inc. v. Windsor*<sup>104</sup> and *Ortiz v. Fibreboard Corp.*<sup>105</sup>

On the other hand, both Professor Redish and I agree that class actions should be permitted to vindicate jointly held rights<sup>106</sup>—although the rarity of such class actions does not create that much common ground. Beyond that obvious convergence lie other areas of agreement. First, I think it unlikely that most mass tort claims are susceptible to class treatment under a superiority as unity principle—not because they are positive-value claims, as Professor Redish holds,<sup>107</sup> but because they are unlikely to involve a unity of facts, law, or remedy (especially in light of individual defenses). Second, negative-value suits are likely to result in class certification—not because the loss of autonomy is *de minimis*, as Professor Redish holds,<sup>108</sup> but because such claims often involve a single consumer statute or a single course of conduct toward a mass of consumers sufficient to establish the requisite unity of law or liability-relevant facts. But “negative value” should not operate as a substitute for unity. The requisite identity of interest might be missing in some negative-value class actions, necessitating the trimming of some broad consumer class actions and the *prima facie* refusal to certify others.<sup>109</sup> I do not regard this outcome as undesirable, for despite some occasional loose judicial language to the contrary,<sup>110</sup> negative-value status is not a talisman for class certification.

Third, Professor Redish generally accepts the idea that suits seeking a class-wide injunction and suits seeking damages should be treated on the same plane; the disparate treatment of injunctive claims, limited-fund monetary claims, and ordinary monetary claims is not defensible.<sup>111</sup> The same is true of the superiority as unity principle; whether each class member is entitled to identical relief, rather than the injunctive or monetary form of that relief, is a key to class treatment.<sup>112</sup>

But that similarity hides a more fundamental disagreement in the two positions. For Professor Redish, the lack of special treatment for limited-

<sup>104</sup> *Id.* at 624 (describing the factual, legal, and remedial differences among class members who were exposed to different asbestos products at different times and had not all yet suffered injury and further noting that the class action was “sprawling”).

<sup>105</sup> 527 U.S. 815, 854–57 (1999) (describing the variance among class members with respect to their factual, legal, and remedial positions).

<sup>106</sup> See *supra* notes 56, 84–86 and accompanying text.

<sup>107</sup> See *supra* note 58 and accompanying text.

<sup>108</sup> See *supra* note 58 and accompanying text.

<sup>109</sup> A court may still find that, without class certification, the underdeterrence of the defendant is so great that the presumption of nonclass treatment due to lack of unity should be overcome. See *supra* note 89 and accompanying text.

<sup>110</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

<sup>111</sup> See REDISH, *supra* note 1, at 129–30.

<sup>112</sup> See *supra* notes 92–94 and accompanying text.

fund monetary claims and injunctive claims means that class suits seeking such relief can no longer be certified as mandatory under, respectively, Rule 23(b)(1)(B) and Rule 23(b)(2). Indeed, except in the context of negative-value class actions, Professor Redish would require that such class actions be opt-in.<sup>113</sup> The superiority as unity principle is more agnostic about mandatory and opt-out class actions. If opt-out rights are allowed, then the superiority calculus will need to be performed again after the opt-out period in order to determine whether the loss of some class members affects the unity or substantial-overlap determination; but opt-outs are unlikely to effect a change in the court's initial certification decision.<sup>114</sup> For reasons that lie beyond the present discussion, I favor mandatory class actions if a court can construct a class action of optimal size.<sup>115</sup> Be that as it may, the superiority as unity principle does not support opt-in (as opposed to opt-out or mandatory) class actions when social utility can be advanced by the collectivization of related claims.

There are some other trivial differences in the operation of Professor Redish's approach and the superiority as unity principle. One is the fate of the exceedingly rare Rule 23(b)(1)(A) claims, in which separate suits by individual class members create a possibility that a defendant will be whipsawed due to an inability to comply with the demands of each suit. Professor Redish would authorize such class action suits.<sup>116</sup> The superiority as unity principle does not accord favored status to these class actions, which must meet the usual requirements of unity and substantial overlap. Indeed, the superiority as unity principle looks on such cases somewhat askance. The differing remedies potentially sought against the defendant in these cases make it impossible to show a unity of remedy—or even substantial overlap on the issue of remedy. But hostility toward such (b)(1)(A) class actions seems entirely appropriate. Despite the sympathy we might feel for a whipsawed defendant, it is difficult to imagine how a

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<sup>113</sup> See *supra* notes 57–59 and accompanying text.

<sup>114</sup> Under a pure superiority principle, in which class actions are certified only when their net social gains exceed those of all other litigation forms, see *supra* notes 66–74 and accompanying text, superiority would need to be recalibrated after the opt-out period. One of the advantages of thinking about superiority in terms of unity of interest along at least one litigation dimension is that opt-outs are unlikely to affect that unity or to reduce the substantial overlap among those class members who remain in the class. Thus, no recalibration is likely to be needed. In any event, data reveal that the rate of opt-outs is low. See WILLGING ET AL., *supra* note 13, at 52–54. In addition, opt-out behavior may occur for strategic-holdout reasons that a class action rule should discourage. See JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 39 (1998) (noting that two sets of opt-outs subsequently settled their claims for multiples of the amounts awarded to class members).

