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The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline

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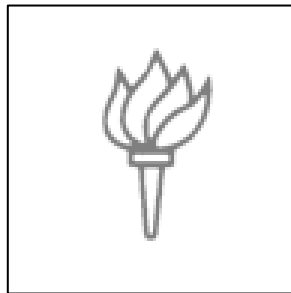
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The Oligarchic Courthouse: Jurisdiction, Corporate Power,
and Democratic Decline

Helen Hershkoff and Luke Norris

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THE OLIGARCHIC COURTHOUSE:
JURISDICTION, CORPORATE POWER, AND DEMOCRATIC DECLINE

Helen Hershkoff & Luke Norris*

Jurisdiction is foundational to the exercise of a court's power. It is precisely for this reason that subject matter jurisdiction today has come to the center of a struggle over corporate power and the regulatory state. Corporations have sought to manipulate forum choice to wear out less-resourced parties and circumvent hearings on the merits, along the way insulating themselves from laws that seek to govern their behavior. Corporations have done so by making creative arguments to lock plaintiffs out of court and push them into arbitration, and failing that, to lock plaintiffs into federal court rather than state court or to punt their cases to administrative agencies that may lack the power or will to resolve the underlying issues in the case. These efforts have largely been successful. This Article offers a panoramic view of how federal courts have acquiesced in a corporate-driven effort to transform jurisdictional doctrines over recent decades and contends that together, these doctrinal changes constitute an inflection point in U.S. law and procedure. We argue that issues of jurisdiction today, as at the turn of the Twentieth Century, are not only slanted towards corporate interests but are also part of a larger struggle over oligarchy and democracy. The shifts in jurisdiction are a core part of the architecture of what we call the oligarchic courthouse—one where courts as public institutions transform their procedures to meet private, corporate interests at the expense of public goals, cementing economic power and translating it into political power. Today, as before, seemingly technical and dry procedural doctrines are employed by courts in ways that protect powerful economic parties and undermine public processes and goals.

The construction of the oligarchic courthouse has troubling implications for democracy. To show the scope of the implications, the Article steps back and clarifies why jurisdiction matters to democracy. Drawing on law and social mobilization literature, we argue that jurisdiction functions as a political resource that shapes the opportunities for democratic contestation and reflects the openness and closedness of the state. Having centered jurisdiction in a larger account of democracy, we explore how the oligarchic courthouse, by undermining the possibilities for democratic contestation and entrenching economic power, can be nested in a larger account of democratic decline in the United States.

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INTRODUCTION

Marc Galanter’s essay, *Why the “Haves” Come Out Ahead*, is one of the most cited pieces in legal scholarship.¹ As is well known, Galanter explained how repeat litigation players, typically corporate litigants, are able to leverage the dull rules of court process to their advantage, effectively creating a caste of perpetual courthouse losers.² Some commentators have argued that ordinary folks can beat the system through strategic use of “jurisdictional redundancy”³—filing suit in the most hospitable court from among those with overlapping and concurrent power.⁴ Indeed, commentators also urge litigants to devise strategies that combine and coordinate adjudication in multiple fora, seeking to draw advantages from both state and federal courts.⁵ These arguments recognize that although forum shopping often smacks of

¹ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

² See Richard Lempert, *A Classic at 25: Reflections on Galanter’s “Haves” Article and Work It Has Inspired*, 33 LAW & SOC’Y REV. 1099, 1103 (1999) (explaining that Galanter “noted the existence of repeat losers”).

³ See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

⁴ Some scholars have also highlighted the normative benefits of litigation pluralism. See Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2371 (2008) (emphasizing the normative value of “multiple centers of adjudication”).

⁵ See Judith Resnik, *Partial “Global Peace”: Federalism and the Long Tail of Remedies in Opioid Litigation*, 70 DEPAUL L. REV. 101 (2022) (reporting on the underutilization of judicial coordination in mature tort cases). On the systemic benefits of concurrent judicial authority, see, e.g.,

gamesmanship, selecting an appropriate judicial forum can promote litigant autonomy and serve regulatory goals.⁶ Forum shopping also is baked into the American legal system as a longstanding practice with roots in federalism and Article III of the Constitution.⁷ Yet in the nearly half century since Galanter published his article, a funny thing has happened on the way to the judicial forum.⁸ Corporate litigants have come to enjoy a distinctive advantage in deploying jurisdictional redundancy, repeatedly defeating the forum choices of their opponents.

Consider three routine scenarios. Suppose a worker files suit in state court, alleging that a corporate employer has violated federal safety laws. The corporate defendant predictably will remove the action to federal court (where the judge may well dismiss the complaint as conclusory under prevailing interpretations of the Federal Rules of Civil Procedure). Alternatively, the corporate defendant may move the federal court to abstain and defer to the jurisdiction of an administrative agency (where the lawsuit likely will take a back seat to a protracted rule-making proceeding, if the agency considers the issue at all). Suppose, instead, that the worker initially files in federal court. Now the corporate defendant can be expected to move to compel arbitration (where the claim will be decided behind closed doors, if it is brought at all).

Each of these situations turns on the corporate party's strategic use of jurisdictional rules, not so much to be in a particular forum, but rather to achieve a predictable substantive goal: circumventing a hearing on the merits and blocking the claimant's shot at redress. Jurisdictional maneuvering drives up the transaction costs of litigation and can facilitate a significant wealth transfer to the corporate defendant; it compels plaintiffs to absorb the financial and psychic loss caused by the corporation's alleged wrongdoing, and it generates demoralization costs along the way.⁹ Nor are the consequences of the litigation confined to the private parties. Rather, these jurisdictional decisions serve to chip away at regulatory laws that the corporation would prefer to avoid wholesale (but which remain immune from constitutional challenge, at least for now, under the precarious New Deal equilibrium).¹⁰ Thus, while regulatory statutes remain on the books, jurisdictional maneuvering enlists the courts in a practice of non-enforcement or diminished

Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in Federal Courts*, 87 CALIF. L. REV. 1409, 1444 (1999) (discussing capacity for "cross-pollination" between state and federal courts).

⁶ See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

⁷ See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) ("The name of the game is forum-shopping. In the American civil litigation system today, few cases reach trial. After perhaps some initial skirmishing, most cases settle. Yet all cases entail forum selection, which has a major impact on outcome.").

⁸ See *A Funny Thing Happened on the Way to the Forum (Film)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/A_Funny_Thing_Happened_on_the_Way_to_the_Forum_\(film\)](https://en.wikipedia.org/wiki/A_Funny_Thing_Happened_on_the_Way_to_the_Forum_(film)).

⁹ With respect to the wealth transfers embedded in arbitration, see Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 502 (2017) (referring to mandatory arbitration terms as "wealth transfers" from workers to employers).

¹⁰ See *infra* note 154 and accompanying text.

enforcement, insidiously promoting deregulatory efforts to hollow out laws intended to regulate markets, provide workplace protection, and curb capitalist excesses.¹¹ Outside the courthouse, the same corporations, allied with likeminded organizations, enhance their jurisdictional advantage by leveraging their resources and power to encourage the appointment of Article III judges who, sharing their worldview and ideological perspective, carry forward this regime.¹²

This Article describes a set of jurisdictional doctrines that consistently disfavor the litigation options of less-resourced parties—persons with limited bargaining power, financial resources, or market clout—who find themselves locked out of court because of arbitration, locked into federal court because of removal jurisdiction, or tossed out of federal court because of administrative primary jurisdiction.¹³ These doctrines favor corporate interests in forum choice, delay, and avoiding adjudication on the merits. We call this phenomenon jurisdictional abuse because, as we explain, we see courts’ acceptance and even encouragement of the practice as an abuse of democratic values and a threat to democratic governance. In elaborating the doctrines that define jurisdictional abuse, our focus is not on traditional questions about the limits of subject matter jurisdiction—about the constraints that the Constitution and statutes interpreting it place on federal courts’ power to hear claims—although we engage with the values that ought to animate subject matter jurisdiction.¹⁴ Nor is our focus on personal jurisdiction and the evolving doctrines and issues concerning where corporations may be haled into court—although, again, the Article implicates the democratic significance of these rules.¹⁵ Instead, we focus on a

¹¹ Among other things, the procedural decisions send a false signal to the political branch about the value and necessity of the plaintiff’s suit and regulatory regime, thus altering the overall information context in which regulatory norms take shape. *Cf.* Helen Hershkoff, *Early Warnings, Thirteenth Chimes: Dismissed Federal-Tort Suits, Public Accountability, and Congressional Oversight*, 2015 MICH. ST. L. REV. 183, 190 (2015) (using the term “retreatism” to discuss the negative spillover and information effects of procedural and jurisdictional dismissals of Federal Tort Claims Act suits on legislative action).

¹² *See* Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 492 (2015) (expressing the concern “that at least some portion of judges might be predisposed to favor wealth. Wealthy interest groups influence judicial appointments ... [a]nd judges, perhaps even more so than elected officials, are drawn from the elite. Though Article III judges are not subject to the same capture and corruption mechanisms at work in the political branches, they too are likely to bring their own beliefs and experiences to bear on decisions they make.”).

¹³ Importantly, these doctrines and examples do not exhaust corporate efforts to manipulate procedural doctrines in their favor. *See infra* note 158 and accompanying text (exploring other areas of procedural retrenchment sought and achieved by corporate actors); Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. 969 (2021) (exploring how private companies are seeking the benefits of the federal government’s “sovereign shield” by exploiting preemption, derivative sovereign immunity, and intergovernmental immunity doctrines).

¹⁴ The traditional bases for subject matter jurisdiction are federal question and diversity jurisdiction. *See* 28 U.S.C § 1331 (federal question jurisdiction); 28 U.S.C § 1332 (diversity jurisdiction). Federal courts also have discretionary power to exercise supplemental jurisdiction in certain instances. *See* 28 U.S.C § 1367.

¹⁵ As a matter of constitutional law, the Fourteenth Amendment limits the exercise of personal jurisdiction. *See, e.g., Ford Motor Co. v. Montana Eighth Judicial Court*, 92 U. S. ____ , slip op. at 4

series of ways that the federal courts, reading statutes or deploying prudential doctrines, have expanded or contracted their subject matter jurisdiction to hear and adjudicate claims in ways pushed for by corporate parties. As corporations have sought to manipulate jurisdiction, federal courts have facilitated their efforts with creative and often strained doctrinal analyses.¹⁶ Federal courts have not been uniform in allowing these tactics, but the trend-line clearly evinces a wide-ranging judicial acceptance of the tactics.¹⁷ Our effort is thus to connect a series of doctrinal shifts—some of which will be familiar to scholars of procedure and aspects of which have been explored in isolation by scholars—and, by linking them together, to reveal the larger architecture of the pro-corporate turn in jurisdiction, generalize about its causes, place it in historical context as a procedural inflection point, and draw sharper normative conclusions about its relationship to processes of democratic decline in the U.S.

Jurisdictional abuse today has important precursors that aid in making sense of the practice and situate it in a dynamic story of jurisdiction and corporate power. Indeed, this is not the first inflection point where federal courts have substantially transformed their jurisdictional doctrines to favor corporate interests. At the turn of the Twentieth Century, federal court jurisdiction was implicated in the struggle over corporate power and the advent of the modern regulatory state. As part of a strategy of economic nationalism focused on fostering the growth of large-scale enterprises and resisting regulatory policies, legislators and judges expanded the power of the federal courts to hear cases involving corporations—facilitating efforts of corporations to remove cases out of state courts and into federal courts perceived to be “forums of order for national commercial interests.”¹⁸ The strategy paid off in the years to come as the federal judiciary issued a series of decisions promoting economic nationalism and overturning regulatory enactments.¹⁹ This history prompted then-Professor Felix Frankfurter to reflect that “under the guise of seemingly dry

(2021) (“The Fourteenth Amendment’s Due Process Clause limits a state court’s power to exercise jurisdiction over a defendant.”). To comply with these constitutional limits, the Supreme Court has permitted federal courts to exercise either specific or general jurisdiction. *See, e.g.,* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so “continuous and systematic” as to render them essentially at home in the forum State.”); *id.* (“Specific jurisdiction, on the other hand, depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”) (internal quotations and alterations omitted).

¹⁶ Stephen Vladeck has described a similar trend of the Supreme Court’s acquiescing in, and even “enabling, (if not affirmatively encouraging)” aggressive litigation techniques by the Solicitor General. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 128 (2019).

¹⁷ As we explore below, in the snap removal and arbitration contexts, not all federal judges have permitted these practices. *See infra* notes 81 & 103 and accompanying text.

¹⁸ Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 517 (2002).

¹⁹ *See infra* Part II.A.

jurisdictional and procedural problems, majestic and subtle issues of great moment to the political life of the country are concealed.”²⁰

Frankfurter’s words aptly describe today’s jurisdictional battleground. But today, the terrain is different. While the earlier century’s effort to cement large-scale enterprises succeeded, the efforts to resist the advent of the modern regulatory state were short-lived and ultimately largely failed in the constitutional confrontation of the New Deal. The New Deal was characterized by an effort to rein in excessive economic power and fight against oligarchy—that is, economic power translating into political power and undermining democracy—by passing a series of regulations governing the marketplace, protecting workers, and safeguarding the environment.²¹ The Supreme Court ultimately upheld landmark pieces of New Deal legislation, ushering in the modern regulatory state.

But the old struggle has new life today. As the regulatory state has grown since the New Deal, litigation has come to play a substantial—and in some ways outsize—role in making regulatory governance function: Congress has placed hundreds of private rights of action in a bevy of regulatory statutes over the past 75 years, with many more in the states.²² Under the banner of efficiency, business interests have sought to defang the regulatory state by securing changes to procedure, both to the rules of practice and to their interpretation by the courts, that make it more difficult for plaintiffs to enforce statutory protections. These efforts, although defended as neutral and apolitical, have resulted in the “corporatization of procedure,” to borrow from J. Maria Glover,²³ and are used instrumentally to promote business interests.²⁴ As scholars have explored in various areas, procedure has provided both a shield and a sword for corporate defendants to block regulatory enforcement.²⁵

²⁰ The letter is quoted and discussed in Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 685–86 (1999); see also FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 2 (1927) (“So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is the means of effectuating policy. Particularly true is this of the federal courts.”).

²¹ See *infra* notes 152–153 and accompanying text.

²² See *infra* notes 155–158 and accompanying text.

²³ See J. Maria Glover, “*Encroachments and Oppressions*”: *The Corporatization of Procedure and the Decline of the Rule of Law*, 86 FORDHAM L. REV. 2113 (2018).

²⁴ Some commentators have criticized these trends for their anti-litigation stance, but in practice the rules are anti-litigation only when parties seek to enforce rights against corporate parties. Compare Arthur R. Miller, *What Are Courts For: Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 798 (2018) (stating that “[c]ertain conservative and pro-business and defense interests have been energetically waging an anti-litigation war for many years”), with Stephen B. Burbank, & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657, 686 (2021) (discussing the “instrumental” approach to litigation by business and progressive groups).

