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## Neoliberal Civil Procedure

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# Neoliberal Civil Procedure

Luke Norris\*

*This Article argues that the current era of U.S. civil procedure is defined by its neoliberalism. The Supreme Court has over the past few decades reinterpreted the Federal Rules of Civil Procedure in ways that have made it more difficult for citizens to bring and maintain civil claims. The major decisions of this new era—in areas as diverse as summary judgment, pleading, class actions, and arbitration—exhibit neoliberal hallmarks. They display neoliberalism’s tendency to naturalize existing market arrangements, its focus on efficiency and obscuring questions of power, its reduction of citizens to consumers, and its attempt to analyze government through the lens of market-modeled concepts. As the Court’s procedural decisions make it increasingly difficult for citizens to bring claims enforcing regulatory law—including antitrust, antidiscrimination, consumer protection, and worker protection laws—the Court’s neoliberal orientation lurks in the background and helps to explain procedure’s modern progression. In order to fully appreciate, critique, and potentially move beyond the current era of U.S. civil procedure, it is important to understand the neoliberal logic that drives it, as well as the logics and values it obscures and sidelines.*

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Introduction.....	472
I. Neoliberalism: A Primer.....	476
A. The Concept.....	476
B. Its Characteristics.....	477
II. Neoliberalism in Procedural Doctrine.....	479
A. Summary Judgment.....	479
1. Market-Naturalization.....	480
2. Market-Insulation.....	483
B. Pleading.....	484
1. Market Naturalization, Redux.....	485
2. Power.....	488
3. Efficiency.....	490
4. <i>Iqbal</i> and Efficiency.....	492
C. Arbitration.....	493
1. Power, Citizen-Consumers, and the Market-State.....	493
2. Encroaching on Employment.....	497
3. Individualized Citizen-Consumers.....	499
D. Class Actions.....	503
1. Power.....	503
2. Individualized Citizen-Consumers.....	506
E. Coda: Other Areas.....	509
III. Analyzing Procedure’s Neoliberal Turn.....	511
A. Its Distinctiveness.....	511
B. Its Drivers.....	513
1. The Influence of Economic Theory.....	514
2. The Corporatization of the Bar and Rulemaking Process.....	515
3. The Changing Shape of the Judiciary.....	516
4. Politicization of Legal Process.....	518
5. Institutional Vulnerability and Adaptation.....	518
Conclusion: Beyond Neoliberal Civil Procedure?.....	522

## INTRODUCTION

U.S. law is increasingly neoliberal. Neoliberalism, broadly speaking, is a legal, political, and economic project and method of thought that prizes existing market arrangements—obscuring the questions of power, distribution, and inequality that underlie them, as well as the role of law, politics, and culture in shaping them—and seeks as a result to minimize ongoing democratic efforts to reshape those arrangements.<sup>1</sup> Neoliberalism valorizes existing market relationships by conceiving

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1. See, e.g., David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 147 (2018) (“[N]eoliberalism [is] a style of thinking and policy making characterized by market-fundamentalist premises and a constricted view of democratic possibilities for reshaping economic relations . . .”).

of them as natural and favorable.<sup>2</sup> And it seeks to reorder law and public institutions to mimic market arrangements and to shield existing market arrangements from democratic efforts to reorder them to align with other values.<sup>3</sup> Neoliberalism offers a “pervasive view of law that encases ‘the market’ from claims of justice and conceals it from analyses of power.”<sup>4</sup> Scholars have shown how neoliberalism has permeated an array of U.S. legal fields, including constitutional, antitrust, employment discrimination, intellectual property, and family law.<sup>5</sup>

Our federal civil procedure is neoliberal, too. A series of doctrinal shifts over the past few decades have ushered in a new era of civil procedure. The Supreme Court has erected hurdles for plaintiffs at the pleading, class certification, discovery, and summary judgment stages, and it has made it harder for plaintiffs to get into court in the first place through its arbitration rulings.<sup>6</sup> Scholars tend to understand these shifts as moving away from the commitments of the previous era of civil procedure to accessible and flexible rules that facilitate the resolution of disputes on the merits.<sup>7</sup> The story is one of the advent of a “restrictive ethos” in civil procedure.<sup>8</sup> But there is also more to the story. In order to fully appreciate the current era of civil procedure—and in particular, the obstacles that the Supreme Court has placed in the way of citizens seeking to bring claims enforcing regulatory law governing the market—we also need to understand the era’s neoliberalism.

Several features define neoliberalism. They include a focus on market-modeled concepts of efficiency permitted in part by assumptions of neutrality; a concomitant lack of focus on questions of power, distribution, and inequality; a tendency to naturalize existing market arrangements; and an attempt to remake the government and citizens in the image of the market and thereby to constrict the possibilities for democratic reordering of existing market arrangements.<sup>9</sup> The doctrines that define the new era of procedure comprise these neoliberal hallmarks and enlarge and complicate our understanding of them.<sup>10</sup> Across doctrinal areas, the Court has developed and elevated a narrow vision of

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2. See *infra* Section I.A; see also, e.g., Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1795–97 (2020) (exploring how neoliberalism is founded on and encases the “autonomy” of the market).

3. See *infra* Section I.A.

4. Britton-Purdy et al., *supra* note 2, at 1784.

5. See *infra* notes 23–27 and accompanying text.

6. See *infra* Parts II, III.

7. While many scholars have discussed the procedural shifts of the past several decades, Stephen N. Subrin and Thomas O. Main have categorized “eras” of civil procedure and marked the current one as the “fourth era” of U.S. civil procedure. See generally Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

8. See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 333–34 (2013) (exploring the departure); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010) (defining the “restrictive ethos”).

9. See *infra* Section I.A.

10. See *infra* Section I.B.

efficiency, focused on reducing defendants' costs and ignoring other variables. And along the way, it has erased from its decisions historical considerations of power, especially where plaintiffs go up against corporate Goliaths.<sup>11</sup> The Court has naturalized existing market arrangements by layering plausibility standards onto procedural analysis, defining what is plausible market behavior through economists' visions of efficiency that tend to naturalize that behavior. Finally, the Court has viewed judicial procedures and the citizens who use them through the lens of the market-modeled concepts. The Federal Rules of Civil Procedure (the Rules) and their layering of process are construed as, among other things, clunky, burdensome, and inefficient as compared to private processes. And citizens are construed as consumers seeking efficient processes—especially in private fora such as arbitration—that maximize individual preferences and work best where aggregate litigation is not pursued.

The result is that procedural interpretation is increasingly a mechanism for the Court to define judicial processes, the citizens who use them, and market arrangements in neoliberal terms. While the Court's procedural decisions generally apply across civil cases, they also bear a special relationship to regulatory litigation—to individual and group claims seeking to enforce federal regulatory legislation. The U.S. regulatory system is somewhat distinctive for the extent to which it relies on lawsuits by ordinary citizens to enforce regulatory legislation.<sup>12</sup> This system, often referred to as one of private enforcement, encompasses, among other things, antidiscrimination suits seeking to eradicate discrimination based on sex or race in the workplace, antitrust suits seeking to keep markets stable and fair, and employment suits seeking to protect workers' basic dignity and security.<sup>13</sup> Private enforcement lawsuits are part of a process through which the public and the government develop and refine the democratic and legislative norms governing economic and social life.<sup>14</sup>

Neoliberal civil procedure undermines this regulatory process subtly but effectively. By employing plausibility analysis, the Court naturalizes the market

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11. While this Article often focuses on instances where individual or groups of plaintiffs square off against larger, institutional defendants, there are other power dynamics that constitute much of our litigation landscape. For example, in some instances, as Daniel Wilf-Townsend shows, large corporate firms, and in particular debt-collection firms, are the plaintiffs, engaging in what he calls assembly-line litigation. *See generally* Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. (forthcoming 2022).

12. *See generally* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017) [hereinafter BURBANK & FARHANG, RIGHTS AND RETRENCHMENT]; Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014) [hereinafter Burbank & Farhang, *Litigation Reform*].

13. *See generally* Burbank & Farhang, *Litigation Reform*, *supra* note 12 (outlining the various forms of legislation that are enforced by private citizens through lawsuits).

14. *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 666 (2013) (articulating the various roles of “private enforcement” litigation). *See generally* Luke Norris, *The Promise and Perils of Private Enforcement* (Jan. 27, 2022) (unpublished manuscript) (on file with author).

arrangements that litigants challenge as deviating from regulatory commands, often keeping cases from getting to juries. By minimizing questions of power and distribution in procedural decision-making and focusing on a narrow view of efficiency, the Court paves the way for procedural decisions that make it harder for private enforcer-plaintiffs to bring and maintain their suits. The Court thus saps from the Rules other values that would support—and historically have supported—construing them to facilitate private enforcement. And the Court’s dim view of judicial procedures and construal of litigants as individualized consumers seeking more efficient processes lead it to disable the very kinds of public, often collective, litigation that best enable regulatory law to be enforced and developed. Procedure provides the gateways and pathways for citizens to bring regulatory claims, and the Court’s neoliberal decisions litter those gateways and pathways with roadblocks and exit ramps.<sup>15</sup>

Having shown the prominence of neoliberalism in modern U.S. procedure, this Article next examines its distinctiveness and the forces behind its rise. Neoliberal civil procedure, I argue, is defined by several characteristics. It is subterranean, largely lost from public view and avoiding the scrutiny that comes with non-procedural judicial interpretation. And it is basic, broad, and integrating, sweeping across civil statutory, constitutional, and common law disputes in federal courts and often influencing state procedure as well. Neoliberalism in procedure also arises from both familiar and distinctive forces. As is the story elsewhere, neoliberalism began to take grip in civil procedure in the 1970s. The forces that have contributed to its rise include the prominence of economics in the legal academy and the judiciary, the corporatization of U.S. legal practice and the rulemaking process, the increasingly corporate makeup of the judiciary, the politicization of procedure by corporate leaders and politicians, and the resource scarcity federal courts have faced in light of caseloads and resulting pressures to remake themselves in the image of businesses and to manage cases more efficiently. Neoliberal civil procedure fits into the account of the larger rise of legal neoliberalism but is also shaped by its own historical and institutional forces.

This Article explores the rise of neoliberal civil procedure in three parts. Part I briefly surveys the core characteristics of neoliberalism. Part II analyzes how those characteristics have come to define procedure in major Supreme Court decisions of the current era of procedure. It shows how the Court’s summary judgment, pleading, arbitration, and class action decisions, among others, are neoliberal in orientation. Part III analyzes what is distinctive about neoliberal civil procedure, as well as the forces that fueled its rise. The Conclusion explores at a high level what moving beyond neoliberal civil procedure may entail.

This Article’s core contribution is to reveal the logic of the new era of civil procedure. Much ink has been spilled in the service of tracking, analyzing, and

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15. See Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1654–55 (2013) (exploring and defining various procedures as gateways and pathways).

critiquing the shifts that characterize this new era. But we need to understand the era's distinctiveness—what drives it—before we can fully approach and critique it. We need to appreciate procedure's neoliberalism in order to potentially resist it.

### I. NEOLIBERALISM: A PRIMER

This Part describes some of neoliberalism's core characteristics to lay a foundation for understanding how they translate to procedure. It focuses on how neoliberal thought prizes efficiency, sidelines questions of power and distribution, depoliticizes and naturalizes existing market arrangements, aims to remake the government in the image of the market, and conceives of citizens as atomistic consumers within the market-state.

#### *A. The Concept*

Neoliberalism is a term used to describe the “revival of the doctrines of classical economic liberalism, also called *laissez-faire*, in politics, ideas, and law.”<sup>16</sup> At its core, neoliberalism prizes existing market arrangements, insulating them from democratic contest and control, and seeks to remake the State and its citizens in the image of the market.<sup>17</sup> As David Grewal and Jedediah Britton-Purdy put it, “Neoliberalism, like classical liberalism before it, is also associated with a kind of ideological expansionism, in which market-modeled concepts of efficiency and autonomy shape policy, doctrine, and other discourses of legitimacy outside of traditionally ‘economic’ areas.”<sup>18</sup> This market-modeled exceptionalism, however, can come into conflict with democracy because its values can both “prove incompatible with capitalistic imperatives” and because the public may “hold a set of expectations about economic and political life that may go beyond or even contradict market logic: for instance, a reasonable level of economic opportunity, distributive fairness, workplace security, community and solidarity, and civic equality.”<sup>19</sup> Neoliberalism's “signature move” is to construct law and politics so as to shield existing market relationships from ongoing democratic control and reordering.<sup>20</sup>

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16. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.*, no. 4, 2014, at 1, 1.

17. *See id.* at 3 (“Neoliberal claims advance the market side of this contest in capitalist democracies between capitalist imperatives and democratic demands.”). As the authors note, some argue that the term is vague, and while it is “not conceptually neat and cannot be defined by a set of necessary and sufficient conditions for its use[, this is] a problem, if it is a problem, that neoliberalism shares with many other ‘essentially contested concepts,’ such as conservatism, individualism, and democracy.” *Id.* at 2.

18. *Id.* at 3.

19. *Id.* at 3–4.

20. *Id.* at 5. Behind this move is the intuition that market arrangements best promote human freedom. *Id.* at 6. The way that neoliberals conceive of the market fails to appreciate the structuring rule of law and the historical variability of markets. *Id.* at 7.

Neoliberalism has become the “common sense of the current moment.”<sup>21</sup> And it is a legal project as well as an economic and political one.<sup>22</sup> Scholars have shown how neoliberalism has permeated an array of legal fields and their doctrines, including constitutional,<sup>23</sup> antitrust,<sup>24</sup> employment discrimination,<sup>25</sup> intellectual property,<sup>26</sup> and family law.<sup>27</sup>

### B. Its Characteristics

There are several neoliberal moves that have come to infuse these fields, and as I explore below, they have come to infuse U.S. civil procedure, too. First, neoliberalism “prizes a certain version of efficiency over all else.”<sup>28</sup> And efficiency is “typically defined—in practice if not always in theory—as a kind of ‘wealth maximization’ that works to structurally prioritize the interests of those with more resources.”<sup>29</sup> Democratic laws, then, are judged from the perspective of efficiency—of whether they maximize wealth and individual preferences.<sup>30</sup> In this way, neoliberalism is connected to aspects of modern law and economics methodology and the efficiency and cost-benefit analyses that have come to define parts of the field.<sup>31</sup> Indeed, in various areas of law, efficiency analysis “anchors both the descriptive framing and the normative assessment of law.”<sup>32</sup>

21. Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 71, 85.

22. See Grewal & Purdy, *supra* note 16, at 13 (“[N]eoliberal efforts necessarily rely upon (and thus must engage) law, but also, more importantly, how apparently diverse jurisprudential trends show the impact, both subtle and direct, of the broader neoliberal moment in which the world finds itself today.”); *id.* at 1 (exploring neoliberalism as an economic and political project); see also DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 17, 19 (2005) (exploring how neoliberalism can be seen “as a political project to re-establish the conditions for capital accumulation and to restore the power of economic elites” (emphasis omitted)).

23. Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 195, 195.

24. See Britton-Purdy et al., *supra* note 2, at 1801–02; see also Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 386 & n.18 (2020); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1665 & n.37 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)); Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 717–22 (2017).

25. See generally Deborah Dinner, *Beyond “Best Practices”: Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017).

26. See generally Amy Kapczynski, *Intellectual Property’s Leviathan*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 131.

27. See generally Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 25.

28. Britton-Purdy et al., *supra* note 2, at 1789.

29. *Id.* at 1790.

30. See *id.*

31. See, e.g., Blalock, *supra* note 21, at 89 (“Although neoliberal rationality should not be reduced to or conflated with the theory of law and economics, the latter’s meteoric rise and proliferation within the legal academy are undeniably symptomatic of neoliberalism’s dominance, as well as an instrument of its dissemination.”).

32. See Britton-Purdy et al., *supra* note 2, at 1790.



Second, and relatedly, neoliberalism is agnostic or even hostile to questions of power, structure, and vulnerability.<sup>33</sup> Neoliberalism's focus on efficiency layers a patina of neutrality over market arrangements, pushing aside questions of economic power and enduring forms of inequality and insecurity.<sup>34</sup> Unequal distributions of power and questions of coercion, subordination, and domination are pushed out of view by assuming relatively equal baselines.<sup>35</sup> The result is to sideline core questions about power and distribution that underlie existing market relationships.<sup>36</sup> This inattention to questions of power and structure stands in marked contrast to theoretical approaches like those focusing on economic coercion and subordination, and racial and gender subordination, including those founded in critical or democratic theory.<sup>37</sup>

Third, by obscuring these forms of inequality and power, neoliberalism depoliticizes and naturalizes existing market arrangements—themselves not natural but the products of law, politics, and culture—and the inequalities that often characterize them.<sup>38</sup> By naturalizing market power and arrangements, the market has been “allowed to operate according to its own ostensible rules and protected in various ways from democratic reordering.”<sup>39</sup> In this way, neoliberalism supplies “no means to analyze, let alone counter, contemporary concentrations of wealth and power, except insofar as they interfere with overall efficiency.”<sup>40</sup>

Fourth, neoliberalism seeks to remake the State in the image of the market. In neoliberal thought, the State is “inertial, heavy, bureaucratic, ill-informed, and perilously corruptible and corrupt.”<sup>41</sup> It is an “inertial Leviathan.”<sup>42</sup> And as a result, where the State exists, it must come to mimic the market and be reformed to become leaner and more “business-like.”<sup>43</sup> The result is often to shrink the State and its functions and regulatory capacity, thereby shielding existing forms of economic power from further democratic interventions.<sup>44</sup> The State, to the extent it does function, does so mainly to facilitate individuals and entities in maximizing their preferences.

