

There Is No Conservative Case for Class Actions

By William P. Barnette

Litigation Practice Group

A Review of:

The Conservative Case for Class Actions, by Brian T. Fitzpatrick (Chicago), <https://press.uchicago.edu/ucp/books/book/chicago/C/bo43233299.html>

About the Author:

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Other Views:

- Kenneth K. Lee, *A Counterintuitive and Compelling Case for Class-Action Lawsuits*, NAT'L REV. (Dec. 2, 2019), <https://www.nationalreview.com/2019/12/conservative-case-for-class-actions-counterintuitive-compelling-argument/>.
- Jasminka Kalajdzic, *A Return to First Principles: Class Actions & Conservatism*, JOTWELL (Feb. 24, 2020), <https://courtslaw.jotwell.com/a-return-to-first-principles-class-actions-conservatism/>.
- Donald R. Frederico, *Book Review: The Conservative Case for Class Actions*, by Brian T. Fitzpatrick, 30 ABA CLASS ACTIONS & DERIVATIVE SUITS LITIGATION COMM. (May 29, 2020), available at <https://www.pierceatwood.com/sites/default/files/Don%20Frederico%20ABA%20book%20review.pdf>.
- Brian Fitzpatrick & John H. Beisner, *The Conservative Case for Class Actions: Point/Counterpoint*, 104 JUDICATURE 68 (2020), https://judicature.duke.edu/wp-content/uploads/2020/08/Classactions_Summer2020.pdf.

Over the past few decades, class actions have changed the face of litigation in America. Class actions—where one or a few plaintiffs sue on behalf of up to thousands or more absent class members—dramatically up the stakes facing defendants. What previously would have been small-dollar disputes involving a single plaintiff are frequently transformed into potential bet-the-company matters. Not surprisingly, given the enormous pressure defendants face, settlements often result even for objectively weak class claims. The money that has changed hands in settlements and fees paid to plaintiffs' class counsel in recent decades is staggering. Largely as a result, the plaintiffs' bar has become a potent special interest group, leading the efforts against tort reform generally and reform of class action litigation in particular.

The impact of class litigation has been felt by industries across the economy, most prominently from the plaintiffs' bar and allied state attorneys' general attacking "Big Tobacco" in the nineties and "Big Pharma" and opioids now, with scores of other businesses bearing the brunt with less publicity. Businesses routinely face workplace-related class actions, such as employee wage and hour challenges, job classification disputes, and suits involving the right to overtime pay.¹ Statutory penalty provisions are also a prime source of class litigation. For example, the Telephone Consumer Protection Act contains draconian penalties for illegal texts or phone calls,² as seen in a recent \$210 million settlement involving Dish Network.³ Privacy is another burgeoning area of class litigation; Facebook recently settled a case involving facial recognition technology for \$650 million.⁴ Any company that suffers a significant data breach—which occur with increasing frequency and arise from criminal conduct—must anticipate class litigation afterwards, with the cases often filed the day or within days of the breach becoming public. Likewise, any significantly sized company that does business in California will quickly become acquainted with class claims under that state's Unfair Competition Law.⁵

More recently, the plaintiffs' bar has not let the COVID-19 crisis go to waste. McDonald's is facing a class action for allegedly

1 See Gerald Maatman & Jennifer Riley, *A Busy Year in Workplace Class Action Litigation is Expected*, LAW360, Jan. 8, 2021.

2 Facebook, Inc. v. Duguid, No. 19-511, slip op. at 3 (April 1, 2021) (noting TCPA "creates a private right of action for persons to sue to enjoin unlawful uses of autodialers and to recover up to \$1,500 per violation or three times the plaintiffs' actual monetary losses").

3 See Lauren Berg, *Dish to Pay \$210M Telemarketing Penalty to Feds*, 4 States, LAW360, Dec. 7, 2020.

4 See Amanda Bronstad, *Judge Approves Facebook's \$650M Privacy Settlement as 'Major Win for Consumers'*, LAW.COM, Feb. 26, 2021.

5 See Cal. Bus. and Prof. Code §17200 (broadly prohibiting "unlawful, unfair, or fraudulent" conduct in connection with business activities).

providing inadequate protections for its employees.⁶ Amazon has been sued for price gouging,⁷ Major League Baseball faces a billion-dollar class action challenging the lack of refunds for season ticket holders,⁸ and major airlines are facing similar litigation regarding cancelled flights.⁹ A number of Ivy League colleges are also facing class actions for failing to give refunds after classes were moved online.¹⁰ In short, there is good reason class actions consistently rank as a top perceived threat for corporate counsel.¹¹

Against this backdrop, it is surprising to see a former clerk for the late Justice Antonin Scalia attempt to make the affirmative case for class actions—from a conservative perspective, no less. While Professor Brian T. Fitzpatrick of Vanderbilt Law School is to be credited for his thought-provoking attempt in *The Conservative Case for Class Actions*, in the end his argument is the legal equivalent of Pickett's Charge at Gettysburg—doomed to fail from the outset.

Fitzpatrick begins by contending that “what is good for conservative principles is not always what is good for big corporations.”¹² No doubt. If nothing else, the Trump era highlighted differences between big business and the conservative base on things like trade, immigration, and criminal justice reform. But the fight against class actions is not solely a big business or U.S. Chamber of Commerce concern. Class actions are a huge problem for big corporations, but they are even more likely to be an existential threat for smaller businesses. The demarcation in support for class actions is thus between businesses of all sizes and the plaintiffs' bar, rather than between political factions.

