Why Class Actions Are Something *both* Liberals *and* Conservatives Can Love

*Brian T. Fitzpatrick**

In Professor Redish's review of my new book, The Conservative Case for Class Actions, *he argues that liberals should oppose the class action because the cy pres doctrine used to distribute settlement money is democratically illegitimate and that conservatives should oppose it because it is inferior to government policing of the marketplace or no policing at all. But cy pres is a longstanding common law doctrine and relying on it is no more illegitimate than relying on any other common law doctrine that has not been abrogated by legislation. Moreover, contrary to popular caricatures, conservatives actually do believe the marketplace needs some policing, and, for all the reasons we prefer private solutions over government solutions in other areas, we should prefer a private police force staffed with class action lawyers over government bureaucrats.*

INTRODUCTION

I am grateful to Professor Martin Redish for reading my new book, *The Conservative Case for Class Actions*,[1] and for offering as provocative a critique of the class action as I try to offer a defense. But we should set one thing straight at the outset. Although he styles his critique as a "liberal" one, much of his essay could have come straight from the mouth of Justice Scalia. He rails against unelected judges and rulemakers "distort[ing]" the "substantive law duly enacted by the

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1. BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019).

people's representatives" instead of "faithfully implement[ing] it."[2] He asserts that "substantive legislation [should] be implemented and enforced in the manner contemplated in and directed by what is contained in the four corners of the statute" and that "a law which provides 'X' cannot properly be judicially construed to mean 'Y'."[3] In short, Professor Redish believes the modern class action fails the test of "democratic accountability."[4]

In other words, despite his protestations to the contrary,[5] Professor Redish in his Scalia hat is more than qualified to critique my book. In this Essay, I will explain why the class action does not lack democratic legitimacy. I will then explain why Professor Redish's other attempts to channel conservative critiques miss the mark.

I. THE LIBERAL(?) CASE AGAINST CLASS ACTIONS?

Professor Redish argues that the class action is undemocratic because it changes the remedial effects of the substantive law. He says the class action has this effect because of something known as "cy pres": when there are leftover monies in a class action settlement because too few class members filed claims or cashed their claim checks, the settlement sometimes calls for the monies to be given to charities that will indirectly benefit the class instead. Cy pres is an old common-law doctrine, originally from wills and trusts, that calls on judges to find the "next best use" for money when it cannot serve its original purpose.[6] Professor Redish argues that cy pres distorts the remedial effect of the substantive law: "[N]o substantive statute being enforced in the class proceeding made even the slightest reference to such a form of supposedly 'second best' remedy. To the contrary, those laws provide solely for compensation to the victims."[7] He says this violates both the

2. Martin H. Redish, *The Liberal Case Against the Modern Class Action*, 73 VAND. L. REV. 1127, 1135 (2020).

3. *Id.*

4. *Id.* Professor Redish also complains about class actions that do not allow class members to opt out and Supreme Court precedents that permit courts to award fees to class action lawyers as a percentage of the face value of a settlement regardless of how much the defendant ultimately pays out. *See id.* at 1136–42. But I do not defend no-opt-out class actions in my book, and I affirmatively oppose Supreme Court precedents that base attorneys' fees on potential compensation and deterrence rather than actual compensation and deterrence. As such, I will not treat these complaints any further in this essay.

5. *Id.* at 1143 ("I am hardly the one to critique the conservative case for class actions . . . .").

6. *See* 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 12:32 n.17 (5th ed. 2019) ("Cy pres is an equitable doctrine with roots in trusts and estates law: 'if the funds in a charitable trust can no longer be devoted to the purpose for which the trust was created, they may be diverted to a related purpose . . . .' " (quoting Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004))).

