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### Endangered Claims: How the U.S. Civil Procedure System Mimics the Wild

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## Endangered Claims: How the U.S. Civil Procedure System Mimics the Wild

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**Date :** June 10, 2022

Brooke D. Coleman, [Endangered Claims](#), 63 Wm. & Mary L. Rev. 345 (2021).

This season I was captured by an article offering a new lens to analyze the precarious state of consumer, employment discrimination, civil rights, and other substantive claims in the U.S. civil litigation system. Brooke Coleman's *Endangered Claims* reminds the reader to consider how such rights—increasingly vulnerable to obstructionist policies and decisions by the federal rule makers, the Supreme Court, and Congress—fare in an ecosystem that favors the privileged. Coleman analogizes claims and claimants in the court system to endangered species who must adapt, migrate, or suffer extinction in a Darwinian world driven by “survival of the fittest.” She illustrates how a system titled “civil” is hardly that, looking more like a brutal story of evolution where the strong devour the weak and the latter must adapt or die.

The analogy reveals that the values underlying much of modern procedural reform prefer parties with greater power and money, are anchored in a restrictive rather than liberal ethos, and undermine court access and promotion of meritorious claims—the primary goals justifying the [Federal Rules of Civil Procedure](#) in 1938. Coleman challenges policymakers to consider the effect of procedural rules and doctrine on “endangered” claims, as a conservationist would consider the effect of environmental policies on endangered species.

Coleman provides persuasive examples of the “evolution story of federal civil litigation.” She describes a landscape littered with adaptation, migration, and extinction of claims since the Federal Rules' inception in 1938. This evolution winds its way through heightened pleadings, limited discovery, robust summary judgment, punitive [Rule 11](#), increased judicial case management, and disappearing jury trials. For example, parties and attorneys have adapted by using multi-district litigation (MDLs) to aggregate claims when class certification barriers were too high and by lobbying the rule makers to change the discovery rules to include a proportionality requirement when discovery was too expensive and burdensome. These litigants and lawyers with power and resources (on both sides of the “v”) have adapted within and without the court system in order for their claims to survive. Repeat players have found work-arounds to maintain court access and control.

Similarly, Coleman offers compelling examples of migration. For example, defendants have migrated to arbitration via mandatory, pre-dispute arbitration clauses that have proliferated in all manner of contracts and garnered unwavering support from the Supreme Court over the last fifty years. Plaintiffs, on the other hand, have migrated to state courts and federal agencies to keep their claims alive.

Those who have not succeeded at adapting or migrating have faced extinction. Coleman states the cold reality: “[A]s with evolution, not everyone can make it. The most vulnerable parties with endangered claims are now extinct.” (P. 386). A notable example involves plaintiffs with civil rights and small consumer claims who could not scale the higher pleadings wall under [Twombly](#) and [Iqbal](#), survive the Supreme Court's rigorous [Celotex](#) summary judgment trilogy, or act collectively because of class action bans in mandatory arbitration agreements post-[Concepcion](#) and [Italian Colors](#). The proliferation of class arbitration bans in consumer and employment contracts has killed claims altogether in any forum. Plaintiffs (such as some DoorDash workers) with sophisticated and well-resourced counsel have tried to adapt by bringing mass individual arbitration filings, with varied success. But for the most part, “defendants—with the blessing of the Court—managed to disappear a large number of cases not just from the federal court system, but from the universe. For many plaintiffs, defendants' migration to arbitration has meant not just endangerment, but extinction.”

(P. 382.)

The article makes important concessions. One is that litigant adaptation is not new. Another is that procedure is one of a number of influencers killing substantive rights. Moreover, there is nothing “natural” about this evolution. This ecosystem does not develop in a vacuum; “[h]uman interference changes this natural development.” (P. 390.) One might go further and say that humans are not an interference, but an integral part of this natural development. In any event, Coleman questions Darwin’s “natural selection” theory and characterizes the “survival of the fittest” model as “perverse.” The analogy is descriptive, not aspirational.

After establishing that the strongest survive in the world of civil litigation as well—a phenomenon that promotes corruption, replicates homogeneity, and undermines the legitimacy of the federal justice system—Coleman pivots to the important question of what policymakers (including rule makers, Congress, and the Supreme Court) should do now. She argues that policymakers have taken a primarily reactive posture to procedural reform. Some might find that framing too generous; for example, the Supreme Court’s extensive pro-arbitration jurisprudence and interpretation of the Federal Arbitration Act is “an edifice of its own creation.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’ Connor, J., concurring).

Coleman urges policymakers to take a page out of the [Endangered Species Act](#), offering an Endangered-Claims-Act framework for procedural reform. Policymakers should focus on protecting endangered claims rather than protecting powerful parties. This requires gathering systemic data and proactively studying the effect of procedural reform on claim survival, something more easily done through the public court system than private non-transparent alternative fora. Coleman describes this shift as one in unit selection: the claim, not the party, measures the success of procedural reform. This subtle shift is significant, as it questions the anchor principle of trans-substantivity; a claim-driven analysis shows that perhaps not all claims should be treated alike.

The article ends by testing this hypothesis in the COVID world. Technological advances to court access proliferated during COVID, when the powerful needed such adaptations. A party-driven system that favors those with resources and power led to innovations that economically marginalized and person with disabilities long had sought. An Endangered-Claims-Act analysis would examine how civil justice reform affects the least powerful and the most vulnerable claims, with the goal of protecting those that are meritorious but left behind.

This is a creative and thoughtful piece about the evolution of the civil justice system. The analogy between endangered claims and endangered species offers a new lens through which to think about how substantive rights and litigants are treated in the U.S. and how civil reform policymakers should lead. Coleman helps the reader appreciate the inequities in our justice system and challenges us go deeper in our understanding of our fragile democracy.

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