An aerial, top-down photograph of a large, diverse group of people of various ages and ethnicities standing on a green lawn. The people are scattered across the left and center of the frame, looking in various directions. The background is a solid, light green color.

THE CONSERVATIVE CASE FOR CLASS ACTIONS

*In this excerpt from
his provocative new book,
Brian Fitzpatrick explains
why conservatives should
stop worrying and learn to love
class actions.*

My new book, *The Conservative Case for Class Actions* [University of Chicago Press], is about conservative principles. This is a matter I know something about; I have been a conservative my entire life. As an adolescent, I subscribed to *National Review* and read books by Dinesh D’Souza. Ever since my first semester of law school, I have been a member of the Federalist Society. After law school, I worked for two of the most conservative judges—Diarmuid O’Scainnlain on the Ninth Circuit and Nino Scalia on the Supreme Court—as well as for one of the most conservative members of the U.S. Senate—John Cornyn of Texas. I have never voted for a Democrat for president in my entire life.

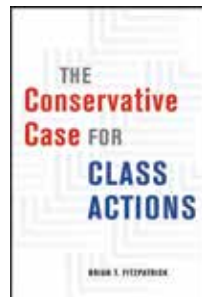
One thing I have learned over the years is that what is good for conservative principles is not always what is good for big corporations. It often is, but not always. Consider what perhaps the most famous conservative academic of them all—the economist Milton Friedman—says on this question:

Over and over again you have the big businessman who talks very effectively about the great virtues of free enterprise and, at the same time, he is off on a plane to Washington to push for special legislation or some special measures for his own benefit. I don't blame him from the point of view of his business, but . . . I do blame the rest of us for not recognizing that [the free enterprise] system is not going to be saved by [the] National Association of Manufacturers, the Chamber of Commerce—you name them—the big organizations and big business. They are almost always on the wrong side.

In other words, “being pro-free enterprise may sometimes require that we be anti-existing business.”

We see examples of the difference between conservative principles and the interests of big

business all the time. Consider states’ rights. Conservatives like to decentralize power by divesting it to the states; yet big corporations often lobby the federal government to start regulating things in order to override state laws the corporations don’t like. Or consider price controls. Conservatives hate government-imposed price controls on goods and services because we believe the market knows better than any government bureaucrat what the right prices are; yet, in recent years, big corporations lobbied Congress for a price control on what lawyers could charge their clients in many personal injury cases, asking to cap lawyers’ fees at 20 percent of recoveries.



“Being pro-free enterprise may sometimes require that we be anti-existing business.”

—Brian Fitzpatrick

I believe we should add one more item to the list of things that may be good for conservative principles even though they may be bad for big corporations: class action lawsuits.

Although class action lawsuits can be filed against anyone—including the government—my focus in this book is on class action lawsuits that are filed against corporations because these are the class actions that have become controversial in recent years. It should come as no surprise that corporations don’t like class action lawsuits. They cost them billions of dollars every year. For this reason, big corporations have been trying to get rid of class action lawsuits ever since we put them on the books in 1966.

I like corporations. I happily represented corporations every day during my years as a practicing lawyer, and I still thank them frequently for all of the prosperity they bring our country. But they are wrong about class actions. As I explain in my book, 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. In fact, there are only two alternatives, and neither of them should be the least bit appealing to conservatives.

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The first alternative is to rely entirely on market feedback loops. If a company does something bad, won't it lose customers? If so, then shouldn't the fear of losing customers be enough to keep companies in line? Conservatives do like market feedback loops, but almost no conservatives think market feedback loops are sufficient to keep companies in line. Although conservatives are often caricatured as against all regulation of the market, this caricature is not true. Almost all conservatives know that markets need at least some rules. At the very least, we support rules requiring companies to honor their contracts, rules preventing companies from committing fraud, and rules prohibiting companies from forming cartels to fix prices. No one really thinks companies ought to be able to do whatever they can get away with.

But someone has to enforce these rules. Who will do it if there are no class action lawsuits? Relying on each person a company steals from to enforce the rules is unrealistic: people sometimes don't know about the theft, and, even when they do, the theft might not be worth enough to hire a lawyer. Class actions

overcome these problems by letting one person sue for everyone else; this transforms an unprofitable lawsuit for a small amount of money into a profitable lawsuit for a lot of money.

This brings me to the second alternative to the class action: the government. The government could file lawsuits against companies to disgorge all their ill-gotten gains. But when is the last time conservatives thought the government was the best solution to a problem? Conservatives believe that the private sector is better at doing most everything than the government is. We favor private schools, private highways and railroads, private prisons, private parks, private retirement accounts, private venture capitalists, and private insurers—just to name a few—rather than public ones. But that's exactly why we should like class action lawsuits: they are privatized enforcement of the law. That's why we often refer to class action lawyers as private attorneys general. As with just about everything else, we

should favor the private attorney general over the public one.

