# ESSAYS

## The Liberal Case Against the Modern Class Action

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*Those who classify themselves as liberal generally favor widespread use of class actions as a means of policing corporate misbehavior and protecting the individual worker or consumer against capitalist excesses. In this Essay, however, I take the counterintuitive position that while class action practice could conceivably be modified in ways that make it far more acceptable than it currently is, liberal political theory should be very skeptical of the modern class action device as it currently exists. Defining the foundation of liberal thought as a process-based belief in accountable democratic government and respect for the right of individuals to protect their rights by resort to the judicial process, I find that in all too many cases, the modern class action is substantially inconsistent with this liberal ideal. In their current form, class actions often serve as a means to deceptively alter existing substantive law through backdoor procedural transformation. This undermines both foundational premises of process-based liberalism.*



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## INTRODUCTION

It is hardly an overstatement that the modern class action is widely deemed by political liberals as an important weapon to police corporate misbehavior.[1] Driven by a combination of a belief in pursuit of the common good and a strong profit motive, plaintiffs' class action attorneys mount powerful attacks on equally powerful corporate entities. Although one can seriously debate the individual merits of each of these legal challenges, it is reasonable to assume that the liberal agenda is generally furthered by the redistribution of wealth and the penalization of corporate legal wrongdoing. In contrast, it is equally reasonable to assume that, on the whole, political conservatives are seriously troubled by what they deem the "legalized blackmail" that results from many modern class actions.[2]

*The Conservative Case for Class Actions*, the recently published, thoughtful, and provocative book by Professor Brian Fitzpatrick, challenges this standard division.[3] Fitzpatrick suggests that conservatives should actually favor the use of class actions for a variety of interesting (and controversial) reasons.[4] In this Essay, I seek to accomplish two goals. First, using Professor Fitzpatrick's work as a form of reverse inspiration, I seek to fashion a mirror image argument—one that is equally out of the ordinary. I will make the liberal case against the modern class action. Second, I raise serious doubts about the logic employed by Fitzpatrick in concluding that conservatives should favor the use of class actions. To be sure, in critiquing the

1. *See* Daniel Fisher, *Are Class Actions Unconstitutional?,* FORBES (Feb. 8, 2010), https://www.forbes.com/forbes/2010/0208/opinions-law-constitution-courts-ideas-opinions.html#36706cd81751 [https://perma.cc/7TL6-SE86] ("[Class action] lawyers say the class action is an indispensable tool for disciplining corporations run amok.").

2. For a discussion of the class action as legalized blackmail, see generally Bruce Hay & David Rosenberg, "*Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000).

3. BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019).

4. *See infra* Part III.

conservative case for the class action, I am in uncharted territory. Unlike Fitzpatrick, I do *not* begin with the assumption of a conservative perspective. But assuming, solely for purposes of argument, that we are seeking to further conservative values, I am mystified by Professor Fitzpatrick's conclusion. To the extent conservatives are willing to accept any form of regulation in place of the invisible hand of the market, I cannot imagine how they would prefer the self-interested, unpredictable form of regulation implemented by the modern class action, whatever their reservations about direct governmental regulation.

This Essay is divided into three parts. In Part I, I devote substantial attention to defining the term "liberal." One can only make a coherent liberal case against the modern class action if one explains what is meant by "liberal." And my definition may not be the same as everyone else's. As I explain, I define liberal as a form of governmental process that has a commitment to consent of the governed as its foundation. This foundational premise in turn leads to an instrumental commitment (at least on subconstitutional issues) to rule solely by those representative of and accountable to the electorate.[5] This commitment requires that voters be able to judge their elected officials by how they vote on legislation that matters to them.

This process-based understanding of liberalism differs from the more substantive version, which identifies as "liberal" a set of substantive goals and values largely agreed upon by most who refer to themselves as liberal: Medicare for all (or, perhaps, all who need it), concern over climate change, recognition of a need for gun control, avoidance of endless wars, etc. But forced imposition of a set of so-called liberal goals on an unwilling electorate would give rise to an untenable theoretical oxymoron: a form of fascist liberalism. Hence, while we can debate what substantive goals and programs are or are not "liberal," the foundational necessary condition for a commitment to liberalism is an overriding recognition of rule by the people and respect for the individual's role in helping to influence governmental policies.[6]

Recognition of the essentially process-based nature of liberalism leads to Part II of this Essay, which fashions a process-based attack on the modern class action.[7] This attack, I should emphasize, is not aimed at the *abstract concept* of a class action. Nor does it necessarily focus on

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5. *See infra* Part I.

6. Professor Fitzpatrick's responding essay expresses confusion as to how I am able to characterize my critique of the modern class action as "liberal." Brian T. Fitzpatrick, *Why Class Actions Are Something* both *Liberals* and *Conservatives Can Love*, 73 VAND. L. REV. 1147, 1147 (2020). In response, all I can do is urge him to reread the above paragraph.

