REVIEW

Can John Coffee Rescue the Private Attorney General? Lessons from the Credit Card Wars

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Entrepreneurial Litigation: Its Rise, Fall, and Future
John C. Coffee Jr. Harvard, 2015. 307 pages.

INTRODUCTION

Over the past several decades, the most divisive and consequential topic in the field of litigation has been class actions. Partisans on one side argue that the class action device is a critical enforcement tool that increases much-needed access to justice.[1] Combatants on the other side scoff that class actions are tools for shaking down corporations for settlement payments and attorney's fees in unmeritorious cases.[2] And every year, these combatants square off in the academic literature and in panel discussions, face each other in the federal appellate courts and at the US Supreme Court, and present competing visions at congressional hearings and before audiences of regulators and judges.

I should know. I am something of a regular on this circuit, presumably because my academic work leaves little doubt about where I stand on these issues. In amicus briefing, testimony, and informal appearances, I am often called on as a designated voice on the pro–class action side of the debate.[3] And, of course,

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1 See, for example, Myriam Gilles and Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U Pa L Rev 103, 108–12 (2006).

2 See, for example, John H. Beisner, Matthew Shors, and Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan L Rev 1441, 1442–44 (2005).

3 See, for example, Brief of *Amici Curiae* Professors of Civil Procedure and Complex Litigation in Support of Petition for Rehearing *En Banc*, *Carrera v Bayer Corp*,

there are regulars on the other side of the issue—smart and energetic people who want as passionately as I do to convey their point of view and convince a broader audience of judges, lawmakers, and ordinary citizens.

The result is loud, and plenty heated. Like so many left-versus-right issues, important new developments—Supreme Court decisions, government studies, and proposed amendments to the Federal Rules of Civil Procedure—are greeted with talking points, white papers, and action plans. And, as with other consequential policy debates, the defenders of corporate interests, like the US Chamber of Commerce, open their checkbooks and tap their standby stables of high-powered lawyers and communications professionals. Meanwhile, consumer- and employment-rights organizations that are staffed by dedicated public-interest lawyers do what they can to man the barricades on the other side. And on and on it goes.

It is against the backdrop of this infernal din that I hear Professor John Coffee's voice. Like a grown-up wading into a room of red-faced toddlers hurling food at one another, Coffee's plea is audible: "Enough!"

It is a distinct voice. For more than thirty years, Coffee has been our preeminent scholar in the area of class actions. His work is invoked by both sides in the class action wars.[4] For the embattled trial lawyers on the left—parched and looking to wring errant drips of validation from Supreme Court dissents or, worse yet, from Ninth Circuit decisions—Coffee's fundamental faith in the class action device is restorative.[5] And for the corporate side, Coffee's relentless focus on endemic agency costs—the built-in misalignment of interests and the mischief that it begets[6]—just proves the point that class actions are and will remain tools for extortion.

Docket No 12-2621, *2–4 (3d Cir filed Oct 4, 2013) (authored by Myriam Gilles, counsel for amici curiae).

4 Compare Gilles and Friedman, 155 U Pa L Rev at 103 (cited in note 1), with Beisner, Shors, and Miller, 57 Stan L Rev at 1453 n 60 (cited in note 2).

5 See, for example, John C. Coffee Jr, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum L Rev 1343, 1348 (1995); John C. Coffee Jr, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U Chi L Rev 877, 896 (1987); John C. Coffee Jr, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md L Rev 215, 226–27 (1983).

6 See, for example, John C. Coffee Jr, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum L Rev 370, 372 (2000).

In his most recent work, *Entrepreneurial Litigation: Its Rise, Fall, and Future*, Coffee puts each side in its place. The book looks to "present a 'warts and all' portrait" of class action litigation—an account, Coffee tells us, "that has long been missing in the literature, in large part because academics writing in this area either have been so ideologically committed to the private attorney general concept or so implacably opposed to it" that they have failed to fully examine its consequences (p 219).[7] On the one hand, Coffee argues that "private enforcement of law through entrepreneurial litigation *does* litigate complex cases well (probably better than more resource-constrained public enforcers can do)" (p 219) (emphasis added).[8] On the other hand, this private enforcement is "persistently misdirected" by "fiduciary failure"—the structurally misaligned incentives that lead "plaintiff's attorneys to settle cases in their own interest" (pp 117, 219).[9]

For Coffee, it is a fundamental feature of class litigation that lawyers—agents—are barely constrained by their figurehead principals, the named plaintiff clients (pp 1–2). Lawyers make investments, often large ones, and lawyers decide when and whether to settle the cases. If it is a virtue of the class device that it can aggregate a large number of small interests—and that surely is a virtue for Coffee—then a corresponding detriment is that the named plaintiffs' interests are too small to warrant any substantial investment in monitoring the lawyers (p 5).[10]

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7 See also John C. Coffee Jr, *Entrepreneurial Litigation: Its Rise, Fall, and Future* 16 (Harvard 2015):

> This book's position is that both views [liberal and conservative] have some basis in fact. The "liberal" view of the plaintiff's attorney as a "private attorney general," who simply supplements public enforcement, significantly understates the reality and impact of our entrepreneurial system of private enforcement. Correspondingly, the "conservative" view of the plaintiff's attorney as a "strike suiter" seems increasingly dated after legislation . . . [but] has substantially raised the bar for plaintiffs in order to protect defendants from "frivolous" litigation.

8 Coffee also points out that liberals value how the class action device "provides legal representation to dispersed and small claimants, who could never afford to sue on an individual basis." Id at 3.

9 Coffee also states that "[e]ntrepreneurial litigation could be redirected, but that goal ultimately requires refashioning the incentives that today invite private attorney generals to grab the low-hanging fruit, often in a manner that benefits mainly lawyers (and not their clients)." Id at 220.

10 See also id at 5 ("Because no individual class member typically has a fraction of the economic stake at risk that the plaintiff's attorney has, the attorney's actions and decisions are seldom closely monitored by the class members."); id at 202 (observing that

The predictable result of these misaligned agency incentives, for Coffee, is what he terms "abusive litigation": the attempt by lawyers to leverage the scale of class actions to coerce unwarranted settlements (p 122). As Coffee explains, the abusive-litigation problem is exacerbated by doctrines and practices that magnify the opportunities for pressing nuisance value settlements (p 122).[11] For example, Coffee points to the "American rule," which effectively immunizes plaintiff's lawyers "from the risk of cost shifting against the loser" (p 29).[12] Freed from worrying about underlying merit, Coffee reports that plaintiffs' lawyers regularly exploit the litigation cost differential created by this rule to induce settlements of even weak class cases (p 165).[13] Coffee also considers the incentives for abusive litigation and sellout settlements in multiforum class litigation, in which plaintiff's lawyers worry that if they do not settle quickly and cheaply, they "may lose out to others" who will (p 121). And "first to file" rules, Coffee observes, "give[ ] control to the first attorney on the scene," but they also generate opportunities for abusive litigation by "reward[ing] premature filing and slapdash complaints" (p 160). Given these sorts of incentives, Coffee tells us, it is to be expected that opportunistic entrepreneurs would organize entire businesses around leveraging the class (or derivative) device "to exploit the nuisance value in cases" (p 122). Thus, "bottom fisher" law firms, as Coffee calls them, ply their craft through derivative suits designed only to threaten delay for M&A transactions, or through class actions alleging imperceptible injuries on

"the U.S. system has long been characterized by weak monitoring of class counsel and only limited accountability").

11 See also Coffee, *Entrepreneurial Litigation* at 122 (cited in note 7):

> [S]ome plaintiff's law firms . . . will seek to exploit the nuisance value in cases[,] . . . [which] may sometimes be based on a favorable litigation cost differential, sometimes on the fact that delay is more costly to defendants than plaintiffs (as in a merger case), and sometimes on the fact that risk-averse individual defendants would prefer to settle if they can arrange to do so based on someone else's money (e.g., the insurer, the indemnifying corporation, or the party bearing the costs of a nonpecuniary settlement).

12 See also id at 11–12 (observing that the American rule "effectively insulated the plaintiff, who otherwise would have had to fear that an unsuccessful suit . . . would result in the shifting of defendant's legal fees against the plaintiff in an amount that might dwarf the damages the plaintiff was seeking").

13 See also id at 165 ("[T]he American rule incentivizes the plaintiff's attorney to impose costs on the adversary, while economizing on its own costs, knowing that it is immune from fee shifting. The net result is to encourage weak litigation.").

behalf of consumers (p 89).[14] And the abusive-litigation problem, for Coffee, is not consigned to these practice ghettos. The class device generally confers the power to extort by threatening defendants, in relatively weak cases, with crippling exposure to risk (pp 122–23).

In Coffee's view, abusive litigation is a pathology born of poorly aligned agency incentives rather than an indictment of class actions themselves:

> At the heart of this problem of abusive litigation is not the availability of the class action, which can be used to assert both meritorious and frivolous claims, but the lack of any downside for the attorney/entrepreneur who is deciding whether to assert a nonmeritorious claim based on its nuisance value. (p 122)

That brings Coffee to his central claim in *Entrepreneurial Litigation*: "Reform requires that the merits need to matter more" (p 122).

To ensure that plaintiffs' counsel make investment decisions based on case merit rather than on exploitable cost asymmetries, Coffee would have lawyers assume a measure of financial responsibility for the fees and expenses incurred in unmeritorious actions (pp 165–66).[15] Toward these ends, Coffee proposes adopting

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14 See also id at 89 (describing "bottom fishers" as attorneys who "d[o] not litigate actively, [do] not conduct discovery, file motions, or take depositions," but rather "just wait[ ] for defendants to make a settlement offer").

15 Coffee also discusses other ways in which we might try to generate incentives for lawyers to invest more time and energy in meritorious class cases. For example, judges could appoint as lead counsel only those lawyers who firmly "agree to commit time and money to the case," or judges could reduce attorney's fees in cases that merely piggyback on earlier public-enforcement actions. Coffee, *Entrepreneurial Litigation* at 161–62, 172 (cited in note 7). Or judges might more regularly certify issue classes to adjudicate complex and expensive-to-prove questions common to the class. See id at 162–65. The glaring problem with the latter proposal, which Coffee himself acknowledges, is that "[c]lass action attorneys are not interested in bestowing valuable findings on the attorneys in the individual actions (where the actual recovery will come) unless they are fairly compensated for so doing." Id at 164. Coffee suggests that this problem might be solved if courts overseeing issue class actions required "that fees be paid out of any individual recovery to the class attorneys," but he notes that this cross court solution would not be "easy to implement" or enforce. Id. To tackle the related problem of multiforum litigation in which defendants settle with the plaintiffs' lawyer who is willing to make the cheapest, quickest deal—potentially selling out class-member interests—Coffee has an interesting proposal to expand the authority of the Judicial Panel on Multidistrict Litigation so that the Panel can "consolidate cases in different states, or in state and federal court." Id at 157. In his view, either federal legislation (pursuant to the Commerce Clause) or interstate compacts among "eight or so key states in which such litigation is common" could enable the Panel to consolidate overlapping decisions and police potential collusion. Id at

a carefully crafted "loser pays" system, or implementing a "seriously enforced system of sanctions for the assertion of weak claims" (p 122). In Coffee's view, such strategies would allow fee-shifting against the plaintiffs' lawyer who brings and loses a meritless case, while also limiting the fee to "a reasonable amount in relation to the plaintiff's own costs and expected payoff" (p 165).[16] Alternatively, Coffee suggests that a legislatively enacted "loser pays" rule could be applied selectively—perhaps "only to those cases that do not survive a motion to dismiss" (p 167).[17]

Importantly, Coffee emphasizes caution in designing these incentives: "[G]o too far in this direction, and entrepreneurial litigation ends" (p 122). And in this, he stands apart from the partisan critics of class actions—those who represent corporations that "are threatened both by meritorious [ ] and frivolous actions" and who thus "prefer overbroad reforms that will chill both types of actions" (p 123).[18] Coffee—the grown-up in the room—represents the "limited constituency interested in optimal reforms that do not 'throw the baby out with the bath water'" (p 123).[19]

It has been an article of faith on my side of the class action wars that when we open the drains to release bathwater, we lose babies.[20] Aggressive actions to curb "abusive litigation" invariably chill the very class actions that Coffee agrees are beneficial. But let's not underestimate Coffee: let's assume that he can calibrate

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157–58. Many details would have to be worked out in practice, but Coffee's concept seems to be an elegant solution to a messy problem.

16 See also id at 165–68. As Coffee describes this reform model, the fee-shifting would allow defendants to "resist . . . 'meritless' litigation but [would have] less impact on cases where the merits are stronger." Id at 166. Presumably, plaintiffs' lawyers would also "recognize that the prospect of fee shifting reduces the prospect of small settlements based on the differential in litigation costs. As a result, fewer 'weak' cases would be filed." Id at 166–67.

17 Coffee does not grapple here with the changes in pleading rules wrought by *Bell Atlantic Corp v Twombly*, 550 US 544 (2007), and *Ashcroft v Iqbal*, 556 US 662 (2009), which may result in a greater number of cases that are dismissed at the Federal Rule of Civil Procedure 12(b)(6) stage and that are, therefore, potentially subject to Coffee's tax on "meritless" litigation. Coffee, *Entrepreneurial Litigation* at 166 (cited in note 7).

18 See also Coffee, *Entrepreneurial Litigation* at 165 (cited in note 7) (warning that any reform to class actions "has to be a balanced one," lest a "Draconian response . . . render the private attorney general extinct").

19 See also id at 153 (observing that it "is not easy to strike" a balance between "protecting the 'negative value' claimant . . . while also penalizing nuisance value suits").

20 See, for example, Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims against Businesses*, 46 U Mich J L Ref 537, 542 (2013) (claiming that the Court's decision in *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740 (2011), "disabled effective private enforcement of many laws made to protect citizens").

a filter that jettisons abusive litigation and keeps the babies where they belong. Presumably, at that point, we would be rid of the abusive-litigation problem. And we might even be able to reverse some of the bad policies that this critique has spawned: the terribly restrictive doctrine and legislation that the courts and Congress have generated in the name of combating abusive class action litigation.[21]

In this hypothetical postreform world, where realigned agency incentives help adjust the signal-to-noise ratio surrounding the class action debate, perhaps we can explore some important questions that otherwise get swept up into—and drowned out by—the old partisan food fight. Maybe, free of abusive-litigation concerns, we can look at how we *really* regard the private attorney general model that is at the core of class actions.

This Review investigates the legitimacy and limits of the private attorney general concept, stripped of abusive-litigation concerns. For this inquiry, there is probably no richer environment than that of consequential class cases that seek structural, institutional reform through injunctive relief. It is injunctive cases, brought as mandatory, non-opt-out class actions under Rule 23(b)(2), that bring into starkest relief concerns about the assumption of power by private actors.[22] When we look at those cases, free from the distortions of the abusive-litigation problem, do we still find areas in which observers encounter significant

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21 Coffee, *Entrepreneurial Litigation* at 125–27 (cited in note 7) (describing legislation that has provided defendants "greater protection" from class actions, including the Private Securities Litigation Reform Act of 1995, the Securities Litigation Uniform Standards Act of 1998, and the Class Action Fairness Act of 2005). See also id at 127–30 (describing the Supreme Court's decisions in *Wal-Mart Stores, Inc v Dukes*, 131 S Ct 2541 (2011), *AT&T Mobility*, and *Comcast Corp v Behrend*, 133 S Ct 1426 (2013), which reveal that "[t]he class action may be dying the death of [ ] one thousand cuts").