The funny thing is, for most of American history, what I have said thus far was not particularly controversial. It was liberals who thought the government should police the marketplace and conservatives and libertarians who thought it should be private lawyers representing private citizens. Hence, in 1940, perhaps the most liberal president in American history, Franklin Delano Roosevelt, vetoed a bill because he thought that it tilted enforcement of the law too far in favor of private lawyers over government agencies. As late as 1978, perhaps the second most liberal president in American history, Jimmy Carter,

A Conservative Legal Scholar Defends Class Actions

Brian Fitzpatrick's book, *The Conservative Case for Class Actions*, released in October by University of Chicago Press, builds on more than a decade of research. Since joining the Vanderbilt law faculty in 2007, Professor Fitzpatrick has published empirical studies of compensation in consumer class actions (*NYU Journal of Law and Business*, 2017) and of class action settlements and fee awards (*Journal of Empirical Legal Studies*, 2010), as well as articles examining the future of class action litigation ("The End of Class Actions?" in the *Arizona Law Review*, 2015) and class action lawyers' compensation (*University of Pennsylvania Law Review*, 2010).

Professor Fitzpatrick graduated first in his class from Harvard Law School and went on to clerk for Judge Diarmuid O'Scannlain on the U.S. Court of Appeals for the Ninth Circuit and Justice Antonin Scalia on the U.S. Supreme Court. Before entering the legal academy, he practiced commercial and appellate litigation at Sidley Austin in Washington, D.C., and served as Special Counsel for Supreme Court Nominations to Sen. John Cornyn (R-TX). He teaches Civil Procedure, Complex Litigation, and Federal Courts and the Federal System and has been recognized with the Hall-Hartman Outstanding Professor Award.



SANDY CAMPBELL

proposed abolishing most private class action lawsuits and replacing them with government lawsuits instead. During all this time, it was conservative Republicans in Congress and elsewhere who argued that, if laws were to be created, they should be enforced by the private bar not the government.

Something changed in recent years. Today, most conservatives seem to want to get rid of class action lawsuits just like Jimmy Carter did in 1978. When a major class action case called *AT&T Mobility v. Concepcion* came before the U.S. Supreme Court a few years ago, many conservatives wrote to the Court and urged it allow companies to insulate themselves from class action lawsuits entirely by adding fine print to their contracts. The five conservatives on the Supreme Court readily agreed and have now put the class action lawsuit on the road to its demise. The same anti-class action sentiments reign supreme among Republicans in Congress, where proposals to abolish or seriously curtail class action lawsuits against corporations are frequently introduced and sometimes enacted.

Why the change of heart? Why are today's conservatives taking advice from Jimmy Carter? Part of the answer is the cozy relationship between today's Republican Party and big corporations. But some of the opposition is more principled. Some conservatives complain that the underlying rules we have adopted in the market go too far, and, if the underlying rules go too far, then those who are trying to enforce them must be going too far as well. I completely understand this. We regulate companies way too much—well beyond the simple rules I mentioned above against breach of contract, fraud and price fixing. But the solution to this problem is not to kill all class action lawsuits; it is to get rid of the rules we don't like—or, if that is not possible, to kill only the class actions that seek to enforce rules that we don't like. We should not throw the class action out with the bathwater, but that's precisely what the Supreme Court's *Concepcion* decision threatens to do.

“No one really thinks companies ought to be able to do whatever they can get away with.”

—Brian Fitzpatrick

Other conservatives oppose class actions because they don't like that the lawyers who file these cases are motivated by making money. I find this remarkable. Conservatives normally love the profit motive! Indeed, it is one of the reasons why we want to privatize everything in the first place. Profit-motivated private citizens do a better job than salaried, tenured government bureaucrats do, and relying on private citizens to do things reduces the size of government and the taxes we have to pay to support it. So why have we turned our backs on the profit motive here? Some conservatives say that the profit motive has led the lawyers to abuse the system. Some of these claims are based on myths about class actions that I debunk in the book. It is certainly true that an unbridled profit motive can lead to destructive consequences. But this is true of any profit motive, including the profit motives of corporations. We aren't afraid of corporate profit motives, and we shouldn't be afraid of lawyers' profit motives either. The challenge is to put rules into place to harness the good of the profit motive without the bad. We do this for corporations by regulating them. We can do the same for class action lawyers.

What would the rules for class action lawyers look like? Many of them are already in place: Judges already have the power to dismiss meritless class action lawsuits as soon as they are filed, and they already must scrutinize the lawsuits before they go to trial, approve any settlements, and award the fees

the lawyers earn. Most judges exercise these powers wisely, but I offer a few suggestions in my book to make our system even better.

I agree with our corporate friends that we may need some new rules altogether. Right now, you can bring a class action lawsuit for almost any violation of the law. But, as I noted, we don't like a lot of the laws that we make companies comply with. Perhaps we should reserve the class action only for the good laws like breach of contract, fraud, and horizontal price fixing? Right now, class actions are too expensive and risky for companies to defend—one jury can resolve hundreds, thousands or even millions of claims all at once—and class action lawyers know it; this leads them to demand settlements from companies that may be more than the companies should have to pay. Perhaps we should make it even easier to dismiss meritless cases, break up class action trials into smaller pieces to reduce the risks, and require class action lawyers to share more of litigation expenses than they do now. I focused this book on conservatives because, if the class action is to survive, it is conservatives who need to be persuaded. We are the ones who are killing it. But if I can be persuaded, I think others can be as well. We can mend the class action; we don't have to end it.