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33. *See id.* at 1789–90.

34. *See id.* at 1794–95.

35. *See id.* at 1813.

36. *See, e.g., id.* at 1820.

37. *See id.* at 1833–35.

38. *See id.* at 1790.

39. *Id.* at 1794.

40. *Id.* at 1790.

41. *See* Kapczynski, *supra* note 26, at 131–32.

42. *Id.* at 144.

43. *See, e.g.,* Dinner, *supra* note 25, at 1067 (“Neoliberalism . . . remodels all spheres of society on the model of the market.”); Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 470 (2020) (connecting neoliberalism to the idea that the “State should not only promote free enterprise but also reconstitute itself along decidedly businesslike lines”).

44. *See, e.g.,* Britton-Purdy et al., *supra* note 2, at 1810.

Fifth, neoliberalism asserts a marketized view of the citizen as a consumer. With its privatized logic, neoliberalism casts citizens as atomistic individuals rather than as interdependent citizens in a social world. Citizens are reduced to consumers trying to maximize their preferences, and personal autonomy and individualism are tied to a vision of atomistic persons who flourish better without regulatory intervention.<sup>45</sup> Citizens are thought to be self-interested maximizers, not shepherds of the common good.<sup>46</sup> As Deborah Dinner writes, for neoliberals “the fundamental subject of law is the individual rather than the collective” and “[i]ndividual contracting in the market . . . is the site of individual expression and private choice.”<sup>47</sup> Limitations on collective action have therefore been central to the neoliberal project. The State must seek to “authorize private ordering” but in a way that minimizes collective and group action.<sup>48</sup>

In shorthand, we can therefore say that neoliberalism is *market naturalizing* and *market insulating*, *efficiency valorizing*, *power obscuring*, and advances a view of both the *market-state* and the *citizen-consumer*. Many of these features of neoliberalism can be found in each of the procedural doctrines and areas that I analyze below, and all of them are present in the overall schema of the new era of civil procedure. In addition, we will see that civil procedure offers twists that deepen our understanding of the dynamics of neoliberalism in modern American law.

## II. NEOLIBERALISM IN PROCEDURAL DOCTRINE

Neoliberal hallmarks permeate the Supreme Court’s major procedural decisions of the past generation. They are present in, among other things, the Court’s summary judgment, pleading, arbitration, and class action decisions. This Part is organized around these doctrinal areas, taking them in relative chronological order, to show how multiple neoliberal hallmarks often exist within single areas and how they interact and interrelate within those areas. While this Part focuses the lion’s share of its attention on Supreme Court decisions, it also shows how neoliberal hallmarks are evident in federal appellate procedural decisions, Supreme Court and advisory committee procedural rulemaking, and federal legislation.

### *A. Summary Judgment*

Neoliberalism perhaps first came to civil procedure in the summary judgment context. Summary judgment is often the last significant gateway before trial. Historically, motions for summary judgment had been granted somewhat sparingly.<sup>49</sup> In a series of 1986 decisions, often referred to as the summary judgment

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45. See Grewal & Purdy, *supra* note 16, at 13–14.

46. See, e.g., Zephyr Teachout, *Neoliberal Political Law*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 215, 230–32.

47. Dinner, *supra* note 25, at 1062, 1066–67.

48. Alstott, *supra* note 27, at 26.

49. See, e.g., Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 77 (1990) (“From its inception, federal judges treated summary judgment

“trilogy,” the Supreme Court reinterpreted Rule 56, which governs summary judgment in federal court, in a manner some of the drafters of the Rule view as judicially rewriting it.<sup>50</sup> Whether this is the case or not, the cases turned the tide towards neoliberalism. This is especially so with *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>51</sup> There, the Supreme Court put itself—and future courts—in a position to judge the plausibility of claims at the summary judgment stage in the antitrust context, and it constructed what is plausible within the marketplace through the lens of efficiency-focused, Chicago-school economic theory about how rational, profit-maximizing firms act. Along the way, it made the procedural burden more difficult for plaintiffs charged with enforcing antitrust law, thereby putting judges in a position to insulate the market from regulatory litigation.<sup>52</sup>

### 1. Market-Naturalization

*Matsushita* is perhaps the zenith of procedural interpretation that is market naturalizing, allowing judges to bring economic theory into their decision-making to construct market rationality. U.S. television manufacturers brought an action against Japanese and Japanese-owned U.S. television manufacturers, alleging that they conspired in violation of the Sherman Act and other federal statutes to drive the U.S. firms out of the market by maintaining artificially high prices in Japan and low prices in the United States.<sup>53</sup> The defendants moved for summary judgment.<sup>54</sup> Under Rule 56, summary judgment should be granted if there is no “genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>55</sup> Summary judgment had historically been used sparingly, especially in antitrust cases where complex questions of motive are often involved.<sup>56</sup> The Court in *Matsushita*, however, decided that judges in deciding such motions must ask whether the plaintiff’s claim is “plausible”—that is, whether it makes “economic sense.”<sup>57</sup>

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warily, perceiving it as threatening a denial of such fundamental guarantees as the right to confront witnesses, the right of the jury to make inferences and determinations of credibility, and the right to have one’s cause advocated by counsel before a jury.”)

50. Miller, *supra* note 8, at 310–11 (“My successor as Reporter to the Rules Advisory Committee—and others—share my view that the Court in essence was unilaterally ‘rewriting’ Rule 56 in these cases.”); see also Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 646 (2010).

51. 475 U.S. 574 (1986).

52. See generally James F. Ponsoldt & Marc J. Lewyn, *Judicial Activism, Economic Theory and the Role of Summary Judgment in Sherman Act Conspiracy Cases: The Illogic of Matsushita*, 33 ANTI-TRUST BULL. 575 (1988).

53. *Matsushita*, 475 U.S. at 577–78.

54. *Id.* at 578.

55. FED. R. CIV. P. 56.

56. See, e.g., *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962) (“[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.”); see also Ponsoldt & Lewyn, *supra* note 52, at 577–78, 591–92.

57. *Matsushita*, 475 U.S. at 587.

Whether this requirement was a departure from the existing summary judgment framework or a clarification of it is beside the point for present purposes.<sup>58</sup> What matters is that the Court required itself and future judges to reason about what is plausible within the market—to opine on what made economic sense in one market or another and, from that vantage, judge whether there was a genuine issue of material fact for trial—and the Court constructed “economic sense” through the prism of Chicago-school, neoclassical, efficiency-focused economic theory.<sup>59</sup> In so doing, it used plausibility analysis as a gateway for naturalizing the defendants’ market behavior and disposing of the case before trial, cutting off regulatory litigation.

Drawing on the work of law and economics scholars, the majority first maintained that predatory pricing conspiracies such as the one alleged in the case were speculative, uncertain to succeed by nature, and unlikely to be undertaken by efficient firms focused on profit maximization.<sup>60</sup> The Court therefore reasoned that such schemes are rare—and doubly rare, as in the case, where they involve several firms and the chance of achieving monopoly power is slight.<sup>61</sup> The Court filled three pages of the Federal Reports with economic theory casting doubt on the plaintiffs’ claims with only passing reference to the record evidence in the case—notable in a summary judgment opinion, where the record is the game—and instead cited and quoted at length from the academic works of law and economics scholars and economists to posit that as rational market actors defendants would not act in the way plaintiffs alleged they had.<sup>62</sup> The Court, whether properly interpreting Rule 56 or not, had in one move elevated itself to construct the plausibility of the particular market behavior of the firms in the case and in the next move constructed market rationality with only passing reference to the record evidence demonstrating the firms’ behavior and suggesting their motivations.<sup>63</sup> Plausibility was a gateway for constructing a neoliberal view of the market.<sup>64</sup>

When the Court next turned to weighing whether the evidence tended to exclude the possibility that the manufacturers acted independently, economic theory

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58. The four dissenters believed the case departed from traditional summary judgment standards and aggrandized the role of the judge in summary proceedings. *Id.* at 601 (White, J., dissenting).

59. For an overview of how this thinking came to infuse antitrust law generally, see generally George L. Priest, *Bork’s Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1 (2014).

60. *Matsushita*, 475 U.S. at 588–89.

61. *Id.* at 589–92.

62. See *id.* (citing and quoting from Robert Bork, John McGee, Frank Easterbrook, and others).

63. In this way, the case has been argued to “reverse[] the traditional inductive process by which juries have always been instructed to proceed—from empirical data to ultimate fact.” Eugene Crew, *Matsushita v. Zenith: The Chicago School Teaches the Supreme Court a Dubious Lesson*, ANTITRUST, Fall 1986, at 11, 11.

64. See Edward Brunet, *The Substantive Origins of “Plausible Pleadings”: An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1, 3–4 (2010) (“As used here, the word implausible appears to be unbelievable in economic theory, seemingly a substantive use of plausible lacking a connection to specific pre-trial motions.”).

was put at war with the evidence in the case. The Court first presented the aggregate evidence that the defendants made certain pricing and market entrance agreements that several of plaintiffs' experts opined were designed to drive U.S. firms from the market.<sup>65</sup> The Court dismissed these opinions by returning back to Chicago-school economic theory: "[C]utting prices in order to increase business is the very essence of competition."<sup>66</sup> The plaintiffs' allegations that this aggregate behavior could constitute evidence of conspiracy was a "mistaken inference" that could, if taken seriously, "chill" competitive market conduct.<sup>67</sup> The Court then reasoned that "economic realities"—again, citing to the theory of Chicago-school theorists—"tend to make predatory pricing conspiracies self-detering."<sup>68</sup> The Court maintained this in the face of the history of antitrust law, where economic behavior has often not conformed to such rigid theory about profit maximization and where such "self-detering" conspiracies had been proved.<sup>69</sup> But in light of its view of rational market behavior developed from efficiency-based theory, the Court determined that there was no "rational motive to conspire" based on this record evidence and that the conduct was not sufficient to create a genuine issue for trial.<sup>70</sup>

The dissenters maintained that the Court's reliance on economic theory to construct plausibility "invade[d] the factfinder's province."<sup>71</sup> This was so in part because the plaintiffs had five experts who thought the conspiracy was plausible.<sup>72</sup> The Court's efficiency-focused approach ignored these explanations because they did not fit within the profit-maximizing frame. The dissenters stressed in particular how the Court's economic theorizing ignored a strong and detailed expert report on the nature and rationale of the alleged conspiracy and the various ways it harmed the plaintiffs,<sup>73</sup> which painted a very different picture of the defendants' motivations.<sup>74</sup> It reasoned that the firms, in engaging in below-cost pricing in the United States, may have been motivated less by profit maximization than by a desire to create a market share large enough to achieve full employment for Japanese

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65. *Matsushita*, 475 U.S. at 594–96.

66. *Id.* at 594.

67. *Id.*

68. *Id.* at 595.

69. *Id.*; see also Crew, *supra* note 63, at 12 (arguing that economic behavior does not always follow rationality can be justified by "political, social, religious, historical, emotional or other motivation[s]"); Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 313–14 (2010) ("Corporate decisionmakers may undertake projects that seem irrational in hindsight but appeared potentially profit maximizing when the firm made the decision. After the fact, judges may not be particularly good arbiters of what constitutes rational ex ante business decision[-]making.").

70. *Matsushita*, 475 U.S. at 597.

71. *Id.* at 599 (White, J., dissenting).

72. See *id.* at 601; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1137 (E.D. Pa. 1981) (discussing the five expert opinions).

73. *Matsushita*, 475 U.S. at 601–02.

74. *Id.*

workers.<sup>75</sup> What the majority thought was implausible from a theoretical profit-maximizing perspective, the report maintained, actually made sense if one understood the motivations and goals of the Japanese and Japanese-owned firms. The dissenters thought the report, along with the other reports, created a genuine factual issue regarding the alleged conspiracy.<sup>76</sup> “No doubt,” Justice White wrote for the four dissenters, “the Court prefers its own economic theorizing to [the expert reports], but that is not a reason to deny the factfinder an opportunity to consider [the experts’] views on how petitioners’ alleged collusion harmed respondents.”<sup>77</sup>

In relying on efficiency-based economic theory to keep the case from going to a jury, the Court, as James Ponsoldt and Marc Lewyn have argued, “substitute[d] the deductive assumptions of neoclassical economic theory for record evidence.”<sup>78</sup> And, as we shall see when I turn to pleadings and motions to dismiss for failure to state a claim in the following Section, *Matsushita* is part of a larger architecture where the Court layers plausibility onto procedural analysis and construes plausibility in ways that rationalize market behavior and make it more difficult for plaintiffs to pursue regulatory claims.

## 2. Market-Insulation

*Matsushita* did not stand alone. The other cases of the term, *Celotex Corp. v. Catrett*<sup>79</sup> and *Anderson v. Liberty Lobby, Inc.*,<sup>80</sup> combined with *Matsushita*, pave the way towards a pro-defendant turn in civil procedure that made it more difficult for plaintiffs to pursue regulatory claims. It is therefore worth exploring the net effects of the other cases of the trilogy briefly. While the other cases are less neoliberal in their doctrinal rationales, they contribute to a tightening on regulatory lawsuits. Both *Anderson* and *Celotex* made summary judgment motions easier for defendants to win and more difficult for plaintiffs to survive.<sup>81</sup> *Anderson* did so by investing district court judges with more discretion to assess the plausibility of a claim, instructing judges to look at the record and ask whether the evidence is so “one-sided,” favoring the defendant, that summary judgment should be granted.<sup>82</sup>

75. E.g., Leslie, *supra* note 69, at 292–93; Ponsoldt & Lewyn, *supra* note 52, at 577 n.8; Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 108–09 (1988).

76. *Matsushita*, 475 U.S. at 603.

77. *Id.*

78. Ponsoldt & Lewyn, *supra* note 52, at 577; see also William H. Page, *Pleading, Discovery, and Proof of Sherman Act Agreements: Harmonizing Twombly and Matsushita*, 82 ANTITRUST L.J. 123, 130 (2018) (“*Matsushita*’s standard of the sufficiency of the evidence has permitted Courts to import economic models and ideology into the resolution of antitrust cases.”).

79. 477 U.S. 317, 325 (1986).

80. 477 U.S. 242, 257 (1986).

81. See Miller, *supra* note 8, at 310–11.

82. *Anderson*, 477 U.S. at 252. As the dissenters argued, the decision is “an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would.” *Id.* at 266 (Brennan, J., dissenting).

*Celotex* made it easier for defendants to bring summary judgment motions without putting forward evidence negating plaintiffs' claims.<sup>83</sup>

Together, the cases made it easier for defendants to bring summary judgment motions, more difficult for plaintiffs to survive them, and augmented judges' interpretive authority in deciding the motions. The cases together were pushed for by corporate lawyers and scholars, and particularly efficiency-focused economists, who sought to have fewer cases go to trial.<sup>84</sup> By placing judges as increasingly empowered hurdles between plaintiffs and trial or settlement, they "transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation."<sup>85</sup> Indeed, since the trilogy was decided, scholars have argued that federal judges have disposed of an increasing number of regulatory cases at the summary judgment stage that would have previously gone to trial.<sup>86</sup> In the words of Arthur Miller, one of the former rule-makers himself, summary judgment has since come to have "an Armageddon-like significance; it has become both the centerpiece and end-point for many (perhaps too many) federal civil cases."<sup>87</sup> And its effects have favored defendants so much that one scholar argues that the doctrine has become patently pro-defendant.<sup>88</sup>

### B. Pleading

In the pleading context, plausibility once again became a mechanism for judges to use procedural interpretation to construct market rationality and insulate the market from democratic control—but, remarkably, without the benefit of depositions, expert reports, signed answers, and other materials apart from the complaint. To make this leap, the Court, more forcefully and clearly than in the summary judgment context, relied on efficiency rationales and obscured historical power considerations.

In the pleading context, the Court has also employed an efficiency rationale that deviates from how efficiency has long been understood in procedural decision-making. And in its decisions, the Court both obscures and constructs power. The Court obscures the power dynamics involved where often low- and middle-income consumers must enforce regulatory laws against large firms. And it

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83. *Celotex*, 477 U.S. at 322–27 (holding that the defendant seeking summary judgment on plaintiff's claims on the basis that the plaintiff lacked evidence to prove them was not required to put forward evidence negating those claims).

84. See, e.g., John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 524 (2007) ("Because summary judgment avoids the time and expense of trial, it also appeals to commentators who prize efficiency.").

85. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003).

86. Miller, *supra* note 8, at 310.

87. *Id.* at 311.

88. See Bronsteen, *supra* note 84, at 539–43.

flips the script: maintaining that the power is really in the hands of those plaintiff-consumers, aided by the Rules.

