2022

Is It Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System

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Abstract: The United States has recently been engaged in some of the largest civil rights movements since the 1960s—from Black Lives Matter to #MeToo—and calls for justice for marginalized communities are stronger than ever. Many decry the longstanding violence and systemic discrimination such communities experience, and advocate for stronger substantive civil rights. What has received less attention, however, is the violence done to those rights by the U.S. Supreme Court's obstructionist civil procedural jurisprudence. Over the last half century, the Court has systemically eroded Americans' capacity to enforce such substantive rights in the civil court system. This erosion arcs away from the constitutional imperative that everyone has the right to be heard. Thus, the time has come for a new civil rights act, grounded in process.

This Article examines the Court's regressive process-based decisions over the last fifty years, particularly regarding pleadings, class actions, and arbitration. It demonstrates how the Court's jurisprudence has reached a tipping point and concludes that corrective civil rights legislation—rather than caselaw or a federal

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rule—is the answer. The Article asks whether this is the right time for a new civil rights act, comparing contemporary conditions with those of the sweeping Civil Rights Act of 1991 and the targeted Lilly Ledbetter Fair Pay Act. Having answered the question affirmatively, the article sets forth normatively what a procedural civil rights restoration act should comprise. The Article concludes that its prescription would realign drafters' intentions, institutional competencies and democratic values with the public dispute resolution system.

Justice too long delayed is justice denied.

—Rev. Martin Luther King, Jr.[1]

INTRODUCTION

The United States has been in one of the largest civil rights movements since the 1960s, and calls for justice for Black and marginalized communities are stronger than ever.[2] Many decry the violence that such communities have experienced due to centuries of systemic racism and discrimination. This criticism has led to significant, though insufficient, legislative gains. What has received comparatively scant attention, however, is the violence done to those legislative gains, and to civil rights more generally, through the U.S. Supreme Court's increasingly obstructionist civil-procedural jurisprudence.

Over the last half-century, the Supreme Court has chipped away at the process that everyday people use to access and employ the civil court system to resolve their grievances and seek remedies. The U.S. Constitution promises due process, yet meaningful court access has become increasingly politicized, compromised, and commodified. The Court has systemically eroded Americans' capacity to protect and enforce their substantive rights. This regressive trend has become even more acute in the last quarter-century.

The Court's increasing resistance toward process that supports private rights of action has endangered various substantive rights. This Article focuses on federal statutory and constitutional civil rights, because of their fundamental place in American history—and their particularly precarious future.

Over several decades, the pendulum has swung from judicial support for robust, private enforcement of civil rights to intolerance of, if not outright hostility to, such claims. Less obvious, but no less harmful, has been the way *procedure* has undermined, and even eradicated, civil litigation designed to re-

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[1] MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, *in* WHY WE CAN'T WAIT 64, 76 (1963).

[2] Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/3GQ5-CM6Q].

dress these grievances. The cumulative effect of such procedural jurisprudence has been to obstruct court access and substantive rights contrary to the lawmakers' and federal rule-makers' intentions.[3]

Deprivation of court access and denial of merits determinations arcs away from the constitutional imperative that everyone has the right to be heard.[4] *Marbury v. Madison* explains that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[5] As Professor Erwin Chemerinsky has noted, the Court's systemic court-blocking has "rendered hollow its assurance in *Marbury*," as it has failed to furnish remedies to victims of government misconduct.[6]

Procedural justice also sets a dignity floor: "If democracy means anything morally, it signifies that the *lives of all citizens matter*, and that their sense of their rights must prevail. Everyone deserves a hearing at the very least . . . ."[7] Not only do access and process level the playing field, but they also promote democratic values.[8] Professor Judith Resnik has noted that courts are democratic institutions, whereas the general public and other government branches form, test, and judge the law.[9]

The Court's obstructionism, however, has been neither absolute nor uniform, making it hard to address. It is death by a thousand cuts—the insidious power of incrementalism. Moreover, some civil rights lawyers have deftly navigated these higher procedural hurdles, incorrectly suggesting that the system is not broken. The reward for such resilience, however, is more of the same. The fact that some judges may be sympathetic to plaintiffs' plights also provides little comfort. Outcomes hinge precariously on the political and personal leanings of individuals, rather than on uniform, predictable standards. This is

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[3] The trend is from a "liberal ethos" to a "restrictive" one. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353, 358–69 (2010); *see also* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1700 (2016) (explaining that current movements toward a restrictive ethos are using procedural law instead of substantive law); 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, 288 (2013) (arguing that the current trend in procedural jurisprudence damages democracy and hurts the justice system).

[4] FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 311 (4th ed. 1992).

[5] 5 U.S. (1 Cranch) 137, 163 (1803).

[6] ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 197–98 (2014).

[7] JUDITH N. SHKLAR, THE FACES OF INJUSTICE 35 (1990) (emphasis added).

[8] *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 88, 91 (2011) (noting that adjudication is a democratic procedure that promotes respectful interactions).

[9] *Id.* at 79–80, 87–88, 91–92, 170. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing against the trend toward encouraging settlement and alternative dispute resolution).

not only fundamentally unfair, but it also undermines confidence in judicial process and outcomes. This Article asks whether meaningful access to and use of the civil court system has regressed to the point of requiring legislative resuscitation for constitutional and civil rights claims. The answer is yes.

At first blush, it may seem counterintuitive to urge procedural reform. There is no dearth of major substantive issues to address: war abroad, a global pandemic, racialized police brutality, sexual violence, inhumane immigrant treatment, voter suppression, gun violence, mass incarceration, global warming, and crushing poverty and wealth disparities, among others. Comprehensive and transformative law is needed to address these crises.[10]

Prioritizing process reform is admittedly difficult, until one considers the futility of substantive rights without procedural protections.[11] Procedure was created in the service of substance.[12] Given the turbulent times, the civil justice system must, at a minimum, properly function to enforce existing constitutional and civil rights. Too much is at stake. This Article challenges lawmakers to take the modest, but imperative, step of crafting process law that ensures real access to justice embodied in substantive-rights law.[13]

Although perpetual gridlock and hyper-partisanship characterize current U.S. politics, visionary lawmaking is required and is starting to take hold. For example, the recent bi-partisan Ending Forced Arbitration of Sexual Assault

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[10] Examples include: John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021); Justice for All Act of 2020, H.R. 8698, 116th Cong. (2020); Creating a Respectful and Open World for Natural Hair ("CROWN") Act of 2022, H.R. 2116, 117th Cong. (2022); Civil Rights Enhancement and Law Enforcement Accountability Improvement Act of 2021, H.R. 1489, 117th Cong. (2021); Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2021); Equality Act, H.R. 5, 117th Cong. (2021); Democracy Restoration Act of 2021, S. 481, 117th Cong. (2021).

[11] *See* J. Maria Glover, *"Encroachments and Oppressions": The Corporatization of Procedure and the Decline of Rule of Law*, 86 FORDHAM L. REV. 2113, 2125 (2018) ("Procedure has long been the battleground for . . . those who seek to limit their exposure to liability." (footnote omitted)); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1723 (2004); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 189–90 (2004). *See generally* SEAN FARHANG, THE LITIGATION STATE (2010) (exploring the history and role of private enforcement of federal laws).

[12] *See generally* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938) (emphasizing the importance of procedure).

[13] *See* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 148 (2017) (noting that "[l]itigation is a social good and promotes democracy"). Admittedly, the civil litigation system itself is limited. Its focus on individual accountability and compensatory relief, in contrast to systemic change and transformative solutions, falls short. *See* Charles M. Blow, Opinion, *The Civil Rights Act of 2020*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/06/10/opinion/police-brutality-protests-legislation.html [https://perma.cc/7BPX-FSWF]; *The BREATHE Act*, M4BL, http://breatheact.org/ [https://perma.cc/US6T-SHUN] (proposing sweeping changes to reform policing, accountability, and community development); *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ [https://perma.cc/W8Z8-B2V2].

and Sexual Harassment Act of 2021—which President Biden signed and the Senate unanimously passed—amends the Federal Arbitration Act to prohibit enforcement of pre-dispute arbitration agreements in cases involving sexual assault and sexual harassment claims.[14] This groundbreaking legislation is an excellent start.

It is time to go even further, to cover a greater array of procedural barriers and a broader swath of Americans. Court access is more about people than partisanship. Procedural injustice disproportionately impacts the poor and powerless, of all political stripes.[15] Women challenging sexual harassment on the job, veterans challenging untenable delays in medical benefits, African-Americans challenging police violence, low-income people challenging draconian lending terms, and small businesses challenging monopolistic practices all benefit from a civil court system more geared toward providing them their day in court. Enhancing court access promotes rule of law, democracy, and justice for everyone.

The Article proceeds as follows. Part I describes how Supreme Court jurisprudence over the past fifty years has undermined private enforcement of constitutional and civil rights claims through process-based decisions.[16] The Court's ongoing statutory misinterpretation of federal procedural rules and statutes—in areas such as pleadings, class actions and arbitration—illustrates this retraction. This regressive pattern tees up the normative question of whether the pendulum has swung too far, to the point of obstructionism. The extent and gravity of the court-access problem is contested.[17] This Part con-

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[14] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2021).

[15] Glover, *supra* note 11, at 2114. *See generally* Myriam Gilles, *When Law Forsakes the Poor*, *in* A GUIDE TO CIVIL PROCEDURE 162 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022).

[16] *See infra* notes 22–281 and accompanying text.

[17] *Compare* Adam N. Steinman, *Notice Pleading in Exile*, 41 CARDOZO L. REV. 1057, 1064 (2020) (arguing that notice pleading still exists after *Iqbal*), Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2269 (2020) (acknowledging procedural obstacles to plaintiffs), *and* Linda S. Mullenix, *Is the Arc of Procedure Bending Towards Injustice?*, 50 U. PAC. L. REV. 611, 611–12 (2019) (examining the record of the Supreme Court's procedural rulings), *with* Spencer, *supra* note 3, at 353, 358–67(stating that a "restrictive ethos" in procedure exists today), Miller, *supra* note 3, at 288 (asserting that procedural barriers to plaintiffs have increased), Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1853 (2014) (listing how pleading standards have changed since 1976), Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 372–74 (stating that conservatives sought to curtail private lawsuits), Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 421 (2005) (exploring other industries where class action waivers may become more prevalent), *and* 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, 527–36, 556–61 (2010) (detailing how pleading standards have been elevated).

tends that the Court has reached a tipping point—the apex of the pendulum—where the status quo is no longer acceptable.

