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Deregulation and Private Enforcement

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Introduction

Several years ago, a group of conservative and libertarian academics filed an amicus brief in the United States Supreme Court. The case was *AT&T v. Concepcion* and it presented the question whether companies could enforce arbitration agreements that required their customers to waive their ability to join a class action. 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. This did not give the conservative and libertarian academics pause. Their solution? "Federal agencies."[1] The Court sided with the academics.

Yet, for much of the time since *Concepcion*, conservative and libertarian academics have done their level best to undermine those same federal agencies. There is now a multi-pronged assault on various doctrines where courts defer to agency interpretations of the law.[2] Other efforts seek to diminish agency independence by rendering agency heads removable at will and stripping them of their bipartisanship.[3] Perhaps the most ambitious attack seeks to bring back the so-called "nondelegation doctrine"[4]—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."[5]

These seemingly conflicting efforts raise a question: who exactly do conservatives and libertarians think *should* enforce the law in the marketplace? Or do they think that the marketplace does not need law at all? I answer these questions in a new book called THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press).

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[1] See Brief of Distinguished Law Professors at 30, available at https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_893_PetitionerAmCuDistinguishedLawProfs.pdf ("[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 . . . .").

[2] See, e.g., Christopher J. Walker, Attacking Auer and Chevron Deference: A Literature Review, 16 GEO. J.L. & PUB. POL'Y 103, 122 (2018).

[3] See, e.g., Kevin M. Stack, Agency Independence After Pcaob, 32 Cardozo L. Rev. 2391 (2011).

[4] See, e.g., Gary Lawson, Delegation and Original Meaning, 88 VA. L. REv. 327 (2002); Gary Lawson, Discretion as Delegation: The Proper Understanding of the Nondelegation Doctrine, 73 GEO. WASH. L. REV. 235, 268 (2005).

[5] Gundy v. United States, 588 U.S. ___ (2019).

My answers are the following: 1) even conservatives and libertarians think that markets need legal rules and 2) conservatives and libertarians should prefer private enforcement of the rules to the only known alternatives: more government regulation or more public enforcement. In this essay, I make the conservative-libertarian case for private enforcement of the law.

The conservative-libertarian case for legal rules

Conservatives are sometimes caricatured as being opposed to all intervention in the market, but these are not serious characterizations. Virtually everyone believes that some legal rules in the market are necessary. Consider what the father 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."[6]

- "An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other."[7]

- "A functioning market economy presupposes certain activities on the part of the state."[8]

Or consider what the father of the Chicago School of economics, Milton Friedman, says 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."[9]

- "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."[10] (This reference to "liberal" is a reference to "classical liberal," a term generally associated with the right in academic circles.)

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[6] Friedrich A. Hayek, *The Road to Serfdom* (London: G. Routledge, 1944), 36.

[7] Ibid.

[8] Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 222.

[9] Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* (San Diego, CA: Harcourt Brace Jovanovich, 1990), 30.

[10] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), 34.

What legal rules do both libertarians and conservatives think we need in the market? Although they start from different places, 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.

First consider libertarians. They believe that government exists to protect our liberty from being infringed by others.[11] Thus, libertarians favor laws against theft. But libertarians don't stop there. Breach of contract and fraud are closely related to theft. If I give you $100 to buy a product, and you take my money and don't give me the product, you have essentially stolen my money. Likewise, if I give you $100 to buy a product, and the product you give me is not the same one you told me I was buying, you have, again, essentially stolen my money. Almost all libertarians I know of believe that government should create laws against theft,[12] against breaching contracts,[13] and against fraud.[14] It is true that, on rare occasion, one encounters a libertarian who takes the view that the government is not needed for any of these things. We do not need the government to forbid theft; people can just hire private security guards.[15] We do not need the government to prohibit breach of contract or fraud; people can just not do business with merchants who have a reputation for mistreating customers.[16] Although this sounds plausible in theory, in reality a world like this would be very costly. How much would each person have to spend to hire his or her own security guards? How much would we spend to research the track record of every merchant we might do business with? The answer most libertarians give is: too much.[17] Even if it is theoretically possible to have a market without government, it is not a good market.[18]

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[11] See, e.g., Gregory Mitchell, "Libertarian Nudges," *Missouri Law Review* 82 (2017): 703.

[12] Hayek, *Constitution of Liberty*, 141.

[13] Ibid., 140–41; Richard A. Epstein, "The Libertarian Quartet," *Reason*, January 1999, 62–63; Richard A. Epstein, "The Uneasy Marriage of Utilitarian and Libertarian Thought," *Quinnipiac Law Review* 19, no. 4 (2000): 786; Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Cambridge, MA: Harvard University Press, 2014), 20; Murray, *What It Means to Be a Libertarian*, 9.

[14] Hayek, *Road to Serfdom*, 39. Epstein, *Classical Liberal Constitution*, 15–16; Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, MA: Harvard University Press, 1992), 25; Richard A. Epstein, "The Neoclassical Economics of Consumer Contracts," *Minnesota Law Review* 92, no. 3 (2008): 807; Epstein, "Uneasy Marriage", 795; Richard A. Epstein, "Unconscionability: A Critical Reappraisal," *Journal of Law & Economics*, 18, no. 2 (1975): 298; Randy E. Barnett, *The Structure of Liberty*, 2nd ed., (Oxford: Oxford University Press, 2014), 103; Murray endorses laws "against fraud and deceptive practice". *What It Means to Be a Libertarian*, 60; Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988), chapter 15; passim; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic, 1974) 26; 63–65; 152; and passim.

[15] David Friedman, "The Machinery of Freedom: Guide to a Radical Capitalism," in *Anarchy and the Law: The Political Economy of Choice*, ed. Edward P. Stringham (New Brunswick: Transaction Publishers, 2011), 40–42.

[16] Ibid., 42; James W. Child, "Can Libertarianism Sustain a Fraud Standard?," *Ethics* 104, no. 4 (July 1994): 722–738.

[17] As James Child reports, for example, "I have read or talked to many libertarians on this point and have not found one who is willing to countenance fraud" (ibid., 723, 4n).

[18] Nathan B. Oman, *The Dignity of Commerce* (Chicago: University of Chicago Press, 2016): 34–35. Some early readers have asked why I do not include private adjudication—such as through arbitration—as another way market participants can protect themselves from theft, breach of contract, and fraud without government. But arbitration is not governmentless. The only way to enforce an arbitration decree if one party does not comply with it is to file a

Conservatives agree we need laws against theft, breach of contract, and fraud. But they get there less as a matter of protecting liberty from infringement and more as a matter of making the market work better. Conservatives, like Milton Friedman and others from the Chicago School, are more utilitarian than libertarians: their goal is to ensure that society allocates resources to their highest uses. But this goal, too, requires laws against theft, breach of contract, and fraud.

