ARE CLASS ACTIONS UNCONSTITUTIONAL?

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WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE CLASS ACTION LAWSUIT. By *Martin H. Redish*. Stanford: Stanford University Press. 2009. Pp. x, 317. $27.95.

INTRODUCTION

Are class actions unconstitutional? Many people—defendants and conservative legislators, not to mention scholars at the American Enterprise Institute—would like them to be. For opponents of the class action, Martin Redish's book *Wholesale Justice*[1] provides some of the most theoretically sophisticated arguments available. The book is a major contribution both to the scholarly literature on class actions and to the larger political debate about this powerful procedural device. The arguments it presents will surely be debated in courtrooms as well as classrooms.

Redish, a leading scholar in constitutional law, federal courts, and civil procedure, argues that studies of class actions have missed an important point: class actions, as they currently exist, violate the Rules Enabling Act and separation-of-powers principles. Congress delegated to the Supreme Court the power to create rules of procedure for the federal courts.[2] Redish argues that this delegation of power does not permit the Court to create rules that transform individual causes of action into monster litigation. Worse yet, the class action brings about this transformation in the absence of democratic accountability, resulting in a type of "stealth" legislation. There is a lot more in Redish's book—he addresses the due process implications of the class action for small claimants who might get nothing while their lawyers walk away with millions, and he makes concrete proposals for reform—but the book's greatest contribution to the ongoing debate over class actions is this structural constitutional point. Redish tests the class action against a coherent vision of American democracy and demonstrates the ways in which it fails to fit into that vision. The book is original, radical, and important. It operates on both theoretical and pragmatic levels and will no doubt play a significant role in the ongoing debate about class actions. It is especially timely as the Supreme Court revisited the relationship between class actions and the substantive law last term in *Shady Grove Orthopedic*

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2. 28 U.S.C. §§ 2071–72 (2006).

Associates v. Allstate Insurance Co.[3] and will decide four more important class action cases in the October 2010 term.[4]

Because Redish's critique could be devastating to the class action rule, scholars of class actions, legislators, and consumer advocates need to address his arguments. Redish is largely right that, with a few exceptions, those of us who write about class actions have paid too little attention to the big constitutional and political theory issues raised by the class action rule.[5] Under his definition of democratic accountability and separation of powers, he is also right about class actions. But his theory is less persuasive when we consider complementary constitutional ideals. In particular, the concept of checks and balances requires the opposite conclusion: class actions *are* constitutional.

This Review of *Wholesale Justice* proceeds in two Parts. I begin by describing Redish's arguments against the class action rule and his proposals for reform; I then respond to them. There is not enough room to delve deeply into his arguments in this Review, but I hope that my summary in Part I will whet the reader's appetite for more. In the second Part, I critique Redish's two central arguments and demonstrate that class actions do not violate principles of separation of powers and that they do not constitute a betrayal of the fundamental requirement of legislative accountability in a democracy. I focus on these points because they are the most original and far-reaching arguments Redish makes.

First, checks and balances, not separation of powers, is the proper metaphor for our constitutional democracy. The powers of the federal government can no more be separated from one another than can the concepts of "substance" and "procedure." This is as true today as it was when Madison pointed it out in several of the *Federalist Papers* attributed to him.[6] In those essays, Madison argued that the maxim that separation of powers is a requirement of free government is not absolute and that overlap between

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3. 130 S. Ct. 1431 (2010).

4. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), *cert. granted sub nom.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (Dec. 6, 2010) (No. 10-277); Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330 (5th Cir. 2010), *cert. granted sub nom.* Erica P. John Fund , Inc. v. Halliburton Co., 131 S. Ct. 856 (Jan. 7, 2011) (No. 09-1403); *In re* Baycol Products Litigation, 593 F.3d 716 (8th Cir. 2010), *cert. granted sub nom.* Smith v. Bayer Corp., 131 S. Ct. 61 (Sept. 28, 2010) (No. 09-1205); Laster v. AT&T Mobility L.L.C., 584 F.3d 849 (9th Cir. 2009), *Cert. granted sub nom.* AT&T Mobility L.L.C. v. Concepcion, 130 S. Ct. 3322 (May 24, 2010) (No. 09-893).

5. Some notable exceptions include, without limitation, Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 Conn. L. Rev. 1239 (2001) (providing a historical analysis of class action suits in the United States); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337 (developing a theory of governance of class actions with reference to political philosophy); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 Ind. L. Rev. 65 (2003) (proposing an alternative regime for governance of small claims class actions based on democratic principles); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L.J. 1623 (1997) (examining collective decision-making procedures in civil rights litigation).

6. 2 The Federalist Nos. 47 at 93–100, 50 at 112–16 (James Madison) (The Lawbook Exchange 2005).

the branches of government is inevitable and necessary for government to function properly. This system of checks and balances has been a foundational principle of American democracy. It supports the power of the Supreme Court, under the Rules Enabling Act, to set forth the class action rule for congressional ratification. Should the class action come to be considered unwise as a policy matter, it will be reformed by political forces. In fact, it already has.

