Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process

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I. INTRODUCTION

It would hardly be an overstatement to suggest that the nature of the litigation process has changed dramatically over the past forty years. Modern procedure has been altered to keep up with the significant changes over the same period in the governing substantive law, which has significantly expanded the scope of private responsibility and liability through the rapid expansion of both statutory and common law bases for suit. This is particularly true in the areas of civil rights, consumer protection, and products liability. Experts may reasonably debate whether the socioeconomic and political effects of these changes in substantive law are beneficial or harmful. But few would doubt the troubled state in which modern litigation procedure finds itself as a result, at least in large part, of the dramatic expansion of the scope of substantive liability. The procedural device routinely employed as the means of resolving the countless individual claims that may now be made against economically powerful defendants is the class action, authorized for use in the federal courts by Rule 23 of the Federal Rules of Civil Procedure. Though the device finds its origins in ancient practice[1] and received codification in the original Federal Rules of Civil Procedure in 1938,[2] the practice assumed its modern form—dramatically different from its earlier structure—in the amendments of 1966.[3] Although that alteration was designed to make the class action device capable of resolving the disputes to which the dramatic expansion in substantive liability was to give rise, the difficulties inherent in any attempt to resolve thousands of parallel, but not neces-

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

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

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

sarily identical, claims in one proceeding could not have been foreseen. The sometimes overwhelming complications that inevitably accompany an attempt to litigate countless claims in one proceeding have proven to be more than the device is capable of handling.

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

Many courts and commentators have applauded the development of the settlement class action as a welcome means of resolving gigantic disputes without incurring the burdens of extended litigation—if, indeed, such mass litigation were even feasible.[4] Not surprisingly, then, the growth of settlement class actions as a means of disposing of modern complex claims has been meteoric.[5] The Supreme Court itself has

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4 See, for example, Herbert B. Newberg and Alba Conte, 2 *Newberg on Class Actions* § 11.09 at 11–13 (Shepard's/McGraw-Hill 3d ed 1992) (noting that the settlement class action offers substantial savings in litigation expenses to both plaintiffs and defendant). See also note 216 and accompanying text.

5 See, for example, *In re The Prudential Insurance Co of America Sales Practices Litigation*, 148 F3d 283, 289–90 (3d Cir 1998) (upholding a district court's certification of a settlement class of more than eight million policyholders in an insurance settlement); *In re Cincinnati Radiation Litigation*, 1997 US Dist LEXIS 12960, *7–9 (SD Ohio) (denying certification of a settlement class because of a failure to meet the commonality requirement, but allowing the parties to renew their motion for certification); Howard Erichson, *Mass Tort Litigation and Inquisitorial*

eased the way for use of the practice in the lower federal courts by holding that the class need not satisfy what is often the most difficult hurdle to class action certification: the requirement of Rule 23(b)(3) that litigation of the class be manageable.[6]

A number of respected courts and scholars, however, have sounded cautionary notes about the practice, suggesting that the settlement class action brings with it serious risks of collusion and unfairness that ultimately disadvantage absent class members.[7] Scholars have therefore proposed a number of reforms, designed to reduce the potential harms to which the settlement class action gives rise.[8] Indeed, congressional concern over the use of the settlement class action has resulted in Congress's commission of a study by the Federal Judicial Conference to investigate the problems it poses.[9] Neither those who approve nor those who disapprove of the settlement class action device, however, have fully recognized the most serious—and fatal—problem with the settlement class action: because by its nature it does not involve any live dispute between the parties that a federal court is being asked to resolve through litigation, and because from the outset of the proceeding the parties are in full accord as to how the claims should be disposed of, there is missing the adverseness between the parties that is a central element of Article III's case-or-controversy requirement. The settlement class action, in short, is inherently unconstitutional. But because class action scholars have mistakenly viewed

Justice, 87 Georgetown L J 1983, 1999–2000 (1999) (discussing cases in which the settlement class action was praised as a "viable approach to resolving mass tort litigation"); Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 9, 35 (Federal Judicial Center 1996) ("Willging study") (finding that, of the class actions studied, 39 percent were certified for settlement purposes only). See also Minutes, Advisory Committee on Civil Rules (Nov 9–10, 1995), online at http://www.uscourts.gov/rules/Minutes/min-cv11.htm (visited Mar 26, 2006) (summarizing the Willging study).

6 See *Amchem Products, Inc v Windsor*, 521 US 591, 620 (1997) (holding that an absence of a trial excuses a district court from examining the manageability of a class, but necessitates "heightened" attention to the other specifications of Rule 23).

7 See, for example, *In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F3d 768, 788 (3d Cir 1995) (citing the dangers of a "premature, even a collusive, settlement" when settlement is reached precertification, and noting that "[e]ven some courts successfully using these devices to achieve settlements apparently recognize these dangers since they certify these actions more cautiously than ordinary classes"); *In re Diet Drugs*, 2000 US Dist LEXIS 12275, *136–37 (ED Pa) (discussing the incentive to reach "any settlement agreement," instead of "the best possible settlement," resulting from inventory settlements specifically); *In re Ford Motor Co Bronco II Products Liability Litigation*, 1995 US Dist LEXIS 3507, *23 (ED La) (noting that the "non-existence of formal discovery" suggested a collusive settlement); *Bowling v Pfizer*, 143 FRD 141, 152–55 (SD Ohio 1992). See also FRCP 23(a)(4) (requiring that the class representatives "fairly and adequately protect the interests of the class").

8 See Part II.B.2.

9 See Class Action Fairness Act, S 1751, 108th Cong, 1st Sess (Oct 17, 2003), in 149 Cong Rec S 12737 (Oct 16, 2003).

the device—both positively and negatively—in a constitutional vacuum, they have uniformly failed to recognize the problematic impact of the settlement class action when it is placed within the broader framework of the nation's constitutional structure.

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

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

If one were to search for an explanation of what sociopolitical purposes are served by Article III's imposition on the federal judiciary of the prerequisite that the parties to litigation be adverse, one would likely be surprised to discover that neither courts nor scholars have devoted significant attention to the question. This is so, despite the requirement's unambiguous existence in Supreme Court doctrine. This Article therefore has two intersecting purposes: first, to provide tex-

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10 See *United States v Johnson*, 319 US 302, 305 (1943) (per curiam) (holding that a court may dismiss a case when adversity is lacking); *Muskrat v United States*, 219 US 346, 361 (1911) (holding that a lawsuit brought "to obtain a judicial declaration of the validity of the act of Congress" is not a case or controversy to which the judicial power alone extends).

11 See Part II.B.3 (surveying the academic literature on settlement class actions).

12 See, for example, Martin H. Redish and Elizabeth J. Cisar, *If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L J 449, 490–91 (1991) (criticizing the Court for recent separation of powers decisions and proposing the use of "pragmatic formalism" in deciding separation of powers cases).

tual, doctrinal, and theoretical analyses of the adverseness requirement of Article III; and second, to test the settlement class action in terms of those three criteria. The ensuing conclusions tell us much about both Article III and the settlement class action. In addition to the conclusion that the text, history, and doctrine of Article III clearly demand that the parties to litigation be truly adverse, our analysis reveals that the adverseness requirement is dictated both by precepts of liberal democratic theory and separation of powers.

On what we refer to as a "private" level, the litigant adverseness requirement is designed to ensure that those who litigate will adequately protect those absent individuals who will be significantly impacted, either legally or practically, by the outcome of the litigation. We describe this as a private concern because it focuses on the private interests of individual litigants. The need to allow individuals to protect and advance their own personal interests through litigation grows out of foundational precepts of liberal democracy from which the adversary system has evolved. Absent the assurance of litigant seriousness of purpose that the adverseness requirement seeks to guarantee, the results of litigation could significantly undermine the ability of future litigants to protect their personal interests, due to the controlling impact of the resolution of the initial litigation on their subsequent legal actions. Where future litigants are legally bound through res judicata by the results of the initial litigation, as where subsequent litigants are in privity with litigants in the first case or are members of a class action brought in the initial suit, the impact will be legally imposed. Even where subsequent litigants are not formally bound, however, in numerous situations—for example, where stare decisis or claims to limited funds apply—they may nevertheless be bound as a practical matter by the outcome of the initial suit.

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

verseness requirement serves as a fulcrum of performance of the judiciary's proper role within our governmental framework.

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

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

Because of the fear of secret collusion between the named plaintiffs and the party opposing the class, several scholars have suggested reforms of the settlement class action procedure that are designed to reduce this danger.[13] Although such reforms are surely commendable

[13] For examples of proposed reforms that are designed to enhance the effectiveness or fairness of the settlement class, see Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz L Rev 687, 702 (1997) (proposing a requirement that defendants negotiate with class representatives rather than class attorneys); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80

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

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

At the same time, the settlement class action gives rise to the systemic dangers designed to be avoided by Article III's adverseness requirement. The class action, it should be recalled, is a procedural device, designed to implement and enforce preexisting substantive legal rights. To the extent that lack of adverseness leads to a lack of seriousness or good faith on the part of one or both of the litigants (and, it should be remembered, Article III categorically equates lack of adverseness with the unacceptable danger of such a risk), then use of the settlement class action gives rise to an unacceptable danger of underenforcement of the social and economic goals embodied in the underlying substantive law. In this way, the practice threatens to disrupt at-

Cornell L Rev 811, 830–36 (1995) (proposing limits on future classes); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 Cornell L Rev 1045, 1117, 1120 (1995) (arguing that courts should adopt a presumption against settlement class approval, requiring parties to make an unambiguous showing of the lack of collusive activity).

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

tainment of legislative goals and policies. Moreover, by authorizing a federal court to redistribute resources as a means of enforcing legislative directives absent adversarial adjudication, the settlement class action effectively transforms the court into an administrative body, which is more appropriately located in the executive branch. In this manner, the device improperly transfers powers reserved to the executive branch to the federal judiciary, in clear contravention of separation-of-powers dictates.

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

Part II of this Article explains the concept and practice of the settlement class action. In the course of this exploration, we consider judicial reaction to the device, as well as scholarly criticisms and proposals for reform. Part III explores the textual and theoretical foundations of the adverseness requirement—an inquiry that, surprisingly, has never before been undertaken by jurist or scholar, despite the undoubted recognition of the requirement in Supreme Court doctrine.

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

Then, Part IV applies the constitutional framework we have developed to the settlement class action, concluding that the practice is, at its core, constitutionally invalid because it contravenes both the text and purposes served by Article III's case-or-controversy requirement. Finally, Part V argues that the Court's current functionalist approach to settlement class actions is inconsistent with Article III's mandate.

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

II. THE SETTLEMENT CLASS ACTION: CONCEPT AND PRACTICE

A. Judicial Recognition of the Settlement Class Action

In a settlement class action, the would-be class representatives and the parties opposing the class seek certification of a class, on the condition that the district court approve a proposed settlement between them.[16] For purposes of the settlement class, it does not matter whether the requested settlement and certification occur when the initial complaint is filed or subsequent to the filing. For purposes of the commencement of the class action proceeding, the two are identical: in both situations, certification of the class proceeding is requested simultaneously with the request for approval of the settlement, and in both, judicial approval of the settlement is a necessary condition for the requested certification. Although Rule 23 on its face neither authorizes nor prohibits the practice, courts that have employed the device assume that the rule at the very least authorizes use of the settlement class. Although numerous cases in the lower federal courts consider the nature of the settlement class, by far the most important case on the issue is the Supreme Court's decision in *Amchem Products, Inc v Windsor*.[17] *Amchem* involved an asbestos class action that, prior to certification, requested certification for settlement-only under Rule

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

17 521 US 591 (1997).