²⁵ See *infra* notes 156–158 and accompanying text.

This Article argues that jurisdictional abuse is an important yet insufficiently acknowledged part of this evolving, modern backlash against the regulatory state. It is also a story with nuance. Unlike the earlier economic nationalist struggle, today's pro-corporate jurisdictional shifts are not solely directed at expanding federal jurisdiction. The shifts are more dynamic. At times, Congress and the federal courts have expanded federal jurisdiction,²⁶ and at others, the federal courts have contracted jurisdiction even when statutes have remained the same. The through-line, however, is that the expansions and contractions track corporate interests in manipulating forum choice to gain advantages and diminish the role of litigation in regulating their affairs.

And now, as before, what Frankfurter dubbed “dry jurisdictional and procedural problems” are implicated in something deeper—a modern struggle over oligarchy and democracy. Our core analytic claim is that the corporate abuse of jurisdiction is part of—and helps to shed light on the dynamics of—rising oligarchic conditions and democratic decline in the U.S. The threat of oligarchy is that concentrated economic power bleeds into political power and undermines prospects for democratic self-government.²⁷ The threat is receiving renewed scholarly attention today, largely outside the realm of civil procedure.²⁸ Procedure scholars have usefully explored various ways in which economic inequality has shaped and infects modern procedural evolutions.²⁹ But the corporate transformation of procedure can also be embedded in a larger account of increasing oligarchic conditions.³⁰ We argue that federal courts’ doctrines and decisions sanctioning corporate efforts to manipulate jurisdiction are part of the growing architecture of what we call “the oligarchic courthouse”—a judicial system in which corporate actors are permitted to leverage

²⁶ For a synthesis of Congressional efforts that expanded federal court power through the grant of diversity jurisdiction, see Richard D. Freer, *The Political Reality of Diversity Jurisdiction*, 94 S. CALIF. L. REV. 1083 (2021).

²⁷ See, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 8 (2022) (“[T]he threat of oligarchy [is] the danger that, because concentrations of economic and political power are mutually reinforcing, if they become sufficiently extreme, they undermine the Constitution’s democratic foundations”).

²⁸ See generally *id.*; see also *infra* note 180 and accompanying text.

²⁹ See, e.g., HELEN HERSHKOFF & STEPHEN LOFFREDO, *GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME* ch. 9 (2019); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. (forthcoming 2022); Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. (2020); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016); Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019); Helen Hershkoff & Kevin E. Davis, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011); Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325 (2007); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462 (2017); Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471 (2022); Daniel Wilf-Townsend, *Assembly Line Plaintiffs*, 135 HARV. L. REV. 1704 (2022).

³⁰ See Luke Norris, *Procedural Political Economy*, LPE BLOG (Apr. 27, 2022) (laying groundwork for exploring the relationship between civil procedure and oligarchy), <https://lpeproject.org/blog/procedural-political-economy/>.

their private economic power into not only greater wealth, but also self-serving public institutional policy, without due regard to the democratic costs of their adjudicative conduct. Today's jurisdictional battles are part of a corporate effort to commandeer the state's procedures for themselves precisely because procedure can determine whether laws on the books are or are not applied in ways that meaningfully regulate their affairs.

These efforts highlight that oligarchy is about the powerful shaping not only “substantive” policies, but also the procedures for implementing—and blocking—enforcement of those policies. In particular, corporations pushing for the construction of the oligarchic courthouse are engaging in what sociologists refer to as “opportunity hoarding”—using their power to control public resources and to deploy them as a means of exploitation.³¹ Such hoarding is part and parcel of how economic power translates into political power—of how oligarchy comes into shape—and can facilitate and reflect a broader process of democratic decline and deconsolidation. And when public resources do not usefully serve business interests, corporate parties seek to narrow the power of the state, to shrink the public realm, and to remit dispute resolution to private decision makers. The rise of the oligarchic courthouse shows how seemingly abstruse jurisdictional and procedural doctrines contribute to the consolidation of economic power through abuse of our public institutions, enlisting the mechanisms of democracy toward anti-democratic ends.

But why would federal courts participate in this project? The oligarchic courthouse has been built in subtle and multifaceted ways over time, and the account we give is not a standard one of corporate forces capturing a public institution.³² While the literature on institutional capture informs our thinking, the story we tell is more multilayered, dynamic, and attuned to the distinctive structural features of courts and adjudicative process. In particular, we explore a set of institutional, organizational, cultural, and informational explanations for the rise of the oligarchic courthouse. Some of the explanations have to do with the role of legal organizations with commitments that conform with or are amenable to anti-regulatory corporate agendas in shaping the views of judges and the bar. Others have to do with the composition of the judiciary, including a longstanding practice—only now showing cracks—of favoring the appointment of Article III judges who come from corporate law backgrounds and may be more predisposed to view corporate claims favorably. A

³¹ See CHARLES TILLY, *DURABLE INEQUALITY* 15 (1998) (using the term opportunity hoarding to describe a practice by which “members of a categorically bounded network acquire access to a resource that is valuable, renewable, subject to monopoly, supportive of network activities, and enhanced by the network’s modus operandi”).

³² For a public choice perspective on the question of judicial capture, see, e.g., Frank B. Cross, *The Judiciary and Public Choice*, 50 *HASTINGS L.J.* 355, 355 (1999) (arguing that “the judicial process is more susceptible to manipulation by narrow interests than are the more democratic branches of government”). Cross emphasizes the ability of well-resourced groups have a special advantage in engage in “precedent purchase.” See *id.* at 367 (“While litigants may be unable to purchase the judge’s favors directly, they can achieve the same end indirectly....”).

series of cultural factors also help to explain what might predispose judges to construct the oligarchic courthouse—including group identity, status affiliation, and relationship networks. And, finally, pro-corporate actors are able to leverage the institutional dynamics of court adjudication and procedural rulemaking to produce an information flow and narrative about litigation that may contribute to the pro-corporate turn in jurisdictional doctrine.

The rise of the oligarchic courthouse has troubling implications for democratic governance—and, indeed, can be nested in a larger account of democratic decline and erosion in the U.S. today. To critique the rise of the oligarchic courthouse and show its relationship to democratic decline, we first center jurisdiction in democracy in a way that departs from conventional accounts. In the late Twentieth Century, it was commonplace to characterize litigation as a private good; on this view, courts constituted a market offering services to businesses and procedure was a technical mechanism best designed to achieve efficient results.³³ The approach gave little attention to the negative spillover effects of litigation on public life and effectively suppressed discussion of the democratic role of litigation and procedure within a political system.³⁴ This Article engages with the argument that adjudication, and jurisdiction as a core aspect of it, is a political resource, one that can dynamically affect the possibilities for democratic contestation and mobilization. Having laid this foundation, we show how the rise of the oligarchic courthouse undermines jurisdiction as a political resource and can be understood as contributing to larger processes of democratic decline in the U.S. today by deepening concentrations of corporate power, exacerbating inequality, and undermining participatory capacity.

This Article proceeds in three Parts. Part I sketches out the doctrinal shifts in jurisdiction—arbitration, removal jurisdiction, and primary jurisdiction—that have promoted the interests of what Galanter a half century ago called the “haves.” Part II explains how these shifts contribute to the construction of the oligarchic courthouse and explores the factors contributing to its rise. Part III critiques the shifts, arguing that jurisdictional abuse erodes democracy. A brief Conclusion offers thoughts on what deconstructing the oligarchic courthouse and reconstructing it as a democratic courthouse might entail.

I. JURISDICTIONAL SHIFTS

This Part forms the core of the Article’s descriptive inquiry, and it sketches out how federal courts are expanding and contracting their subject matter jurisdiction in ways that follow corporate interests and support an anti-regulatory agenda. In

³³ The canonical article is William B. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

³⁴ This alternative view, pressed earlier by Frankfurter, threaded through European approaches to litigation in the post-World War II period. *See, e.g.*, PIERO CALAMANDREI, PROCEDURE AND DEMOCRACY (John Clarke Adams & Helen Adams trans. 1956).

particular, this Part tracks three doctrinal shifts in jurisdiction, focusing on how arbitration doctrine locks plaintiffs (usually workers and consumers) out of court, removal locks less-resourced parties into federal court and out of state courts perceived to be friendlier to their claims, and how primary jurisdiction decisions throw these claimants out of federal court in ways that serve to delay and obfuscate rather than further regulatory enforcement. The overall effect of these doctrinal shifts, slowly and in incremental steps, has been to support deregulatory efforts to narrow federal laws intended to protect workers, consumers, and the environment, undermine state regulatory capacity, and undercut principles of equality and inclusion embedded in antidiscrimination and other laws.

A. Lock Out: Arbitration

By now it is familiar fare that the Court has transformed the Federal Arbitration Act (FAA) into a coercive mechanism that allows corporate entities to avoid liability by locking claimants out of federal and state court—giving corporate parties a proverbial “get out of jail free” card, to borrow the provocative description of two leading commentators.³⁵ Indeed, the Congress that enacted the FAA in 1925 would not recognize the Court’s statute as its own.³⁶ The FAA was a narrow, tailored statute, borne of particular circumstances. Before the FAA, federal courts permitted parties who had agreed to arbitrate their disputes to “revoke” the agreement at any time before an arbitral award was issued.³⁷ Federal courts created this revocation doctrine to blunt concerns that rising arbitration among commercial parties might “oust” them of their jurisdiction.³⁸ Congress passed the FAA to thwart federal courts from being “jealous” of their jurisdiction in this way and to ensure that they honored commercial parties’ agreements.³⁹ The FAA also was part of a movement for procedural reform.⁴⁰ The framers of the FAA explicitly designed it not to apply to

³⁵ KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, *ECON. POL’Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 17 (2015), <https://www.epi.org/publication/the-arbitration-epidemic/> (last visited June 22, 2022).

³⁶ As Justice O’Connor put it, the Court has “abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.” *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., dissenting).

³⁷ See Luke P. Norris, *The Parity Principle*, 93 N.Y.U. L. Rev. 249, 258–259 (2018) (exploring the history of the revocation doctrine).

³⁸ Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926).

³⁹ At the time, when federal courts generally followed the labyrinthian procedures of the state courts where they sat, the FAA “was part of the process by which reformers sought to simplify procedure in order to let parties more swiftly and effectively adjudicate disputes on the merits.” Norris, *supra* note 40, at 261–62.

⁴⁰ See Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1978–80 (2014) (linking the FAA to procedural simplification and reform efforts); Imre S. Szalai, *Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure*, 2010 J. DISP. RESOL. 391, 411–19 (arguing that the FAA was an “outgrowth” of procedural reform efforts linked to “dissatisfaction with the confusing, technical procedural landscape during the early 1900s”).

employment contracts in interstate commerce and they had consumer arbitration nowhere in mind in drafting the statute; it was designed and intended to promote the enforcement of commercial arbitration agreements.⁴¹

Today, the Supreme Court and federal courts have expansively interpreted the FAA to allow corporations to “contract” out of federal jurisdiction in ways that are neither sanctioned nor envisioned by the FAA, to compel workers and consumers to be bound by adhesive contractual terms mandating arbitration, to restrict these weaker parties from engaging in group or collective arbitral actions, and to limit the scope of permissible federal court appellate review of arbitral decisions. To be sure, corporate parties are beginning to meet some resistance to these trends, as some claimants’ counsel bundle arbitral claims and file them in bulk, with each individual claim requiring the corporation to pay its portion of the arbitrator’s fee. Faced with rising transaction costs, corporate parties are rethinking their forum preferences, by reneging on arbitral promises, trying to rewrite the rules of arbitration, and seeking to compel litigation in federal court.⁴²

i. “Contracting” Around Court Jurisdiction

The Court’s atextual, and in our view, anti-democratic, transformation of the FAA departs sharply from Congress’s design of the statute, the FAA’s primary goal, and its initial, more faithful judicial interpretation. Current doctrine negatively impacts the rights of employees, consumers, and other less-resourced parties who are rendered unable to enforce legitimate statutory claims in court. But the Court’s doctrine also produces perverse and negative effects on the Article III system itself. The FAA was never intended to deprive federal courts so sweepingly of adjudicative power, and at the time of the statute’s enactment and for decades to come, the statute was interpreted to preserve significant aspects of federal court jurisdiction, especially where questions of the interpretation of public law and deep power disparities were involved.

This emphasis on retaining jurisdiction is baked into the FAA itself. While the statute directs federal courts to enforce arbitration agreements and had commercial agreements in mind, section 1 of the statute excepts those agreements involving employees in interstate commerce.⁴³ The framers of the FAA thus preserved federal court jurisdiction for employment disputes because they worried that workers would

⁴¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 126 (2001) (Stevens, J., dissenting) (“[N]either the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contain any evidence that the proponents of the legislation intended it to apply to agreements affecting employment.”).

⁴² See *infra* notes 75–78 and accompanying text.

⁴³ 9 U.S.C. § 1 (2012) (“[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”).

be compelled to accept take-it-or-leave-it arbitration clauses as a condition of employment and would therefore lose the benefits and protections of public process.⁴⁴

The emphasis on retaining jurisdiction also animated the Supreme Court's earlier decisions involving public law claims. In *Wilko v. Swan*, the Court declined to enforce an arbitration provision governing a Securities Act claim because the statute "was drafted with an eye to the disadvantages under which buyers [of securities] labor"; arbitral awards, unlike judicial ones, could be issued without explanation or the right to appeal the arbitrator's "conception of the legal meaning of . . . statutory requirements."⁴⁵ The Court also noted that a securities buyer would be giving up a wider choice of courts and venue, and that arbitrators may not have the "judicial instruction on the law" possessed by judges.⁴⁶ It thus concluded that the "protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness."⁴⁷ As Judith Resnik put it, in *Wilko* "[t]he arbitrator as dispute resolver was posited as a potential hazard to the state, as lawmaker."⁴⁸

This view continued in *Alexander v. Gardner-Denver Company*, where the Court held that an employee's statutory right to bring a Title VII claim alleging workplace discrimination was not foreclosed by previously submitting the claim to grievance arbitration under a collective bargaining agreement's non-discrimination clause.⁴⁹ The Court once again focused on the importance of having federal judges apply and interpret the statute,⁵⁰ stressing both the important role played by civil litigants in developing anti-discrimination law and how judges were better suited than arbitrators to resolve statutory and constitutional issues "whose broad language frequently can be given meaning only by reference to public law concepts."⁵¹

Beginning in the 1980s, however, the Court did an about-face and began to endorse arguments put forward by corporations that radically revised the FAA. Through strained statutory interpretation, the Court relinquished federal and state

⁴⁴ See generally Norris, *supra* note 37; see also HELEN HERSHKOFF & JUDITH RESNIK, PROCEDURE, CONTRACT, PUBLIC AUTHORITY, AUTONOMY, AGGREGATE LITIGATION, AND POWER: A VIEW FROM THE UNITED STATES, REPORT ON THE CONTRACTUALIZATION OF CIVIL LITIGATION IN THE UNITED STATES PRESENTED TO THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW (manuscript on file with the authors) (forthcoming 2022).