For example, in order for markets to work well, people need to be able to trust each other. If I invest millions of dollars in a factory, I need to be able to trust that my competitor cannot simply come in and take the facility from me. If I enter into a contract with you to sell me a product for $100, I need to be able to trust that you will deliver the product. If you tell me that the product will cure cancer, I need to be able to trust that you are not lying to me. If we cannot trust each other, then we will be reluctant to invest and to buy. If we are reluctant to invest and to buy, then the market is crippled. It might still be around, but it does not move very fast.

How do we inspire trust in the market? The answer is to create legal ground rules.[19] One rule says: you can't steal other people's things. Another rule says: you have to honor your contracts. Another rule says: you cannot fraudulently represent your products. If you violate these rules, the government stands ready to force you to pay up through the court system. If you do not pay the court judgment, the government stands ready to help again by sending the sheriff to seize your property. This is not just an article of faith: there is empirical evidence showing that markets flourish when the participants must follow these basic legal rules.[20]

Of course, it is not enough to create rules and a court system. Someone has to bring the rule violators to court. That is the question I turn to in the next section. But whoever brings the enforcement action, it is clear that we need at least a few rules. Markets cannot form without rules already in place to govern transactions. Who would buy anything if there were no contract law in place to give you recourse if your product was never delivered? Not many of us.

Indeed, competition in the market is so important to conservatives that many of them do not stop with simple contract and fraud laws. Many of believe it is not enough to give people confidence that, if they buy something, they will receive what they thought they bought. Rules of that sort will create a good market, but not a great one. Why? Because in order to have a great market, there must not only be confidence, but competition. Buyers and sellers must have options. If there is only one option, we do not have much of a market. It is for this reason that many conservatives also believe in antitrust laws.[21] These laws are not designed to facilitate trust; they are designed to facilitate competition. Many conservatives go even further and believe that the government should also prevent merchants from becoming monopolies or exploiting their monopolies. Some

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lawsuit in court. This has been true from the very beginning of arbitration, as Christian Burset chronicles in "The Rise of Modern Commercial Arbitration and the Limits of Private Ordering."

[19] Oman, *Dignity of Commerce*, 36.

[20] "[T]he answer to the question of whether securities [fraud] laws matter is a definite yes. Financial markets do not prosper when left to market forces alone." Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, "What Works in Securities Laws?," *Journal of Finance* 61, no. 1 (February 2006): 27.

[21] Zingales, *Capitalism for the People* 5, 37, 47.

conservatives would go even further and reduce transaction costs in the market even more than fraud and contract laws do by forcing merchants to internalize all of the costs of their products in their prices through tort and environmental laws or by leveling information asymmetries through mandatory disclosure laws.[22] Others would promote liquidity in the market by prohibiting things like covenants not to compete.[23]

Libertarians leave the train well before all of this.[24] But the important point is that both groups agree we need some ground rules, and they agree on many of what those rules should be: laws against theft, laws against breach of contract, laws against fraud, and, for many, laws against price fixing. Almost no one believes in no rules at all.

Of course, many of our laws go well beyond the market ground rules conservatives and libertarians support. 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.[25] But my point here is

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[22] Richard A. Posner, "Regulation [Agencies] versus Litigation [Courts]: An Analytical Framework", in *Regulation versus Litigation: Perspectives from Economics and Law*, ed. Daniel P. Kessler [Chicago: The University of Chicago Press, 2012], 11–12; Clifford Winston, *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance* (Washington, D.C.: Brookings Institution Press, 2006), 27, 1n. See also Richard A. Epstein, "Externalities Everywhere?: Morals and the Police Power," *Harvard Journal of Law & Public Policy* 21, no. 1 (1997): 62; Hayek, *Road to Serfdom*, 87; Epstein, "Neoclassical Economics," 826; Jeff McMahon, "What Would Milton Friedman Do About Climate Change? Tax Carbon," *Forbes*, October 12, 2014, accessed March 8, 2017, http://www.forbes.com/sites/jeffmcmahon/2014/10/12/what-would-milton-friedman-do-about-climate-change-tax-carbon/; Lambert, *How to Regulate*, 57–59 (writing about externalities); 217 (discussing mandatory disclosure for information asymmetries).

[23] Zingales, *Capitalism for the People*, 232.

[24] Fred L. Smith Jr. calls for the abolition of all antitrust price fixing laws in "Why Not Abolish Antitrust?," *Regulation* 7, no. 1 (1983): 23; see also Smith Jr., "The Case for Reforming the Antitrust Regulations (If Repeal Is Not an Option)," *Harvard Journal of Law and Public Policy* 23, no. 1 (1999): 23–24, 53–57; Donald J. Boudreaux & Andrew N. Kleit, *How the Market Self-Polices Against Predatory Pricing*, Competitive Enterprise Institute, June 1996, http://www.cei.org/PDFs/predatorypricing.pdf; Donald J. Boudreaux, "Antitrust and Competition from a Market-Process Perspective," chapter in *Research Handbook on Austrian Law and Economics*, eds. Todd J. Zywicki and Peter J. Boettke, (Northampton, MA: Edward Elgar, 2017), 278. Professor DeBow notes a "small but tenacious group" "identified with the 'Austrian school' of economics" and "of libertarian origin" who argue "for the repeal of all antitrust statutes" in "What's Wrong with Price Fixing," 45; see also Kressin, "The Debate Within Libertarianism;" Dominick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* (New York: Wiley, 1982), 32. On the other hand, some libertarians support antitrust laws against horizontal price fixing and even laws against monopolies. See, e.g., Richard A. Epstein "Monopoly Dominance or Level Playing Field? The New Antitrust Paradox," *University of Chicago Law Review* 72, no. 1 (2005): 49. In *Constitution of Liberty*, Hayek writes that "property should be sufficiently dispersed so that the individual is not dependent on particular persons who alone can provide him with what he needs or who alone can employ him" (141).

[25] See, e.g., Michael Greve argues that objectionable class actions "rest in large part on *statutory* laws . . . separate and apart from the common-law rules that traditionally governed relations". *Harm-Less Lawsuits?* (Washington, D.C.: American Enterprise Institute, 2005), 2. Robert A. Kagan notes that conservative tort reform efforts have been concerned with the substance of the law not who the enforcer is. "American Adversarial Legalism in the Early 21st Century," (unpublished manuscript, March 2015). Alexandra Lahav, "[T]he real concern of critics is not litigation per se, but the underlying rights people are seeking to enforce by bringing lawsuits". *In Praise of Litigation* (New York: Oxford University Press, 2017) 11. "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" (ibid., 33).

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."[26]

The conservative-libertarian case for private enforcement

The real question, then, is not whether we need legal rules to govern the marketplace, but how best to implement the rules. If you look around the world, you see that most countries implement them differently than we do. Most countries rely on government agencies to implement the rules. Companies must go to the government and ask for permission to do things, and, if the permission is granted, the company is insulated from legal liability if anyone is harmed. What happens to the people who are harmed? They are compensated, but not from the company: most other western countries have generous social insurance programs—like universal, government-provided health care, unemployment benefits, etc.—to make people whole who are injured for any reason, including injury caused by perfectly legal corporate activity.[27]

In the United States, we sometimes employ this go-to-the-government-for-permission model (see, for example, the Food and Drug Administration's requirement that companies seek its approval before they sell new drugs, or many of our environmental laws), but mostly we do not. For the most part, we let companies do what they want, but, if they injure people, then they get sued and have to pay compensation through our litigation system. We do not have the generous social insurance systems to pick up the tab.

