THE GOALS OF CLASS ACTIONS

*Andrew Faisman**

Class actions for monetary relief have long been the subject of intense legal and political debate. The stakes are now higher than ever. Contractual agreements requiring arbitration are proliferating, limiting the availability of class actions as a vehicle for collective redress. In Congress, legislative proposals related to class actions are mired in partisan division. Democrats would roll back mandatory arbitration agreements while Republicans would restrict class actions further.

This Note explains that many of the battles over class actions for monetary relief can be understood as disagreements over what goals they are supposed to serve. It examines two broad justifications for class actions: efficiency and representation. It then offers a taxonomy of the goals of class actions. The efficiency justification is associated with the goals of compensation and monetary deterrence; the representation justification is associated with the goals of providing access to justice and shaping laws and norms. An analysis of recent legislative proposals demonstrates that congressional Republicans prioritize the goal of compensation while congressional Democrats prioritize both representational goals.

This Note argues that the goals of class actions can be reconciled. It offers a framework for distinguishing between those class actions that are supposed to serve efficiency goals and those class actions that are supposed to serve representation goals. This framework can guide courts toward a more expansive understanding of the policy interests behind class actions. Furthermore, this reconciled understanding of class actions may offer a path toward crafting legislative compromises that are reasonably compatible with the current views of both Republicans and Democrats.

* J.D. Candidate 2022, Columbia Law School. The author is especially grateful to Professor Susan Sturm and Professor Bert Huang for their guidance and insight during the process of writing this Note, as well as to Steve Cirami for inspiring him to explore these issues in the first place. For thoughtful feedback at various stages of this project, the author would like to thank John Clayton, Joanna Faisman, Professor David Marcus, and Alexandra Nickerson. For tenacity in editing this Note, the author would also like to thank Rivky Brandwein, Kimberly Chen, Corine Forward, Taoxin Wang, Brandon R. Weber, and the staff of the *Columbia Law Review*.

INTRODUCTION

Debates over class actions have often been compared to a war.[1] This war centers on class actions for monetary relief, which aggregate many damages claims into a single lawsuit.[2] One side defends such class actions as a tool for providing access to justice and keeping the powerful in check.[3] The other side accuses them of enabling meritless litigation and bleeding money from corporations.[4] This war is fought on many fronts. Some question whether

1. Four decades ago, Professor Arthur R. Miller described these debates as a "holy war." Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 Harv. L. Rev. 664, 664 (1979) [hereinafter Miller, Of Frankenstein Monsters and Shining Knights]. Professor David Marcus has spoken of the "class action wars." David Marcus, The History of the Modern Class Action, Part I: *Sturm Und Drang*, 1953–1980, 90 Wash. U. L. Rev. 587, 610–14 (2013) [hereinafter Marcus, History of the Modern Class Action].

2. This Note focuses on class actions for monetary relief. Other categories of class actions do not raise most of the issues this Note discusses and should be treated as distinct. See Maureen Carroll, Class Action Myopia, 65 Duke L.J. 843, 850 (2016) ("Not only does the current debate largely fail to reflect the function and importance of subtypes other than the aggregated-damages class action, but more important, it also has produced across-the-board changes in class-action law that have made the purposes of the other subtypes more difficult to achieve.").

3. E.g., Elizabeth J. Cabraser, The Class Abides: Class Actions and the "Roberts Court", 48 Akron L. Rev. 757, 800–01 (2015) ("May [class actions] abide . . . to serve the good of the many in our uniquely challenging time; and to preserve for adjudication those trespasses to our economic and personal rights and interests that our individual resources, or those of the courts themselves, do not permit us to effectively pursue alone."); Arthur R. Miller, The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative, 64 Emory L.J. 293, 312 (2014) ("[S]ooner or later, thoughtful people will be distressed by the realization that restricting class actions and other forms of group litigation inevitably leads to the under-enforcement of important public policies.").

4. E.g., Linda S. Mullenix, Ending Class Actions as We Know Them: Rethinking the American Class Action, 64 Emory L.J. 399, 405 (2014) (arguing that class actions for damages are dysfunctional and that class actions should be limited to injunctive relief). Sometimes, concerns along these lines are targeted at specific types of damages class actions rather than being

it is desirable, or even constitutional, for class actions to be binding upon class members without their express consent.[5] Others argue that class action plaintiff's attorneys are subject to distorted incentives that cause them to litigate too aggressively,[6] or perhaps to settle too cheaply.[7] The much-contested certification requirements of Federal Rule of Civil Procedure 23 (Rule 23) have been subject to renewed scrutiny under the Roberts Court.[8] The class action war is now fifty years old.[9] Class actions have been debated endlessly, and many of the same themes have reverberated through the decades. Disagreements between the two sides are as heated as ever. Class actions have often proven resilient, and they have often been slow to change. Yet they *have* changed, and recently they have been changing fast. It now appears that the class action war has reached an important new juncture.

Over the past decade, proponents of class actions have decidedly been put on the defensive. In a line of cases beginning with *AT&T Mobility LLC v. Concepcion*, the Supreme Court has held that contractual agreements requiring individual arbitration are protected under the Federal Arbitration Act of 1925.[10] Arbitration, an alternative to traditional litigation, is an informal

---

generalized to all damages class actions. E.g., Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 516–19 (1991) (arguing that the meritoriousness of legal claims is a relatively weak determinant of whether securities class actions are filed and the size of the resulting settlements, and that the degree of decline in stock prices and the amount of insurance coverage are stronger determinants).

5. E.g., Martin H. Redish, Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit 2–3 (2009) [hereinafter Redish, Wholesale Justice] (arguing that class actions raise constitutional and political concerns because they "often revok[e]—either legally or practically—the individual right holder's ability to control the protection or vindication of his rights" and "often effect dramatic alterations in the DNA of the underlying substantive law"). For a rebuttal to these arguments, see Alexandra D. Lahav, Are Class Actions Unconstitutional?, 109 Mich. L. Rev. 993, 999–1009 (2011) (book review).

6. E.g., Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1056–57 (1996) (claiming that "lawyer abuse in class actions is rampant" and proposing that there should be a threat of legal liability for lawyers in order to deter such abuse).

7. E.g., John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 689–90 (1986) [hereinafter Coffee, Understanding the Plaintiff's Attorney] ("[P]laintiff's attorneys have an incentive to settle prematurely and cheaply when they are compensated on the traditional percentage of the recovery basis.").

8. See generally Robert H. Klonoff, The Decline of Class Actions, 90 Wash. U. L. Rev. 729, 745–823 (2013) (surveying federal case law that has made class actions more difficult for plaintiffs to bring); Robert H. Klonoff, Class Actions Part II: A Respite From the Decline, 92 N.Y.U. L. Rev. 971 (2017) (reviewing further developments in federal case law that represent a slowdown, though not a reversal, in the trend that class actions are becoming more difficult for plaintiffs to bring).

9. See infra notes 52–55 and accompanying text.

10. 563 U.S. 333, 352 (2011) (overturning a California common law rule that prohibited contracts from disallowing class-wide arbitration, finding that such a rule is preempted by the Federal Arbitration Act); see also Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1616 (2018) (upholding employment agreements requiring individual arbitration and dismissing a challenge based on the Federal Arbitration Act's saving clause and the National Labor Relations

and nonjudicial means of resolving disputes. In *individual* arbitration, a single claimant seeks redress for themselves, without anyone else being represented in the proceeding or bound by the outcome. Arbitration is relatively uncontroversial when the parties agree to it after the dispute arises, mutually availing themselves of a forum that may be cheaper, faster, or more tailored to the dispute than litigation in court.[11] But it is increasingly common for corporations to include provisions requiring individual arbitration in employment and consumer contracts, and for people to sign away the right to litigate in court *before* disputes arise.[12] Most people do not, and probably could not, bargain out of mandatory arbitration agreements, so there are few checks on their proliferation.[13] Given that most people bound by mandatory arbitration agreements cannot take part in class actions, there are likely to be fewer class actions wherever such agreements proliferate.[14] Proponents of class actions have called on Congress to

---

Act); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 228 (2013) (holding that contractual agreements requiring individual arbitration cannot be invalidated on the ground that costs of individual arbitration exceed the potential recovery).

11. See *Concepcion*, 563 U.S. at 344–45 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets.").

12. See Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration, Econ. Pol'y Inst. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/ZWA8-DMDY] (reviewing empirical evidence of the growing trend of mandatory employee arbitration).

13. See *Epic*, 138 S. Ct. at 1637, 1643 (Ginsburg, J., dissenting) (discussing inequality of bargaining power between workers and employers).

One of the few downsides that corporations must consider when including mandatory arbitration provisions in contracts is the possibility that many people who would not otherwise litigate against the corporation will pursue arbitration. In such a scenario, mandatory arbitration agreements can backfire on the corporation, forcing it to pay arbitration fees for many disputes at once. While this has traditionally been viewed as unlikely, plaintiff-side law firms have recently introduced a tactic of mass arbitration, which involves coordinating large numbers of claimants to bring arbitration actions. This tactic has sometimes been remarkably effective. For example, it recently forced Amazon to remove a mandatory arbitration provision from its contract with customers. Michael Corkery, Amazon Ends Use of Arbitration for Customer Disputes, N.Y. Times (July 22, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html (on file with the *Columbia Law Review*) (last updated Sept. 28, 2021). Still, it appears unlikely that the mass arbitration tactic will be broadly replicated against small and midsize corporations or in the context of complicated disputes.

14. See John C. Coffee, Jr., Entrepreneurial Litigation: Its Rise, Fall, and Future 129 (2015) ("Over time, the use of arbitration clauses will only spread, predictably covering most persons in contractual relationships with a company and also applying to at least some tort claimants, disabling both groups from suing in court."); Brian T. Fitzpatrick, The Conservative Case for Class Actions 128 (2019) [hereinafter Fitzpatrick, The Conservative Case] ("The status quo is no longer lots and lots of class actions like it was before 2011. The status quo is now few and maybe no class actions.").

Not all mandatory arbitration agreements contain explicit waivers that prohibit participation in class actions and class arbitration, but courts are likely to interpret mandatory

intervene, recognizing that class actions are in peril if Congress does nothing.[15] Congress must decide whether class actions are worth saving.

But class action legislation is mired in partisan division. Democrats wish to preserve class actions, as demonstrated by the Forced Arbitration Injustice Repeal Act (FAIR Act), a bill that would render unenforceable any contractual agreements that bar class litigation of employment, consumer, antitrust, and civil rights disputes.[16] The FAIR Act was passed by a Democratic-controlled House of Representatives in September 2019, but it never became law.[17] By contrast, Republicans would weaken class actions further: In March 2017, a Republican-controlled House of Representatives passed the Fairness in Class Action Litigation Act (Fairness Act), a bill that would significantly restrict class actions.[18] Like the FAIR act, the Fairness Act never became law.[19] Class actions remain a live and urgent issue, with Democrats and Republicans rallied around opposing visions of reform. Even while Democrats control both houses of Congress and the presidency, their proposals are unlikely to become law due to the prospect of a Senate filibuster and possible dissent from conservative Democratic senators.[20] A path to compromise is needed if any reforms are to pass.

This Note explains that class actions are so contentious in part because of disagreements over what goals they are supposed to serve.[21] To assist in

---

arbitration agreements as prohibiting participation in class proceedings even in the absence of such explicit waivers. See, e.g., Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1411 (2019) (holding that mandatory arbitration agreements that are silent or ambiguous as to the availability of class arbitration do not permit class arbitration).

15. See, e.g., *Epic*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting) ("Congressional correction of the Court's elevation of the [Federal Arbitration Act] over workers' rights to act in concert is urgently in order."); Fitzpatrick, The Conservative Case, supra note 14, at 125–27 (calling on Congress to amend the Federal Arbitration Act so as to reverse the outcome of *Concepcion*).

16. H.R. 1423, 116th Cong. (2019). For analysis of the FAIR Act, see infra section II.B.

17. See infra notes 141–142 and accompanying text.

18. H.R. 985, 115th Cong. (2017). Among other provisions, the Fairness Act would require courts to determine, as prerequisites to class certification, that "each proposed class member suffered the same type and scope of injury as the named class representative[s]" and that there is "a reliable and administratively feasible mechanism . . . for distributing directly to a substantial majority of class members any monetary relief secured for the class." Id. §§ 1716(a), 1718(a). For analysis of the Fairness Act, see infra section II.A.

19. See infra notes 120–121 and accompanying text.

20. See infra note 143 and accompanying text.

21. This fundamental disagreement over the purpose of class actions is often overlooked. It is sometimes recognized in academic commentary, but, even there, less often than one might expect. The following works identify approximately the same dichotomy in views as this Note discusses, with much variation in exactly how they distinguish the two sides of the disagreement and in what labels they use to describe them: John H. Beisner, Matthew Shors & Jessica Davidson Miller, Class Action "Cops": Public Servants or Private Entrepreneurs?, 57 Stan. L. Rev. 1441, 1442 (2005) (distinguishing between the view that class actions are a "means of resolving numerous commonly grounded controversies through a single lawsuit" and the view that they are "private law enforcement efforts" by "private attorneys general"); Sergio J. Campos, The Uncertain Path of Class Action Law, 40 Cardozo L. Rev. 2223, 2228

understanding these disagreements, this Note proposes a taxonomy of the goals of class actions. It first identifies two broad justifications for class actions: One justification is that class actions make litigation more efficient; the other justification is that class actions expand representation in litigation. In this Note's taxonomy, each of these two broad justifications is associated with two goals. Under the efficiency justification, one goal of class actions is to benefit plaintiffs by allowing them to save on the transactional costs of litigation, thereby increasing their net compensation;[22] the other goal is to benefit the public by increasing monetary deterrence against wrongdoing.[23] Under the representation justification, one goal of class actions is to benefit plaintiffs by including more of them in litigation;[24] the other goal is to benefit the public by giving rise to new and qualitatively different lawsuits that have outsized influence over laws and norms.[25] This Note observes that there is a tension between the two efficiency goals and the two representation goals. Efficiency goals are best furthered by the inclusion of *more valuable claims* in class actions while representation goals are best furthered by the inclusion of *more claimants* in class actions.