⁴⁵ *Wilko v. Swan*, 346 U.S. 427, 435–36 (1953).

⁴⁶ *Id.* at 436.

⁴⁷ *Id.* at 437.

⁴⁸ Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 224 (1995).

⁴⁹ *Alexander v. Gardner-Denver Co.*, 416 U.S. 36 (1974).

⁵⁰ The Court there focused on the importance of courts and civil litigation in enforcing Title VII, and on how arbitration, with its emphasis on effectuating contractual intent, was "comparatively inferior to judicial processes" for resolving Title VII disputes. *Id.* at 57. Arbitrators were competent in "the law of the shop, not the law of the land," whereas courts had expertise in resolving statutory and constitutional issues. *Id.*

⁵¹ *Id.*

courts' power to hear a sea of claims involving workers and arising under federal regulatory statutes governing broad swaths of U.S. life. In a foundational departure, the Court read general arbitration clauses to encompass not only claims sounding in contract, but also those involving federal and state statutes.⁵² As it increasingly allowed the arbitration of statutory claims, the Court erased from its decisions any notion that federal jurisdiction protected less powerful parties or was important to public law development,⁵³ first casting doubt on *Wilko*'s reasoning and ultimately effectively overruling it.⁵⁴ In various consumer and antitrust regulatory contexts, among others, the Court liberally enforced arbitration clauses.⁵⁵ It did so in part by reading atop the FAA a "liberal policy favoring arbitration" and celebrating what it dubbed the flexibility and informality of arbitration as a contractual choice.⁵⁶ These efforts have led to arbitration clauses becoming ubiquitous across core sectors of the economy, but the notion that contractual choice justifies the turn to arbitration is belied by the fact that arbitration clauses are frequently embedded in contracts of adhesion and other documents that do not reflect a "meeting of the minds."⁵⁷ Further tilting the needle towards arbitration and away from court jurisdiction, the Court has

⁵² The Court first made this move in a case about international arbitration. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (concluding that the parties' intentions should be "generously construed as to issues of arbitrability" and that "[t]here is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory right"); see also Katherine V.W. Stone, *Arbitration—From Sacred Cow to Golden Calf: Three Phases in the History of the Federal Arbitration Act*, 73 LABOR L.J. 1174772 (2022) (recounting changes in the Court's interpretation of the FAA and calling current doctrine "expressly pro-business"); Katherine V.W. Stone, *The Bold Ambition of Justice Scalia's Arbitration Jurisprudence: Keep Workers and Consumers out of Court*, 21 EMPLOYEE RTS. & EMP. POL'Y 189 (2017) (chronicling developments in the Court's interpretation of the FAA).

⁵³ See Norris, *supra* note 29, at 493–498 (exploring how in various decisions the Court erased considerations of power or of the benefits of public proceedings from its rationales).

⁵⁴ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 243 (1987) (Blackmun, J., dissenting) ("In today's decision, however, the Court effectively overrules *Wilko* by accepting the Securities and Exchange Commission's newly adopted position that arbitration procedures in the securities industry and the Commission's oversight of the self-regulatory organizations (SROs) have improved greatly since *Wilko* was decided.").

⁵⁵ See, e.g., *Shearson/American Express*, 482 U.S. at 222 (enforcing an arbitration clause involving Section 10(b) of the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act).

⁵⁶ *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

⁵⁷ See, e.g., 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) (exploring how arbitration clauses deviate from fundamental components of contractual choice); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 962 & n.171 (1999) (showing a variety of instances where courts have upheld arbitration clauses "when consent is thin, if not outright fictitious," including cases involving "arbitration agreements that appear in a document incorporated into a contract by reference, even when one party had no opportunity to see or no reason to anticipate the incorporated term").

directed that contractual ambiguities about whether arbitration was intended should be resolved in favor of arbitration and by arbitrators themselves.⁵⁸

And, against the text and history of section 1 of the FAA and its restrictions involving employment contracts, the Court concluded in 2001 that the section prohibits federal courts only from enforcing arbitration agreements involving transportation workers, narrowing the ability of courts to hear claims arising from employment relationships.⁵⁹ At the time the Court ruled, a small fraction of non-unionized, private sector employees were bound by arbitration clauses—around two percent.⁶⁰ By 2018, sixty percent of such employees were bound by arbitration clauses, and by 2024, it is projected that eighty percent will be.⁶¹

ii. Aggregate Litigation and Restricted Judicial Power

Even as it abdicated federal jurisdiction in favor of arbitral power, the Court made it tougher for weaker parties to receive redress through arbitration. Again, the Court's interpretive move was procedural in form but predictable in its substantive consequences: interpreting the FAA in ways that depress the ability of parties to bring regulatory actions—here, in aggregate form—and reshape both federal and state courts' jurisdiction and power. Corporate parties thus have narrowed federal jurisdiction to hear statutory claims, but enlisted federal jurisdiction to impose unprecedented procedural limits on claimants now locked into arbitration.

Consider *AT&T Mobility LLC v. Concepcion*, where the Supreme Court held that the FAA preempted a California unconscionability doctrine. California courts had found that when class action waivers exist in certain contracts of adhesion involving small amounts of damages, unequal bargaining power, and large numbers of harmed consumers, the waivers may be unconscionable and that California courts therefore should not enforce them and require the ability of class-wide arbitration.⁶² The Court held that the FAA preempted this doctrine because “[r]equiring the availability of class[-]wide arbitration interferes with fundamental attributes of

⁵⁸ See, e.g., *Moses Cone*, 460 U.S. at 24–25 (“[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration” and “doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”).

⁵⁹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

⁶⁰ See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More Than 60 Million American Workers*, 2 ECON. POL'Y INST. (Apr. 6, 2018), <https://files.epi.org/pdf/144131.pdf>.

⁶¹ See *id.*

⁶² 563 U.S. 333 (2011). Under the California *Discover* doctrine, when waiver was found in a contract of adhesion and “in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,” then the waiver may be found to be an attempt to evade liability and be unconscionable. *Id.* at 340.

arbitration and thus creates a scheme inconsistent with the FAA.”⁶³ For the Court, arbitration’s attributes were ones of flexibility and informality, and aggregate proceedings impermissibly interfered with those attributes.⁶⁴ But, as the dissent argued, class-wide arbitration was neither inconsistent with the FAA nor unworkable, and the real impact of the decision would be to make it incredibly difficult for plaintiffs with small claims to get lawyers and proceed in arbitration.⁶⁵ California’s unconscionability doctrine was an example of a state court preserving some of its jurisdiction and power of review: maintaining that certain unconscionable contracts banning aggregate dispute resolution should not be enforced, and that the claim should proceed in aggregate form. The Court’s reading of the FAA to preempt the doctrine both limits the power of state courts and legislatures to supervise arbitration and augments the power of federal courts to find that the FAA preempts state efforts to regulate arbitration and preserve judicial power in certain contexts.

Two other cases follow the trend. In *American Express v. Italian Colors Restaurant*,⁶⁶ the Supreme Court enforced an arbitration clause banning class-wide proceedings where an expert had opined that the cost of the plaintiff’s proceeding on its own in arbitration would exceed any recovery it would receive by at least ten times,⁶⁷ making individual arbitration in the words of Justice Kagan, “a fool’s errand.”⁶⁸ And, in *Epic Systems v. Lewis*,⁶⁹ the Court held that arbitration clauses banning aggregate litigation or arbitration did not conflict with the provisions of the National Labor Relations Act protecting the right of workers “to engage in ... concerted activities” for their “mutual aid or protection.”⁷⁰ The Court so held against a history of viewing forms of collective worker action—whether petitioning Congress, making pleas to the media, or bringing lawsuits or other public claims—as encompassed within the statute’s protections.⁷¹ Both of these cases bear upon the power and jurisdiction of courts. *Italian Colors* limits the ability of federal and state courts to inquire into whether arbitration clauses make dispute resolution practicably unworkable for the parties, further shrinking their role in supervising arbitration. And *Epic Systems* limits the ability of federal and state courts and arbitrators to hear collective claims protected by federal labor law.

⁶³ *Id.* at 344.

⁶⁴ *See id.* at 345.

⁶⁵ *See id.* at 359–62 (Breyer, J., dissenting).

⁶⁶ 570 U.S. 228 (2013).

⁶⁷ *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.”).

⁶⁸ *Id.* at 240 (Kagan, J., dissenting).

⁶⁹ 138 S. Ct. 1612 (2018).

⁷⁰ 29 U.S.C. § 157.

⁷¹ *See* 138 S. Ct. at 1637–39 (Ginsburg, J., dissenting) (cataloguing the kinds of litigation and governmental activity that have been understood to fall within the statute’s protections).

iii. Winnowing Appellate Jurisdiction

The Court has also winnowed the jurisdiction of federal courts to review arbitral awards. Arbitration is a largely private process, and its proceedings, and results, are closed to the public. Arbitrators do not publish their decisions on West or Lexis; in the usual situation, counsel for consumers or employees do not know how arbitrators cash out the value of particular kinds of claims. Instead, as Cynthia Estlund has put it, mandatory arbitration is a “black hole,” lacking the transparency and publicity that are hallmarks of public process.⁷² The Supreme Court has heightened the secrecy that surrounds arbitration, and, again, has done so by narrowing appellate jurisdiction, even when parties explicitly seek federal review. In *Hall Street Associates v. Mattel*, the Court considered whether the parties could contract to allow a court to vacate, modify, or correct an award where the arbitrator’s conclusions of law were erroneous.⁷³ Section 10 of the FAA lists several, quite limited, bases—such as corruption and fraud—for a court to vacate, modify, or correct an arbitral award.⁷⁴ The question in the case was whether those bases were exclusive or whether the parties, since arbitration was a matter of contract, could choose other bases for federal court appellate review. The Court held that the bases in section 10 were exclusive, reasoning that Congress had limited appellate review to rather extreme instances, which it laid out in detail in the statute.⁷⁵

By effect, *Hall Street* further enlarged the private sphere and insulated it from public scrutiny, removing from Article III courts the power to shine some light into the black hole of arbitration. Because the grounds listed in section 10 are so limited, arbitral awards that stray far from the meaning or commands of public regulatory laws are protected from judicial scrutiny. The Court thus suppressed litigant choice, notwithstanding the FAA’s silence, and undermined faithful public regulatory enforcement in cases in which choice would afford judges and public process a greater role in overseeing arbitral decisions. The case thus shows how corporate actors seek not only to control public process, but also to dismantle or enervate it and substitute privatized procedures that better serve their interests at the expense of public values. As a result of *Hall Street*, federal circuit courts are now split over whether an arbitrator’s *manifest disregard* for the law—including disregard of laws that protect workers and consumers—is a permissible ground for vacating, modifying, or correcting an award.⁷⁶

⁷² Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

⁷³ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, (2008).

⁷⁴ 9 U.S.C. § 10 (2006 ed.).

⁷⁵ 552 U.S. at 583–88. The dissents found this textual argument that the statute was meant to be comprehensive to be strained, and argued that the question was whether the FAA *precluded* federal courts from enforcing an arbitration agreement that gives the court the ability to set aside an error of law. Since it did not, the parties should have been able to include the provision. *See id* at 593–96 (Stevens, J., dissenting); at 596 (Breyer, J., dissenting).

⁷⁶ Several circuits concluded that manifest disregard for the law is not a valid basis for vacating, modifying, or correcting an award. *See Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120,

One concern about the corporate push for arbitration has been that it is designed to suppress claims, not merely to shift them to private fora.⁷⁷ Although data are limited and not easily accessible, available information confirms that injured parties are less likely to arbitrate than they are to litigate—in part because of the difficulty of finding a lawyer in arbitration—meaning that contracting around jurisdiction can amount to contracting around liability.⁷⁸ The Court’s ban on aggregate mechanisms in arbitration has contributed to this process of claim suppression by decreasing lawyer incentives to provide representation. The result is that jurisdictional doctrines undermine the application and enforcement of regulatory law.

Recent trends suggest some push-back by segments of the bar that are finding creative ways to design informal methods of aggregation that facilitate the filing of masses of individual arbitration claims, representing at times thousands of plaintiffs individually.⁷⁹ And, true to form, corporate parties once again are attempting to tilt all of the advantages of forum choice in their own favor, finding ways to weasel out of arbitration clauses and to get back into federal court, driven by calculations that court adjudication would be more favorable and less expensive than one-by-one arbitration involving often thousands of claims—even though one-by-one arbitration is what those corporate parties chose.⁸⁰ While federal courts have not as of yet acquiesced in these efforts, the process of litigating these motions saps resources from plaintiffs and creates a system of delay and confusion.⁸¹

124 n. 3 (1st. Cir. 2008); *Southern Communications Services, Inc. v. Thomas*, 720 F.3d 1352 (3rd Cir. 2013); *Jones v. Michaels Stores, Inc.*, 991 F.3d 614, (5th Cir. 2021); *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.* 660 F.3d, 281, 285 (7th Cir. 2011); *Medicine Shoppe International Inc. v. Turner Investments, Inc.*, 614 F.3d 485 (8th Cir. 2010); *Hall Street in Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010). Others find that it survives in one form or another. *See Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008); *Comedy Club Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Warfield v. Icon Advisers Inc.*, 26 F.4th 666 (4th Cir. 2022); *THI of New Mexico at Vida Encantada, LLC v. Lovato*, 864 F.3d 1080 (10th Cir. 2017).

⁷⁷ *See COLVIN & STONE, supra* note 35, at 21–22.

⁷⁸ *See id.*

⁷⁹ *See generally* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. _ (forthcoming 2022)..

⁸⁰ *See, e.g.,* *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062 (N.D. Cal. 2020); *Jef Feeley, BuzzFeed Sues to Block Arbitration Claims Over Initial Offering*, BLOOMBERG (Apr. 22, 2022), <https://www.bloomberg.com/news/articles/2022-04-22/buzzfeed-sues-to-block-arbitration-claims-over-initial-offering>.

⁸¹ *See* *Abernathy*, 438 F. Supp. 3d at 1064–66 (compelling arbitration for the employees who had agreed to the arbitration clause and denying DoorDash’s motion to stay the proceedings); *see also id.* at 1067 (noting the irony of the defendant demanding arbitration and then reneging when the workers actually sought to arbitrate).