The Article breaks new ground in Part II, concluding that the solution to the Court's obstructionism is corrective civil rights legislation.[18] Part II explores the institutional competencies of Congress vis-à-vis the Court and federal rule-makers, and demonstrates why the former is best suited to turn the tide toward greater court access. This Part explains why a federal statute—rather than jurisprudential law or a Federal Rule—is the answer.

Part III asks whether this is the right *time* for a new civil rights act.[19] This Part assesses the propriety of such legislation through a historical lens, comparing contemporary conditions with those of previous eras when Congress enacted corrective civil rights legislation. The Article considers two models of restorative legislation, ranging from the sweeping Civil Rights Act of 1991 to the targeted Lilly Ledbetter Fair Pay Act. This Part examines conditions that catalyzed a legislative correction, including: the quantity and quality of regressive Supreme Court caselaw; dissension within the Court; and the political landscape at the time. Each offers lessons and foreshadows whether the pursuit of a civil rights restorative act would achieve success today.

Finally, Part IV steps into the breach, setting forth broadly what a procedural civil rights restoration act would comprise, primarily in the areas of pleadings, class actions, and arbitration.[20] This Part makes a unique contribution to the literature, identifying which precedent to overturn, which lower-court trends to follow, which legislative models to consider, and which new voices and ideas to elevate. The Article concludes that such restorative legislation would realign congressional and rule-makers' intentions, institutional competencies, and democratic values with the public dispute-resolution system.[21] In calling for a procedural civil rights restoration act, this Article recognizes the harm that procedural jurisprudence has done to civil rights enforcement, and concludes that it is time for a new civil rights act that squarely addresses this harm.

I. PROCEDURAL LAW HAS REACHED A TIPPING POINT

The Court's civil-procedural jurisprudence has undermined civil rights enforcement in many troubling ways.[22] The Court's trans-substantive application of procedural rules has negatively impacted substantive civil rights over

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[18] *See infra* notes 282–390 and accompanying text.

[19] *See infra* notes 391–542 and accompanying text.

[20] *See infra* notes 543–604 and accompanying text.

[21] *See* Resnik, *supra* note 8, at 87, 91–92.

[22] *See generally* Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455 (2014) (discussing several ways the Rules have undermined civil rights litigation).

the last several decades.[23] The pendulum has swung so far toward a restrictive ethos that everyday Americans have difficulty effectively using the civil litigation system to protect and enforce their civil rights. Consequently, we have reached a precipice—the point at which the status quo is no longer acceptable.

This is not to suggest that procedural anarchy exists or that it is impossible for all plaintiffs to access and use the legal system to pursue such claims.[24] Indeed, plaintiffs and their counsel have adjusted and learned how to mitigate the nature and number of obstacles. Federal judges have similarly recalibrated, softening the blow many expected from Supreme Court precedent. It remains true, however, that access to the civil court system has become exceedingly difficult and illusive for civil rights litigants.

This Part illustrates how the Supreme Court's procedural jurisprudence has steadily eroded civil rights enforcement through statutory misinterpretation, focusing on such examples as pleadings, class-action lawsuits, and arbitration as examples.[25] The Court has interpreted federal process rules and congressional statutes counter to the drafters' intentions in the areas of pleadings, class actions and arbitration jurisprudence, necessitating a legislative course correction. Section A will focus on pleadings,[26] Section B will focus on class actions,[27] and Section C will cover arbitration.[28]

A. Pleadings

With respect to pleadings, modern procedural jurisprudence has diverged from the founding tenets of the Federal Rules of Civil Procedure. At the Rules' enactment in 1938, the rule-drafters prioritized easy access to the court system and resolution of cases on their merits[29] over procedural gamesmanship.[30] Pro-

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[23] *See id.* at 524–25*;* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 387 (2010).

[24] *See generally* Cyrus Mehri & Michael D. Lieder, *Onward and Upward After* Wal-Mart v. Dukes, AM. ASS'N FOR JUST. TRIAL MAG., Apr. 2013, at 32, 32–37 (exploring how plaintiff attorneys can adapt); *see also* Patel, *supra* note 17, at 2262–65 (acknowledging that litigation can still be effective).

[25] *See infra* notes 29–281 and accompanying text.

[26] *See infra* notes 29–82 and accompanying text.

[27] *See infra* notes 83–175 and accompanying text.

[28] *See infra* notes 176–281 and accompanying text.

[29] *See* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542 (1925).

[30] *See* Miller, *supra* note 3, at 288; *see also* Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 604 (2010) (stating that the Rules were intended to aid those with valid claims).

cedure was subordinate to substance; process enabled the enforcement of important policies and substantive-rights.[31]

"Notice pleading" was the objective: pleadings simply put the parties and the court on notice of a dispute's parameters.[32] Thus, Rule 8 required only "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[33] The accompanying forms at the time[34] also reflected these yielding pleading requirements.[35]

The drafters crafted rules that emphasized equity over common law,[36] and inclusion over exclusion.[37] In sync with these principles, in 1957, in race-discrimination employment case *Conley v. Gibson*,[38] the Supreme Court established that a complaint should only be dismissed if the plaintiff could "prove no set of facts in support of [the plaintiff's] claim" that would grant relief.[39] Consistent with the drafters' intent, under *Conley*, a plaintiff could easily initiate a lawsuit, knowing that its merit would be tested after discovery pursuant to summary judgment or trial.[40] *Conley* governed for over a half-century until a detour in 2007.

In *Bell Atlantic Corp. v. Twombly*[41]—a consumer antitrust class action—the Court retired *Conley*'s permissive "no set of facts" standard.[42] Tracking Rule 8's language, the Court held that for a complaint to actually "show" a plaintiff is entitled to relief, its allegations must be plausible, not just possible.[43] This watershed "interpretation" effectively rewrote the rule, requiring complaints to have greater factual support to survive dismissal than before, and undermining the formal rule-making process.[44]

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[31] *See* Clark, *supra* note 29, at 519; Clark, *supra* note 12, at 297; Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1170 (2006).

[32] Clark, *supra* note 12, at 316.

[33] FED. R. CIV. P. 8(a)(2).

[34] *See* FED. R. CIV. P. 84 (repealed 2015) (providing "a limited number of official forms which may serve as guides in pleading").

[35] *See* Clark, *supra* note 12, at 316.

[36] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987).

[37] *See id.* at 975.

[38] 355 U.S. 41 (1957).

[39] *Id.* at 45–46 (first citing Leimer v. State Mut. Life Ins. Co., 108 F.2d 302 (8th Cir. 1940); then citing Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); and then citing Cont'l Collieries, Inc. v. Shober, 130 F.2d 631 (3d Cir. 1942)).

[40] *See* Clark, *supra* note 12, at 318.

[41] 550 U.S. 544 (2007).

[42] *Id.* at 557–63.

[43] *Id.* at 557 (quoting FED. R. CIV. P. 8(a)(2)).

[44] *See generally* Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2012) (analyzing and critiquing the Federal Judicial Conference's study of dismissal after *Twombly* and *Iqbal*). *But see* Steinman, *supra* note 17, at 1064 (arguing that notice pleading remains viable); *see also* Swierkiewicz v. Sorema

The *Twombly* majority expressed: (1) concern that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"; and (2) skepticism that lower courts could effectively prevent this threat through "careful case management" and supervision.[45] Thus, the Court tasked pleadings with solving the problem by conditioning plaintiffs' access to discovery on stronger factual allegations at the starting line.[46]

This Rule 8 interpretation is unmoored from the rule-makers' intentions that court access be easy and decisions be merit-based.[47] Moreover, *Twombly* undermines Congress's intent to facilitate robust, private enforcement of the federal antitrust laws,[48] demonstrated by the availability of treble damages and attorney's fees for successful plaintiffs.[49]

The Court later made clear in *Ashcroft v. Iqbal* [50]—a constitutional civil rights case against top government officials—that the new plausibility standard applied to all civil actions, including discrimination claims.[51] In 2009, in *Iqbal*, the Court clarified the trans-substantive application of the new plausibility standard, and explained how judges should determine plausibility based on their "judicial experience and common sense."[52] The Court's prior skepticism of the "careful-case-management approach" to potential discovery abuse went from skepticism to outright "rejection."[53] The Court dismissed Javid Iqbal's complaint—alleging constitutional violations against the Attorney General and FBI Director following the 9/11 terrorist attacks—and granted defendants qualified immunity.[54] Although the Court conceded that the complaint's factual allegations, taken as true, were consistent with purposeful discrimination,[55] the

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N.A., 534 U.S. 506, 512 (2002) (noting that Rule 8's "simplified notice pleading standard" can only be changed by amending the Rules); Jones v. Bock, 549 U.S. 199, 224 (2007) (same).

[45] *Twombly*, 550 U.S. at 559.

[46] *See id.*

[47] *See* Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 84 (2010); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1229–30 (2012); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1311 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 448–50 (2008).

[48] *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting) (stating that the "Court marche[d] resolutely" against the intent of antitrust statutes and civil procedure rules).

[49] *See* Clayton Antitrust Act of 1914, Pub. L. No. 63-212, § 4, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. §§ 12–27).

[50] 556 U.S. 662 (2009).

[51] *See id.* at 684–85.

[52] *Id.* at 679.

[53] *Compare Twombly*, 550 U.S. at 558–59 (expressing uncertainty about whether case management works), *with Iqbal*, 556 U.S. at 685 (writing off case management as a strategy).

[54] *See Iqbal*, 556 U.S. at 682.