Fitzpatrick defines “conservative” as the “political right” or people who typically vote Republican.¹³ In the context of class litigation, however, a more accurate definition of a conservative would perhaps be the old saw of a liberal who has been mugged by reality.¹⁴ That is, while there is not a conservative case for class actions, nor is there a liberal or progressive one either—at least from a business perspective. On the contrary, from Apple to Hobby Lobby, from the most progressive to the most

conservative, there actually is a bipartisan business consensus that class actions are a big problem. As there are no atheists in foxholes, there likewise are no fans of class actions—regardless of political persuasion—among businesses who have been on the receiving end of one.

I. CRITIQUE OF CLASS ACTIONS GENERALLY

Fitzpatrick claims his book is “about conservative principles,” and he elucidates those principles by drawing on the works of, among other luminaries, Milton Friedman, Friedrich Hayek, Judge Richard Posner, and Professor Richard Epstein.¹⁵ In essence, Fitzpatrick contends that because conservatives favor market forces, the profit motive, and privatization, they should prefer regulating corporations through private class actions, rather than through regulation by big government. In particular, Fitzpatrick focuses on privatization, noting conservatives favor the concept generally because they believe better incentives in the private sector will typically lead it to outperform the government. Indeed, Fitzpatrick recognizes that private actors have to be more efficient because, unlike the government, they have to make a profit. Relatedly, he notes that private actors tend to be better resourced than government enforcers, making them more effective. All of this leads Fitzpatrick to conclude that private class actions “are not only the most effective way to hold corporations accountable, they are also the most *conservative* way to hold them accountable.”¹⁶

The problem with this argument is that whatever its merits in theory, in reality the conservative principles Fitzpatrick espouses are either wholly missing or fundamentally distorted as applied in modern class action practice. As Fitzpatrick acknowledges, “[a]lmost no country in the rest of the world allows class action lawsuits in the way we do”¹⁷ And for good reason. The criticisms of class actions are well-known and well-founded. As Justice Scalia noted in a major case involving Wal-Mart's promotion practices, a class action is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”¹⁸

In his book *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit*, scholar Martin H. Redish recognized that this exception frequently leads to abuse because “in all too many class action suits, there is, for all practical purposes, no class being represented. Instead, . . . the attorneys themselves are the real parties in interest.”¹⁹ Before going to prison, prominent plaintiffs' securities litigator William Lerach put the matter more colorfully, noting that “I have the greatest practice of law in the world. I have no clients.”²⁰

6 See Tom Hals, *U.S. Workers Hit McDonald's With Class Action Over Covid-19 Safety*, REUTERS, May 19, 2020.

7 See Lauren Berg, *Amazon Wants to Arbitrate Covid-19 Price-Gouging Claims*, LAW360, June 23, 2020.

8 See Zaxhary Zagger, *Ticket Buyers Sue MLB for Covid-19 Refunds*, LAW360, April 21, 2020.

9 See Amanda Bronstad, *Class Actions Seeking Refunds for Flights Cancelled Due to Covid Hit Turbulence*, LAW.COM, Oct. 14, 2020.

10 See Hailey Konnath, *Ivy League Schools Swept Up in Covid-19 Refund Suits*, LAW360, April 23, 2020.

11 See *Class Actions Still Top Concerns of Businesses Globally*, CLAIMS J., June 9, 2015.

12 BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS I* (2019).

13 *Id.* at 6.

14 See Wesley J. Smith, *Science Proves a Conservative Really is a Liberal Mugged by Reality*, NAT'L REV., Jan. 9, 2012, <https://www.nationalreview.com/human-exceptionalism/science-proves-conservative-really-liberal-mugged-reality-wesley-j-smith/> (quoting Irving Kristol's quip that “A conservative is a liberal mugged by reality.”).

15 Fitzpatrick, *supra* note 12, at 1, 6.

16 *Id.* at 3.

17 *Id.* at 59.

18 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011).

19 MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 42-43 (2009).

20 See *Shakedown Street*, FORBES, Feb. 11, 2008, https://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html.

Fitzpatrick essentially concedes Redish’s point, but he posits that we should rely on judges and legislatures to control plaintiffs’ class counsel.²¹ Conspicuously absent from Fitzpatrick’s analysis is the apparently old-fashioned notion of the client controlling his lawyer, which is the typical model in traditional litigation and is the basis for our ethical rules governing attorney conduct. Doing away with the fig leaf that real plaintiffs are actually in control of class actions is to be commended. But the recommended fix of relying on judges to control them has not been shown to be effective. Needless to say, judges can only exert meaningful control after a case is filed, which is simply too late to limit unnecessary or abusive filings in the first place. And indeed, the number of class filings, many questionable at best, continues to increase year after year.²²

The disconnect between the nominal plaintiff and the counsel driving the litigation is significant because it distorts the profit motive, which leads to more litigation overall and more filing of marginal claims. Unlike a regulator, class counsel is interested in theories that will lead to or at least threaten certification, which in turn creates pressure on defendants to settle, which then generates a fee for class counsel. The bottom line is that we regularly see private class actions filed based on theories that a government regulator would never pursue. The underlying merits of any individual claim—and frequently even the merits of the class’s claims in the aggregate—are often an afterthought. So, for example, many consumer class actions are based on nothing more than novel theories concocted by plaintiff’s counsel that are divorced from the realities of how a business actually operates. Or class actions may be based on weak merits claims that, even if true, would be exceptions to company policy, rather than uniform practices susceptible to class treatment. Despite their relative weakness, these cases keep getting filed. Why?