### 1. *Market Naturalization, Redux*

As with summary judgment, historically motions to dismiss for failure to state a claim were less significant to pretrial procedure. Under Rule 8, complaints need only give the defendant notice of the claim and the grounds for relief sought, and Rule 8 had long been construed to permit simplified notice pleading.<sup>89</sup> But in 2007 in *Bell Atlantic Corp. v. Twombly*, another antitrust case, the Court read atop Rule 8 a requirement of plausibility.<sup>90</sup> Plausibility analysis here, as with summary judgment, has become a way for judges to reason about what makes “economic sense” in certain cases. In doing so, the Court has again constructed its own view of efficient market rationality—although here, less aided by reliance on scholarly theory—and used that view to naturalize market behavior and insulate it from regulatory litigation.

In *Twombly*, consumers brought a putative class action alleging antitrust violations by four telecommunications and internet carriers.<sup>91</sup> The plaintiffs alleged that the carriers agreed to prevent competition by new market entrants in their respective markets and also agreed to refrain from competing with one another in their markets.<sup>92</sup> The case centered on what allegations would be sufficient regarding the anticompetitive agreement for the plaintiffs to survive a motion to dismiss for failure to state a claim. Rule 8 had long been understood by the Supreme Court and rule-makers to establish a notice pleading regime.<sup>93</sup> Under it, plaintiffs need only to provide a “short and plain statement of the claim,” which would give defendants notice of the claim and the grounds for relief.<sup>94</sup> And the complaint would only be dismissed if there were no set of facts that would allow plaintiffs to demonstrate an anticompetitive agreement.<sup>95</sup> Based on Rule 8 and the precedents construing it, the Second Circuit held that the complaint, which alleged an agreement among the carriers in violation of the Sherman Act, complied with Rule 8.<sup>96</sup>

However, the Court departed from the longstanding interpretation of Rule 8. The majority held that plaintiffs needed to and failed to provide sufficient factual

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89. See generally Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); FED. R. CIV. P. 8.

90. 550 U.S. 544, 555 (2007).

91. See *id.* at 546.

92. *Id.* at 550–51.

93. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim.’”); Miller, *supra* note 89, at 4–5 (describing the history of notice pleading).

94. FED. R. CIV. P. 8.

95. See *Conley*, 355 U.S. at 45–46 (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

96. See *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 118–19 (2d Cir. 2005).



content in their complaint suggesting an anticompetitive agreement in order to comply with Rule 8.<sup>97</sup> An agreement needed not only to be conceivable based on the allegations but also, now, plausible.<sup>98</sup> To survive a motion to dismiss based on the Sherman Act violations involved in the case, the Court concluded that Rule 8 “requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made” among the carriers, and “without that further circumstance pointing toward a meeting of the minds, an account of a defendant’s commercial efforts stays in neutral territory.”<sup>99</sup> The Court wrote that the “practical significance” of this interpretation of Rule 8 was that it constrained plaintiffs’ power to exact resources—whether in discovery costs or settlement pressure—from defendants.<sup>100</sup>

As with summary judgment, the Court elevated itself and future courts to construct market rationality at the pleading stage through plausibility analysis. But pleading is different. Unlike summary judgment, at the pleading stage, courts engage in plausibility analysis without having any record evidence with which to grapple. Instead, the complaint is the whole game. Under the previous notice pleading framework, as Justice Stevens pointed out in his dissent, the plaintiffs in the case would have proceeded to (likely limited) discovery and the defendants’ answers, sworn depositions, and the other materials gathered during discovery and the pretrial process would have (at least theoretically) informed the district court at the summary judgment stage as to the structure of the market, the behavior at hand and its nature, and whether there was a triable question of agreement or conspiracy.<sup>101</sup> Indeed, while *Matsushita* is mostly a foray into neoclassical economic theory, the Court at least measured that theory against some record evidence.<sup>102</sup> But with *Twombly*, the Court inserted itself and future courts into reasoning about what was plausible within the market and whether market relationships evinced anticompetitive conduct at the pleading stage, without the benefit of these materials. This empowered the Court and future courts to cut off regulatory litigation at an earlier stage.

The decision ultimately became a warring battle about what was rational or anticompetitive market behavior without the benefit of a developed record. The plaintiffs, according to the majority, needed to include allegations that could be “placed in a context that raises a suggestion of a preceding agreement.”<sup>103</sup> The word “context” is important: it draws on judges’ situational sense about what markets are and how they function. The plaintiffs alleged that each carrier engaged in similar conduct to prevent competition from new market participants in their regions, that they communicated amongst themselves through industry group meetings, and

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97. *Twombly*, 550 U.S. at 556–57.

98. *Id.* at 570.

99. *Id.* at 556–57.

100. *Id.* at 557–58.

101. *Id.* at 572–73 (Stevens, J., dissenting).

102. See *supra* note 65 and accompanying text.

103. *Twombly*, 550 U.S. at 557.

included the statement of one CEO that competing with one another would be profitable but wouldn't be "right."<sup>104</sup> The plaintiffs also alleged that the Telecommunications Act of 1996 was intended and designed to encourage the carriers to compete with one another by entering one another's markets, an act that would be in each defendant's economic self-interest.<sup>105</sup> The carriers did not enter one another's markets, and the plaintiffs argued that this evidence suggested an agreement as well. Based on these facts and circumstances, the plaintiffs offered a Gestaltian view of the corporate behavior at hand—thwarting new entrants in parallel fashion and not competing with another, against a backdrop of communication and a red-flag statement about competition not being "right"—that could, they argued, plausibly suggest an agreement "when viewed in light of common economic experience."<sup>106</sup>

The Court's first move was to disaggregate the behavior, parceling it into separate pieces, then offering its own view of market rationality and common economic experience as to each piece. Striking the plaintiffs' conclusory statements about an agreement having been reached, the Court analyzed separately the behavior to thwart new market entrants and the decision of the carriers to not compete with one another.<sup>107</sup> With regard to thwarting new market entrants, the Court maintained that the carriers' behavior could just as easily have been the natural action of each provider to retain its regional dominance.<sup>108</sup> Resistance to new market participants, the Court asserted, was as equally likely "the natural, unilateral reaction" of each carrier.<sup>109</sup> "[R]esisting competition is routine market conduct."<sup>110</sup>

The Court then turned—again, disaggregating—to the decision of the carriers not to compete with one another. The Court again offered a different economic interpretation: while this behavior "could very well signify illegal agreement," it could also just reflect that the carriers were keeping to historical practices of "dominating [their] separate geographical segments of the market."<sup>111</sup> A "natural explanation"—note the use of "natural" again, a word the majority uses five times to describe the behavior of the carriers—for the lack of competition was that each carrier was "sitting tight."<sup>112</sup> It is a "rational and competitive business strategy" for the carriers to engage in similar conduct to thwart new market entrants into each market; such behavior is "routine market conduct."<sup>113</sup>

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104. *Id.* at 550–52.

105. *See id.* at 549.

106. *Id.* at 565.

107. *See id.* at 566.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 567–68.

112. *Id.* at 568.

113. *Id.* at 554.

In each instance, the Court offered its own view of what was rational or natural market behavior—and in a historically contingent and heavily regulated market that may be less amenable to broad generalizations by courts at the pleading stage. Thus, while the plaintiffs pointed to a variety of circumstances *in toto* suggesting an agreement, the Court asserted its own view of market rationality, naturalizing each piece of conduct based on its own economic “common sense” about how rational firms act. As was the case in the summary judgment context, a certain view of market rationality emerged that naturalized and legitimized existing practices. As Edward Purcell puts it, “[B]oth *Matsushita* and *Twombly* illustrate the conservative majority’s faith in the benevolence of the ‘free market’ and ‘rational’ market behavior.”<sup>114</sup> And in both, plausibility was constructed around the “assumption that free market actors would not behave in an economically ‘irrational’—and therefore unlawful—manner.”<sup>115</sup> Rationality corresponded not with the historical behavioral practices of the firms but instead with neoclassical ideals about efficiency and profit maximization, which were here somewhat awkwardly employed to rationalize both carrier decisions to thwart new market entrants in their respective areas and not to compete with one another.

In scrapping notice pleading, the majority thus authorized itself, in the words of Justice Stevens, to “engag[e] in armchair economics at the pleading stage,” unconstrained by the context-specific materials produced through discovery.<sup>116</sup> “[T]he unfortunate result of the majority’s new pleading rule,” he continued, “will be to invite lawyers’ debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence.”<sup>117</sup>

## 2. Power

The majority’s view of power is also neoliberal. Gone from the decision is the historical solicitude the Court has paid to consumers and small businesses who must enforce antitrust law, often against large firms, in order to fulfill important public purposes.<sup>118</sup> The *Twombly* majority, indeed, did not just obscure the aspects of power entailed in a system that asks citizens as private enforcers to regulate large and well-resourced firms. It also flipped the script and focused on the power of plaintiffs and their threat to corporate defendants. The majority worried that antitrust plaintiffs with groundless claims would take up the time and resources of corporate defendants, extracting their resources with costly discovery and

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114. Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1754 (2014).

115. *Id.* at 1755.

116. *Twombly*, 550 U.S. at 587.

117. *Id.* at 595.

118. See, e.g., Miller, *supra* note 89, at 16 (arguing that the Court’s pleading decisions “increase the burden on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths in cases in which critical information is largely in the hands of defendants and is unobtainable without access to discovery”).

settlement pressures.<sup>119</sup> The Court's framing of the plaintiffs' power is difficult not to be overwhelmed by: the majority wrote that the plaintiffs composed over ninety percent of all subscribers in the United States, in an action that would require discovery "generating reams and gigabytes of business records" for antitrust violations occurring over nearly a decade.<sup>120</sup> But stop and flip the sentence: if plaintiffs' allegations are correct, carriers conducted illegal activity for nearly a decade, affecting over ninety percent of U.S. subscribers, and the fact that uncovering such conduct requires searching their business records is part of the cost of remedying systemic misconduct. There is some peculiarity in naturalizing a market where four carriers service ninety percent of consumers and then balking at the enforcement costs of having consumers conduct discovery against such powerful carriers when wrongdoing is alleged.

In this vein, Justice Stevens' dissent observed how the focus on the power of plaintiffs obscured how the decision transferred power to defendants. As I mentioned above, the executives in this case were not only freed of the obligation to provide sworn depositions or other limited discovery; they also were not even required to file an answer denying the claims in the complaint.<sup>121</sup> The majority's ruling thus "permit[ted] immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot."<sup>122</sup> Under the previous notice pleading framework, the company and its executives would have had to have spoken. This power shift was all the more remarkable because the regulatory system places enforcement responsibility on consumers where essential information is in the hands of defendants.<sup>123</sup> Congress had authorized treble damages under the Sherman Act to "encourage, rather than discourage, private enforcement of the law"—a feat made more difficult by the Court's decisions.<sup>124</sup>

In the pleading context and others below, the Court thus offers a twist on power obscuring. As here, the Court often decides procedural cases involving, on one side, low- or middle-income workers and consumers or small businesses, and on the other, large multinational corporations. Davids often go up against Goliaths.<sup>125</sup> Furthermore, our regulatory system relies on Davids to enforce regulation by making private rights of action central to regulatory enforcement.<sup>126</sup> The Court, however, consistently ignores these aspects of power, structure, and

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119. *Twombly*, 550 U.S. at 558–59.

120. *Id.* at 559.

121. *See id.* at 572–73 (Stevens, J., dissenting).

122. *Id.* at 572.

123. *See id.* at 586 (noting that the case is a "poor vehicle for the Court's new pleading rule, for we have observed that 'in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly").

124. *Id.* at 587.

125. *See, e.g.*, ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION 88–93 (2017) (exploring resource disparities in litigation); Denise S. Owens, *The Reality of Pro Se Representation*, 82 MISS. L.J. SUPRA 147, 147–159 (2013).

126. *See generally* BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 12.

vulnerability. But it focuses on another: the power of those plaintiffs and the vulnerability of corporate defendants. The well-resourced must suffer laborious processes triggered by plaintiffs with often meritless claims who are aided by the Rules. In this way, the Court both obscures and constructs power.

### 3. Efficiency

The decision is also neoliberal in the way it conceives of costs and inefficiencies. The specter of discovery and forced settlement hangs over the opinion, as the Court worries about the inefficient costs of litigation.<sup>127</sup> Nowhere is the analysis calibrated to the power of the defendants and the nature of the case—a complex case against large organizational defendants with considerable resources. The Court several times alluded to the expense of discovery in antitrust cases and to the pressures for settlement.<sup>128</sup> It relied on and quoted extensively from an article by Judge Easterbrook arguing that discovery is a form of abuse, as well as other economic analyses that focus on plaintiffs’ power in class action litigation.<sup>129</sup> And the majority expressed skepticism that judges could control discovery run amok. Plaintiffs in antitrust suits with “anemic” cases can use “the threat of discovery expense [to] push cost-conscious defendants to settle” and to punish others who are less cost conscious.<sup>130</sup>

The majority opinion reads in this respect like a defendant’s brief; no balance or consideration of the overall power structure is attempted, nor is there consideration of the benefits of antitrust suits to the public. No attention, either, is paid to the considerable evidence that discovery costs are generally low, and where they are high, they are frequently pegged to large cases and institutional defendants.<sup>131</sup> As Arthur Miller puts it, “*Twombly*’s emphasis on the defendant’s costs . . . reveals how one-sided the discussions about expense and the expressions of concern have become.”<sup>132</sup> Contrast this picture of the state of affairs with the one offered by Justice Stevens’s dissent. Justice Stevens reflected on how the antitrust defendants who bear discovery costs “are some of the wealthiest corporations in the economy” who have pushed the defense bar to limit discovery,

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127. *Twombly*, 550 U.S. at 556–58.

128. *See id.*

129. *See id.* at 558–59 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) and William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898–99 (2003)). For a different view of discovery founded in democratic regulatory theory, see generally Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020).

130. *Twombly*, 550 U.S. at 559.

131. *See infra* note 315 and accompanying text. Nor is there an effort to consider the various values associated with discovery beyond efficiency. *See, e.g.*, Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS L. REV. 1317, 1322 (2019) (exploring the relationship between discovery and procedural justice norms of accuracy, efficiency, and participation); Zambrano, *supra* note 129 (exploring the relationship between discovery and regulatory goals).

132. Miller, *supra* note 89, at 61.

using anecdotal evidence that the Court accepts.<sup>133</sup> It is “no surprise that the antitrust bar” should push for this outcome, he added, “but we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public.”<sup>134</sup>

As with its analysis of power, the Court’s analysis of efficiency—both in *Twombly* and, as we shall see, elsewhere—also adds a twist. As we saw above, the Court’s efficiency analysis is deeply linked to defendants’ discovery costs. This is a departure from efficiency as it has traditionally been understood in procedure, and it evinces another way that neoliberal civil procedure is different. Efficiency has traditionally had a distinctive meaning in procedure. Rule 1 of the Federal Rules of Civil Procedure says that the Rules should be construed “to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>135</sup> And efficiency has, since the Rules came into their modern form in 1938, been about ensuring that procedure is not used as a sporting device that interferes with courts resolving claims on the merits.<sup>136</sup> In this way, procedural efficiency has been at least tangentially tied to how efficiency is understood generally. Procedural efficiency ties to economic efficiency’s focus on preference maximization by ensuring that judicial processes do not excessively or unnecessarily sap resources and exact costs on parties; by reducing cost and delay, efficiency enables parties to resolve their claims without waste.<sup>137</sup> But reducing costs has never been the sole focus of efficiency analysis. Instead, the endeavor has been to “balance between the need to efficiently administer the civil justice system and to fairly adjudicate litigant claims.”<sup>138</sup> Efficiency therefore “meant reaching a result with the least amount of administrative obfuscation.”<sup>139</sup> Thus, one would look at the nature of the case and tag the efficiency of the procedure to the extent to which it most simply enabled the parties to resolve their dispute on the merits. Costs and justice needed to align.

The Supreme Court, as we see in *Twombly* and will see elsewhere, has increasingly not viewed efficiency this way. As Brooke Coleman has shown, its efficiency analysis is just about reducing costs.<sup>140</sup> There is no effort to “contextualize the cost by valuing and evaluating the benefits of the litigation. This shows the widespread belief that efficiency is achieved when reform makes litigation cheaper—without regard to other kinds of costs.”<sup>141</sup> The Court therefore

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133. *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting).

134. *Id.* at 595 (Stevens, J., dissenting).

135. FED. R. CIV. P. 1.

136. *See, e.g.*, Miller, *supra* note 89, at 3–4 (connecting the Rules to speedy resolution on the merits).

137. *See, e.g.*, D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 877–78 (2006) (linking efficiency to, among other things, reducing delay).

138. Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1787 (2015).

139. *Id.* at 1788.

140. *Id.* (“The current focus shifted, it appears, to reaching a result as cheaply as possible. In other words, a premium is placed on assessing the raw cost of each litigation moment without much regard for other potentially more nuanced costs that should be considered.”).

141. *Id.* at 1790.

obscures other considerations, such as how the costs scale to the case and harm at hand or what costs the plaintiffs bear in light of the decision, including by not being able to bring their suit, and what costs the public may also bear as a result.<sup>142</sup> Efficiency in leading Supreme Court procedural decisions has increasingly become about reducing corporate defendants' costs.