7. *See infra* Part II.

*all* class actions. The point, rather, is that as presently structured, the class action device either requires or permits forms of multiparty representative litigation that seriously threaten core notions of process-based liberalism. Mandatory classes[8] and opt-out inclusion[9] also raise serious concerns from the perspective of process-based liberalism.

Of greatest concern, however, is the problem of what I refer to as the "faux" class action.[10] In such proceedings, most of the class members are little more than cardboard cutouts of actual class members. To be sure, the class members actually exist. But because of the relatively small value of the claims and the often considerable difficulty in identifying class members, the likelihood that they will ever be aware they are class members, much less actually recover for the harm they suffered, is very small. But this problem fails to prevent class certification. Either through adjudication or (more likely) settlement, the suit is resolved, the defendants "compensate" as if all class members will receive the money due them, and class attorneys are compensated by reference to the full amount awarded.

What happens to the often significant amount of money left over after class members are given the opportunity to recover? In recent years, it has been donated to some deserving charity under a doctrine known as cy pres—derived from a French phrase meaning "second best." The problem, however, is that the charity has never been injured by the defendants, and the only compensatory method authorized by the underlying substantive law—usually, state or federal statutes—is *compensation to the injured victims*. This perversion of the underlying law being enforced through resort to a backdoor procedural shell game takes place without the voters being aware of the fundamental change in the DNA of the laws on which their legislators voted. Is there a big difference between a legislator voting for a law that requires wrongdoers to compensate those whom they injured on the one hand and a law requiring wrongdoers to pay uninjured attorneys and uninjured charities? You bet there is—or, at least, there may well be. Yet through the purely procedural device of a Federal Rule of Civil Procedure, the underlying essence of the substantive law being enforced is significantly transformed. This, I submit, represents a serious threat to the foundations of the democratic process: representativeness and accountability of those chosen by the people to enact laws impacting

8. FED. R. CIV. P. 23(b)(1)–(2).

9. FED. R. CIV. P. 23(b)(3).

10. *See* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 24 (2009) ("[I]n [faux class actions], as a practical matter, it is the private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations.").

social or economic behavior. In effect, it amounts to a form of legislative deception—most assuredly giving rise to a pathological threat to democracy. In Part II, I elaborate on both the nature of process-based liberalism in a democratic society and the manner in which the modern class action, in all too many cases, presents a serious threat to those process-based values by altering the fundamental remedial scheme expressly enacted by an authorized legislative body.

In Part III, I assume the hypothetical (and unfamiliar) role of a conservative. Through a conservative's eyes, I examine Professor Fitzpatrick's arguments as to why my conservative self should welcome the modern class action as perhaps the least of all possible regulatory evils.[11] Professor Fitzpatrick acknowledges the need to deter corporate misdeeds—something on which he and liberals can comfortably agree. Yet, my conservative reaction to these arguments is, at best, one of skepticism. If a conservative believes that some or even all governmental regulation is improper or ill-advised as an interference with the free market, then I cannot imagine why he or she should prefer the often Wild West–like, self-interested clash or bargains between profit-motivated plaintiffs' lawyers and large companies. The results are likely to amount either to too much or too little regulation. If somehow the strategic game of chess between these two actually amounts to just the right amount of regulation, it will be through no fault of logic or reason.

Professor Fitzpatrick himself seems to acknowledge the serious problems that plague the modern class action, since he proposes significant, even dramatic alterations to the procedural device. I agree with many of these suggested reforms. But if he is suggesting that even absent implementation of such reforms the modern class action remains the best regulatory alternative, I believe both my true liberal self and my hypothetical conservative self would be forced to disagree with him.

## I. WHAT DOES IT MEAN TO BE A "LIBERAL"?

One, of course, cannot rationally claim to be fashioning a liberal attack on the modern class action without first defining what one means by "liberal." If one were to survey one thousand well-educated individuals who consider themselves to be liberal, one would likely receive responses that consisted primarily, if not exclusively, of a list of specific political and social programs: gun control, universal health care, increased protections and opportunities for racial minorities, tolerance of diverse sexual preferences, and so on. It would be difficult

11. *See infra* Part III.

to argue with such responses, at least as a matter of modern-day politics. But what if these same individuals were asked whether an unrepresentative, unaccountable, unelected dictatorial government could be deemed "liberal" if it imposed such programs by fiat on an unwilling society? Hardly. One could arguably believe that support for the substantive progressive political platform constitutes a *necessary* condition for liberalism, but surely it cannot be deemed a *sufficient* condition. An equally necessary condition for liberalism, I submit, is a government chosen by and accountable to the people. To be sure, a wise democratic government will likely establish some form of countermajoritarian constitutional limitation on majoritarian power, much as our own society has done. But if so, as I have argued in prior writing, it is for the paradoxical reason that accountable democratic government can only be preserved by imposition of some form of regulation that is insulated from democratic rule.[12]