Because if plaintiffs’ counsel succeeds in forcing a settlement, the merits of such marginal claims are never litigated. As Judge Posner noted twenty-five years ago, even a defendant with strong defenses “may not wish to roll [the] dice” when certification puts a sufficient number of claims at issue; instead, the defendant often succumbs to the “intense pressure” to settle.²³ Twenty years earlier, Judge Henry Friendly characterized as “blackmail settlements” those resulting from the small risk of a crushing class action judgment.²⁴

The decades since have done nothing to lessen those risks; on the contrary, over time the stakes for defendants have grown higher and higher, as recent settlements demonstrate. For instance, a proposed settlement recently announced in the opioids litigation is valued at \$26 billion.²⁵ Private antitrust class actions likewise resulted in over \$24 billion in settlements between 2009 and

2019,²⁶ not including Blue Cross’s recently announced \$2.7 billion class settlement.²⁷ Similarly, securities class settlements cumulatively cost defendants over a billion dollars annually.²⁸

In addition to the risks presented by class actions, another major concern for defendants is simply the cost of litigating. These costs, particularly those surrounding discovery, are asymmetrical and borne almost entirely by the defendant. For example, in a typical consumer class case, the plaintiff will possess relatively few relevant materials, while the defendant can easily be required to produce millions of pages of documents, including emails, texts, and other electronic data. Likewise, key employees, including the defendant’s senior executives, will have to prepare for and give depositions, with the attendant disruption to normal business operations that entails. In many circumstances, imposing that cost and disruption upon the business defendant is in fact the point. The potential for harassment through discovery favors plaintiffs and plays a key role in driving settlements of class litigation, regardless of the merits of the claims.

More fundamentally, incentives again are skewed in the sense that meritless cases are not punished or even meaningfully discouraged. Unlike most of the world, the American system does not employ two-way cost-shifting, under which the loser of a suit pays the winner’s attorney’s fees. The majority rule creates an obvious incentive for plaintiffs’ counsel to carefully consider and evaluate their cases before they file, knowing that their client may have to pay the other side’s fees if he loses.

But the American rule does not require the loser to pay.²⁹ Thus, there is no market discipline involved in the decision to file cases. As a result, the entrepreneurial spirit and creativity of class counsel are unleashed, which has led to both an increase in the filing of class litigation and the pursuit of more marginal claims.

If class action litigation operated in an efficient market, as Fitzpatrick contends,³⁰ we would expect to see one or a few filings per dispute and not redundant, copycat filings. But that is not what happens. Any major company that is sued in a class action all too frequently receives numerous similar, indeed essentially identical, follow-on suits. Plaintiffs’ counsel is incentivized to file a slew of cases. Some will be copycats while others will explore different, and sometimes conflicting, theories. If only one of these cases hits, class counsel will get a significant return on their investment. And no matter what, plaintiffs won’t have to pay the defendants’ costs for their losses. Thus, the profit motive driving class counsel does not lead to efficiency, but rather abuse.

21 Fitzpatrick, *supra* note 12, at 54.

22 See 2020 Carlton Fields Class Action Survey, available at <https://classactionsurvey.com/>. See *infra* note 52 and accompanying text.

23 *In re Rhone Polenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

24 HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973).

25 See Amanda Bronstad, *Lawyers Suing Over Opioid Crisis Announce \$26B Proposed Settlement*, LAW.COM, Nov. 5, 2020.

26 See Matthew Perlman, *Antitrust Class Actions Netted \$24B in Deals Last Decade*, LAW360, Sept. 22, 2020.

27 See Anna Wilde Matthews and Brent Kendall, *Blue Health Insurers Reach Tentative Antitrust Settlement for \$2.7 Billion*, WALL STREET J., Sept. 24, 2020.

28 See NERA, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review*, at 13-17, Feb. 12, 2020.

29 *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015) (defining the American Rule as “Each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.”).

30 Fitzpatrick, *supra* note 12, at 44-45.

To give a real-life example of this dynamic, one major retailer I represented faced a series of class actions challenging the sale of damage waivers in connection with its tool rental business. Plaintiffs' original theory was that the damage waivers were misrepresented as mandatory instead of optional. These claims inevitably failed on a class basis due to the inherently individualized liability issues underlying the transactions (e.g., what the customers were told regarding the damage waiver, whether the customers saw signs disclosing the damage waiver as optional, etc.).³¹ Class counsel then shifted theories to allege that the waivers were worthless and should not have been offered for sale at all. These claims likewise failed.³² So at the end of the litigation, defendant had defeated 17 class actions alleging seriatim counsel-created theories, none of which had merit, but which were nevertheless alleged and copied in cases across the country. This total "victory" cost the defendant several million dollars in defense costs, but the various class counsel essentially nothing, other than wasted time and effort.

The problem of copycat filings has been exacerbated by the increasing prevalence in the federal system of Multi-District Litigation ("MDL") proceedings,³³ where similar cases are consolidated in front of one judge for pretrial proceedings. Indeed, one side effect of a 2005 law that expanded federal jurisdiction over class actions, the Class Action Fairness Act ("CAFA"), has been an increase in just such filings.³⁴ As a result, post-CAFA MDL practice in the federal courts has blossomed. In fact, cases in MDLs now account for more than half of the federal docket; many of these are class actions where jurisdiction is based on CAFA.³⁵

Because of the sheer number of claims and the level of associated risk to defendants, MDLs typically function as massive settlement claims processing proceedings, rather than true litigation. So-called "steering" or "leadership" committees, typically consisting of ten or more plaintiffs' firms, are appointed by the court to manage the litigation and in essence function as full employment acts for plaintiffs' lawyers. Enterprising class counsel do not want to be left out of any potential settlement, thus incentivizing the filing of copycat class actions which are then consolidated in the MDL. For example, in two recent data breaches involving Target and Home Depot, more than fifty class actions were consolidated against each company in MDLs.³⁶

31 See *Berger v. Home Depot U.S.A., Inc.*, 741 F.3d 1061 (9th Cir. 2014).

32 *Rickher v. Home Depot*, 535 F.3d 661 (7th Cir. 2008).