23.[18] The circuit courts were split on whether a settlement class had to fulfill the Rule 23(a) and (b) requirements applicable to a litigated class.[19] The Court in *Amchem* resolved their disagreement, holding that Rule 23's requirements apply equally to all certification decisions, although a settlement class action need not satisfy the 23(b)(3) manageability prerequisite because it will never be litigated.

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

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

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

20 521 US at 597.

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

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

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

The Supreme Court affirmed the dismissal, also on nonconstitutional grounds. The Court initially held that Rule 23 requirements—including predominance, typicality, and commonality[28]—"demand undiluted, even heightened, attention in the settlement context."[29] However, "a district court need not inquire whether the case, if tried, would present intractable management problems,"[30] given that there will be no trial.

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

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

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

26 Id at 626.

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

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

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

30 Id at 620. "The manageability inquiry under Rule 23(b)(3)(D) concerns 'such matters as the size or contentiousness of the class, the onerousness of complying with the notice requirements, the number of class members that may seek to intervene and participate, or the presence of special individual issues.'" Christopher J. Willis, *Collision Course or Coexistence?* Amchem Products v. Windsor *and Proposed Rule 23(b)(4)*, 28 Cumb L Rev 13, 25 (1998), quoting Charles

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

B. Dealing with the Problems of the Settlement Class

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

A. Wright, Arthur R. Miller, and Mary Kay Kane, 7A *Federal Practice and Procedure* § 1780 (West 2d ed 1986) (articulating matters to be considered by the Court in adjudicating a 23(b)(3) claim). As such, it overlaps substantially with the predominance inquiry: individual issues that render a class unmanageable also often mean that common issues do not predominate, suggesting that the scope of the *Amchem* decision is broader than it appears on the surface.

31 See *Amchem*, 521 US at 612–13 (noting, however, that "Rule 23's requirements must be interpreted in keeping with Article III constraints").

32 There are a number of other criticisms of the settlement class that fall beyond the scope of this Article. For example, Professors Carrington and Apanovitch argue that the certification of class actions for the limited purpose of settlement "is replete with substantive consequences" in violation of the Rules Enabling Act—for example the alteration of "the substantive rights of state governments to enact and enforce their own laws governing such matters as standards of care, measures of damages, statutes of limitations, and the law of judgments," the displacement of "not only the states' laws of torts, but also the states' laws of conflict of laws," and the "establishment of a fictional contract of employment between members of the class and class counsel." Paul D. Carrington and Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated under Federal Rule 23*, 39 Ariz L Rev 461, 464–66 (1997). See also Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 Harv L Rev

1. The settlement class and opportunistic behavior.

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

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

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

John Coffee has explained the bargaining process that precedes the creation of a settlement class, focusing on what he labels "structural collusion": "suspect settlements" that stem from "the defendants' ability to shop for favorable settlement terms."[37] He argues that the settlement class practice was once dominated by fee shopping, whereby the class attorney bargained for a lump sum and, with the

2294, 2309 (1998) (arguing that the settlement class violates the Rules Enabling Act by, among other things, undermining the individual's substantive right to "control [his own] causes of action," as well as the right to "have [his] causes of action resolved through litigation at all").

33 *In re General Motors Corp*, 55 F3d at 784–85.

34 Yeazell, 39 Ariz L Rev at 701–02 (cited in note 13) (internal citations omitted).

35 *In re General Motors Corp*, 55 F3d at 778.

36 Coffee, 95 Colum L Rev at 1348 (cited in note 14) (suggesting, however, that the possibility of opportunistic behavior and collusive settlements is not a sufficient basis for rejecting mass tort class actions).

37 Id at 1354, 1373–82 (discussing the ethically complicated problem of "structural collusion" in mass tort class actions).

defendant's consent, divided it unequally between herself and the class, resulting in disproportionately high attorneys' fees and low class recovery.[38] This technique no longer dominates the market.[39] Instead, Coffee has identified a number of "new" forms of opportunistic behavior plaguing the settlement class, two of which are relevant to our analysis: the reverse auction and the inventory settlement.[40]

A "reverse auction" is a technique by which the defendant solicits a settlement—ordinarily in the large-claim mass tort context where, in the absence of a class, individual litigation would likely devastate the defendant financially[41]—by organizing individual settlement negotiations with various plaintiffs' attorneys.[42] Pursuant to these negotiations, plaintiffs' counsel compete against one another to secure position as class counsel, motivated by the attorney's fees that will accompany settlement.[43] The lowest bid for the value of the class's claims wins.

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38 Id at 1367.

39 See Willging, Hooper, and Niemic, *Empirical Study of Class Actions* at 11 (cited in note 5) (finding that fee-recovery ratios were within a normal range in most class actions studied). "We did not find any patterns of situations where (b)(3) actions produced nominal class benefits in relation to attorneys' fees. . . . The fee-recovery rate . . . exceeded 40% in 11% or fewer of settled cases." Id.

40 See Coffee, 95 Colum L Rev at 1371–73 (cited in note 14) (describing the reverse auction); id at 1373–75 (describing the inventory settlement).

41 Professor Coffee dismisses the potential for a reverse auction in a small-claim class action. Id at 1352 ("In 'small claimant' class actions, defendants tend to resist class certification (because plaintiffs have no realistic alternative), whereas in 'large claimant' classes, defendants increasingly prefer class certification for a variety of reasons."). We disagree. It is true that in a large-claim class, the defendant has significant incentive to settle the claims prior to certification, given the litigation expenses at stake. But a similar level of risk is involved in the small-claim class. Even though absent class members are less likely to bring individual suit, the probability of certification is higher. Because small-claim classes are not mass torts, they involve fewer individualized questions—for example, differences in severity or timeframe of injury. One could persuasively argue that the defendant's decision to settle precertification is determined not by the likelihood of individual opt-out, but rather by the likelihood of certification, given the litigation expenses that flow from certification hearings and related proceedings. Thus, a defendant confronted with a small-claim class has an equal, if not greater, incentive to solicit precertification settlement than a defendant confronted with a large-claim class.

42 Empirical studies confirm the prevalence of this practice. See Willging, Hooper, and Niemic, *Empirical Study of Class Actions* at 8 (cited in note 5) ("Multiple filings of related class actions might indicate a race by counsel to the courthouse, perhaps to gain appointment as lead counsel. . . . At least one form of multiple filing occurred in 20% to 39% of the class actions in the four districts.").

43 But see Class Action Fairness Act, 28 USC § 1713 (Supp 2005) (regulating attorneys' fees by requiring that, for any settlement "under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member," the court "make[] a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss"). It has yet to be determined what effect the Class Action Fairness Act will have on the reverse auction. However, two factors suggest that the effect will be minimal. First, even though absent class members receive only minimal monetary benefit from most settlement classes, it is rare that they actually have to pay attorneys' fees out-of-pocket. Instead, the small net recovery distributed to each class member is what remains after the fees have been deducted from the net

This practice has been widely thought to deprive class members of the fair value of their claims.[44] An inventory settlement, in contrast, involves a plaintiffs' attorney who represents a large number of individual plaintiffs with claims pending against a single defendant. For the purpose of gaining leverage in the settlement of these individual claims, plaintiffs' counsel offers to independently file, request certification of, and settle the claims of a class of future plaintiffs.[45] The class is then drawn to exclude currently pending claims. In this scenario, class counsel has little or no incentive to haggle over the price of settlement for the class. Rather, she uses the class as a bargaining chip to secure separate, more favorable settlements for her current inventory of clients. This technique seriously threatens the right of future plaintiffs to adequate representation and their interest in the fair value of their claims.[46]

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

In response to the numerous problems posed by the settlement class practice, a number of scholars have recommended changes to the operation of Rule 23's procedural safeguards. The proposals for reform fall into three general categories: (1) heightened standards governing selection of class counsel; (2) enhanced monitoring of attorney conduct, for the purpose of identifying and regulating conflicts of interest; and (3) creation of criteria to identify signs of opportunistic behavior.[47] Professor Coffee has specifically identified three needed

settlement. This type of distribution arrangement would not fall under the Act's terms. Second, the Act includes a significant loophole, enabling courts to approve a settlement even when absent class members will suffer a net loss. See also notes 4 (detailing the role that docket burdens have in influencing approval of settlement classes), 48, and accompanying text.

44 See, for example, Coffee, 95 Colum L Rev at 1372 (cited in note 14) (explaining that a reverse auction often results in "suboptimal outcome[s]" for class members).

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

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

47 For other proposals that fall beyond the scope of this Article, see Kent A. Lambert, *Class Action Settlements in Louisiana*, 61 La L Rev 89, 129–33 (2000) (suggesting that the court should ban inventory settlements and classes consisting exclusively of future plaintiffs, as well as hold collateral estoppel inapplicable to legal malpractice suits against class counsel for inadequate representation); Nikita Malholtra Pastor, *Equity and Settlement Class Actions: Can There Be Justice for All in* Ortiz v. Fibreboard*?*, 49 Am U L Rev 773, 819–21 (2000) (advocating the reform of ethical standards); Greg M. Zipes, *After* Amchem *and* Ahearn*: The Rise of Bankruptcy over the Class Action Option for Resolving Mass Torts on a Nationwide Basis, and the Fall of Finality?*,

reforms. First, to prevent the defendant from handpicking plaintiffs' counsel, he would "require the court to oversee the selection of the plaintiffs' counsel, after adequate notice was first given to the specialized bar handling the specific mass tort that certification of a settlement class was contemplated."[48] Second, he proposes using "broad and representative steering committees, deliberately chosen to mirror the composition of the plaintiffs' bar," which would ratify the settlement before it could be submitted to the court for approval.[49] Third, he recommends banning classes "defined exclusively in terms of future claimants," noting they are "silent and passive, and thus . . . cannot monitor their attorneys."[50]

1998 Detroit Coll L Rev 7, 10 (arguing that the bankruptcy system "may become more prominent in the mass tort arena by default," because it has inherent structural safeguards that are not present in the normal federal system—for example, a group-rights model and the preapproval of creditors' counsel). See also Joseph F. Rice and Nancy Worth Davis, *The Future of the Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 SC L Rev 405, 410 (1999) ("Preferring chapter 11 over settlement class actions [as a way to solve the problems with the settlement class] this early in the evolution of each method threatens to limit the proper application of both.").

