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Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development

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CRITICAL PROCEDURE: ADR AND THE JUSTICES' "SECOND WAVE" CONSTRICTION OF COURT ACCESS AND CLAIM DEVELOPMENT

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ABSTRACT

*Expansive alternative dispute resolution (ADR) was the centerpiece of efficiency-based procedural reforms in the 1980s and early 1990s. ADR and other reforms collectively altered the litigation landscape, at times for the better. Yet some scholars raised early questions about ADR's effect on systemic litigation fairness and the ability of the disenfranchised to assert and maintain claims in court. Amid second wave procedural changes, commencing around the mid-2000s, a Justice Scalia-led majority significantly expanded the grasp of compelled, private, and individualized arbitration. Under the shroud of efficiency, that Court majority imposed those second wave changes by judicial fiat, bypassing formal rulemaking. Collectively, both waves sharply constrict court access and claim development to the detriment of less powerful social groups. Two Supreme Court cases—*American Express Co. v. Italian Colors Restaurant *(*Amex*) and* AT&T Mobility LLC v. Concepcion (Concepcion*)—epitomize ADR's privatization (without judges, full discovery, or public scrutiny) and individuation (without class adjudication, broad joinder, or cost sharing) of claims by employees, consumers, tenants, small businesses, and discrimination claimants against more powerful businesses and institutions. This Article first articulates a developing* Critical Procedure *analytical framework for assessing the political and ideological preferences in and intended substantive consequences of procedure's formation, application, and revision. It then assesses* Amex *and* Concepcion *through this critical procedure lens and concludes that these ostensibly efficiency-driven ADR rulings are actually a claim suppressing mechanism that effectively shields large businesses from substantive law liability and public accountability, creating "an alternate system of justice" for those businesses that casts doubt about the legitimacy of the legal system.*

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"The erection of barriers to court access under the guise of procedural efficiency . . . will burden the weak and the aggrieved unfairly, and it ultimately will undermine the legitimacy of the legal system."

—Jack Weinstein, U.S. District Judge[1]

"Over the last 10 years, thousands of businesses across the country . . . have used arbitration to create an alternate system of justice."

—Jessica Silver-Greenberg and Michael Corkery, New York Times[2]

"This is among the most profound shifts in our legal history. . . .Ominously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach."

—William G. Young, U.S. District Judge[3]

I. INTRODUCTION

TWENTY years ago, in an essay *ADR: Where Have the Critics Gone?*,[4] I described a hastening rush toward alternative dispute resolution (ADR) paired with a notable decline in mainstream scholarship critical of key aspects of ADR.[5] I observed then that the ADR train had left the station and that critics of its impacts on societal "outsiders"[6] were not welcome aboard.[7]

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1. Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

2. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System"*, N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=2 [Perma link unavailable].

3. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http//www.nytimes.com/2015/11/01/business dealbook, arbitration-everywhere-stacking-the-deck-of justice.html?_r=1 (quoting Judge William G. Young).

4. Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996) [hereinafter Yamamoto, *ADR*].

5. *See id.* at 1055–56.

6. The 1996 ADR essay characterized "outsiders" as "racial minorities, women and the poor; those traditionally of lesser power in society." *Id.* at 1058. It also cited Mari Matsuda's description of "outsider" as constituencies historically excluded from jurisprudential discourse. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 n.15 (1989). This present Critical Procedure article builds upon these characterizations of outsiders to also encompass "those outside the political and cultural mainstream, particularly those challenging accepted legal principles and social norms" and those who "rais[e] difficult and often tenuous claims that demand the reordering of established political, economic and social arrangements, that is, those at the system's and society's margins." Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 345 (1990) [hereinafter Yamamoto, *Efficieny's Threat*] (footnote omitted).

7. Yamamoto, *ADR*, *supra* note 4, at 1066–67 ("We need to ask if amid mainstream ADR proselytizing by Congress, courts, scholars and practitioners a master narrative has emerged that the ADR 'train has already left the station' and that all who do not scramble aboard will be left behind." (footnote omitted)).

Writing during a "First Wave" of efficiency procedural reforms in the 1980s through mid-1990s,[8] and drawing upon the insights of pioneering scholars,[9] I asked whether this "ADR Express" undermined legal discourse and policy decisions critical of ADR's overall efficacy.[10] ADR's overpowering salutary narrative, it appeared, tended especially to exclude, or at least overlook, those critical of ADR's harmful effects on marginalized social groups.[11]

I cast these perceptions in preliminary fashion. Many have since materialized into procedural reality. This reality, as others and I now suggest, is integral to larger "Second Wave" procedural changes that commenced around the mid-2000s[12] and continue today. A spate of restrictive Supreme Court rulings sharply constricts court access and claim development, so much so that some characterize it as a deformation of procedure[13] reflecting a sharply "restrictive ethos."[14]

During the ongoing Second Wave, a monumental ADR decision, *American Express Co. v. Italian Colors Restaurant*[15] (*AMEX*), dramatically, and perhaps traumatically for some, altered the justice landscape.[16] *AMEX*, along with its predecessor *AT&T Mobility LLC v. Concepcion*[17] (*Concepcion*), through tight enforcement of small-print arbitration clauses in a wide array of contracts under the Federal Arbitration Act,[18] compels private arbitration of nearly all small-claimant-versus-large-business disputes and, moreover, compels those claimants' waiver of class

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8. Framed generally, the First Wave of reforms spanned from the late 1970s through the early 1990s. For a succinct description of the impetus for the First Wave efficiency reforms, see generally, Yamamoto, *Efficiency's Threat*, *supra* note 6.

9. *See* Yamamoto, *ADR*, *supra* note 4, at 1058–62 (outlining early critiques of ADR by Owen Fiss, Richard Delgado, Marjorie Silver, Trina Grillo, John Esser, Carrie Menkel-Meadow, and Kim Dayton).

10. With this in mind, I posed the following questions:

> If there has been a decline in the amount, depth, and prominence of scholarship critical of ADR, . . . why is this so? Is it because studies reveal the across-the-board salutary effects of ADR? . . . Or is a decline linked to a "failing faith" in adjudication and our collective pressing need to embrace an encompassing alternative? Or is there scholarly, or prominent law review, disinterest in the issues? Or is it because ADR issues of race, gender and class arise only in the limited context of family disputes and civil rights claims, and ADR is now most prevalent in contract and tort disputes? Or something else?

Id. at 1066 (footnote omitted).

11. *See id.* at 1066–67.

12. For a discussion of an "Interregnum" period between the First and Second Waves, see *infra* Section II.B.

13. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 357–71 (2013).

14. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 358–59 (2010) (footnote omitted) (broadly characterizing philosophical ethos of the recent procedural changes as "restrictive" of court access and the pursuit of claims).

15. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

16. *See infra* Section V.

17. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

18. Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1–16 (Westlaw through Pub. L. No. 115-46).

adjudication.[19]

These cases epitomize ADR's privatization (without judges, full discovery, or public scrutiny) and individuation (without broad joinder or cost sharing) of claims by employees, consumers, tenants, small businesses, and discrimination claimants against more powerful businesses and institutions.[20] The consequences are in-your-face startling. Backed by other cases, *AMEX* and *Concepcion* effectively block fair resolution of a wide range of potentially meritorious claims possessed by those of lesser societal stature or economic power. In doing so, they erect for many an insurmountable threshold barrier to justice.[21] Moreover, the combined procedural rulings undercut major businesses' and institutions' substantive legal liability and diminish their public accountability—undermining the rule of law.[22]

These practical consequences result not from fully vetted, formal procedural rulemaking. Rather, they emerge from the singular votes of a slim conservative majority of the Supreme Court—significant procedural change by judicial fiat. And now, despite considerable push back by the National Labor Relations Board (NLRB), lower courts, and workers' advocates, the reconstituted conservative-leaning Court appears poised to affirm unbargained-for arbitration class action waivers despite union employees' right to bargain collectively.[23] Moreover, in late 2017, Congress and President Trump blocked the U.S. Consumer Financial Protection Bureau's effort to invalidate those waivers in consumer financial transactions.[24] Indeed, in crucial ways, expanding compelled privatized, individu-

19. *See infra* Section V.
20. *See* id.
21. *See infra* Section VI.
22. *See* Weinstein, *supra* note 1.
23. *See* NLRB v. Murphy Oil USA, Inc., 137 S. Ct. 809 (2017). The Court granted certiorari to resolve conflicts between the Second, Fifth, and Eighth Circuits (finding mandatory class waivers do not violate employees' National Labor Relations Act (NLRA) right to engage in concerted activity) and the Seventh and Ninth Circuits (ruling that compelled waivers violate unionized employees rights under the NLRA § 8(a)(1)). *See also In re* D.R. Horton, Inc., 357 N.L.R.B. No. 184 (2012) (holding that compelled judicial class action waiver violates employee's right under the NLRA § 8(a)(1) to engage in concerted activity, but later reversed in part by D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344 (5th Cir. 2013) (holding that NLRB's decision did not give proper weight to FAA and that the arbitration agreement was enforceable)); Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016) (affirming lower court's determination that arbitration clause waiving collective actions was unenforceable under the NLRA); Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016) (reversing judgment of the lower court and finding arbitration clause waiving class actions violates NLRA and concerted class action waiver was unenforceable under the FAA); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013) (reversing the lower court's decision to deny defendant's motion to dismiss or stay arbitration proceedings and instead holding that employees' right to class action can be waived in an arbitration agreement); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) (reversing the district court's decision and instead concluding that the class waiver at issue was enforceable) In granting certiorari in *NLRB v. Murphy Oil USA, Inc.*, the Court consolidated appeals from the Fifth, Seventh, and Ninth Circuit Court decisions discussed above.
24. H.R.J. Res. 111, 115th Cong., 131 Stat. 1243 (2017) (congressional resolution invalidating the Consumer Financial Protection Bureau's rule prohibiting mandatory arbitration class waivers for consumer financial transactions (Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017))); Gail Ablow, *Trump Kills CFPB Arbitration Rule: The Little Guy*

alized arbitration reflects the "most profound shift in our legal history."[25]

For this reason, and others discussed below, alternative dispute resolution, through *AMEX* and *Concepcion*, now takes center stage in a conservative majority generated deformation of procedure[26] that, in Judge Weinstein's words, "under the guise of procedural efficiency . . . burden[s] the weak and the aggrieved unfairly, and . . . ultimately will undermine the legitimacy of the legal system."[27] In this Second Wave setting, the time is ripe through critical procedure inquiry to assess *AMEX* and *Concepcion* and the contemporary relevance of *ADR: Where Have the Critics Gone?*.

II. CONSTRICTING COURT ACCESS AND CLAIM DEVELOPMENT: TWO WAVES OF PROCEDURAL CHANGE

Let's begin with a big picture. Framing kinetic movement in the legal process while leaving details in the distance for later examination. The picture's outlines and coloring convey messages that are legally significant—and socially disturbing.

The drafters designed the 1938 Federal Rules of Civil Procedure (FRCP)[28] to ensure court access and foster decisions on the merits.[29] Few would "disagree that the Federal Rules were intended by their drafters to open wide the courthouse doors"[30]—described as the FRCP's "liberal ethos."[31] This "open-access approach," however, "was not always a welcome development in the eyes of all."[32] With low pleading barriers, far-

Loses Again, MOYERS & COMPANY (Nov. 02, 2017), http://billmoyers.com/story/trump-kills-cfpb-arbitration-rule-little-guy-loses/ (reporting on President Trump's approval of the congressional resolution).

25. *See* Silver-Greenberg & Gebeloff, *supra* note 3.

26. *See* Miller, *supra* note 13, at 357.

27. Weinstein, *supra* note 1, at 1906.

28. The Enabling Act of 1934 authorized the Supreme Court to promulgate civil procedural rules that govern federal courts. 28 U.S.C. § 2072 (1976). Rulemakers with congressional approval promulgated the Federal Rules of Civil Procedure in 1938. STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 54 (2006).

29. *See* Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOK. L. REV. 1, 2–3, 25 (1988) [hereinafter Weinstein, *Ghost*] ("[T]he Rules provided an immense shift towards increasing plaintiffs' capacity to enforce substantive rights."); *see also* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986) ("Sobered by the fate of the Field Code, Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labeled the 'liberal ethos,' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.").

30. Weinstein, *supra* note 1, at 1906 (describing the drafters' commitment to ensuring access to justice).

31. "The liberal ethos in civil procedure generally refers to those aspects of federal procedure that tend to promote access and merits-based or accurate resolutions of civil disputes." Spencer, *supra* note 14, at 354 (footnote omitted).

32. *Id.* at 359 (citing Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 85 (2006); *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 255–56 (1952)).

reaching discovery, and the new 1966 class action device,[33] the 1960s and 1970s witnessed the rise of public law litigation[34]—more complicated cases implicating new federal and state law claims of public interest, including civil rights, employment and housing discrimination, environmental protection, products liability, and financial regulation.[35] Those concerned about systemic inefficiencies of expanding litigation opportunities teamed up with those desirous of limiting corporate liability and accountability under substantive law to push for a procedural narrowing of the adjudication system.[36]

Thirty years of legal and political skirmishing generated two waves of procedural changes. These waves sometimes bolstered the liberal ethos,[37] but most often undercut it.[38]And they marked significant shifts in the shape and tenor of federal litigation and the people and institutions affected by it.

A. The First Wave: Efficiency Reforms

Beginning in the late 1970s, "[c]ries for procedural reform emanated from many camps . . . . The rallying point—efficiency."[39] The expansion of public law litigation posed new challenges,[40] including discrimination claims against government and private employers, charges of excesses against administrative regulatory regimes, deceptive practices by large retailers, product defect claims against mass manufacturers, and environmental claims against manufacturers and agribusinesses.[41] The flurry of

33. Fed. R. Civ. P. 23.

34. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976) (describing how public law litigation differs significantly from the traditional model).

35. *See* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270, 279–83 (1989) (describing the differences between private litigation and public law litigation, including the latter's "'sprawling and amorphous' party structure" and the widespread effects of the outcome on many person and entities, sometimes not directly involved in the lawsuit).

36. *See* David Halperin, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence*, Public Citizen (July 1997), https://www.citizen.org/article/discovery-abuse-how-defendants-products-liability-lawsuits-hide-and-destroy-evidence [https://perma.cc/J24J-3STP] (describing business associations' push for "tort reform" that resulted in ostensibly efficiency-neutral procedural changes benefitting businesses).

37. *See* Spencer, *supra* note 14, at 353 (referencing the previously established understanding of the 1938 FRCP to "promote open access to the courts and to facilitate a resolution of disputes on the merits").

38. *See id.* at 353–54 ("[A] 'restrictive ethos' prevails in procedure today, with many rules being developed, interpreted, and applied in a manner that frustrates the ability of claimants to prosecute their claims and receive a decision on the merits.").

39. Yamamoto, *Efficiency's Threat*, *supra* note 6, at 350.

40. *See* Tobias, *supra* note 35, at 270–71 (discussing originally unforeseen impacts of public law litigation); Chayes, *supra* note 34, at 1284 (coining the term and describing the attributes of "public law litigation").

41. *See* Weinstein, *Ghost*, *supra* note 29, at 2–3, 25 ("[T]he Rules provided an immense shift towards increasing plaintiffs' capacity to enforce substantive rights."); *see also* Marcus, *supra* note 29, at 439 ("Sobered by the fate of the Field Code, Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labeled the 'liberal ethos,' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.").

new substantive law claims, generated by both legislatures and courts, in conjunction with the open-door spirit of the Federal Rules regime[42] and the newly codified class action rule,[43] expanded litigation in federal courts. That expansion meant more case filings, more sprawling party structures, sometimes intense discovery battles, and occasional judge-supervised equitable relief.[44] This volatile mix combusted into what some described as a "litigation explosion."[45] The catchphrases—too much cost, too much delay, too many unmeritorious claims—spurred growing numbers of reform advocates. Their focus: litigation procedures.

But the super-heated rhetoric about an ostensible litigation explosion wreaking havoc on the justice system often belied realities. Increased court filings of substantive legal claims roughly paralleled population growth, and excessive cost and delay did not mark the vast majority of "ordinary" cases.[46] The 1938 Federal Rules regime, with open access, liberal discovery, and minimal judge management, continued to work well in many small-to-moderate-value suits.

It also tended, however, to encourage over-discovery in some cases and to allow parties—mostly large, well-resourced defendants but also some plaintiffs lawyers' personal injury groups[47]—to game the system in more complicated cases. In those cases litigation became a game of financial intimidation and attrition—dispute resolution driven in part by which

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42. According to U.S. District Judge Jack Weinstein, a highly regarded procedure specialist, the Federal Rules of Civil Procedure ensured open public access to the courts by simplifying procedures—lowering the threshold for pleading requirements, concentrating litigation in one forum, and liberally structuring discovery to avoid surprise. Weinstein, *Ghost*, *supra* note 29, at 2–3. Judge Weinstein acknowledged other factors in the opening of the federal courts:

> [A] powerful civil rights movement, the expansion of the contingency fee, a huge growth in the power of the bar, and a genuine sense of devotion by most members of the legal profession to the principle that all Americans have the right to vindication of what the substantive law in theory affords.

Id. at 3. Another factor to add to this list is the congressional creation of "rights" enforceable by individuals in federal court and the emergence of public interest law groups.

43. FED. R. CIV. P. 23 (promulgated in current form in 1966).

44. *See, e.g.*, Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 4 (1986) (evaluating the apparent increase in civil litigation); Halperin, *supra* note 36 (describing discovery battles and judge supervised equitable relief).

45. Galanter, *supra* note 44, at 5–7 (finding a lack of reliable empirical evidence to document the "litigation explosion").

46. *Id.* at 3; *see* Yamamoto, *Efficiency's Threat*, *supra* note 6, at 351 n.45.