[55] *See id.*

Court usurped the jury's role and concluded that the allegations did not establish a plausible claim for relief because of "more likely explanations" for defendants' actions.[56] The Court's weighing of the relative merits of alternative liability theories would have been inappropriate at summary judgment, let alone at the pleading stage.[57]

Iqbal compromises court access for claimants alleging intentional discrimination and other causes of action involving state of mind. Such claimants may be unable to show plausibility before discovery as the defendant has exclusive access to evidence that would enable them to overcome dismissal.[58]

Most would agree that *Twombly* and *Iqbal* together raised the bar for court access.[59] The Court justified this shift on the grounds that it wanted to rein in exorbitant discovery costs[60] and optimize senior government officers' time for official duties.[61] Discovery-control and law enforcement, however, are not mutually exclusive with court access and merits-based resolutions. Moreover, no matter how laudable, the Court's intentions cannot replace those of the rule-makers. As with congressionally enacted statutes,[62] the Court should hesitate to overturn rule-based precedent without sufficient justification for abandoning stare decisis.[63] Here, the founding rule-makers clearly spoke to the importance of opening the civil litigation process and vindicating substantive rights. In light of this unambiguity, the Court's pleadings jurisprudence is flawed.[64]

There is disagreement over how and the degree to which *Twombly* and *Iqbal* have impacted litigation, particularly in civil rights and employment-discrimination cases.[65] Most empirical studies have found such cases more

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[56] *See id.* at 681.

[57] *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (explaining that a judge's role at the summary judgment stage is to "determine whether there is a genuine issue for trial").

[58] *See* Malveaux, *supra* note 47, at 89–91.

[59] *See Iqbal*, 556 U.S. at 679. *Twombly* and *Iqbal* pertain only to the factual sufficiency of a complaint, not deficiencies in the legal theory underlying a complaint. Johnson v. City of Shelby, 574 U.S. 10, 10–12 (2014) (per curiam).

[60] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007).

[61] *Iqbal*, 556 U.S. at 685.

[62] *See* Pavelic & LeFlore v. Marvel Ent. Grp., 493 U.S. 120, 123 (1989) (interpreting rules like statutes).

[63] *See* Mulligan et al., *supra* note 47, at 1233; Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) (requiring "compelling justification" to construe a statute differently); Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) (preferring stability).

[64] *See* Simona Grossi, *The Claim Prism* 9, 19–26 (Loy. L. Sch., Legal Stud. Rsch. Paper No. 2016-07, 2016).

[65] *Compare* Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 107 (1994) (noting that a stricter pleading standard harms civil rights litigants), Schneider, *supra* note 17, at 527–36, 556–61 (same), Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2125–29 (2015) (detailing several negative effects of elevated pleading), Christina L. Boyd, David A. Hoffman, Zoran Obradovic & Kosta Ristovski, *Building a Taxonomy of Litigation: Clusters of Causes of Action in*

vulnerable to dismissal,[66] whereas a few have not.[67] Empiricists agree that more 12(b)(6) motions have been filed and granted post-*Iqbal*,[68] meaning that courts are dismissing more of these cases, even if the dismissal rate has remained the same.[69] They also agree that statistics generally have inherent limitations, and particular design shortcomings,[70] which results in an incomplete picture and inconclusive evidence about causation.[71]

The bar has shed light on the new standard's impact. Some lawyers include more factual allegations and structure their complaints differently.[72] Others have completely abandoned potentially meritorious cases.[73] Those who

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Federal Complaints, 10 J. EMPIRICAL LEGAL STUD. 253, 254 (2013) (suggesting that *Twombly* and *Iqbal* had a significant effect on pleading strategies), Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2306–07 (2012) (demonstrating a significant harmful effect on plaintiffs), Hoffman, *supra* note 44 (attacking the Federal Judicial Center's finding that *Twombly* and *Iqbal* did not have a major effect on dismissal rates), *with* William H.J. Hubbard, *The Effects of* Twombly *and* Iqbal, 14 J. EMPIRICAL LEGAL STUD. 474, 478 (2017) (arguing that there is no proof that *Twombly* and *Iqbal* have caused a significant change in dismissals), Steinman, *supra* note 17, at 1058, 1064–65, 1068–70, 1078 (reconciling cases and forms with notice pleading), *and* Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473, 510–16 (2010) (urging cabined interpretation of cases).

[66] *See, e.g.*, Reinert, *supra* note 65, at 2119–24, 2130–32, 2154–57; Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1011; Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 605 (2012); Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1837 (2008); Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127, 132 (2012); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal *'s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 36, 39–40 (2011); Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 239–40 (2011).

[67] *See, e.g.*, Hubbard, *supra* note 65, at 475, 479, 482, 495; JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, FED. JUD. CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* 21–23 (2011); JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS, JARED J. BATAILLON, ET AL., FED. JUD. CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND 1 (2011).

[68] Hubbard, *supra* note 65, at 477–78, 550.

[69] Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-*Iqbal, 57 N.Y.L. SCH. L. REV. 719, 739–40 (2013).

[70] *Id.*

[71] *See* Reinert, *supra* note 65, at 2129; Malveaux, *supra* note 69; David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1222 (2013); Jonah B. Gelbach, *Material Facts in the Debate Over* Twombly *and* Iqbal, 68 STAN. L. REV. 369 (2016).

[72] Malveaux, *supra* note 69, at 743–44; *see* Morgan L.W. Hazelton, Procedural Postures: The Influence of Legal Change on Strategic Litigants and Judges 125 (Aug. 2014) (Ph.D. dissertation, Washington University in St. Louis) (finding more language in complaints post-*Twombly*).

[73] Malveaux, *supra* note 69, at 743–44; *see also* Boyd et al., *supra* note 65, at 273–74 (finding that plaintiffs plead less claims per case post-*Twombly*). *But see* Reinert, *supra* note 65, at 2167.

have not changed their pleadings practice[74] have, at a minimum, incurred additional costs to defend themselves from increased 12(b)(6) motions practice.[75]

Lower-court responses to *Twombly* and *Iqbal* have varied.[76] In the cases' immediate aftermath, district courts dismissed cases they would not have otherwise, and most federal courts of appeals affirmed such dismissals.[77] Many courts have questioned the notice pleading's viability.[78] Others have taken a flexible, contextual approach—allowing plaintiffs to plead upon information and belief when appropriate; liberally granting leave to amend; and permitting parties to take limited, targeted discovery to determine plausibility ahead of a 12(b)(6) ruling[79]—a method some scholars recommend.[80]

Although assessment of the sister cases' impact on civil rights vindication varies, the vast majority suggests significant adversity.[81] Moreover, there is no evidence that the higher pleading hurdle has succeeded in separating the wheat from the chaff.[82]

B. Class Actions

Much like with pleadings, procedural jurisprudence regarding aggregation of claims has drifted from its core purpose in the civil rights arena. In 1938, the class action originated in equity.[83] The rule-drafters designed federal class action Rule 23, an efficiency-promoting joinder device, to provide equitable and legal relief.[84] The rule was later amended in 1966,[85] *inter alia*, to empower the

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[74] *See* Hubbard, *supra* note 65, at 477–78 (finding effect on pro se plaintiffs); Reinert, *supra* note 65, at 2166–67 (describing potential change in litigant behavior and limited empirical evidence).

[75] Malveaux, *supra* note 69, at 743–44; *see The Supreme Court—Leading Cases: Federal Jurisdiction and Procedure*, 121 HARV. L. REV. 305, 314 (2007) [hereinafter *Federal Jurisdiction and Procedure*].

[76] Malveaux, *supra* note 69, at 744.

[77] *Id.*

[78] Steinman, *supra* note 17, at 1067 & n.67.

[79] Malveaux, *supra* note 69, at 744–45; *see also* Brescia, *supra* note 66, at 240–41 (noting that judges in employment and housing discrimination cases are not dismissing cases with equally plausible explanations and rarely invoking judicial "experience and common sense").

[80] *See, e.g.*, Malveaux, *supra* note 47, at 106–40.

[81] *See* Reinert, *supra* note 65, at 2119 & nn.10 & 11, 2120, 2129 n.59, 2130–38.

[82] *Id.* at 2122–23, 2170–71; Alexander A. Reinert, *The Supreme Court's Civil Assault on Civil Procedure*, 41 HUM. RTS. 11, 12 (2015).

[83] *See* Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 169 (1969).

[84] *See id.*

[85] Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 148 (S.D.N.Y. 1966), *rev'd*, 391 F.2d 555 (2d Cir. 1968).

private bar to enforce civil rights law,[86] level the playing field between parties,[87] and confront segregation.[88]

The rewrite of the modern class action rule took place "in direct parallel to the Civil Rights Act of 1964[,] and the race relations echo of that decade was always in the committee room."[89] Drafters of the modern rule worked before a backdrop of fierce resistance to desegregation efforts. Although some cases—most notably *Brown v. Board of Education*—provided broad remedial class relief for systemic constitutional civil rights violations,[90] others, post-*Brown*, permitted only individualized, piecemeal relief.[91] The rule-makers understood the importance of individuals using aggregation as private attorneys general under the Civil Rights Act of 1964.[92] As Professor Arthur R. Miller aptly notes, "The Committee's motivation, in significant part, was to create a receptive procedural vehicle for the explosion of civil rights cases" post-*Brown*.[93]

Thus, modern Rule 23(b)(2) was born[94] to facilitate a class when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ."[95] The Advisory Committee Note reveals: "Illustrative are various actions in the [civil rights] field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."[96]

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[86] *See* David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 608 (2013) [hereinafter Marcus, *Sturm*].

[87] *See* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

[88] Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 KAN. L. REV. 325, 333, 350–51 (2017); John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions*, *in* 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 260, 266 (1997) [hereinafter WORKING PAPERS].

[89] WORKING PAPERS, *supra* note 88, at 266.

[90] *See* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 857–60 (2016); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 681–83 (2011) [hereinafter Marcus, *Flawed*]; Marcus, *Sturm*, *supra* note 86, at 601.

[91] *See* Carroll, *supra* note 90, at 857–58; *see also* Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 468 (1960) (detailing hesitance to include unnamed, injured individuals in civil rights class actions after a "favorable decree").

[92] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 50 (1991); Carroll, *supra* note 90, at 859–60; Marcus, *Sturm*, *supra* note 86, at 600, 608; *see* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem*," 92 HARV. L. REV. 664, 670 n.31 (1979).