33 See 28 U.S.C. § 1407.

34 See Senate Rep. 109-14, *The Class Action Fairness Act of 2005*, at 5 (hereinafter "S. Rep. 5") (CAFA allows "overlapping and 'copycat' cases to be consolidated in a single federal court"); *id.* at 38 (claims of similar classes can "be handled efficiently on a coordinated basis pursuant to" MDL process); Catherine R. Borden, *Managing Related Proposed Class Actions in Multidistrict Litigation*, at v (Federal Judicial Center, Pocket Guide Series 2018).

35 See Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, Law360, March 14, 2019, <https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload> (noting MDLs account for 52% of all pending federal civil cases).

36 See Erin Coe, *Target Presses Panel to Send Data-Breach Cases to Minn.*, Law360, March 27, 2014 (noting 100 proposed data breach class actions

This redundant litigation, which is a typical occurrence, does not scream market efficiency. On the contrary, marginal claims proliferate. In the Chinese Drywall MDL, for instance, my client was sued in eight different class actions despite there being no evidence that it ever sourced or sold any of the relevant drywall.³⁷ Indeed, several of the plaintiffs there alleged they bought the drywall at the address for the defendant's corporate headquarters, an impossibility given that location, not surprisingly, does not sell products at retail.

Fitzpatrick nevertheless contends that there "is little reason to think that most or even many class action lawsuits are meritless."³⁸ He bases this on the fact that motions to dismiss class actions are only granted roughly 20-30% of the time.³⁹ But the motion to dismiss tests only whether, taking the allegations as true, the individual class representative has stated a claim that if ultimately proven would entitle him to relief. It does not address either the merits of the class allegations or the appropriateness of class treatment of those allegations, each of which are resolved later in the case. And even with the Supreme Court in recent years having tightened up the pleading standards on a motion to dismiss,⁴⁰ it is still relatively easy for any competent attorney to craft a complaint that states a claim. Significantly, once the motion to dismiss hurdle is cleared, the plaintiff is then off to the races on the expensive, time-consuming, and often harassing discovery process, which is often leveraged to force a settlement.

Given that it is the class allegations that make these cases significant, the proper metric for assessing their merit should be whether the class ultimately prevails (or at least is certified). Here, definite numbers are hard to come by, but my experience indicates most class allegations do not ultimately succeed. For instance, the major retail client I am most familiar with has faced over 200 class actions over the last decade, with only two litigation classes being certified and a couple of others settling on a class basis. Certainly not all those cases that failed on a class basis were frivolous, but a good number were. The problem, of course, is that to get to the point where the defendant can show the case is not a proper class action costs significant amounts of time and money, while class counsel is running up their fees for any potential settlement in the meantime.

And class counsel's fees ultimately are the heart of the matter. It is well known (and Fitzpatrick concedes) that the claim rates in consumer class settlements are abysmal; typically, well less than 10% of class members even bother to make claims.⁴¹ So it's

had been filed against Target in 39 district courts); Jonathan Stempel, *Home Depot Settles Consumer Lawsuit Over Big 2014 Data Breach*, REUTERS, March 8, 2016 (noting 57 data breach class filings against Home Depot).

37 See *In re Chinese-Manufactured Drywall Products Liability Litigation*, MDL 2047 (E.D. La.); Elizabeth Leamy and Susan Rucci, *Some China-Made Drywall Causing a Stink*, ABC NEWS, March 23, 2009.

38 Fitzpatrick, *supra* note 12, at 74.

39 *Id.* at 75.

40 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); see Fed. R. Civ. P. 12(b)(6).

41 Fitzpatrick, *supra* note 12, at 88.

not class members who primarily benefit from class settlements. Fitzpatrick argues that class members do benefit because settlement funds are typically distributed pro rata, meaning the total settlement amount is divided up among however many class members submit valid claims.⁴² But even accepting that characterization, which is not universally true, that just means that those few people who submit claims receive windfalls bearing little relation to their alleged injury; the vast majority of class members still receive nothing.

But class counsel does always benefit from settlements in the form of attorney fees. As noted earlier, there is no true market discipline over fees because the American rule does not make the loser pay. Indeed, in many ways the American rule is even worse than each party simply bearing its own fees. If plaintiff loses, then each party bears its own fees; but if plaintiff prevails or forces a settlement, then defendant is typically responsible for both the class counsel's and its own lawyer's fees. That is, defendant is often responsible for both sides' fees. And usually class counsel's fee amount (or at least a maximum award, which the defendant agrees not to object to) is agreed to in the settlement and thus not effectively litigated.

Nevertheless, according to Fitzpatrick, class counsel on average end up with a fee that is only 15% of the overall settlement value, which he contends is "too little rather than too much."⁴³ Given the gross amounts that are awarded,⁴⁴ focusing solely on the percentage of the award tends to miss the forest for the trees, particularly given how few class members are actually benefiting in any event. Fitzpatrick, however, puts his money where his mouth is here, frequently serving as an expert in support of class counsel's fee applications (and, in full disclosure, he has been opposite my client before).