7. Redish, *supra* note 2, at 1138 (footnote omitted).

Rules Enabling Act (because then Rule 23 of the Federal Rules of Civil Procedure would "abridge, enlarge or modify" a substantive right) as well as the U.S. Constitution (because it is a "violation of separation of powers . . . to alter . . . substantive legislation").[8] Perhaps recognizing the impracticality of opposing all cy pres—virtually every class action settlement has at least a few dollars left over—Professor Redish suggests that cy pres is only illegal when a "significantly large portion of the class" has not received compensation.[9] Giving away the class's money to charities apparently does not violate the law when it is done only in small amounts.

Let me say at the outset that I am not the biggest cheerleader for cy pres you can find. But at least cy pres is a real attempt to solve a real problem: for a variety of reasons, it is difficult to get money to class members in some class action cases. Sometimes the amount of money is so small it is not worth much effort to find class members; sometimes even when they are found, class members think the offer of money is a scam or the amount of money is not worth the effort to fill out a claim form.[10] As the expansion of the internet, electronic banking, and "big data" collection lowers transaction and information costs, these problems will be mitigated.[11] But, in the meantime, there is often money left over from class action settlements, and we have to do something with it. Giving the money to a third party, as cy pres does, is a plausible option, but I believe there are better ones.[12] Before we get to the better options, however, let's discuss the worst option, the one that Professor Redish appears to favor: giving the leftover money back to the defendant.[13]

This is the worst option because it uniquely undermines the deterrent goals of the substantive law.[14] If a company has committed

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8. *Id.*

9. *Id.* at 1140.

10. *See* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions,* 11 NYU J.L. & BUS. 767, 783–84 (2015).

11. *See id.* at 789–91 ("Indeed, the fact that opportunities for automatic distribution and direct deposit may only grow suggests that compensation in consumer class actions will be even brighter in the future than in the past."); *see also* Jessica Erickson, *Automating Securities Class Action Settlements*, 72 VAND. L. REV. 1817 (2019) (describing market-based and regulatory approaches to automating securities class action settlement distributions to class members).

12. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2080–82 (2010) (suggesting that under the deterrence-insurance perspective, which prioritizes incentivizing counsel to bring small-claims class actions, leftover settlement proceeds should be given to class attorneys instead of being distributed cy pres).

13. Redish, *supra* note 2, at 1137 ("[O]ne could persuasively argue that they should be returned to the defendant . . . .").

14. *See* Fitzpatrick, *supra* note 12, at 2081 ("[B]ut because this may lower the amount defendants must pay to a level below the cost of the harm they caused, it undermines the deterrence function of class action litigation.").

$100 million of illegal harm, the company should have to fork over all of the $100 million; otherwise, the company will profit from wrongdoing. If companies know they can profit from wrongdoing, they will commit more and more of it. If we cannot distribute all of the $100 million to the victims, at least we can prevent the wrongdoer from holding on to its ill-gotten gains by giving the money to someone else, thereby discouraging wrongdoing in the first instance. This is "Law and Economics 101."[15]

Professor Redish thinks that "Law and Economics 101" is democratically illegitimate, but this is not the case. To begin with, it is widely understood that compensation is not the only purpose behind our substantive laws; deterrence is a purpose as well.[16] Depriving a wrongdoer of its ill-gotten gains through cy pres therefore furthers the purpose of the substantive law rather than undermines it. Although it may be true that our substantive laws do not say that courts have the power to give unclaimed compensation to someone else, they also don't say that courts do *not* have this power. Rather, our laws have been written against the backdrop of a variety of longstanding common-law doctrines that enable courts to fashion appropriate remedies in the cases that come before them,[17] including escheatment[18] and—drum roll—cy pres.[19] We interpret silence in our substantive laws to do no harm to these longstanding common-law doctrines.[20]

But truth be told, cy pres does not serve only the deterrent purpose of the substantive law; it also serves the compensatory purpose. The entire point of the doctrine is to give the money to a charity that

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15. Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?*, *in* THE CLASS ACTION EFFECT 181, 186 (Catherine Piché ed., 2018); *see, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 178–182 (2004) (explaining what levels of liability incentivize would-be injurers to exercise appropriate levels of care).

