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As experiments with class actions spread to more distant shores, especially in countries of civil law backgrounds, a recurring question arises: what is the relation of the private class action to the customary regulatory power of the state? The response offered here is that, in fact, the class action stands in three different postures to state authority: as a direct challenge, as a complement, and as a rival. Recent class action cases in the U.S. are analyzed to examine these three functions and to give a distinct justification for each. At bottom, each justification turns on a contested commitment to a diversity of regulatory authority—here termed "regulatory pluralism"—that lends coherence to all three forms of interaction between the state and private authority, claiming the mantle of the "private attorney general."

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INTRODUCTION

Even as class actions spread beyond their American home medium,[1] they remain a source of contestation in every legal system. Some of the disputes are over technical issues of class structure, such as whether the opt-out form of the American class action infringes individual autonomy,[2] or whether the customary cost-shifting rules of continental legal systems should be modified to facilitate collective actions.[3] In the hands of lawyers and judges, these technical issues come to the fore as contested procedural matters in the administration of collective litigation. But the technical debates ill-capture the fundamental source of tension in class action law. That tension, as set out below, is presented most acutely in civil law countries, but an examination of American developments shows that even the country with the most established class action practices is not immune.

1. *See* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179 (2009) (evaluating European class action reforms in light of the American experience with mass litigation); Richard A. Nagareda, *Aggregate Litigation across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 3 (2009) (noting that European countries have "come to embrace civil procedure reforms to authorize aggregate litigation"). *See also* RICARDO LUIS LORENZETTI, JUSTICIA COLECTIVA (2010) (tracing the development of Argentinian class actions); FRANCISCO VERBIC, PROCESOS COLECTIVOS (2007) (setting forth the jurisprudential foundations in Argentine law for the development of aggregate litigation); LEANDRO J. GIANNINI, LA TUTELA COLECTIVA DE DERECHOS INDIVIDUALES HOMOGÉNEOS (2007) (developing Argentine law in context of undifferentiated individual claims); Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307 (2011) ("[A]t least twenty-one countries . . . have adopted some type of class action . . . ."); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 326–31 (2003) (providing an overview of class actions in Brazil, the most developed of any civil law country); CASSIO SCARPINELLA BUENO, DIREITO PROCESSUAL CIVIL 197–317 (2010) (providing a systematic overview of Brazilian class action law and the use of the public prosecutor for organizing collective litigation); W.A. BOGART ET AL., CLASS ACTIONS IN CANADA: A NATIONAL PROCEDURE IN A MULTI-JURISDICTIONAL SOCIETY?, GLOBAL CLASS ACTIONS EXCHANGE (2007), *available at* http://globalclassactions.stanford.edu/sites/default/files/documents/Canada_National_Report.pdf (presenting a general overview of Canadian class action law).

2. *See, e.g.*, Christopher Hodges, *What Are People Trying to Do in Resolving Mass Issues, How Is It Going, and Where Are We Headed*?, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 330, 341 (2009) ("This debate has acted as a brake on the adoption of collective action mechanisms in countries such as Austria, France, and Germany."); S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 22 (2008) ("[C]ivil law nations interpret a class action—even with an opt-out provision—as an infringement on a non-representative plaintiff's right to decide when and how to exercise his or her right to a cause of action."). *See generally* Remo Caponi, Collective Redress in Europe: Current Developments of "Class Action" Suits in Italy (2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract _id=2100448 (discussing new Italian regulation on class action suits).

3. *See* Gidi, *supra* note 1, at 340 (explaining that in Brazil, for example, unsuccessful class action plaintiffs are exempted from the traditional "loser pays" fee-shifting regime).

At its simplest, and most compelling, the class action is a centralizing device that overcomes a variety of collective action problems.[4] This is clearest when the class action is directed to negative value claims whose potential legal merit cannot justify the transactional values of pursuing legal redress.[5] But it is just as compelling when individual claims for redress arise from a broad harm whose effects are undifferentiated among its victims, as in the classic civil rights cases that formed the basis for modern Rule 23 jurisprudence.[6]

When viewed as a procedural device to overcome collective action problems in mass society, the class action is at once most comprehensible and most problematic. The simple fact is that all societies already possess an institution designed to overcome collective action barriers to common security and the proper allocation of burdens and resources: the state, in its most basic Hobbesian functions.[7] The class action offers an alternative form of collective organization to the state—without the elements of popular participation, political consent, and electoral accountability that justify governmental authority in a democracy. That delegation of collective authority to an institution without the democratic pedigree of the state demands some justification, especially in countries with the strong statist tradition emerging from Roman law.

Ricardo Lorenzetti—the President of the Argentine Supreme Court and the author of the transformative opinion in Argentine jurisprudence—well captures the view of the class action as an alternative to state monopoly control on collective action in *Halabi v. Poder Ejecutivo Nacional*:[8]

4. For example, bankruptcy proceedings provide an alternative mechanism for resolving aggregate claims. *See* Troy A. McKenzie, *Toward a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 960 (2012) ("[B]ankruptcy serves as a better model for judging when to use, and how to order, nonclass aggregation of mass tort litigation.").

5. Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) ("The most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit . . . ."). *See also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (citing favorably the fact that plaintiffs would have been unlikely to pursue individual claims, each averaging just $100).

6. *See* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 661 (2011) (arguing that Rule 23 authors primarily had desegregation suits in mind when they provided for mandatory class treatment under Rule 23(b)(2)).

7. THOMAS HOBBES, LEVIATHAN 89 (Richard Tuck ed., Cambridge Univ. Press 1996) (noting that absent the collective security afforded by the state—in the hypothesized state of nature—"there is no place for Industry; because the fruit thereof is uncertain"). *See also* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 338 (describing "the class action mechanism as fundamentally a centralizing device designed to accomplish some of the same functions as performed by the state").

8. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice]

> Collective actions are a great support for the institutional design of the country because they are mechanisms that allow civil society to participate in the state of law. If ordinary citizens participate in the life of the country, there [are] . . . fewer centralized decisions in a country with a long tradition of centralized decisionmaking.[9]

In some countries, the tension between state authority and the class action's collective empowerment plays out in debates over entrusting only state-designated non-governmental organizations (NGO), such as registered consumer advocacy groups, to bring a class action—as in early legislation in Brazil and Italy.[10] But, perhaps because class actions are by now well-rooted in American law, the debate over the relationship between class actions and state authority is paradoxically less well developed in this country.

