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## DEREGULATION AND PRIVATE ENFORCEMENT

by  
Brian T. Fitzpatrick\*

*Many conservatives oppose much of the administrative state. But many also oppose much of our private enforcement regime. This raises the questions of whether conservatives believe the marketplace should be policed at all, and if so, who exactly should do that policing? In this Essay, based on my new book, The Conservative Case for Class Actions, I take a deep dive into conservative principles to try to answer these questions. I conclude that almost all conservatives believe the marketplace needs at least some legal constraints, and I argue that ex post, private enforcement is superior to the alternatives. Not only is private enforcement the right answer as a matter of theory, but I believe that conservatives need private enforcement as a practical matter if they wish to make progress on their agenda to roll back the administrative state.*

### INTRODUCTION

Several years ago, several conservative academics filed an amicus brief in the United States Supreme Court. The case was *AT&T v. Concepcion* and the question presented was whether companies could enforce arbitration agreements that required their customers to waive their ability to join a class action.<sup>1</sup> It was apparent to everyone that if the class action waiver was enforced, it would mean that the customers would have no legal recourse at all; the harms involved were too small for many people to pursue individual arbitration even if they knew about the alleged injury. Not to worry, the academics told the Court, there is a solution to this problem: “federal agencies.”<sup>2</sup>

This brief struck me as very curious because I consider myself a conservative academic, yet it was the first time I had heard from anyone on my side of the aisle

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\* Professor of Law, Vanderbilt Law School.

<sup>1</sup> *AT&T Mobility v. Concepcion*, 563 U.S. 333, 336 (2011).

<sup>2</sup> See Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner at 30, *Concepcion*, 563 U.S. 333 (No. 09-893) (“[T]he exculpatory clause rationale suffers from a flawed premise—that the alleged inability of consumers to pursue low-value claims will result in companies escaping liability and undermine general deterrence. This theory neglects the fact that state attorneys general . . . and appropriate federal agencies have oversight over sellers of consumer products . . .”).

that “federal agencies” are the right way to police the marketplace. Usually, I hear that we want to undo federal agencies. After all, we are in the midst of a multi-pronged assault on various doctrines where courts defer to agency interpretations of the law.<sup>3</sup> We are seeking to diminish agency independence by rendering agency heads removable at will and stripping them of their bipartisanship.<sup>4</sup> We are even attempting to bring back the so-called “nondelegation doctrine”<sup>5</sup>—the doctrine that says Congress cannot delegate its legislative power to the Executive branch—something Justice Kagan has said would render “most of Government . . . unconstitutional.”<sup>6</sup>

The amicus brief caused me to take a deep dive into first principles and to ask the question: what, exactly, is the conservative way to police the marketplace? My answer is in a new book, *The Conservative Case for Class Actions*. As you can guess, the answer is not federal agencies. If by “federal agencies” we mean “go to the government to get permission to do something,” then federal agencies are the *worst* possible answer. This, of course, is one of the reasons why those on my side of the aisle have been trying to dismantle them.

It is important to note, however, that the answer is also not “no policing of the marketplace.” I discuss this in more detail below, but I want to emphasize it now to make a separate point: the conservative effort to dismantle the administrative state needs class actions. That is, I seriously doubt we can make any significant headway against federal agencies without an alternative means of holding companies accountable for misdeeds. And, at least for the small injuries that make up most market violations, the class action lawsuit is the only viable alternative.

\* \* \*

What are our options for policing the marketplace? As I noted above, one option is “no one,” but let me take that option off the table right away. It is true that companies that do bad things can be punished by their customers when they take their business elsewhere. Is that enough to keep companies in line? The research for my book revealed that the answer to that question is “no.” Although 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* rules.

Consider what the father of the libertarian Austrian School of economics, Friedrich Hayek, said on the question:

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<sup>3</sup> See, e.g., Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103, 121–22 (2018).

<sup>4</sup> See, e.g., Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2392 (2011).

<sup>5</sup> See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 (2002); Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 268 (2005).