22 Coffee does not focus much attention on injunctive class cases in *Entrepreneurial Litigation*. His primary example of these phenomena are nonmonetary securities class settlements mandating additional disclosures. Not surprisingly, Coffee has a dim view of these deals. See, for example, Coffee, *Entrepreneurial Litigation* at 41–42 (cited in note 7) (reporting the results from studies of securities class action suits that found that many settled not for "monetary relief" but instead only for "cosmetic" changes to corporate governance structures); id at 45 ("[T]he process of settlement is dysfunctional, [ ] because [ ] cosmetic and nonpecuniary settlements enable plaintiff's attorneys to obtain an acceptable return at low risk."); id at 92 (observing that the "vast majority [of M&A litigation] provided only for additional disclosures" rather than compensation to class members). But securities class actions that settle for superficial changes do not even begin to represent the broader universe of injunctive-only class actions, and Coffee's single-minded focus prevents him from fully grappling with some of the more controversial aspects of the private attorney general model.

discomfort with the private attorney general model? I believe that we do.

I focus here on three such discomfort zones, all of which are variations on a sort of the "who the heck are you" critique aimed at the class action lawyer's self-appointed assumption of power. Part I considers what I call the "tyranny paradox": the authority of class counsel to engineer broad injunctive settlements and releases that may benefit a majority of class members while simultaneously disabling the rights of a minority to continue litigation for better or different relief. Part II examines the perceived usurpation of the traditional role of public enforcers by self-appointed private lawyers. Finally, Part III takes on the clash between realism and formalism in contemporary class action practice—the disconnect between (1) the real practice of contemporary class action lawyers, particularly in sprawling, multi-defendant litigations, and (2) the traditional conception of one lawyer representing one client.

To explore these theoretical issues in a tangible context, I focus on a group of recent cases that provides a unique laboratory for crystallizing and examining attitudes toward the private attorney general model. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*[23] ("MDL 1720") and *In re American Express Anti Steering Rules Antitrust Litigation*[24] ("Amex ASR") (together, "the Payment Card Cases") involve class actions brought on behalf of merchants against the major credit card companies relating to the swipe fees that merchants incur for accepting credit cards. In these cases, the private attorneys and defendants' counsel negotiated industry-changing reform of the rules that govern merchant credit card acceptance. In the case of *MDL 1720*—brought against Visa and MasterCard, as well as their largest member banks—the settlement called for cash payments of roughly $7 billion, making it by far the largest antitrust settlement in history.[25] In the *Amex ASR* case, class damages were unavailable as a result of the Supreme Court's decision in *American Express Co v Italian Colors Restaurant*,[26] in which the Court upheld American Express's ("Amex's") class action

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[23] 991 F Supp 2d 437 (EDNY 2014).

[24] 2015 WL 4645240 (EDNY).

[25] See Christie Smythe, *Visa, MasterCard $7.25 Billion Fee Deal Wins Approval* (Bloomberg, Nov 9, 2012), archived at http://perma.cc/T4J8-8YUA.

[26] 133 S Ct 2304 (2013) ("Italian Colors").

waivers.[27] As a result, by the time of the proposed settlement, *Amex ASR* focused entirely on the claims for injunctive relief and on reforming Amex's policies under Rule 23(b)(2).[28] Both sets of cases were driven by entrepreneurial lawyers who invested over a decade of time and capital in the litigation.

But what makes the Payment Card Cases ideal for the purposes of our inquiry here is that they so squarely implicate each of the three areas that I identify for enduring skepticism of the private attorney general model. The Payment Card Cases are peculiarly on point in teeing up the second discomfort zone: the usurpation of public-enforcement prerogatives by private actors. These cases also raise the "tyranny of the majority" problem. The *Amex ASR* case in particular is like a perfect exam question designed to illustrate the constitutional and policy concerns underlying private structural-reform litigation.

But the area in which the Payment Card Cases are truly unique is in the third discomfort zone: the unease that the traditional bar and commentariat feel with the on-the-ground, realpolitik, actual practice of meaningful reform litigation. These cases illustrate a high-impact collision of realism and formalism, in which a lawyer intent on achieving industrial reform for his clients—and practicing all the politics and diplomacy necessary to get there—smacks headlong into settled expectations regarding how lawyers ought to behave.

Like many collisions, this one kicks off sparks that provide rare illumination of the behind-the-scenes sausage making that is normally the stuff of rank conjecture or the latest John Grisham novel. But we have to be careful to keep our eyes on the narrow inquiry here, as this story has no shortage of distractions: we get this rare backstage pass because one of the defense-side lawyers working on *MDL 1720*, Willkie Farr & Gallagher partner Keila Ravelo, turns out to have been engaged in a long-running criminal scheme to defraud her client, MasterCard, Inc, out of millions of dollars.[29] When her criminal activities came to light in December 2014, Ravelo was terminated and her files were searched, at which point her employer discovered a great deal of correspondence

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27 Id at 2312.

28 See *Amex ASR*, 2015 WL 4645240 at *4 (describing the proposed settlement as "effectively modify[ing] American Express's Non-Discrimination Provisions," resulting in a prohibition on merchants imposing "differential surcharging" on "transactions completed with a specific brand(s) and/or product type(s)").

29 See Robin Sidel, *Keila Ravelo: From 'Women Worth Watching' to Under Arrest* (Wall St J, Aug 31, 2015), archived at http://perma.cc/XLD8-QLK8.

between Ravelo and Gary Friedman, a longtime friend and a plaintiffs' class action lawyer representing the merchant classes in both *MDL 1720* and *Amex ASR*.

Because the settlements in both cases were contested by prominent objectors, and because Willkie Farr believed the correspondence may have contained "inappropriate" communications, the firm initiated a disclosure procedure under which the Friedman-Ravelo communications were disclosed to all interested parties.[30] Under court supervision, more than eighteen thousand pages of e-mails and other documents were ultimately produced under seal.[31] At that point, the objectors were free to wring whatever narrative they could out of the massive record to argue that the *MDL 1720* settlement, already long approved, should be vacated under Rule 60[32] and that the *Amex ASR* settlement, which had not yet been approved, should be rejected.[33] And it is in these submissions—the briefs of the objectors, a decision of one federal judge, and a public response by Friedman—that we see the collision between realism and formalism.

At this point, a whopper of a disclosure is in order. I am not remotely unbiased here. Gary Friedman is my husband, and Keila Ravelo was a friend for twenty years—I first met her when I was a summer associate, and she was my assigned mentor at a corporate law firm in 1994. I have watched as the Friedman-Ravelo communications became the subject of conspiracy theories aimed at toppling the class action settlements, and I have seen the credulity with which even the most fanciful arguments are received by an audience primed to believe the worst about the plaintiffs' class action bar. Many people—from a federal judge to professional objectors,[34] from serious journalists to the

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30 *Amex ASR*, 2015 WL 4645240 at *6–7.

31 See Declaration of Theresa Trzaskoma, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *2 (EDNY filed July 29, 2015).

32 See Objectors' Reply Memorandum of Law in Support of Motion to Vacate Judgment or, in the Alternative, to Grant Further Discovery, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Civil Action No 05-MD-1720, *21–26 (EDNY filed Sept 1, 2015).

33 See Individual Merchant Plaintiffs' Supplement in Opposition to the Proposed Class Settlement, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *6–9 (EDNY filed June 12, 2015) (available on Westlaw at 2015 WL 4985768).

34 See, for example, *Amex ASR*, 2015 WL 4645240 at *11 (concluding that "improper and disappointing conduct . . . fatally tainted the settlement process").

New York Post[35]—were lightning quick to latch onto the familiar narrative of a plaintiffs' class action lawyer selling out his clients' interests, even when the evidence showed otherwise.[36]

The wells of distrust run deep in class action land. My suspicion is that even if we were to implement Coffee's prescriptions for fully aligning the incentives of class members and class counsel, we would not easily escape a sort of formalism that is itself largely a by-product of concerns with Coffee's abusive-litigation problem. Even in a world that has solved Coffee's abusive-litigation problem, I suspect that this formalism—these vague, ex ante precepts for proper comportment, designed to obviate nettlesome ex post inquiry into whether the agent has indeed rendered loyal and able service to his principal—will persist, vestigial, like a phantom limb.

I. THE TYRANNY PARADOX AND THE LIMITS OF RULE 23(B)(2)

Among the questions raised by mandatory class actions seeking consequential injunctive relief is how to account for divergent preferences and agendas among the various members of the represented class. It is easy to say that class-member interests must be "cohesive," as courts and commentators invariably do[37]—but what does that really mean, in kind and degree? After all, significant injunctive-relief class actions will almost always feature some measure of heterogeneity in the goals and agendas of the constituent class members. If we tolerate relatively more heterogeneity in the composition of these mandatory classes—that is, if we allow the private attorney general, like the public attorney general, to represent a group that is at least somewhat heterogeneous in terms of member preferences—then we risk sanctioning a tyranny of the majority. Settlement terms will reflect the preferences of the majority, while releases will snuff out the ability of the minority to pursue its preferred resolutions

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35 See, for example, Kevin Dugan, *'Burn after Reading' Email Sets Fire to AmEx Credit-Card Pact* (NY Post, Aug 4, 2015), archived at http://perma.cc/JR7L-K4ZZ (describing Friedman and Ravelo as "ethically challenged" and "bone-headed").

36 See Gary Friedman, *Open Letter Responding to Judge Garaufis's Aug. 4 Opinion* (Sept 29, 2015) ("Friedman Open Letter"), archived at http://perma.cc/6ZXE-HYTJ (calling the proposed class settlement one "that would have provided historic benefits").

37 See, for example, *Lemon v International Union of Operating Engineers, Local No 139, AFL-CIO*, 216 F3d 577, 580 (7th Cir 2000) ("Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members.").

through litigation. On the other hand, if we tolerate relatively *less* heterogeneity—that is, if we insist on a truly unitary set of preferences and agendas—then we risk a tyranny of the minority, by which a holdout, gadfly, or other outlier can deprive all class members of important relief to which they are entitled and that they would be unable to obtain in the absence of the class device.

It is not just the *degree* of heterogeneity that matters, though; courts also need to look at what *kind* of class-member interests are at stake. Certainly, a Rule 23(b)(2) class can accommodate substantial heterogeneity in class members' views on litigation strategy or in class members' varying appetites for trial risk.[38] But what about directional interests? Doesn't the private attorney general have to show that the injunctive relief directionally benefits all members of the class? And is that sufficient? These issues are not new. Back in the 1970s, a class led by basketball star Oscar Robertson reached a settlement with the NBA that "radically modified draft practices" and "virtually eliminated option clauses."[39] Wilt Chamberlain objected that the deal would foreclose his claims for different and better relief—presumably, a true free agency system.[40] Is it enough that Chamberlain directionally benefited from the injunction along with the other players? The courts thought so in that case.[41]

It is difficult in the abstract to assess the degree and kind of heterogeneous interests that the contemporary private attorney general suit can accommodate. So far as mandatory-injunctive-relief cases go, these issues have not been terribly well-developed by courts or commentators.[42] Part of the problem, I think, is that

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38 See, for example, Robert G. Bone, *The Misguided Search for Class Unity*, 82 Geo Wash L Rev 651, 707 (2014) (observing that "subjective preferences or goals" do not count for class cohesion because if they did, "[Rule 23(b)(2)] class actions would not qualify as strongly cohesive," but remarking that "[e]ven a civil rights class action can include class members with different preferences about the scope of injunctive relief and different views on the desirability of suing at all"); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand L Rev 995, 1023–24 (2005) ("Different class members often act with different degrees of reasonableness, intent, and knowledge, are injured to different extents, value their losses differently, and have differing goals for the outcome of litigation, but these differences are not necessarily relevant or material in every case.").

39 *Robertson v National Basketball Association*, 556 F2d 682, 686 (2d Cir 1977).

40 *Robertson v National Basketball Association*, 72 FRD 64, 68 (SDNY 1976).

41 Id at 70–71 (holding that the settlement protected the interests of both players and owners and noting that it would help facilitate peaceful and stable labor relations "for many years to come").

42 Professor Coffee, for example, has previously written on divergent class interests in the context of Rule 23(b)(3)–damages suits. Coffee, 100 Colum L Rev at 389–90 (cited

context is so important. It is hard to conjure, let alone find, cases that perfectly present the tyranny paradox that I have described here. And yet the *Amex ASR* case does exactly that.

And so, at the outset, some background on the *Amex ASR* case is in order.

A. The *Amex ASR* Claims

In early 2005, plaintiffs' attorneys began to file class action lawsuits on behalf of merchant clients against Visa, MasterCard, and Amex challenging their no-surcharge and antisteering rules: the rules that prevent merchants from using so-called surcharges and steering to reduce their card-acceptance costs (the "merchant restraints").[43] A surcharge is an extra fee that the merchant can impose on the cardholder to cover the cost to the merchant of the credit card transaction. When credit card networks impose high swipe fees on the merchant, a surcharge allows the merchant to recoup that cost and to induce cardholders—to *steer* cardholders—to use a cheaper (nonsurcharged) payment product.

The core of the antitrust claims is that the merchant restraints insulate the card networks from having to compete with one another on how they price their services to merchants, who have suffered for years from swipe fees that vastly exceed those elsewhere in the world.[44] With the restrictive merchant restraints

in note 6) (noting that risk attitudes affecting litigation and settlement preferences are bound to vary across any group of claimants). A handful of other scholars have examined these issues in the Rule 23(b)(2) context, but they have primarily focused on the paradigmatic case of discernible class conflicts, in which some class members support specific reforms and others support directionally opposite reforms. See, for example, Bone, 82 Geo Wash L Rev at 677–87 (cited in note 38); David Marcus, *The Public Interest Class Action*, 104 Georgetown L J 777, 789–95 (2016); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L Rev 1057, 1077–80 (2002).

43 See, for example, *The Marcus Corp v American Express Co*, 2005 WL 1560484, *1 (SDNY). When a consumer uses a credit card, the merchant pays a fee ranging from a few cents to a flat percentage amount of the transaction—usually between 1 and 3 percent, depending on the card type. The acquiring bank keeps some portion of this fee, and the remainder of the fee goes to the network and the issuing bank as the interchange fee. See *Demystifying Credit Card Processor Fees* (PayPal), archived at http://perma.cc/K4YR-2T5M. See also Adam J. Levitin, *Payment Wars: The Merchant-Bank Struggle for Control of Payment Systems*, 12 Stan J L, Bus & Fin 425, 431–33 (2007).