Following the invitation of President Lorenzetti to ground the use of class actions in a conception of "regulatory pluralism," this Article will use the idea of multiple sources of regulatory power to explore the relationship between class actions and state authority.[11] Class actions

24/2/2009, "Halabi c. Poder Ejecutivo Nacional" Ley 25.873, decreto 1563/042/amparo ley 16.986 (finding a right to collective action directly under the Argentine constitution and adopting a mechanism for prosecution of consumer class action). For a discussion of the role of *Halabi* in establishing a procedural route for the vindication of what are termed "individual homogeneous" rights, in accordance with Brazilian usage, see JOSÉ MARÍA SALGADO, TUTELA INDIVIDUAL HOMOGÉNEA 103–11 (2011).

9. The passage from which this English translation derives reads as follows:

> Las acciones colectivas son un gran aporte al diseño institucional del país porque son mecanismos que provee el Estado de Derecho para que la sociedad civil participe. Y si el ciudadano común participa en la vida del país, entonces hay más control, más debate, hay discusión y transparencia, menos oscilaciones pendulares y más equilibrio de fuerzas, menos decisiones centralizadas en un país con una larga tradición de decisiones centralizadas.

Ricardo Lorenzetti, *La acción de clase es un aporte al diseño institucional del país*, PORTAL DEL CONSUMIDOR PROTECTORA, http://www.protectora.org.ar/legislacion/la-accion-de-clase-es-un-aporte-al-diseno-institucional-del-pais/1453/ (last visited June 23, 2012).

10. Lei No. 8.078, de 11 de Setembro de 1990 CÓDIGO DE PROTEÇÃO E DEFESA DO CONSUMIDOR [C.D.C.] [Consumer Code], art. 82 (Braz.), *translated in* Gidi, *supra* note 1, at 406 (limiting collective standing to government officials and public interest associations); Decreto Legislativo 6 Settembre 2005, n.206, *in* CODICE DEL CONSUMO [Consumer Code] art. 140 bis (It.), *as discussed in* Caponi, *supra* note 2, at 8. On the ability of such groups to serve the role of consumer protection adequately, compare Issacharoff & Miller, *supra* note 1, at 194–97 (noting potential conflicts of interest between nonprofit organizations and the consumers they represent), with John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 347 (2010) (arguing that because nonprofit organizations stake their "reputational capital" on the outcome of litigation, they are likely to deliver "loyal and competent performance").

11. Regulatory pluralism is generally used to connote the overlap of regulatory powers between formal state functions and private associations that may set professional standards or in other ways fill gaps in formal state coordination. *See* Fabrizio Cafaggi, *Rethinking Private Regulation in the European Regulatory Space*, *in* REFRAMING SELF-REGULATION IN EUROPEAN

exist in fundamentally different relations to state power, at times as a direct antagonist, at times as overt or tacit ally, and at times independent of direct governmental involvement. Examined through this framework, recent class action cases flesh out some observations about the political economy of non-state collective actions.

I. THE CLASS ACTION AS A CHALLENGE TO STATE AUTHORITY

Central to the reforms of Rule 23 of the Federal Rules of Civil Procedure in 1966 was a desire to facilitate the successful prosecution of civil rights claims.[12] The language and structure of Rule 23(b)(2) is framed in terms of the uniformity of the defendant's treatment of a group of persons—what would later be framed as the cohesiveness of the affected class.[13] That uniformity, in turn, would provide the basis for declaratory or injunctive relief that would condemn the defendant's across-the-board conduct.

As straightforward and compelling as this account is, it is nonetheless paradoxical. It is precisely the uniformity of the conduct, as with the segregation of the school system in Topeka, Kansas, that makes class certification both proper under Rule 23(b)(2) and unnecessary. What difference would it have made had *Brown v. Board of Education*[14] gone forward as just an individual case brought in the name of either Oliver Brown, the putative lead plaintiff, or his daughter Linda Brown, the actually excluded schoolchild? Any declaration of unconstitutionality, or even more certainly an injunction against the continued operation of the segregated system as to the Brown family, could not possibly have been confined to the Brown family's claims alone. Further, class certification might have actually worked to the *disadvantage* of the challenge to school segregation. Were the first case to stumble in its theory or evidentiary presentation, res judicata would not serve as a bar to subsequent, better formulated challenges, *unless* the class were certified.[15]

Two possible justifications for class treatment are readily apparent.

PRIVATE LAW 3, 36–38 (Fabrizio Cafaggi ed., 2006) (focusing on a single regulatory relationship as opposed to monopolistic private regulatory power). Here, I use this term one step further to include the incremental regulatory effect of litigation.

12. *See* Marcus, *supra* note 6, at 704–06 (noting that authors focused extensively on desegregation suits in considering various drafts of Rule 23(b)(2)).

13. Rule 23(b)(2) reads: "The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ." FED. R. CIV. P. 23(b)(2).

14. 347 U.S. 483 (1954).

15. *See* Taylor v. Sturgell, 553 U.S. 880 (2008) (clarifying that class-wide suits must conform to the procedural requirements of Rule 23 to have preclusive effect).

First, class actions take pressure off the individual plaintiffs in politically or socially charged litigation. For the same reason the NAACP Legal Defense Fund chose to proceed in the name of Oliver Brown rather than his minor daughter, so too the fact of having many named plaintiffs acting on behalf of a veritable army of claimants diminishes the vulnerability of individual plaintiffs precisely because they become largely interchangeable.

Second, and more central to the present inquiry, the anticipated scope of Rule 23(b)(2) class actions puts them on a collision course with the political choices of democratically elected governmental authority. This problem is more specific than the ever-present consternations over countermajoritarian judicial review. Rather, the classic civil rights class action directed at discriminatory state action is characterized precisely by a claim that the majoritarian processes have placed the class at risk of harm by the legislated choices of majoritarian constituencies. On this view, the certification of a class conforms to the central insight of the renowned *Carolene Products* footnote four.[16] The Rule 23(a) factors, in effect, are a proxy for the discreteness of a cohesive class of plaintiffs, and the Rule 23(b)(2) requirement of being subject to a uniformly applied policy or course of conduct establishes that the class is treated as distinct from the population at large—an operationalization of the footnote's insularity requirement.[17] The key to Rule 23(b)(2) is that the uniformity of treatment across the affected population defines the class.[18] In turn, the Rule 23(a) prerequisites for class certification require that the group subject to distinct state conduct be substantial[19] and that the legal claim substantially addresses the asserted harm suffered by the entirety of the class.[20] When combined, the formal

16. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). In footnote four, the Court set out the basis for modern judicial review by suggesting that certain categories of legislation may be subject to more exacting scrutiny. *Id.* The Court recognized that it might at some point have to apply more searching review to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Id.* In the most famous passage of the footnote, the Court added that stricter scrutiny might also apply when "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.*

17. FED. R. CIV. P. 23(b)(2) (the opposing party's actions or inaction must "apply generally to the class").

18. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011) (holding that Rule 23(b)(2) applies only when "conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them") (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)) (internal quotation marks omitted).