B. Lock In: Removal

The arbitration cases illustrate ways in which corporate parties seek to restrict judicial power to hear claims when an alternative, private forum effectively sounds the death knell for many of those claims. But the manipulation of jurisdiction also involves the expansion or robust exercise of federal court power in ways that conform with the interests of corporate parties. Absent an arbitration clause, it has long been understood that defendants tend to prefer having their claims heard in federal court.⁸² Federal courts are thought to be less solicitous of plaintiffs' claims than state courts and federal courts' procedures are in many instances more restrictive than those in state court.⁸³ Thus, corporations have sought to remove actions filed in state court to federal court, effectively ending state courts' authority to hear the claims. Under the federal removal statute, defendants may seek to remove a case to federal court so long as the federal courts have concurrent jurisdiction (with a few exceptions).⁸⁴ Plaintiffs may later seek to remand the case back to state court if the federal court lacks jurisdiction or the removal was defective in some way.⁸⁵ Removal has been a battleground for jurisdictional power in numerous ways and has resulted in various adverse outcomes for plaintiffs.

i. Fraudulent and Erroneous Removal

Consider first fraudulent and erroneous removal. Fraudulent removal “occurs when a removing defendant’s assertion of federal jurisdiction is made in bad faith or is wholly insubstantial.”⁸⁶ For example, after a plaintiff files a claim in state court, defendants have removed to federal court only to file a motion to dismiss arguing that the federal court lacks subject matter jurisdiction over the case.⁸⁷ While plaintiffs may seek to remand the case back to state court, and sometimes successfully do, the process saps time and resources.⁸⁸ Worse yet, in some instances, the federal court

⁸² See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 604 (1998) (exploring how corporate defendants prefer removing to federal court rather than litigating in state court); Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961 (1995) (reviewing empirical evidence on corporate party preference for litigating in federal court).

⁸³ As Edward Purcell shows, these views and preferences are deeply rooted in U.S. legal history. See EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, 87–103, 127–47 (1992) (overviewing corporate battles over removal and against perceived local prejudice).

⁸⁴ See 28 U.S.C. § 1441(a).

⁸⁵ See *id.* § 1446(d) (providing that after removal “the State court shall proceed no further unless and until the case is remanded”).

⁸⁶ Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. F. 87, 87–88 (2021).

⁸⁷ See *id.* at 88.

⁸⁸ See *id.* at 89 (“[F]raudulent removal wastes judicial resources, needlessly delays proceedings, and offends notions of federalism.”).

dismisses the removed case rather than remanding it, effectively allowing the defendant to end the litigation even though removal was improper.⁸⁹

Fraudulent removal connects to a larger phenomenon of erroneous or dubious removal practices. Sometimes a defendant removes to federal court, apparently knowing that the forum lacks jurisdiction and that the case will likely be remanded, but does so strategically, in an effort to exhaust a weaker party. Theodore Eisenberg and Trevor Morrison studied this phenomenon of erroneous removal over a twenty-year period and found growing instances of a defendant's opting for the federal forum, simply to "run up attorney fees and other costs, thus sapping the poorer party's litigation resources and harming its bargaining position."⁹⁰ One example involved a defendant who removed the same case to federal court four times, only to have the case remanded back to state court each time, but with the effect of derailing a jury trial.⁹¹

Another questionable removal practice involves the federal officer removal statute. The statute somewhat liberally allows the United States, any federal agency, or "any officer (or any other person acting under that officer) of the United States or of any agency" to remove an action to federal court.⁹² Importantly, deviating from removal standards elsewhere, a federal officer may remove even when the only federal issue involved in the litigation is a federal defense, deviating from the regular rule that federal court jurisdiction must be evident upon a plaintiff's well-pleaded complaint and not based on a defense.⁹³ Corporate defendants have jumped on the "acting under" language to argue that they are covered by the statute—claiming in various instances that they are so heavily regulated and directed by government agencies that they "act under" their authority.⁹⁴ And while many courts have rejected such claims, various federal district courts have permitted corporate defendants to remove their actions to federal court under the statute.⁹⁵ Moreover, the Supreme Court has made it advantageous for corporate defendants to seek removal under the federal officer statute, since that basis for jurisdiction allows for appellate review not

⁸⁹ See *id.* at 92 ("Worse yet, sometimes a case will be dismissed rather than remanded, triggering further adverse consequences for plaintiffs.").

⁹⁰ Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 552 (2005).

⁹¹ See *Smith v. Life Insurance Co. of Georgia*, No. 4:04CV97 (N.D. Miss., May 28, 2004).

⁹² See 28 U.S.C. § 1442 (2018)(permitting removal when the action is against "The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity....").

⁹³ See, e.g., *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) ("[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action....")

⁹⁴ See Lonny Hoffman & Erin Horan Mendez, *Wrongful Removals*, 71 FLA. L. REV. F. 220, 225–26 (2020).

⁹⁵ See, e.g., *Watson v. Philip Morris Cos.*, 551 U.S. 142, 154 (2007).

otherwise available when cases are remanded, and the Court has read the statute broadly, permitting review of all bases of removal jurisdiction.⁹⁶

ii. Snap Removal

“Snap” removal is yet another—and significant—instance of corporate defendants manipulating forum choice, and they are able to do so because of their superior litigation resources and because courts allow them to deploy those resources in ways that are incompatible with the purposes of a specific jurisdictional grant. Typically, if a plaintiff brings an action in state court and a defendant is a citizen of that state, the defendant may not remove to federal court if the basis of removal is that the federal court has diversity jurisdiction.⁹⁷ The federal removal statute thus states, “A civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”⁹⁸ The logic is that federal courts exercise diversity jurisdiction to ward against local bias, but when a defendant is a citizen of the state in which the plaintiff has brought suit, such concerns are absent and the constitutional basis for removal is not present.⁹⁹

Defendants, however, have jumped on the “properly joined and served” language to make creative—and often successful arguments—to get around the statute and remove local cases to federal court. As various commentators have explained, the language was added to stop plaintiffs in state court from joining but never serving a nominal defendant who is a citizen of the forum-state, thus blocking an out-of-state defendant who is the real party-in-interest from being able to remove the action on the basis of diversity jurisdiction.¹⁰⁰ However, corporate defendants who

⁹⁶ See *BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. ---, 141 S. Ct. 1532 (2021) (interpreting 28 U.S.C. § 1447(d) to permit appellate review of all asserted grounds for removal, and not only of removal based on the federal officer statute, 28 U.S.C. § 1442, or the civil rights removal statute, 28 U.S.C. § 1443). BP involved a state court action filed by the City of Baltimore against oil and gas companies for misrepresentations contributing to climate change. As Justice Sotomayor warned in dissent, the majority’s reading of the statute, which she found was not required by the text of the statute, could easily “reward defendants for raising strained theories of removal under § 1442 or § 1443 by allowing them to circumvent the bar on appellate review entirely.” *Id.*, slip op. at 7 (Sotomayor, J., dissenting).

⁹⁷ See 28 U.S.C. § 1441(b)(2) (2018).

⁹⁸ *Id.*

⁹⁹ See, e.g., Thomas O. Main, Jeffrey W. Stempel, David McClure, *The Elastics of Snap Removal: An Empirical Case Study of Textualism*, 69 CLEV. ST. L. REV. 289, 293–94 (2021) (arguing that because diversity jurisdiction is based on bias, the limits on removal in the statute “prevent[] removal of a diversity case by a citizen of the forum state” because “a local defendant needs no escape from their home court.”)

¹⁰⁰ See, e.g., Hoffman & Mendez, *supra* note 94, at 223 (“It’s clear that what Congress had in mind [in drafting the “properly joined and served” language] was to stop a plaintiff from merely naming a non-diverse defendant solely to destroy complete diversity but intentionally never serving them, reflecting her lack of interest in actually including them as a party.”); Adam B. Sopko, *Swift Removal*, 13 FED. CTS. L. REV. 1, 9 (2021) (“Congress’s intent in drafting § 1441 in general and the forum

are in-state defendants *and* real parties-in-interest have the resources to learn about a lawsuit even before they have been served—largely by monitoring electronic state dockets—and have increasingly filed their notice of removal in the period between filing and service.¹⁰¹ The argument is that removal is permissible because they have not yet been “properly joined and served.” This practice of “snap” removal permits local defendants to remove on the basis of diversity jurisdiction, even though the case was filed in their local state court in a state where they are a citizen, and the statute plainly bars their entry into federal court.

Many judges have adopted a wooden interpretation of the statute and permitted the practice, concluding that technically, the forum defendant, having not yet been served, could remove, even though, had that party been served, the provision would prohibit removal.¹⁰² Other judges have found that this interpretation goes against the purposes of diversity jurisdiction and facilitates the kind of gamesmanship the statutory provision was drafted to avoid.¹⁰³ The practice, however, has been allowed by an increasing number of federal courts, and the most recent study found that defendants who pursue snap removal succeed approximately ninety percent of the time.¹⁰⁴ The study shows that the practice is becoming more prevalent, is almost always used by in-state corporate defendants in suits brought by individual

defendant rule in particular was to prevent bias. Specifically, judges and scholars argue the purpose was to prevent state court bias against out-of-state defendants by providing a means to access a neutral federal forum. The presence of a forum defendant obviates such a need.”).

¹⁰¹ See Sopko, *supra* note 100, at 7 (finding that “snap removals arise largely from electronic monitoring of state dockets, rather than from intentionally delivering the complaint before formal service”).

¹⁰² See, e.g., *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 707 (2d Cir. 2019) (“Put simply, the result here—that a home-state defendant may in limited circumstances remove actions filed in state court on the basis of diversity of citizenship—is authorized by the text of Section 1441(b)(2) and is neither absurd nor fundamentally unfair. We therefore have no reason to depart from the statute’s express language...”); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153 (3d Cir. 2018) (“Congress’ inclusion of the phrase ‘properly joined and served’ addresses a specific problem—fraudulent joinder by a plaintiff—with a bright-line rule. Permitting removal on the facts of this case does not contravene the apparent purpose to prohibit that particular tactic.”); see also *O. Main et al.*, *supra* note 99, at 290–98 (exploring how textualist methodology leads some judges to interpret the removal statute to permit snap removal).

¹⁰³ See, e.g., *Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 1222 (M.D. Tenn. 2017) (“If, however, the [stature] is read to allow snap removals, this could encourage defendants to engage in a different gamesmanship—racing to remove before service of process is effected on the forum defendant.”) (internal quotation marks omitted); *Fields v. Organon USA Inc.*, No. 07-2922 (SRC), 2007 WL 4365312, at *5 (D.N.J. Dec. 12, 2007) (“[T]he result of blindly applying the plain ‘properly joined and served’ language of § 1441(b) is to eviscerate the purpose of the forum defendant rule. It creates a procedural anomaly whereby defendants can always avoid the imposition of the forum defendant rule so long as they monitor the state docket and remove the action to federal court before they are served by the plaintiff. In other words, a literal interpretation of the provision creates an opportunity for gamesmanship by defendants, which could not have been the intent of the legislature in drafting the ‘properly joined and served’ language.”).

¹⁰⁴ See Sopko, *supra* note 100, at 35 (finding that the snap removal tactic prevailed in approximately 87 percent of the cases).

plaintiffs, and that it “increases existing asymmetries between litigants with economic resources and legal sophistication and those without.”¹⁰⁵

iii. Waiver of Removal & Remand

It is also worth briefly mentioning waiver as it relates to forum choice and a party’s strategic use of jurisdiction. Under judge-made doctrines, defendants can waive their rights to remove cases to federal court, just as plaintiffs can waive their rights to remand those cases back to state court.¹⁰⁶ A recent study by Joan Steinman compared the doctrines governing defendants’ waiver of the right to remove and plaintiffs’ waiver of the right to remand to see if there was parity and consistency.¹⁰⁷ There was not. She found that the doctrines substantially favor defendants, making it much harder for them to waive their right to remove and much easier for plaintiffs to waive their right to remand.¹⁰⁸ Her study concludes that “courts have created bodies of law concerning waiver of the right to remove and waiver of the right to remand that are strongly skewed against plaintiffs and in favor of federal court adjudication, even in cases that raise only substantive state law issues.”¹⁰⁹

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These removal practices result in increasing costs and delays for plaintiffs, exacting a toll on those plaintiffs without the resources or wherewithal to withstand jurisdictional gamesmanship. These practices also affect the merits (or the inability of a plaintiff to reach the merits). Significantly, plaintiffs have higher loss-rates in removed cases than they do in cases filed as an original matter in federal court. Leading empirical studies (from 1998 and 2002, but showing trends over a thirty-year period) support the anecdotal view that forum choice matters to case resolution and that removal provides corporate defendants with a more favorable forum; they also suggest “the possibility of increasing abuse of removal as a forum-selection device.”¹¹⁰ Indeed, in a more recent study, Zachary D. Clopton has coined the phrase “catch and kill jurisdiction” to describe the general phenomenon of parties removing cases to federal courts where judges are “willing and able to expand federal jurisdiction,” may

¹⁰⁵ *See id.* at 35–41.

¹⁰⁶ Joan Steinman, *Waiving Removal, Waiving Remand—the Hidden and Unequal Dangers of Participating in Litigation*, 71 FLA. L. REV. 689, 695–96 (2019) (exploring the logic and evolution of waiver doctrines in the removal and remand contexts).

¹⁰⁷ *See generally id.*

¹⁰⁸ *See id.* at 691–92 (laying out her findings); *id.* at 707–61 (comparing and distinguishing the remand and removal waiver doctrines).

¹⁰⁹ *Id.* at 691–92.

¹¹⁰ Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L REV. 119, 122 (2002); Clermont & Eisenberg, *supra* note 86.

be “hostile to a class of litigation or litigants,” and where those judges, after asserting jurisdiction, effectively “kill” the claim.¹¹¹

These removal practices, when they involve statutory claims, contribute to a regime of non-enforcement and diminished enforcement in which regulatory protections are slowly gutted through the steady accretion of precedent dismissing cases even when the basis for dismissal is unrelated to the merits.¹¹² Removal of state law claims also produces comparable effects on state regulatory authority, as shown by parallel experience under the Class Action Fairness Act (CAFA).¹¹³ CAFA has facilitated a process that increasingly shifts state law class actions to federal courts, elevating federal judges, without significant expertise in state common law, to be the primary interpreter state law, producing what Samuel Issacharoff and Florencia Marotta-Wurgler have called a “hollowed out common law” that undermines state regulatory interests.¹¹⁴

C. Throw Out: Primary Jurisdiction

Our final example is that of primary jurisdiction, which involves federal courts’ relinquishing—in theory only temporarily—their jurisdiction in favor of an administrative agency. Primary jurisdiction, initially devised as a narrow, discretionary abstention doctrine, permits a federal court to stay or dismiss a case without prejudice to allow an administrative agency to first address an issue in the litigation when “enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”¹¹⁵ The doctrine arose in rate-setting and labor disputes, where referring the issue to a federal agency was justified either by the agency’s exclusive authority over the issues in the litigation or a strong demand for the agency to answer

¹¹¹ Zachary D. Clopton, *Catch and Kill Jurisdiction*, 120 MICH. L. REV. _ (forthcoming 2022), , available at SSRN: <https://ssrn.com/abstract=4061193>.

¹¹² *Id.*

¹¹³ See, e.g., JoEllen Lind, *Procedural “Swift”: Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 719 (2004) (arguing that “when Congress deploys minimal diversity to make access to federal courts available in class action and mass tort cases there are potential risks to the role of states in promoting the democratic values of political participation, transparency, and accountability”); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1472 (2006) (positing that “it is difficult to avoid the conclusion that” the provision of a federal forum for state law class actions on a theory of minimal diversity under the Class Action Fairness Act “was designed to offer absolution to potential defendants in what are termed ‘negative value’ class actions, such as consumer cases”).