Using this taxonomy, this Note examines the current views of Republicans and Democrats through an analysis of the Fairness Act and the FAIR Act. This analysis shows that Republicans believe only in the goal of compensation while Democrats believe in the goals of providing access to justice and shaping laws and norms. This difference in views reveals two cleavages between Republicans and Democrats. One cleavage is that Republicans do not believe class actions serve any public purpose, whereas Democrats do. The other cleavage, which this Note identifies as being

---

(2019) (distinguishing between the "exceptional" view of class actions, which considers class actions to be a tool for efficiency and prioritizes the goal of allowing each individual their day in court, and the "alternative" view, which prioritizes substantive rights and values class actions as a tool for enforcing those rights); Myriam Gilles & Gary B. Friedman, Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers, 155 U. Pa. L. Rev. 103, 105–07 (2006) (distinguishing between the "orthodox" approach of assuming that class actions are intended to compensate absent class members and the proposed view that their purpose is to deter more types of wrongdoing); Diane Wood Hutchinson, Class Actions: Joinder or Representational Device?, 1983 Sup. Ct. Rev. 459, 459–60 (distinguishing between the "joinder model," which views class actions as a device for efficient adjudication of claims that should be individually viable, and the "representational model," which embraces the inclusion of class members who could not have sued independently); Alexandra D. Lahav, Two Views of the Class Action, 79 Fordham L. Rev. 1939, 1941 (2011) (distinguishing between the view that class actions are "an advanced joinder device, merely aggregating individual cases" and the view that they represent "a transformative procedural rule that creates an entity out of a dispersed population of claimants"); Marcus, History of the Modern Class Action, supra note 1, at 592–94 (distinguishing between the "adjectival conception," which views class actions as serving the goal of procedural efficiency, and the "regulatory conception," which views class actions as a device for enforcing substantive law).

22. See infra notes 71–74 and accompanying text.

23. See infra note 76 and accompanying text.

24. See infra notes 78–82 and accompanying text.

25. See infra notes 83–85 and accompanying text.

deeper and more fundamental, is that Republicans align with the efficiency justification while Democrats align with the representation justification. These two views of class actions shape the current political debate—and political impasse—over class actions and mandatory arbitration agreements.

Despite these divisions, this Note argues that the goals of class actions are not inherently in conflict with one another and that political compromise is possible. If the efficiency goals and the representation goals were diametrically opposed, it would be difficult to see how the class action war could ever end. One side might achieve a particular legislative victory, but, if the past fifty years are any indication, the concerns of the opposing side would always reestablish themselves. Indeed, one might expect the class action war to continue for another fifty years. This Note rejects that vision and offers a path toward reconciling these goals. The approach advanced by this Note considers efficiency and representation to be equally important justifications for class actions, avoiding the typical notion that one predominates over the other. Instead, this Note presents a framework for distinguishing between those class actions that primarily serve efficiency goals and those class actions that primarily serve representation goals. This framework conceptually reconciles the goals of class actions and can guide courts toward a more expansive understanding of the policy interests behind class actions. Moreover, this Note argues that this reconciled understanding of class actions offers a path toward crafting legislative compromises that may be reasonably palatable to both Republicans and Democrats.

This Note proceeds in three Parts. Part I explains the goals of class actions, reviewing their historical context and describing their theoretical underpinnings. Part II explains that different views of the goals of class actions are motivating opposing Republican and Democratic legislative proposals related to class actions, as exemplified by the Fairness Act of 2017 and the FAIR Act of 2019. Part III proposes a framework for reconciling the goals of class actions and offers examples of legislative compromises that can be built on this reconciled understanding.

I. UNDERSTANDING THE CLASS ACTION WAR

This Part introduces the goals of class actions and contextualizes them within the class action war. These goals are divided between two broad justifications for class actions: efficiency and representation. Section I.A provides context by reviewing the aspects of class action history that are most relevant for understanding these two justifications. Section I.B presents a taxonomy of the goals of class actions, explaining the conceptual fault lines between them and highlighting expressions of these goals in jurisprudence and legal commentary.

A. *The Evolution of Class Actions*

This section provides historical context for the class action war and the goals of class actions. It summarizes the historical evolution of two foundational elements of class actions, which are now built into Rule 23: the commonality requirement and the binding effect on absent class members. This history demonstrates that class actions have long served two broad justifications: efficiency and representation.

In the United States, class actions have always been based on commonality of interest. Although this feature of class actions is the product of a long evolutionary process, that evolution predated the American class action.[26] Class actions were imported into American jurisprudence by Justice Joseph Story, who wrote that class treatment is appropriate "where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole."[27] As its defining feature, a class action allows a group to be a single litigative entity.[28] While riding circuit, Justice Story decided the early class action *West v. Randall*, in which one of the heirs of an estate sued on behalf of himself and other heirs who were not before the court.[29] Justice Story wrote that while it is "a general rule in equity" that all individuals "materially interested" in a lawsuit should be

---

26. Class actions can be traced to British courts of equity, where class treatment was not always based on commonality of interest. Until the 1700s, class actions primarily involved cohesive groups, such as villages and manorial tenants, that had significant social or political meaning independent of the dispute. See Stephen C. Yeazell, Group Litigation and Social Context: Toward a History of the Class Action, 77 Colum. L. Rev. 866, 867 (1977).

By the time class actions arrived in the United States, courts were searching for justifications for class treatment other than group cohesiveness. See Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 160–96 (1987) [hereinafter Yeazell, From Medieval Group Litigation] (arguing that the relevance of group cohesion as a justification for class treatment eroded as Great Britain transformed from a rural and customary society to an individualistic and industrial one).

The trend toward applying class treatment based on commonality of interest is evident in *Good v. Blewitt*, in which the captain of a ship sued on behalf of himself and his crew, claiming they were owed their share of captures from the Napoleonic Wars. Good v. Blewitt (1807) 33 Eng. Rep. 343 (Ch.) 343. A crew of seamen bound together only by a single journey is not a particularly cohesive group. Nonetheless, the crew was given class treatment because the seamen had a common interest in the lawsuit and it would have been impractical to call them all before the court. Id. at 345 ("[T]heir situation at any period, how many were living at any given time, how many are dead, and who are entitled to representation, cannot be ascertained.").

27. Joseph Story, Commentaries on Equity Pleadings § 97 (1840). Justice Story also proposed two other categories of class action:

> (2) where the parties form a voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous, and though they have, or may have, separate and distinct interests; yet it is impracticable to bring them all before the court.

Id.

28. Yeazell, From Medieval Group Litigation, supra note 26, at 1.

29. 29 F. Cas. 718, 722 (C.C.D.R.I. 1820) (No. 17,424).

parties, that rule need not be followed when "consistently with practical convenience it is incapable of application."[30] The Supreme Court followed this example in *Smith v. Swormstedt*, in which two groups of Methodist preachers laid claim to a pension fund and the Court applied class treatment to both groups because of their common respective interests in the litigation.[31]

Various purposes of class actions were articulated during this early period, yet it was unclear which purpose, if any, was most important. Justice Story viewed class actions as serving a mix of different purposes, writing that the class action "does not seem to be founded on any positive and uniform principle; and therefore it does not admit of being expounded by the application of any universal theorem, as a test."[32] A slightly longer description was offered by the Lord High Chancellor Eldon in the British case *Cockburn v. Thompson*, later cited by Justice Story in *West*:

> The strict rule is, that all persons materially interested in the subject of the suit, however numerous, ought to be parties; that there may be a complete decree between all parties having material interests: but, that being a general rule established for the convenient administration of justice, must not be adhered to in cases to which, consistently with practical convenience, it is incapable of application.[33]

Lord Eldon's phrase "convenient administration of justice" elevates two justifications: efficiency and access to justice. This phrase also proves slightly mercurial on close inspection. Are the two justifications equal, or is one more salient than the other? Put differently, do class actions serve more to enhance the efficiency with which justice can be administered, or do they serve more to enhance how much justice, to how many people, can be administered? This question, left unresolved, has come to be one of the dividing lines between the present-day views of class actions.

Even though early American class actions included the commonality requirement, they were fundamentally different from modern class actions in that they were not always binding on absent class members. For over a century, American jurisprudence was indecisive about whether absent class

---

30. Id. (citing Cockburn v. Thompson (1809) 33 Eng. Rep. 1005 (Ch.) 1007).

31. 57 U.S. 288, 303 (1853).

32. Story, supra note 27, § 76.

33. *Cockburn*, 33 Eng. Rep. at 1005 (cited by *West*, 29 F. Cas. at 722). The Supreme Court articulated approximately the same view in *Swormstedt*:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.

57 U.S. at 303.

members—those who had neither opted into the class nor opted out of it—were precluded from bringing the same claim in another lawsuit.[34] To the modern legal mind, nonbinding class actions hardly seem like class actions at all. Indeed, nonbinding class actions proved ineffective and were intentionally eliminated by the 1966 revisions to Rule 23, which imposed a binding effect on absent parties.[35] The failure of nonbinding class actions leading up to the 1966 revisions is worth elaborating on. It illuminates the two justifications for class actions discussed in this Note and demonstrates that both justifications had a role in shaping Rule 23. Nonbinding class actions failed for two reasons: They were inefficient, and they were not representative enough to properly administer justice.

The inefficiency of nonbinding class actions is exemplified by the 1944 case *York v. Guaranty Trust Co. of New York*.[36] A noteholder sued a trustee on behalf of himself and similarly situated noteholders, claiming the trustee had breached fiduciary obligations, but the Second Circuit determined that the lawsuit was not binding on absent class members.[37]

---

34. Justice Story, always a patron of class actions, believed class actions should be binding on absent class members. Story, supra note 27, § 120 ("[I]n most, if not in all, cases . . . the decree obtained . . . will ordinarily be held binding upon all other persons standing in the same predicament, the Court taking care, that sufficient persons are before it, honestly, fairly, and fully to ascertain and try the general right in contest."). But Federal Equity Rule 48, promulgated in 1842, stated that class actions were *not* binding on absent class members. Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xxxix, lvi (1842) (superseded 1912) ("[T]he decree shall be without prejudice to the rights and claims of all the absent parties."). And yet, the Supreme Court upheld the binding effect on absent class members in cases such as *Swormstedt*. See *Swormstedt*, 57 U.S. at 303. In 1912, that approach was codified in the new Federal Equity Rule 38. Rules of Practice for the Courts of Equity of the United States, 226 U.S. 659 (1912) (superseded 1938); see also Christopher v. Brusselback, 302 U.S. 500, 505 (1938) (affirming that the new Federal Equity Rule 38, unlike the old Federal Equity Rule 48, permitted judgments to be binding on absent parties).

When the original Rule 23 was introduced in 1938, it provided no answer as to what effect judgments would have on absent class members. Advisory Comm. on Rules for Civil Procedure, Report Containing Proposed Rules of Civil Procedure for the District Courts of the United States 60 (1937); Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 377–78 (1967). Nonetheless, Professor James W. Moore, one of the drafters of the original Rule 23, recommended that the effect of binding absent class members should not apply in the case of "spurious" class actions, which were capaciously defined in the original Rule 23 to include class actions involving "several" rights affected by a common question and related to common relief. James W. Moore & Marcus Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment, 32 Ill. L. Rev. 555, 555–63 (1938) (Professor Moore's recommendation); see also Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (explaining the definition of "spurious" class actions under the original Rule 23). Professor Moore's recommendation was influential in the period predating the 1966 revisions to Rule 23. Kaplan, supra, at 378–79.

35. See infra note 48 and accompanying text.

36. 143 F.2d 503 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945).

37. Id. at 508–12, 528. The Second Circuit determined that the case would not be binding on absent class members because it fell into the category of a "several" class action. Id. at 528.

The Second Circuit realized that allowing class treatment without any effect on parties who were not before the court would be "purely academic and lack all practical significance," particularly because the claims of absent class members would lapse and they would be unable to seek relief.[38] So the Second Circuit tried a workaround that did not involve binding absent class members: If a judgment was made against the defendant, other class members would later have the opportunity to opt in, but they would not be bound if they remained silent.[39] This approach became known as "one-way intervention." While it may have appeared to be an appealing middle ground at the time of *Guaranty Trust*, it turned out to be utterly impractical. The problem with one-way intervention was that it prevented defendants from settling their liabilities: If the defendant lost, they were uncertain of which plaintiffs might sue them again, as absent plaintiffs were not barred from pursuing future claims; even if the defendant won, only the named plaintiffs were precluded from making another attempt at obtaining a favorable judgment.[40] In turn, the inability to offer complete resolution implied the class would have difficulty negotiating an adequate settlement. By extending judgments to absent class members, the 1966 revisions intentionally eliminated the inefficiencies of nonbinding class actions and one-way intervention.[41]

The importance of the binding effect for the purpose of representation is evident in the 1951 case *Wilson v. City of Paducah*, in which two Black students sued for admission to a college on behalf of themselves and similarly situated applicants.[42] The district court allowed the case to proceed as a class action, and after finding that the students possessed the qualifications required of white applicants it issued an injunction requiring that they be granted admission.[43] In this case, unlike in *Guaranty Trust*, the district court took the position that the class action was binding on absent class members: When two other Black students not named in the original complaint intervened, the district court considered them to be members of the class who could take advantage of the original judgment, and it once again enjoined the defendant from denying admission.[44] The 1966 revisions were written in the early 1960s, with an awareness of such civil rights

38. Id. at 528.

39. Id. at 529.

40. See Kaplan, supra note 34, at 385 ("[One-way intervention] was distasteful as being 'one-way,' as lacking 'mutuality': for it was assumed that members of the class could remain outside the action if the determination were adverse to their interests and in that event they would not be bound.").

41. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment ("[O]ne-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class."); Kaplan, supra note 34, at 397 ("The [new] rule has advantages for the defendant, too, in that it attempts to conclude the class when the decision is unfavorable to it.").

42. 100 F. Supp. 116, 117 (W.D. Ky. 1951).

43. Id.

44. Id. at 117–18.

litigation.[45] The drafters considered the example of *Paducah* and recognized that the students not named in the original complaint were only able to benefit from the original judgment because the district court had viewed it as binding on absent class members.[46] This would have been a denial of justice, not merely an inefficiency, as students are unlikely to pursue such lawsuits on an individual basis.[47]

The 1966 revisions to Rule 23 introduced the modern framework for class actions. The failures of nonbinding class actions had been manifested in both their inefficiency and their unrepresentativeness. The new Rule 23 made judgments resulting from class actions binding upon all class members: The entire class has a chance to benefit if the class action succeeds and, in exchange, the entire class is precluded from reintroducing the same claim.[48] The 1966 revisions also codified a structure that all first-year law students learn: Class actions are subject to the threshold requirements of numerosity, commonality, typicality, and adequacy;[49] class actions are categorized into those for avoiding inconsistent judgments, those for injunctive relief, and those for damages;[50] and class actions for damages are subject to the additional requirements of predominance and superiority.[51]

But even as the major features of modern class actions took shape, it remained unclear whether the primary justification for class actions was efficiency or representation. No answer had been provided by the history of class actions preceding the 1966 revisions to Rule 23. Nor was any answer provided by the 1966 revisions, which, in their major innovation of

---

45. Miller, Of Frankenstein Monsters and Shining Knights, supra note 1, at 670 n.31 ("Although not promulgated until 1966, the basic text of the current rule actually was drafted by the Advisory Committee on Civil Rules in 1961 and 1962 . . . . [A]s a practical matter the contours of the new rule had become firm by 1964."). The new Rule 23 was worked on with an awareness of early civil rights cases and an appreciation of the class action's usefulness in the civil rights context, even though it predated the wave of civil rights litigation in the 1960s. Id. at 670.