That America is different from the rest of the world in this way is well known. Legal scholar Robert Kagan puts it well when he says: "It is only a slight oversimplification to say that in the United States lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states."[28]

So which of these systems sounds more conservative to you? Go to the government for permission to do things and have "high-tax, activist welfare states" pick up the tab when something goes wrong? Or let people do what they want and rely on self-help (i.e., private litigation initiated by injured parties) to hold them accountable? The answer seems obvious to me: the American system of self-help.

In fairness, however, these are not our only choices. There are four choices. I map them in figure 1. On one axis, we see a choice between enforcing the law before a company acts (ex ante) or

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[26] Gary Becker and George Stigler, "Law Enforcement, Malfeasance, and Compensation of Enforcers," *Journal of Legal Studies* 3, no. 1 (January 1974): 16.

[27] See Robert E. Litan, Peter Swire, and Clifford Winston, "The U.S. Liability System: Background and Trends," in *Liability: Perspectives and Policy*, eds. Robert E. Litan and Clifford Winston (Washington, D.C.: Brookings Institution Press, 1988), 4.

[28] Robert A. Kagan, *Adversarial Legalism: the American Way of Law* (Cambridge, MA: Harvard University Press, 2001), 16.

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).[29]

Figure 1: Enforcement choices

	Ex Ante	Ex Post
Government	1	2
Private	3	4

As I said at the outset, most developed countries around the world fall into something like box 1: 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.

The United States mostly falls into box 4: 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.

As I intimated above, the choice between boxes 1 and 4 is not difficult for a conservative. Many conservatives have said as much in the past.[30] They have included academics like the libertarian law professor Richard Epstein[31] and the conservative economist Milton Freidman[32] as well as

[29] For a description of some of the virtues and vices of each of these boxes, see Daniel Kessler, "Introduction" in *Regulation versus Litigation: Perspectives from Economics and Law*, ed. Daniel Kessler (Chicago and London: University of Chicago Press, 2011), 13–22.

[30] Herbert J. Hovenkamp writes that "[l]ibertarians and conservatives have been particularly critical of the progressive state . . . [in] contrast . . . [to] the common law". "Appraising the Progressive State," *Iowa Law Review* 102 (2017): 1086–1087.

[31] See, e.g., Richard Epstein, "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation," *Yale Law Journal* 92, no. 8 (1983); "Unconscionability: A Critical Reappraisal," *Journal of Law and Economics* 18, no. 2 (1975); "A Theory of Strict Liability," *Journal of Legal Studies* 2, no. 1 (1973); "The Libertarian Quartet," *Reason*, January 1999, 63.

[32] See Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* (San Diego, CA: Harcourt Brace Jovanovich, 1990), 207. Liberal economists make the case for box 1 by arguing that judges have neither the incentives nor the expertise to fashion rules of liability for market behavior; see, for example, Andrei Shleifer, "Efficient Regulation," in *Regulation versus Litigation: Perspectives from Economics and Law*, ed. Daniel Kessler (Chicago and London: University of Chicago Press, 2011): 31–42. As I explain below when comparing boxes 2 and 4, 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 1. As Shleifer explains, "[w]ith respect to the creation of rules, there are even deeper concerns about regulators than about judges"

politicians like the libertarian Republican Gary Johnson.[33] 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."[34] What kind of ex post solutions are these? "Contract" and other private "common law" lawsuits, including "class-action activity."[35] The reason is simple: box 1 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 4 lets companies to 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.

It is therefore surprising that these days many companies—the same ones that generally support conservative politicians—say they prefer box 1. Indeed, many companies today beg Washington, D.C., to regulate them. Without any prompting by the government, these companies go to the federal government asking for permission to do things.[36] Why would companies do this? Because they are hoping that the government's blessing will insulate them from private lawsuits through

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(ibid., 39). See also Steven Shavell, "A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation," *Journal of Legal Studies* 42 (2013): 275. Indeed, although comparative studies of this sort are difficult to do well, we now have empirical evidence that box-4 nations have better economies than box-1 nations. For example, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer recount studies showing "the superior performance of . . . common law countries" in "The Economic Consequences of Legal Origins," *Journal of Economic Literature* 46, no. 2 (2008): 286, 298.

[33] See Ryan Lizza, "The Libertarians' Secret Weapon," *The New Yorker*, July 25, 2016.

[34] Andrew Thierer, *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom* (Arlington, VA: Mercatus Center, 2014). See also Veronique de Rugy, "Beyond Permissionless Innovation," *Reason*, January 2016, 14.

[35] Thierer, *Permissionless Innovation*, 75–77.

[36] There are many examples of this phenomenon. J.R. Deshazo and Jody Freeman discuss how coal companies supported the Air Quality Act of 1967, a federal law regulating pollution. "Timing and Form of Federal Regulation: The Case of Climate Change," *University of Pennsylvania Law Review* 155 (2007): 1508, 23n. Robert Pear reports that both drug companies and physicians supported the National Childhood Vaccine Injury Act, a bill to expand federal regulation of vaccines. "Reagan Signs Bill on Drug Exports and Payment for Vaccine Injuries," *New York Times*, November 15, 1986. More recently, 462 private companies and trade associations signed a letter supporting federal regulation of the labeling of foods containing genetically modified organisms. Coalition for Safe and Affordable Food, Letter to the U.S. House of Representatives, July 21, 2015, https://www.uschamber.com/sites/default/files/7.21.15-_coalition_letter_to_house_supporting_h.r._1599_the_safe_and_accurate_food_labeling_act.pdf. Similarly, a group of chemical manufacturers recently backed a bill to significantly expand federal authority to regulate toxic chemicals. American Alliance for Innovation, "Business Alliance Comments on Bipartisan Chemical Safety Legislation in Senate," press release, June 11, 2013, https://www.uschamber.com/sites/default/files/7.21.15-_coalition_letter_to_house_supporting_h.r._1599_the_safe_and_accurate_food_labeling_act.pdf. In the same vein, the American Car Rental Association backed a bill to expand federal regulation of the car rental industry. "ACRA Applauds Car Rental Recall Provisions in Highway Bill Conference Report," press release, December 23, 2015, https://www.acraorg.com/2015/12/acra-applaus-car-rental-recall-provisions-in-highway-bill-conference-report/. Around the same time, the Chamber of Commerce backed the "enactment of a truly uniform national data breach notification law." "Letter to the Chairman of the House Committee on Energy and Commerce," April 15, 2015, https://www.uschamber.com/sites/default/files/4.15.15-_hill_letter_supporting_the_data_security_and_breach_notification_act.pdf.