Second, Redish's argument that class actions constitute a kind of stealth legislation points to a real problem with modern legislation: remedies do not reach the same level of salience as causes of action. This is true when laws are passed with great fanfare but little effect because the remedy provided is inadequate as well as when a minor cause of action becomes a major litigation by operation of the class action rule. At the same time, Redish fails to appreciate the fact that although some laws are more salient to voters than others, this does not mean that lawmakers who make these laws are unaccountable. Legislative measures that today garner no interest can tomorrow be the object of reform. So it has been with the class action. The appropriate solution to this accountability problem is a more robust public discussion of procedures and remedies, including but not limited to the class action rule.

I. *Wholesale Justice*

Redish makes three arguments against the class action in *Wholesale Justice*. First, Redish argues that class actions transform substantive rights by collecting individual claims in a single suit. This transformation violates separation-of-powers principles and the Rules Enabling Act because it is achieved through the Supreme Court's rulemaking power rather than by congressional action. Second, he argues that class actions also violate individual rights, including a right of litigants to freedom from association. Third, he argues that settlement class actions in particular are unconstitutional because they violate Article III's case-or-controversy requirement. As Redish himself explains, these arguments are the meat of the book (p. 61), but he also presents some pragmatic suggestions for reformation of the class action rule to render it constitutional.

First, Redish argues that by aggregating claims where the class members are truly absent—"comatose" in Redish's colorful language—the class action fundamentally transforms the underlying right into something else (p. 14). That something else is not what the legislature specifically intended. Often it is a lawsuit run by lawyers offering no meaningful compensation to individual litigants. Redish calls this a "faux class action" (p. 14, passim). Such a suit may have the salutary effects of deterrence, but it is not what the legislature meant to achieve. In this way the procedural rule impermissibly circumvents legislative intent.

A concrete example, drawn from the Supreme Court's recent decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, will help

clarify the issue.[7] Shady Grove Orthopedic Associates provided medical care to a patient who assigned to it her rights to insurance benefits under a health insurance policy issued by Allstate Insurance. Allstate paid eventually, but not on time, and refused to pay the statutory interest that had accrued as a result of the late payment. Shady Grove was owed approximately $500 in interest. It filed a class action lawsuit against Allstate on behalf of all the providers that had claims for statutory interest based on overdue payments from Allstate.[8] Now, instead of being a single suit for $500, Allstate faced an interest penalty in excess of $5,000,000 in a collective litigation. Furthermore, nearly all the members of this hypothetical lawsuit—the absent class members—have little individual interest in filing a suit and probably would not have filed one absent the class action. If the lawsuit yields results, the class members may not even file claim forms because it is too complicated or they do not care enough to do so.

Such small claims lawsuits are brought because the lawyer stands to gain some percentage of the winnings for her trouble. As Redish explains, "[N]o one . . . understands the purpose of this form of class action to be the compensation of class members in the first place."[9] Except, according to Redish, the legislators who created the underlying cause of action. This state of affairs, Redish argues, is not only wrong as a policy matter (which has been argued before); it is also wrong as a constitutional matter because it permits a court-promulgated rule to disfigure a substantive cause of action (assuming that, in creating the substantive law of the state, the legislature intended to create numerous $500 cases, not one litigation worth $5,000,000) (pp. 73–78, 83–85).

Underlying this analysis is the principle that it is the job of the legislature to determine the scope of substantive rights. The class action is a court-promulgated procedural rule. Proposals for amending the Federal Rules of Civil Procedure are first drafted by the Advisory Committee on Civil Rules. The Advisory Committee proposes rules to the Judicial Conference of the United States, which then decides which rules to present to Congress. If Congress does not act by the statutory deadline, the rules go into effect.[10] Redish argues that this system violates the Presentment Clause because Congress cannot legislate by inaction and also exceeds the federal courts'

7. *Shady Grove*, 130 S. Ct. at 1431.

8. *Id.* at 1436–37.

9. P. 42. *Compare* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006) (arguing that a class action that does not directly compensate plaintiffs realizes the deterrence goals of the substantive law), *with* Brian Wolfman & Alan Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996) (arguing that the class action rule ought to do more to protect the interest of individual plaintiffs).

10. *See* 28 U.S.C. §§ 2071–2074 (2006) (authorizing rulemaking power and describing procedure). As with administrative regulations, there is often a notice and comment period before a rule is proposed to the Judicial Conference. *See generally* Catherine Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure,* 150 U. PA. L. REV. 1099 (2002) (arguing in favor of judicial restraint in interpreting the rules, which, if they are to be amended, should be amended through the rulemaking process).

Article III power, which limits them to deciding cases and controversies.[11] What is supposed to save the rulemaking process is that the power of the Court to make such rules is limited by the Rules Enabling Act, which states that the rules may not "enlarge, abridge or modify any substantive right."[12] But Redish rightly points out that the distinction between substantive and procedural laws is so tenuous as to be virtually meaningless (pp. 71–73). Almost all procedural rules have some effect on substantive rights.