<sup>6</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

- “[I]n order that competition should work beneficially, a carefully thought-out legal framework is required . . . .”<sup>7</sup>
- “An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.”<sup>8</sup>
- “A functioning market economy presupposes certain activities on the part of the state . . . .”<sup>9</sup>

Or consider what the father 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.”<sup>10</sup>
- “A government which maintained law and order, defined property rights, served as a means where 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.”<sup>11</sup> (The reference to “liberal” here 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 my 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.<sup>12</sup>

Of course, our laws today go well beyond these ground rules of the market. Indeed, I believe much of the opposition to class actions and other private enforcement is opposition to the underlying laws that the lawsuits are seeking to enforce.<sup>13</sup>

<sup>7</sup> FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 36 (1944).

<sup>8</sup> *Id.* at 39.

<sup>9</sup> FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 222 (1960).

<sup>10</sup> MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 30 (1980).

<sup>11</sup> MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 34 (1962).

<sup>12</sup> 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).

<sup>13</sup> See, e.g., MICHAEL S. GREVE, *HARM-LESS LAWSUITS? WHAT’S WRONG WITH CONSUMER CLASS ACTIONS 2* (2005) (arguing that objectionable class actions “rest in large part on *statutory* laws . . . separate and apart from the common-law rules that traditionally governed relations”).

But my point here is that this line of reasoning only gets us so far. There are some laws that even conservatives like. For at least the laws we like, we should want vigorous enforcement based on conservative principles. As the famous conservative Chicago School economists Gary Becker and George Stigler once put it: “[T]he view of enforcement and litigation as wasteful in whole or in part is simply mistaken. They are as important as the harm they seek to prevent.”<sup>14</sup>

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What, then, are the other options to police the marketplace? There are four. I map them in Figure 1. On one axis, 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 other 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).<sup>15</sup>

Figure 1: Enforcement choices

	Ex Ante	Ex Post
Government	1	2
Private	3	4

Most developed countries fall into something like box one: you have to ask permission before you do something new, and you go to the government for that permission. If the government tells you that what you want to do is lawful, then you are good to go. These countries deal with any fallout through social insurance programs. Deterrence comes from forcing companies to ask for permission before they act; compensation comes from the social insurance programs.

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Robert A. Kagan notes that conservative tort reform efforts have been concerned with the substance of the law, not who the enforcer is. ROBERT A. KAGAN, *AMERICAN ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 274 (2d ed. 2019); *see also* ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* 11 (2017) (“[T]he real concern of critics is not litigation per se, but the underlying rights people are seeking to enforce by bringing lawsuits . . . .”); *id.* at 33 (“The battle over enforcement of the law through litigation is really a disagreement over whether certain conduct should be regulated and how much regulation is appropriate, although the debate is often presented as being about lawyer overreach or frivolous lawsuits.”).

<sup>14</sup> Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 111 J. LEGAL STUD. 1, 16 (1974).

<sup>15</sup> For a description of some of the virtues and vices of each of these boxes, see Daniel Kessler, *Introduction*, in *REGULATION VERSUS LITIGATION* 1–8 (Daniel P. Kessler ed., 2011).

The United States mostly falls into box four: you don't have to ask anyone permission, but you have to pay for any fallout you cause, and the mechanism to collect those payments is initiated by whomever is injured. We don't need social insurance programs to pick up the tab. Deterrence comes from the companies themselves when they figure out whether or not they should act by weighing whether they might be sued if they do and how much it would cost if they are; compensation comes from the companies when they lose those lawsuits.

The choice between boxes one and four should not be difficult for a conservative. Many conservatives have said as much in the past.<sup>16</sup> They have included academics like Milton Friedman<sup>17</sup> as well as politicians like the libertarian Republican Gary Johnson.<sup>18</sup> Indeed, a terrific new book by a libertarian research fellow at George Mason University's Mercatus Center is devoted entirely to this question, and its conclusion could not be clearer: "ex post (or after the fact) solutions should generally trump ex ante (before the fact) controls."<sup>19</sup> What kind of *ex post* solutions are these? "Contract" and other private "common law" lawsuits, including "class-action activity."<sup>20</sup> The reason is simple: box one stifles innovation and experimentation because we can never know enough about something new to know how much permission to grant to it. It also requires massive taxes to support social insurance programs to compensate people when they are harmed. Box four lets companies innovate and experiment as much as they want as long as they promise to clean up any messes they make. And it costs us nothing in taxes.