their power to preempt state law.[37] But we don't have the European-style social insurance programs to compensate people who are injured from corporate activity; who will compensate injured persons? Incredibly, many corporations say they want more social insurance programs, too.[38]

Again, this is not usually thought of as the conservative way to run a country. But boxes 1 and 4 are not our only boxes. We also have box 2 and box 3. Box 3 has not been tried much[39] and it

[37] Indeed, the reason each of the industries described in the previous footnote backed the federal regulations in question was because each planned expansion of federal regulation would preempt state law. Deshazo and Freeman note that the reason coal companies supported the Air Quality Act of 1967 was because of its federal preemption provisions. "Timing and Form of Federal Regulation," 1508, 23n. Pear notes that the National Childhood Vaccine Injury Act substantially limited vaccine manufacturers' liability for state law claims through preemption. "Reagan Signs Bill on Drug Exports and Payment for Vaccine Injuries." Industry groups supporting federal regulation of labeling of genetically modified organisms cited the fact that it would "[put] a stop to the patchwork of state-based labeling requirements" as a reason to back the bill. Coalition for Safe and Affordable Food, *Letter to the U.S. House of Representatives*. The chemical industry trade group discussed above backed an expansion of federal authority to regulate toxic chemicals in part because it would lead to federal preemption. American Alliance for Innovation, "Business Alliance Comments." The car rental industry backed a bill to expand federal regulation of the car rental industry because it would result in "one federal rental vehicle safety recall standard rather than a patchwork of potentially conflicting state laws." American Car Rental Association, "ACRA Applauds Car Rental Recall Provisions." And the Chamber of Commerce backed federal regulation of data breach notification law because it would to "preempt state law regarding data security." "Letter to the Chairman of the House Committee."

[38] For example, Burke notes that in backing the National Childhood Vaccine Injury Act, vaccine manufacturers supported a government-run social insurance scheme to supplant tort liability. *Lawyers, Lawsuits, and Legal Rights*, 121–150. Barry Brownstein describes how the nuclear power industry successfully lobbied to create a government insurance scheme to compensate victims of nuclear accidents. "The Price-Anderson Act: Is It Consistent with a Sound Energy Policy?," *Policy Analysis* no. 36 (1984), https://www.cato.org/publications/policy-analysis/priceanderson-act-is-it-consistent-sound-energy-policy. Business lobbying was a key factor in many states' decision to expand Medicaid eligibility following the passage of the Affordable Care Act. Alexander Hertel-Fernandez, Theda Skocpol, and David Lynch, "Business Associations, Conservative Networks, and the Ongoing Republican War over Medicaid Expansion," *Journal of Health Politics, Policy, and Law* 41, no. 2 (2016). Raymond L. Mariani notes that a core purpose of the 9/11 Victims Compensation Fund was to protect the airline industry against lawsuits. "The September 11th Victim Compensation Fund of 2001 and the Protection of the Airline Industry: A Bill for the American People," *Journal of Air Law and Commerce* 67 (2002): 172–174. J.D. Harrison reports that "80 percent of business owners said they oppose proposals to save federal money by curbing Social Security benefits, which have been floated in varying degrees by both parties in Washington. Nearly three in four said lawmakers shouldn't cut back on Medicare, and two in three said the same about proposed cuts to Medicaid". "Business Owners Urge Congress to Take Medicare, Social Security Cuts Off the Table," *Washington Post*, February 20, 2013. Robert Pear has identified lobbying efforts by the food and beverage industries as a key part of the opposition to restrictions on the use of food stamps. "Soft Drink Industry Fights Proposed Food Stamp Ban," *New York Times*, April 29, 2011. This opposition is often public; a Walmart vice president said in a public statement that "any reduction in SNAP benefits creates additional financial pressure on our customers who count on these benefits . . . we encourage [Congress] to adopt reforms that do not impact those who need the program the most." Jack Sinclair, "Walmart Statement on SNAP Reductions," *corporate.walmart.com*, December 6, 2013, https://corporate.walmart.com/_news_/news-archive/2013/11/01/walmart-statement-on-snap-reductions.

[39] 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 (1935), and similar schemes in Europe today, see, e.g., C. Boyden Gray, "Democracy at Home," *Texas Review of Law & Politics* 9 (Spring 2005): 209, as box 3 examples. 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.

suffers from the same threat to innovation and need for vast social insurance that box 1 does. Thus, the real choice for conservatives is between box 2 and box 4. 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?[40] Becker and Stigler said it was private parties,[41] and Posner and Landes said it was sometimes private parties, and sometimes the government.[42] 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.[43] Other conservative thinkers in this era came to the same conclusion.[44]

It was not just in the academy that conservatives had these thoughts. They manifested themselves in the political world as well. As Robert Kagan[45] and Sean Farhang[46] 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

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[40] See Gary S. Becker and George J. Stigler, "Law Enforcement, Malfeasance, and Compensation of Enforcers," *Journal of Legal Studies* 3, no. 1 (January 1974): 1–18; William M. Landes and Richard A. Posner, "The Private Enforcement of Law." *Journal of Legal Studies* 4, no. 1 (January 1975): 1–46.

[41] See Becker and Stigler, “Law Enforcement,” 16–17.

[42] See Landes and Posner, “Private Enforcement of Law,” 30.

[43] See ibid., 3, 32.

[44] For example, some of Hayek’s endorsement of the common law has been interpreted to rest on the virtues of private enforcement and not just the virtues of judicial lawmaking. See Peter J. Boettke and Rosolino Candela, “Hayek, Leoni, and Law as a Fifth Factor of Production,” *Atlantic Economic Journal* 42, no. 2 [2014]: 129-30.

[45] See Kagan, *Adversarial Legalism*, 50–51).

[46] See Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* [Princeton, NJ: Princeton University Press, 2010], 107–108, 120.

Progressive and New Deal eras was to wrest enforcement of the law away from the private sector.[47] Franklin Delano Roosevelt went so far as to veto New Deal legislation when it relied too heavily on private enforcement instead of government agencies.[48] 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.[49] The sponsor of the Administration's bill in the United States Senate? Ted Kennedy.[50]

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 the term in the 1960s.[51] Whatever its origin, it has been a staple of Republican politics and conservative and libertarian thought in the United States since Ronald Reagan.[52] 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.[53] 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.[54] 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.[55] There

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[47] See Andrei Shleifer, *The Failure of Judges and the Rise of Regulators* [Cambridge, MA: MIT University Press, 2012], 143; 148). See also William B. Rubenstein, "On What a Private Attorney General Is—and Why It Matters," *Vanderbilt Law Review* 57, no. 1 (2004): 2135.

[48] See Harry Kalven Jr. and Maurice Rosenfield "The Contemporary Function of the Class Suit," *University of Chicago Law Review* 8, no. 4 (1941): 686. 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.