47. Organized segments of the plaintiffs personal injury bar have been criticized for improperly soliciting claimants, pursuing dubious claims, and caring more about attorney's fees than helping injured clients. *See* Deborah R. Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 49, 79–81, 102 (2000) (describing financial incentives for organized plaintiffs bars to litigate class actions and the apparent negative impacts on defendants' businesses); *see also* Donald W. Nauss, *Chrysler Takes on "Frivolous" Suits with Legal Action Against 5 Lawyers*, LOS ANGELES TIMES (Mar. 27, 1996), http://articles.latimes.com/1996-03-27/business/fi-51800_1_class-action-lawsuits [https://perma.cc/G9P9-8NLR] (reporting on Chrysler Motor Company's suit against lawyers who "allegedly acted improperly in filing . . . frivolous class-action lawsuits" because class actions "have become increasingly troublesome to major companies, which claim that attorneys manipulate the system not to help consumers but to win huge legal fees. Big business often settles the cases—even those considered frivolous—rather than face costly and lengthy litigation.").

party had the resources to outlast or intimidate its opponent.[48]

Diverse segments of the bench and bar rallied for efficiency-based procedural reforms.[49] Yet, divergent political and economic interests collided over what should be done, who should benefit, and who should pay the price. Disagreements over specific reforms turned toward the ideological—plaintiffs versus defendants, large versus small litigants, entrenched institutions versus those seeking social structural change.[50]

What emerged comprised the First Wave of procedural reforms.[51] It encompassed expansive alternative dispute resolution,[52] Rule 11 sanctions for filings challenging established legal norms,[53] apparent heightened pleading requirements for civil rights plaintiffs,[54] mandatory prefiling disclosures,[55] limits on discovery,[56] eased defendants' summary

48. Halperin, *supra* note 36.

49. *See*, *e.g.*, A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 251 (1985); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 767–69, 781 (1977) (highlighting "increased government costs, a clogged legal system, the impossibility of evenhanded law enforcement, a decline in respect for the law, increased costs for private business"); *see also* Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319, 319–20 (1985); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770 (1981); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1357 (1978); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 319–20 (1985); Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 808 (1981); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547–55 (1986).

50. Yamamoto, *Efficiency's Threat*, *supra* note 6, at 352–53.

51. *See* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1841 (2014). Stephen N. Subrin and Thomas O. Main characterized the historical evolution of civil procedure in four eras, or "waves," starting with the merger of law and equity and continuing to the present fourth wave procedural changes. This helpful historical description differs from the two waves and interregnum as described in this article.

52. *See* Yamamoto, *Efficiency's Threat*, *supra* note 6, at 360; *see also id.* at 407 (transforming minority litigation experience into a value of external participation, making a subordinated group's voice heard by other groups); Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug.1996, at 54, 55; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 611 (1986) (examining rights discourse as expressions of human and communal values emphasizing "the interdependence of autonomy and community"); Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 LAW & SOC'Y REV. 271, 274 (2009) (employing legal mobilization theory and "intertwining . . . broader structures of political opportunity, organizational resources, and rights consciousness" for specific groups).

53. FED. R. CIV. P. 11 (requiring reasonable attorney research into and assessment of law and facts for all court filings).

54. *See* Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) (describing the shift to heightened fact pleading standards created by judicial activism).

55. FED. R. CIV. P. 26(a) (self-executing "mandatory" disclosure of information to be used to support claims or defenses).

56. FED. R. CIV. P. 26(f), 26(b), 30, 32 (addressing pretrial conferences, including discovery plans, in Rule 26(f) and scope of discovery limitations in Rule 32).

judgment standards, and more extensive pre-trial judge management.[57] On the heels of the Civil Justice Reform Act,[58] these procedural reforms emerged after considerable public debate through a mélange of formal judicial rulemaking amendments, legislative reforms, and court rulings.[59] And the reforms extended well beyond complex cases. They revamped important parts of the litigation process across the board.

I observed then that, whether or not intended, the efficiency-justified changes noticeably diminished the capacity of the lesser empowered to assert and maintain claims in court,[60] erecting partial roadblocks to the courthouse for consumers, employees, and public law litigants seeking social justice through the legal system.[61] First Wave impediments thus raised questions about systemic litigation fairness.[62]

B. INTERREGNUM

From roughly the early 1990s through the early 2000s, organized industry associations seized upon First Wave criticisms of undue cost and delay and intensified the push for further procedural advantages. Those business groups lobbied Congress, local legislatures, rulemakers, and courts to fix what they argued was a still broken system marked by wildly accelerating litigation costs.[63] In doing so, businesses tied additional procedural changes to a forcefully asserted platform for substantive tort law reform to protect overburdened business defendants.[64] From a variety of

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57. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 317–18 (1986) (allowing a defendant to carry its initial burden of production on a motion for summary judgment by simply pointing to an "empty record").

58. Civil Justice Reform Act, 28 U.S.C. §§ 471–482 (Supp. 1991) (enacted as Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990)).

59. For an in depth description of the formal rulemaking process, see *About the Rulemaking Process*, UNITED STATES COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process [https://perma.cc/ZD5U-WJNZ].

60. *See* Yamamoto, *Efficiency's Threat*, *supra* note 6, at 344–45; *see also* Miller, *supra* note 13, at 309–13.

61. *See* Miller, *supra* note 13, at 304, 309–13, 359 (characterizing these partial roadblocks as "substantial procedural hurdles," "obstacles," and "stop signs").

62. *See, e.g.*, Weinstein, *supra* note 1, at 1906 (perceiving an undermining of legal system legitimacy).

63. The American Tort Reform Association lobbied hard for substantive and procedural reforms to "bring greater fairness, predictability and efficiency to America's civil justice system." *ATRA at a Glance*, AM. TORT REFORM ASS'N, http://www.atra.org/about/ [https://perma.cc/6MMR-EAW7]. A 2006 survey of corporate counsel found that American companies on average spent $20 million on litigation, or 70% of their legal budgets, and recounted that "[h]igh legal costs and punitive damages in the U.S. were cited by more than half of the foreign in-house lawyers as 'a top concern about litigating a dispute in the U.S.'" *Survey: Litigation Big Burden for U.S. Corporations*, TRIANGLE BUS. JOURNAL (Oct. 10, 2006), http://www.bizjournals.com/triangle/stories/2006/10/09/daily14.html [Perma link unavailable]. *See also* Michael D. Johnston, *The Litigation Explosion, Proposed Reforms, and Their Consequences*, 21 BYU. J. PUB. L. 179, 179 (2007) (concluding that costs of litigation have increased substantially, citing a 1991 study finding that "over the last two generations the cost of injury litigation rose fourteenfold after inflation, while the size of the real U.S. economy rose threefold" (quoting WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991)).

64. Advocates of systemic reforms asserted that escalating litigation costs unfairly burdened especially big businesses, with higher prices passed on to customers. *See* Victor E.

vantage points, many acknowledged an important value in preventing unfair burdens on business.[65]

But, according to knowledgeable critics, the "record shows . . . expense and delay . . . [were] often the result of deliberate attempts by corporate defendants—the very entities urging 'tort reform'—to avoid disclosure of critical information."[66] Indeed, an array of federal court judges and business commentators expressed consternation, if not revulsion, at the expanding trend of major corporations' abuse of the litigation process to escape exposure and accountability.[67] One federal district judge highlighted a continuous scheme of corporate bad faith discovery.[68] A federal court of appeals found an "unrelenting [corporate] campaign to obfuscate the truth," remarking about the "disturbing regularity with which discovery abuses occur in our courts today."[69] The legal affairs editor of *Busi-*

Schwartz, Leah Lorber & Rochelle M. Tedesco, *Taking a Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Justices Can Protect Their Courts from Becoming Judicial Hellholes*, 27 AM. J. TRIAL ADVOC. 215, 216 (2003) (cataloguing reform arguments). They asserted that procedural and substantive laws were stacked against large, particularly out of state, corporate defendants. Those laws created "judicial hellholes" marked by "improper certification of class actions, admission of 'junk science' evidence, allowing attorneys to appeal to juror bias, and refusing to dismiss baseless claims." *Id.* In particular, the exorbitant costs of malpractice actions against doctors and products liability class action suits against manufacturers and pharmaceutical companies, brought by a "[s]ophisticated [and] [i]nnovative [p]laintiff's [b]ar," imposed excessive burdens on business. INS. INFO. INST., LIABILITY TRENDS, ISSUES, AND JURY VERDICTS: IMPACT ON INSURANCE LIABILITY AND EXCESS CASUALTY MARKETS (2003), http://www.iii.org/sites/default/files/docs/pdf/liability.pdf [https://perma.cc/LN9V-D736]. *But see* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985–86, 990–96 (2003) (acknowledging industry's position about a "litigation explosion" and its negative societal impacts warranting substantive and procedural law reforms, but also questioning industry data and reform arguments); Galanter, *supra* note 44, at 5–7 (finding a lack of reliable empirical evidence to document the "litigation explosion").

65. *See generally* Levin & Colliers, *supra* note 49; Manning, *supra* note 49. *See*, *e.g.*, Malautea v. Suzuki Motor Corp., 148 F.R.D. 362, 365 (S.D. Ga. 1991), *aff'd sub nom.* Malautea v. Suzuki Motor Co., 987 F.2d 1536 (11th Cir. 1993); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

66. *See* Halperin, *supra* note 36. David Halperin describes "tort reform" advocates arguments about excessive litigation costs and delay but identifies significant systematic corporate litigation discovery abuse as a primary reason, citing several courts' sanctions on corporate lawyers for excessive and bad faith discovery accompanied by sharp admonitions about widespread corporate discovery abuse. *See, e.g.*, *Malautea*, 148 F.R.D. at 376 (imposing the most severe sanction against Suzuki Motor Company (default) and its attorneys (substantial fines) for willful pervasive litigation abuse).

67. *See, e.g.*, Kawamata Farms, Inc. v. United Agri Products, 948 P.2d 1055, 1090 (Haw. 1997), *as amended* (Jan. 13, 2004) (imposing upon chemical manufacturer Du Pont a $1.5 million sanction for intentionally misleading the court concerning key test records); *In re* E.I. Du Pont De Nemours & Co., 918 F. Supp. 1524, 1556 (M.D. Ga. 1995) (sanctioning a chemical manufacturer for defrauding the court "consciously, deliberately and with purpose" through its repeated discovery abuse); Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054 (1993) (sanctioning a drug manufacturer for deliberate discovery abuse).

68. *See* Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1538 (11th Cir. 1993) ("[D]efendants continually and willfully resisted discovery, even deliberately withholding discoverable information that the judge had ordered them to produce.").

69. *Id.* at 1544–46.

ness Week confirmed this trend of "corporate foul play": "Corporate foul play in high-stakes cases appears to be increasing . . . destroying evidence, striking secret deals, and stonewalling . . . . [I]t is difficult to recall a time when so many respectable companies have been hit with court sanctions."[70] The business editor weighed in on the ethical significance: "[b]y refusing to play by the rules, [those] companies undercut their moral authority to criticize the [United States] tort system."[71]

Indeed, judges in a variety of cases imposed extraordinary sanctions against businesses and their lawyers for "cheating and cheating consciously" in an effort to hide the merits and grind claimants and their lawyers into economic submission.[72] Public interest watchdogs suggested a malign agenda: businesses generating a facade of a litigation crisis in order to spur new procedural barriers to the pursuit of bona fide legal claims, protecting manufacturers, large retailers, and financial institutions.[73]

With mounting skepticism, judiciary rulemakers appeared to respond haltingly to industry calls for further procedural reforms during this Interregnum[74]—the period roughly in-between the First and Second Waves, the calm between the storms.[75] With "relative restraint,"[76] they refrained from imposing heightened pleading standards for all plaintiffs, mandating significantly stricter criteria for class action certification, further easing defendants' summary judgment evidentiary burdens, and extending compelled private arbitrations.[77]

Rulemakers did amend the discovery rules to limit (or tailor) discovery.[78] Congress also passed the state-court limiting, and euphemistically titled, "Class Action Fairness Act."[79] And judges stepped up active discovery management to better infuse "cost-benefit balancing factors" and fairness into the resource-influenced pretrial process.[80] On the whole, however, rulemakers rejected calls for new major "efficiency" reforms.

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70. Mike France, *Commentary: Corporate Litigation: Playing Hardball is One Thing . . .* , BLOOMBERG (June 30, 1996, 11:00 PM), https://www.bloomberg.com/news/articles/1996-06-30/commentary-corporate-litigation-playing-hardball-is-one-thing-dot-dot-dot [perma.cc/LJH3-MHEL].

71. *Id.*

72. *See*, *e.g.*, Malautea v. Suzuki Motor Corp., 148 F.R.D. 362, 373 (S.D. Ga. 1991), *aff'd sub nom*. Malautea v. Suzuki Motor Co., 987 F.2d 1536 (11th Cir. 1993), *cert. denied*, 510 U.S. 863 (1993); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

73. *See infra* Section VI.D.

74. *See supra* Section II.B.

75. Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L. J. 1559, 1592 (2015).

76. *Id.*

77. *Id.*

78. *See* FED. R. CIV. P. 26(a)–(b), 26(f), 30, 32; *see also* Spencer, *supra* note 14, at 359.

79. Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012).

80. *See*, *e.g.*, Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 98 (D. Md. 2003) (employing the cost-benefits proportionality principle to limit electronic discovery); FED. R. CIV. P. 26(b)(1) (infusing cost-benefit proportionality in determining the scope of discovery).

C. The Second Wave: Rule Changing by Judicial Fiat

But business industry's calls, it seems, reached a powerful new audience.[81] A conservative Supreme Court majority picked up the cudgel. As Burbank and Farhang's 2015 study revealed, the "impulse for [judicial] restraint was overwhelmed by a call to action from the Chief Justice [Roberts]."[82] Against strident dissents, the conservative majority,[83] through case declarations, unilaterally imposed a number of the procedural changes that organized businesses advanced unsuccessfully in the Interregnum.

Rather than alter the substantive law explicitly to favor large manufacturers, retailers, and employers, thereby generating strong public opposition, the five-justice majority affected the substantive shifts through procedural rulings "far less likely to trigger group mobilization."[84] Burbank and Farhang's study ascertained that under the veil of procedural neutrality the "large transformation in private enforcement [narrowing court access and claim development] resulted from a succession of individual Court decisions, none of which may have appeared monumental in isolation."[85]

In this Second Wave of procedural changes, commencing around the mid-2000s, the Justice Antonin Scalia-led majority bypassed the established multi-layered checks-and-balances rulemaking process and often jettisoned settled case precedent. Venerable procedure scholar Arthur Miller calls it the "[d]eformation of [f]ederal [p]rocedure."[86] Others characterize it as ideologically driven procedural activism and rulemaking by judicial fiat.[87]

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81. Industry associations, defense lawyers, and politicians also endeavored to sharply tilt the composition of the Rules Advisory Committee towards defendant-oriented interests, shifting the balance decidedly toward economically powerful businesses. Burbank & Farhang, *supra* note 75, at 1591–92 (describing the intense political lobbying and maneuvering to generate conservative imbalance on the Advisory Committee).

82. *Id.* at 1594 n.131.

83. That majority consisted of Chief Justice Roberts, Justice Scalia, Justice Alito, Justice Thomas, and Justice Kennedy, with Justice Scalia passing away in February 2016.

84. Burbank & Farhang, *supra* note 75, at 1594 (quoting Stephen B. Burbank & Sean Farhan, *Litigation Reform: An Institutional Approach*, U. Pa. L. Rev. 1543, 1581 (2014)).

85. *Id.* (describing a litigation reform agenda and how "since 1970 the Supreme Court—increasingly conservative and influenced by ideology—has been more effective than Congress in reducing opportunities and incentives for private enforcement [of federal law through litigation]").

86. *See* Miller, *supra* note 13, at 286.

87. The Second Wave was presaged by the conservative Court majority's interpretations of the Federal Arbitration Act that diverged from explicit congressional intent. Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 Loy. U. Chi. L.J. 391, 400–06 (2012) (suggesting that "[e]ven prior to Concepcion, the Court's arbitration decisions were replete with examples of judicial interpretation divorced from congressional intent").

> In 1995, for example, Justice Sandra Day O'Connor[, a moderately conservative justice,] noted:"[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation." Justice John Paul Stevens also commented that the [majority] has done more than "put its own imprint" on the FAA[. Justice Stevens charged that the conservative majority misused its authority]

With burdens on corporations and government officials in mind, the conservative majority generated heightened fact-pleading for plaintiffs[88]—tasking judges with employing their "experience and common sense" to assess whether plaintiffs pleaded enough specific facts to establish the "plausibility" of their claims.[89] In doing so, the majority created a "powerful new tool" for defendants[90] and eliminated at the threshold a swath of bona fide claims resting partly on incriminating evidence in defendants' files.[91]

> "[w]hen its refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid."

Id. at 399–400 (quoting Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 283 (1995) and Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132 (2001)). See also, *infra* Section V(A) (describing other recent arbitration rulings by the Court's conservative majority).

88. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007), imposed a heightened fact pleading requirement of "plausibility" for antitrust claims, replacing the "no set of facts" standard reflected in FED. R. CIV. P. 8(a)(2)'s notice pleading regime and in the interpretive language of Conley v. Gibson, 355 U.S. 41 (1957). The Court majority extended *Twombly* to all civil actions in Ashcroft v. Iqbal, 556 U.S. 662 (2009), overturning settled case law and effectively rewriting the language of Rule 8(a)(2). In doing so it posed a "threat to access to justice" through the "erosion of notice pleading in the federal courts in favor of a plausibility-pleading system that screens out potentially meritorious claims that fail to offer sufficient specificity and support at the pleading stage." A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1710 (2013).

89. According to proceduralist A. Benjamin Spencer, "[n]ot only did the Court sidestep the established rule amendment process to produce a novel rule of pleading (overturning Conley v. Gibson in the process), but the rule it announced was particularly pernicious for its overinclusiveness, subjectivity, and disruptiveness." Spencer, *supra* note 14, at 1712 (footnotes omitted). Responding to "apologists" supporting the change, Benjamin observes that their

> efficiency view is misguided because (1) it is based on the positing of a problem—discovery abuse—that has not been confirmed to exist, and (2) the remedy that Twombly and Iqbal have delivered to address the ailments that efficiency proponents lament is poorly calibrated for the task, being grossly subjective and overinclusive in ways that ensnare meritorious claims.

Id. at 1714. *But see* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1299 (2010) ("properly understood, the post-*Iqbal* pleading framework is not fundamentally in conflict with notice pleading"); Nathan Psyno, *Should* Twombly *and* Iqbal *Apply to Affirmative Defenses?*, 64 VAND. L. REV. 1633, 1652–53 (2011) (extending the heightened pleading requirement to defendants' pleadings).