The class action is not supposed to expand legislatively created substantive rights. But, as Redish points out, this is exactly what the class action does. In Redish's words, "[T]he class action was never designed to serve as a freestanding 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" (p. 22). This is especially true, he explains, of mandatory class actions, which transform "the DNA of the substantive rights" (p. 130). To the extent that the class action rule transforms rights by multiplying their effect on defendants and limiting their benefit to plaintiffs, Redish argues, it violates separation-of-powers principles. On this point, the four Supreme Court Justices who dissented in *Shady Grove* seem to agree with Redish. As Justice Ginsburg wrote in that case, "The Court today approves Shady Grove's attempt to transform a $500 case into a $5,000,000 award, although the State creating the right to recover has proscribed this alchemy."[13]

Second, Redish argues that the class action subverts individual rights by erasing an individual's cause of action in favor of the collective. Redish explains that litigant autonomy in the resort to governmental processes—judicial, legislative, or administrative—is a central value of our democracy (p. 136). As a due process matter, rights belong to individuals and cannot be taken away by operation of a procedural rule unless individuals willingly choose to participate in that process (p. 136). Another way of thinking about this is that litigants have a right to freedom of association (pp. 159–62) or, rather, freedom to be free from association with a class. For this reason, Redish believes that both mandatory and opt-out class actions violate due process and suggests that damages class actions should only be opt in (p. 174–75). This means that claimants who did nothing will not be part of the class action and will not be precluded from subsequently bringing a competing lawsuit. It is noteworthy that Redish reaches the conclusion that the injunctive class action—the primary procedural vehicle for obtaining the permanent enforcement of the autonomy-promoting right to equal protection of the laws (especially with respect to school desegregation)—is unconstitutional precisely on autonomy grounds (p. 137).

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11. U.S. Const. art. I, § 7; *see also* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 Notre Dame L. Rev. 1419, 1450–52 (2003) (arguing that, because it fails to meet the constitutional requirements of presentment, the class action rule "is but a guideline or rule of thumb whose force derives only from consistent practice and the wisdom that the rule embodies").

12. 28 U.S.C. § 2072.

13. *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

Third, Redish argues that settlement class actions violate the case-or-controversy requirement of Article III (pp. 176–225). A settlement class action describes the situation where lawyers file both a class action complaint and a proposal of settlement at once. The idea is that the class action lawsuit need never be litigated because the parties have already come to an agreement as to how to resolve it. Because the parties have already agreed on a resolution, Redish argues, they lack the case or controversy Article III requires. He explains that "[t]here is simply no . . . 'case' or 'controversy' to include a proceeding in which, from the outset, nothing is disputed and the parties are in complete agreement" (p. 178). Instead, the parties present a done deal in order to have the court ratify the settlement and obtain preclusive effect, or in the language of class action scholars, "global peace."[14] If the court agrees to certify the settlement class action and approves the settlement, all the claimants who failed to opt out will be bound. In Redish's view, this is a misuse of the court system. Returning to the theme of separation of powers, Redish explains that "[a]s the one branch that is not representative of or accountable to the populace, the judiciary may threaten core democratic values unless its actions are tied to performance of the traditional judicial function of dispute resolution" (pp. 179–80). Redish recognizes cases where the Supreme Court has strayed from this position—in the appointment of Article III judges to the Federal Sentencing Commission and in permitting the appointment and supervision of independent counsel[15]—but distinguishes them on the grounds that they are special cases and in any event likely wrongly decided (pp. 205–06).

Can class actions be made constitutional? Redish proposes some far-reaching reforms that he argues will legitimize the class action procedure, but, as he admits, they will also limit class actions considerably. He makes three key proposals. First, settlement class actions should be recognized as an unconstitutional violation of the case-or-controversy requirement of Article III. Second, courts should hold mandatory class actions (that is, injunctive and "limited fund" class actions) unconstitutional because they violate an individual's due process rights, except in the very limited category where the defendant may be subject to inconsistent obligations. Third, all money damages class actions should be permitted only on an opt-in basis, unless litigants can demonstrate that the claims at issue "though sufficiently large to reasonably justify the filing of a claim form as part of a settlement or judicial award, would be insufficiently large to justify individual suit" (p. 231).

These proposals are very radical indeed. It is not clear how many class actions would be able to be certified under this regime. Civil rights class actions, like those based on gender or race discrimination, would not be permitted at all. While individuals would still be able to obtain injunctive relief against a defendant, the courts would have no mechanism by which to

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14. Richard A. Nagareda, Mass Torts in a World of Settlement 214 (2007).

15. Mistretta v. United States, 488 U.S. 361 (1989) (Federal Sentencing Commission); Morrison v. Olson, 487 U.S. 654 (1988) (oversight of independent counsel).

oversee structural change. Instead, plaintiffs would have to pursue a costly strategy of multiple litigations to try and convince a defendant that it should abandon discriminatory policies. With respect to money-damages class actions, opt-in actions in the consumer context would not be very effective in achieving the deterrent purpose of consumer-protection laws because too few class members respond to class notices. Many consumer-protection class actions involve amounts too small to justify individual suit. Redish would let such claims proceed on an opt-out basis only if they are large enough to justify filing a claim. Falling through the cracks of Redish's proposal are claims against defendant corporations who steal very small amounts from a class of consumers. Although such illegal actions cost consumers individually very little—perhaps too little to justify bringing a claim—they amount to an unlawful windfall that the consumer-protection laws are intended to redress.