44 According to estimates by the Merchants Payments Coalition, US merchants pay swipe fees that are many times the fees that are paid by Europeans. See Oliver Tree, *The Great Plastic Robbery Continues: Visa, MasterCard Still 'Ripping Off' US Consumers* (International Business Times, Aug 3, 2012), archived at http://perma.cc/F57Q-5S5F. See also Levitin, 12 Stan J L, Bus & Fin at 427 (cited in note 43) ("In 2006, U.S. merchants paid nearly $57 billion to accept payment card transactions."); id at 428–29 (observing

in place, a merchant faced with high swipe fees cannot respond by using surcharges to steer his customers to use cards that carry lower swipe fees, such as debit cards. But if merchants were able to charge slightly more for high-swipe-fee cards—that is, to impose a surcharge—then customers would rationally move to lower-swipe-fee cards in order to avoid the surcharge. And as a result, the card networks would have incentives to reduce their swipe fees, lest they lose cardholders to the issuers of lower-fee products.

From a policy perspective, the claims also attack the merchant restraints for enforcing a highly regressive system that compels the least-affluent consumers to subsidize more-affluent users of high-rewards cards. Simply put, swipe fees pay for rewards, such as frequent-flier miles, hotel stays, and cash-back programs. Under the merchant restraints, the consumer who chooses to use the high-rewards, high-swipe-fee card (like an Amex charge card) does not bear the cost of that decision.[45] Merchants must bake the cost of these expensive perquisites into their prices for all goods and services.[46] Consequently, users of cash, debit, and electronic-benefits cards are subsidizing the high-end rewards that affluent consumers earn on their premium-card products, like Amex cards. Thus, Federal Reserve economists have observed that the merchant restraints "produce[ ] a cross-subsidy of consumers who use higher-cost payment methods like credit cards by consumers who use lower-cost methods like cash or PIN debit,"[47] and that the users of high-rewards cards—the most-affluent consumers—on average "receive a $2,188 subsidy every year" from users of lower-cost payment forms.[48]

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that "the cost of accepting payment cards has increased" such that "for many merchants, payment card acceptance has become the fastest growing cost of doing business").

45 See Levitin, 12 Stan J L, Bus & Fin at 434 (cited in note 43) (noting that "consumers are not forced to internalize the costs of their choice of payment system" and that "[a]s rewards cards have risen from less than 25% of new card offers in 2001 to nearly 60% in 2005, merchants find themselves performing more and more of their transactions on costlier cards") (citation omitted).

46 See id at 427–28 ("Merchants are unable to pass along the relative costs of different payment systems to consumers because the rules of the major payment card networks—MasterCard, Visa, American Express, and Discover—functionally require merchants to charge all consumers the same price, regardless of payment system.").

47 Scott Schuh, et al, *An Economic Analysis of the 2010 Proposed Settlement between the Department of Justice and Credit Card Networks* *6 (Federal Reserve Bank of Boston, July 8, 2011), archived at http://perma.cc/4KL6-9537.

48 Scott Schuh, Oz Shy, and Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations* *21 (Federal Reserve Bank of Boston, Aug 31, 2010), archived at http://perma.cc/CG5U-K33V.

B. Challenging Amex's Arbitration Clause

Highlighting these anticompetitive and regressive effects, a putative merchant class brought suit challenging Amex's merchant restraints in 2005.[49] But there was a problem: Amex's standard-issue card-acceptance contract included an arbitration clause containing a class action waiver. A group of Amex merchants who were subject to the arbitration clause then challenged these provisions on various grounds.[50] After the district court upheld Amex's class action waiver,[51] the Second Circuit reversed, holding that—under the "vindication of statutory rights" doctrine—arbitration clauses are generally not enforceable when the prohibitive cost of arbitrating effectively precludes claimants from vindicating federal rights, such as the antitrust claims at issue here.[52] The Second Circuit then reaffirmed that ruling three more times in as many years, following intervening Supreme Court precedents.[53]

But in 2013, in a 5–4 decision authored by Justice Antonin Scalia, the Supreme Court reversed the Second Circuit in *Italian*

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49 See *In re American Express Merchants Litigation*, 2006 WL 662341, *1–2 (SDNY).

50 Id. At the time that the merchants challenged Amex's clause, it was only small merchants that were subject to arbitration. Thus, other larger, non-arbitration-bound merchants were allowed to proceed with their litigation, even as their smaller brethren fought the arbitration clause. See, for example, *Marcus Corp*, 2005 WL 1560484 at *1. By the time of the *Italian Colors* decision, however, Amex had successfully required more than 99 percent of its merchant base to agree to class action–waiving arbitration provisions. For a full account of the various strands of the Amex merchant litigation, see Class Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *13–14 (EDNY filed Apr 15, 2014) ("Class Plaintiffs' Opening Brief on Final Approval").

51 *In re American Express Merchants Litigation*, 2006 WL 662341 at *1.

52 *In re American Express Merchants' Litigation*, 554 F3d 300, 320 (2d Cir 2009) ("Amex I"). See also id at 312, 316–17 (describing the expert report of economist Dr. Gary French, who concluded that "it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million").

53 See *In re American Express Merchants' Litigation*, 634 F3d 187, 189 (2d Cir 2011) ("Amex II") (finding that the Supreme Court's decision in *Stolt-Nielsen SA v AnimalFeeds International Corp*, 559 US 662 (2010), did not mandate a different result); *In re American Express Merchants' Litigation*, 667 F3d 204, 212 (2d Cir 2012) ("Amex III") (finding that the string of *Amex* decisions "rests squarely on 'a vindication of statutory rights analysis'"—an issue untouched by *AT&T Mobility*); *In re American Express Merchants' Litigation*, 681 F3d 139, 139 (2d Cir 2012) ("Amex IV") ("[T]he limited holding in this case is not governed by the Supreme Court's reasoning in *AT&T Mobility LLC v. Concepcion*.").

Colors.[54] The majority held that the vindication-of-statutory-rights doctrine does not apply to invalidate an arbitration clause just because it bars class or group proceedings and would thus force individual claimants to assume prohibitive costs in one-on-one arbitrations.[55]

In the wake of *Italian Colors*, Amex moved to dismiss the merchant class action challenging the merchant restraints—the *Amex ASR* case—and moved to compel one-on-one arbitration. The *Amex ASR* plaintiffs had, up to this point, sought both class damages and injunctive relief. After the *Italian Colors* decision, however, the plaintiffs conceded that their multibillion-dollar class damages claim was nonviable.[56]

But injunctive relief was another matter. The Amex arbitration clause prevents merchants from pursuing market-wide reforms; instead, it provides that the arbitrator may award relief only to the individual claimant.[57] Under this clause, a merchant may win the right to impose surcharges on its own transactions in arbitration, but the arbitrator has no power to force Amex to change its rules across the market.[58] The *Amex ASR* class plaintiffs thus resisted the motion to compel arbitration of their injunctive claims based on a distinct vindication-of-statutory-rights

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54 *Italian Colors*, 133 S Ct at 2312.

55 Id at 2311. In a scathing dissent, Justice Elena Kagan complained that the majority's response to the reality that an arbitration clause would impose burdens on a claimant that rendered the vindication of rights impossible was, put simply, "[t]oo darn bad." Id at 2313 (Kagan dissenting).

56 See Friedman, *Friedman Open Letter* (cited in note 36) (asserting that class counsel "persisted in demanding class damages right up until the Supreme Court took that option off the table in its June 2013 *Italian Colors* decision, when it upheld Amex's class action waivers," and that the damages demand "started at $2.2 [billion] and after cert was granted in *Italian Colors*, [it] moved to $1.3 [billion]") (quotation marks omitted). See also Class Plaintiffs' Opening Brief on Final Approval at *13 (cited in note 50) ("The Supreme Court's June 2013 ruling in *Italian Colors* . . . upholding Amex's collective action ban made it clear to Class Counsel that no damages class action was realistically feasible in *Amex ASR*.").

57 See *Card Acceptance for American Express* *12 (Amex Merchant Services, Oct 2012), archived at http://perma.cc/R9HY-3W6G (providing that "[t]he arbitrator will have no power or authority to alter th[e] Agreement or any of its separate provisions" and that the agreement purports to ban broad injunctions on behalf of or awarded to merchants beyond merely the named claimant).

58 See Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging "Anti-reform" Provisions in Arbitration Clauses*, 69 U Miami L Rev 469, 471–73 (2015) (describing "anti-reform" provisions in arbitration clauses, which "prohibit an individual arbitral claimant from seeking to end a practice, change a rule, or enjoin an act that causes injury to itself and to similarly-situated non-parties").

challenge that survived *Italian Colors*[59]—namely, that enforcement of Amex's clause would prevent them from vindicating their rights under the antitrust laws in order to pursue equitable relief that would "effectively pry open to competition a market that has been closed by defendants' illegal restraints."[60] If the class plaintiffs were to prevail, they would have a live class action that was seeking, for all US merchants, the unfettered right to impose surcharges on Amex transactions.[61] If Amex were to prevail, then each merchant would only be able to seek such rights for itself in costly one-on-one arbitrations—meaning that 99 percent of US merchants would be left out in the cold.[62]

Against this backdrop, with the motion to compel arbitration of the injunctive case sub judice, the parties agreed to settle the case.

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[59] In *Italian Colors*, Scalia made clear that, despite upholding the Amex class waiver, a vindication-of-statutory-rights challenge could still be asserted against "a provision in an arbitration agreement forbidding the assertion of certain statutory rights," and particularly a "prospective waiver of a party's *right to pursue* statutory remedies." *Italian Colors*, 133 S Ct at 2310. Post–*Italian Colors* cases have followed the same logic. See, for example, *Parisi v Goldman, Sachs & Co*, 710 F3d 483, 487 (2d Cir 2013), citing *Paladino v Avnet Computer Technologies, Inc*, 134 F3d 1054, 1062 (11th Cir 1998) ("[L]anguage [in an arbitration clause] insulating [a defendant] from damages and equitable relief renders the clause unenforceable."). This opening allowed the class plaintiffs to argue that Amex's arbitration clause was unenforceable to the extent that it would ban merchants from seeking classwide reform of Amex's rules and practices.

[60] Reply Memorandum of Law in Further Support of Class Plaintiffs' Motion for Final Approval of Class Action Settlement, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *59 (EDNY filed July 14, 2014) (available on Westlaw at 2014 WL 8480960) ("Class Plaintiffs' Reply Brief on Final Approval"), quoting *Zenith Radio Corp v Hazeltine Research, Inc*, 395 US 100, 133 (1969).

[61] See, for example, Gilles, 69 U Miami L Rev at 472–73 (cited in note 58) (asserting that "[t]hese legal arguments are serious and the stakes are high" because corporate defendants do not want a regime in which "a single claimant could enjoin widespread injurious practices in arbitration" or in which "arbitrators wielding unchecked authority [could] issue broad and diverse injunctions in individual arbitrations"); id at 473:

> [Q]uestions surrounding the enforceability of anti-reform clauses are just as important to putative defendants as the class action bans they have spent years defending; depending on the context, divesting individual claimants of the power to enjoin or reform a market-wide policy or practice may be even more critical than the threat of monetary liabilities.

[62] See Class Plaintiffs' Reply Brief on Final Approval at *34–35 (cited in note 60) (observing that if the class were to lose the motion to compel arbitration of its equitable claims, "each merchant [would] only be permitted to seek relief *for itself* in arbitration, and would not be able to seek a rule change benefiting any other merchant," and therefore concluding that "rejection of the Settlement would consign all merchants to a world where each merchant may only seek to change the contractual rules that bind that merchant alone," despite the fact that "meaningful relief requires an injunction that benefits merchants across the market-place").

C. The *Amex ASR* Settlement

Under the terms of the proposed class settlement, Amex would allow merchants to impose surcharges on Amex transactions.[63] But while the class plaintiffs had sought in litigation the *unfettered* right to use surcharges, the settlement allowed surcharging only subject to certain restrictions. The main restriction was that a merchant surcharging Amex-branded cards must also impose a similar (or parity) surcharge on all other credit cards it accepts, with one very consequential exception.[64] If the merchant wished to impose a so-called differential surcharge—that is, to offer one or more credit card brands on a surcharge-free basis, or to surcharge different credit cards at different amounts—it could do that by applying a surcharge-offsetting discount to the favored brands.[65] The settlement also contemplated that merchants might bring individual damages arbitrations—there was no release of any damages claims—and it provided for access to the full class action evidentiary record to aid merchants in this pursuit.[66] Finally, the agreement provided for attorney's fees and certain other costs in an amount to be determined by the court, up to $75 million—a figure representing 84 cents on the dollar of the billable time expended by some thirty law firms over eleven years.[67]

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63 Exhibit A: Class Settlement Agreement, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *20 (EDNY filed Apr 15, 2014).

64 Id.

65 In essence, the offsetting-discount approach allows a card network to contract with merchants to absorb some or all of the surcharge on its branded cards. See Class Plaintiffs' Memorandum in Response to Question Number 1 Posed by the Court in Its Order Dated April 30, 2015, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *4 (EDNY filed June 1, 2015). Amex presumably believes that it would fare well competing in this way because it is able to contract more nimbly with merchants than its competitors are. The merchants' ability to employ this strategy (that is, using surcharge-offsetting discounts as a way to do differential surcharging) was contingent on the DOJ winning its trial and invalidating Amex's no-discount rule, which it did in 2015. See *United States v American Express Co*, 88 F Supp 3d 143, 238–39 (EDNY 2015). See also text accompanying notes 81–84 (describing the public enforcer's role in the Payment Card Cases).

66 Because the settlement contemplated that merchants might bring individual damages arbitrations, it provided access to the full class action evidentiary record. As such, the settlement released only future claims for injunctive relief, and it did not release past claims for damages. Class Plaintiffs' Opening Brief on Final Approval at *16 (cited in note 50) (stating that there is no release for past claims and that arbitral claimants are entitled to the entire evidentiary and litigation record from these cases).

67 See Memorandum of Law in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Costs and for Leave to Distribute Service Awards, *In re American*

For the purposes of the settlement—which followed many years of litigation, including more than 160 depositions and over 20 million pages of produced documents[68]—the court certified an injunctive class under Rule 23(b)(2).[69] The class consisted of all Amex-accepting merchants, including about a dozen large merchants who had been litigating a parallel action against Amex on a nonclass basis alongside class plaintiffs for years, including Rite Aid Corp, CVS Pharmacy, Walgreen Co, and others ("the Rite Aid group").[70] The proposed settlement would have precluded these plaintiffs from pursuing their individual claims, which included seeking the ability to practice unfettered differential surcharging. Under the settlement, members of the Rite Aid group would be able to maintain their own actions for damages, but the injunctive relief they received—the new surcharging rules—would be dictated by the class settlement.

