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# Redefining Prey and Predator in Class Actions

Christine P. Bartholomew<sup>†</sup>

## INTRODUCTION

On its face, Federal Rule of Civil Procedure 23 appears neutral. Rule 23, which governs the procedures for collective actions, does not explicitly support or condemn class actions. Instead, it seems merely a procedural rule to aggregate related claims. In application, however, it is hardly neutral.

Courts are increasingly skeptical of class claims and the attorneys who bring them. Class actions are often treated as the Big Bad of modern day civil procedure—in need of banishment, or, at a minimum, significant restraint. Name-calling is now commonplace: class actions have been branded everything from “monstrosities”<sup>1</sup> to “a plethora of evils”<sup>2</sup> to “inherently corrupt.”<sup>3</sup> The harsher name-calling, though, is

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<sup>1</sup> Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 220 (A. Leo Levin & Russell R. Wheeler eds., 1979) (large cases including class actions are “monstrosities”).

<sup>2</sup> Willy E. Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent” State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly “Impartial” and “Competent” Federal Courts—A Historical Perspective and an Empirical Analysis of Class Action Dispositions in Federal and State Courts, 1925-2011*, 3 WM. & MARY BUS. L. REV. 419, 464 (2012) (internal citations omitted) (discussing criticisms of class actions).

<sup>3</sup> Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1055 (1996); cf. David J. Kahne, *Curbing the Abuser, Not the Abuse: A Call for Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers*, 19 GEO. J. LEGAL ETHICS 741, 742 (2006) (describing class actions as a “corrupt” process that “continues unabated”).

reserved for class action attorneys: the “bounty-hunters,” “greedy hustlers,” and “extortionists” of the justice system.<sup>4</sup>

With the growth of this heavily rhetoric-laden messaging, potential for public good has become secondary to concerns that class actions bog down the judicial system<sup>5</sup> and present a danger to efficient marketplaces.<sup>6</sup> Capitalizing on themes of market efficiency and individual autonomy, much class action scholarship encourages reform, thereby narrowing class actions.<sup>7</sup> Consequently, consumers lose a potentially strong source of private regulation—particularly for business torts. This, in turn, protects corporate defendants from liability because without a procedural mechanism for aggregating claims, individuals will not realistically seek to redress corporate wrongdoing.<sup>8</sup>

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<sup>4</sup> See, e.g., Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1243 (discussing how “corporate defendants, reform-minded legislators, and the business press” characterize class action counsel as “greedy,” “extortionist” “bounty hunters”); 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, 236-61 (1983); see also 141 CONG. REC. S9173 (daily ed. June 27, 1995) (statement of Sen. Mikulski); Mike France, *23: Don't Kill All the Trial Lawyers*, BUS. WK. (Aug. 25, 2002), <http://www.bloomberg.com/bw/stories/2002-08-25/23-dont-kill-all-the-trial-lawyers> (arguing against negative perceptions of plaintiffs’ attorneys); Evan Schaeffer, *Class Actions Deter Corporate Wrongdoing*, ROANOKE TIMES (Feb. 23, 2001), <http://www.evanschaeffer.com/class-actions-deter-corporate-wrongdoing.html>.

<sup>5</sup> See, e.g., Brief for Appellants at 19, *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474 (6th Cir. 2014) (No. 10-3928); Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 436 (discussing judicial drain caused by aspects of class actions); Jerold S. Solovy & Robert M. Mendillo, *Calculating Class Action Awards: Is It Time to Unload the Lodestar?*, NAT’L L.J., May 2, 1983, at 19 (discussing how fee petitions in class actions create judicial waste).

<sup>6</sup> William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1041 (2012) (book review) (noting the “U.S. style of private rights of action . . . pose[s] serious risks of overdeterrence”); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2176 (2010) (arguing securities class actions bring about overregulation of the securities markets).

<sup>7</sup> See, e.g., Rice, *supra* note 2, at 552-53 (“[C]lass action reformers have argued that forcing corporations and national insurers to defend themselves and litigate ‘nationwide class actions’ in state courts is inefficient and unfair, because each state court judge has to weigh and apply, if necessary, fifty-one different sets of substantive laws to resolve each dispute.”); Eric P. Voigt, *A Company’s Voluntary Refund Program for Consumers Can Be a Fair and Efficient Alternative to a Class Action*, 31 REV. LITIG. 617, 623 (2012).

<sup>8</sup> Consumer class actions include violations of antitrust and consumer protection laws. Putative class members, in the majority of these cases, are individual consumers or perhaps small businesses. In contrast, the defendants are predominately large national or international corporate defendants. Securities, employment, and environmental class actions are beyond the scope of this article. The plaintiffs in such cases are not consumers, and consequently warrant slightly different analyses.

By prioritizing efficiency over public good, rhetoric has redefined the “victim” in class actions. Individual consumers, or putative class members, are no longer seen as the victims of corporate defendants’ malfeasance. Instead, building on dicta from one Seventh Circuit decision,<sup>9</sup> defendants are advancing arguments that class action procedures harm corporate defendants by forcing them into extortionist settlements.<sup>10</sup> Successful class action attorneys have been redefined as the predators with corporations as their prey.<sup>11</sup>

This “blackmail myth”<sup>12</sup> continues to grow and undermine class action utility, with the last decade seeing unparalleled efforts to limit class actions.<sup>13</sup> With the assistance of Congress and judges, class action mechanisms under Rule 23 are eroding. It is now more difficult to state a class claim, certify a class, and survive summary judgment than it has been since the birth of the modern class action in 1966.<sup>14</sup> Whether a serious injury afflicts a substantial class is now secondary to procedural battles. Class claims rarely

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<sup>9</sup> *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (“But [defendants] could not be confident that the defenses would prevail. They might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.”).

<sup>10</sup> *See, e.g.*, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167-68 n.8 (3d Cir. 2001); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *Barreras Ruiz v. Am. Tobacco Co.*, 180 F.R.D. 194, 198 (D.P.R. 1998); *In re Dow Corning Corp.*, 211 B.R. 545, 585 (Bankr. E.D. Mich. 1997).

<sup>11</sup> Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 738 (2013) (noting criticism of class actions grow along with the success of some plaintiffs lawyers).

<sup>12</sup> For a thorough discussion of the blackmail myth and its fallacy, see generally Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681 (2005). In essence, branded as extortionists, plaintiff class action attorneys are primarily characterized as greedy entrepreneurs preying on corporate defendants. *See, e.g.*, H.R. REP. NO. 104-50, at 15 (1995); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) (“Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims’ actual worth.”); Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 168 (2008) (describing how corporate lobbyists characterize class action attorneys as extortionists); *Examiner Editorial: Greedy Class-Action Lawyers Take It on the Chin*, WASH. EXAMINER (Feb. 21, 2013, 12:00 AM), <http://washingtonexaminer.com/examiner-editorial-greedy-class-action-lawyers-take-it-on-the-chin/article/2522230>.

<sup>13</sup> *See, e.g.*, Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2006); Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. DAVIS BUS. L.J. 1, 46-51 (2006).

<sup>14</sup> For a thorough discussion of increased gatekeeping under the Roberts Court, see generally Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313 (2012).

reach merit-based determinations, as procedural hurdles that create barriers to resolving liability continue to rise.<sup>15</sup>

The current theoretical frameworks for evaluating class actions favor corporate defendants. Coloring those discussions is an underlying assumption that defendants are found liable too often.<sup>16</sup> Building on this questionable assumption, critics advance cost-benefit justifications to spur judicial aversion to class actions' regulatory potential.<sup>17</sup> These frameworks favor marketplace correction over private enforcement, and thus encourage courts to curb class actions.<sup>18</sup>

Other theories, such as those rooted in autonomy, focus more on the role of plaintiff class action attorneys and their decision-making power over class members. Autonomy arguments conflict with collective action as group treatment necessarily diminishes individual participation.<sup>19</sup> Not every class member's voice is equally heard.<sup>20</sup> Thus, some scholars use these principles to argue against class actions because of their potential to "subvert[] individual autonomy."<sup>21</sup>

What is missing from the dialogue is a theoretical framework to counterbalance this defendant-orientated literature and evaluate class actions from class members' perspectives. In presenting this discussion, the point is not to be polemic. Rather, it is to provide a competing narrative to challenge the current anti-class action animus.

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<sup>15</sup> This push away from merit-based determinations is occurring across civil litigation. See Edward D. Cavanagh, *Making Sense of Twombly*, 63 S.C. L. REV. 97, 119 (2011) (discussing data on the vanishing trial).

<sup>16</sup> See, e.g., JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 325 (2003) (discussing how law and economic literature assumes "defendants are found liable too often and pay too much").

<sup>17</sup> See Joseph William Singer, *Pay No Attention to That Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts*, 75 IND. L.J. 659, 663 (2000) ("[S]ome law and economics scholars want us to presume that plaintiffs should lose torts cases, with some narrow exceptions, because they believe that generally losses should lie where they fall . . .").

<sup>18</sup> 104 CONG. REC. S17,997 (daily ed. Dec. 5, 1995); 104 CONG. REC. H2760-80 (daily ed. Mar. 7, 1995); *House Passes Securities Class Action Litigation Reform Bill*, TECH L.J. (July 23, 1998), <http://www.techlawjournal.com/seclaw/80723.htm>.

<sup>19</sup> See, e.g., Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 554-55 (2012).

<sup>20</sup> See, e.g., Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (arguing that absent class members need more opportunity to be heard).

<sup>21</sup> Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 890 (2010); see, e.g., Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 568 (2004) ("Class actions entail a significant displacement of fundamental individual autonomy rights warranted only by necessity or inferred consent.").

This Article attempts to fill that gap using Professor Martha Fineman's vulnerability theory.<sup>22</sup> Vulnerability theory has been applied in a variety of fields, ranging from disability law<sup>23</sup> to animal rights<sup>24</sup> to disaster response.<sup>25</sup> To date, though, there has been limited application of this theory to judicial procedural rules, making this Article not only innovative but also a logical extension of vulnerability theory's challenge to define the appropriate role of the state and its institutions, including the judiciary.<sup>26</sup> In an attempt to introduce the theory to those less familiar with it, the basic tenets are as follows:

- (1) Everyone is vulnerable at some point in life.
- (2) The vulnerable subject should replace the current, autonomous juridical ideal.
- (3) Equal treatment of the vulnerable subject does not sufficiently overcome vulnerability.
- (4) Resiliency assets (such as human, physical, and social assets that empower the vulnerable) are key to mitigating vulnerability.
- (5) Institutions, including the state, can provide resiliency assets.
- (6) The state should actively promote resiliency assets when developing and regulating institutions.

Layering vulnerability analysis on private consumer class actions brings new dimension to the class action debate in two ways. First, it offers a retrospective understanding of judicial reluctance towards class actions. Second, it provides a framework to respond to anti-class action rhetoric by stimulating

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<sup>22</sup> See, e.g., Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 19-22 (2008) [hereinafter Fineman, *Anchoring Equality*]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010) [hereinafter Fineman, *Vulnerable Subject*].

<sup>23</sup> See Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 513 (2008).

<sup>24</sup> See generally Ani B. Satz, *Animals As Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65 (2009).

<sup>25</sup> See Susan S. Kuo & Benjamin Means, *After the Storm: The Vulnerability and Resilience of Locally Owned Business*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 95 (Martha Albertson Fineman & Anna Gear eds., 2013).

<sup>26</sup> Cf. Fineman, *Vulnerable Subject*, *supra* note 22, at 265 ("I argued for a more collective and institutionally shared notion approach to dependency: a reallocation of primary responsibility for dependency that would place some obligation on other societal institutions to share in the burdens of dependency, particularly those associated with the market and the state.").

a more robust vision of class actions as a potential resiliency tool for consumers.<sup>27</sup>

To that end, Part I of this Article encapsulates key aspects of vulnerability scholarship to provide an essential foundation. Part II applies this foundation to the history of class actions. Using vulnerability analysis to reevaluate the seismic shift against class actions shows how this shift is another variation of the neoliberal, pro-corporate agenda. Part III discusses how the current anti-class action sentiment is a misguided effort to equalize justice without first considering the parties' pre-filing, pre-existing disadvantages, such as financial and informational vulnerability. Finally, Part IV explores class actions as essential resiliency tools, thus providing a new justification for class actions. This justification identifies guiding principles for the future of class action rhetoric.

## I. UNDERSTANDING VULNERABILITY THEORY

Attempting to distill vulnerability analysis into a handful of pages is yeoman's work given its richness and scope. To begin, this Article opens by providing more detail on this theory, including vulnerability scholarship's characterization of the current unresponsive state. Then, it explains how vulnerability analysis emphasizes human vulnerability. At its core, the theory proposes a two-part heuristic tool to interrogate the relationship between the state and the individual.<sup>28</sup> First, a vulnerable analysis approach would examine how neoliberal notions of autonomy have resulted in disparate result—whereby some groups are favored and others disadvantaged. Second, after identifying the disadvantaged (or vulnerable) group, applying this theory requires identifying what state institutions can empower the vulnerable group<sup>29</sup>—namely, consumers.

With this foundation in place, the Article moves on to applying vulnerability theory to class actions.

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<sup>27</sup> Fineman, *Anchoring Equality*, *supra* note 22, at 19-22; Satz, *supra* note 23, at 522 (“[V]ulnerability is part of the human experience, and the state must develop structures to address substantive inequality and disadvantage.”).

<sup>28</sup> Martha Albertson Fineman & Anna Grear, *Introduction: Vulnerability as Heuristic—An Invitation to Future Exploration*, in *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 1, *supra* note 25 (describing vulnerability theory as a “heuristic tool through which to interrogate the core concepts and conclusions of liberal legal and political subjectivity and the structural arrangements they support”).

<sup>29</sup> *See id.* at 2-3.

### A. *Understanding the Neoliberal Status Quo*

The starting point for vulnerability scholars is the fundamental belief that state institutions play too minimal a role in addressing disparities in society's social and economic well-being.<sup>30</sup> Rather than advancing social justice, American institutions—defined broadly to include legal institutions<sup>31</sup>—are currently unresponsive:<sup>32</sup> “Western societies have witnessed the progressive withdrawal of the state’s responsibility for the functioning of public institutions.”<sup>33</sup> This scholarship identifies two sources for this lack of responsiveness: (1) overly narrow equality concepts, and (2) overly expansive autonomy concerns.<sup>34</sup>

Taken in turn, U.S. equal protection laws limit state responsiveness.<sup>35</sup> These laws encourage “sameness” in treatment. However, this does not always result in justice, as sameness of treatment does not equate to sameness in outcome. Formal equity only provides the same opportunities to advantaged and disadvantaged groups. Consequently, it does little to remedy substantive inequalities.<sup>36</sup> As Fineman explains, “Such a narrow approach to equality is ineffective in combating the forces that have resulted in the growing inequality in wealth, position, and power experienced in the United States over the past few decades.”<sup>37</sup>

<sup>30</sup> See Morgan Cloud, *More than Utopia*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 88, *supra* note 25; cf. Ani. B Satz, *Overcoming Fragmentation in Disability and Health Law*, 60 EMORY L.J. 277, 322 (2010) (“A weak, unresponsive state would be one that largely does not regulate private firms (i.e., regulation would likely address only safety) and probably provides no antidiscrimination mandates or public health or disability benefits.”).

<sup>31</sup> Cloud, *supra* note 30, at 71.

<sup>32</sup> See Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 18, *supra* note 25 [hereinafter Fineman, *Equality*] (“I argued for a more collective and institutionally shared approach to dependency—a reallocation of primary responsibility for dependency . . . particularly those associated with the market and the state.”).

<sup>33</sup> See Sean Coyle, *Vulnerability and the Liberal Order*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 71, *supra* note 25.

<sup>34</sup> See Fineman, *Vulnerable Subject*, *supra* note 22, at 254 (discussing the tension between equality and autonomy); Fineman, *Anchoring Equality*, *supra* note 22, at 2 (discussing how false equity and prioritizing of autonomy has led to a “rhetoric of non-intervention [that] prevails in policy discussions”).

<sup>35</sup> See Helen Carr, *Housing the Vulnerable Subject: The English Context*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 108, *supra* note 25 (describing how concerns with U.S. equal protection laws spurred the creation of vulnerability analysis).

<sup>36</sup> See Satz, *supra* note 23, at 524.

<sup>37</sup> See Fineman, *Equality*, *supra* note 32, at 14.

According to vulnerability scholars, the current neoliberal framework also uses autonomy to justify limited state response.<sup>38</sup> The legal subject is currently defined as “fully capable and functioning and therefore able to act with autonomy”<sup>39</sup>—free from state action. As long as there is minimal equal treatment, neoliberals believe concepts of individual autonomy and self-reliance will create a utopic meritocracy. State interference with the market-place would upset this meritocracy; instead, a “free market” will remedy any injustices in time, without state intervention.<sup>40</sup> This inhibits remedial action for disadvantaged groups,<sup>41</sup> including regulation or other kinds of assistance.<sup>42</sup>

Rather than addressing these inequalities, the state has taken an apathetic approach to justify inaction, accepting arguments about “individual responsibility” and the alleged dangers of providing social welfare. When the state does act, these are just momentary awakenings. These rare occasions are often narrowly manifested to protect limited categories of individuals rather than remedy broad discrimination or disadvantage.<sup>43</sup> As a result, by focusing on the autonomous liberal legal subject in current political and legal thought, the state overlooks “the material, social, and developmental realities of the human condition.”<sup>44</sup>

Understood from this perspective, it is not surprising that vulnerability scholars contend legal institutions presently advantage corporations.<sup>45</sup> A free market approach emphasizes capitalist priorities<sup>46</sup> that “systematically and adaptively” privilege corporate power.<sup>47</sup> The corporation becomes, in some

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<sup>38</sup> See Fineman, *Vulnerable Subject*, *supra* note 22, at 262; see also Rachel Anne Fenton, *Assisted Reproductive Technology Provision and the Vulnerability Thesis: From the UK to the Global Market*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 126, *supra* note 25.

<sup>39</sup> Fineman, *Vulnerable Subject*, *supra* note 22, at 262.

<sup>40</sup> See Fineman, *Equality*, *supra* note 32, at 14; see also Coyle, *supra* note 33, at 64 (“Human freedom is a more effective solver of problems than the government’s legislative scheme.”).

<sup>41</sup> Fineman, *Vulnerable Subject*, *supra* note 22, at 259.

<sup>42</sup> See *id.* at 258; see also MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 10 (2004) [hereinafter FINEMAN, MYTH].

<sup>43</sup> The Civil Rights Act is a key example of state action to equalize disadvantage. See, e.g., Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-will Debate*, 43 SW. L. REV. 275, 288 (2013).

<sup>44</sup> See *id.* at 298-99.

<sup>45</sup> See, e.g., Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 13 (2012).

<sup>46</sup> See Anna Grear, *Vulnerability, Advanced Global Capitalism and Co-Symptomatic Injustice: Locating the Vulnerable Subject*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 53, *supra* note 25.

<sup>47</sup> *Id.* (emphasis omitted).

ways, the ideal legal subject.<sup>48</sup> It fulfills the autonomous ideal of a disembodied, decontextualized person.<sup>49</sup> By its very construction, a corporation's business structure minimizes individual players. As Professor Grear explains, "the corporation is an artificial body 'created by contract' in which the... 'corporeally specific body... [produc[es] a] transmogrification of that corporeally specific vulnerability into a 'common Power.'"<sup>50</sup>

The Supreme Court's growing acceptance of corporate personhood demonstrates the bold advancement of the corporate agenda.<sup>51</sup> Now corporations have freedoms of religion and free expression once afforded only to corporal individuals.<sup>52</sup> At the same time, the corporation's disembodied nature can make it a difficult target for legal accountability.<sup>53</sup> Hence, current institutions afford corporations favored status, including increased immunization from wrongdoing, while disadvantaging the individuals impacted by corporate misconduct. The corporate person is increasingly treated equally as the autonomous human—without recognition that such equal treatment often fails to remedy economic and social disparities.

### B. *Shifting Perspective to Consider Vulnerability*

Instead of focusing on the autonomous juridical subject, vulnerability theory offers an alternative framework for policy discussion. The theory starts by replacing the autonomous person with the vulnerable subject.<sup>54</sup> "Vulnerable" in this context is not intended to be a loaded or negative descriptor; rather, it is meant

<sup>48</sup> *Id.* at 48-49.

<sup>49</sup> *Id.* at 53; *see also* Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 478 (2013) ("Corporations—legally constructed entities comprised of capital, held together by contracts, and owned and operated by various other entities and individuals—lack self-consciousness and are not subject to the vulnerabilities arising from either death and illness or thinking and feeling.").

<sup>50</sup> *See* Grear, *supra* note 46, at 53; *see also* Shiloh Y. Whitney, *Dependency Relations: Corporeal Vulnerability and Norms of Personhood in Hobbes and Kittay*, 26 HYPATIA 554, 554-74 (2011).

