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Book Review: *The Conservative Case for Class Actions*, by Brian T. Fitzpatrick

Why are class actions consistent with conservative thinking?

By Donald R. Frederico – May 29, 2020

Good books are those that are written well and capture our interest and attention. Important books are those that do all of that but also challenge conventional wisdom, potentially shifting paradigms. By these definitions, *The Conservative Case for Class Actions*, by Professor Brian T. Fitzpatrick of Vanderbilt Law School, is an important book.

Professor Fitzpatrick, who self-identifies as a conservative, describes the book's overarching theme in its opening page, proclaiming his belief "that what is good for conservative principles is not always what is good for big corporations." The question he sets out to answer is whether class actions should be added to the list of things that fit this description. His answer, as the title suggests, is a resounding "yes."

He gets to that answer by examining the alternatives to class actions and by refuting the arguments conservatives often make in opposition to class actions. A recurring theme throughout the book is that conservatives agree that at least three rules are necessary to govern markets: "rules requiring companies to honor their contracts, rules preventing companies from committing fraud, and rules prohibiting companies from forming cartels to fix prices." Accepting this premise (which certainly seems reasonable), he concludes that class actions are valuable tools for enforcing these rules. Market feedback loops, he posits, are insufficient, and government enforcement is both insufficient and undesirable. In Fitzpatrick's view, if conservative principles demand private solutions to business and societal problems, then private class actions are superior to the invisible hand and overreaching government regulation.

Fitzpatrick identifies and refutes a number of conservative arguments against class actions. Prominent among them are two commonly heard arguments: that many class actions are meritless and that too much of the money from class action settlements goes to lawyers.

His response to the first argument is that meritless cases can be resolved on motions to dismiss, before corporate defendants spend significant sums on discovery. Although that response sounds good in theory, practicing lawyers know that it is difficult to win a motion to dismiss even in a meritless case. Enterprising plaintiffs' lawyers are good at framing a complaint in a way that will survive an early dispositive motion, even if the claim lacks merit and the judge should dismiss it. And some judges may be inclined to dismiss some, but not all, claims, so that something will be left for a negotiated resolution.

Fitzpatrick is on stronger ground when refuting the argument that plaintiffs' lawyers are paid too much, although here too he defies conventional conservative wisdom. He relies on a study he conducted of every federal class action settlement over a two-year period—688 in all. His study found that, although class counsel recovered billions in fees, only 15 percent of the aggregate recoveries in all the cases studied went to class counsels' fees, with average and median percentages of 25 percent. If anything, Fitzpatrick argues, class action attorney fees are too

small, or at least they are not a sufficient incentive for counsel to work to maximize the recovery for the class. He acknowledges the concerns that fees are sometimes based on the nominal amount of the settlement and that not all of the class relief ends up distributed to class members. But even then, he points out, few courts tolerate reverters anymore (provisions allowing residual funds to go back to the settling defendants), and settling parties often rely on cy pres distributions instead. And, Fitzpatrick posits, although cy pres distributions have been criticized for arguably misdirecting funds to uninjured nonparties, even settlements that include cy pres distributions serve the important goal of deterring bad corporate behavior, a worthy goal of private class action enforcement. Quite apart from these arguments, Fitzpatrick's thoughtful discussion of the percentage fee recovery and lodestar methods should interest plaintiffs' and defendants' counsel alike.

If Fitzpatrick's arguments cut against conventional conservative thinking, he says it was not always so. According to Fitzpatrick, conservatives did not always oppose class actions. Rather, conservative scholars once defended class actions because they deterred the type of corporate misconduct that conservatives believed should be deterred (breach of contract, fraud, and horizontal price fixing). Although some conservatives argue that class actions do not deter, Fitzpatrick disagrees. Relying primarily on empirical studies in the areas of antitrust compliance and securities fraud, he purports to demonstrate that the threat of class action lawsuits deters bad corporate behavior and motivates companies to engage in desirable practices. Coupled with research involving the effects of tort litigation generally, he concludes that class actions serve an important deterrence function, including for the types of corporate misconduct that conservatives agree should be deterred.

Fitzpatrick ends his book by suggesting several changes to class actions that he believes would address conservatives' criticisms but leave class actions in place as a preferred approach for compensating large numbers of injured parties and deterring corporate misconduct. The one that will likely resonate with most lawyers is his view that "congress must amend the Federal Arbitration Act to make it clear that class action waivers are not enforceable over contrary state contract law." In other words, legislatively override the Supreme Court's decisions in *AT&T Mobility v. Concepcion* and its progeny.

This proposal is remarkable not only because it contradicts most conservative biases, but also because Fitzpatrick served as a law clerk to Justice Scalia, the author of the majority opinions in *Concepcion* and *American Express Co. v. Italian Colors Restaurant*. More importantly, it highlights the tension between what may sound good as a matter of conservative theory but what may only be wishful thinking as a matter of conservative practice. After all, it is one thing for a company, or a chamber of commerce representing many companies, to be persuaded in the abstract that conservative principles support the availability of class actions for remedying mass harms. It is another thing entirely to convince any given corporation or groups of corporations that they should willingly subject themselves to class action litigation. The profit motive, executive compensation systems, and duties to shareholders may dictate supporting outcomes that are not consistent with conservative theory, at least as Fitzpatrick envisions it.

Despite these practical limitations, *The Conservative Case for Class Actions* should be a must-read for all lawyers who are interested in the philosophical underpinnings of class action

litigation and their application to the ongoing debates about the perceived virtues and vices of class actions. One hopes that it will spark a debate in academia, Congress, the bench, and the bar about ways to improve a much-maligned mechanism so that it more perfectly fulfills the dual goals of compensation and deterrence that are the cornerstones of Professor Fitzpatrick's insightful analysis.

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