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

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

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

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

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

50 Id at 1455–56. Coffee also offered a fourth recommendation: that courts align the standards governing the class action and the settlement class. See id at 1456 (arguing that when a class is certifiable for settlement but not litigation, the plaintiffs' attorney "lack[s] negotiating

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

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

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

Current proposals for reform have been of the subconstitutional variety, focused on the rules and regulations that govern the settlement class. As a result, they fail to address the root cause of the problems to which they have pointed: the nonadverseness of the parties. The lack of disagreement between the defendant and class counsel as to the desired outcome of the suit ultimately renders ineffective or

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

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

52 Id.

53 Id. Professor Yeazell also notes the problems with his suggested approach:

> How would [the] defendant select these 'class' representatives? How many would it have to notify to rid itself of the suspicion that it had merely substituted gullible parties for hungry lawyers? Moreover . . . the defendant would be notifying previously quiescent plaintiffs not only that they had claims but that the defendant thought these claims viable.

Id.

54 Id.

inadequate all proposed reforms, which rely on individualized inquiries to assess the legitimacy of the settlement class in the specific case. When the plaintiffs and the defendant agree on settlement terms and the desirability of certification prior to coming to court, neither party has the incentive to ask such important questions as whether class representation is "adequate" or whether the claims are "typical" of the class as a whole. This inherently deprives the court of the benefit of adversarial litigation concerning the satisfaction of Rule 23's requirements, thereby seriously limiting its ability to protect absent class members.[55] Imposing additional burdens on the parties—over which there will also be no disagreement between them, given that both seek the same outcome—is likely to be no more effective than are current requirements in preventing or remedying opportunistic behavior, because of the inherent lack of adverseness between the parties.

Moreover, even if the proposed reforms were to prove successful in remedying the settlement class's subconstitutional defects, they nevertheless fail to address the practice's inherent unconstitutionality. This failure is reflected in the scholarly approach towards "collusion," or the opportunistic behavior that so often accompanies the development of a settlement class.[56] As noted previously, settlement class action courts have defined "collusion" narrowly, to require a secret, unethical agreement between two parties to a suit.[57] Civil procedure scholars have echoed this approach. A review of the literature indicates that most, if not all, scholars currently writing in this area assume that in order to be illegitimate, the settlement class must involve secret, unethical, or criminal cooperation between the plaintiff and the defendant, designed to defraud absent class members, in the individual case.[58]

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

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

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

57 See id.

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

59 367 US 497 (1961).

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

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

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

III. ADVERSENESS AND THE CASE-OR-CONTROVERSY REQUIREMENT

A. Adverseness and Constitutional Text

To understand the constitutional implications that flow from the settlement class's lack of adverseness, one must engage in an analysis of the foundations of Article III's adverseness requirement. Article III, § 2 extends federal judicial power solely to the adjudication of

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

"cases" or "controversies." Certain categories of suits, particularly those falling within the federal courts' diversity jurisdiction, must involve a "controversy." The remainder, primarily concerning federal question suits, must qualify as "cases."

The definition of the term "controversy" is straightforward, having been construed consistently throughout the centuries. A current-day legal dictionary defines the word as a "disagreement or a dispute."[61] A nonlegal dictionary offers a similar definition: a "controversy" is "a dispute, especially a public one, between sides holding opposing views."[62] This modern interpretation is consistent with the meaning given the term by dictionaries at the time of the Constitution's Framing.[63] For example, "controversy" was defined by a 1755 English dictionary as a "debate" or "dispute,"[64] a definition that mirrors the word's etymology. The root of "controversy" is Latin, from *controversus*, which means "disputed."[65] From these definitions, one can fairly conclude that the word "controversy" plainly requires a substantial disagreement between parties as to the suit's preferred outcome.[66]

The term "case" is arguably more ambiguous. For example, a current-day dictionary includes eleven different definitions of the word, including the broad description of "case" as "an instance of something."[67] However, when one takes into account textual context and

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

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

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

64 Nathan Bailey, *An Universal Etymological English Dictionary* 210 (Neill 16th ed 1755). See also Thomas Blount, *A Law-Dictionary and Glossary* 42 (Eliz, Nutt & Gosling 3d ed 1717) (in the context of defining the phrase "batable ground," using the terms "in debate" and "controversy" interchangeably—although not separately defining the word "controversy").

Early American dictionaries, however, do not contain an entry for the word "controversy." See, for example, John Bouvier, 1 *Law Dictionary* (1st ed 1839). "Controversy" was not separately defined in an American dictionary, according to our search, until around 1848, at which time it was described as "a dispute arising between two or more persons; it differs from case, which includes all suits criminal as well as civil; whereas controversy is a civil and not a criminal proceeding." John Bouvier, 1 *A Law Dictionary* 337 (Johnson 3d ed 1848). See also John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U Chi L Rev 203, 222 n 47 (1997) (summarizing early American definitions, in the context of arguing that "controversies" are limited to civil proceedings, while "cases" include suits of both civil and criminal variant). Despite the absence of entry in American dictionaries, one could argue that an English definition of "controversy" from the pre-Framing era provides persuasive evidence of the Framers' assumptions when using the word to define judicial power in Article III.

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

66 See also *In re Asbestos Litigation*, 90 F3d 963, 988–89 (5th Cir 1996) (noting that Article III plainly "requires that the parties be truly adverse").

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

circumstance, the term's meaning when used in Article III becomes readily apparent. For example, current-day legal dictionaries define "case" as a justiciable "action or suit,"[68] or an "argument."[69] Eighteenth century dictionaries suggest a similarly narrow reading of the word in the legal context. A legal dictionary from 1773 contains no entry for "case."[70] Nevertheless, it references—seven times—the phrase "adverse party" in the course of defining related legal terms such as "demurrer," "duces tecum," and "interrogatory,"[71] suggesting a strong focus on adverseness at the time of the Framing.

Even if a textualist analysis were not enough, standing alone, to establish unambiguously the outer perimeters of a constitutionally permissible "case," more than three hundred years of legal practice and tradition establish a presumption that the word "case," like the word "controversy," requires an adversarial suit.[72] Initially, the early English common law system mandated an adversarial relationship between litigants, with few exceptions.[73] While not conclusive evidence of the Framers' intent, this history indicates that, in adopting a legal system based largely on the English common law system, the Constitution's drafters likely sought to incorporate a focus on litigant adverseness. Second, nothing in the Framers' records supports a substantive distinction between the words "case" and "controversy" for purposes of adverseness.[74] Indeed, the Framers' deliberations indicate that

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

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

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

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

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

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

74 The scholarly literature indicates that one can parse numerous distinctions between the terms "case" and "controversy," although none is immediately relevant to this discussion. For example, it has been suggested that the term "controversy" is less comprehensive than the term "case," in that it includes only "suits of a civil nature," whereas "case" is an umbrella, encompassing civil and criminal actions alike. *Aetna Life Insurance Co v Haworth*, 300 US 227, 239 (1937); William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U Chi L Rev 131, 133 (1990)

they were committed to the proposition that "jurisdiction given [to the judiciary] was constructively limited to cases of a Judiciary Nature."[75] A "case[] of a Judiciary Nature," in turn, was defined by early American practice and tradition as excluding feigned, nonadversarial suits.[76] Third, since the late nineteenth century, the Court has conflated the terms "case" and "controversy,"[77] holding that any difference in their meaning is neither supported by historical practice nor the Framers' intent.[78] In light of such history, there is a heavy burden on anyone who suggests that the word "case" was designed to have a far broader reach than the word "controversy."[79]

(tracing the distinction between "cases" and "controversies" to St. George Tucker). But see Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L Rev 447, 460 (1994) (arguing that had the Framers intended a criminal/civil distinction, they would have used the term "civil cases" instead of "controversies" and noting the conspicuous lack of eighteenth century discussion of such a distinction). Additionally, Akhil Amar argues that the use of the word "all" before Article III's reference to the three types of "cases" indicates that the Court's jurisdiction over those subject matters is mandatory, whereas the omission of "all" before references to the six party-defined "controversies" proves that the Court's jurisdiction in that context is permissive. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 BU L Rev 205, 244 n 128 (1985). But see Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U Pa L Rev 1633, 1636 (1990) (criticizing Amar's approach as analyzing a "few selected words . . . in a vacuum," contrary to "any reasonable textual construction" and the Framers' intent). Neither of these distinctions, however, is relevant to the narrow question of whether the definition of "controversy" as an adversarial dispute also extends to the definition of "case."

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

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

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

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

79 Professor Robert Pushaw has attempted to carry this burden. He argues that the Framers intended that a "case" would permit a more expansive judicial role than a "controversy." The word "case," he argues, refers to the public, law-espousing function of the courts and thus, unlike a "controversy," does not mandate that the parties claim adverse legal interests. Pushaw, 69 Notre

B. Adverseness in Supreme Court Doctrine

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

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

The Court concluded that federal jurisdiction could not constitutionally extend to the case, despite the express grant of jurisdiction by Congress. The suit constituted "neither more nor less . . . than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress," rather than an action-

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Dame L Rev at 481–83 (cited in note 74). Pushaw's theory has been criticized as inconsistent with the history of the Framing. See, for example, David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L Rev 75, 149 n 278 (critiquing Pushaw's analysis of the word "controversy"). In any event, there can be no doubt that the Court has never accepted the argument.

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

81 *Aetna Life Insurance*, 300 US at 240–41 (noting that there must be a real and substantial controversy admitting specific relief in order for a case to be justiciable). See also *Veazie*, 49 US (8 How) at 255.

82 219 US 346 (1911) (holding that petitions must be presented in the form of a "case" or "controversy" to be justiciable).

83 Id at 349–50. This Act, which was part of the Indian appropriation bill, is the authority for the maintenance of the two suits.

able, adversarial dispute.[84] Although the Cherokees did possess a legal interest in the lands and were allegedly injured by the 1906 Act, the defendant in the case—the Government—had "no interest adverse to the claimants."[85] Even if the government does have an abstract interest in establishing the constitutionality of a federal statute, the Court held that this interest was de minimis and was insufficient to establish federal jurisdiction.[86]

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

> [T]he exercise of the judicial power is limited to "cases" and "controversies." . . . By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom . . . [and] the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.[88]

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

The Court has consistently cited *Muskrat* for the proposition that adverseness plays an essential role in an adversary system, and in appropriately restraining judicial power, and it has applied its logic to a variety of fact patterns.[89] For example, in *United States v Johnson*,[90] the

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84 Id at 361.

85 Id at 361–62.

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

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

88 *Muskrat*, 219 US at 356–57.

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

90 319 US 302 (1943).

Court dismissed a nonadversarial suit, finding it to be in violation of the dictates of Article III. Unlike *Muskrat*, where the parties' nonadverseness flowed from a lack of disagreement as to the desired outcome, the parties in *Johnson* explicitly arranged to bring a nonadversarial case to the court, to further the defendant's economic interests.[91] The plaintiff, a friend of the defendant, had no role in the proceedings. He did not pay the lawyer who appeared in his name, never saw the complaint, and did not learn of the lower court's decision until reading about it in the newspaper.[92] The Court refused to reach the merits of the plaintiff's claims. There was no "genuine adversary issue between the parties" as required by Article III, it held, given that the parties agreed on the desired outcome, as well on the underlying facts of the case.[93]

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

The Court in *Swift* did not believe its conclusion was inconsistent with its earlier holdings on adverseness. It is difficult, however, to understand the Court's logic. First, the *Swift* Court distinguished the consent decree from precedents in which the Court had held a nonadversarial dispute to be nonjusticiable, such as *Lord v Veazie*.[97] A consent

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

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

93 Id.

94 276 US 311 (1928).