90. Stephen C. Yeazell & Joanna C. Schwartz, CIVIL PROCEDURE 402 (9th ed. 2016).

91. Professor Joe B. Gelbach's study of judicial and litigant effects found that in employment and civil rights cases "switching from Conley to Twombly/Iqbal negatively affected plaintiffs in at least 15.4% and at least 18% of cases, respectively," and that in non-civil rights, employment, or financial disclosure cases "Twombly/Iqbal negatively affected at least 21.5% of plaintiffs facing" motions to dismiss. Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L. J. 2270, 2277–78 (2012). Professors Stephen Yeazell and Joanna Schwartz note that these telling statistics "do not [even] take into account that litigants' behavior might change . . . . Some plaintiffs may decide not to file a lawsuit . . . or might settle . . . soon after filing." YEAZELL & SCHWARTZ, *supra* note 90, at 402. They also observe that the *Twombly-Iqbal* motion offers a "powerful new tool to [the] defendants" and has become a time-consuming "staple of federal civil litigation." *Id.*

"In the first 32 months after Twombly . . . judges cited it almost twice as many times (22,990) as Erie Railroad v. Tompkins . . . was cited in the first 72 years after it was decided (13,546 citations)! As of 2015, Iqbal was cited in more than 85,000 cases." *Id.*

The majority also shrank state and federal court jurisdictional reach over foreign mass manufacturers, thereby impeding injured individuals' efforts to conveniently sue out-of-state product manufacturers indirectly marketing to claimants' home states.[92] And it sharply limited certification of class actions against large multi-store companies like Wal-Mart, altering settled caselaw and judicial practice to erect a new stringent "commonality" prerequisite to impede collective actions by employees.[93] In doing so, it appeared to channel the extreme view of class actions against large businesses as "legalized blackmail."[94]

The majority also orchestrated a radical transformation of summary judgment standards in qualified immunity civil rights damage cases and significantly expanded interlocutory appellate jurisdiction[95]—markedly expanding defendants' summary adjudication prospects and litigation leverage while eroding plaintiffs' path to trial on the merits (or settlement). And it diminished the availability of the preliminary injunctive relief—signaling forthcoming invalidation of the pro-plaintiff sliding scale test and indicating the majority's disaffection for a primary litigation tool of environmental and civil rights claimants.[96] And, as developed below, inte-

92. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883 (2011) (constricting court access by resurrecting Justice O'Connor's restrictive Due Process minimum contacts stream of commerce formulation for mass manufacturers); James M. Brogan, *Personal Jurisdiction After* Goodyear *and* McIntyre *One Step Forward; One Step Backward?*, 34 U. PA. J. INT'L L. 811, 811–12 (2013) (furthering "conservative expectation[s]" in the effort to "reign in state and federal district court[ ] . . . personal jurisdiction over both non-U.S. affiliates of U.S based companies and non-U.S. based manufacturers").

93. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348–55 (2011) (significantly narrowing Rule 23(a)(2)'s commonality requirement, erecting a major impediment for class certification of actions against large companies). Justice Scalia, for the five-member majority, rejected the plain language of the applicable federal rule (which requires only a common question of law *or* fact) and overturned settled caselaw and class action practice to drastically constrain employee class actions against large business employers. *Id. See* Lyle Denniston, *Opinion Analysis:* Wal-Mart's *Two Messages*, SCOTUSBLOG (June 20, 2011, 2:02 PM), http://www.scotusblog.com/2011/06/opinion-analysis-wal-marts-two-messages/ [https://perma.cc/ZZY2-D8WU] (observing that the opinion by Scalia, "the Court's most dedicated skeptic about" class actions, sent the message that "the bigger the company, the more varied and decentralized its job practices, the less likely it will have to face a class-action"); Theodore J. Boutrous, Jr. & Bradley J. Hamburger, *Three Myths About* Wal-Mart Stores, Inc. v. Dukes, 82 GEO. WASH. L. REV. ARGUENDO 45, 45 (2014) (substantially "rais[ing] the bar for plaintiffs seeking class certification and . . . hav[ing] a significant impact on all class actions for decades to come").

94. *See* YEAZELL & SCHWARTZ, *supra* note 90, at 861 (describing extreme critics' framing of class actions as "legalized blackmail"). *See generally* Steven Greenberger, *Justice Scalia and the Demise of the Employment Class Action*, 21 EMP. RTS. & EMP. POL'Y J. 75, 83–84 (2017) (characterizing Scalia as going "out of his way to disparage the utility of class-wide arbitration generally," as viewing "class arbitration [as] fundamentally unfair to defendants," and as insisting on "reading his own policy preferences into the statute").

95. *See* Scott v. Harris, 550 U.S. 372 (2007) (significantly expanding defendant summary judgment prospects and litigation leverage in qualified immunity civil rights cases). Professor Tobias Barrington Wolff characterizes the conservative majority's ruling in *Scott* as a "radical doctrinal reformation" that recasts core summary judgment standards to significantly expand interlocutory appellate jurisdiction in qualified immunity civil rights cases, eroding the path to trial for all plaintiffs. Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1352 (2015).

96. *See* Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7 (2008) (signaling forthcoming majority rejection of the Ninth Circuit's pro-plaintiff sliding scale preliminary injunc-

gral to the Second Wave, at the behest of large businesses and institutions, the Court's conservative majority also significantly expanded the grasp of compelled private, individualized arbitration.[97]

Under the encompassing shroud of efficiency,[98] both the First and Second Waves of procedural changes benefitted some, and perhaps many, at times making litigation quicker and more streamlined.[99] In differing ways, however, the changes also collectively constricted court access for those with bona fide justice claims, discouraged collective actions, constrained preliminary remedies, limited claim development by curtailing discovery,[100] and, especially significantly, privatized and individualized an increasingly wider swath of controversies.[101]

These changes reflect what Professor A. Benjamin Spencer calls the prevailing "restrictive ethos" in "procedure today, with many rules being developed, interpreted, and applied in a manner that frustrates the ability of claimants to prosecute their claims and receive a decision on the merits."[102] U.S. District Judge Weinstein observes that the restrictive ethos hides behind the "guise of procedural efficiency" and burdens the "weak and the aggrieved unfairly."[103]

Critical procedure inquiry, described in the next section, illuminates how large businesses and institutional litigants tend to benefit significantly at the expense of those with markedly less economic and political power.[104] Some therefore view the ongoing Second Wave as a judge-generated "alternate system of justice" for big business[105] that may be "undermin[ing] the legitimacy of the legal system.[106] And at the heart of it all, developed in Sections IV and V following, lies alternative dispute resolution and the Supreme Court's *AMEX* and *Concepcion* rulings.

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tion test); *cf.* Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011) (determining that at least initially the sliding-scale test survives *Winter*). *See generally* Elisabeth Long, Alliance for the Wild Rockies v. Cottrell: *Raising "Serious Questions" About Post-*Winter *Injunctive Relief in the Ninth Circuit*, 39 ECOLOGY L.Q. 643, 643–44 (2012).

97. *See infra* Section VI.

98. *See* Yamamoto, *Efficiency's Threat*, *supra* note 6, at 359–60, 362, 371–72 (describing the multi-faceted push for efficiency-reforms in response to mounting claims of excessive litigation costs and undue delay, including ADR, an amended Rule 11 in 1983, civil rights pleading requirements, and reformulated summary judgment standards).

99. Some alternative dispute programs reduced costs for litigants and courts. The 1983 version of Rule 11 required attorneys to more rigorously screen claims, defenses, and motions throughout the court process. New pretrial conference and discovery rules invested judges with greater managerial authority. *See* Peckham, *supra* note 49, at 770–73; *see also* Yamamoto, *Efficiency's Threat*, *supra* note 6, at 361–62.

100. Amendments to Rule 26 aimed to limit the scope of discovery. *See* Tobias, *supra* note 35, at 270, 292 (discussing originally unforeseen impacts of public law litigation); Chayes, *supra* note 34, at 1284 (coining the term and describing the attributes of "public law litigation").

101. *See infra* Section VI.D.

102. Spencer, *supra* note 14, at 353–54 (footnote omitted).

103. Weinstein, *supra* note 1, at 1906.

104. *See infra* Section VI.

105. Silver-Greenberg & Corkery, *supra* note 2.

106. Weinstein, *supra* note 1, at 1906.

III. CRITICAL PROCEDURE: AN ANALYTICAL FRAMEWORK

A developing critical procedure offers analytical tools for interrogating the often under-explored facets of present-day ADR—particularly how the Court's *AMEX* and *Concepcion* rulings are integral to the Second Wave's overall constriction of court access and claim development for those of comparatively lesser power. Critical procedure provides a contextual lens for this inquiry.[107] As a complement to and departure from traditional legal analysis, it posits that "formalist notions of efficiency, neutrality and fairness have obscured the cumulative effects and attendant value judgments of procedural reforms."[108] From the vantage point of those lesser empowered, it interrogates

> what is really at stake, who benefits and who is harmed (in the short and long term), who wields the behind-the-scenes power, which social values are supported and which are subverted, how political [or economic] concerns frame the legal questions, and how societal institutions and differing segments of the populace will be affected by the court's decision[s].[109]

Critical procedure emerges from critical legal studies and critical race theory of the 1980s–1990s[110] and new legal realism's continuing socio-

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107. Yamamoto, *Efficiency's Threat*, *supra* note 6, at 345. For efforts undergirding the development of a critical procedural inquiry, see also Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, Thomas O. Main & Alexandra Lahav, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT (4th ed. 2012); ROY L. BROOKS, CRITICAL PROCEDURE 3–5 (1998); Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 6, 19 (1994); Yamamoto, *Efficiency's Threat*, *supra* note 6; David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW & CONTEMP. PROBS. 111, 111–12 (1988); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Schneider, *supra* note 52, at 589–90.

108. Yamamoto, *Efficiency's Threat*, *supra* note 6, at 345; *see* D. Kapua'ala Sproat, *Wai Through* Kânâwai*: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 154–55 (2011) (defining legal formalism as the view of law as an "'internally consistent and logical body of rules that is' . . . 'objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics'" (quoting BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 2 (2009) and Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 731 (2009)).

109. Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 291–92 (2005) (characterizing critical legal inquiry).

110. "Critical legal studies" and "critical race theory" have both played a significant role in advancing critical legal analyses. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3–5 (2d ed. 2012) (engaging critical theory analysis in race and law); EMMA COLEMAN JORDAN & ANGELA P. HARRIS, BEYOND RATIONAL CHOICE: ALTERNATIVE PERSPECTIVES ON ECONOMICS (2006) (employing critical legal theory to critique and remake standard economic analysis of justice issues); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 827–28 (1997) (calling for pragmatic linkage of critical race theory to frontline legal justice practice); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 532–33 (1988) (describing critical legal theory inquiry with roots in legal realism); Schneider, *supra* note 52, at 597–98 (employing critical legal theory to assess and advance the feminist deployment of the litigation process).

legal study of the litigation process.[111] Critical procedure advances a sharp "changing . . . narrative [in] civil procedure": "[A]ny attempt to understand procedural reform without attention to the legal and political philosophies [and interests] of its supporters and opponents, and without setting it in broader social [and political] context, is doomed."[112] Critical procedure thus explicitly and systematically integrates "changing social dynamics and consequences"[113] into its assessments.

Viewed in this light, critical procedure serves as a framework for realistically evaluating the impact of procedural changes. That framework is operationalized through insights into a given procedure's (or group of procedures') genesis, interpretation, application, alteration, and consequences.[114]

A. Empowering/Disempowering

The first critical procedure insight highlights procedure as "an instrument of power."[115] It stimulates inquiry into the impacts of litigation procedure on the empowerment or disempowerment of social groups.[116]

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111. A "new legal realism" by scholars who appear to span a wide political spectrum, bolstered by empirical studies, is grounded in rejecting the formalist legal method as a description of how the legal process actually operates and in seeking to interrogate the ways in which law actually functions. *See* Sproat, *supra* note 108, at 160–61 (describing legal realist analysis as a jurisprudential reaction to the inadequacy of the formalist legal method); Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 Ann. Rev. L. & Soc. Sci. 341 (2010); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. Chi. L. Rev. 831, 832–34 (2008); Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 Wis. L. Rev. 335, 336–37 (2005); Daniel A. Farber, *Toward a New Legal Realism*, 68 U. Chi. L. Rev. 279, 303 (2001); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991).

112. Burbank & Farhang, *supra* note 75, at 1563.

113. *See* Steve Subrin, *Reflections*, 15 Nev. L.J. 1689, 1691 (2015); *see generally* Edward A. Purcell, Jr., Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America 257 (2000); *see also* Civil Procedure: Doctrine, Practice and Context, *supra* note 107; Singer, *supra* note 110, at 501 (contending that judges should decide cases in part "based on a thorough understanding of contemporary social reality" and by "closely examin[ing] the social context in which those affected by legal rules operate").

114. In 1988 amid the First Wave reforms, Robert M. Cover, Owen M. Fiss, and Judith Resnik laid an important foundation for critical procedural inquiry. Robert M. Cover, Owen M. Fiss & Judith Resnik, Procedure (1988). The casebook explored the "Values of Procedure" and their significance in "Strategic Interactions (including the "Ideology of Advocacy"). It then cast procedural study as a realist endeavor, examining "Information in a Strategic Context," the "Strategic Manipulation of the Costs of Information," and the "Powers and Attributes of Decisionmakers." It also cast procedural inquiry as highly interactive with political constituencies, encompassing the "Role of an Audience," "Coping with Membership in Multiple Communities," "Hierarchical Structures," "Anti-Procedure," and "Political Preclusion." *Id.* at xiii–xv.

115. *See* Stephen B. Burbank, *The Costs of Complexity*, 85 Mich. L. Rev. 1463, 1471 (1987); Yamamoto, *Efficiency's Threat*, *supra* note 6, at 397 (characterizing "[p]rocedural discretion . . . as a potential 'instrument of power'").

116. *See* Roy Brooks, *supra* note 107, at 196 (describing the transformative power of class action lawsuits, particularly when initiated by those of lesser power, and also noting the disempowering effect of class certification denials); *see also* Yamamoto, *Efficiency's Threat*, *supra* note 6, at 404–07 (valuing empowerment of social groups through three related aspects of procedural power: personal autonomy, community-building, and group mobilization); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place;*

More specifically, it reveals ways that the litigation process enables people to coalesce because of group commonalities (including identity or similar harms) in joint pursuit of claims[117] or forces them to disaggregate and pursue claims in isolation.[118] It inquires into ways that procedure empowers communities to deploy litigation as a centerpiece for social justice organizing[119] or compels them to individually litigate hyper-technical pieces of a controversy devoid of larger social content.[120] And it assesses how procedure enables claimants to seek behavior-altering group remedies or impels them to craft narrow, individualized relief that, even when

Asserting Our Rights, 24 HARV. C.R.-C.L. L. REV. 9, 42 (1989) (placing collective empowerment of black women into the framework of rights discourse); *see generally* Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 15–17 (1987) (analyzing importance of perceived differences between groups, especially male and female groups, in empowering at times and disempowering at other times groups in constitutional adjudication); Schneider, *supra* note 52, at 640 (explaining how a collective empowerment, translated through legal formulation and demand for power, emerged out of the women's rights movement); *see also* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 373 (1986) (explaining how "[c]onstitutional litigation itself performs a similar unifying function, for it is a process in which ideology is reinforced by the behavior of litigants and of legal professionals, including judges").

117. For example, class certification enables disparate individuals with related claims to join together and generate group-based power in asserting claims against large businesses and government. *See, e.g.*, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1042–43, 1044–45 (2016) (affirming lower court's class certification in a suit that centered on violations of the Fair Labor Standards Act, enabling individual moderate value claimants to band together to sue); Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 458–59 (2013) (certifying federal securities fraud class action). Class actions are one prominent form of procedural coalescence. Coalescence can also occur through liberal joinder rules that allow claimants with similar injuries to collectively sue in one lawsuit and thereby leverage their power. *See, e.g.*, Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333–34 (8th Cir. 1974) (allowing a broad plaintiffs' joinder in an employment discrimination case).

118. *See, e.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2416–17 (2014) (vacating securities fraud class action certification for lack of "predominance" at the class certification stage); Comcast Corp. v. Behrend, 569 U.S. 27, 30, 34 (2013) (denying certification of customers' antitrust class action); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011) (narrowing class certification prospects by changing the commonality prerequisite, relegating the class members to pursue individual litigation or to abandon their claims entirely); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336, 349–50, 351 (2011) (compelling individualized arbitration based on hypertechnical analysis of federal preemption of state law prohibiting forced contractual waiver of class actions); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (effectively invalidating class arbitration).

119. *See* Michael W. McCann, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 10, 68–74 (1994) (describing McCann's empirical research on the indirect but springboard effect of litigation on social justice movements); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 68 (2011) (referencing McCann's insight "that simply playing the litigation game can have important benefits for movement actors and organizations"); Ann Southworth, *The Rights Revolution and Support Structures for Rights Advocacy*, 34 LAW & SOC'Y REV. 1203, 1209 (2000) (describing "how rights are claimed and negotiated in a wide variety of settings, including courts but also legislatures, agencies, the workplace, the media, public squares and private interactions . . . and how these various forms of activism influence one another in complex ways"); Güneş Murat Tezcür, *Judicial Activism in Perilous Times: The Turkish Case*, 43 LAW & SOC'Y REV. 305, 312 (2009) (conceiving litigation as a "social movement tactic" potentially employed by the lesser empowered).

120. *See* BROOKS, *supra* note 107, at xxvii (explaining how "procedural law can frustrate the assertion of substantive rights" and impede community organizing).

awarded, tends to preserve the institutional status quo.[121]

B. Exposing the Myth of Inherent Neutrality

The second critical procedure insight dispels the myth of inherent procedural neutrality.[122] Procedure's patina of neutrality (it is only process, not substance) at times disguises significant substantive consequences.[123] Particular procedural rules—in their formulation, interpretation, application, and alteration—implicate substantive value choices. For instance, studies found that amended Rule 11's facially neutral, stepped up sanctioning of "frivolous" filings actually emerged from intense behind-the-scenes plaintiffs versus defendants battles over substantive impacts—whether the revamped sanctioning rule should be structured in a way that chilled civil rights claimants and their lawyers as well as those asserting novel theories of defendant liability.[124] Indeed, follow-up studies revealed disproportionate sanctioning in civil rights cases and a marked decline in discrimination filings.[125]

Critical procedure lifts the veil of inherent neutrality to reveal an often

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121. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22–23 (2008) (reversing the Ninth Circuit Court of Appeals' preliminary injunction by invoking the Navy's overriding interest in realistic sonar training exercises); *see also* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301, 304 (1987) ("With much fanfare, the powerful periodically distribute rights as proof that the system is fair and just, and then quietly deny rights through narrow construction, nonenforcement, or delay.").