19. FED. R. CIV. P. 23(a)(1).

20. *Dukes*, 131 S. Ct. at 2551 (clarifying that the common question "must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity

criteria of the rules and the resulting class definition set forth the discreteness and insularity of the affected population.

Viewed in this fashion, the Rule 23(b)(2) class action is a claim of political disregard by the majority for the particularized interests of the minority.[21] The final passage of the *Carolene Products* footnote, too often overlooked in favor of the evocative concepts of discreteness and insularity, makes this point clear: "[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[22]

The countermajoritarian force of the class action as a challenge to governmental conduct is still more apparent in a recent massive class action, also denominated *Brown*. In *Brown v. Plata*,[23] the Supreme Court confronted the most significant class action litigation of the past decade, yet one whose procedural contours appear so obvious as to not even register as a "class action case." At issue was the persistent overcrowding of California state prisons, the subject of ongoing litigation challenging various manifestations of desperate prison conditions.[24] The named petitioners claimed medical and psychological traumas as a result of the breakdown of basic prison functions. But the manifested harms were merely symptomatic of the brute fact of overcrowding of the state's prisons. Despite prior determinations of unconstitutional conditions,[25] California continued to incarcerate—furthered by its punitive sentencing policies,[26] including "three strikes

will resolve an issue that is central to the validity of each one of the claims in one stroke"); Nagareda, *supra* note 18, at 132 (arguing that "[w]hat matters to class certification" under Rule 23 is "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation").

21. In its most extreme and unstable form, this minority is so localized as to be the problematic "class of one." In its most recent incarnation, this claim of equal protection disregard for such particularized interests divided the Seventh Circuit in *Del Marcelle v. Brown County Corp.*, 680 F.3d 887 (7th Cir. 2012) (producing a three-way split on the proper standard of review for class of one claims).

22. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

23. Brown v. Plata, 131 S. Ct. 1910 (2011).

24. *Id.* at 1922 (noting that California's prison conditions had been the subject of "years of litigation").

25. *See* Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (finding that state officials acted with deliberate indifference toward inmates' mental health needs in violation of the Eighth Amendment); Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932243, at *1 (N.D. Cal. May 10, 2005) (appointing a Receiver to supervise the prison system's medical facilities after finding persistent violations of inmates' Eighth Amendment rights).

26. In 1977, California enacted a Determinate Sentencing Law ("DSL"), which limited judicial discretion and mandated higher sentences in a variety of circumstances. 1976 Cal. Stat.

and you're out"[27]—to the point that its inmate population reached over 150,000, housed in prisons built to hold 80,000.[28] As the incarcerated population grew, the basic systems of health and security broke down, with alarming incidences of mental illness, violence, and disease.[29]

The need for class treatment in *Brown v. Plata* may be readily discerned from the perspective of crafting a remedy. Each member of the class had been duly sentenced and properly subject to incarceration, leaving aside the inevitable individual appeals and habeas proceedings that may have been pending. No prisoner could claim an individual right to release from prison as a consequence of the overcrowding. Damages might be awarded for claims of severe harm, as with the named plaintiffs in *Brown*, but damage awards to prisoners are notoriously sparing.[30] Whatever the cumulated total of damages awards to individual prisoners, the incentives to the state would have been to allow the problem to fester rather than confront the harsh consequences of state policy. It was simply cheaper—economically and politically—to pay off the worst abused prisoners in a dysfunctional system rather than have to confront the structural calamity of the California state prisons. Absent unitary treatment through a class action, no prisoner would have a claim as to the systemic violations caused by overcrowding, but only standing to seek legal redress for his or her individual harms.

5140 (codified as amended at CAL. PENAL CODE § 1170(a)). In part as a result of its more stringent sentencing regime, the state's prison population increased more than sevenfold between 1980 and 2007. Joan Petersilla, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 209 (2008). The Supreme Court struck down the DSL in 2007. *See* Cunningham v. California, 549 U.S. 270, 293 (2007) (finding that the statute violates defendants' Sixth Amendment rights to a jury trial by permitting "the judge, not the jury, to find the facts permitting an upper term sentence").

27. Three Strikes Law, CAL. PENAL CODE § 667 (West 2003). The Supreme Court has heretofore rejected Eighth Amendment challenges to three-strikes laws. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 66 (2003) (upholding defendant's sentence of two consecutive twenty-five-year terms for shop lifting, his third felony offense). *But see* Ramirez v. Castro, 365 F.3d 755, 768 (9th Cir. 2004) (overturning three-strikes sentence for a third shoplifting offense as disproportional in violation of the Eighth Amendment).

28. *Plata*, 131 S. Ct. at 1923.

29. The record revealed appalling instances of abuse and neglect due to overcrowding. Suicidal inmates awaiting treatment were at times "held for prolonged periods in telephone-booth sized cages without toilets." *Id.* at 1924. Inmates suffering from physical ailments likewise experienced prolonged delays: in one facility, "[a] prisoner with severe abdominal pain died after a five-week delay in referral to a specialist." *Id.* at 1925. A doctor testified that "extreme departures from the standard of care were 'widespread.'" *Id.*

30. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1626 (2003) (noting that even before the 1995 Prison Litigation Reform Act, which raised the bar for recovery, "plaintiffs were successful in only a small minority of inmate cases filed, and even the successful cases usually garnered quite small damages").

