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Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals

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

Adopted as Rule 23 in the original Federal Rules of Civil Procedure in 1937, the federal class action device was dramatically revised in 1966, when it largely assumed its current format.[4] Since the early 1990s, the Rules Advisory Committee has considered, but for the most part declined to implement, a number of

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

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

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

[4] See FRCP 23. The rule remained unchanged until 1987 when subdivision (c) was amended to eliminate all gender-specific language. In 1998, Rule 23(f) was added to permit courts of appeal to exercise discretion to hear interlocutory appeal of orders granting or denying class certification. In April 2003, Rule 23 was amended in several ways. See *Moore's Federal Rules Pamphlet 2001* 214 (Lexis 2000). See also note 5. None of those amendments, however, in any way moots the propositions in this article.

significant structural changes in Rule 23's format.[5] The Committee continues to struggle with the possibility of more far-reaching amendment of the Rule.[6] Scholars have also devoted substantial attention to the class action issue, particularly its increasing use in the mass tort context.[7]

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[5] "[I]n 1991 . . . the Judicial Conference asked the [Advisory] Committee to begin a reconsideration of the Rule in light of the upheaval in modern civil litigation since adoption of the Rule." David F. Levi, *Memorandum to the Civil Rules Advisory Committee: Perspectives on Rule 23 Including the Problem of Overlapping Classes* 4 (Apr 24, 2002), available online at <http://www.lfcj.com/articles/display.asp?artnum=70> (visited Aug 25, 2003). Judge Levi further notes that "[a]t the beginning, the Committee developed a comprehensive re-draft of the Rule. In 1992, Judge Pointer, Chair of the Committee . . . prepared a revision that . . . provided for opt-in classes at the court's discretion . . . ." Id. The Committee recommended, and ultimately the Supreme Court promulgated, the new Rule 23(f), effective December 1, 1998, which authorized a court of appeals, in its discretion, to permit an appeal from an order of a district court granting or denying class action certification. See FRCP 23(f); FRCP 23(f) Advisory Committee's Note, 1998 Amendments. For an approving commentary on the addition of Rule 23(f), see Linda S. Mullenix, *Some Joy in Wholeville: Rule 23(f), a Good Rulemaking,* 69 Tenn L Rev 97 (2001). Far-reaching additional reforms were proposed, but ultimately not promulgated, in 1996. For a general discussion of the 1996 proposed reforms of Rule 23, see George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions,* 26 J Legal Stud 521, 537–39 (1997). Reforms to Rule 23 were also proposed in 2001. See *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil and Criminal Procedure and the Rules of Evidence,* 201 FRD 560, 586–657 (2001).

[6] Advisory Committee officials recently indicated that "[t]here are several areas that may yet deserve additional attention and that have not received definitive answers . . . ." Levi, *Memorandum to the Civil Rules Advisory Committee* at 7 (cited in note 5). In particular, the Committee "may . . . reconsider the opt-in/opt-out question. The 1966 Committee adopted an 'opt-out' provision but did not foresee the consequences of doing so." Id at 7–8. In 1992, a Committee draft recommended providing the trial court with discretion to certify the class as an opt-in or opt-out class, but the recommendation was "then withdrawn on the Standing Committee's advice that further consideration would be required before such a sweeping proposal could be published for public comment." Id. That recommendation "might provide a starting point" for the current Committee's reconsideration of the issue. Id. In his memorandum, Judge Levi writes: "In the years since that time, we have engaged in [the further consideration called for by the Standing Committee], and can now appreciate how prescient and sophisticated that first effort was." Levi, *Memorandum to Civil Rules Advisory Committee* at 5 (cited in note 5). For a detailed examination of the opt-out issue and a recommendation for an amendment replacing opt-out with opt-in, see text accompanying notes 82–106. For a recommendation for dramatic revision in the current opt-out procedure, see Part IV B.

[7] See, for example, sources cited in note 3. See also John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum L Rev 1343 (1995) (examining the development of the mass tort class action and proposing remedies to protect the interests of future claimants); Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform,* 73 Va L Rev 845 (1987) (arguing that mass tort actions pose a responsibility dilemma and suggesting non-tort solutions). These citations, it should be noted, are only a few of a considerably longer list.

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

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[8] Pre-existing scholarly critiques of the class action differ substantially from my own. Professor Coffee has pointed to "three distinct themes" of academic criticism that have been leveled at class actions: first, "that the legal rules governing the private attorney general have created misincentives that unnecessarily frustrate the utility of private enforcement;" second, "that the incentive to litigate may be inherently excessive, in large part because the parties to an action do not bear its public costs," leading to a "failure to internalize the full cost of litigation, including the costs of the judicial systems," resulting in an artificial inflation in the demand for litigation as a "public subsidy equal to these costs, and the private incentive to litigate exceeds the social incentive," causing "an excessive reliance on law and lawyers;" and finally, that "the social benefits of litigation brought by private attorneys general" should be discounted because "rational, well-informed plaintiffs might bring an action that has no chance of success at trial in order to extort a recovery from the defendants." John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum L Rev 669, 671–72 (1986). See also Coffee, 95 Colum L Rev at 1345–49 (cited in note 7).

In contrast to these economic critiques, my analysis focuses exclusively on criticisms derived from the perspective of American political theory. Nor is my critique based on concerns about agency problems growing out of plaintiffs' attorneys' alleged failure to satisfy their attorney-client obligations to the class members. Finally, I am not arguing, as Judge Friendly did many years ago, that "the benefits to the individual class members are usually minimal" while lawyer compensation "seems inordinate." Henry Friendly, *Federal Jurisdiction: A General View* 119–20 (Columbia 1976). See also Edward J. Ross, *Rule 23(b) Class Actions—A Matter of "Practice and Procedure" Or "Substantive Right"?* 27 Emory L J 247, 249 (1978) (commenting that "recovery from the settlement of a class action does not necessarily inure to the allegedly damaged class members; the real reward is often to their lawyers"). My concern, rather, is with the all-too-frequent situation in which, for all practical purposes, the class is simply irrelevant to the suit because class members effectively receive *no* meaningful relief.

one of implementing and facilitating the enforcement of existing substantive law.[9]

In considering the modern class action's problematic impact on American democracy, it is important to keep in mind a central fact often ignored in modern procedural scholarship: the class action was never designed to serve as a free-standing legal device for the purpose of "doing justice," nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds or as a mechanism by which to redistribute wealth.[10] Both its structure and description, rather, make clear that it is nothing more than an elaborate procedural device designed to facilitate the enforcement of pre-existing substantive law. A class action suit, after all, does not "arise under" Rule 23 of the Federal Rules of Civil Procedure. If no pre-existing substantive law vests a cause of action in plaintiff class members, they cannot bring a class action suit.

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

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

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

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

Moreover, because, like virtually all of the Federal Rules of Civil Procedure, Rule 23's class action device is inherently "transsubstantive,"[11] its use should not vary based upon differences in the nature of the substantive claim. Thus, unlike administrative interpretation and application of a particular statute, invocation of the class action device in no way authorizes creative interpretation or application of the particular substantive law in a case.

The substantive laws enforced by use of the class action device—for example, the federal antitrust laws,[12] federal consumer protection laws,[13] federal securities laws,[14] or, in cases falling within the federal courts' diversity jurisdiction,[15] state tort laws—all contain two fundamental elements: the proscription or regulation of an actor's "primary behavior"[16] and the provision of a remedy or remedies by which these behavioral regulations are to be enforced. For the most part, these laws enforce their behavioral proscriptions by establishing claims for damages for private victims of the proscribed behavior.[17] These provisions are designed to make the private victim whole by obtaining compensation from those who have caused them harm. Moreover, as the statutory provision for treble damages in the antitrust laws illustrates,[18] such damage remedies may also include punitive, as well as compensatory awards. In each of these cases, the assertion of private rights to compensation through the mechanism of litigation may well have the incidental effect of advancing the public interest by

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

[12] 15 USC §§ 1, 2, 15 (2000).

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

[14] 15 USC § 78j (2000).

[15] 28 USC § 1332 (2000).

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

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

[18] 15 USC § 15 (2000).

punishing, deterring, and halting law violations on the part of defendants. In this sense, the private plaintiffs may be viewed as a type of "private attorney general."[19] This is so, even if we presume that the motivation of the litigants who bring suit to enforce their compensatory rights under the relevant substantive law is solely the desire to improve their own personal economic position. But under that law no plaintiff is ever required to enforce his private compensatory right. To the contrary, the substantive law vests that choice exclusively in the individual victim. Thus, in such situations, any incidental benefit to the public interest is wholly contingent upon the private victim's decision to seek to judicially enforce her substantively created remedy.

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

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[19] See Part II.

[20] Under limited circumstances, the Supreme Court has been willing to infer a private damage remedy when Congress has not expressly provided for one. See *J.I. Case Co v Borak*, 377 US 426, 431–34 (1964) (inferring an "implied" damage remedy from the Securities Exchange Act of 1934, 15 USC § 78n(a), based upon Congressional purpose). More recently, however, the Court has severely restricted this practice. See, for example, *Thompson v Thompson*, 484 US 174 (1988) (holding that the Parental Kidnapping Prevention Act of 1980 was intended for use in adjudicating custody disputes and not to create an entirely new cause of action). For a criticism of the practice of implied remedies, see Martin H. Redish, *The Federal Courts in the Political Order* 39 (Carolina Academic 1991) ("The facts that the damage remedy may be thought to foster the beneficial purposes served by the statute or that the legislature may not have foreseen the severity of the

hand, where a statute provides for enforcement exclusively through victim compensation, enforcement of the statute's behavioral norms by any other method inevitably and profoundly alters the statute's substantive directives.