16. *See, e.g.*, Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 314 (1978) ("The Court has noted that [the federal antitrust statute] has two purposes: to deter violators and deprive them of 'the fruits of their illegality,' and 'to compensate victims of antitrust violations for their injuries.'" (internal quotation marks omitted) (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977))).

17. *See, e.g.*, Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 70–71 (1992) ("[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.").

18. *See, e.g.*, Sean M. Diamond, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 EMORY L.J. 971, 978–80 (2011) (describing the development of American escheat, in which courts "expanded the subject matter of escheat to include unclaimed intangible personal property").

19. *See* 4 RUBENSTEIN, *supra* note 6, § 12:32. Although it is true that the doctrine of cy pres originated in a different context—wills and trusts—and only evolved to embrace unclaimed class action monies, as Professor Redish noted, over the last fifty years, that is unremarkable. The very essence of the common law is to use old principles to meet new challenges.

20. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012) ("The better view is that statutes will not be interpreted as changing the common law unless they effect the change with clarity.").

will benefit class members; it is a form of *indirect* compensation.[21] For example, in cases where the victims of bank fraud cannot be found, settlement money has been sent to financial literacy nonprofits.[22] Courts and litigants do not always do a good job finding charities that will indirectly benefit class members, and I have criticized them when they do not.[23] But the fact that the application of cy pres has not been perfect does not mean we should jettison it; nothing is perfect.

Moreover, the fact that cy pres itself comes from a longstanding common-law doctrine shows why there is nothing about it that violates the Rules Enabling Act. Judges do not get their authority to use cy pres from Rule 23. Like the common benefit doctrine that drives attorneys' fees in class actions,[24] judicial authority for cy pres comes from substantive federal and state common law or codifications thereof.[25]

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21. *See* 4 RUBENSTEIN, *supra* note 6, § 12:32:

> [B]y sending money to charities that work in the class's interest, it is arguably compensatory, albeit indirectly so. The class benefits from a *cy pres* distribution as it realizes the gains that its charitable contribution can accomplish. This makes *cy pres* preferable to *pro rata* redistribution, as the absent class members realize no gain (other than deterrence) when their fellow class members are enriched at their expense.

(footnotes omitted).

22. See, for example, *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 568 (N.D. Ill. 2011), in which excess funds were donated to credit counseling organizations in the states where the defendant operated.

23. *See* Fitzpatrick, *supra* note 12, at 2080 & n.158.

24. *See* Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P., 888 F.3d 455, 461 (10th Cir. 2018) ("Whether to award counsel a fee out of a common fund is . . . 'a substantive legal issue and is therefore controlled by state law [in a diversity case].' " (quoting N. Tex. Prod. Credit Ass'n v. McCurtain Cty. Nat'l Bank, 222 F.3d 800, 817 (10th Cir. 2000))); Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656, 657–58 (1991).