122. *See* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517, 519–22 (2010) (showing the disparate impact upon civil rights and employment discrimination litigation); *see also* Stephen B. Burbank, *Procedure, Politics, and Power*, 52 J. Legal Educ. 342, 344 (2002) (acknowledging statistically significant differential impacts on similarly situated litigants when the veil is lifted on the "myth of neutrality"); Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 Brook. L. Rev. 827, 836–39 (1993) (explaining that procedural changes are often made for ostensibly but not actually neutral reasons).

123. *See* Yamamoto, *Efficiency's Threat*, *supra* note 6, at 396–97.

> In creating or reforming a procedural system, people bring to bear particular viewpoints not only about specific procedural rules but also about substantive issues and fundamental purposes of adjudication . . . [that] shape their sense of a system's appropriate scope, costs and benefits, which affects their structuring and operation . . . . Uniform rules of procedure are thus no longer viewed as inherently substance-neutral or litigant-neutral in operation . . . . Procedural form and substantive results are at times inextricably bound.

Id. (footnotes omitted).

124. *See, e.g.*, Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1082 (7th Cir. 1987) (exacting Rule 11 sanctions against plaintiff's counsel for asserting minority contractor's novel racial discrimination claims and thereby dissuading similar future claims); Lepucki v. Van Wormer, 765 F.2d 86, 87 (7th Cir. 1985) (sanctioning plaintiff's attorney and generating a chilling effect on other claimant's pursuit of similar claims); *see also* Eric K. Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora's Box?*, 13 U. Haw. L. Rev. 57, 104 (1991) (describing highly disproportionate rates of Rule 11 sanctions levied against civil rights plaintiffs, substantially impacting their right and ability to access litigation).

125. Yamamoto & Hart, *supra* note 124, at 103–04.

politicized process of rule formation and alteration.[126] This veil lifting exposes parries and thrusts over "neutral" efficiency procedural shifts maneuvers that alter the impact of substantive law by affecting court access and claim development in ways that benefit some over others.[127] It thus expands procedural inquiry beyond ordinary costs and burdens into the realm of social and economic consequences for individuals, organizations, governments, communities, businesses, and the judiciary itself.

C. Advantaging/Disadvantaging Some over Others

The third, and related, critical procedure insight reveals how procedure's differential effects, at times by design, substantively advantage those more economically powerful[128] and disadvantage outsiders of lesser power, especially those challenging established political, social, or economic arrangements.[129] I observed during the First Wave that efficiency reforms tended to discourage litigants on society's margins by compelling privatized dispute resolution, imposing punitive sanctions for cutting-edge filings, requiring greater factual support for some civil right filings,

126. From the early 1980s, the public pressured Congress and the judiciary to make the legal system more efficient. Professor Lori Johnson observed that "[f]rom the 1930s to the early 1970s, judicial branch committees dominated the process, and Congress uniformly accepted their recommendations. Then Congress began to express much more interest in the rules for federal courts, and the environment of procedural rulemaking became increasingly politicized." Lori A. Johnson, *Creating Rules of Procedure for Federal Courts: Administrative Prerogative or Legislative Policymaking?*, 24 Just. Sys. J. 23, 23 (2003); *see also* Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 Ala. L. Rev. 529, 613–14 (2001).

127. *See* Margaret Y.K. Woo, *Manning the Courthouse Gates: Pleadings, Jurisdiction, and the Nation-State*, 15 Nev. L.J. 1261, 1281 (2015) (recognizing that the "benign focus on efficiency" and conservation of judicial resources often results in steeper procedural hurdles with negative consequences for plaintiffs); Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions*: Wal-Mart v. Dukes *and* AT&T Mobility v. Concepcion, 7 Duke J. Const. L. & Pub. Pol'y 73, 74 (2011) (identifying the courts' value judgment that large companies need protection from litigation to enhance profitability even at the expense of claimants with potentially meritorious claims); Spencer, *supra* note 14, at 361–62, 366–70 ("Civil procedure tends to . . . protect[ ] commercial defendants against claims by members of various out-groups."); Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2192 (1989) (observing that certain types of potential litigants are more severely impacted by a "neutral" rule to deter frivolous filings because their social situation generates disproportionate numbers of claims deemed frivolous by current norms).

128. *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. Pa. L. Rev. 1543, 1613 (2014) (analyzing Congress's protection of the institutional status quo in rulemaking); *see also* Stempel, *supra* note 126, at 532 (describing post-1976 Federal Civil Rules' advantages to defendants); Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 368 (1992) (assessing the changing face of American jurisprudence through legal realism, "exposing the result-oriented, value-laden nature of legal decision-making" in racial justice cases).

129. *See* Miller, *supra* note 13, at 304, 309–10, 322 (altering the procedural landscape primarily at the expense of societal outsiders by constructing "substantial procedural hurdles," "obstacles," and "stop signs" for those attempting to change prevailing law); *see also* Yamamoto, *Efficiency's Threat*, *supra* note 6, at 420–21 (describing the disproportionately high price paid by outsiders, through diminished court access, for the systemic efficiency reforms); Delgado, *supra* note 121, at 308–09 (illuminating political and economic interests influencing legal decisionmaking and replicating power hierarchies and perpetuating the socio-economic subordination of outsiders).

shrinking the "information-gathering process and erect[ing] tougher obstacles to juries. They pared down the system of public adjudication" in ways that benefitted some but not others.[130]

Professor Brooke Coleman's recent study finds that the procedural limits on court access are in fact preventing plaintiffs from pursuing substantively meritorious claims.[131] This insight opens to scrutiny the political and economic underpinnings of the fights over procedural reform.[132] It casts an eye on how procedural changes are affecting who wins and who loses in terms of both legal outcomes and broad social and economic consequences.[133]

D. Articulating Public Values/Shaping Public Consciousness

Building upon the others, the fourth critical procedure insight identifies the importance of the litigation of cutting-edge claims to public values articulation and to a reshaping of mainstream public consciousness about what is right and just.[134] It underscores the dynamic interplay of pleadings, discovery, motions, and trial with parties, judges, community advocates, and media in imbuing social meaning to the "public"[135] in public law litigation. For this reason, the fourth insight sees courts as more than forums for dispute resolution. They are also dynamic sites of cultural performances.[136]

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130. Yamamoto, *Efficiency's Threat*, *supra* note 6, at 344.

131. Brooke D. Coleman, *The Vanishing Plaintiff*, 42 Seton Hall L. Rev. 501, 503 (2012).

132. *See* Burbank & Farhang, *supra* note 128, at 1600–01 (noting the reluctance of rulemakers to become direclty involved in controversies and who therefore accede to those lobbying the hardest); *see also* Stempel, *supra* note 126, at 613–14 (acknowledging the "pressure points of political power" and the procedural reform movement's receptiveness to conservative political and economic ideology).

133. *See* Trubek, *supra* note 107, at 129–31 (focusing on subtle changes of power on who wins and who loses in ADR's shifting focus from vindication of rights to satisfaction of needs).

134. *See* Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 Cal. W. L. Rev. 1, 56 (2007). "[R]esearch on legal consciousness suggests that 'over time, . . . law norms may alter what both governmental actors and larger populations view as "right," "natural," "just," or "in their interest."' Even unsuccessful litigation of redress claims can help generate new understandings of history . . . , sources of group harm . . . , and remedy." *Id.* *See also* Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 Harv. L. Rev. 985, 993 (1990) (assessing a need for solid mechanisms to transform theories of reconstituted community articulating public values).

135. *See* Sproat, *supra* note 108, at 168 (describing how political perspectives play a significant role in shaping adjudicatory outcomes and how ideological views of justices have substantial impact on decisions); *see also* Yamamoto, Haia & Kalama, *supra* note 107, at 19–21 (describing the interplay of claims, defenses, pleading, discovery, and motions—in the public eye through media—as a cultural performance that at times uplifts counter-narratives to prevailing public understandings of injustice and need for rectification).

136. Yamamoto, Haia & Kalama, *supra* note 107, at 6; *see also* Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L.J. 625, 628 (1990); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2440–41 (1988); David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 Colum. J. Gender & L. 326, 382

"Courts and the cultural performance,"[137] I have observed, at times produce transformations in sociocultural practices and in public consciousness. Where rights claims challenge prevailing social or economic arrangements, the status quo often wins out. In these instances the legal process reinforces inequality or power imbalance in existing relationships.[138] At other times, the confluence of creative claim framing, assertive lawyering, political organizing, and an attentive media uplift counter narratives about injustice and rectification,[139] irrespective of formal legal outcomes.[140] In these instances, the litigation process becomes "liberatory, opposing or reconfiguring entrenched group images and relationships."[141]

The litigation process, through subpoena power, enables participants to discover previously private information and develop claims and defenses. Through pleadings, discovery, motions, and trial itself, parties are empowered to organize, assert, and publicize counter narratives that challenge dominant understandings, or master narratives, undergirding unfair political or social arrangements.[142] In this way, public law litigation is not

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(2012); Julian Aguon, Comment, *Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, 31 U. HAW. L. REV. 113 (2008).

137. For further explication and application of *Courts and the Cultural Performance*, see Susan K. Serrano, *The Human Costs of "Free Association": Socio-Cultural Narratives and the Legal Battle for Micronesian Health in Hawai'i*, 47 J. MARSHALL L. REV. 1377, 1381 n.19 (2014) (exploring *Courts and the Cultural Performance* as the cultural narrative of Micronesian people in Hawai'i barred from requisite healthcare under Compact of Free Association); Forman, *supra* note 136, at 382–83 (citing *Courts and the Cultural Performance* regarding gay and lesbian justice debates); Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 879 n.53 (2000) (examining how law reflects social forces and how those forces are implicated in *Courts and the Cultural Performance*); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 440 n.156 (2000) (assessing competing cultural narratives as an expansion of the "master-narratives" and "counter-narratives" through a *Courts and the Cultural Performance* lens); Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at* Baehr v. Lewin, 9 GEO. MASON U. C.R. L.J. 1, 109–10, 112 (1998) (revisiting the same-sex marriage debate viewed through a contextualized lens, as explained in *Courts and the Cultural Performance*); Sally Engle Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889, 892 (1991) (expanding upon the idea of cultural performances as dynamic forums for events that produce transformations in sociocultural practices and general consciousness).

138. Yamamoto, Haia & Kalama, *supra* note 107, at 21.

139. *See* Yamamoto, Kim & Holden, *supra* note 134, at 63 (2007) ("[S]ocio-legal research finds that a 'most stunning example of law's constitutive powers is the willingness of persons' to try to shape themselves into the 'kind of beings the law implies they are—and needs them to be.'"); *see also* Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1643 (2015) (viewing courts "as sources of new understandings of what 'equal' means").

140. *See* Yamamoto, *Efficiency's Threat*, *supra* note 6, at 398 ("[a]cknowledging the [r]ole of [a]djudication in the [d]evelopment of [p]ublic [v]alues").

141. *See* Yamamoto, Haia & Kalama, *supra* note 107, at 17–18 (describing the transformation of group images and relationships, especially in legal disputes "reflective of a larger on-going social-political controversy"). *See also supra* notes 135–37.

142. Yamamoto, Haia & Kalama, *supra* note 107, at 21–25 n.58 ("A court's cultural performances can contribute to reinforcing [the] prevailing narratives or to elevating countering ones . . . [and] [t]hose [court] performances sometimes aid in the transformation of

merely a process for resolving disputes.[143] It is also a process that sometimes transforms narrow legal claims into larger public messages about social justice.[144]

Highly-public litigation becomes a vehicle for those without effective access to elective or bureaucratic power to participate actively in public debates about social controversies and to shape larger societal understandings and policymaker actions over time.[145]

E. Acknowledging Politics and Ideology Matters

The final critical procedure insight is that politics and ideology sometimes matter. This insight connects the others, and it reflects a twist on the familiar idea that "context matters."[146] When procedural shifts generate markedly non-neutral impacts, substantially advantaging some over others, the idea that *ideology matters* explicitly directs inquiry toward the politics of procedure. That inquiry examines political and economic influences, with an emphasis on underlying value preferences that determine practical consequences.[147]

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indigenous peoples' disputes into public messages, discounting or highlighting the perspective, and silencing or enhancing the voice, of the group."); *see* Aguon, *supra* note 136, at 121–22 n.51 (transforming disputes in part by reshaping cultural narratives illustrative of courts as theaters and the performances they produce being as important as their judgments).

143. Subrin, *supra* note 113, at 1691 (recognizing impacts of court process extending beyond resolution of specific disputes).

144. *See* Yamamoto, Haia & Kalama, *supra* note 107, at 19–21 (describing the litigation phenomenon of "dispute transformation" through the expansion of claims from narrow private disputes into public controversies).

145. *See* Yamamoto, Kim & Holden, *supra* note 134, at 63 ("[S]ocio-legal research finds that a 'most stunning example of law's constitutive powers is the willingness of persons' to try to shape themselves into the 'kind of beings the law implies they are—and needs them to be.'"); Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DePaul L. Rev. 293, 293 (2016) ("An extensive body of research in political science, law, history, and sociology has established that, beginning with the 'rights revolution' of the 1960s and 1970s, the role of lawsuits and courts in the creation and implementation of public policy in the United States has grown dramatically."); *see also* Yamamoto, Haia & Kalama, *supra* note 107, at 6 (describing how indigenous groups are using the courts to "help focus cultural issues, to illuminate institutional power arrangements and to tell counter-stories in ways that assist larger social-political movements").

146. *See generally* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. Cal. L. Rev. 1597 (1990); Brian Z. Tamanaha, Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law 39–41 (1997); Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 How. L.J. 241 (2006).

147. Professor A.E. Dick Howard's study reveals that "external politics have affected the inner workings" of the Supreme Court and that "today's Court faces even lower approval ratings and seems to be more politically and ideologically driven and divided than ever."

> [E]xternal politics have affected the inner workings of the institution. Perhaps life at the Court is different in good part because politics outside the Court have become more polarized. The increased diversity on the bench, a decline in consensus, the combative nomination process, the hiring of clerks from ideologically compatible "feeder judges," and media portrayals of the Court all carry political overtones.

A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 Va. L. Rev. 231, 315–16 (2015).

This is because procedure is neither value-free nor a technical science.[148] Both in formulation and operation, procedural systems embody often contested value choices about the importance of resources (or lack thereof) in resolving disputes; about whether similarly situated individuals should be allowed to band together to enter the courthouse and access the tools of factual discovery (particularly for discovery of private information located in defendants' files); about the significance of preliminary injunctive relief in forestalling damaging conduct at the risk of disrupting business or government operations; about the impact of the legal process in reshaping seemingly oppressive social relations and thus about the importance of boundary-shifting social justice claims; and about the storytelling, public-educating functions of the legal process.[149]

These insights direct inquiry into the proclivities of those behind procedural decisionmaking.[150] At its most basic, critical procedure undertakes a realist assessment of the extent to which procedural changes by legislators, rulemakers, and judges are guided, at least partly, by ideological preferences for those of greater social and economic power[151] over those of lesser stature and power.[152] Or vice versa. Politics—with a small "p"—sometimes matters.

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148. Yamamoto, *Efficiency's Threat*, *supra* note 6, at 396.

149. *See* Woo, *supra* note 127 and accompanying text.

150. As Professor Subrin observes about procedural shifts substantively benefitting some over others:

> [T]he great discretion given to trial judges under the initial Federal Rule regime, augmented by the subjectivity inherent in deciding motions to dismiss at the pleading and summary judgment stages under current procedural jurisprudence, has resulted in a distinctly anti-plaintiff bias, especially in civil rights cases. Our inevitable prejudices as human beings, including the biases of judges, tend not to be dampened by current federal civil procedure.

Subrin, *supra* note 113, at 1691; Carter, *supra* note 127, at 2192 (as a federal judge, observing that amended Rule 11 had been applied in a manner evincing "extraordinary substantive bias" against individuals suing businesses); *see also* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2050 (1989) ("[M]any individual procedural rules or clusters of rules have an inherently political aspect, in that they favor or disfavor types of cases or litigants."). Professor Margaret Woo observes, "[d]espite the seemingly benign focus on efficiency and conserving judicial resources, scholars are finding that the increase in pretrial dispositions with earlier and steeper procedural hurdles often results in negative consequences for plaintiffs," particularly for those with lesser resources. Woo, *supra* note 127, at 1281.

151. *See, e.g.*, Galanter, *supra* note 44, at 5–6 (empirically analyzing court filing rates and finding unsupported powerful litigation players' contention that a "litigation explosion" justifies procedural reforms limiting court access and claim development); Miller, *supra* note 13, at 982 (echoing Galanter's analysis and observing how "[e]fficiency [c]lichés" are being advanced by powerful interests to push procedural changes that erode "[o]ur [d]ay [i]n [c]ourt").

152. *See* Burbank & Farhang, *supra* note 75, at 1560 ("In contrast to this limited legislative success in retrenching private enforcement . . . in the period 1970 through 2013, Supreme Court justices have increasingly forged majorities for anti-private-enforcement decisions and that the justices' votes on those issues have been increasingly influenced by ideology, leading to a wide gap between the Court's liberals and conservatives.").

IV. "ADR: WHERE HAVE THE CRITICS GONE?"

Early *critical procedure* critiques of ADR as a part of the First Wave of efficiency procedural reforms set the stage for grappling now with ADR's integral role in the ongoing Second Wave. A brief step back into First Wave history is warranted.

A. ADR Amid First Wave Reforms

As a centerpiece of First Wave reforms, ADR appeared to have many benefits. It shortened and reduced the cost of dispute resolution for some.[153] Participants paid less for lawyers.[154] It allowed the judiciary to pay less for judges, staff, and juries.[155] ADR promoted early dispute resolution through settlement and de-emphasized winning or losing by court decree. ADR seemed to work for ordinary disputes and disputants. The benefits of ADR appeared to address legitimate concerns of undue cost and delay in adjudication.

ADR spread rapidly through the procedural system and beyond. State-mandated court-annexed arbitration systems proliferated.[156] Congress authorized selective mandatory arbitration of cases.[157] Members of the Supreme Court were supportive.[158] Private arbitrators, operating *in camera* with minimal discovery, without formal evidentiary constraints, and, in a limited time frame, disposed of a vast array of cases.