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

In these "faux" class actions, most members of the class never make a conscious choice to seek judicial enforcement of their substantive right to pursue private damages.[22] Indeed, because membership in a Rule 23(b)(3) class is established merely by the class

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problem matter little because the damage remedy was not subjected to the formal requirements of the legislative process ....") (internal citations omitted). But see Richard Stewart and Cass Sunstein, *Public Programs and Private Rights,* 95 Harv L Rev 1193, 1229 (1982) (rejecting criticism of implied remedies as unduly formalistic).

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

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

member's failure to opt out of the class (rather than her decision to affirmatively opt in),[23] many members of the class quite probably never focus upon, recognize, or understand the notification of the class suit. At the very least, it is impossible to be certain of the contrary assumption. Thus, it is quite conceivable that many class members are even unaware that they are parties to a lawsuit. Moreover, when the litigation dust settles, even in cases in which the plaintiff class prevails (either by means of judgment or settlement), often the overwhelming majority of class members never receive anything approaching meaningful compensation for the defendants' violation of their substantive rights. Instead, they are frequently "awarded" the opportunity to receive some form of discount coupon for purchase of a product or service already provided by the defendant in the normal course of business.[24] This relief is provided even though the discount is often for products or services likely to be of little or no use to the overwhelming majority of class members.[25] Despite such virtually non-existent benefit to the class and non-existent loss to the defendant, courts have regularly approved such class settlements.[26] Of course, one might ask, if the absent class members have so little interest in the outcome of the class action, why should the fact that they receive no meaningful compensation really matter? The answer is not that we should be concerned about the individual class members as much as we should be concerned about the fundamental transformation of the underlying substantive law through the purely procedural device of the class action. As a result of the class action procedure, what purports to be a substantive compensatory framework has been furtively transformed into a structure in which no one receives compensation through enforcement of the underlying substantive law. We never know whether the public would approve such a transformation, because it is never informed that such a transformation has been made. It is, then, the impact on the democratic process, rather than the impact on individual class members, that gives rise to concern.

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

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

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

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

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

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

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

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[27] See text accompanying note 114.

[28] See text accompanying note 117.

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

hunter" remedial model that is very different from the one established in the substantive law being enforced in the class action.[30]

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

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

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

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

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

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

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

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

In its current form, the faux class action constitutes a wholly improper and unacceptable departure from the fundamental precepts of American democracy, and thus gives rise to what can be described as "the democratic difficulty." The sources of the serious (and ultimately fatal) problems of democratic theory to which the faux class action gives rise are two-fold: (1) Such actions are not what they purport to be—namely, compensatory damage suits—and (2) in any event these disguised bounty hunter actions have never been authorized by the underlying substantive law that such actions purport to enforce. In effect, then, these actions constitute a form of procedural shell game, in which a procedural device that has been designed to do nothing more than facilitate the enforcement of the substantive law's authorization of private

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[34] See Part II.

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

[36] See text accompanying note 75.

damage suits[37] transforms that private remedial model into a qualitatively different form of remedy that was never part of that substantive law.[38] If the substantive law is to authorize a bounty hunter remedial model as a supplement to or replacement for the pre-existing private damage remedy, the change may not properly be effected through the operation of a procedural device such as Rule 23. Such a dramatic modification of the substantive law through resort to an avowedly procedural device contravenes the fundamental democratic notions of representation and accountability, because the process effectively deceives the electorate. As a result of this deception, the electorate is unable to judge its elected representatives by examining how they voted on these important modifications of enforcement models, because those representatives have never been asked to vote on the issue. The democratic process is substantially undermined as a result.

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

I should emphasize that my argument does not represent an attack on class actions in the abstract. Nor am I suggesting that, as an empirical matter, every class action currently filed should necessarily be viewed as an invocation of a pure bounty hunter remedial model, rather than merely as the procedural collectivization of private compensatory rights.[42] The problem is that, as

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

[38] See Part II.

[39] 28 USC § 2072(b).

[40] See Part III E.

[41] See Part IV.

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

currently structured, Rule 23, at the very least permits and condones what are pure bounty hunter actions in everything but name. The question then becomes how to modify the adjudicatory structure established by the Rule in order to permit the pure class action without authorizing the faux class action.[43] This Article will argue that substantial amendment to Rule 23 is necessary in order to assure that the class action device does nothing more than achieve its stated purpose of facilitating the adjudication of claims authorized by pre-existing substantive law. Toward that end, the Article will seek to fashion specific proposals for revision of the rule that would replace the existing opt-out procedure with an opt-in structure and that would substantially restrict the certification of class actions where there exists doubt that truly compensatory relief could ever be fashioned.[44]

Proponents of the modern class action would no doubt respond that such amendments to Rule 23 would inevitably gut the effectiveness of class actions as a means of policing corporate misdeeds. It is true that many of the class actions currently in existence would be rendered invalid under the amended Rule 23 proposed in this Article. However, the affected actions do not fit within the private rights adjudicatory model in which Rule 23 is supposed to function.[45] In some cases, private rights adjudication would no longer function as an effective means of furthering the public interest by policing illegal corporate behavior, because the individual claims are so small that maintenance of a true class action and the distribution of compensatory relief are rendered infeasible. In such an event, however, it is the legislature's responsibility to consider alternative options by which private activity may be tapped as a means of protecting the public interest. Certainly, express legislative adoption of a bounty hunter model or other *qui tam*-like actions might provide such an alternative, though consideration of the constitutionality of such alternatives exceeds the scope of my inquiry. In a democratic society it is the legislature's responsibility to take such action overtly, rather than covertly—through use of the disguise of a procedural rule

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[43] See Conclusion.

[44] See id.

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

that purports to do nothing more than implement the existing substantive law's private compensatory rights structure. It is only then that the electorate may meaningfully perform its essential function of making informed choices about those who seek to represent it.

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

I. DEMOCRATIC THEORY, PRIVATE LITIGATION, AND PUBLIC GOALS

There are two ways in which the modern class action impacts foundational precepts of democratic theory. One way, raised traditionally in the debates between advocates of communitarianism or civic republicanism on the one hand and pluralism or individualism on the other,[50] concerns the manner in which the pursuit of narrow self-interest impacts the advancement of the broader public interest in a democratic society. In the litigation context, this issue presents itself primarily in the shaping of the so-called "private attorney general" concept. The other way in

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[46] See Part I.

[47] See Part II.

[48] See Part III.

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

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

which democratic theory and class actions intersect concerns the manner in which the modern class action subverts the fundamental democratic precepts of representation and accountability by bringing about a disguised transformation of the underlying substantive law. In order to fully understand the nature of the latter's impact, however, one must initially grasp the essence of the first intersection. For it is only when one comprehends the subtle but significant distinctions, for purposes of democratic theory, in the applications of the private attorney general theory that one can fully understand how the modern class action improperly transforms the essential structure of pre-existing substantive law.

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

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

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

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

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

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

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

On occasion, the legislature may create a private statutory right to damages, at least in part for the purpose of advancing the public interest. Private litigation may often do the government's work for it, by deterring and punishing violations of law. By seeking to benefit the individual litigants, then, adjudication may have the incidental impact of advancing the public interest. As Professor Coffee has written, "[p]robably to a unique degree,

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[55] See, for example, *Sierra Club v Morton*, 405 US 727 (1972).

[56] See, for example, id (noting that an ideological plaintiff lacks the injury in fact required for standing).

[57] See id.

American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies."[58] Coffee further notes that "[t]his system of enforcement ... is most closely associated with the federal antitrust and securities laws and the common law's derivative action, but similar institutional arrangements have developed recently in the environmental, 'mass tort,' and employment discrimination fields."[59] This, in short, describes the concept of the "private attorney general."[60]

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

> [A] supplement to governmental regulation of large, diffuse markets ... reflect[ing] a consensus that the old, ordinary forms of liability were not functioning to discipline their operations .... In [Kalven's and Rosenfeld's] view the representative suit would serve to supplement regulatory agencies both by requiring wrongdoers to give up their ill-gotten gains and by ferreting out instances of

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[58] Coffee, 86 Colum L Rev at 669 (cited in note 8).

[59] Id.

[60] Id. See also Michael L. Rustad, *Smoke Signals From Private Attorneys General in Mega Social Policy Cases*, 51 DePaul L Rev 511, 511 (2001) (encapsulating the articles written for a symposium on tort law and social policy that "reflect the reality that tort law has been transformed from compensating private individuals to private law that empowers often disadvantaged individuals with a public purpose"). The term was coined by Judge Jerome Frank in *Associated Industries of New York State, Inc v Ickes*, 134 F2d 694, 704 (2d Cir 1943) ("Such persons, so authorized, are, so to speak, private Attorney Generals."), vacd as moot, 320 US 707 (1943). See also Coffee, 42 Md L Rev at 215 n 1 (cited in note 30). Professor Coffee notes, however, that "[t]he issue in *Associated Industries* was one of standing in an administrative law dispute, and no question of private damages was involved." Id. Nevertheless, it is quite clear that today the label is employed for private damage actions. Consider id.