Consequently, the Rite Aid group objected to the proposed settlement, arguing that the unfettered surcharging rights the group had sought for years were markedly superior to the watered-down version obtained by the class.[71] The Rite Aid group argued that the difficulties most merchants would face in pursuing these rights absent a class deal—that is, the expense of one-on-one arbitrations—should not limit the Rite Aid group's ability to bring claims against Amex for the rules reforms that it wanted.[72] And because the class settlement took unfettered surcharging off the table, it severely diminished these plaintiffs' leverage to seek significant monetary relief in their individual damages

Express Anti-steering Rules Antitrust Litigation, Civil Action No 11-MD-02221, *12–13 (EDNY filed Apr 15, 2014).

68 See Class Plaintiffs' Opening Brief on Final Approval at *19–20 (cited in note 50) (describing in detail the exhaustive discovery process and multiple rounds of appellate court briefing conducted over more than ten years before class counsel reached a settlement agreement).

69 Class Settlement Preliminary Approval Order, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *5–6 (EDNY filed Feb 11, 2014).

70 These merchants were not subject to Amex's arbitration clause. See generally *Rite Aid Corp v American Express Travel Related Services Co*, 708 F Supp 2d 257 (EDNY 2010) (involving individual claims arising from merchant agreements not falling within the scope of Amex's arbitration clause). But despite this enviable position, the Rite Aid group did not offer to seek broad relief for the benefit of all merchants or otherwise to "assume fiduciary duties to merchants." Class Plaintiffs' Reply Brief on Final Approval at *5 (cited in note 60).

71 See Class Plaintiffs' Reply Brief on Final Approval at *4–6 (cited in note 60).

72 See id.

proceedings.[73] Other very large merchants—including 7-Eleven, Wal-Mart, Target, and others—joined the Rite Aid group in leveling these challenges as well.[74]

In response to these objections, class plaintiffs pointed to data from around the world and argued that the restricted surcharging rights achieved in the settlement were nearly as effective as the unfettered surcharging that the large-merchant objectors sought.[75] They also contended that there was a distinct value in having a universal right to surcharge—that is, each merchant benefits if all other merchants have the right to surcharge.[76] Further, class plaintiffs maintained that there was no better relief to be had for 99 percent of the 3.4 million Amex-accepting US merchants, because less than 1 percent of merchants could possibly have a sufficient stake to justify one-on-one arbitrations seeking unfettered surcharging on an individual basis.[77] And it was undisputed by all that Amex would never agree to unfettered surcharging in a class settlement.

D. The Tyranny Paradox

So how do we analyze a proposed injunctive settlement that would provide a substantial benefit for a strong majority of class members but that a minority of large merchants (less than 1 percent, accounting for 20 percent or so of volume) opposed on the ground that they could do better for themselves if left to pursue

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73 See Exhibit A: Transcript of Civil Cause for Status Conference before the Honorable Nicholas G. Garaufis United States District Judge, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action 11-MD-02221, *19 (EDNY filed Jan 25, 2014) (noting that counsel for the Rite Aid group argued to the judge that if he gave "final approval to the class settlement, it would extinguish [its] ability to challenge [Amex's] rules on the injunctive relief" and asked that it "be exempted from any release on the final judgment that they're doing with the class"); id at *21 ("We, our clients, have come forward because we had individual interests to vindicate here, but we can't get full vindication just with damages. . . . So there may well be a clash between us and the class on the injunctive part."); Class Plaintiffs' Reply Brief on Final Approval at *2 (cited in note 60) ("Understandably, the [Rite Aid objectors] want a live injunctive claim so they can lever the greatest possible monetary settlement from Amex.").

74 Class Plaintiffs' Reply Brief on Final Approval at *2 (cited in note 60) (listing prominent objectors and asserting that their real goal was to derail the *MDL 1720* settlement by arguing that the surcharging relief in that case would be valueless if merchants were not also free to surcharge Amex, despite their previous lack of interest in suing at any time).

75 Id at *5–6.

76 Id at *11.

77 Id at *6 ("Class Plaintiffs have been forthright that, yes, it would have been desirable to achieve for the six million class members the ability to engage in differential surcharging. . . . But desirable and achievable are two different things.").

their own individual injunctive claims? What is the theoretical font of authority that allows a self-nominated private attorney general to determine that the interests of the majority should foreclose a minority from pursuing its own interests in litigation? On the other hand, what would be the basis for *refusing* to give vent to the majority's interests—particularly when that majority is very likely to get no benefit at all in the absence of the mandatory Rule 23(b)(2) settlement?[78]

1. The problem.

One way to approach these questions is, again, to think about the nature of the divergent class-member interests. Surely, it is one thing for a mandatory class to accommodate some level of heterogeneous class-member preferences and strategic agendas, but it is quite another thing to house, within a single non-opt-out class, members with directionally opposed economic interests. For example, if there were merchants who would affirmatively suffer from an order banning Amex's antisteering rules, one might well question the cohesiveness of the proposed class.[79]

But where does that point us here? For present purposes, let's stipulate to the seemingly obvious point that the large merchants would clearly benefit (vis-à-vis their position today) even from the weaker version of relief obtained by the class; they just would not benefit *as much* as they would from the unfettered surcharge rights that they might win in individual proceedings. The real complaint, it seems, is that the class is settling for a field goal when the larger merchants want to go for a touchdown. If there were genuine directional conflict here, we might be able to avoid the tough questions. But there isn't, and we can't.

What, then, is a private attorney general to do? In the *Amex ASR* case, the decision was apparently not difficult for class counsel. With no directional conflict blocking the path, they wrapped themselves in the interests of the 99 percent and unabashedly sought to run roughshod over the rights that large merchants

78 See Class Plaintiffs' Opening Brief on Final Approval at *7 (cited in note 50) ("The alternative to this settlement is not a better settlement; it is no settlement.").

79 But even then, we would need to ask: Suffer in what way? In litigation, Amex argued that many business owners carried Amex rewards cards and so were net beneficiaries of the no-surcharge policies that redistributed wealth from cash payers to premium-rewards-card users. I assume that any such exogenous consideration is simply irrelevant to the cohesion analysis. Likewise, I would not regard merchants who own Amex stock as having interests that are opposed to those of the class.

would otherwise have in order to seek additional relief.[80] For reasons unrelated to Coffee's abusive-litigation concerns—for surely the Payment Card Cases raise no such concerns[81]—I imagine that this aspect of a private attorney general model, this endemic-tyranny phenomenon, is deeply irksome to class action critics. And yet, it seems fair enough for a lawyer to heed the interests of a strong majority of his clients in any group environment.

So let's rephrase the question: What is a district judge to do? The judge in *Amex ASR* appeared caught between a tyranny of the majority and a hard place. And doctrine was not going to solve his problem.[82] The Supreme Court stated the basic rule (which it adopted from Professor Richard Nagareda) in *Wal-Mart Stores, Inc v Dukes*:[83] "The key to the [Rule 23(b)(2)] class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the 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.'"[84] But that hardly solves the current problem. Surely, the conduct was unlawful across the board and it could and should be enjoined across the board—but does that mean that the large merchants must abandon their claims for additional relief on top of the available across-the-board relief? Not obvious.

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80 See Class Plaintiffs' Reply Brief on Final Approval at *8–9 (cited in note 60) ("To be sure, class members have varying personal preferences. Some have stated they would prefer to pursue claims for full-blown differential surcharge rights, even at the risk of losing all surcharge rights."); id at *11:

> [G]iving six million merchants the right to do simple surcharging does more good for U.S. merchants as a whole than giving each of 15 or 50 (or 500 for that matter) well-resourced and motivated merchants the right to initiate an individual arbitration at which, if the merchant wins, it may seek for itself alone the right to engage in full-blown differential surcharging.

81 In Coffee's argot, abusive litigation is characterized by weak or meritless claims brought by unsophisticated lawyers who invest no time or effort in the claims and instead simply exploit the litigation cost differential, potential delay, or fear of crippling class liability to press a nuisance value settlement. Coffee, *Entrepreneurial Litigation* at 222 (cited in note 7). The Payment Card Cases do not qualify as abusive even under this broad definition.

82 Nor does the text of the rule get us too far: Rule 23(b)(2) is satisfied so long as the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." FRCP 23(b)(2).

83 131 S Ct 2541 (2011).

84 Id at 2557, quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 NYU L Rev 97, 132 (2009).

2. A Rule 23(b)(2) opt-out solution?

Faced with these competing plaintiff-side forces, a judge might reasonably be tempted to allow dissatisfied class members to opt out and seek additional relief for themselves. But does the Rule allow for that? The pre–*Wal-Mart Stores* case law is useless here.[85] To the extent that opt-outs have been allowed under Rule 23(b)(2), it has primarily been in the sort of "hybrid" cases that *Wal-Mart Stores* abolished.[86] In *Wal-Mart Stores* itself, the Court observed that Rule 23(b)(2) "provides no opportunity for . . . class members to opt out,"[87] and some courts have suggested that allowing opt-outs in injunctive cases would expose "defendants to varying and possibly inconsistent obligations" and to "the possibility of conflicting judgments," and that it would essentially "permit limitless collateral challenges [that] would greatly diminish the possibility that complicated class actions for equitable relief would ever settle."[88]

But there are ways for a court to effectively allow injunctive opt-outs if it wishes. For example, there is nothing to stop a court from demanding that a release exclude from its coverage any individual claims that the court thinks ought to go forward on a nonclass basis.[89] Or—unorthodox as this may be—a court could announce that it is only willing to certify a settlement class under Rule 23(b)(3), even though the relief will be purely injunctive.[90]

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85 For the leading pre–*Wal-Mart Stores* case, see *Allison v Citgo Petroleum Corp*, 151 F3d 402, 411 (5th Cir 1998) (allowing some monetary claims for back pay to be brought under Rule 23(b)(2)).

86 But see William Rubenstein, Alba Conte, and Herbert B. Newberg, 2 *Newberg on Class Actions* § 4:36 at 144 (West 5th ed 2015) (observing that while opt-outs are not required in Rule 23(b)(2) class actions, "they are discretionary, may be permitted, and have been employed").

87 *Wal-Mart Stores*, 131 S Ct at 2558.

88 *In re Colt Industries Shareholder Litigation*, 566 NE2d 1160, 1166 (NY 1991). See also *In re A.H. Robins Co*, 880 F2d 709, 728 (4th Cir 1989) ("[N]o member has the right to opt out in a [Rule 23(b)(1)] or (b)(2) suit.").

89 See FRCP 23(b)(3), (c)(2)(B)(iv) (providing the certification process for classes and allowing for exclusions upon request).

90 Traditionally, injunctive claims are classed under Rule 23(b)(2), while damages claims proceed under Rule 23(b)(3). See Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 7A *Federal Practice and Procedure* § 1775 at 470 (West 2d ed 1986) ("If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2)."); *Jefferson v Ingersoll International Inc*, 195 F3d 894, 898 (7th Cir 1999) ("Rule 23(b) begins by saying that an action 'may' be maintained as a class action when the prerequisites of subdivision (a) and a part of subdivision (b) have been satisfied; it does not say that the class *must* be certified under the *first* matching subsection."). Indeed, courts have often granted injunctive relief in the context of Rule 23(b)(3) claims, at least when

Rule 23 itself contains no prohibition against certifying a class for injunctive relief under the auspices of Rule 23(b)(3), so long as the class meets the higher standards of community, predominance, and superiority demanded by that provision.[91] And Rule 23(d)(1)(E)'s broad grant of powers to make appropriate orders arguably gives the court authority to permit opt-outs in Rule 23(b)(2) cases.[92] In general, Rule 23 is sufficiently flexible to allow courts to direct that injunctive opt-out rights be provided for cases in which these class members have meaningful claims to better or different relief.[93]

The more interesting question is *whether* to allow injunctive opt-outs, at least when the opt-out claim seeks relief that is limited to the particular claimant as opposed to broad classwide relief. The issue is whether opt-out relief would be additive to class relief, or whether it would subject the defendant to fundamentally inconsistent obligations—a question that can be answered only in a case-by-case analysis.[94] In this respect, injunctive class action claims seem quite different from the classic mandatory class action vehicle in Rule 23(b)(1), which is applicable to limited-fund

equitable and monetary damages are both sought. And when this occurs, opt-outs from the Rule 23(b)(3) class are free to seek individual injunctive relief. See, for example, *Wal-Mart Stores, Inc v Visa U.S.A. Inc*, 396 F3d 96, 112 (2d Cir 2005).

91 FRCP 23(b)(3).

92 Rule 23(d)(1)(E) endows district courts with discretion to "issue orders that . . . deal with similar procedural matters." FRCP 23(d)(1)(E). This discretion is meant to facilitate "the fair and efficient conduct of the action." FRCP 23, Advisory Committee Notes to the 1966 Amendments. See also *County of Suffolk v Long Island Lighting Co*, 907 F2d 1295, 1304 (2d Cir 1990) (finding that then–Rule 23(d)(5)—now Rule 23(d)(1)(E)—provided ample authority for a district court's decision to allow class members to opt out of a "limited fund" class action brought under Rule 23(b)(1)(B)).

93 See Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 Colum L Rev 599, 652 (2015) (suggesting that "the determination of whether opt-out rights are required should turn [ ] on the relationship between the individual claims of absent class members and the scope of the defendant's remedial obligation" rather than on a "sharp distinction between equitable claims and monetary claims"); *McReynolds v Richards-Cantave*, 588 F3d 790, 800 (2d Cir 2009), quoting *Eubanks v Billington*, 110 F3d 87, 94 (DC Cir 1997) (allowing a Rule 23(b)(2) plaintiff who objected to the settlement to opt out, stating that "[t]he right of a class member to opt-out in Rule 23(b)(1) and (b)(2) actions is not obvious on the face of the rule; however, 'the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions'"); *Long Island Lighting*, 907 F2d at 1302–05.

94 Professor Jay Tidmarsh provides an economist's definition of "additive," suggesting that "court[s] should [ ] extend the privilege of opting out to all class members who can demonstrate that the marginal expected net loss to the value of the class action from their departure will be offset by the marginal expected net gain as a result of their ability to proceed alone." Jay Tidmarsh, *Auctioning Class Settlements*, 56 Wm & Mary L Rev 227, 243 (2014).

cases.[95] When there is not enough money to go around for all claimants, then any opt-out claim for individual damages will necessarily conflict with the class action. But there is no such structural reason for assuming that individual injunctive claims conflict with class relief.

And indeed, one could argue that the Due Process Clause demands opt-out rights in claims for truly individualized, additive injunctive relief of the sort that the members of the Rite Aid group sought for themselves in *Amex ASR*.[96] *Wal-Mart Stores* expanded on prior doctrine by recognizing that due process demands that class members must have the right to opt out from cases involving any nonincidental claims for monetary relief, irrespective of whether the plaintiffs had framed their claims as ones for nominally injunctive or "hybrid" relief.[97] It is no giant leap from that argument to say that any claim to remediate or protect against a concrete economic harm—whether framed as a claim for damages or for injunctive relief—demands opt-out rights as a matter of due process. After all, if the Rite Aid group were seeking damages to redress all the past and future harms that it stood to suffer from Amex's illegal conduct, there would be no question that it could opt out. Why does it have no such

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[95] Rule 23(b)(1) allows class actions when

> prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

FRCP 23(b)(1).