Further, a prisoner's status impedes any meaningful recourse to the political process. California disenfranchises convicted felons during their incarceration or parole, with felons constituting the substantial majority of the population in the state prisons.[31] The inability to vote is really only a formality that confirms the outcast status of violent criminals who make up the bulk of the prison population. On the issue of greatest concern to the prison population—the overcrowding and oppression of the prisons themselves—prisoners are unlikely to compete successfully for scarce state resources against schools, roads, parks, and the services consumed by the law-abiding, voting population. Moreover, prisoners face the concentrated and effective political force of the correction workers' union, a powerful force that, through lobbying and extraordinary campaign contributions, has pressed for harsher sentences—a major source of overcrowding.[32]

Ultimately, the Supreme Court upheld a lower court order requiring the immediate reduction of the California prison population by 40,000 inmates, until such time as its prisons hold no more than 137.5% of capacity.[33] It is inconceivable that the paralyzed California political system could have mustered the will to resolve the intolerable conditions inside its prisons, nor is it conceivable that, absent a mechanism for collective redress, any meaningful legal remedy could have been fashioned in one-by-one litigation. The question of class certification legitimately placed the Court in a role of public superintendent over the rights of inmates. This, in turn, allowed the extraordinary and controversial remedy of ordering the release of prisoners duly convicted of crimes, in effect putting felons back on the street.[34]

Viewed against the backdrop of political power, the class action in a case such as *Brown v. Plata* serves as the legitimate and efficient

31. JOSEPH M. HAYES, PUB. POL'Y INST. OF CAL., CALIFORNIA'S CHANGING PRISON POPULATION 1 (2012), *available at* http://www.ppic.org/content/pubs/jtf/JTF_PrisonsJTF.pdf.

32. The California Correctional Peace Officers Association ranked fifth among the top-ten contributors to independent expenditures committees between 2001 and 2006. CAL. FAIR POLITICAL PRACTICES COMM'N, INDEPENDENT EXPENDITURES FOR LEGISLATIVE AND STATEWIDE CANDIDATES 4 (2008), *available at* http://www.fppc.ca.gov/meeting_slides/20080214/Presentation-Final.pdf. Harsher sentencing laws are reflected in an aging prison population, with prisoners aged fifty years or older now comprising nineteen percent of the state's inmates. HAYES, *supra* note 31, at 1.

33. *Plata*, 131 S. Ct. at 1945–46.

34. A ringing dissent by Justice Scalia described the approved remedy as "the most radical injunction issued by a court in our Nation's history." *Plata*, 131 S. Ct. at 1950 (Scalia, J., dissenting). The District Court permitted the State to devise its own plan to reduce overcrowding within two years. *Id.* at 1943. Pending appeal, California initiated a program to transfer "thousands" of prisoners to county jails. *Id.*

mobilizing device for statutory or constitutional challenges to public authorities, particularly on behalf of those who have no effective prospect of political mobilization to correct untoward public behavior.

II. THE CLASS ACTION AS A COMPLEMENT TO STATE AUTHORITY

Unlike the origins of Rule 23(b)(2) as a form of channeling and legitimating challenges to governmental authority, the need for judicial efficiency in the prosecution of related claims for recompense prompted the 1966 innovation of the Rule 23(b)(3) class action.[35] As with all public goods, the more diffuse the related interests become, the more likely there will be insufficient investment to secure common benefits.[36] Here again, the class action needs to confront the role of the state as the primary guarantor of public goods. A key justification of public ordering is the risk of underproduction of undifferentiated, commonly utilized goods, such as national defense, environmental protection, maintenance of water quality, and a host of goods that are difficult to underwrite through private user fees. The state, through its common capacity to pool costs and benefits through the taxing and regulatory power, is the prime mechanism to overcome the "tragedy of the commons"[37] that leads to suboptimal societal results.

Class actions address the public goods dilemma in two ways. First, by pooling the stakes in the case, the class action balances the incentives for investment in litigation between a repeat-play defendant and a host of one-time actors, as with the relation between a mass marketer and an undifferentiated group of individual consumers. While the mass producer of goods or services can amortize the cost of defense across numerous transactions, the sheer cost and bother of pursuing claims over a single consumer transaction will deter any rational actor from seeking legal redress. To quote Judge Richard Posner, "only a lunatic or a fanatic sues for $30."[38] Indeed, overcoming the "negative value"

35. On the history of Rule 23(b)(3), see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 669–70 (1979) (arguing that the 1966 revisions to Rule 23(b)(3) were not intended to revolutionize class-action practice, but merely to create "a more effective procedural tool"); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 335–36 (2005) (emphasizing that considerations of efficiency and access shaped modern Rule 23(b)(3)). *See also* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2146–49 (2004) (arguing that Rule 23(b)(3) permits class action plaintiffs to supplement public regulation by acting as "private attorneys general").

36. *See* Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 388 (1954) (explaining the "pure theory of government expenditure" on collective consumption goods).

37. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968).

38. Carnegie v. Household Int'l Inc., 376 F.3d 656, 661 (7th Cir. 2004).

associated with seeking relief is offered as one of the prime justifications for the small-value class action.[39] Second, pooling claims creates a common reservoir of recovery that may induce an agent to take the reins on behalf of the class. The Supreme Court has acknowledged this, stating:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[40]

The modern form of the class action subsidizes private attorneys in overcoming these collective action barriers.[41] Common fund recoveries are an important inducement for entrepreneurial attorneys to seek out promising cases and invest in them accordingly. Also, the characteristically American form of the opt-out class action further reduces the transaction costs of prosecuting on behalf of a large, diffuse group. Under Rule 23(c), reasonable efforts must be made to provide notice of the action to the affected population.[42] But the burden of exclusion falls on the class members who will be bound unless affirmatively choosing to opt out. As a result, class representatives and, more significantly, class attorneys are spared the expense of having to attempt to contract on a one-by-one basis with all class members—a costly effect of an opt-in system of representation.

If the state is to subsidize private actors to assume the role of public agents—what the law describes as the private attorney general model[43]—then why should the state not assume the role of public guardian itself? Access to justice is itself a costly public good and the availability of relatively low-cost, private attorney general actions depends on the infrastructure of courts, liberal discovery, and the enforceability of judgments. In many areas of law, the subsidy provided by the opt-out class action is sufficient to induce private action that either makes further investment in public enforcement an unnecessary

39. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) ("The most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit.").

40. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 2007)).

41. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2145–47 (2000) (arguing that modern class action rules help subsidize private enforcement of public interests).

42. *See* FED. R. CIV. P. 23(c)(2).

43. *See generally* Rubenstein, *supra* note 35 (explaining the role of private attorney generals in class action suits).

public expenditure or proves to be more efficient in ferreting out wrongdoing that directs public administrative action.