<sup>51</sup> *See, e.g.*, Zachary K. Ostro, Note, *Janus Capital Group, Inc. v. First Derivative Traders: Further Limiting Limited Liability, and Missing an Opportunity to Curb Corporate Misconduct*, 8 J. BUS. & TECH. L. 275, 299 (2013) ("These holdings represent the Court's consistent inattention to needed corporate governance reform, while drastically expanding protections for corporate entities.").

<sup>52</sup> *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. June 30, 2014) (recognizing corporations' ability to exercise religious beliefs); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (affording corporations freedom of speech rights).

<sup>53</sup> Grear, *supra* note 46, at 53.

<sup>54</sup> Fenton, *supra* note 38, at 126.

as distinct from traditional identity categories.<sup>55</sup> The vulnerable subject is intentionally broad and can change over time or in differing circumstances.<sup>56</sup> Vulnerability stems from variations in the human condition or experience, including mental, intellectual, social, material, and financial variations.<sup>57</sup> It can also originate from external perils, such as “disease pandemics, environmental catastrophes, terrorism, crime, crumbling infrastructure, failing institutions, recessions, corruption, and physical decline.”<sup>58</sup> More generally, political inequalities can also trigger vulnerability.<sup>59</sup>

Recognizing vulnerabilities is primary to identifying models of state support and legal protection.<sup>60</sup> This framing allows for an analysis of whether the state, through its institutions and mandates, inappropriately advantages or disadvantages segments of society.<sup>61</sup> Rather than focusing on equal treatment, then passively leaving individuals to survive through independence alone, a vulnerability theory approach considers ways to cushion against such vulnerabilities.<sup>62</sup> While a state free from all vulnerability is impossible, the goal is to foster “resilience”—meaning acquiring the assets and resources to help mitigate such vulnerabilities.<sup>63</sup> The ability to overcome the challenges that arise in the embodied human experience depends on the total resiliency one has developed.

The responsibility for acquiring resiliency tools is shared by both individuals and the state. This is a notable shift from the neoliberal framework, which focuses exclusively on the individual, to instead require the state to shoulder shared

<sup>55</sup> Fineman, *Anchoring Equality*, *supra* note 22, at 8-9 (“Vulnerability . . . freed from its limited and negative associations is a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality than is currently afforded under the equal protection model.”).

<sup>56</sup> Satz, *supra* note 24, at 79.

<sup>57</sup> Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1754 (2012) [hereinafter Fineman, *Beyond Identities*]; *see also* Fineman, *Equality*, *supra* note 32, at 20 (discussing how the human condition “carries with it the imminent or ever-present possibility of harm, injury, and misfortune”).

<sup>58</sup> Fineman, *Beyond Identities*, *supra* note 57, at 1753.

<sup>59</sup> *Id.* at 1754.

<sup>60</sup> *Id.* at 1752.

<sup>61</sup> *See* Fineman, *Anchoring Equality*, *supra* note 22, at 2; *see also* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587 (1990) (“Feminists have adopted the notion of multiple consciousness as appropriate to describe a world in which people are not oppressed only or primarily on the basis of gender, but on the bases of race, class, sexual orientation, and other categories in inextricable webs.”).

<sup>62</sup> *See* J. Fineman, *supra* note 43, at 300.

<sup>63</sup> *See id.*; PEADAR KIRBY, VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBALISATION 55 (2006).

responsibility.<sup>64</sup> Consequently, the second step of the vulnerability heuristic is to evaluate ways the state can respond to these vulnerabilities. There is a need for a “responsive state” that addresses vulnerabilities by promoting avenues of resilience: “the state [should] be active, involved, and responsive to vulnerability—monitoring institutions and better ensuring that the promise of equality of access and opportunity is realized.”<sup>65</sup> A responsive state should actively seek to encourage institutions that promote resiliency. These state institutions include laws and the judiciary.<sup>66</sup> Advancing institutions that are responsive to vulnerabilities results in greater equity, a more robust democracy, and increased public participation.<sup>67</sup> Thus, understanding the vulnerable subject allows one to categorize, label, and discuss obligations the state should undertake.<sup>68</sup>

Resiliency tools include human, physical, and social assets.<sup>69</sup> Human assets are generally “[d]efined as innate or developed abilities to make the most of a given situation.”<sup>70</sup> They include the ability to “participat[e] in the market” and “accumulate[e] material resources.”<sup>71</sup> Physical assets are the material goods one possesses.<sup>72</sup> These resources are central to one’s “standard of living and ability to invest or respond to economic crisis.”<sup>73</sup> Social assets are the relationships from which individuals derive support and strength.<sup>74</sup> Social assets include networks people can rely on to solve shared problems;<sup>75</sup> thus,

<sup>64</sup> Fineman, *Anchoring Equality*, *supra* note 22, at 12, 13.

<sup>65</sup> Fineman & Gear, *supra* note 28, at 2, 3.

<sup>66</sup> See John Handmer et al., *Using Law to Reduce Vulnerability to Natural Disasters*, 14 GEO. J. ON POVERTY L. & POL’Y 13, 37 (2007).

<sup>67</sup> See Fineman, *Anchoring Equality*, *supra* note 22, at 19.

<sup>68</sup> *Id.* at 8-9.

<sup>69</sup> This list is not exhaustive, as scholars also include environmental and existential assets. See *id.* at 22.

<sup>70</sup> *Id.* at 23.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> J. Fineman, *supra* note 43, at 302.

<sup>74</sup> *Id.*

<sup>75</sup> Kuo & Means, *supra* note 25, at 97. Professor Calmore’s discussion of social capital informs vulnerability analysis’ definition of social assets. As he explains:

There are two primary dimensions to social capital. First, there is a social glue aspect that refers to the degree to which people participate in group life. It relates to the amount of trust or comfort one experiences when identifying and participating in a social group. The second aspect of social capital is a social bridging function that establishes links between groups. The bridges are important, because “they not only connect groups to one another but also give members in any one group access to the larger world outside their social circle through a chain of affiliations.” Both the glue and bridge aspects must be developed among the inner-city poor. In redressing their plight we must keep in mind that both stability and mobility are important.

opportunities to participate in groups have the potential to offer resiliency.<sup>76</sup> In this way, vulnerability differs greatly from the neoliberal focus on the autonomous individual.<sup>77</sup> The “disconnected individual” may not coordinate efforts with others to achieve a desired effect.<sup>78</sup> Collective action can assist in overcoming vulnerability, and thus should be encouraged by a responsive state.<sup>79</sup>

Resiliency also includes broader assets, such as those aimed at providing collective social good.<sup>80</sup> Collective assets impact one’s experiences, since individuals interact with “a web of economic and institutional relationships.”<sup>81</sup> Thus, unlike in the neoliberal paradigm, vulnerability theory recognizes that everyone is dependent on institutions that operate (sometimes without their consent) to advance and develop their interests, identity, and power through collectives. These collectives include traditional state institutions, such as the judiciary or governmental agencies, but they also include other collectives such as the family. As Fineman explains, “[i]n complex modern societies no one is self-sufficient, either economically or socially. Whether the subsidies we receive are financial . . . or nonmonetary . . . we all live subsidized lives.”<sup>82</sup> Since individuals already live a subsidized life, the role of the state is to empower those institutions to be responsive to individuals’ vulnerabilities. Only by supporting institutions that foster growth of the assets responsive to pre-existing vulnerabilities can the state help subjects overcome disadvantages.

This vision of the state’s role is notably different from the present conservative framework. Currently, focusing on equal outcomes without considering pre-existing vulnerabilities ignores how equal treatment does not result in equal outcomes. For

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John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1953 (1999) (internal citations omitted).

<sup>76</sup> See, e.g., Daniela Kraiem, *Consumer Direction in Medicaid Long Term Care: Autonomy, Commodification of Family Labor, and Community Resilience*, 19 *AM. U. J. GENDER SOC. POL’Y & L.* 671, 717 (2011) (“Support of groups that encourage social interaction . . . create the kind of social support that enables people to go on living independently for as long as possible.”); Gavin Smith et al., *Assessing State Policy Linking Disaster Recovery, Smart Growth, and Resilience in Vermont Following Tropical Storm Irene*, 15 *VT. J. ENVTL. L.* 66, 76 (2013) (discussing the role of group participation in building resiliency).

<sup>77</sup> Kuo & Means, *supra* note 25, at 97.

<sup>78</sup> See Daniel P. Aldrich, *Fixing Recovery: Social Capital in Post-Crisis Resilience*, *J. HOMELAND SECURITY* 6 (2010).

<sup>79</sup> See Fineman, *Anchoring Equality*, *supra* note 22, at 8.

<sup>80</sup> See *id.* at n.42.

<sup>81</sup> See *id.* at 10.

<sup>82</sup> FINEMAN, MYTH, *supra* note 42, at 50.

example, Professor Fenton uses healthcare to illustrate the difference between the current neoliberal perspective and a vulnerability analysis.<sup>83</sup> Traditional equality concerns might look narrowly at the availability of healthcare resources: so long as individuals have equal access to those resources, the neoliberal position concludes there is no need for a more responsive state.<sup>84</sup> Thus, in the current paradigm there is “[a] certain reluctance (if not hostility)” toward adopting structured resiliency tools.<sup>85</sup>

In contrast, a vulnerability analysis of the same healthcare inquiry begins by considering “the ability of differently situated groups in society to actually access them.”<sup>86</sup> Rephrased, a vulnerability analysis considers the underlying vulnerabilities in the population seeking healthcare that hinder access. If vulnerabilities are present, equal access is insufficient—assuming universal healthcare is the goal.<sup>87</sup> Considering pre-existing vulnerabilities may elicit alternative justifications for a more responsive state.

## II. THE CLASS ACTION BACKLASH THROUGH A VULNERABILITY LENS

With a foundation on vulnerability analysis in place, this Part details class actions’ larger social justice goals that protect and empower individuals. It then explains how false cries of needing to “equalize” class actions eclipsed these goals. Finally, it discusses the current judicial reluctance to permit class actions.

### A. *The Mixed Goals of the 1966 Amendment to Rule 23*

Federal Rule of Civil Procedure 23 sets forth the prerequisites for class certification.<sup>88</sup> The current class action requirements come from Rule 23’s 1966 Amendment,<sup>89</sup> which eliminated the earlier “true, hybrid, and spurious” class categories under the original 1938 version.<sup>90</sup> These vague

<sup>83</sup> See Fenton, *supra* note 38, at 131-32.

<sup>84</sup> See *id.*

<sup>85</sup> See Coyle, *supra* note 33, at 64.

<sup>86</sup> Fenton, *supra* note 38, at 132 (emphasis omitted).

<sup>87</sup> *Id.* (“Without genuine equality of opportunity and access, the least vulnerable in society (who are best placed to access healthcare) are further privileged.”).

<sup>88</sup> FED. R. CIV. P. 23.

<sup>89</sup> Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970). Though class actions were permitted under the prior 1938 version of the rule, the actual procedures for certification were nebulous at best. Hence, the true birth of class actions is more attributable to the 1966 amendment. Klonoff, *supra* note 11, at 738.

<sup>90</sup> Klonoff, *supra* note 11, at 736 (internal quotations omitted).

classifications hindered the growth of class actions since they “baffled both courts and commentators.”<sup>91</sup> Conversely, the 1966 Amendment provided more functional categories, such as injunctive or damages classes, as well as some broad-brush requirements for satisfying this certification.<sup>92</sup>

However, the 1966 Amendment was not a wholesale adoption of private enforcement. The Amendment was akin to what vulnerability analysis recognizes as a momentary willingness to address the disadvantaged.<sup>93</sup> As with other state responses, the institutional assistance offered by Rule 23 was narrow, limiting its full potential. While the Amendment expanded earlier class action rules, it created several vague hurdles to private enforcement.<sup>94</sup> Congress drafted the statute without fully defining key terms. For example, one requirement for certification is “numerosity,” but the statute is silent as to how numerous class members must be.<sup>95</sup>

While the Amendment encouraged greater use of Rule 23,<sup>96</sup> the purpose for this expansion was less clear from legislative history.<sup>97</sup> Scholars and critics quickly began proffering justifications for the Amendment and its resulting expansion.<sup>98</sup> Generally, these justifications fall into two categories, creating a divide that shaped the future of class action debates: (1) regulatory potential—which recognized quasi-vulnerability concerns, and (2) judicial efficiency—which threatened to neuter class actions’ utility for actual legal and social change.

On the regulatory side, the Amendment reflected, in part, the then-current skepticism of the market<sup>99</sup>—and accompanying skepticism of the government’s ability (or willingness) to regulate companies.<sup>100</sup> Because individuals only suffer minimal monetary

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<sup>91</sup> Wright, *supra* note 89, at 176 (internal quotations omitted).

<sup>92</sup> FED. R. CIV. P. 23.

<sup>93</sup> Cf. Fineman, *Anchoring Equality*, *supra* note 22, at 2 (discussing moments of state responsiveness).

<sup>94</sup> STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 278 (1987).

<sup>95</sup> FED. R. CIV. P. 23(a).

<sup>96</sup> Wright, *supra* note 89, at 170.

<sup>97</sup> YEAZELL, *supra* note 94, at 238-39.

<sup>98</sup> *See id.* As Professor Yeazell, a leading class action historian, explains: “Predicated on the failure of market capitalism and pledged to remedy its defects through legal actions, [the 1966 Amendment] represented both a rejection and an embrace of the invisible hand as a social mechanism.” *Id.* at 244. Consumer protection concerns were also coupled with environmental and racial discrimination concerns. *Id.* To some, it is these combined concerns that stimulated stronger class action procedures in the 1960s. *Id.*

<sup>99</sup> The Amendment also was a response to racial politics and interests in advancing civil rights. *See id.* at 243 (discussing the history of the 1966 Amendment).

<sup>100</sup> MICHAEL PERTSCHUK, *REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT* 11 (1982); WALTER A. ROSENBAUM, *THE POLITICS OF*

damages in business tort class actions, they often lack financial motivation and resources to undertake lengthy, expensive litigation against well-funded defendants.<sup>101</sup> By aggregating consumers' claims, the Amendment provided a mechanism to equalize opportunities and allow individuals to take full advantage of the judicial system.<sup>102</sup> Thus, the expansion of Rule 23 encouraged individuals to "supplement regulatory agencies both by requiring wrongdoers to give up their ill-gotten gains and by ferreting out instances of wrong that might have escaped the regulators' observance."<sup>103</sup>

To others, the Amendment was more about procedural fairness and efficiency. The Amendment was merely a mechanism to allow individuals with similar claims to bring suit collectively, thereby minimizing the judicial resources needed to evaluate those claims.<sup>104</sup> These critics also raised autonomy concerns, particularly about how class actions may require individuals to pursue claims they otherwise might not.<sup>105</sup> Hence, critics in this camp believe class action mechanisms should be narrowly cast without concern for regulatory impact.<sup>106</sup> Otherwise, such procedural rules would violate the Rules Enabling Act, which limits the judiciary's ability to expand substantive law remedies.<sup>107</sup>

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ENVIRONMENTAL CONCERN 65-66 (1973); JAMES Q. WILSON, *THE POLITICS OF REGULATION* 357-97 (1980).

<sup>101</sup> See, e.g., *Chieftain Royalty Co. v. QEP Energy Co.*, 281 F.R.D. 499, 506 (W.D. Okla. 2012); *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 605 (E.D. Cal. 2008), *adhered to*, 287 F.R.D. 615 (E.D. Cal. 2012).

<sup>102</sup> *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 240 (S.D.W. Va. 2005) ("A class action significantly reduces the overall cost of complex litigation, allowing plaintiffs' attorneys to pool their resources and requiring defendants to litigate all potential claims at once, thereby leveling the playing field between the two sides."); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 842 (E.D.N.Y.1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987); see also William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 433 (2001) ("Class actions can reduce disparities in bargaining power between plaintiffs and defendants.").

<sup>103</sup> YEAZELL, *supra* note 94, at 232.

<sup>104</sup> See *id.*

<sup>105</sup> See Jay Tidmarsh, *Living in CAFA's World*, 32 REV. LITIG. 691, 719 (2013) ("Pushed to its limit, respect for individual autonomy requires the abolition of all class actions other than opt-in arrangements in which class members voluntarily join together.").

<sup>106</sup> See David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 594 (2013).

<sup>107</sup> 28 U.S.C. § 2072(b) (2012). Professor Martin Redish's work exemplifies Rules Enabling Act arguments in the class action context. See, e.g., MARTIN H. REDISH, *WHOLESALE JUSTICE* ch. 3 (2009); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 82 (2003) ("[O]ne might be tempted to conclude that, as presently structured, Rule 23 violates the separation of powers protections of the United States Constitution, or at the very least the statutory directive of the Rules Enabling Act that a procedural rule may not abridge, enlarge, or modify a substantive right."); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1596 (2007).

Uncertainty about how to fulfill Rule 23 requirements and the purpose for encouraging more class actions left the courts to answer these nebulous questions.<sup>108</sup> The future of class actions, post-1966, depended on which of these goals the judiciary adopted.<sup>109</sup> The first goal would allow the judicial system to empower individuals by giving them a key resiliency procedural mechanism.<sup>110</sup> The second goal would give corporate defendants room to minimize Rule 23 so as to avoid large-scale exposure.<sup>111</sup> Judicial response to these goals is the focus of the next section.

### B. *The Growth of Anti-Class Action Rhetoric*

Because of the uncertainty surrounding the 1966 Amendment, courts were initially hesitant to follow the Congressional nudge towards permitting class actions.<sup>112</sup> It was not until the 1980s that courts began regularly certifying putative claims.<sup>113</sup> Rather than focusing on issues of judicial access or social justice, courts highlighted class actions' potential efficiency: class action mechanisms were preferable to "repeating, hundreds of times over, the litigation of [the same factual issues]."<sup>114</sup>

This justification allowed courts to overlook class actions' larger potential but still creatively experiment with them—something corporate defendants and their allies<sup>115</sup> greatly feared given the potential for class actions to "rearrang[e] the economic landscape."<sup>116</sup> To successfully undermine the expansion intended

<sup>108</sup> YEAZELL, *supra* note 94, at 278.

<sup>109</sup> See Marcus, *supra* note 106, at 622 (discussing the divide over how to interpret the purpose of Rule 23).

<sup>110</sup> Cf. *Id.* at 623 ("The regulatory conception's chief value of regulatory efficacy is straightforward. Courts should deploy Rule 23 to maximize the substantive law's purchase, so as to compensate for inadequacies of public administration.").

<sup>111</sup> See *id.* at 621.

<sup>112</sup> Klonoff, *supra* note 11, at 736; see, e.g., *In re N.D. Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982); *In re Fed. Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (denying class certification of claims stemming from collapsed skywalks at a Kansas City hotel).

<sup>113</sup> See Marcus, *supra* note 106, at 648-51 (discussing the late 1970s and the early 1980s as a period of stability, whereby courts and corporate litigants had decided they "could live with class action litigation").

<sup>114</sup> Klonoff, *supra* note 11, at 737 (quoting *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986)).

<sup>115</sup> Anti-class action criticism often follows party lines. As Professor Mullenix explains, "not surprisingly, the critics of expansive and innovative use of the class action rule (especially when applied to resolve mass tort and small claims damage class actions) included corporate defendants, the Chamber of Commerce of the United States, like-minded lobbying groups, and most Republicans." Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 523 n.54 (2013).

<sup>116</sup> YEAZELL, *supra* note 94, at 264.

by the 1966 Amendment, critics had to negate regulatory and efficiency justifications for class actions.

This section details the derailing of both justifications for the 1966 Amendment through the rise of the blackmail myth and cost-benefit arguments, and judicial adoption of these arguments. By debunking the primary justifications for more expansive class actions, reformists succeeded in emasculating federal class actions just as they were poised to truly counteract corporate power. This success is a prime example of what Professor Grear accurately describes as “capitalism’s uncanny ability to continuously, adaptively, and reflexively adopt the guise and languages of its putative critiques and counter-values.”<sup>117</sup>

### 1. Buying Into the Blackmail Myth

First, early class action criticism was fueled by judicial and academic voices that refocused class action dialogue away from its regulatory potential. Professor Milton Handler’s commentary exemplifies this:

Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace. Furthermore, while the judicial system is less encumbered than it would be if such an action were litigated, the imposition on judicial time is nevertheless substantial.<sup>118</sup>

Handler’s scholarship helped redirect the class action debate away from victimized class members.<sup>119</sup> His critique

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<sup>117</sup> Grear, *supra* note 46, at 54 (discussing the power of global capital).