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<sup>16</sup> Herbert J. Hovenkamp writes that "[l]ibertarians and conservatives have been particularly critical of the progressive state" compared to the common law. Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. REV. 1063, 1086–87 (2017).

<sup>17</sup> See FRIEDMAN & FRIEDMAN, *supra* note 10, at 207. Liberal economists make the case for box one by arguing that judges have neither the incentives nor the expertise to fashion rules of liability for market behavior. See, e.g., Andrei Shleifer, *Efficient Regulation*, in REGULATION VERSUS LITIGATION, *supra* note 15, at 27–42. As I explain below, when comparing boxes two and four, I am very skeptical that decentralized, independent, generalist judges are inferior to centralized, politically compromised, albeit specialized, government bureaucrats. The case is even more dubious for box one. As Shleifer explains, "[w]ith respect to the creation of rules, there are even deeper concerns about regulators than about judges." *Id.* at 39; see also Steven Shavell, *A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation*, 42 J. LEGAL STUD. 275, 275 (2013). Indeed, although comparative studies of this sort are difficult to do well, we now have empirical evidence that box-four nations have better economies than box-one nations. For example, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer recount studies showing "the superior performance of . . . common law countries" in Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285, 286, 298 (2008).

<sup>18</sup> See Ryan Lizza, *The Libertarians' Secret Weapon*, NEW YORKER (July 18, 2016), <https://www.newyorker.com/magazine/2016/07/25/gary-johnson-the-third-party-candidate>.

<sup>19</sup> ADAM THIERER, PERMISSIONLESS INNOVATION 103 (rev. ed. 2016) (ebook); see also Veronique de Rugy, *Beyond Permissionless Innovation*, REASON, Jan. 2016, at 14.

<sup>20</sup> THIERER, *supra* note 19, at 122–24.

This is why I said at the outset that, if by “federal agencies” we mean “go to the government and get permission,” then that is the *worst* possible option. But boxes one and four are not our only boxes. We also have box two and box three. Box three has not been tried much<sup>21</sup> and it suffers from the same threat to innovation and need for vast social insurance that box one does. Thus, in my view, the real choice for conservatives is between box two and box four. Both of these boxes take advantage of the innovation and energy that comes from letting companies do what they want without asking for permission first. Both of these boxes seek to deter wrongdoing by giving companies incentives to be careful about what they do by insisting that companies pay for any harm they cause later on. Neither of these boxes requires the creation of social insurance programs to compensate people when the permitted corporate activities injure people; the companies themselves pay the compensation when they are sued later on. The only difference is who brings the lawsuit when the companies cause harm: government lawyers or private lawyers.

So which lawyers should conservatives and libertarians prefer? I think the answer is easy: private lawyers. Indeed, there was a time when this notion would not have been as provocative as it might sound today. Although it has been largely forgotten, for most of our history, conservatives preferred legal enforcement by private lawyers because they thought private enforcers of the law were better than public enforcers. For example, in the 1970s, prominent conservative economists—Judge Richard Posner, William Landes, Gary Becker, and George Stigler—engaged in a famous debate on this question. In a series of articles, they debated who is better suited to enforce the criminal and civil law: private parties or the government?<sup>22</sup> Becker and Stigler said it was private parties,<sup>23</sup> and Posner and Landes said it was sometimes private parties, and sometimes the government.<sup>24</sup> But even Posner and Landes thought private parties were best for the civil laws that conservatives and libertarians support (e.g., breach of contract, fraud, and antitrust) as well as the lawsuits that give rise to class actions.<sup>25</sup> Other conservative thinkers in this era came to the same conclusion.<sup>26</sup>

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<sup>21</sup> Some people point to early New Deal legislation where the federal government delegated gatekeeping power to private trade associations. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 495 (1935); C. Boyden Gray, *Democracy at Home*, 9 *TEX. REV. L. & POL.* 205, 209 (2005) (discussing similar schemes in Europe today). But in these examples the government holds ultimate gatekeeping power and chooses to adopt what the private associations propose to it; these are not purely private schemes. Purely private *ex ante* schemes are very rare, with organizations that certify products as “kosher” and the like perhaps the best examples.