The result is a form of public-private collaboration in which the private class action augments public administration of the laws. Antitrust law provides the best example. The broad channel of antitrust actions begins as public enforcements, either civil or criminal, brought by the Federal Trade Commission and the Department of Justice.[44] Typically, these cases seek injunctive relief, sometimes civil fines or criminal penalties, but almost never restitution or compensation to the victims of unlawful action. Instead, that task is left to private enforcement through the "private attorney general" actions brought by private lawyers challenging the consequences of the anticompetitive activity and seeking recovery for the class. Notably, one of the more notorious of recent antitrust cases set the stage for the elevation of pleading standards beyond the long established "notice pleading" requirement for initiating a civil lawsuit.[45] In *Bell Atlantic Corp. v. Twombly*, the Supreme Court began the modern trend toward heightened pleading requirements that satisfy a plausibility standard of initial judicial scrutiny.[46] For present purposes, it is worth noting only that *Twombly* was among the subset of antitrust class actions in which private parties sought to both establish the liability for the underlying conduct and recover for the damages. The Supreme Court upheld a dismissal for failure to state a plausible claim, something that would be extremely hard to imagine if there had been a prior public prosecution or civil action resulting in a finding of liability.

Although less of a cooperative venture, a similar overlap of private and public enforcement appears in the securities fraud context. One study by Professor Howell Jackson found that between 2002 and 2004,

44. *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 21 (2007) (noting that private plaintiffs "may be able to benefit from the discovery the government collected" and that "potential plaintiffs often lobby the government agencies to bring the cases first"). An earlier study found that between 1973 and 1983, nearly a quarter of all private claims were filed as "follow-on" cases to government enforcement actions. Thomas E. Kauper & Edward A. Snyder, *Private Antitrust Cases that Follow on Government Cases*, *in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 329, 358 (Lawrence J. White ed., 1988).

45. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 19 (2010) (arguing that *Twombly* "transformed the function of a complaint . . . by imposing a more demanding standard that requires a greater factual foundation than previously was required or originally intended").

46. *See* 550 U.S. 544, 555 (2006) (holding that to survive a motion to dismiss, a complaint must plead sufficient facts "to raise a right to relief above the speculative level").

private class actions accounted for nearly forty percent of all sanctions imposed on securities fraud defendants, despite overlapping jurisdiction between private and public actions.[47] In light of the most recent wave of financial dislocations, renewed attention has turned to the perceived insufficiencies of private enforcement to deter misconduct.[48] As well-summarized by Harvey Goldschmidt, former Commissioner of the SEC: "Private enforcement is a necessary supplement to the work that the [SEC] does. It is also a safety valve against the potential capture of the agency by industry."[49]

Though the symbiotic relationship between public and private enforcement is less apparent than in the antitrust context, private securities fraud claims benefit from a strong doctrinal cost-savings boost. All fraud cases require, as an element of proof of harm, evidence that the purchaser relied on the deception that constitutes the fraud—overt in the form of a misrepresentation or covert in the form of an omission of critical information—in making the decision that led to her losses. The best evidence of such detrimental reliance is the testimony of the purchaser herself (even if it is prone to be self-serving after the fact), especially in omission cases where the individual claim of reliance constitutes a counterfactual about what would have happened under untested circumstances.

The need for such direct testimony of fraud would doom all class actions by eliminating the efficiency gains of common prosecution and restoring all the transactional obstacles to small-value prosecutions.[50] But such an inherited conception of common law fraud would presume that modern capital markets operate as nothing more than an extended series of contractual exchanges between individual buyers and sellers, rendering the New York Stock Exchange an elaborate bazaar where individual buyers and sellers haggle over the price of a putatively antique rug.

Modern finance theory, not to mention common sense, casts a

47. *See* Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. ON REG. 253, 280–81 (2007) (graphing U.S. securities regulation enforcement actions in terms of both public and private actions).

48. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1536–38 (2006) (arguing that a greater share of liability must be assigned to corporate managers and directors in order to achieve optimal deterrence from securities class actions).

49. Stephen Labaton, *Businesses Seek Protection on Legal Front*, N.Y. TIMES, Oct. 29, 2006, at A1.

50. *See* Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1648 (2000) ("The modern securities class action would be impossible if such reliance needed to be established on an individual basis . . . .").

skeptical account on this rendering of rapid-fire capital markets. In its place, one may presume that "thick markets," ones in which the traded securities are fully fungible and the buyers and sellers are unknown to each other, are "efficient" in the sense that transactions occur at the market clearing price and not as a result of the exchange of private communication among the transacting parties.[51] This is the "efficient capital market hypothesis," which posits that in thick and efficient markets, all publicly available information will be incorporated into the price of a stock. This then allows securities claims to be based on a fraud on the market theory that presumes that all transactions are affected by the market incorporation of material information that the seller delivers to the market, as with improper claims in a prospectus or misleading representations in public filings.[52]

The ability to prove fraud through market activity has a direct bearing on the prospect for private enforcement, in effect relieving private actions of the transactional burden of establishing reliance through the costly common law method of individual proof.[53] The substantive law's recognition of the efficiency gains realized by institutional actors in thick capital markets is then matched by a procedural tool that overcomes the collective action barrier to investors seeking redress in parallel efficient fashion. Once relieved of the burden of showing individually specific reliance in each transaction, the purchasers of shares during a fixed period of time become interchangeable parts of a market complex, differentiated not by their individual decision making, but by the mechanical facts of the prices at which they bought or sold.

As summarized last Term by Chief Justice Roberts in *Erica P. John Fund v. Halliburton Co.*: "Because the market 'transmits information to the investor in the processed form of a market price,' we can assume . . .

51. *See* Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 384 (1970) ("[I]n an efficient market prices 'fully reflect' available information."); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 567 (1984) (surveying the literature on the efficient capital market hypothesis and identifying the mechanisms through which information may be incorporated into the market price).

52. *See* Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 BUS. LAW. 1, 10 (1982) ("Because the market is efficient, investors who rely on a market price that is artificially inflated or depressed by fraudulent conduct suffer an economic loss."). One of the earliest formulations of the fraud on the market theory in a securities class action appears in *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975) (permitting class certification without individualized proof of loss causation on the ground that "proof of subjective reliance on particular misrepresentations is unnecessary to establish a 10b-5 claim for a deception inflating the price of stock traded in the open market").