ADR and the First Wave reforms collectively altered the litigation landscape, at times for the better.[159] But, scholars in the early 1990s embracing a critical perspective on law and legal process contested crucial aspects of hastening ADR developments, seeing ADR's potential as a double-edged sword.[160]

B. Outsider Critiques of ADR

Amid the First Wave, I described early critiques of ADR's ideological

153. *See generally* Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 426 (1986).

154. *See id.* at 434.

155. *See id.* at 432.

156. Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 55 (describing the proliferation of efficiency based, court-initiated, and court-enforced ADR programs).

157. 28 U.S.C.A. §§ 651–58 (Westlaw 2017). Some federal district courts implemented effective multi-faceted ADR programs, with designated ADR magistrate judges. *See* Wayne D. Brazil, *Judicial Mediation of Cases Assigned to the Judge for Trial*, Disp. Resol. Mag., Spring 2011, at 24, 24–25 (addressing mediation).

158. Ken Kobayashi, *Kennedy Decries Defeat of Pay Raise for* Judges, Honolulu Star-Bulletin, Aug. 6, 1989, at A13.

159. For an extensive discussion of how the First Wave reforms altered the litigation landscape for outsiders, see Yamamoto, *Efficiency's Threat*, *supra* note 6; *see also* Subrin & Main, s*upra* note 51, at 1853–56; Miller, *supra* note 13, at 309–13; Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 Geo. L.J. 887, 900–02 (1999).

160. Yamamoto, *ADR*, *supra* note 4, at 1058 n.17.

dimensions, particularly its effects on societal outsiders.[161] Richard Delgado, Trina Grillo, and others examined ADR's structure and its shortcomings.[162] Delgado's seminal article, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, explored ADR's risks for racial minorities, women, and the poor.[163] These societal outsiders, according to Delgado, were more likely to suffer prejudice in an informal ADR setting than in formal adjudication that "tend[s] to suppress bias[es]."[164] Trina Grillo's research confirmed this. It determined that ADR failed its essential purposes in child custody disputes and divorce proceedings.[165] "Mediation, without the process protections of adjudication, often left women unprotected from more

161. *Id.* at 1058–62 (citing commentary by scholars Richard Delgado, Owen Fiss, Marjorie Silver, Trina Grillo, John Esser, Carrie Menkel-Meadow, and Kim Dayton, among others).

162. *See generally* Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145 (1988); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Michele G. Hermann, *The Dangers of ADR: A Three-Tiered System of Justice*, 3 J. CONTEMP. LEGAL ISSUES 117 (1989–1990); David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397 (1985); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1991); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482 (1987); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992).

163. Delgado et al., *supra* note 162, at 1388–99. Delgado succinctly elucidates the effect of informality on parties of unequal power:

> [F]ormal legal institutions begin with a presumption of inequality between the parties and construct elaborate rules and mechanisms to protect weaker parties. Informal systems deemphasize these concerns—they presume "that the people or entities that interact outside formal legal institutions are roughly equal in political power, wealth, and social status."

Id. at 1394 (footnote omitted).

164. *Id.* at 1400. Delgado observed that prejudice is more likely "when a member of an in-group confronts a member of an out-group," or "when a person of low status and power confronts a person or institution of high status and power." *Id.* at 1402.

> ADR also poses heightened risks of prejudice when the issue to be adjudicated touches a sensitive or intimate area of life, for example, housing or culture-based conduct. Thus, many landlord-tenant, interneighbor, and intrafamilial disputes are poor candidates for ADR. When the parties are of unequal status and the question litigated concerns a sensitive, intimate area, the risks of an outcome colored by prejudice are especially great.

Id. at 1403 (footnote omitted).

165. Yamamoto, *ADR*, *supra* note 4, at 1060; *Grillo*, *supra* note 162, at 1549. Trina Grillo acknowledged that mediation has the potential to be "useful and empowering" if its inherent risks are addressed rather than ignored. *Id.* at 1610. Grillo noted that mediation lacks many protections that are present in formal adjudication. *Id.* at 1561. A lack of lawyers means that parties lack a protector of their rights and insulation against the other party. The protections present in formal adjudication especially benefit the party with less power, often women. Mediation as currently instituted leaves women exposed and vulnerable and is ultimately less beneficial to society's outsiders than adjudication. *Id.* at 1610.

powerful spouses."[166] Grillo ultimately found ADR to be a "fundamentally flawed" alternative to adjudication in certain situations, forcing those with less power, usually women, "to acquiesce in their own oppression."[167]

Another key critic, Professor Marjorie Silver, broached the shadowy impact of ADR on civil rights claims.[168] Silver noted a lack of empirical studies to support ADR by federal civil rights enforcement agencies.[169] She also highlighted a "lack of empirical study of and theoretical inquiry into the political dimensions of ADR."[170] Instead, she observed, the salutary spotlight on ADR highlighted its potential for efficiency but left its politics in the dark.[171] ADR also focused too much on individual disputes, precluding agencies from acting upon "patterns and systems of discrimination" and thus disempowering already disadvantaged groups and preserving the institutional status quo.[172] In an overriding effort to save time and money, "justice, law compliance and relief for civil rights complainants as a group" fell by the wayside.[173]

C. Five Years Hence: Where Have the Critics Gone?

I highlighted these early critiques in my 1996 essay, *ADR: Where Have the Critics Gone?*. I noted that ADR presented daunting obstacles for those on society's margins. ADR removed disputes from the light of public scrutiny. Deterrence and public education values served by open proceedings were undermined by ADR. The loss of a public forum was critical for those of lesser societal power. Serious public consideration of minority perspectives was sacrificed. ADR also transformed public debates about rights and misconduct into secret proceedings.

I noted that these earlier critiques had seemingly disappeared from mainstream legal discourse and public policymaking.[174] I observed that overriding concerns for efficiency and waning attention to race and gen-

166. Grillo, *supra* note 162 at 1610.

167. *Id.*

168. Silver, *supra* note 162, at 527–28 (analyzing the effect of ADR on civil rights claims in terms of expedience, efficiency, cost effectiveness, finality, and enforceability).

169. *Id.* at 498 (emphasizing the "dearth of empirical evaluation" of dispute resolution, particularly the use of alternative procedures by government agencies).

170. *Id.* at 588; Yamamoto, *ADR*, *supra* note 4, at 1061.

171. *Id.* at 543. A General Accounting Office (GAO) report to Congress dispelled the EEOC's claim that its ADR settlements were efficient. Although ADR expedited dispute resolution, it generated "inadequate" settlements "ha[ving] little if any substance." *Id.* According to the GAO,

> [B]oth employers and charging parties felt they were pressured into settlements that failed to accord justice—employers because they believed they made concessions in the absence of cognizable wrongdoing; charging parties because receiving some settlement led them to believe that their charges must have merit, but that the settlement was inadequate.

Id.

172. Yamamoto, *ADR*, *supra* note 4, at 1060 (highlighting Silver's concern that ADR's narrow focus negatively impacts civil rights claimants).

173. *Id.*; *see also* Silver, *supra* note 162, at 540–46.

174. Yamamoto, *ADR*, *supra* note 4, at 1062–67.

der critiques, woven together, created a partially broken mosaic of mainstream ADR proselytizing.[175]

By weaving these observations with those of early critics of efficiency reforms, I concluded that the "hastening rush toward ADR" buried critical analysis of "ADR's actual benefits and hidden disadvantages for the already disadvantaged"[176] and dropped a veil over "ADR's possible ideological dimensions."[177]

Professor Carrie Menkel-Meadow similarly observed that ADR was "becoming an institutionalized part of the system it was supposed to transform."[178] She raised essential, unanswered jurisprudential and policy questions: "What are the politics of ADR?" "How should we measure the 'quality' of justice?"[179]

Professor Kim Dayton thus called for empirical scrutiny into the impacts of ADR, particularly for those of lesser social or economic power.[180] "Calling ADR's efficacy a 'myth,' Dayton argued that 'the statistics simply do not support' the claim that ADR is cost and time efficient."[181] Dayton also called for "more exacting scrutiny . . . to determine whether ADR is the salvation of federal civil litigation—or if the emperor has no clothes."[182]

With these questions and observations in mind, I assessed ADR through a "critical legal-sociological" lens into political underpinnings and economic consequences.[183] That lens is sharpened by critical procedural inquiry.[184] Critical procedure now illuminates ADR and *AMEX/Concepcion*'s integral role in the on-going Second Wave.

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175. *Id.* at 1066.

176. *Id.* at 1062; *see* Deborah R. Hensler, *Does ADR Really Save Money? The Jury's Still Out*, NAT'L L.J., Apr. 11, 1994, at C2.

177. Yamamoto, *ADR*, *supra* note 4, at 1062, 1064 (observing that "the time and cost-savings of ADR are evaluated and highlighted while the underlying political impacts and value choices are downplayed").

178. *Id.* at 1061; Menkel-Meadow, *supra* note 162, at 2. Carrie Menkel-Meadow described the "conflicting impulses and purposes behind the ADR movement" and mandatory arbitration. *Id.* By 1991, institutionalization of ADR was already widespread, permeating both public and private forums for dispute resolution, as well as professional ADR organizations. Menkel-Meadow expressed concern that ADR, while salutary in some instances, "does not foster communitarian and self-determination goals." *Id.* at 11.

179. *Id.* at 5.

180. Dayton, *supra* note 162, at 957. Professor Dayton contrasted the apparent popularity of ADR in 1991 with federal trial judges, attorneys, and litigants with the lack of empirical scrutiny evidencing ADR's success. Congress "swallowed so completely the myth of ADR in federal courts" that the Civil Justice Reform Act of 1990 pushed ADR to reduce backlog and delay in litigation without clear evidence of ADR's purported benefits. *Id.* Dayton's own study failed to confirm ADR's advocates salutary claims. *Id*.

181. Yamamoto, *ADR*, *supra* note 4, at 1061 (quoting Dayton and highlighting Dayton's study finding a lack of evidence to support ADR's efficiency).

182. Dayton, *supra* note 162, at 957; Yamamoto, *ADR*, *supra* note 4, at 1061–62.

183. Yamamoto, *ADR*, *supra* note 4, at 1056; *see* Trubek, *supra* note 107, at 111 (describing a "critical sociology of civil procedure" that examines linkages between language, knowledge, and power and the social effects of dispute resolution process and procedure).

184. *See supra* Section II.

V. *AMEX* AND *CONCEPCION*: PRIVATIZING AND INDIVIDUALIZING DISPUTE RESOLUTION

American Express Co. v. Italian Colors Restaurant[185] and *AT&T Mobility LLC v. Concepcion*[186] are the sinecure of the conservative Court majority's covert campaign to suppress small- and moderate-sized claims against large businesses. As central to the Second Wave's procedural changes wrought by fiat rather than rulemaking, the ADR rulings in these cases dramatically constrict court access and claim development for consumers, employees, small businesses, tenants, and civil rights claimants. Laying a broad foundation for these cases, beginning in 2006, the Scalia five-member majority "propound[ed] an interpretation of the FAA and an approach to arbitration that would make arbitration agreements unescapable and arbitration decisions nearly impermeable to challenge, even in the face of overwhelming evidence of egregious unfairness, overreaching, or bias."[187] The Court's *AMEX* and *Concepcion* rulings then shunted small and moderate-sized claimants into arbitration and forced them to forgo class treatment and litigate individually.[188] Especially significant, those rulings compelled claimants to arbitrate separately even when the high cost of individually arbitrating claims far surpasses potential recovery.[189] More "than a decade in the making, the move to block class actions was engineered by a Wall Street-led coalition of credit card companies and retailers" and advanced by then private lawyer, and now chief justice, John Roberts.[190]

A. The Foundational Cases

The Supreme Court laid a cornerstone for *AMEX* three years earlier.[191] *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.* held that

185. 133 S. Ct. 2304 (2013).

186. 563 U.S. 333 (2011).

187. Katherine V.W. Stone, *The Bold Ambition of Justice Scalia's Arbitration Jurisprudence: Keep Workers and Consumers Out of Court*, 21 Emp. Rts. & Emp. Pol'y J. 189, 192 (2017).

188. Alison Frankel, *What Hope Remains for Consumers, Employees After SCOTUS* Amex *Ruling?*, Reuters (June 20, 2013) ("Between them, Concepcion and Amex leave consumers, employees and small businesses that are subject to class action waivers in mandatory arbitration provisions without hope of evading the waiver.").

189. Michael B. Miller & Adam J. Hunt, American Express Co. v. Italian Colors Restaurant*: The Supreme Court Reaffirms Its Commitment to Enforcing Arbitration Agreements*, Morrison Foerster (June 24, 2013), http://media.mofo.com/files/Uploads/Images/130624-American-Express-vs-Colors.pdf [https://perma.cc/SQ64-AA24].

190. Silver-Greenberg & Gebeloff, *supra* note 3.

191. In addition to the cases discussed in this section, conservative justices laid other pieces of the foundation. In Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006), under the FAA, Justice Scalia for the majority enforced a mandatory arbitration clause even though state contract law would likely have invalidated the contract as a whole (deeming the arbitration clause severable). *Accord* Nitro-Lift Techs, L.L.C. v. Howard, 133 S. Ct. 500, 504 (2012); Marmet Health Care Ctr. V. Brown, 565 U.S. 530, 533 (2012). In Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010), the Court further narrowed employees', consumers' and small businesses' prospects for challenging a specific arbitration clause as unconscionable (where the contract as a whole is valid but the unbargained-for arbitration provision is not). Scalia, for the majority, rejected a court's power to determine

absent an express, mutual agreement for class arbitration, neither party could compel the other to arbitrate as a class.[192] The Court declared that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties [particularly corporate defendants] consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator."[193] The conservative majority, led by Justice Samuel Alito, disguised the sharp consequences of its ruling behind neutral contractual language: unless large companies expressly agree to class arbitration in their contracts with employees/consumers/contractors, they cannot be so compelled.[194]

Two years after *Stolt–Nielsen*, *Concepcion* laid the next foundational piece. Vincent and Liza Concepcion purchased a service contract from AT&T Mobility LLC.[195] The contract's small print required "arbitration of all disputes" in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[196]

The Concepcions sued in the United States District Court for the Southern District of California, claiming that "AT&T had engaged in false advertising and fraud by charging [a hidden] sales tax on phones it advertised as free."[197] The district court consolidated the case with others and refashioned them as a class action.[198] AT&T moved to compel individual claimant arbitrations, asserting that the plaintiffs waived any right to sue as a class. The plaintiffs responded that the class waiver contract clause was invalid because they had not bargained over it[199] "the arbitra-

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the validity of the mandatory arbitration clause where the clause itself delegates that determination to the arbitrator—even though the delegation language was an integral part of the arbitration clause and even though judges are otherwise to determine the validity and applicability of the arbitration clause. After *Rent-A-Center,* large businesses could avoid court determinations of unconscionability of arbitration clauses (including class waivers) simply by including a phrase in the clause delegating those determinations to the arbitrators (most of whom are selected by the businesses). *See also* CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012) (holding that the FAA overrides an on-point federal statute creating a consumers' right to sue credit organizations and therefore dismissing a statutory-based consumer class action against a financial services company for fraudulent misrepresentations). Professor Stone characterizes the Scalia majority's decisions in these and other related cases as having built an "edifice of arbitration law that effectively walls off the federal courts from most lawsuits brought by ordinary individuals . . . [relegating consumers and worker's claims] to the privatized, invisible, and unaccountable forum of arbitration." Stone, *supra* note 187, at 192.

192. 559 U.S. 662, 684 (2010).

193. *Id.* at 685.

194. *See id.* 684, 687 (declaring that since Stolt-Nielsen did not agree to class arbitration it could not be compelled to class arbitrate).

195. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011).

196. *Id.* at 336.

197. *Id.* at 337.

198. *Id.*

199. In 2008 the United States District Court for the Southern District of California in Laster v. T-Mobile USA, Inc., No. 05cv1167, 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008), under state law, nullified unbargained-for arbitration agreements as substantively unconscionable "because the class arbitration waiver allowed the corporation to avoid responsibility for wrongful behavior that the consumers would have addressed through class arbitration, but did not have an incentive to address through individual arbitration." Jeremy McManus, *A Motion to Compel Changes to Federal Arbitration Law: How to Remedy*

tion agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures."[200] California law—the *Discover Bank* rule—invalidated class action waivers that exempted the party with "superior bargaining power . . . from responsibility for [its] own fraud, or willful injury to the person or property of another."[201]

The Supreme Court addressed whether the Federal Arbitration Act (FAA) prohibited state courts from refusing to enforce class arbitration waivers in light of state no-class waiver laws.[202] The conservative five-to-four majority, led by Justice Scalia,[203] held that the FAA preempted the state law ban on class action waivers in consumer contracts.[204] California's *Discover Bank* rule,[205] he wrote, employing neutral language of effi-

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the Abuses Consumers Face When Arbitrating Disputes, 37 B.C.J.L. & SOC. JUST. 177, 200 (2017).

200. *Concepcion*, 563 U.S. at 337–38. After the conservative majority's series of byzantine rulings on state law unconscionability, three pitfalls threaten unconscionability challenges in federal court.

> First, unconscionability arguments must be directed solely at the arbitration provision, and not the contract as a whole. A challenge that seeks to invalidate the contract as a whole (other than [its initial formation]) must be decided by the arbitrator; a challenge that seeks to invalidate only the arbitration clause is decided by the court. Second, . . . if the arbitration clause contains a delegation provision saying the arbitrator will decide the validity of the arbitration clause, any challenge must be directed to the delegation provision itself [whether delegation to the arbitrator was proper] . . . Unless that delegation provision is invalid, the arbitrator will decide the rest. Finally, because of the Supreme Court's ruling in *Concepcion*, arbitration clauses usually cannot be held unconscionable because they eliminate class actions, although the enforceability of the waiver may be undermined by applicable state law.

Karla Gilbride & Arthur H. Bryant, *Loosen the Bonds*, 40 L.A. LAWYER 22, 26 (2017) (footnotes omitted).

201. Concepcion, *563 U.S.* at 340 (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (citing Cal. Civ. Code Ann. §1668)). The Discover Bank rule assesses three factors in determining whether a class action waiver in a consumer contract is unconscionable:

> (1) Whether the agreement was a contract of adhesion, (2) whether the dispute was likely to involve small amounts of damages, and (3) whether the party with superior bargaining power carried out a scheme to deliberately charge large numbers of consumers out of individually small sums of money.