25. *See* All Plaintiffs v. All Defendants, 645 F.3d 329, 337 (5th Cir. 2011) ("We therefore conclude that the question of who shall have a property right in the unclaimed funds is substantive, as that term was set forth in *Erie* and refined in subsequent cases including *Guaranty Oil, Byrd, Hanna,* and *Gasperini*."); *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., No. M-02-1486-PJH, 2013 WL 12333442, at *83 (N.D. Cal. Jan. 8, 2013) ("[F]ederal courts have employed [the cy pres] approach under federal common law . . . ."), *report and recommendation adopted*, 2014 WL 12879520 (N.D. Cal. June 27, 2014); *In re* San Juan Dupont Plaza Hotel Fire Litig., 687 F. Supp. 2d 1, 1 (D.P.R. 2010) ("In ordering distribution of unclaimed funds, the courts rely on their general equity power or on what is commonly referred to as the *cy pres* doctrine."); Andrew Rodheim, Note, *Class Action Settlements, Cy Pres Awards, and the* Erie *Doctrine*, 111 NW. U. L. REV. 1097, 1120 (2017) ("[T]wenty-one states have cy pres statutes that codify specific requirements for cy pres awards as a part of a class action settlement agreement."). The foregoing note was written by one of Professor Redish's students, and, although it concedes that most courts would find that uncodified cy pres doctrines come from substantive common law, it argues that cy pres comes from Rule 23 instead. Rodheim, *supra*, at 1100, 1118, 1120 ("[T]he court would likely determine that federal common law—not Rule 23(e)—governs cy pres awards."). The note rests this argument on the fact that the federal rulemakers decided not to put cy pres provisions into Rule 23 for fear of violating the Rules Enabling Act. *Id.* at 1100 ("[T]he Rule 23 Subcommittee's proposal to codify cy pres awards as a part of Rule 23(e) is a tacit acknowledgment that class action cy pres settlement remedies are in fact derived from Rule 23 . . . ."). But the rulemakers' action compels precisely the *opposite* conclusion: *because* cy pres comes from

The Rules Enabling Act is therefore wholly irrelevant. Indeed, because the vast majority of class actions that are not dismissed end in settlement, judges do not even need this common-law authority: their authority comes from the terms of the settlement agreement that call for cy pres. It has long been understood that judges have the power to enforce and even approve settlement agreements that require parties to do things that could not have been ordered after trial.[26] Thus, even if the common law were not there—but it is—cy pres would still not violate the Rules Enabling Act.

Does any of this violate separation of powers? Surely not. Whether cy pres comes from statutory codifications of the common law or the common law itself, there is nothing unconstitutional about following it. Although substantive federal common law is disfavored in the modern era, even Justice Scalia was unwilling to say it should never exist,[27] and the Supreme Court has already rejected the notion that federal common-law powers to fashion remedies violate separation of powers.[28] But even more importantly: in many if not most cases, the relevant common law of cy pres will not be federal common law but state common law because the federal court will have subject matter jurisdiction from diversity. It obviously does not violate separation of powers principles in the U.S. Constitution for federal judges to apply state common law in diversity cases.

Thus, cy pres is both legal and no more democratically illegitimate than any of the other substantive common-law doctrines in our legal system. But that doesn't mean it is the best option for dealing with leftover class action settlement money. What are some better options?

I have argued in the past that the best option is to give the money to the class's attorneys.[29] This option serves the deterrent function of the substantive law even better than cy pres because

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substantive common law, the rulemakers concluded they *could not* put it into Rule 23 without violating the Rules Enabling Act!

26. *See, e.g.*, Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 378 (1996) (granting res judicata to a class action settlement in state court even though the settlement included claims that could not have been brought in state court at all); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) ("[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.").

27. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504–13 (1988) (Scalia, J.) (creating substantive federal common law).

28. *See* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 73–74 (1992) ("In making this argument, respondents misconceive the difference between a cause of action and a remedy. Unlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power.").

29. Fitzpatrick, *supra* note 12, at 2079–82.

contingency fees equal to any amount less than one hundred percent always leave some wrongdoing unpursued; every little bit of extra compensation helps to bridge this gap.[30] I am sure Professor Redish won't like this option either, but as I noted above, it, too, has the virtue of substantive common law behind it: the unjust enrichment doctrine that empowers courts to award attorneys' fees in class actions.[31]

But the leading option according to most scholars these days is simply to redistribute the leftover settlement money to the class members who did file claims and cash claim checks until the money is all gone.[32] Incredibly, Professor Redish does not like this option either—even though the victims are the only ones receiving compensation—because some victims might receive more than they were injured, thereby again "distorting" the substantive law.[33] This is theoretically possible, but I am not sure how often it happens in the real world. Class action settlements—like all settlements—usually recover only a fraction of the plaintiffs' damages. After deducting attorneys' fees and other transaction costs, it is unlikely that dividing the remaining money among even, say, ten percent of the class[34] will result in class members receiving more than one hundred percent of their individual damages. Indeed, securities fraud class actions have been distributed this way for decades, and I have never heard anyone say that class members there have been receiving windfalls. In any event, if we really wanted to, we could cap redistributions at one hundred percent of damages and then send the rest of the money to the class's attorneys or cy pres. But in all events, we should not give it back to the wrongdoers.