46. Kaplan, supra note 34, at 383.

47. Professor Marcus has argued that the binding effect allowed class actions to advance desegregation in two ways: Binding class actions did not become moot due to the changed circumstances of an individual plaintiff, such as a student graduating, and they also forced injunctive relief to be broadly tailored so as to actually change institutional practices of discrimination. David Marcus, Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action, 63 Fla. L. Rev. 657, 679–80 (2011).

48. Fed. R. Civ. P. 23(c)(3). The preclusive effect of class actions is softened by the requirement that class members be notified of the class action and given the opportunity to opt out. Fed. R. Civ. P. 23(c)(2)(B)(v).

49. Fed. R. Civ. P. 23(a) (stating that the class must be "so numerous that joinder is impracticable," the class must have commonality of interest, the representative party must be "typical of the claims or defenses of the class," and the representative party must be able to "fairly and adequately protect the interests of the class").

50. Fed. R. Civ. P. 23(b).

51. Fed. R. Civ. P. 23(b)(3) (requiring that questions common to all class members predominate over questions affecting individual members, and that a class action be superior to other methods of adjudication).

making class actions binding on absent class members, had served the purposes of both efficiency and representation.

Political battles over class actions began soon after the 1966 revisions to Rule 23. In 1969, Senator Joseph D. Tydings introduced a bill that would have expanded the reach of Rule 23 by establishing federal jurisdiction over class actions alleging state law claims.[52] President Richard Nixon introduced a more restrictive proposal, which would have limited federal jurisdiction to eleven types of fraud and would only have allowed class actions to proceed after the DOJ took action to stop the wrongdoing.[53] Senator Tydings pushed back, advocating for a strong class action regime in order to protect consumer rights.[54] In 1970, hearings over the two competing bills turned into an intense political battle that has never truly ended.[55]

B. *The Goals of Class Actions*

This section presents a taxonomy of the goals of class actions. It proposes that these goals have usually defined the battle lines in the class action war, as most doctrinal and political debates over class actions involve the various factions siding with certain goals over others. This taxonomy begins with the two broad justifications section I.A introduces: efficiency and representation. Each of these justifications corresponds to two goals. This section reviews the theoretical underpinnings of these goals and observes that there is a meaningful tension between the efficiency goals and the representation goals.

---

52. S. 1980, 91st Cong., 1st Sess. (1969). At the time, Rule 23 was considered more friendly than class action procedures at the state level. Class Action and Other Consumer Protection Proceedings: Hearings Before the Subcomm. on Com. and Fin. of the Comm. on Interstate and Foreign Com., 91st Cong. 37 (1970) (statement of Sen. Tydings) (discussing the "liberal machinery" of Rule 23). Senator Tydings's bill was intended to reverse the effects of *Snyder v. Harris*, in which the Supreme Court held that the amount in controversy needed to satisfy the federal diversity jurisdiction statute could not be aggregated across class members, effectively denying federal subject matter jurisdiction over most class actions that were based on state law claims. 394 U.S. 332, 336 (1969); see also Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973) (clarifying that any plaintiff who does not satisfy the jurisdictional amount must be dismissed from the class action). *Snyder v. Harris* became obsolete when the federal supplemental jurisdiction statute became law in 1990. 28 U.S.C. § 1367(a) (2018); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558–59 (2005) (holding that if one member of the class satisfies the jurisdictional amount requirement, a court may exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional amount requirement on their own).

53. See Robert B. Semple, Jr., Nixon Proposes a "Bill of Rights" for Consumers, N.Y. Times (Oct. 31, 1969), https://nyti.ms/1RRdJ5s (on file with the *Columbia Law Review*).

54. See Joseph D. Tydings, The Private Bar—Untapped Reservoir of Consumer Power, 45 Notre Dame L. Rev. 478, 479 (1970) ("[T]he consumer must be given an adequate private remedy in court. No administrative agency can possibly guard the rights of millions of individual consumers or process the thousands of complaints that would be received each year.").

55. See Marcus, History of the Modern Class Action, supra note 1, at 611–12.

The goals of class actions are separated by a simple divide: Efficiency goals suggest that class actions amplify the effects of litigation that can exist without class actions, while representation goals suggest that class actions make litigation have qualitatively different effects. The goals are also cross-divided according to whether they serve the interests of plaintiffs or the broader public. This results in a taxonomy of four goals: The two efficiency goals are increasing compensation to plaintiffs and increasing monetary deterrence against misbehavior; the two representation goals are providing access to justice to plaintiffs and shaping laws and norms against misbehavior.

Before delving in, it is worth introducing two concepts that will prove useful for understanding the distinctions between these four goals. First, this Note uses the term "valuable claim" to describe a claim that is sufficiently large that a class member could potentially achieve compensation outside of the class action. The more valuable the claim, the more the claimant is in a position to care about how much they are compensated through the class action. If a claim is not valuable, the claimant may be assumed to be content to have any access to justice at all. The concept of a valuable claim is a younger sibling to the well-known concept of a positive-value claim, which is a claim that is sufficiently large that the payout is expected to exceed the cost of litigating the claim on an individual basis.[56] Positive-value claims are the *most* valuable claims, as a positive-value claimant has a clear incentive to litigate their claim with or without the class, though they will still tend to participate in a class action if it increases their net compensation.[57] By contrast, a negative-value claim is one for which the cost of litigating the claim on an individual basis is expected to be greater than the benefit.[58] But negative-value claims can still be somewhat valuable. If they are sufficiently large, such claims can be added on to other lawsuits through traditional joinder. In some circumstances, sufficiently large negative-value claims may be worth pursuing through alternative dispute resolution mechanisms such as arbitration. One could even argue that small claims that can only be compensated through a class action can still be considered *slightly* valuable, in the narrow sense that the claimant could hope to be better compensated through a different class action. Some claims have no value at all, as they are

---

56. See 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 (1987) (describing "independently marketable" claims for which "the client could convince an attorney to take the case on a contingent fee basis or . . . the client would herself pay the attorney on some other basis").

57. See id. (describing the benefits to positive-value claimants as consisting of economizing on litigation costs, threatening risk-averse defendants with greater liability so as to push them to settle, and avoiding a "race to judgment" among competing plaintiffs).

58. See Samuel Issacharoff, Preclusion, Due Process, and the Right to Opt Out of Class Actions, 77 Notre Dame L. Rev. 1057, 1059–60 (2002) (defining negative-value claims); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (observing that class treatment may permit plaintiffs with claims averaging $100 to pool their claims, thereby transforming them into claims that are viable to litigate).

so small that the claimant would not even bother to collect the money offered to them.[59] The overall point is that class treatment impacts nonvaluable claims more dramatically than valuable claims, as it makes nonvaluable claims feasible to pursue.[60] This echoes Lord Eldon's distinction between convenience and justice:[61] For those with valuable claims, class actions are a matter of convenience, as they make it even more cost-effective to litigate; for those with nonvaluable claims, class actions are a matter of justice, as it is not otherwise feasible to seek redress at all.

Also relevant is the distinction between the private effects of class actions and the public effects of class actions. Private effects are those effects that class actions have on the parties to litigation—plaintiffs and defendants, including members of the class—while public effects are any effects that class actions have on nonparties, or the public at large.[62] It is not immediately obvious from the text or history of Rule 23 that class actions are supposed to have public effects.[63] Yet the idea that they do is pervasive,

---

59. For an example of the negative correlation between the size of the claim and the likelihood that the class member will actually collect the money, see Brian T. Fitzpatrick & Robert C. Gilbert, An Empirical Look at Compensation in Consumer Class Actions, 11 N.Y.U. J.L. & Bus. 767, 784 (2015) ("[T]he size of class members' payouts influenced negotiation rates: class members were more likely to negotiate larger denomination checks than smaller denomination ones.").

60. Moreover, there is no downside to participating in a class action for claimants with nonvaluable claims. By contrast, participating in a class action can be a double-edged sword for claimants with valuable claims. It is possible that a class action will achieve a smaller compensation amount than such claimants could achieve on their own, particularly if the settlement fails to recognize special circumstances that entitle them to greater compensation than other members of the class. In such situations, claimants with valuable claims are able to opt out of the class action and pursue their own lawsuit. See Fed. R. Civ. P. 23(c)(2)(B)(v) (requiring that members of class actions for damages be notified of their right to request to be excluded from the judgment).

61. See supra note 33 and accompanying text.

62. The following works have explicitly discussed the distinction between private and public effects of class actions: J. Maria Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1217 (2012) (arguing that private litigation, including through class actions, plays an "important yet often underappreciated structural role . . . in our diffuse, decentralized regulatory system"); Alexandra D. Lahav, The Political Justification for Group Litigation, 81 Fordham L. Rev. 3193, 3193 (2013) [hereinafter Lahav, Political Justification] ("[W]hat legitimates the class action best is the role it plays in the larger polity rather than the internal protections it offers participants."); William B. Rubenstein, Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action, 74 UMKC L. Rev. 709, 710 (2006) [hereinafter Rubenstein, Positive Externalities] ("The class action mechanism is important not just because it enables a group of litigants to conquer a collective action problem and secure relief, but also—perhaps more so—because the litigation it engenders produces external benefits for society."); see also James D. Cox, Response, Securities Class Actions as Public Law, 160 U. Pa. L. Rev. PENNumbra 73, 73 (2011) [hereinafter Cox, Securities Class Actions] (offering a criticism of "the narrow view that securities class actions have only a private and not a public mission").

63. The 1966 revisions were motivated by a desire to provide a better mechanism for private remedies. See Miller, Of Frankenstein Monsters and Shining Knights, supra note 1, at 669 ("The Advisory Committee's objectives in rewriting [Rule 23] were rather clear. It had few, if any,

perhaps being most frequently invoked in the idea that class actions deter harmful conduct by increasing the monetary cost of engaging in such conduct.[64] Perhaps not as commonly, commentators have also suggested that class actions provide a public benefit by advancing laws and norms.[65] The distinction between public and private effects is also captured in the concept of the "private attorney general," which entered into widespread legal parlance soon after the 1966 revisions to Rule 23.[66] Although the exact definition proves elusive, the concept of the "private attorney general" suggests that either litigants or attorneys involved in class actions serve a mix of private and public functions.[67] In general, the idea that class actions provide public benefits is powerful, as it implies there is more at stake in class actions than at first meets the eye.[68] As this section explains, each of the two justifications for class actions aligns with a distinct idea of how class actions are supposed to provide public benefits.

The taxonomy presented in this section examines the goals of class actions from the vantage point of two key groups of stakeholders: plaintiffs and the general public. It is worth acknowledging that there are other stakeholders who may benefit from class actions. For example, class actions can benefit courts by allowing more economical adjudication of disputes.[69]

---

revolutionary notions about its work product . . . . [T]he draftsmen conceived the procedure's primary function to be providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies."); see also Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (describing the categories of the original Rule 23, which were eliminated by the changes to Rule 23, as "obscure and uncertain"). See generally Kaplan, supra note 34, at 375–400 (discussing at length the reasons behind the 1966 revisions to Rule 23).

64. See infra note 76 and accompanying text.

65. See infra notes 83–85 and accompanying text.

66. See William B. Rubenstein, On What a "Private Attorney General" Is—And Why It Matters, 57 Vand. L. Rev. 2129, 2135 n.32 (2004) [hereinafter Rubenstein, Private Attorney General] (tabulating the use of the term "private attorney general" by decade and finding a significant increase between the 1960s and the 1970s). The general concept was described, however, before the term "private attorney general" was coined. See Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 715–17 (1941) (articulating a view that class actions serve as a supplement to government regulation by allowing private attorneys to correct wrongdoing missed by regulators).

67. Rubenstein, Private Attorney General, supra note 66, at 2130–31. Professor William B. Rubenstein suggests that where a case falls along the public–private gradient depends upon three core factors: (1) whether the client is the public or a private party (or, for that matter, a class of private parties); (2) whether the attorney is compensated through a fixed salary or in some fashion compensated conditionally on working on or succeeding in the lawsuit; and, (3) most importantly, whether the goal of deterrence is prioritized above the goal of compensation. Id. at 2137–42.

68. The idea that class actions serve an important public goal can be invoked to call for a degree of tolerance of apparent problems in class actions, such as attorney's fees being out of proportion to rates of compensation. See, e.g., Cox, Securities Class Actions, supra note 62, at 73–79 (defending securities class actions based on the fraud-on-the-market theory against the criticism that they are ineffective at compensation by arguing that they advance public welfare).

69. See, e.g., Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 155 (1982) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue

They sometimes even benefit defendants, as they provide defendants the ability to resolve class-wide liabilities all at once.[70] These could be considered "goals" of class actions, yet they are not described in the taxonomy presented here. Given that this is a taxonomy of the goals of class actions, the possible downsides of class actions are not the focus either. These topics should not be discounted. This section proposes, however, that the taxonomy presented here is the best starting point for understanding the battle lines in the class action war.

1. *Efficiency Goals.* — The efficiency justification suggests that class actions amplify the benefits of litigation not through qualitative change, but by making lawsuits more effective at achieving the benefits they are already capable of achieving without class treatment. Under this justification, the private goal of class actions is to reduce the cost of litigation, which allows plaintiffs to increase their net compensation. The Supreme Court expressed this view in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, in an opinion written by Justice Antonin Scalia:

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.[71]

Many of those who believe in the goal of compensation consider changes to *who* takes part in litigation to be a mere byproduct. In *Shady Grove*, Justice Scalia acknowledged that "some plaintiffs who would not bring individual suits for the relatively small sums involved [would] choose to join a class action" but downplayed the significance of this effect, stating that it has "no bearing . . . on [the defendants'] or the plaintiffs' legal rights."[72] He also argued this effect is consistent with the procedural mandate of the

---

potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." (second alteration in original) (internal quotation marks omitted) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979))); Roger Bernstein, Judicial Economy and Class Actions, 7 J. Legal Stud. 349, 363–66 (1978) (presenting data suggesting that class actions result in greater aggregate recovery amounts and per-person recovery amounts per unit of judicial time); Edward F. Sherman, Class Actions and Duplicative Litigation, 62 Ind. L.J. 507, 507 (1987) ("By trying a group of similar cases together in a single suit, the class action promises to prevent the unnecessary waste of judicial resources and the possibility of inconsistent judgments.").

70. See supra notes 40–41 and accompanying text. Indeed, there was once great deal of concern that the 1966 amendments would make Rule 23 friendlier to defendants because, it was believed, defendants would be able collude with plaintiff's attorneys to settle class-wide liabilities cheaply. See Brian T. Fitzpatrick, The Ironic History of Rule 23, at 7 (Vand. L., Rsch. Paper No. 17-41, 2017), https://ssrn.com/abstract=3020306 [https://perma.cc/9L93-TKT9]. Concerns over this kind of collusion continue to be expressed by some commentators, though they have been mitigated by the expanded role of trial courts in reviewing settlement agreements. See infra notes 100–101. Even if settlements are not collusive, it is reasonable to think that some defendants may prefer the finality offered by class litigation.