¹¹⁴ Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. Rev. 600, 615, 628, 635 (2020) (documenting that “the vast majority” of all types of contract cases are heard in federal, and not state, court, disrupting “the normal hierarchical ordering of the law” and reducing the production of law “as a public good”).

¹¹⁵ *Ellis v. Tribune Television Co.*, 443 F.3d 71, 81 (2d Cir. 2006) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). The “discretionary doctrine [is] used to fix forum priority when the courts and an administrative agency have concurrent jurisdiction over an issue.” *Mrs. W. v. Tirozzi*, 832 F.2d 748, 758–59 (2d Cir. 1987).

the question to provide regulatory stability and coherence.¹¹⁶ However, primary jurisdiction is an emergent terrain for corporate entities to manipulate forum choice, to delay or derail litigation, and to opt in favor of a decision-maker likely to be more favorable to business interests, even on issues outside administrative expertise.

i. *Amazon* and State Law

Amazon v. Palmer, currently on appeal before the U.S. Court of Appeals for the Second Circuit,¹¹⁷ is a prime example.¹¹⁸ Plaintiffs are employees at an Amazon warehouse in New York City—larger than fourteen football fields and one of the largest in the nation—and their family members.¹¹⁹ They allege claims arising from Amazon’s failure to comply with New York state nuisance and health and safety law in responding to the COVID-19 pandemic, including a violation of Amazon’s duty under New York Labor Law § 200 to “provide reasonable and adequate protection to the lives, health and safety of all persons employed” at the facility.¹²⁰ Amazon sought to dismiss the claims, arguing that OSHA had primary jurisdiction over the matter. The district court granted the motion to dismiss, asserting that “courts are not expert in public health or workplace safety matters, and lack the training, expertise, and resources to oversee compliance with evolving industry guidance” and that the plaintiffs’ “claims and proposed injunctive relief go to the heart of OSHA’s expertise and discretion.”¹²¹

The reading of primary jurisdiction asserted by Amazon and accepted by the district court is overly expansive and needlessly shrinks judicial power. First, this is not an area where OSHA had sought to regulate. OSHA both had not opined on and seemingly had no intent to opine on the workplace safety issues raised by plaintiffs.¹²² While the agency supplied some guidance to workplaces with regard to COVID-19, it had not engaged in any rulemaking or given notice that it would. Referring the plaintiffs to OSHA thus made little sense. As one court put it in another case, “Common sense tells us that even when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency is aware of but has expressed no interest in the subject matter of the litigation.”¹²³

In addition, *Palmer* is about the meaning of state law, which should be interpreted by judges, not OSHA. Primary jurisdiction conventionally has provided a

¹¹⁶ Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO ST. L.J. 541, 541–47 (2017) (exploring the historical evolution of the doctrine).

¹¹⁷ *Palmer v. Amazon.com, Inc.*, No. 20–3989 (2d. Cir.)

¹¹⁸ *See Palmer v. Amazon.com, Inc.*, 498 F. Supp. 3d 359, 364 (E.D.N.Y. 2020).

¹¹⁹ *See id.* at 364–66.

¹²⁰ New York Labor Law § 200.

¹²¹ *Palmer*, 498 F. Supp. At 370.

¹²² For further development of this argument, see Brief of Amici Curiae Law Professors in Support of Appellants and Reversal (2021).

¹²³ *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 791 (9th Cir. 2015).

basis for abstention when federal courts must decide federal claims involving issues that Congress has committed to a federal agency.¹²⁴ However, courts have rightly been hesitant to apply the doctrine where the claims arise under state law.¹²⁵ The underlying federal statute empowering OSHA does not preempt state-law claims or task OSHA with resolving state-law workplace safety issues.¹²⁶ The workers' claims against Amazon involve issues of state nuisance public health law, and the interpretation of those laws is squarely outside OSHA's jurisdiction.¹²⁷ The district court's invocation of the doctrine stretches the primary jurisdiction doctrine beyond any sensible limit and creates needless delay—which is especially harmful in litigation arising during a pandemic and based on risks to workers' health and safety.¹²⁸

ii. “Circumforaneous Litigants”

Palmer both reflects and draws from a larger history of corporations seeking to expand primary jurisdiction well beyond its initial confines. In various cases, including some sanctioned by the Supreme Court, federal courts have relied upon the doctrine to permit an agency to offer advice on an issue that is tangential to the case—as in one case where the Supreme Court permitted referral to an agency to see if there was a violation of the rules of the Commodity Exchange Act that might bear upon the antitrust claims in the case.¹²⁹ In dissent, Justice Marshall questioned why the federal district court should “stay its hand pending action by an agency which in all likelihood lacks the statutory power to resolve an issue in the lawsuit” and reasoned that “[a]n agency cannot have primary jurisdiction over a dispute when it probably lacks jurisdiction in the first place.”¹³⁰ Put otherwise, the case was about the Sherman Act, which the court was well-positioned to interpret, not the Commodity Exchange Act.

¹²⁴ See Brief of Amici Curiae, *supra* note 122, at 14 (“The paradigmatic application of the doctrine of primary jurisdiction is when a court faces a federal claim that depends on a question of federal law, the resolution of which Congress has committed to a federal agency.”).

¹²⁵ See, e.g., *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) (declining to apply primary jurisdiction to a state common-law claim of fraudulent misrepresentation in part because “[t]he standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts”).

¹²⁶ The OSH statute “does not “diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.” 29 U.S.C. § 653(b)(4).

¹²⁷ See Brief of Amici Curiae, *supra* note 122, at 20 (“OSHA does not set New York law, and New York workplace safety and health requirements may exceed federal requirements—especially where, as here, OSHA has already declined to issue federal requirements.”).

¹²⁸ Abstention in favor of an administrative agency's primary jurisdiction is first-cousin to the

¹²⁹ *Ricci v. Chicago Mercantile Exchange and Chicago Mercantile Exchange v. Deaktor*, 409 U.S. 289 (1973).

¹³⁰ *Id.* at 309–10 (Marshall, J., dissenting).

Justice Marshall expressed concern, presciently, about the consequences of liberally dispatching plaintiffs to agencies that often had no obligation to respond to their claims. Among his concerns were situations “[w]here the plaintiff has no means of invoking agency jurisdiction, where the agency rules do not guarantee the plaintiff a means of participation in the administrative proceedings, and where the likelihood of a meaningful agency input into the judicial process is remote....”¹³¹ Yet federal courts, responding to motions made by corporations, abstain in favor of primary jurisdiction in precisely these situations. In various cases arising under California food-labeling law, for example, courts have invoked primary jurisdiction to dismiss or stay proceedings, sending plaintiffs off to the FDA, which has declined to respond to their inquiries.¹³² In other cases, referrals have been made when the agency had no mechanism permitting a party to raise the issue, was not authorized to resolve the issue, or where the issue was not necessary or substantially relevant to resolving the claim.¹³³ The circuit courts are divided on the doctrine’s use; one federal court of appeals pointedly stated that the doctrine “has created a confused class of circumforaneous litigants, wandering perplexedly from forum to forum in search of remediation.”¹³⁴

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Primary jurisdiction began as a doctrine about expertise and authority. But without a showing that abstention will promote regulatory goals, a court’s reliance on the doctrine allows corporate parties to delay case disposition, to drive up costs, and to undermine statutory protection.¹³⁵ The costs of the delays for plaintiffs are significant. In some cases, litigants have been delayed from pursuing their actions in federal court for five or even ten years.¹³⁶ In other instances, defendants have used the delay created by the doctrine to seek changes in the law that have mooted the litigation.¹³⁷ Even dismissals without prejudice pose the risk to plaintiff that a claim

¹³¹ *Id.* at 321 (Marshall, J., dissenting).

¹³² *See, e.g.*, *In re Gen. Mills, Inc. Kix Cereal Litig.*, No. 12-249(KM), 2013 WL 5943972, at *1 (D.N.J. Nov. 1, 2013); *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at *9 (N.D. Cal. July 25, 2013); *Cox v. Gruma Corp.*, No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013); *Astiana v. Hain Celestial Grp., Inc.*, 905 F. Supp. 2d 1013, 1016-17 (N.D. Cal. 2012), *rev'd and remanded*, 783 F.3d 753 (9th Cir. 2015); *see also Winters, supra* note 116, at 579–85 (describing a series of FDA cases involving primary jurisdiction).

¹³³ Paula K. Knippa, *Primary Jurisdiction Doctrine and the Circumforaneous Litigant*, 85 TEX. L. REV. 1289, 1305–06 (2007) (describing this “myth of referral”).

¹³⁴ *New Eng. Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 158-59 (1st Cir. 1989) (internal citation and quotations omitted).

¹³⁵ *Id.* at 541 (criticizing the use of primary jurisdiction as “a tool that permits courts to stay or dismiss a case while seeking agency advice on a particular issue, without a finding that such a referral is necessary to forward the purpose of the regulatory scheme”).

¹³⁶ *Miss. Light & Power Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976) (eleven year delay due to primary jurisdiction); *J.M. Huber v. Denman*, 367 F.2d 104 (5th Cir. 1966) (five year delay due to primary jurisdiction); *see also Knippa, supra* note 133 (describing common delays).

¹³⁷ *See Knippa, supra* note 133, at 1319 (describing mooted cases).

will become time barred.¹³⁸ And from the public’s perspective, federal courts’ temporary abandonment of jurisdiction is another lost opportunity to enforce federal law, contributing further to a deregulatory campaign to undermine existing federal law.

II. CONSTRUCTING THE OLIGARCHIC COURTHOUSE

How did these doctrinal jurisdictional shifts come to be, and what should one make of them together? In one sense, it is surprising that federal judges have acquiesced in let alone supported a corporate project to transform their subject matter jurisdiction. Federal judges enjoy political independence, professional prestige, and financial protection. As such, scholars generally view them as invulnerable to, or at least insulated from, raw forms of capture associated with administrative agencies and other non-Article III decision makers.¹³⁹ Nevertheless, over time a set of jurisdictional practices has developed that constitute the infrastructure and circuitry of what we dub the oligarchic courthouse—a legalized system that, we argue, encourages economic and political concentration, thwarts democratic decision-making, and tilts in favor of market deregulation and against statutory protection of less-resourced persons. This Part historicizes the concept of an oligarchic courthouse in earlier struggles over jurisdiction, describes its current form, and explores factors exogenous to courts that have contributed to its rise.

A. Early Foundations: Jurisdiction and the Struggle Against Oligarchy

The history of parties seeking to control forum choice is as old as the federal courts. However, the current moment of jurisdictional transformation perhaps has its closest analogue in the expansion of federal court jurisdiction at the turn of the Twentieth Century. At that time, jurisdiction came to be at the center of a struggle over corporate power and regulation that prompted a constitutional confrontation over oligarchy and democracy, in an episode that lays the foundations for understanding the rise of the oligarchic courthouse today.

Then, as corporations sought to cement their place in a national economy and to resist regulatory pressures, jurisdiction became a battleground for keeping claims out of state courts. And then, as now, federal courts adapted their jurisdictional

¹³⁸ *Id.* at 1305 (explaining that dismissals under the doctrine can “impose[] the very real risk that one’s cause of action will become time-barred by the running of the statute of limitations or that one’s claim for injunctive relief may be rendered moot by the mere passage of time and absence of judicial oversight”).

¹³⁹ See, e.g., Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 *BYU L. REV.* 827, 827 (exploring, through the lens of public choice theory, the institutional structures that make judges unlikely to be captured); Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, in *REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* 11, 19–20 (Daniel P. Kessler ed., 2010) (exploring the features that make judges less likely to be captured than agencies).

practices to serve corporate interests. As part of a larger strategy of growing the national economy and resisting state and federal regulatory interventions, Congress passed a series of removal statutes in the decades after the Civil War, seeking to redirect litigation involving corporations into the federal courts.¹⁴⁰ Federal judges interpreted the laws broadly, as historian Howard Gillman has written, “authoriz[ing] the removal into federal courts of any case that raised an issue of federal law or that otherwise fell within the federal judiciary’s Article III jurisdiction (such as diversity jurisdiction).”¹⁴¹

Scholars have connected these efforts to a larger Republican Party focus on economic nationalism—what Gillman has characterized as a “preoccupation with the defense of property and economic respectability for large-scale enterprise[s],” driven by a vision of building a national capitalist market largely free from regulatory control.¹⁴² Republican leaders sought to enlist federal courts in promoting economic nationalism by “redirect[ing] civil litigation involving national commercial interests out of state courts and into the federal judiciary,” believing that the federal courts would be “forums of order for national commercial interests seeking a hearing free from the interests and perspectives that dominate state proceedings.”¹⁴³

To achieve this nationalist goal, Republicans thus sought to enlarge the federal courts’ jurisdiction by expanding removal jurisdiction and vesting federal question jurisdiction. They also sought to staff the courts “with judges who were ideologically sympathetic to this new mission.”¹⁴⁴ They favored judges with “social and professional backgrounds [that] disposed them towards the viewpoints advocated by corporations.”¹⁴⁵ As Edward Purcell’s research has confirmed, Republican appointees in the aftermath of the Civil War were “a remarkably similar, if not insular, social group” and were connected to “powerful political and economic actors . . . trained and experienced at the bar, steeped in the revered common law, and coming largely from the ranks of the corporate elite.”¹⁴⁶

¹⁴⁰ See Gillman, *supra* note 18, at 512, 515 (describing the passage of various removal statutes).

¹⁴¹ *Id.* at 518.

¹⁴² *Id.* at 516 (quoting ERIC FONER, RECONSTRUCTION, AMERICA’S UNFINISHED REVOLUTION, 1863–1867, 517, 522 (1988)). On the relation between Republican economic policies and Southern Reconstruction, see also MARK W. SUMMERS, RAILROADS, RECONSTRUCTION, AND THE GOSPEL OF PROSPERITY: AID UNDER THE RADICAL REPUBLICANS, 1865–1877 (1984).

¹⁴³ Gillman, *supra* note 18, at 517 (internal quotation marks omitted). The pro-business emphasis displaced the Republican earlier concern for judicial protection of freed Black people. See, e.g., Freer, *supra* note 26, at 1095 (“The Republicans, who had championed the cause of freed slaves, now shifted their concern to providing courts that were pro-business.”); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333, 341 (1969) (recounting Republicans “substitute[d] sympathies for entrepreneurial interests in place of their earlier care for the freemen”).

¹⁴⁴ Gillman, *supra* note 18, at 517.

¹⁴⁵ *Id.* at 519.

¹⁴⁶ EDWARD A. PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA 320 (2000).