Perhaps the easiest way to consider this contention is to ask: is there a shortage of willing class counsel in this country? After all, if class counsel were truly underpaid, we would expect to see an inadequate supply of attorneys filing class actions. Needless to say, that is not the case, as evidenced by both the number of class filings we see each year and the number of plaintiffs' attorneys involved in prosecuting those cases.

Indeed, in the two most recent class cases I've litigated that resulted in settlements, both cases saw over twenty different plaintiffs' firms—that's firms, not attorneys—submitting requests seeking a portion of the fee. That was against the one firm that represented the defendant in each case.⁴⁵ Fitzpatrick contends that private class actions will result in better regulatory outcomes because of the better incentives class counsel have in the form of the profit motive.⁴⁶ But in any other business realm, the notion that such redundant and inefficient staffing practices served market forces would be laughable. It should be here as well.

⁴² *Id.* at 87.

⁴³ *Id.* at 85, 96.

⁴⁴ See, e.g., *Lawyers Share \$175M Payday in VW Settlement*, COURTHOUSE NEWS SERVICE, March 20, 2017.

⁴⁵ See *In re The Home Depot, Inc. Customer Data Security Breach Litig.*, MDL 2583 (N.D. Ga.).

⁴⁶ Fitzpatrick, *supra* note 12, at 31-32.

II. CLASS ACTIONS REMAIN ON THE RISE

Fitzpatrick claims that class actions are on the road to extinction due to the Supreme Court's decade-old holding in *AT&T Mobility v. Concepcion*,⁴⁷ which he terms a "game changer."⁴⁸ *Concepcion* and its progeny permit defendants to force some cases into individual, i.e., non-class, arbitration rather than class action litigation. As a result, according to Fitzpatrick, the "status quo is now few and maybe no class actions."⁴⁹ The reality does not come close to supporting this contention.

To begin, arbitration is under sustained assault by the plaintiffs' bar and its congressional allies. The subtly-named Forced Arbitration Injustice Repeal ("FAIR") Act, which would render unenforceable employer-imposed arbitration and class action waiver requirements, passed the House in September 2019.⁵⁰ The 2020 election results certainly raise the odds of this bill becoming law. Meanwhile, some plaintiffs' firms have developed a tactic of flooding companies with mass arbitration claims, filing thousands or more individual arbitration proceedings at once. Door Dash, for example, was hit with 6,000 simultaneous arbitration claims with a bill for filing costs—borne by the defendant—of \$9 million.⁵¹ The transparent purpose of these tactics is to try to force, in essence, a class settlement from supposed individual arbitrations.

More importantly, despite all the complaining by the plaintiffs' bar, the reality is *Concepcion* has not even slowed the pace of growth in class action filings, much less halted them. On the contrary, class filings overall continue to steadily increase year after year. For instance, according to one prominent study, in 2011, the year *Concepcion* was decided, 53.4% of companies were facing class action litigation. According to that same study, by 2019, there was a slight increase (to 54.9%) in companies defending class actions. But significantly, the average number of class actions those companies were facing had increased nearly four-fold, from 4.4 in 2011 to 15.1 in 2019.⁵²

More fundamentally, the suggestion that class actions are on the verge of going away is nothing new. The plaintiffs' bar makes this claim every time there is a major reform effort. For example, congressional enactments over twenty years ago like the Securities Litigation Uniform Standards Act and the Private Securities Litigation Reform Act were supposed to lead to the demise of securities class actions.⁵³ The passage of CAFA over a decade ago was allegedly going to do the same with class actions generally.⁵⁴

⁴⁷ 563 U.S. 333 (2011).

⁴⁸ Fitzpatrick, *supra* note 12, at 16.

⁴⁹ *Id.* at 128.

⁵⁰ See H.R. 1423, available at [congress.gov/bill/116th-congress/house-bill/1423](https://www.congress.gov/bills/116/house-bills/1423).

⁵¹ See Jim McAuley, 'Scared to Death' by Arbitration: Companies Drowning in Their Own System, N.Y. TIMES, April 6, 2020.

⁵² See 2020 Carlton Fields Class Action Survey, *supra* note 22, at 12, 14.

⁵³ See 15 U.S.C. §78a; 15 U.S.C. §78u.

⁵⁴ See 28 U.S.C. §1332(d).

None of these doomsday predictions have panned out. Securities class actions are as prevalent and dangerous to companies as ever, as evidenced by the 433 federal cases filed in 2019, marking the third consecutive year that such filings topped 400.⁵⁵ Eighty securities class actions settled in 2019 for an average of \$30 million.⁵⁶ Likewise, antitrust class filings nearly doubled from 2009 to 2019, to over 200.⁵⁷ CAFA has moved a significant portion of class action practice from state to federal courts, but it has not reduced the overall number of filings.

More generally, even a cursory review of the Supreme Court's jurisprudence over the last decade reveals that there is not a solid conservative majority standing ready to slay any class action that ventures nearby, particularly with Justice Scalia no longer there. The Court's high-water mark from the defense perspective is clearly *Wal-Mart v. Dukes*, where it reversed certification of a nationwide class action alleging sex discrimination in Wal-Mart's promotion practices. *Dukes* stands for what should be the common sense proposition that the alleged illegality of a million local promotion decisions spanning several years cannot be proven based on the individualized experiences of a handful of plaintiffs.⁵⁸ Similarly, in an antitrust case involving Comcast, the Court cut back on the types of expert testimony that will support class certification, sensibly holding that such testimony must reasonably fit the class theory of liability to be considered.⁵⁹ Notably, both *Dukes* and *Behrend* were close-run, 5-4 decisions.