71. 559 U.S. 393, 408 (2010).

72. Id.

Rules Enabling Act[73] because it is merely an "incidental effec[t]."[74] This implies that the *non*incidental effect of class actions is aggregating valuable claims, as opposed to nonvaluable claims. By reducing the transactional costs associated with litigation, class actions increase the net compensation that plaintiffs gain from litigation. Thus, under the efficiency justification, the private goal of class actions boils down to increasing the compensation of plaintiffs with valuable claims.

Class actions may also be seen as serving a public goal of increasing monetary deterrence against misbehavior.[75] This goal also fits under the efficiency justification because, like the goal of increasing compensation, it is a way for class actions to amplify the existing benefits of litigation rather than to change the character of litigation. Many commentators have argued that class actions reduce misbehavior by making wrongdoers internalize more of the cost of their violations.[76] Of course, one reason for this is that class actions include nonvaluable claims along with valuable claims, and in the aggregate these nonvaluable claims can increase monetary deterrence. The fact that class members are opted in by default also makes

---

73. 28 U.S.C. § 2072 (2018) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence . . . . Such rules shall not abridge, enlarge or modify any substantive right.").

74. *Shady Grove*, 559 U.S. at 408 (alteration in original).

75. This Note uses the term "monetary deterrence" to avoid an ambiguity that is often present in discussions of deterrence, particularly in the context of class actions. *Monetary* deterrence only refers to changes in behavior that are motivated by the financial penalties imposed through litigation. This does not include changes in behavior caused by the mere existence of litigation, which may operate through "softer" mechanisms, such as fear of reputational damage or a desire to abide by laws and norms. This Note includes such effects in the category of "shaping of laws and norms." See infra section I.B.2.

76. E.g., Richard A. Posner, Economic Analysis of the Law 803 (9th ed. 2014) ("[W]hat is most important from an economic standpoint is that the violator be confronted with the costs of his violation—this preserves the deterrent effect of litigation—not that he pay them to his victims."); James D. Cox, The Social Meaning of Shareholder Suits, 65 Brook. L. Rev. 3, 39–40 (1999) [hereinafter Cox, Shareholder Suits] (arguing that deterrence is a more important goal than compensation); Kenneth W. Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. Legal Stud. 47, 60–61 (1975) (proposing that deterrence can serve as an independent justification for class actions); Fitzpatrick, The Conservative Case, supra note 14, at 103–13 (arguing that class actions deter wrongdoing); Gilles & Friedman, supra note 21, at 105 (arguing that deterrence is a more important goal than compensation); Beverly C. Moore, Jr., Does It Go Far Enough?, 63 A.B.A. J. 842, 842 (1977) ("The primary function of the class action is deterrence of harmful conduct . . . . Judicial efficiency and compensation of small claimants are merely desirable by-products.").

Professor John C. Coffee, Jr. has also argued that class actions are more effective at creating monetary deterrence than other public benefits because plaintiff's attorneys inherently tend to focus on less controversial cases with large amounts of money at stake. See John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 230–36, 280–84 (1983) (arguing that the plaintiff's attorney is risk averse and pursues relatively uncontroversial cases that represent a safe bet); Coffee, Understanding the Plaintiff's Attorney, supra note 7, at 682 (arguing that plaintiff's attorneys gravitate toward areas of law where "search costs" for quality cases are lowest).

participation more likely because some might prefer not to actively take an adversarial stance against a defendant with whom they might have future dealings. The goal of monetary deterrence is also compatible with the goal of compensation. Both of these goals are furthered by the inclusion of more valuable claims and are not furthered by the inclusion of more claimants per se. Additionally, joining together well-compensated class members enables better-funded lawsuits, which are more likely to achieve large awards or settlement amounts when facing well-funded defendants. It is important to recognize, however, that the goals of compensation and monetary deterrence are also separable, and it is possible to believe in one goal but not the other.[77]

2. *Representation Goals.* — The representation justification suggests that class actions make litigation better through qualitative change, by enabling lawsuits to represent more people and more grievances. Under this justification, the private goal of class actions is to provide access to justice to more claimants. The Supreme Court articulated this view in *Amchem Products, Inc. v. Windsor*, in which Justice Ruth Bader Ginsburg wrote that "[w]hile the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high," in designing the 1966 revisions to Rule 23 "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"[78] Justice Ginsburg elaborated on this point by quoting the Seventh Circuit case *Mace v. Van Ru Credit Corp.*:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[79]

Under this view, the priority is including more people with nonvaluable claims in the lawsuit, as they are least likely to otherwise obtain access to justice.

Those who believe in the goal of access to justice often consider the amount that plaintiffs are compensated to be a secondary priority. In *Van Ru*, a class action was brought on behalf of people who had received threatening debt collection letters.[80] The district court denied certification in part because it concluded the recovery would be limited to a "de minimis" amount of twenty-eight cents per class member.[81] On appeal, the Seventh

77. As section II.A discusses, congressional Republicans endorse the goal of compensation but not the goal of monetary deterrence. See infra notes 106–107 and accompanying text.

78. 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969)).

79. Id. (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

80. *Van Ru*, 109 F.3d at 340–41.

81. Id. at 344.

Circuit acknowledged that twenty-eight cents was a "de minimis" amount and characterized the monetary award as "nominal," yet it argued that class certification should not be barred on those grounds.[82] While one who upholds the goal of providing access to justice might not deny that compensation of class members is worthwhile, they would stress the importance of representing people in class actions in the first place—not only as a necessary prerequisite to compensating them, but as an important goal even in the absence of meaningful compensation. This is aligned with the priorities of class members with nonvaluable claims. These class members are not in a position to be choosy about the amount of compensation they receive from the class action, given the small size of their claims and the reality that they would not otherwise achieve any compensation at all. If these class members care about the class action, they may assign greater importance to the dignitary value of being represented in a class action that can vindicate grievances they hold and allows them to participate, even if only by proxy, in a meaningful judicial process.

The representation justification is also associated with the public goal of shaping laws and norms though lawsuits that are made possible by the inclusion of nonvaluable claims in class actions. Some commentators have suggested that the class as an entity has rights and interests worthy of recognition.[83] Some have made broader arguments that including more people in more lawsuits, and therefore giving rise to litigation over more kinds of grievances, yields important public benefits through qualitative effects such as shaping legal and ethical norms.[84] These arguments suggest that the public benefits of litigation go beyond monetary deterrence. They cut against the tendency to view litigation as a necessary evil and suggest that at least some litigation is a public good, independent and apart from any direct effects on private parties.[85] The goal of shaping laws and norms fits

---

82. Id.

83. Issacharoff, supra note 58, at 1060; David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913, 919 (1998). It is unorthodox to view a class as an entity that deserves its day in court. Still, this may be a useful model if the class is a stand-in for societal interests. For a critique of the entity model, see Redish, Wholesale Justice, supra note 5, at 148–56.

84. See, e.g., Cox, Shareholder Suits, supra note 76, at 5 (arguing that the very existence of a lawsuit subjects defendants to "social opprobrium," and therefore the possibility of a lawsuit serves as a nonmonetary deterrent to misbehavior); Lahav, Political Justification, supra note 62, at 3197–205 (arguing that class actions promote the rule of law by revealing information that is otherwise hidden, holding wrongdoers accountable, promoting equality before the law, and providing a forum for reasoned deliberation); Rubenstein, Positive Externalities, supra note 62, at 723–25 (arguing that class actions produce "positive externalities" in the form of decrees that guide future behavior, settlements that serve as a guide for future litigation, threats against misbehavior, and shifts in the burden of enforcement toward the private sector).

85. For an affirmative argument that litigation is a public good, not limited to the context of class actions, see generally Alexandra Lahav, In Praise of Litigation (2017). Professor Alexandra Lahav argues that litigation provides societal benefits through four mechanisms: (1) enforcing the law; (2) providing transparency by revealing information that informs

within the representation justification because, like the goal of providing access to justice, it involves qualitatively changing litigation by making it more representative. These two goals are also clearly compatible, as both goals are furthered by the inclusion of a greater number and diversity of claimants in class actions.

* * *

This section has described two broad justifications for class actions and their associated goals. This taxonomy is summarized in Table 1. This section has situated these goals at the root of doctrinal and academic debates surrounding class actions, suggesting that many debates are motivated or shaped by people siding with some of these goals over others.

TABLE 1: THE GOALS OF CLASS ACTIONS

	Efficiency Goals	Representation Goals
Private Goals	*Compensation:* Class actions enable claimants to share the transactional costs of litigation, resulting in greater net compensation. This is the priority of plaintiffs with valuable claims, who do not need class actions for access to justice.	*Access to Justice:* Class actions allow more claimants and more grievances to be represented in the legal system. This is the priority of plaintiffs with nonvaluable claims, who cannot feasibly seek redress on their own.
Public Goals	*Monetary Deterrence:* Class actions increase monetary penalties for legal violations, thereby deterring misbehavior.	*Shaping Laws and Norms:* Class actions give rise to lawsuits over a wider range of grievances, and these new types of lawsuits have a significant impact over legal precedent and societal norms.

This section's discussion of the theoretical underpinnings of the goals of class actions supports two observations. First, within each justification for class actions, there appears to be no meaningful tension between the private goal and the public goal. That is, when one considers the pair of efficiency goals (compensation and monetary deterrence) or the pair of representation goals (access to justice and shaping laws and norms), the two goals within each pair are perfectly compatible. This is not to suggest that the pairs cannot be separated—people can choose to espouse the private goal without the public goal, or vice versa. In general, it seems likely that people who believe class actions serve a public goal are those who prefer a larger role for class actions, while those who only believe in a private goal prefer a smaller role for class actions.

Second, there *is* a meaningful tension between the efficiency goals and the representation goals. For one thing, efficiency and representation

public and private decisions; (3) enabling participation in self-government; and (4) equalizing opportunities to speak and be heard. Id. at 1–2.

are different justifications for class actions, each having deep roots in class action history. There is also a simple conceptual difference between them: Efficiency goals seek to amplify the existing effects of litigation while representation goals seek to qualitatively change litigation. More concretely, efficiency goals and representation goals suggest different prescriptions for class actions: Efficiency goals are furthered by the inclusion of *more valuable claims* while representation goals are furthered by the inclusion of *more claimants*.

This raises an important conceptual question: Is it reasonable and consistent to believe in *both* efficiency goals and representation goals? To put it slightly differently, is it reasonable and consistent to believe equally in the efficiency justification and the representation justification? Part II demonstrates the current relevance of this question to the politics of class actions, explaining that there is currently a divide between Republicans and Democrats over whether class actions are justified by efficiency or representation. Part III endeavors to answer this question, arguing that the efficiency goals and the representation goals can, in fact, be reconciled.

II. TWO LEGISLATIVE AGENDAS

This Part describes how the goals of class actions shape the opposing legislative agendas of Republicans and Democrats in Congress. This Part focuses on two bills, each of which passed the House of Representatives but did not become law. Section II.A discusses the Fairness Act of 2017, a Republican bill that would impose restrictions on class actions. Section II.B discusses the FAIR Act of 2019, a Democratic bill that would invalidate arbitration agreements in order to increase the availability of class actions. The Fairness Act and the FAIR Act are both named in reference to fairness, but this Part shows that they define fairness differently. Republicans only believe in the goal of compensation, which is a goal associated with the efficiency justification; Democrats believe in the goals of providing access to justice and shaping laws and norms, thereby embracing both of the goals associated with the representation justification. This leads to a conclusion that a fundamental disagreement underlying this debate is over the proper justification for class actions: Republicans believe in the efficiency justification while Democrats believe in the representation justification.

This Part views the Fairness Act and the FAIR Act as representing at least some of the genuine legislative desires of Republicans and Democrats, respectively. Both bills were supported and opposed along partisan lines, and neither came close to becoming law.[86] Indeed, if passing legislation

86. The Fairness Act was passed by a Republican-controlled House of Representatives in 2017 but was never put up for a vote in the Senate. See infra notes 120–121 and accompanying text. Conversely, in 2019, the FAIR Act was passed by a Democratic-controlled House of Representatives but was never put up for a vote in the Senate. See infra notes 141–142 and accompanying text. Even if it had passed the Senate, the FAIR Act would have been vetoed by then-President Donald Trump. See infra note 140.

related to class actions and arbitration agreements will require give-and-take compromise between Republicans and Democrats, these bills are excellent examples of what not to do. But it is precisely because these bills were not crafted through compromise that they can be taken as reflections of reforms that Republicans and Democrats would genuinely *like* to pass.[87] Of course, anyone familiar with the politics of class actions is also likely to suspect that these bills are motivated by more basic desires to decrease or increase the presence of class actions in society. That may be true as well. But the point stands that these bills show *how* each party would increase or decrease class actions and reveal underlying assumptions about what class actions are for.

This Part also highlights empirical evidence about class actions that is relevant to the arguments of both sides of the debate. There is more such evidence available than ever before.[88] That is a promising development, as lamenting a lack of empirical evidence has long been a mainstay of commentary regarding class actions.[89] Perhaps it is time for that to change. This Part also shows, however, that simply having more empirical evidence does little to advance the debate when the two sides have different views of the

87. Bills that are understood not to have a realistic chance of becoming law are sometimes called "dead-on-arrival bills." Jeremy Gelman, Rewarding Dysfunction: Interest Groups and Intended Legislative Failure, 42 Legis. Stud. Q. 661, 663–64 (2017) (defining dead-on-arrival bills). The most prominent examples of dead-on-arrival bills in recent years were repeated efforts by congressional Republicans to repeal the Affordable Care Act in the face of an inevitable veto by President Obama. See, e.g., Mike DeBonis, Obama Vetoes Republican Repeal of Health-Care Law, Wash. Post (Jan. 8, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/01/08/obama-vetoes-republican-repeal-of-health-care-law/ (on file with the *Columbia Law Review*).

Political scientists have found support for the intuitive view that dead-on-arrival bills express the partisan preferences of the party voting in favor of the bill, without accommodating the preferences of the opposing party. See Frances E. Lee, Insecure Majorities: Congress and the Perpetual Campaign 142–43 (2016) (discussing the proliferation in Congress of "partisan message votes," which are votes taken to showcase partisan positions that the party voting in favor supports and that the other party opposes); Gelman, supra, at 661 (arguing that dead-on-arrival bills are intended to accrue political support from partisan interest groups).

88. For example, empirical evidence is being brought to bear on how frequently class members file claims to obtain their share of the recovery. See infra note 96 and accompanying text. Attorney's fees are being compared to class recovery amounts, the amount of work attorneys do, and other variables. See infra notes 104–105 and accompanying text. Empirical evidence is also used to compare the frequency with which arbitration and class actions are used as vehicles for people to seek relief. See infra note 128 and accompanying text.