[61] Deborah R. Hensler and Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 L & Contemp Probs 137, 137 (2001).

> wrong that might have escaped the regulators' observance.[62]

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

Though at first glance the intersection of private litigation and public goals appears to be both simple and straightforward, closer examination of the role of the modern private class action in the service of the public interest reveals that both empirical and conceptual ambiguities exist about the nature of the public-private interaction. The former have already been noted by others, while the latter appear to have been completely overlooked. On an empirical level, questions have been raised concerning the extent to which the private class action effectively fosters the public interest as a supplement to out-manned and out-gunned governmental agencies. Many class actions come in the form of what have been called "coattail" classes—in other words, class actions that follow successful governmental litigation on either the civil or criminal fronts, and feed off of the fruits of the governmental agency's efforts.[64] In such situations, the class action does not itself ferret out illegal corporate behavior, spurred by the private economic incentive provided by the creation of damage remedies. To the contrary, the government has already brought such illegality to light and successfully imposed punishment. The

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[62] Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 232 (Yale 1987) (referencing Harry Kalven, Jr. and Maurice Rosenfeld, *The Contemporary Function of the Class Suit,* 8 U Chi L Rev 684, 721 (1941)).

[63] Yeazell, *From Medieval Group Litigation* at 232 (cited in note 62).

[64] See Howard M. Erichson, *Coattail Class Actions: Reflections On Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation,* 34 UC Davis L Rev 1, 5 (2000) (defining "coattail class action" as "a class action that follows government litigation, seeking to benefit from the government's work"). See also Bryant Garth, Ilene H. Nagel, and S. Jay Plager, *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation,* 61 S Cal L Rev 353, 376 (1988) (explaining an empirical study demonstrating that in modern class actions, "private attorneys tended to 'piggyback' their cases on governmental investigations, even to the extent of copying the government's complaint") (internal citation omitted); Coffee, 42 Md L Rev at 220–23 (1983) (cited in note 30) ("[T]he available empirical evidence does not provide much support for the thesis that the private attorney general significantly supplements public law enforcement by increasing the probability of detection .... [A] recurring pattern is evident under which the private attorney general simply piggybacks on the efforts of public agencies . . . in order to reap the gains from the investigative work undertaken by these agencies. As a result, the private attorney general does not seem to broaden the scope of law enforcement, but rather only intensifies the penalty.") (internal citations omitted).

private action simply basks in the light of the government agency's efforts.[65] While some have criticized the coattail class action,[66] it does not necessarily follow that class actions are pointless in coattail situations. The class action may well justify its existence, merely by performing the extremely valuable function of compensating large numbers of victims in a relatively efficient manner.[67] Moreover, even coattail classes may advance the public interest by adding to the deterrence of corporate wrongdoing.[68] The fact remains, however, that coattail class actions obviously fail to perform the classic function of privately generated exposure of unlawful behavior traditionally facilitated by the private-attorney general concept.

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

Scholars have already recognized one dichotomy within the broader concept of the private attorney general. Commentators

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[65] Professor Erichson notes that "[t]he chance of successful private litigation rises dramatically when government litigation paves the way." Erichson, 34 UC Davis L Rev at 5 (internal citation omitted) (cited in note 64).

[66] See id at 3 ("[S]ome observers object to the easy ride that plaintiffs and their lawyers get by piggybacking on government actions."). Professor Erichson points to an editorial in the Wall Street Journal labeling class counsel in the Microsoft class actions as "tort parasites" and a reference in the Washington Post to class action lawyers as "predatory" and the class actions, themselves, as "simple buzzardry." Id (internal citations omitted).

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

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

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

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

What no one appears to have recognized, however, is the legally and theoretically significant dichotomy that exists within the concept of what have been described, somewhat overinclusively, as "bounty hunter" class actions.[73] As already noted, this category is thought to include those actions brought exclusively for the purpose of personal gain, rather than for broader public interest concerns. But there exist two very different subcategories of such "personal interest" litigation. One is properly described as "compensatory" litigation. In these cases, one can readily presume that those bringing suit—both plaintiffs and their attorneys—are motivated exclusively by considerations of narrow self-interest: the plaintiffs seek to make themselves economically

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[70] Garth, Nagel, and Plager, 61 S Cal L Rev at 353–54 (cited in note 64) (noting that sometimes the private attorney general is considered a "Lone Ranger" and at other times, a "bounty hunter").

[71] See text accompanying notes 57–59.

[72] See text accompanying notes 34–35.

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

whole by obtaining compensation for their injuries caused by the defendants, and the attorneys serve as "hired guns," doing nothing more than receiving compensation for performing a service on behalf of a client. Such suits may nevertheless be categorized as private attorney general actions, because they may well have the incidental impact—perhaps even intended by the legislative creation of the private right—of exposing and punishing law violations. In this sense, private litigation serves the public interest, regardless of the motivation of those bringing suit.

The "self-interest" litigation category of private attorney general actions includes an additional subcategory, also appropriately described as "bounty hunter" litigation. But it is important to distinguish this narrow subcategory from the primary category of "personal interest" litigation itself. Neither in the Old West nor in more recent times has a bounty hunter acted on behalf of the interests of specific private individuals, nor have they sought compensation for injury caused to themselves by others.[74] Bounty hunters, instead, have sought to serve the interests of the community by apprehending (and sometimes punishing) those who disturb or threaten the public peace. In exchange, the community has rewarded them. It is reasonable to assume that invariably it was the reward, rather than a sense of civic-mindedness, that has traditionally driven the bounty hunters (though of course the two motivations are by no means mutually exclusive). It is therefore probably fair to say that the work of the bounty hunters effectively illustrates the intersection of self-interest and public interest. But this intersection does not involve the additional purpose of simultaneously compensating the victims of the apprehended wrongdoer. Thus, the appropriate litigation analogy to the bounty hunters is not the private compensatory action, for the simple reason that the work of bounty hunters has never been thought to include efforts to obtain compensation for private victims.

A more appropriate legal analogy to the bounty hunter is the *qui tam* action. In its modern form, the *qui tam* action is embodied in the False Claims Act, which authorizes private citizens (referred to as "relators") to bring suit against defendants who have knowingly defrauded the United States government.[75] In order to induce such private action, the Act authorizes the private plain-

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[74] See text accompanying notes 32–35.

[75] 31 USC §§ 3729, 3730(b) (2000).

tiff to recover a percentage of the proceeds from the action.[76] In this manner, "the *qui tam* provision works to provide an incentive for private litigants to expose the fraud and benefit from the recovery."[77] Commentators have noted that "the number of *qui tam* suits filed is accelerating each year and recoveries are steadily trending upward."[78] The *qui tam* plaintiff has suffered no personal injury at the hands of the defendant that she is seeking to remedy through adjudication. Rather, the plaintiff's apparent motivation is to obtain the reward offered by the government for ferreting out and judicially punishing fraud against the government.[79] In this sense, the *qui tam* action represents an adjudicatory parallel to the actions and motivations of the Old West's bounty hunter.[80]

Once one understands the subtle but important distinctions among the categories and subcategories of private attorney general actions, it is appropriate to examine the modern class action in light of this background. Such an examination reveals that in its present form, the modern class action includes cases that fall within all three of the relevant categories: idealistic, self-interested, and its two sub-categories, private compensatory and

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

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

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

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

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

bounty hunter. The problem is that the substantive law that the class action purports to enforce invariably fails to authorize private attorney general actions of the bounty hunter variety.[81] Moreover, at no point does anyone acknowledge the true character of those class actions that properly fall within the bounty hunter category. Rather, such actions are universally described, quite inaccurately, to be of the private compensatory variety. This is so despite the fact that in many such actions the only individuals involved in and financially motivated by the possibility of recovery are the attorneys, who have never suffered a legally cognizable and compensable injury at the hands of the defendants. The following section provides a detailed examination of the modern class action's legal structure, in an effort to explain how what purports to be a private compensatory action and what legally is permitted to be nothing more than a private compensatory action in reality transforms itself into a disguised bounty hunter action.

II. THE MODERN CLASS ACTION AS A BOUNTY HUNTER SUIT

If one seeks to determine exactly how the modern class action fits within the framework of private attorney general actions, it is first appropriate to distinguish between the civil rights class action, in which the class seeks primarily injunctive relief, authorized by Rule 23(b)(2),[82] and those class actions brought primarily in order to compensate a class of victims.[83] The former largely fall

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

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

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

under the "idealistic" heading,[84] while the latter generally fall within the "self-interested" category. Of course, even a damages class action may be motivated in part by ideological concerns on the part of both class members and class attorneys. For example, individuals who firmly believe that big business must be curbed for the betterment of the community may eagerly pursue an action for damages as much to bring their political principles into reality as to acquire compensation. We nevertheless may draw this dichotomy because the distinction will be accurate more often than not and, in any event, at this level the implications of the distinction are purely sociological, rather than legal. What may well have significant legal consequences, however, is the distinction between the two different subcategories of self-interested litigation: private compensatory and bounty hunter. Yet as presently structured, Rule 23 effectively authorizes both forms.