Diversity jurisdiction also played a role in this project. In a national economy that increasingly exposed plaintiffs to wide-ranging corporate harms, diversity jurisdiction that treated corporations as citizens of their state of charter meant that plaintiffs were very often citizens of different states from corporate defendants.¹⁴⁷ This permitted corporate defendants to liberally remove state actions to federal court. This ability to remove was especially useful because at the time federal courts were considered more expensive and less convenient for plaintiffs; under the regime of *Swift v. Tyson*, their jurisdiction also provided a source for creating alternative rules of decision to those of the state courts.¹⁴⁸ Diversity jurisdiction and removal doctrines thus enabled corporations to, in the words of William Jennings Bryan, “take shelter” in federal courts.¹⁴⁹ And, for some time, corporations were able to secure favorable decisions there, with the “judiciary articulat[ing] legal principles that were consistent with the promotion of a more unfettered national market” and overturning a series of regulatory enactments governing the workplace and marketplace.¹⁵⁰

Lochner is the familiar shorthand to describe the ensuing confrontation between the Court’s corporate-protective doctrines and the Constitution—a confrontation that came to a head in the New Deal.¹⁵¹ As William Forbath and Joseph Fishkin show in a magisterial book, *The Anti-Oligarchy Constitution*, this confrontation was in large part about oligarchy—about how powerful economic actors had amassed great political power, principally in and through the courts, and about resisting and rebalancing power through the legislative process.¹⁵² The exercise of jurisdiction enabled federal courts to protect corporate interests by overturning regulatory laws that would provide some measure of economic security for workers and consumers who regularly dealt with corporations. While the Republican project to instantiate large-scale enterprises in U.S. life largely succeeded, in the clash of the New Deal, the Court ultimately turned away from its deregulatory project and upheld a series of regulatory actions—including the National Labor Relations Act, Social Security Act, and Fair Labor Standards Act.¹⁵³

¹⁴⁷ See *id.* at 66.

¹⁴⁸ 41 U.S. 1 (1842).

¹⁴⁹ *Id.* at 67.

¹⁵⁰ Gillman, *supra* note 18, at 519.

¹⁵¹ For an overview of the labor struggles of the era as they related to *Lochner* and its anti-regulatory agenda, see generally, e.g., WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); Luke Norris, *Constitutional Economics: Lochner, Labor, and the Battle for Liberty*, 28 YALE J.L. & HUMAN. 1 (2016).

¹⁵² See FISHKIN & FORBATH, *supra* note 27, at 251–318.

¹⁵³ See, e.g., Luke Norris, *The Workers’ Constitution*, 87 FORDHAM L. REV., 1459, 1499 (2019) (recounting the histories of the enactment and upholding of the National Labor Relations Act, Social Security Act, and Fair Labor Standards Act).

B. The Rise of the Oligarchic Courthouse Today

Constitutional scholars speak of the New Deal “settlement,” in which the Article III courts have come to defer to Congress’s exercise of its Article I powers in the economic sphere, largely upholding regulatory legislation as valid exercises of the federal commerce power.¹⁵⁴ However, the corporate struggle against regulation never died. To the contrary, courts and rules of procedure have remained a battleground as corporate actors have continued to resist laws aimed at curbing their power over workers, consumers, and the environment. Not surprisingly, corporate actors have resorted to new strategies and reinvigorated older approaches to regain any advantage they thought they had lost. In that effort, corporate resistance has reached a new inflection point through the practice of jurisdictional abuse.

Part of the reason that jurisdiction has centered in corporate anti-regulatory efforts has to do with the prominence of litigation in regulatory enforcement today. Congress and state legislatures have passed a multitude of laws regulating the workplace, environment, and marketplace, and have often at the same time invested citizens with the power to enforce those laws in court.¹⁵⁵ This system of private enforcement of regulatory law provoked a backlash—what Stephen Burbank and Sean Farhang have called a “campaign against private litigation as a tool of federal policymaking.”¹⁵⁶ This campaign was led by Reagan officials who had pro-corporate, “free”-market, and anti-regulatory commitments and initially sought to disarm private enforcement by passing legislation to tame the beast.¹⁵⁷ Even as legislative efforts failed, the project secured important support from the federal judiciary, as an increasingly conservative Supreme Court reinterpreted long-standing procedural doctrines—including those governing pleading, standing, class actions, and more—in restrictive ways that have made it more difficult for the beneficiaries of federal law to maintain regulatory claims against corporate actors.¹⁵⁸

¹⁵⁴ See, e.g., Laura Weinrib, *Breaking the Cycle: Rot and Recrudescence in American Constitutional History*, 101 BOSTON U. L. REV. 1857, 1866 (“Many embrace the so-called New Deal settlement, commonly associated with footnote four of *United States v. Carolene Products Co.*, which calls for deference to legislators and administrators on social and economic issues coupled with judicial enforcement of minority rights and judicial policing of the integrity of the political process.”).

¹⁵⁵ See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.*, 10 (2010).

¹⁵⁶ STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* xix (2017).

¹⁵⁷ See *id.* at 25–64 (exploring several failed, and a few successful, attempts to retrench litigation through the legislative process).

¹⁵⁸ These decisions relate to a range of conventional rules of procedure. See, e.g., *id.* at 130–92; Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L. J. 120 (2011) (pleading); Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS. 5 (1991) (class actions); Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587 (2011) (pre-trial disposition); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004) (arbitration).

The backlash against regulatory enforcement litigation—of which the new phase of jurisdictional abuse is part—has its own pattern, constructed by courts and fueled by distinct yet overlapping interests. The effort is well-organized, well-funded, and well-epitomized by a memorandum prepared by Justice Powell for the Chamber of Commerce in 1971 just before he assumed the bench, in which he argued that the American economic system was “under attack,” and the culprit was litigation by civil rights groups, labor unions, and nonprofits that needed to be reined in.¹⁵⁹ A half century later, caseload data support the view that the campaign has paid off in terms of declining cases, declining plaintiff victories, and declining enforcement.¹⁶⁰ And the jurisdictional decisions, together with those involving other procedural rules and adjudicative trends, have begun to assume a disturbing shape—what we call the oligarchic courthouse.

The oligarchic courthouse is one where the rules for litigation are designed by and favor the interests of powerful economic parties. It is one where a public institution and its practices and policies are transformed to meet private interests at the expense of public goals. The oligarchic courthouse, in addition, has a particular place among other institutions in democracy. Although it often stands not far from legislatures that have created regulatory laws and selected judicial enforcement, the oligarchic courthouse is wired with circuitry that makes it more difficult for members of the public to enforce those laws and to make real their commands in economic and social life. The oligarchic courthouse is now a substantial work-in-progress, clad with more than scaffolding, and it has been rising steadily over the past half-century.¹⁶¹

¹⁵⁹ 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>

¹⁶⁰ The current political situation underscores that while Congress and the President are subject to few practical institutional constraints, Article III courts, and especially the Supreme Court, are even less accountable. Indeed, since the Roberts Court, it seems implausible to associate ideologically driven procedural decisions with Legal Process neutrality.

¹⁶¹ To borrow from the great English historian S.F.C. Milsom, we can think of each jurisdictional ruling as a dot, and the dots are unnumbered; how legal commentators choose to connect the dots requires imaginative and theoretical reconstruction. S.F.C. MILSON, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* xiv (1969); see also David Ibbetson, *Milsom's Legal History*, 76 *CAMBRIDGE L.J.* 360 (2017), available at doi:10.1017/S0008197317000241 (explaining that “[t]he dots may be fixed points, facts if you like, but we can only make sense of them against the background of the whole picture, and the picture can only be known in so far as it is reconstructed”). In our view, the larger concern of oligarchy and democracy ought to shape how the legal community connects these dots and understands the current situation. See also Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 *U. PA. L. REV.* 1823, 1888–89 (2008) (explaining that the Class Action Fairness Act “fit the classic model of federal jurisdictional reform,” but also “to a large extent [was] the product of three sweeping, interrelated and relatively recent developments: the institutionalization of a powerful business-oriented ‘tort reform’ movement, a broad shift in the ideological assumptions that underlay American social and political thought, and the galloping processes of globalization”); see generally Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958*, 3–4 (1992) (introducing the concept of a social litigation system).

C. Factors Contributing to Its Rise

It is no surprise that corporate parties manipulate jurisdiction, seeking to redesign public rules to favor their interests; indeed, one would be surprised if it were otherwise. The question of why judges might participate in constructing this edifice is a more complicated one. To answer the question, it is helpful to broaden the lens to consider the kinds of professional, institutional, and cultural forces that may have predisposed judges to accept corporate arguments and transform jurisdictional doctrines.

One answer has to do with the organizational forces that translate political commitments into legal culture and influence decision-making. Republicans at the turn of the century sought to create an economy of large enterprises and to resist regulatory interventions; Republicans today tend to valorize existing market arrangements and resist many regulatory interventions.¹⁶² But one change has been the organizational channel for translating these ends into legal culture and doctrine. Today, conservative lawyers often affiliate with and organize themselves around the Federalist Society and it has both coordinated lawyers who share this worldview about markets and regulation and inculcated and nourished the worldview.¹⁶³ The Federalist Society is thus part of a “larger conservative agenda to reduce regulation and curtail litigation” (or, to be precise, litigation on behalf of particular parties and to enforce particular claims), and scholars have shown in detail the ways in which it organizes and directs conservative lawyers and shapes U.S. legal developments.¹⁶⁴ Its libertarian framing, emphasizing market freedom, personal autonomy, and meritocratic elitism, both attracts and arguably shapes judges who may be sympathetic to corporate efforts to transform jurisdictional doctrines in ways that construct an oligarchic courthouse to favor deregulation and support resource concentration.

The account, however, would be significantly incomplete if it focused only on the Republican Party side of the ledger. The oligarchic courthouse also can be understood as a byproduct of longstanding judicial appointment decisions by Democratic presidents and the Democratic Party. Through the beginning of the Biden Administration, Democratic presidents have followed Republican presidents in appointing federal judges who come primarily from the corporate bar and prosecutorial positions.¹⁶⁵ There has been a dearth of judges on the federal district

¹⁶² See, e.g., BURBANK & FARHANG, *supra* note 156, at 9 (exploring the pro-business and anti-regulation views of many Republicans).

¹⁶³ For a comprehensive account of the Federalist Society’s role in American law and legal development, see generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR THE CONTROL OF LAW* (2008).

¹⁶⁴ Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1871 (2014).

¹⁶⁵ 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/>

courts and courts of appeal who primarily represented plaintiffs or were public defenders or civil rights or “poor people’s” lawyers before assuming the bench.¹⁶⁶ There is some evidence that this is changing with the Biden Administration’s appointments, but the federal bench is still remarkably slanted toward business interests and will likely be for some time.¹⁶⁷ Judges who have spent their careers defending corporations may be more open to their views about the excesses of litigation, the benefits of privatization, and corporate forum choice in the federal courts. Similarly, many prosecutors leave their posts and go to law firms that represent corporate defendants, and often know or expect that they will do so when they accept their positions as prosecutors.¹⁶⁸ Many are thus connected to the corporate defense bar, and these connections may also predispose them to be sympathetic to corporate claims-making.

The literature on agency capture provides a useful, albeit imperfect, analogue for understanding how judges with such backgrounds might be more disposed towards corporate efforts to transform jurisdiction. Courts are differently situated from agencies in various ways, including those we explored at the beginning of this Part relating to their life tenure and approach to resolving disputes. However, in the agency context, scholars have articulated a set of background forces that make regulators more susceptible to corporate claims, and those background forces also have some explanatory power in the judicial context. Scholars have focused on the cultural forces that dispose regulators to identify with regulated groups and view their claims sympathetically, including those related to group identification, status, and relationship networks.¹⁶⁹ Regulators may be disposed towards the views of regulated parties because they identify with them or view them as part of the same group, view them of similar or high social status, and operate within the same social networks as them. Group identity is a particularly important mechanism because membership in groups can help people organize their views about the world. Thus, a

2020/06/17/486366/startling-lack-professional-diversity-among-federal-judges/; Norris, *supra* note 53, at 516–17 (exploring the professionally slanted nature of the federal bench).

¹⁶⁶ *See id.*

¹⁶⁷ According to a December 2021 report, approximately 20 percent of Biden’s nominees have civil rights experience, 14 percent have plaintiff-side experience, and 4 percent 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>.

¹⁶⁸ *See, e.g.,* Douglas R. Richmond, *As the Revolving Door Turns: Government Lawyers Entering or Returning to Private Practice and Conflicts of Interest*, 65 ST. LOUIS U. L.J. 325, 325 (2021) (“Government lawyers regularly leave public service for private law practice—often through the same revolving door that launched their public careers.”).

¹⁶⁹ *See* James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 11–27 (Daniel Carpenter & David A. Moss eds., 2013) (exploring how cultural capture operates through shared identity, status, and relationships); *see also* J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1555 (2018) (“Cultural capture, where the informal influence of an industry along with the interpersonal relationships among agency employees, is a more amorphous type of capture but likely greatly influences regulators.”).

regulator who “identifies as an economically sophisticated steward of efficient financial markets will adopt different policy positions from someone who identifies as a defender of the ‘little guy’ against large, faceless corporations, even if both share the ultimate objective of increasing the economic welfare of ordinary people.”¹⁷⁰

Somewhat similar dynamics may help to explain judicial solicitude for corporate efforts to manipulate jurisdiction. Judges who hail from corporate practice have experience in the larger milieu of corporate counsel and may identify with corporate counsel as a group, may view other corporate counsel as being of high status, and likely have a roster of relationship networks both among corporate counsel and corporate actors. Similarly, prosecutors who have begun at or plan to join corporate firms—as many prosecutors do upon leaving the government—may have similar forms of cultural affiliation, identifying as a matter of history or future plans with the corporate bar, especially as their peers go off to join corporate firms. In these ways, we can see how cultural context may predispose judges to view certain corporate claims and claimants favorably.

The agency capture literature provides another useful angle for explaining the success of the corporate effort to create an oligarchic courthouse. Scholars have explored how information flows and asymmetries might make regulators more susceptible to the claims of regulated parties.¹⁷¹ These asymmetries result from classic collective action issues: small and motivated regulated parties have much more interest in shaping the flow of information to regulators than the diffuse public does.¹⁷² In the literature on agencies, regulated parties can achieve informational capture by making regulators dependent on them for information, inundating them with information, or manipulating the quality and flow of information in self-serving ways.¹⁷³

¹⁷⁰ Kwak, *supra* note 169, at 14; *see also* Edward A. Purcell, Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 169 U. PA. L. REV. 2583 (2021) (implicit racial bias); Helen Hershkoff, *Some Questions About #MeToo and Judicial Decision Making*, 43 HARBINGER 128 (2019) (implicit gender bias). For a discussion of similar trends in state courts, *see* MICHAEL J. NELSON & JAMES L. GIBSON, *JUDGING INEQUALITY: STATE SUPREME COURTS AND THE INEQUALITY CRISIS* (2021).