[96] By contrast, in *MDL 1720*, objectors argued only that the injunctive relief was insufficient consideration for a broad release and not that any objector had additive, individual injunctive claims that he wished to bring on his own. So the rationale for injunctive opt-out would be lacking in *MDL 1720*, unless one buys into the argument, which seems dubious, that Rule 23(b)(2) is simply unconstitutional because it lacks opt-out rights. See, for example, Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U Mich J L Ref 347, 394 (1988) ("The problem of the Rule 23(b)(2) class action is that binding absent class members without giving them notice and the right to opt out violates due process.").

[97] *Wal-Mart Stores*, 131 S Ct at 2559. In *Phillips Petroleum Co v Shutts*, 472 US 797 (1985), the Supreme Court held that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." Id at 812. *Wal-Mart Stores* built on *Phillips Petroleum* to the extent of noting the "serious possibility" that absence of notice and opt-out violates due process, which would "provide[ ] an additional reason not to read Rule 23(b)(2) to include the monetary damages claims" in that case. *Wal-Mart Stores*, 131 S Ct at 2559.

opt-out right if it seeks to address that same harm by forcing Amex to change its conduct toward the Rite Aid group? On this view, *Wal-Mart Stores* is quite possibly not the end point for the expansion of due process–driven opt-out rights. The Rule 23(b)(2) shoe may yet drop.

In any event, we have here the seeds of a potential solution to the tyranny paradox. In an appropriate case, a judge could condition approval of a class settlement on the parties' agreement to allow individual class members, or some subset of class members, to bring certain defined claims for injunctive relief. Class members seeking exclusion could be compelled to submit a request—perhaps during a narrow opt-out window—proclaiming an intent to seek additional individual relief and even describing the specific relief sought. This brief statement would allow the judge to see that a real class member seeks to vindicate a real interest and would help the judge to ensure that the opt-out relief sought is individualized, additive, and consistent with the class relief.

Defendants, seconded by settling class counsel, will argue that incentives to negotiate injunctive settlements are vitiated if there is a risk that absent class members may be afforded individual opt-out rights.[98] And there is much to recommend that view: after all, if the opt-outs will receive the benefit of the class relief anyway, then opt-out injunctive plaintiffs can free ride in ways that the damages opt-outs arguably cannot. But does this remove the incentive to participate in the class deal? In *Amex ASR*, one could argue that Amex stood to gain a great deal by settling with the class, *even if* the Rite Aid group and other large merchants were left free to pursue unfettered surcharging rights in individual proceedings. How many merchants will submit requests for exclusion affirming an intent to file an individual injunctive claim? Maybe 1 percent? On those numbers, even assuming that the 1 percent represented some of the country's largest merchants, Amex would gain the knowledge that 99 percent of US merchants would not adopt the specific surcharging

98 Of course, in any given case, the defendant could decline the court's invitation to modify the agreement to include opt-out rights (or carveouts), thus effectively scrapping the agreement. But that is a risk we should gladly tolerate to eliminate the tyranny paradox. And I think the risk is an unavoidable one, unless we are prepared to mandate opt-out rights—the way that we do with Rule 23(b)(3)—which in many cases would mean that we were gutting the class relief to allow the individual claims. Also, if opt-out rights were truly mandatory—that is, if defendants had no right to back out of the deal—it would be too risky in many cases for the defendant to negotiate a settlement in the first place.

practices that it deemed so dangerous to its business—practices that might otherwise spread across the marketplace.[99]

On this model, 99 percent of merchants stand to gain the long-sought right to impose surcharges—not the unfettered variety, but meaningful and valuable rights nonetheless. And the large merchants (the 1 percent) will have their opportunity to pass up the field goal and go for the touchdown—and gain significant leverage for use in their individual damages arbitrations. And because those minority interests will be served without scrapping the class settlement, private enforcement of the antitrust laws will play its intended role of "pry[ing] open" markets to competition.[100]

Coffee's project of incentive alignment is surely furthered by a limited opt-out right. To the extent that the class contains some diversity of goals and preferences, the opt-out mechanism allows class counsel to align themselves unreservedly with the majority, without adversely affecting the interests of the minority members. In the damages context, Coffee has written that the "value of the right to opt out may lie more in its utility as a checking mechanism than in its ability to protect litigant autonomy," because when enough members opt out, the "practical net effect might be to torpedo the dubious settlement or force its renegotiation."[101] Here, the opt-out right serves this checking function *and* gives opt-outs greatly valued autonomy.

Further to Coffee's project, the potential opt-outs, and specifically their exclusion requests, would serve a valuable monitoring function. As Coffee counsels, judges supervising class action settlements are often "unable or unwilling to monitor the settlement process rigorously" (p 195). These judges "need allies," he tells us, to help them more effectively supervise privately negotiated pacts (p 195). In Rule 23(b)(2) settlements, courts would glean a great deal from requests for exclusion that briefly describe the individual relief that is sought. These requests would give a court far-greater insight into the merits of a proposed settlement vis-à-vis its real-world alternatives than the court is likely to acquire from the current objection process,

99 See Class Plaintiffs' Reply Brief on Final Approval at *11 (cited in note 60) (discussing the "snowball effect," in which the practice of surcharging—both parity and differential—spread in Australia after the no-surcharge rules were invalidated there in the early 2000s).

100 *Zenith Radio*, 395 US at 133.

101 Coffee, 95 Colum L Rev at 1450 (cited in note 5).

which is often obscured by a profiteering objectors' bar and the murky agendas of objecting parties.[102] As Coffee recognizes, "settling parties have a strong desire to blind the court to the imperfections in their settlement, and so lock arms and compliment each other" (pp 138–39). Allowing injunctive opt-outs would certainly disrupt this convivial klatch, but the practice seems well designed to fortify the private attorney general model.

3. Anticlimax: the court's punt in *Amex ASR*.

Whether remarked on or not, the tyranny paradox is present to one degree or another in almost all consequential class actions that seek reform. Recent cases—such as those involving NCAA athletes seeking compensation for their services,[103] sports fans seeking the unrestricted ability to watch their favorite out-of-market teams,[104] Uber drivers (and other "gig economy" workers) seeking employee-type benefits,[105] authors seeking royalties for electronic publishing,[106] or Silicon Valley engineers challenging

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102 See Coffee, *Entrepreneurial Litigation* at 138 (cited in note 7) (describing members of the professional-objector bar as "unloved figures" who appear to be "motivated by the hope that either (1) they can convince the court to award them a portion of the amount by which the court cuts the proposed plaintiff's attorneys' fee award or (2) they will be paid off by class counsel not to appear at the hearing").

103 See *O'Bannon v National Collegiate Athletic Association*, 802 F3d 1049, 1053 (9th Cir 2015) (affirming that NCAA regulations are subject to antitrust scrutiny, issuing a decision in aid of the 1 percent, and finding that rules prohibiting scholarships up to the cost of attendance were invalid while rules prohibiting payment to student-athletes for the use of their images or other commercial activities were not).

104 See *Laumann v National Hockey League*, 105 F Supp 3d 384, 388, 400 (SDNY 2015) (certifying a Rule 23(b)(2) antitrust class challenging agreements entered into by the MLB, the NHL, regional sports networks, DirecTV, and Comcast that "limit options, and increase prices, for baseball and hockey fans who want to watch teams from outside the home television territory [ ] where the fans live," and rejecting the existence of a fundamental intraclass conflict between "winners and losers" in which injunctive relief would benefit some fans in some markets but have no effect on others).

105 See *O'Connor v Uber Technologies, Inc*, 2015 WL 5138097, *12 (ND Cal), quoting Defendant Uber Technologies, Inc.'s Opposition to Plaintiffs' Motion for Class Certification, *O'Connor v Uber Technologies, Inc*, Civil Action No 13-03826, *30 (ND Cal filed July 9, 2015) (available on Westlaw at 2015 WL 4554634) (noting the defendant's argument, in opposition to the certification of a Rule 23(b)(3) class of Uber drivers alleging that the company failed to pay tips and other perquisites, that putative class representatives sought "a remedy—an employment relationship with Uber—that irreconcilably conflict[ed] with the interests of countless drivers").

106 See *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F3d 242, 252 (2d Cir 2011) (rejecting a class settlement governing future uses of authors' works—including those with registered and unregistered copyrights—in electronic publishing when "named plaintiffs with only Category C claims were obligated to advance the collective interests of the class, rather than those of the subset of class members whose claims mirrored their own").

antipoaching agreements among employers[107]—invariably result in deals struck by class counsel on behalf of all members, notwithstanding the fact that some members, if left to their own devices, might be able to obtain or threaten to obtain superior relief. And in an age in which the ability to obtain money damages via class actions is being restricted because of class waivers and other doctrinal developments,[108] the forfeiture of individual equitable claims spells the forfeiture of valuable settlement leverage.

Few cases could have presented these tyranny-paradox issues more starkly than *Amex ASR*, in which the proposed settlement was exhaustively briefed and argued by highly sophisticated lawyers on all sides. The district judge—Judge Nicholas Garaufis of the Eastern District of New York—was presented with a golden opportunity to address these undertheorized but critical issues.

However, distrust of class action lawyers runs deep. And as I mentioned, when Willkie Farr partner Ravelo was arrested for fraud in December 2014, a search of her e-mails turned up substantial correspondence with *Amex ASR* lead counsel Friedman, a longtime friend.[109] That correspondence was then produced to all of the *Amex ASR* objectors.[110] And while some of those large-merchant objectors (including the Rite Aid group) eschewed any attempt to argue that the Friedman-Ravelo communications provided a reason to reject the deal—instead urging the court to rule on the merits of the settlement[111]—others (including 7-Eleven and Target)[112] argued that some sort of conspiracy was

107 See *In re High-Tech Employee Antitrust Litigation*, 2015 WL 5159441, *3–4 (ND Cal) (approving a damages settlement over the objections of individual employees asserting that the settlement formula did not provide them with full recovery and that they could do better at trial).

108 See, for example, Coffee, *Entrepreneurial Litigation* at 15–17 (cited in note 7); Myriam E. Gilles, *The End of Doctrine: Private Arbitration, Public Law and the Anti-lawsuit Movement* *7–21 (Benjamin N. Cardozo School of Law, Aug 2014), archived at http://perma.cc/D8H6-C5HQ (describing recent legislative and judicial efforts to limit or eliminate class actions).

109 *Amex ASR*, 2015 WL 4645240 at *6–7.

110 Id at *7.

111 Class Plaintiffs' Memorandum in Response to Question Number *Two* Posed by the Court in Its Order Dated April 30, 2015, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *3 (EDNY filed July 29, 2015) (available on Westlaw at 2015 WL 7252727) ("Class Plaintiffs' Memorandum in Response to Question Number Two") (noting that the Rite Aid group did not join in the other objectors' "conspiracy theory").

112 Id at *1. Commentators have taken note of the agendas of these large-merchant objectors in attempting to derail the *MDL 1720* settlement at all costs. See, for example,

afoot and that Friedman's communications with Ravelo, a lawyer for nonparty MasterCard, had tainted the settlement.[113]

Judge Garaufis rejected the class action settlement.[114] As I discuss more fully in Part III, he did so without grappling with the tyranny paradox and without ruling on the merits of the proposed agreement. Instead, the court rejected the settlement based on what I have identified as a distinct "discomfort zone"—a disconnect between normative intuitions about how a lawyer ought to conduct the business of litigation, on the one hand, and the practical, on-the-ground realities of complex, multiforum litigation, on the other.

II. THE PUBLIC ENFORCER

The second discomfort zone revolves around the perceived usurpation of the traditional role of public enforcers by self-appointed private lawyers. These concerns are familiar in the context of Rule 23(b)(3)–damages class cases: Professor Coffee has long noted that the presence of a profit motive distinguishes private and public attorneys general in material ways,[115] and class action critics have found it especially galling that private lawyers don the garb of the public enforcer to bring unmeritorious cases in the hopes of shaking down corporate defendants.[116]

But once we have filtered out suspect claims via Coffee's prescriptions, what discomfort remains with the private attorney

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Todd Zywicki, *Consumers Are the Winners in the Visa/Mastercard Antitrust Settlement* (Forbes, Aug 21, 2012), archived at http://perma.cc/Y26D-Q53T:

> What explains the opposition of this group? Most likely, simple self-interest. . . . By blowing up the litigation settlement, the big box retailers can perpetuate litigation uncertainty and preserve the political option of extending the Durbin Amendment's punitive price controls to credit cards, giving them a regulatory edge as they roll out their new payment network.

113 See The 7-Eleven Objectors' Submission regarding the Impact of the Friedman-Ravelo Communications on the Court's Review of the Proposed Settlement, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *1 (EDNY filed July 29, 2015).

114 *Amex ASR*, 2015 WL 4645240 at *1.

115 Coffee, *Entrepreneurial Litigation* at 221 (cited in note 7) (describing many within the plaintiffs' class action bar as having "the incentive to overreach and litigate every profitable opportunity, regardless of its merit"). See also Coffee, 42 Md L Rev at 220–28 (cited in note 5).

116 See, for example, William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 Vand L Rev 2129, 2147–48 (2004) (cataloguing critiques against the private attorney general model, with a focus on class action lawyers that supplement public-enforcement actions).

general—in Coffee's terms, with "a private enforcer performing a public role . . . without authorization by the legislature" (p 152)?

Plenty, as it turns out. In the traditional Rule 23(b)(3)–damages context, a major concern—quite separate from abusive-litigation issues—is the "piling on" problem: when a public enforcer brings an enforcement action uncovering a violation (especially in securities, antitrust, and consumer areas), the private bar invariably responds by filing a spate of copycat damages claims.[117] The traditional critique is that these follow-on cases result in overdeterrence: the private bar is not interested in calibrating to some optimal deterrence level; its disposition is always maximalist.[118] The politically accountable public enforcer, on the other hand, will tend to seek a point of equilibrium in the public interest.[119] And as Coffee shows, for matters in which both private and public enforcers take action against a corporate defendant, the private recoveries vastly outstrip the public recoveries by a margin of more than ten to one (pp 174–75). This fact speaks well to the efficacy of the private bar, but it does nothing to quell concerns regarding overdeterrence.[120]

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117 Indeed, Coffee has long inveighed against the inefficiencies of piggyback class actions. See, for example, Coffee, 42 Md L Rev at 228 (cited in note 5) (describing the "spectacle . . . in which the filing of the public agency's action serves as the starting gun for a race between private attorneys, all seeking to claim the prize of lucrative class action settlements, which public law enforcement has gratuitously presented them"); id at 222 (observing that plaintiffs' class action lawyers "simply piggyback[ ] on the [enforcement] efforts of public agencies . . . in order to reap the gains from the investigative work undertaken by these agencies"). See also John C. Coffee Jr, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 Colum L Rev 669, 681 (1986) (describing the substantial number of class actions that are sparked by government investigations).