II. Manufacturing Justice

If Redish is right, then the current class action rule is unconstitutional. What is more, his proposals for reform would render the revised class action rule next to useless for the vindication of civil and consumer rights, among others. There is a lot at stake. So is he right? I disagree with Redish for two reasons. First, "checks and balances," not "separation of powers," is a better description of our constitutional order. Second, at least with respect to class actions, the requirement of democratic accountability (which is a matter of political theory, not constitutional law) has been met. My critique focuses on the arguments about separation of powers and democratic accountability because they are central to Redish's thesis that the class action rule, as currently structured, is unconstitutional, and because they are the most original contribution of the book.

A. *Checks and Balances*

The conception of separation of powers that is the basis for Redish's book is both empirically inaccurate and normatively undesirable. The branches of government are not in fact separate, nor should they be. The idea of strict separation of powers originates with Montesquieu, but of course Montesquieu erred when he stated that the powers of the three branches of government can or ought to be separate. Our government is one of overlapping powers that check one another.[16] This was one of the key insights Madison explored in the *Federalist Papers*. In *Federalist No. 48*, Madison argued against absolute separation of powers, writing that "unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation

16. Judith Resnik convincingly demonstrates an analogous mistake in the Supreme Court's federalism jurisprudence. *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 Yale L.J. 619 (2001).

which the maxim requires as essential to a free government, can never in practice be duly maintained."[17] He elaborated on this idea in *Federalist No. 51*, stating that "the great security against a gradual concentration of the several powers in the same department, consists of giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[18] "Ambition must be made to counteract ambition."[19]

The Supreme Court has never taken an absolutist or formalist view of separation of powers. As Justice Jackson explained in *Youngstown Sheet & Tube Co. v. Sawyer*, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[20] Congress has the power to create Article I courts, for example.[21] It also has the power to delegate rule-making authority to the federal courts.[22] Redish recognizes that these holdings are not likely to change, although he disagrees with them.[23] But the Supreme Court was right to uphold the Rules Enabling Act. In particular, the Court did not usurp congressional power by promulgating Rule 23 because Congress has reviewed and approved that rule through the usual process of legislative enactment several times. The dialogue between the Court and Congress with respect to class actions demonstrates how well a system of "separateness but interdependence" can work.

The debate in the courts and Congress about the desirability of the class action is a rather nice example of the type of dialogue that can occur between the overlapping branches of government. The class action rule was drafted under the auspices of the judicial branch and ratified by Congress. Congress revisited that rule on several occasions. For example, in 1995 legislators became concerned about the proliferation of securities class actions and passed the Public Securities Litigation Reform Act of 1995 ("PSLRA"), which heightened pleading requirements for securities class actions and dictated who could be a representative plaintiff in such a class action.[24] More recently, Congress reconsidered the class action rule in 2005 when it passed the Class Action Fairness Act of 2005 ("CAFA"), legislation that essentially federalized class actions.[25] That act granted broad jurisdiction to the federal courts over all class actions where any class member is from a different state than any defendant and the matter in controversy exceeds five million dol-

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17. The Federalist No. 48, *supra* note 6, at 101.

18. The Federalist No. 51, *supra* note 6, at 117.

19. *Id.*

20. 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

21. Williams v. United States, 289 U.S. 553, 565–67 (1933).

22. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

23. P. 64. Redish is in good company disagreeing with me; Justice Frankfurter made a very similar argument in his dissent in *Sibbach*.

24. Pub. L. No. 104–67, 109 Stat. 737 (1995).

25. Pub. L. No. 109–2, 119 Stat. 4 (2005).

lars.[26] This legislation sweeps most class actions into federal court. CAFA was hotly debated and demonstrates both that class actions are salient to lawmakers and the electorate and that Congress approves of the way the federal courts handle them.

The debate over CAFA proves that legislators were well aware of the effects of the class action rule on individual rights and the manner in which the class action rule transforms small individual causes of action into large-scale litigation. For example, Senator Herb Kohl, who supported the bill, explained, "Right now, people across the country can be dragged into lawsuits unaware of their rights and unarmed on the legal battlefield. What our bill does is give back to regular people their rights and representation."[27] Senator Arlen Specter said of the class action, "What we are really talking about here is a system that impacts the vast majority of people who live in this country."[28] Senator Barbara Boxer, an opponent of CAFA, described the benefits of class actions for individuals like the father of a girl killed by a faulty airbag in a Chrysler minivan, a Wal-Mart worker cheated out of overtime pay, and a firefighter who brought a class action against a credit card company "for cheating her and other consumers out of their vehicles . . . destroying their credit ratings in the process."[29] CAFA also signals that Congress understands the class action to be a form of public law litigation, an idea Redish rejects (pp. 21–24). Congress included a provision that requires notices of settlement to be sent to "appropriate" federal or state officials.[30] This demonstrates mistrust of private lawyers as well as the importance of class actions for the enforcement of socially beneficial laws.