<sup>115</sup> For a discussion of this “optimality” principle and the reasons why it should deny opt-out rights to class members, see Betson & Tidmarsh, *supra* note 74. Like the superiority as unity principle, the optimality principle is distinct from, albeit an outgrowth of, the superiority principle. Adoption of the superiority as unity principle does not require adoption of the “optimality” principle or its denial of opt-out rights to class members.

<sup>116</sup> See *supra* note 57 and accompanying text.

class representative could adequately represent the interests of class members “who are free alternatively either to assert rights or to challenge them”<sup>117</sup> by yanking the whipsaw one way or another. One of the great puzzles of the present Rule 23 is how (b)(1)(A) class actions can survive against an adequacy challenge.<sup>118</sup>

A second, related difference is the fate of limited-fund class actions. Professor Redish argues that such actions should not result in mandatory treatment; indeed, unless they are of the negative-value, opt-out variety, it seems that such class actions may be conducted only on an opt-in basis.<sup>119</sup> The superiority as unity principle is not as categorical, but again, the demand of each putative class member to a larger share of the pie makes it difficult to see how such class actions would routinely pass adequacy-of-representation muster.<sup>120</sup>

Given the different starting points, differences at the endpoint—both large and small—are unsurprising. More surprising are the places of agreement. Perhaps future thinking about class actions should be shaped around those areas on which both theories can agree.<sup>121</sup> In any event, the convergences, as well as the remaining differences, highlight how far the present Rule 23 lies from any consistent theory of class actions. The great gift of *Wholesale Justice* is to remind rulemakers to attend to these first principles—whether grounded in democratic theory and individual autonomy, as Professor Redish has argued, or in social utility, as I have argued—in thinking about the shape of a class action rule.

### CONCLUSION

The highest achievement for any scholar is to produce work that influences the ideas of others. Despite the occasional claim that a particular article or book is “definitive,” the truth is that no scholar’s work

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<sup>117</sup> *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

<sup>118</sup> Indeed, the formulation used in Rule 23(b)(1)(A) was not a part of either the traditional understanding of the circumstances in which class actions were appropriate, see *Hazard et al.*, *supra* note 32, at 1876–78, or in the 1938 version of Rule 23, see *FED. R. CIV. P. 23* (1938). For a discussion of the adequacy-of-representation issue, as well as the limited circumstances in which such a class action might satisfy adequacy-of-representation concerns properly understood, see *Tidmarsh*, *supra* note 18, at 1164–67, 1175–89.

<sup>119</sup> One concern in such class actions is the adequacy of representation, given that the class representative and class members are all competing for a share of a limited pie. See *Tidmarsh*, *supra* note 18, at 1159–64. Such class actions raise a host of other concerns, including their potential preemption by the Bankruptcy Code. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838–41 (1999) (prescribing the general limits of (b)(1)(B) class actions); *id.* at 843 (noting the tension between a broad use of Rule 23(b)(1)(B) in mass tort cases and the Bankruptcy Code).

<sup>120</sup> See *supra* notes 57–59 and accompanying text.

<sup>121</sup> Cf. AMARTYA SEN, *THE IDEA OF JUSTICE* 87–113 (2009) (arguing that disagreements over comprehensive moral theories should not prevent people from undertaking those actions on which different theories agree, even if they disagree on the reasons for those actions or on the appropriateness of other actions).

definitively ends debates, for we will never arrive at the definitive endpoint of knowledge. Instead, a scholar's best work opens up and moves debates forward on the scholar's terms.

Marty Redish is one of the greatest legal scholars of this, or any, time. His work has enormous influence. I know—in part because of the enormous influence his work has had on me. When I was just entering the academy twenty-some years ago, his newly revised collection of essays on federal court jurisdiction<sup>122</sup> was the single most significant work I read. I did not, and do not, agree with everything in that book. But I have kept its ideas close as I have thought about my own solutions to problems in the law of federal courts and procedure.

For the past several years, I have been thinking about the law of class actions and trying to find a set of principles that, taken as a whole, can serve as the foundation for a sensible class action rule. In this Essay, I debuted in abbreviated form the newest part of my thought process: the superiority as unity principle. As I have been thinking about this project, it was fitting that Marty Redish was already there—again lighting my way with the essays collected in *Wholesale Justice*, again forcing me to grapple with his ideas. *Wholesale Justice* is not only a wonderful synthesis of the concerns for liberal democratic theory and individual autonomy that animate all of Professor Redish's work, but it is also one of the most important works on class actions in years. I share Professor Redish's concerns about the breadth of modern class action law, as well as his desire to vindicate the individual autonomy on which American democracy depends. I come out in a different place from Professor Redish regarding how best to allay these concerns and to give proper effect to individual autonomy in a mass-injury society. But my disagreement is a small matter in comparison to Professor Redish's singular achievement in keeping these issues front and center in the class action debate. My debt to him is overwhelming.

For now, let me repay a small part of that debt with words of gratitude that I intend as my highest possible praise for Marty's intellectual guidance: Marty Redish is a true scholar.

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<sup>122</sup> MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* (2d ed. 1990).