<sup>118</sup> Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

<sup>119</sup> By the 1970s he was already a leading antitrust scholar and considered a centrist. See Sylvia Nasar, *Milton Handler, 95, Is Dead; Antitrust Expert Wrote Laws*, N.Y. TIMES (Nov. 12, 1998), <http://www.nytimes.com/1998/11/12/business/milton-handler-95-is-dead-antitrust-expert-wrote-laws.html> (“On antitrust matters, Professor Handler’s philosophy was distinctively centrist.”); see also Milton Handler, *Recent Antitrust Developments*, 112 U. PA. L. REV. 159, 188 (1963) (discussing his centrist views). Thus, his criticism was viewed as tempered, though it failed to consider the consequences to plaintiffs and larger enforcement goals. In fact, he later lamented the lack of government regulation—something these private class actions could have supplemented. Milton Handler, *Foreword*,

created the foundation for the current neoliberal framework's abandonment of "vulnerability as a moral issue" in favor of a focus on marketplace principles.<sup>120</sup> By creating a crisis, namely this alleged "legalized blackmail," critics could begin pushing for reform.

Though it took over a decade, critics advancing this pro-corporate sentiment found an ally in Judge Posner.<sup>121</sup> Echoing much of Handler's sentiment, the Seventh Circuit, in an opinion drafted by Posner, built on the blackmail myth to conceptualize corporate defendants as vulnerable parties in need of judicial protection.<sup>122</sup> *In re Rhone-Poulenc*<sup>123</sup> involved a putative class action claim against manufacturers of certain blood products.<sup>124</sup> The plaintiffs were hemophiliacs who contracted HIV from defendants' tainted products.<sup>125</sup> Though there was significant evidence that blood transfusions spread HIV, the defendants forewent blood testing, pointing to cost and reduced supply concerns.<sup>126</sup> The defendants also allegedly failed to warn the plaintiffs of the danger of contracting AIDS from the products<sup>127</sup>—leaving this vulnerable group further disadvantaged.

The trial court granted class treatment for a portion of the claims.<sup>128</sup> However, with significant judicial or evidentiary support, Posner decertified the class because of concerns about the potential harm certification could cause the defendants.<sup>129</sup>

75 CAL. L. REV. 787 (1987) ("It is only in the [Reagan] administration, however, that a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot long remain free.").

<sup>120</sup> Gear, *supra* note 46, at 66.

<sup>121</sup> Judge Posner was not the only judicial voice to raise allege blackmail concerns. As early as 1972, Judge Henry Friendly, the revered Second Circuit jurist, raised concerns about class actions forcing defendants into "blackmail settlements." See HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973); see also Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1430 (2003).

<sup>122</sup> See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

<sup>123</sup> *Id.* at 1293.

<sup>124</sup> See *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410, 413 (N.D. Ill. 1994).

<sup>125</sup> See *id.* at 414. For a detailed discussion of the facts in the underlying case, see Jeff Wright, Note, *Bad Blood: Wadleigh v. Rhone-Poulenc Rorer, Inc., Mandamus Uncabined*, 23 W. ST. U. L. REV. 549, 550-52 (1996) (discussing in detail the background of the *Wadleigh* case); see also Jeff Lyon, *A Matter of Life or Death*, CHI. TRIB. (Apr. 23, 1989), [http://articles.chicagotribune.com/1989-04-23/features/8904060794\\_1\\_blood-last-year-factor-donor](http://articles.chicagotribune.com/1989-04-23/features/8904060794_1_blood-last-year-factor-donor) (discussing the history of hemophiliacs with HIV and the effects on hemophiliacs of recent price increases of hemophilia medication).

<sup>126</sup> Kathryn Glasgow Lotfi, *Suppliers of AIDS-Contaminated Blood Now Face Liability*, 34 HOW. L.J. 183, 187-88 (1991); see also James K. Lehman, *Blood Suppliers' Liability for AIDS Contaminated Blood*, 41 S.C. L. REV. 107, 109 n.14 (1989).

<sup>127</sup> See *Wadleigh*, 157 F.R.D. at 410.

<sup>128</sup> See *id.* at 415-18.

<sup>129</sup> See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995).

Posner rationalized decertifying the class because of “the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, expose[d] [defendants to] . . . intense pressure to settle.”<sup>130</sup>

In essence, Posner’s argument mirrored Handler’s earlier critique, but in the context of *In re Rhone-Poulenc*, its merit was particularly questionable. Blood manufacturers already successfully defended similar claims by relying on “blood shield statutes.”<sup>131</sup> Further, the defendants previously evaded liability since the blood industry was slow to test blood—allowing defendants to raise standard of care arguments.<sup>132</sup> Hence, these defendants were hardly defenseless against class actions. Rather, Posner sympathized with the corporate giants, leaving the HIV hemophiliac putative class members with no reasonable avenue for legal recourse.<sup>133</sup>

Judge Posner’s remarks spread like wildfire, and the blackmail myth soon dominated class action rhetoric.<sup>134</sup> Branded as extortionists, plaintiffs’ attorneys became the focus of class action criticism for placing defendants “under intense pressure to settle.”<sup>135</sup> This narrative became the rally cry for sweeping judicial activism.

However, in a thorough debunking of the blackmail myth, Professors Kanner and Nagy point out that settlement rates for class actions are directly on par with settlements in other types of federal actions.<sup>136</sup> There is no evidence that class actions create

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<sup>130</sup> *Id.* at 1297-98.

<sup>131</sup> See Kathryn W. Pieplow, *AIDS, Blood Banks and the Courts: The Legal Response to Transfusion-Acquired Disease*, 38 S.D. L. REV. 609, 622-23 (1983).

<sup>132</sup> See Laurie C. Uustal, In the Matter of Rhone-Poulenc Rorer; *Shielding Defendants Under Rule 23*, 51 U. MIAMI L. REV. 1247, 1258-59 (1997).

<sup>133</sup> While there had already been a series of individual suits against the defendants, the cost and stigma concerns made individual litigation unlikely. See *In re Rhone-Poulenc*, 51 F.3d at 1303 (“The plaintiffs argue that an equally important purpose of the class certification is to overcome the shyness or shame that many people feel at acknowledging that they have AIDS or are HIV-positive even when the source of infection is not a stigmatized act. That, the plaintiffs tell us, is why so few HIV-positive hemophiliacs have sued.”).

<sup>134</sup> This is not to say all class actions have merit. Few, if any, societal institutions are free from isolated instances of abuse. This has also been true in class actions’ fifty year history in federal courts. For class action, initial rumbles against this form of aggregate litigation occurred in response to early coupon settlements, where class members did not receive direct monetary compensation but instead received coupons off future purchases. Rather than recognizing the potential deterrent and non-compensatory attributes associated with such settlements, the focus instead turned to the class action plaintiffs’ attorneys who receive compensation under fee shifting provisions.

<sup>135</sup> See *In re Rhone-Poulenc*, 51 F.3d at 1298; see also *Newton v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 259 F.3d 154 (3rd Cir. 2001) (using “hydraulic pressure” to define class actions’ alleged pressure to settle put upon defendants, when they want to avoid “potentially ruinous liability”).

<sup>136</sup> Kanner & Nagy, *supra* note 12, at 697.

any unique pressure. Perhaps the more intriguing question is how this narrative continued to dominate despite empirical evidence undermining its accuracy. Given its lack of merit, the blackmail myth becomes an example of what some scholars might characterize as the rise of falsely generated crises to justify less government responsiveness during the neoliberal period.<sup>137</sup>

This fear of class actions successfully minimized plaintiffs' ability to participate in the judicial system.<sup>138</sup> The blackmail myth allowed courts to protect corporations and falsely equalize the playing field in class actions.<sup>139</sup> A primary justification for class actions—increased regulatory impact—went to the wayside, replaced with concerns about well-funded corporate defendants unjustly paying for corporate malfeasance.

## 2. The Rise of Cost-Benefit Analyses . . . and the Fall of Private Enforcement

Next, with regulatory justifications minimized, critics turned to undermining the alternative justification for the 1966 expansion of class actions—judicial efficiency. As the blackmail myth grew in popularity, cost-benefit arguments started redefining efficiency justifications.

Interestingly, early law and economic analyses of class actions, such as those advanced by Professor Dam, supported the 1966 Amendment's expansion. While these arguments did not consider policy or larger social goals, they recognized that class actions reduced transaction costs. Further, class actions resulted in deterrence gains.<sup>140</sup> Thus, initial law and economic analyses of class actions aligned with the regulatory justification for the 1966 Amendment.

However, these supportive critiques were soon eclipsed by reframed efficiency arguments. New cost-benefit arguments

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<sup>137</sup> See, e.g., NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 8-11, 15, 16 (2007) (discussing this false crisis generation as “the shock doctrine”); see also BARRY BUZAN ET AL., *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* 17 (1998) (describing “securitization” as the creation of a scapegoat to generate fear and disorient the public).

<sup>138</sup> Cf. Grear, *supra* note 46, at 60 (explaining vulnerability analysis as a means of minimizing “the usual corporate financial dominance over ‘participatory’ processes”).

<sup>139</sup> See Silver, *supra* note 121, at 1358 (discussing how “[h]ydraulic pressure . . . to settle’ is now a recognized objection to class certification” that is repeatedly asserted by defendants).

<sup>140</sup> Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975); see also Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1939 (2000) (describing competing law and economic class action arguments).

advanced autonomy concerns.<sup>141</sup> To critics, benefits of class actions do not outweigh potential harm.<sup>142</sup> While class actions may deter wrongdoing, critics contend this benefit is insufficient to justify the potential harm to corporations and increased costs for consumers from defending against such claims.<sup>143</sup> Instead, “[w]e should rely on individual litigation to secure financial compensation for individuals’ financial losses, accepting that some losses that were wrongfully imposed by others will go uncompensated because they are simply too small to be worth the cost of individual litigation.”<sup>144</sup> A rational individual would forego class action rights<sup>145</sup> and wait for administrative agencies and attorneys general to achieve the goals currently addressed by class actions.<sup>146</sup>

Like the blackmail myth, cost-benefit and rational actor arguments ignore the consequences of attacking class actions. If accepted, these arguments exclude aggregation for small and large individual sum cases. Low individual sum cases—the cases originally intended for class aggregation—fail cost-benefit/efficiency analyses because of the small amounts at issue compared to the expense of suit.<sup>147</sup> Large individual sum cases, in contrast, fail such analyses “because individuals could cost-effectively achieve just compensation through more traditional legal outlets.”<sup>148</sup> Thus, by relying on autonomy and cost-benefit arguments, neoliberal arguments essentially immunize corporate defendants from class action claims.

Despite these points, efficiency arguments quickly took root in judicial opinion. Without a true vision of what costs and

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<sup>141</sup> See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1465 (1995) (questioning the utility of class actions because of the cost spent litigating the claims).

<sup>142</sup> See, e.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 35 (2000) (discussing class action criticisms).

<sup>143</sup> See *id.*

<sup>144</sup> DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 471 (Rand Institute for Civil Justice ed. 2000) [hereinafter RAND REPORT], available at [www.rand.org/publications/MR/MR969](http://www.rand.org/publications/MR/MR969).

<sup>145</sup> See, e.g., Silver, *supra* note 121, at 1361-62 (citing *Eisen v. Carlisle & Jacqueline*, 391 F.2d 55 (2d Cir. 1968) to demonstrate facts of a case with claims too small to litigate); cf. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 382 (2000) (discussing apathy arising from small stakes claims).

<sup>146</sup> Patrick A. Luff, *Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions*, 41 U. MEM. L. REV. 65, 68 (2010).

<sup>147</sup> See, e.g., *Legge v. Nextel Commc'ns, Inc.*, No. CV 02-8676, 2004 WL 5235587, at \*13-17 (C.D. Cal. June 25, 2004).

<sup>148</sup> See, e.g., Luff, *supra* note 146, at 73.

benefits should be analyzed,<sup>149</sup> courts started using cost-benefit arguments to justify class certification denials.<sup>150</sup> Class actions were deemed no longer efficient, gutting even the second, narrower rationale for the 1966 expansion.

Once regulatory and efficiency justifications for expanding class actions were negated, it was not long before courts and Congress began chipping away at class actions—taking back one of the few resiliency tools for plaintiffs in large business tort claims. Decisions denying certification began incorporating the blackmail myth and inefficiency concerns.<sup>151</sup> The Fifth Circuit, once supportive of class actions,<sup>152</sup> decertified the largest class action to date, a 50 million-person nationwide class of nicotine addicts.<sup>153</sup> The Sixth Circuit and Third Circuit quickly followed suit, decertifying other important putative class claims.<sup>154</sup> But the full class action backlash was still yet to come.

### C. *The Current Impotency of Rule 23*

The outcry for class action reform continued into the early 2000s, when the blackmail myth eventually drove Congress and the judiciary to undertake changes to class action mechanisms. These changes were meant to protect defendants, stripping the advantages intended by Rule 23. The largest change adopted under the guise of equalizing class actions was the 2005 Class Action Fairness Act (CAFA). Though Congress originally labeled the Act the “Consumer Class Action Bill of Rights,”<sup>155</sup> the Act did not aim to help consumers but rather solve “the problem of unfair settlements and excessive attorneys’ fees.”<sup>156</sup> Hence,

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<sup>149</sup> See *id.* at 69 (“The cost-benefit analyses employed by courts lack any semblance of uniformity and are frequently premised on under-informed conclusions.”).

<sup>150</sup> See, e.g., *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (denying certification and noting that “defendants’ potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff[s]”).

<sup>151</sup> See, e.g., *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 n.8 (3d Cir. 2001); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

<sup>152</sup> See *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (“[T]he defendants enjoy all of the advantages, and the plaintiffs incur the disadvantages, of the class action—with one exception: the cases are to be brought to trial.”).

<sup>153</sup> *Castano*, 84 F.3d at 752.

<sup>154</sup> See, e.g., *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995); see also Mullenix, *supra* note 115, at 524.

<sup>155</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 3, 119 Stat. 4, 5-9 (to be codified at 28 U.S.C. §§ 1711-15).

<sup>156</sup> JUDICIARY COMM. REPORT ON CLASS ACTION FAIRNESS ACT, S. REP. NO. 109-14, at 27 (2005), reprinted in 2005 U.S.C.C.A.N. 26, 27.

CAFA was Congress' adoption of and response to the blackmail myth and efficiency and autonomy concerns.<sup>157</sup>

In addition to discouraging class actions by limiting attorneys' fees, CAFA expanded federal diversity jurisdiction to force state class claims back into federal court.<sup>158</sup> The removal of class actions from state court was predicated as a measure essential to "equalize" the treatment of defendants in pending state and federal class actions, as state courts were perceived as more sensitive to local plaintiffs. However, once again, empirical evidence did not support this alleged need to protect corporate defendants.<sup>159</sup>

The expansion of federal jurisdiction has had very real consequences for class action plaintiffs. As Professor Rice explains:

[C]orporate defendants are substantially more likely to win tort-based class actions when those claims are litigated in federal courts of appeals. And corporate defendants won large percentages of tort-based, federal class actions regardless of whether class members sued multinational corporations and insurers jointly or individually. Corporate defendants "win" ratios in federal courts are 66.7% and 84.6%, respectively.<sup>160</sup>

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<sup>157</sup> See, e.g., 151 CONG. REC. S1245 (daily ed. Feb. 10, 2005) (statement of Sen. Dodd) ("[C]urrent pleading practice by the class action plaintiffs bar has very effectively denied Federal jurisdiction over cases that are predominantly interstate in nature. These are precisely the kinds of cases the Framers thought deserve to be heard in Federal courts. . . . [This Act only brings] pleading practice more into line with constitutional requirements. Cases that are primarily intra-rather than interstate in nature may continue to be heard in State courts. But . . . clearly interstate [cases] will now be more likely to be heard in Federal court, where they belong.")

<sup>158</sup> 28 U.S.C. § 1332(d)(2) (2005). Plaintiffs' class action attorneys sought refuge in state courts. Unlike their federal brethren, state court judges demonstrated a clearer willingness to allow class actions. Mullenix, *supra* note 115, at 525-26. These state court successes only fueled anti-class action sentiment and gave critics new cause to reinvigorate arguments centered on protecting alleged corporate wrongdoers. The reinvigorated arguments found a sympathetic environment in the current pro-corporate neoliberal environment.

<sup>159</sup> See *Class Action "Judicial Hellholes": Empirical Evidence Is Lacking*, PUB. CITIZEN'S CONG. WATCH (Jan. 2005), available at <http://www.citizen.org/documents/OutlierReport.pdf> (reporting that very few jurisdictions are "unfair" to defendants and that various states have altered their class action rules for defendants' benefit); cf. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 645, 652-54 (2006) (finding, on limited data, no differences in treatment of class actions between state and federal courts, and observing that "[a]ttorney perceptions of judicial predispositions toward their clients' interests show little or no relationship to the judicial rulings in the surveyed [state and federal class action] cases"). But see Klonoff, *supra* note 11, at 732 (discussing how state-court jurisdictions "were not sympathetic to large, out-of-state defendants").

<sup>160</sup> Rice, *supra* note 2, at 541.

Thus, while CAFA was enacted to promote fairness, in actuality it has helped corporations evade class action liability.

With multistate class actions now funneled into federal court,<sup>161</sup> federal judicial activism continues to chip away at class action procedures. The Roberts Court's pro-corporate record is well-established. After just five terms, the Roberts Court ruled for business interests 61% of the time.<sup>162</sup> This is in contrast to 46% in the last five years of the Rehnquist Court and 42% of all Courts since 1953.<sup>163</sup> The Court's corporate protection has greatly limited class actions.<sup>164</sup> The Roberts Court has actively heightened procedural requirements, making it harder to get into court; harder to plead a business tort class claim; and harder to certify a federal class.<sup>165</sup>

Now, the dominant judicial attitude towards class actions is knee-jerk skepticism. At the inception of any class action, scales already tip heavily in the defendant's favor. Putative class members' very attempt to pursue class claims places them in a suspect posture for judges. In fact, the tenor in some class certification decisions assumes the claims are of questionable merit from the outset. As one court recently stated, "denying or granting class certification is often the defining moment in class actions (for it may . . . create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . ."<sup>166</sup>

Even assuming corporate defendants need more protection, the Supreme Court has added substantial gatekeeping

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<sup>161</sup> See Klonoff, *supra* note 11, at 745 ("CAFA has in fact had an enormous impact in shifting most class actions to federal court."); see also Gail E. Lees et al., *Year in Review on Class Actions*, 13 CLASS ACTION LITIG. REP. (BNA) No. 4, at 225 (Feb. 24, 2012) (noting—indeed, exclaiming—that, following CAFA's enactment, "consumer class action filings increased by 577% in the district courts in the Ninth Circuit!").

<sup>162</sup> Lee Epstein, William M. Landes & Richard A. Posner, *Is the Roberts Court Pro-Business?* 1-2 (Dec. 17, 2010) (unpublished manuscript), [www.scribd.com/doc/50720643/EPSTEIN-LANDES-POSNER-Is-the-Roberts-Court-Pro-Business](http://www.scribd.com/doc/50720643/EPSTEIN-LANDES-POSNER-Is-the-Roberts-Court-Pro-Business).

<sup>163</sup> See *id.*

<sup>164</sup> See, e.g., George Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 25 (2012) (discussing the Supreme Court's trend to rule against expanding class action mechanisms).

<sup>165</sup> See Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 56-58 (2010). This is in addition to narrowing the substantive claims often brought as private class actions. For example, the Roberts Court eroded *per se* liability for key potential antitrust violations. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling the long-standing doctrine of *per se* illegality in holding that resale price maintenance is to be judged by the rule of reason); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (finding joint venture agreement to sell gasoline at the same price to their separate chains of branded service station owners was not *per se* illegal as a horizontal price fixing agreement).

<sup>166</sup> *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001).

to class actions during the last decade alone.<sup>167</sup> One of the primary new gates to business tort class claims is *Bell Atlantic Corporation v. Twombly*, which altered the pleading standard for a complaint.<sup>168</sup> In *Twombly*, the Supreme Court returned to blackmail and efficiency rationales to justify empowering judges to dismiss class claims they deem implausible based on their “judicial experience and common sense.”<sup>169</sup> The Supreme Court’s tenor demonstrates a clear disdain for class actions, framing them as potentially asserting “a largely groundless claim . . . tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.”<sup>170</sup> This skepticism and new pleading standard means class plaintiffs must now prove their case without the aid of discovery.<sup>171</sup>

For many areas of law, this standard means little. For example, in a typical contract case, a plaintiff need only allege facts for each element of the claim, with potentially more emphasis on breach and damages allegations. So long as a party states facts “plausibly suggesting (not merely consistent with)” illegal conduct,<sup>172</sup> the complaint should stand.

But in antitrust and consumer fraud claims, what is “plausible” is far more relative. *Twombly* permits a judge to subjectively decide whether she believes wrongdoing is plausible in a given industry.<sup>173</sup> This subjectivity is notably deadly for putative antitrust class actions. Two out of every three antitrust claims filed since *Twombly* have been dismissed

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<sup>167</sup> Lazaroff, *supra* note 13. For a thorough discussion of increased gatekeeping under the Roberts Court, see generally Wasserman, *supra* note 14.

<sup>168</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>169</sup> *Id.* at 565.