It is important to distinguish liberalism from such leftist programs as socialism or communism. Indeed, the well-known liberal organization, Americans for Democratic Action, was formed in the 1940s as an alternative to the expansion of the American Communist Party.[13] The organization's famous founders rejected communism, primarily because of its failure to require a democratically accountable form of government.[14]

The modern political philosopher most associated with liberal thought, John Rawls, has likewise focused on the existence of a truly representative form of government as the essence of liberal political philosophy. In his most famous work, *A Theory of Justice,* Rawls adopts what he call his "First Principle," which mandates that "[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."[15] Rawls includes within the concept of basic liberty such foundational freedoms as the right to vote, the rights of freedom of speech and assembly, the liberty of conscience, and freedom of thought.[16] These are the key rights designed to enable citizens to develop and exercise their

12. *See generally* MARTIN H. REDISH, JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX (2017) (arguing that the American constitutional democratic system can only function effectively with vigilant enforcement of judicial independence).

13. *See* MARTIN H. REDISH, THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA 14 (2005).

14. *See id.* ("Americans for Democratic Action, an organization that had been founded by many of the leading liberals of the period, expressly excluded communists from membership.").

15. JOHN RAWLS, A THEORY OF JUSTICE 250 (reprt. ed. 2005).

16. *Id.* at 61.

intellectual and moral powers and to judge society and its policies.[17] In his later work, Rawls recast his definition of a fully adequate scheme of equal basic liberties in political terms, including such liberties as political liberties, freedom of association, freedoms specified by the liberty and integrity of the person, and rights and liberties covered by the rule of law.[18]

It is important to distinguish this rights-based form of liberal political theory from the modern political philosophy of libertarianism. It is true that any legitimate form of libertarianism would likely include a process-based mode of liberalism. But libertarianism generally goes much further, including within its protective reach such substantive liberties as economic freedom, freedom to bear arms, or freedom to use drugs. Process-based liberalism is best described as a form of meta-libertarianism—the liberty to participate in the process of liberty. It is this form of liberty that is essential to the continued viability of a constitutional democracy. It is to be distinguished from substantive libertarianism—the rights to use drugs, not to wear crash helmets, or to own guns, for example. One may or may not accept those rights as a legal or normative matter; that is an issue for another day. Rather, it is those liberties directly involved in the continued operation of the democratic process which liberal theory necessarily embraces.

With this foundational understanding of the core notions of liberal political theory now established, it is possible to test the modern class action against it. As the following Part shows, while the abstract concept of the class action is not necessarily inconsistent with political liberalism, both the manner in which it has been formally shaped and the manner in which it has functioned in the real world all too often raise serious concerns from the perspective of liberal values. And the irony of this fact should not be lost. Today, most in the legal world who describe themselves as liberal strongly support widespread use of the modern class action, because it serves as an effective check on the illegality of corporate behavior. Regulation of big business to assure compliance with law and to protect otherwise defenseless individuals against corporate power, it is safe to say, is central to the modern substantive liberal political agenda. But in seeking to achieve this end, the modern class action too often undermines core notions of representative and accountable government and, therefore, the foundational premises of process-based liberalism.

17. *See id.*

18. *See* JOHN RAWLS, POLITICAL LIBERALISM 310–34 (1993).

## II. THE MODERN CLASS ACTION AND PROCESS-BASED LIBERALISM

At the outset, it is important to emphasize that the class action, in the abstract, is not inherently inconsistent with political liberalism. A complex procedural aggregation device that enables plaintiffs possessing parallel claims or claims arising out of the same allegedly illegal behavior by the same defendant or group of defendants is pragmatically attractive and consistent with the promotion of substantive justice and the rule of law. Too often, however, the system has been corrupted in pathological ways, either because Rule 23 of the Federal Rules of Civil Procedure expressly requires this result or because Rule 23 fails to protect against it.

The ways in which the modern class action threatens or undermines liberal political values can be grouped under two broad headings: (1) legislative deception[19] and (2) corrupted individualism. The former operates on a macro level, since it negatively impacts democratic society as a whole, while the latter functions on a micro level, because its pathological impact is on the individual citizen's ability to exercise his or her meta-liberty to participate in the democratic governmental processes as a means of furthering or protecting his or her interests.

### *A. The Political Pathology of Legislative Deception*

The Federal Rules of Civil Procedure are just that—rules of procedure, and nothing more. They are promulgated pursuant to, and limited by, the Rules Enabling Act, which restricts them by expressly prohibiting them from abridging, enlarging, or modifying a substantive right.[20] The most likely reason for this congressionally imposed limitation is the core premise of liberal democracy, the accountability of those who govern to those whom they were elected to represent. We do not allow legislators to cast secret ballots, for example, because our system operates on the assumption that the voters determine whether they wish to retain their elected representatives, at least in part, on whether they agree with how those representatives voted on particular pieces of legislation.