#### 4. *Iqbal and Efficiency*

When *Ashcroft v. Iqbal* was decided a few years later, *Twombly*'s interpretation of Rule 8 was extended more broadly beyond the antitrust context, protecting the government—and in particular, the FBI and high-level government officials—from the burdens of fact-gathering and discovery.<sup>143</sup> Javaid Iqbal brought an action against government officials, claiming that they violated his constitutional rights while arresting and detaining him in the aftermath of the September 11, 2001, terrorist attacks.<sup>144</sup> The Court extended its plausibility standard from *Twombly*.<sup>145</sup> While *Iqbal* is a case about government power and therefore less relevant to my claims about neoliberal procedure and market arrangements, arguments about the excesses of discovery and the costs of litigation permeated the decision and once again were not calibrated to the resources of the institutional defendant—here, the U.S. government—or the purposes of having citizens vindicate important rights—here, constitutional rights.<sup>146</sup> Litigation, the Court wrote, “exact[s] heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”<sup>147</sup> Courts are expensive, and the government, the majority reminded, is otherwise busy “responding to . . . a national and international security emergency unprecedented in the history of the American Republic.”<sup>148</sup> Let us forget that for Mr. Iqbal, the proper work of government might be not violating constitutional rights and being held to account when it does.<sup>149</sup>

Justice Souter, who wrote the majority decision in *Twombly*, was now in a flipped position as the lead dissenter, arguing that the assertions in Mr. Iqbal's complaint met the bar the majority had erected in *Twombly*.<sup>150</sup> His framing of *Twombly* in his dissent, however, betrayed the case's neoliberal alignment. He explained that in *Twombly*, the “difficulty was that the conduct alleged was consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of

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142. *See id.* at 1788–93.

143. *Ashcroft v. Iqbal*, 556 U.S. 662, 684–85 (2009).

144. *Id.* at 666–70.

145. *Id.* at 677–82.

146. *See id.* at 685–86.

147. *Id.* at 685.

148. *Id.* (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring)).

149. For an in-depth exploration of the case, see generally Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379 (2017).

150. *Iqbal*, 556 U.S. at 695–98 (Souter, J., dissenting).

the market.”<sup>151</sup> Those common perceptions, of course, were based not on discovery materials, expert reports about the market, or sworn statements, but on the pleadings and briefs alone. And they were common to the majority—as well as some economic theorists—but not the plaintiffs or the dissenters. Whatever solicitude the dissent showed for Mr. Iqbal’s terrible plight, *Twombly*’s focus on the discovery costs and burdens for institutional defendants was now too baked into the Court’s procedural decisions to resist. Costs, burdens of discovery, settlement pressures, and vaguely defined inefficiencies drowned out other—reading the majority opinions, one might ask, what other?—values.

### C. Arbitration

Over the past few decades, the Supreme Court has interpreted the Federal Arbitration Act (FAA) so as to allow corporations to push much of American regulatory and other litigation into private fora.<sup>152</sup> The Court’s arbitration decisions feature several neoliberal hallmarks: they construct an image of the market-state and citizen-consumer, obscure power, and valorize a certain view of efficiency. As arbitration clauses grow at a breakneck pace across core sectors of the economy, our neoliberal arbitration law undermines both the ability of plaintiffs to enforce federal regulatory law and the role of courts and judicial precedent in our legal system.<sup>153</sup>

#### 1. Power, Citizen-Consumers, and the Market-State

The origins of neoliberal arbitration law can be traced to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>154</sup> The case involved an arbitration clause between two foreign corporations. One corporation sought to litigate claims between the parties in federal district court rather than in arbitration in part because the lawsuit asserted antitrust claims under the Sherman Act.<sup>155</sup> It relied on the fact that the arbitration clause did not explicitly encompass Sherman Act claims—or claims arising under federal statutes generally—as well as the history of federal courts uniformly holding that federal antitrust rights of action were “of a character inappropriate for enforcement by arbitration.”<sup>156</sup> The other party sought to resolve the claims in international arbitration, arguing that the arbitration clause, while not explicitly referencing Sherman Act claims, was general enough to encompass

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151. *Id.* at 696 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007)).

152. For accounts of the rise and pervasiveness of arbitration, see generally Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371; J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); Norris, *supra* note 14; Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2869–70 (2015).

153. For an overview of the growth of arbitration clauses in banking, employment, credit, and other areas, see Norris, *supra* note 14, at 17–18.

154. 473 U.S. 614 (1985).

155. *Id.* at 616–20.

156. *Id.* at 621.



them.<sup>157</sup> As a case about international arbitration, *Mitsubishi* did not speak directly to the domestic arbitration at the center of the FAA, but its logic would be returned to over the following decades to shape domestic arbitration law in neoliberal fashion.

The Court's first move was to expand the reach of general arbitration clauses to encompass federal statutory rights of action.<sup>158</sup> The Supreme Court and federal courts had before declined in a variety of circumstances to enforce arbitration clauses involving federal statutes.<sup>159</sup> For example, in *Wilko v. Swan*, the Court declined to enforce an arbitration clause in a claim arising under the Securities Act of 1933, maintaining that the statute "was drafted with an eye to the disadvantages under which buyers [of securities] labor" and that arbitration would only exacerbate those disadvantages for buyer-plaintiffs because arbitral awards "may be made without explanation of their reasons and without a complete record of their proceedings."<sup>160</sup> Arbitral proceedings would deprive plaintiffs of understanding or challenging "arbitrators' conception of the legal meaning of [the] statutory requirements."<sup>161</sup> Previous arbitration decisions both evinced a sensitivity to power dynamics and a robust view of the importance of public procedures in vindicating statutory rights.

The Court got around Soler Corporation's argument by relying on the "liberal policy favoring arbitration agreements" it had announced two years before in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*<sup>162</sup> In that case, the Court had determined "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."<sup>163</sup> And it announced that any "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."<sup>164</sup> In light of this language, the Court in *Mitsubishi* concluded that while the parties did not explicitly reference federal rights of action, their intentions would be "generously construed as to issues of arbitrability," and therefore, the general clause would be construed to cover arbitration of the cause of action under the Sherman Act.<sup>165</sup>

The decision is not only notable for its presumption that arbitration clauses would cover statutory causes of action in light of a history of courts shielding many such causes of action from arbitration.<sup>166</sup> The Court also began to paint a picture of

157. *Id.* at 616.

158. *Id.* at 625–29.

159. *See, e.g., id.* at 650 (Stevens, J., dissenting) ("[T]he Court has repeatedly held that a decision by Congress to create a special statutory remedy renders a private agreement to arbitrate a federal statutory claim unenforceable.").

160. *Wilko v. Swan*, 346 U.S. 427, 435–36 (1953).

161. *Id.*

162. 460 U.S. 1, 24 (1983).

163. *Id.*

164. *Id.* at 24–25.

165. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

166. *See generally* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (involving arbitration and a claim under Title VII of the Civil Rights Act of 1964); *Barrentine v. Ark.-Best Freight Sys., Inc.*,

arbitration and private ordering much different from the one it had before. In the Court's previous arbitration decisions, federal courts were viewed as institutions that equalized power through procedure and developed regulatory law through public process and precedents.<sup>167</sup> Not so here. There is no reason, the Court said, to depart from favoring arbitration when the claims raised are founded on statutory rights because “[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”<sup>168</sup> Erasing concerns about power and parity, the Court reasoned that a party whose arbitration agreement is construed to encompass statutory rights of action does “not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>169</sup>

The Court then began to flip the script: valorizing nimble private ordering and contrasting it with onerous public ordering.<sup>170</sup> As the Court decided to enforce the agreement to arbitrate,<sup>171</sup> it described how arbitration offered “adaptability” and “streamlined proceedings” with “expeditious results” that made it well-suited for resolving even complicated antitrust claims.<sup>172</sup> A party who proceeds in arbitration, the Court wrote, can pursue their claim in a forum that is, unlike federal courts, characterized by “simplicity, informality, and expedition.”<sup>173</sup> The Court, in these passages, erased the concerns that animated its previous decisions about power disparities, the benefits of public procedural protections, and the importance of public legal and regulatory development.<sup>174</sup> Courts and their procedures came to be

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450 U.S. 728 (1981) (involving arbitration and a wage claim under the Fair Labor Standards Act); *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284 (1984) (discussing arbitration's interaction with principles of res judicata and collateral estoppel); *Wilko*, 346 U.S. 427 (involving arbitration and a claim under the Securities Act of 1933).

167. For explorations of how courts are democratic sites that develop public values, see generally LAHAV, *supra* note 125; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 804 (2008).

168. *Mitsubishi*, 473 U.S. at 626–27.

169. *Id.* at 628.

170. In the decision and others to come, the Court would paint a picture of arbitration as offering an efficient forum as compared to courts, without considering either empirical data on arbitration's costs or on whether plaintiffs can or do pursue their regulatory claims in the forum. Among other things, the data show that parties who litigate are less likely to arbitrate in part because they have more difficulty finding lawyers to represent them in arbitration. See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., BRIEFING PAPER: THE ARBITRATION EPIDEMIC, BRIEFING PAPER NO. 414, at 21–22 (2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/A7Y4-CLDA>].

171. *Mitsubishi*, 473 U.S. at 629. The Court here limited its enforcement to the fact that this was an internal arbitration agreement where comity and respect for the capacities of international tribunals, among other variables, justified enforcing the arbitration clause. *Id.*

172. *Id.* at 632–34.

173. *Id.* at 628.

174. See *supra* notes 159–161 and accompanying text. For explorations of how arbitration threatens substantive law and the role of courts, see generally Resnik, *supra* note 152; Gilles, *supra* note 152; Glover, *supra* note 152.

viewed through the lens of the market as less streamlined and efficient as private processes. And the State's role therefore was not to equalize power and build regulatory law but to facilitate citizen-consumer choice and interest maximization in dispute resolution. It was to facilitate parties in resolving disputes that involve only themselves and their interests. Litigants are thus viewed as bilateral, self-interested maximizers. Lost from view is whether the choice to arbitrate is meaningful for plaintiffs, which it often is not.<sup>175</sup>

These shifts were not lost on the dissenters. Justice Stevens observed that this was the first case in which the Court had enforced an arbitration agreement involving anything other than a contract claim.<sup>176</sup> He surveyed the Court's cases involving regulatory, statutory litigation—including suits adjudicating issues arising under employment discrimination, securities, and labor laws.<sup>177</sup> The cases were driven by a recognition of the importance of public procedural protections for plaintiffs seeking to enforce regulatory law, as well as a recognition of the democratic value of giving judges rather than arbitrators “final authority to implement federal statutory policy.”<sup>178</sup> In previous cases, the Court had explicitly stated that arbitrators are concerned with and equipped for effectuating the intent of the parties, not for developing the “law of the land.”<sup>179</sup> Justice Stevens also noted how arbitration awards are “virtually unreviewable” and “need not be written or published.”<sup>180</sup> He referred to arbitration as a “[d]espotic decision[-]making” that is suitable for contractual disputes but ill-suited to developing public law doctrine.<sup>181</sup> And he argued that public proceedings were especially important in this case in light of the nature of antitrust claims, which involved much more than bilateral dispute resolution and went to the very stability and fairness of markets.<sup>182</sup> Indeed, he noted that because of the public importance of antitrust enforcement, antitrust plaintiffs have long been analogized to private attorneys general.<sup>183</sup>

Two years later, in *Shearson/American Express, Inc. v. McMahon*, the Court confronted domestic arbitration involving Section 10(b) of the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act.<sup>184</sup> Relying on and expounding the logic in *Mitsubishi*, the Court stated that its duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises

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175. Workers and consumers subjected to arbitration very often hardly comport with this vision of active choice. The arbitration clauses commonly come in contracts of adhesion, and the process is chosen and structured by the corporation. See, e.g., Resnik, *supra* note 152, at 2869–70; Luke P. Norris, *The Parity Principle*, 93 N.Y.U. L. REV. 249 (2018) (exploring power disparities in arbitration).

176. *Mitsubishi*, 473 U.S. at 646 (Stevens, J., dissenting).

177. *Id.* at 646–50.

178. *Id.*

179. *Id.* at 647–49.

180. *Id.* at 656–57.

181. *Id.* at 657.

182. *Id.* at 655–57 (“A claim under the antitrust laws is not merely a private matter.” (quoting *Am. Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 826–27 (2d Cir. 1968))).

183. *Id.* (citing *Am. Safety Equip. Corp.*, 391 F.2d at 826–27).

184. 482 U.S. 220, 222 (1987).

a claim founded on statutory rights.<sup>185</sup> The Court signaled that federal statutory rights were generally amenable to being submitted to arbitration.<sup>186</sup> And it took aim at its previous decisions’ “general suspicion of the desirability of arbitration and the competence of arbitral tribunals,” stating that the Court had long moved past these views.<sup>187</sup>

In his dissent, Justice Blackmun focused on the power disparities these regulatory laws were designed to confront and even out, and he lamented the Court’s idealized view of arbitration and failure to appreciate the benefits of public, judicial process.<sup>188</sup> As Justice Stevens had done in *Mitsubishi*, Justice Blackmun went through the various features that distinguished arbitration from public adjudication and the various power dynamics at play in the regulatory framework.<sup>189</sup> He offered a different view of the courts, their procedures, and how they interacted with plaintiffs’ relative power and vulnerability.<sup>190</sup> But the ship had already sailed.

## 2. *Encroaching on Employment*

The next terrain for expanding the sphere of private ordering would be employment. If the Court’s reasoning broadly swept across regulatory statutes, potentially keeping a wide swath of private enforcement litigation out of courts, it hit a hurdle with federal statutes governing employment relations. Section 1 of the FAA excludes from its command to enforce arbitration agreements those contained in “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>191</sup> The Court narrowly avoided the hurdle in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>192</sup> There, it considered whether a claim under the Age Discrimination in Employment Act could be arbitrated.<sup>193</sup> The Court held that it could, and it avoided section 1 of the FAA because the parties below had not raised the issue and the arbitration clause was not contained in the actual contract of employment.<sup>194</sup> One of the plaintiff’s reasons for why the statutory framework was not amenable to arbitration had to do with unequal bargaining power.<sup>195</sup> The Court rejected the argument: “Mere inequality in

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185. *See id.* at 226.

186. Some exclusions include contracts involving fraud or other grounds for the revocation or where Congress provides a contrary command. *See id.* at 227–28.

187. *Id.* at 231–32.

188. *Id.* at 252–58 (Blackmun, J., dissenting). With regard to the Exchange Act, he observed that the statute was designed to “protect investors from predatory behavior” and lamented how the Court “effectively overrule[d]” its previous decisions protecting investors and ensuring they had the benefits of federal procedural protections despite the fact that each day the “industry’s abuses towards investors are more apparent than ever.” *Id.* at 243 (Blackmun, J., dissenting).

189. *See id.* at 257–58.

190. *See id.*

191. 9 U.S.C. § 1 (2012) (emphasis added).

192. 500 U.S. 20 (1991).

193. *Id.* at 23.

194. *See id.* at 34–36.

195. *See id.* at 32.

bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>196</sup>

Justice Stevens wrote the dissent, flagging just how far the Court had gone in ignoring power considerations.<sup>197</sup> He asserted that the FAA had excluded arbitration agreements involving employers and employees precisely because of unequal bargaining power and that there was “no reason to limit this exclusion from coverage to arbitration clauses contained in agreements entitled ‘Contract of Employment.’”<sup>198</sup> Since the agreement to arbitrate arose out of the employment agreement, Justice Stevens interpreted the FAA to direct courts not to enforce the arbitration clause.<sup>199</sup> He reflected on how the procedural decisions of the Court construing the FAA had taken a long foray away from the statute’s original aims and rationales: “When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship.”<sup>200</sup> The Court had, in its construal of the statute, “put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other.”<sup>201</sup>

In *Circuit City Stores v. Adams*, the Court continued to be agnostic to considerations of power, structure, and the equalizing force of public process when it directly addressed the meaning of section 1 of the FAA.<sup>202</sup> The Court construed the section’s language as prohibiting federal courts only from enforcing arbitration agreements involving transportation workers.<sup>203</sup> Scholars have critiqued its statutory interpretation in depth, arguing that the legislative history clearly evinces an intent to prohibit the enforcement of arbitration clauses in federal court involving all workers within Congress’s commerce clause authority.<sup>204</sup> But for our present purposes, what is more instructive is how the Court used its strained textualism to ignore the questions of power and structure that animated the addition of section 1 to the statute. The legislative history of section 1 focused on disparities in bargaining power and the power that employers would bring into arbitration, and based on the structure of the employment relationship and those power disparities, it directed federal courts not to enforce employment arbitration agreements.<sup>205</sup> The Court did

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196. *Id.* at 32–33.

197. *Id.* at 43 (Stevens, J., dissenting).

198. *Id.* at 40.

199. *See id.*

200. *Id.* at 43.

201. *Id.* at 42–43.

202. 532 U.S. 105, 119 (2001).

203. *See id.*

204. *See* Matthew W. Finkin, “Workers’ Contracts” Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282, 298 (1996); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106–08 (2006); Norris, *supra* note 175, at 272–89.