95 Id at 320–21.

96 Id at 325.

97 49 US (8 How) 251 (1850).

decree, unlike the private contract involved in *Veazie*, "deals primarily, not with past violations, but with threatened future ones."[98] Under this rule, the *Swift* case was justiciable because of the credible threat of impending adverseness, stemming from future statutory violations.[99] Even accepting this interpretation, however, the settlement class does not present a comparable threat: the conflicting interests of the parties to the suit are resolved at the time of settlement.[100] Except for execution of the agreement, there is no remaining area of potential disagreement.

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

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

1. The two levels of constitutional purpose.

According to both textual and doctrinal interpretations of Article III, the case-or-controversy requirement unambiguously mandates the existence of an adversarial relationship between opposing litigants. How-

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98 *Swift*, 276 US at 326.

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

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

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

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

The adverseness requirement also serves a larger, systemic purpose—that of limiting the judiciary's role in relation to its two coequal branches. First, the lack of adverseness disrupts Congress's underlying

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

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

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

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

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

The requirement that litigants on opposite sides have "adverse" legal interests for a suit to be justiciable is appropriately viewed as a logical outgrowth of the nation's commitment to an adversary system. Both the adverseness requirement and the adversary system of which it is a part flow from a recognition that the "adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity."[104] Indeed, adverseness and the adversary system depend on one another: in the absence of litigant adverseness, the very DNA of the adversary system, which relies on the parties' competitive incentives to investigate the facts and to research and analyze the governing law that grows out of the party's adverseness to her opponent, is transformed. That transformation, in turn, threatens the core assumptions and values on which our legal system depends—primarily the protection of the interests of individuals who may be bound, legally or practically, by the court's judgment. Particularly in group litigation, where individual participation in court proceedings is impractical and the outcome will have formal res judicata impact on absent litigants, the required adverseness between litigants serves as an essential safeguard. It ensures that the group representative has the necessary incentive to seek an outcome that embodies the legal interests of absent but bound individuals. By contrast, when, from the outset of the litigation, the in-

104 *Poe*, 367 US at 503.

court representative seeks the same outcome as the opposing party, she lacks incentive to disclose information to the court that may reflect negatively on the joint, nonadversarial agreement, hindering the court's ability to protect individuals who will—practically, if not legally—be bound by its judgment.

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

The adversary system may be contrasted with the civil law or "inquisitorial" systems in place in various Latin American and European nations.[110] The two systems vary in both ends and means. First, the in-

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105 This also encompasses control over legal argumentation in the case:

> Through vigorous advocacy each party helps the court to perceive and to respond properly to weaknesses in the presentations made by the other parties. In addition, vigorous advocacy can illuminate facets of a case that are not immediately apparent and might not otherwise be considered by the court. These benefits of vigorous advocacy serve as the foundation of the adversarial system, and appear to be deeply and permanently rooted in our legal system.

Girardeau A. Spann, *Expository Justice*, 131 U Pa L Rev 585, 650 (1983) (internal citations omitted).

106 Id at 588.

107 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv L Rev 353, 364 (1978).

108 Id.

109 Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U Pa L Rev 1031, 1035 (1975). One commentator has paraphrased Fuller to say that this objective search depends on three interrelated conditions:

> (i) The adjudicator should *attend* to what the parties have to say. (ii) The adjudicator should *explain* his decision in a manner that provides a substantive reply to what the parties have to say. (iii) The decision should be *strongly responsive* to the parties' proofs and arguments in the sense that it should proceed from and be congruent with those proofs and arguments.

Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 Harv L Rev 410, 411–12 (1978). See also Christopher J. Peters, *Adjudication as Representation*, 97 Colum L Rev 312, 375 (1997) (discussing Fuller's theories on the relationship between court and litigant).

110 See Erichson, 87 Georgetown L J at 2005–10 (cited in note 5) (making this comparison in the context of discussing the effect of the settlement class on judicial decisionmaking). See also Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 Judicature 109, 109 (1993).

quisitorial system is unqualifiedly focused on "ascertain[ing] the truth of the contested matter for itself," a goal that justifies active court involvement in the development of a case's factual and legal foundations.[111] This obligation "has no counterpart in American courts," which are instead focused on party-oriented procedural guarantees.[112] In fact, "[e]mployed by interested parties, the [adversarial system] often achieves truth only as a convenience, a byproduct, or an accidental approximation."[113]

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

111 Strier, 76 Judicature at 109 (cited in note 110).

112 Erichson, 87 Georgetown L J at 2007 (cited in note 5). See also Frankel, 123 U Pa L Rev at 1032 (cited in note 109) (arguing that "our adversary system rates truth too low among the values that institutions of justice are meant to serve").

113 Frankel, 123 U Pa L Rev at 1037 (cited in note 109). See also Dean Robert Gilbert Johnston and Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 John Marshall L Rev 147, 147–48 (2002) ("The underlying theory [of an adversary system] . . . is that the truth is best served by placing the responsibility on the parties themselves to formulate their case and destroy the case of their adversary.").

114 Erichson, 87 Georgetown L J at 2006 (cited in note 5).

115 See Peters, 97 Colum L Rev at 347 (cited in note 109):

> Most judicial decisions are to a very great extent products . . . of a process of participation and debate among the parties to the case that greatly restricts the decisional options available to the court. In this sense, judicial decisions resemble the decisions made by a democratic legislature after debate and a fair hearing at which all relevant views have been aired.

116 Strier, 76 Judicature at 109 (cited in note 110).

117 Specifically, adverseness "optimize[s] the likelihood that [judicial] exposition will be well-informed and that the power to expound will be exercised prudently." Spann, 131 U Pa L Rev at 632 (cited in note 105).

"context in which to consider the principles they are called upon to expound."[118]

A comparative analysis of the benefits and disadvantages of these two systems is beyond the scope of this Article.[119] Suffice it to say that American judges, trained in and accustomed to an adversary structure, are "ill-equipped for effective inquisitorial judging."[120] Not only is an investigatory or managerial judicial role incompatible with the highly entrenched adversarial norms and customs in the U.S. legal system,[121] but American judges lack the investigatory resources available to judges in an inquisitorial system. The federal judiciary operates on a

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118 Id at 647. This principle is reflected in the Court's Article III jurisprudence. The Court in *Baker v Carr*, 369 US 186 (1962), for example, framed the Article III standing question as follows: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult [ ] questions?" Id at 204. See also *GTE Sylvania, Inc v Consumers Union of the United States, Inc*, 445 US 375, 382 (1980) ("The purpose of the case-or-controversy requirement is to 'limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'") (internal citation omitted); *Butz v Economou*, 438 US 478, 513 (1978) (holding that the agency proceedings in question were legitimate because they enjoyed the adversarial "safeguards" available "in the judicial process": "The proceedings [were] adversary in nature. They [were] conducted before a trier of fact insulated from political influence. A party [was] entitled to present his case.") (internal citations omitted).

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

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

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

limited budget and with restricted factfinding powers, limiting its capabilities outside the context of an adversarial dispute.[122] Moreover, even if inquisitorial judging techniques were technically compatible with current legal structures, as we subsequently demonstrate, they are not desirable given the democratic premises on which the nation's adversary system is based.

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

Although the concerns of liberal adversary theory are of course most intense when the private party's legal interests are formally impacted—for example, through the doctrines of claim or issue preclusion—it is important to recognize that the interests of nonlitigants will often be impacted significantly on a purely practical level by the results of litigation. This impact may derive from a variety of sources. First, although not as legally binding as claim or issue preclusion, the doctrine of stare decisis will often have as virtually a dispositive im-

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

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

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

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

126 Redish, 51 DePaul L Rev at 369–70 (cited in note 124).

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

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

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

It is conceivable that, in certain instances, the absence of adverseness will not actually imply suspiciousness of motivation. However, commitment to a prerequisite of litigant adverseness represents a choice in favor of an ex ante categorical approach, rather than a case-by-case inquiry into litigant seriousness of purpose. The choice of a categorically applied rule is a decision in favor of possible overprotection, rather than the risk of underprotection normally associated with a more elusive case-by-case inquiry, where there always exists the danger that a court will mistakenly fail to recognize the improper motivation of

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

nonadverse parties. Because an absence of adverseness will, in the large majority of cases, signal the failure of one of the litigants to protect the interests of future litigants whose legal rights will be affected (if only as a practical matter), Article III is properly construed to employ the absence of adverseness at the outset of a suit as a rule of thumb by which to measure a litigant's lack of seriousness or good faith.

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

Specifically, she identified ideological litigation, where the plaintiff challenges legislation "without the traditional personal stake" in the outcome, as a serious threat to future litigants.[131] If courts were

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

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

[131] Id at 306. Brilmayer further distinguishes the ideological plaintiff from the traditional plaintiff by way of this example:

> [I]magine a citizen in a town that has recently enacted an ordinance prohibiting the posting of campaign signs on residential property. Assume he believes it is unconstitutional to restrict political expression this way, but has posted no campaign signs himself . . . . What can he do? First, he might initiate litigation by alleging the ordinance infringes the first amendment rights of others. His neighbor would put up signs but for the ordinance. Second, he

permitted to hear suits by uninjured plaintiffs, two negative effects would flow, she argued. First, the court's judgment in that case may—as a practical matter, if not a legal one—bar future litigation by individuals actually harmed by the operation of the challenged statute. At the very least, it will create persuasive precedent that a future court may follow when the two situations are "indistinguishable."[132] Second, she asserted that the ideological litigant, because he is uninjured, lacks the incentive to serve as a champion for the cause. Absent the self-interest that flows from concrete injury, the plaintiff cannot effectively represent the interests of third parties not currently before the courts, who nevertheless will be affected by the court's judgment. The injured individual, Brilmayer argued, is more likely to fight for the rights of all individuals similarly situated, now or in the future, as well as possess the incentive to invest both time and resources in the suit—not necessarily because of an altruistic desire to assist others, but because of the desire to protect or advance his own interests. Recognizing the role that such incentives play in the proper functioning of an adversary system,[133] Brilmayer advocated strict adherence to the injury-in-fact requirement of Article III.[134] This limitation "ensure[s] the accountability of representatives" by guaranteeing that "the individuals most affected by the challenged activity will have a role in the challenge."[135]

One may reasonably question the accuracy of Brilmayer's unsupported assumption that it is only injured plaintiffs who will fully and enthusiastically assert their interests. A plaintiff who has been injured only minimally will naturally lack incentive to argue her case to the fullest. In contrast, an uninjured plaintiff driven by ideological considerations who possesses substantial resources may well develop her case to the fullest.[136] For present purposes, however, that issue is beside the point. Like Professor Brilmayer, we glean from both Article III's

> might attempt to show that his own future first amendment rights are threatened. Next year, he may wish to post campaign signs.

Id at 298. Brilmayer believes that neither the first nor the second option should create a justiciable case under Article III's ripeness and injury-in-fact requirements, whose function is to prevent merely concerned citizens from "litigat[ing] abstract principles of constitutional law when the precedent established will govern someone else's . . . rights." Id at 308.