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19. *See generally* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 NW. U. L. REV. 437 (2006) (describing the precept of American political theory that "the judiciary has the constitutional power and obligation to assure that Congress has not deceived the electorate as to the manner in which its legislation actually alters the preexisting legal, political, social, or economic topography").

20. Rules Enabling Act, 28 U.S.C. § 2072 (2012).

Of course, not every voter will care about every, or even most, legislative votes cast by their elected representatives. But it would be dangerous and wrongheaded to casually dismiss the notion of democratic accountability. Much like advertising, where it is often said that half of advertising is useless but no one knows which half,[21] it is likely that some voters care about some bills and it is effectively impossible to determine, either ex ante or ex post, which bills which voters care about. For example, surely there are voters who care about how their representatives vote on bills concerning women's reproductive rights, or the environment, or how unions are treated, or how religious institutions are dealt with. But even on less well-known or controversial legislative proposals, there may well be pockets of voters who are members of interest groups that care about each one. Because there is no feasible way for any of us to determine which bills voters care about and which they do not, it is essential for us to assume that some voters care about each one. It is therefore essential, for representative liberal democracy to function properly, that substantive legislation be implemented and enforced in the manner contemplated in and directed by what is contained in the four corners of the statute. To be sure, issues of textual interpretation will on occasion arise over which reasonable people will differ. But it is certain that a law which provides "X" cannot properly be judicially construed to mean "Y," or "not X." To do so would amount to a backdoor judicial manipulation of the substance of the law enacted by the people's elected representatives. Just as importantly, it would amount to a serious subversion of representative democracy, because the electorate will be misled as to what the controlling law actually is. Even more troubling is that the substantive law duly enacted by the people's representatives will have been distorted by those whose job it was to faithfully implement it.

Every legislatively enacted substantive prohibition on or regulation of citizens' primary behavior[22] necessarily contains within it two elements: the proscriptive and the remedial. The former describes the prohibited or regulated behavior, and the latter refers to the penalties or negative consequences that flow from a violation of the behavioral proscription. Both elements represent inherent parts of the

21. John Wanamaker famously claimed, "Half the money I spend on advertising is wasted; the trouble is I don't know which half." *See John Wanamaker*, QUOTATIONS PAGE, http://www.quotationspage.com/quotes/John_Wanamaker/ (last visited May 7, 2020) [https://perma.cc/4TPY-EH4X].

22. *See* Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (citing HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1953)) (arguing substantive laws are those which affect "primary decisions respecting human conduct").

substantive law which either Congress or a state legislature has enacted.

A legislative body has a variety of alternatives available to it in shaping a remedial model. It can choose from permutations or combinations of a number of conceivable penalties for violation of a substantive behavioral proscription: criminal conviction, civil fines, administrative penalization, or an award of compensatory damages. A legislature can also choose to establish a form of qui tam remedy, as it has in the current whistleblower statute, the False Claims Act.[23] Under this framework, an uninjured party may be compensated for choosing to pursue a valid specified civil claim against a culpable defendant.[24]

A backdoor judicial alteration in the DNA of *either* the proscriptive *or* the remedial elements of legislation is properly viewed as a serious undermining of liberal democratic institutions. Voters may well care as much about the remedial as the proscriptive elements. For example, whether a law imposes a penalty of life imprisonment or a slap-on-the-wrist civil fine may well be the subject of political debate. Similarly, imposition on corporate wrongdoers of an obligation to compensate injured victims may well be far more palatable to the voters than requiring those wrongdoers to do nothing more than pay large amounts to uninjured plaintiffs' lawyers, or even to uninjured charities only tangentially or remotely related to the unlawful harm committed. Thus, for a procedural mechanism like the class action to surreptitiously convert a legislative scheme designed to compensate injured victims into a form of indirect civil fine or qui tam structure constitutes a serious distortion of liberal democracy.

### *B. How the Modern Class Action Alters the DNA of Underlying Substantive Law*

Though I have already made the point multiple times, it is worth reiterating it at this point: I am not suggesting that *all* class actions inherently undermine or distort the underlying substantive law being enforced. My point, rather, is that all too often, that is exactly the case.

In order to prove this point, the place to begin is with Professor John Coffee's taxonomy of the modern class action. A number of years ago, Professor Coffee divided the modern class action into three

23. 31 U.S.C. §§ 3729, 3730(b) (2012).

24. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 81; *see also* Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 774 (2000) (noting "the long tradition of *qui tam* actions in England and the American Colonies").

categories, "Type A," "Type B," and "Type C" class actions.[25] Type A class actions are those in which the individual claims of the class members are sufficiently large in amount that if there were no class action, they could be brought as viable individual claims.[26] In other words, these claims are of an amount sufficient to justify an attorney's time in pursuing them on their own. They are what can be called "positive value" claims. Type B claims, or "negative value" claims, are not sufficiently large to justify individual suits.[27] "Type C" claims, according to Coffee, involve a mixture of Type A and Type B claims.[28]

While Professor Coffee's trichotomy is valuable for its structural insights, his categorizations omit a very important category of claims: those that are so small that they cannot stand on their own and it simply is not worth the cost for claimants even to bother to file a claim or for the attorneys to find the claimants. Classes predominantly made up of claims falling into this fourth category, I believe, are appropriately labeled "faux" class actions.[29] They amount to a cardboard cutout of a real class: from a distance, it looks like a real class, but upon closer examination it is seen not to be real. The claimants are, in an important sense, comatose: not only do they fail to stand on their own, but also it is simply not worth the cost for claimants even to file a claim or for the attorneys to attempt to find the claimants.[30] Alternatively, many who fall within the class's description are difficult to ascertain, either in name or location.[31] Yet the amount of any award or settlement and, in turn, the fee amount awarded to class attorneys, will be determined on the basis of the size of this faux class. Obviously, a significant portion of the total amount awarded will go unclaimed. The underlying substantive law being enforced, which dictates that the remedy for violation be compensation of those injured, will have been ignored. *And everyone involved, from the moment the class was certified, will know this.*

What happens to the unclaimed funds, which are often of a very significant amount? Theoretically, one could persuasively argue that they should be returned to the defendant: the defendant's obligation under controlling substantive law is solely to compensate injured

25. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action,* 54 U. CHI. L. REV. 877, 904–06 (1987).

26. *Id.* at 904–05.

27. *Id.* at 905.

28. *Id.* at 905–06.

29. *See generally* Redish, *supra* note 24 (explaining "faux" class actions as those where the bulk of the class members have claims so small that it will effectively be impossible to compensate them).

30. REDISH, *supra* note 10, at 24.

31. *Id.* at 24–25.

victims, and unless and until those victims can be discovered, there is no basis on which to take money from the defendant. The optics of this result, however, are obviously bad, and I am unaware of any situation where this course of action was adopted. Rather, from the very beginning of the process, everyone involved is aware that the money will either escheat to the state or, more likely, be awarded to a charity that supposedly is related in some way—no matter how attenuated—to the subject of the suit.[32] No one seems to care that the charity has not been injured in any way and, indeed, has absolutely nothing to do with either the lawsuit or the events that gave rise to that lawsuit.

This form of remedy is known as cy pres, derived from a French phrase that means "the second best" or "the best possible."[33] As a legal concept, cy pres developed in the law of trusts and estates, having nothing to do with litigation. In the early 1970s, however, courts—in an attempt to insert the proverbial square peg into a round hole—began to borrow the concept for the context of litigation.[34] Courts did so under the auspices of Rule 23 alone; no substantive statute being enforced in the class proceeding made even the slightest reference to such a form of supposedly "second best" remedy.[35] To the contrary, those laws provide solely for compensation to the victims. Yet by enforcing a procedural rule, the courts—with the encouragement of plaintiffs' lawyers and often even defendants' lawyers[36]—effectively perform the legal equivalent of transforming straw into gold by changing the DNA of the underlying substantive law properly enacted through the democratic process.

Such a practice should be held unconstitutional as a violation of separation of powers: courts have absolutely no authority to alter, ignore, or transform constitutionally valid substantive legislation. One likely need not reach that constitutional issue, however, because the practice obviously violates the unambiguous directive of the Rules Enabling Act that a Federal Rule of Civil Procedure "not abridge, enlarge or modify [a] substantive right."[37] If Rule 23 were to be construed to enable a court to ignore or transform the remedial element of a substantive law being enforced in a class proceeding, Rule 23 would violate that legislative directive. A Federal Rule of Civil Procedure is

32. Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 649 (2010).

33. *See id.* at 624.

34. *See id.*

35. *See id.* at 624, 634–35.

36. Defendants' lawyers have often concurred in the court's resort to cy pres as part of their effort to obtain a settlement with the plaintiff class.

37. 28 U.S.C. § 2072(b) (2012).

just that—*a procedural rule*. It is simply too small a tail to wag such a large dog.[38]

From the perspective of process-based liberalism,[39] such backdoor procedural manipulation of underlying substantive law pathologically undermines core premises of representative democracy. Democratic institutions have chosen to enact into law a specific form of remedy: compensation for victims. And without even intimating that such a remedial model is unconstitutional, courts transform the law to create a perverse combination of civil fine and qui tam relief. It involves a civil fine because while the defendant is required to suffer a financial penalty, some of the money it pays goes to a wholly uninjured party. It is the equivalent of a court fining a defendant and directing her to pay the money to the Red Cross. It smacks of qui tam, because plaintiffs' attorneys receive significant compensation for no reason other than they pursued the case, even though truly injured parties remain uncompensated for the most part.