[93] Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294 (2014) [hereinafter Miller, *Preservation*].

[94] Marcus, *Sturm*, *supra* note 86, at 602–06, 608; Wright, *supra* note 83, at 178; Carroll, *supra* note 90, at 860; Marcus, *Flawed*, *supra* note 80, at 702–11.

[95] FED. R. CIV. P. 23(b)(2).

[96] FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment; *see id.* (listing cases).

Title VII employment-discrimination class actions in the 1960s and 1970s typified the law-enforcement role of Rule 23(b)(2). Aggregate litigation supplemented and even supplanted federal agency regulation, which limited resources and tepid political will often hampered.[97] Fueled by public interest litigation, courts certified civil rights cases impacting broad classes and providing far-reaching relief.[98] Under Rule 23(b)(2), courts regularly certified cases enjoining discriminatory policies and compensating individuals with back pay—because of its equitable nature.[99]

Over time, however, the Supreme Court reined in civil rights class actions. Although recognizing that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs," the Court cautioned that "careful attention to the requirements of [Rule 23] remains nonetheless indispensable."[100] The Court rebuked the "across-the-board" approach that enabled named plaintiffs alleging discrimination to represent those challenging a broad swath of human resource practices.[101] Instead, the Court held that class representatives had to be members of the class they sought to represent and "possess the same interest and suffer the same injury" as class members.[102] Retreat of the public interest movement and growth of corporate political power resulted in fewer Title VII class actions operating as vehicles for systemic change.[103]

Despite the rule-makers' emphasis on the regulatory power and efficiency of collective action, the Court has made class certification more difficult.[104] The most significant example is *Wal-Mart Stores, Inc. v. Dukes* in 2011, in which the Supreme Court raised the bar for showing commonality among litigants challenging systemic discrimination.[105] "Commonality" has historically been one of the easiest certification criteria to meet, as precedent requires only

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[97] Marcus, *Sturm*, *supra* note 86, at 639–40.

[98] *See id.*

[99] *Id.* at 640–41.

[100] E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977).

[101] Marcus, *Sturm*, *supra* note 86, at 641–43.

[102] *Rodriguez*, 431 U.S. at 403–04 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)); Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982) (quoting *Rodriguez*, 431 U.S. at 403).

[103] Marcus, *Sturm*, *supra* note 86, at 647.

[104] *See* Miller, *Preservation*, *supra* note 93, at 304, 321 (noting class certification as a "procedural stop sign[]").

[105] *See* 564 U.S. 338, 355 (2011); Malveaux, *supra* note 22, at 490–504; Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 39, 42–43 (2011) [hereinafter Malveaux, *Goliath*], https://scholarlycommons.law.northwestern.edu/nulr_online/58/ [https://perma.cc/63NZ-FNBC]; A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 463–75 (2013).

one common question of law or fact.[106] *Wal-Mart*, however, required plaintiffs to demonstrate commonality with "[s]ignificant proof" that the company functioned under a broad system of discrimination.[107]

Moreover, the Court in *Wal-Mart* concluded that an employer's "undisciplined system of subjective [decision-making]" could not bond the class.[108] The all-male majority was incredulous that managers might act—even subconsciously—in a manner that systemically deprives women of equal opportunities.[109] This was especially true where an employer took the unremarkable step of putting a formal, written anti-discrimination policy in place.[110] Clearly reasonable minds can—and did—differ on the issue of whether the plaintiffs' factual allegations pointed toward systemic discrimination. Four dissenting Supreme Court Justices,[111] several Ninth Circuit judges,[112] and the district court judge[113] all concluded that gender discrimination could be the glue that held the class together.

The Court also required that a question be central to the case to satisfy commonality,[114] improperly importing a predominance standard into Rule 23(b)(2).[115] Additionally, the Court emphasized individual employee experience over defendant's systemic conduct, counter to Rule 23(b)(2)'s utility as broad civil rights avenger.[116]

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[106] *See, e.g.*, Marisol A. *ex rel.* Forbes v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997) ("The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." (first citing *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 166–67 (2d Cir. 1987); then citing Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994); and then citing 3B James W.M. Moore, Allan D. Vestal & Philip B. Kurland, MOORE'S MANUAL—FEDERAL PRACTICE AND PROCEDURE § 23.06 (1996))); *Kanter*, 43 F.3d at 56 ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." (citing *In re Agent Orange*, 818 F.2d at 166–67)).

[107] *Wal-Mart*, 564 U.S. at 355 (quoting *Falcon*, 457 U.S. at 147 n.15). While only one common question may still suffice, the nature of the question has significantly changed. *See* Castillo v. Bank of Am., NA, 980 F.3d 723, 728 (9th Cir. 2020) (post-*Wal-Mart*, "[e]ven a single common question of law or fact that resolves a central issue will be sufficient to satisfy this mandatory requirement for all class actions" (citing *Wal-Mart*, 564 U.S. at 359)).

[108] *See Wal-Mart*, 564 U.S. at 355 (quoting Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990–91 (1988)).

[109] *See id.* ("[L]eft to their own devices *most* managers in *any* corporation—and *surely most* managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all." (emphasis added)).

[110] *See id.* at 352–53.

[111] *Id.* at 367, 372–73 (Ginsburg, J., dissenting in part and concurring in part).

[112] *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 628 (9th Cir. 2010) (Ikuta, J., dissenting), *rev'd*, 564 U.S. 338 (2011).

[113] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 167–68 (N.D. Cal. 2004).

[114] *See Wal-Mart*, 564 U.S. at 349–50.

[115] FED. R. CIV. P. 23(b)(3) (requiring that common questions predominate).

[116] The Court focused on the individual employee's question—"why was I disfavored"—and individual employee monetary relief versus class-wide injunctive relief. *Wal-Mart*, 564 U.S. at 352,

Finally, *Wal-Mart* effectively reversed a half-century of Title VII jurisprudence by requiring that monetary relief be incidental to any injunctive or declaratory relief sought in a Rule 23(b)(2) class action.[117] This unanimous ruling runs counter to the text and history of Rule 23(b)(2). The rule is silent about whether monetary relief is permitted, much less whether it must be incidental.[118] The Advisory Committee, however, conspicuously was not; its notes state that so long as the final relief does not relate "exclusively or predominantly to money damages," (b)(2) certification is appropriate,[119] a conclusion most appellate courts adopted.[120] Back pay, in particular, was historically granted because of its equitable nature.[121] Regardless, *Wal-Mart* eradicated the equity/nonequity distinction as a basis for monetary relief, instead choosing incidentality as the lynchpin for (b)(2) certification.[122] This makes it more difficult for employees challenging systemic discrimination to seek monetary relief because they now must likely use the more rigorous[123] and costly Rule 23(b)(3) provision, rather than (b)(2)[124]—the provision particularly designed to curb widespread discriminatory conduct.[125]

Many consider *Wal-Mart* a "dramatic shift"[126] in class action jurisprudence.[127] Many litigants challenging systemic discrimination have had a harder time getting class certification.[128] Employees challenging decentralized, exces-

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360–61 (emphasis omitted); *see also id.* at 376 (Ginsburg, J., dissenting) ("Individual differences should not bar a . . . Rule 23(b)(2) class . . . ." (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 n.19 (1997))).

[117] *See id.* at 359–60 (unanimous opinion).

[118] *See* FED. R. CIV. P. 23(b)(2).

[119] FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment.

[120] Malveaux, *Goliath*, *supra* note 105, at 49 n.89 (citing cases).

[121] *See Dukes*, 603 F.3d at 618–19, 618 n.40.

[122] *See Wal-Mart*, 564 U.S. at 359–61.

[123] The (b)(3) class requires common issues to predominate, and a class action to be superior. *See* FED. R. CIV. P. 23(b)(3).

[124] For (b)(2) certification, some plaintiffs forego monetary relief, forsaking a complete remedy, risking preclusion, and undermining deterrence.

[125] Mehri & Lieder, *supra* note 24, at 34; Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After* Wal-Mart v. Dukes, 48 AKRON L. REV. 803, 805 (2015).

[126] *See* Scott v. Fam. Dollar Stores, Inc., 733 F.3d 105, 119 (4th Cir. 2013) (Keenan, J., concurring); *see also* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 487 (7th Cir. 2012) (describing *Wal-Mart* as a "milestone").

[127] *See, e.g.*, Carroll, *supra* note 90, at 889; John M. Husband & Bradford J. Williams, Wal-Mart v. Dukes *Redux: The Future of the Sprawling Class Action*, 40 COLO. LAW. 53, 59 (2011) (calling *Wal-Mart* a "watershed case").

[128] *See* R. Paul Yetter, Christian J. Ward & Dori Kornfeld Goldman, The Impact of Wal-Mart v. Dukes on Employment Law Class Actions and FLSA Collective Actions 4 (Oct. 2013) (unpublished manuscript), http://www.yettercoleman.com/wp-content/uploads/2013/10/The-Impact-of-Wal-Mart-v.-Dukes-on-Employment-Law-Class-Actions-and-FLSA-Collective-Actions.pdf [https://perma.cc/PY25-G8P4] (citing early denials of certification or decertifications post-*Wal-Mart*). *But see* Selmi, *supra* note 125, at 804–05, 829–30 (stating that courts distinguish *Wal-Mart* based on its national

sive, discretionary decision-making by local managers as a discriminatory policy now lack commonality.[129]

Granted, *Wal-Mart* has not precluded class actions involving discretionary practices altogether.[130] Where local managers exercise discretion pursuant to a company-wide policy[131] or upper-level managers are the ones who exercise the discretion,[132] commonality may be satisfied.[133] Moreover plaintiffs have mitigated *Wal-Mart*'s impact by: employing regional and subclasses,[134] distinguishing *Wal-Mart*,[135] challenging employment practices under statutes other

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scope, merits and jurisdiction, resulting in less impact on employment discrimination cases than anticipated); David Marcus, *The Persistence and Uncertain Future of the Public Interest Class Action*, 24 LEWIS & CLARK L. REV. 395, 407, 409–10, 412, 415–16, 426 (2020) (stating that unlike *Wal-Mart*, cases seeking solely injunctive relief solely against government defendants usually not impacted).