118 See, for example, Coffee, 42 Md L Rev at 223 (cited in note 5) (observing that follow-on class actions do not result in a broader "scope of law enforcement" or better deterrence but only in an intensified penalty); Beisner, Shors, and Miller, 57 Stan L Rev at 1453–54 (cited in note 2) ("The reason class action lawyers prefer to follow—rather than to lead—government investigations is simple: those lawyers prefer 'no research' lawsuits that appear likely (from the investigation itself) to yield lucrative settlements with only a minimal investment of time and money.").

119 See Coffee, *Entrepreneurial Litigation* at 191 (cited in note 7) (describing the SEC's response to the "Coffee proposal" as arguing for greater use of private counsel by public enforcers and noting that "the SEC's general goal is [not] to sue as many deep-pocketed parties and collect as much in penalties as possible" but instead to "aggressively [ ] uphold the law and serve the interests of justice") (quotation marks and citation omitted); id at 17 ("Entrepreneurial enforcement is . . . seldom constrained by the same principles of prosecutorial discretion that guide public enforcers.").

120 In this vein, Judge Jed S. Rakoff of the Southern District of New York compares a series of "relatively paltry" SEC settlements with the tremendous success of private securities class actions brought by specialized and well-resourced plaintiffs' firms, which suggests that the class action is "a much better vehicle for bringing justice to the victims

In the context of Rule 23(b)(2) injunctive claims, however, the concerns are different. It is not cases in which the government enforcers *are* acting that present a problem for critics; it is the cases in which they are not.[121] When private attorneys seek reforms that public enforcers have not chosen to seek—and maybe even claims that public enforcers have affirmatively chosen not to seek[122]—then we are really courting the "who the heck are you" problem. The critique is that the private attorneys are subverting the prosecutorial prerogative of the public enforcer.[123] And in consequential injunctive cases, in which remedial orders can look an awful lot like legislation, the perceived usurpation of public-enforcement authority is at its zenith. In this sense, the purest distillation of the private-versus-public problem is not found in the Rule 23(b)(3)–damages class cases at all; it is in the injunctive sphere, where litigation encroaches on traditionally legislative turf—and where court cases that are prosecuted by unelected private lawyers have the effect of rewriting the rules of the road for defendants and sometimes of reforming entire industries.[124]

of the alleged fraud." Jed S. Rakoff, *The Cure for Corporate Wrongdoing: Class Actions vs. Individual Prosecutions* (The New York Review of Books, Nov 19, 2015), archived at http://perma.cc/82L8-38AV. But, as Rakoff rightly observes, "the monies awarded to the victim shareholders" in class suits "are paid not by the executives responsible for the frauds, but by the companies themselves." Id. As such, Rakoff concludes that private "class actions are no real substitute for criminal and regulatory prosecution of the individuals actually responsible for corporate misconduct." Id.

121 See, for example, Beisner, Shors, and Miller, 57 Stan L Rev at 1454 (cited in note 2):

> Some private class actions combine the worst of both worlds—they are "coat-tail" lawsuits *and* they supplant the reasoned decisions of state officials. Many class actions, for example, are filed precisely because a state or federal regulatory agency has investigated an alleged problem and concluded that no punishment or remedial action is called for under the circumstances. Class action lawyers then "piggyback" on the factual work undertaken by the agency and simply use the class action vehicle as a way to relitigate the decision whether remedial action is required.

122 See Coffee, *Entrepreneurial Litigation* at 17 (cited in note 7) ("[T]he plaintiff's attorney does not simply supplement public enforcement but extends and drives the law's development, sometimes pushing it in directions that public enforcers would not have gone.").

123 See Beisner, Shors, and Miller, 57 Stan L Rev at 1455 (cited in note 2) ("[W]hen class action lawyers file lawsuits state officials have not filed . . . [they] perform the anti-democratic function of usurping the role traditionally entrusted to expert regulatory agencies and state attorneys general.").

124 In fact, Coffee tells us, the primary reason that other countries have not generally adopted US-style aggregate-litigation systems is discomfort with the concept of a "private enforcer performing a public role in order to solve collective action problems but without authorization by the legislature." Coffee, *Entrepreneurial Litigation* at 152 (cited in note 7).

How legitimate is this concern with subverting prosecutorial authority? Might not the private attorney general sometimes serve as a "failsafe," in Coffee's words, against agency capture and political considerations that lead to the underenforcement of important legal rights (p 6)?[125] And how much deference should we accord to agency nonenforcement decisions in the context of broad remedial statutes? Should we be concerned that private actors, in seeking broad structural reform, will be less sensitive than their public counterparts to encroaching on the legislative process—that is, bigfooting their way into areas of ongoing congressional concern? And what is the utility of private attorneys general in cases in which public enforcers do act? Does it matter whether private lawyers are unwelcome interlopers into a government action, as opposed to harmoniously working side by side? How about when the government joins an ongoing private case? For each of these questions, *Amex ASR* provides a real-world context for examination.

A. *Amex ASR*

In 2009, the Antitrust Division of the DOJ was coming out of an eight-year torpor, having not initiated any conduct cases during all of President George W. Bush's administration.[126] But early that year, the DOJ served Visa and MasterCard with substantive civil investigative demands relating to their merchant restraints.[127] Meanwhile, also in early 2009, the Second Circuit in *In re American Express Merchants' Litigation*[128] cleared the *Amex ASR* class plaintiffs to proceed by invalidating Amex's

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125 See also id at 6 ("Private enforcement thus plays a failsafe function, arguably protecting society against the danger that important legal rules . . . may, from time to time, be quietly underenforced.").

126 See, for example, Jonathan B. Baker and Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in Robert Pitofsky, ed, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* 235, 244 (Oxford 2008) (observing that the Bush administration was "more permissive on antitrust issues than any administration in modern times"); Albert A. Foer, ed, *The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President* 58–65 (Vandeplas 2008) (reporting that the Bush administration had initiated no monopolization cases and describing this practice as a "virtual interment of Section 2 [of the Sherman Act]").

127 See Jessica Dye, *AmEx to Fight DOJ on Merchant-Fee Antitrust Claims* (Law360, Oct 4, 2010), archived at http://perma.cc/F7PY-USRX (reporting that the DOJ and various state attorneys general issued civil investigative demands on Visa and MasterCard relating to their card-acceptance-fee rules).

128 554 F3d 300 (2d Cir 2009).

class action waiver.[129] As they commenced a daunting discovery process, *Amex ASR* class counsel then approached the DOJ, urging it to expand its investigation to include Amex.[130] Among other things, counsel hoped that the DOJ's involvement might serve to unearth higher-quality documents in the discovery process and to put additional pressure on the defendant.[131]

In October 2010, after completing investigations and negotiations, the DOJ announced a consent decree with Visa and MasterCard and filed a lawsuit against Amex.[132] Like the private cases, the DOJ actions challenged the three networks' antisteering rules, but unlike the private cases, the Government's cases stopped short of challenging the rules against surcharging, which presented a politically sensitive issue. To hear the private lawyers tell it, the government attorneys fully understood and agreed that rescission of the no-surcharge rules was a key component of industry reform, and yet they backed off at the last minute because the issue of credit card surcharging promised to become a political hot potato.[133] Card networks have attempted

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129 See text accompanying notes 49–62 (discussing challenges to the Amex class action waiver). See also Class Plaintiffs' Opening Brief on Final Approval at *12 (cited in note 50) ("Because the merchants challenging Amex's anti-steering rules were all subject to the arbitration clause, the *Amex ASR* case was largely stayed from its inception in 2006 until the Second Circuit ruled in *Italian Colors* in January 2009. At that point, the parties commenced discovery in earnest.").

130 See Class Plaintiffs' Opening Brief on Final Approval at *12 (cited in note 50) ("Class Counsel submitted to the Justice Department—whom it understood was investigating Visa and MasterCard's rules relating to merchant steering—a white paper entitled 'Why The Antitrust Division Should Challenge American Express's Anti-Steering Rules.'").

131 See Peter Eichenbaum, *Visa Says Justice Department Weighing Antitrust Suit* (Bloomberg, July 29, 2010), archived at http://perma.cc/BZ4M-FZSR (quoting *MDL 1720* lead counsel K. Craig Wildfang as saying that "[h]aving another government agency conclude that these things are anticompetitive . . . and to have the DOJ weigh in on this, would be, in the grand scheme of things, helpful to the private plaintiffs").

132 Competitive Impact Statement, *United States v American Express Co*, Civil Action No 10-04496, *2 (EDNY filed Oct 4, 2010) (available on Westlaw at 2010 WL 10912947). See also *Justice Department Sues American Express, Mastercard and Visa to Eliminate Rules Restricting Price Competition; Reaches Settlement with Visa and Mastercard* (DOJ, Oct 4, 2010), archived at http://perma.cc/W2LN-ZBHH.

133 It is unclear at what level the DOJ's surcharging case was kiboshed, but there was broad speculation as to what might have caused the about-face. At the time, I heard from two different sources the rumor that the Antitrust Division gave a green light to the attack on the no-surcharge rules but that senior White House officials nixed the plan, fearing potential political fallout if the administration were perceived to be imposing checkout fees on US consumers. Compare *Justice Department Sues American Express, Mastercard and Visa* (cited in note 132) (noting that the complaint focused on "rules that prohibit merchants from encouraging consumers to use lower-cost payment methods"), with *U.S. District Court*

for decades to spin surcharging as "anticonsumer." Visa in particular has widely employed faux grassroots organizations—with names like "Consumers Against Penalty Surcharges"—to get out the message that surcharges are anticonsumer checkout fees.[134] And while merchants and major consumer organizations have long understood that no-surcharge rules are anticompetitive and regressive, it is reasonable to assume that the Obama administration was concerned with political backlash.[135]

Still, while it did not attack the no-surcharge rules, the DOJ did go forward aggressively with the claim against Amex's other antisteering restraints—for example, the prohibitions against merchants advertising "We Prefer Discover" or offering their consumers a discount for using Visa.[136] For four years, DOJ lawyers worked shoulder to shoulder with counsel for the merchant plaintiffs—sharing time at depositions, discussing strategies, and keeping one another apprised of developments. Ultimately, the DOJ proceeded to a full-blown seven-week bench trial against Amex, which the DOJ won, resulting in an injunction rescinding Amex's antisteering restraints.[137] However, the DOJ

Rules That American Express Violated Antitrust Laws (DOJ, Feb 19, 2015), archived at http://perma.cc/UF2A-ZQU3 (noting that "[t]he trial focused on . . . 'swipe fees'").

[134] In a 1987 internal memorandum, the public relations firm Hill+Knowlton bragged that its agents, and specifically veterans of its tobacco campaigns, had "put together 'Consumers Against Penalty Surcharges' for a coalition of credit card companies." Exhibit C: Hill and Knowlton Memorandum, *Italian Colors Restaurant v Harris*, Civil Action No 14-00604, *2 (ED Cal filed Aug 15, 2014). See also *Discover Card Abandons Cardholders in Battle against Check Out Fees* (PR Newswire, Feb 14, 2006), available at http://perma.cc/E59B-DJRQ (describing "merchant imposed check out fees" as unfair and anticonsumer, and disclosing that the organization "enjoys the financial support of VISA USA").

[135] Major consumer organizations, including Consumer Action, the National Association of Consumer Advocates, the National Consumers League, and the US Public Interest Research Group, have submitted numerous amicus curiae briefs in support of merchant efforts to strike down laws against surcharging, emphasizing that such rules essentially impose highly regressive wealth transfers. See, for example, Motion of Amici Curiae Consumer Action, National Association of Consumer Advocates, National Consumers League, and U.S. Public Interest Research Group for Leave to File a Brief as Amici Curiae in Support of Plaintiffs' Motion for Summary Judgment, *Italian Colors Restaurant v Harris*, Civil Action No 14-00604, *1 (ED Cal filed Nov 19, 2014).

[136] See *United States v American Express Co*, 21 F Supp 3d 187, 193, 197 (EDNY 2014) (denying Amex's motion for summary judgment and finding that its "anti-steering rules, which limit the ability of merchants to 'steer' customers toward the use of another card," may violate the antitrust laws).

[137] *United States v American Express Co*, 88 F Supp 3d 143, 152, 238–39 (EDNY 2015). See also Christie Smythe, *American Express Loses Antitrust Suit over Merchant Rules* (Bloomberg, Feb 19, 2015), archived at http://perma.cc/7ULR-KRU6 (reporting that the case "went to trial in July and was held without a jury" and that "[m]ore than 30 witnesses testified, including representatives from airlines, retailers and hotel companies").

trial win did not deliver to merchants the long-sought right to impose card surcharges—and so the private plaintiffs soldiered on.

And at this point, two aspects of the private-public partnership bear note. First, there is a legislative story. Large merchants had been lobbying Congress for years to enact legislation capping swipe fees.[138] And quixotic as the quest for blunt price regulation usually is, in the United States, these merchants had recently enjoyed spectacular success: in 2010, § 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[139] ("the Durbin Amendment") effectively capped swipe fees on debit card transactions, and merchant lobbyists wanted to extend rate regulation to credit cards.[140] But when the private antitrust settlements were announced in the Payment Card Cases—promising merchants the ability to use surcharging to inject price competition into the market and to discipline swipe fees—the proponents of legislative rate regulation became alarmed. Durbin's senior counsel wrote to the head of the National Retail Federation (NRF) (the de facto leader of the objecting merchants' group) and warned darkly that the proposed settlements will "foreclose the prospect" of rate-capping legislation and that the "efforts to have Congress rein in credit-card swipe fees will be imperiled" unless the objectors manage to derail the settlements.[141]

138 See, for example, *Swipe Fees: Latest News* (NRF), archived at http://perma.cc/Q6WS-JDPS ("[The National Retail Foundation] has led the retail industry's fight over swipe fees for a number of years, seeking legislation that would introduce transparency and competition that would bring fees down to a reasonable level."). The National Retail Federation was a strong objector in the *MDL 1720* settlement, arguing that the settlement "fail[ed] to reform the cartel-like system" established by Visa and MasterCard because it allowed "fees [to] be passed along to consumers in the form of a surcharge" rather than to be absorbed by the networks. Id.

139 Pub L No 111-203, 124 Stat 1376, 2068–74 (2010), codified at 15 USC § 1693o-2.

140 On July 21, 2010, Congress passed legislation to address the rise of debit card fees. Sponsored by Illinois Senator Richard Durbin, the Durbin Amendment directs the Federal Reserve to establish a rate cap for debit card swipe fees—a cap that the Fed has since set at a level that is well under half the level of swipe fees applicable to credit card transactions (which are unregulated). See 15 USC § 1693o-2; Declaration of Alan S. Frankel, Ph.D., *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *13–14 (EDNY filed Apr 15, 2014).