Would the public likely care about this perversion of the explicitly directed remedial model? I suppose one could debate the answer. On the one hand, many who consider themselves to be liberal would likely endorse the result, because their goal would be primarily to police and control illegal corporate behavior. But there is no doubt that many members of the public are not fans of plaintiff class action attorneys, rightly or wrongly. If the underlying substantive law had explicitly provided that the result of a class proceeding would be that true victims would not be compensated but instead plaintiff class attorneys would receive significant amounts of the penalty imposed on defendants, it is by no means clear that the public would have supported

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38. More recently, some courts, possibly pressured by the widespread attacks on cy pres, have shifted to an alternative method of dealing with unclaimed funds: distributing unclaimed funds among those claimants who did in fact file. The American Law Institute has proposed distribution of undistributed funds in this manner. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(b) (AM. LAW INST. 2019):

> If the settlement involves individual distributions to class members and funds remain after distributions . . . the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

But in many cases, this alternative will be almost as problematic as cy pres. While these plaintiffs have presumably been injured, their injuries are limited to the actual loss suffered (perhaps augmented by treble damage awards or punitive damage awards, depending on the specific substantive law being invoked). But surely they have not been injured in the absurdly large amounts that could potentially be bestowed on them. And those excess amounts are available solely because other claimants have *not* been compensated. Such an approach views class members not as individuals deserving of justice, but rather as faceless, fungible masses.

39. *See* discussion *supra* Part I (discussing process-based liberalism and its place within theories of political liberalism).

such a law. At the very least, we cannot be certain one way or the other. The result of the process in such faux class actions, then, constitutes an unambiguous perversion of the essence of liberal democracy.

I should emphasize once again that by no means do all modern class actions fall within the faux category I have described. Classes that qualify as what Professor Coffee referred to as Type A classes[40] would not fall within the faux category, because the amounts of the individual claims are, by definition, sufficiently large to justify individual suit. Class members are therefore almost certainly going to be interested in and aware of the class proceeding that will determine their rights. Even Type B claims, where the individual claims are insufficient to justify individual suit, may escape the faux label where, due to the circumstances of the situation, class members are relatively easily ascertainable. But it would be incorrect to assume that the large majority of modern class actions are not faux class actions. They remain a significant problem for process-based liberal democracy.

Is there a means to avoid faux classes? It would be extremely easy to do so. We could simply add to Rule 23(a) the requirement that before a class may be certified, named plaintiffs establish that "meaningful relief" could be given to the members of the class. Choice of the standard "meaningful relief" intentionally implies some room for judicial discretion. Rarely will a class be either clearly faux or not faux. In most instances, a certain portion of the class is likely to be interested or ascertainable and compensated with relative ease. It would be up to the court to determine, on the basis of the showing made by plaintiffs' attorneys, whether a significantly large portion of the class is likely to be compensated. But where the percentage of compensated class members is likely in the single digits, the class most surely should not be certified. For reasons I am unable to grasp, however, the Rules Advisory Committee appears unwilling to even consider the propriety of such an amendment to Rule 23(a).

### *C. Mandatory Class Actions and Individualist Liberalism*

Commitment to democracy may fall within a variety of forms. A communitarian form of democracy, for example, places relatively little emphasis on the rights of the individual member of society. Rather, its primary concern is with maintaining the community's ability to self-determine.[41] But it is my belief that a truly liberal form of democracy is

40. *See supra* notes 25–28 and accompanying text.

41. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).

properly grounded in a moral commitment to the worth of the individual member of society as an integral whole, worthy of respect and fair treatment. It should be noted once again that such a commitment to individualist liberalism is by no means the same thing as a commitment to modern libertarianism. Rather, it represents only acceptance of meta-libertarianism—that is, the right to participate freely in the processes of liberty. Thus, individualist liberalism concerns the freedom of the individual to participate in the process of choosing those who govern, and in petitioning the government for rulings or legislation that will advance the individual's moral beliefs or personal interests. While this is not the time or place to justify a choice in favor of liberal democracy over communitarian democracy, it is worth noting the communitarian's failure to recognize the obvious: the fact that the community is made up of individuals.[42] For present purposes, it is sufficient to establish that process-based liberalism necessarily includes recognition of the individual citizen's worth and value, as well as the individual citizen's role in choosing and petitioning those who govern.

In a number of situations, the modern class action (even in contexts other than the faux class action) contravenes core notions of liberalism. Rule 23(b) creates four categories of class actions, and three of them establish mandatory classes.[43] A "mandatory" class prohibits all class members from removing themselves from the class, even if they fervently wish to do so. As a result, individual class members' rights are to be litigated by class counsel as chosen by the court,[44] even if they wish to use only their own lawyer with a totally different legal strategy. This is of course an especially serious problem in Type A classes, where the individual claims are often substantial. By paternalistically forcing individual class members to litigate their claims only as part of a large group without any realistic opportunity to control the manner of litigation, mandatory classes violate due process and are therefore unconstitutional.