[129] *See, e.g.*, Davis v. Cintas Corp., 717 F.3d 476, 481 (6th Cir. 2013); Tabor v. Hilti, Inc., 703 F.3d 1206, 1206 (10th Cir. 2013); Bolden v. Walsh Constr. Co., 688 F.3d 893, 894–98 (7th Cir. 2012); Bennett v. Nucor Corp., 656 F.3d 802, 814–15 (8th Cir. 2011); Bell v. Lockheed Martin Corp., 270 F.R.D. 186, 188–90 (D.N.J. 2010); *see also Scott*, 733 F.3d at 110 (affirming the district court's denial of commonality). Courts have applied the same reasoning to discretionary lending practices under the Fair Housing Act, Equal Credit Opportunity Act, and § 1981 of the Civil Rights Act of 1991. *See* Malveaux, *supra* note 22, at 495–96, 496 n.253 (citing cases); Rodriguez v. Nat'l City Bank, 726 F.3d 372, 384, 386 (3d Cir. 2013).

[130] *See* Selmi, *supra* note 125, at 822–29 (discussing *McReynolds* and *Scott*); *Scott*, 733 F.3d at 113; Andrew J. Trask, Wal-Mart v. Dukes*: Class Actions and Legal Strategy*, CATO SUP. CT. REV., 2010–2011, at 319, 355 (noting that class actions are "not doomed," but that the certification game is "a little fiercer").

[131] *See* Chi. Tchrs. Union, Loc. No. 1 v. Bd. of Educ., 797 F.3d 426, 437–38 (7th Cir. 2015); *McReynolds*, 672 F.3d at 488–90; *In re* Johnson, 760 F.3d 66, 73 (D.C. Cir. 2014); DL v. District of Columbia, 713 F.3d 120, 126, 128 (D.C. Cir. 2013); Chen-Oster v. Goldman, Sachs & Co., 877 F. Supp. 2d 113, 117–18 (S.D.N.Y. 2012); Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 509, 511–12 (N.D. Cal. 2012); Floyd v. City of New York, 283 F.R.D. 153, 174 (S.D.N.Y. 2012) (stating that the stop-and-frisk program was a centralized policy).

[132] Woods-Early v. Corning Inc., 330 F.R.D. 117, 124 (W.D.N.Y. 2019); *see Scott*, 733 F.3d at 114; *Chi. Tchrs. Union*, 797 F.3d at 438.

[133] *See Chi. Tchrs. Union*, 797 F.3d at 437–38; *Scott*, 733 F.3d at 114, 116–17; *In re* Countrywide Fin. Corp. Mortg. Lending Pracs. Litig., 708 F.3d 704, 707–10 (6th Cir. 2013). Even so, companies may escape liability by failing to enact a companywide policy, thereby decoupling supervisor misconduct from the company. *See, e.g.*, *Bennett*, 656 F.3d at 814–15.

[134] Mehri & Lieder, *supra* note 24, at 35, 36; *see, e.g.*, Calloway v. Caraco Pharm. Lab'ys, Ltd., 287 F.R.D. 402, 406 (E.D. Mich. 2012) (subclasses); *Ellis*, 285 F.R.D. at 496, 509 (certifying class that was a "mere fraction" of *Wal-Mart*'s class).

[135] *Compare* Cerjanec v. FCA U.S., LLC, No. 17-10619, 2018 WL 3729063, at *9 (E.D. Mich. Aug. 6, 2018) (distinguishing *Wal-Mart* and analogizing to *McReynolds*), *with* Schonton v. MPA Granada Highlands LLC, No. 16-cv-12151, 2019 U.S. WL 1455197, at *6 (D. Mass. Apr. 2, 2019) (distinguishing *Wal-Mart* as "unavailing").

than Title VII,[136] and initiating actions in state courts—with varying degrees of success.[137] The net result, however, has been a higher bar for collective action.

Indeed, the Court has rejected many of *Wal-Mart*'s offspring as untimely or as suffering the same defects as their parent. In *China Agritech, Inc. v. Resh*, the Supreme Court unanimously disallowed putative class members, upon denial of class certification, to file a new class action after the statute of limitations had expired.[138] The Court prohibited equitable tolling on judicial efficiency grounds, concluding that "stacked" class actions would enable "limitless" filings.[139] Thus, *Wal-Mart* plaintiffs could not try again; their cases were dismissed as impermissible stacked class actions.

As for civil rights claimants seeking monetary remedies, although 23(b)(3) is more arduous,[140] it has not proved insurmountable.[141] For example, bifurcation of class-wide injunctive and individual monetary relief, coupled with Rule 23(c)(4) issue certification[142]—although controversial[143]—has satisfied predominance.[144] The cost of Rule 23(b)(3) individualized notice, however, has chilled some employees from bringing meritorious cases altogether.[145]

Notably, the Court's obstructionist class action jurisprudence has not been absolute, therein making procedural obstructionism harder to see and address.[146] For example, in 2016, in *Tyson Foods, Inc. v. Bouaphakeo*,[147] the Su-

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[136] *See* Yetter et al., *supra* note 128, at 13–19 (holding that Rule 23 certification not applicable to FLSA and state wage and hour collective actions).

[137] Malveaux, *supra* note 22, at 499; *see* Yetter et al., *supra* note 128, at 9–11 (describing plaintiff strategies post-*Wal-Mart*); *see, e.g.*, Selmi, *supra* note 125, at 829–30 (rejecting regional class actions post-*Wal-Mart*).

[138] 138 S. Ct. 1800, 1804 (2018).

[139] *See* Ronald Mann, *Opinion Analysis: Justices Limit Tolling of Statutes of Limitations That Permits "Stacked" Class Actions*, SCOTUSBLOG (June 11, 2018), https://www.scotusblog.com/2018/06/opinion-analysis-justices-limit-tolling-of-statutes-of-limitations-that-permits-stacked-class-actions/ [https://perma.cc/UY3A-Y9VN].

[140] Mehri & Lieder, *supra* note 24, at 34, 36–37; *see, e.g.*, Parko v. Shell Oil Co., 739 F.3d 1083, 1085–87 (7th Cir. 2014) (reversing class certification and applying rigorous criteria to satisfy Rule 23(b)(3) predominance).

[141] Mehri & Lieder, *supra* note 24, at 36–37.

[142] *See, e.g.*, Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950, 2015 WL 1566722, at *15 (S.D.N.Y. Mar. 10, 2015).

[143] Jenna G. Farleigh, Note, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1595–1603 (2011) (describing different circuit courts' approaches).

[144] *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 489–92 (7th Cir. 2012); *In re* Johnson, 760 F.3d 66, 74–75 (D.C. Cir. 2014).

[145] STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 67, 75 (2017).

[146] Lyle Denniston, *Opinion Analysis: Group Lawsuits Get a (Modest?) Boost*, SCOTUSBLOG (Mar. 22, 2016), https://www.scotusblog.com/2016/03/opinion-analysis-group-lawsuits-get-a-modest-boost/ [https://perma.cc/84TQ-6WB8]; Tony Mauro, *Supreme Court Rules for Class Action Plaintiffs*, LAW.COM, https://www.law.com/2016/01/20/supreme-court-rules-for-class-action-plaintiffs/?slreturn=20210729123400 [https://perma.cc/SSG6-ZGXU] (Jan. 20, 2016).

preme Court upheld a Rule 23(b)(3) class and collective action where workers relied on a representative sample to establish class-wide liability under the Fair Labor Standards Act of 1938 ("FLSA") and state wage law[148]—a move disappointing to business interests.[149]

In 2016, in *Campbell-Ewald Co. v. Gomez*,[150] the Supreme Court also held that where a plaintiff did not accept a settlement offer or Rule 68 offer of judgment, neither the plaintiff's claims nor those of the putative class were mooted.[151] *Campbell-Ewald* thwarts the strategy of corporate defendants defeating putative class actions by mooting a putative representative's claim.[152] The Court did not decide whether the same result would occur "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."[153] But most circuit courts have concluded that this hinges on whether there is a putative class action, in which case tendering complete relief to an individual named plaintiff is unlikely to moot class claims.[154]

In 2021, however, in *TransUnion LLC v. Ramirez*,[155] the Supreme Court's interpretation of the standing doctrine denied court access to class members alleging a Fair Credit Reporting Act ("FCRA") violation.[156] Despite Congress's creation of statutory rights for a violation alone, the Court concluded

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[147] 136 S. Ct. 1036 (2016).

[148] *See id.* at 1046.

[149] *See* Kristin Linsley Myles & David J. Feder, *In "*Tyson*," SCOTUS Sketches New Test for "Trial by Formula*,*"* LAW.COM: THE RECORDER, https://www.law.com/therecorder/almID/1202753706113/in-tyson-scotus-sketches-new-test-for-trial-by-formula/?slreturn=20200712173624 [https://perma.cc/XJW3-LQ42] (Mar. 30, 2016); Jess Bravin, *Supreme Court Upholds Employee Class Action Against Tyson Foods*, WALL ST. J., https://www.wsj.com/articles/supreme-court-upholds-employee-class-action-against-tyson-foods-1458657604 [https://perma.cc/K7YJ-7NUM] (Mar. 22, 2016).

[150] 136 S. Ct. 663 (2016).

[151] *See id.* at 666–74.

[152] Ross Todd, Campbell-Ewald*: Defense Lawyers Say Clients Still Have Options*, CLASS ACTION REP. (Beard Grp., Inc., Philadelphia, Pa.), Feb. 3, 2016; David Carpenter & Micah Moon, *In the Beginning There Was* Genesis*, but* Campbell *Made It Moot*, LAW.COM: CORP. COUNS., https://www.law.com/corpcounsel/almID/1202750534206/In-the-Beginning-There-Was-Genesis-but-Campbell-Made-It-Moot/ [https://perma.cc/Z79X-94MD] (Feb. 24, 2016).