[49] See Stephen B. Burbank and Sean Farhang, *Rights and Retrenchment*, 12.

[50] See ibid.

[51] Alfred C. Aman Jr., *Government by Contract: Outsourcing and American Democracy*, eds. Jody Freeman and Martha Minow (Cambridge, MA: Harvard University Press, 2009), 262. See also the Reason Foundation's citation of 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. *Transforming Government*, 21.

[52] See *Transforming Government*, 2-36.

[53] See, e.g., Donahue, *The Privatization Decision*, 7. 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. *Privatization and Public-Private Partnerships* (New York: Chatham House Publishing, 2000), 88, table 4.6.

[54] See Donahue,*The Privatization Decision*, 215.

[55] See ibid.

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 from 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.

Smaller government. Many libertarians want to privatize because they like less government rather than more.[56] Not only is a big government more expensive to maintain, but a big government is a threat to our freedoms and liberties—if not today, then tomorrow. Once all the government agents we hired to do the good things are done doing them, we are afraid they might turn to taking away our freedoms.[57] This is all the more worrisome in a world of crony capitalism, where, as I explain in more detail below, government agents can be influenced by campaign contributors or other political supporters. Better to minimize the risk by minimizing the number of government agents. This is why, of course, those who founded our nation wanted the federal government to be of "limited and enumerated" powers.[58]

Self-help. Libertarian-minded conservatives have a special reason to prefer private solutions to many problems: they enable us to help ourselves instead of creating dependence on the government to do things for us. When we let government provide things for us, it becomes too easy to stop trying to provide things for ourselves. Over time, the government does not even need to take our liberties away: we freely hand them over. In order to forestall becoming wards of the state, we should minimize the number of instances where government does things that we could do for ourselves.[59]

Better incentives. Utilitarian-minded conservatives tend to favor privatization for a more pragmatic reason: they believe the private sector will do a better job at most things than the public sector.[60] Why? First and foremost because private sector workers have better incentives than government workers. In particular, they believe that the profit motive drives private actors to do a better job than their government counterparts.[61] As the father of privatization, Robert Poole, noted, "[p]rivate firms tend to be efficient precisely *because* they have to make a profit."[62] For the most part, public officials make the same government salary no matter whether they do a good job or a bad job. Civil service protections make it harder to fire them for doing a bad job, too. Without financial

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[56] See, e.g., Savas, *Privatization and Public-Private Partnerships*, 5.

[57] See, e.g., Michaels, "Running Government Like a Business," 1169-72.

[58] See, for example, *The Federalist Papers*, no. 45 (James Madison), (New Haven, CT: The Avalon Project at Yale Law School, 2008), accessed February 15, 2018 at http://avalon.law.yale.edu/18th_century/fed45.asp.

[59] See Murray Newton Rothbard, *For a New Liberty: The Libertarian Manifesto*, second edition (Auburn, AL: Ludwig von Mises Institute, 2007), 192.

[60] See, e.g., Reason Foundation, *Transforming Government*, 3.

[61] See, e.g., Butler, *Privatizing Federal Spending*, 65.

[62] Poole, *Cutting Back City Hall*, 27–28.

"carrots" and "sticks,"[63] we have to depend on the professionalism of public officials to spur their performance. Although that is not nothing, we can do even better in the private sector: private actors have the same desire for professional success, but they also make more money when they do a good job and get fired when they do a bad job.[64] This is why, as the Yale law professor Peter Schuck summarized in his book *Why Government Fails So Often*, "studies indicate that . . . services can usually be provided better and more cheaply by private groups" and that "the market almost always performs more cost-effectively."[65] What's not to like about that?

Better resources. A closely related reason we like to privatize is this one: the government is always strapped for cash. Frankly, this is the way we conservatives (especially libertarians) like it. We don't want to raise taxes, and, as a result, budgets are always limited in the public sector. This makes it hard for the government to make timely investments. Take a look at our infrastructure in this country. By all accounts, it is crumbling.[66] Or take a look at the Internal Revenue Service. No one likes the IRS, but, if the IRS doesn't audit people every once in a while, no one will pay their taxes. Every dollar of enforcement brings in many dollars of additional tax revenue.[67] Yet Congress still slashes the IRS's enforcement budget because it is politically popular.[68] The private sector doesn't have this problem.[69] The resources of the private sector are virtually unlimited. If there is a profitable venture, the private sector will fund it. If the proprietors of the goods or services themselves don't have the money, they can borrow the money or find an investor. They don't have to worry about the political repercussions.

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[63] See, e.g., Bennett and Johnson, *Better Government at Half the Price*, 20, 31.

[64] See, e.g., Savas, *Privatization and Public-Private Partnerships*, 109, 112.

[65] Peter H. Schuck, *Why Government Fails So Often: And How it Can Do Better* (Princeton, NJ: Princeton University Press, 2014), 101; 205.

[66] For example, the Environmental Protection Agency estimates that American sewers release raw sewage into the water supply 23,000 to 75,000 times a year. "Sanitary Sewer Overflows (SSOs)," accessed February 23, 2018, https://www.epa.gov/npdes/sanitary-sewer-overflows-ssos. The Federal Highway Administration estimates that 56,007 bridges in the United States are structurally deficient. Department of Transportation, "National Bridge Inventory: Deficient Bridges by Highway System 2016," last modified December 31, 2016, https://www.fhwa.dot.gov/bridge/nbi/no10/defbr16.cfm. The American Society of Civil Engineers estimates that over the next decade, America's failure to invest in infrastructure will cost four trillion dollars in lost GDP. *Failure to Act: Closing the Infrastructure Investment Gap for America's Economic Future*, published online May 23, 2016, 4, https://www.infrastructurereportcard.org/wp-content/uploads/2016/05/ASCE-Failure-to-Act-Report-for-Web-5.23.16.pdf.

[67] The Department of the Treasury estimates that IRS enforcement spending has a six-to-one direct return on investment, and an indirect return on investment as a result of deterrence three times the direct impact. *The Budget in Brief: Internal Revenue Service*, 2015, https://www.irs.gov/pub/irs-news/IRS%20FY%202015%20Budget%20in%20Brief.pdf.

[68] "Trump Budget Continues Multi-Year Assault on IRS Funding Despite Mnuchin's Call for More Resources," *cbpp.org*, March 16, 2017, https://www.cbpp.org/research/federal-budget/trump-budget-continues-multi-year-assault-on-irs-funding-despite-mnuchins.

[69] Schuck, *Why Government Fails So Often*, 101. Soloway and Chvotkin, "Federal Contracting in Context," 196.