¹⁷¹ *See* Anderson, *supra* note 169, at 1560–63 (describing the dynamics of informational capture); Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO 1, 5 (2010) (describing how an agency “might depend on information from the affected entities and lack the means or ability to review that information skeptically”); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1372 (2013) (exploring how disclosure requirements can lead to “information overload” in agencies); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1329–34 (2010) (exploring the dynamics of “information capture”).

¹⁷² *See* Anderson, *supra* note 169, at 1552–53 (locating modern capture theory in problems of collective action); *id.* at 1561 (exploring the relationship between informational capture and collective action problems).

¹⁷³ *See id.* at 1561–63 (exploring each of these dynamics and overviewing the literature on them).

One can observe a somewhat different, yet similar dynamic in the judicial context, where pro-corporate actors leverage the institutional dynamics of court adjudication and procedural rulemaking to produce an overwhelming—and often, descriptively inaccurate or questionable—informational flow and narrative.¹⁷⁴ The structure of adjudication and procedural rulemaking facilitates these information flows. Courts move case-by-case and procedural rulemaking tends to be incremental and reactive.¹⁷⁵ These structures provide an opportunity for corporate actors to provide incomplete information that shapes the judicial view about litigation. For the past fifty years, a series of pro-corporate interests have advanced a negative view about litigation-as-regulation, the excesses of state courts, and liberal procedural rules that leverages the piecemeal nature of court adjudication and procedural rulemaking processes. Whether the topic has been pleading, class actions, discovery, or many others, these actors have painted a consistent narrative of litigation gone awry to support restrictive procedural standards. Since judges are not equipped to gather systematic data on their cases and procedural rulemaking is both reactive and lacks the kinds of informational infrastructures that sophisticated agencies have, corporate parties have in some ways had an easier time shaping and leveraging information asymmetries in the judicial-procedural context.¹⁷⁶

One can see how information flows and asymmetries might affect all of the jurisdictional doctrines surveyed above. Consider removal. In the class action context, narratives about runaway awards and corporate “blackmail” shaped the passage of the CAFA, which we discussed in Part I and which shifts most large class actions out of state court and to federal court.¹⁷⁷ The narratives around the statute cast dim light on state courts and more positive light on federal courts, turning the tide towards removal. Similarly, corporate defendants have advanced a narrative about a litigation crisis and litigation run amok and forcing settlement pressure that has supported the Supreme Court’s restrictive procedural decision-making.¹⁷⁸ This meta-

¹⁷⁴ For a specific critique of the “cost and delay” narrative, see Alexander A. Reinert, *The Narrative of Costs, The Costs of Narrative*, 40 CARDOZO L. REV. 121 (2018); see also Danya Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 ORE. L. REV. 1085 (2021).

¹⁷⁵ See, e.g., Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 476–78 (1993) (critiquing the civil rulemaking process for following an incrementalist model that is piecemeal, restricted in scope, and remedial).

¹⁷⁶ See *id.* (arguing that rather than following an incrementalist model, court rulemaking should follow a comprehensive rationality model—one that identifies goals proactively, evaluates effective methods for achieving them, and selects among alternatives in a way that takes into account of larger context that the rules operate in and values they seek to realize).

¹⁷⁷ See, e.g., Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 743 (2013) (exploring the statute’s enactment history); Norris, *supra* note 165, at 505 (“[CAFA’s] 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.”)

¹⁷⁸ Narratives about corporate defendants beleaguered by discovery costs and frivolous litigation have shaped rule-making to restrict access to discovery and undergird the Supreme Court’s decisions to move to a more restrictive “plausibility pleading” regime in *Twombly* and *Iqbal*. See, e.g.,

narrative about beleaguered corporate defendants and litigation run amok may make judges more susceptible to corporate efforts to lock plaintiffs out of court, lock them into federal court rather than state court, or throw them out of court and to other fora.

These organizational, cultural, and institutional explanations are especially important because the construction of the oligarchic courthouse today differs from the turn of the century episode in another important way: Then, it was Congress that took the lead in enacting statutes facilitating removal, with the federal courts building upon their efforts in interpreting the statutes. Today, congressional behavior—including expanding diversity jurisdiction, establishing the Panel on Multidistrict Litigation, and failing to enact rules of recusal for the Court—have facilitated some of the trends that we emphasize. But the initiative has passed to the Article III courts themselves, with federal courts expanding and constricting jurisdiction largely on their own, exercising their largely uncontrollable and unconstrained discretion, and drawing on older statutory provisions and prudential doctrines—all of which elevates to the fore questions about the background dynamics that might facilitate this judge-driven process.¹⁷⁹ Beyond any differences, however, what unites both eras is judicial use of jurisdiction to transform courts into forums that serve corporate interests by denying enforcement of regulatory laws, exiling under-resourced claimants from federal court, and enabling the “haves” to hoard and leverage adjudicative resources in ways that raise concerns about oligarchy and subvert democratic practice.

III. CRITIQUING THE OLIGARCHIC COURTHOUSE: JURISDICTION & DEMOCRACY

In the fifty years since Galanter warned that the “haves” systemically use their wealth to distort and reap unwarranted advantages from judicial proceedings, corporate power has continued, more and more rapidly, to translate into political power, receiving significant support from courts to effect *de facto* changes to statutes

Norris, *supra* note 165, at 490–92 (exploring how these narratives shaped the pleading context and undergirded the Court’s decisions in *Twombly* and *Iqbal* and how the evidence about discovery suggests an alternative view of discovery). This narrative has persisted despite the fact that the best available data show that discovery time and costs are often either minimal or appropriately scaled to the nature and complexity of the case. See, e.g., Subrin & Main, *supra* note 164, 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*, 39 B.C. L. REV. 683, 684–86 (1998) (gathering studies showing there is little to no discovery in the most litigation).

¹⁷⁹ This is not to underestimate the importance of the 2002 Multiparty, Multiforum Trial Jurisdiction Act and the 2005 Class Action Fairness Act, which “opened the federal courts to more litigation.” See PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, *THE FEDERAL COURTS: AN ESSENTIAL HISTORY* 432–33 (2016) (discussing litigation effects of these statutes).

and regulation through patterns of judicial non-enforcement and diminished enforcement and forms of jurisdictional gerrymandering. Using the courts does not provide corporations with a sure-fire way to influence public policy; alone, it is not a silver bullet. But litigation based on a strategy of jurisdictional abuse provides an important plank in a broader pro-business, deregulatory campaign, supported by information flows that can sustain the practice and can be especially useful when legislative change is not feasible because of its salience or cost. Given the longtime efforts of business to use courts to their political advantage, one might see the current use of jurisdiction as merely “business as usual.” We argue, instead, over time jurisdictional practice has altered democratic practice, contributing to oligarchic conditions that have turned democratic mechanisms against democracy.¹⁸⁰

Oligarchic conditions are most clearly understood—and critiqued—when powerful economic actors determine “substantive” public policy and shape it to their own ends. But when corporate forces play an outsized role in shaping the state’s adjudicative procedures, they can undermine democracy in equally powerful, if more subtle, ways. In particular, judicial jurisdiction is a political resource, and the design and application of jurisdictional doctrines affect the possibilities for, and opportunity structure of, democratic mobilization and contestation, bearing upon the openness or closedness of the state. Manipulations of jurisdiction by powerful actors affect the ability of other, less-resourced persons to engage in democratic contestation over the meaning of rights and norms and to effectuate rights that democratic majorities have enacted on their behalf. As such, oligarchic conditions, and their increasing embeddedness in the form of an oligarchic courthouse, pose both a threat to democratic governance and contribute to larger processes of democratic decline in the U.S.

¹⁸⁰ On the rise of oligarchic conditions in the U.S., see, e.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564 (2014) (measuring key variables for 1,779 policy issues and finding that “[m]ultivariate analysis indicates that economic elites and organized groups representing business interests have substantial impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence. The results provide substantial support for theories of Economic-Elite Domination and for theories of Biased Pluralism, but not for theories of Majoritarian Electoral Democracy or Majoritarian Pluralism.”); Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSPECTIVES ON POLITICS 731 (2009) (analyzing empirical studies measuring the growth of inequality in the U.S., and suggesting that it would be appropriate to move from discussions of inequality and to “think about the possibility of *extreme* political inequality, involving great political influence by a very small number of extremely wealthy individuals. We argue that it is useful to think about the US political system in terms of oligarchy”). For an argument that the “sphere of justice” is and ought to be autonomous from wealth given American commitments to democracy, pluralism, and equality, see, e.g., MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 20 (1983) (“[n]o social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x ”).

A. Jurisdiction as a Political Resource

At the most basic level, jurisdiction is power; litigation enables private parties to leverage public power for both private and public ends. In and of itself, there is nothing unusual about such conduct—indeed, it is a basic feature of the American adversarial system. In theory, the jurisdictional resources of the state are available to all who seek justice and meet the conditions that the state has imposed on the use of its power. Precisely because private parties are permitted to use public power for their own ends, their use of such power is subject to constraint. These constraints are not only a matter of individual fairness; they also implicate federalism and the separation of powers. And they implicate the integrity of judicial process, the democratic nature of the courthouse, and the principle of political equality that is essential to democracy—namely, that certain public goods (such as the vote or the right to petition or to engage in free speech) are political resources that are, or at least ought to be, equally available to all. The U.S. legal system has long tolerated disparities in the provision of justice;¹⁸¹ indeed, unequal access is sanctioned by the Court’s interpretation of the Constitution.¹⁸² Inequality by itself thus does not mark a transition from democracy to oligarchy, but unequal access to political resources can reflect oligarchic trends and contribute to them; over time, political-resource inequality can amplify other types of inequalities, by concentrating political opportunities in the “haves” who are then even better positioned to use state power for their own ends.

Treating judicial jurisdiction as a political resource is an idea that threads implicitly through theories of social movements that focus on resource mobilization—on, that is, the resources available to citizens seeking to engage in democratic action.¹⁸³ In this area, scholars have focused on how litigation and features of the litigation process are political resources that can be deployed or diminished in democratic contestation.¹⁸⁴ Jeffrey Sellers, for example, has focused on how social

¹⁸¹ See, e.g., Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1865 (2018) (documenting “non[-]prisoner pro se litigants comprise a meaningful percentage of the federal docket”; that pro se litigants show up in substantial numbers across many different types of litigation”; and that “in nearly all of those types of cases, ... overall, pro se plaintiffs are less than one tenth as likely to win cases as represented plaintiffs”; whereas pro se defendants are only about one-third as likely to win cases as represented defendants).

¹⁸² See, e.g., William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1869 (2002) (discussing reasons “for the constitution’s impotence in civil procedure”); HERSHKOFF & LOFFREDO, *supra* note 29, at 785–86 (explaining that current constitutional doctrine “does not mandate the assignment of publicly funded lawyers to civil litigants” and that “[w]ithout legal representation, there is a danger” that legal needs go unmet).

¹⁸³ For summaries of resource mobilization theory, see Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 377 (2018); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 701–02 (2012).

¹⁸⁴ Christopher Coleman, Laurence D. Nee, & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663, 668 (2005); see also Helena Silverstein, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS

movements, individuals, and firms use litigation as an “opportunity structure” in seeking to shape democratic norms.¹⁸⁵ Procedural choices affect the overall opportunity structure through which litigation as a political resource operates. Sellers thus focuses on how features such as judicial review and attorneys’ fees provisions structure or limit the opportunities for democratic contestation.¹⁸⁶ Legal procedures and conventions become “important strategies of action” through which citizens assert rights and make democratic claims.¹⁸⁷ And few procedures are more important than those governing jurisdiction. The entire opportunity structure of litigation is based upon the availability of jurisdiction and on the ability of the claimant to deploy that jurisdiction in a lawsuit.

Relatedly, theorists focus on political process: how the openness or closedness of the state and state institutions affect the prospects for democratic contestation.¹⁸⁸ For these theorists, changes in political environment, the accessibility of state structures, and in elite views can open or close the doors for democratic contestation. Political opportunities are thus shaped by the “relative openness or closure of the institutionalized political system,” elite alignments and shifts, and shifts in state capacity and propensity for repression.¹⁸⁹ Political opportunity, then, encompasses “the formal institutional or legal structure of a given political system” and “the more informal structure of power relations that characterize the system at a given point in time.”¹⁹⁰

Jurisdiction as a political resource also bears upon the openness or closedness of the state. At the most basic level, jurisdictional doctrines either facilitate or thwart members of the democratic polity in accessing the state and making claims in the forum of their choice that determine the meaning and application of legal norms. Jurisdictional doctrines shape and affect the prospects for democratic contestation by determining when, where, and whether members of the public can access courts and proceed with their claims. Manipulations of jurisdiction can therefore dynamically

MOVEMENT 71 (1996); Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 SOC. FORCES 944, 954-55 (1980); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1687 (2014); Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 145, 145-46, 158 (Austin Sarat & Stuart A. Scheingold eds., 2006).

¹⁸⁵ Jeffrey M. Sellers, *Litigation as a Local Political Resource: Courts in Controversies over Land Use in France, Germany, and the United States*, 29 L. & SOC. REV. 479 (1995).

¹⁸⁶ *Id.*

¹⁸⁷ MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 6 (1994).

¹⁸⁸ For summaries of political process theory, see Cummings, *supra* note 183, at 377; NeJaime, *supra* note 183, at 702.

¹⁸⁹ Doug McAdam, *Conceptual Origins, Current Problems, Future Directions*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS, 23, 27 (Doug McAdam et al. eds., 1996).

¹⁹⁰ *Id.* at 26.

affect the ability of citizens to engage in democratic contestation over the meaning of rights and norms. Jurisdictional doctrines and decisions can augment or diminish jurisdiction as a political resource.

Understanding jurisdiction as a political resource clarifies what is at stake in current jurisdictional battles and why we characterize these jurisdictional shifts as an abuse of democracy and the base of an oligarchic courthouse. When courts acquiesce in corporate efforts to manipulate jurisdiction—expanding or contracting judicial power to impede public claims-making and to support deregulatory efforts—they enhance and consolidate public power in the hands of a concentrated business minority, creating oligarchic conditions that diminish the ability of most of the public to engage in political contestation. The jurisdictional shifts we surveyed above exhibit this point. The arbitration decisions divest civil plaintiffs of the ability to make claims in state institutions and courts of the ability to hear claims and exercise robust review to ensure that private adjudicators follow the law or that arbitral proceedings are workable and fair. They close off state institutions and processes and diminish jurisdiction as a political resource for plaintiffs. The removal decisions make it harder for plaintiffs to choose a forum and fold in levels of delay and obfuscation that can either end claims or sap plaintiffs of resources, creating weary and worn-down litigants. And the primary jurisdiction decisions close courts—albeit temporarily—and direct litigants to other organs of the state that may be unwilling or unable to resolve their claims. These jurisdictional decisions exhibit that winning or losing a jurisdictional struggle is not the only way to affect its power as a political resource; processes of delay, needless complication, and obfuscation can also wear out parties and affect the overall power distribution and potency of litigation as a strategy of democratic contestation.