In sum, Congress observed what it regarded as deficiencies in the way class actions were being adjudicated and acted to correct those deficiencies. In both the case of the PSLRA and CAFA, Congress, after debate, specifically ratified the ability of the federal courts to adjudicate claims on a class-wide basis by enacting legislation. As a policy matter, that legislation may be flawed, but that is a separate issue from the constitutional concern Redish raises about default procedural rules overstepping legislative prerogatives.

The legislature is well aware of the effect of the class action device on substantive law. Large-scale revisions of the class action rule are not the only occasion that Congress has acted to limit the effects of that rule. In 1996, Congress limited the ability of legal-services providers that receive federal funds from representing clients in class actions.[31] The Truth in

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26. 28 U.S.C. § 1332(d) (2006). The statute requires the federal court to remand the case to state court when more than two-thirds of the class members are citizens of the same state as the primary defendant and makes remand discretionary when between one-third and two-thirds of the class members are citizens of the same state as the primary defendant. *Id.* § 1332(d)(3)–(4).

27. 151 CONG. REC. 661 (2005).

28. 151 CONG. REC. S1001 (daily ed. Feb. 7, 2005).

29. *Id.* at S998.

30. 28 U.S.C. § 1715 (2006).

31. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, § 504(a)(7), 110 Stat. 1321 (1996).

Lending Act ("TILA") specifically limits the available remedies in class actions brought under that law to the lesser of $500,000 or 1 percent of the net worth of the defendant.[32] Congress is certainly capable of writing legislation that carves out or limits class actions. It does not matter that Rule 23 is a default rule.

The dialogue about class actions is bilateral, flowing also from the Court to Congress. In *Amchem Products, Inc. v. Windsor*, the Court began its opinion by describing a report from the United States Judicial Conference Ad Hoc Committee on Asbestos Litigation.[33] That report recounted the litigation crisis caused by the influx of asbestos cases into the federal courts and concluded that real reform required a legislative solution.[34] With no such solution forthcoming, manufacturers and plaintiffs' attorneys attempted to resolve the litigation through a settlement class action of the kind Redish argues is unconstitutional. While the Court cited procedural requirements as a reason to overturn the settlement,[35] I suggest the real reason was substantive—the settlement traded off the interests of some clients against others in unacceptable ways.[36] *Amchem* effectively stopped the certification of mass tort class actions. The Court's cry for help was unanswered; no legislative solution to the asbestos litigation crisis has been forthcoming. Instead, mass tort cases have settled on an aggregate basis through negotiated settlements, raising similar concerns to those Redish puts forth, but without the formal protections of the class action device.[37]

There is a contradiction inherent in Redish's approach to the separation-of-powers problem. Redish believes that the Court has overstepped its bounds in "legislating" a far-reaching procedural rule that transforms substantive causes of action. At the same time, he wants the courts—that countermajoritarian institution—to be the body that polices the lines between the branches.

B. *Accountability for the Rules in a Modern Democracy*

Redish's second central argument is that class actions violate principles of democratic accountability that are central to our form of government. This argument is based not on specific constitutional requirements, but in political theory. Redish argues that the class action is "stealth" legislation which transforms small individual rights or claims into collective monster

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32. 15 U.S.C. § 1640(a)(2)(B) (2006).

33. 521 U.S. 591, 597–98 (1997).

34. *Id.* at 598.

35. *Id.* at 627–29.

36. The *Amchem Products* dissent supports this view. *See id.* at 630 (Breyer, J., concurring in part and dissenting in part) ("I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair.").

37. *See* Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 Fla. L. Rev. 383 (2007) (arguing against the privatization of the process of resolving mass torts through aggregate settlement).

litigation. It is stealthy because ordinary laws creating, for all appearances, individual causes of action are expanded by the class action device into something different, and legislators are not likely to be held accountable for this expansion because it operates by default through a procedural rule of which the public may not be aware. While I disagree with Redish that the public is unaware of the class action device, I share his general criticism of the poor level of discourse in American political life regarding the relationship between rights and remedies.

The key to Redish's argument that class actions are stealth legislation is his conception of accountability. Redish writes that "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" (p. 46). In order to hold legislators accountable, laws ought to be transparent. In Redish's view, the class action enables a kind of secret—or perhaps obscure—legislation because it is a "process whereby governing law is surreptitiously transformed into a different or contrary law" (p. 49). This is an overstatement. Class actions do not transform underlying causes of action into a contrary law, nor do they make one law into another. Instead, class actions multiply exponentially the *effect* of a particular law on defendants. They do not change the litigation very much from the plaintiffs' point of view.