[153] *Campbell-Ewald*, 136 S. Ct. at 671–74; *see* Todd, *supra* note 152 (describing *Campbell-Ewald* as "narrow" (quoting Eric Troutman)).

[154] *See* Kuntze v. Josh Enters., Inc., 365 F. Supp. 3d 630, 640–41 (E.D. Va. 2019) (describing this circuit split). *Compare Justiciability—Class Action Mootness—*Campbell-Ewald Co. v. Gomez, 130 HARV. L. REV. 427, 432 (2016) (stating that the individual named plaintiff's case would be moot), *and* THOMAS D. ROWE, JR., 13 MOORE'S FEDERAL PRACTICE § 68.04 (2018) (stating that where there is only one individual claim, an unconditional deposit moots a case), *with* Katrina Christakis, Jeff Pilgrim & James Morrissey, "*So You're Telling Me There's a Chance!": The Post-*Campbell-Ewald *Possibility of Mooting a Class Action by "Tender" of Complete Relief*, 71 CONSUMER FIN. L.Q. REP. 237, 253 (2017) (noting that few defendants have mooted individual and class claims by tendering complete relief).

[155] 141 S. Ct. 2190 (2021).

[156] *Id.* at 2200, 2208–09.

that Article III standing was not satisfied when an individual class member's injury lacked a "close historical or common-law analogue" to the FCRA.[157]

Although *TransUnion* left open the question of whether each class member must evince standing prior to class certification,[158] the Court's reliance on the standing doctrine may forecast the next obstructionist frontier.[159] In a dissent by Justices Kagan, Breyer and Sotomayor, and an unexpected one by Justice Thomas, the Justices balked at the majority's use of the Constitution to bar court access where Congress has explicitly created a private right of action.[160]

Lower-court aggregation law is also in flux in disconcerting ways.[161] For example, the circuit courts are split on the standard courts should use to ascertain members of a class ("ascertainability") at the class certification stage.[162] Some jurisdictions have elevated this court-made threshold—historically requiring only that a class be defined using objective criteria.[163] Some courts now require evidentiary proof of an administratively feasible method for determining class membership from the outset, regardless of whether such rigor comports with the text and purpose of Rule 23 or sound policy.[164] This has led some scholars to conclude that heightened ascertainability "will lead to almost

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[157] *Id.* at 2204.

[158] *Id.* at 2208 n.4. Thus, the viability of the "no injury" class actions issue has been staved off.

[159] *See* Amy Howe, *Opinion Analysis: Court Limits Standing in Credit-Reporting Lawsuit*, SCOTUSBLOG (June 25, 2021), https://www.scotusblog.com/2021/06/court-limits-standing-in-credit-reporting-lawsuit/ [https://perma.cc/VLN2-4LHS]; Matthew M. Petersen, Douglas A. Thompson & Christopher J. Schmidt, TransUnion LLC v. Ramirez*: The Supreme Court Further Narrows Article III Standing and Rejects "No Injury" Class Actions*, BRYAN CAVE LEIGHTON PAISNER (June 29, 2021), https://www.bclplaw.com/en-US/insights/transunion-v-ramirez-the-supreme-court-further-narrows-article-iii-standing.html [https://perma.cc/KS4Z-46P2] (stating that *TransUnion* "is a significant blow to consumer plaintiffs," "unquestionably raises the bar," and "significantly ups the ante").

[160] *See TransUnion*, 141 S. Ct. at 2225 (Kagan, J., dissenting); *id.* at 2217–18, 2221 (Thomas, J., dissenting).

[161] A comprehensive discussion of these is beyond the scope of this paper.

[162] *See, e.g.*, Heather Swadley, Comment, *Class Dismissed: The Dangers of Applying Ascertainability Requirements to Rule 23(b)(2) Class Actions*, 93 TEMP. L. REV. 395, 396, 410 nn.190 & 192 (2021) (describing circuit split); Kyle Harris Timmons, Comment, *The End of Low-Value Consumer Class Action Lawsuits?: The Federal Circuit Split on the Ascertainability Requirement for Class Certification*, 68 MERCER L. REV. 1107, 1119–1134, 1119 n.192 (2017) (same); *see also* Kristin MacDonnell, *Is It Time for the End of Typicality?*, 5 J.L. 17, 19–20 (2015) (describing lack of consensus and confusion).

[163] Swadley, *supra* note 162, at 396, 401–04, 410–17 (disapproving of the more rigorous standard for Rule 23(b)(2) classes).

[164] *Id.*; Timmons, *supra* note 162, at 1144 (demonstrating that heightened ascertainability "reduces corporate accountability, lessens oversight and protection . . . and incentivizes poor record keeping").

certain death for some civil rights class actions,"[165] an issue the Court has declined to address.[166]

Another circuit split exists over the use of Rule 23(c)(4) issue certification under Rule 23(b)(3). A majority of circuits permits certifying a class action to resolve a particular issue by siphoning the issue off from the rest of the case being considered for 23(b)(3) certification.[167] Supporters tout its efficiency[168] and capacity to advance materially the litigation,[169] especially where a systemic discrimination question exists. A minority of circuits, however, contends this strategy evades Rule 23(b)(3)'s requirement that common issues predominate over individual ones and that the case as a whole satisfies predominance.[170] Critics see it as an end-run[171] and constitutional quagmire.[172] The Court has yet to resolve this debate.

Lower courts and commentators also disagree over the appropriate rigor of Rule 23(a)(3) typicality. Some support a high bar.[173] Others treat it the same

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[165] Swadley, *supra* note 162, at 415; *see also* Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 CONN. L. REV. 695, 721 (2018) (detailing the harm to plaintiffs).

[166] *See* Mullins v. Direct Digit., LLC, 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016); Rikos v. Proctor & Gamble Co., 799 F.3d 497 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1493 (2016); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir.), *cert. denied*, 138 S. Ct. 313 (2017).

[167] *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008); *see* Farleigh, *supra* note 143, at 1601 (describing this circuit split).

[168] *See, e.g.*, Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012); Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH. L. REV. 249, 299, 334.

[169] *McLaughlin*, 522 F.3d at 234; PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. a (AM. L. INST. 2010); *see also* Farleigh, *supra* note 143, at 1630 (proposing a multi-factor test); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 238–40 (2003) (approving of issue class certification that splits liability from monetary relief).

[170] *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 745 & n.21 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1297 (7th Cir. 1995).

[171] Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 711–12, 749–52 (2003) (advocating a strict approach); John C. Coffee, Jr. & Daniel Wolf, *Class Certification: Trends and Developments Over the Last Five Years (2004–2009)*, *in* THE 13TH ANNUAL NATIONAL INSTITUTE ON CLASS ACTIONS, at F-1, F-50 to -52 (Am. Bar Ass'n ed., 2009).

[172] *See Castano*, 84 F.3d at 747, 750 (holding that the Seventh Amendment Reexamination Clause was violated); *Rhone-Poulenc*, 51 F.3d at 1303 (same); Farleigh, *supra* note 143, at 1602 (noting that issue class certification is "uniquely plagued by Reexamination Clause concerns"). *But see* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 736 (2005) (finding that the Reexamination Clause is not a bar); Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 500 (1998) (same); Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 832 (2004) (same).

[173] *See, e.g.*, Treviso v. Nat'l Football Museum, Inc., No. 17CV472, 2018 WL 4608197, at *3 (N.D. Ohio Sept. 25, 2018) (citing Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537–38 (6th Cir. 2012)).

as commonality, adequacy, and ascertainability.[174] Still others seek to eradicate it altogether, concluding it has no independent justification post-*Wal-Mart*.[175] This issue, like others, is ripe for Court resolution.

In sum, the landscape for modern civil rights class actions is complex and riddled with significant obstacles to systemic discrimination claims that warrant a legislative intervention.

C. Arbitration

The Court has also interpreted the Federal Arbitration Act ("FAA") detached from the drafters' intent. In 1925, Congress sought to provide an inexpensive, fast, and efficient procedural alternative for merchants of equal bargaining power to regularly and voluntarily resolve disputes in federal court.[176] Over the last several decades, however, the Court has expanded the power of this alternative forum and of pre-dispute, private arbitration contracts far beyond Congress's intent.

The Court has broadened *whom* the FAA covers.[177] The coverage is not only businesses, but also individuals who have contracted with employers, large service providers, and powerful financial institutions.[178] Today, one can find a pre-dispute, compulsory arbitration agreement with everyday people in all manners of contract.[179] For example, the FAA's drafters emphasized in the legislative history their intent to exempt a broad swath of workers from the statute.[180] In 2001, in *Circuit City Stores, Inc. v. Adams*, however, the Supreme Court held that the Act's exemption clause covered only transportation workers,[181] thereby exposing the vast majority of employees and employment contracts to arbitration.[182] Justice Stevens concluded that the majority failed to consider properly Congress's will, "misuse[d] its authority"[183] and "skew[ed] its interpretation with

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[174] *See* MacDonnell, *supra* note 162, at 30–31; *see, e.g.*, Skipper v. Giant Food Inc., 68 F. App'x 393, 397 (4th Cir. 2003).

[175] *See, e.g.*, MacDonnell, *supra* note 162, at 19, 27, 30–31, 37–38.

[176] Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 102–03, 106, 108 (2006) [hereinafter Moses, *Misconstruction*].

[177] *See id.* at 102, 106.

[178] *See id.* at 112–13.

[179] *See id.*

[180] *See id.* at 105–06; Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 124–30 (2001) (Stevens, J., dissenting); *see also* Federal Arbitration Act ("FAA"), ch. 392, 61 stat. 669 (1947) (codified at 9 U.S.C. § 1) (exempting certain professions from the Act).

[181] *Cir. City*, 532 U.S. at 109–11, 113–19 (majority opinion).

[182] *But see* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 543–44 (2019) (holding that the agreement fell within the exemption).