132 Id at 307.

133 See also Part IV.B.1.a.

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

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

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

case-or-controversy requirement and the political principles of liberal theory that underlie the adversary system a concern for protection of the interests of future litigants, and urge the shaping of the requirement's interpretation to protect those interests. This concern, in turn, leads to the conclusion that the case-or-controversy requirement demands true adverseness between opposing litigants at the outset of suit, because absent such adverseness we cannot be assured that the litigants will effectively protect the interests of affected individuals not currently before the court.

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

First, it might be argued that our theory proves too much, because litigants may always settle a suit at any point. Even certified class actions may be settled, subject to judicial approval.[137] If, as we assert, the absence of adverseness at the outset of a suit undermines the protection of future similarly situated litigants and therefore a rigid rule demanding adverseness must be imposed, then should not an absence of adverseness that necessarily comes with settlement at any point in the litigation process be prohibited?[138] Because prohibition of all settlement would be absurd, the argument proceeds, the absence of adverseness at the outset of suit should also logically be acceptable. It is not true, however, that the dangers to the interests of future litigants will always be as great from a lack of adverseness due to settlement in the midst of litigation as they will from a lack of adverseness at the outset of suit. For one thing, when a suit that is adverse at the outset settles during the course of litigation, we can be reasonably assured that the suit was not brought solely for the purpose of legally or practically binding future litigants. When a nonadverse suit is brought, in contrast, it is difficult to understand why the case has been brought to court in the first place, save for an attempt to bind future litigants. The inherent existence of this suspicious motivation automatically distinguishes the two situations. Moreover, when an ongoing suit is settled, it is highly unlikely that any binding legal precedent that might negatively impact similarly situated parties will

137 See FRCP 23(e).

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

be promulgated as a result. In contrast, when a nonadverse suit is brought, for reasons already discussed, it is likely that it is filed for the very reason of obtaining some form of binding declaration as to the state of the law; again, why else file suit in the first place? In addition, significant social benefit flows from the settlement of adverse litigation, if only from the reduction in the expenditure of judicial resources. No such benefit may be derived from allowing nonadverse suits to be filed.

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

Of course, it is conceivable that a litigant may outwardly present all the indicia of adverseness, yet in reality be secretly acting in consort with his opponent. In such a situation, it is up to the court in the individual case to attempt to ascertain the validity of the asserted adverseness, and it is certainly conceivable that it will fail in that endeavor. But recognition of this possibility in no way leads to a lack of concern for the absence of adverseness when it is recognized from the outset.

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

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

3. Public concerns: the systemic interests in adverseness.

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

Second, adverseness serves a critical function in distinguishing between the roles constitutionally intended for the judiciary and those to be exercised by the executive branch. In addition to adjudicating cases or controversies, administrative agencies that perform executive functions are solely responsible for distributing private resources in the absence of an adversarial dispute. These agencies, when legisla-

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

tively empowered to do so, may function as administrators, deciding in the individual situation whether claimants are entitled to compensation for their claims, even in the absence of a formal adversary proceeding. When a federal court, from the outset of a suit, does nothing more than supervise and administer the redistribution of assets dictated by an agreement previously reached by the parties, it is effectively operating as an administrative entity, appropriately found within the executive branch. When an Article III court takes cognizance of a nonadversarial suit, then, it steps into a sphere expressly committed by the Constitution to the discretion of the executive department, threatening the separation of powers.

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

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

142 Id.

143 The term "private attorney general" is generally used to refer to an attorney in a case where it is clear that "'the law' should be implemented or enforced—so that we do not need to ask at whose behest or on whose behalf." Jeremy Rabkin, *The Secret Life of the Private Attorney General*, 61 L & Contemp Probs 179, 179, 181 (1998) (noting that "[w]ith sympathetic nurturing from courts and Congress," the private attorney general "form of legal advocacy seemed for a time to be a powerful engine of public policy"). See also Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 Mich L Rev 589, 599–606 (2005) (surveying the history of the private attorney general, including the rise of citizen-suit provisions and qui tam suits). Although this does not translate perfectly into the class action context, given that the class, not the public at large, is the specified beneficiary of the court's judgment, the functions played by the two groups of plaintiffs, and their attorneys, are similar. In general, the private attorney general

her attorney may be primarily or even exclusively motivated by considerations of personal economic gain, this view deems private litigation to be integrally intertwined with attainment of the statute's social goals. The empowerment of private individuals as quasi–private attorneys general "protect[s] the public interest by enforcing the public policies embodied in controlling statutes."[144]

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

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

litigates to vindicate the public good. The class action plaintiff litigates for the purpose of collecting compensation for her injuries, but with the same effect as the private attorney general—that of deterring and punishing wrongful conduct.

One difference between the private individual in the hybrid model and the private attorney general is the relief sought. Although this Article focuses on private damages, most private attorneys general instead tend to seek broad nonmonetary relief: "[R]ather than seeking redress for discrete injuries, private attorneys general typically request injunctive or other equitable relief aimed at altering the practices of large institutions." Morrison, 103 Mich L Rev at 590.

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

suspiciousness of nonadverse litigation in the first place, there is greater reason to trust the incentive structure in operation when truly adverse litigation is settled.

b) The administrative compensation model.

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

The point at which responsibility shifts from the executive to the judiciary is defined by the case-or-controversy element of Article III, including the adverseness requirement. This bright line was first introduced in *United States v Todd*,[148] in which the Court addressed the Article III implications of the congressional revision of the Act struck down two years earlier in *Hayburn's Case*.[149] An individual had applied for pension benefits in the New York Circuit Court. That court held that Article III judges could legitimately act as administrative commissioners in their individual capacities—as opposed to "as a Circuit Court"—and issued an opinion that "Todd ought to be placed on the

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145 US Const Art II, § 3.

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

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

148 (1794) (unreported). *Todd* was summarized in *United States v Ferreira*, 54 US (13 How) 40, 52–53 (1852).

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

pension list."[150] The Supreme Court reversed. It held that the Act "could not be construed to give [authority] to the judges out of court as commissioners."[151] Addressing whether pension administration was a proper function for the Circuit Court sitting in its Article III capacity, the Court answered in the negative: the decision of whether individuals are entitled to pension benefits is not the exercise of "judicial power within the meaning of the Constitution," but rather is the type of power typically exercised by administrative "commissioners," such as the Secretary of the Treasury.[152]

There do exist two prominent instances in which the Supreme Court has upheld legislative schemes that seemingly contravened the case-or-controversy requirement by vesting in the hands of Article III judges certain functions that do not directly involve the adjudication of adversarial suits. In *Mistretta v United States*,[153] the Court approved the required participation of Article III judges on the Federal Sentencing Commission, whose function was to promulgate sentencing guidelines for federal crimes. In *Morrison v Olson*,[154] the Court upheld the performance of what appeared to be nonadjudicatory functions of a special Article III court in the appointment and supervision of independent counsel. One may question the wisdom of one or both of these decisions.[155] Nevertheless, both involved obviously unique situations, and therefore may be distinguished from the vesting of nonadjudicatory jurisdiction, as a general matter, in the federal courts. *Mistretta* concerned not the vesting of nonadjudicatory jurisdiction in an Article III federal court, but rather the use of individual Article III judges for executive purposes, a fact expressly noted by the Court.[156] *Morrison*, too, involved rather unique circumstances. Although, unlike *Mistretta*, the case did involve the use of a special Article III court, its administrative functions were tied to a truly unique process that could well lead to subsequent adversarial litigation. That these cases are, rightly or wrongly, viewed by the Court as presenting very special, and therefore limited, circumstances is made clear by its continued unwavering adherence to the adjudicatory requirements of Article III in all other contexts. At no point have subsequent decisions construed these cases as in any way affecting the constitutional requirements of

150 *Ferreira*, 54 US (13 How) at 53.

151 Id.

152 Id.

153 488 US 361 (1989).

154 487 US 654 (1988).

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

156 488 US at 402.

standing, ripeness, mootness, or adverseness. Indeed, in reaching its conclusions in these decisions the Court expressly adhered to its venerable precedents prohibiting the Article III judiciary from performing nonadjudicatory executive functions.[157]

ii) The implications of the judicial exercise of functions constitutionally reserved for executive agencies. A number of policy-based arguments support construing Article III to prohibit judicial cognizance of all nonadversarial compensation schemes. Most important, while the judiciary is constitutionally constrained by the case-or-controversy requirement, the executive branch is instead constrained

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

It could be argued that a similar situation arises in the context of bankruptcy proceedings, given that, like the claims proceedings in *Ferreira*, most Title 11 actions are uncontroverted. See Avery, 12 Bankr Dev J at 400 (cited in note 100) (arguing that the Bankruptcy Code "frequently give[s] rise to cases that fail to comply with the case or controversy requirement of Article III"); Douglas G. Baird and Thomas H. Jackson, *Cases, Problems and Materials on Bankruptcy* 1 (Little, Brown 2d ed 1990) ("The legal proceeding [in bankruptcy] of the typical individual who asks for a discharge is an uncontested affair. . . . There is nothing to fight over."). See also *Kilen v United States*, 129 BR 538, 542 (Bankr ND Ill 1991), citing 28 USC § 151 (explaining that although bankruptcy judges are not Article III judges, they "are statutorily deemed to be 'unit[s] of the district court'" and thus must meet Article III requirements). Given the complexity of the subject matter and the fact that the Supreme Court has not spoken directly on this question, the constitutionality of bankruptcy proceedings reaches far beyond the scope of this Article. It suffices to note that the bankruptcy scheme is a narrow exception to the adverseness requirement. Surely no one would argue that this exception consumes the general rule that, in order for a suit to be justiciable, the parties must enjoy an adversarial relationship. Similarly, the Court has never suggested that the presence of bankruptcy distribution in the federal courts somehow voids the adverseness requirement in other contexts or affects its adverseness jurisprudence as a whole. Moreover, the unique nature of bankruptcy, as distinguished from other nonadversarial litigation like the settlement class, has been recognized by courts and scholars alike. In bankruptcy, the presence of adverseness is a case-by-case inquiry. Because the creditor is always a *possible* adverse party, some bankruptcy cases will be adversarial while others will not, rendering any ex ante determination as to adverseness impossible. See Susan Block-Lieb, *The Case against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 Fordham L Rev 721, 773 n 301 (1994); Thomas Galligan, Jr., *Article III and the "Related To" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U Puget Sound L Rev 1, 39–40 n 145 (1987) (analogizing bankruptcy to the fact pattern in *Tutun v United States*, 270 US 568, 577 (1926), where the Court held naturalization proceedings to be justiciable because the United States is always a "possible adverse party"). The same is not true of the settlement class: *all* settlement classes are, by definition, nonadversarial, given that the parties agree on the desired outcome before coming to court.

by electoral accountability.[158] When the unelected judiciary exercises executive power by taking cognizance of a nonadversarial suit, it operates without either the adverseness limit imposed by the case-or-controversy requirement or electoral restraint, contrary to the fundamental checks and balances of our constitutional system.