Less bias. Another popular reason why conservatives favor the private sector: the public sector is unduly influenced by campaign contributions, [70] lobbying,[71] and the revolving personnel door between government and industry.[72] This, again, is the crony capitalism I mentioned above. Academics call it something that sounds nicer: public choice theory[73] or agency capture.[74] But the idea is the same. The private sector has its eye on one thing and one thing only: making a profit—something it should be able to earn only if it does a good job. By contrast, the government has its eye on other things,[75] many of which do not help its performance: Who gave us campaign contributions? Who will give us campaign contributions? Isn't that lobbyist or corporate executive our former colleague and friend? Didn't our colleague work for that lobbyist or corporation at some point? Campaign money, lobbying, and the revolving door make the government beholden to special interests in a way that the private sector simply is not.[76] For obvious reasons, we think this negatively affects public sector performance relative to its private sector counterparts.[77]

Less centralization. The last reason most conservatives favor the private sector over the public sector is because the private sector is less centralized.[78] We have only one federal government, for example, whereas we can have an infinite number of private providers of goods and services. As the godfather of the Austrian School of economics, Friedrich Hayek, explains, decentralization is good because it leads to "experimentation" and "competition."[79] Experimentation and competition produce information about what works and what doesn't; they are how we innovate, how we

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[70] Savas, *Privatization and Public-Private Partnerships*, 99. Bennett and Johnson, *Better Government at Half the Price*, 80.

[71] See Clifford D. Winston's detailed chart showing which interest groups rent seek in which policy areas. *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance* (Washington, D.C.: Brookings Institution, 2006), 83–84.

[72] See Luigi Zingales, *A Capitalism for the People* 95.

[73] Schuck, *Why Government Fails So Often*, 130. See also Patrick Dunleavy, "Explaining the Privatization Boom: Public Choice Versus Radical Approaches," *Public Administration* 64, no. 1 (1986): 16.

[74] Schuck *Why Government Fails So Often*, 215; Zingales, *A Capitalism for the People*, 95.

[75] See Michaels, "Running Government Like a Business," 1168.

[76] See Alexandra Lahav, *In Praise of Litigation* [New York: Oxford University Press, 2017], 36.

Zingales cites examples of this in the financial industry (xviii–xix; xxvii), including the decision by big banks to come under more regulation of the Federal Reserve after the financial crisis:

> From the beginning . . . , large banks made it clear that they wanted to be regulated . . . . The reason wasn't that the Fed had the best record in solving problems or that it was the most logical regulator . . . . Rather, it was that the Fed was already influenced by the large banks, which choose the board of the New York Fed and provide much of the information needed by the Fed to operate. (*A Capitalism for the People*, xxi)

[77] Winston, *Government Failure versus Market Failure*, 75.

[78] See Schuck, *Why Government Fails So Often*, 101; Savas, *Privatization and Public-Private Partnerships*, 109; Donahue, *The Privatization Decision*, 78.

[79] F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 263. See also the recent book by the conservative federal judge Jeff Sutton, who makes the case for decentralization in the context of interpreting the Constitution. *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford University Press, 2018), 20.

improve.[80] Government offers us one solution, for better or for worse. The private sector can offer us an infinite number of solutions; we can find the best solution over time—and keep one eye open to see if we might find an even better one someday. It is the difference between a monopoly and the market.[81] And it is another reason why we think the private sector generally does a better job than the public sector.

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Do these reasons in favor of privatization tell us anything about using private lawyers to enforce the rules of the market? That is, is the so-called private attorney general better for these reasons than the public one? I think the answer is a big yes:

Smaller government. Obviously, this reason for privatizing favors privatizing the enforcement of market rules, too.[82] If we did not rely on the private bar to enforce the law, we would have to hire thousands upon thousands of government lawyers to replace them—or, even worse, we would have to start regulating the economy ex ante like Europe does.

Self-help. Again, this reason for privatizing obviously favors privatizing the enforcement of the law. Indeed, many libertarians are especially keen on private enforcement because many of them believe we have an innate right to protect ourselves from infringements on our liberty, but that we had no choice but to surrender our right to protect ourselves by force to the government (which exercises a monopoly on force through the criminal law). As a consequence, many libertarians believe the government has an *obligation* to give us a substitute form of self-help, such as the civil lawsuit.[83] Yet, it is not much of a substitute if the government has to file the lawsuit for us; it is not *self*-help if we have to depend on the whim of government bureaucrats.[84]

Better incentives. There is little question that the profit motive gives the private bar better incentives to enforce our market rules than those of government lawyers. Government lawyers, like all government employees, generally earn the same salary no matter how much money they recover against wrongdoers. They also enjoy the same civil service protection from termination as many government employees. Whether they bring one lawsuit or 10, whether they win or lose, they still have a job and they still make the same salary. This is not so for the private plaintiffs'

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[80] See Aman, "Privatization and Democracy," 269.

[81] Pirie, *Dismantling the State*, 3, 4, 25.

[82] Farhang, *The Litigation State*, 55. Stephen Burbank, Sean Farhang, and Herbert Kritzer, "Private Enforcement," *Lewis and Clark Law Review* 17, no. 3 (2013); 662, 665.

[83] See Andrew S. Gold, "A Moral Rights Theory of Private Law," *William & Mary Law Review* 52, no. 6 (2011): 1907–1912.

[84] Gold explains that

> [u]se of the private right of action is thus appropriately open to the plaintiff's discretion. Within this rubric, there is a reason why corrective justice is not a state-compelled remedy. The rights at issue belong to the party who was wronged. She gets to decide whether to do something about being wronged, including whether to make use of her entitlement to enforce her rights. If the state intervened as a matter of course, the party who was wronged would have less control over the counterparty's duties than her moral enforcement rights provide for. (Ibid., 1912)

bar. Much of the time—indeed, almost all of the time in class action litigation—the private bar is paid only on what is known as *contingency*. This means that private lawyers are paid only when their clients recover; if their clients get nothing, they get nothing, too. Moreover, contingency lawyers are usually paid a percentage of what their clients recover. Thus, the more their clients get, the more they get, too.

Better resources. There is also little doubt that the private attorney general outshines the public attorney general with respect to resources. Government enforcement budgets are just as strapped as other government budgets—if not more so because enforcement is a lot less "sexy" than other government expenditures (like those that send people checks in the mail or deliver other goodies). As Yale law professor Peter Schuck summarizes in his book: "[C]ongressional appropriations for enforcement . . . tend to be woefully inadequate."[85] Other scholars agree.[86] Scholars from across the political spectrum agree that the private sector can throw more resources into enforcing the law.[87] The reason is simple, and it goes back to the profit motive. The private sector invests in enforcement like it does everything else: as far as profit allows. Because the private bar is usually paid a one-third percentage of any recovery through the contingency fee system, this means the private bar will invest in any lawsuit where the expected recovery is at least three times what it would cost in time and money to litigate the case.[88] If a given lawyer does not have enough time or money to do it on his or her own, he or she will borrow time and money from someone who does. As Posner and Landes, two of the economists associated with the conservative Chicago School, put it:

The assumption of a budget constraint would be unrealistic as applied to a private enforcer, for assuming reasonably well functioning capital markets he would be able to finance any enforcement activities where the expected monetary return exceeded the expected costs.[89]

As we know, the government does not work this way; the government works under a budget that is constrained by politics. That's why pretty much everyone thinks, in the words of Professor Lemos, that the government "can rarely keep pace with . . . private-sector spending."[90]

But lawsuits cost money. You have to pay lawyers, paralegals, and experts. You have to pay travel expenses and for technology to sift through millions of pages of records. The more constrained

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[85] Schuck, *Why Government Fails So Often*, 223.