53. *See* Basic Inc. v. Levinson, 485 U.S. 223, 245 (1988) ("Requiring a plaintiff to show . . . how he would have acted if omitted material information had been disclosed . . . would [impose] an unnecessarily unrealistic evidentiary burden.").

that an investor relies on public misstatements whenever 'he buys or sells stock at the price set by the market.'"[54] In *Halliburton*, the Court permitted investors to organize collectively as an opt-out class without first proving that each individual investor's losses from the decline in stock prices resulted from the defendant's misrepresentations, precisely because such a requirement would have reduced market-based collective claims to a series of individual exchanges.[55] The result overturned an emerging trend in some lower courts that required investors to prove loss causation in order to take advantage of the fraud on the market presumption, thereby maintaining the economic viability of private enforcement actions.

The antitrust and securities cases lie across a spectrum of complementary public-private enforcement actions in which cost-effective class action mechanisms buttress the limited collective resources available to the state. The spectrum includes arrangements whereby the state agency serves as the initial clearinghouse for collective prosecution, permitting private actions only after state authorities have decided not to sue directly, as with the screening role of the Equal Employment Opportunity Commission under Title VII.[56] Each setting offers a distinct, unique hybrid of public and private enforcement, each organized to overcome the collective action barrier to private individuals seeking redress on their own.[57] The public dimension uses the forced collective action of the state; the private dimension uses the voluntary private aggregation made possible by liberal class action rules.

III. THE CLASS ACTION AS A SUBSTITUTE FOR DIRECT STATE AUTHORITY

At the furthest remove from the idea of exclusive state regulatory authority is the use of the class action as a form of regulatory authority designed to be relatively independent of formal state administration.

54. Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2185 (2011) (quoting *Levinson*, 485 U.S. at 244).

55. *Id.* at 2183.

56. A party wishing to file a discrimination claim under Title VII must first file a claim with the EEOC, which conducts an initial investigation. If the EEOC determines there is "reasonable cause to believe the charge is true," it may file a claim on the party's behalf or issue a right to sue letter permitting the party to pursue her claim in court. 42 U.S.C. § 2000e-5(b)–(f) (2006).

57. It is possible to extend the spectrum beyond the class action mechanism to include *qui tam* actions in which the private recovery of relators allows even individuals to assume collective responsibility for pursuing public harms. *See, e.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773–74 (2000) (noting "the long tradition of *qui tam* actions in England and the American Colonies," and affirming relator's standing to bring suit based on injury to the United States).

While no private action operates truly independent of the state—the locus is courts and private enforcement of legal norms—what is critical in this domain is that the moving agent regarding any particular claim of harm is a private actor rather than a state regulator or prosecutor. Such private enforcement is particularly alluring in common law systems that depend on ex-post liability to police market activity, as opposed to more rigid regulatory review as a condition of market entry.[58]

Once after-the-fact civil liability becomes a major source of regulatory oversight, there is no necessary reason for the state to be the lead enforcement agent. In responding to discrete injuries, the active agents can easily be private actors representing claimants for alleged misconduct that may emerge as the driving force in both establishing liability and obtaining relief.[59] Indeed, in describing the trend in Europe toward greater avenues of aggregate litigation, Fabrizio Cafaggi and Hans Micklitz specifically tie the role of collective litigation to different regulatory strategies: "Shifting enforcement from *ex ante* to *ex post* may permit entry liberalization, leaving pre-market authorization only for specific and riskier products or services."[60]

Thus, the class action in many areas of law is the private alternative to government enforcement; that is, the mechanism that allows the flexibility of the common law to operate instead of more formal command and control regulation. Private enforcement mechanisms play a role in the operation of what may be termed "regulating after the fact," the system of ex-post accountability that is the hallmark of the common law. The expansive role of civil litigation in the U.S., contrasted with greater formal regulation in much of the developed economic world, is part and parcel of a commitment of private regulatory enforcement.[61]

58. *See* Samuel Issacharoff, *Regulating after the Fact*, 56 DEPAUL L. REV. 375, 377–78 (2007) (emphasizing the "centrality of ex post regulation" in the American legal system).

59. Ex-ante regulation is most effective when potential harms are predictable and precautions easily ascertained. Enforcement through ex-post liability is better suited to circumstances where potential harms are variable or available precautions uncertain. *See* Samuel Issacharoff & Ian Samuel, *The Institutional Dimension of Consumer Protection*, *in* NEW FRONTIERS OF CONSUMER PROTECTION: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT 47, 50–53 (Fabrizio Cafaggi & Hans-W. Micklitz eds., 2009) (proposing a typology to explain the relationship between public and private, and ex-post and ex-ante, regulation).

60. Fabrizio Cafaggi & Hans-W. Micklitz, *Introduction*, *in* NEW FRONTIERS OF CONSUMER PROTECTION, *supra* note 59, at 1, 8.

61. Richard L. Marcus, *Reform through Rulemaking?*, 80 WASH. U. L. Q. 901, 907 (2002), http://lawreview.wustl.edu/inprint/80-3/p901Marcusbookpages.pdf ("[T]he American tendency to litigate about topics that are handled without litigation in other societies is not pathological, but rather a logical consequence of the American method of providing activist government without a centralized bureaucracy. On the positive side, it can provide remarkable protections on the initiative of a few, including the dispossessed; those who champion the remedial potential of adversary legalism are right.").

In important areas of consumer law and economic damages, as with securities fraud, the private class action overcomes the distinct disabilities of public enforcement: the problem of insufficient resources, the risk of regulatory capture, and the proclivity toward rigidity of formal regulation in markets that require innovation and speed of change.[62]

The difference between a fixed, preexisting consumer organization or other state-licensed enterprise and the flexible use of the class action reflects long-standing divisions in economic organization. If we go back one thousand years to the rise of Venice as a major trading power, one sees the importance of single-venture economic organizations to capitalize on entrepreneurial initiative and harness active agents to the needs of more passive principals. As told in the compelling account by Daron Acemoglu and James Robinson, Venice pioneered the use of the *commenda*, "a rudimentary type of joint stock company, which formed only for the duration of a single trading mission."[63] A *commenda* "involved two partners, a 'sedentary' one who stayed in Venice and one who traveled. The sedentary partner put capital into the venture, while the traveling partner accompanied the cargo."[64] Acemoglu and Robinson praise the *commenda* for unleashing new uses of investment capital and for preventing the stultifying effects of permanent state monopolies on trade or enterprise.[65]

One can find many parallels between the single-undertaking joint ventures of old and the modern class action as developed in the U.S. Unlike the fixed creation of a government agency, or even the licensing of a single actor such as a designated consumer organization or some other NGO, the class action is transactionally limited. It exists for the limited purpose of pursuing a common set of claims among people who typically have no prior and no subsequent relation to each other. The result is mutually beneficial temporary alliances, as with the *commenda*, but with no institutional permanence beyond the single undertaking.