In *Shady Grove*, the Supreme Court considered the question of how class actions should be viewed: as a procedure for aggregating individual claims or as a transformative procedural device.[38] The majority of the Justices viewed the class action from the class members' point of view. They defined the class action as a method for aggregating existing claims.[39] The dissenters, like Redish, defined the class action from the defendants' point of view, presenting a picture of the class action as a mechanism that transforms a small case into massive litigation.[40] Both the four dissenting Justices and Redish too readily buy into the defense-side argument that, as a result of its size, the class action is a form of legalized "blackmail."[41] There is no empirical evidence to support that claim.[42] Since fewer than all eligible plaintiffs will file lawsuits, the class action transforms a case that from the defendants' perspective might have been valued at $500 to one valued at

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38. Shady Grove Orthopedic Assocs. v. Allstate Insurance Co., 130 S. Ct. 1431 (2010).

39. Justices Scalia, Sotomayor, Roberts, and Thomas reasoned in part that a class action is an aggregation of claims. *Id.* at 1443. Justice Stevens concurred with the plurality in this respect. *Id.* at 1448.

40. *Id.* at 1460 (Ginsburg, J., dissenting).

41. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (arguing that the blackmail thesis is empirically and normatively baseless).

42. *See id.* Redish supports his position by citing to Judge Posner's opinion in *In re Rhone–Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). P. 62 n.1. This opinion provided no empirical evidence to support the blackmail thesis and should not be relied upon for anything more than a theoretical account of what the class action device *might* do in some cases. In any event, the type of class action at issue there—a mass tort class action—is now essentially forbidden.

$5,000,000. But the members of the class action still have a claim on their share of the $5,000,000. Thus, from the class plaintiff's perspective, the suit remains one for $500. Redish is also concerned with the extent to which the class action suit is large from the lawyers' perspective: a share of $5,000,000 yields more money with less work for the lawyer than a series of $500 suits.

Missing from the analysis is the role of the class action in enforcing the rule of law. If a defendant has violated the law, it should be made to pay an appropriate amount of damages. The law does not absolve a defendant from liability merely because it harmed tens of thousands instead of one individual. But all these questions—of how best to enforce the law, whether claimants are *really* getting $500, whether lawyers' incentive to bring these lawsuits is too strong, and whether lawyers are overpaid—are policy questions about how well the class action is policed by the courts, rather than questions about democratic accountability.

To the extent that the effect of the class action device on enforcement is hidden, it may present an accountability problem. Redish's approach to accountability operates on two levels. At the retail (or micro) level, he is concerned about the lawyers who effectively run class actions not being sufficiently accountable to the class. He calls this a "faux" class action because it is not really a lawsuit to vindicate the rights of the class, but at its best merely a deterrence suit that benefits lawyers (p. 14). In the class action literature this is usually described as an agent-principal problem.[43] The same issue is reflected at the wholesale (or macro) level when elected representatives enact "stealth" legislation that is not accountable to the electorate. This macro level is where Redish's argument is most novel.

This accountability argument raises two issues. First, what does accountability mean? It is useful to unpack the question of accountability and consider it as a function of two concepts: salience and access. Second, to what extent are class actions special and to what extent are other rules and laws "stealth" legislation? The lamentable mismatch between rights and remedies that Redish points to is a much greater concern with respect to more obscure laws.

1. *Democratic Accountability: Salience and Access*

To understand the extent to which a procedural rule such as the class action violates principles of democratic accountability, a more nuanced view of accountability is needed. Democratic accountability really has two aspects.[44] The first is *salience*—that is, the public prominence of the issue.[45]

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43. Although he describes it a bit differently, I think Redish's micro-level discussion of the accountability problem between lawyers and class members is not so different from the prevailing agent-principal analysis.

44. *See* Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?* 6 Theoretical Inquiries L. 113, 122 (2005).

45. *See id.* at 122–23.

This is the aspect on which Redish focuses. The second is *access*—legal rules that enable the citizenry to affect the decision-making process.[46]

As a general matter, Redish notes, most people would agree that the rules of civil procedure lack salience to the general electorate (p. 62). They are considered at best technical and at worst "mind-numbing."[47] But if ever there were an exception to this general perception, it is the class action. Lawsuits in which class allegations are made are only a tiny fraction of the federal court docket—perhaps 1 percent.[48] Often class allegations are not followed by motions for class certification, meaning that it is probable that many such suits are not in the end class actions.[49] Despite the low class action caseload, class actions are a substantial part of the public discussion of litigation. They receive more than their fair share of the media airwaves and legislative time, as the debate over CAFA illustrates.

Not only are class actions salient on a national level, but individuals also have access to class actions, in the sense that many of us have been members of class actions. We have received notices in the mail and gathered that while we will only obtain a very small recovery, the lawyers managing these cases will get millions. Class members are entitled to call the lawyers in charge of the case and there is often a toll free number available for that purpose. Class members are also entitled to write to the court as well as to appear at a fairness hearing about the settlement.[50]

The problem is that the class actions to which citizens have access—class actions of which they are actually a member—lack salience. This is either because class action notices are indeed mind numbing or because the amounts at stake are simply too small to bother over. Most people do not call that toll free number, protest the settlement in person or in writing, or even respond to the notice. Opt-out rates are low.[51] There is little data on claiming rates in class actions,[52] and this lacuna itself ought to raise

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46. *See id.* at 123.