89. See, e.g., Jonah B. Gelbach & Deborah R. Hensler, What We Don't Know About Class Actions but Hope to Know Soon, 87 Fordham L. Rev. 65, 66–67 (2018) (discussing the lack of empirical data about class actions and describing the kinds of data needed); Deborah R. Hensler, Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All This Time?, 165 U. Pa. L. Rev. 1599, 1602–03 (2017) (same); Miller, Of Frankenstein Monsters and Shining Knights, supra note 1, at 666 ("[D]espite the attention that has been riveted on rule 23, we have precious little empiric evidence as to how it actually has been functioning, in terms of either its alleged benefits or supposed blasphemies.").

underlying goals of class actions. Until this underlying disagreement is addressed, empirical evidence will not prevent Republicans and Democrats from talking past one another.

A. *The Republican Proposal: The Fairness Act of 2017*

The Fairness Act of 2017 is premised on the view that class actions are broken and must be curtailed. On March 7, 2017, the House Judiciary Committee, which was under Republican control at the time, released a report (the Republican Report) recommending passage of the Fairness Act.[90] This report is an utterly scathing assessment of class actions. It begins by claiming that class actions are "putting . . . U.S. companies at a distinct economic disadvantage when competing with companies worldwide," and that "[f]ederal judges are crying out for Congress to reform the class action system."[91]

The Republican Report takes the view that the only goal of class actions is to increase the compensation of class members—and that class actions are failing at that goal. The central problem the report describes is that "[m]ost class actions (particularly class actions brought on behalf of consumers) produce no benefits for class members."[92] In particular, it argues that, in consumer class actions, "less than [five percent] of class members on average" receive compensation,[93] and that even when compensation is offered to the class, "only the tiniest fraction of a percent of consumer class action members bother to claim the compensation awarded them."[94]

Such arguments that class actions are performing poorly at compensation have their fair share of support among commentators.[95] They arguably also have empirical support. Two years after the Republican Report, an FTC study found that the median rate of class members filing claims was nine percent.[96] This is far more than "the tiniest fraction of a percent," yet it does not refute the general idea that few class members receive compensation.

---

90. H.R. Rep. No. 115-25 (2017).

91. Id. at 2.

92. Id. at 3.

93. Id.

94. Id. at 21.

95. E.g., William W. Bratton & Michael L. Wachter, The Political Economy of Fraud on the Market, 160 U. Pa. L. Rev. 69, 94–101 (2011) (stating that shareholders compensated by securities fraud class actions based on the fraud-on-the-market theory recover only a fraction of their losses); Mullenix, supra note 4, at 418–20 (arguing that there is little evidence that class actions effectively compensate victims of wrongdoing and citing some evidence that they do not).

96. FTC, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns 11, 13 (2019), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf [https://perma.cc/C86E-W9F4] (analyzing 149 consumer class actions and finding a median claim filing rate of nine percent).

The Republican Report also reveals its focus on the goal of compensation by making arguments that plaintiff's attorneys make too much money from class actions in comparison with the compensation of the class. The report argues that class actions permit "unscrupulous lawyers to fill classes with hundreds and thousands of unmeritorious claims and use those artificially inflated classes to force defendants to settle the case."[97] It argues that "[w]hen cases are settled, the fees for lawyers representing the class take up a large share of the settlement, typically millions of dollars per case."[98] It also claims that "because so few class members receive settlement payments in most cases, the amount paid to lawyers is often many times the amount actually paid to class members."[99]

Again, the idea that plaintiff's attorneys face distorted incentives has some support among commentators.[100] To combat these concerns, trial courts are responsible for ensuring that class action settlements reflect the interests of the class.[101] Still, some argue there should be additional limits to prevent fee awards that are outsized relative to the compensation received by the class.[102] As for empirical evidence, the Republican Report does not cite data to support its argument that attorney's fees are too high.[103] One recent empirical study might cut against this argument, finding that attorney's fees are closely correlated with recovery amounts.[104] Even so, it is reasonable to be concerned that attorney's fees are often higher than they need to be, especially when the class receives a particularly large financial award.[105]

---

97. H.R. Rep. No. 115-25, at 2.

98. Id. at 3.

99. Id.

100. Some commentators have argued that class action plaintiff's attorneys are incentivized to agree to settlements early in the litigation process on terms that are favorable to them and to defendants, but not as favorable to the class as whole. See Coffee, Understanding the Plaintiff's Attorney, supra note 7, at 688–90; Koniak & Cohen, supra note 6, at 1056–57; see also Martin H. Redish, Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals, 2003 U. Chi. Legal F. 71, 90–93 (distinguishing between attorneys who seek client compensation and those who seek only their own fee).

101. Manual for Complex Litigation (Fourth) § 21.61 (2004) (outlining the "critical" role of the trial court in reviewing class action settlements by examining "whether the interests of the class are better served by the settlement than by further litigation," and noting that "the adversariness of litigation is often lost after the agreement to settle").

102. E.g., Mullenix, supra note 4, at 444–46 (discussing possible reforms to attorney financing, such as public financing of class litigation and a loser-pays rule).

103. The report simply describes three examples of class actions in which class members received no compensation while attorneys were well compensated. H.R. Rep. No. 115-25, at 21–22.

104. Theodore Eisenberg, Geoffrey Miller & Roy Germano, Attorneys' Fees in Class Actions: 2009–2013, 92 N.Y.U. L. Rev. 937, 940 (2017) (describing the relationship between the monetary class recovery amount and attorney's fees as "amazingly regular").

105. This is the conclusion of a recent empirical study of large securities fraud class action settlements. Stephen J. Choi, Jessica Erickson & A. C. Pritchard, Working Hard or Making Work? Plaintiffs' Attorney Fees in Securities Fraud Class Actions, 17 J. Empirical

It is important to observe that the Republican Report does not consider monetary deterrence to be a goal of class actions, even though, like the goal of compensation, the goal of monetary deterrence is associated with the efficiency justification. The Republican Report states that "the *whole purpose* of class actions is to redress the injuries sustained by class members."[106] It also criticizes the practice of cy pres awards, which give any award money that cannot be distributed to class members to nonprofit organizations.[107] Cy pres awards are consistent with the goal of monetary deterrence but not the goal of compensation, so this stance is further evidence that the Republican Report rejects monetary deterrence. The present compensation-only stance of Republicans contrasts with the views of many conservative-leaning legal commentators, who have often taken the goal of monetary deterrence more seriously.[108]

The Fairness Act contains two categories of provisions: Some would curtail class actions in a relatively arbitrary fashion, while others would curtail only class actions that are less effective at compensation. Both of these are logical avenues of reform for legislators who believe class actions are failing at an essential goal of compensation. In the more arbitrary category, the most significant provision is a requirement that federal courts only certify class actions for monetary relief if "each proposed class member suffered the same type and scope of injury as the named class representative[s]."[109] Given that Rule 23 already includes requirements that tend to ensure class members have suffered similar types of harm,[110] the effect of this provision would be to eliminate class actions in which class members are entitled to different amounts of damages, without any particularized rationale for targeting these class actions.[111] This provision is best understood as a broadside attack on class actions.

Other provisions of the Fairness Act would require class actions to be more effective at compensation. One provision requires plaintiffs to demonstrate, as a prerequisite to class certification, that there is "a reliable and administratively feasible mechanism . . . for distributing directly to a substantial majority of class members any monetary relief secured for the

---

Legal Stud. 438, 464 (2020) (arguing that attorneys are rewarded with far higher fees and appear to work less efficiently when working on large settlement cases, and that "being appointed as lead counsel in a securities class action that is likely to end with a large settlement is like receiving a winning lottery ticket").

106. H.R. Rep. No. 115-25, at 19 (emphasis added).

107. Id. at 24 (describing cy pres awards as a "troubling trend" that "raises serious questions about the purpose of the class action device").

108. E.g., Fitzpatrick, The Conservative Case, supra note 14, at 103–13; Posner, supra note 76, at 803; Dam, supra note 76, at 60–61.

109. H.R. 985, 115th Cong. § 1716(a) (2017).

110. See supra notes 49–51 and accompanying text.

111. Howard M. Erichson, Searching for Salvageable Ideas in FICALA, 87 Fordham L. Rev. 19, 21–22 (2018) (concluding that this provision of the Fairness Act would restrict class actions without serving any particularized rationale).

class."[112] The Republican Report justifies this provision by stating that "[b]ecause the whole purpose of class actions is to redress the injuries sustained by class members, the system should ensure that any benefits obtained in such cases can actually be delivered to those class members."[113] Notably, this provision would limit nonvaluable claims, as it is expensive and often infeasible to distribute money to a "substantial majority" of class members when most class members are only entitled to small amounts of money—and it is harder still to devise a mechanism for doing so at the class certification stage.[114] The Fairness Act also limits attorney's fees based on monetary relief to "a reasonable percentage of any payments directly distributed to and received by class members."[115] Further, attorney's fees based on monetary relief cannot be paid until the distribution of the monetary recovery to class members is completed and cannot exceed "the total amount directly distributed to and received by all class members."[116] These provisions clearly assume that compensation is the primary yardstick by which the value of class actions, and therefore also the work of plaintiff's attorneys, should be assessed.

In explaining their unanimous opposition to the Fairness Act, Democrats had an entirely different way of understanding the purpose of class actions. The dissenting views of Democratic members were included at the end of the Republican Report.[117] They did not engage in any depth with the arguments that class actions result in too little compensation for class members and excessive attorney's fees. Instead, the Democrats emphasized that the bill would deny small claimants access to justice.[118] They also argued that because class actions provide small claimants with access to justice, they "are particularly vital in consumer protection, civil rights, antitrust, personal injury, and employment cases."[119] This alternative view

112. H.R. 985 § 1718(a).

113. H.R. Rep. No. 115-25, at 19 (2017).

114. See John C. Coffee, Jr., How Not to Write a Class Action "Reform" Bill, CLS Blue Sky Blog (Feb. 21, 2017), https://clsbluesky.law.columbia.edu/2017/02/21/how-not-to-write-a-class-action-reform-bill/ [https://perma.cc/83V4-NU7Q] ("It makes no sense to deny certification simply because a 'substantial majority' of the class cannot be identified at the class certification stage (when it is both costly and infeasible to reach them).").

115. H.R. 985 § 1718(b). In the context of multidistrict litigation, the Fairness Act also imposes a hard ceiling of twenty percent on attorney's fees. Id. sec. 105(l).

116. Id.

117. H.R. Rep. No. 115-25, at 45–63.

118. Id. at 45 ("Class actions are a critical tool for allowing those injured by corporate wrongdoing to receive some measure of justice by making it economically feasible to pursue claims that are too small or too burdensome to pursue on an individual basis, but are nonetheless meritorious."). Only after emphasizing the goal of providing access to justice did the dissenting Democrats also mention efficiency gains from class actions—though, interestingly, they emphasized the efficiency benefits to courts, not plaintiffs. Id. ("Finally, they promote the efficient consideration of numerous cases raising substantially the same factual and legal questions, thereby lessening burdens on courts.").

119. Id.

of the goals of class actions was largely ignored by the Republicans. Unsurprisingly, the Fairness Act passed the House of Representatives along partisan lines, with Republicans voting 220-14 in favor and Democrats voting 0-187 opposed.[120] It was never put up for a vote in the Senate.[121]

B. *The Democratic Proposal: The FAIR Act of 2019*

The FAIR Act of 2019 is premised on the view that class actions are working, and that the real threat lies in mandatory arbitration agreements that preclude class litigation.[122] After Democrats won control of the House of Representatives in the 2018 midterm election, Republican concerns with class actions were set aside. On September 13, 2019, the House Judiciary Committee, now under Democratic control, released a report (the Democratic Report) recommending passage of the FAIR Act.[123] The Democratic Report argues that mandatory arbitration agreements should be invalidated to "restore access to justice for millions of Americans who are currently locked out of the court system."[124]

The Democratic Report takes the view that an essential goal of class actions is providing access to justice, so that more people and more grievances are included in litigation. The report does not analyze whether class actions achieve greater compensation than arbitration, thereby ignoring the criterion used by the Republican Report in assessing whether class actions are working.[125] Instead, the Democratic Report focuses on whether it will be feasible for people to pursue their claims at all without class actions, stating that "arbitration clauses appear to dissuade consumers from adjudicating disputes altogether" and that "the lower probability of victory[] and meager legal fees associated with mandatory arbitration may also discourage attorneys from representing individuals in arbitration proceedings."[126]

Many legal commentators share the concern that mandatory arbitration agreements lock small claimants out of the legal system.[127] A 2015

120. Roll Call 148, Clerk of the U.S. House of Representatives (Mar. 9, 2017), https://clerk.house.gov/Votes/2017148 [https://perma.cc/Y75S-G7PA].

121. Alison Frankel, Class Action Reform Isn't Dead. It's Just Not Coming From Congress., Reuters (Dec. 28, 2018), https://www.reuters.com/article/legal-us-otc-class action-idUSKCN1OR1G1 [https://perma.cc/28TH-T5RU] ("The [Fairness Act] passed the House [of Representatives] with alacrity but never even made it to a vote in the Senate Judiciary Committee, let alone [before] the full body.").

122. For background on the relationship between mandatory arbitration agreements and class actions, see supra notes 10–15 and accompanying text.

123. H.R. Rep. No. 116-204 (2019).

124. Id. at 4.

125. See id. at 6 ("Although proponents of arbitration claim that it decreases litigation costs for consumers, consumers often do not receive any benefit of reduced costs through forced arbitration.").

126. Id.

127. E.g., Jean R. Sternlight, Tsunami: *AT&T Mobility L.L.C. v. Concepcion* Impedes Access to Justice, 90 Or. L. Rev. 703, 722–24 (2012); Editorial, Gutting Class Action, N.Y. Times (May 12, 2011), https://www.nytimes.com/2011/05/13/opinion/13fri1.html (on file with the *Columbia*

study by the Consumer Financial Protection Bureau also supports this conclusion, finding that between 2010 and 2012, approximately thirty-two million consumers of financial products were eligible for relief each year as class members in class actions, while only 600 analogous arbitration cases and 1,200 analogous individual federal lawsuits were filed each year.[128]

The Democratic Report also takes the view that class actions serve a public goal of shaping laws and norms, arguing that excluding many people and grievances from the legal system eliminates lawsuits that have a public importance beyond monetary deterrence. It argues that arbitration will fail to challenge certain categories of misconduct that are only feasible to litigate in class actions, and that arbitration decisions do not have the same legitimacy as court decisions because "there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process."[129] Moreover, the Democratic Report argues that the secretive nature of arbitration makes it less effective at stopping wrongdoing than litigation that takes place in the open.[130] Notably absent from the Democratic Report is any claim that arbitration fails to prevent misbehavior because it does not provide enough monetary deterrence.