205. *See* Finkin, *supra* note 204, at 298; Moses, *supra* note 204, at 106–08; Norris, *supra* note 175, at 272–89.

not address these concerns. It replaced considerations of power and structure with an exploration of the “real benefits” of arbitration in the employment relationship.<sup>206</sup> Arbitration, it affirmed again, is less costly and burdensome and often more effective for parties than federal courts’ procedures.<sup>207</sup>

Justice Stevens again held the pen in dissent. He criticized how the Court’s “refusal to look beyond the raw statutory text enable[d] it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today.”<sup>208</sup> Justice Stevens posited that the case showed the wisdom of the observation of Justice Aharon Barak of the Supreme Court of Israel that the minimalist judge who maintains “that the purpose of the statute may be learned only from its language has more discretion than the judge who will seek guidance from every reliable source.”<sup>209</sup> The Court’s method of statutory interpretation was “deliberately uninformed, and hence unconstrained” and as such was able to produce a result that may be “consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.”<sup>210</sup> Section 1, put otherwise, was all about power when it was drafted and not at all about power when it was interpreted.

### 3. Individualized Citizen-Consumers

The Court has also conceived of arbitral efficiency as best being permitted by bilateral arbitration and has placed a thumb on the scale against aggregate proceedings. In this way, the Court’s decisions double down on neoliberalism’s construal of citizen-consumers as individual preference maximizers and its antagonism towards collective action.<sup>211</sup>

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* in 2010, the Court considered whether arbitration clauses that were silent on the issue of class arbitration could be interpreted to permit it.<sup>212</sup> In the case, the parties had agreed to let the arbitration panel decide the question of whether class arbitration was a permissible procedure, and the panel had decided that it was.<sup>213</sup> The Court in *Stolt-Nielsen* held that the panel’s decision was impermissible because class arbitration was not a permissible inference from silence and needed to be explicitly

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206. *Circuit City*, 532 U.S. at 122–23.

207. *See id.*

208. *Id.* at 132–33.

209. *Id.* at 133 (quoting AHARON BARAK, *JUDICIAL DISCRETION* 62 (Y. Kaufmann transl., Yale 1989)).

210. *Id.* at 132–33.

211. Hila Keren has also associated the Court’s anti-collective action arbitration decisions with neoliberal thought. *See* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 606–16 (2020).

212. 559 U.S. 662, 666 (2010).

213. *See id.* at 672–73.

referenced in the parties' agreement.<sup>214</sup> The Court reasoned that even an implicit agreement to permit class arbitration was not one an arbitrator could infer in these circumstances because the class form "changes the nature of arbitration."<sup>215</sup> For the Court, individual arbitration is characterized by low costs and flexibility.<sup>216</sup> These benefits are "much less assured" in class arbitration, where the arbitrator must resolve disputes between potentially thousands of parties.<sup>217</sup>

Justice Ginsburg wrote in dissent that the Court constructed its own logic about how the class form changes the efficient nature of arbitration without considering how the class form may be the only mechanism through which plaintiffs wronged and subject to arbitration agreements may obtain relief.<sup>218</sup> Aggregation was not only power; it was potentially the only way to seek relief.<sup>219</sup> In short, the Court's construal of what arbitration means—in the face of what the parties and arbitrators themselves thought it could mean—effectively allowed it to put a thumb on the scale against collective action and therefore against plaintiffs vindicating their rights.

The Court's bent against aggregate dispute resolution came to the fore again the next year in *AT&T Mobility LLC v. Concepcion*.<sup>220</sup> In the case, the Court considered whether the FAA prohibited the application of California's unconscionability doctrine to an arbitration clause banning class arbitration.<sup>221</sup> The parties below had argued that the adhesion contract was unconscionable, and the Ninth Circuit agreed and declined to enforce the agreement because it did not permit class-wide arbitration.<sup>222</sup> However, the Supreme Court concluded that the FAA preempted the California doctrine. Justice Scalia wrote that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."<sup>223</sup> Class arbitration interfered with the "streamlined" nature of arbitration and inserted procedural formality, like that required in court, in its place.<sup>224</sup> The Court thus continued to valorize arbitration as an efficient sphere of private ordering, much unlike public ordering.

The Court also continued to maintain a lopsided view of power and vulnerability. Defendants' vulnerability came to the center of the decision. Class

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214. *See id.* at 684 ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.").

215. *Id.* at 685.

216. *Id.* at 684–86.

217. *Id.* at 685–86.

218. *Id.* at 699 (Ginsburg, J., dissenting) ("When adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing,' i.e., without them, potential claimants will have little, if any, incentive to seek vindication of their rights." (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997))).

219. *Id.*

220. 563 U.S. 333 (2011).

221. *See id.* at 336–40.

222. *See id.* at 337–38.

223. *Id.* at 344.

224. *Id.* at 344–45.

arbitration, Justice Scalia said, “greatly increases risks to defendants.”<sup>225</sup> The cost of errors in arbitration rose exponentially for defendants in class-wide arbitration based on the size of the proceeding and the lack of ability to seek meaningful appellate review, a fact that may cause defendants to settle.<sup>226</sup> The Court’s defendant-protective reasoning for finding the California doctrine to be preempted is remarkable: for decades it had been extolling the virtues of arbitration and arbitrators as compared to courts, but now it warned of arbitrators’ errors and about how limited appellate rights for defendants may make it nearly impossible to correct such errors in the context of aggregate arbitration. Plaintiffs must live with the risk of error in arbitration, errors that may have serious and even catastrophic effects on their personal lives and financial stability. Their vulnerability is nowhere in view in recent arbitration decisions. But corporations, facing the same threats from plaintiffs who have aggregated to try to match their power, must be protected from such risk.

When the Court turned to the plaintiffs and the fact that individual arbitration may defeat their claims, the air of solicitude was gone. To the extent that small-value claims would not be brought if class arbitration were not available, the Court reflected that the “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”<sup>227</sup> Of course, as Justice Breyer noted in his dissent, class arbitration had been widely used and viewed as consistent with the statute and been used in part because of power dynamics: absent an aggregation mechanism, plaintiffs with small-value claims would likely be required to face off against AT&T without counsel.<sup>228</sup>

Finally, two years later in *American Express Co. v. Italian Colors Restaurant*, the Court’s individualistic view of arbitration and bent against collective action left plaintiffs powerless and likely without relief once again.<sup>229</sup> American Express forbade class arbitration explicitly under its agreement with merchants.<sup>230</sup> Italian Colors, a restaurant, sought to bring an antitrust action against American Express, and an expert opined that the cost of proceeding on its own in arbitration would exceed any recovery the restaurant would receive by at least ten times.<sup>231</sup> The Court thus considered whether the class arbitration waiver was enforceable in these circumstances. The majority concluded that the FAA did not preclude arbitration

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225. *Id.* at 350.

226. *See id.*

227. *Id.* at 351.

228. *See id.* at 361–66 (Breyer, J., dissenting). He also noted the history of the statute conditioning arbitration on “roughly equivalent bargaining power . . . [which] suggests, if anything, that California’s statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.” *Id.*

229. 570 U.S. 228 (2013).

230. *Id.* at 231.

231. *Id.* at 231 (“[R]espondents submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be ‘at least several hundred thousand dollars, and might exceed \$1 million,’ while the maximum recovery for an individual plaintiff would be \$12,850, or \$38,549 when trebled.”).



in these circumstances and that its previous decisions holding that federal statutory rights of action could be arbitrated unless the party could not effectively vindicate its rights in arbitration did not make the waiver unenforceable.<sup>232</sup> The Court reasoned that Italian Colors did not waive its right to pursue statutory remedies nor were filing and administrative fees so high that access to the arbitral forum was rendered impracticable.<sup>233</sup> Quite simply, “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>234</sup>

Justice Kagan’s dissent framed the power dynamics and whitewashed choice-based reasoning differently. Italian Colors, she wrote, is a “small restaurant” that thinks American Express “has used its monopoly power to force merchants to accept a form contract violating the antitrust laws.”<sup>235</sup> The arbitration clause to which the restaurant is subject would make pursuing these claims “a fool’s errand” in light of the costs of maintaining the suit alone.<sup>236</sup> The result is that if the clause were to be enforced, American Express “has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”<sup>237</sup> The case, in short, was about power and its connection to collective action. The majority’s refusal to see this meant that it fashioned arbitration not “as a streamlined method of resolving disputes” but instead “as a foolproof way of killing off valid claims.”<sup>238</sup>

And, indeed, Justice Kagan noted that the Court’s hostility to class arbitration was likely influenced by its hostility to Rule 23 class actions in court—to which I turn next. “To a hammer,” she wrote, “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>239</sup> The Court was seemingly anti-aggregation wherever and whenever it found it. The result was an ironic one in light of the Court’s precedents. For all the Court has written about parties agreeing to arbitrate because the forum offers streamlined and more efficient process, the Court increasingly envisioned arbitration to make it less usable by plaintiffs who could best, and perhaps only,

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232. *See id.* at 234–39.

233. *See id.* at 236 (citing *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000)) (“It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights[.]”).

234. *Id.* at 236.

235. *Id.* at 240 (Kagan, J., dissenting).

236. *Id.*

237. *Id.*

238. *Id.* at 244 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).

239. *Id.* at 253–54. Pamela Bookman shows how the Court’s anti-litigation and pro-arbitration orientations relate and how its anti-litigation posture sometimes wins out. *See generally* Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119 (2019).

arbitrate successfully in aggregate form.<sup>240</sup> The citizen-consumer, then, has a choice so long as they have the means to go it alone.

#### *D. Class Actions*

In the class action context, procedural interpretation and rulemaking over the past three decades have also demonstrated neoliberal hostility to collective action and reified the baseline presumption that the citizen-consumer litigates alone, even when facing mass harm. Procedure, in this way, has insulated corporate power from the form of litigation that is best equipped to create an equal playing field, and in some instances—such as where government enforcement authorities lack information, resources, or will—best equipped among all options to enforce regulatory law.<sup>241</sup> The transformation of the class action is best described as death by a thousand cuts. However gradual the transformation has been, a thread runs through Supreme Court and federal decisions, procedural rulemaking, and federal legislation: constructing a universe where the power is on the side of plaintiffs and the constraints on corporate defendants; expressing skepticism of class settlement because of plaintiff power; and presuming that litigation is bilateral and collective, or aggregate action is an outlier, thus thwarting the ability of citizens to litigate together.

##### *1. Power*

One early and influential example of neoliberal class action jurisprudence is Judge Posner's decision for the Seventh Circuit, *In re Rhone-Poulenc Rorer, Inc.*<sup>242</sup> *Rhone-Poulenc* was a decision overturning a class certification. It was a mandamus decision because the Rules did not then provide for interlocutory appeals of certification decisions.<sup>243</sup> The decision reversed the certification of a class in part because the potential amount of a settlement or verdict would put “intense” pressure on the defendants to settle.<sup>244</sup> The court's use of its equitable power was thus said to be justified by “the sheer magnitude of the risk to which the class action” exposed the defendants “in contrast to the individual actions pending or likely.”<sup>245</sup> While the defendants faced three hundred suits, with class certification,

240. *Am. Express*, 570 U.S. at 253 (“In the hands of today's majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”). In light of these decisions, Hila Keren views the Court's arbitration decisions as evincing “a premeditated effort to undermine collectivity.” Keren, *supra* note 211, at 575.

241. *E.g.*, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *YALE L.J.* 616, 631, 658 (2013); J. Maria Glover, *The Structural Role of Private Enforcement Mechanism in Public Law*, 53 *WM. & MARY L. REV.* 1137, 1155 (2012).

242. 51 F.3d 1293 (7th Cir. 1995).

243. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 *WASH. U. L. REV.* 729, 732 (2013) (“[P]rior to the adoption of Federal Rule of Civil Procedure 23(f) in 1998, defendants typically could not seek immediate appellate review of an order granting class certification.”).

244. *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1298.

245. *Id.* at 1297.

Judge Posner reasoned they could face a few thousand.<sup>246</sup> In light of those numbers, they “may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.”<sup>247</sup>

This reasoning not only treats individual suits as the baseline in the context of mass harm, but it also looks at settlement power only from the defendants’ perspective. From the perspective of the potentially thousands of plaintiffs allegedly harmed by the defendants, the power to proceed as a class was likely the power to obtain relief. And the sources that Judge Posner cited for his conclusion about settlement pressure included academic articles by corporate lawyers and economists decrying class actions and referring to them as legalized “blackmail.”<sup>248</sup> Before *Rhone-Poulenc*, the media and prominent Republicans had jumped on examples of large class settlements and verdicts, with hefty fees for plaintiffs’ counsel, to characterize the class action as a form of blackmail.<sup>249</sup> The narrative—which was always strained for broader empirical support<sup>250</sup>—was now gaining traction in the federal courts. And, as with the examples of neoliberal civil procedure above, the narrative obscured from view the power of corporate defendants and the resource disparities often existing between them and the citizens our regulatory system charges with bringing enforcement actions against them.

Soon after the decision, the Advisory Committee on Civil Rules drafted Rule 23(f).<sup>251</sup> The Rule was designed to give both plaintiffs and defendants the ability to appeal, respectively, class certification denials or grants, making the exercise of mandamus power unnecessary.<sup>252</sup> As the plaintiffs’ bar correctly predicted, the Rule overwhelmingly protected defendants. In the decade and a half after it was enacted, most appeals accepted and won were by defendants.<sup>253</sup> Throughout decisions, the pressure plaintiffs whose classes were certified put on

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246. *Id.* at 1297–98.

247. *Id.*

248. *See id.* One article he cited said that class action “is an area in which the labels ‘legalized blackmail’ and ‘Frankenstein monster’ seem more appropriate than the extravagant praise of the Rule’s enthusiasts.” William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 375 (1972). Another said that class certification decisions “compel defendants to enter settlements on favorable terms with hundreds and thousands of unimpaired claimants as a way of clearing courts’ dockets.” Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers’ Rates of Return*, 15 CARDOZO L. REV. 1755, 1780 (1994).

249. Klonoff, *supra* note 243, at 737–38.

250. *See, e.g.*, Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681 (2005). For data on what class action settlements look like and how they compare to settlements by public attorneys general, see BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* 44–45 (2019); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 131–32 (2006).

251. FED. R. CIV. P. 23(f); *see also* Klonoff, *supra* note 243, at 738–42 (exploring the relationship between the decision and Rule 23(f)).

252. *See* Klonoff, *supra* note 243, at 739–41 (overviewing the history of the Rule).

253. *See id.* at 741–42 (collecting cases).

defendants to settle has been a consistent factor.<sup>254</sup> But the problem is that “[i]n every case in which a class is certified, a defendant can argue as a ground for appeal that it faces pressure to settle” and that courts of appeal “are in no position to engage in case-specific factfinding necessary to gauge the true pressure on the defendant.”<sup>255</sup> Also, settlement pressure is arguably justified where there is mass harm. These decisions are particularly one-sided when appellate courts write that the certification decision is a “death knell” for defendants that will cause them to settle.<sup>256</sup> What is a death knell for corporate defendants is often relief for the plaintiffs, especially if their claims about wrongdoing are correct—and indeed, the class action is based on the premise that it may be the only relief most plaintiffs are likely to receive because of the difficulties of individually prosecuting cases involving broad or systemic harm and small-value relief.<sup>257</sup>

If Rule 23(f) empowered federal appellate courts to scrutinize class certification decisions, the Class Action Fairness Act of 2005 augmented federal courts’ sphere of influence.<sup>258</sup> The legislation broadly permitted the removal of class actions from state to federal court, resulting in the shift of most class actions to federal courts.<sup>259</sup> The congressional record is full of statements about class actions being extortionate and unfair mechanisms for plaintiffs to exact resources and about state courts overreaching and federal courts being fairer and more neutral fora.<sup>260</sup> The preamble to the legislation paints a picture of “abuses of the class action device” involving extortionate settlements by lawyers.<sup>261</sup> This narrative, like Judge Posner’s statement, was not based on or supported by empirical data.<sup>262</sup>

But the one-sided narrative about plaintiffs’ power—and concomitant obscuring of the power of defendants—stuck. With federal courts as the near-exclusive domain of class actions, federal judges began imposing hurdle after hurdle to class litigation, reflecting neoliberal impulses against collective action. In a sweeping article, Robert Klonoff surveys federal district court and appellate decisions that have turned the screws on class action litigation in a multitude of ways: raising the evidentiary standards for district courts to certify class actions,

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254. *See id.*

255. *Id.*

256. *See id.* at 740.

257. *See id.*; *see also* Klay v. Humana, Inc., 382 F.3d 1241, 1275 (11th Cir. 2004) (“Mere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit.”).

258. Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

259. *See* Klonoff, *supra* note 243, at 732.

260. *See, e.g., id.* at 743 (exploring the enactment history); *see also* S. REP. NO. 109–14, at 13–23 (2005); 151 CONG. REC. S1225, S1228 (daily ed. Feb. 10, 2005) (statement of Sen. Orrin Hatch); 151 CONG. REC. H723, H726 (daily ed. Feb. 17, 2005) (statement of Rep. F. James Sensenbrenner); 151 CONG. REC. S999–02, S999 (daily ed. Feb. 7, 2005) (statement of Sen. Arlen Specter).