The class action fits well in American law precisely because of its separation from formal state control. In part, the centrality of class actions in areas such as consumer protection reflects a generalized

62. Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 137–42 (1999).

63. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 152 (2012).

64. *Id.* at 152–53.

65. *Id.* at 153. Acemoglu and Robinson attribute the atrophying of Venice in part to the elimination of flexible economic organizations, such as the *commenda*, in favor of fixed state licenses, a process that promoted capture by established economic actors and that in turn led to economic stagnation. *Id.* at 153–56.

common law approach to incremental regulation through evolving standards of care, similar to the growth of product liability law in the twentieth century.[66] The class action is a procedural device that responds to two obstacles that may frustrate the proper functioning of common law accountability. First, as already discussed, the prospect of collective prosecution serves as a litigation-inducing device through the coordination of small-value claims. Not only does it make collective prosecution possible, but it also allows for potential complete resolution of all claims, thereby saving on the transaction costs of repeat litigation and offering the prospect of a "global peace"[67] premium in exchange for a complete release of all claims against defendants.[68] Second, following the 1966 reforms to Rule 23, class actions proved particularly well suited to economic harm claims arising from impersonal markets for mass produced goods and services. In so doing, class actions bridged a critical gap between limited contractual remedies for the mass of affected consumers and the redress available to the subset of claimants whose physical injuries would place them within the reach of tort law, as in pharmaceutical cases.[69]

But focusing only on the litigation features of the class action would understate the major feature of private litigation in mass markets. Returning to President Lorenzetti's initial account of the role of the class action, what stands out in this form of private action is the introduction of multiple actors into legal enforcement, a form of regulatory pluralism. This role is captured in part by the account of

66. For a discussion on the evolution of products liability, see MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 9–26 (2006); William Powers, Jr., *Is There a Doctrinal Answer to the Question of Generic Liability?*, 72 CHI.-KENT L. REV. 169, 172–73 (1996) (noting that section 402a of the Restatement of Torts paved the ground for modern products liability law through its case-by-case adoption).

67. *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 310 (3d Cir. 2011) ("[W]ere we to mandate that a class include only those alleging 'colorable' claims, we would effectively rule out the ability of a defendant to achieve 'global peace' by obtaining releases from all those who might wish to assert claims, meritorious or not.").

68. In this sense, class action settlements overcome not only the commons problem of public goods, but the negative commons problem arising from the inability to coordinate fractionated interests in a common asset. For an incisive discussion of this element of the "peace premium" in class resolution of common claims, see D. Theodore Rave, *Governing the Anticommons in Non-Class Aggregate Settlements* 7–9 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-42, June 28, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122877 (noting that "defendants are sometimes willing to pay a premium for total peace" to avoid adverse selection effects, reduce uncertainty, and minimize transaction costs).

69. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.01 (2010) (noting that class actions may be more effective in addressing "economic injuries from a generally applicable course of conduct" than "personal injuries" where common issues are generally not as prevalent).

class action plaintiffs as private attorneys general. However, the private attorney general model is limited in implying that the only role of the class action suit is to fill the gap for lack of public resources. Offering a rival actor who can challenge regulatory failure is not simply a response to the benign fact of constrained capacity, but represents a deeper concern about the misdirection of public resources.

Class actions then play a central regulatory role because of their independence from formal state channels. From this perspective, the purpose of the class action is to be a rival to the enforcement powers of state actors so as to serve as a check on the misuse of public authority. Mass markets are prone to the concentrated interests of the repeat actor overwhelming the diffuse interests of small-time actors. The effect is not just a matter of different litigation incentives, but of the disproportionate political pressure that concentrated minorities are likely to exert.[70] On this view, private suit enforcement through a class action is not just a matter of equalizing litigation resources. Rather, the critical issue is having diverse sources of oversight of markets with asymmetric stakes between engaged repeat actors and passive consumers. The greater the number of potential regulatory enforcement agents, the less likely the prospect of the regulator being captured by the superior resources and incentives of the regulated. The trade-off, however, is that there is less public accountability to the form of regulatory enforcement, and that the extent of regulation is largely determined by the economic incentives facing private actors, rather than the formalities of political decision making.

This potential for the class action to serve as an enforcement device independent of state authorities is the feature of class action law that is most likely to engender strenuous opposition from institutional actors. Any mass marketer of goods or services would rather face the limited resources and attention of the individual consumer, whether in the limited domain of one-on-one dispute resolution, or even in the political arena. To speak of class actions as "leveling the playing field"[71] is not

70. This is the classic public choice account of why minority factions can extract disproportionate returns from the political process. For an early formulation of public choice theory, see WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962). On the superior ability of organized minorities to advance their interests, see MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 143 (1965) ("The multitude of workers, consumers, white-collar workers, farmers, and so on are organized only in special circumstances, but business interests are organized as a general rule."). For a comprehensive overview of the public choice literature, see Steven Croley, *Interest Groups and Public Choice*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 49, 49–80 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

71. *See* Samuel Issacharoff, *Assembling Class Actions*, WASH U. L. REV. (forthcoming 2012) (manuscript at 13) (on file with author).

only a matter of balancing the strengths of the relative litigation interests but of the deeper concern that absent some form of independent collective redress, wrongdoing will likely go undetected and unchallenged.

Perhaps not surprisingly, many of the most important battles of current class action case law in the U.S. are being waged in the domain where the class action is a primary mechanism of independent challenge to mass-scale wrongdoing. This is the issue of moment in the domain of consumer law, where the asymmetries of scale between mass marketers and individuals allow the former to control standard form contracting. Across a range of services, such as cell phones and credit cards, and increasingly in the employment context, standard form contracts now prohibit the accepting party from seeking redress as part of a class action and force any individual dispute into individual arbitrations.[72]

The leading cases in this area, most notably *AT&T Mobility LLC v. Concepcion*,[73] turn on the preemptive force of the Federal Arbitration Act (FAA) in preventing state law interference with the effort to disable private enforcement.[74] So long as the consumer contracts are generated in a state that recognizes the enforceability of such waivers, the FAA then serves to preclude any other state remedies.[75] Some cases, with *Concepcion* again the most notable, have looked to the practical

72. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 379 (2005) (predicting that collective action waivers, if permitted to proliferate, will ultimately result in "the near-total demise of the modern class action."); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1638–39 (2005) (noting the ubiquity of mandatory arbitration clauses in contracts of adhesion); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 62–63), *available at* http://ssrn.com/abstract=2038985 (describing collective action waivers as a substantial impediment to negative value class action suits).