The Supreme Court has never ruled on the due process challenge to mandatory classes.[45] It has conspicuously construed the mandatory

42. For a detailed examination of the alternative theories of democracy, including adversary democracy, see MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY (2013).

43. The three categories of mandatory classes are Federal Rules of Civil Procedure 23(b)(1)(A), (b)(1)(B), and (b)(2). A detailed discussion of the substance of the Rule 23(b) categories is beyond the scope of this essay. For a detailed explanation of these categories in this context, see REDISH, *supra* note 10, at 135–75.

44. *See* FED. R. CIV. P. 23(g)(1).

45. At one point the Court did agree to consider the issue, but ultimately dismissed certiorari as having been improvidently granted. *See* Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir.

categories in a narrow manner, however, likely because of the Justices' unease with such a constitutionally questionable frontal assault on litigant autonomy.[46]

### *D. The Irony of the Liberal-Capitalist Critique of the Modern Class Action*

In prior scholarship, I proposed as the proper theoretical rationale of the modern class action what I called the "guardianship model."[47] Under this framework, class attorneys are properly viewed as the guardians of the interests of passive class members who have allegedly been injured by a corporate defendant.[48] In so doing, they can reasonably be deemed to be furthering liberal values by protecting the interests of the little person against potential corporate bullies. But ironically, the guardians' motivation will often be—at least in significant part—grounded in a capitalist-driven profit motivation.

There is nothing inherently wrong with this; people should be allowed to do well by doing good. However, if economic externalities are allowed to pervert those capitalistic incentives, then the liberal interest in protecting vulnerable individuals is easily and dangerously subverted. And the modern class action is plagued with such externalities. Indeed, the very fact that class attorneys are compensated by reference to the amount awarded to the class as a whole, rather than with reference to the amount actually paid to class members, reduces class attorney incentives to locate and compensate individual class members. Equally threatening to the capitalistic incentives supposedly driving class attorneys is the very existence of cy pres relief.[49]

The easiest way to preserve the process-based values of liberalism, ironically, is to measure the validity of any class action procedure by whether it furthers or reduces the capitalistic profit incentive of class attorneys to protect the interests of real plaintiff class members. All too often, the modern class action fails this paradoxical capitalistic test of process-based liberalism.

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1992) (holding that due process required an opportunity for plaintiff to remove himself from the class where forum court had personal jurisdiction over plaintiff), *cert. granted in part,* 510 U.S. 810 (1993), *cert. dismissed per curiam as improvidently granted,* 511 U.S. 117 (1994).

46. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (construing narrowly Rule 23(b)(2)); Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (construing narrowly Rule 23(b)(1)(B)).

47. Martin H. Redish, *Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process*, 64 EMORY L.J. 451, 453 (2014).

48. *Id.*

49. *See supra* notes 33–36 and accompanying text.

## III. THE DUBIOUS CONSERVATIVE CASE FOR THE MODERN CLASS ACTION

I am hardly the one to critique the conservative case for class actions, in light of the fact that, at least on a political level, I most certainly would never describe myself as a conservative. Nevertheless, if I were to begin my normative analysis by assuming the validity of what I understand to be basic conservative political values, I must say I am puzzled by any sympathy a conservative would have for modern class procedures.

Perhaps the argument is grounded in a sort of zero-sum game. Conservatives generally believe in the wisdom of the market, and that belief is accompanied by mistrust of government. Because conservatives dislike direct governmental regulation, they might choose to reject such regulatory programs in favor of the more indirect regulation imposed by the class action. The first problem with such reasoning, of course, is the assumption that regulation is a zero-sum game. The mere fact that one chooses to reject direct regulation does not necessarily imply acceptance of regulation through class actions. And one should never forget that the regulation imposed by class actions is an important form of governmental regulation. The laws being enforced are generally enacted by the legislative branch of government, and those laws are being enforced by yet another branch, the judiciary. A conservative could, then, just as easily reject all forms of governmental regulation, preferring instead to place almost full reliance on the market, with the assistance of individual litigations to enforce substantive legislative regulation.

Conservatives might well argue that regulators are inherently biased in favor of regulation, because, after all, that is their job. I myself have raised such concerns in the context of a procedural due process analysis.[50] But is it preferable, from the conservative perspective, to have regulation imposed through the efforts of financially incentivized private class action attorneys, motivated not by neutrality but primarily, if not exclusively, by personal profit? To be sure, in the abstract, conservatives strongly believe in profit-incentivized activity; that, after all, is the theory of the market. But surely we do not desire adjudicators—required by due process to be neutral[51]—to be

50. Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State,* 94 NOTRE DAME L. REV. 297, 312–13 (2018).