The FAIR Act is designed to advance a fundamental priority of including more people in class actions. The stated purpose of the bill is to "prohibit agreements and practices that interfere with the right . . . to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute."[131] For these four categories of disputes, any predispute agreements that would bind parties to arbitration or waive the opportunity to participate in a class action are made unenforceable.[132] The Democratic Report justifies these four categories by explaining that they are expected to consist mainly of claims that would not be litigated in court without the availability of class actions.[133] Commentary about this bill has recognized that it is intended to give more people the ability to participate in litigation.[134]

Law Review) (describing *AT&T Mobility v. Concepcion* as creating "major setbacks for individuals who may not have the resources to challenge big companies in court or through arbitration").

128. Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers, https://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf [https://perma.cc/Y32N-N8GG] (last visited Aug. 5, 2021). For the full report to Congress, see Consumer Fin. Prot. Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/UL7T-8T7Q].

129. H.R. Rep. No. 116-204, at 4–6 (2019).

130. Id. at 11–12 (citing the example of employers sexually harassing employees as a type of violation that is more likely to stop when publicly litigated).

131. H.R. 1423, 116th Cong. sec. 2 (2019).

132. Id. § 402(a).

133. H.R. Rep. No. 116-204, at 9–15.

134. See, e.g., Hugh Baran, End Forced Arbitration to Honor Justice Ginsburg's Legacy, Bloomberg L. (Oct. 2, 2020), https://news.bloomberglaw.com/daily-labor-report/end-

This time, it was Republicans who offered a reminder that there is an alternative way of understanding the purpose of class actions. The end of the Democratic Report includes the dissenting views of Republican Congressman Doug Collins, who was the Ranking Member of the House Judiciary Committee.[135] Congressman Collins largely disregards the Democrats' concern that many people who would participate in class actions do not participate in arbitration, and he instead focuses on whether those who participate in arbitration achieve greater compensation than those who participate in class actions.[136] Having adopted this criterion, he argues that arbitration is a "speedier, less expensive and more flexible means of dispute resolution than litigation."[137] For example, he argues that employees who engage in arbitration are more likely to prevail and likely to achieve greater compensation than employees who engage in litigation,[138] and that participating in arbitration is cheaper than going to court.[139] Less than a week after the Democratic Report was released, the administration of then-President Trump expressed the same views and indicated the FAIR Act would be vetoed if it were to pass Congress.[140] Like the Fairness Act, the FAIR Act passed the House of Representatives along partisan lines, this time with Democratic members voting 223-2 in favor and Republican members voting 2-183 opposed.[141] Also like the Fairness Act, it was never put up for a vote in the Senate and never became law.[142]

Democrats currently control both houses of Congress and the presidency, but it would be a mistake to assume they can now pass the FAIR Act without compromise. They are likely to encounter obstacles in the Senate, where they will face the prospect of a filibuster and cannot afford to lose

---

forced-arbitration-to-honor-justice-ginsburgs-legacy/ (on file with the *Columbia Law Review*) ("The FAIR Act would, in short, restore workers' rights to collectively hold their employers accountable for lawbreaking before judges and juries."); Alexia Fernández Campbell, The House Just Passed a Bill That Would Give Millions of Workers the Right to Sue Their Boss, Vox (Sept. 20, 2019), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act/ [https://perma.cc/CC2D-TNEV] ("[The FAIR Act] would restore access to the courts to more than sixty million US workers.").

135. H.R. Rep. No. 116-204, at 29–45.

136. Id. at 32–44.

137. Id. at 30.

138. Id. at 42–44.

139. Id. at 32–34.

140. OMB, Exec. Off. of the President, Statement of Administration Policy: H.R. 1423—Forced Arbitration Injustice Repeal (FAIR) Act (Sept. 17, 2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/09/SAP_HR-1423.pdf [https://perma.cc/D654-X4CW] (stating that arbitration leads to "lower costs, faster resolution, and reduced burden on the judiciary" and that the FAIR Act would lead to more costly and inefficient litigation).

141. Roll Call 540, Clerk of the U.S. House of Representatives (Sept. 20, 2019), https://clerk.house.gov/Votes/2019540 [https://perma.cc/K7VN-FYUJ].

142. The FAIR Act was introduced but never voted on in the Senate, which was under Republican control. S. 610, 116th Cong. (2019).

the votes of conservative Democratic senators.[143] It is worth remembering that Republicans were in a similar position during the 2017–2019 congressional term, yet the Fairness Act did not become law. The two parties are at an impasse.

* * *

This Part's analysis of the Fairness Act and the FAIR Act shows that Republicans and Democrats are sharply divided over the goals of class actions. Republicans only believe in the goal of compensation, an efficiency goal. Democrats believe in the goals of access to justice and shaping laws and norms, thereby embracing both representation goals.

This implies there are two cleavages between the Republican view and the Democratic view. First, Republicans and Democrats disagree over whether class actions serve any public purpose: Republicans do not believe in any private goal while Democrats believe in the public goal of shaping laws and norms. As section I.B suggests, this cleavage over whether class actions should serve a public goal does not implicate any fundamental conceptual tension. If Republicans wake up tomorrow and start believing in the goal of monetary deterrence, a public goal, reconciling that goal with the goal of compensation would not raise any difficulties. The fact that Republicans do not believe in any public goal reflects their vision for a limited role for class actions. The fact that Democrats do believe in a public goal reflects their vision for a much larger role for class actions. As important as this cleavage is, it is not hard to find a middle ground.

More fundamentally, Republicans and Democrats disagree over the justification for class actions. Republicans favor the efficiency justification while Democrats favor the representation justification. As section I.B suggests, this cleavage raises a greater question over the compatibility of the Republican view and the Democratic view—whether it is reasonable to hold a combination of both views or find common ground between them. If there is any hope for compromise between Republicans and Democrats, it requires bridging the gap between the efficiency justification and the representation justification.

III. A PATH FORWARD

This Part presents a path toward reconciling the goals of class actions discussed in this Note. As Part I explains, the goals of class actions are separated by a divide between two broad justifications for class actions, efficiency and representation. As Part II explains, a difference in views regarding the goals of class actions is contributing to an impasse between Republicans and

143. See Mark Kantor, What the U.S. Election Will Mean for Arbitration in the U.S., Mediate.com (Nov. 2020), https://www.mediate.com/articles/uselectionarbitraion1.cfm [https://perma.cc/QPN4-E2GW] (arguing that the 2020 election could not put Democrats in a position to pass the broad reforms to arbitration agreements encompassed in the FAIR Act).

Democrats over legislation related to class actions, and a central cleavage between the Republican view and the Democratic view is an underlying disagreement over whether the proper justification for class actions is efficiency or representation. This Part argues that the goals of class actions can, in fact, coexist in peace. Section III.A presents a framework for distinguishing between those class actions that are supposed to serve efficiency goals and those class actions that are supposed to serve representation goals. This reconciles the efficiency justification and the representation justification, showing that core principles of both can be sustained within a single analytical framework. Section III.B then provides examples of legislative compromises that can be built on this reconciled understanding of the goals of class actions and that may be palatable to both Republicans and Democrats.

A. *Reconciling the Goals of Class Actions*

This section presents a framework for determining whether class actions are primarily supposed to serve efficiency goals or representation goals. It demonstrates this framework by applying it to a securities fraud class action and a consumer class action. This framework has implications for the current impasse between Republicans and Democrats, which section III.B elaborates upon, but it has broader relevance as well. It resolves the deeper conceptual tension between the efficiency justification and the representation justification. The viability of this framework implies that the two justifications for class actions are compatible, and that it is consistent and reasonable to adopt a reconciled view of class actions that includes both efficiency goals and representation goals.

This framework rests on the proposition that, as a general matter, efficiency and representation are on equal footing as justifications for class actions. This Note has shown that it is typically assumed that either efficiency or representation is the more important justification for class actions, in both doctrinal[144] and political debates.[145] Yet efficiency and representation are both foundational procedural objectives.[146] They are inexorably tied together: If litigation becomes less efficient, justice becomes scarcer; if justice becomes scarce, it takes more resources to achieve the same just outcomes. It is also worth recalling Justice Story's comment that the class action "does not seem to be founded on any positive and uniform principle," as well as Lord Eldon's prioritization of the hybrid purpose of "convenient administration of justice."[147] These words counsel against any rigid assumption that, between efficiency and representation, one justification is generally more important than the other.

---

144. See supra section I.B.

145. See supra Part II.

146. See, e.g., Fed. R. Civ. P. 1 (stating that the Federal Rules of Civil Procedure should be used "to secure the just, speedy, and inexpensive determination of every action and proceeding").

147. See supra notes 32–33 and accompanying text.

The framework offered by this section considers efficiency and representation to be on equal footing in the sense that neither of the two justifications *generally* predominates over the other, but it instead proposes that class treatment has different justifications and serves different goals in different contexts. This framework consists of two criteria. One criterion determines whether the primary *private* goal of a class action is compensation (an efficiency goal) or access to justice (a representation goal). The other criterion determines whether the primary *public* goal of a class action is monetary deterrence (an efficiency goal) or shaping laws and norms (a representation goal). Sometimes a criterion may indicate that a class action has a mix of two private goals or a mix of two public goals. Nonetheless, it is usually possible to determine that such a criterion leans one way more than the other.

The private criterion considers whether the goal of a class action from the perspective of class members is increasing compensation or providing access to justice. This criterion asks what proportion of the relief is directed at claimants who might have achieved compensation without the class action, and what proportion is directed at claimants who would not have received any compensation without the class action. The more relief is directed at those who might have received compensation without the class action, the more the class action's primary private goal is to increase compensation, which is an efficiency goal. The more relief is directed at those who would *not* have been compensated without the class action, the more the class action's primary private goal is to provide access to justice, which is a representation goal. The main question that guides the determination of the private criterion is how much of the relief is sought by class members with valuable claims and how much is sought by class members with nonvaluable claims.

The public criterion considers whether the goal of a class action from the perspective of the broader public is to provide monetary deterrence or to shape laws and norms. This criterion asks which of these effects has greater potential to prevent future violations similar to the one the defendant is alleged to have committed. Deterring violations through monetary penalties is an efficiency goal, while shaping laws and norms prohibiting violations is a representation goal. The main question that guides the determination of the public criterion is whether the defendant's violation resulted more from perverse monetary incentives or more from underdeveloped legal or ethical norms.

For most class actions, these two criteria lead to an ultimate conclusion as to whether the class action is primarily supposed to serve efficiency goals or representation goals. A class action may be described as "efficient" if it is primarily supposed to serve the goals of compensation and monetary deterrence, which are associated with the efficiency justification. A class action may be described as "representational" if it is primarily supposed to serve the goals of providing access to justice and shaping laws and norms,

which are associated with the representation justification. Even class actions that have a mix of efficient and representational qualities can usually be identified as being mostly efficient or mostly representational.

Of course, these criteria offer an analytical framework, not a precise dividing line.[148] A criterion will sometimes result in a mixed determination. When that happens, the other criterion may still provide guidance. If the two criteria point in opposite directions, one suggesting the class action is efficient and the other suggesting it is representational, one may break the tie by asking whether the relevant private goal or the relevant public goal is more salient.

The rest of this section demonstrates that this framework is workable by applying it to two class actions, a securities fraud class action and a consumer class action. The legal claims in these examples are common among these categories of class actions. As is typical, both class actions ended in settlements.[149] These examples are analyzed using only the kinds of information and inferences that are readily available to courts.

1. *Example: A Securities Fraud Class Action.* — This section's framework for distinguishing between efficient and representational class actions is first demonstrated through an analysis of a securities fraud class action, *In re BHP Billiton Ltd. Securities Litigation*.[150] *Billiton* had a mix of two private goals, compensation and access to justice, as the class included a mix of claimants who would have litigated their claims without a class action and claimants who would not have done so. Thus, the private criterion results in a mixed determination. The public goal of *Billiton* was monetary deterrence, a goal aligned with the efficiency justification. This leads to a conclusion that while *Billiton* included a mix of efficient and representational elements, it was probably more efficient than representational. This analysis of *Billiton* also demonstrates that this section's framework can provide guidance even when one of the criteria results in a mixed determination.

Billiton arose out of the collapse of a dam at an iron ore mining complex in Brazil, a disaster that killed nineteen people, injured many others, and caused extensive property and environmental damage.[151] The dam was owned and operated by Samarco Minercão (Samarco), a Brazilian company of which BHP, a large energy company, was fifty-percent owner.[152] The class

148. A more precise dividing line would not necessarily be a more accurate one. For an example of a dividing line between efficient and representational class actions that is more precise but less accurate than the complete framework presented in this section, see infra section III.B.2.

149. See infra notes 155, 172–173 and accompanying text.

150. 276 F. Supp. 3d 65 (S.D.N.Y. 2017).

151. Id. at 70–71.

152. Id. at 70. BHP is dual listed but operates as a unified business entity with a single board of directors and management team. Id. at 70. BHP is comprised of two corporate entities, which were named BHP Billiton Limited and BHP Billiton Plc at the time. Id. These have since been renamed to BHP Group Limited and BHP Group Plc, respectively. Press Release, Change of Name to BHP Group, BHP (Nov. 20, 2018), https://www.bhp.

action was brought against BHP by its investors, who alleged that BHP was aware of increasingly dire warnings that the dam might burst.[153] Claims were brought under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, which provide a cause of action when a defendant knowingly misrepresents or omits information that is material to investors, where relying on those misrepresentations or omissions causes investors economic loss.[154] The trial court agreed that certain statements by BHP gave rise to liability under Section 10(b) and Rule 10b-5, including the statement "[w]e maintain a relentless focus on the health and safety of our people and the communities in which we operate," as well as various statements downplaying the toxicity of the mudflow released by the dam's collapse.[155] *Billiton* resulted in a $50 million settlement.[156]

The *Billiton* class included a fair mix of class members who might have been compensated even without the class action and those who would not have been compensated without the class action. If a court were to explore whether some of the class members had valuable claims, it might start by considering the class members who applied to be lead plaintiff. In a securities fraud class action, the role of lead plaintiff is presumptively reserved for the class member with the greatest financial interest in the litigation.[157] The class member who was appointed lead plaintiff in *Billiton* had a claim of $473,000; other class members who filed unsuccessful motions seeking to be appointed lead plaintiff had claims of $114,000, $107,000, $80,000, $60,000, $44,000, and $32,000 (all amounts rounded to the nearest thousand).[158] It can be assumed that at least some of these are valuable claims

---

com/media-and-insights/news-releases/2018/11/change-of-name-to-bhp-group/ [https://perma.cc/E6AF-8N3X].

153. *Billiton*, 276 F. Supp. 3d at 72–74, 77.