<sup>170</sup> *Id.* at 558 (internal quotations omitted). Soon after, the Supreme Court confirmed that this new pleading standard applied to all cases, not just antitrust class actions. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009) (applying the *Twombly* standard to a qualified immunity claim). However, the revised pleading standard disproportionately impacts consumer class actions, particularly antitrust claims. See, e.g. Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 17-27 (2008) (discussing impact of *Twombly*).

<sup>171</sup> Cavanagh, *supra* note 170, at 22.

<sup>172</sup> *Twombly*, 550 U.S. at 557.

<sup>173</sup> Further, this requirement ignores that defendants, not plaintiffs, have access to detail needed to pass this barrier. See also Hovenkamp, *supra* note 165, at 58 (discussing the problematic nature of *Twombly* for plaintiffs attempting to plead implicit market division agreements). As one scholar explains, “Based on differences among judges, one judge may dismiss a complaint while another concludes that it survives, solely because of the way each judge applies his or her ‘judicial experience and common sense.’ This is bound to create unpredictability, lack of uniformity, and confusion.” Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest of Justice*, 37 OHIO N.U. L. REV. 621, 624 (2011).

on Rule 12(b)(6) motions,<sup>174</sup> a figure nearly 25% higher than in torts or contracts cases.<sup>175</sup> Thus, even assuming class actions needed more gatekeeping—a suspect assumption—*Twombly* more than sufficed.

Nonetheless, *Twombly* is far from the only obstacle to realizing class actions' potential. In *American Express Co. v. Italian Colors Restaurant*,<sup>176</sup> the Court provided potential defendants with a powerful tool to avoid class actions altogether.<sup>177</sup> A potential defendant need only include an arbitration clause that precludes class actions to avoid such suits.<sup>178</sup> By inserting the correct magic language in the fine print of a product's terms and conditions, a potential defendant can immunize itself from class actions.<sup>179</sup>

This decision reflects another autonomy-based justification for narrowing class actions: freedom of contracts—even if that freedom is illusory to the average consumer. Freedom to contract focuses on the capabilities of autonomous legal actors, while concurrently failing to recognize the power differential between corporations and consumers. To the Court's majority, class actions wrongly interfere with that freedom and thus need curtailing. As Justice Kagan accurately describes the decision: "The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled."<sup>180</sup>

These procedural changes significantly restricted the viability of class actions. As Senator Arlen Specter noted:

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<sup>174</sup> Heather Lamberg Kafele & Mario M. Meeks, *Developing Trends and Patterns in Federal Antitrust Cases after Bell Atlantic Corp. v. Twombly and Aschcroft v. Iqbal*, SHEARMAN & STERLING LLP ANTITRUST DIG., Apr. 2010, at 8. A segment of scholars, practitioners, and advocacy organizations have sought to ameliorate the harm caused by this decision, though their proposed responses are far from uniform. Some advocate for limited discovery, others seek a legislative override of the decision or amendments to the Federal Rules. See Malveaux, *supra* note 173, at 629; see also Letter from Albert A. Foer, President, The Am. Antitrust Inst., to Hon. Lee H. Rosenthal, Chair, The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (May 27, 2010) (endorsing "flashlight discovery," that is, limited initial discovery).

<sup>175</sup> Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 607 (2010).

<sup>176</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

<sup>177</sup> As one commentator describes the decision: "This is as big a pro-business, pro-corporate ruling as we've ever seen from the Roberts' Court—and it will take explicit Congressional action to overturn it." Andrew Cohen, *No Class: The Supreme Court's Arbitration Ruling*, ATLANTIC (Apr. 27, 2011, 5:33 AM), <http://www.theatlantic.com/national/archive/2011/04/no-class-the-supreme-courts-arbitration-ruling/237967>.

<sup>178</sup> *Italian Colors*, 133 S. Ct. at 2309-10.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 2320 (Kagan, J., dissenting).

The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries . . . I think that is an especially unwelcome development at a time when, with the litigating resources of our executive-branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants.<sup>181</sup>

The true perniciousness of these changes, however, is their alleged intent to make class actions fairer. Since class actions equalize judicial access and consumers' regulatory power, restricting Rule 23 does not create fairness or social justice. It instead returns consumers to their original posture—namely one of disadvantage against large corporate defendants. The next part explores consumers' pre-existing disadvantages in vulnerability terms.

### III. CLASS ACTIONS THROUGH A VULNERABILITY LENS

The current anti-class action sentiment is a classic example of what vulnerability analysis describes as the neoliberal agenda. Rule 23, read literally, is party-neutral but as presently applied benefits the already advantaged. In terms of vulnerability, the dialogue over class actions fails to consider the pre-existing imbalances created by social and economic disparities between plaintiffs and defendants. In simple terms, courts are not looking at the bigger picture. Larger questions of social justice are ignored, as class action reform focuses myopically on formal efficiency and corporate protection.

Rather than focusing solely on how corporate defendants fare once a claim is certified, a vulnerability analysis offers a broader, more comprehensive vision. It starts by diagnosing vulnerabilities then evaluates whether the state is sufficiently responsive to these needs. Prior vulnerability scholarship has yet to discuss class action mechanisms. This part fills that gap. It starts by examining corporate defendants' posture, explaining why some of the supposed disadvantages perceived by the courts are more mythical than real. Then, it juxtaposes these advantages against class action plaintiffs' oft overlooked disadvantages.

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<sup>181</sup> *Specter Proposes Return to Prior Pleading Standard*, BLOG OF LEGAL TIMES (July 23, 2009, 11:43 AM), <http://legaltimes.typepad.com/blt/2009/07/specter-proposes-return-to-prior-pleading-standard.html> (internal quotation marks omitted).

### A. *Mythical Corporate Disadvantages*

To start, this Article acknowledges corporations, as with small businesses or other entities, have the potential to experience vulnerabilities.<sup>182</sup> When a corporation commits wrongdoing, that wrongdoing is done by individuals. For example, in a consumer case, specific individuals are responsible for failing to disclose information; or, in an antitrust case, individuals create an overly restrictive distribution policy. But vulnerability from one's status as an individual is limited by the corporate structure. As a corporation, these defendants do not face meaningful individual financial liability. Further, corporations are advantaged by the rise of procedural gatekeeping in class actions—making it easier for a case to avoid merit based determinations.<sup>183</sup> As a result, judicial advocacy to limit class actions is not warranted.

While class actions often involve high stakes claims, defendants in these cases are also uniquely well-situated to weather this risk. Corporate defendants often have deep enough pockets and maybe more significantly, can rely on both primary and secondary insurance to shield themselves from class action losses.<sup>184</sup> The corporate structure immunizes individuals from accountability. Because individuals' actions take place under a corporate shield, it is rare for individuals to be charged with corporate misconduct.<sup>185</sup> If misconduct is uncovered, the corporation—not the individual wrongdoers—pays the potential consequences.<sup>186</sup> While criminal punishment for business class action torts is possible, individual jail time is still a rarity.<sup>187</sup> And

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<sup>182</sup> Fineman, *Anchoring Equality*, *supra* note 22, at 12.

<sup>183</sup> See Arthur R. Miller, *Mcintyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 476 (2012) (discussing how increased procedural gatekeeping benefits defendants).

<sup>184</sup> See Silver, *supra* note 121, at 1414.

<sup>185</sup> Abigail H. Lipman, *Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 359, 360 (2009); Matambanadzo, *supra* note 49, at 471 (“Because prosecutors are hesitant to punish ‘innocent’ shareholders for corporate wrongdoing, only a small number of criminal cases proceed against corporate defendants.”).

<sup>186</sup> Matambanadzo, *supra* note 49, at 470 (“The corporation enjoys a separate legal existence from its shareholders, directors, and officers. This separate legal existence provides limited liability for the human persons behind the corporation, even though their decisions and preferences control the actions of the corporate person.”).

<sup>187</sup> See, e.g., Ben Hallman, *Too Big to Jail: Wall Street Executives Unlikely to Face Criminal Charges*, HUFFINGTON POST (Sept. 8, 2012, 2:42 PM), [http://www.huffingtonpost.com/2012/09/08/criminal-charges-wall-street\\_n\\_1857926.html](http://www.huffingtonpost.com/2012/09/08/criminal-charges-wall-street_n_1857926.html) (discussing how few corporate defendants will face jail time for their role in the subprime mortgage debacles); Eric Tucker, *Jail Time for Toyota Executives is Unlikely*, TWINCITIES.COM (Mar. 25, 2014, 12:01 AM), [http://www.twincities.com/ci\\_25419498/jail-time-toyota-executives-is-unlikely](http://www.twincities.com/ci_25419498/jail-time-toyota-executives-is-unlikely) (discussing how despite persuasive efforts to conceal the extent of dangerous car defendants, it is unlikely Toyota executives will face jail time).

if a corporate actor must pay an individual fine, corporations often provide compensation.<sup>188</sup> Such pay is often offset by insurance, thus further minimizing financial disadvantage.

Beyond financial advantage, corporate defendants also have procedural advantages in class actions. Growth of procedural limitations brings more protection for corporate defendants from class action exposure. As procedural hurdles rise, courts increasingly move away from merit-based determinations. Corporate defendants can avoid potential class action exposure by prohibiting class actions in the terms and conditions for their products.<sup>189</sup> If a claim manages to survive this hurdle, the odds for dismissal on a motion to dismiss are in defendants' favor. Even in the class action setting, corporate defendants have the power of dispositive motions.<sup>190</sup> Such motions are particularly powerful post-*Twombly*. Prior to the heightened pleading requirements articulated in *Twombly*, at least one-third of class actions were already resolved on purely dispositive motions.<sup>191</sup> Since *Twombly*, there has been a notable increase in motions to dismiss<sup>192</sup>—without corresponding evidence that the quality of complaints is somehow on the decline. A complaint is one-and-a-half times more likely to be dismissed now than before *Twombly*: three out of ten complaints are now tossed out.<sup>193</sup>

Courts also continue to restrict Rule 23, making it less likely a corporate defendant will have to face a certified class. The extensive requirements of Rule 23 already provided a procedural framework embedded with mechanisms favoring defendants. This is even more true for Rule 23(b)(3) classes, which permit monetary damages. For such claims, class counsel must prove numerosity, typicality, adequacy, predominance, and superiority.<sup>194</sup> While historically, some courts permitted use of

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<sup>188</sup> JOHN M. CONNOR, GLOBAL PRICE FIXING 419-20 (2001) (describing how during cross-examination at the famous 1998 trial of three top executives of ADM for price fixing, the lead (immunized) witness for the prosecution was made to admit that his employer had paid his entire fine and promoted him to president of one of its largest subsidiaries).

<sup>189</sup> See *supra* Part II.C. and accompanying notes (detailing new procedural hurdles in class actions).

<sup>190</sup> Kanner & Nagy, *supra* note 12, at 694.

<sup>191</sup> See THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 29-32 (1996) (citing figures and noting that, although appeals courts disagree on the appropriateness of ruling on dispositive motions prior to certification, district judges routinely do so).

<sup>192</sup> See Hatamyar, *supra* note 175, at 622-23 (analyzing dismissal rates pre and post-*Twombly*).

<sup>193</sup> See *id.*

<sup>194</sup> FED. R. CIV. P. 23(b)(3).

presumptions to establish some of the requirements for class certification, with the attack on class actions came an erosion of those presumptions as well.<sup>195</sup> Even assuming a legitimate need to narrow class actions, there has been an overcorrection without sufficient justification.

More significantly, perhaps, is the Supreme Court's recent heightening of the commonality requirement. Prior to 2011, commonality was relatively easy to satisfy so long as "there [was] 'at least one issue whose resolution will affect all or a significant number of putative class members.'"<sup>196</sup> In *Wal-Mart v. Dukes*,<sup>197</sup> however, the Supreme Court heightened the requirement. Class members must now establish they share the same injury, not just one common issue.<sup>198</sup> This heightened commonality requirement makes class certification harder and has already resulted in certification denials<sup>199</sup>—which limit claims defendants face by denying plaintiffs' judicial access.<sup>200</sup> Accordingly, the standards for class certifications are more arduous than a decade ago, even without the other procedural hurdles such claims now face. Nonetheless, judicial protection of corporations increases with each new procedural hurdle for class actions. Members of the Senate Judiciary Committee have noted how the Rehnquist and Roberts Courts have systematically gutted substantive laws aimed at protecting consumers, "sometimes turning these laws on their heads and making them protections for big business rather than for ordinary citizens."<sup>201</sup>

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<sup>195</sup> See Christine Bartholomew, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2182 (2014) (discussing presumptions impacting class certification determinations); see, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, 41 (D.D.C. 2012) (alternating presumption of impact to something more akin to a presumption-plus, meaning some additional evidence is needed for common impact).

<sup>196</sup> *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993); cf. FED. R. CIV. P. 23(a)(2).

<sup>197</sup> 131 S. Ct. 2541 (2011).

<sup>198</sup> *Id.* at 2551.

<sup>199</sup> See, e.g., *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 493, 497-98 (7th Cir. 2012) (finding that class plaintiffs failed to establish commonality under the *Dukes* standard in an action alleging the failure to ensure children's rights under the Individuals with Disabilities in Education Act); *Haggart v. Endogastric Solutions, Inc.*, No. 10-346, 2012 WL 2513494, at \*4 n.5 (W.D. Pa. June 28, 2012) ("While it appears that there could certainly be common issues resolvable in a way that would move the litigation forward . . . and/or common questions of law, it also appears that class members have not suffered the same class of injury and that commonality would therefore not be met under *Dukes*." (emphasis omitted) (citation omitted)).

<sup>200</sup> See A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 448 (2013).

<sup>201</sup> *Short-Change for Consumers and Short-Shrift for Congress? The Supreme Court's Treatment of Laws that Protect Americans' Health, Safety, Jobs and Retirement: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2008) [hereinafter *Short-*

Given the procedural benefits afforded corporate defendants, the notion that settlements are extorted is suspect from the outset. More fundamentally, though, characterizing class actions as blackmail is a flawed justification for evading social justice for four distinct reasons. First, it ignores that settlement pressure exists for all cases. Second, framing settlements as “blackmail” assumes settlements are unjustified pay outs—hardly a neutral premise. Settlements in these cases may instead be redress or disgorgement. Third, corporate defendants can offset any perceived threat brought on by litigation by maximizing the available class action procedures. Such procedural gatekeeping limits potential claims needing resolution—be it through merit based determinations or settlement.

Finally, and perhaps most telling, the premise that corporate defendants are victims of meritless class actions lacks support. For example, the Committee on the Judiciary study of class actions analyzed allegations of meritless claims leading to forced settlements and found such concerns were unfounded, given procedural mechanisms offset any illusory concerns of coercive settlement.<sup>202</sup> The bipartisan Antitrust Modernization Commission reached a similar result in its study of private antitrust class actions.<sup>203</sup> During its investigation, the Commission sought testimony and evidence to assess the need for additional gatekeeping.<sup>204</sup> It concluded: “No actual cases or evidence of systematic over-deterrence were presented to the Commission . . . .”<sup>205</sup> Such conclusions raise significant questions about characterizing class action settlements as extortion. Rather, they suggest such settlements are just the natural by-product of litigation more generally.

Hence, to frame class actions as only disadvantaging corporate defendants by extorting settlements is overly simplistic. Once the parties’ relative positions are considered, it becomes evident that putative plaintiffs are the true systematically disadvantaged. The next section begins that juxtaposition.

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*Change*] (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_senate\\_hearings&docid=f:44331.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:44331.pdf); see also Simon Lazarus, *Hertz or Avis? Progressives’ Quest to Reclaim the Constitution and the Courts*, 72 OHIO ST. L.J. 1201, 1249 (2011).

<sup>202</sup> See JUDICIARY COMM. REPORT ON CLASS ACTION FAIRNESS ACT, *supra* note 156, at 94-95.

<sup>203</sup> See ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 247 (2007).

<sup>204</sup> See *id.*

<sup>205</sup> See *id.*

## B. *Class Action Plaintiffs as the Disadvantaged*

While corporate defendants face limited financial disadvantages—most of which can be offset through procedural advantages—class action plaintiffs' disadvantages are significant. These disadvantages exist across a putative class and are independent of class members' identity in terms of traditional markers, such as age or race. Corporate wrongdoing often impacts large numbers of individuals.<sup>206</sup> As has long been recognized, “[m]odern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.”<sup>207</sup> Though hardly a comprehensive list, putative class members asserting business tort claims are disadvantaged financially, informationally, and because of judicial favoritism.

### 1. Consumers' Financial Disadvantage Vulnerability

From purely a financial viewpoint, the disparity between class action plaintiffs and defendants is marked. Such cases are notably expensive, as they often implicate complex, protracted legal questions.<sup>208</sup> Individual litigation expenses easily exceed any potential recoupment.<sup>209</sup> This is particularly true when the harm consumers suffer from wrongdoing is minimal—even if the aggregate harm the corporate defendant has caused is extensive.

As detailed above, individual plaintiffs face significant financial vulnerabilities that stand in stark relief to the more limited financial constraints of corporate actors. Few class members have the funds to undertake years-long litigation. These class members are dependent on plaintiffs' lawyers to front the money for such claims, often to the sum of many

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<sup>206</sup> As the Ontario Law Reform Commission noted in justifying class actions, the activities of major corporations in “mass manufacturing, mass production, and mass conception” can affect and harm large groups of individuals. 1 ONTARIO LAW REFORM COMM'N, REPORT ON CLASS ACTIONS 3, § 56 (1982).

<sup>207</sup> Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

<sup>208</sup> See, e.g., Brief of Amicus Curiae, The Commonwealth of Pennsylvania, in Support of the Petitioner at \*3, *Eisen v. Carlisle & Jacquelin*, 1973 WL 172434 (U.S. 2004) (“Antitrust litigation, almost by definition, is complex, protracted, and costly.”).

<sup>209</sup> Radha Geismann, M.D., *P.C. v. Allscripts Healthcare Solutions, Inc.*, 764 F. Supp. 2d 957, 961 (N.D. Ill. 2011) (discussing how “[l]itigating class actions is expensive”); Comm. on Prof'l Responsibility Assoc. of the Bar of the City of N.Y., *Financial Arrangements in Class Actions, and the Code of Professional Responsibility*, 20 FORDHAM URB. L.J. 831, 832 (1993) (“[C]lass actions can be extremely expensive to carry to the point where recovery of costs can be realized from a settlement fund or judgment.”).

millions of dollars.<sup>210</sup> As the Supreme Court once noted: “A class action solves [the problem]” that “small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights” by “aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”<sup>211</sup>

The facts in *AT&T Mobility v. Concepcion*<sup>212</sup> highlight how consumers’ financial vulnerability limits redress against alleged corporate wrongdoing. The facts of the case are relatively straightforward: AT&T offered consumers a free phone for signing a two-year contract. Subsequently, AT&T charged consumers money for their “free” phone.<sup>213</sup> The amount of individual harm suffered varied, but the Concepcions, the named plaintiffs in the class, were charged \$30.22.<sup>214</sup> The Concepcions brought a putative class claim, alleging in part, AT&T engaged in false advertising and fraud by charging sales tax on phones it advertised as free.<sup>215</sup> Rather than allowing all similarly aggrieved consumers to proceed as a class, the Supreme Court instead enforced AT&T’s arbitration clause which prohibited class actions.<sup>216</sup>

This decision just exacerbates consumers’ financial vulnerability. Because consumers lack equal bargaining power, they have limited ability to avoid such arbitration provisions in the first place.<sup>217</sup> Additionally, consumers can no longer rely on plaintiffs’ attorneys to front the money to bring suit. As Justice Breyer’s dissent explains, “The maximum gain to a customer

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<sup>210</sup> See, e.g., Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 230 (2004) (“There is no doubt that class actions have been fueled by entrepreneurial incentives for plaintiffs’ lawyers.”).

<sup>211</sup> *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617-18 (1997) (internal citations omitted).

<sup>212</sup> 131 S. Ct. 1740 (2011).

<sup>213</sup> *Id.* at 1744.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (“The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties’ individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” (internal citation omitted)).

<sup>217</sup> This point is more thoroughly explained in Justice Kagan’s dissent in *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). This case expands the holding of *Concepcion* to federal claims. In dissenting, Justice Kagan states: “In the hands of today’s majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting). For a full discussion of both decisions, see generally *Recent Case*, *American Express Co. v. Italian Colors Restaurant*, 127 HARV. L. REV. 278, 283 (2013).

for the hassle of arbitrating a \$30.22 dispute is still just \$30.22 . . . . What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?”<sup>218</sup>

Hence, because of the rise of the blackmail myth and the corresponding retraction of class action mechanisms, consumers’ financial vulnerability is increased. Without attorneys to advance fees and costs, the financial disparity leaves consumers with no realistic means of seeking judicial relief for corporate malfeasance.<sup>219</sup>

This financial disadvantage is only worsened by the current wealth disparity in the United States.<sup>220</sup> The top 1% of households own close to 60% of corporate wealth.<sup>221</sup> This is in contrast to the bottom half of the population, owning just 2% of American wealth.<sup>222</sup> As corporate wealth increases, so does the gap between the very rich and the rest of the population.<sup>223</sup> This is compounded by government tax subsidies to corporations eclipsing social welfare spending.<sup>224</sup> This growing gap between

<sup>218</sup> *Concepcion*, 131 S. Ct. at 1760-61 (Breyer, J., dissenting).