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

By establishing membership in the class through the inherently passive procedure of opt-out,[85] Rule 23 creates a framework for litigation that undermines the essential premises of the private compensatory model of adjudication. Pursuant to the private compensatory model, the substantive law simultaneously proscribes specified behavior on the part of a category of actors and vests in the victims of that behavior the individual right to sue the wrongdoer in order to be made whole. None of the laws in question draws any distinction between individual and class injuries. To the contrary, they do nothing more than vest compensatory rights in individual victims. Thus, in its pre-litigation state, the right to sue belongs solely to the individual victim. Rule 23 permits those individual claims to be aggregated in a single action in order to bring about litigation convenience and provide a viable procedural means of vindicating the underlying substantive claims. Yet because the rule transforms individual victims into class members solely on the basis of their failure to remove themselves from the class, rather than by manifestation of their

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

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

affirmative assent to participate, it virtually invites the creation of a class in which, as a practical matter, numerous class members have not only not assented to suit, but are completely unaware that they are even suing. The upshot of this process, then, is that quite probably numerous plaintiffs—the individuals in whom the cause of action has been vested in the first place—are made members of the class without the slightest awareness of the suit.[86]

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

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

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

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

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

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

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

[89] Id at 917. See also id at 921 (finding the entity model "the more appropriate in the class action setting"). Professor Shapiro acknowledges, however, that "substantial institutional problems remain when it comes to implementation." Id at 917.

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

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

Shapiro concedes that:

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

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

In anticipating and responding to criticism of the entity theory, Professor Shapiro effectively underscores the extent to which his entire analysis focuses upon an analytical perspective that is completely beside the point in deciding on the validity of the modern class action. Shapiro, recall, sees the debate as one between individual autonomy and collective justice. He attempts to fight off anticipated attacks on the entity theory that are grounded exclusively in basic autonomy rights of the individual to control his own litigation by pointing to numerous examples of existing entities in which individual members lack autonomy. But the fundamental problem with his analogies is not so much that, unlike the class, membership in these organizations is usu-

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[91] Id at 921.

[92] Id.

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

ally voluntary, but that these organizations are themselves the creations of substantive law that directly regulates private individuals' primary behavior. In contrast, the class action exists as a procedural device designed to implement pre-existing legal regulations of citizens' primary behavior. If the laws establishing these regulations vest compensatory rights not in an entity of plaintiffs but rather in individual victims, then to view the class as an entity effectively transforms the essence of the pre-existing private right.

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

In any event, there is no basis in the text of Rule 23(b)(3) to support the view that the Rule was somehow intended to transform the nature of the substantive rights being enforced from those vested in the individual plaintiff to rights vested in some ethereal entity of plaintiffs. Indeed, while I criticize the Rule for its use of an opt-out procedure,[94] if the Rule's drafters had some form of entity model in mind, they presumably would not have permitted opt-out at all. Instead, the entity of the class would have been permitted to act as the unitary force that it inherently is.[95] To describe the class as an entity, then, represents nothing

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[94] See text accompanying notes 180–81.

[95] Perhaps a stronger argument can be fashioned that the drafters did, in fact, intend classes certified pursuant to either 23(b)(1) or 23(b)(2) to constitute entity-based classes, since no provision for the right of opt-out, or even of required notification, was made for these classes. See Shapiro, 73 Notre Dame L Rev at 925–26 (cited in note 88) (arguing that "the knowledge that these actions generally involve the group as an entity may well have led the rulemakers in 1966 to make such classes 'mandatory'"). On the other hand, arguably the lack of opt-out rights in these classes could be justified by the pragmatically-based compelling need to resolve the entire matter in a single proceeding, because of the harmful impact on either absent class members or the party opposing the class in the absence of class treatment. Such reasoning, however, does not respond to my critique

more than a convenient, after-the-fact rationalization for what is largely a political effort to facilitate the successful operation of the modern class action. Whatever one concludes about the normative social issues implicated by the modern class action, it is clear that those conclusions should not enable the judiciary to contravene the essential nature of the underlying substantive rights.[96] Adoption of an entity view of the class action, however, does just that.

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

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

Although this argument was not fashioned specifically in the context of the opt-in/out-opt debate,[98] one could reasonably rely on it

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grounded in the undermining of the substantive-procedural balance brought about by the denial of opt-out when the underlying substantive law creates only individual rights. The Supreme Court has cast doubt on mandatory classes under certain circumstances, because of their negative impact on litigants' procedural autonomy and therefore construed the scope of the mandatory categories narrowly. See *Ortiz v Fibreboard Corp*, 527 US 815, 842–43 (1999) (stating that a limiting construction of the Rule 23(b)(1)(B) mandatory class "avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims").

[96] See Part II.

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

[98] Professors Macey and Miller, it should be noted, developed the argument in support of the position that individualized notice in small claim class actions should not be re-

to support a preference for opt-out. Because of the overwhelming likelihood that a reasonable class member would choose to include herself in the class, one may appropriately proceed on this presumption, unless and until the class member affirmatively tells us otherwise.

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

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

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quired. See id. They were not specifically focusing upon the opt-out question. See generally id.

[99] See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U Chi L Rev 877, 906 (1987) ("Con-

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

Even in Professor Coffee's "Type B" class actions, where individual claims are presumed to be too small to justify individual suit,[105] it is by no means clear that the argument that plaintiffs have nothing to lose justifies a presumption that absent class members will affirmatively wish to sue. At least as likely is that he will simply have no interest in the possibility of suit, one way or the other, for the simple reason that even under a best case scenario, he is not likely to be materially better off by suing than

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sider the position of a plaintiff whose claim faces either serious problems of factual proof or legal adequacy or who has suffered relatively minor damages. Rationally, such a plaintiff should gravitate to the class action because she has no alternative.").

[100] But see text accompanying notes 106–07.

[101] Coffee, 54 U Chi L Rev at 905 (cited in note 99). See also Shapiro, 73 Notre Dame L Rev at 923–24 (cited in note 88) (defining small claim class actions as "those cases in which the claim of any individual class member for harm done is too small to provide any rational justification to the individual for incurring the costs of litigation"). Professor Shapiro points, as an example, to "a claim on behalf of many purchasers that defendants have engaged in a price-fixing conspiracy to violate the federal antitrust laws. The case would easily fit the small claims category if, even after damages are trebled, the amount due any single purchaser would not exceed, say, $100." Id at 924.

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

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

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

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

by not suing. Harm or benefit classified as *de minimis*, and therefore deemed legally and practically irrelevant, is a concept well established in the law. Similarly, a small claim is, as a general matter, likely to be viewed by a potential plaintiff as *de minimis* and therefore not worthy of legal action, even absent any litigation costs or burdens. To be sure, the potential class member may not actually *oppose* suit; quite probably, he just does not care. But the litigation inertia inherent in the private compensatory model of the governing substantive law requires the victim to exercise his right to sue. A litigant not even willing to complete and mail a simple "yes-or-no" form could hardly be said to have chosen to exercise his right to sue. Thus, one cannot properly presume, even in a "Type B" class action, that absent plaintiffs would necessarily choose to become members of the class.

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

On occasion, government, acting as *parens patriae*, may choose to intercede in order to protect the interests of its citizens.[107] Such situations occur when, due to high informational or transaction costs, individuals are unlikely to be unable to perceive or protect their own legal interests. It is conceivable that in

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

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

particular areas Congress could choose to create a semi-*parens patriae* action, allowing individual plaintiffs to opt out under specified circumstances. But these situations clearly involve substantive policy choices that generally have not been made in the governing substantive law enforced in modern class actions. Those laws, instead, create a compensatory right in individual victims, to be asserted by those victims in their discretion. To allow a rule that purports to do nothing more than create a procedural mechanism to transform pre-existing private compensatory rights into a crude form of *parens patriae* action is to abuse the rules of procedure.[108]

Close examination of the 1966 Advisory Committee's rationale for adopting an opt-out procedure demonstrates the manner in which the Committee's choice was designed to subvert the essential remedial structure of the governing substantive law. According to Judge Levi, the Committee apparently had in mind small-claim, consumer class actions in which no one class member would have a sufficient interest to litigate an individual claim and in which the forces of inertia might be greater than a potential class member's desire to participate, given the small stakes involved.[109] Benjamin Kaplan, who served as Reporter for the 1966 Committee, wrote that for the "small people" who may be prevented from affirmatively opting in due to "ignorance, timidity, [or] unfamiliarity with business or legal matters," the class action "serves something like the function of an administrative proceeding where scattered individuals are represented by the Government."[110] But no matter how small the individual claims, their very existence derives from the substantive law's vesting of those rights *in the individual victim*. According to governing substantive laws, those rights may be judicially enforced only if individual victims choose to exercise them. If the individual injuries recognized by the substantive law are so small as not to justify the individual victim's decision to enforce them, then the rights will not be enforced.

Procedural rules may have the effect of making suit more attractive by reducing adjudicatory transaction costs through an

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

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

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

increase in the fairness or efficiency of the litigation process. However, unless the substantive law establishes some form of public guardian empowered to sue on behalf of injured victims the choice to sue remains in the victim. Indeed, Professor Kaplan's analogy of the class action to an administrative proceeding reveals his understanding that the small-claim class action is designed to transform the private compensatory remedy provided for in the governing substantive law into a wholly different concept.

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

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

Moreover, it is a practical reality today that relatively few class actions proceed to judgment, and it is also a practical reality

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[111] But see text accompanying notes 114–117 (discussing coupon settlements).