IV. VIEWING THE SETTLEMENT CLASS THROUGH THE LENS OF ARTICLE III

A. Textualism: The Nonadverseness of the Settlement Class

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

Insofar as the word "controversy" mandates an adversarial dispute between two or more parties, as we have argued that it does, any settlement class alleging only violation of state law contravenes the plain meaning of Article III.[159] The only conceivable jurisdictional basis for such suits is the diversity clause, which extends federal judicial power solely to such "controversies." Parties to the settlement class

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

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

are definitionally nonadverse.[160] At the time of class certification—the point at which the class action proceeding commences as a distinct suit—they do not seek diverse outcomes, and thus do not present a live "dispute" to the court.[161] Instead, prior to seeking certification and often even before filing a complaint with the court, the parties have agreed on terms of settlement, which usually consists of a privately ordered, quasi-administrative distribution scheme that distinguishes among claimants based on type and severity of injury. They then agree to seek—or at least not oppose—class certification, which, if granted, will have the effect of binding all absent class members to the private contract between named plaintiffs and the defendant. The district court is asked to certify the class if and only if it approves settlement; in other words, if the settlement agreement were to be rejected by the court, the class is not eligible to be litigated.

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

The definition of "case" is arguably broader than that of "controversy," and one might contend that, where jurisdiction is premised on a federal question, the nonadverseness of the parties to a settlement class, at least from the textualist perspective, is immaterial. However, even if it were true that the word "case" permits nonadversarial adjudication, it would only mean that settlement classes arising under federal law—which are relatively few and far between—are constitutional. Settlement classes premised on diversity jurisdiction—the large majority of settlement classes heard in federal court—would still be beyond the court's Article III authority. Moreover, no federal court has ever suggested that the "case" requirement permits nonadversarial suits, nor would such a position be defensible. History, Framers' intent, and the Court's jurisprudence all support reading the terms

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160 See Carrington and Apanovitch, 39 Ariz L Rev at 463 (cited in note 32):

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

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

"case" and "controversy" synonymously, to require adverseness in diversity and federal question suits alike.

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

In traditional, nonclass litigation, the *Bancorp* rule provides the court the requisite authority to dismiss the suit with or without prejudice when the parties settle. Although the act of dismissal is, per se, an exercise of the court's Article III authority in the absence of a continuing adversarial dispute, it is appropriately viewed, in a commonsense manner, as incidental to the underlying adversarial presettlement proceedings. Similarly, a court's ability to enter a consent decree that resolves previously adversarial litigation is appropriately viewed as ancillary to the adjudicatory process. In contrast, the settlement class requires the court to act beyond the scope of its *Bancorp* authority. Where the settlement, request for certification, and complaint are all filed at the same time, there is no in-court adversary proceeding to

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162 513 US 18 (1994).

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

164 *Bancorp*, 513 US at 22, quoting *Chandler v Judicial Council of the Tenth Circuit*, 398 US 74, 111 (1970) (Harlan concurring) (finding that various supervisory tasks of the Judicial Council were appropriate under Article III). See also Avery, 12 Bankr Dev J at 409 (cited in note 100) ("[Under *Bancorp*, a]s a general rule, all settled issues in a case are moot. Although the court lacks jurisdiction to decide the merits of any issue which has been settled, it retains jurisdiction to enter a judgment, dismiss or take any other action necessary to dispose of the case.").

which the settlement can be deemed ancillary. From the minute that the parties file with the court, they seek the same outcome. The court is never privy to competitive adversarial proceedings, distinguishing settlement-only certification from the court's "primary, dispute-deciding" responsibilities discussed in *Bancorp*.

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

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

The Fifth Circuit has reasoned that because the parties to a settlement class occupied "adversarial positions . . . before settlement negotiations" concluded, and would return to such positions "if the settlement is not approved," the use of the settlement class device in the case did not violate the textual dictate of Article III, but rather

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165 See *Glidden v Chromalloy American Corp*, 808 F2d 621, 626–27 (7th Cir 1986) (explaining that absent class members are not bound by judgments issued prior to certification).

166 Of course, merely because the class settlement is, as a general matter, constitutional under the Article III adverseness requirement does not mean that all class settlements are legitimate. The class settlement may still pose structural difficulties, wholly apart from its adverseness, which are beyond the scope of this Article.

167 See FRCP 23(e)(1)(A).

resolved a "truly" adversarial dispute.[168] This argument misinterprets the limits on judicial authority set forth by the case-or-controversy requirement. The text of Article III imposes a categorical limit on the court's jurisdiction, mandating that there be a live, adversarial dispute between plaintiff and defendant at the time they request judicial intervention,[169] as well as at all times during the suit.[170] This line is rooted in the Court's application of Article III's mootness doctrine in the context of the adverseness requirement. There are a number of cases in which the Court has dismissed a suit as nonadversarial due to settlement while appeal was pending.[171] If the Fifth Circuit were correct, it would be impossible to determine at exactly what point prior to suit the parties would need to be adverse. One year? Five years? One need only recall our hypothetical about the parties who have settled their differences by entering into a contract, and then sue in federal court for a declaration of the contract's validity. Clearly, there would be no Article III jurisdiction, because the parties are not adverse—at the very least—*at the time of suit*. Yet under the Fifth Circuit's approach, presumably Article III jurisdiction would exist in this hypothetical, because at some point prior to their request for judicial intervention the parties were truly adverse. Such a conclusion, however, would be unambiguously incorrect under established Article III jurisprudence. The settlement class action is no different: at the time the class proceeding is brought, adverseness is completely absent.

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

The plain meaning of Article III, supported by the Court's case-or-controversy jurisprudence, conclusively establishes the inherent unconstitutionality of the settlement class. One need look no further than these sources to demonstrate the fatal constitutional flaw in certification of a class for settlement only, given that the parties no longer seek diverse outcomes. However, to shed light on the values underlying the adverseness requirement, as well as to demonstrate the harm in per-

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168 *In re Asbestos Litigation*, 90 F3d at 988–89. See also *In re Orthopedic Bone Screw Products*, 176 FRD 158, 172 (ED Pa 1997) (finding no violation of Article III because until the time of certification and settlement, the parties were adverse).

169 See *Muskrat*, 219 US at 357 ("[Case or controversy] implies the existence of *present* or possible adverse parties.") (emphasis added).

170 See, for example, *Lake Coal Co v Roberts & Schaefer Co*, 474 US 120, 120 (1985) (dismissing the case on appeal due to the "complete settlement of the underlying causes of action").

171 See, for example, *Cleveland v Chamberlain*, 66 US (1 Black) 419, 425 (1862) (dismissing the case on appeal after finding that the parties to the initial dispute had settled and that the appellant was merely attempting "to obtain[] a decision injurious to the rights and interests of third parties").

mitting the settlement class to operate unobstructed within an adversary system, we move beyond these arguments. The settlement class practice undermines the values fostered by the adverseness requirement, including the private interest in protecting the individual litigant and the public interest in maintaining constitutional qualifications on the federal judiciary.

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

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

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

versarial agreement, even though that evidence may reveal critical details about the effect of the settlement on absent class members.

Most courts and commentators have viewed this breakdown in incentives as solely a subconstitutional problem, looking at it through the lens of the Rule 23(a)(4) adequacy of representation requirement. We take the argument one step further, conceptualizing the link between the settlement class, the constitutional requirements of Article III, and the broader goals of the adversary system. Specifically, we employ the settlement class to demonstrate the importance of the prophylactic nature of Article III's ban on nonadversarial litigation. Although the adequacy of representation inquiry, as well as other Rule 23 requirements, offers protection to litigants on a case-by-case basis, it is far more vulnerable to mistakes than is a categorical, ex ante rule that nonadversarial suits are nonjusticiable.

a) The settlement class, adversary protections, and evidence production. The parties to a settlement class agree, before requesting class certification, on the desired outcome of the suit. They no longer seek diverse outcomes, and thus do not—and in fact, have a disincentive to—dispute the satisfaction of Rule 23's certification requirements or the fairness of settlement and compensation terms. Two interrelated factors explain the disincentive to create a concrete record for the court's appraisal: the jointly held intent to bind absent class members; and the resultant lack of an economic or structural incentive to present the court with information that would jeopardize court approval of the precertification settlement. First, the sole motive of class and defense counsel in bringing to the court their settlement agreement, negotiated privately, is to bind the interests of absent class members.[172] If this were not so, counsel would presumably draft a private contract, enforceable under state law, embodying the terms of their agreement. By instead filing a request for certification with the court, these parties have decided that their private agreement, standing alone, is insufficient to meet their needs. Instead, the negotiating parties, by seeking class certification for settlement only, request the court's assistance in affecting the rights of third parties, over whom the negotiating parties otherwise have no control. The rationales are two-fold. For

[172] In this way, the settlement class strongly resembles the fact pattern in *Cleveland*, where the Court rejected as nonjusticiable a suit in which the plaintiff bought out the defendant, such that the interests on both sides of the dispute were one and the same. 66 US (1 Black) at 426. The Court held that the plaintiff's only remaining interest in the outcome of the suit was to bind the interests of third parties not before the court. "It is plain that this is no adversary proceeding," the Court wrote. "Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interests of persons not parties to the pretended controversy." Id.

the defendant, binding absent class members to the settlement is necessary to protect it against the threat of future individual litigation, which is likely to be costly in terms of both time and money. For class counsel, the circumstances surrounding the creation of a settlement class are full of temptations that conflict with the interests of absent class members. Because of market competition for position as class counsel and other countervailing interests such as the settlement of pending nonclass suits against the defendant, class counsel has a pressing interest in certification, as well as in excluding the voice of other participants—objectors and absent class members alike—who may discourage settlement approval.[173]

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

It may be true that, in any given case, some absent class members would support the terms of settlement. However, there is no way to make this determination in the individual case. Nonadverseness is a structural deficiency that affects the inner working of representative litigation in an adversary system: when they are nonadverse, the in-court representatives lack any motivation to determine whether it is, in fact, true that the suit satisfies the requirements of Rule 23. The implications are two-fold. First, an incomplete record can have a detrimental effect on the class certification process. In *In re General Mo-*

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173 Moreover, because absent class members are inherently passive in the negotiation and certification process, they do not have a chance to assert their own interests. See Part IV.B.2.c (explaining why the right to opt out of the (b)(3) class does not fully protect the interests of the individual litigant).

174 For courts that have recognized the information deficit that flows from the settlement class's nonadverseness, see, for example, *Plummer v Chemical Bank*, 668 F2d 654, 657 (2d Cir 1982) (holding that the trial court record was insufficient to "support a responsible finding that the settlement was fair, reasonable, and adequate" and suggesting that the nonadverseness of the settlement class was to blame for the information deficit).

tors Corp Pick-Up Truck Fuel Tank Products Liability Litigation,[175] the Third Circuit explained that in the settlement class, "the issue of certification is never actively contested."[176] As a result, "the judge never receives the benefit of the adversarial process that provides the information needed to review propriety of the class and the adequacy of settlement."[177] Second, the information deficit can influence settlement approval. Because there is not a "fully developed evidentiary record," the court "is incapable of making the independent assessment of the facts and law required in the adjudicatory context,"[178] including whether the settlement fairly reflects the value of class claims.