II. THE CONSERVATIVE CASE FOR CLASS ACTIONS!

Let me turn now to Professor Redish's effort to channel not only Justice Scalia but other conservatives in critiquing my book. In my book, I explain that we have only four options to police our marketplaces. I map them in Figure 1, below. On the horizontal axis,

30. *See id.* at 2062, 2070 ("If class action lawyers receive any less than [one hundred percent], then some cost-justified class actions will not be filed because class counsel cannot recover their expected litigation costs.").

31. *See supra* note 24 and accompanying text.

32. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (AM. LAW INST. 2019) ("[A]ssuming that further distributions to the previously identified class members would be economically viable, that approach is preferable to cy pres distributions.").

33. Redish, *supra* note 2, at 1139 n.38.

34. The FTC recently found that the median claims rate in consumer class actions is nine percent. FED. TRADE COMM'N, CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS 22 (2019), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf [https://perma.cc/86P6-UJ7J].

we see a choice between enforcing the law before a company acts (ex ante) or after a company acts (ex post). This is the choice between requiring permission before you act versus being permitted to do whatever you want but having to pay up later if things don't turn out well. On the vertical axis, we see a choice between who does the enforcement: the government or a private party. All of these models seek to do the same two things: to discourage companies from harming people in the first place (i.e., deterrence) but to compensate people if they nonetheless end up getting harmed (i.e., compensation).[35]

FIGURE 1: ENFORCEMENT CHOICES

	Ex Ante	**Ex Post**
Government	1	2
Private	3	4

I argue in the book that the most conservative way to police the marketplace is box 4: private lawyers representing private citizens pursuing companies after they have committed wrongdoing. I try to make this case from the perspectives of both libertarian conservatives, who are focused on maximizing liberty, and more utilitarian-minded conservatives, who are focused on allocating resources to their highest uses. Simply put, I argue that the "ex ante" solutions in boxes 1 and 3 have undesirable innovation-sapping effects and that box 2 is inferior to box 4 for all the same reasons conservatives and libertarians prefer private-sector over government-sector solutions to other problems.

Professor Redish argues that conservatives would vote instead for none of the above and "place almost full reliance on the market."[36] Although it is true that conservatives are often caricatured as against all intervention in the market, this caricature is not accurate. Almost all conservatives know that markets need at least *some* legal rules. Consider what one of the fathers of the libertarian Austrian school of economics, Friedrich Hayek, said on the question:

- "[I]n order that competition should work beneficially, a carefully thought-out legal framework is required."[37]

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35. For a description of some of the virtues and vices of each of these boxes, see Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, *in* REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11, 13–22 (Daniel P. Kessler ed., 2011).

36. Redish, *supra* note 2, at 1143. He says "almost" because he thinks conservatives might also allow "individual litigations." *Id.* But for the small-stakes injuries that need class actions, individual litigations are not financially viable; it is class action litigation or no litigation at all.

37. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 37 (1944).

- "An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other."[38]

- "A functioning market economy presupposes certain activities on the part of the state . . . ."[39]

Or consider what one of the fathers of the Chicago school of economics, Milton Friedman, said on the matter:

- "Th[e] role of government . . . includes facilitating voluntary exchanges by adopting general rules—the rules of the economic and social game that the citizens of a free society play."[40]

- "A government which maintained law and order, defined property rights, served as a means whereby we could modify property rights and other rules of the economic game, adjudicated disputes about the interpretation of the rules, enforced contracts, promoted competition, provided a monetary framework, engaged in activities to counter technical monopolies and to overcome neighborhood effects widely regarded as sufficiently important to justify government intervention . . . such a government would clearly have important functions to perform. The consistent liberal is not an anarchist."[41] (This reference to "liberal" is a reference to "classical liberal," a term generally associated with the right in academic circles.)