But for every pro-defense class decision by the Court, there are plenty of cases going the other way. For example, in an opinion by Justice Elena Kagan, the Court held that the denial of class certification does not have collateral estoppel effect as to absent class members.⁶⁰ The practical effect of this ruling is to sanction the filing of copycat class actions by allowing plaintiffs to keep taking bites at the certification apple until they succeed or defendant settles. Likewise, in an employment case dealing with the right to overtime for Tyson poultry factory workers handed down the month after Justice Scalia's death, the Court retreated from *Dukes*' analysis of what constitutes a common injury sufficient to support certification. Rather than requiring that the class suffer the same injury, as in *Dukes*, Justice Anthony Kennedy's opinion affirmed certification of a class that admittedly included both injured and uninjured members.⁶¹

Allegations of fraud are typically not good candidates for certification because they involve individualized issues—e.g., what the plaintiff was told, whether he relied on the alleged misrepresentation, etc. In securities fraud class actions, however, the Court has adopted a presumption of reliance based on

a fraud-on-the-market theory, which greatly facilitates class certification.⁶² In a major case involving Halliburton, the Court unanimously held that the presumption could be rebutted. The Court, however, rejected defendant's request to overrule the presumption entirely, leaving the threat of securities fraud class actions intact.⁶³

Then there are the cases that, while victories for the defense, tend to be of the pyrrhic nature. For instance, in an employment class action challenging a meal break policy, the defendant sought to moot plaintiff's claim through an unaccepted offer of judgment. Because the offer if accepted would have fully satisfied the plaintiff's individual claim, Justice Clarence Thomas for the Court held that the case had to be dismissed for lack of standing.⁶⁴ So far, so good. But in dissent, Justice Kagan argued that the case was not moot because despite being made whole, the plaintiff should have had the opportunity to seek class certification as well—that is, it should have been the plaintiff's "choice, and not the defendant's or the court's, whether satisfaction of her individual claim, without redress of her viable classwide allegations, is sufficient to bring the lawsuit to an end."⁶⁵ The determination of standing, needless to say, should never be left to the plaintiff's subjective "choice," as opposed to the existence of an objective, concrete injury; otherwise, no case would ever be dismissed on such grounds.

Over time, however, the dissent's position has proved persuasive. Three years later, the Court reversed itself and held that an unaccepted offer of judgment does not render the class representative's claim moot.⁶⁶ Long-standing precedent establishes that a class representative must have individual standing, i.e., must have his own injury, and cannot rely on the standing of absent class members.⁶⁷ Thus, if the offer of judgment mooted the class representative's claim, one would think the class claim would have to be dismissed as well, as in *Genesis Healthcare*. To get around the possibility of what it called "picking off" the class claims, the Court accepted the questionable notion that a plaintiff who sues for a statutory penalty amount, is then offered that exact amount by the defendant, and rejects the offer, still has a concrete injury allowing him to pursue . . . the exact amount he just rejected. In effect, the Court sanctioned a litigation-for-litigation's-sake approach that benefits no one aside from class counsel. The result is that defendants can no longer offer judgment to defeat class certification, which is not the kind of outcome a Court supposedly hell-bent on killing off all class actions would reach.

Likewise, the Court acknowledged in *Dart Cherokee* that in passing CAFA, Congress did away with the presumption against removal in class actions that exists in ordinary cases.⁶⁸ But in

⁵⁵ See *Recent Trends in Securities Litigation*, *supra* note 28, at 1.

⁵⁶ *Id.*

⁵⁷ See Perlman, *supra* note 26, and accompanying text.

⁵⁸ *Dukes*, 564 U.S. 338.

⁵⁹ *Comcast v. Behrend*, 133 S. Ct. 1426 (2013).

⁶⁰ *Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

⁶¹ *Tyson v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

⁶² *Basic Inc. v. Levinson*, 485 U.S. 224 (1985).

⁶³ *Halliburton v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).

⁶⁴ *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

⁶⁵ *Id.* at 1536 (Kagan, J., dissenting).

⁶⁶ *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016).

⁶⁷ *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982); see William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. TEX. L. REV. 451 (2015).

⁶⁸ *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014).

so-called small value or negative value claim. As Fitzpatrick puts it, “private enforcement of small harms is not possible without the class action device,” so it’s either “the class action or no private enforcement at all.”⁷⁹ But that is simply not true. Every state has small claims courts that are specifically designed to resolve individual low-dollar disputes. Some states, like California, prohibit parties from being represented by attorneys in small claims proceedings.⁸⁰ Thus, in those states, the lack of an attorney prosecuting a small value claim—thereby lowering the cost—is a feature, not a bug.

Indeed, one senses that the repeated incantations from the plaintiffs’ side that without class actions small value claims wouldn’t be litigated is in reality an acknowledgement that the real parties in interest are the class counsel. As Redish puts it in *Wholesale Justice*, “uninjured plaintiff attorneys . . . act as private enforcers of substantive legal restraints.”⁸¹ Further, the fact that people often choose not to resort to small claims court to resolve minor disputes does not justify class proceedings; if anything, that simply again shows that life is short and the real parties in interest in many class actions are the attorneys who file the cases. That is, an individual’s lack of interest in pursuing a claim should not somehow justify a third party pursuing the claim on his behalf. And indeed, the previously noted abysmal claims rates in class settlements further confirm the issue with small value claims is largely a lack of interest, not the lack of an attorney.