[183] *Cir. City*, 532 U.S. at 132 (Stevens, J., dissenting).

its own policy preferences."[184] This statutory "misconstruction"[185] of the FAA has resulted in the compulsion of employees without bargaining power being compelled to waive court access as a condition of employment.[186]

The Court has broadened *how* FAA coverage works. Despite the drafters' emphasis on voluntariness,[187] the Court has enforced adhesion contracts and arbitration agreements made without knowledge and consent.[188] For example, in *Circuit City*, the Court permitted a job application that conditioned employment on the applicant's agreement to arbitrate all claims, including civil rights ones.[189] Some of the Court's major justifications for its liberal enforcement of arbitration agreements have been to protect litigant choice and the freedom to contract.[190] The Court's jurisprudence perpetuates this myth of mutual consent and masks an ever-growing problem—misuse of the arbitral forum as a safe haven for misconduct.[191] In reality, many "agreements" are take-it-or-leave-it arrangements involving little understanding, unequal power, and no negotiation.[192]

The Court has greatly expanded *what* the FAA covers. The forum's scope has evolved beyond simple disputes arising out of normal business transactions[193] to statutory and constitutional claims not originally contemplated.[194]

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[184] *Id.* at 133.

[185] Moses, *Misconstruction*, *supra* note 176, at 146–49 (noting that the textual interpretation was misguided); *Cir. City*, 532 U.S. at 128 (Stevens, J., dissenting) (accusing the Court of "reason[ing] in a vacuum"); *id.* at 138.

[186] *See* Moses, *Misconstruction*, *supra* note 176, at 146–52.

[187] *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 279 (1926); Moses, *Misconstruction*, *supra* note 176, at 106–08, 110–11 (noting that the FAA "was not intended to permit a party with greater economic strength to compel a weaker party to arbitrate"); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010) (emphasizing that arbitration requires "consent, not coercion" (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989))).

[188] *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

[189] *Cir. City*, 532 U.S. at 109–10 (majority opinion). *See generally* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that an Age Discrimination in Employment Act (ADEA) claim falls under the FAA).

[190] *See, e.g.*, *Volt Info. Scis.*, 489 U.S. at 474, 478 (explaining the Federal Arbitration Act's goal of "enforc[ing] agreements into which parties had entered" and putting arbitration agreements "upon the same footing as other contracts") (internal citation omitted) (first quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985); and then quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

[191] *See, e.g.*, *Cir. City*, 532 U.S. at 109–10, 121; Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013).

[192] *See generally* William M. Howard, *Validity of Arbitration Clause Precluding Class Actions*, 13 A.L.R.6th 145 (2006).

[193] *See* Moses, *Misconstruction*, *supra* note 176, at 112.

[194] *See id.* at 144 (Racketeer Influenced and Corrupt Organization Act (RICO), ADEA, and Carriage of Goods by Sea Act (COGSA) claims, among others (first citing Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 241–42 (1987); then citing *Gilmer*, 500 U.S. at 20; and then citing Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995))); Cohen & Dayton, *supra* note 187, at 281; Moses, *Misconstruction*, *supra* note 176, at 111; *see, e.g.*, Mitsubishi Motors Corp. v.

For example, civil rights claims include allegations of employment discrimination and sexual harassment under Title VII, disability discrimination under the Americans with Disabilities Act ("ADA"), wage theft under the FLSA, and maternity and medical leave denials under the Family and Medical Leave Act.[195]

The Court has expanded *where* the FAA applies. Although Congress intended the Act to apply solely to federal courts,[196] the Court has held that the FAA applies to states.[197] It also preempts contrary state law.[198] In 2011, in *AT&T Mobility LLC v. Concepcion*,[199] the Supreme Court held that the FAA preempted California's judicial rule classifying certain class arbitration bans as unconscionable.[200] The Court reinforced state obedience in *DIRECTV, Inc. v. Imburgia* in 2015,[201] again holding the FAA preempted California law.[202]

The Court's jurisprudence has gone beyond *why* the FAA was enacted. Although the law was designed to merely level the playing field between arbitration agreements and other contracts, the former receives favor.[203] The Court's unwavering deference to such agreements' enforceability has been steadfast. Arbitrators enjoy heightened deference and no meaningful appellate review.[204] The Court has asserted "a liberal federal policy *favoring* arbitration agreements"[205] not rooted in the Act[206] and more ambitious than envisioned,[207] as Justice Stevens observed in his *Circuit City* dissent over twenty years ago.[208]

For example, the Court has gone so far as to enforce an arbitration agreement even when plaintiffs would be unable to vindicate their substantive rights

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Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624–25 (1985) (antitrust claims); *Gilmer*, 500 U.S. at 27–28 (ADEA).

[195] ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 1 (2017).

[196] *See* Moses, *Misconstruction*, *supra* note 176, at 112.

[197] Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

[198] *Id.*; Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996). *See generally* Southland Corp. v. Keating, 465 U.S. 1 (1984) (FAA applies to state courts); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995) (confirming *Southland*). See Kristen M. Blankley, *Standing on Its Own Shoulders: The Supreme Court's Statutory Interpretation of the Federal Arbitration Act*, 55 AKRON L. REV. 101, 136–37 (2022) for an analysis of the Court's FAA preemption jurisprudence.

[199] 563 U.S. 333 (2011).

[200] *Id.* at 336–43, 351–52.

[201] 136 S. Ct. 463 (2015).

[202] *See id.* at 465.

[203] *See* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 110–11 (2001); *id.* at 125 (Stevens, J., dissenting).

[204] *See, e.g.*, *DIRECTV*, 136 S. Ct. at 465; *see also* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 531 (2019) (noting that arbitrators determine the question of arbitrability).

[205] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (emphasis added).

[206] *See* Moses, *Misconstruction*, *supra* note 176, at 123.

[207] *See id.* at 123–24.

[208] *Cir. City*, 532 U.S. at 131–32 (Stevens, J., dissenting).

because of the agreement's embedded class action ban.[209] In 2013, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court heard a case by a group of retailers that accused American Express of using its monopoly power to violate federal antitrust law.[210] The cost of an expert analysis necessary to prove the retailers' claims eclipsed each individual's potential recovery, some by ten times, thereby necessitating cost-sharing.[211] The only viable way to proceed was collectively, which plaintiffs' arbitration agreement prohibited.[212]

The Court concluded that even if a putative class *proves* that it would be impossible or irrational to pursue its individual cases, an arbitration agreement prohibiting collective action is enforceable under the FAA.[213] Consequently, large corporate defendants like Amex can effectively immunize themselves from liability where plaintiffs have little money or negative value claims. Thus, the class arbitration ban functioned as an exculpatory clause.

Italian Colors elevates form over substance to a height unbound, and severely narrows the effective vindication rule, which states: arbitration is permissible "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum . . . ."[214] The rule's purpose is "to prevent arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights."[215] But *Italian Colors* concludes that so long as an arbitration agreement allows a plaintiff to *assert* a substantive right, it does not matter if the terms make it impossible to actually *vindicate* that right.[216]

Italian Colors would extend to employment and consumer cases that often cannot be brought individually because of the substantial resources required, thereby necessitating collective action or cost sharing. *Italian Colors* protects arbitration agreements that lack, if not outright prohibit, such solutions.

Italian Colors is just one of many allowing class-arbitration bans under the FAA.[217] More recently, the Court has concluded that the National Labor Relations Act ("NLRA") also allows class-arbitration bans in employment contracts.[218] In 2018, in *Epic Systems Corp. v. Lewis*, the Court held that although the statute protects a worker's right to "engage in . . . concerted activities for

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[209] *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013).
[210] *Id.*
[211] *Id.*
[212] *See id.*
[213] *Id.* at 233–35.
[214] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).
[215] *Italian Colors*, 570 U.S. at 240 (Kagan, J., dissenting).
[216] *See id.* at 236–37.
[217] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337–43, 351–52 (2011); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 463 (2015).
[218] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1612 (2018).

the purpose of collective bargaining or other mutual aid or protection,"[219] this does not include class actions.[220] Thus, workers will find no safety in the NLRA from being required to arbitrate alone.

In sum, the architects of the FAA would be amazed to fathom the Court's unbridled favoritism toward arbitration. Procedural law has become untethered from Congress's goal of encouraging recalcitrant courts to consider properly voluntary arbitration agreements between corporate players in the commercial context. The Court's jurisprudence has swung far from the legislature's original intent, "building . . . case by case, an edifice of its own creation," as Justice O'Connor observed over three decades ago.[221] The Court's jurisprudence has been insular and self-referential, creating a canon that enforces arbitration agreements at nearly any cost.[222]

Workers and others challenging systemic discriminatory policies and unfair practices are paying the price.[223] Mandatory pre-dispute arbitration agreements in employment contracts have proliferated over the last three decades.[224] A 2017 study found that over fifty-six percent of all private-sector, nonunion employees (over sixty million American workers) are subjected to mandatory

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[219] *See* 29 U.S.C. § 157.

[220] *See* 138 S. Ct. at 1612.

[221] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring); *id.* (noting that "all pretense of ascertaining congressional intent" of the FAA is gone); *see* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) ("[T]he Court is standing on its own shoulders . . . ."); *see also* Blankley, *supra* note 198, at 102–03 ("[A]rbitration jurisprudence is insular . . . ."); Deepak Gupta, *Symposium: For Decades, Court Has Built "An Edifice of Its Own Creation" in Arbitration Cases—It's Time to Tear It Down and Rebuild*, SCOTUSBLOG (May 24, 2018), https://www.scotusblog.com/2018/05/symposium-for-decades-court-has-built-an-edifice-of-its-own-creation-in-arbitration-cases-its-time-to-tear-it-down-and-rebuild/ [https://perma.cc/WX4N-B598] (explaining that the Supreme Court is not trying to follow congressional intent).

[222] *See* Blankley, *supra* note 198, at 134–35, 150. Justices even rely on interpretive tools that counter their judicial philosophies to achieve this outcome. *Id.* at 102–03.

[223] In the consumer context, eighty-one percent of Fortune 100 companies impose mandatory arbitration. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234, 254 (2019), https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf [https://perma.cc/KY92-KD68].