What legal rules do libertarians and conservatives think we need in the market? Although they start from different places, I show in the book that, at the very least, both groups favor laws against theft, breach of contract, and fraud. Many would go further, favoring antitrust laws, and some would go even further than that.[42] But even if we stop at breach of contract, fraud, and antitrust, those categories comprise

38. *Id.* at 40.

39. FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 222 (1960).

40. MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 30 (1980).

41. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 34 (1962).

42. I also set forth much of this analysis in Brian T. Fitzpatrick, *Justice Scalia and Class Actions: A Loving Critique*, 92 NOTRE DAME L. REV. 1977 (2017).

over seventy-five percent of today's class actions against businesses.[43] In other words, "none of the above" is not the best option.

Professor Redish also argues that, even if conservatives have to accept some policing of the marketplace, they would prefer "ex ante" solutions because they are more predictable than the "Wild West" of ex post class action lawsuits.[44] Although it is true that ex ante solutions are more predictable than ex post solutions, that is part of the problem: requiring companies to get permission before they do anything stifles innovation because we can never know enough about something new to know how much permission to grant to them. Many conservatives have said as much in the past,[45] including academics more famous than me, such as Richard Epstein[46] and Milton Freidman.[47] Indeed, a terrific new book by a libertarian research fellow at George Mason University's Mercatus Center is devoted entirely to this question; its conclusion could not be clearer: "*ex post* (or after the fact) solutions should generally trump *ex ante* (preemptive) controls."[48] What kind of ex post

43. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Actions and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 818 (2010).

44. Redish, *supra* note 2, at 1144–45.

45. Herbert Hovenkamp writes that "[l]ibertarians and conservatives have been particularly critical of the progressive state . . . [in] contrast . . . [to] the common law." Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. REV. 1063, 1086–87 (2017).

46. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1358–59 (1983) (writing that rules "cannot be judged sufficient simply because they give the ideal responses suitable to an ideal world," but rather they "must be judged as well by the way in which they handle problems of uncertainty, error, and enforcement"); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198–99 (1973) (discussing the limitations and drawbacks of ex ante rules, such as duties imposed by tort or common law); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 304 (1975) ("One of the strengths of the unconscionability doctrine is its flexibility, an attribute much needed because it is difficult to identify in advance all of the kinds of situations to which it might in principle apply."); Richard A. Epstein, *The Libertarian Quartet*, REASON (Jan. 1999), https://reason.com/1999/01/01/the-libertarian-quartet/ [https://perma.cc/YF57-6BFD] ("We would have more vibrant labor markets by scrapping the entire government apparatus in favor of the 19th-century common law regime that allows people to refuse to deal for good reason, bad reason, or no reason at all.").

47. *See* FRIEDMAN & FRIEDMAN, *supra* note 40, at 207–08 ("The evidence confirms what general reasoning strongly suggests. It is no accident that the [FDA's rules and regulations], despite the best of intentions, operate[ ] to discourage the development and prevent the marketing of new and potentially useful drugs.").