<sup>219</sup> See, e.g., *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The ‘realistic’ alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”); Brief for Sixteen Law Professors as Amici Curiae Supporting Respondents at 17, *Proskauer Rose LLP v. Troice*, Nos. 12-79, 12-86 and 12-88 (U.S. July 24, 2013) [hereinafter Brief of Sixteen Law Professors] (“Denial of class relief under both federal and state law as a matter of statutory interpretation would mean no relief at all.”).

<sup>220</sup> THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 257 (Arthur Goldhammer trans., 2014).

<sup>221</sup> See David Cay Johnston, *Corporate Wealth Share Rises for Top-Income Americans*, N.Y. TIMES (Jan. 29, 2006), <http://www.nytimes.com/2006/01/29/national/29rich.html>.

<sup>222</sup> PIKETTY, *supra* note 220, at 257 (detailing the wealth disparity globally and in the United States).

<sup>223</sup> See *id.*

<sup>224</sup> Corporations receive \$100 billion a year in business subsidies. See Tad DeHaven, *Corporate Welfare in the Federal Budget*, CATO INST. POLY ANALYSIS, July 25, 2012, at 2, available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/PA703.pdf>. This figure is close to double the social welfare benefits provided by the government. See OFFICE OF MGMT. & BUDGET, *FISCAL YEAR 2013 BUDGET OF THE U.S. GOVERNMENT*, available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/budget.pdf>; see also Mike P. Sinn, *Government Spends More on Corporate Welfare Subsidies than Social Welfare Programs*, THINK BY NUMBERS (Mar. 6, 2011, 9:03 PM), <http://thinkbynumbers.org/government-spending/corporate-welfare/corporate-welfare-statistics-vs-social-welfare-statistics/>. Because corporate subsidies come from taxes, consumers are unwittingly funding this widening gap. Though critics disagree on the precise figure, the average American family pays between \$1000 to \$6000 in corporate welfare subsidies. Compare Paul Buchheit, *Add It Up: The Average American Family Pays \$6,000 a Year in Subsidies to Big Business*, COMMON DREAMS (Sept. 23, 2013), <https://www.commondreams.org/view/2013/09/23>, with Scott Lincicome, *Calculating the Real Cost of Corporate Welfare*, THE FEDERALIST (Sept. 30, 2013), <http://thefederalist.com/2013/09/30/calculating-the-real-cost-of-corporate-welfare/>.

corporate and individual wealth has notable consequences to consumers' vulnerability to corporate wrongdoing. A corporation's primary goal is to produce profits, regardless of social cost.<sup>225</sup> This "amoral maximization of profits" is further challenged in times of financial instability, including the United States' current financial crisis.<sup>226</sup> As Thomas Piketty explains, "In my view there is absolutely no doubt that the increase inequality in the United States contributed to the nation's financial instability."<sup>227</sup> This financial instability incentivizes corporate wrongdoing—wrongdoing that appears to be on the rise since the recent economic downturn.<sup>228</sup>

Consumers are the common victim of such misconduct: they pay the price of companies' decisions to take short-cuts for product safety issues or engage in anticompetitive behavior. Thus, consumers' financial vulnerability is likely to only increase in the face of future exposure to corporate misconduct. As Judge McDade explains, without aggregation, consumers are unlikely to seek redress because of financial barriers: "Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action."<sup>229</sup> The exceptional expense and time associated with pursuing complex litigation creates barriers few individuals choose to overcome—even if they can.<sup>230</sup> Stated bluntly, "the individual is very often unable or unwilling to stand alone in meaningful opposition."<sup>231</sup>

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<sup>225</sup> See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 60-84 (2004).

<sup>226</sup> See PIKETTY, *supra* note 220, at 297.

<sup>227</sup> *Id.*

<sup>228</sup> Anecdotal evidence suggests the current economic downturn has resulted in increased corporate misconduct. See, e.g., *The Rot Spreads: Corporate Crime is on the Rise*, *ECONOMIST* (Nov. 9, 2009), <http://www.economist.com/node/14931615> (discussing results of PricewaterhouseCoopers survey showing, "[t]he recession has taken its toll on morals as well as profits").

<sup>229</sup> *Shaver v. Trauner*, No. 97-1309, 1998 WL 35333713, at \*8 (C.D. Ill. July 31, 1998) (citing *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 628, 629 (E.D. Pa. 1994)).

<sup>230</sup> See, e.g., *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980) (observing that class actions make it possible to bring claims that otherwise would not be economically possible); *Eisen v. Carlisle*, 417 U.S. 156, 161 (1974) (noting that without class action, "[n]o competent attorney would undertake [petitioner's] action to recover so inconsequential an amount").

<sup>231</sup> REPORT ON CLASS ACTIONS, *supra* note 206.

## 2. Consumers' Information Inequity

Even beyond financial disparity, potential plaintiffs are disadvantaged by information disparity between the parties. Business tort class actions often involve covert wrongdoing, making it difficult for individuals to know they were victims. Without this knowledge, individuals cannot evaluate their role in responding to this harm. Instead, putative class members unwittingly provide monetary rewards for corporate wrongdoing. Private antitrust class actions provide a quintessential example. Antitrust class actions are replete with allegations of secretive arrangements.<sup>232</sup> Few defendants are forthcoming about price-fixing. Thus, consumers continue purchasing price-fixed products, helping to generate corporate profits.

Even for those business torts where individuals are aware of being wronged, class members are still informationally disadvantaged. Corporations have successfully adopted furtive corporate practices that hinder justice by making investigation difficult. Such practices include silent recalls and secret warranties—which minimize individuals' ability to assess how widespread a problem is or the extent of defendants' knowledge.<sup>233</sup> Individual consumers are reliant on the rare corporate whistleblower to leak information or a lucky consumer advocacy group able to compile consumer complaints.<sup>234</sup> Thus, relief from wrongdoing is inconsistent, at best.

General Motors' (GM) recent defective ignition switch debacle illustrates consumers' information vulnerabilities. In 2002, GM knowingly elected to use an ignition switch that fell far below its own specification requirements.<sup>235</sup> Early in production, GM engineers learned the switch's problems could cause a car to continue running even after turned off.<sup>236</sup> In fact, GM engineers internally called the part "the switch from hell."<sup>237</sup> Despite

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<sup>232</sup> See, e.g., *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437, 449 (D.N.J. 2007); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197, 2000 WL 1475705 (D.D.C. May 9, 2000), *clarified on denial of reconsideration sub nom. In re Vitamins Antitrust Litig.*, No. Misc. 99-197, 2000 WL 34230081 (D.D.C. July 28, 2000); *Abernathy v. Bausch & Lomb Inc.*, 97 F.R.D. 470, 472 (N.D. Tex. 1983).

<sup>233</sup> Jeff Sovern, *Good Will Adjustment Games: An Economic and Legal Analysis of Secret Warranty Regulation*, 60 MO. L. REV. 323, 329 (1995).

<sup>234</sup> See *id.* at 326.

<sup>235</sup> ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 1 (May 19, 2014) [hereinafter VALUKAS REPORT], available at <http://www.beasleyallen.com/webfiles/valukas-report-on-gm-redacted.pdf>.

<sup>236</sup> See *id.*

<sup>237</sup> *Id.* at 5.

customer complaints and lawsuits, GM did not act to recall cars with the faulty switch until 2014—12 years later.<sup>238</sup>

This is not just a case of negligence. Rather, at the orchestration of its legal department, GM undertook action to minimize the spread of information about the safety problem. Employees were discouraged from note-taking at meetings.<sup>239</sup> GM officials downplayed its knowledge of the problem in interviews with the press.<sup>240</sup> Efforts to investigate the switch were hindered by a GM official's decision to bury information about modifications of the switch by concealing the part's identification number.<sup>241</sup> Because of this covert action, consumers were deprived key information necessary to unearth the extent of the harm they suffered from purchasing GM cars with this switch.<sup>242</sup>

Other barriers to information are judicially sanctioned. For example, after *Concepcion* and *Italian Colors*, a corporation can wholly avoid class actions and force non-class binding arbitration through contractual terms and conditions.<sup>243</sup> In addition to raising questions about the viability of the unconscionability doctrine and adhesion contract arguments, forced arbitration further limits consumers' information. It is difficult for individuals to learn of other pending arbitration claims,<sup>244</sup> especially for arbitrations subject to confidentiality provisions.<sup>245</sup>

In cases where individuals can overcome these initial disadvantages, informational disparities continue to hinder judicial recourse in other ways. Defendants often hold all the information necessary to prove the substantive claim and certify the class but have the experience and savvy to complicate or, at a

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<sup>238</sup> See *id.* at 1-2.

<sup>239</sup> See, e.g., Bill Vlasic, *G.M. Lawyers Hid Fatal Flaw, From Critics and One Another*, N.Y. TIMES (June 6, 2014), <http://www.nytimes.com/2014/06/07/business/gm-lawyers-hid-fatal-flaw-from-critics-and-one-another.html>.

<sup>240</sup> VALUKAS REPORT, *supra* note 235, at 7.

<sup>241</sup> See *id.* at 9-10.

<sup>242</sup> Now that more extensive information of GM's wrongdoing is publicly available, plaintiffs in one previously settled individual lawsuit against GM seek to reopen the litigation. See *Georgia Lawsuit Still Causing Trouble for GM*, DALLAS MORNING NEWS (July 1, 2014, 8:20 PM), <http://www.dallasnews.com/business/headlines/20140701-georgia-lawsuit-still-causing-trouble-for-gm.ece>. Moreover, several putative class members have brought class action complaints for suffered economic damage through loss of resale value. See, e.g., *Andrews v. General Motors LLC*, No. 5:14-cv-1239 (C.D. Cal. filed June 18, 2014). These putative class claims are still in their infancy.

<sup>243</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>244</sup> *Italian Colors*, 133 S. Ct. at 2316 (Kagan, J., dissenting) (discussing the dangers of arbitration confidential provisions).

<sup>245</sup> See, e.g., *id.*; Marci A. Eisenstein, *Enforcing Arbitration Clauses in Consumer Class Actions: An Uncertain Future*, BRIEF, Summer 2006, at 30, 33.

minimum, frustrate the production of such information.<sup>246</sup> Plaintiffs must fight lengthy discovery battles to learn the scope of the wrongdoing and quantum of monetary harm suffered.

Information disadvantages further inhibit plaintiffs' ability to fulfill the ever-heightening requirements for class certification. For example, to prove numerosity under Rule 23(a), class counsel must offer evidence of the class size.<sup>247</sup> Or in a consumer law case, class members may have to establish defendants' knowledge of wrongdoing.<sup>248</sup> Such evidence is often solely in the defendants' possession.<sup>249</sup>

For those cases that survive certification and are resolved via settlement or trial, individuals may still remain information-deprived. For example, in damages cases under Rule 23(b)(3), courts focus primarily on compensatory damages, ignoring other harm such as moral injury.<sup>250</sup> But, as Judge Tamora explains, "cost-benefit analysis [means] balancing human lives and limbs against corporate profits."<sup>251</sup> Mere compensatory damages are sometimes insufficient to deter wrongdoing<sup>252</sup> and can deny class members alternative remedies which could foster class actions' potential as a public good.<sup>253</sup>

<sup>246</sup> See, e.g., *Algee v. Nordstrom, Inc.*, No. C 11-301 CW, 2012 WL 1575314 (N.D. Cal. May 3, 2012), *motion for relief from judgment denied*, No. C 11-301 CW, 2012 WL 1919134 (N.D. Cal. May 25, 2012) (discussing the need for discovery in a class action when defendant is sole possessor of evidence); James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 521 (1997) ("[Evidence of wrongdoing in securities cases] is generally in the possession of the defendant corporation so that the lack of discovery in such cases seriously impedes the initiation of such suits.").

<sup>247</sup> See FED. R. CIV. P. 23(a).

<sup>248</sup> See, e.g., *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 478 (C.D. Cal. 2012), *perm. app. denied*, *Cobb v. BSH Home Appliances Corp.*, No. 13-80000, 2013 WL 1395690 (9th Cir. Apr. 1, 2013), *cert. denied*, 134 S. Ct. 1273 (2014); cf. *Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 496 (D. Md. 1998) (discussing how defendant's knowledge of alleged wrongdoing precluded defense in a Fair Debt Collection Act class claim).

<sup>249</sup> See, e.g., *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 237 (2d Cir. 1974); *CE Design v. Beaty Const., Inc.*, No. 07 C 3340, 2009 WL 192481, at \*3 (N.D. Ill. Jan. 26, 2009); cf. *State Teachers Retirement Bd. v. Fluor Corp.*, 80 F.R.D. 142, 144 (S.D.N.Y. 1978).

<sup>250</sup> Moral injury considers the harm class members suffer from learning of defendants' failure to conform to moral standards. See, e.g., *Animal Legal Def. Fund v. Mendes*, 160 Cal. App. 4th 136, 147 (2008) ("moral injury" resulting from defendants' alleged violation of anticruelty laws in raising calves could not support UCL action because plaintiffs did not purchase dairy products that were of inferior quality). For a thorough discussion of moral injury and how it differs from compensatory damages, see Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1671 (1992).

<sup>251</sup> *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 812 (1981).

<sup>252</sup> See, e.g., David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1323-24 (1976); Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787, 1816 (1983).

<sup>253</sup> See, e.g., *Class Actions for Punitive Damages*, *supra* note 252 (arguing for punitive damages in class actions to ensure full deterrence).

Hence, information deficiencies exacerbate consumers' vulnerability. Consumers' ability to fully assess the harm they suffered is correspondingly compromised. This hinders consumers in their attempt to recover for corporate wrongdoing.

### 3. Judicial Favoritism, the Rise of Procedural Hurdles, and the Harm to Consumers

Consumers are disadvantaged by the rise of procedural hurdles that allow defendants to avoid legal accountability. A corporation can "win" either by beating a motion for class certification or by winning a dispositive motion without necessarily reaching the substantive allegations of misconduct.

As previously detailed, in federal court, where these claims are primarily brought, it is now harder to get into court; harder to plead a claim; and harder to certify a class.<sup>254</sup> With each new procedural advantage afforded to defendants, the scales of justice continue to tip in defendants' favor. This, in turn, leaves consumers further disadvantaged from equal access to justice. Nonetheless, post-CAFA, courts still rely on the blackmail myth to justify additional class action restrictions.<sup>255</sup> As it stands, consumers can only proceed to trial if they win each of six procedural hurdles corporate defendants may raise: (1) a motion to dismiss; (2) pre-certification *Daubert* motions, challenging plaintiffs' expert testimony's admissibility; (3) class certification; (4) an expert challenge pre-summary judgment; (5) summary judgment; and (6) a renewed *Daubert* challenge pre-trial.<sup>256</sup> While courts have yet to fully consider the cumulative effect of these changes, the procedural disadvantages consumers face are significant given, individually, such hurdles already disproportionately impact plaintiffs.

Through a distorted definition of who needs judicial protection, class action claims, particularly for business torts,

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<sup>254</sup> See Hovenkamp, *supra* note 165, at 56-58.

<sup>255</sup> See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80 (2006) ("Even weak cases brought under [Rule 10b-5] may have substantial settlement value . . . because [t]he very pendency of the lawsuit may frustrate or delay normal business activity.") (internal quotation marks omitted); *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 755 (3d Cir. 2010) ("[C]lass certification puts pressure on defendants to settle claims, even if they are frivolous."); *In re Constar Int'l Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009) (explaining that class certification is an "especially serious decision"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) ("[C]lass certification may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.") (internal quotation marks omitted).

<sup>256</sup> Cavanagh, *supra* note 15, at 119; see also Bartholomew, *supra* note 195, at 2185-86.

have gone from the equivalent of a slingshot to a handful of pebbles in an individual's arsenal. As Judge Weinstein explains:

The class action as a device to equalize the litigation power of the many with small monetary, discrimination and other claims against powerful institutions—government and private—was an exciting American development of the last third of the twentieth century. It is now being strangled and neutered, largely because it was too effective in providing remedies against malefactors who would otherwise escape the law.<sup>257</sup>

In sum, not only are individuals disadvantaged economically, due to a lack of information, the judicial system continues deepening individuals' vulnerability to corporate wrongdoing. With each procedural advantage afforded corporate defendants, it is more likely individuals' claims will go unredressed. This inequity is problematic since class actions provide key resiliency assets, as explored in the next part.

#### IV. ADVANCING RESILIENCY UNDER RULE 23

Understanding the pre-existing disadvantaged state of individual plaintiffs provides a new starting point for class action debates. Vulnerability theory's primary tenet is that a responsive state is obligated to remediate disadvantages by advancing opportunities for connection and interdependence.<sup>258</sup> Class action mechanisms provide such opportunities. A putative class is analogous to other political collectives, such as unions, whose group action can provide resilience against market-generated vulnerabilities.<sup>259</sup> Consumers, like individual employees, have little realistic avenue to voice grievances against corporate misconduct. Both may lack the motivation, information, or political wherewithal necessary to undertake

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<sup>257</sup> Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 114 (2008).

<sup>258</sup> Fineman, *Equality*, *supra* note 32, at 26 ("Vulnerability's values would be more egalitarian and collective in nature, preferring connection and interdependence rather than autonomy and independence in both political and personal visions."); *see also* Fineman, *supra* note 43, at 300 ("This means that as the subject of policy and politics, the vulnerable subject cannot merely be left to his autonomy, liberty, and independence, but should be cushioned by a responsive state.")

<sup>259</sup> *Cf.* Marion Crain, *Strategies for Union Relevancy in a Post-Industrial World: Reconceiving Antidiscrimination Rights as Collective Rights*, 57 LABOR L. J. (2006), available at 2006 WL 7123709 ("Unions are able to capitalize on legislative rights achieved through political voice, bringing group actions alleging violations of 'individual' rights protected by employment legislation as a prelude to organizing campaigns."). Consequently, some of the same efficiency and autonomy attacks on class actions have also been brought against unions. *See, e.g.*, Laurie Serafino, *Life Cycles of American Legal History Through Bob Dylan's Eyes*, 38 FORDHAM URB. L.J. 1431, 1441 (2011).

action that would lead to a collective best outcome, but collective forms help remedy this problem.<sup>260</sup> While neoliberalism emphasizes individual action, the default in a vulnerability analysis is that “individuals bolster their resilience by joining together to address vulnerabilities generated by the market.”<sup>261</sup> This viewpoint reflects a more interdependent view of individuals and collectives, understanding that individual interests must be supported and structured over time through institutions that allow individuals to act collectively.

As a starting point, class actions are a way for the responsive state to provide a societal institution—the judicial system—that cushions consumers against misfortune, namely misfortune resulting from business torts.<sup>262</sup> Class actions provide a type of social capital,<sup>263</sup> whereby an individual’s vulnerability is mediated by working with a group “to accomplish greater things than they could by their isolated efforts.”<sup>264</sup> Through class actions, consumers gain resilience from strength in numbers to combat “the defining characteristic of the modern citizen: alienation.”<sup>265</sup>

However, the benefits from this form of collective action extend beyond social assets. This Part explains how incentivizing—rather than limiting—class actions provides

<sup>260</sup> See, e.g., Louise Sadowsky Brock, Note, *Overcoming Collective Action Problems: Enforcement of Worker Rights*, 30 U. MICH. J.L. REFORM 781, 786 (1997) (discussing the barriers to employees bringing individual lawsuits to obtain a collective good); see generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 12 (1971) (arguing individuals will not act to further group interests with coercion or other incentives).

<sup>261</sup> Cf. Fineman, *Equality*, *supra* note 32, at 23.

<sup>262</sup> See *id.* at 22.

<sup>263</sup> By making this point, I do not mean to wade into the existing controversies regarding social capital. Compare Yuko Nakagawa & Rajib Shaw, *Social Capital: A Missing Link to Disaster Recovery*, 22 INT’L J. MASS EMERGENCIES & DISASTERS 5, 9 (2004) (discussing how social capital for its “over-versatility”), with JON ELSTER, *EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 456 (2007) (describing social capital as “useless and harmless”). For a further discussion of the divide over the utility of social capital see generally Kuo & Means, *supra* note 25, at 99-100 (discussing how the social capital has not been universally accepted). Rather, I use the term just as an alternative way to characterize the resilience value of class actions. See, e.g., Fineman, *Equality*, *supra* note 32, at 23 (defining social assets as the “networks of relationships from which we gain support and strength”).