[86] See Burbank, Farhang, and Kritzer, "Private Enforcement," 662. Kenneth W. Dam, "Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest," *Journal of Legal Studies* 4, no. 1 (January 1975): 67. Landes and Posner, "Private Enforcement of Law," 36. Lahav, *In Praise of Litigation*, 38.

[87] Coffee, *Entrepreneurial Litigation*, 232. Burbank, Farhang, and Kritzer "Private Enforcement," 662. Rubenstein "On What a Private Attorney General Is," 2135. Amanda M. Rose "Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5," *Columbia Law Review* 108, no. 6 (2008): 1344. Daniel A. Crane "Optimizing Private Antitrust Enforcement," *Vanderbilt Law Review* 63, no. 3 (2010): 677.

[88] See Brian Fitzpatrick, "Do Class Action Lawyers Make Too Little?," *University of Pennsylvania Law Review* 158, no. 7 (2010): 2062.

[89] Landes and Posner, "The Private Enforcement of Law," 36.

[90] Lemos, "Aggregate Litigation Goes Public," 524.

your resources, the fewer lawsuits you can file. The more constrained your resources, the less you can do in the lawsuits you do file. This means, again, that we would expect the government to enforce the law less frequently and recover less when it does try to enforce it; it means, again, that there will be less compensation for victims of wrongdoing and less deterrence of misbehavior.[91]

More independence. Government enforcers are beset by the distractions of special interest campaign money, lobbying, and the revolving door just as much as other government officials. Indeed, government enforcers may be the government officials *most* affected by this crony capitalism. Businesses have every incentive to influence the government to look the other way when they do something wrong or to give them a sweetheart deal if it doesn't look the other way. The government has enormous discretion in deciding when to enforce the law and when not to, in deciding when to settle a case and when not to. Who's to say the decision wasn't made on the merits as opposed to past election support? The promise or even hope of future election support? The fact that the wrongdoer is run by a former colleague and friend from government? No one.

Scholars agree: government enforcers are often "captured" by the businesses and industries against which they are supposed to be enforcing the law.[92] Indeed, it is conservative scholars who are often the *most* agitated about government capture—hence, again, our focus in recent years on crony capitalism. As one scholar notes, "Libertarians and conservatives have been particularly critical of the progressive state because of its propensity to special interest capture."[93] Some trace this entire field of inquiry to the conservative Chicago School[94] or the libertarian Virginia School of economics.[95] Again, we would expect capture to lead to fewer enforcement actions and lower recoveries even when an enforcement action is brought. It is much more difficult for wrongdoers to capture the private bar like this.

Less centralization. Finally, it is obvious that the private bar is less centralized than government enforcement,[96] and it is equally clear that less centralization in enforcement reaps the same benefits of less centralization in other areas. Lawyers can innovate just like anyone else. Private lawyers who come up with better legal theories or more skillful presentations of evidence attract more clients and make more money. Thousands of private lawyers bringing thousands of cases can try new things out in the way that the federal government's lawyers—and even the lawyers of the fifty states—cannot. Over time, we would expect this to lead to better compensation for victims and better deterrence of wrongdoing.

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[91] Zachary D. Clopton "Class Actions and Executive Power," *New York University Law Review* 92, no. 4 (2017): 889.

[92] Schuck, *Why Government Fails So Often*, 221–223, 226. Coffee *Entrepreneurial Litigation*, 192; Engstrom "Private Enforcement's Pathways," 1930, 1939. Ramphal, "The Role of Public and Private Litigation," 103; Lahav *In Praise of Litigation*, 38. Clopton "Class Actions and Executive Power," 893.

[93] Hovenkamp, "Appraising the Progressive State," 1086.

[94] See Shleifer, *The Failure of Judges and the Rise of Regulators*, 4.

[95] See James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan, 1962).

[96] See, e.g., Schuck's *Why Government Fails So Often*, 83. Crane "Optimizing Private Antitrust Enforcement," 677. Lahav *In Praise of Litigation*, 39.

Indeed, the trial and error of the private attorney general model is one of the things that has made what lawyers call the *common law* approach to legal enforcement so attractive among conservative and libertarian scholars. What is the common law approach? Decentralized private lawyers persuading decentralized judges to try this or that; over time, we learn what makes sense and what does not. If we had the same law firm—or even the same 50 law firms—litigating all our cases, we would miss out on all of this.[97] As conservative legal scholar Todd Zywicki noted of Friedrich Hayek, the father of the libertarian Austrian School of economics:

Hayek . . . clearly came to believe that the . . . common law uniquely embodied the rule of law . . . [because] the rules that emerge from the decentralized decision making of the common law, like the prices that emerge from the decentralized decision making of markets . . . emerge from . . . spontaneous order[.][98]

An even more extended libertarian defense of the common law method can be found in Georgetown law professor Randy Barnett's book *The Structure of Liberty*.[99] We find much the same view among economists from the conservative Chicago School. Consider how Becker and Stigler put it:

Free competition among enforcement firms may seem strange, . . . [b]ut society does not pretend to be able to designate who the bakers should be . . . Why should enforcers of the law be chosen differently? Let anyone who wishes enter the trade, innovate, and prosper or fail.[100]

Indeed, utilitarian conservatives have often argued that the common law process will inevitably lead to the rules of law that produce the most wealth for our society.[101] That's obviously hard to

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[97] Of course, plaintiffs' firms specialize, and some areas of the law may end up with only 50 or even 10 private firms suing wrongdoers. The securities fraud bar is thought to be particularly concentrated. Some argue that a small number of experienced firms may be the optimal way to enforce the law. See e.g., Engstrom, "Harnessing the Private Attorney General," 1256-1263. This may be true, but, as in all industries, we need to reassure ourselves of that by keeping barriers to entry low so that new firms can test incumbents. This is one of the greatest virtues of the rise of the third-party litigation funding that I mention below when I discuss the fall of champerty and maintenance: it democratizes the plaintiffs' bar.

[98] Todd Zywicki, "Posner, Hayek and the Economic Analysis of Law," *Iowa Law Review* 93, no. 2 (2008): 588; see also Todd Zywicki and Edward Stringham, "Austrian Law and Economics and Efficiency in the Common Law," in *Research Handbook on Austrian Law and Economics,* eds. Todd J. Zywicki and Peter J. Boettke (Northampton, MA: Edward Elgar, 2017): 199–202. Zywicki and others have criticized Hayek's support for the common law as a bit under-theorized. See ibid., 202–203; John Hasnas, "Hayek, Common Law, and Fluid Drive," *New York University Journal of Law & Liberty* 1 (2005): 98–109; Adrian Vermeule, "Many-Minds Arguments in Legal Theory," *Journal of Legal Analysis* 1, no. 1 (2009): 13–16. But even these critics end up fairly positive on the common law method. For example, Hasnas says: "I frequently argue for the common law in preference to legislation myself." "Hayek, Common Law, and Fluid Drive," 105. And Zywicki and Stringham conclude: "Those who take Hayek's discussion of the importance of discovery through competition seriously, should question the idea that the state must provide law centrally." "Austrian Law and Economics," 205.