48. ANDREW THIERER, PERMISSIONLESS INNOVATION: THE CONTINUING CASE FOR COMPREHENSIVE TECHNOLOGICAL FREEDOM 44 (2014); *see also* Veronique de Rugy, *Beyond Permissionless Innovation*, REASON (Jan. 2016), https://reason.com/2015/12/22/beyond-permissionless-innovati/ [https://perma.cc/A765-BNL6] (discussing the central argument in Thierer's book, namely that "[a] right to try new things should be the default presumption," which "would effectively knock down the barriers to progress erected by cautious governments and self-serving special interests").

solutions are these? "Contract" and other private "common law" lawsuits, including "class action activity."[49]

I understand why big businesses do not like the innovation that comes with decentralized enforcement of the law. When you are on top, you want certainty; big businesses have obviously mastered the existing rules. But doing what is best for big businesses is not always the same as doing what is conservative. Locking incumbent businesses into their positions is simply not the goal of our legal system. For conservatives, the goal is fostering the conditions of competition, conditions that could very well lead to the displacement of incumbent businesses. The certainty of ex ante government regulation is how they do things in Europe and most of the rest of the world. Our country is exceptional because we have mostly rejected the European approach in favor of decentralized, ex post policing by private attorneys general. Although it is hard to prove, scholars who have tried conclude that the economies in countries like ours that rely on decentralized lawmaking like the common law outperform countries like those in continental Europe that rely on centralized lawmaking.[50] I don't think conservatives should want to jettison the American advantage.

Finally, Professor Redish argues that, even if conservatives might have to accept some ex post policing of the marketplace, they would reject private enforcement because, although the theory of privatization usually favors profit-motivated actors, profit-motivated *lawyers* are different.[51] But in the book I debunk the notion that harnessing the profit motive of lawyers is less desirable than harnessing it for any other provider of goods or services in our society. As the famous conservative Chicago school economists Gary Becker and George Stigler once put it: "[T]he view of enforcement and litigation as

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49. THIERER, *supra* note 48, at 75–77.

50. Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer summarize the findings:

> [C]ommon law is associated with (a) better investor protection, which in turn is associated with improved financial development, better access to finance, and higher ownership dispersion, (b) lighter government ownership and regulation, which are in turn associated with less corruption, better functioning labor markets, and smaller unofficial economies, and (c) less formalized and more independent judicial systems, which are in turn associated with more secure property rights and better contract enforcement.

Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285, 298 (2008).

51. Redish, *supra* note 2, at 1143 (doubting whether it is "preferable . . . to have regulation imposed through the efforts of financially incentivized private class action attorneys" even though "in the abstract, conservatives strongly believe in profit-incentivized activity").

wasteful in whole or in part is simply mistaken. They are as important as the harm they seek to prevent . . . ."[52]

Professor Redish argues that the profit motive will drive lawyers to file abusive lawsuits.[53] I understand this concern. There is little doubt that the pursuit of profits leads the private bar to exploit technicalities, to push the envelope on what is illegal, and to file meritless lawsuits. There is also little doubt that, because government lawyers cannot pursue profits and have more limited resources, they will do these things less often.[54] (For the same reasons, they will also bring *good* lawsuits less often!)

But nothing about this concern is unique to lawyers' profit motives. It is a general problem of the profit motive that, if not pointed in the right direction, it can drive people to do bad things.[55] Many liberals complain about corporate profit motives for these same reasons. Corporate profit motives can lead corporations to cut corners when they make products, to deceive customers about what they are buying, and to conspire with their competitors to fix prices. As good conservatives, our response to these problems is not, as it has been in other countries, to nationalize all of our industries. Our response is to acknowledge that profit motives can lead to both good and bad, and to put laws into place that point corporate motives more toward the good than the bad.

Our answer should be the same when it comes to profit-motivated lawyers. Profit-motivated lawyers are no different than profit-motivated anything else. Because they are profit motivated, they will enforce the law more thoroughly than government lawyers will. This means they will bring more lawsuits against egregious corporate misconduct. But it also means that, if we let them, they will bring more lawsuits that we are not so keen on. A rising tide lifts all lawsuits, so to

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52. Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 16 (1974).

53. *See* Redish, *supra* note 2, at 1144 (noting "legalized extortion," "intimidation," and "collusion").