261. Class Action Fairness Act of 2005.

262. *See, e.g.,* FITZPATRICK, *supra* note 250 (discussing settlement data); Gilles & Friedman, *supra* note 250 (same).

tightening the numerosity requirement and analysis, heightening the commonality requirement of Rule 23(a), rejecting class certification because plaintiffs have not pursued all conceivable claims, and rejecting class certification under Rule 23(b)(3) because individual issues are involved (even without analyzing whether they predominate), among other examples.<sup>263</sup> Settlement pressure has become pervasive in these decisions and has even risen to becoming a factor district courts “weigh in the certification calculus.”<sup>264</sup> Judges have also inserted themselves in a jury-like role by deciding before certifying the class whether the weight of evidence favors the plaintiff.<sup>265</sup> Federal decisions reach across the class certification process and stand in marked contrast with the class certification analyses that federal courts conducted for the first few decades after the modern Rule 23 class action was put into place.

## 2. Individualized Citizen-Consumers

One core move that courts make is to disaggregate the class, focusing less on collective harm and more on individual distinctions and due process concerns. Thus, in its class action decisions the Supreme Court once again trains its eye on the individual citizen-consumer and thwarts and dampens collective litigation.

*Wal-Mart Stores, Inc. v. Dukes* is a prime example.<sup>266</sup> In the case, a putative class of over a million and a half women alleged that Wal-Mart relied on gender stereotypes in its promotion and pay decisions.<sup>267</sup> The case was about whether the threshold criteria of Rule 23(a)(2) was met—whether there were “questions of law or fact common to the class.”<sup>268</sup> The district court and Justices Ginsburg, Sotomayor, Breyer, and Kagan believed that the common question was whether Wal-Mart’s pay and promotion policies were discriminatory.<sup>269</sup> Justice Ginsburg, writing for these justices, explored how the majority’s move was to elide the common dispute in the case and to focus on dissimilarities among the plaintiffs.<sup>270</sup> Its move was to thwart collective litigation by disaggregating the proposed class.

Rule 23(a)’s requirement of common questions of law or fact has long been understood to be satisfied by a single common question.<sup>271</sup> Only after that common question is found does Rule 23(b) kick in, and plaintiffs must then satisfy one of its

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263. See Klonoff, *supra* note 243, at 745–815.

264. See *id.* at 740; see also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (“[Settlement pressure] is a factor [the court] weigh[s] in [the] certification calculus.”); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (considering “intense pressure to settle”); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834–35 (7th Cir. 1999) (arguing that the grant of class certification “sounds the death knell” and “can put considerable pressure on the defendant to settle”).

265. See, e.g., *Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 317; see Klonoff, *supra* note 243, at 755–56.

266. 564 U.S. 338 (2011).

267. See *id.* at 342–48.

268. FED. R. CIV. P. 23(a).

269. See *Wal-Mart*, 564 U.S. at 342–47, 360–72.

270. *Id.* at 372 (Ginsburg, J., concurring in part, dissenting in part).

271. See *id.* at 369–70 (citing authorities for the proposition).

requirements.<sup>272</sup> One of them, Rule 23(b)(3), requires that common questions of law and fact predominate and that the class mechanism be the superior mechanism for adjudicating the case.<sup>273</sup> Justice Ginsburg argued, correctly in my view, that the majority in the case imported Rule 23(b)(3) criteria into the threshold consideration of Rule 23(a), empowering courts to pick apart classes at an earlier stage.<sup>274</sup> The Court focused on how the case was based on “literally millions of employment decisions,” potentially involving differing reasons for disfavoring individual female plaintiffs, where managers likely used their discretion, even if discriminatorily, in various different ways.<sup>275</sup> The plaintiffs, too, were different: they held many jobs, some for longer than others, across thousands of stores, and under the supervision of a variety of managers.<sup>276</sup> As Justice Ginsburg put it, “The [majority’s] ‘dissimilarities’ approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them.”<sup>277</sup> Rather than understanding the plaintiffs as a group of citizens alleging gender discrimination in Wal-Mart’s hiring and promotion policies, the Court disaggregated them as atomistic citizens defined by their differences.

In a variety of contexts, the Court has leaned into the presumption that the citizen-consumer litigates alone in ways that disarm class litigation. Particularly in the mass litigation surrounding asbestos exposure, the Court has undone precertification settlements because of its concerns about individual rights and due process, even if those concerns all but meant that plaintiffs facing mass harm would not obtain relief.<sup>278</sup> For example, in *Amchem Products, Inc. v. Windsor*, the Court rejected a precertification class settlement in large part because the lower courts had not engaged in the Rule 23 analysis to protect the individual due process rights of absent individuals as if the case were going to trial.<sup>279</sup> A class certified for the purposes of settlement thus needs to meet the requirements of Rule 23 in the same

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272. See FED. R. CIV. P. 23(b).

273. FED. R. CIV. P. 23(b)(3) (permitting certification where “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”).

274. See *Wal-Mart*, 564 U.S. at 375 (Ginsburg, J., concurring in part, dissenting in part) (“The Court blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer easily satisfied.” (internal quotations omitted)).

275. *Id.* at 352, 370–75.

276. See *id.* at 359–60.

277. *Id.* at 377 (Ginsburg, J., concurring in part, dissenting in part).

278. See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475–76 (2005) (arguing the Supreme Court has “transformed Federal Rule of Civil Procedure 23(b)(3)’s ‘superiority’ requirement into a mandate of perfection”); see also Sergio J. Campos, *The Uncertain Path of Class Action Law*, 40 CARDOZO L. REV. 2223, 2227 (2019) (arguing that in various contexts, the Court’s attempt to disaggregate classes and view them as exceptions to bilateral litigation is a “threat to the very existence of the class action itself, insofar as the Court has slowly forgotten the utility of, and thus the justification for, the class action procedure”).

279. 521 U.S. 591, 625–26, 628 (1997). And in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864–65 (1999), the Court rejected another precertification settlement and cabined the availability of “limited fund” class actions pursuant to Rule 23(b)(1)(B).

way as a class certified for trial.<sup>280</sup> The result, as Elizabeth Cabraser put it, was that “the perfect was the enemy of the good: the multibillion-dollar settlement, rejected by the Supreme Court, was lost forever, and thousands of claimants who would gladly have traded their pristine due process rights for substantial monetary compensation have been consigned to the endless waiting that characterizes asbestos bankruptcies.”<sup>281</sup>

In valorizing individual rights and autonomy over practical aggregate resolution, the Court has constructed, as Samuel Issacharoff has argued, a “cartoonish depiction of aggregation as a departure from an idealized individual litigant claiming [their] day in court.”<sup>282</sup> The Court’s “Sunday-school oratory about the importance of the rights of individuals standing before the courts” is often ill-matched to permitting plaintiffs to obtain relief from mass harm.<sup>283</sup> Rather than asking how the class mechanism can facilitate that relief, the Court doubles down on the presumptions of bilateral adjudication.<sup>284</sup> These cases follow a general trend where the Court has relied on individual rights and autonomy to weaken class actions, including by strengthening opt-out rights and the ability of absent class members to attack settlements.<sup>285</sup> And these decisions tend to focus on the vulnerability of defendants and power of plaintiffs, while not “account[ing for] the collective benefits of the class action to plaintiffs.”<sup>286</sup>

The past few decades of the procedure of class actions feature several neoliberal moves: a near-exclusive focus on the power of plaintiffs and vulnerability of defendants with scant attention to the structures of modern economic power that harm plaintiffs and make it difficult for them to seek redress, a multifaceted effort to disaggregate the class and therefore make plaintiffs proceed (if they can) individually, and a form of procedural perfectionism fueled by a judicially constructed presumption that individual action is the baseline and that collective action is the outlier. The story of class action law in the past generation is the mounting of hurdle after hurdle to thwart the possibility of collective action.

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280. See *Amchem*, 521 U.S. at 620–22.

281. Cabraser, *supra* note 278, at 1476.

282. Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1929–30 (2002).

283. *Id.*

284. See *id.* at 1927.

285. See Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 551–56 (2012); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (discussing the foundations of the opt-out right).

286. Lahav, *supra* note 285, at 553. The class action, which has at times been understood from a “regulatory conception” as a mechanism of public administration to enforce regulatory law, is increasingly understood as a mere joinder rule. See generally David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587 (2013).

*E. Coda: Other Areas*

The analysis of core doctrinal areas above is illustrative and covers many of the leading doctrines and cases defining the current era of procedure. It is not, however, fully exhaustive. Indeed, other procedural changes that define the new era are neoliberal. Consider briefly two others: discovery and personal jurisdiction.

While Rule 26 initially laid out a liberal discovery framework, it has been narrowed over the past few decades—mostly through rulemaking amendments.<sup>287</sup> These amendments have, among other things, limited the scope of discovery, introduced required initial disclosures, and introduced proportionality requirements into discovery.<sup>288</sup> They have also introduced more judicial management over discovery.<sup>289</sup> The amendments show how neoliberalism in procedure is not limited to judicial decisions. Corporate forces pushed for these changes in part by putting forward narratives about plaintiff power run amok—narratives that, though strained for empirical support, stuck with rule-makers.<sup>290</sup> The “pervasive myth of discovery abuse” came to the center of reform efforts,<sup>291</sup> despite the fact that in most cases, only a few hours are spent on discovery.<sup>292</sup> And, once again, that myth obscured and constructed power. Reforms to restrict and reduce parties’ access to discovery have been, as Brooke Coleman has shown, based on one-sided “plaintiff skepticism” fueled by narratives about plaintiff power and corporate defendant vulnerability.<sup>293</sup> The view of power presented in the previous Sections thus also extends to discovery reform.

287. See, e.g., Brooke D. Coleman, *Discovering Innovation: Discovery Reform and Federal Civil Rulemaking*, 51 AKRON L. REV. 765, 772 (2017) (“The original discovery rules, namely under Rule 26, allowed for the discovery of all relevant information related to the subject matter of the litigation.”).

288. See *id.* at 775–79 (overviewing the history of these changes). See generally Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (providing an in-depth account of the dynamics behind the significant 1993 amendments).

289. See, e.g., Endo, *supra* note 131, at 1335–36 (overviewing these developments); FED. R. CIV. P. 26(b), (g) advisory committee’s notes to 1983 amendment (“In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request.”).

290. See Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 303 (1994) (overviewing these narratives and their role in shaping rulemaking); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 623–25 (2001) (exploring the role of the corporate bar in pushing the narrative of discovery as abuse); see also Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 845 (1993) (critiquing the lack of empirical support for the 1993 “required disclosure” amendments to Rule 26).

291. Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994).

292. See JAMES S. KAKALIK, DEBORAH R. HENSLER, DANIEL F. MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, RAND INST. FOR CIV. JUST., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA 28 (1998).

293. Coleman, *supra* note 138, at 1779, 1790. As the defense bar pushed the narrative that discovery costs were out of hand and discovery was inefficient, rule-makers paid heed, introducing a series of amendments to restrict discovery. See, e.g., Miller, *supra* note 8, at 354. As one rule-maker put it, “In retrospect, our collective judgment was more impressionistic than empirical.” *Id.* This fact he attributes to, among other things, the composition of the rulemaking committees. See *id.* at 355 n.262.



And discovery reform has been based on an efficiency-as-cost rationale that equates discovery with inefficiency merely because it entails costs for corporate defendants, both deviating from historical procedural efficiency analysis and failing to consider the other values that exist alongside and sometimes push against a focus on pecuniary cost.<sup>294</sup> As Coleman summarizes it, the rule-makers behind discovery reform are “no longer focused on discovery as a mechanism for a full exchange of information that can then lead to a determination of the merits” but instead are “focused on lowering the cost of discovery, without any express or even implied reflection on how restrictions on discovery might affect the ability of parties to get to trial.”<sup>295</sup> As was the case in the exploration of pleading standards and arbitration above, in the discovery context efficiency has both taken on tantamount importance and been reduced to considerations of defendants’ costs.

Similarly, in the personal jurisdiction context, the Court has narrowed its doctrine of where corporate defendants can be sued under specific jurisdiction and where they can be considered to be “at home” under general jurisdiction in decisions that ignore questions of power and access for the plaintiffs, focusing instead on corporate interests and inconveniences, and along the way even thwarting aggregate litigation.<sup>296</sup> The Court’s specific and general jurisdiction decisions make it more difficult for plaintiffs to sue corporations, in particular foreign corporations, in convenient fora and instead focus on the inconveniences to corporate defendants without focusing on the considerable obstacles that plaintiffs face.<sup>297</sup> The Court’s stringent focus on contacts and devaluing of fairness factors has paved the way for taking plaintiffs and the power considerations that

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294. Coleman, *supra* note 138, at 1790; *see also* Endo, *supra* note 131 (exploring other values); Zambrano, *supra* note 129 (same). Along the way, Maureen Carroll argues that courts’ discovery decisions may link to and exacerbate economic inequality. *See* Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269, 281–84 (2020).

295. Coleman, *supra* note 138, at 1815.

296. *See generally* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1 (2018) [hereinafter Dodson, *Personal Jurisdiction*]; Scott Dodson, *Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73 (2018) [hereinafter Dodson, *Jurisdiction in the Trump Era*].

297. *See* Michael H. Hoffheimer, *End of the Line for General Territorial Jurisdiction*, 87 TENN. L. REV. 419, 463–64 (2020) (exploring the personal jurisdiction revolution, its lack of emphasis on plaintiff’s ability to bring cases, and its hurdles to plaintiffs’ access to justice); Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court’s New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT’L L. & POL’Y 209, 267–68 (2015) (considering pro-corporation and anti-plaintiff bias of cases); Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 475–76 (2012) (exploring how defendants can structure their behavior to do business in all states while avoiding the reach of most, or any, state courts such that “[n]o longer would injured consumers and employees be free to bring cases where they receive defective products or services, or live, or were injured; rather, plaintiffs might have to litigate in distant fora, and possibly in other countries, or abandon their claims altogether”). *See generally* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs,”* 100 CORNELL L. REV. 1129 (2015) (exploring the difficulties of establishing personal jurisdiction in the internet context and calling for a return of fairness and predictability factors).

affect them out of the equation.<sup>298</sup> And recent personal jurisdiction decisions contribute to a larger arc of procedural decision-making that is animated by hostility to aggregate litigation.<sup>299</sup> Recent decisions have “imbued [personal jurisdiction] with a powerful disaggregation effect by requiring a close connection between the forum state, each defendant, and each claim.”<sup>300</sup> This means plaintiffs with similar injuries who may best proceed in aggregate form, if injured in separate states, may not be able to sue defendants together in certain circumstances.<sup>301</sup>

Neoliberal logics thus increasingly infuse procedural decisions as early in litigation as the court’s exercise of personal jurisdiction and as late as its rulings on summary judgment motions on the eve of trial.

### III. ANALYZING PROCEDURE’S NEOLIBERAL TURN

Thus far, this Article has explored the contours and dimensions of neoliberal procedure. Having laid this descriptive foundation, this Part takes a step back to analyze neoliberal civil procedure at a more general level. It first considers what is distinctive about neoliberal civil procedure. It then considers the forces that made its rise possible.

#### *A. Its Distinctiveness*

Civil procedure both tracks and adds wrinkles to neoliberalism’s features. It offers its own conception of efficiency and a one-sided view of power and vulnerability. It protects existing market arrangements and constructs market rationality through plausibility analysis. And it also protects the market from regulatory litigation by constructing judicial procedures as less efficient than private ones and citizens as consumers choosing individualized dispute resolution mechanisms. Efficiency once pegged to matching streamlined process with parties’ ability to vindicate their rights has become a nearly one-sided analysis of corporate defendants’ costs. And that analysis is often not scaled to the size of the defendant or the nature of the case. Power in modern procedural decisions is not so much absent as distorted. Corporate Goliaths are posed as powerless against the weight of the Rules, and plaintiffs are caricatured as wielding extortionate influence. Substantive views naturalizing market arrangements are snuck into procedural decisions through plausibility analysis. And judicial procedures—the Rules made

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298. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299–300 (1980) (Brennan, J., dissenting) (arguing that the Court’s decision “focus[es] tightly on the existence of contacts between the forum and the defendant” and that “[t]he essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends traditional notions of fair play and substantial justice” (internal quotations omitted)).

299. See Dodson, *Personal Jurisdiction*, *supra* note 296.

300. *Id.* at 4–5.

301. See *id.* at 5 (“This restrictive approach to personal jurisdiction means that similarly situated plaintiffs injured in different states are unlikely to be able to sue codefendants from different states . . . in the same lawsuit.”).

and amended through a public process—are framed as costly and inefficient. The citizen-consumer, we are told, is better off turning to a private forum for dispute resolution—whether or not they meaningfully choose that forum. And, finally, the citizen-consumer is better off going it alone, whether in court or arbitration. Collective action and power must cede to efficiency and individual autonomy.

Neoliberal civil procedure therefore uses process as a gateway for importing substantive judgments about the State and the market into law. And it feeds off a certain bias in how power and efficiency are construed. Indeed, the problem is not that considerations such as cost to defendants or plaintiffs' power have entered into procedural analysis. It is that these considerations have become the *modus operandi* of procedural decision-making in the new era, to the exclusion of other variables and considerations.