<sup>22</sup> *See* Becker & Stigler, *supra* note 14; William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 *J. LEGAL STUD.* 1 (1975).

<sup>23</sup> Becker & Stigler, *supra* note 14, at 16–17.

<sup>24</sup> Landes & Posner, *supra* note 22, at 30.

<sup>25</sup> *Id.* at 32–33.

<sup>26</sup> For example, some of Hayek’s endorsement of the common law has been interpreted to

It was not just in the academy that conservatives had these thoughts. They manifested themselves in the political world as well. As Robert Kagan<sup>27</sup> and Sean Farhang<sup>28</sup> have chronicled, many of the statutory regimes Congress enacted in this era could win Republican support only on the promise that they would be enforced by private lawsuits rather than government bureaucrats. Indeed, for much of the twentieth century, it was liberals and not conservatives who objected to private lawsuits to enforce the law. One of the reasons liberals built the administrative state during the Progressive and New Deal eras was to wrest enforcement of the law away from the private sector.<sup>29</sup> Franklin Delano Roosevelt went so far as to veto New Deal legislation when it relied too heavily on private enforcement instead of government agencies.<sup>30</sup> Similarly, decades later, it was the liberal Carter Administration that sought legislation to abolish small-claim class actions brought by the private bar and replace them with government lawsuits.<sup>31</sup> The sponsor of the Administration's bill in the United States Senate? Ted Kennedy.<sup>32</sup>

In my book, I try to reclaim this conservative tradition, but I do so by drawing upon a new—and, I hope, an especially appealing—perspective: the theory of privatization of government. Since at least the 1970s, the theory of privatization has been a central tenet of conservative and libertarian theories of government. There are few government functions that conservatives do *not* think should be turned over to the private sector. For many of the same reasons we want to privatize nearly everything else, I think we should want to privatize the enforcement of market rules as well.

The conservative theory of privatization is often traced to Margaret Thatcher's British government in the late 1970s, but Robert Poole, the founder of the libertarian Reason Foundation (and leading privatization think tank) is said to have coined

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rest on the virtues of private enforcement and not just the virtues of judicial lawmaking. See Peter J. Boettke & Rosolino Candela, *Hayek, Leoni, and Law as a Fifth Factor of Production*, 42 ATL. ECON. J. 123, 129–30 (2014).

<sup>27</sup> See KAGAN, *supra* note 13, at 262–63.

<sup>28</sup> See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 107–08, 120 (2010).

<sup>29</sup> See ANDREI SHLEIFER, *THE FAILURE OF JUDGES AND THE RISE OF REGULATORS* 143 (2012); William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2135 (2004).

<sup>30</sup> See Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941). The text of the veto message is available online through a historical archive maintained by the University of California, Santa Barbara at <http://www.presidency.ucsb.edu/ws/index.php?pid=15914>.

<sup>31</sup> See STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* 44 (2017).

<sup>32</sup> *Id.*



the term in the 1960s.<sup>33</sup> Whatever its origin, it has been a staple of Republican politics and conservative and libertarian thought in the United States since Ronald Reagan.<sup>34</sup> The basic idea is that much of what the government does should be done by the private sector. The theory encompasses a spectrum of efforts to transition government work to private parties.<sup>35</sup> At one end, the government entirely divests itself of assets or industries, as Britain did with many of its industries under Thatcher and as many conservatives want the United States to do with Amtrak.<sup>36</sup> On the other end, more common in the United States, the government retains financial control but outsources the delivery of goods or services to private parties.<sup>37</sup> There are numerous arrangements in between. There is almost no end to the government services that conservatives want to privatize in one form or another.