B. Jurisdiction and Democratic Decline

Forum shopping is a tried-and-true litigation tactic, and so it would be tempting to characterize jurisdictional abuse as ordinary rent-seeking by corporate powers—to be reined in, if at all, by narrow tweaks to procedural rules. Reforms enacted in response to the battle over diversity jurisdiction at the turn of the Twentieth Century took just such a business-as-usual approach, relying on piecemeal, technical statutory changes, (such as the definition of corporate citizenship) as a way to put the brakes on the business community’s sharp litigation practices.¹⁹¹ As Thomas M. Keck has explained, reforms of this sort may work when a court system is merely polarized—but not, however, when the judiciary is in the thrall of “an anti-system party,” and the court is using its power “to assist that party in maintaining control without appealing to popular majorities”—in other words, to support

¹⁹¹ See, e.g., PURCELL, JR., LITIGATION AND INEQUALITY, *supra* note 161, at 91 (discussing 1887 amendment to the diversity jurisdiction statute that raised the amount in controversy from \$500 to \$2,000).

oligarchy.¹⁹² Our use of the term “oligarchic courthouse” is a strong indictment of the federal judiciary, and we use that term intentionally to locate current jurisdictional trends in a larger account of de-democratization and democratic erosion in the U.S.

Consider first processes of de-democratization. Charles Tilly’s pathbreaking work lays a foundation for understanding how the jurisdictional shifts we have explored fit within a series of movements away from democracy and how they—to use our term—abuse democratic norms and institutions. Tilly describes democratization and de-democratization as larger processes that have within them smaller processes of net movements towards and away from democracy.¹⁹³ To judge the degree of democracy, or on the other end, de-democratization, Tilly argues that we should “assess the extent to which the state behaves in conformity with the expressed demands of its citizens.”¹⁹⁴ One of Tilly’s core indicia of democratization is “how equally different groups of citizens experience a translation of their demands into state behavior.”¹⁹⁵ The state is most democratic when citizens can participate in elections, lobbying, and other forms of direct contact or consultation with state officials and institutions.¹⁹⁶ In contrast, when powerful forces determine governmental actions—as is the case under oligarchic conditions, when economic elites determine those actions—there is less consultation and the state is less democratic.¹⁹⁷

In those instances, interactions with the state can create and reproduce forms of inequality that undermine democracy. When certain parties seek to access the state and regularly yield advantages over others, they create and reproduce boundaries of inequality that undermine democracy.¹⁹⁸ Thus, increasing inequality gives certain groups the means and incentives to create beneficial relationships with state institutions and agents and shield themselves from political obligations.¹⁹⁹ One particular concern for Tilly is that “privileged powerful elites such as large landlords,

¹⁹² Thomas M. Keck, *Court-Packing and Democratic Erosion*, in *DEMOCRATIC RESILIENCE: CAN THE UNITED STATES WITHSTAND RISING POLARIZATION?*, 141, 142 (Robert C. Lieberman, Suzanne Mettler & Kenneth M. Roberts eds. (2022)).

¹⁹³ See CHARLES TILLY, *DEMOCRACY* 12–14 (2007) (describing net movements towards and away from democracy).

¹⁹⁴ *Id.* at 13.

¹⁹⁵ *Id.*

¹⁹⁶ See *id.* at 95 (in strongly democratic settings “[i]nterested citizens participate more actively, on the average, in elections, referenda, lobbying, interest group membership, social movement mobilization, and direct contact with politicians—that is, in consultation.”)

¹⁹⁷ See *id.* (“[T]o the extent that rich, powerful people can buy public officials or capture those pieces of government bearing most directly on their interests, they weaken public politics doubly: by withdrawing their own trust networks and by undermining the effectiveness of less fortunate citizens’ consultation.”)

¹⁹⁸ See TILLY, *supra* note 193, at 111 (inequality “occurs when transactions across a categorical boundary (e. g., male-female) 1) regularly yield net advantages to people on one side of the boundary and 2) reproduce the boundary”).

¹⁹⁹ See *id.* at 118.

industrialists, and professionals have much greater incentives than ordinary people to escape or subvert democratic compacts when those compacts turn to their disadvantage.”²⁰⁰

Today, there are many examples of net moves away from democracy in the U.S., including the undermining of free and fair elections, forms of lawmaking that consistently favor wealthy and concentrated interests, instances of outright corruption, and much more.²⁰¹ The oligarchic courthouse and jurisdictional shifts that define it can be embedded in this larger story of net moves away from democracy. The jurisdictional shifts we have explored are an instance of different groups experiencing a translation of their demands into state behavior in different ways that can entrench inequality. Corporate parties have successfully translated their demands for courts to manipulate their jurisdictional doctrines by closing themselves off to civil plaintiffs or sending plaintiffs down circuitous routes. As a result, the state—through its courts—is less responsive to claims-making, consultative processes are diminished for much of the larger public, and jurisdictional doctrines ensure that corporate parties regularly yield net procedural advantages.

These net procedural advantages can also entrench inequality and undermine democratic compacts. Jurisdiction has become a battleground for stunting democratic compacts—for using procedural decision-making to undermine the ability of the public to enforce and make real the demands of regulatory commitments. Furthermore, these compacts are often designed either to cabin excessive corporate power or to diminish inequality and level out power imbalances by providing anti-discrimination, workplace, and consumer protection guarantees to members of the public. When citizens find themselves wronged in the economy by powerful actors, recourse to courts is at times the only effective means of redress they have. And when jurisdiction is manipulated by corporate parties—with the acquiescence of courts—jurisdictional mazes and redirections can mean that citizens’ rights on paper lose real-world meaning and application. This, again, is why we use the term jurisdictional abuse—to capture how these jurisdictional transformations, by concentrating economic power and undermining the application and enforcement of democratic laws, abuse democratic values and undermine democratic governance. Jurisdictional abuse—along with the large architecture of procedural retrenchment, including more restrictive pleading standards, reforms to dampen aggregate litigation, and narrowed standing doctrines—forms part of the procedural story of de-

²⁰⁰ *Id.* at 195.

²⁰¹ See Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right in Vacuo? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 *BUFF. L. REV.* 523, 525–26 (2022) (exploring how these features contribute to democratic erosion). For other accounts of how democratic erosion occurs or is occurring, see also STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); Aziq Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78 (2018); Ewan McGaughey, *Fascism-Lite in America (Or the Social Ideal of Donald Trump)*, 7 *BRIT. J. AM. LEG. STUD.* 291 (2018).

democratization.²⁰² Together, these procedural shifts produce an oligarchic civil litigation architecture that favors corporate parties and incrementally closes off the state to the larger litigating public.

Beyond Tilly's frame, scholars today have paid increasing attention to how declining participatory capacity and concentrated economic power are part of a larger constellation of forces eroding democracy in the U.S. today.²⁰³ Democratic erosion, like de-democratization, often occurs through incremental, seemingly small changes and practices, including drifts away from democratic-procedural protections.²⁰⁴ The oligarchic courthouse contributes, too, to this larger process of erosion. Corporations have pushed for jurisdictional changes that cement and insulate their power and subvert democratically-enacted commitments by constricting the possibilities for plaintiffs to participate in judicial enforcement processes and implement statutory law. Consistent with David Landau's theory of "abusive constitutionalism," the phenomenon of jurisdictional abuse uses the mechanisms of democracy—namely, judicial power—for anti-democratic ends in the sense of blocking off avenues of political participation, concentrating wealth, and insulating corporate wrongdoers from liability.²⁰⁵

Jurisdictional abuse is unlikely to get headline-grabbing attention, but it plays an especially potent and subversive role in protecting and deepening concentrated economic power.²⁰⁶ Indeed, the technical and seemingly dry nature of doctrines such as jurisdiction makes their manipulation less likely to be politically salient, in turn making procedural reform a particularly promising way for powerful actors to protect their power and stunt processes of democratic contestation and law enforcement. This fact once again summons Frankfurter's words, reminding us that "under the guise of seemingly dry jurisdictional and procedural problems, majestic and subtle issues of great moment to the political life of the country are concealed."²⁰⁷

²⁰² See *supra* note 158 and accompanying text.

²⁰³ See *supra* note 201.

²⁰⁴ See Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N.U. L. REV. 351, 355 (2018) ([T]he steps in democratic backsliding are . . . incremental . . . [T]he present danger today is not so much the sudden collapse of democracy, but instead its erosion in a series of small individual steps that, each on their own, may not appear alarming.”).

²⁰⁵ David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

²⁰⁶ See Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293, 295 (2016) (“[T]he Court’s decisions on rights enforcement, because of their lower public visibility, are less constrained by public opinion and, therefore, less tethered to democratic governance.”). For an unusual, but troubling, exception, see *United States of America v. Donziger*, 2022 WL 2232222 (2d Cir. June 22, 2022) (upholding the appointment of “special prosecutors” under Fed. R. Civ. P. 42(a)(2); see also Frente de Defensa de la Amazonia, 55 Nobel Laureates Demand End to Judicial Attacks on U.S. Human Rights Lawyer Steven Donziger (Nov. 4, 2020).]

²⁰⁷ See *supra* note 1 and accompanying text.

CONCLUSION

Our focus in this Article has been on how corporations have sought to transform jurisdictional doctrines to their advantage and how the federal courts have facilitated these efforts. In doing so, corporations and courts have participated in constructing the oligarchic courthouse—one where procedure is manipulated to favor corporate interests in circumventing hearings on the merits and blocking claimants' efforts to enforce democratically-enacted regulatory laws. This episode highlights how today, as before, jurisdiction is implicated in struggles over political economy—over how democracy and law interact with, shape, and are shaped by the economy and economic forces.²⁰⁸

It may be tempting to take away from this episode the conclusion that the best path forward is to separate jurisdiction from issues of political economy—to fashion jurisdictional doctrines without their economic effects in mind. But that separation is easier to imagine than it is to realize, and it is precisely this false sense of apolitical neutrality that has aided the emergence of the oligarchic courthouse. In a world where litigation ineluctably bears upon the economic rights and entitlements of parties—whether their damages in tort or their relief from impermissible workplace discrimination—questions of jurisdiction cannot be separated from issues of political economy. Jurisdiction goes to the heart of judicial power, and for better or worse, judicial power is deeply related today to how law shapes economic outcomes and ordering. The problem with the oligarchic courthouse, then, is not that jurisdiction has come to connect to economic goals, outcomes, or entitlements. It is that the political economy of jurisdiction is warped towards the economically powerful, essentially commandeering state processes *for* them. Our Article highlights the procedural dynamics of growing oligarchic conditions, not to suggest that procedure should be disentangled from larger battles over law and economic power, but instead to chart how procedure has stretched itself in one direction that undermines democratic governance.

The entwinement of jurisdiction and economic power underscores why conventional jurisdictional fixes would not quickly or easily dismantle the oligarchic courthouse. So long as that entanglement exists, powerful actors will seek to bend jurisdictional doctrines to suit their interests. Still, it is worth reflecting on a few reorientations that might halt and prevent oligarchic drift. And because we are teachers of procedure and jurisdiction, our immediate audience is the legal academy.

²⁰⁸ Political economy refers to “the interrelationship between economics and politics.” Barry R. Weingast & Donald A. Wittman, *The Reach of Political Economy*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 3, 3 (Barry R. Weingast & Donald A. Wittman eds., 2008); *see also* K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1332 (2016) (defining political economy as “how our politics and economics relate to one another, how they are structured by law and institutions, and how they ought to be structured in light of fundamental moral values”).

First, procedural scholars need to anchor jurisdiction in a democratic vision of the role of courts and law, and not as a merely technical feature of adjudication. We have hopefully contributed to this effort by defining jurisdiction as political resource centered in a larger account of democratic contestation and mobilization—and by showing that its design and practice cannot be detached from those democratic processes. Once we center jurisdiction in facilitating democratic governance, we also place ourselves in a better position to critique jurisdictional doctrines that prevent parties, whether individually or in aggregate form, from carrying out legislative policy and making real democracy’s demands on economic ordering.

Second, deconstructing the oligarchic courthouse requires the construction of networks that can counterbalance the structural, informational, and cultural features that have made jurisdictional abuse possible—and, indeed, made it conventional not to perceive these jurisdictional shifts as a dangerous abuse of democracy. For too long corporate-driven narratives about litigation cost, delay, and inefficiency have crowded out values of equality, inclusion, and respect from courthouse practice and procedure.²⁰⁹ Remediating this requires building a culture that respects those values and where those who spend their time working on behalf of people other than the “haves” have a seat at the table.

Finally, to deconstruct the oligarchic courthouse, the democratic idea of participatory power must be placed at the center of jurisdictional design.²¹⁰ So long as legislatures task diffuse, often uncoordinated, under-resourced workers and consumers with enforcing regulatory laws governing large-scale enterprises who seek to resist such enforcement, then jurisdictional design must enable their meaningful engagement with litigation process and facilitate their exercise of countervailing power.²¹¹ When jurisdictional doctrines promote gamesmanship by more powerful parties that wears out weaker parties or frustrates them in their efforts to enforce

²⁰⁹ Helen Hershkoff & Stephen Loffredo, *Legal Culture, Optimal Delay, and Social Commitments: A Tribute to Vincenzo Varano*, in *PROCESSO E CULTURA GIURIDICA, PROCEDURE AND LEGAL CULTURE: SCRITTI PER GLI 80 ANNI DI VINCENZO VARANO* 295, 306 (Vittoria Barsotti et al. eds., 2020) (“Numerous studies have shown that U.S. procedural reforms adopted with the neutral goal of achieving efficiency have produced negative differential impacts on litigants in discrete groups, including women, people of color, the poor, and workers”); Norris, *supra* note 29, at 476–78 (exploring how a neoliberal conception of neutrality influences and biases procedural decision-making).

²¹⁰ For some efforts along these lines, see Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 *STAN. L. REV.* 87 (2022) (drawing on prison impact-lawyering to develop an account of participatory litigation) and Luke Norris, *The Promise and Perils of Private Enforcement*, 108 *VA. L. REV.* _ (forthcoming 2022) (manuscript on file with author) (developing a participatory democracy theory of private enforcement litigation).

²¹¹ See Helen Hershkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel’s Approach to Reform of Public Education*, 28 *NYU REV. L. & SOC. CHANGE* 319, 320 (2003) (exploring how “evolving forms of rights-based public interest litigation, particularly in state courts, is critical in encouraging local, countervailing sources of power”); Norris, *supra* note 29, at 478–82, 544–52 (applying the concept of countervailing power to civil procedure).

regulatory law, then jurisdictional doctrines contribute to democratic disillusion and rot. The response must be to take seriously the structural and background capacities that members of the public bring to the litigation process and to design jurisdictional doctrines with facilitating their participation and power in mind.

These reorientations are largely directed to the legal community. Alone they are not sufficient to construct a participatory, democratic courthouse. We hope, however, that our effort has at least clarified the sweep and success of the corporate project to transform jurisdictional doctrines, the project's threat to democratic governance, and the importance of resisting it in the name of democratic governance.