One could argue that the litigant-oriented harms that flow from the settlement class also plague the *post*certification class settlement, given that in both scenarios, the parties are nonadversarial at the time that the court conducts the Rule 23(e) fairness hearing. Postcertification nonadverseness, the argument might proceed, limits the court's access to necessary information about the fairness of settlement, in much the same way that precertification nonadverseness affects the certification and settlement approval process. The postcertification class settlement, however, is far less susceptible to the problems recognized by the Brilmayer representation model. First, unlike the settlement class, the interests of class counsel in a postcertification settlement are not dependant on binding the rights of third parties to a private agreement negotiated in their absence. Class counsel in a postcertification settlement need not compete with other attorneys for the right to file the class,[179] and the definition of the class has been already drawn so that she cannot trade the class's claims for those of her inventory clients.[180] Thus, class counsel's interests closely resemble those of the traditional attorney—for example, maximum attorney's fees. These fees are contingent on class recovery, producing an incidental incentive to advance the interest of absent class members in securing a favorable judgment and maximum redress.

Second, postcertification settlement terms are more likely to reflect a fair value of the class's claims than are precertification settlement terms. Due to the ubiquitous risk that she will lose her bid as class counsel, the plaintiffs' attorney in precertification negotiations

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175 55 F3d 768 (3d Cir 1995).

176 Id at 789.

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

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

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

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

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

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

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

182 See Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 Notre Dame L Rev 221, 228–29 (1999):

> Economic models of settlement assume that the parties derive a settlement amount from the likely amount the court will award if the case is tried. In other words, if the two parties to a case were to agree, for example, that after trial the court will definitely award the plaintiff $20,000, but it will cost each side $4000 to bring the case to trial, then the parties could save time and money by settling for somewhere between $16,000 (what the plaintiff would net from trial) and $24,000 (what the defendant would spend in damages plus litigation costs).

But see George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1, 4–5 (1984) (arguing that economic models of settlement are distorted by party optimism and other estimation errors).

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

the class and its representatives will fulfill the needs of absent class members,[184] a benefit that the settlement class court does not enjoy.[185]

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

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

b) The settlement class and the passive judiciary. The lack of litigant adverseness has a significant impact on the court's traditional role in resolving private disputes. In light of the party disincentive to produce evidence challenging the accuracy of certification, the court has two options. First, it could engage in independent factual investi-

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

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

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

187 Willging, Hooper, and Niemic, *Empirical Study of Class Actions* at 10 (cited in note 5). See id at 56 ("[Rates of participation by absent class members were] 11%, 0%, 9%, and 5% of the cases in the four districts. . . . In all four districts, a total of six nonmembers of an alleged class attempted to intervene."). This low level of participation pervaded fairness hearings as well. See id at 57 ("[N]onrepresentative parties were recorded as attending the settlement hearing infrequently, with 14% in E.D. Pa. being the high mark and the other three districts showing 7% to 11% rates of participation.").

188 Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 Ind L Rev 65, 85 (2003) (internal citations omitted). The availability of objectors is a critical distinction between the settlement class and postcertification class settlement. Insofar as the quick pace of and lack of public information available in most settlement classes discourages objectors, when settlement occurs postcertification, objectors have an opportunity to compile a motion for intervention and to provide the court with critical information on the benefits and disadvantages of the class format.

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

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

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

a) Rule 23(a)(4): adequacy of representation. A number of courts have held that the Rule 23(a)(4) adequacy of representation

189 See, for example, *Walker v Bayer Corp*, 1999 US Dist LEXIS 10060, *7–8 (ND Ill) (finding that, if the petitioner could not with reasonable effort gather evidence to qualify for the class payment, he may still be entitled to proceed with an individual action).

190 See *In re General Motors Corp*, 55 F3d at 788, citing *In re Joint E & S District Asbestos Litigation*, 129 BR 710, 802 (E & SD NY 1991) ("[In a settlement class] [t]here is in fact little or no individual client consultation."). See also Macey and Miller, 58 U Chi L Rev at 5 (cited in note 47) (offering a general criticism of relying on named plaintiffs: "The named plaintiff does little—indeed, usually does nothing—to monitor the attorney in order to ensure that representation is competent and zealous.").

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

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

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191 Specifically, for courts that have noted that collusive behavior in the settlement class raises Rule 23(a)(4) adequacy issues, see *Amchem*, 521 US at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); *In re Diet Drugs*, 2000 US Dist LEXIS 12275, *136–40 (ED Pa) ("Unlike *Amchem*, the named class representatives' interests are closely aligned with those of the class, such that fair and adequate representation of the class is ensured."); *In re Ford Motor Co Bronco II Products Liability Litigation*, 1995 US Dist LEXIS 3507, *23 (ED La) ("One of the dangers inherent in class actions settlements is that class counsel 'is potentially an unreliable agent of his principals' and may try to 'sell out' the class in exchange for substantial attorneys' fees.") (internal citation omitted).

192 See G. Chin Chao, *Securities Class Actions and Due Process*, 1996 Colum Bus L Rev 547, 565–74 (summarizing these approaches and providing examples of each).

193 Id at 570–71.

194 Id at 572–74.

195 Id at 565–70.

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

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

Much like the stop sign, Article III's adverseness prerequisite imposes a rigid requirement that the parties to a federal litigation be truly adverse at all times, until the case is resolved one way or another. Both due process and Rule 23(a)(4)'s adequacy requirement, in contrast, involve exclusively a far more individualized inquiry. This does not mean that either due process or (a)(4) is superfluous. Both may perform an extremely important individualized inquiry to protect absent class members, once a finding of adverseness has been made. But surely, neither inquiry can—even in the abstract—perform the salu-

196 See *Johnson*, 319 US at 304 (dismissing the suit for "absence of a genuine adversary issue between the parties"). See also text accompanying notes 89–93.

tary protective function performed by Article III's adverseness requirement.

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

It is true that, at least to a certain extent, the very same problems plague the Rule 23(e) fairness hearing held following settlement of a traditionally litigated class. But, once again, for a number of reasons the dangers of abuse are far greater in the settlement class. First, as previously noted, the settlement of a litigated class occurs only after the court has had the benefit of an adversarial dispute concerning the

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197 See, for example, Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm & Mary L Rev 1, 33 (2000) (arguing that due process problems that flow from binding unrepresented absent class members to a class agreement can be remedied through Rule 23 judicial supervision over the formulation and operation of the class action).

198 There are some examples of "active" courts that, because of the absence of information on the terms and fairness of settlement, have rejected the settlement class after a fairness hearing. See, for example, *Plummer*, 668 F2d at 657 (concluding that the record was insufficient to "support a responsible finding that the settlement was fair, reasonable, and adequate" and remanding for further development of the record). However, even the rejection of a settlement class can be problematic. Specifically, it implicates the hybrid model, under which the decision to address the fairness of the settlement outside the confines of an adversarial dispute works a change in the foundation of underlying substantive law. It also implicates the litigant-oriented interest in being free from unfair preclusion: even when the settlement is rejected, the court's judgment regarding the unacceptability of class certification is binding on class members, evoking concern about the class representative's proper advancement of the interests of absent but bound individuals.

199 *In re General Motors Corp*, 55 F3d at 786.

merits of certification. This is by no means merely a technical difference. When the defendants have the incentive to challenge certification, we may assume that the class representatives who participate in the settlement process are truly adequate champions on behalf of absent class members. This is not true of the settlement class. Second, where settlement occurs following certification, class representatives are necessarily in a far better bargaining position than in the case of the settlement class, where the threat of actual litigation if the settlement process fails is far more theoretical than real. Finally, because many plaintiffs' attorneys enter into settlement class actions with the incentive of disposing of inventory claims and because the process is often plagued by the problem of the reverse auction, the dangers of a court approving an unfair settlement are far greater in the case of a settlement class than in approval of a settlement of a litigated class action.

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

There are a number of problems with reliance on an opt-out right to remedy the litigant-based harms of the settlement class. First and foremost, even if the failure to opt out does constitute consent to inadequate recovery, it does not constitute consent to nonadversarial dispute resolution. The decision to opt out is made against the background assumption of an adversary system, which includes the presupposition that the claim was resolved in a traditional adversary context and that the class representative had the incentive to advance the rights of absent class members. The absent class member faced with

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[200] Compare *Phillips Petroleum v Shutts*, 472 US 797 (1985) (holding that failure to opt out is consent to jurisdiction in a particular forum). But see *Commodity Futures Trading Commission v Schor*, 478 US 833, 849–51 (1986) (holding that while the individual interest in impartial adjudication can be waived, the structural guarantees of Article III cannot); Brilmayer, 93 Harv L Rev at 298 (cited in note 129) (noting that Article III's case-or-controversy requirement is not waivable: if there is no case or controversy, "courts are without power to proceed, regardless of the wishes of the parties").

the decision of whether to opt out of a settlement class is not told that her advocate did not act within the confines of the traditional adversary system and had no incentive to present the court with sufficient information from which to assess whether the compensation promised each class member under the settlement was fair. These factors render the opt-out decision in a settlement class inherently uninformed.

Second, the opt-out device suffers from numerous procedural flaws. As a general matter, "inertia, the complexity of class notices, and the widespread fear of any entanglement with legal proceedings" renders notice and opt-out ineffective in many cases.[201] Although these problems plague both the settlement class and the postcertification class settlement, the latter contains a structural safeguard absent in the former scenario—the newly amended Rule 23(e)(3).[202] The amendment provides that when settlement occurs *after* certification, the court must issue two separate notices: one at the time of certification; one at the time of settlement. This additional opt-out opportunity significantly increases the effectiveness of the right to opt out. The amended Rule 23(e)(3), according to the Advisory Committee, "reflects concern that inertia and a lack of understanding may cause many class members to ignore the original exclusion opportunity," while the second notice, "identify[ing] [ ] proposed binding settlement terms[,] may encourage a more thoughtful response."[203]

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

> [E]ven if [absent class members] have enough information to conclude the settlement is insufficient . . . the mere presentation of the settlement notice with the class notice may pressure even skeptical class members to accept the settlement out of the belief

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201 See Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 Ariz L Rev 923, 936 (1998). See also Redish, 2003 U Chi Legal F at 94–103 (cited in note 144) (arguing that inertia warrants a rule requiring affirmative "opt-in" instead of "opt-out"). For example, opt-out requires the class member to take a number of affirmative steps: she must open her mail, fill out a form, and then send it back. Each required step lessens the probability that the individual will actually seize the opportunity to exclude herself from the class.

202 Rule 23(e)(3) is inapplicable to the settlement class, given that certification and settlement approval occur simultaneously. See FRCP 23, Advisory Committee Notes to the 2003 Amendments ("[Rule 23(e)(3) does not apply when the] class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication.").

203 Id.

> that, unless they are willing to litigate their claims individually—often economically infeasible—they really have no choice.[204]

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

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

a) The hybrid model: the settlement class, nonadversarial litigation, and underlying public goals. Even though the settlement class does not require the court to issue an advisory opinion or expound upon the state of the law, it nevertheless represents a substantial intrusion into the inner workings of the state or federal legislative branches that fashion underlying substantive law. In a suit for damages, where substantive law specifies enforcement by way of a private remedy, the underlying goal is to provide a mechanism by which to simultaneously compensate victims and punish wrongdoers. The decision to place responsibility for statutory enforcement in the hands of victims and their private attorneys is wholly dependent on the assumption that these individuals will have the necessary tools and incentives to prosecute their claims vigorously. When two parties seek divergent outcomes, the individual plaintiff is presumed to possess a competitive

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204 *In re General Motors Corp*, 55 F3d at 789. This is especially true in small claim classes, where maximum possible recovery on the claim is often less than the cost of bringing individual suit, rendering the right to opt out futile.