Why do conservatives and libertarians love to privatize? I identify six reasons in the literature: 1) smaller government is better than bigger; 2) self-help is preferable to dependence on government; 3) private actors have better incentives; 4) private actors have access to better resources; 5) private actors are more independent from special interests; and 6) private actors are less centralized. I show in the book that all six of these reasons counsel in favor of using private lawyers to police the marketplace over government lawyers.<sup>38</sup> I also show that this is not merely a matter of theory: there is strong empirical evidence in favor of the private bar as well.

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Some conservatives believe that enforcement of the law is different from other products or services that might be produced in the private sector because the profit motive will always drive lawyers to take things too far and file too many lawsuits. The concern is that profits can be made not only by pursuing egregious corporate misconduct; profits can also be made by pursuing conduct that is neither egregious nor even in violation of the law. I understand this concern. It makes sense that the

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<sup>33</sup> Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 262 (Jody Freeman & Martha Minnow eds., 2009); see also Robert W. Poole, Jr., *Reflections on 30 Years of Promoting Privatization*, in *TRANSFORMING GOVERNMENT THROUGH PRIVATIZATION* 21 (2006) (citing the 1969 book *The Age of Discontinuity* by Peter Drucker and the 1970 book *Uncle Sam, the Monopoly Man* by William Wooldridge for conceiving of privatization as an intellectual movement).

<sup>34</sup> See *id.* at 22.

<sup>35</sup> See, e.g., JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* 7 (1989). E.S. Savas lists this spectrum of activity from more privatized to less privatized: market, franchise, vouchers, grants, contract, government vending, intergovernmental agreement, and governmental. E.S. SAVAS, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* 88 (2000).

<sup>36</sup> See DONAHUE, *supra* note 35, at 6, 215.

<sup>37</sup> *Id.*

<sup>38</sup> Many of these points were made from a less ideological perspective in an important article many years ago, Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 *TEX. INT'L L.J.* 135, 136–40 (1999).

pursuit of profits leads the private bar to exploit technicalities, to push the envelope on what is illegal, and to file meritless lawsuits. It also makes sense that, because government bureaucrats cannot pursue profits and have more limited resources, they do these things less often.<sup>39</sup> On the other hand, turning enforcement over to the government is not the only way we can inject more discretion into the enforcement of the law. In order for private plaintiffs to win lawsuits, they must convince a judge to interpret the law in their favor; if judges think the lawsuits are nitpicky technicalities not worthy of the court's time, they can dismiss them.

But nothing about this concern is unique to lawyers' profit motives. It is a well-known problem of the profit motive that, if not pointed in the right direction, it can drive people to do bad things.<sup>40</sup> 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 speak. What we have to do is not cast the private lawyer aside, but to regulate, just as we have to regulate the corporate profit motive.<sup>41</sup>

It is true that some are pessimistic about whether we can regulate lawyer profit motives well enough. The concerns are that it is hard to calibrate lawyers' fee awards so that we achieve the socially optimal level of enforcement or that the legislature or

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<sup>39</sup> See Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 615–18 (2008). But see David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1936 (2014) ("Nor is a tendency toward larger-scale, wider-scope litigation efforts unique to private enforcement. Indeed, one might expect a similar trend in regimes delegating enforcement authority solely to prosecutors and agencies.").

<sup>40</sup> See, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION* 42 (1991).

<sup>41</sup> See, e.g., JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION* 221 (2015). 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).

judges are not up to the task. But the same is true of every profit motive, including the corporate ones. It is hard to calibrate the rules of the market to ensure corporate motives are pointed in the right direction and they have big lobbying budgets to try to resist regulation. But we would rather try our best than turn our industries over to the government. The same is true of the enforcement of legal rules.

