

The Conservative Case for Class Actions. By Brian T. Fitzpatrick. Chicago, IL: University of Chicago Press, 2020. 272 pp. \$29.99 hardback

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A mostly thoughtless hyperpartisanship pervades class-action discourse. Liberal counterparts reify class actions as the Second Coming. Conservative business groups rail against class actions and aim to interclass actions with eulogy withheld. These views infect politicians, organizations, and social groups, as in the highly partisan contest over passage of the Class Action Fairness Act of 2005 (Purcell 2008). The battle lines across society and politics are clear and entrenched: liberals love class actions and conservatives hate them.

In his concise new monograph, with explanations (and simplifications) that make digestible the nerdy jargon of civil litigation and regulatory theory, Brian Fitzpatrick means to cut through the rhetorical noise. An unabashed conservative, he presents a social and economic defense of class actions using data, conservative economic principles, and common sense.

After some preliminary background, Fitzpatrick begins by making the conservative case for (some) regulation of businesses. He means to stave off hard-core free marketers by arguing that market regulation alone is insufficient, even from a conservative point of view, to reliably prevent fraud, breach of contract, theft, and other misdeeds that hinder market functionality. Conservatives and libertarians are not anarchists, after all.

So, if some regulation is needed to make the markets function efficiently, what are the options? One is a European-style model of top-down governmental regulation that, often, requires businesses to get preapproval or submit to oversight and disclosures in exchange for immunity from private lawsuits. Harms are remedied through taxpayer-funded programs like compensation funds and free healthcare. Fitzpatrick mostly rejects this big-government model as the antithesis of conservatism, as it is likely to lead to overregulation and inefficiency.

Instead, Fitzpatrick argues that conservatives should prefer the private, profit-driven regulation of civil litigation, which results in smaller government, better alignment of incentives, potentially less bias, and more focused regulation. He acknowledges the theoretical risk that localized payouts can create incentives for attorneys to press litigation efforts in meritless cases, but he shows that the data simply do not support the existence of

troublesomely large misincentives in class-action litigation. He acknowledges that meritless class actions are filed but shows, again using data, that their costs are very small compared to the benefits of meritorious ones.

Fitzpatrick then turns to why class actions are socially beneficial. Say, for example, a telecommunication provider overcharges its data-plan customers \$10 a month. No individual customer is going to sue for that amount in court, nor will an attorney agree to represent an individual consumer in such a case. Even for a slam-dunk case, the payoff is just too low—indeed, it is a negative payoff because the cost of litigating vastly exceeds the expected return. Meanwhile, the provider reaps millions, perhaps even billions, of dollars of revenue for its unlawful conduct. Such suits present both undercompensation and underdeterrence problems. Class actions solve these problems by allowing injured customers to join together to litigate all their claims together at once. They can then use one lawsuit to sue for the aggregate harm, enabling both compensation and deterrence more effectively and more efficiently than nonclass litigation. Of course, businesses might prefer individual litigation because most customers will not sue at all in any forum. But Fitzpatrick rightly rejects this position as socially illegitimate. Such a strategy seeks nothing less than the freedom to engage in harmful, unlawful conduct without punishment or remediation. Conservatives and liberals alike should recoil from such a strategy.

Having shown that class actions are both necessary for and consistent with conservative-minded regulation, Fitzpatrick offers some class-action reforms to ensure that they operate within conservative values. This is the chapter most likely to raise the ire of progressives. For example, Fitzpatrick suggests that class actions might be restricted only to “good” laws that conservatives favor, such as claims for breach of contract, fraud, and antitrust violations (5). He also proposes restricting class-action remedies to actual compensation rather than allowing class recovery for statutory damages, treble damages, and punitive damages. Finally, he proposes some mechanical adjustments to lower the expense of class-litigation defense and to ensure that class attorneys are motivated by meritorious rather than meritless class actions.

At the end, Fitzpatrick rightly asks whether these reforms are possible. He answers optimistically in part because he believes that thoughtful conservatives will be swayed by his arguments and that liberals will have to compromise because of the Supreme Court’s strong hostility to class actions. As he notes early in the book: “If we want to keep only some parts of the class action and not others, liberals have no choice but to go along with us. We [conservatives] hold all the class action cards” (13).

Fitzpatrick does not address multidistrict litigation, an important alternative to class actions. Nor does he consider complex models of regulation involving amalgamations of federal and state laws, civil litigation, arbitration and small-claims courts, punitive damages, the Better Business Bureau and social-media networks that inform customers, internal grievance procedures, and boards that exercise oversight over corporate officers.

Fitzpatrick also seems overly optimistic about legislative or rulemaking reforms. Rulemakers disfavor large-scale, controversial amendments (Dodson 2017), and Congress has other things on its plate. Whether Fitzpatrick's Goldilocks class action is more than a fairy tale remains to be seen. Progressives are likely to bristle at the message that space for compromise is widest when one's back is to the wall, while conservative hostility to class actions remains deeply entrenched (Frank 2019).

Still, Fitzpatrick is right that there is room for partisan compromise, if only hardened positions can be softened. His book is a plausible emollient. Readers should find Fitzpatrick's sober analysis a welcome deviation from the usual partisan-fueled dialectic, and perhaps the book will induce more productive conversations among diverse segments of society. Those may then lead to the real battle: the extent of class-action reform.

References

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Biotech Juggernaut: Hope, Hype, and Hidden Agendas of Entrepreneurial. By Tina Stevens and Stuart Newman. Chicago, IL. University of Chicago Press, 2019. 206 pp. \$42.95 paperback

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