141 Matt Townsend and Dakin Campbell, *Durbin Sees Visa Accord Thwarting Push to Cap Card Fees* (Bloomberg, Aug 13, 2012), archived at http://perma.cc/NX3V-LDY6. See also Zywicki, *Consumers Are the Winners in the Visa/Mastercard Antitrust Settlement* (cited in note 112) (reporting that Durbin "blast[ed] the . . . settlement" as a "stunning giveaway" to the credit card networks and that he had "tak[en] the extraordinary step of intervening in a private legal action to lobby retailers to reject the settlement").

And indeed, as of this writing, the NRF and its fellow objectors remain on the warpath.[142]

Second, there is a story here about private-public complementarity. In the typical coattail class action, private damages claims follow on the heels of a government-enforcement case. That is, the private remedy—and the deterrent wallop that it packs—is cumulative of the public remedy. And the normative question, identified with Coffee's scholarship, is whether the cumulative remedy overdeters. But here, where the private remedy and the public remedy are injunctive, the dynamics are quite different.

In *Amex ASR* in particular, the injunctive remedies were complementary. The proposed class settlement delivered the right to surcharge credit cards but not the right to do so *differentially*.[143] The DOJ injunction, meanwhile, gave merchants the right to treat credit cards differentially, but it did not deliver the right to surcharge.[144] Putting the two together, the class settlement provided that if the DOJ were to win at trial, then—but only then—merchants could surcharge differentially, subject to certain restrictions.[145] This unique structure allowed the parties to settle what they could and to not be stymied by posturing over points that would be settled one way or the other in the then-upcoming DOJ trial.

B. The Private Attorney General and the Public Enforcer

So now back to our questions. Should deference be paid to agency nonenforcement decisions in the context of remedial statutes? Coffee suggests that the private attorney general may sometimes serve as a failsafe against political considerations that can lead to the underenforcement of important legal rights.[146] And certainly, the facts of *Amex ASR* bear that concept

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142 See *Swipe Fees* (cited in note 138) ("NRF is still pursuing legislation that would increase transparency by requiring card companies to clearly disclose the fees charged by each type of card and boost competition by ending Visa and MasterCard's cartel-like practices in setting the fees.").

143 See Class Plaintiffs' Opening Brief on Final Approval at *13–14 (cited in note 50).

144 *American Express*, 88 F Supp 3d at 163.

145 See Friedman, *Friedman Open Letter* (cited in note 36) (explaining how the DOJ and class relief would interact to permit a potent form of differential surcharging and further describing the "bet" on the DOJ: "[i]f DOJ were to win [at trial], the No-Discount Rule would be rescinded," while "[i]f DOJ were to lose, my team reasoned, then we would never have won this point anyway").

146 See note 125.

out in spades. But I would go further and reject the argument—pressed by some defendants[147]—that private lawyers are subverting prosecutorial prerogatives by pursuing reforms in cases where the public enforcer has taken a pass. Once we filter out abusive litigation via Coffee's reform proposals, there is no clear rationale for ignoring Congress's provision of enforcement rights to private actors based on executive enforcement decisions.[148] And certainly, in the Payment Card Cases, the price of deference to an agency nonenforcement decision would have been to sacrifice the quest for surcharge reform.

To the extent that we are concerned about reform litigation encroaching on legislative turf in particular, there may not be much real-world difference between private and public enforcers. The remedies that they achieve are the same, and the turf that they invade is the same. And in the Payment Card Cases, the merchant lobbyists and Durbin's staff could just as easily have warned that an impending government consent decree imperiled their legislative agenda, as they warned that the private class action settlements did. The concern, at bottom, is with reform litigation (by whomever) subverting legislation—and not properly with the private attorney general model.

To be sure, skepticism with the private attorney general model will linger in the context of Coffee's coattail or follow-on class actions. But as the Payment Card Cases show, there are many other models of private-public partnership, and they need not implicate any such skepticism. And here, Coffee and I would add one more salutary private-public model to the mix. In an earlier work, I made the argument that, following the Supreme Court's class action–killing decisions of recent years, "state attorneys general

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[147] See note 123.

[148] Any argument that private enforcers ought to yield to decisions by public agencies must rest on concerns of profit-driven overdeterrence and a related belief that the public enforcers' interests are better aligned with the public's interests. Professor Amanda M. Rose, for example, makes this argument, asserting that private follow-on class actions undermine the "non-profit-driven private enforcers['] [decision] . . . to engage in a form of discretionary nonenforcement." Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10b-5*, 108 Colum L Rev 1301, 1338 (2008). But even this staunch supporter of exclusive public enforcement acknowledges that the SEC and other agencies may be subject to "political whims," "behavioral biases," "laxity and inefficiency," and resource restraints. Id at 1340–41. See also Coffee, 42 Md L Rev at 227 n 25 (cited in note 5) ("Although the public prosecutor lacks any profit motive that might lead him to bring weak or marginal cases for their nuisance value, a prosecution can be motivated by ideological, political, and careerist motives, and it is an open question as to which set of perverse incentives is more dangerous.").

[should] make broad use of their parens patriae authority . . . to represent the interests of their citizens in the very consumer, antitrust, wage-and-hour, and other cases that have long provided the staple of class action practice."[149] And to tackle these complex cases, state attorneys general should retain private class action lawyers with serious "expertise in originating, investigating, and prosecuting class actions, as well as financing them."[150] In *Entrepreneurial Litigation*, Coffee expands on this theme of the "semi-private attorney general" (p 195). Observing that the private attorney general has often been "much more effective than public enforcement" in extracting significant monetary settlements (p 174), Coffee suggests that "the entrepreneurial energy of the plaintiff's bar [could] be harnessed" by the public attorney general (p 175).[151] As Coffee posits, this form of private-public partnering would "add teeth to public enforcement," allowing regulators to bring more and bigger cases than their budgets currently allow (p 175). And the combination would provide oversight of class actions by public agencies, which are "better able to monitor the private attorney general than can private clients" (p 175).[152]

III. WHEN REALISM MET FORMALISM

As the third discomfort zone, I have identified a sort of frustration that jurists encounter when their normative intuitions about how lawyers ought to conduct the business of litigation conflict with the practical, on-the-ground realities of complex, multiparty litigation. As Professor Coffee reminds us, lawyer-driven

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149 Myriam Gilles and Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v Concepcion, 79 U Chi L Rev 623, 630 (2012). See also id at 660 ("Parens patriae suits are not subject to Rule 23 or contractual waiver provisions, and so avoid the majority of impediments to contemporary class actions.").

150 Id at 630. See also id at 669 (observing that, politics aside, "there is little to stop state AGs from engaging private law firms on a contingent fee basis to pursue claims in parens patriae on behalf of injured state residents," so long as the attorneys general retain "total control over all key decision making").

151 See also Coffee, 42 Md L Rev at 226 (cited in note 5) (asserting that the private attorney general may be both more efficient than governmental machinery and more consistent, in that it is immune from changes such as vacillating political will or the vagaries of the public-budget process).

152 In commenting on Coffee's "semi-private attorney general" concept, Rakoff pointed to an additional benefit: that government agencies employing private lawyers to bring securities enforcement actions would enjoy the political latitude to "direct that more attention be paid to pursuing individuals," such as executives who actually committed the alleged misconduct, thereby packing a greater deterrent wallop. Rakoff, *The Cure for Corporate Wrongdoing* (cited in note 120).

class litigation has never fit comfortably with the fundamental assumptions that our legal system makes about the role of lawyers, including the premise that "clients, not their attorneys, should define litigation objectives."[153] As such, Coffee observes, ethical firestorms are bound to erupt over the conduct of private attorneys who "wield[ ] a degree of public power, but [are] motivated by powerful economic incentives, and yet subject to only limited accountability" (p 2).

Bracing themselves against Coffee's classic critique that they do not represent "real" clients who perform a meaningful monitoring function, class action lawyers go to great lengths to project the appearance of traditional attorney-client relationships. But, of course, the relationships *are* different—and the day-to-day activities of class counsel in large, sprawling cases often bear little resemblance to the conventional paradigm.[154] The class lawyer's activities can look more like those of a shadowy diplomat, engaging in constant temperature-taking and idea-floating in order to broker viable deals among willing players in opposing camps. Indeed, it is hard to see how complex, multiparty settlements could occur without these sorts of communications.

The essential tug-of-war here is between realism and formalism. On one side stands a pragmatic philosophy concerned with the reality of how complex deals are closed, a realism emblemized by Coffee's tireless inquiry into what entrepreneurial lawyers actually do and why they do it. And on the other side stands a formal philosophy concerned with preserving a traditional conception of how lawyers behave, a formalism that looks to ex ante rules to ensure fidelity to that traditional form. This tug-of-war plays out in dramatic fashion in the Payment Card Cases.

A. *Amex ASR* and the Collusion Theory

As discussed above, some of the nation's largest megamerchants were committed to stopping settlement of the Payment Card Cases at all costs. These objectors lost round one,

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153 Coffee, 86 Colum L Rev at 677 (cited in note 117). See also Coffee, *Entrepreneurial Litigation* at 6 (cited in note 7) ("[T]his notion of the lawyer as an entrepreneur is normatively troubling to many, and it cannot be easily reconciled with traditional legal ethics, which views the attorney as an agent and insists that the client is entitled to make all significant litigation decisions.").

154 See, for example, Coffee, *Entrepreneurial Litigation* at 28 (cited in note 7) (observing that the adoption of the class action device "changed the fundamental relationship between lawyers and their clients in plaintiff's litigation in the United States").

as the Visa-MasterCard settlement won lower court approval.[155] And the objectors looked to be in further trouble as the *Amex ASR* settlement moved toward court approval in late 2014. But then came a thunderbolt from out of the blue: Ravelo's arrest, the search of her files, and the dissemination of eighteen thousand pages of materials—including hundreds of personal and professional e-mails spanning many years with a longtime friend, Friedman, who was lead counsel for the plaintiffs in *Amex ASR* and who was active in negotiating the no-surcharge reform in *MDL 1720*. The objectors sensed an opportunity and moved to derail the settlements.

In *Amex ASR*, the district court ordered the objectors and class plaintiffs to simultaneously submit ten-page, double-spaced briefs addressing how, if at all, the disclosed communications should affect the court's determination of the proposed settlement.[156] On the appointed day, Friedman's class plaintiffs submitted a conventional legal brief that emphasized the merits of the proposed settlement and its value to the 3.4 million merchants in the class.[157] The various objectors, meanwhile, made several coordinated submissions asserting that the Friedman-Ravelo communications reflected serious misconduct.[158] Some objectors alleged an elaborate conspiracy.[159] Others suggested something darker—that Friedman and Ravelo were both criminals hiding behind the Fifth Amendment: "Since Ms. Ravelo has been charged criminally and both she and Mr. Friedman have

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155 See *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 986 F Supp 2d 207, 213–14 (EDNY 2013). The class settlement provided for (1) "[t]he creation of two cash funds totaling up to an estimated $7.25 billion (before reductions for opt-outs)"; (2) "Visa and MasterCard rule modifications to permit merchants to surcharge on Visa- or MasterCard-branded credit card transactions at both the brand and product levels"; (3) "[a]n obligation on the part of Visa and MasterCard to negotiate interchange fees in good faith with merchant buying groups"; (4) "[a]uthorization for merchants that operate multiple businesses under different 'trade names' or 'banners' to accept Visa and/or MasterCard at fewer than all of its businesses"; and (5) "[t]he locking-in of the reforms in the Durbin Amendment and the DOJ consent decree with Visa and MasterCard, even if those reforms are repealed or otherwise undone." Id at 217.

156 See Order re: Motion for Final Approval of Class Action Settlement, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221 (EDNY filed Apr 30, 2015).

157 See Class Plaintiffs' Memorandum in Response to Question Number Two at *1 (cited in note 111).

158 *Amex ASR*, 2015 WL 4645240 at *7–9, 13 (outlining the arguments for why Freidman's interactions with Ravelo constituted "egregious conduct").

159 See Class Plaintiffs' Memorandum in Response to Question Number Two at *3–4 (cited in note 111).

criminal attorneys representing them, the ability to examine this issue is unlikely."[160]

In the early evening of the day that the briefs were due, the court issued an extraordinary and unprompted order directing that neither side would be permitted to file responsive papers.[161] In other words, whatever allegations were made or charges levied against Friedman by the objectors, he and his team would be foreclosed from responding, denying, or explaining their conduct.

Friedman has since written that his team "did not anticipate," and could not have foreseen, the "distorted narrative that the objectors would wring out of the 18,000-page record," and he has complained that he had no opportunity to rebut the "incredible allegations" made by the objectors.[162] According to Friedman, the objectors' intentions were to "goad[ ] the [court] to latch onto the familiar narrative of a plaintiffs' class action lawyer selling out his clients' interests."[163] If Friedman is correct, the goading worked: the court rejected the settlement just days after shutting down the briefing. And the court did not base its decision on an evaluation of the proposed relief; instead, the court rejected the Amex settlement because it found class counsel's conduct so contrary to traditional notions of legal professionalism that it could not countenance approval.[164]

So what was the conduct that the objectors alleged and that the court found so abhorrent that it warranted scrapping a settlement that sought to provide substantial benefits to 3.4 million Amex-accepting merchants in the United States?

The nub of the collusion theory—advanced by the objectors and uncritically accepted by the district court—was that Friedman shared information with Ravelo in a bid to induce Visa and MasterCard to structure their settlements with a "level playing

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160 Friedman, *Friedman Open Letter* (cited in note 36).

161 See Scheduling Order, *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221 (EDNY filed July 28, 2015) ("The court is in receipt of the supplemental memoranda filed today by [certain objectors] regarding . . . communications exchanged between Gary Friedman and Keila Ravelo. . . . No other related submissions will be permitted by any other parties or objectors.").

162 Friedman, *Friedman Open Letter* (cited in note 36).

163 Id.

164 *Amex ASR*, 2015 WL 4645240 at *11:

> [T]he court need not, and does not, reach the merits of these aforementioned objections today, because it concludes that the improper and disappointing conduct of Co-Lead Class Counsel Gary B. Friedman has fatally tainted the settlement process. The procedural unfairness and failure of adequate representation . . . requires disapproval of the Settlement.

field" clause, thereby setting the stage for Amex to later settle on a parity-surcharging basis.[165] According to the court, this structure served to insulate all three networks from "differential surcharging."[166]

In support of this theory, the court pointed to three areas of communication. First, the court identified seven documents that Friedman shared with Ravelo, allegedly in violation of a protective order and in an effort to influence MasterCard's settlement.[167] Second, the judge pointed to "email discussions and outlines regarding 1720 MDL settlement negotiations, status, strategy, and proposed provisions."[168] By these communications, the theory holds, Friedman sought to steer defendants to include the level playing field provision and pave the way for Amex to settle on a parity basis. And third, the court was perturbed by numerous communications between Friedman and Ravelo after the *MDL 1720* settlement that related to the *Amex ASR* settlement.[169] In general, the court was struck by Friedman and Ravelo's relationship, which over the years had included family vacations, discussions of investment opportunities, and personal loans.[170] The judge was especially alarmed at their close communications regarding the *Amex ASR* settlement negotiations, pointing out that "Friedman consulted Ravelo at what appears to be every step along the way."[171] The court reasoned that Friedman's ability to be a zealous advocate for the class was compromised by his "collaboration with counsel for MasterCard, an entity with interests divergent to those of the class," and that "there [was] reason to be concerned he was not acting solely in the class's interests."[172]

Friedman saw things differently. Complaining that he never had an opportunity to address these charges in court—and unable

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[165] Id at *5, 11. Under the level playing field clause in *MDL 1720*, a merchant may surcharge Visa and MasterCard transactions only if it also surcharges Amex transactions. Under parity surcharging, a merchant may surcharge Amex transactions only if it also surcharges Visa and MasterCard transactions. The allegation was that Friedman got Visa and MasterCard to agree to the level playing field clause to pave the way for settling with Amex on a parity-surcharging basis. Id at *11.