Indeed, not only can we put rules into place to harness class action lawyers' profit motives for the public good, but I think we largely already have. Ever since the Class Action Fairness Act of 2005,<sup>42</sup> most class action cases of any significance must go through the federal court system. In light of the Supreme Court's recent cases in *Bell Atlantic Corp. v. Twombly*<sup>43</sup> and *Ashcroft v. Iqbal*,<sup>44</sup> it is cheaper and easier to dismiss meritless cases in today's federal courts than it ever has been in American history.<sup>45</sup> 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.<sup>46</sup> It cannot be settled unless a judge signs off.<sup>47</sup> And every dollar of attorneys' fees collected by class action lawyers must be approved by judges too.<sup>48</sup>

Of course, judges could exercise these powers unwisely, but that is not what the data suggests. As I show in my book, it is difficult to find many clearly meritless 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 a surprising result: class action lawyers are only collecting around 15%.<sup>49</sup> The rest of the money is going to class members, or, if they cannot be found, to charity.<sup>50</sup>

It is true that in many class action cases, only a small percentage of class members get any of the relief. A new study by the Federal Trade Commission puts the median claims rate in a consumer class action at nine percent.<sup>51</sup> But we have to

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<sup>42</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

<sup>43</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>44</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>45</sup> For a rare academic defense of these decisions, see Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012).

<sup>46</sup> FED. R. CIV. P. 23(c)(1)(A).

<sup>47</sup> FED. R. CIV. P. 23(e).

<sup>48</sup> FED. R. CIV. P. 23(h).

<sup>49</sup> See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 830-31 (2010).

<sup>50</sup> Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 97 (2014).

<sup>51</sup> FED. TRADE COMM., CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS 11 (2019), [https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class\\_action\\_fairness\\_report\\_0.pdf](https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf).

remember what the alternative is: the government. Would the government do a better job? No. Most of the time, the government is prohibited by law to distribute monies it recovers from corporations to the victims.<sup>52</sup> But even when the government is not prohibited, how do you think the government goes about making its distributions? By hiring the same companies the class action lawyers do! In other words, the government's "claims rate" is usually zero percent, but, even when it is not zero, it is no better than what the private bar achieves.<sup>53</sup>

But if some class actions do a poor job of compensating class members, what is the point of bringing these lawsuits? The point is a notion pioneered by conservative law and economics scholars: deterrence.<sup>54</sup> When companies know they will have to pay for doing something wrong, they will be less likely to engage in the wrongdoing to begin with. For deterrence, it does not matter who gets the money so long as it does not go back to the wrongdoer. Even when class actions do not do well at compensating, they can still do well at deterring. It is true that some critics dismiss deterrence-based arguments as "mere theory," but, as I show in my book, not only is it a very good theory, there are indeed several empirical studies that support the theory.<sup>55</sup>

Although I argue that judges are largely exercising their powers wisely, it does not mean our system is perfect. At the end of my book, I take seriously several legitimate objections that are raised about our class action system and offer proposals to respond to each and every one of these objections. Some of these proposals will not be welcomed by class action lawyers. For example, I suggest we should breach the principle of "trans-substantivity" and limit class actions to the substantive laws that have broad political consensus. I suggest that we should share more discovery costs and change class action trial procedures to reduce the possibility of overdeterrence. And I suggest ideas to crack down even further on meritless cases. But my hope is that by meeting legitimate objections halfway, we can persuade my fellow conservatives to keep class action lawsuits around for the next generation of consumers, employees, and shareholders. As I say repeatedly in the book, conservatives can mend the class action. We don't have to end it.

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<sup>52</sup> See Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 341 n.63 (2015) (citing 15 U.S.C. § 78u(d)(3)(C)(i) (2013)).

<sup>53</sup> See FED. TRADE COMM., OFFICE OF CLAIMS AND REFUNDS ANNUAL REPORT 2 (2017), <https://www.ftc.gov/system/files/documents/reports/bureau-consumer-protection-office-claims-refunds-annual-report-2017-consumer-refunds-effected-july/redressreportformattedfor-web122117.pdf>.

<sup>54</sup> Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?*, in THE CLASS ACTION EFFECT 181 (Catherine Piché ed., 2018).

<sup>55</sup> *Id.* at 188 n.20.