Neoliberal civil procedure is also somewhat distinctive for other reasons that have to do with its reach and foundations. In this way, it is like neoliberal constitutional law. Jedediah Britton-Purdy argues that constitutional neoliberalism is characterized by its basicness, breadth, and integrating tendency.<sup>302</sup> To an extent, the same can be said about neoliberal civil procedure. The Constitution is more basic, as the foundational document for our governmental structure and rights.<sup>303</sup> However, civil procedure is basic because it provides the processes and norms for enforcing non-criminal constitutional, statutory, and common law rights in federal court. Civil procedure not only encompasses due process but also a host of other shared considerations of who gets to call fellow citizens and the government to account for wrongs and receive compensation (and maybe justice) in public. Civil procedure is broad because the Rules are largely trans-substantive, governing all kinds of non-criminal disputes. In this way, procedure influences the interpretations that govern the substance of various kinds of constitutional and statutory law, as well as common law interpretation. And it is integrating because its account of what those processes should look like produces a moral image of the citizen, the State, and public process, and it often shapes procedure used in state courts as well.

Procedural neoliberalism is also distinctive in another way: its method of collateral attack. Neoliberal civil procedure is subterranean, collaterally attacking the regulatory state and insulating the market. As Stephen Burbank and Sean Farhang show, political attacks on courts and their procedures through the legislative process have largely failed.<sup>304</sup> Similarly, the regulatory legislation that procedure is often used to enforce has proven durable. Procedural interpretation, however, has proven effective at making it harder for citizens to enforce regulatory law—and thereby to make it real in their lives.<sup>305</sup> Without attacking the content of regulation or amending the Rules, Supreme Court majorities have used procedural interpretation to make

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302. See Purdy, *supra* note 23, at 195.

303. See *id.*

304. See generally BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 12.

305. See generally *id.*

regulatory law increasingly toothless. And neoliberal procedural interpretation exists largely behind the scenes; as the judges deconstruct the foundation of the house from below, the public and media see very little.<sup>306</sup> The result is somewhat strong regulatory rights with weakened judicial enforcement mechanisms and a market increasingly shielded from further democratic control through litigation. Neoliberal civil procedure is in this way perhaps more subversive than other forms of legal neoliberalism.

### B. *Its Drivers*

How did the current era of federal civil procedure come to be neoliberal? The neoliberal era did not just arise out of thin air—in civil procedure or elsewhere. This Section considers the conditions that permitted neoliberalism’s rise in civil procedure. Indeed, for those who seek to resist it, understanding how neoliberalism came to increasingly permeate our federal civil procedure is a necessary first step.

As elsewhere, the story is complex and not amenable to easy generalizations. Neoliberal ideas began to infiltrate U.S. law in the 1970s, and scholars have offered a variety of background conditions that explain its rise, including the end of the period of relative posterity that characterized the post-World War II period and the renewed prominence of questions of distribution that led some to turn back towards market-modeled concepts to blunt redistributive efforts.<sup>307</sup> Some of the background drivers that these scholars explore—like the rise of strands of law and economics scholarship—extend to the rise of neoliberalism in civil procedure.<sup>308</sup> However, neoliberal civil procedure has its own political economy and institutional story. The account overlaps with the one that scholars develop about the rise of the new era of civil procedure generally.<sup>309</sup> But seeing how those background forces relate to neoliberalism helps to cohere those forces and puts the drivers of the current era in new light. And, on the flip side, for scholars of neoliberalism, the story offers a more fine-grained understanding of how neoliberalism arose in courts and came to shape procedure.

Before proceeding, it is worth noting that one perhaps intuitive answer that this Part does not offer is that there was a seepage of neoliberalism from our “substantive” law to our “procedural” law.<sup>310</sup> It may be tempting to think that as areas of law came to embody neoliberal premises, it was only a matter of time before

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306. See generally Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293 (2016).

307. See, e.g., Britton-Purdy et al., *supra* note 2, at 1817–18.

308. See *id.* at 1816 (“Without being reductionist, we can recognize law and economics as both autonomous scholarship and as a partial rationalization that gained support within a specific political economy.”).

309. And in particular, many of these neoliberal forces—although they are not characterized as such—are summarized in Subrin & Main, *supra* note 7.

310. For an overview of approaches to thinking about the distinction, or lack thereof, between procedure and substance and for a theory of the distinction, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 192–225 (2004).

our procedure followed suit. However, neoliberal civil procedure was coterminous with neoliberalism elsewhere and arose from both overlapping and distinct forces from those in other areas of law. Neoliberal civil procedure is both different and the same.

### 1. *The Influence of Economic Theory*

One influence—particularly seen in the plausibility realm and in the judicial focus on efficiency—is economic theory and its translation into law through some law and economics scholarship. What we conceive of as the modern law and economics field that came up in the second half of the twentieth century was really the second generation of law and economics in U.S. law. The first generation of law and economics scholars—such as Robert Lee Hale and Walton Hamilton—wrote against post-Industrial Revolution laissez-faire claims and focused on how purportedly neutral market arrangements were actually sites of coercion and power relationships shaped by legal norms and political decision-making.<sup>311</sup> They therefore justified government efforts to reshape market rules (understanding and clarifying that law always structured markets and thereby attacking the myth of laissez-faire).<sup>312</sup> The iteration of law and economics that reached its zenith in the second half of the twentieth century had many strands, and not all contributed to the rise of neoliberal civil procedure. One, in particular, did. As Stephen Teles has explored in depth, a variant of law and economics arose out of a group of University of Chicago Law School professors, drawing upon the work of Friedrich Hayek to critique and challenge the prominent legal-regulatory order and its development.<sup>313</sup> This strand of law and economics scholars refocused legal analysis around questions of efficiency and wealth maximization in a market-insulating fashion. And civil procedure was no exception to this approach.

Scholars in this camp wrote articles about procedural excesses and their inefficiency. Recall from the summary judgment context the article *Discovery as Abuse*,<sup>314</sup> penned by then-professor, now-Judge Frank Easterbrook, which created a narrative of discovery costs gone awry (a claim hardly supported by the data then and now).<sup>315</sup> Some of those scholars soon became judges whose attention scholars

311. *See generally* BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998) (examining the first law and economics movement).

312. *See id.*

313. *See* STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 91 (2008); *see also* Britton-Purdy et al., *supra* note 2, at 1815 (exploring the roots of the modern law and economics field).

314. *See supra* note 129 and accompanying text.

315. *See, e.g.*, Subrin & Main, *supra* note 7, at 1850–51 (“In the majority of cases there is very little or no discovery and, in the other cases, the amount of discovery is, by any reasonable measure, proportionate to the stakes.”); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 791 (1998) (“Cases involving extensive discovery are in fact relatively rare—the studies using actual file reviews uncovered very few cases involving more than ten discovery requests . . . .”); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*,

could capture by writing about efficiency and excess.<sup>316</sup> And, as we saw in the summary judgment framework, some law and economics scholarship was cited by and relied upon by Supreme Court justices in constructing plausible views of the market.<sup>317</sup> The emphasis of law and economics on efficiency and wealth maximization made it a natural counterpart for the corporate forces in the 1970s who were opposed to the growing footprint of the regulatory state and litigation's role in regulatory enforcement and governance. As Subrin and Main write, the "emphasis [of law and economics] on wealth maximization and efficiency fits easily into, and readily supported, the conservative agenda to reduce regulation and curtail civil litigation."<sup>318</sup> At the same time, wealthy donors created foundations to support law and economics scholars in law schools.<sup>319</sup> The "philosophical thrust [of law and economics] in the direction of free markets and limited government" put it at odds with an increasingly regulatory state that relied on courts and procedural protections and stricture to carry out regulatory goals.<sup>320</sup>

## 2. *The Corporatization of the Bar and Rulemaking Process*

At the same time, as federal rights of action under regulatory statutes grew and were aided by the class action mechanism, some corporate lawyers increasingly saw the liberal regime put into effect by the Rules as being against their clients' interests. The modern corporate law firm—growing to be business-like and managerial itself—took on a leading role for corporate clients in trying to peel back the procedural protections that had been gained in the first few decades of the Rules.<sup>321</sup> Major law firm partners and in-house corporate lawyers became early crusaders against procedural protections that their clients increasingly saw as interfering with their business interests. In the media and at conferences, they attacked liberal pleading regimes, class actions, discovery, settlement pressures, and rogue juries.<sup>322</sup> And over time, some of them became the authors of the briefs behind the cases

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39 B.C. L. REV. 683, 684–86 (1998) (gathering studies showing there is little to no discovery in the majority of cases).

316. Prominent examples include Frank Easterbrook, Richard Posner, and Robert Bork.

317. See *supra* notes 62, 129 and accompanying text.

318. See Subrin & Main, *supra* note 7, at 1871.

319. See *id.*

320. See TELES, *supra* note 313, at 188–89 (quoting Jim Piereson). See generally JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996).

321. See, e.g., Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 LOY. L.A. L. REV. 563, 564–66 (2004) (exploring how the "1980[s] witnessed a perception growing in the minds of some federal judges and some corporate executives and their lawyers, of a problem in need of a solution that arose from the liberality and tolerance embedded in the 1938 Federal Rules").

322. See Subrin & Main, *supra* note 7, at 1864 (exploring corporate attacks on pleading, juries, class actions, and settlement).

that have shaped U.S. neoliberal civil procedure.<sup>323</sup> Just a few decades before, the corporate bar had powerful members supporting the rise of the Federal Rules, in part because they thought simplified procedure could facilitate the quick resolution of claims for their clients.<sup>324</sup> But as their large, institutional clients faced complicated and sometimes massive cases, some forces within the corporate bar sought to tame the lion their forebears had helped raise.

The corporate bar also came to take on an outsize role in rulemaking. The practitioners largely responsible for drafting and amending the Rules have increasingly and disproportionately been chosen from the corporate bar.<sup>325</sup> Most of the rule-makers, however, are judges.<sup>326</sup> And the judges came to “skew in a conservative direction” at the same time that Republican leaders were coming to critique litigation and its relationship to the regulatory state.<sup>327</sup> In some circumstances, such as discovery, the composition of the rulemaking bodies has resulted in rulemaking that is pro-corporate defendant. And where the Supreme Court and lower courts engage in procedural reinterpretation of the Rules, often led by justices concerned about litigation overreach and judges picked from the corporate bar, the committees are less likely to correct the Court or respond.

### 3. *The Changing Shape of the Judiciary*

The shape of the judiciary has also changed in ways that facilitated the rise of neoliberal civil procedure. Lawyers from the corporate bar, in particular, have taken prominence on the federal appellate courts, engaging in procedural interpretation that binds the district courts that must oversee pleading, discovery, summary judgment, class certification decisions, and the like.<sup>328</sup> Lawyers who have spent the majority of their careers in private practice—and in particular, “in business-oriented firms that derive their revenues from business transactions and litigation representing the interests of corporations”—made up, as of 2020, sixty-five percent of the federal appellate bench.<sup>329</sup> As of that time, only about one percent of judges on the appellate bench had spent the majority of their practice as legal aid attorneys and only a handful had significant experience representing civil rights claimants.<sup>330</sup>

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323. Indeed, the Supreme Court appellate bar is overwhelmingly composed of lawyers representing corporations. See Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1008, 1016–17 (2016).

324. See, e.g., Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 508–09 (2017) (exploring the role of ABA lawyers, many of whom were corporate counsel).

325. See Coleman, *supra* note 323; Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1566–68 (2015).

326. See Coleman, *supra* note 323.

327. See *id.*

328. See, e.g., Maggie Jo Buchanan, *The Startling Lack of Professional Diversity Among Federal Judges*, CTR. AM. PROGRESS (June 17, 2020), [https://www.americanprogress.org/issues/courts/news/2020/06/17/486366/startling-lack-professional-diversity-among-federal-judges/\[https://perma.cc/Q6LC-MY9T\]](https://www.americanprogress.org/issues/courts/news/2020/06/17/486366/startling-lack-professional-diversity-among-federal-judges/[https://perma.cc/Q6LC-MY9T]).

329. See *id.*

330. See *id.*

The result is that “the majority of judges on the appellate bench have legal expertise that was predominantly gained through the lens of advancing the interest of businesses.”<sup>331</sup> This is changing somewhat with the recent federal judicial appointments and nominations by the Biden Administration, but the federal bench is still skewed in its composition.<sup>332</sup>

None of this is to say that these judges strive to be anything but impartial. Many would likely not share the view, expressed by Justice Powell just before he assumed the bench, that litigation by civil rights groups, labor unions, and nonprofits constituted a “broad attack” on business interests and needed to be reined in.<sup>333</sup> But, at the same time, the experience of the appellate bench is simply slanted. A supermajority of judges have spent their careers representing corporations, and some of them developing arguments to try to push plaintiffs’ claims out of courts at every stage. We saw decisions above that were one-sided in their focus on the pressures on defendants and the power of plaintiffs. One reason that these judges may construct power this way, and recoil from the process baked into the Rules, is that they spent the formative years of their careers putting themselves in the shoes of corporate defendants. Many had no experience representing the parties who bring the lion’s share of federal statutory claims—workers, consumers, small businesses, and patients.

The trend of appointing judges with principally corporate-law experience has been bipartisan.<sup>334</sup> Democrats put judges who were corporate lawyers up for judgeships in part to assuage and win the support of Republicans in Congress.<sup>335</sup> Judges who represented corporate interests—but might be socially liberal and defend Democratic interests in other ways—were simply more palatable for both parties, especially as the Democratic Party attempted to forge better relationships with the business community.<sup>336</sup>

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331. *Id.*

332. A December 2021 report found that, 19.7% of Biden’s nominees have civil rights experience, 14.1% have plaintiff-side experience, and 4.2% have legal services experience. All. for Just., *A Fairer Court: How President Biden and Congress Raised the Bar in 2021* (Dec. 2021), <https://www.afj.org/wp-content/uploads/2021/12/A-Fairer-Court-How-President-Biden-and-Congress-Raised-the-Bar-in-2021.pdf> [<https://perma.cc/KY6W-UTXD>].

333. Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com., *Attack on American Free Enterprise System 1* (Aug. 23, 1971), <http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf> [<https://perma.cc/NQ78-J7L2>].

334. See Brian Fallon & Christopher Kang, *No More Corporate Lawyers on the Federal Bench*, ATLANTIC (Aug. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/no-more-corporate-judges/596383/> [<https://perma.cc/5QGM-JKR7>] (“For years, presidents of both parties, along with the senators who advise on their judicial selections, have favored a certain kind of résumé . . . But perhaps no qualification is more prevalent than prior work at a major private-sector firm, representing the interests of large corporations.”).

335. *See id.*

336. *See id.*



#### 4. Politicization of Legal Process

Political pressure may also have shaped the rise of neoliberal civil procedure. Members of both political parties have called out what they saw as excessive plaintiffs litigation and proposed legislation to rein in civil process.<sup>337</sup> The politicians seeking to reform courts have been as diverse as then-Senator Joseph R. Biden Jr. and Representative Newt Gingrich.<sup>338</sup> However, as Burbank and Farhang show, the locus of the legislative agenda to reform courts came from the Republican Party.<sup>339</sup> They examine how Reagan administration officials “well understood” the growth of private enforcement of regulatory statutes and were concerned about “invasive, disruptive, and costly lawsuits.”<sup>340</sup> An ambitious reform proposal—restricting attorneys’ fees to cut off private enforcement—was proposed during the early days of President Reagan’s term. It did not pass, and the legislative efforts to curb procedure and courts largely failed in the years ahead, but as Burbank and Farhang suggest, it “signaled the emergence of a movement.”<sup>341</sup>

One could argue that these failures could have emboldened courts to resist neoliberal impulses by showing that the procedures the Rules embodied continually survived political attack. However, these efforts also demonstrated that courts and their procedures were under attack. Judges, jealous of their status and authority, and protective of the seemingly fragile role of courts in our legal order, may well have received these attacks differently and felt the need to respond by reining in procedure and remaking it around concepts like efficiency. And, as I explore in the next Section, the precarious position of courts makes this conclusion more likely.

#### 5. Institutional Vulnerability and Adaptation

Another component of the story—perhaps the most essential—is an institutional one of both judicial empowerment and neglect. Congress empowered courts in the federal regulatory system by creating a bevy of private causes of action in regulatory statutes, elevating citizens in regulatory enforcement, but it did not increase courts’ resources or capacity sufficiently to meet the demand the expansion caused.<sup>342</sup> This left courts overworked and overburdened by civil litigation (not to mention rising criminal dockets).<sup>343</sup> Under this pressure, courts creatively adapted to run themselves like businesses.<sup>344</sup> This had two effects. The first was to put efficiency and case management at the center of judicial attention. The second was

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337. See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1551–57 (describing the political attack beginning in the Reagan administration); Subrin & Main, *supra* note 7, at 1867–68 (describing political forces generally).

338. See Subrin & Main, *supra* note 7, at 1867–68.

339. See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1551–57.

340. *Id.* at 1551.

341. *Id.* at 1545.