Stone, *supra* note 187, at 192.

202. *Id.* at 341–52.

203. Jeffrey Toobin, *Looking Back*, THE NEW YORKER (February 29, 2016), http://www.newyorker.com/magazine/2016/02/29/antonin-scalia-looking-backward [https://perma.cc/QFH9-5PEL] ("Antonin Scalia . . . devoted his professional life to making the United States a less fair, less tolerant, and less admirable democracy.").

204. *Concepcion*, 563 U.S. at 352.

205. *See* CAL. CIV. CODE § 1668 (West 2016); Laster v. T-Mobile USA, Inc., No. 05CV1167, 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008) (characterizing the *Discover Bank* rule's "[f]aithful adherence to California's stated policy of favoring class litigation and [class] arbitration to deter alleged fraudulent conduct in cases involving large numbers of consumers with small amounts of damages"); Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (highlighting that the *Discover Bank* rule, on unconscionability grounds, prohibits enforcement of a class action waiver when the waiver is in a "take it or leave it" consumer contract, the waiver involves a dispute with a predictably small amount of damages, and it is alleged that the party with superior bargaining power engaged in a scheme to deliberately cheat consumers).

ciency, "st[ood] as an obstacle to . . . the FAA's objectives" of "enforcement of private [arbitration] agreements and encouragement of efficient and speedy dispute resolution."[206]

Despite the gross disparity in bargaining power, the majority ruled that the FAA—applicable when the underlying contract involves interstate commerce[207]—commands enforcement of private arbitration and class waiver contract clauses.[208] Employing neutered language about "efficient and speedy dispute resolution,"[209] the majority blandly reasoned that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"[210]

Justice Stephen Breyer's dissent countered by focusing on the non-neutral group-disempowering impacts of the majority's preemption ruling. Breyer maintained that in order to "implement Congress' intent, [the Court] should think more than twice before invalidating a state law that does just what § 2 [of the FAA] requires, namely, put[ ] agreements to arbitrate and agreements to litigate 'upon the same footing.'"[211] Breyer noted that the California Supreme Court had the "perfectly rational view" that "nonclass arbitration over such [small] sums will . . . sometimes have the effect of depriving claimants of their claims" and "insulate an agreement's author from liability for its own frauds."[212] Breyer called for the federal courts to allow state laws to block the enforcement of arbitration clauses in near-adhesion contracts where enforcement effectively bars the adjudication of meritorious claims and inoculates businesses against liability for their wrongdoing.

Following *Concepcion*, small claimants faced a substantial hurdle. Boilerplate class action waivers buried in arbitration clauses in a multitude of business-drafted agreements involving interstate commerce would be enforced by federal courts regardless of state laws invalidating arbitration class waivers.[213] After *Concepcion*, businesses regularly incorporated

206. *Concepcion*, 563 U.S. at 343, 345; *cf.* Geier v. Am. Honda Motor Co., 529 U.S. 861, 872 (2000); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000).

207. Federal Arbitration Act, 9 U.S.C. §1 (defining commerce to include "commerce among the several states") and §2 (requiring "a transaction involving commerce") (West 2017). *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) ("the FAA encompasses a wider range of transactions than those actually "in commerce"a—that is, 'within the flow of interstate commerce'").

208. *Concepcion*, 563 U.S. at 352.

209. *Id.* at 345 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

210. *Id.* at 344 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

211. *Id.* at 362 (Breyer, J., dissenting) (citing 9 U.S.C.A. § 2 (West 2016)).

212. *Id.* at 365–66 (citing *Discover Bank*, 113 P.3d at 1100).

213. *See* Jonathan Gertler & Christian Schreiber, AT&T Mobility v. Concepcion*: The Death Knell for Class Actions?*, PLAINTIFF MAGAZINE, June 2011, at 3–4. Despite its professed fealty to the express terms of arbitration clauses, reflected in *Concepcion*, the Court refused to enforce an explicit arbitration clause invalidating an entire arbitration provision "if the law of your state makes the waiver of class arbitration unenforceable." In DIRECTV v. Imburgia, 136 S. Ct. 463 (2015), the Court declined to enforce the specific terms of the arbitration agreement, relying on *Concepcion* to find the state law preempted. In dissent, Justice Ginsburg described the import of the majority's ruling.

class waivers into the small-print arbitration clauses in standard form contracts.[214]

Stolt–Nielsen and *Concepcion* closed the door to class action lawsuits and class arbitration, but with one remaining opening—the effective vindication exception.[215] Prior to *AMEX*, this court-recognized exception offered a possible escape route for small-to-moderate-sized claimants seeking to publicly hold large corporate defendants liable for substantive law violations. The escape, by design, "prevent[s] arbitration clauses from choking off a plaintiff's ability to enforce congressionally created [legal] rights."[216]

The Court first recognized the effective vindication exception in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[217] The exception applies if arbitral proceedings "will be so gravely difficult . . . that [the claimant] will for all practical purposes be deprived of his day in court."[218] The effective vindication exception applies not only to "baldly exculpatory [provisions or] prohibitive fees," but also to "the world of other provisions a clever drafter might devise to scuttle even the most meritorious federal claims."[219]

B. *AMEX*—The Scalia Majority

AMEX addressed the viability of the effective vindication exception, specifically, whether the FAA permits courts to invalidate a contractual class arbitration waiver where a plaintiff's cost of individually arbitrating a federal claim far exceeds its potential recovery.[220] Justice Scalia, writing for the Court's conservative majority, said no.[221]

Plaintiff Italian Colors Restaurant initiated a class action on behalf of

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> Today, the Court holds that consumers lack not only protection against unambiguous class-arbitration bans in adhesion contracts. They lack even the benefit of the doubt when anomalous terms in such contracts reasonably could be construed to protect their rights.

Id. at 476 (Ginsburg, J., dissenting).

214. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052, 3082 n.126 (2015) (citing Justice Goodwin Liu of the California Supreme Court for his pushback against the U.S. Supreme Court's recent arbitration cases).

215. Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 Pepp. Disp. Resol. L.J. 375, 377 (2014) (characterizing the effective vindication exception as conceived to ensure that arbitration is an effective mechanism for vindicating federal statutory rights and concluding that the exception plays a crucial role in promoting access to justice for small claimants against large corporate defendants).

216. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting).

217. 473 U.S. 614 (1985).

218. *Id.* at 632.

219. *Am. Express*, 133 S. Ct. at 2317.

220. *See id.* at 2307.

221. *Id.* at 2312; *see* David Garcia & Leo Caseria, *Opinion Analysis: A Class Action Waiver in an Arbitration Agreement Will Be Strictly Enforced Under the Federal Arbitration Act*, SCOTUSblog (June 21, 2013, 10:45 AM), http://www.scotusblog.com/2013/06/opinion-analysis-a-class-action-waiver-in-an-arbitration-agreement-will-be-strictly-enforced-under-the-federal-arbitration-act/ [https://perma.cc/AF5W-UBG9].

small business merchants accepting American Express charge cards.[222] American Express required the merchants to sign its unilaterally drafted commercial contract. That contract included a small-print clause requiring individual arbitration of all disputes.[223] Italian Colors initiated an antitrust class action, claiming that American Express deployed its monopoly power to force merchants to accept charge cards at rates thirty percent higher than competitors.[224]

American Express moved to compel arbitration and dismiss the class litigation.[225] Italian Colors and the other merchants resisted. They argued that the exorbitant cost of individual arbitrations prevented "[effective] vindication of [their] meritorious federal claims."[226] The merchants' expert presented conclusive evidence that the claimants could only prove their antitrust claims through a $200,000-plus economic study that defines relevant markets, establishes American Express's monopoly power, and shows anti-competitive effects.[227] The study was inordinately expensive for an individual claimant in light of the approximate $30,000 ceiling for the individual's recovery.[228] To afford to pursue their identical claims, numerous small businesses would need to join in one action and share costs.

The district court granted American Express's motion to compel individual private arbitration and dismissed the suit.[229] But, the Second Cir-

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222. *Am. Express*, 133 S.Ct. at 2308.

223. The arbitration provision of the Card Acceptance Agreement read, in relevant part:

> If arbitration is chosen by any party with respect to a claim, neither you nor we will have the right to litigate that claim in court or have a jury trial on that claim. . . . Further, you will not have the right to participate in a representative capacity or as a member of any class of claimants pertaining to any claim subject to arbitration. The arbitrator's decision will be final and binding. Note that other rights that you would have if you went to court may also not be available in arbitration.
>
> There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card . . . or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.

In re Am. Express Merch. Litig., 554 F.3d 300, 306–07 (2d Cir. 2009); *see also Am. Express*, 133 S.Ct at 2308.

224. *Am. Express*, 133 S. Ct. at 2308; *Class Actions—Class Arbitration Waivers*—American Express Co. v. Italian Colors Restaurant, 127 HARV. L. REV. 278, 287 (2013) (describing the Supreme Court's message that "absent a clear textual signal from Congress, class waivers are enforceable even if plaintiffs' federal statutory claims are too expensive to bring individually").

225. *In re* Am. Express Merch. Litig., No. 03 CV 9592 (GBD), 2006 WL 662341, at *1 (S.D.N.Y. Mar. 16, 2006).

226. *Am. Express*, 133 S. Ct. at 2320 (Kagan, J., dissenting)

227. *See id.* at 2308 (majority opinion) (detailing prohibitive costs that would prevent plaintiffs from individually pursuing their claims).

228. *See id.* at 2308 (highlighting individual arbitration's exorbitant cost and minimal recovery that would leave even a successful claimant hundreds of thousands of dollars in the hole).

229. *In re Am. Express*, 2006 WL 662341, at *10.

cuit held the litigation waiver unenforceable because the merchants "would incur prohibitive costs if compelled to [individually] arbitrate under the class action waiver."[230] In support, the court relied upon the effective vindication exception to compelled class waivers in *Green Tree Financial Corp. Alabama v. Randolph*.[231] In *Randolph*, the Supreme Court determined that the effective vindication exception was vital to the overall claim resolution process—it invalidated arbitration provisions that precluded plaintiffs from vindicating modest value claims because of prohibitive individual arbitration costs.[232]

Indeed, *Randolph*, following *Mitsubishi*,[233] clarified the effective vindication exception's application. If the plaintiff presented clear evidence that prohibitive individual arbitration costs would preclude pursuit of an apparently meritorious claim, the court would invalidate the arbitration class waiver provision.[234] The plaintiff in *Randolph* failed to meet this burden, and the Supreme Court approved individual arbitration.[235] Especially significant, the Court in *Randolph* reaffirmed the judiciary's duty to invalidate arbitration class waiver provisions where prohibitive costs are demonstrated.[236]

Justice Scalia, for the *AMEX* majority, rejected *Randolph*'s continuing embrace of the effective vindication exception. He deemed the exception inapplicable despite Italian Colors' convincing showing that exceedingly high individual arbitration costs would prevent continued pursuit of its federal claims.[237]

Justice Scalia's initial thrust against the effective vindication doctrine was to characterize it as *Mitsubishi* dicta. He declared that *Mitsubishi* did not rely upon the exception, and thus it could not be considered controlling law.[238] But, as Justice Kagan aptly observed in refuting his declaration, Scalia labeled the exception dicta while having "precious little to say about why."[239] Scalia then turned to asserting that if the effective vindication exception were "law," it would bar only facially explicit "prospective waiver[s] of a party's *right to pursue* statutory remedies."[240] The exception would only invalidate arbitral provisions that expressly foreclosed plaintiffs' statutory rights. But no such contract provisions exist. By limiting the exception to nonexistent circumstances, Scalia achieved the conservative majority's readily apparent objective: eliminating "prohibitive

230. *In re* Am. Express Merch. Litig., 554 F.3d 300, 315–16 (2d Cir. 2009) (finding the exception satisfied).
231. *Id.*; Green Tree Financial Corp.–Alabama v. Randolph, 531 U.S. 79 (2000).
232. *See Randolph*, 531 U.S. at 91–92.
233. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
234. *Randolph*, 531 U.S. at 92.
235. *Id.* at 91–92.
236. *See id.* at 80–81.
237. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting).
238. *Id.*; *Mitsubishi*, 473 U.S. at 640.
239. *Am. Express*, 133 S. Ct. at 2317 (Kagan, J., dissenting).
240. *Id.* (quoting *Mitsubishi*, 473 U.S. at 637 n.19 (emphasis added)).

costs" as a trigger for the exception. Employing pure formalist language, Scalia concluded that the "fact that it is not worth the expense involved in proving a statutory remedy [would] not constitute the elimination of the right to pursue that remedy."[241]

Justice Scalia also characterized *Concepcion* as the precedential deathblow to the effective vindication exception: "[t]ruth to tell, our decision in [*Concepcion*] all but resolves" *AMEX*.[242] But Scalia's terse one-paragraph discussion of *Concepcion*, referencing the "procedural morass" that accompanies class arbitration, failed to show how.[243] Relying upon the ostensibly neutral principle of procedural efficiency as his trump card, Scalia simply asserted that "[*Concepcion*] established . . . that the FAA's command to enforce arbitration agreements [in the name of efficiency] trumps any interest in ensuring the prosecution of low-value claims."[244] *Concepcion*, however, did not address the effective vindication exception at all. As Justice Kagan pointed out, Justice Scalia wrongly relied upon *Concepcion* as his precedential coup de grâce.

After three tenuous arguments for undercutting the effective vindication exception, Justice Scalia turned to broad Second Wave efficiency reform rhetoric. He contended that the Second Circuit's regime in *AMEX* for invalidating arbitration class action waivers would necessitate an administrative superstructure, and this bulky apparatus would run counter to arbitration's efficiency rationale.[245] Unless substantially narrowed, Scalia maintained, the effective vindication exception superstructure would force courts and parties to constantly litigate predicted arbitration costs versus potential recovery in order to determine the exception's applicability.[246] This motion-to-compel-arbitration superstructure "would undoubtedly destroy the prospect of speedy resolution that arbitration in general . . . was meant to secure."[247] The judicial interest in "streamlined proceedings"—a sweeping, all-encompassing resort to efficiency—justified writing the effective vindication exception practically out of existence.[248]

At bottom, the conservative majority's ruling cut the legs off the effective vindication exception.[249] It sent a message loud and clear: No escape—no class actions, no class arbitration.[250]

But, ensconced behind the veil of efficiency, Scalia left much unsaid. Justice Elena Kagan's stinging dissent identified what was really going

241. *Id.* at 2311.
242. *Id.* at 2312.
243. *Id.*
244. *Id.* at 2312 n.5.
245. *Id.* at 2312.
246. Garcia & Caseria, *supra* note 221.
247. *Am. Express*, 133 S. Ct. at 2312 (construing the FAA as disproving such a judicially-created superstructure); *see* Garcia & Caseria, *supra* note 221.
248. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011); Glover, *supra* note 214, at 3063–64.
249. Garcia & Caseria, *supra* note 221.
250. *See id.*

on—ideological preferences for some over others, big over small, businesses over people.

C. Kagan Dissects Scalia: "Do not Be Fooled"

Justices Ruth Bader Ginsburg and Stephen Breyer joined Justice Kagan[251] in exposing how the *AMEX* majority undermined the rule of law through its ideologically-driven elimination of the effective vindication exception.[252] The majority ruling was not actually about precedent, she maintained. Nor was it really about efficiency. Kagan emphasized that the conservative majority's ostensibly procedural ruling revealed a clear substantive preference: de facto legal immunity for large businesses by preventing small and moderately sized claimants from effectively vindicating meritorious claims publicly through class actions.[253] And Kagan aptly characterized Justice Scalia's reaction to *AMEX's* deleterious impact on those possessing "low value claims" as "[t]oo darn bad."[254] The conservative majority disguised its ideological preferences though neutral language of procedural efficiency. Kagan warned: "Do not be fooled."[255]

1. "Giving the Monopolist Power to Deprive Its Victims of All Legal Recourse"

Mitsubishi and Randolph are precedent, not dicta. More specifically, Justice Kagan rebuked the *AMEX* majority's "betrayal of our precedents"—*Mitsubishi* and *Randolph*.[256] The effective vindication exception, she showed, is a settled doctrine integral to the entire federal arbitration scheme. It is not mere dicta as Justice Scalia contended. *Mitsubishi* recognized that "federal statutory claims are subject to arbitration so long as the claimant may effectively vindicate [its] rights in [an] arbitral forum."[257] It thereby barred judicial enforcement of mandatory arbitration that would effectively "confer immunity from potentially meritorious federal claims."[258] *Mitsubishi* recognized the exception as an integral pillar

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251. *See id.* ("Justice Sotomayor recus[ed] herself because she sat on the Second Circuit panel that originally decided the case.").

252. *Am. Express*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

253. For subsequent cases exemplifying *AMEX/Concepcion*'s de facto immunity for large businesses by preventing small and moderately sized claimants from vindicating their claims through class actions, see, for example, Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 494–95 (3d Cir. 2014); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 293 (2d Cir. 2013) (per curiam); Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1074 (9th Cir. 2013); Ferguson v. Corinthian Colls., Inc., 733 F.3d 928, 932 (9th Cir. 2013).

254. *See Am. Express Co.* at 2313 (Kagan, J., dissenting) (observing that *AMEX* bars not just class actions but also other forms of claimants' cost sharing).

255. *See id.* at 2320.

256. *See id.* at 2313, 2314–15 (describing how the effective vindication emerged as a core part of the arbitration scheme recognized in *Mitsubishi* and reinforced in *Randolph*.); Green Tree Fin. Corp.–Alabama v. Randolph, 531 U.S. 79, 80–81 (2000); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

257. *Am. Express*, 133 S. Ct. at 2310 n.2 (citing *Mitsubishi*, 473 U.S. at 636).