<sup>264</sup> Kuo & Means, *supra* note 25, at 97-98 (internal quotations omitted) (discussing value of social capital for effective disaster response); Katie Melnick, *In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms*, 22 ST. JOHN’S J. LEGAL COMMENT. 755, 788 (2008) (“Similarly the class action device gives plaintiffs a sort of strength in numbers mentality. Alone, facing the big businesses of the world can be daunting; and yet, as one in a group of injured plaintiffs, this daunting task becomes more feasible.”); cf. Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 137 (2001) (discussing social benefits of class actions).

<sup>265</sup> Coyle, *supra* note 33, at 69.

consumers benefits. First, class actions increase opportunities for consumer participation in the judicial system. Second, by bringing consumer class actions, individuals have the ability to avoid future business tort harm through class actions' deterrent effect. Third, class actions are a way the state can permit consumers an alternative form of market influence. Each of these benefits produce resiliency assets responsive to the consumer vulnerabilities identified in Part III. Recognizing and rewarding these resiliency gains can help redefine prey and predator in terms of the true disadvantaged party in these cases: the putative class member.<sup>266</sup>

#### A. *Overcoming Vulnerability through Participation Options*

To begin, a class action is a “powerful and versatile tool” for ensuring consumers access to justice<sup>267</sup>: a class action can move the judicial system closer to allowing every injured party his day in court.<sup>268</sup> Class actions guarantee corporations are not beyond the reach of the long arm of the law by allowing consumers to pursue claims that would likely otherwise go unlitigated.<sup>269</sup> Specifically, class actions increase judicial participation by giving consumers tools to overcome financial and informational vulnerabilities and minimize judicial favoritism.

First, class action mechanisms provide class members much needed financial resources. Consumers have the right to sue for corporate wrongdoing; however, that right is illusory given the expense of individual litigation.<sup>270</sup> Through claim aggregation procedures, the state provides consumers a way to “accumulate resources,” which in turn helps overcome the disparity between

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<sup>266</sup> See, e.g., David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 586-93 (1987) (discussing how the economic benefits of class action suits outweigh fairness concerns, especially when the concern for individual autonomy threatens the economic feasibility of pursuing a class action in the first place).

<sup>267</sup> Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 719 (2006); Darren Carter, *Notice and Protection of Class Members' Interests*, 69 S. CAL. L. REV. 1121, 1121 (1996).

<sup>268</sup> See Melnick, *supra* note 264, at 788; see also Lee W. Rawles, *The California Vexatious Litigant Statue: A Viable Tool to Deny the Clever Obstructionists Access?*, 72 S. CAL. L. REV. 275, 275 (1998) (“It is axiomatic in our system of justice that every person is entitled to his day in court.”).

<sup>269</sup> See, e.g., Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 745-75 (2007) (suggesting that businesses, knowing individuals are unlikely to bring suit “may knowingly engage in illegal conduct that causes dispersed injury, confident that it will not be held accountable”).

<sup>270</sup> See *supra* Part II.A-C.

consumers and corporations.<sup>271</sup> Class counsel advances fees and costs, which are recouped only if the case settles or there is a final determination in class members' favor.<sup>272</sup> Further, by pooling their resources, plaintiffs have the added resiliency gain of retaining more qualified lawyers.<sup>273</sup> These resiliency gains “level[] the playing field” between consumers and corporate defendants,<sup>274</sup> allowing consumers to hold large corporations accountable even in situations where individual harm is low yet the aggregate harm is significant.<sup>275</sup> In fact, “the policy at the very core of the class action mechanism” is to help overcome financial hurdles that limit judicial access.<sup>276</sup>

Second, consumers also gain resiliency against information vulnerability by participating in class actions. The fee-shifting dimension of class actions incentivizes attorneys to identify and investigate corporate wrongdoing.<sup>277</sup> Filing of these claims leads

<sup>271</sup> Fineman, *Equality*, *supra* note 32, at 22.

<sup>272</sup> Class counsel commonly advances the costs of class-action litigation. *See, e.g.*, Sylvia R. Lazos, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 314 n.35 (1985) (“As in contingent fee contracts, the class attorney will most likely recover a full fee only if the class suit is successful. Thus, the attorney, not the class, absorbs the full cost of defeat in class action suits.”); *see also* 5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 15:21 (4th ed. 2002) (stating that cost advancements on a contingency basis are critical in class actions); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1171 (2009) (discussing how counsel generally advance fees in class actions).

<sup>273</sup> *See* Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 102 (1985)

<sup>274</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 141-44 (1974); Benjamin Sachs-Michaels, *The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665, 671 (2011) (“Although there has been extensive academic debate over class action lawsuits for many years, even detractors of the device would admit that it can be used successfully to level the playing field between aggrieved individuals and powerful corporations.”). Some argue that this very power, and its corresponding potential for recourse, makes class actions a target for reform. *See* Melnick, *supra* note 264, at 790-91.

<sup>275</sup> Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2083 (2010) [hereinafter Fitzpatrick, *Lawyers*]; Note, *Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action*, 117 HARV. L. REV. 2665, 2671 (2004) (“[T]he need to aggregate small recoveries to make unmarketable claims into marketable class actions continues to sit close to the heart of Rule 23(b)(3).”); *cf.* Rosenberg, *supra* note 266, at 564 (“Because defendant firms are in a position to spread the litigation costs over the entire class of mass accident claims, while plaintiffs, being deprived of the economies of scale afforded by class actions, can not, the result will usually be that the firms will escape the full loss they have caused . . .”).

<sup>276</sup> *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997); *see also* David Korn & David Rosenberg, *Concepcion’s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1194 (2013).

<sup>277</sup> Class action critics often overlook pre-filing investigations by class counsel. *See, e.g.*, Coffee, *supra* note 4, at 222 (describing class actions as “simply piggyback[ing] on the efforts of public agencies”). While many private enforcement cases follow government enforcement, this does not necessarily undermine class actions’ potential to provide consumers resiliency assets. *See* Howard M. Erichson, *Coattail Class*

to news coverage, which helps spread information to putative class members who otherwise may not have known they were harmed.<sup>278</sup> Litigation-related documents are publicly available and one can search for similar claims.<sup>279</sup> Greater information about the extent of wrongdoing and harm suffered by consumers is often unearthed during discovery.<sup>280</sup>

For class members still unaware of the alleged wrongdoing, information about the class action is also provided to consumers through Rule 23's notice requirements. For example, before a trial court will approve a settlement, class counsel notifies class members of the pending settlement.<sup>281</sup> This notice helps overcome information vulnerabilities for putative class members as well as consumers more generally. Class notice is often mailed directly to class members and/or disseminated via

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*Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 42 (2000) ("Not only do coattail class actions add something of value to government actions in terms of compensation and deterrence, but they are superior to non-coattail class actions as a matter of both efficiency and legitimacy.").

<sup>278</sup> Press releases about newly filed consumer class action complaints are commonplace. See, e.g., *Class Action Complaint Against General Motors Company Filed By Clark Fountain Law Firm In Response To False Safety Ratings*, WALL ST. J. MARKETWATCH (June 27, 2014, 5:09 PM), <http://www.marketwatch.com/story/class-action-complaint-against-general-motors-company-filed-by-clark-fountain-law-firm-in-response-to-false-safety-ratings-2014-06-27>; Christopher Zara, *Twitter Spam Lawsuit: Mobile Users Ambushed By Annoying Text Messages, Class Action Says*, INT'L BUS. TIMES (July 2, 2014, 4:06 PM), <http://www.ibtimes.com/twitter-spam-lawsuit-mobile-users-ambushed-annoying-text-messages-class-action-says-1618020>.

<sup>279</sup> See generally *Pacer Brings Court Records to the Public*, FED. LAW., Oct. 2009, at 44.

<sup>280</sup> See, e.g., *In re Pressure Sensitive Labelstock Antitrust Litig.*, 69 Fed. R. Serv. 3d (West) 791 (M.D. Pa. 2007) ("During the course of discovery, Plaintiffs uncovered evidence of what they allege broadened the conspiracy to encompass market allocation and supply restriction, and that this conduct began as early as January 1, 1996."); see also D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT L. 91, 116 (2012) (discussing how abbreviated opportunities for discovery may hinder knowledge of the full extent of defendants' wrongdoing).

<sup>281</sup> MANUAL FOR COMPLEX CIVIL LITIGATION (FOURTH) § 21.633 (2004). The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

mass media.<sup>282</sup> These notices educate putative class members, as well as consumers who are not part of the class.<sup>283</sup>

By permitting consumers to participate in class actions, the responsive state can also provide information resiliency in a slightly different way. Class actions can prompt stronger governmental investigation of corporate wrongdoing.<sup>284</sup> For example, private class actions spurred governmental investigation of corporate wrongdoing in the insurance industry.<sup>285</sup> Class counsel brought suit on behalf of consumer policy holders claiming deceptive practices regarding vanishing premium insurance policies in the 1980s.<sup>286</sup> These class actions triggered insurance commissioners in 30 states to create a task force to investigate the allegations and provided over a million consumers redress.<sup>287</sup> Hence, by supporting the use of class action mechanisms, the responsive state can provide consumers multiple resilience assets to lessen information vulnerabilities.

Third, incentivizing judicial participation can help overcome consumers' vulnerability in the face of judicial favoritism towards corporations. Class actions provide consumers much-needed opportunities to be heard<sup>288</sup> (*i.e.* opportunities to exercise their political voice).<sup>289</sup> Ensuring consumers have

<sup>282</sup> See, *e.g.*, Johnson v. Gen. Mills, Inc., No. SACV 10-00061, 2013 WL 3213832 (C.D. Cal. June 17, 2013) (“[T]he class notice plan conducted by The Garden City Group, Inc. was successful and notice was disseminated through ‘nationwide magazine print publications, hundreds of highly trafficked websites including Facebook.com and Yahoo.com, a national newspaper magazine distributed through more than 800 newspapers across the country, and through a press release that had the opportunity to be picked up by more than 1,100 nationwide English and Spanish news outlets and blogs.”); *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738, 2012 WL 5289514, at \*2 (E.D.N.Y. Oct. 23, 2012) (detailing direct mail and mass media notice campaign).

<sup>283</sup> Increased consumer information can empower consumer decision-making in the marketplace. See Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959, 963 (1998) (discussing how information promotes consumer sovereignty in the marketplace).

<sup>284</sup> See Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT’L L.J. 135, 138 (1999).

<sup>285</sup> *Id.*

<sup>286</sup> See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 474 (D.N.J. 1997), *aff’d*, 148 F.3d 283 (3d Cir. 1998).

<sup>287</sup> See *Prudential Ins. Co.*, 962 F. Supp. at 480; Scot J. Paltrow, *Panel’s Settlement with Prudential Could Be Delayed*, L.A. TIMES, July 4, 1996, at D1; see also Issacharoff, *supra* note 284, at 138.

<sup>288</sup> Opportunities for consumers to be heard are notably on the decline in the neoliberal period. COLIN CROUCH, *THE STRANGE NON-DEATH OF NEOLIBERALISM* 151 (2011) (“[P]ublic debate in many of our societies is dominated by a small number of corporate media enterprises, with other giant firms limiting the scope of serious debate . . .”).

<sup>289</sup> In using the term “voice”, I do not mean to implicate the “voice-loyalty-and-exit typology” used to challenge class actions. See, *e.g.*, Coffee, *supra* note 145. Rather, I use the term “voice” more in the general participatory context.

avenues to air grievances promotes the overall fairness of the legal system, which generates resiliency for society as a whole.

In terms of voice, class actions can help overcome judicial favoritism towards corporations by providing consumers a voice regarding how much or how little enforcement should exist. Through class actions the responsive state provides a forum for debate. The settlement approval process is a key example of how class actions can afford opportunities to be heard. Before class action settlement approval, the court elicits and evaluates class members' responses,<sup>290</sup> including the rate of claims made; the number of opt-outs; and any objections about the adequacy and fairness of a proposed settlement.<sup>291</sup> By participating in class actions, consumers can actively take part in this legal/electoral process, making their voices heard not only in the settlement process, but, if successful, in corporate boardrooms and legislative chambers.

By encouraging participation in class actions, the state can also increase additional societal resilience reserves. Class actions allow consumers a way to advance the fairness of the legal system.<sup>292</sup> Strengthening the perceived fairness of the legal system encourages cooperation with the civil justice system. Stated differently, by participating in class actions, consumers can strengthen society's larger compliance with laws. When procedures are considered fair, people are more likely to "obey the law" and have greater respect for the legal system generally.<sup>293</sup> Conversely, when court procedures do not prioritize constituents' needs, there are increased risks of

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<sup>290</sup> See MANUAL FOR COMPLEX LITIGATION, *supra* note 281.

<sup>291</sup> See, e.g., *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (discussing how objections that "sharpen debate" about the adequacy of a settlement are entitled to attorney fees); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 358 (N.D. Ga. 1993) (same). While the objection process expands participation, this process has also been abused by anti-class action crusaders who attack the class settlement on principle rather than based on the particularities of the case. Further, objectors who advance criticism solely for a payday equally frustrate the participatory potential of the settlement approval process. See generally Bruce D. Greenberg, *Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN'S L. REV. 949 (2010) (detailing the issues with class action objectors).

<sup>292</sup> See, e.g., *Carideo v. Dell, Inc.*, 520 F. Supp. 2d 1241, 1246 (W.D. Wash. 2007) (discussing class actions as a mechanism for providing a public good); *Charles v. Goodyear Tire & Rubber Co.*, 976 F. Supp. 321, 327 n.3 (D.N.J. 1997) ("The class action suit is designed to serve the 'public good' . . ."); Luff, *supra* note 146, at 74 ("Class actions, in addition to serving individual needs, also serve the 'public good.'").

<sup>293</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 4-6 (1990); Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367, 368 (1987).

discontent and mistrust of the legal system.<sup>294</sup> A responsive state can avoid this discontent by enhancing consumers' access to class action mechanisms. Professor Tom Tyler's work on procedural justice fleshes out this point by explaining:

[P]eople defer to rules primarily because of their judgments about how those rules are made, rather than their evaluations of their content. Judgments about the fairness of decision-making authorities have been found to be more central to a rule's legitimacy, and to people's willingness to accept it, than are judgments of decision favorability. In other words, people are willing to defer to laws and legal authorities on procedural justice grounds.<sup>295</sup>

According to procedural justice theory, the intangible value of ensuring judicial fairness matters more than the potential monetary compensation available in class actions.<sup>296</sup> As an interview with a named class member highlights, the perception that the judicial system allows consumers to fight back has value: "I knew the money was not, I mean, we got a little bit but that wasn't the motivation [in bringing suit]. It was more just kind of to fight back, I guess."<sup>297</sup>

Rather than recognize these participatory gains, class action critics point out how collective action denies consumers from fully participating in the adversarial process because such cases often settle rather than proceed to trial.<sup>298</sup> To bolster this argument, critics may point to low claims rates in damages class actions.<sup>299</sup>

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<sup>294</sup> See Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 72 (2008).

<sup>295</sup> Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 231 (1997); see also TYLER, *supra* note 293, at 176 ("People feel that their membership and status in the group are confirmed when their views are heard and considered, irrespective of the decisions made by the third party."); Jody Clay-Warner, *Perceiving Procedural Injustice: The Effects of Group Membership and Status*, 64 SOC. PSYCHOL. Q. 224, 225-26 (2001); Jan-Willem van Prooijen et al., *Procedural Justice and Status: Status Salience as Antecedent of Procedural Fairness Effects*, 83 J. PERSONALITY & SOC. PSYCHOL. 1353, 1354 (2002).

<sup>296</sup> See, e.g., Shestowsky & Brett, *supra* note 294, at 68.

<sup>297</sup> Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 94 (2011).

<sup>298</sup> Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 151 (2003) ("In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis . . .").

<sup>299</sup> See, e.g., Gail Hillebrand & Daniel Torrence, *Claims Procedures In Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 747 (1988) (arguing low claims rates in consumer class actions suggest the claims are ill-suited for class action procedures); Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an*

But it is that very deal-making potential that makes class actions an option for consumer resilience. Without class actions, consumers' ability to deal-make, by exchanging their legal claims for money or other redress by corporations, is lost. Again, the union analogy seems appropriate. Whereas an individual employee would likely not have enough money to bring suit individually against his employer, in the collective form of a union, the playing field is at least a bit more level.<sup>300</sup> Thus, the resilience potential of class actions is not defined by whether a class action settles or proceeds to trial. As for low claim rates, one can turn this argument on its head by arguing that low claim rates highlight the necessity to facilitate larger participation rather than pointing to the need to deprive this avenue of participation altogether.<sup>301</sup>

More fundamentally, these criticisms can sometimes make the perfect the enemy of the good. With the onslaught of legislative and judicial activism to reform and minimize class actions, the question is not whether class actions provide equal voice compared to other kinds of "individual vs. individual" cases—like a straightforward neighbor dispute or breach of contract claim. Rather, the real query is whether allowing individuals some voice in the class action context advances participatory goals better than none. As Professor Stempel explains:

What these critics overlook is that class actions were designed in large part to give voice to claims that would otherwise not be brought at all . . . . Measured against this goal, class actions can fall

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*Essential Element*, 43 HARV. J. ON LEGIS. 1, 9 (2006) (using low claims to justify increased reliance standards in consumer fraud class actions).

<sup>300</sup> See Michael J. Zimmer, *Inequality, Individualized Risk, and Insecurity*, 2013 WIS. L. REV. 1, 25 ("[T]here is a positive correlation between the extent of unionization and the general level of economic equality."); see also ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 100 (1997) (describing how unions are "a force for greater equality, because they promote[] a more egalitarian distribution of earnings").

<sup>301</sup> For example, providing class notices with language appropriate for laypersons could potentially increase claims-rates. See Todd B. Hilsee et al., *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359, 1365 (2005) ("The [Federal Judicial Center] found that 'converting the notice to plain language is not the only way to improve communications with class members . . . experience tells us that attorneys and judges can significantly improve class members' motivation to read and comprehend class action notices by changing the language, organizational structure, format, and presentation of the notice."); see also Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 555 (2003) ("The Federal Judicial Center has undertaken a project to improve the readability of class action notices by designing notices using plain language . . . .").

short of the individualized adjudicative ideal and nonetheless provide considerable social value.<sup>302</sup>

Thus, a responsive state can promote consumer resiliency by encouraging participation in class actions. Rather than financial inequalities creating default wins for corporations, permissive class action mechanisms allow individuals to band together. In doing so, the state allows consumers a forum for grievances, while simultaneously offering consumers financial and information resiliency. As a result, the state can move one step closer to objectives that enhance justice rather than favoring private or profit motivations.<sup>303</sup>

### B. *Class Actions Protect Consumers From Future Harm*

In addition to enhancing consumer participation in the judicial system, class actions also allow the responsive state to build consumers' resiliency to corporate risk-taking. Increasing deterrence partially offsets consumers' financial and information vulnerability. Deterred wrongdoing means consumers suffer less financial harm. Further, there is less wrongdoing to uncover, making information disparities between corporations and consumers less relevant.

The threat of class action exposure "deters risky behaviors . . . and results in safer products and better corporate practices."<sup>304</sup> The U.S. judiciary,<sup>305</sup> scholars,<sup>306</sup> and foreign

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<sup>302</sup> Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through A More Functional Approach to Class Treatment of Disputes*, 83 WASH. U. L. Q. 1127, 1131 (2005).

<sup>303</sup> Cf. Fineman, *Beyond Identities*, *supra* note 57, at 1762 ("Political responsibility precedes and is an essential complement to the idea of *personal* responsibility, which focuses only on individual autonomy and free-market ideals.").

<sup>304</sup> See Elizabeth Chamblee Burch, *CAFA's Impact on Litigation As A Public Good*, 29 CARDOZO L. REV. 2517, 2550 (2008); see also Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN. ST. L. REV. 1, 13-14 (2005) ("The mere possibility of a class action lawsuit may encourage a government or private agency to change its behavior without engaging in litigation."); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 711 (2006).

<sup>305</sup> In the United States, decades ago, deterrence was a recognized goal of private enforcement class actions. For instance, the Supreme Court previously cited deterrence to justify granting treble damages in private antitrust classes. See, e.g., *Am. Soc'y of Mech. Engrs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.").

<sup>306</sup> See, e.g., Leah Bressack, *Small Claim Mass Fraud Actions: A Proposal for Aggregate Litigation Under RICO*, 61 VAND. L. REV. 579, 593 (2008); Klonoff, *supra*

countries have all recognized class actions' deterrent potential.<sup>307</sup> Even Judge Posner, who has actively promoted the blackmail myth, recognizes how class actions can "prevent the defendant from walking away from the litigation" without paying a full recovery because of practical obstacles to individual distribution.<sup>308</sup> In fact, the primary substantive laws pursued as class actions, such as civil rights, antitrust, and securities, were enacted not merely for compensatory relief but to pressure potential defendants to deter future misconduct.<sup>309</sup>

In this way, class actions pressure corporations—not to settle<sup>310</sup> but, rather, to avoid unlawful behavior.<sup>311</sup> Class actions raise potential transactional costs for corporations who seek to engage in illegal conduct. These costs incentivize avoiding such

note 11, at 830 ("The threat of a class action also provides deterrence against wrongdoing."); Jay Tidmarsh, *Superiority As Unity*, 107 NW. U. L. REV. 565, 580 (2013) ("[I]ndividual litigation may impose no loss of autonomy but may yield less deterrence than a class action."); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1874 (2002).