[99] Randy E. Barnett, *The Structure of Liberty*, 2nd ed. (Oxford, UK: Oxford University Press, 2014), 115–128.

[100] Becker and Stigler, "Law Enforcement," 13. As Todd Zywicki and Edward Stringham put it, "[t]he common law . . . has been subject to much praise from economists in both the neoclassical and Austrian traditions." Zywicki and Stringham, "Austrian Law and Economics," 192.

[101] See Zywicki and Stringham, "Austrian Law and Economics," 192–194.

prove and a lot of people disagree.[102] But it is not only conservatives who praise decentralization in enforcement of the law. Scholars on the left and right agree that the private bar is more innovative than the government.[103] Indeed, decentralization not only gives the private bar an advantage over the government with regard to innovation in prosecuting misconduct, but it often gives the private bar an advantage over the government with regard to detection of misconduct. Private lawyers are often closer to the misconduct because they are closer to the people who are actually injured by it: their clients.[104] As legal scholar Myriam Gilles puts it, "the massive government expenditures required to detect and investigate misconduct are no match for the millions of 'eyes on the ground' that bear witness to . . . violations."[105]

There is one way in which government enforcement might be better suited to detection of misconduct: if the government suspects a company of criminal misconduct, it can wield the awesome investigatory powers of the grand jury. It is not uncommon to see private lawsuits follow on a criminal investigation by the government for this reason (although, as I explain below, not as common as many people think). On the other hand, these powers are only awesome if they are used; many people have criticized government enforcers because they so infrequently use their criminal powers against corporations.[106] Moreover, even if these powers sometimes do give the government a leg up in detection, it does not mean that private enforcement is still not better suited to prosecuting wrongdoers once the misconduct has been detected. Indeed, in light of the reluctance of the government to pursue criminal charges against corporations, it is all the more imperative that someone is available to hold corporations accountable under the civil law. But my view is not that we should get rid of government enforcement; sometimes government enforcers are needed. But that does not mean we should not prefer private enforcers.

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At this point in my argument, many conservatives will raise the following objection: 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 pursuing egregious corporate misconduct; profits can also be made pursuing conduct that is neither egregious nor even in violation of the law. I understand this concern. It makes sense that the pursuit of profits leads the private bar to exploit technicalities, to push the envelope on what is illegal, and to file meritless

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[102] See, e.g, the research described in ibid., 195–196 and Andrei Schleifer, "Efficient Regulation," in *Regulation versus Litigation: Perspectives from Law and Economics*, ed. Daniel Kessler (Chicago: University of Chicago Press, 2011): 37.

[103] See, e.g., Burbank, Farhang, and Kritzer "Private Enforcement," 662-64;Engstrom "Private Enforcement's Pathways," 1930. Dam "Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest," 68. Lemos "Privatizing Public Litigation," 554.

[104] See, e.g., Crane "Optimizing Private Antitrust Enforcement," 677.

[105] Myriam Gilles, "Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights," *Columbia Law Review* 100, no. 6 (2000): 1413.

[106] See, e.g., David M. Uhlmann, "Justice Falls Short in GM Case," *New York Times*, September 19, 2015. Perhaps the most exhaustive study is Brandon Garrett's *Too Big to Jail*, which documents "outrage that corporations are getting leniency" yet "no employees are being held accountable" either (95).

lawsuits. It also makes sense that, because government bureaucrats cannot pursue profits and have more limited resources, they do these things less often.[107] 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.[108] 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.[109]

It is true that some are pessimistic that we can regulate lawyer profit motives well enough. The concern is that it is hard to calibrate lawyers' fee awards so that we achieve the socially optimal level of enforcement or that the legislature or 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 to turn our industries over to the government. The same is true of the enforcement of legal rules.

This is why I am not persuaded by what may be the most compelling concern with profit-motivated private enforcement. The concern is that, profit-motivated enforcers will not just push to enforce the law too frequently, but they will push the law itself—the underlying market rules—in a more and more liberal direction. The private bar will push judges to interpret the law to encompass more and more corporate activity; they will lobby the legislature to do the same. The more market

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[107] See Richard A. Nagareda, "Class Actions in the Administrative State: Kalven and Rosenfield Revisited," *University of Chicago Law Review* 75, no. 2 (2008): 615–618. But see Engstrom's counterpoint that "one might expect a similar trend in regimes delegating enforcement authority solely to prosecutors and agencies". "Private Enforcement's Pathways," 1936.

[108] See, e.g., Olson, *The Litigation Explosion*, 42.

[109] See, e.g., Coffee, *Entrepreneurial Litigation*, 221. 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 violation detected can achieve the socially most preferred outcome in the competitive case". "Private versus Public Enforcement of Fines," *Journal of Legal Studies* 9, no. 1 (1980): 108.

behavior that is illegal, the more misconduct private enforcers can remedy, and the more profits they will earn. If we dangle profits in front of enforcers, we may not only get too much enforcement, these critics worry, but we may get too much law to begin with—legal rules well beyond the ground rules of the market I argued even conservatives favor.

This is a strong objection. But I do not think it kills the case for private enforcement. It does not even come close. The reason is that we already have profit-motivated actors pushing the law in directions we conservatives do not like. They are called big corporations. Corporations push judges and legislatures to eliminate even the necessary ground rules of the market; for laws punishing their competitors; and for laws giving themselves special treatment that their competitors do not enjoy. All of these things should make conservatives blanch. In other words, corporations already lobby judges and legislatures to push the law in one direction; all the private bar does is counteract their efforts by seeking to push the law in the other direction. Frankly, without the private bar pushing back on corporate lobbying, it is not clear who would; consumers are not well enough organized—and probably never could become well enough organized—to raise the money necessary to go toe to toe with corporate lobbyists. In the academy, we call this a *collective action problem*; indeed, it is the *classic* collective action problem: "one shots" like consumers versus "repeat players" like corporations. I made the same point when I responded to conservative critics who worry about the influence the private bar exercises over the election of judges in states that elect them; corporations already try to influence these same elections. Thus, the point turns out to be doubly important: if we neuter the private bar, not only does this clear the playing field for corporations to lobby government enforcers not to enforce the law (or to selectively enforce it against their competitors), but it also clears the field for them to lobby judges and legislatures to eliminate the underlying laws in the first place.

This, of course, is not the only objection conservatives have made to my argument and I address the others in my book. But my conclusion remains robust: for all the reasons we favor private other things, we should prefer the private attorney general over the public one.