47. *See* Sheryl Gay Stolberg, *Parliamentarian in Role as Health Bill Referee*, N.Y. TIMES, March 14, 2010, at A1 (describing parliamentarian Alan S. Frumin as "a whiz at mastering the mind-numbing rules of civil procedure" in law school).

48. One study found that 1,250 cases filed in the federal courts between January and June 2007 had class allegations and an additional 1,104 were labor class actions, which I think would not offend Redish because they are opt-in class actions not brought under Rule 23. *See* EMERY G. LEE, III & THOMAS E. WILLGING, FED. JUD. CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT 3 (2008), http://www.fjc.gov/library/fjc_catalog.nsf (search for "The Impact of the Class Action Fairness Act of 2005"). To put this in perspective, 245,427 cases were filed in the federal courts in 2008. This author's very rough estimate is that, during the period of January through June 2008, only 1% of the cases filed in the federal courts made class allegations.

49. *See id.*

50. FED. R. CIV. P. 23(e).

51. *See* Lahav, *supra* note 5, at 83 (discussing low opt-out rates and the limited utility of opt-out rights).

52. Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* (RAND Working Paper Series WR–599–ICJ, 2008), *available at* http://ssrn.com/abstract=1206315 (concluding that little data is available).

concerns. Existing data are not encouraging. For example, in the Ford Explorer class action settlement, class members were offered vouchers for the purchase of Ford vehicles. Of the 1,647 claims approved, only 148 redeemed their vouchers.[53]

Similarly, where class actions are most salient—at the level of national debate about the so-called "litigation explosion"—there is little access for ordinary citizens. People can appear at class action fairness hearings as objectors, but in order to object one has to be a member of the class. Citizens can contact their congressperson or protest about class actions, but these attempts at influencing the national debate over class actions have limited effect in comparison to the direct access available to class members in any individual class action lawsuit.

Furthermore, while citizens may be concerned about class actions at a national level, many such lawsuits proceed at the state level. A state class action may affect national companies, but individuals who are not citizens of that state cannot influence its laws. The federalization of class actions under CAFA can be seen as a response to this problem. On the one hand, by federalizing class actions, CAFA brought these cases into the federal system, where they are more salient. On the other, CAFA removed class actions from state power, where citizens are more likely to have access to the political process and therefore have influence over its outcomes. Allowing cases to proceed at the state level will lead to inconsistent rules but more experimentation. States can amend their class action rules to deal with the policy problems Redish raises, as New York did when it enacted a class action rule that prohibited cases invoking statutory penalties as a default rule to proceed as class actions.[54] Other states have expanded their reach and certified national class actions.[55]

It is a paradox of modern life that people are least interested in the things that they can most influence.[56] This paradox is not resolved by removing class actions to the federal courts. Class members are no more likely to be interested in a federal class action than a state action (although a federal class action may be harder to certify so there will be less need for them to be interested). Furthermore, the courts are the governmental branch that probably offers the least access for ordinary citizens; this is a large part of Redish's quarrel with the rulemaking process. Having this countermajoritarian institution hold that class actions are unconstitutional does not resolve the access problem. Lack of interest on the part of the citizenry and alien-

53. Final Report on Settlement Claims and Voucher Redemption, at 2, Ford Explorer Cases, JCCP Nos. 4266 & 4270 (Cal. Super. Ct. March 8, 2010).

54. N.Y. C.P.L.R. 901(b) (McKinney 2006).

55. *See* Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. Pa. L. Rev. 2001, 2015–22 (2008).

56. *See* Hills, *supra* note 44, at 124–25. Hills explains that individuals have more access at the local level, yet national issues have more salience, as evidenced by the fact that voter turnout is lower at the local level than for presidential elections. *Id.*

ation from large-scale political institutions are fundamental problems of modern public life that go beyond the class action rule.

2. *Stealth Legislation: Know Your Rights*

This brings us to the rulemaking process. Redish's main critique is that this process is structurally improper. Congress, not the Court, should be making the rules, and therefore the system, which he thinks often yields good results, is "inherently defective" (p. 66). But one might also ask whether the rulemaking process is sufficiently transparent, whether it obtains the attention of informed citizens and provides them with access to decision making. This is a different accountability problem. We might be concerned that this process can be captured by special interests or that the Judicial Conference will prefer rules that are good for judges or the court system rather than those that the citizenry more generally might prefer. As many commentators have demonstrated, what started in 1938 as a process of rulemaking by experts who thought procedure was neutral as to substance has become a politicized process run by special interests who know that "I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time."[57] These are important concerns, although I am not sure that assigning rulemaking to Congress directly would be an improvement over the current regime.

Redish distinguishes the class action as stealth legislation both from delegation to administrative agencies and from judicial decision making in cases where the legislature has failed to act. In the case of administrative delegation, he argues, agencies are indirectly accountable as part of the executive branch (p. 49). In the case of judicial lawmaking, the judicial branch is merely "filling a vacuum" because "the court must determine the governing law, simply to determine who wins" (p. 49). These justifications, he claims, do not apply to the class action, where the judiciary transforms a substantive right through a procedural device without express legislative consent. The argument is not convincing. If the judicial branch is allowed to "fill a vacuum" then surely it should be allowed to apply existing procedural rules that have been *ratified by Congress* to the substantive law.