[166] Id at *17.

[167] Id at *13–16.

[168] *Amex ASR*, 2015 WL 4645240 at *15.

[169] Id at *18.

[170] Id.

[171] Id at *15.

[172] *Amex ASR*, 2015 WL 4645240 at *17.

to appeal the decision[173]—Friedman published an open letter, arguing that the entire collusion theory was illogical for several reasons. First, he noted, each of the seven allegedly confidential documents that the judge identified was transmitted *only after* MasterCard settled and thus could not have influenced MasterCard's settlement.[174]

Second, Friedman argued that the "negotiation e-mails" he sent to Ravelo were part and parcel of legitimate negotiations—a process that, to Friedman's mind, involved sharing strategic thinking with the adversary in these serious and complex cases.[175] According to Friedman, he worked to "help forge approvable deals in cases with multiple players and agendas."[176] That "work entailed no shortage of sidebars, and it required relationships of trust between individual lawyers in opposing camps."[177]

Moreover, far from scheming to implement a level playing field provision in *MDL 1720* to pave the way for a parity-surcharging resolution in *Amex ASR*, the level playing field provision was not Friedman's innovation at all; rather, according to all parties to the settlement, it was thrust on the litigants by the mediators, and, indeed, Friedman led the charge to get rid of it.[178] Further, the judge was mistaken in his characterization of

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173 The court's order dated August 4, 2015, dismissed Friedman as lead counsel, provisionally decertified the proposed settlement class, and invited the remaining lawyers to re-present an untainted settlement. Id at *21. Friedman had no standing to appeal the rejection under Rule 23(f), as it was not a final judgment. Further, I believe any attempt to appeal the lead counsel ruling under Rule 23(g) might have been harmful to the class, as the interests of class members before this particular district judge were clearly not best served with this particular lead counsel.

174 Friedman, *Friedman Open Letter* (cited in note 36). Friedman acknowledged sharing with Ravelo, in this post-MasterCard-settlement time frame, a handful of documents covered by a protective order—mostly court papers that he should have transmitted only in redacted format. Id. Friedman did not dispute that these transmissions likely amounted to a violation of the protective order, but he contended that the violation was "inconsequential" and "technical" because in briefs and accompanying documents filed with the court under seal, the defendant networks and banks averred that Ravelo never shared these documents with anyone on the defense side; she had agreed to be bound to confidentiality, like any consultant. Id.

175 See id.

176 Id.

177 Id.

178 See Class Plaintiffs' Opposition to Rule 60 Motions to Vacate Judgment, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Civil Action No 05-MD-01720, *24–29 (EDNY filed Sept 1, 2015). As the defendants in *MDL 1720* put it: "Objectors assert that in 2011 Mr. Friedman caused the level playing field provision to be part of the Settlement so that he could then manipulate the American Express settlement to include 'parity surcharging.' Not true." Defendants' Memorandum of Law in Opposition to Objectors' Motion to Vacate Judgment, *In re Payment Card Interchange*

the settlement terms: the *Amex ASR* settlement in fact *permitted* differential surcharging, and not just parity surcharging, as discussed above.[179] If the conspiracy was aimed at achieving a pure parity deal, it failed miserably.

Third, as for communications with Ravelo regarding the Amex settlement well after MasterCard had settled, Friedman argued that, protective order violations aside, there was nothing wrong with these communications.[180] As a defense-side lawyer with fifteen years of directly on-point experience under her belt, Ravelo was a useful confidante, benefiting Friedman and, by extension, his clients.[181]

Additionally, Friedman alleged that the court misstated facts in order to portray him as a lawyer selling out his clients' interests. According to Friedman's open letter, documents relied on by the court show that Friedman had demanded a "huge f'ing number" for class damages—before *Italian Colors*, when damages were still on the table.[182] In the decision, however, the judge wrote that Friedman, in settling the injunctive case, demanded this "huge" number for *attorney's fees*—a withering allegation of moral bankruptcy, in the world of entrepreneurial lawyers.[183] Similar or worse allegations abound in the report submitted by the 7-Eleven objectors' questionable ethics expert, albeit in somewhat more cartoonish language.[184]

Fee and Merchant Discount Antitrust Litigation, Civil Action No 05-MD-01720, *1 (EDNY filed Sept 1, 2015). The defendants went on to point out that the clause originated from their negotiations with the DOJ and was then adopted by the mediators, all before Friedman became involved in the settlement negotiations. Id at *1–3.

179 See text accompanying notes 132–45 (discussing the interaction between the DOJ relief and the proposed settlement).

180 Friedman, *Friedman Open Letter* (cited in note 36).

181 See id ("In the years following the MDL 1720 settlement, I consulted Ravelo regarding the settlement process, the approval process and possible individual merchant arbitrations, among other things. . . . She brought a deep and unique understanding of how the GCs of large payment card networks think.").

182 Id.

183 *Amex ASR*, 2015 WL 4645240 at *15.

184 Without reviewing any of the pleadings in the case—indeed, without even reviewing the terms of the settlements—the expert, retired Professor Roy D. Simon of Hofstra University School of Law, pronounced that Friedman was a "double agent" and a "turncoat," "representing the plaintiff merchant classes by day and the defendant MasterCard by night" and giving "aid and comfort to the enemy." Exhibit 1: Declaration of Professor Roy D. Simon, Jr., *In re American Express Anti-steering Rules Antitrust Litigation*, Civil Action No 11-MD-02221, *5–6 (EDNY filed July 29, 2015).

I do not pretend to be neutral or unbiased here.[185] But the evidence suggests that a respected federal judge was successfully goaded to latch onto a "lawyer sells out client" story even though it was contravened by all of the known facts. Which raises the question of why—an inquiry that surely holds implications for my thesis. What lessons can be drawn from all this about our enduring discomfort with entrepreneurial lawyers?

B. The Clash between Realism and Formalism

One take on the collision between Friedman and Judge Garaufis is that it is a proxy war for the conflict between realism and formalism. By realism, I have in mind the philosophy that Coffee practices in his writing, particularly in *Entrepreneurial Litigation*. His judgments are informed by the practical realities of lawyering.[186] Coffee is tireless in trying to understand what entrepreneurial lawyers actually do and why they do it. To understand actions, he wants to understand interests. Motivations are everything; labels mean little. And when ethical questions arise, Coffee's question is always: Who was harmed and how? In discussing the case of famed securities class action lawyer Mel Weiss, who was prosecuted in 2008 for making side payments to figurehead class action clients, Coffee's question is pointed: "[E]ven if the[ ] behavior was sleazy and the pattern of misconduct long-standing, the question remains: who was really injured by the payments to professional plaintiffs?" (p 76). And he digs until he finds satisfactory (if surprising) answers—in the case of Milberg LLP, Coffee identifies rival law firms as parties harmed by the side payments (pp 76–77). At any rate, the question for Coffee is actual harm: the effects of actions on interests in the real world.

On the other side of the spectrum is what I am calling formalism. Judgments in this realm are based on ex ante rules or precepts.[187] When written rules exist, the formalist is at his happiest—relieved of bothering with an after-the-fact inquiry into how a person's actions may have affected the real-world interests of

[185] See text accompanying note 34 (disclosing the relevant relationships with the parties).

[186] See, for example, Coffee, *Entrepreneurial Litigation* at 22–23 (cited in note 7) (discussing the practical origins of the so-called American rule against fee-shifting).

[187] See Frederick Schauer, *Formalism*, 97 Yale L J 509, 510 (1988) ("At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to *rule*.").

other parties.[188] When rules do not exist, the formalist relies on a sort of intuition to tell him what the ex ante rule would be if there were a rule.[189] Whatever else these intuitions may draw on, they are surely informed by a platonic form of traditional lawyering, in which one lawyer represents one client and negotiates against one adversary.

The work of contemporary class action lawyers in complex cases—the shadowy work of "forg[ing] approvable deals" with "multiple players and agendas"—bumps into these formal precepts.[190] For instance, Friedman regularly generated memoranda and discursive e-mails that he sent to his team regarding positions and ideas on rules-reform issues that cut across all three networks in both sets of cases, and he regularly sent this thinking along to various co-counsel and sometimes opposing counsel as well, including Ravelo.[191] Friedman defended this practice—forwarding sent e-mails, often sprinkled with comments—as an efficient way to communicate.[192] The court saw it differently. Friedman's e-mails and memoranda to his team were attorney work product, in formal terms, and his sharing them was seditious leaking.[193] One person's collaborative attempts at problem-solving are another person's collaboration, in the Vichy sense of the word.

As I said earlier, this case gives us a rare backstage pass, a chance to observe in real time the reaction of a traditional and well-respected jurist—albeit under stress test conditions fomented by uniquely powerful and motivated objectors—to some of the below-the-surface practices of entrepreneurial lawyers in complex cases. One can only imagine the reaction if other aspects of contemporary class practice were on display in similarly candid e-mails. I have in mind, for example, e-mails concerning the favor-trading deals that are often made in arranging for

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188 See id ("Formalism is the way in which rules achieve their 'ruleness' precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.").

189 See Lon L. Fuller, *Consideration and Form*, 41 Colum L Rev 799, 801 (1941) (observing that, even in the absence of a rule, judges should consider what rule might be desirable to ensure that parties perform in a particular manner).

190 Friedman, *Friedman Open Letter* (cited in note 36).

191 Id.

192 Id.

193 *Amex ASR*, 2015 WL 4645240 at *14 ("Friedman was bound to keep confidential, and agreed not to disclose to third parties, any work product or confidential information of the [individual merchant plaintiffs] shared with Friedman. His emails to Ravelo violated those agreements.").

class leadership,[194] or e-mails regarding the operation of document-review mills, in which the difference between treating the reviewer as an expense (like a photocopying vendor) or a lodestar-generating associate may determine the financial viability of the case.[195] Or consider case funding, in which entrepreneurial lawyers in complex commercial cases often tap equity capital from wealthy tort lawyers, litigation-finance operations, or even British insurance companies.[196] Private e-mail communications on these sorts of issues—especially if they shared the irreverent and profane tenor of the Friedman-Ravelo e-mails[197]—would surely offend traditional judicial sensibilities, stretching and perhaps breaching the boundaries of what courts recognize as the practice of law.

In a formalist fashion, the court's reaction to the Friedman-Ravelo e-mails does not ask what the effects of the lawyers' actions were on actors in the real world. The court did not engage in an analysis of Friedman's motivations or of the real interests of the parties, nor did it engage in the Coffee-esque inquiry of locating real harm:

> Whether Friedman exchanged confidential and/or privileged materials with Ravelo and consulted with her regarding these actions for financial reasons, out of personal loyalty, due to a misplaced sense that her advice would in fact benefit the merchant class and was not improper, and/or for

194 See, for example, Coffee, *Entrepreneurial Litigation* at 67–68 (cited in note 7) (discussing favor trading, egregious overstaffing, coalition building, "featherbedding," and "logrolling practices" common among class counsel in brokering lead counsel positions).

195 See, for example, Gilles and Friedman, 155 U Pa L Rev at 147–51 (cited in note 1) (examining the traditional business model for lawyers in class action lawsuits).

196 See, for example, Rachel M. Zahorsky, *Third-Party Litigation Funding Picks Up as UK Investors Eye US Cases* (ABA Journal, June 4, 2010), archived at http://perma.cc/FKE5-KJS3 (discussing the entrance of UK-based litigation-finance investors into the US market, potentially including the class action market); Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 NYU L Rev 1273, 1298–1300 (2012) (discussing alternative litigation financing of cases involving the drug fen-phen and other mass tort litigations).

197 For example, Friedman e-mailed Ravelo a term sheet of the Amex settlement three days before it was made public with a note "Burn after reading." *Amex ASR*, 2015 WL 4645240 at *13. He also e-mailed Ravelo an unredacted copy of the class's reply brief to those objecting to the class settlement with the note "hahahahahaha." Id. As to the latter, Friedman said he was merely offering "insincere condolences" because the "Miami Heat had that day lost LeBron James back to Cleveland." Friedman, *Friedman Open Letter* (cited in note 36). The court noted these infractions multiple times in its denial of the class settlement and seemed more perturbed by their tenor than by their content. *Amex ASR*, 2015 WL 4645240 at *13–17.

> some other reason(s), is something this court cannot currently, and need not, determine.[198]

Friedman's response challenges precisely this formalism, saying that "[i]t was a terrible mistake for the Court not to inquire into the reason for my actions, once they were called into question."[199] Friedman frames the conflict, almost explicitly, as one between Coffee's realism and the court's formalism: "If Judge Garaufis wants to argue that it does not matter whether my confidential consultation with Ravelo helped the class . . . I'd expect him to point to some hard-and-fast rule that says 'even if it helps your clients, you can't have communications like x, y or z.'"[200]

CONCLUSION

So, can Professor Coffee rescue the private attorney general? I agree with him that the abusive-litigation problem, as he sets it up, is the core problem posed by contemporary class action litigation. One side of the class action debate obsesses over the abusive-litigation problem, while the other side obsesses over the doctrinal devastation that has been wrought by judicial overreactions to that problem (I know that I do). As for Coffee's prescriptions, I will not put my partisan credentials on the line by endorsing a loser-pays system anytime soon, but I take his point—and I would be genuinely interested to see specific proposals for the alignment of incentives and for how to make "the merits . . . matter more" (p 122).

But the assumption of public-enforcement-like powers by self-nominated private lawyers will continue to drive a "who the heck are you" type of skepticism, even if the case inventory of the class action bar is cleansed of abusive litigation. The nets of Coffee's "bottom fishers" may empty out, but discomfort abounds. Objections to the arrogation of power by majority groups and the usurpation of public functions will not soon abate, although the concrete problems that they pose seem solvable with thoughtful consideration. Where I am less sanguine is in the realm of perspective and disposition; I fear that the attitudinal residuum of our decades-long policy debates consigns us to conflict.

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198 *Amex ASR*, 2015 WL 4645240 at *18.

199 Friedman, *Friedman Open Letter* (cited in note 36).

200 Id ("[I]f some exogenous rule of ethics is so very compelling that it warrants depriving 3.4 million U.S. merchants of meaningful tools . . . then I think it is incumbent upon a judge to write a decision explaining what that rule might be.").