Fitzpatrick tries to enlist Judge Posner in support of his argument here, quoting Posner’s statement that only “a lunatic or a fanatic sues for \$30.”⁸² But in a later case, Posner more carefully noted that the denial of class certification “does not mean that the class members are remediless, but they will have to seek their remedies in small claims courts.”⁸³ Subsidiarity would be better served by moving away from massive class actions and towards enforcement of individual small dollar disputes in small claims courts, where local judges can pass on claims brought by their citizens who are actually invested in pursuing them.

Modern class action practice also lacks any substantial basis in this nation’s jurisprudential history, thus further contravening fundamental conservative principles. For example, Edmund Burke’s theory of prescription, described in Yuval Levin’s *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left*, is that, to the extent society improves, it does so over time by building on its strengths and traditions. Prescription is thus a “model of gradual change—of evolution rather than revolution.”⁸⁴ It is “a way of adapting well-established practices and institutions to changing times, rather than starting over and

losing the advantages of age and experience.”⁸⁵ Similarly, Russell Kirk noted that conservatives adhere to “custom, convention, and continuity” because they “prefer the devil they know to the devil they don’t.”⁸⁶ This country’s 240-year dispute resolution tradition is rooted in bilateral litigation. The “invention” in 1966 of the modern class action has radically changed that tradition, particularly over the last few decades.⁸⁷ Allowing that “revolutionary change”⁸⁸ to occur is, according to Fitzpatrick, the “biggest mistake corporate America has ever made with regard to our system of civil justice.”⁸⁹ Indeed, Redish notes that the modern class action is “unprecedented in the manner in which it collectivizes the adjudication of individual rights.”⁹⁰

It is difficult to square an unprecedented invention that has caused radical changes in the risks attendant to litigation with any conservative notion of prescription or adherence to tradition. Indeed, Burke believed that prescription should result in “pursu[ing] change carefully, preferring changes to substance over changes to form where possible, and incremental over radical reform where necessary.”⁹¹ Federal law, in the Rules Enabling Act, similarly holds that procedural rules may not affect substantive rights.⁹² Crucially, however, modern class counsel’s “bounty hunter” role is “not created by the substantive law itself.”⁹³ Thus, by permitting a radical change in procedure, i.e., form, to effect a tremendous change in substance, i.e., in how the merits of disputes are collectivized and resolved, the move to class over bilateral litigation fails the prescription standard on all counts.⁹⁴

Further, increasing reliance on the class action device has also contributed to another loss of tradition, that of the jury trial.

85 *Id.* at 77.

86 Russell Kirk, *Ten Conservative Principles*, available at <https://kirkcenter.org/conservatism/ten-conservative-principles/>.

87 Fitzpatrick, *supra* note 12, at 8.

88 Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903, 905 (2018); *id.* (quoting John Frank, member of the committee which drafted them, referring to the 1966 amendments to Rule 23 as the “most radical act of rulemaking since” Rule 2).

89 Fitzpatrick, *supra* note 12, at 11.

90 Redish, *supra* note 19, at 230.

91 Levin, *supra* note 84, at 143.

92 See 28 U.S.C. § 2072.

93 Redish, *supra* note 19, at 14.

94 In his famous 1774 Bristol speech, Burke “told his new constituents that he would not see his role as merely the representative of their views: ‘Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.’” Levin, *supra* note 84, at 111. That is, Burke believed the role of “each member of Parliament was not to stand in for his constituents but to apply his wisdom to advance their interests and needs” *Id.* Some commentators have contended that Burke’s “theory of interests” is “important for it has become the basis of much of modern class action doctrine.” John E. Kennedy, *Book Review: Digging for the Missing Link, From Medieval Group Litigation to the Modern Class Action*, 41 VAND. L. REV. 1089, 1110 (1988) (citing STEPHEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 202-03 (1987)). Under this reading, Burke’s understanding that a representative is “not the agent of the electorate, but rather its trustee, positively charged to

79 Fitzpatrick, *supra* note 12, at 60, 66.

80 Cal. Code Civ. Pro. 116.530(a).

81 Redish, *supra* note 19, at 132.

82 Fitzpatrick, *supra* note 12, at 67 (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

83 *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1047 (7th Cir. 2007).

84 YUVAL LEVIN, *THE GREAT DEBATE: EDMUND BURKE, THOMAS PAINE, AND THE BIRTH OF RIGHT AND LEFT* 67 (2014).

It is no secret that jury trials—the fundamental basis of dispute resolution in the American system of litigation—have long been in decline, to the point that numerous articles and studies have been published on the “vanishing trial” phenomenon for even ordinary cases. Class actions by design collectivize claims and consequently result in such significant risk for defendants that, even more so than regular cases, they almost always are too risky to try. As a result, settlements frequently occur, whatever the merits of the claims.

Even when defendants are willing to roll the dice, class actions are simply too large and unwieldy to try in a fair and appropriate manner. In this regard, Redish correctly notes that the class action device creates no substantive rights, nor could it without violating the Rules Enabling Act. Rather, it simply allows for the aggregation of “pre-existing individual private rights created by substantive law.”⁹⁵ Invariably, however, we end up with corners being cut and substantive law being altered to accommodate the procedural class action device, particularly in those rare instances in which class trials have been attempted.⁹⁶ For example, the Fourth Circuit has noted the problem of the “perfect plaintiff” approach to trying class claims, where class counsel is allowed to piece together various bits of evidence from members of the amorphous class that in reality affected no single, real individual.⁹⁷

Other examples of the problems inherent in trying class actions are found in the tobacco wars, such as in the *Scott* and *Engle* cases, smoker class actions which were absolute train wrecks that consumed over a decade of time and judicial resources in the state courts of Louisiana and Florida, respectively. Jury selection

in *Scott* alone took over a year and a half, largely because the trial judge kept insisting on trying to seat jurors with immediate family members in the class that was suing for supposedly life-saving medical monitoring benefits, leading to multiple appeals.⁹⁸ *Engle* likewise devolved into the jury trying to decide whether individual smoking advertisements, which were obviously run at different times and seen by different people and relied on, if at all, differently, somehow affected all class members. Not surprisingly, both cases largely failed as class actions, but plaintiffs’ counsel still walked away with several hundred million dollars in fees in each.⁹⁹ Neither conservative principles nor the legal tradition in this country support such outlandish outcomes.