342. See, e.g., Subrin & Main, *supra* note 7, at 1859–62.

343. See *id.*

344. For the most prominent account of the forces behind this form of management and what it looks like, see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

to put democratic procedure—with all of its stricture and layers—in potential perceived tension with the perceived survival and legitimacy of courts. The most subtle but maybe most powerful reason explaining the rise of neoliberal civil procedure is that Congress created the conditions—through empowerment and neglect—for courts to become neoliberal in their doctrinal approach to survive. Those who were more committed to neoliberalism—who were opposed to the growing demands of the regulatory state and sought to remake the shape of courts in the image of the market—found fertile ground in federal courts struggling to manage their caseloads.

As with the general story about neoliberalism, the 1970s stand out as a turning point. As the regulatory state grew, civil caseload filings rose exponentially in the 1970s and 1980s.<sup>345</sup> Importantly, the growth in caseload well-outpaced the growth in the number of judges added to the bench.<sup>346</sup> Plaintiffs bringing statutory claims under regulatory statutes were a significant part of the increase in cases.<sup>347</sup> The modern class action mechanism, introduced in 1966, also proved a somewhat powerful component of this regime, giving attorneys incentives to bring claims alleging and seeking to remedy distributed and sometimes systemic harm.<sup>348</sup> The claims of some economists, corporate lawyers, politicians, and others about the excesses of litigation gained more traction as courts came under pressure from mounting dockets and complex regulatory causes of action. By expanding the responsibilities of courts without expanding their capacities, Congress made courts feel the pinch of their growing regulatory function, and it made them susceptible to claims that the regulatory state—of which judges were part—was an inertial Leviathan.

Courts came to run themselves like businesses to survive. As Subrin and Main describe it, “The judges’ reaction to the perception that things were ‘out of control’ was to ‘take control.’”<sup>349</sup> Case management became one solution. Warren Burger, who would become Chief Justice of the Supreme Court in 1969, had as early as a decade previously, when he was a court of appeals judge, called for case management and for courts to integrate business management techniques.<sup>350</sup> Judges managed cases by taking more control of discovery and other features of pretrial process and often by promoting settlement.<sup>351</sup> Moving cases along was the overarching goal. Federal district court judges felt new pressure as each judge was moved to a calendar system and held accountable for the pace of clearing their

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345. See Subrin & Main, *supra* note 7, at 1859.

346. See *id.*; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 548 tbl.A-12 (2004).

347. See Subrin & Main, *supra* note 7, at 1859.

348. See FED. R. CIV. P. 23.

349. See Subrin & Main, *supra* note 7, at 1861.

350. See *id.* at 1862; Warren E. Burger, *The Courts on Trial*, Speech at the American Bar Association (Feb. 21, 1956), in WARREN E. BURGER, *DELIVERY OF JUSTICE* 4, 6 (1990).

351. See generally Resnik, *supra* note 344.

docket. Case “clearing” time became one of the core pieces of data collected.<sup>352</sup> Calls for case management and business-like efficiency came from judges appointed by presidents of both parties and had the support of political leaders from both parties.<sup>353</sup> The result, as Judith Resnik argued, is that the federal judiciary has not only taken on a “corporate identity,” but part of that identity, as expressed in its rulemaking and education functions, has been anti-adjudication and pro-settlement.<sup>354</sup>

Procedural provisions allowing for liberal pleading, discovery, summary judgment, and class certification, among other features of procedure, came to stand in the way of judicial efficiency and management. The pinch on courts became a pinch on procedure. As the federal docket grew and outpaced the growth in judicial capacity, these phenomena, in the words of Judge Robert Carter, “fueled demands that the Rules be revised or reinterpreted in such a way as to encourage quick or economic dispositions.”<sup>355</sup> Efficiency became the “criterion of successful judicial functioning.”<sup>356</sup> And as Resnik summarized, the entire conversation around procedure changed and the judiciary itself came to be one reflecting “failing faith” in adjudication.<sup>357</sup> “We have,” she wrote, “moved from arguments about the need to foster judicial decisions ‘on the merits’ by simplifying procedure to conversations about the desirability of limiting the use of courts in general and of the federal courts in particular.”<sup>358</sup>

These phenomena, too, structured the turn away from courts and towards arbitration and other forms of alternative dispute resolution (ADR). The 1976 “Pound Conference” was a turning point. As Andrew Mamo explains, the Conference dealt with “concerns regarding the institutional capabilities of the courts to handle all the claims brought before them amidst the perception of rapid growth in litigation rates caused by a growth in regulation, administrative costs of the welfare state, and a breakdown of the social fabric.”<sup>359</sup> Some of the participants in the Pound Conference, such as then-Solicitor General and future Judge Robert Bork, critiqued courts for their regulatory function.<sup>360</sup> Indeed, some of the most

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352. See Subrin & Main, *supra* note 7, at 1863.

353. *Id.* at 1867.

354. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 995 (2000).

355. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2181 (1989).

356. *Id.*

357. See generally Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

358. *Id.* at 497.

359. Andrew B. Mamo, *Three Ways of Looking at Dispute Resolution*, 54 WAKE FOREST L. REV. 1399, 1411–12 (2019).

360. See Robert H. Bork, *Dealing with the Overload in Article III Courts*, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 8, 1976), in Warren E. Burger, *Preface* to THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 150, 150–51 (A. Leo Levin & Russell R. Wheeler eds., 1979).

prominent voices at the Pound Conference were members of the corporate bar, lamenting the excesses of litigation.<sup>361</sup> Others had real concerns about courts, including how they would treat historically marginalized groups, and turned to ADR as a community-based alternative to courts.<sup>362</sup> Others still were defenders of the Rules and legal process; they were simply seeking refuge for claims that they feared would not receive solicitude from overburdened courts.<sup>363</sup>

Soon, ADR scholars of all stripes were talking about the most efficient fora and institutional mechanisms for resolving disputes; economic analysis came to the center of ADR scholarship.<sup>364</sup> As Amy Cohen has argued,<sup>365</sup> when Owen Fiss penned his now canonical essay, *Against Settlement*, he was responding to these forces.<sup>366</sup> Fiss saw the influence of neoliberalism in Latin America and defended courts as expositors of public values bound by procedure and process, and against the pessimism about courts and the turn towards purportedly more efficient dispute resolution mechanisms.<sup>367</sup> Whatever one thinks about Fiss's strong stance against settlement, his fears about neoliberalism were prescient. And neoliberalism not only came to structure the push for settlement; as Part II showed, it also shaped the interpretation of the Rules in a variety of other contexts.

Arbitration, likewise, soon became more attractive to judges for its ability to clear dockets and avoid discovery. Then-Judge and future Justice Burger argued in 1968 that “a large part of all litigation in the courts is an exercise in futility and frustration.”<sup>368</sup> Discovery, he continued, following a popular line, was excessive, and the flood of cases entering courts showed that “we are the most litigious people on the globe.”<sup>369</sup> Judge Burger argued that ADR promised new and better routes for resolving cases. In some ways, the narrative was overwrought.<sup>370</sup> Most cases, as I explained above, have little or no discovery.<sup>371</sup> And it has long been established that Americans are not very litigious, but as new regulatory causes of action cropped up and judges' dockets became fuller, the narrative took hold.<sup>372</sup> Bork was right at the Pound Conference when he said that the modern welfare and regulatory state

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361. See Subrin & Main, *supra* note 7, at 1864 (exploring the role of corporate lawyers Simon H. Rifkind and Francis R. Kirkham).

362. See Mamo, *supra* note 359, at 1414–15.

363. See *id.*

364. See *id.* at 1414, 1419–20.

365. Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 *FORDHAM L. REV.* 1143, 1150–51 (2009).

366. See Fiss, *supra* note 167.

367. See generally *id.*

368. Warren E. Burger, Remarks to the American Arbitration Association (Nov. 25, 1968), in WARREN E. BURGER, *DELIVERY OF JUSTICE* 27, 27 (1990).

369. Warren E. Burger, Remarks at the Arthur T. Vanderbilt Dinner (Nov. 18, 1982), in WARREN E. BURGER, *DELIVERY OF JUSTICE* 121, 123 (1990).

370. Burger, *supra* note 368, at 30–31.

371. See *supra* note 315 and accompanying text.

372. See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 5 (1983).

was “changing the very nature of courts.”<sup>373</sup> But he was also part of a cadre of people drawing on these developments to push courts to change in order to restrict their role in the regulatory enforcement and governance. As courts’ dockets grew, the Rules, once celebrated for their democratic virtues, became lamented for their inefficiency.

Had Congress expanded the federal courts’ capacity to meet the new claims, neoliberal civil procedure may have not been the success it has been or may have taken another course. U.S. federal courts occupy a small slice of our government’s budget, and better equipping them would have arguably been doable and justifiable.<sup>374</sup> But as courts felt the pressure of the demands of regulatory causes of action, they were especially susceptible to the claims that they should be run like businesses, that efficiency was key, and that litigation was cumbersome and needed to be reformed. The Rules created a universe of democratic process. The pressures of judging with inadequate resources gave judges reason to turn away from that process, to turn to the fortress of the market for solutions. Suddenly, injecting judges as gatekeepers into pleading, summary judgment, and class action decisions made more sense: they could manage and weed out cases and claims, keeping their calendars on par with their peers. And arbitration took cases mostly out of the judges’ realm altogether.

In this sense, we can see how all of the forces this Part has considered interlink and work together. As Congress made federal courts central to American regulatory development and left them poorly equipped to carry out their functions, they became fertile ground for the corporate bar and political forces skeptical of litigation and regulation (and litigation as regulation) to sow doubts about procedure and to turn the tide towards efficiency. Corporate lawyers also increasingly came to occupy the bench, and lawyers who spent their careers representing workers, consumers, patients, and small businesses increasingly did not. As federal courts felt the pinch and saw the ranks of corporate lawyers and judges grow, the conditions were ripe for neoliberalism to infuse procedure. The rest, as the doctrinal analysis above showed, is history.

#### CONCLUSION: BEYOND NEOLIBERAL CIVIL PROCEDURE?

U.S. law is now nearly a half century into its neoliberal turn. As law increasingly has been defined around efficiency, focused away from questions of power, valorized market arrangements, and reshaped government institutions and citizens around market concepts, civil procedure has not resisted the turn. Indeed, in some

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373. See Bork, *supra* note 360.

374. See, e.g., Thomas Kaplan, *Federal Courts, Running Out of Money, Brace for Shutdown’s Pain*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/politics/courts-money-government-shutdown.html> [<https://perma.cc/4NV3-KSBL>] (“With roughly 33,000 employees nationwide and annual federal funding of under \$8 billion, the judiciary makes up a tiny part of the federal budget. In recent years, it has accounted for only about two-tenths of 1 percent of annual federal spending.”).

ways, neoliberal civil procedure has been a great success. Neoliberalism has hardly been shown to have deep democratic support among the polity, which makes its interventions tenuous.<sup>375</sup> Because neoliberal civil procedure effects a collateral attack on regulatory litigation and a subterranean valorization of the market, it obscures its anti-democratic politics and operates largely behind the scenes.

For this reason, one possible future—maybe even a likely one—is the continuing growth of neoliberal civil procedure. So long as procedural reform remains subterranean, so long as it is not politically salient, it may be an especially powerful tool of the neoliberal State. But other futures are possible. This Article has articulated the logics and values of neoliberal civil procedure, and as they become more apparent, those who oppose the neoliberal turn may find themselves in a stronger position to challenge it. It is possible that the neoliberal era, like each era of civil procedure before it, will come to an end. Fully undoing neoliberal civil procedure—and resisting the pull of neoliberalism in our law generally—would likely require a profound shift, a democratic reordering that is unlikely to occur without a new governing coalition. Some believe that the current moment of economic inequality and concentrated corporate power—now magnified by the effects of an ongoing global pandemic—may pave the way in the years or decades ahead towards a “new New Deal” or a democratic revival in which democracy gets the upper hand in the ongoing conflict between it and economic power.<sup>376</sup>

Should that democratic renaissance come, moving beyond neoliberal civil procedure likely cannot be a story of return to the civil procedure that preceded the neoliberal turn. The previous era of civil procedure had its merits: among them, simplified pleading, easily accessible discovery, and a class action device that for some time more easily allowed citizens to aggregate to address diffuse, complex harms.<sup>377</sup> However, the era was also founded on and largely shaped for a model of litigation conducted by citizens who gain lawyers principally through the market, have resources, and often resolve bilateral disputes.<sup>378</sup> Too many citizens have lacked the resources to bring claims against large institutional defendants, and if they can bring them, to prosecute them adequately.<sup>379</sup>

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375. See, e.g., Britton-Purdy et al., *supra* note 2, at 1832 (arguing that while neoliberalism has been successful as intellectual, doctrinal, and policy shift, “it has always been a fragile configuration”).

376. See, e.g., Michelle Goldberg, Opinion, *The New Great Depression Is Coming. Will There Be a New New Deal?*, N.Y. TIMES (May 2, 2020), <https://www.nytimes.com/2020/05/02/opinion/sunday/coronavirus-new-deal-ubi.html> [<https://perma.cc/2P27-MUVQ>]; William J. Novak & Steven W. Sawyer, *The Need for Neodemocracy*, LAW & POL. ECON. PROJECT (Nov. 7, 2019), <https://lpeblog.org/2019/11/07/the-need-for-neodemocracy/> [<https://perma.cc/98RE-WU7R>] (“Neodemocracy involves a wholesale repudiation of the inheritance of neoliberalism and a commitment to re-inventing and re-envisioning a new, critical democratic tradition.”).

377. See generally Miller, *supra* note 8 (exploring these characteristics).

378. See Resnik, *supra* note 357, at 513–15, 517 (explaining the various premises about resources and parties baked into the Rules).

379. See *supra* note 125 and accompanying text.

What, then, would a civil procedure for a revitalized democratic regulatory era look like? The nature and scope of what such procedural design would look like could fill volumes, but three broad and high-level points about what it might entail are worth briefly exploring in concluding.

*Beyond neoliberal norms.* The first is that developing such a procedure may require shifting normative focus beyond efficiency-as-cost and other neoliberal values. The burgeoning “law and political economy” (LPE) approach offers a useful starting point for expanding the focus of procedure. LPE is founded, in part, on investigating how law interacts with and shapes the balance between democratic and economic power.<sup>380</sup> An LPE approach to procedure would put at its center a focus on procedure’s political economy—on how procedure is central to how law relates to economic ordering and to how citizens regulate economic behavior.<sup>381</sup> It would mean recognizing that seemingly neutral procedural rules can interact with and reproduce existing distributions of power.<sup>382</sup> Considerations of structure and power might thus come to shape procedural design and redesign.<sup>383</sup>

*Beyond the market-state.* Achieving such a procedure may also involve rethinking the role of the government as facilitator of litigation. For the public and courts to participate with power in the regulatory ecosystem, they need supportive institutions and procedural design. The government may need to take a more active role in ensuring that citizens, their lawyers, and courts have the resources to fulfill their regulatory functions. This would require an affirmative vision of the government in setting the conditions for norm contest in courts. At a more concrete level, it may well necessitate increasing funding to courts so that judicial attention can be given to large, complex cases, while at the same time decreasing costs for less-resourced parties, including court fees. And it may occasion dramatically increasing funding or incentives for legal representation for plaintiffs, and perhaps even going so far as guaranteeing representation as a matter of statutory law even where constitutional due process does not require it.<sup>384</sup>

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380. See Britton-Purdy et al., *supra* note 2, at 1784–93, 1818–27 (articulating a vision of LPE); see also Luke Herrine, *Consumer Protection After Consumer Sovereignty* (unpublished manuscript) (January 11, 2022) (on file with author) (articulating a “moral economy” framework for analyzing consumer protection law).

381. See Norris, *supra* note 324 (outlining the idea of procedural political economy).

382. See, e.g., Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219–20 (1989) (arguing that “we cannot and should not ignore the political content and consequences of procedural rules” in part because of the role powerful forces played in shaping them to their advantage).

383. The focus—and the focus of the proposals of this Conclusion generally—gel with critical civil procedure scholarship. See, e.g., A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES (Brooke D. Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., forthcoming May 2022); Eric K. Yamamoto, *Critical Procedure: ADR and the Justices’ ‘Second Wave’ Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765 (2017).

384. See generally FREDERICK WILMOT-SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* (2019) (developing a case for socializing legal representation).

*A politics of procedure.* To achieve all this, a final step is likely necessary: developing an alternative vision of procedure and its relationship to our democratic politics. The past generation has made perhaps clearer than ever that procedure ineluctably relates to normative and value-laden political choices. Neoliberal procedure not only expresses its own values and normative predispositions; it is also connected to a larger political project of diminishing the role of citizens and courts in regulatory governance and of enfeebling regulatory governance altogether. Resisting neoliberal procedure would require developing an alternative democratic vision of the role of procedure in our democratic and economic life. Such a vision might center the government's procedures—in courts and elsewhere—as the infrastructure of democracy.

This is not to deny that building an alternative vision of procedure would be hard. Such a vision would need to be sustained by ongoing consciousness among citizens that the government's procedures are core mechanisms through which the practice of democracy occurs. It would involve understanding and acting on the basis that procedure is power. The rise of neoliberal civil procedure has made that lesson clearer than ever. Procedural design and interpretation can mean the difference between democracy governing or guarding economic power. For at least the time being, neoliberal civil procedure places a thumb on one side of the scale.