54. *Cf.* Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 615–18 (2008) ("Kalven and Rosenfeld . . . not[ed] the potential for private litigation by way of class actions to 'result in an insistence upon the harshest results and the most technical interpretations.' " (quoting Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 719 (1941))). But see Engstrom's counterpoint that "one might expect a similar trend in regimes delegating enforcement authority solely to prosecutors and agencies." David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1936 (2014).

55. *See, e.g.*, WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 42 (1991) ("Paying people only if their efforts culminate in success definitely coaxes more effort out of them, but the question is always whether the effort is aimed in the right direction.").

speak. We should not cast private lawyers aside, but regulate them, just as we regulate the corporate profit motive.[56]

Indeed, not only *can* we regulate class action lawyers' profit motives, I argue in the book that we largely *already have*. Ever since the Class Action Fairness Act of 2005,[57] most class action cases of any significance must go through the federal court system. In light of the Supreme Court's cases in *Bell Atlantic Corp. v. Twombly*[58] and *Ashcroft v. Iqbal*,[59] it is cheaper and easier to dismiss meritless cases in today's federal courts than it ever has been in American history.[60] Even if a putative class action survives a motion to dismiss, it cannot proceed as a class action unless certified as such by a judge.[61] It cannot be settled unless a judge signs off.[62] And every dollar of attorneys' fees collected by class action lawyers must be approved by judges too.[63]

Of course, judges could exercise these powers unwisely, but that is not what the data suggests. As I show in the book, it is difficult to find many clearly meritless class action cases that survive a motion to dismiss anymore; you can probably count such cases on one or two hands every year. Moreover, judges are increasingly vigilant about settlements that do little more than pay class action attorneys: if you add up all the money defendants pay out in class actions and compare it to every dollar awarded to class action lawyers, the comparison yields the surprising result that class action lawyers are only collecting fifteen percent.[64] *Fifteen percent!* Rather than compensate class action lawyers too much, I argue in the book that we are mostly compensating them too little. Professor Redish says "all too often" class actions end by "intimidation" or "collusion" and that class actions are "plagued" by

56. *See, e.g.*, JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 221–22 (2015) (explaining the incentives of plaintiffs' lawyers to bring meritless litigation and arguing reforms are necessary). Compare this view with A. Mitchell Polinsky's stance, which, although critical of private enforcement, concedes that "[r]egulating private enforcers by paying them something different than the fine for each violator detected can achieve the socially most preferred outcome in the competitive case." A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 108 (1980) (emphasis omitted).

57. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

58. 550 U.S. 544 (2007).

59. 556 U.S. 662 (2009).

60. *See* Brian T. Fitzpatrick, Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1626–29 (2012) (noting that *Twombly* and *Iqbal* have made "federal judges . . . gatekeepers to discovery" through the heightened "plausible pleading standard").

61. FED. R. CIV. P. 23(c)(1)(A).

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

63. FED. R. CIV. P. 23(h).

64. *See* Fitzpatrick, *supra* note 43, at 830–31.

class action lawyers earning fees on money that defendants never pay out, but he points to no data to support these assertions.[65]

CONCLUSION

Of course, our class action system is not perfect, and I offer several proposals in the book to tighten things up even further.[66] But Professor Redish is wrong to interpret these proposals to mean that I have attached "numerous qualifiers" to my support for class actions and that "the version of the class action [I] support[ ] does not exist."[67] Let me be clear: I think our system as it stands now is better than all the alternatives, but that doesn't mean our current system cannot be made even better. In other words, with or without my proposals, I would rather have private lawyers representing private citizens policing our marketplaces than the alternatives favored by Professor Redish: government bureaucrats or no policing at all.

65. Redish, *supra* note 2, at 1142–44.

66. I discuss some of these ideas in Brian T. Fitzpatrick, *Can the Class Action Be Made Business Friendly?*, 24 N.Z. BUS. L.Q. 169 (2018).

67. Redish, *supra* note 2, at 1145 (emphasis omitted).