258. *Id.* at 2313 (Kagan, J., dissenting) (noting that the effective vindication exception "doubtless covers the baldly exculpatory clause . . . that . . . would preclude an arbitration

of the arbitration edifice.[259] And Kagan observed, "we have repeated[ly] . . . instruct[ed] courts not to enforce an arbitration agreement that effectively (even if not explicitly) foreclose[d] a plaintiff" from vindicating a federal claim.[260] Moreover, *Randolph* established a clear standard for triggering the established effective vindication exception—when a claimant demonstrated "prohibitive costs."[261] Justice Kagan thus declared, "whatever else the majority might think of the effective-vindication rule, it [did not originate in] dictum."[262]

Justice Kagan also shredded Justice Scalia's assertion that the exception was ambiguous because no clear case example existed to guide its application.[263] She admonished the majority for intentionally ignoring *Randolph*, which "fits this case hand in glove."[264] *Randolph* acknowledged that "forcing a[n individual] plaintiff to bear the brunt of 'hefty' arbitration costs and 'steep filing fees'" would trigger the exception.[265] And, Kagan wrote, *Randolph*'s delineation of the exception expressly encompassed *any* situation where a contract bars cost-sharing and arbitration costs effectively bar individual pursuit of federal claims.[266]

Justice Kagan then linked *Randolph* to *AMEX*. "Italian Colors proved what the plaintiff in *Randolph* could not: the individual arbitration of each claim would be prohibitively expensive."[267] Italian Colors thus established that the contract "'operate[d] . . . as a prospective waiver' and prevent[ed] the effective vindication" of its federal claims.[268]

For Justices Kagan, Breyer, and Ginsburg, the conservative majority in *AMEX*, under the guise of ADR efficiency, eviscerated the effective vindication exception to give the "monopolist . . . power to insist on a contract effectively depriving its victims of all legal recourse."[269] Justice

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agreement's enforcement. But so too it covers the world of other provisions a clever drafter might devise to scuttle even the most meritorious federal claims." (*Id.* at 2317.)).

259. *See Mitsubishi*, 473 U.S. at 637 n.19 (concluding that if an arbitration agreement operates as a prospective waiver of a party's right to pursue a statutory remedy, the Court would condemn the agreement as against public policy).

260. *Am. Express*, 133 S. Ct. at 2314 (Kagan, J., dissenting).

261. *Randolph*, 531 U.S. at 91–92.

262. *Am. Express*, 133 S. Ct. at 2317 (Kagan, J., dissenting).

263. Chukwumerije, *supra* note 215, at 437–38 (characterizing Scalia's gambit of calling the effective vindication exception "unclear" in order to significantly narrow it while ignoring the Court decisions reaffirming the exception and clarifying its application).

264. *Am. Express*,133 S. Ct. at 2313 (Kagan, J., dissenting).

265. Chukwumerije, *supra* note 215, at 399 (addressing Green Tree Fin. Corp.–Ala. v. Randolph, 178 F.3d 1149, 1157 (11th Cir. 1999)).

266. *See id.* at 403–04.

267. *Am. Express*, 133 S. Ct. at 2316 (Kagan, J., dissenting); *see* Green Tree Fin. Corp.–Alabama v. Randolph, 531 U.S. 79, 92 (2000) (where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs").

268. *Am. Express*, 133 S. Ct. at 2317 (Kagan, J., dissenting) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

269. *Id.* at 2313–14 (Kagan, J., dissenting) (using "monopolist," without further elaboration, to refer to American Express and other economically-powerful businesses similarly situated).

Kagan warned of the majority's misleading procedural rhetoric.[270] Judge by the consequences: what groups are disempowered, what groups benefit.

2. "Diminishing the Usefulness of Rule 23 Class Actions"

Concepcion is irrelevant to the effective vindication rule—much less the "deathblow." Justice Kagan rejected Justice Scalia's pithy reliance on *Concepcion*, clarifying that *Concepcion* does not resolve this case.[271] The conservative majority, she declared, in distorting past cases, is surreptitiously "bent on diminishing the usefulness of Rule 23" for small claimant class actions.[272]

Concepcion nowhere cited the effective vindication exception to class waivers.[273] According to Justice Kagan, Justice Scalia badly overreached in his deathblow reliance on *Concepcion*. *Concepcion* "involved a *state* law, and therefore could not possibly implicate the [federal] effective-vindication rule."[274] Kagan also admonished the majority for narrowly limiting the effective vindication rule to "baldly exculpatory provisions."[275] Doing so would allow major companies to always avoid the exception—businesses crafting arbitration clauses would simply avoid express language conferring substantive law immunity.[276]

For the dissenting justices, what was really going on was this: conservative antipathy toward class adjudication. The Scalia majority deployed procedure covertly to eliminate the substantive impacts of class litigation because collective actions at times are the only vehicle for holding large companies, like American Express, legally liable and publicly accountable for widespread, moderate value law violations.[277] A scholar and self-proclaimed "one of [Scalia's] biggest fans," even observes:

> for better or for worse . . . [no] other Justice of the Supreme Court in American history has done more to hinder the class action lawsuit than Justice Scalia did. The Justice did his damage not so much in his opinions interpreting the Federal Rules of Civil Procedure . . . but in his opinions interpreting the Federal Arbitration Act . . . giving a green light to corporations that want to opt out of class-wide liability *entirely* so long as they do so using arbitration contracts.[278]

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270. *Id.* at 2320.

271. *Id.* at 2319–20.

272. *Id.* at 2320 (highlighting that the Court is "bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled").

273. *Id.* (highlighting that *Concepcion* did not cite or discuss the primary effective vindication exception cases—*Mitsubishi* and *Randolph*).

274. *Id.*

275. *Id.* at 2314.

276. *Class Actions*, *supra* note 224, at 282.

277. *See id.*

278. Brian T. Fitzpatrick, *Justice Scalia and Class Actions: A Loving Critique*, 92 NOTRE DAME L. REV. 1977, 1977 (2017).

3. "A Foolproof Way of Killing Off Valid Claims"

The effective vindication exception promotes the FAA's goal of efficiency. Finally, Justice Kagan pointed out that Justice Scalia quibbled about inefficiencies generated by *Concepcion*'s no-class-waiver state law. That ban, Scalia opined, "mitigated arbitration's primary advantage—'its informality'—by making the process 'slower, more costly, and more likely to generate procedural morass than final judgment.'"[279] Justice Kagan rooted her rejoinder in legal process reality. "The effective-vindication rule furthers the [FAA]'s goals by ensuring that arbitration remains a real, not faux, method of dispute resolution."[280] It encourages large corporations to adopt arbitration procedures that streamline actual complaint resolution.[281] And it "promotes the most fundamental purposes of the FAA itself"[282]: "actual arbitration—that is, arbitration as a streamlined 'method of resolving disputes,' not as a foolproof way of killing off valid claims."[283] The majority, she observed, instead of streamlining real-life dispute resolution, was formalistically morphing compelled arbitration into "a mechanism [more] easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."[284]

VI. CRITICAL CONSEQUENCES

Early ADR critics, myself included, worried about the unstated politics of ADR and its "hidden disadvantages for the already disadvantaged."[285] Amid the First Wave of efficiency procedural reforms, we worried about the "'quality' of justice" for outsiders over time and whether arbitration, in particular, might prove less the "salvation of federal . . . litigation" and more—at least in some situations—a case of the "emperor ha[ving] no clothes."[286]

The Supreme Court's Second Wave *AMEX*/*Concepcion* rulings significantly deepen those concerns. They extend ADR's deleterious impacts well beyond the cautionary scenarios imagined by the early outsider critiques. Critical procedure underscores the significance. Its attention to the power of procedure to generate differential impacts and reflect ideological preferences—all under the guise of ostensibly neutral efficiency reforms—reveals how and possibly why a conservative Court majority deployed compelled arbitration to privatize and individualize a wide swath of claims against major businesses and institutions. As Justice Ka-

279. *Id.* at 281 (citing *Am. Express*, 133 S. Ct. at 2312).
280. *Am. Express*, 133 S. Ct. at 2315 (Kagan, J., dissenting).
281. *Id.*
282. *Id.* at 2313 (majority opinion).
283. *Id.* at 2315 (Kagan, J., dissenting) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).
284. *Id.* at 2320.
285. *See* Yamamoto, *ADR*, *supra* note 4, at 1062; *supra* Section IV.C. and text accompanying note 177.
286. Yamamoto, *ADR*, *supra* note 4, at 1061–62 (quoting Dayton, *supra* note 162, at 957).

gan's *AMEX* dissent intimates, and as critical procedure inquiry illuminates, *AMEX* and *Concepcion* are key drivers of the Second Wave's constriction of court access and claim development—a designed narrowing of the legal process by judicial fiat.

Assessed through a critical procedure lens, the consequences are profound. At bottom, the rulings force many small-to-moderate-sized claimants—often those of limited social or economic power—to abandon meritorious claims. They abandon those claims because of the *AMEX/ Concepcion* triple whammy: those claimants are compelled to waive public litigation in favor of private arbitration; are compelled to waive class treatment and litigate individually once in arbitration; and are no longer allowed to avail themselves of the "effective vindication exception" even if individual arbitration costs far exceed potential recovery.[287] This claim suppression flows from Justice Scalia and the conservative majority's "jiggery-pokery" in favor of big business.[288]

A. *Jiggery-Pokery*—Hiding Ideology Behind the Veil of Procedural Neutrality

Professor David S. Schwartz takes Justice Scalia to task for "jiggery-pokery"—a phrase Scalia coined[289] to characterize justices' employment of slithery language to hide what is really going on. Schwartz turns Scalia's phrase back on him, skewering Scalia for his "penchant for criticizing his colleagues for judicial practices in which he frequently indulged himself."[290] Schwartz highlights Scalia's jiggery-pokery in *AMEX* and *Concepcion*.[291]

Justice Scalia deceptively advanced the conservative majority's substantive value choice of protecting large business defendants[292]—even at the expense of subverting meritorious claims of those of lesser power, even if doing so entailed five justices by fiat rewriting settled procedural law. Scalia, an express advocate for judicial restraint, did so through misdirection, employing the language of efficiency to disguise actual value preferences.[293] Schwartz concluded, "one can hope that Justice Scalia's doctrinal jiggery-pokery in federal arbitration law will soon be overruled,

287. *Am. Express*, 133 S. Ct. at 2316 (Kagan, J., dissenting) (describing how the majority ruling, in practice, forces a small business claimant to choose between spending exorbitantly more to arbitrate than its claim is worth, or relinquishing a potentially meritorious substantive federal claim).

288. Glover, *supra* note 214, at 3092 (examining the effects of enabling large businesses to achieve a hassle-free reduction of legal liability by enlisting the courts to enforce mandatory individual arbitrations provisions in contracts that consumers have no choice but to sign to obtain a credit card, or cell phone, or other products).

289. King v. Burwell, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting) (describing the "Court's next bit of interpretive jiggery-pokery").

290. David S. Schwartz, *Justice Scalia's Jiggery-Pokery in Federal Arbitration Law*, 101 Minn. L. Rev. Headnotes 75, 75 (2016).

291. *See id.*

292. *Am. Express*, 133 S. Ct. at 2320; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

293. *See supra* Section V.B.1.

gone and forgotten."[294]

B. Compelled *Privatized* Arbitration—Subverting "Courts and the Cultural Performance"

After *Concepcion* the effective vindication doctrine remained the sole day-in-court lifeline for small-to-moderate-sized claimants seeking to reject boilerplate small-print arbitration clauses in employment, leasing, product supply, retail sales, and financial transactions.[295] But then *AMEX* terminated that lifeline, practically narrowing the doctrine out of existence.[296] A wide array of claims has now vanished from the public adjudication arena—and, indeed, from any arena. As Professor Myriam Gilles observes, this shift from public litigation to private arbitration "amounts to [a] whole-scale privatization of the justice system."[297] And because the Scalia majority invoked the ostensibly neutral principle of efficiency, "[t]he change has been swift and virtually unnoticed . . . [and] Americans [are actively being deprived of their] fundamental right: their day in court."[298] Jiggery-pokery in action.

Critical procedure underscores this loss. As developed in Section III, courts in controversial cases serve as sites of cultural performances. Pleadings, full discovery (with subpoena power), temporary restraining orders, motions, and public trials offer claimants of lesser power a structured decisional forum where the more powerful are obliged to disclose and participate—even against their will—in a dynamic ritual of public accounting. Those claimants, with attendant media reportage, are empowered to organize collective voices and publically advance narratives that generate new understandings of wrongful behavior—for instance, the widespread injustice of a multi-store business' discriminatory treatment of women and immigrants.[299]

By design, compelled arbitration erases it all. The arbitral regime expanded by the conservative majority, with no collective actions, means limited informational discovery and dissemination; frequent, stark litigation resource imbalances; isolated claimant voices; publicly unaccountable decisionmakers; and limited media scrutiny and real-time social commentary. *AMEX/Concepcion* thus tears asunder a fundamental attribute of legal dispute resolution—"courts and the cultural perform-

294. *See* Schwartz, *supra* note 290, at 93.

295. Garcia & Caseria, *supra* note 221.

296. *See Am. Express*, 133 S. Ct. at 2316, 2320 (Kagan, J., dissenting) (observing that *AMEX* bars not only class actions but also other forms of claimants' cost sharing).

297. Silver-Greenberg & Corkery, *supra* note 2 (quoting Myriam Gilles).

298. *Id.*; Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 Harv. L. & Pol'y Rev. 329, 329–30 (2015); *see also Am. Express*, 133 S.Ct. at 2313 (Kagan, J., dissenting) (predicting that large businesses like *AMEX* will continue to "use [their] monopoly power to insist on a contract effectively depriving its victims of all legal recourse"); Glover, *supra* note 214, at 3092 (concluding that small claimants who sign waivers of class and public litigation often lack the option to reject those contractual waivers).

299. *See supra* note 116 and accompanying text.

ance"—undermining the public educational aspects of adjudication and diminishing opportunities for groups of lesser power to coalesce around common claims and collectively advocate.[300]

For this and related reasons, several state Attorneys General joined to protest the expansive mandatory privatization of dispute resolution. In a 2014 letter to the Director of the Consumer Financial Protection Bureau, they declared that the Supreme Court badly erred in its recent arbitration rulings.[301] The FAA, they wrote, "was intended to facilitate . . . disputes between commercial entities of similar situation and bargaining power,"[302] not to enable large businesses to force individually powerless people unknowingly to waive their rights to public adjudication. Courts now routinely compel private dispute resolution, the Attorneys General observed, "even if [the consumer] . . . had no opportunity to negotiate or reject" the provision because he or she was simply unaware the provision was buried in the terms of the contract.[303]

Professor Judith Resnik[304] views this burgeoning privatization of dispute resolution as undercutting a traditional adjudication value: an open process that places on the public stage the defendant's accountability under the law.[305] Resnik observes that alternative dispute resolution, especially arbitration, occurs "outside the public purview and it displaces [the importance of a fair] public adjudication."[306] A primary ADR incentive for many defendants, her research shows, is to ensure secrecy.[307] But secrecy, or confidentiality, frustrates the public's need to know and deprives claimants of the public "benefits of precedential decision-making."[308]

Professor J. Maria Glover[309] extends this criticism of the privatized ar-

300. Resnik, *supra* note 139, at 1642.

301. State Attorneys General, Comment Letter on Proposed Rule on Mandatory Arbitration Provisions in Long-Term Care Facility Contracts Under the Reform of Requirements for Long-Term Care Facilities (Oct. 30, 2016), https://www.ag.state.mn.us/Office/PressRelease/PDF/LTCArbitrationComments.pdf [https://perma.cc/BGJ8-LNPP] [hereinafter "Comments of the State Attorneys"].

302. *Id.*; *see* Federal Arbitration Act, 9 U.S.C. §§ 1–2 (West 2017); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991); *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 362 (2011) (Breyer, J., dissenting) (Congress intended that "arbitration would be used primarily . . . where the parties possessed roughly equivalent bargaining power").

303. Comments of the State Attorneys, *supra* note 301; *see, e.g.*, Nino v. Jewelry Exch., Inc., 609 F.3d 191, 201 (3d Cir. 2010) ("We have consistently found that adhesion contracts—that is, contracts prepared by the party with greater bargaining power and presented to the other party 'for signature on a take-it-or-leave-it basis'—satisfy the procedural element of the unconscionability analysis." (citation omitted)).

304. *See* 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, 2804 (2015); Resnik, *supra* note 139, at 1631; Judith Resnik, The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75, 162 U. PA. L. REV. 1793, 1793 (2014).

305. *See* Resnik, *supra* note 139, at 1634.

306. *Id.* at 1636.

307. *Id.* at 1635–36.

308. Glover, *supra* note 214, at 3055.

309. *Id.* at 3052; J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012); J. Maria Glover, *Beyond*

bitral regime. It deprives less powerful claimants of the opportunity to publicly appeal arbitrary, secretly-rendered decisions by unaccountable arbitral panels often repeatedly selected by the businesses crafting the mandatory arbitration provisions.[310] For Glover, like Resnik,[311] the Court's marked expansion of mandatory ADR—with huge differential impacts for haves and have nots—taints the rule of law.[312] If sunshine serves as a disinfectant for corporate misfeasance, then shrouding the entire claim assertion and adjudication process allows infections to fester and spread.[313]

C. Compelled *Individualized* Arbitration—Blocking Collective Empowerment

A person or small business signing a contract with an *AMEX/Concepcion* class-waiver arbitration clause is now bound to arbitrate individually[314]—even if numerous others identically situated are prepared to assert identical claims against the same company.[315] The Court's conservative five-member majority eliminated both class action suits and claimant joinder in arbitration. As Justice Kagan observed, *AMEX/Concepcion* blocks all forms of aggregation,[316] quietly but significantly eliminating what the conservative majority perceives as the "dreadful scourge" of class adjudication against businesses.[317]

Consistent with critical procedure's insight into the power of procedure, Terisa Chaw characterizes *AMEX/Concepcion* as insidious because it disempowers those who challenge broad scale wrongdoing.[318] Female employees, for instance, are forced to waive class action litigation and to

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Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements, 59 Vand. L. Rev. 1735 (2006).

310. Glover, *supra* note 214, at 3062–63.

311. Resnik, *supra* note 139, at 1687.

312. Glover, *supra* note 214, at 3082; Resnik, *supra* note 139, at 1654 (the facial illegitimacy of the judicial system has been furthered by "courts[‘] . . . promulgat[ion of] hundreds of rules governing various forms of ADR," particularly arbitration).

313. *See id.* at 3076–77 (noting that there are two principles that *AMEX* dramatically undercuts: "one, that the reworking of substantive law should be achieved by publicly accountable bodies, and two, that . . . public scrutiny should accompany attempts to effectuate changes in substantive legal obligations" that large businesses have).