154. Id. at 77–78. For a class action proceeding under Section 10(b) and Rule 10b-5, it is not necessary to show that all members of the class knew about and actually relied on a misleading statement. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 277–78 (2014). This is based on the fraud-on-the-market theory, which assumes that public and material information is incorporated into the price of a security in an efficient market, and that any investor who buys or sells stock at the market price relies on the integrity of that price. Id. at 268.

155. *Billiton*, 276 F. Supp. 3d at 80, 84–86.

156. In re BHP Billiton Sec. Litig., No. 1:16-cv-01445-NRB, 2019 WL 1577313, at *1 (S.D.N.Y. Apr. 10, 2019), aff'd sub nom., City of Birmingham Ret. & Relief Sys. v. Davis, 806 F. App'x 17 (2d Cir. 2020).

The $50 million settlement amount is in the ninetieth percentile among securities class action settlements in 2019. Cornerstone Rsch., Securities Class Action Settlements: 2019 Review and Analysis 19 (2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2019-Review-and-Analysis.pdf [https://perma.cc/2NY2-XTFZ].

157. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I) (2018).

158. Order at 5, In re BHP Billiton Sec. Litig., No. 1:16-cv-01445-NRB, 2019 U.S. Dist. LEXIS 63598 (S.D.N.Y. June 14, 2016), ECF No. 11 (noting that the class member with the greatest financial stake among those who had sought to be lead plaintiff had claimed losses of $473,049.63, and that a different class member had claimed losses of $43,618.80); Declaration of Jeremy A. Lieberman in Support of Motion of Richard Frechman and James Crumpley exh. C, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01445-NRB), ECF No. 33-3 (indicating that a

and that some of these claimants would have sued BHP even without a class action. For example, these claimants and other large claimants might have brought a lawsuit by relying on traditional joinder. Moreover, the fact that these claimants volunteered to be the lead plaintiff indicates their willingness to actively litigate against BHP. It may also be readily assumed, however, that there were many small investors in BHP, as is always the case for publicly traded companies. These small investors presumably had nonvaluable claims and would not have been compensated in the absence of the class action. The private criterion therefore leads to a mixed determination: *Billiton* was primarily efficient to a small number of class members with large claims, but it was primarily representational to a large number of class members with small claims.[159]

While the private criterion results in a mixed determination, the public criterion indicates that *Billiton* was an efficient class action. If *Billiton* provided a benefit to the public, it did so through monetary deterrence rather than by clarifying laws or norms in a way that might prevent misbehavior. BHP's negligence in maintaining the dam, besides being obvious from the facts, had already led Brazilian prosecutors to charge BHP and Samarco executives with involuntary manslaughter and to bring a $43 billion civil lawsuit.[160] The addition of this class action by BHP's investors—who were not the primary victims of the incident, having been nowhere near the dam's mudflow—was not necessary for further establishing the wrongfulness of BHP's negligence. One would also be hard-pressed to argue that the class action was necessary as a reminder that companies must not misrepresent information that is material to investors. Eighty-seven percent of non-M&A federal securities class actions filed in 2019 included

---

prospective lead plaintiff has a stake of $32,179); Declaration of Michael W. Stocker in Support of the Motion of the Town of Jupiter Police Officers' Retirement Fund exh. B, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01445-NRB), ECF No. 27-2 (indicating that a prospective lead plaintiff has a stake of $80,192.92); Declaration of Reed R. Kathrein in Support of Motion exh. 3, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01445-NRB), ECF No. 38-3 (indicating that a prospective lead plaintiff has a stake of $113,565.32); Declaration of Richard W. Gonnello in Support of Richard and Sandra Michael's Motion exh. 4, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01920-NRB), ECF No. 10-4 (indicating that a prospective lead plaintiff couple has a stake of $107,051.15); Memorandum of Law in Support of Motion of Thomas O'Reilly exh. 3, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01445-NRB), ECF No. 20-3 (indicating that a prospective lead plaintiff has a stake of $59,773.44).

159. It may nonetheless be possible to determine which way the private criterion leans if one makes additional analytical choices that build on the foundational framework presented here. Such an analysis might seek to measure how much of the relief is sought by claimants with valuable claims and how much is sought by claimants with nonvaluable claims. For example, one could define a threshold dollar amount that is assumed to separate valuable claims and nonvaluable claims, and then decide how to weigh the dollar value of relief in each category. This way, one can arrive at percentages that can be assumed to represent the extent to which the class action is efficient and the extent to which it is representational under the private criterion.

160. *Billiton*, 276 F. Supp. 3d at 81, 91.

a Rule 10b-5 cause of action similar to that of *Billiton*.[161] Given the lack of novelty in the legal claims, *Billiton* did little to advance legal precedent or to clarify legal or ethical norms in a new factual context.

Cases such as *Billiton* are far more likely to provide a public benefit by imposing an added monetary deterrent against misbehavior. BHP and Samarco had sufficient warning to realize they were causing a level of risk that was unlawful and unethical.[162] Yet they did not change course because of a profit motive: In fact, BHP increased production in the year prior to the dam's collapse in order to maintain profitability, thereby causing the dam to receive more waste, even as warnings that it might not hold were growing more dire.[163] While BHP's actions were deeply irresponsible, the company showed at least a semblance of rationality. Samarco's board, which included BHP executives, carefully assessed the risks presented by the dam over the course of three years prior to the dam's collapse and stressed the importance of both safety and cost reduction.[164] These actions suggest that even while BHP was unresponsive to legal and ethical norms, it was still responsive to basic monetary incentives. It is entirely possible that imposing a $50 million penalty on BHP, and similar penalties in analogous situations, will sometimes change the calculus of actors such as BHP. Thus, the public criterion, which asks by what mechanism the class action is more likely to provide a public benefit, suggests that *Billiton* operated through monetary deterrence, an efficiency goal. If one assumes that *Billiton*'s public goal was at least as salient as its two private goals, one can conclude that *Billiton* was mostly an efficient class action.

2. *Example: A Consumer Class Action.* — This section's framework for distinguishing efficient and representational class actions is next demonstrated through an analysis of a consumer class action, *Klee v. Nissan North America, Inc.*[165] The private goal of *Klee* was to provide access to justice, as all the relief was directed at claimants who would have been unlikely to be compensated without a class action. The public goal was to shape laws and norms. Since these are both goals aligned with the representation justification, *Klee* is found to be a representational class action.

Klee concerned the original model of the Nissan Leaf.[166] When it was introduced a decade ago, the Leaf was described by some as the first mass-

161. Cornerstone Rsch., Securities Class Action Filings: 2019 Year in Review 10 (2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review.pdf [https://perma.cc/V8M2-RCVM].

162. *Billiton*, 276 F. Supp. 3d at 73–74 (noting that, in the two years prior to the collapse, Samarco executives were informed that cracks were appearing in the dam and that monitoring equipment indicated "emergency" levels of pressure and stress on the dam).

163. Id. at 72–73.

164. Id. at 74–76.

165. No. CV 12-08238 AWT (PJWx), 2015 WL 4538426 (C.D. Cal. July 7, 2015).

166. Id. at *1.

market electric car.[167] The experience of driving a Leaf was greatly dependent on its battery capacity, which determined how far the car could go before needing to be charged.[168] A class of owners and lessees of 2011 and 2012 Leaf models alleged that Nissan had misrepresented the battery capacity of these models, claiming the Leaf's battery capacity sometimes degraded significantly over time.[169] The parties initially agreed to a proposed settlement under which Nissan would repair or replace batteries that fell below a capacity of approximately seventy percent.[170] Then the case made headlines due to an objection filed by then-Chief Judge Alex Kozinski of the Ninth Circuit, the circuit in which the case was being adjudicated, and his wife, who objected to the proposed settlement in their capacity as owners of a 2011 Nissan Leaf and members of the class.[171] The initial settlement was not approved, and the parties, along with Chief Judge Kozinski, engaged in mediation.[172] They ultimately reached a settlement in which Nissan agreed to *replace* the battery with a newer battery model, not merely to repair the battery, if the capacity fell below the threshold level.[173] Nissan also provided class members with ninety days of free charging at charging stations or, for class members who could not participate in this program, payments of $50.[174]

---

167. David Gluckman, 2011 Nissan Leaf SL, Car & Driver (Aug. 25, 2011), https://www.caranddriver.com/reviews/a15124059/2011-nissan-leaf-sl-long-term-road-test-review/ [https://perma.cc/2C7S-QHBP].

168. Id. (discussing concerns over the Leaf's driving range, ways to extend its battery range, and how to plan battery-friendly driving routes).

169. *Klee*, 2015 WL 4538426, at *1.

170. Id.

171. Objection to Plaintiffs' Motion for Final Approval of Class Action Settlement, Klee v. Nissan N. Am., Inc., No. 2:12-cv-08238-BRO-PJW (C.D. Cal. Nov. 10, 2013), 2015 WL 4538426. Chief Judge Kozinski and his wife argued that the plaintiffs' counsel had not done due diligence to demonstrate that the proposed settlement was a good deal for the class, and that their valuation of the settlement was speculative. Id. at *1–7, *18–22. In particular, they argued that the settlement took credit for inducing Nissan to make changes to its warranty, when in fact Nissan would have made those changes even in the absence of the class action in order to "quell consumer complaints." Id. at *9–12. They claimed that the proposed settlement was "worthless." Id. at *24.

Chief Judge Kozinski's objection received extensive coverage in the legal press. See, e.g., Debra Cassens Weiss, Electric-Car Owner Alex Kozinski Offers "Scathing" Objection in Class Action, ABA Journal (Nov. 21, 2013), https://www.abajournal.com/news/article/nissan_leaf_owner_alex_kozinski_is_scathing [https://perma.cc/3ZR7-9FLB]; see also N.Y.U. Sch. of L., The Future of Class Action Litigation: Keynote by Chief Judge Alex Kozinski, YouTube (Nov. 11, 2014), https://youtu.be/zipvHeC42Lw (on file with the *Columbia Law Review*) (Chief Judge Kozinski discussing his objection in *Klee*). Judge Kozinski stepped down from the federal judiciary in 2017 following accusations of sexual harassment. Niraj Chokshi, Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations, N.Y. Times (Dec. 18, 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html (on file with the *Columbia Law Review*).

172. *Klee*, 2015 WL 4538426, at *2.

173. Id.

174. Id.

The *Klee* class appears to have consisted of class members with non-valuable claims, who were unlikely to be compensated outside the class action. The class members were current or former U.S. owners and lessees of 2011 and 2012 models of the Nissan Leaf[175]—a class of approximately 19,000.[176] Unlike in *Billiton*, the claims were quite uniform in size, as those class members who had experienced degraded battery performance had presumably suffered approximately the same scale of injury. These injuries had already been mitigated prior to the settlement: Independently of the class action, Nissan had enhanced its warranty to provide battery repairs, though not necessarily battery replacements, to customers who experienced degraded battery performance.[177] This suggests that the value of the settlement was relatively limited for most class members. Even if some class members would not have received repairs or other support from Nissan without the settlement, an upper bound for the value the settlement provided them was the cost of battery replacement, which was estimated to be $6,500 by the plaintiffs' expert witness.[178] Even at that maximum amount, it is questionable whether a typical claimant would seek compensation outside the class action, whether through independent litigation, joinder, or an alternative dispute resolution mechanism. *Klee* offers no reason to believe that any class members had larger individual claims than that. Even if there were a small number of class members who would have pursued their claims, they were a small minority. Thus, the private criterion, which considers the purpose of the class action from the standpoint of class members, indicates that *Klee* was a representational class action.

It is not clear that *Klee* provided any meaningful public benefit through monetary deterrence. While the plaintiffs valued the settlement at $24 million, the trial court found this valuation to be "nothing more than pure speculation."[179] The value of the settlement is especially difficult to estimate because Nissan was willing to make concessions to frustrated customers even in the absence of a settlement.[180] Thus, even when the settlement is considered in the aggregate, it is reasonable to speculate that much of the relief supposedly provided by the settlement simply codified actions that Nissan was already going to take.[181] Indeed, with the benefit of hindsight, replacing defective batteries for free appears to have been a wise investment in the goodwill of customers who placed their faith in the pioneering 2011 and 2012 models of the Leaf, as the Leaf later achieved cumulative sales of over 450,000, and for several years it was the best-selling electric car of all

175. Id. at *5.

176. Id. at *3 ("Plaintiffs originally estimated the number of eligible class members to be 18,588, and notice was ultimately sent to 19,332 class members.").

177. Id. at *1–2.

178. Id. at *10.

179. Id.

180. Id. at *1–2.

181. Chief Judge Kozinski had raised a similar point in his objection to the original proposed settlement. See supra note 171.

time.[182] Given the speculative value of the settlement and the possibility that it contained relief that Nissan would have offered voluntarily, *Klee*'s role in providing monetary deterrence is uncertain at best.

It is far more likely that *Klee* provided a public benefit by clarifying legal and ethical norms pertaining to electric car batteries and warranties. Nissan's alleged violation had occurred in a context where such norms were underspecified—a problem that a class action such as *Klee* can help remedy. Given the pioneering state of electric cars at the time, the public was undecided on what expectations should be placed on electric car manufacturers. Early reviews of the Nissan Leaf described the capacity and longevity of its battery as an area of concern, yet they did so without clearly assigning blame to Nissan by, for example, accusing it of producing a seriously defective car or deliberately misleading its customers.[183] Over time, industry publications described growing frustration with Nissan and began to reference the fact that a class action was moving forward.[184] Even though *Klee* did not actually result in a finding of legal liability,[185] it gave voice to consumers and provided a public forum for them to hold Nissan accountable. Moreover, this is a context where such public accountability matters, as buyers of electric cars are likely to do careful research. Since Nissan and other car manufacturers have a strong interest in maintaining a positive public image in order to sell cars, they tend to react relatively conscientiously when faced with class actions such as *Klee*. As a result, both the private criterion and the public criterion indicate that *Klee* was a representational class action.

* * *

The examples of *Billiton* and *Klee* demonstrate the workability of this framework for identifying class actions as being efficient or representational.

---

182. Maximilian Holland, Tesla Passes 1 Million EV Milestone & Model 3 Becomes All Time Best Seller, CleanTechnica (Mar. 10, 2020), https://cleantechnica.com/2020/03/10/tesla-passes-1-million-ev-milestone-and-model-3-becomes-all-time-best-seller/ [https://perma.cc/7XKT-KQS6] (noting that the Nissan Leaf achieved 450,000 in cumulative sales before being surpassed by the Tesla Model 3 as the all-time best-selling electric car in late 2019 or early 2020).

183. See, e.g., Gluckman, supra note 167 ("[F]ear extends to and permeates the ownership experience. You're afraid you won't make it to the next electrical outlet, afraid of having to take a charge-sapping detour to buy milk, afraid to turn on accessories like the climate control or the radio.").

