A Return to First Principles: Class Actions & Conservatism

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Brian T. Fitzpatrick, The Conservative Case for Class Actions (2019).

For decades, most opposition to class actions in the United States has come from the political right. Corporations on the receiving end of class action lawsuits have hired lobbyists and lawyers to restrict the availability of class actions, through legislation such as the Class Actions Fairness Act and by successfully arguing for narrow judicial interpretations of Federal Rule of Civil Procedure 23. If the pendulum has swung toward 'killing' the modern class action in the United States, it is conservatives who have pushed it.

For this reason, Brian Fitzpatrick's *The Conservative Case for Class Actions* offers a unique contribution to political debates over class actions. A self-described card-carrying member of the Federalist Society and former clerk to Justice Antonin Scalia, Fitzpatrick argues that "class action lawsuits are not only the most effective way to hold corporations accountable; they are also the most conservative way to hold them accountable." This contention rests on two basic premises: what is "good for conservative principles may be bad for big corporations" and "the private sector is better at doing most everything than the government is." He persuasively supports the first premise as a matter of principle and history: Republicans acknowledge that some rules are necessary (like laws against fraud or anti-competitive behaviour), and conservative principles have not always aligned perfectly with the interests of big business. He defends the second premise by exploring the options for enforcement and empirically showing that the conservative preference for private enforcement is justified: the private sector is better than the government at detecting misconduct and enforcing the law.

After recounting the ironic history of Rule 23 in chapter 1, which includes an attempt by Democrats to curb class actions in favour of government enforcement, Fitzpatrick explains in chapter 2 that a preference for limited *ex ante* regulation and greater reliance on *ex post* regulation by private lawyers is consistent with long-standing conservative political and economic theory. There is little public enforcement in the U.S. compared to "large central bureaucracies that dominate governance in high-tax, activist welfare states," a fact made more true in the past three years of deregulation by the Trump Administration. If all but the most radical conservatives accept that some rules are necessary (for the protection of the capital markets, for example), then all but the most radical conservatives must accept enforcement of these rules. Pointing to such prominent conservatives as economist, law professor, and former judge Richard Posner, Fitzpatrick states that "for most of our history, conservatives preferred legal enforcement by private lawyers."

Fitzpatrick then explains why conservatives should prefer private enforcement by private lawyers to public enforcement by government lawyers. He cites six reasons the private bar is preferable to government lawyers, but the most persuasive is that private lawyers have better incentives and better resources to detect misconduct. Quoting civil rights scholar Myriam Gilles, "The massive government expenditures required to detect and investigate misconduct are no match for the millions of 'eyes on the ground' that bear witness to … violations." If conservatives accept that some regulation is good, then better and more efficient enforcement of those regulations in a manner that reduces the size of government and avoids the risks of crony capitalism and agency capture should be embraced by conservatives. In other words, just as conservatism is not to be conflated with big business interests, an aversion to government enforcement should not be conflated with support for impunity.

Fitzpatrick addresses the main arguments against class actions in chapter 4: class-action lawyers select only lucrative cases to pursue; class-action lawyers bring frivolous lawsuits when there has been no wrongdoing; and the private bar

is not accountable to the political process as compared to government enforcers. He responds to each criticism with data and arguments based on conservative first principles. For example, the data do not show that the private bar pursues less meritorious cases than the government does. Unlike their government counterparts, class action lawyers are not subject to agency capture. They also represent a decentralized form of regulation. And since when do conservatives have a problem with the profit motive?

If private enforcement is better than government enforcement, then class-action attorneys should be the private enforcers of choice. Private enforcement of small harms can only occur if aggregated in representative litigation. Quoting libertarian legal scholar Richard Epstein, Fitzpatrick posits that "without the class action, the 'real risk is that serious wrongdoing at the corporate level will go unchecked for want of a champion to respond to a common problem.'" Opposing class actions in order to immunize corporations from such wrongdoing is neither principled nor consistent with conservative values.

Fitzpatrick then tackles the two most frequent conservative arguments against class actions: that they are usually meritless and that lawyers get all of the money. Even if is true that some class actions are without legal merit, defendants have an inexpensive way to combat them: motions to dismiss. More importantly, the majority of class actions do have merit. Entrepreneurial lawyers working on contingency fee have every incentive to file meritorious and strong cases. Empirical studies show that motions to dismiss are successful in less than one-third of cases and that most settlements are for amounts far greater than their nuisance value (the cost of defending the action)—both of which show the underlying merit of the lawsuit. Similarly, studies do not support the view that class members get nothing while class attorneys get everything; while class members are rarely made whole, statistically class actions are still better than government enforcement at compensating victims.

Fitzpatrick spends considerable time in chapter 8 addressing whether class actions deter wrongdoing. The argument that they do not "flies in the face of decades of economic theory that was *pioneered* by conservative academics." Fitpatrick's empirical studies revealed that 25% of all settlements include a provision requiring the defendant to change its behaviour in some way, usually by way of injunctive relief; in other cases, defendants changed offending practices as soon as lawsuits were commenced.

Fitzpatrick concludes with a series of proposed amendments to the class action regime that would make it more palatable to conservatives, most radically to limit class actions to certain types of wrongs or to require that plaintiffs share defendants' discovery expenses to dissuade defendants from settling to avoid the expense of discovery. And with Republicans in charge of the Senate and the Presidency, he writes that now is the time to negotiate such amendments.

Fitzpatrick's writing is crisp, accessible, and intended for a lay audience, but with hundreds of dense footnotes that will appeal to lawyers and academics. Published in November 2019, the book's provocative argument has attracted criticism from the right. The U.S. Chamber of Commerce rejects Fitzpatrick's argument that class actions promote accountability and the rule of law, labelling the plaintiffs' bar "the storm troopers of the anti-free-enterprise agenda" and arguing that because the majority of class-action settlements do not compensate class members but enrich lawyers, class actions actually undermine democratic accountability. The argument is unconvincing, given that the data cited in the book dispels the Chamber's assumption that most settlements pay nothing to class members. Moreover, in light of its central mission to lobby for the eradication of regulations that protect consumers and the environment (among other constituents), the Chamber's complete rejection of the role for private enforcement suggests a preference for corporate unaccountability.

Martin Redish makes a similar argument against class actions, but in the name of liberalism. He writes that "certain types of modern class actions [are] fundamentally inconsistent with process-based liberalism" because a settlement that includes large cy pres awards "transforms a compensatory statute magically into a form of civil fine or qui tam action" through undemocratic means. Redish has argued that cy pres settlements are unconstitutional. Fitzpatrick anticipated this charge, arguing, with empirical support, that most courts now scrutinize cy pres settlements more

closely and that while "[t]hese settlements may have been a problem at some point, …they are not today." In any event, opposition to a minority of settlements that include cy pres relief does not justify wholesale opposition to class actions.

That Fitzpatrick is under fire by different sides of the political spectrum is the best advertisement for his book. On a topic so easily dominated by partisanship, he makes a principled argument for the modern class action. *The Conservative Case for Class Actions* is a persuasive defense of this form of litigation, at a time in its history when it needs it.

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