314. *Id.* at 3082.

315. *See* Garcia & Caseria, *supra* note 221; *see also* Terisa E. Chaw, Exec. Dir. of the Nat'l Emp't Lawyers Ass'n, Statement Made in Response to American Express Co. v. Italian Colors Restaurant (June 20, 2013) (transcript available at *U.S. Supreme Court Decision Will Embolden Companies to Flout Workplace Laws—Congress Must Act*, NELA (June 20, 2013), https://www.nela.org/index.cfm?pg=20130620AMEX [https://perma.cc/CBH3-9ES4] (observing that the *AMEX* case "eliminate[s] the ability of small businesses to join together to vindicate their statutory rights under antitrust laws in arbitration").

316. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

317. Yeazell & Schwartz, *supra* note 90, at 861 (describing "major businesses and . . . institutions'" view of class actions as a "dreadful scourge, forcing them to settle even unjustified suits").

318. *See* Chaw, *supra* note 315 (warning that "[f]orced arbitration is anathema to our public justice system and . . . [large] companies [use forced arbitration] to trump substantive legal rights," thereby "insulat[ing] wrongdoers from liability").

arbitrate their discrimination claims individually. They are barred from joining their claims in both litigation and arbitration.[319] The empowering opportunity to coalesce and show pervasive group-based discrimination is lost.[320] For employment lawyer Chaw, *AMEX/Concepcion* drastically alters the collective action landscape, disempowering claimants by fracturing the bonds of joint action in challenging employer misfeasance.[321]

Porreca v. Rose Group[322] exemplifies lower courts' struggles with these "unjust" consequences.[323] The District Court for the Eastern District of Pennsylvania compelled individual arbitration in employment disputes between restaurant employees and their Rose Group employer—claimants were barred from jointly arbitrating claims.[324] The court recognized the "increasing frequency [in the business community] with which these arbitration [provisions] and class action waivers are employed," and it characterized that deployment as "unfortunate, and in many situations, unjust"[325]—claimants do not know they are waiving class actions, they are not allowed to join together, and the individual recovery is not worth the expense of separate arbitration. The court nevertheless compelled nonaggregated employee arbitration because a judge "is not at liberty to ignore the decisions of the United States Supreme Court."[326]

D. Claim Suppression—Procedure Determining Substance

Prior to *AMEX*/*Concepcion*, the effective vindication exception existed as a narrow but essential safety valve. It prevented the FAA's broad pro-arbitration policy from eviscerating claimants' potentially meritorious, al-

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319. *See* Fed. R. Civ. P. 20(a)(1) (facilitating easy joinder of claimants).

320. *See* Chaw, *supra* note 315.

321. *Id.*; Garcia & Caseria, *supra* note 221 (the *AMEX* majority made "class action waivers ironclad"); Moe Cain, *Supreme Court Allows Class-Action Waivers in Arbitration Agreements*, Legal Financing 4 U (July 17, 2013), http://cash.immigrationmaster.ca/?p=36 [https://perma.cc/4WH7-CHJR] (predicting that the Court's conservative majority would continue "[t]o . . . hammer[ ] everything [that] looks like a nail" and that "every[ ] [form of litigation that] looks like a class action[would] be dismantled").

322. No. 13-1674, 2013 WL 6498392, at *1 (E.D. Pa. Dec. 11, 2013).

323. *Id.* at *16; Jason M. Halper & William J. Foley, *United States: Seven Months After* "American Express v. Italian Colors Restaurant": *The End of Class Actions?*, Mondaq, http://www.mondaq.com/unitedstates/x/285906/Class+Actions/Seven+Months+After+American+Express+v+Italian+Colors+Restaurant+The+End+Of+Class+Actions [https://perma.cc/PPB9-6T7S] (last updated Jan. 14, 2014) (noting that some courts seek ways to navigate the *AMEX* and *Concepcion* rulings in order to preserve class procedures for arbitration and avoid unjust consequences); *see also* Damato v. Time Warner Cable, Inc., No. 13-CV-994, 2013 WL 3968765, at *1 (E.D.N.Y. July 31, 2013) (attempting to preserve the essence of class action procedures for small claimants despite defendant Time Warner Cable's individual arbitration contract clause).

324. *Porreca*, 2013 WL 6498392, at *1, *16 (filing a class action suit challenging a "long-standing policy and practice of paying tipped employees less than the hourly minimum wage yet requiring these tipped employees to spend a substantial amount of time performing an array of duties outside of the duties of their tipped positions for which there is no possibility of earning tips" (internal quotation marks omitted)).

325. *Id.* at *16.

326. *Id.*

beit moderate-value, federal claims.[327] Courts would not enforce an arbitration agreement that effectively, for practical reasons, foreclosed the claimants from vindicating those claims.[328]

As discussed, the Scalia majority in *AMEX* practically entombed the effective vindication exception.[329] It protected business defendants by suppressing a range of claims of modest individual value (albeit of substantial cumulative worth). After *AMEX/Concepcion*, *in theory*, as Justice Scalia pointed out, claimants with modest-value claims can still arbitrate individually. But, as Justice Kagan responded, *in reality*, in the face of aggressive defendant litigation tactics, the cost of individually arbitrating often forecloses claim assertion entirely.[330]

As critical procedure inquiry reveals, this efficiency-justified arbitral regime is anything but substance neutral in effect. Professor Schwartz aptly characterizes it as "claim-suppressing arbitration."[331] Arbitration clauses crafted by large businesses diminish or even eliminate their substantive law liability.[332] Professors Paul Carrington and Paul Haagen eloquently predict that now corporate defendants will become "birds of prey [that] will sup on [small claimants like] workers, consumers, shippers, passengers, and [small businesses]."[333]

Richards v. Ernst & Young, LLP[334] is illustrative. After years of costly pretrial discovery,[335] the Ninth Circuit compelled individual arbitration of claims originally filed in court as a class action asserting wage and hour violations by employer Ernst & Young.[336] The Ninth Circuit enforced the employment contracts' mandatory individual arbitration clauses under the FAA and, following *AMEX*, discounted proof that individual arbitration (without cost sharing) would be prohibitively expensive[337]—effec-

327. Brief for Respondents at 13, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133); Glover, *supra* note 214, at 3072 n.93 (determining that the effective vindication principle was crafted as a narrow but essential safety valve for ensuring that the FAA's broad policy in favor of arbitration does not eviscerate federal rights).

328. *Am. Express*, 133 S. Ct. at 2315 (Kagan, J., dissenting).

329. *See supra* Section V.B.

330. *See* Garcia & Caseria, *supra* note 221 (concluding that courts will be unable to help small claimants escape an individual arbitration agreement even though arbitration is clearly economically prohibitive).

331. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 243 (2012); *see also* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 944–45 (1999) (describing arbitration history).

332. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1253 (2009).

333. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996).

334. 744 F.3d 1072, 1072 (9th Cir. 2013).

335. Richards v. Ernst & Young LLP, No. C-08-04988, 2012 WL 92738, at *1 (N.D. Cal. Jan. 11, 2012) (determining "that defendant [Ernst & Young] had waived its right to arbitration by litigating the actions for years without raising the . . . arbitration clause in the plaintiff's employment agreements").

336. *Richards*, 744 F.3d at 1074 (holding that the plaintiff failed to establish any prejudice resulting from Ernst & Young's alleged delay in asserting its arbitral rights).

337. *Id.* at 1074–75; *see* Barnes, *supra* note 298, at 346; *see generally* Miller & Hunt, *supra* note 189 (concluding that courts after *AMEX* will enforce arbitration clauses even

tively preventing employees from pursuing their claims at all.[338] The bottom line substantive law impact: across the board claim suppression.[339]

Critical procedure underscores the social costs of this kind of procedurally shrouded substantive claim suppression. Workers are deprived of a viable forum for their moderate value (though personally significant) wage claims. Moreover, compelled privatized, individualized arbitration of wage violations impedes the articulation of public values and squelches public awareness of possibly pervasive employer mistreatment of employees.[340] This diminishes employer incentives to treat workers fairly and comply with the law. Critical inquiry into who wins and who loses from procedural changes thus highlights the *AMEX/Concepcion* majority's stark ideological preference for the economically dominant.

For these reasons, the several states' Attorneys General pressed the U.S. Consumer Financial Protection Bureau for action. They determined that "[m]andatory [private] arbitration . . . jeopardizes one of the fundamental rights of Americans; the right to be heard and seek judicial redress for our claims" and represents "a systemic failure to hold [publicly] accountable those companies who abuse the trust placed in them by consumers."[341] Congress thereafter instructed the CFPB to study the impact of mandatory individualized arbitration on consumers of financial products and services.[342]

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though the costs of individually litigating the claims in arbitration outweigh potential recovery).

338. *Richards*, 744 F.3d at 1075 (quoting Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 698 (9th Cir. 1986) ("[A]ny extra expense incurred as a result of [an employee's] deliberate choice . . . in contravention of their contract, cannot be charged to [an employer]."); Barnes, *supra* note 298, at 346–47; *cf.* Morris v. Ernst & Young, LLP, 834 F.3d 975, 983–84 (9th Cir. 2016) (finding an arbitration clause waiving class actions violates NLRA because the "clause prevents concerted activity by employees in arbitration proceedings, and . . . prevents the initiation of concerted legal action anywhere else").

339. Philip Bump, *How the Supreme Court's Decision on* American Express *and Class Actions Could Affect You*, BUS. INSIDER (June 20, 2013, 3:02 PM), http://www.businessinsider.com/american-express-v-italian-colors-2013-6 [https://perma.cc/9WQA-LCY6].

340. Yamamoto, *Efficiency's Threat*, *supra* note 6, at 408 n.312. As integral to courts as sites of cultural performances,

> [m]inority perspectives are communicated through the legal process to the public in at least three general ways. First, group members spread the message about the litigation and its issues to one another and to an expanding circle of interested others through word of mouth, newsletters, meetings and demonstrations. Second, if the litigation appears controversial and the message can be packaged attractively, the news media will present a minority's views. Finally, the court's decision and opinion become recorded history. The court's articulation and treatment of minorities' perspectives may have significant effect. It may recognize the legitimacy of those views or it may devalue them. In either event the court is likely to reveal value judgments that will serve as a basis for future discourse.

Id.

341. Letter from State Attorneys General to Richard Cordray, Dir., Consumer Fin. Prot. Bureau 2–3 (Nov. 19, 2014) [https://perma.cc/P65M-UQNA].

342. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028(a), 124 Stat. 1376, 2003–04 (2010) (authorizing the CFPB to study "the use of agreements providing for arbitration of any future dispute between covered persons and

The CFPB study found stark claim-suppression consequences. Post-*AMEX*/*Concepcion* mandatory "arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and . . . consumers rarely file individual lawsuits or arbitration cases to obtain such relief."[343] The CFPB then promulgated an administrative rule to address the consumer claim suppression consequences of *AMEX/Concepcion.* The CFPB rule sought to undo the effects AMEX *and Concepcion* for consumer financial transactions. The rule

> prohibits covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action concerning the covered consumer financial product or service.[344]

But, as anticipated, politics intervened[345] and in late 2017, Congress and the President blocked the CFPB's rule.[346]

The National Labor Relations Board also attempted to intervene in situations covered by the National Labor Relations Act. The Board refused to enforce class action waivers, ruling that mandatory individual arbitration vitiates employees' "right[s] to engage in concerted activit[y]" protected by the federal labor organizing statute.[347] But that limited ruling was upended by federal courts and is now likely to be invalidated by the Supreme Court, with Justice Neil Gorsuch in Scalia's stead.[348]

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consumers in connection with the offering or providing of consumer financial products or services").

343. Arbitration Agreements, 82 Fed. Reg. 33,210, 33210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

344. *Id.*

345. *See* Evan Weinberger, *Industry Gears Up to Battle CFPB Arbitration Rule*, LAW360 (Aug. 19, 2016, 8:32 PM), https://www.law360.com/articles/829906/industry-gears-up-to-battle-cfpb-arbitration-rule [https://perma.cc/DR3E-MZ89] (warning that the fate of CFPB's arbitration rule will ultimately be challenged by the affected industries and decided by a conservative court); Seth Welborn, *Is the Future of CFPB's Arbitration Proposal in Doubt?*, MREPORT (Nov. 14, 2016), http://www.themreport.com/daily-dose/11-14-2016/future-cfpbs-arbitration-proposal-doubt [https://perma.cc/3GBG-EC43] (highlighting that the substantial support for CFPB's arbitration rule faces an uphill battle with the Trump Administration and Republican congressional majorities).

346. In November 2017, President Trump signed congressional legislation blocking enforcement of the CFPB rule. H.R.J. Res. 111, 115th Cong., 131 Stat. 1243 (2017). *See supra* note 24.

347. *See In re* D.R. Horton, Inc., 357 N.L.R.B. 2277, 2291–92 (2012) (determining that compelled arbitration class waivers violate employees' right to engage in concerted activity under the NLRA §§ 8(a)(1) and (4)).

348. *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017) (appealing U.S. Fifth Circuit Court of Appeals' ruling enforcing arbitration class waivers under the National Labor Relations Act). After certiorari was granted, Neil Gorsuch assumed former Justice Scalia's Supreme Court seat.

E. Business Immunity from Legal Liability and Public Accountability— "Insulating Wrongdoers from Liability"

As the underbelly to claim suppression, *AMEX*/*Concepcion* have enabled large businesses to avoid legal liability and public accountability. Critical procedure captures the differential group impacts. For attorney Lauren Guth Barnes, the conservative majority exhibited "not only unfairness to the harmed consumers but also a systemic failure to hold accountable [and liable] those companies who abuse the trust placed in them by consumers."[349] Barnes characterizes these consequences of the arbitration rulings as "near immunity for . . . corporate wrongdoers."[350] Justice Kagan, in *AMEX*, calls it "insulat[ing] wrongdoers from liability."[351] Without class actions, without a public forum, and without an effective vindication cost exception, businesses can violate the rights of employees, consumers, or tenants without fear of legal reprisals. That de facto corporate legal immunity is what some describe as "an alternate legal system" for business. And it comes at the expense of public accountability.[352]

Moreover, by avoiding "courts and the cultural performance," *AMEX/Concepcion*'s vastly expanded arbitral regime reposes control over substantive law to large businesses and removes it from public lawmakers and judges.[353] As Professor Glover observes, the *AMEX* majority "placed the power to craft . . . plaintiffs' path to [effective] vindication of substantive rights . . . in the hands of private, [economically powerful] would-be defendants" and "not in the hands of the public lawmaking bodies."[354] The consequences: ideologically driven, court-generated immunity for businesses and starkly diminished corporate accountability—both undermining rule of law's legitimacy.

VII. CRITICAL CONCLUSIONS: THE IDEOLOGICAL DEPLOYMENT OF PROCEDURE— "DO NOT BE FOOLED"

In short, *AMEX*/*Concepcion*'s procedural rulings morphed mandatory arbitration into a do-it-yourself claim suppression guide for large companies. More so, the conservative majority's decisions substantially benefit large businesses by keeping out of the public eye dirty legal laundry

349. Barnes, *supra* note 298, at 354 (quoting Letter, Attorneys General, *supra* note 341).

350. *Id.* at 330; *see also* Arthur R. Miller, *From Conley to Twombly to Iqbal*: *A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 45 (2010) (discussing the problem of informational asymmetry where large institutions possess essential litigation information in their files and computers).

351. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

352. *See* Glover, *supra* note 214, at 3076 (predicting diminished corporate accountability to the public and to the rule of law).

353. *Id.* at 3074.

354. *Id.*

sought to be aired by employees, consumers, tenants, small businesses, and discrimination claimants.

Justices Kagan, Ginsburg, and Breyer objected strenuously. American Express and other similar businesses, they observed, would be insulated from widespread liability, even when they clearly violated the law and harmed many in identical ways. For the dissenting justices, after *AMEX* and *Concepcion*, pursuit of small-to-modest-value claims against large businesses or institutions is "a fool's errand."[355] And without legal liability and public accountability, those businesses and institutions possess little incentive to stop profitably violating the law.

Critical procedure's rejection of the myth of the inherent neutrality of facially uniform procedures and its attention to context and consequences help unearth *AMEX/Concepcion*'s ideological underpinnings. Critical procedure sees the expanded arbitral regime as integral to the broad Second Wave's constriction of court access and claim development—significantly disadvantaging the claims of those less powerful under the guise of neutral efficiency reforms. Looking behind bland procedural language at differential group impacts shows, for some, what ostensibly efficiency-driven arbitrator rulings are actually designed to be: "an alternate system of justice"[356] that strongly favors large companies and institutions while treating "the weak and the aggrieved unfairly."[357]

Critical procedure inquiries into empowerment/disempowerment, differential group impacts, the myth of inherent procedural neutrality, public values articulation, and consciousness-raising—all backstopped by contextual interrogation of ideology—disrobe *AMEX/Concepcion* and Justice Scalia's efficiency rhetoric. Those ADR cases are not isolated rulings about more efficient dispute resolution. Instead, the regime of mandatory privatized, individualized arbitration—dramatically expanded by five justices—lodges squarely amid, and markedly advances, the conservative majority's Second Wave of procedural constraints on courthouse entry and claim development. That regime is close kin to heightened fact pleading, elevated barriers to class certification, diminished court personal jurisdictional reach over out-of-state manufacturers, narrowed preliminary injunctive relief, and expanded defendant summary judgments.

In sum, critical procedure reveals the impact of the AMEX/Concepcion rulings and the conservative majority Justices' "Second Wave" constriction of court access and claim development. In the words of Judge Young, in the epigraph, "[o]minously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach."[358] And Judge Weinstein aptly highlights what is at stake: This "erection of barriers to court access under the guise of procedural effi-

355. *Am. Express*, 133 S. Ct. at 2313 (Kagan, J., dissenting).
356. Silver-Greenberg & Corkey, *supra* note 2.
357. Weinstein, *supra* note 1, at 1906.
358. Silver-Greenberg & Corkery, *supra* note 3 (quoting Judge William Young).

ciency . . . undermine[s] the legitimacy of the legal system."[359] For in the end, it is not only about procedure. It is about power and substantive advantage for some over others. It is about injustice—or justice—for people and communities. "Do not be fooled."[360]

359. *Weinstein*, *supra* note 1, at 1906.
360. *Am. Express*, 133 S. Ct. at 2320 (Kagan, J., dissenting).