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

[113] It is thus not surprising that in her empirical study of class actions, Professor Hensler found that "class members do not always come forward to claim the full amount defendants make available for compensation." Hensler, et al, *Class Actions Dilemmas* at 459 (cited in note 21) (noting that in cases where settlement required class members to come forward to claim modest amounts of compensation, the fraction of compensation funds actually disbursed was modest to negligible).

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

One might respond that Rule 23 already provides adequate means to prevent settlements that mistreat class members in this way. Under Rule 23(e), the court must approve the fairness of every class action settlement.[117] Where a settlement provides class members with a virtually non-existent benefit, one would expect a reviewing court to function as an adequate safety net. But the terms of the Rule provide a reviewing court with absolutely no guidance in determining a proposed settlement's fairness. It is not unlikely that, in making its fairness ruling, the court is often driven more by the desire to avoid the costs and burdens of a class action's adjudication than the need to assure itself that class members have been truly compensated.[118] The

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[114] See Leslie, 49 UCLA L Rev at 993 (cited in note 24). According to the same commentator, "[c]oupon-based settlements most commonly appear in antitrust and consumer class actions." Id at 995. Professor Leslie notes that "[c]oupon settlements appear to be increasing in popularity." Id (internal citation omitted).

[115] Id.

[116] Leslie, 49 UCLA L Rev at 993 (cited in note 24). Other commentators have reacted with greater outrage in their assessment of the widespread use of coupon settlements. See Victor E. Schwartz, Mark A. Behrens, and Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv J on Legis 483, 483 (2000) ("Consumers are being taken for a ride by a renegade legal practice that often compensates them nominally—for example, with coupons—while their lawyers take home millions of dollars in fees.") (internal citations omitted).

[117] FRCP 23(e) ("A class action shall not be dismissed or compromised without the approval of the court . . . .").

[118] See, for example, *In re Mexico Money Transfer Litigation*, 267 F3d 743, 748 (7th Cir 2001) (upholding approval of a coupon settlement), cert denied, 535 US 1018 (2002).

Not all reviewing courts have blindly accepted the fairness of proposed coupon settlements, however. See, for example, *In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F3d 768, 803 (3d Cir 1995) (rejecting lower court approval of a class action settlement, because "a number of factors militate against the

problem appears to have reached even greater heights in a group of cases in which courts have approved settlements that effectively provided absent class members with virtually nothing at all while simultaneously awarding class counsel significant attorneys' fees.[119]

This is not necessarily to imply that in all class actions, absent class members receive no meaningful relief.[120] For purposes of argument, I will presume that in a number of modern class actions the class members actually receive the relief to which they are legally entitled, or at least meaningful compensatory relief. The fact remains, however, that a not insignificant number of modern class actions are resolved without class members receiving what could rationally be deemed real compensation. As presently structured, Rule 23 allows such a result to take place.

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

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conclusion that the class's interests were sufficiently pursued"). The Third Circuit found that

> the settlement arguably did not maximize the class members' interests. Every owner received a coupon whose value could only be realized by purchasing a new truck. Significant obstacles existed to the development of a secondary market in the transfer certificates given that the transfer restrictions and the certificates' limited lifespan minimize the value of the transfer option.

Id. The court also noted that "class counsel effected a settlement that would yield very substantial rewards to them after what, in comparison to the $9.5 million fee, was little work." Id.

[119] An organization in Southern West Virginia, Citizens Against Lawsuit Abuse, has catalogued some of the most abusive examples, though it should be noted that some (but not all) of them occurred in state court. See Mauk, *Lawsuit Abuse*, Charleston Gazette at 5A (cited in note 86).

[120] Professor Hensler, discussing her empirical study of class actions, notes that "[t]he wide range of outcomes that we found in the lawsuits contradicts the view that damage class actions invariably produce little for class members, and that class action attorneys routinely garner the lion's share of settlements." Hensler, et al, *Class Action Dilemmas* at 427 (cited in note 21). She points out, however, that "class counsel were sometimes simply interested in finding a settlement price that the defendants would agree to—rather than in finding out what class members had lost, what defendants had gained, and how likely it was that defendants would actually be held liable if the suit were to go to trial." Id.

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

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

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[121] Id.

that a class action may achieve deterrence does not automatically resolve the problems of democracy raised by the modern class action.

III. REMEDIAL MODELS, BOUNTY HUNTER SUITS, AND THE DEMOCRATIC DIFFICULTY

A. The Political Consequences of the Choice of Remedial Model

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

As already explained, in many instances the governmental choice to prohibit behavior is legislatively implemented by means of a private compensatory remedial model, which seeks simultaneously to compensate those who have been harmed by that behavior and to punish and deter the behavior by those who have engaged in it or are considering doing so.[122] Government, however, has available to it alternative means of enforcing its prohibitions, especially when the effectiveness of the compensatory remedy as a punishment or deterrent is in doubt. This situation will arise where the transaction costs in judicially enforcing compensation remedies are likely to be high, where injured victims may lack the sophistication to bring suit, where either the existence or determination of damage is in doubt, or where the prohibited behavior is deemed sufficiently culpable as to justify punishment, untied to compensation.

When this occurs, government may: (1) replace actual damages with a statutorily determined measure of damages; (2) supplement actual damages with either statutorily determined penalties or an authorization of the judicial award of punitive damages; (3) punish the behavior criminally; (4) authorize the imposition of civil fines; (5) create a system of administrative enforcement; or (6) establish a public guardian to act on behalf of the

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[122] See Part I.

victims. Also, as the discussion of *qui tam* actions shows,[123] in rare cases government has employed a "bounty hunter" model, by providing a non-compensatory reward to private individuals to encourage them to assist in enforcing legal regulation of behavior deemed harmful to the public interest.

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

B. The Foundations of Democracy

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

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[123] See text accompanying note 26.

[124] See Part III.

than raise normative issues of political theory, or whether they also give rise to statutory and/or constitutional violations.

1. *Democracy as representation and accountability.*

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

All scholars who express a foundational belief in democracy, however, must agree on at least one key point. In the words of constitutional and political theorist Alexander Meiklejohn, the ultimate normative premise of democratic theory is that "[g]overnments . . . derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers."[127] It is certainly true that the American governmental system is far from a pure democracy, grounded exclusively on the value of popular sovereignty. Our society also has a countermajoritarian constitutional system, which imposes significant limitations on popular sovereignty, both procedurally and substantively. Concern about the unpredictability and danger of decision-making by uncontrolled masses played an important role in the minds of those who shaped the American Constitution.[128]

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[125] See sources cited in notes 53–55.

[126] Compare Benjamin Barber, *Strong Democracy* (California 1984) (favoring heavy involvement of the citizenry in the democratic process) with Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (Harper 1942) (urging an extremely limited role for the electorate in the democratic process).

[127] Alexander Meiklejohn, *Political Freedom* 9 (Harper 1960). See also Henry Mayo, *An Introduction to Democratic Theory* 103 (Oxford 1960) ("[E]verything necessary to [democratic] theory may be put in terms of (a) legislators (or decision-makers) who are (b) legitimated or authorized to enact public policies, and who are (c) subject or responsible to popular control at free elections."); J. Roland Pennock, *Democratic Political Theory* 310 (Princeton 1979) ("Elections are thought to constitute the great sanction for assuring representative behavior, by showing what the voters consider to be their interests by giving them the incentive to pursue those objectives.").

[128] See Randy E. Barnett, *Constitutional Legitimacy*, 103 Colum L Rev 111, 128 (2003) ("Despite their rhetorical commitment to 'popular sovereignty,' by the time the Constitution was written its framers were pretty well convinced that pure majority rule or democ-

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

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racy was a bad idea."); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 203–43 (Vintage 1997).

[129] US Const Art II, § 1, cl 2; Amend XII (establishing the manner in which the electoral college representatives will be selected and the procedure that the electors will use to elect the President).

[130] US Const Art I, § 3, cl 1. This process of Senatorial election was subsequently changed to a direct electoral process by amendment. See US Const Amend XVII.

[131] See US Const Art I, § 7, cls 2, 3 (presentment clauses); Art I, §§ 1 and 7, cl 2 (bicameralism requirement). See also *INS v Chadha*, 462 US 919 (1983) (holding that a federal immigration statute allowing the House to overrule the Attorney General on deportation decision failed to meet the constitutional requirements for legislative actions of bicameralism and presentment).

[132] See Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 Nw U L Rev 845, 847–48, 854–71 (2001) (emphasizing that separation of powers and interest group power complicate the majoritatian assumption).

[133] See James A. Morone, *The Democratic Wish* 33 (Yale 2d ed 1998) ("Americans broke from England expressing a democratic wish."). See also id at 39 ("When Parliament imposed taxes on the colonies . . . the Americans charged that their own assemblies had not approved the levies—taxation without representation.").