205 See, for example, *Johnson*, 319 US at 305; *Muskrat*, 219 US at 362–63.

interest in developing her own case, and presenting facts to the court that shed favorable light on her position. Congress must be deemed to presume the existence and effectiveness of this typical adversarial arrangement when empowering the victim to make use of the legal system to enforce the proscriptions contained in the underlying statute.[206]

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

It might be argued that the settlement class action actually furthers underlying legislative policies. Absent the settlement class, the argument proceeds, it would often be impossible to attain legislative goals. In many instances, it might be thought, the class could not satisfy traditional Rule 23 certification criteria, and individual claims are often so small as to make individual suit infeasible. Thus, without the settlement class action, there would be no enforcement at all of substantive policies.

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

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206 See *In re Fibreboard Corp*, 893 F2d 706, 710–11 (5th Cir 1990) ("[The] adversarial backdrop" against which Congress legislates is a "way[] of proceeding [that] reflect[s] far more than habit. [It] reflect[s] the very culture of the jury trial and the case and controversy requirement of Article III.").

207 Redish, 2003 U Chi Legal F at 82 (cited in note 144) (discussing the manner in which class actions threaten to transform the remedial method provided for in the underlying substantive law).

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

The settlement class is a paradigmatic example of such a scenario. The settlement class court functions as a type of administrative "commissioner," under the guise of Article III adjudication. Insofar as the settlement class court assumes an active or supervisory role in the postcertification, postsettlement formulation of distribution and compensation procedures,[208] it performs the executive tasks of "adjust[ing]

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[208] One could argue that in some settlement classes, the court plays only a minimal role in the creation and implementation of a distribution scheme—tasks that are instead performed by the private parties. For example, in *Amchem*, the parties proposed that the administrative compensation scheme would be run by the conglomeration of defendants, and that this group would, on the basis of information provided by individual claimants, make all final determinations as to the claimant's level of injury and corresponding level of compensation. 521 US at 599–600. Despite the semiprivate nature of this scheme, it nevertheless poses constitutional difficulty. First, the court still supervises the distribution of resources, which constitutes judicial exercise of an executive function. Second, even if this is not true, and instead private parties are actually responsible for all distribution decisions in the absence of court supervision, the settlement class effectively concedes executive authority to private parties. The implementation of a nonadversarial administrative compensation scheme is the exclusive responsibility of the executive branch. Giving government sanction to the settlement agreement and terms of implementation, the court transfers authority that rightfully belongs to another branch to private persons, jeopardizing the liberal democratic system. Specifically, private individuals lack the "objectivity and accountability" necessary to control the exercise of the power of resource allocation, threatening the interests of both absent class members and the public at large:

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

Redish and Mathews, 53 Emory L J at 4 (cited in note 141). One could argue that, in this regard, the settlement class is no different from a traditional settlement, where the distribution of resources pursuant to their private agreement would also be left to the private parties, to be car-

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

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

Judicial exercise of this type of executive function has a number of implications. First and foremost, it invades a sphere constitutionally reserved for the executive branch. Performance of executive tasks and utilization of executive weapons are textually reserved for the executive branch, regardless of whether those tools currently lay dormant. Insofar as "the Article II Vesting Clause designates, identifies, and describes the President as the *only* proper recipient of executive

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ried out as they saw fit. However, the purely private nonclass settlement does not receive judicial sanction. Rather, upon settlement, the court merely dismisses the suit; the implementation of the agreement is an exercise of a purely private power, regulated by state contract law. In contrast, the settlement class is a governmental directive. The parties choose to bring their nonadversarial agreement to the court to secure Article III approval of the distribution arrangement. And once the court certifies the class for settlement, the settlement requires government approval to bind the thousands of absent class members whose interests are at stake. The terms of settlement are then embodied in a court order—a judicially mandated administrative compensation scheme that does considerably more than govern the rights of those immediately before the court.

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

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

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

power,"[212] judicial cognizance of a settlement class violates the constitutionally mandated separation of powers. Moreover, the case-or-controversy requirement of Article III expressly limits the scope of the judiciary's adjudicatory function, implicitly leaving suits that do not qualify as "cases" or "controversies"—including nonadversarial dispute resolution—for the court's coequal branches.[213]

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

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

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

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

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

215 See Calabresi, 48 Ark L Rev at 65 (cited in 158) ("Even leaving aside conflicts of interest, it is inherently difficult for one person to do two jobs. Yet, that is what is demanded if we rely on members of Congress or judges to perform the executive tasks that the Constitution leaves to the President and his agents.").

V. THE INCOMPATIBILITY BETWEEN PRAGMATIC BALANCING AND ARTICLE III'S ADVERSENESS REQUIREMENT

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

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

A. Balancing of Private Harms

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

> [t]he District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. . . . The court believed the settlement would create a compensation system that would make more money available for

> plaintiffs who later develop serious illnesses. . . . [I]t suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects.[216]

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

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

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216 521 US at 633, 636–39 (Breyer dissenting in part) (concluding that any problems with regard to conflicts of interests among class members were endemic to "toxic tort cases," and that the likelihood of *some* type of compensation under the terms of the settlement agreement—compensation that was unlikely in the absence of settlement—rendered the agreement inherently "fair[]").

217 See John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L Rev 990, 994 (1995) (arguing that the threat posed by mass torts to the court system—in terms of docket pressures—is greatly overblown; indeed, the "perception that mass tort cases present 'special' problems . . . may arise not from the cases themselves, but from the threshold decision [how] to view them").

218 Consider *In re Joint E and S District Asbestos Litigation*, 14 F3d 726, 733 (2d Cir 1993) (rejecting the argument that proceeding by way of a 23(b)(1)(B) class was far more efficient than filing in a bankruptcy court, given that the latter was statutorily mandated: "the function of federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges"); *In re Fibreboard Corp*, 893 F2d 706, 712 (5th Cir 1990) (rejecting the argument that statistical sampling is the "only realistic way of trying [the class action]" as irrelevant).

219 Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U Chi L Rev 153, 160 (1987) (addressing the constitutional limits on the power of the federal courts under Article III), citing *Valley Forge Christian College v Americans United for Separation of Church and State, Inc*, 454 US 464, 475 (1982). See also *Whitmore v Arkansas*, 495 US 149, 161 (1990):

> [P]etitioner argues next that the Court should create an exception to traditional standing doctrine for this case. The uniqueness of the death penalty and society's interest in its proper imposition, he maintains, justify a relaxed application of standing principles. The short answer to this suggestion is that the requirements of an Art. III "case or controversy" [are] not merely a traditional "rule of practice," but rather [are] imposed directly by the Constitution. It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case.

ized rule has been made long since, in favor of the former. As the Court has explained:

> Article III . . . is not merely a troublesome hurdle to be overcome . . . it is a part of the basic charter promulgated by the Framers.
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> . . .
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> Implicit in the [respondent's position] is the philosophy that . . . "cases and controversies" are at best merely convenient vehicles . . . and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme.[220]

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

B. Balancing of Public Harms

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

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220 *Valley Forge*, 454 US at 476, 489.

221 478 US 833 (1986).

222 Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 Duke L J 679, 705 (1997). This position reflects a "functionalist" approach towards the separation of powers. See

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

Use of a functionalist approach in dealing with the public harms posed by the settlement class is seriously flawed. First, it undermines the Constitution's fundamental goal in imposing a system of separation of powers. As one of us has argued, "Madison described the very accumulation of all power in the hands of one body or individual as the essence of tyranny."[225] In his view, "'tyranny' is not limited to the misuse of [another branch's] power, or even to its exercise. [ ] [I]t is the very fact of its accumulation that [he] equated with tyranny."[226] As a result, the Framers chose not to define "case" or "controversy" by

also *Mistretta*, 488 US at 381 (finding that only when "the whole power of one department is exercised by the same hands which possess the whole power of another department" are "the fundamental principles of a free constitution . . . subverted"), quoting Federalist No 47 (Madison), in *The Federalist* 325–26 (Wesleyan 1961) (Jacob E. Cooke, ed). Functionalism can be contrasted with formalism, which "posits perfect identity between the three 'categories' of 'powers' and the Constitution's three decisionmaking institutions," and "tolerates *no* task-sharing among them." Fitzgerald, 46 Duke L J at 708. See also *Mistretta*, 488 US at 426 (Scalia dissenting) ("In designing [the constitutional] structure, the Framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document."); Redish and Cisar, 41 Duke L J at 474 (cited in note 12).

223 The Court's doctrine in this area, however, reflects a certain amount of eclecticism, given its contemporaneous application of both the formalist and the functionalist approach to separation of powers. For explanations of how to reconcile the Court's jurisprudence in this area, see Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 Admin L J Am U 961, 999–1000 (1995) (noting that when the "challenged action 'encroaches upon a power that the text of the Constitution commits in explicit terms to [another branch],'" the Court applies a formalist approach, but when "the power at issue was not explicitly assigned by the text of the Constitution," the Court applies functionalism) (internal citation omitted); Timothy Hui, Note, *A "Tier-ful" Revelation: A Principled Approach to Separation of Powers*, 34 Wm & Mary L Rev 1403, 1404–05 (1993) (explaining that the Court consistently applies a formalist analysis when Congress is overreaching, and applies functionalism when judicial or executive self-aggrandizement is in question). But see Ronald J. Krotoszynski, *On the Danger of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 Wm & Mary L Rev 417, 480 (1997) (critiquing the Court's distinction between legislative aggrandizement on the one hand and judicial or executive aggrandizement on the other, arguing that "[t]he Court has it precisely backwards").

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

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

226 Id.

the functional impact of judicial activity on the operations of other departments or by reference to a balancing test. Rather, the case-or-controversy language itself was their determination of how far the judicial branch could insert itself into the actions and policies of the other branches. On their view, as evidenced by their definition of "judicial power" in Article III, the vesting of any legislative or executive authority in the judicial branch unduly accretes power to the judiciary.

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

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

VI. CONCLUSION

The lower federal courts have willingly embraced the settlement class action practice for its ability to offer victims compensation and clear dockets en masse. In assuming jurisdiction over such suits, however, these courts have neglected their fundamental Article III obliga-

227 Id at 463.

228 Id at 465.

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

tion to hear only cases or controversies—an obligation rooted in the text, jurisprudence, and values served by the adverseness requirement. This Article has sought to critique current practice, by viewing it through the lens of a new articulation of the values underlying Article III's adverseness requirement. Although a number of scholars have called for revisions in settlement class practice, none has recognized that the settlement class is based on fundamentally flawed constitutional foundations, a fact that becomes all too clear once one acknowledges the practice's inherent nonadverseness. This recognition should, in turn, move us toward appreciation of the constitutional invalidity of precertification class settlement.