73. 131 S. Ct. 1740, 1753 (2011) (holding that the Federal Arbitration Act preempts California's common law unconscionability rule barring class action waivers in contracts of adhesion).

74. Two earlier cases both involved contracts that were silent on the question of class-wide arbitration. In *Green Tree Financial Corp. v. Bazzle*, a plurality of justices held that the FAA empowers the arbitrator—not the state court—to determine whether a contract may be read as permitting class-wide arbitration. 539 U.S. 444, 447 (2003). The Supreme Court went a step further in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, concluding that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis," thereby superseding the background rules of individual states. 130 S. Ct. 1758, 1763 (2010). *See also* Preston v. Ferrer, 552 U.S. 346, 347–48 (2008) (finding that the FAA preempts a California state law requiring exhaustion of administrative remedies prior to arbitration).

75. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (emphasizing that "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles" but "[may not] place arbitration clauses on an unequal 'footing'").

effectiveness of the arbitration forum.[76] But this is the exception, and the grant of strong preemptive power to the FAA has given the requirement of private arbitration the imprimatur of the supremacy of federal law.

To date, most efforts to resist mandatory arbitration have fallen into the trap of asking whether the quality of the underlying consumer agreement as a contract of adhesion made the terms unconscionable.[77] The individualist premise of the unconscionability doctrine does not engage the regulatory role played by class actions in areas of law poorly overseen by state authorities. Indeed, only a handful of cases have addressed the legal enforceability of compelled individual arbitration in terms of the effectiveness of the overall regulatory scheme, primarily in the context of federal law where the state-federal issues of the FAA do not obtain.[78]

At present, it is precisely where public enforcement is difficult, compromised, captured, or under-resourced that the flexibility and the entrepreneurial drive behind the class action are most decisive and most significant. And, not surprisingly, it is there that the political economy

76. The contract at issue in *Concepcion* specified that AT&T would "pay all costs for non-frivolous claims"; guaranteed a minimum recovery of $7,500 plus double attorney fees should the final award exceed AT&T's settlement offer; and permitted plaintiffs to choose whether to arbitrate "in person, by telephone, or based only on submissions." Owing to these generous terms, the Supreme Court observed that "consumers who were members of a class would likely be worse off." 131 S. Ct. at 1744–45. *But see In re* Am. Express Merchs.' Litig., 667 F.3d 204, 218 (2d Cir. 2012) (finding that a class action waiver could not be enforced because the costs of individual arbitration would effectively preclude plaintiffs from bringing their antitrust claims), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 2012 WL 3096737 (U.S. Nov. 9, 2012) (No. 12-133).

77. *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (holding that class action waivers in contracts of adhesion are unconscionable in circumstances where "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money"), *abrogated by Concepcion*, 131 S. Ct. at 1753.

78. The leading example is the Second Circuit's decision in a federal antitrust action. *See In re* Am. Express Merchs.' Litig., 667 F.3d 204 (2d Cir. 2012), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 2012 WL 3096737 (U.S. Nov. 9, 2012) (No. 12-133). The court specifically found that a successful antitrust action would require expenditures approaching one million dollars just for the expert econometrics necessary to prosecute any claim, something that no individual litigant would ever rationally pursue in arbitration or any other individual case. *Id.* at 217–18. By contrast, in *CompuCredit*, the Supreme Court upheld a class action waiver in the face of what appeared to be a statutory commitment to the availability of full court protection. CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669–70 (2012) (holding that a provision of the Credit Repair Organization Act (CROA) mandating disclosure of consumers' "right to sue" does not preclude enforcement of a mandatory arbitration clause). Only Justice Ginsburg argued the importance of private enforcement to effectuate the statutory scheme. *See id.* at 678 (Ginsburg, J., dissenting) (noting that the Court's decision reduces plaintiffs' right to sue to a far less meaningful right "to seek, or defend against, court enforcement of an award rendered by the arbitrator chosen by the credit repair organization").

of resistance by institutional actors is most acute. The most contested arena of class action law is where the private enforcement action substitutes for or displaces public enforcement for reasons that are not difficult to divine. That fact alone speaks to the importance and complexity of private class action law.

CONCLUSION

At the heart of the modern class action is the creation of a private form of collective authority standing relatively independent of the state. The independence can yield an effective mechanism to challenge state conduct, to assist the state without swelling the permanent ranks of enforcement administration, and even to police potential misconduct by state actors vested with exclusive enforcement authority. As ably summarized by Judge Scirica of the Third Circuit:

> The class action device and the concept of the private attorney general are powerful instruments of social and economic policy. Despite inherent tensions, they have proven efficacious in resolving mass claims when courts have insisted on structural, procedural, and substantive fairness. Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality.[79]

Part of the allure of class actions is that they can offer these benefits more flexibly and often more efficiently than can the state. That raises the question, particularly as more civil law countries are experimenting with private enforcement, of their relation to the traditional reliance on direct state regulatory authority. The promised benefits correspond to a deeper commitment to regulatory pluralism, one that recognizes not only the gains that might be realized through private enforcement, but the risks associated with excessive reliance on exclusive state regulatory power.[80]

79. Sullivan v. DB Invs., Inc., 667 F.3d 273, 340 (3d Cir. 2011) (Scirica, J., concurring).

80. My colleague Arthur Miller powerfully makes the point about the deregulatory impulse behind the private attorney general model:

> Even though private lawsuits might be viewed as an inefficient ex post method of enforcing public policies, they have dispersed regulatory authority; achieved greater transparency; provided a source of compensation, deterrence, and institutional governance; and led to leaner government involvement. Without this private-attorneys-general concept, the substitution of an alternative methodology would be necessary. This probably would mean the establishment of the type of continental-style, centralized bureaucracies and administrative enforcement that many think are inconsistent with our culture and heritage.

Miller, *From* Conley *to* Twombly *to* Iqbal, *supra* note 45, at 6.