[134] Schumpeter, *Capitalism, Socialism, and Democracy* at 285 (cited in note 126). See also id at 246 (proposing "government approved by the people"); id at 285 (suggesting that a criterion for "identifying the democratic method" is "competition among would-be leaders for the vote of the electorate"). According to democratic theorist Peter Bachrach, Schumpeter thought "it is absurd to believe that 'the people' have rational views on every issue and that the function of their representatives is to carry out their views in the legislative chamber." Peter Bachrach, *The Theory of Democratic Elitism: A Critique* 20 (University 1967). Thus, according to Schumpeter, "the people must understand that they cannot take political action between elections. Even 'bombarding' representatives with letters and

The keys to the form of democracy adopted in the United States, then, are not principles of majoritarianism, but rather—at least for policy choices not controlled by the counter-majoritarian Constitution[135]—the axioms of representation and accountability. In other words, those who make basic, sub-constitutional choices of social policy must (1) have been chosen by the electorate, and (2) be accountable to the electorate if they wish to continue in office. Focus upon commitment to these basic principles of democratic theory at some level moots one of the primary dilemmas of democracy. Both historically and politically, democratic theorists have wavered between the urge to value widespread participatory democracy—what political scientist James Morone refers to as "the democratic wish"[136] —and the simultaneous "dread of government."[137] By selecting those who govern, the electorate contributes to its own governing.[138] At the same time, representative government protects liberty by serving as a check on potentially despotic leadership that has been freed from any accountability to the people.[139]

2. *Attacks on the representation-accountability rationale.*

This does not mean that modern commentators, particularly in the legal field, have universally adopted an unquestioning commitment to these foundational precepts of democracy, on either normative or empirical levels.[140] My colleague Robert Bennett, for example, has argued that, as a practical matter, the individual's vote is invariably meaningless in choosing elected officials.[141] Therefore the primary value of democracy is neither "rep-

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

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

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

[137] Id at 2.

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

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

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

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

resentativeness" nor accountability of elected officials. It is, instead, the incidental benefits to be derived from the democratic conversation to which the governing process gives rise.[142] But while Professor Bennett's point about the meaninglessness of the individual vote is no doubt accurate, the generalization of this insight to the entire electoral process is fundamentally flawed, because it effectively renders a benevolent dictatorship morally indistinguishable from a democracy. Moreover, if the electoral process itself is largely meaningless, what is the point of encouraging conversations about that process among members of the electorate? Thus, it is both logically and practically impossible to separate the developmental values of democracy from commitment to the foundational principles of representation and accountability.

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

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

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[142] Id at 871–76.

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

swers."[144] But it is unclear who, exactly, gets to determine the content of these "substantively right answers." In any event, such reasoning is fundamentally inconsistent with the substantive epistemological humility inherent in any commitment to a democratic system: a society that values democracy only to the extent that it reaches externally derived, predetermined normative conclusions is no more a democracy than Iran was under the Ayatollah Khomeini or the Eastern European Communist states were during the Cold War period. Thus, to the extent modern civic republicans posit the existence of a "good," derived by means external to the will of the populace, that is to legally bind society, they are *rejecting* democracy, rather than *defining* it.

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

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

If one accepts the principles of representation and accountability as the foundations of democracy, it logically follows that laws enacted by the electorate's representatives ought not be kept secret. Nor would it logically be possible for legislators to vote by secret ballot. There is little point in allowing the public both to choose and retain its governing representatives, if the public is unaware of how those representatives voted on legislation, both proposed and enacted. Moreover, it would be even more harmful to democratic interests were government to purport to adopt "Law A" while secretly enacting "Law B" or "Law Not A." At least when legislators' votes on legislation are kept secret, the public is on notice to pursue alternative avenues of assuring itself of the political views of its chosen representatives. When legislators

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

publicly proclaim their support (or opposition) to "Law A," but in reality the legislature has enacted a different or contrary law, the public has been effectively defrauded. Indeed, it is difficult to distinguish such political fraud from a candidate's obtaining money from union workers on the basis of the false assertion that he has actively participated in union activities. Such deceptive lawmaking is far more harmful to democracy than secretive legislation—as problematic as such legislation is—because in such a situation the public is deceived into believing that democracy is actually working.

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

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

[146] See Mashaw, 1 J L, Econ, & Org at 87 (cited in note 9) (finding "it difficult to understand why we do not presently have exactly the 'clowns . . . we deserve.' The dynamics of accountability apparently involve voters willing to vote upon the basis of their represen-

arguably ameliorating factors exists in the context of the surreptitious transformation of governing legislation.

The response might be fashioned that as a general matter, the public is likely to be unaware of and uninterested in either the content or structure of substantive law or the lawmaking process. A majority of the public, the argument proceeds, generally cannot tell the difference between "Law A" and "Law Not A," and therefore little of practical import turns on the openness and candor of the legislative process. In many instances, this assertion would no doubt be accurate. But it most certainly will not be true in all instances. Many segments of the public become energized by one type of law or another, from abortion regulation to welfare standards to international trade policy, to name only a few.[147] Once this point is conceded, however, it becomes impossible to determine, ex ante, which laws will, in fact, engender public interest and concern, and which will not. Therefore, it is necessary to proceed on a general assumption that in order for democracy to function properly, we should presume that all laws stimulate public interest.

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

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tative's record in the legislature. Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls. How is it that we are not being represented?").

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

[148] Consider Abner J. Mikva, *Symposium on the Theory of Public Choice: Foreword,* 74 Va L Rev 167 (1988); Steven Kelman, *"Public Choice" and Public Spirit,* 87 Pub Int 80 (1987).

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

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

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[149] Levi, *Memorandum to the Civil Rules Advisory Committee* at 2 (cited in note 5).
[150] Priest, 26 J Legal Stud at 525 (cited in note 5).
[151] Id.
[152] Id.

democratic function of selecting its governmental representatives on the basis of their legislative choices.

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

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

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

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

tionally, the judiciary itself has, on more than one occasion, expressed disdain for plaintiff class action attorneys.[156]

It should be kept in mind that all of these criticisms have been made while plaintiffs' attorneys were operating under the rubric of what purports to be a private compensatory damage class action framework. While many have pointed critically to the willingness of plaintiff class attorneys "to subordinate the interests of class members to the attorney's own economic self-interest,"[157] the public may temper this negative view with its assumption that at the very least, these individuals are serving a valuable public function by facilitating the compensation of victims injured by corporate wrongdoing. Full public recognition of the fact that, in numerous class actions today, (1) injured victims are usually unaware that suit has been brought on their behalf; (2) plaintiffs generally receive no meaningful compensation as a result of the suit; and (3) the only ones meaningfully rewarded for the judicial punishment of corporate misdeeds are those very same plaintiffs' attorneys who are so widely disdained and mistrusted, may lead to widespread public outrage.

The response might be made that the public is, in fact, already aware of this information. After all, criticism of modern class actions on the grounds that "class action attorneys are the prime beneficiaries" of damage class actions[158] is already widespread. Thus, public outrage should not be expected to increase were the legal reality to be transformed into formal legal rule. But it is dangerous to assume general public understanding of this issue. The class actions in question are, at least superficially, brought to enforce private compensatory rights established by pre-existing substantive law, and injured victims are often paraded as part of the suits. At the very least, then, the existing legal framework likely gives rise to substantial public confusion on the matter. One might further respond that reliance on democratic principles as a basis for criticizing modern class actions

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Republicans of being the 'party of special interests' but the Democrats rarely get tagged as 'the party of trial lawyers,' which they are.").

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

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

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

makes little sense when many of the substantive laws being transformed, such as the antitrust laws, were enacted long before any current citizens were even alive and by legislators who have long passed from the scene. But many of the substantive laws invoked in modern class actions, such as consumer protection or environmental protection, are of much more recent vintage.

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

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

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

and incidental. My argument is that this is far from the case with the modern class action. A rule, promulgated by an unrepresentative and unaccountable body such as the Supreme Court[160] that effectively transforms an essential element of the underlying substantive law is, I submit, on an entirely different level.

E. The Constitutional and Statutory Implications of the Democratic Difficulty

To this point, the analysis has focused largely on the implications of political theory for the structure and operation of the modern class action. It is reasonable to ask, however, whether these considerations of political theory, in turn, have significant implications for issues of constitutional or statutory interpretation. Put in the most concrete terms, one should ask whether the criticisms of the class action that I have made logically lead not only to a need for substantial revision of Rule 23, but also to the judicial invalidation of the Rule or its operation on statutory or constitutional grounds, regardless of any action taken by the Advisory Committee. It may well be possible to fashion arguable constitutional and statutory critiques of modern class action operation. Ultimately, however, it is likely that neither legal basis would support judicial invalidation of any part of Rule 23, for both practical and conceptual reasons.

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

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[160] It is true, of course, that Congress possesses the legislative power to overrule individual Federal Rules, see 28 USC § 2072, so its failure to do so could arguably be taken to represent legislative approval. But such a "legislation-by-inaction" method most assuredly fails to satisfy the Constitution's bicameralism and presentment requirements for the *enactment* of legislation. See *INS v Chadha*, 462 US 919, 946–51 (1983).

1. *Statutory implications.*

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

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[161] 28 USC § 2072(b).

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

[163] 480 US 1 (1987).

[164] Id at 5.

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

Note that, under the "incidental" standard of *Burlington Northern*, the fact that a rule consciously alters the case's outcome does not automatically render the rule an inva-

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

It is nevertheless extremely difficult to predict a successful Enabling Act attack on the opt-out provision of Rule 23, for several reasons. Initially, any such attack on a federal rule faces a significant uphill battle, because of the Supreme Court's strong presumption in favor of the Rules' validity under the Enabling Act. The Court has indicated that "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court . . . give the Rules presumptive validity under both the constitutional and statutory constraints."[168] Sec-

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lid modification of substantive rights. As long as the rule is designed primarily to affect the fairness or efficiency of the adjudicatory process, the fact that it employs the threat of dismissal or a variant of res judicata as a club by which to enforce its procedural directive does not necessarily mean that it abridges, enlarges, or modifies a substantive right.