<sup>307</sup> For example, the office of Fair Trading and the European Commission, as well as the U.K. government, have openly acknowledged how class actions expand the number of investigated cases, have deterrence value, and promote greater awareness of substantive legal claims. See CIVIL JUSTICE COUNCIL, IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS: DEVELOPING A MORE EFFICIENT AND EFFECTIVE PROCEDURE FOR COLLECTIVE ACTION 13 (John Sorabji et al. eds., 2008), available at [http://www.ucl.ac.uk/laws/judicial-institute/files/Improving\\_Access\\_to\\_Justice\\_through\\_Collective\\_Actions\\_-\\_final\\_report.pdf](http://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf). That said, the E.U. has yet to wholesale accept U.S.-style class actions and advances compensation as the primary goal of private enforcement. See, e.g., Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 700 (2010) (noting the E.U.'s White Paper analysis "shies away from U.S.-style class actions"); COMM'N OF THE EUROPEAN COMMUNITIES, WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES 3 (2008).

<sup>308</sup> *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

<sup>309</sup> WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 1.8 (5th ed. 2013). Section 1 of the Sherman Antitrust Act which, in addition to compensatory elements, has punitive and deterrence goals. *Diamond Chem. Co., Inc. v. Akzo Nobel Chem. B.V.*, 517 F. Supp. 2d 212, 218 (D.D.C. 2007); *In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091, 1105 (N.D. Ill. 1983), *rev'd in part*, 744 F.2d 1252 (7th Cir.1984) (internal citation omitted). This is equally true for securities cases. See, e.g., *Derdiarian v. Futterman Corp.*, 223 F. Supp. 265, 271 (S.D.N.Y. 1963) ("Quite clearly the [securities] statutes relied on here are meant to deter bad practices in the sale of securities."); William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 173 (1934) ("The civil liabilities imposed by the Act are not only compensatory in nature but also *in terrorem*. They have been set high to guarantee that the risk of their invocation will be effective in assuring that the 'truth about securities' will be told."); George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 663 (1956) ("[T]he record of litigated cases is prophylactic—a deterrent to future wrong-doing. Every successful suit duly rewarded encourages other suits to redress misconduct and by the same token discourages misconduct which would occasion suit.").

<sup>310</sup> See *supra* Part III.B (discussing why corporate defendants' settlement pressures are illusory).

<sup>311</sup> See generally Rosenberg, *supra* note 306, at 1872 (discussing deterrence effect).

behavior in the first place.<sup>312</sup> Rather than viewing this pressure as a problem, from a resiliency standpoint, this pressure means consumers can lessen and ameliorate individual vulnerability by proactively warding off future financial harm.<sup>313</sup>

Class actions offer consumers an alternative avenue to affect corporate conduct. As consumers, individuals are limited to their roles as passive agents—hampered by their lack of power to impact market conditions.<sup>314</sup> But as putative class members, consumers can enforce compliance with legal and moral norms<sup>315</sup> and thus “participate in decisions and activities that affect [their] well-being.”<sup>316</sup> Class actions maximize society’s total welfare by encouraging potential wrongdoers to refrain from undertaking unreasonable risks.<sup>317</sup> For example, class actions can improve consumer safety by ensuring accountability for corporations that knowingly sell dangerous products. Alternatively, a company may elect to spend more money testing a new product pre-release or invest in more compliance training to minimize potential class action exposure.

This deterrent effect has the potential to stimulate widespread change.<sup>318</sup> Class actions provide consumers resilience against wrongdoing not only from named corporate defendants but also from other industry members.<sup>319</sup> This deterrent effect

<sup>312</sup> See Jared N. Jennings et al., *The Deterrent Effects of SEC Enforcement and Class Action Litigation* 8 (Working Paper, Dec. 2011), available at <http://ssrn.com/abstract=1868578>.

<sup>313</sup> Cf. Fineman, *Equality*, *supra* note 32, at 22.

<sup>314</sup> See Orit Dayagi-Epstein, *Furnishing Consumers with a Voice in Competition Policy* (Working Paper, 2005), available at [http://luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/workingpapers/dayagi\\_epstein\\_consumers\\_voice.pdf](http://luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/workingpapers/dayagi_epstein_consumers_voice.pdf)

<sup>315</sup> Eran B. Taussig, *Broadening the Scope of Judicial Gatekeeping: Adopting the Good Faith Doctrine in Class Action Proceedings*, 83 ST. JOHN’S L. REV. 1275, 1358 (2009).

<sup>316</sup> See Dayagi-Epstein, *supra* note 314, at 2; Taussig, *supra* note 315, at 1358; see also CAROL C. GOULD, *RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY AND SOCIETY* 21-22, 32, 39 (1988); ARDITH MANEY & LOREE BYKERK, *CONSUMER POLITICS: PROTECTING PUBLIC INTERESTS ON CAPITAL HILL 16* (Greenwood Press 1994). Through class actions, consumers also have the potential to affect government action. Private enforcement gives consumers an alternative way to spur additional government responsiveness. Such litigation has the likelihood to influence the agenda of governmental agencies charged with enforcing regulation. See Dayagi-Epstein, *supra* note 314, at 2.

<sup>317</sup> See Rosenberg, *supra* note 306, at 1880.

<sup>318</sup> This widespread effect is not limited to consumer class actions. See Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590 (2005) (“From school desegregation to fair housing, environmental management to consumer protection, the impact of the private attorney general litigation is rarely confined to the parties in a given case.”).

<sup>319</sup> See Michael K. Block & Jonathan S. Feinstein, *The Spillover Effect of Antitrust Enforcement*, 68 REV. ECON. & STATE 122, 122 (1986) (discussing how antitrust deterrence is most effective when targeted at other firms in the same industry as the violator); cf. Jennings, *supra* note 312, at 8. A 2011 empirical study analyzed both SEC and class action enforcement of securities laws and found class actions curb aggressive reporting behaviors

applies across industries and can extend over multiple years so long as there is sustained and reported enforcement activity. Thus, without liberal class action mechanisms, most class members will suffer twice: first, they will be denied judicial access to redress defendants' wrongdoing because of financial and informational barriers; and second, they forego the potential deterrent effect of bringing suit.

To minimize this deterrence potential, class action criticism often falls into two camps. Some squabble about the vagaries of quantifying this deterrent effect.<sup>320</sup> Others assume class actions introduce the danger of over-deterrence.<sup>321</sup>

Admittedly, quantifying deterrence is difficult as it requires proving a non-event, namely deterred illegal conduct.<sup>322</sup> Though unlike the unsubstantiated blackmail myth, there is some evidence that class actions can impact corporate conduct. For example, in interviewing corporate representatives in 2000 (when there were fewer barriers to class actions than there are today), the Rand Institute found:

[C]orporate representatives . . . interviewed said that the burst of new class litigation had caused them to review financial and employment practices. Likewise, some manufacturers noted that heightened concerns about potential class action suits sometimes have a positive influence on product design suits.<sup>323</sup>

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of industry peers—not just the corporation sued. *Id.* While not the focus of this article, the deterrent effect of securities class actions is still relevant for evaluating consumer class actions as both are brought against corporate defendants.

<sup>320</sup> See, e.g., Marilyn F. Johnson, *In re Silicon Graphics Inc.: Shareholder Wealth Effects Resulting from the Interpretation of the Private Securities Litigation Reform Act's Pleading Standard*, 73 S. CAL. L. REV. 773, 784 (2000) (“[I]mprecise deterrence is worse than no deterrence.”); A.C. Pritchard, *Markets As Monitors: A Proposal to Replace Class Actions with Exchanges As Securities Fraud Enforcers*, 85 VA. L. REV. 925, 958 (1999) (“[C]lass actions offer, at best, a very imprecise and expensive form of deterrence.”).

<sup>321</sup> See, e.g., Kovacic, *supra* note 6, at 1041 (“[T]he U.S. style of private rights of action . . . pose[s] serious risks of overdeterrence.”). *But see* Luff, *supra* note 146, at 80-81 (“Critics assume that overdeterrence is a problem of the class action mechanism; research and common sense, however, show otherwise.”). Some courts use the blackmail myth to confirm the fears of overdeterrence. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (noting potential for class actions to “blackmail” defendants into settling frivolous claims (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973))).

<sup>322</sup> See, e.g., Elizabeth Chamblee Burch, *Securities Class Actions As Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 92 (2008) (“The impossibility of precisely measuring potential class litigation’s *ex ante* incentives on a corporate agent contemplating wrongdoing may make it a fool’s errand . . .”).

<sup>323</sup> RAND REPORT, *supra* note 144, at 119; see also Sherman, *supra* note 210, at 232 (providing a more exhaustive analysis of the Rand Report).

More significantly, though, the quantum of deterrence is less important than ensuring some deterrence. Some deterrence is evidently needed, as a PricewaterhouseCooper survey illustrates economic corporate crime rates have steadily increased.<sup>324</sup> As a result, over-deterrence concerns may be overblown: over-deterrence is a concern most closely associated with negligent conduct, whereas consumer class actions often involve intentional conduct.<sup>325</sup>

Further, it is not that class actions offer perfect deterrence;<sup>326</sup> rather, class actions' potential for at least some resiliency against harm justifies more expansive class action mechanisms. As Professor Campos explains, "The relevant trade-off is not between the deterrence provided by the class action and the accuracy provided by the individual trial. The trade-off is between optimal deterrence and imperfect compensation versus no deterrence and compensation at all."<sup>327</sup> Fears of over-deterrence assume enforcement by public entities is sufficient.<sup>328</sup> This ignores how private enforcement, including class actions, is more effective in providing deterrence than government regulation.<sup>329</sup> No matter how dedicated to consumer protection, government actors often cannot devote sufficient

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<sup>324</sup> Anecdotal evidence suggests the current economic downturn has increased corporate misconduct. See, e.g., *The Rot Spreads: Corporate Crime is On the Rise*, *supra* note 228 (discussing results of PricewaterhouseCoopers survey indicating "[t]he recession has taken its toll on morals as well as profits").

<sup>325</sup> See Robert W. Taylor, *Re-Evaluating Holder Actions: Giving Defrauded Securities Holders A Fighting Chance*, 86 NOTRE DAME L. REV. 413, 427 (2011); cf. *Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc.*, 43 F.3d 1119, 1123 (7th Cir. 1994) (commenting that "antitrust violations [are] based on deliberate rather than inadvertent actions"); *Wiley v. Gerber Prods. Co.*, 667 F. Supp. 2d 171 (D. Mass. 2009) (detailing consumer class action "alleging various claims under Massachusetts and New Jersey state law sounding in fraud, breach of warranties and intentional misrepresentation"); *Jaramillo v. DineEquity, Inc.*, 664 F. Supp. 2d 908, 912 (N.D. Ill. 2009) (describing putative class action for intentional misrepresentations).

<sup>326</sup> Other scholars reach the same middle ground of recognizing class actions are hardly perfect regulators, but they are still worth encouraging. See, e.g., *Burch*, *supra* note 304, at 2519 (admitting class actions are "not perfect regulators" but still recognizing the important rule of such cases).

<sup>327</sup> Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT'L L. 751, 800 (2012).

<sup>328</sup> See, e.g., *Luff*, *supra* note 146, at 81 ("Following administrative action with class actions, according to critics, yields only excessive penalties rather than increased deterrence.").

<sup>329</sup> See, e.g., Michael G. Dupee, *Federalism or Futility? Suter v. Artist M. and Its Effect on § 1983 Actions to Enforce Spending Clause Statutes*, 16 HAMLIN J. PUB. L. & POL'Y 135, 182 (1994) ("[P]rivate enforcement . . . has often been cited as a much more effective method of policing government compliance."); Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 897 (2008) ("[I]t is safe to conclude that private enforcement is significantly more effective at deterring illegal behavior than DOJ criminal antitrust suits."); see also Georgene Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 REV. LITIG. 721, 803 (2013).

resources to enforcement.<sup>330</sup> Governmental regulatory agencies lack the financial resources to monitor and detect all wrongdoing.<sup>331</sup> Moreover, government enforcement alone is unlikely to provide consumers sufficient resiliency. Class actions offer consumers a broader array of damages and remedies than available from governmental enforcement—which results primarily in injunctive or restorative relief.<sup>332</sup>

Government enforcement is also hindered by political constraints.<sup>333</sup> For example, there are reasons to question the FTC's ability to sufficiently monitor consumer protection violations.<sup>334</sup> Studies show the FTC is unlikely to pursue claims against constituents of legislators serving on committees with FTC oversight responsibility.<sup>335</sup> Further, by its own admission, the FTC lacks the requisite resources to fulfill its "broad competition and consumer protection responsibilities."<sup>336</sup> Hence, class actions offer consumers greater resiliency by providing the more consistent enforcement that is necessary for a deterrent effect. Unlike government enforcement, which wavers by administrative interest, politics, and economic resources,<sup>337</sup> private class actions have the potential for more constant regulatory oversight—and thus greater resiliency gains.<sup>338</sup>

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<sup>330</sup> See ROBERT N. MAYER, *THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE* 39-40 (1989) (discussing limitations government agencies face in advancing consumers' interests).

<sup>331</sup> RAND REPORT, *supra* note 323, at 69.

<sup>332</sup> Sherman, *supra* note 210, at 236 ("In addition, when governmental agencies do undertake enforcement actions, their powers may lead only to injunctive or restorative relief and not to the broad range of damages and remedies available in a class action. Thus it is in providing alternatives to government regulation through the role of private attorneys general that the consumer class action might make a winner out of consumers at large.").

<sup>333</sup> RAND REPORT, *supra* note 323, at 69.

<sup>334</sup> Andrew A. Caffrey, III & Jonathan M. Rotter, *Consumer Protection, Patents and Procedure: Generic Drug Market Entry and the Need to Reform the Hatch-Waxman Act*, 9 VA. J. L. & TECH. 1, 38 (2004) (arguing that, in the context of the FTC, "the limitations of the agency make the consumer class action suit a superior means of enforcement").

<sup>335</sup> M. L. GREENHUT & BRUCE BENSON, *AMERICAN ANTITRUST LAWS IN THEORY AND IN PRACTICE* 181-82 (1989); Bruce Benson, *Why are Congressional Committees Dominated by "High Demand" Legislators?*, 48 S. ECON. J. 68, 68-77 (1981); Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 329-42 (1982); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 83 (1969).

<sup>336</sup> Press Release, Fed. Trade Comm'n, FTC's Thomas B. Leary Addresses Class Action Litigation Summit (June 26, 2003), available at <http://www.ftc.gov/news-events/press-releases/2003/06/ftcs-thomas-b-leary-addresses-class-action-litigation-summit>.

<sup>337</sup> Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 310-11 (2004); Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 230 (2003).

<sup>338</sup> Bartholomew, *supra* note 195, at 2151; Bauer, *supra* note 337, at 310-11.

Class actions supplement limited government regulatory enforcement. As private attorney generals, consumers likely have more deterrent impact than their government counterparts. Antitrust class actions provide a solid illustration. Private enforcement of antitrust violations is disproportionately left to class actions.<sup>339</sup> Consumer class actions are the dominant form of private antitrust enforcement in the United States.<sup>340</sup> Federal, private antitrust cases exceed United States government actions (civil and criminal) by more than 25 to 1<sup>341</sup>

Thus arguments about the need to protect markets from overdeterrence are a variation on the blackmail myth. Just as corporations are not being pressured into settlements by class actions, the market is not suffering from an overabundance of private regulation. To the contrary, the last decade's Congressional and judicial reforms of class actions raise significant questions about what potential deterrent effects have already been lost.<sup>342</sup> In limiting class actions, consumers' resiliency to lessen future harm is lost, thus increasing their financial and information vulnerability.<sup>343</sup>

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<sup>339</sup> See, e.g., Crane, *supra* note 307, at 676. Securities class actions have seen similar insufficient governmental enforcement. From 2002-2005, post-securities class action reform through the PSLRA but before the start of increased procedural hurdles in 2007, the majority of monetary sanctions for reporting violations come from private enforcement rather than public enforcement. In fact, securities class actions have generated 40% more monetary fines from culpable firms than the SEC. Jennings, *supra* note 312, at 8 ("Over the years 2002-2005, the average payments made by culpable firms on account of SEC monetary sanctions total \$801 million relative to \$1.923 billion attributable to class actions rewards and settlements.").

<sup>340</sup> Bartholomew, *supra* note 195, at 2157 ("[A]t least ninety percent of antitrust enforcement is addressed through private actions."); see also BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: ANTITRUST CASES FILED IN U.S. DISTRICT COURTS BY TYPE OF CASE, 1975-2006, available at <http://www.albany.edu/sourcebook/pdf/t5412006.pdf>.

<sup>341</sup> Bartholomew, *supra* note 195, at 2151; Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 431 (1997) ("With respect to redress, however, government civil cases have not been an effective surrogate for, or even supplement to, private class actions.").

<sup>342</sup> See, e.g., Klonoff, *supra* note 11, at 735 ("[T]he emergence of myriad cases that cut back the ability to pursue classwide relief represents a troublesome trend that undermines the compensation, deterrence, and efficiency functions of the class action device."); Byron G. Stier, *Crimtorts, Class Actions, and the Emerging Mass Tort Method*, 17 WIDENER L.J. 893, 897 (2008) (discussing how "the greater scrutiny afforded class actions means that small-value class actions may not be certified" resulting in underdeterrence); Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009) ("CAFA's jurisdictional shift appears to be weakening enforcement, resulting in underdeterrence and perhaps greater corporate misbehavior.").

<sup>343</sup> Cf. Coyle, *supra* note 33, at 71 (discussing how corporate influence on governmental institutions results in less development of individual assets essential for resilience); Fineman, *Anchoring Equality*, *supra* note 22, at 20.

C. *Class Actions Advantage Consumers by Reducing Economic Disparity*

Third, class actions are a mechanism by which consumers can reduce economic disparities. In this way, class actions provide an alternative type of participation: enhanced participation in the marketplace. This enhanced marketplace participation generates consumers resiliency by providing an institutional means of improving the economic standing of consumers vis-à-vis large corporations, thus helping overcome financial vulnerability and judicial favoritism.<sup>344</sup> Such a mechanism is justified from a vulnerability perspective given “the unavoidable realization that when corporations act primarily with a profit motive they can both intensify their own precariousness and generate hazards for society.”<sup>345</sup>

In making this point, the intent is not to trigger politically-loaded debates over wealth transfers, nor is the argument that class actions are the only or most ideal way to reduce economic disparities. Rather the point is to consider how strengthening class actions could be another way the responsive state can address consumers’ financial vulnerabilities—particularly in a time when more traditional mechanisms, such as increased corporate taxation, seem politically unattractive alternatives to some.<sup>346</sup> Thus, while wealth redistribution is a contentious proposition, in terms of vulnerability it is a relevant physical resiliency asset.

Consumers’ resilience is dependent on maximizing opportunities to place themselves on more “even terms with the firms . . . who might otherwise dominate them.”<sup>347</sup> It has long been recognized that heavy concentration of wealth can undermine economic and political democracy.<sup>348</sup> Extreme wealth concentration can stunt economic growth.<sup>349</sup> Further, it can generate political

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<sup>344</sup> See Fineman, *Anchoring Equality*, *supra* note 22, at 19.

<sup>345</sup> Fineman, *Equality*, *supra* note 32, at 25.

<sup>346</sup> *Cf. id.* (discussing the state’s willingness to protect “the vulnerable position of certain big businesses” without necessarily affording individuals similar protection).

<sup>347</sup> CROUCH, *supra* note 288, at 53.

<sup>348</sup> See *id.* at 53; see also Alan Krueger, *Inequality, Too Much of Good Thing*, in *INEQUALITY IN AMERICA 1* (Benjamin F. Freidman ed., 2003) (“[I]ncome inequality [would be] problematic in a democratic society if those who are privileged use their economic muscle to curry favor in the political arena and thereby secure monopoly rents or other advantages.”).

<sup>349</sup> See, e.g., Winnie Byanyima, *Working for the Few: Inequality and the Threat to Democracy*, HUFFINGTON POST (Mar. 24, 2014, 5:59 AM), [http://www.huffingtonpost.com/winnie-byanyima/working-for-the-few-inequ\\_b\\_4643748.html](http://www.huffingtonpost.com/winnie-byanyima/working-for-the-few-inequ_b_4643748.html).

instability.<sup>350</sup> Class actions offer consumers one form of resiliency against such wealth concentrations, and thus are institutional responses the state should encourage to help consumers respond to the rise of wealth concentration.