51. Tumey v. Ohio, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant . . . denies the latter due process of law."). *See generally* Martin H. Redish & Lawrence

incentivized by profit, which is to be determined solely on the basis of which side wins. And these private class action attorneys are empowered with the legal equivalent of a nuclear weapon: what some refer to as a form of legalized extortion—a "bet the company" class action.[52] As a result, the resolution of the suit is generally not through reasoned judicial decision but by settlement. Moreover, while Rule 23 requires judicial approval of all class settlements,[53] it would probably not be unfair to suggest that all too often, class actions end with either regulation by intimidation (where defendants feel forced to settle because the risks of litigation are just too great) or by collusion (where defendants and plaintiffs end in suspicious agreement). It is, then, difficult to understand why a conservative would prefer such a "Wild West" form of unpredictable regulation that, of course, takes place only *after* substantial injuries may have been suffered, perhaps due to the absence of pre-injury governmental regulation.

Professor Fitzpatrick, as a conservative, favors class actions for much the same reason that substantive liberals do: because they deter corporate misbehavior.[54] But they also may distort the market in pathological ways. For example, they may actually overdeter. Corporations may be chilled from marketing beneficial products, for fear of the dangers of class actions brought for no reason other than profit motivation. There will be situations where a class action lacks merit, but its very threat shapes corporate behavior in perverse ways. More importantly, neither Professor Fitzpatrick nor any of his conservative comrades who endorse class actions (how many there are, I do not know) have responded to the alchemy of the modern class action: transforming a compensatory remedial model in a substantive statute into an entirely different, noncompensatory remedial model.

The natural response of both liberals and conservatives who support class actions is to ask rhetorically, isn't it better to provide *some* relief than none at all? Isn't it better at least to achieve corporate deterrence, even if we are not able to provide meaningful compensation to the large (often *very* large) majority of class members? The problem with this nakedly utilitarian argument is that the Rules Enabling Act does not provide that a Federal Rule of Civil Procedure may not enlarge, modify, or abridge a substantive right *unless there is a really good pragmatic reason to do so.* Rather, the statute unqualifiedly prohibits

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C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986).

52. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297–99 (7th Cir. 1995) (noting the "intense pressure to settle" caused by the filing of a class action).

53. FED. R. CIV. P. 23(e)(2).

54. FITZPATRICK, *supra* note 3, at 99–113.

any such activity by a Federal Rule of Civil Procedure.[55] In this context, it must once again be emphasized that a lawsuit does not "arise under" Rule 23; that is nothing more than a rule of procedure. Rather, the suit arises under the underlying substantive law being invoked. More importantly, this solution swims fatally halfway across a river. To allow courts to selectively enforce only part of a law inevitably transforms that law into something for which those accountable to the electorate never voted. If those laws turn out to be ineffective means of achieving their intended ends, then in our constitutional democracy it is up to the political branches to reshape them. It cannot be achieved through the alternative method of resorting to a cynical procedural shell game.

The most noteworthy aspect of Professor Fitzpatrick's endorsement of class actions, however, is the numerous qualifiers which he attaches to his support. Towards the close of his book, Professor Fitzpatrick suggests numerous means of reforming the class action—many of which (for example, limiting class attorney compensation to a percentage of the amount actually claimed, rather than the amount awarded) would go far to removing many of the pathologies and perverse economic incentives that plague existing class procedures. Whether they go far enough one could debate. Absent acceptance of my suggested ex ante requirement of demonstrating the realistic possibility of meaningful class-wide relief, I fail to see how the process could be deemed acceptable. But of greater importance is this one obvious fact, "hidden" in plain sight: *the version of the class action Professor Fitzpatrick supports does not exist, nor is there any likelihood that it will in the foreseeable future.* Thus, when Professor Fitzpatrick seeks to make the conservative case for the class action, one must wonder whether he really means the conservative case for the hypothetical *reformed* class action that he envisions—which, at least for the present time, is nothing more than a procedural mirage.

## CONCLUSION: THE DANGER OF RESULT-ORIENTED LIBERALISM

Many who classify themselves as liberal often measure governmental actions solely in terms of results: a government cannot be deemed "liberal" unless it has adopted a specific set of programs that achieve liberal ends. And I understand how easy it is to focus exclusively on whether or not the program being implemented furthers one's own social values. I am even willing to concede that adoption of such a political agenda could be deemed a necessary condition of a truly liberal society. But the fact that it is a necessary condition, of course,

55. *See* 28 U.S.C. § 2072 (2012).

does not mean it is also a sufficient condition. And it most certainly is not. As noted at the outset of this Essay, authoritarian imposition of "liberal" social programs on an unwilling society amounts to an oxymoron: fascist liberalism. At least as necessary an element to any truly liberal society is the noun that must follow the adjective "liberal"—and that noun is "democracy."

As I have shown in this Essay, the modern class action all too often (though concededly not always) amounts to a procedural end run around the remedial choices adopted in the substantive laws being enforced in the class proceeding. If the remedial models adopted through the democratic process are to be modified or replaced, it must be through the same democratic processes that enacted them in the first place, not through a secretive and confusing procedural process of alchemy.