184. See, e.g., Jeff Cobb, Nissan Leaf Owners Fear the Worst, Hope for the Best, GM-Volt (Aug. 21, 2012), https://www.gm-volt.com/threads/nissan-leaf-owners-fear-the-worst-hope-for-the-best.336996/ [https://perma.cc/Q8PA-RC72]; Stephen Edelstein, Nissan Leaf Battery Capacity Lawsuit: Court Approves Settlement, Green Car Reps. (July 20, 2015), https://www.greencarreports.com/news/1099200_nissan-leaf-battery-capacity-lawsuit-court-approves-settlement [https://perma.cc/2JZD-LKCF]; US: Class Action Proposed on Nissan Leaf Batteries, Auto. World (Oct. 3, 2012), https://www.automotiveworld.com/articles/96318-us-class-action-proposed-on-nissan-leaf-batteries/ [https://perma.cc/4YJS-73PB].

185. Because the parties agreed to a settlement prior to class certification, the court's approval only required it to consider whether the class should be certified and whether the settlement was fair. *Klee*, 2015 WL 4538426, at *3. The court also expressed reservations about how strong the plaintiffs' case would be if it proceeded to trial. Id. at *6.

This framework implies that it is consistent and reasonable to adopt a reconciled view of class actions. Under such a view, one need not choose between the efficiency justification and the representation justification, and one may subscribe to goals associated with both justifications. This framework can also be useful to courts seeking a more expansive understanding of the policy interests behind class actions. The following section goes a step further, arguing that this framework can potentially guide legislators toward compromise.

B. *Searching for Compromise in Class Action Legislation*

The reconciled view of class actions has many possible implications for the political and legislative battle over class actions. To begin with, it urges the two sides to stop speaking at cross-purposes when debating whether class actions are working. For example, Republicans believe class actions are not working based on arguments that they fail at the goal of compensation,[186] yet they tend to disregard the question of *who* is in the class. Republican arguments often proceed by comparing the average compensation of claimants in arbitration to the average compensation of claimants in class actions.[187] Under the reconciled view of class actions, this comparison is sensible for claimants who have sufficiently large claims to engage in arbitration, but not for small claimants for whom it may not be worthwhile to engage in arbitration, as access to justice remains their first priority. Democrats, on the other hand, believe class actions should be strengthened based on arguments that they succeed at providing access to justice, as they are capable of representing larger numbers of people than arbitration.[188] Under the reconciled view of class actions, including more people in class actions without regard to their compensation is more appropriate for representational class actions than for efficient class actions. Democrats can make their line of argument most persuasive if they apply it to those categories of class actions that bring important *new* grievances to light and prevent misbehavior by shaping laws and norms.[189]

This section proposes that the reconciled view of class actions might also provide a path for Republicans and Democrats to compromise on

186. See supra notes 92–94 and accompanying text.

187. See, e.g., supra notes 135–139 and accompanying text.

188. See supra note 126 and accompanying text.

189. As a contrary example, one can argue that securities fraud class actions proceeding under Rule 10b-5 tend to be efficient rather than representational. Under the public criterion described in section III.A, these class actions tend not to be representational because they are repetitive, bringing the same legal claims in relatively similar factual contexts, such that there are likely far more securities fraud class actions than necessary to maintain legal and ethical norms against misleading investors. See supra notes 154, 161 and accompanying text. This implies that it may not be valuable to offer more plaintiffs "access to justice" through such securities fraud class actions when the plaintiffs are not reasonably compensated. This line of reasoning does not exclude the possibility that securities fraud class actions can be justified on the grounds that they are useful for compensating investors and increasing monetary deterrence against misbehavior.

class action reform legislation. This is a bold claim. After all, Republicans and Democrats disagree not only over the goals of class actions but also over whether class actions are working—in essence, they disagree over whether class actions are mostly bad or mostly good.[190] Given these politics, any path to compromise is narrow. And yet the reconciled view of class actions can help devise give-and-take compromises that are potentially profitable to both sides. Given that Republicans only believe in the goal of compensation and do not recognize any public goal, these compromises must primarily mediate between the two private goals: compensation and access to justice. This section offers two examples of such compromises. The first example focuses on the incentives for bringing class actions, imagining a legislative compromise that would guide courts on how to determine attorney's fees. The second example focuses on constraints placed on class actions, imagining a legislative compromise that borrows ideas from both the Fairness Act and the FAIR Act, while appropriately targeting provisions at either efficient or representational class actions.

1. *Regulating Attorney Incentives*. — Neither side of the current debate over class actions can be satisfied with the current approach to calculating fees for class action plaintiff's attorneys—really, the current lack of any coherent approach. Attorney's fees are important because they provide the incentives to invest in class litigation. Those incentives should presumably be calibrated according to one's understanding of the goals of class actions and the effectiveness of class actions at achieving those goals. Currently, courts most often calculate attorney's fees based on a percentage of the class recovery.[191] When courts follow this method, they face a choice over what percentage to use. If courts find the percentage method to be inadequate, they sometimes rely on the lodestar amount, which pays attorneys according to hours worked and a reasonable hourly rate.[192] Sometimes, courts employ a mixed method known as a "lodestar cross-check," which involves calculating a percentage of the recovery, checking against the lodestar method, and adjusting the award if the "lodestar multiplier" is viewed as excessive.[193]

---

190. See supra notes 91, 122–124 and accompanying text.

191. In one four-year study, the percentage method was used in 53.6% of class actions, while a mix of the percentage method and the lodestar method was used in 38.2% of class actions. Eisenberg et al., supra note 104, at 945.

192. See Manual for Complex Litigation (Fourth) § 21.71 (2004) (noting that "the court's task is easiest when class members are all provided cash benefits," but courts sometimes use the lodestar method because the benefit to the class is "speculative" or consists of injunctive or declaratory relief and "the value of such relief cannot be reliably determined or estimated").

193. See, e.g., Hall v. Child.'s Place Retail Stores, Inc., 669 F. Supp. 2d 399, 400, 404–05 (S.D.N.Y. 2009) (finding that a requested fee award of $3,240,000, which was twenty-seven percent of the settlement, was unreasonable because it resulted in a 3.75 lodestar multiplier, and instead approving a "reasonable" award of $1,800,000, which was fifteen percent of the settlement and resulted in a 2.08 lodestar multiplier).

The lodestar cross-check is another opportunity for judges to apply discretion, as they may accept a greater or lesser lodestar multiplier based on the quality of work the plaintiff's

In summary, the total compensation of the class is the most important guidepost for determining attorney's fees, but courts have extraordinary leeway. To Republicans, the problem with the status quo is that, aside from judicial discretion, there are few constraints on attorney's fees, which Republicans view as being generally excessive.[194] Democrats should not be happy with the status quo either: As long as the total compensation of the class is the main guidepost for determining fee amounts, representation goals will often be undervalued. Under the reconciled view of class actions, one can imagine a compromise that takes steps to ease both concerns.

To alleviate Republican concerns, Congress could introduce limits on attorney's fees relative to compensation. These limits should be gradated according to per-claimant compensation. As an illustration, Congress might choose to cap attorney's fees at fifteen percent of the first $10,000 in relief per claimant, ten percent for any relief per claimant in excess of $10,000 and up to $100,000, and five percent for any relief per claimant in excess of $100,000. Such a gradated approach would be sensible under the reconciled view of class actions for two reasons. First, it makes the most sense to tie attorney's fees to compensation in the context of efficient class actions, for which compensation is an apt measurement of the private value of the class action. Since class actions that consist of claimants with larger compensation amounts are most likely to be efficient class actions, it is appropriate that such class actions would be subject to the most stringent limits under the gradated approach. Second, the attorney's contribution to the compensation achieved by the class should be understood relative to how much compensation claimants might have received in the absence of class litigation. Compensation awarded to large claimants may be greater than the compensation they would have achieved on their own, but compensation awarded to small claimants would not have otherwise been obtained at all. For example, a hundred class members who received a million dollars each presumably had valuable claims and would have been compensated without a class action, but a million class members who receive a hundred dollars each probably had nonvaluable claims and would have received nothing without a class action.

In exchange, Congress could also take modest steps to recognize that attorneys should sometimes be rewarded for providing access to justice to class members who do not end up receiving meaningful compensation. Under the reconciled view of class actions, this is appropriate in the context of representational class actions. Congress can provide a framework for courts to award fees in such cases, while recognizing that judicial discretion must play a significant role. First, the court can be required to assess whether the class action is representational, following an analysis such

attorneys did or amount of the risk they took on. See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121 (2d Cir. 2005) ("Courts in their discretion may increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys.").

194. See supra notes 97–99 and accompanying text.

as the one section III.A.2 describes. Second, if the class action is representational, the court can be permitted to determine a per-class-member dollar amount that represents the degree of grievances suffered by the class members and the extent that the class action served as an effective public forum for adjudicating these grievances. The dollar amount can be capped at some amount per claimant, such as $50. This total dollar amount can be used as a supplement to actual compensation for the purpose of calculating attorney's fees.

2. *Balancing Compensation and Access to Justice.* — One can potentially view the Fairness Act and the FAIR Act as containing reasonable ideas but extending those ideas beyond their proper scope. Republicans say class actions are deviating from the goal of compensation. That is why, for example, one provision of the Fairness Act would require plaintiffs to demonstrate, prior to class certification, that there is "a reliable and administratively feasible mechanism . . . for distributing directly to a substantial majority of class members any monetary relief secured for the class."[195] The problem with this provision is that it would not only apply to efficient class actions, which are most associated with the goal of compensation, but would also undermine representational class actions by increasing the difficulty of pursuing class actions consisting of nonvaluable claims.[196] On the other hand, Democrats wish to increase the availability of class actions in order to further representational goals—namely, to expand access to justice and to better shape laws and norms against misbehavior.[197] For this reason, the FAIR Act would render unenforceable any predispute agreements that waive the opportunity to participate in class actions for employment, consumer, antitrust, and civil rights disputes.[198] But this provision would increase not only the number of representational class actions, which are most associated with the representational goals Democrats have in mind, but also the number of efficient class actions.

Under the reconciled view of class actions, perhaps a path to compromise is to channel each provision toward the class actions that its underlying rationale is most applicable to. That is, perhaps Republican ideas for enforcing the compensatory purpose of class actions should be targeted at efficient class actions, and Democratic ideas of expanding access to justice should be targeted at representational class actions.

To draw an approximate line between efficient class actions and representational class actions, Congress could define a threshold amount of monetary relief per class member, such that it can be assumed that class members obtain access to justice by pursuing claims below that amount, whereas giving a class member relief in excess of that amount can be as-

195. H.R. 985, 115th Cong. §1718(a) (2017).

196. See supra note 114 and accompanying text.

197. See supra notes 124–126, 129–130 and accompanying text.

198. H.R.1423, 116th Cong. (2019).

sumed to serve a compensatory purpose. Defining such a threshold inherently involves a significant degree of arbitrariness, and it is an exercise that only Congress can undertake. It can be a relatively low amount, such as $50, or it can be a higher amount. To the extent that class actions provide relief below the threshold amount per class member, they can be assumed to serve a representational purpose; to the extent they exceed the threshold amount, they can be assumed to serve an efficient purpose. While this method is far from perfect, it is a step toward separating efficient and representational class actions.[199]

Congress can design a compromise around such a threshold. To the extent that class actions achieve relief for class members above the threshold amount, they might be held to a compensatory goal. To the extent that class actions achieve relief for class members below the threshold amount, relief might be allowed regardless of arbitration agreements. Thus, a compromise might consist of the following provisions (assuming, for the purpose of illustration, that Congress sets the threshold at $50):

> (1) Prior to federal courts certifying a class action seeking monetary relief, the party seeking to maintain the class action must demonstrate that there is a reliable and administratively feasible mechanism for the distribution of any monetary relief in excess of [$50] per class member directly to a substantial majority of class members entitled to such amounts of relief.
>
> (2) No predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to claims for monetary relief up to [$50] per class member with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

Such a compromise would require Congress to weigh many questions. To Republicans, revoking the applicability of mandatory arbitration provisions up to the threshold amount raises fears of increasing the number of class actions. Yet the number and size of those class actions will be constrained by the threshold amount, and in exchange, Republicans will go a long way toward addressing their concerns over inadequate compensation and excessive attorney's fees by regulating above the threshold amount. Democrats may fear that the threshold will cut into the ability of class actions to provide access to justice. And yet the threshold amount will still permit class actions to be brought, even if there are arbitration agreements, if the class is sufficiently large. Of course, opponents of mandatory arbitration agreements take the view that they deserve to be invalidated more generally.[200] Ideally, Congress should take these warnings seriously.

---

199. As section III.A explains, the public criterion for determining whether a class action is compensatory or representational analyzes the public effect of the class action. This criterion is not captured by the threshold approach.

200. Some would argue that such agreements are not rationally assessed by people who sign them. See, e.g., Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1206–07 (2003) (arguing that buyers do not consider all contract terms, so that sellers are incentivized to provide low-quality attributes

Still, the compromise presented here might be more realistic given the current politics of both sides: It brings some small claimants back into the courtroom, yet it also allows mandatory arbitration agreements to keep much of their vitality by capping per-claimant compensation amounts. Both sides must give something up, but in exchange, both sides get much of what they want.

CONCLUSION

After fifty years of conflict, perhaps healing begins with the various factions of the class action war understanding one another. To that end, this Note has described a taxonomy of the goals of class actions. These goals are organized around a fundamental question of whether class actions are justified by efficiency or representation. The efficiency justification is associated with a private goal of compensation and a public goal of increasing monetary deterrence against misbehavior. The representation justification is associated with a private goal of providing access to justice and a public goal of advancing legal and ethical norms. A vast body of legal doctrine and commentary has upheld certain goals over others, often siding with one justification over the other. Polarization has also taken hold of the political debate over class actions. Republicans only believe in the goal of compensation, which is associated with the efficiency justification, while Democrats believe in both representational goals. Neither Republicans nor Democrats are likely to pass significant reforms without compromise.

This Note has argued that the goals of class actions can be reconciled. It has advanced a framework that places the efficiency justification and the representation justification on equal footing, yet distinguishes class actions for which efficiency goals are most salient and class actions for which representation goals are most salient. Following this framework, courts can obtain a more expansive understanding of the policy interests behind class actions. This Note has also offered hope that political compromise is possible, arguing that the framework presented here can provide guidance toward crafting reforms related to class actions and arbitration agreements that are respectful of the views of both Republicans and Democrats. The class action war is ultimately not a war between the views of class actions, but a war between their adherents. Those adherents face a choice between continued conflict and compromise.

---

that buyers do not detect in contracts, and arguing that, to counteract this effect, provisions that do not increase social welfare should not be enforced). It is also possible that the presence of too many mandatory arbitration agreements is harmful to society. See Albert H. Choi & Kathryn Spier, The Economics of Class Action Waivers, 38 Yale J. on Regul. 543, 545–46 (2021) (arguing that class action waivers are sometimes not aligned with social welfare).