In the current anti-class action paradigm, consumers' options to influence the market are primarily limited to purchasing decisions and occasional market research.<sup>351</sup> However, through class actions, consumers can fight against judicial favoritism stemming from corporations' financial power and thereby limit corporations' ability to abuse their economic advantage over consumers. These forced monetary distributions have the potential to reshape the marketplace and improve social welfare.<sup>352</sup>

Enhanced class action mechanisms also offer resiliency against corporate favoritism.<sup>353</sup> Distributions from corporations to class members can often represent significant amounts of money. For example, from 2006 to 2007 consumer class action settlements totaled close to \$3 billion.<sup>354</sup> Though this figure is just one one-thousandth of post-tax corporate profits in the same period,<sup>355</sup> it is difficult to identify another mechanism by which consumers impact the marketplace on an equal or larger scale. To curb class actions means limiting this avenue of resiliency.

Through class actions, consumers' potential to impact the marketplace is not limited to monetary distributions to the individual. Class actions provide consumers resilience by allowing them to play a role in protecting the marketplace's economic freedom and fostering more potential for competition.<sup>356</sup> This is

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<sup>350</sup> See, e.g., Andrew G. Berg & Jonathan D. Ostry, *Equality and Efficiency*, 48 FIN. & DEV. 12, 14 (2011) ("Beyond the risk that inequality may amplify the potential for financial crisis, it may also bring political instability, which can discourage investment.").

<sup>351</sup> See CROUCH, *supra* note 288 at 56.

<sup>352</sup> This power is particularly relevant to consumer resiliency in the neoliberal period, where corporate responsibility is narrowly defined in terms of maximizing state value with little consideration for larger social goals. See *id.* at 136.

<sup>353</sup> See Fineman, *Equality*, *supra* note 32, at 25-26 (discussing how the state played favorites in the recent economic bailout by helping big business but limiting help to individual mortgage holders).

<sup>354</sup> See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 825 (2010) (discussing settlement amounts for various cases, listing antitrust and consumer cases separately).

<sup>355</sup> See *Corporate Profits After Tax (without IVA and CCAAdj)*, ECON. REA.: FED. RES. BANK OF ST. LOUIS, <http://research.stlouisfed.org/fred2/series/CP/> (last updated Mar. 27, 2015) (detailing how corporate profits in 2006-2007 were roughly \$1,400 billion).

<sup>356</sup> See, e.g., *Acme Mkts., Inc. v. Wharton Hardware & Supply Corp.*, 890 F. Supp. 1230, 1236 (D.N.J. 1995) ("Thus, courts generally find that competitors and consumers are proper parties because the antitrust laws are intended to protect the economic freedom of participants in the relevant market." (internal citation omitted)); see also *Midland Exp., Ltd. v. Elkem Holding, Inc.*, 947 F. Supp. 163, 167 (E.D. Pa. 1996). This more competitive market also has the potential of greater consumer welfare by fostering innovation, which improves

particularly true for antitrust consumer class actions. Private enforcement of antitrust laws allows consumers a means of attacking abuse of market power, be it through leveraging monopolies, price-fixing, or other illegal restraints.<sup>357</sup> By disrupting anticompetitive conduct, private enforcement limits corporations' ability to extract supracompetitive prices from consumers,<sup>358</sup> while shaping the market as a whole by making room for potential competition.<sup>359</sup>

Admittedly, the reduction of economic disparities, alone, is not enough to overcome vulnerability.<sup>360</sup> Class action settlement distributions do not result in a net gain by class members. Monetary settlements or post-trial judgments in class actions actually represent a return of wrongly obtained funds, as damages in such cases are limited to compensatory damages.<sup>361</sup> Still, without mechanisms for aggregate litigation,

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options for consumers. See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 619-22 (Richard Nelson ed., 1962). But see JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 84-85 (1942) (questioning the degree antitrust law enhances consumer welfare).

<sup>357</sup> 15 U.S.C. §§ 1-2 (2004). Perhaps the largest limitation on consumers' ability to enforce antitrust laws was *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730 (1977) where the Court held that only direct purchasers could sue under federal law to recover antitrust damages. In the dissent, Justice Brennan noted the decision's danger to enforcement, stating the decision "flouts Congress' purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement." *Illinois Brick Co.*, 431 U.S. at 749 (Brennan, J., dissenting).

<sup>358</sup> See, e.g., Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 *FORDHAM L. REV.* 2349, 2351 (2013) ("[T]he overriding purpose of antitrust statutes is to prevent firms from stealing from consumers by charging them supracompetitive prices.").

<sup>359</sup> It is often stated that antitrust laws are intended to protect consumers. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (describing the Sherman Act as a "consumer welfare prescription"); see also John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425, 2469 (2013) ("Congress and the American people want an antitrust system that protects consumers and small suppliers from exploitative behavior—behavior that takes their wealth without providing them with offsetting benefits."). However, the overall benefit to competition as a whole still is worth noting. See, e.g., *Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666 (D.C. Cir. 2005) (antitrust law protect competition); *Holmes Prods. Corp. v. Dana Lighting, Inc.*, 958 F. Supp. 27, 32 (D. Mass. 1997) ("At the outset, this Court works from the premise that antitrust law protects 'competition, not competitors.'" (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)).

<sup>360</sup> See Coyle, *supra* note 33, at 68.

<sup>361</sup> While treble damages are possible from consumer antitrust class actions, they are rarely awarded or reflected in settlement figures. See Robert H. Lande, *Five Myths About Antitrust Damages*, 40 *U.S.F. L. REV.* 651, 662 (2006) ("[O]verall, the awarded antitrust damages are only a fraction as large as they should be to ensure optimal deterrence, and that they should be increased significantly.").

corporate defendants would continue to gain wealth at the expense of consumers.<sup>362</sup>

Further, beyond improving the economic position of class members, consumer class actions also result in significant payments to charities and non-profit agencies. When settlement funds remain after distribution to class members, these funds are distributed as *cy pres* to third-parties on behalf of the class members.<sup>363</sup> These third parties include charities, such as the Make a Wish Foundation, Susan G. Komen Breast Cancer Foundation,<sup>364</sup> American Red Cross Disaster Relief Fund,<sup>365</sup> and non-profit agencies like the New York University Medical Center, the Beth Israel Medical Center's Continuum Women's Cardiac Care Network,<sup>366</sup> the National Consumers League, and the Consumers Union.<sup>367</sup> Consequently, class actions generate resiliency by supporting organizations that provide individuals safety nets for times of misfortune.<sup>368</sup> This resiliency asset is particularly valuable since charities are already feeling the pinch of a sluggish economy.<sup>369</sup>

Charitable distribution amounts can be significant. Class actions have allowed consumers to fund public benefits ranging from music distributed to libraries and educational institutions,<sup>370</sup> promoting financial literacy,<sup>371</sup> and enforcing

<sup>362</sup> Cf. *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012) ("A class action is a more efficient procedure for determining liability and damages in a case such as this involving a defect that may have imposed costs on tens of thousands of consumers, yet not a cost to any one of them large enough to justify the expense of an individual suit."); Lande & Davis, *supra* note 329, at 889 (discussing a multi-year study proving consumer antitrust class actions, alone, generated settlements totaling \$1.815 billion).

<sup>363</sup> See generally Christine P. Bartholomew, *Charitable Settlements*, FORDHAM L. REV. (forthcoming 2015) (detailing charitable distributions history and judicial application).

<sup>364</sup> *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1396-99 (N.D. Ga. 2001).

<sup>365</sup> *In re Infant Formula Multidistrict Litig.*, No. 4:91-CV-00878, 2005 WL 2211312 (N.D. Fla. Sept. 8, 2005).

<sup>366</sup> *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 432 (2d Cir. 2007).

<sup>367</sup> *In re LivingSocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1 (D.D.C. 2013).

<sup>368</sup> See, e.g., Tidmarsh, *supra* note 306, at 572 (discussing the social welfare gains from class actions); accord Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1000 n.4 (2005) ("Class actions potentially promote social welfare by overcoming collective action problems inherent in the regulation of conduct affecting disorganized groups."). Defendant class actions also have the potential to enhance social welfare. See generally Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73, 79 (2010) (discussing how defendant class actions can serve the goals of maximizing social welfare).

<sup>369</sup> John F. Wasik, *How to Choose a Charity Wisely*, N.Y. TIMES (Nov. 7, 2013), [http://www.nytimes.com/2013/11/08/giving/how-to-choose-a-charity-wisely.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/11/08/giving/how-to-choose-a-charity-wisely.html?pagewanted=all&_r=0).

<sup>370</sup> *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003).

consumer rights.<sup>372</sup> A 2003 consumer class action settlement resulted in \$38 million going to charitable governmental and non-profit organizations to promote the health and nutrition of class members.<sup>373</sup> The 2006 *Microsoft* consumer antitrust case settlement resulted in Wisconsin public schools receiving over \$80 million.<sup>374</sup> Thus, settlements to third parties can help finance valuable organizations and the beneficiaries of these organizations, who are often class members.

Rather than embracing class actions' potential for economic resiliency, critics often contend class actions only lessen the economic disparity between defendants and class counsel—not class members. Hence, one rhetorical trick is for critics to claim class members only receive pennies while class counsel receives millions.<sup>375</sup> This attack ignores that in the aggregate, class members' "pennies" can still represent a notably large benefit to consumers.

It is undeniable that a successful class action settlement will result in a significant payday for class counsel. But arguably, this payout is a good thing for consumers. It encourages counsel to continue undertaking highly risky litigation, where there is no guarantee of payout.<sup>376</sup> Without willing counsel, consumers' class claims cannot be brought.<sup>377</sup>

<sup>371</sup> *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1355 (S.D. Fla. 2011).

<sup>372</sup> *See, e.g., LaGarde v. Support.com, Inc.*, No. 12-0609, 2013 WL 1994703 (N.D. Cal. May 13, 2013) (approving settlement with charitable distribution to two consumer advocacy groups); *In re Publ'n Paper Antitrust Litig.*, No. 3:04 MD 1631, 2009 WL 2351724, at \*2 (D. Conn. July 30, 2009) (ordering that a *cy pres* award in an antitrust class action be distributed to the American Antitrust Institute, finding that "[b]ecause the plaintiffs' claims here are based on antitrust injury, the next best use for the settlement funds is to disburse those funds to charitable institutions designed to guard against antitrust injury and protect consumers").

<sup>373</sup> *See In re Vitamin Cases*, 107 Cal. App. 4th 820, 824 (2003).

<sup>374</sup> *See Microsoft Wisconsin Cy Pres Plan*, MICROSOFTWIK12, <https://microsoftwik12.com/> (last updated Oct. 31, 2014) (detailing the settlement terms).

<sup>375</sup> *See, e.g., Dan Kelly, Class Action Suits Enrich Lawyers While Consumers Get Pennies*, *READING EAGLE*, Dec. 31, 2003, at A1; Eleanor Laise, *Picked Clean: Plaintiff's Attorneys and Middlemen Thrive under the Securities Class-Action System; What's in it for You? Pretty Much Bupkis*, *SMARTMONEY*, May 2005, at 81, 81 (describing class action suits as thriving but stating that the supposed plaintiff-beneficiaries often receive pennies on the dollar or small nonmonetary compensation, while lawyers have turned such lawsuits into an industry for collecting large fees).

<sup>376</sup> *See, e.g., King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 615 (W.D. Tex. 2010) ("[Class Counsel] has asked no client or Class member to pay fees or advance costs. Class Counsel have received no compensation for their efforts in this case. Absent the settlement, there was a no guarantee that the Settlement Class members would obtain relief from Defendant or compensation for their work on behalf of Plaintiffs and the Class.");

<sup>377</sup> *See supra* Part III.B (discussing consumers' financial vulnerability).

As Judge Jones recently noted in approving a settlement in a consumer class action against T-Mobile:

The practices that led to this lawsuit cost most class members between a few cents and a dollar, on average. . . . Almost no one would file a lawsuit to recover a dollar or less. Collectively, however, T-Mobile may have profited several million dollars as a result of these practices. While almost no one would sue to recover less than the cost of a cup of coffee, the court also expects that almost no one would be comfortable with the notion of a company making millions by unfairly charging millions of its customers a few extra pennies. Currently, the class action is the most widely used solution to this dilemma.<sup>378</sup>

Moreover, 85% of class action revenues go to class members or charities, while only roughly 15% of settlements go to class counsel.<sup>379</sup> While this 15% represents a sizable amount of money, it is a necessary cost to achieve class actions' redistributive effects. Moreover, 15% is typically lower than the take of other contingency-fee lawyers in individual litigation,<sup>380</sup> which does not generate the same scope of resiliency benefits as class actions.

While wealth distribution discussions often generate heated debate,<sup>381</sup> the reality is class actions are a way for consumers to lessen economic disparity and “accumulate the resilience or resources that they need to confront the social, material, and

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<sup>378</sup> Zaldivar v. T-Mobile USA, Inc., No. 07-CV-1695, 2010 WL 1611981, at \*1 (W.D. Wash. Mar. 16, 2010).

<sup>379</sup> See Fitzpatrick, *Lawyers*, *supra* note 275, at 2085-86 (discussing how class action attorneys should make more money in order to maximize the social welfare benefits of class actions); Fitzpatrick, *supra* note 354, at 813.

<sup>380</sup> See Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 248 (1996) (noting that “standard contingency fees” are “usually thirty-three percent to forty percent of gross recoveries” (emphasis omitted)); Fitzpatrick, *Lawyers*, *supra* note 275, at 2083; Joni Hersch et al., *An Empirical Assessment of Early Offer Reform for Medical Malpractice*, 36 J. LEGAL STUD. S231, S238 (2007) (referencing “the more typical one-third contingency fee rate”); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals Without Technique”?*, 60 FLA. L. REV. 349, 383 (2008) (mentioning “the usual 33-40 percent contingent fee”) (internal quotation omitted); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 286 (1998) (reporting the results of a survey of Wisconsin lawyers, which found that “[o]f the cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency fee of 33% was by far the most common, accounting for 92% of those cases”).

<sup>381</sup> One incarnation of this debate appears in some of the critiques of THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014). Some argue that concerns about wealth inequity are overblown while others argue it is a significant issue in need of more wealth transfer. See, e.g., *Debating Piketty's Theory on How Wealth Begets Wealth, Widens the Economic Gap*, PBS NEWSHOUR (May 13, 2014, 6:38 PM), <http://www.pbs.org/newshour/bb/debating-pikettrys-theory-wealth-begets-wealth-widens-economic-gap/>.

practical implications of vulnerability.”<sup>382</sup> Collectively with participatory and deterrent resiliency potential, enhancing consumer class actions becomes a viable way for the responsive state to empower consumers.

## CONCLUSION

The battle over class action mechanisms is still raging. With ever-growing corporate concentration and the corresponding emergence of the mega-global corporation, class actions will continue to suffer in the near future. This struggle is exacerbated as class action critics advance false-cries of corporate victimhood. The current anti-class action rhetoric overlooks how procedural form impacts consumers’ participation in the judicial system and the marketplace. Rather than embracing class actions, their resiliency potential has been undermined by increased barriers.<sup>383</sup> As previously detailed, these barriers now impact virtually every stage of a class action, making it more difficult for consumers to bring claims, let alone proceed as a class.<sup>384</sup> These barriers undermine the state’s potential to respond to consumers’ vulnerabilities, exacerbating consumers’ potential harm.<sup>385</sup>

Vulnerability theory provides a framework to envision a different future: one where consumers have the potential for more equal footing in seeking redress and influencing corporate decision-making. Instead of the blackmail myth shaping the future of class actions, judges and policymakers should embrace class actions as a means to offer consumers resilience. This would allow class actions to more effectively overcome consumer vulnerability.

Applying vulnerability theory to class actions justifies class action reform—reform that consciously benefits class plaintiffs, not corporate defendants. Class action procedural rules should not be net-neutral. Instead, rules that favor

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<sup>382</sup> See Fineman, *Equality*, *supra* note 32, at 19; see also Fineman, *Anchoring Equality*, *supra* note 22, at 13 (explaining the role of the state is provide resilience).

<sup>383</sup> The increased gatekeeping hurdles in class actions are well-documented. See, e.g., Bartholomew, *supra* note 195, at 2185-86 (detailing the increased procedural gatekeeping in antitrust class actions); Lazaroff, *supra* note 13, at 46-51. For a thorough discussion of increased gatekeeping under the Roberts Court, see generally Wasserman, *supra* note 14. The consequences to class actions are equally stark. See Miller, *supra* note 183, at 476 (“We are moving toward a system in which an increasing number of civil actions may be stillborn.”).

<sup>384</sup> See Bartholomew, *supra* note 195, at 2185-86; Hovenkamp, *supra* note 165, at 55.

<sup>385</sup> Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1079-80 (2012) (“Conversely, the lack of state action may intensify vulnerability, or negative policies may exacerbate or create more intense vulnerability.”).

plaintiffs are necessary to empower class actions. To advance towards this re-envisioned future, the first step must be debunking the need for greater corporate protection from class actions. It is time to redefine prey and predator.

Once consumer welfare becomes the guiding light of class action reform, what becomes interesting and warrants more discussion is how to reinvigorate class actions to further advance resiliency. The nuances of this reform are beyond the scope of this Article, though I offer some beginning suggestions here.

Initial considerations for reform include some moderate proposals. Legislation that rolls back some of the Supreme Court's recent class action reforms, such as the repeal of *Concepcion*, *Italian Colors*, and *Twombly*, is a logical starting point. These changes would allow courts to focus on whether a wrong has occurred instead of allowing procedural hurdles to preclude such determinations and advantage corporations.

Without legislative repeal of both pro-corporate decisions, consumer class actions are stalled from their infancy, with little hope of success for the vast majority of claims. Stare decisis principles make judicial correction of these cases unlikely, leaving redress for these missteps to Congress. Thus, swift action is needed to protect consumer class actions.

Unfortunately, legislative efforts to correct these decisions have failed or are stymied in Congressional gridlock.<sup>386</sup> There is hope, though, that as the impact of years of class action reform is felt, legislative reform may find more success.

Perhaps, though, this reform agenda need not be so narrow. Given the 30 years neoliberalism has had to undermine class actions, more drastic proposals may be necessary for true change. More sweeping proposals are particularly justified here, since the pro-corporation narrative stems from judicial activism—in essence, a state institution is responsible for this distortion.

The most radical proposal is adding statutory minimums for computing class action claims. This would simplify damage calculations and allow federal courts to streamline the largest

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<sup>386</sup> For example, the Open Access to Courts Act of 2009, which would have returned pleading standards to pre-*Twombly* requirements, stalled after hearings in the House and Senate. See Pamela Gilbert & Victoria Romanenko, *Proposals for Reform*, in PRIVATE ANTITRUST LAW IN THE UNITED STATES 369 (2012) (discussing legislative reform efforts potentially impacting private antitrust suits). Equally gloomy are the chances that the Arbitration Fairness Act, which would overturn *Italian Colors*, will pass. Arbitration Fairness Act, S. 878, 113th Cong. (2013). After over five years of winding through the legislative process, GovTrack.gov—a legislative tracking tool—places the odds of passage remain at only 6%. See *S. 878 (113th): Arbitration Fairness Act of 2013*, <https://www.govtrack.us/congress/bills/113/s878> (last visited Mar. 30, 2015).

hurdle to class certification, the predominance requirement under Rule 23.<sup>387</sup> Doing so allows the parties to focus on arguments more related to claims' merit rather than procedural hurdles. This helps overcome class members' procedural disadvantage in private enforcement class actions.

A second proposal is precluding corporate defendants from recouping class action payouts through product cost increases. Some argue corporate defendants recover settlement costs by raising the price for products they sell.<sup>388</sup> Doing so essentially means consumers are financing their own settlements through future purchases. The logistics of such a prohibition are complicated, at best, but could include continued monitoring and a shifting burden whereby after a class judgment or settlement, a corporate defendant has to justify price increases for a reasonable period.

As more scholars work on redefining class actions from a vulnerability perspective, additional reform ideas will be generated. Such research can potentially identify new options to increase "equality of opportunity."<sup>389</sup> To be clear, class actions are not a panacea, but they do work towards lessening individual consumer vulnerability. Hence, the current judicial strategy of class action retrenchment is not the answer. Instead, the government should more actively protect and, in fact, encourage expanded reliance on Rule 23. In doing so, the responsive state can arm consumers in their efforts to fight against corporate wrongdoing rather than leaving consumers to waive the white flag of defeat.

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<sup>387</sup> FED. R. CIV. P. 23(b)(3).

<sup>388</sup> See, e.g., Lisa M. Bass, *The Class Action Fairness Act: What's Fair About It?*, 2 BUS. L. BRIEF 23 (2005) ("To protect consumers from losing entire awards and incurring the costs of class action suits through increased prices, and to protect businesses from state courts which give excess awards, Congress proposed the Class Action Fairness Act of 2005."); cf. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration As an Alternative to Litigation*, 33 HARV. J.L. & PUB. POL'Y 607, 612 (2010) (discussing how "companies must raise the prices of their goods and services" to respond to class action litigation).

<sup>389</sup> Fineman, *Vulnerable Subject*, *supra* note 22, at 256.