Finally, and most fundamentally, class actions promote collectivization, at the expense of individual liberty. As Redish notes, class actions infringe on an individual’s interest in choosing whether to prosecute a claim—a property right—and, if so, how to prosecute the claim.¹⁰⁰ That is, in a class action, the decision as to whether a claim will be prosecuted is left to the class representative in theory but to the class counsel in reality. In any event, the decision is taken from the individual holder of the property right, unless he happens to be the class representative. Thus, the “class action inevitably constrains an individual’s ability to direct the course of his interaction with the judicial process because class representatives [guided by counsel] make all the decisions about how the individually possessed claims will be pursued.”¹⁰¹ Money damages class actions at least provide class members with the opportunity to opt out and pursue claims on their own. Mandatory injunctive relief classes, by contrast, do not allow class members to opt out. Thus, they further exacerbate the infringement on individual liberty inherent in class actions by removing from a class member “even the basic choice whether to participate in the collective and passive litigation of his rights.”¹⁰²

Nor are these concerns academic. For example, in recent antitrust litigation against the leading credit card brands and card issuing banks, the class sought approval of a \$6 billion settlement that included a release of all future damages claims; the class was mandatory in nature, so members had no opportunity to opt out. Under the proposed settlement, leading companies, such as Amazon, Target, and Home Depot, would have had their claims against the defendants released forever despite the fact that those companies were actively litigating against the defendants. And the decision to accept that release would have been made not by those companies, but by class counsel and their putative class representatives. Thus, at bottom, the class sought to take from certain of its members the “foundation of the procedural due process guarantee: the individual litigant’s autonomy in deciding whether to pursue her claim and if so, how best to conduct

seek the electorate’s best interest by his own means,” presages the role of the class representative. *Id.* Significantly, however, Burke’s theory was stated in the context of political representation, not litigation. Further, as discussed above, much of modern class practice is driven by class counsel, rather than the nominal class representative. Given that class counsel is thus choosing to represent the class, rather than being chosen by the class as Burke was chosen by his constituents, the notion that Burke’s theory of interests supports modern class practice is structurally unsound.

95 Redish, *supra* note 19, at 155.

96 In the recent Supreme Court oral argument for *TransUnion v. Ramirez*, Justice Kagan posited that the class representative “could have brought this as a class action and not testified at trial. Or, alternatively, he could have had somebody else testify at trial, a different member of the class. I mean, there’s no necessary relationship between who’s the class representative and who testifies at trial.” No. 20-297, Tr. at 52 (March 30, 2021). The fundamental issue in *TransUnion* revolves around the class representative’s alleged damages and whether they are typical of the class or highly individualized instead. Justice Kagan’s notion that somehow because it’s a class action the named plaintiff would not have to testify to establish his individual damages and instead could rely on some absent class member to do so for him is a textbook—if unwitting—illustration of a Rules Enabling Act violation. That is, in an individual case, there would be no argument that the plaintiff could prove his own damages without testifying at trial. The fact that the plaintiff brought the case as a class action does not change the procedure required for him to prove his claim. On the contrary, the point of a class action is that the claims of the class rise or fall on whether the named plaintiff proves his own claim. Indeed, a commonly stated test is that predominance is met when proving the claims of the class representative establishes a right of recovery in the absent class members—not the other way around. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 128 (2005).

97 *Broussard v. Meineke*, 155 F.3d 331 (4th Cir. 1998).

98 *See Scott v. Am. Tobacco Co.*, 795 So. 2d 1176 (La. 9/25/01).

99 *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006); *Scott v. Am. Tobacco Co., Inc.*, 949 So. 2d 1266 (La. Ct. App. 4th Cir. 2/7/07).

100 Redish, *supra* note 19, at 126.

101 *Id.*

102 *Id.*

that litigation.”¹⁰³ Fortunately, the settlement was vacated on appeal, with a concurrence noting that the terms amounted to a “confiscation, not a settlement.”¹⁰⁴ Such an attempted fundamental infringement on individual liberty, in favor of collectivism, can in no way be said to further conservative principles.

IV. CONCLUSION

Ultimately, Fitzpatrick’s thesis fails on perhaps the most fundamental conservative principle of all—seeing the world as it is, instead of how we wish it to be. Class actions are not on the verge of disappearing, because of arbitration or any other aspect of Supreme Court jurisprudence. Class actions vastly increase the regulatory burden on companies, creating issues that government enforcers would never bother to pursue. Class actions typically do not meaningfully benefit class members, but they do enrich class counsel. Class actions are not driven by market forces, but rather the profit motive has been distorted to incentivize copycat, abusive filings. Finally, class actions as currently practiced have no basis in this country’s legal tradition, have effected a radical change in the risk defendants face for many types of claims, and promote collectivization at the expense of individual liberty. Aside from the plaintiffs’ bar, no one should be happy with how class actions are litigated in the country today, least of all conservatives.

103 *Id.* at 135-36.

104 *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 827 F.3d 223, 242 (2nd Cir. 2016) (Leval, J., concurring).