[166] See Part II A.

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

[168] *Burlington Northern*, 480 US at 6 (1987). But see Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 Notre Dame L Rev 47, 100 (1998) ("It is equally unrealistic to assume that the Court, in transmitting proposed Rule amendments to Congress, has made a determination that the Rules are valid."). See also id at 48–49 (noting that while "the Court has never found a Rule invalid for impermissibly affecting a substantive right," it is also true that "[i]n several recent cases, the Court has

ondly, at least when the opt-out provision is viewed in a vacuum, it is difficult to deny its significant impact on the process of class organization—an unambiguously procedural matter.

Even less vulnerable to a Rules Enabling Act attack is the second of the ominous bookends of the modern class action: the settlement or adjudication of a class action suit in which class members effectively receive no relief. The obvious problem is that such a result is nowhere dictated by the explicit text of Rule 23. Indeed, it is certainly possible, under Rule 23 as currently written, to conduct a class suit that satisfies all of the requirements of the private compensatory remedial model contemplated in the underlying substantive law. This category would include any suit in which (1) meaningful and useful relief is made available to class members, and (2) it is realistic to believe that class members will receive that compensation. Thus, there is nothing explicit in Rule 23 that could be directly challenged under the Rules Enabling Act. In effect, one would be seeking to challenge the Rule 23's *failure to preclude* class actions that did not fall in this legitimate category. It is therefore difficult to imagine how a Rules Enabling Act challenge would even be framed in this context.

It does not necessarily follow, however, that the concerns manifested in the Rules Enabling Act should have no influence on those charged with the duty to consider revisions of the Rules. Though traditionally the Rules Enabling Act's directive on substantive rights had its primary impact on cases involving federal enforcement of state substantive rights,[169] in recent years scholars have adopted the position "that in granting a limited power to promulgate rules, Congress was concerned more about protecting its own prerogatives as an elected national legislature than about the danger that the rules would run afoul of the powers of the states as expressed in the Rules of Decision Act."[170] As Professor Shapiro has correctly noted, "procedure," as used in the Rules

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signaled its willingness to take the substantive rights limitation seriously, treating it as a rule of construction in reading Rules narrowly, so as not to overstep the bounds of the Court's rulemaking authority") (internal citations omitted). It does not appear that such willingness on the part of the Court could have any relevance to the opt-out procedure, however, since that provision does not lend itself to narrowing interpretation. But see *Amchem Products, Inc v Windsor*, 521 US 591, 612–13 (1997) (noting that Rule 23 must be interpreted in conjunction with the Rules Enabling Act).

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

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

Enabling Act, performs the "subordinate role" of "acting as the *means* of determining substantive rights and liabilities."[171] The Rules Enabling Act's restriction of the Rules to procedural matters, then, surely does not authorize a rule that both permits and condones the creation of a form of litigation that completely transforms the remedial model established in the underlying substantive law.

2. *Constitutional implications.*

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

Though in important respects the situation is not identical to the present one under consideration, it is interesting to note that, under established separation of powers doctrine, Congress may not require the Article III federal courts to enforce a procedural or evidentiary rule that alters pre-existing substantive law, unless Congress itself simultaneously alters that substantive law.[172] Though Congress possesses broad power to regulate the jurisdiction of the federal courts,[173] it may not require those courts to act in an unconstitutional manner.[174] To require the federal

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

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

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

[174] See, for example, *United States v Klein*, 80 US (13 Wall) 128, 145–47 (1871) (acknowledging congressional power to limit the Supreme Court's appellate jurisdiction, but holding that the power does not extend to congressional vesting of jurisdiction in a man-

courts to enforce a procedural rule that effectively transforms the governing substantive law would make the federal courts complicit in the commission of a fraud on the electorate, and thereby undermine the courts' integrity.[175]

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

F. Pragmatism, Class Actions, and the Democratic Difficulty

In criticizing the modern class action as a circumvention of the democratic process, I have attempted to link a hard dose of pragmatism to a considerably more abstract analysis, grounded in political theory. I have focused on pragmatic considerations, looking behind technicalities and appearances and determining whether or not a real class exists by assessing practical realities.

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ner that limits the Court's decision making independence). See also Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv L Rev 1362, 1372–73 (1953) (noting that "the difficulty involved in asserting any judicial control in the face of a total denial of jurisdiction doesn't exist if Congress gives jurisdiction but puts strings on it," and arguing that "if Congress directs an Article III court to decide a case," the court could "easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it") (emphasis in original).

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

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

I have also focused on issues of abstract political theory, by condemning class actions on the grounds that they often circumvent the democratic process. I have developed this theoretical critique, however, without regard either to the impact of my analysis on the viability of the modern class action or to the arguably positive social benefits performed by the modern class action. Both aspects of my approach arguably leave me vulnerable to attack.

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

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

Such an argument is seriously flawed, on both empirical and conceptual grounds. Initially, it ignores much of the point of my critique: with its current structure, the class action too often fails to provide meaningful compensation to injured victims. It is true that this failure does not alter the use of class actions as a deterrent to illegal corporate behavior. But the exclusive focus of class action defenders on the procedure's deterrence value is itself misguided. Initially, it suffers from what I describe as "the fallacy of the free-standing class action." Scholars who would make such an argument operate under the fallacious assumption that the class action procedure itself provides a free-standing check on corporate illegality. As already noted, however, it is the underlying substantive law, rather than a procedural rule, that establishes both the standards of corporate illegality and the means of enforcing those standards.[177] If the class action enforces those standards by resort to a remedial model that differs from the remedial

[177] See Part II.

model adopted in the substantive law. It is no defense of the class action to suggest that it deters illegal corporate behavior.

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

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

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

far too broad an empirical brush, thereby effectively destroying real class actions in an effort to ferret out faux class actions.

The anticipated argument brings to light what could be called the problem of categorization. Closer examination reveals that it is in reality a combination of two distinct yet related issues: the problems of both *inter*-class categorization and *intra*-class categorization. Inter-class categorization refers to the overbroad nature of any of the remedies I might suggest, because those remedies are likely to sweep both real and faux class actions within their reach. Intra-class categorization, in contrast, describes the problems caused by my willingness to classify an entire class as faux, even where some minimal number of class members will likely be aware of the suit and/or receive meaningful compensation—for example, where a small number of class members actually take advantage of and benefit from discount coupons. The two concerns are linked by their emphasis on the practical difficulty inherent in any attempt to categorize conceptually class actions that realistically defy such categorization. While it is certainly reasonable to raise such concerns about my critique, ultimately they should not present serious difficulties for remedying the problem I have perceived in the modern class action.

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

[178] See text accompanying notes 103–06.

dure may well improve the efficient and effective enforcement of substantive rights.[179]

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

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

IV. AVOIDING THE DEMOCRATIC DIFFICULTY: RECOMMENDATIONS FOR THE REVISION OF RULE 23

A. The Permutations of Reform

As already noted, the democratic difficulty is created by a synthesis of the ominous bookends of the 23(b)(3) class action—its start and its close. At its start, the inherent passivity brought about by the use of opt-out sets the groundwork for an entirely comatose class of plaintiffs, who have never chosen to enforce their private rights and are even unaware that a suit has been brought on their behalf.[180] At its close, even a successful class action may fail to vindicate class members' private rights by provid-

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

[180] See text accompanying notes 88–89.

ing meaningful compensation—a result easily predictable at the outset of the suit, because of the inherent impossibility of translating a class-based award into concrete, individualized damage awards to class members.[181] In one sense or another, both of the bookends contribute to the ultimate transformation of the class action from an aggregative private compensatory action into what amounts to a pure bounty hunter action. Before one can properly consider specific reform proposals, then, it is appropriate to examine the way to combine the reform of the two problem areas.

There appear to be four such conceivable permutations: (1) revise neither one; (2) revise both; (3) revise only the method of initiation; or (4) revise only the method of resolution. I have already rejected option one, for reasons that should by now be obvious. Thus, we are left to choose among the final three options. It quite probably would be unwise to rely solely on option three. While revising opt-out would undoubtedly do much to bring the class action back to the private compensatory rights remedial model expressly adopted in the governing substantive law, it would be unwise to rely exclusively on such a mode of revision. To alter the problematic aspects of initiation while leaving the constructive non-compensatory/bounty hunter remedial phase that pervades modern damage class actions unchanged would be to leave much of the problem unaffected. Indeed, it is the transformation at the remedial stage from private compensatory to the bounty hunter model that gives rise to the most significant difficulties of democratic theory. Thus, if one were forced to choose between the two stages as the focus of reform, it would seem to make sense to center attention exclusively on the resolution phase, what I have labeled option four. Since there is no logical reason why both ends of the litigation process could not be reformed, however, perhaps the best solution would be to reform both the initiation and the resolution stages—what I have labeled option two.