More convincing is Redish's concern about accountability more generally; that is, that Congress is making laws that do not say what they mean. He is worried that the apparent mismatch between substance and procedure misleads the public and believes that if the truth came out there would be "widespread public outrage" (p. 52). Class actions are so highly visible in the media and legislatures that this seems to me unlikely.[58] On a broader level, this observation has some merit: the mismatch between rights and

57. *Hearings on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell). For one version of this politicization story, see Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 Nw. U. L. Rev. 1561, 1612–13 (2008) (discussing the amendment process of Rule 68).

58. Redish offers no empirical evidence to support his intuition.

remedies is present throughout the law. The relationship of people with the legal system is complex and sometimes contradictory.[59] There are many situations in which laws are not well publicized so people do not know their rights, or limitations on remedies are not well publicized so people think they have rights when in fact there is no remedy.

Many statutes are not readily understood by potential plaintiffs, and this means that people do not always vindicate their rights. For example, in civil rights cases brought under § 1983, individuals who prevail are entitled to attorneys' fees.[60] But this right is not absolute. A defendant can make an offer of judgment anytime before trial and if the plaintiff receives less than that offer, that defendant need not pay plaintiff's attorneys' fees from the time the offer was made even if the plaintiff ultimately prevails.[61] Defendants are allowed to offer plaintiffs everything they want in exchange for giving up their attorneys' fees, making it harder for civil rights lawyers to bring certain kinds of cases.[62] Furthermore, plaintiffs cannot obtain attorneys' fees when their lawsuit was merely a "catalyst" that led the defendant to change an illegal practice.[63] Nor can plaintiffs be awarded attorneys' fees when they obtain a preliminary injunction if that injunction is subsequently dissolved or reversed.[64] This insidious "disarming" of the private attorney general is just as, and perhaps more, troubling than any abuses of the class action device.[65] Yet these limitations get much less attention, though the rights at stake are constitutionally protected.

On the substantive side of things, do most people know that they can file a lawsuit for a minimum of $100 when a business willfully prints more than the last five digits of their credit card number on a receipt and that if they prevail they are entitled to attorneys' fees?[66] Before Lily Ledbetter's case made it to the Supreme Court, how many people knew that they only had 180 days after an adverse employment decision to sue for pay discrimination on the basis of race or gender?[67] Because the populace did not know of this limitation, the decision in the *Ledbetter* case raised ire. But that does not mean that the decision was illegitimate because there was not sufficient

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59. *See generally* Susan S. Silbey & Patricia Ewick, The Common Place of Law (1998) (providing a historical account and analyzing the relationship of the people to the law).

60. 42 U.S.C. § 1988(b) (2006).

61. Marek v. Chesny, 473 U.S. 1, 5–12 (1985).

62. Evans v. Jeff D., 475 U.S. 717, 738–43 (1986).

63. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 600–01 (2001).

64. Sole v. Wyner, 551 U.S. 74, 86 (2007).

65. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183.

66. 15 U.S.C. § 1681n(a) (2006). Redish would oppose permitting such suits to proceed as class actions, but I wonder, who would bring such a suit individually?

67. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (statute of limitations on Title VII pay discrimination cases is 180 days). *But see* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009) (amending Title VII to recognize that a discriminatory compensation decision occurs each time compensation is paid).

institutional accountability. It was just wrong. The question is not one of process, but of norms.

Most of us do not know our legal rights. We might be outraged to learn how limited some rights are. And we might be surprised to learn how beneficial others are. If every obscure law or law with a mismatch between right and remedy were unconstitutional, few laws could remain on the books. Class actions are big and so they present an easy target, but the real target should be the smaller laws that nobody pays attention to, the laws that are not salient and with respect to which there is little access for the ordinary citizen, the laws that undo our rights piecemeal. Among the least salient of these laws are the ordinary procedural rules that limit access to justice. Laws that silently limit people's ability to vindicate their rights, particularly their civil rights, are constitutional. But they are also wrong as a policy matter. We would do well to heed Redish's call to pay more attention to the creation not only of rights and causes of action, but of remedies for vindicating them.

Conclusion

Wholesale Justice will occupy an important place in the debate over class actions because it is the only sophisticated, sustained critique of the class action based in constitutional law and political theory. The book should appeal to anyone interested in our civil litigation system, not only those who study class actions. It also provides an excellent articulation of these arguments for use in the classroom. But as I have argued, the book should be read with care. Neither separation of powers nor the principle of democratic accountability calls for judicial invalidation of the class action rule. If the class action is to be reformed, it will be on a policy basis, not a constitutional one. Nor is the legal process through which this procedural device is created the real issue. The real issue ought to be whether the class action is socially beneficial. The book makes a larger point than this, however. Setting Redish's arguments in the broader context of our civil justice system, we should take seriously his concerns about the extent to which procedures and remedies stealthily prevent the vindication of substantive rights.