B. Initiation Reform

If one decides to protect against the democratic difficulty at the initiation stage of a 23(b)(3) class action, the strategy would seem to be clear: simply replace opt-out with opt-in. It is true, of course, that such an amendment would not resolve the question of exactly at what point in the litigation process notice must be

[181] See text accompanying notes 123–24.

sent to class members, but neither would it appear to make that issue any more difficult than it already is. Arguably more troubling are the possible implications of the democratic critique for 23(b)(1) and 23(b)(2) class actions. After all, one could reasonably argue that the very same democratic considerations that render suspect the use of opt-out, rather than opt-in, raise questions, *a fortiori,* about class actions in which class members may not even opt out. In both situations, rights vested in the individual victim under governing substantive law are being exercised, even when the individual has not made the decision to exercise them. Because of this fact, it would seem to make sense to abandon the mandatory nature of at least 23(b)(1) class actions.[182] If particular substantive actions are to be deemed mandatory (subject, of course to procedural due process limitations), it is appropriate for that choice to be made by Congress.

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

In considering the impact of the democratic critique on mandatory 23(b)(2) classes, it is important to keep in mind the context

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[182] The Supreme Court has expressed uneasiness about mandatory damage class actions, though on grounds of procedural due process rather than separation of powers and accountability. See *Ortiz v Fibreboard Corp*, 527 US at 842–43. It is arguable that in 23 (b)(1)(A) class actions, use of a due process balancing calculus adopted in *Mathews v Eldridge*, 424 US 319, 334–35 (1976) (weighing the private interests that will be affected by an official action with the Government's interest in pursuing an action to determine whether due process has been met), could satisfy due process concerns, due to the arguably compelling governmental interest in protecting parties opposing the class from irreconcilable directives growing out of multiple suits. A similar argument, though probably not as strong, could be made to justify 23(b)(1)(B) classes against a procedural due process attack, due to the potentially negative impact on absent class members flowing from multiple suits. Neither rationale, however, is responsive to the concern grounded in considerations of political accountability and representation.

[183] FRCP 23(b)(2).

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

C. Resolution Reform

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

The response could be made that there is no need for reform of Rule 23 in order to ensure against the furtive transformation of the case into a pure bounty hunter action, because courts have more than sufficient power under the current version of Rule 23 to prevent class actions in which the only real parties in interest (other than the defendants) are the class attorneys. Under Rule 23(e), no settlement of a class action may be made absent a judicial determination that the settlement is fair.[185] This mechanism clearly empowers the court to prevent coupon settlements or any other settlement where it finds that no meaningful relief is to be awarded to individual class members. The problem, however, is not that the current version of Rule 23 *prevents* courts from avoiding transforming a class action into a bounty hunter action, but that it does not *require* courts to prohibit such a transformation. Controlled only by the hopelessly vague directive to assure that a settlement is "fair," class action courts have approved numerous settlements that amount to virtually pure bounty hunter

[184] See Part III E.
[185] See FRCP 23(e).

actions in everything but name.[186] The task, then, is to insert language into Rule 23 that will prevent such a result.

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

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

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[186] See Part II.

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

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

At the close of the action,[189] when the court is asked to review the fairness of a proposed settlement, adoption of a more categorical approach is required, for the simple reason that such categorical rules appear to be readily available and can effectively insure against the practices most likely to bring about the improper transformation of a class action into a bounty hunter action. Initially, an amendment to Rule 23 dictating that attorneys' fees be measured by reference to the value of the total number of class member claims actually filed, rather than the total amount of settlement or potential claims, would go far toward deterring pure bounty hunter class actions.[190] Moreover, use of coupon set-

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Of course, in the context of settlement class actions, whose frequency is increasing, the difference is moot.

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

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

[190] Such a proposal was made in Professor Hensler's RAND study, which suggested that "if judges approve coupon settlements . . . they [should] base fee awards on the mone-

tlements generally contributes to the improper transformation into bounty hunter actions, since invariably such coupons will be of little use to the vast majority of class members, even if they are willing to overcome the strong inertia against filing claim forms to obtain such coupons in the first place.[191]

Are there cases in which coupons, given as part of a settlement, actually benefit class members up to the face value of the coupons? Perhaps. But then the question arises whether it is feasible, in the individual case, to distinguish coupons that (1) are likely to be obtained by a substantial number, if not a majority, of class members, and (2) are likely to provide a real economic value to the class members that is roughly equivalent to the coupon's face dollar value. The answer to this question requires thorough empirical investigation that does not appear to have been conducted. If, without the relevant empirical data, one does not feel comfortable predicting that it will be possible for a court to make this judgment accurately in an individual case and, on the basis of anecdotal or casual information, one believes it far more likely than not that the answer to both questions is "no," then the only alternative is to adopt an express categorical rule prohibiting the use of discount coupons in class action settlements.[192]

Such a proposal would no doubt be met by the response that a blanket prohibition on coupon settlements would overwhelm the courts with the burdensome adjudication of complex class actions that would otherwise have settled.[193] But if the use of coupon settlements renders the portrayal of the class action as a

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tary value of coupons *redeemed*, not offered." Hensler and Rowe, 64 L & Contep Probs at 151 (cited in note 61) (emphasis in original).

[191] See notes 115–16 and accompanying text.

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

[193] See id at 1076–77. Professor Leslie is afraid that judicial rejection of any settlement with a coupon component will "deny concrete benefits to the class and force litigation in which every member of the class could wind up with nothing." Id.

compensatory device a sham, effectively transforming it into a legislatively unauthorized *qui tam*-like bounty hunter action, then practical concerns should not persuade us to continue the lie. In any event, it is far more likely that considerably fewer class actions would be brought, because of the enormous difficulties in ultimately transmitting individual small-claim payments to class members. If it is found that such a result undermines effective enforcement of congressional regulation of corporate behavior, Congress has available to it the option of expressly establishing bounty hunter actions, in which uninjured plaintiffs are rewarded for exposing unlawful corporate behavior.[194]

It is arguable that a blanket prohibition on the use of discount coupons in class action settlements goes too far.[195] Perhaps it is possible to fashion less sweeping, more contingently framed restrictions that would nevertheless go far toward preventing the harms to which coupon use currently gives rise. For example, Rule 23(e), directing the court to review proposed class settlements for fairness, could be amended to create a strong presumption against the use of coupon settlements. Under this approach, a court in a particular case would have available a safety valve if it determines that coupons would have real value to individual class members.[196] However, because reviewing courts are generally concerned primarily with the goal of avoiding burdensome litigation, the amended rule would need to provide that the only way the presumption could be overcome would be on the basis of a clear and convincing showing that individual class members are

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[194] It is not entirely clear whether such actions would satisfy the justiciability requirements of Article III, which require injury in fact, traceability of that injury to defendant's behavior, and the possibility of judicial action to remedy that injury. When the only "injury" is the artificial one created by Congress for the very purpose of allowing a suit, the essential elements of private rights adjudication are arguably undermined. While the Supreme Court has upheld *qui tam* actions against Article III attack, *Vermont Agency of Natural Resources v Stevens*, 529 US 765, 774 (2000), it did so in large part on the historical pedigree of the practice, something that such bounty hunter actions would of course lack. But if so, then the surreptitious creation of bounty hunter actions under the guise of the aggregation of classic private compensatory claims becomes even more problematic because they, of course, lack the historical pedigree that was so important to the Court in upholding *qui tam* actions.

[195] See Leslie, 49 UCLA at 1076 (cited in note 24) ("Some coupon settlements may be appropriate. Even critics of coupon settlements recognize the legitimacy of coupon settlements under certain conditions.") (internal citations omitted).

[196] Professor Leslie has suggested another possible reform, "requir[ing] that class counsel be paid in the same currency as the class"—in other words, "the counsel shall receive its fees in coupons as well." Id at 997. However, as a practical matter such an approach is likely tantamount to the blanket prohibition of the use of discount coupons in settlement.

likely to benefit from the coupons. Any approval of the use of coupons should, moreover, be contingent on the filing of claim forms by a majority of class members. Class attorneys and defendants would likely be deterred from entering into bounty hunter settlements under these circumstances.

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

CONCLUSION: DEMOCRATIC THEORY AND LEGAL APATHY

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

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[197] See, for example, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479, 1497–98 (1987) (arguing that statutory interpretation need not conform to the intent of Congress (and therefore, presumably the intent of the electorate) and recommending a dynamic approach to meet changing societal circumstances).

[198] See Parts IV B and IV C.

All too often, the modern 23(b)(3) class action has surreptitiously transformed the governing substantive law, which unambiguously embodies a private compensatory remedial model as the exclusive, primary, or secondary means of enforcing legislative restrictions on primary behavior, into an entirely distinct "bounty hunter" remedial model—one that has not been enacted as part of the substantive law. Pursuant to this approach, uninjured private individuals are rewarded for ferreting out and judicially punishing corporate illegality, much in the manner that classic *qui tam* actions historically have.[199] It has done so, even though the class action exists solely as a procedural device designed to facilitate implementation of existing substantive law. Such a furtive transformation of governing law undermines the principles of accountability and representation that are so essential to any political system that views popular sovereignty as an important element.

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

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

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[199] See text accompanying note 79.

[200] Part III E.

[201] See Part IV.

grounded in fundamental notions of democratic theory, for those proposed revisions.

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

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[202] See Part III F 1.

[203] See, for example, Coffee, 54 U Chi L Rev 877 (cited in note 99) (exploring the causes of the failure of the market for legal services in the class action context); Macey and Miller, 53 U Chi L Rev 1 (cited in note 97) (arguing against providing notice in small claims class actions).