[224] *See* COLVIN, *supra* note 195; *see also* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights* 15–16 (Econ. Pol'y Inst., Briefing Paper No. 414, 2015) (stating that arbitration in the employment context has increased significantly); Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CALIF. L. REV. 1203, 1208 (2002) (same). This trend has taken off since *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Blankley, *supra* note 198, at 151 (stating that the court's goals are expanding arbitration and contracting aggregation); *see* EEOC v. Waffle House, Inc., 534 U.S. 279, 296 n.11 (2002) (discussing the proliferation of arbitration agreements).

arbitration[225]—with the greatest impact on industries disproportionately comprised of low-wage workers, women, and African-Americans.[226]

A 2015 study found that although arbitration cases move faster, they enjoy far less success: "Employee win rates in mandatory arbitration are much lower than in either federal court or state court . . . . Differences in damages awarded are even greater . . . ."[227] The study concludes that "mandatory arbitration is massively less favorable to employees than are the courts."[228] Although the success rate gap has decreased, the employee win rate was still 35.7% lower in arbitration than adjudication.[229] Other studies put employee win rates in arbitration even lower.[230] For those employees who prevailed in American Arbitration Association ("AAA")[231] arbitrations, their awards were far less than those who litigated.[232] Employees in mandatory arbitration also have more difficulty retaining counsel.[233]

In addition to the quantitative evidence, qualitative data paints a bleak picture of arbitral outcomes. The *New York Times* uncovered numerous casualties in a study of 25,000 arbitrations between 2010 and 2014, and in interviews of hundreds of plaintiffs, attorneys, arbitrators, and judges.[234] Employees chal-

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[225] *See* COLVIN, *supra* note 195. Approximately fifty-four percent of nonunion, private-sector employers require arbitration. For employers with more than one thousand employees, sixty-five percent require the same. *Id.*

[226] *See* Stephanie Bornstein, *When Forum Determines Rights: Forced Arbitration of Discrimination Claims*, *in* A GUIDE TO CIVIL PROCEDURE, *supra* note 15, at 368, 374; *see, e.g.*, Rebecca N. Morrow, *Taxing Employers for Imposing Mandatory Arbitration, Class Action Waiver, and Nondisclosure of Dispute Provisions*, 74 SMU L. REV. 59, 81–82 (2021).

[227] Stone & Colvin, *supra* note 224, at 19; *see also* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1322–27 (2015) (supporting the argument that plaintiffs do worse in arbitration than in court).

[228] Stone & Colvin, *supra* note 224, at 19.

[229] *See id.*; *see also* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 688 (2018) ("[I]t is striking how discouraging the more recent data are.").

[230] *See, e.g.*, Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. RELS. REV. 1019, 1028 (2015) (finding that the employee win-rate in AAA arbitrations was nineteen percent); Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375, 383 (2018) (finding that the employee win-rate was twenty-two percent).

[231] The AAA accounts for roughly half of employment arbitration agreements. ALEXANDER J.S. COLVIN & MARK D. GOUGH, COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS, AND OUTCOMES 34 (2014).

[232] *See* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 80 (2014) (noting that the median arbitration award was $36,500, whereas the median litigation award was $150,500 for federal discrimination cases).

[233] Stone & Colvin, *supra* note 224, at 21–22 (illustrating that plaintiffs' counsel accepted half as many cases involving employees with mandatory arbitration agreements).

[234] *See* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System,"* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-

lenging discrimination have also testified before Congress about the myriad ways in which the arbitral forum has personally failed them.[235]

Class action bans in agreements in particular have taken a toll on everyday Americans. As Justice Ginsburg noted in her *DIRECTV* dissent: "It has become routine, in a large part due to this Court's decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses."[236] For example, for private-sector, non-union employees beholden to mandatory arbitration, forty-one percent are subject to class arbitration bans[237]—accounting for almost a quarter of American private-sector, nonunion workers.[238] Moreover, for the eighty-one Fortune-100 companies requiring arbitration in their consumer contracts, almost all of them forbid class actions.[239] The Court has disallowed class arbitration where a contract prohibits, is ambiguous about,[240] or is silent regarding class actions.[241] Justice Ginsburg warned that the confluence of *DIRECTV*, *Concepcion*, and *Italian Colors* has deprived consumers the ability to seek recourse for losses, therein shielding influential economic interests from responsibility for contravention of consumer-protection laws.[242]

The same is true for civil rights, where the marriage between compulsory arbitration and the class action ban is particularly insidious.[243] Emboldened by the pendulum's fixed pro-arbitration jurisprudence, companies have strategically stripped workers—particularly low-wage ones—of their ability to act collectively to challenge company-wide discriminatory policies.[244] Class arbi-

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arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/2K4X-59SE]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/L379-KKNR].

[235] *See, e.g.*, *Arbitration: Is It Fair When Forced?: Hearing Before S. Comm. on the Judiciary*, 112th Cong. 119 (2011) (statement of Dr. Deborah Pierce, Associate Director of Emergency Medicine).

[236] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting).

[237] COLVIN, *supra* note 195.

[238] *See id.* For private-sector, nonunion employers that require arbitration, thirty percent prohibit class actions. *See id.*

[239] Szalai, *supra* note 223, at 238, 254.

[240] *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019).

[241] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (finding that silence is not consent). Some courts interpret silence on this matter as an outright prohibition. Szalai, *supra* note 223, 238 & n.11.

[242] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 477 (2015) (Ginsburg, J., dissenting); *see* Blankley, *supra* note 198, at 154 (explaining that FAA jurisprudence has "largely expanded the powers of arbitrators and favored business interests" over the last forty years).

[243] *See* Malveaux, *supra* note 22, at 506; Miller, *Preservation*, *supra* note 93, at 323, 324 nn.140–41; Sternlight, *supra* note 227, at 1311.

[244] *See* Stone & Colvin, *supra* note 224, at 15.

tration bans are largely enforced,[245] leaving individual employees with no choice but to pursue relief on their own in arbitration—often a more difficult option.[246] Consequently, there are strikingly few individual arbitration cases,[247] resulting in misconduct often going unchallenged.[248] As Judge Posner famously quipped, "only a lunatic or a fanatic sues for [thirty dollars]."[249]

This conventional wisdom, however, is being challenged. Thousands of workers—primarily independent contractors in the gig economy—have alleged misclassification, wage theft (through denial of minimum wage and overtime) and other labor law violations against Uber, Lyft, DoorDash, and others.[250] In response, such companies have instinctively and successfully filed motions to compel individual arbitration based on mandatory, pre-dispute arbitration agreements and class action bans.[251] Surprisingly, these companies now face a

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[245] Silver-Greenberg & Gebeloff, *supra* note 234 (noting that the *New York Times*' study of federal cases filed between 2010 and 2014 reveals "[i]n 2014 alone, judges upheld class [] action bans in 134 out of 162 cases").

[246] *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, 2808, 2836 (2015) (discussing unfairness) [hereinafter Resnik, *Diffusing Disputes*]; 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, 1795 (2014) (same) [hereinafter Resnik, *Privatization*].

[247] Estlund, *supra* note 229, at 689–700 (estimating there are 34,000 "missing" arbitration employment cases covering civil rights, ADA, ERISA, FLSA, and FMLA each year); *see also* Resnik, *Diffusing Disputes*, *supra* note 246, at 2808 (noting that despite the rise in mandatory arbitration clauses, many litigants choose not to arbitrate).

[248] *See* Estlund, *supra* note 229, at 698; Amy Howe, *Opinion Analysis: Employers Prevail in Arbitration Case*, SCOTUSBLOG, https://www.scotusblog.com/2018/05/opinion-analysis-employers-prevail-in-arbitration-case/ [https://perma.cc/PTD4-GE7M] (May 21, 2018) (stating that *Epic Systems* is "huge victory for employers" because it reduces the number of cases they face); Gupta, *supra* note 221 ("The main effect is . . . to kill cases entirely . . . .").

[249] Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004); *see, e.g.*, Alison Frankel, *Forced into Arbitration, 12,500 Drivers Claim Uber Won't Pay Fees to Launch Cases*, REUTERS (Dec. 6, 2018) [hereinafter Frankel, *Forced Arbitration*], https://www.reuters.com/article/legal-us-otc-uber/forced-into-arbitration-12500-drivers-claim-uber-wont-pay-fees-to-launch-cases-idUSKBN1O52C6 [https://perma.cc/J4Z6-7U27] (noting a Fitbit lawyer's admission that "no rational litigant would pay a $750 filing fee to arbitrate a claim over a product that costs $162"); Alison Frankel, *Fitbit Lawyers Reveal "Ugly Truth" About Arbitration, Judge Threatens Contempt*, REUTERS (June 4, 2018), https://www.reuters.com/article/legal-us-otc-fitbit/fitbit-lawyers-reveal-ugly-truth-about-arbitration-judge-threatens-contempt-idUSKCN1IX5QM [https://perma.cc/5H7F-AYRD].

[250] Erin Mulvaney, *DoorDash Got Its Arbitration Wish, Costing Millions Upfront*, BLOOMBERG L.: DAILY LAB. REP., https://news.bloomberglaw.com/daily-labor-report/doordash-got-its-arbitration-wish-costing-millions-upfront [https://perma.cc/K7QL-NDD5] (Feb. 12, 2020) (noting that this "strategy is picking up steam" and includes DoorDash, Uber, Lyft, Postmates, Chipotle Mexican Grill, and Buffalo Wild Wings).

[251] John Ryan, *Poetic Justice: How Keller Lenkner Is Turning the Tables on Defendants and Shaking Up the Plaintiffs' Bar*, LAWDRAGON (Apr. 6, 2020), https://www.lawdragon.com/lawyer-limelights/2020-04-06-poetic-justice-how-keller-lenkner-is-turning-the-tables-on-defendants-and-shaking-up-the-plaintiffs-bar/ [https://perma.cc/H3E6-RS6B].

deluge of individual arbitration demands.[252] Savvy plaintiffs' counsel have called defendants' bluff and are using the very forum the latter fought to compel.[253] With class arbitration bans roundly enforced, thousands of individual workers are seeking to have their cases heard pursuant to agreements that promise to pay their initial fees to move forward in arbitration.[254] When filed *en masse*, individual arbitrations can require a company to pay millions in filing fees alone, sometimes ten times greater than plaintiffs' actual recovery.[255]

Defendants have failed to honor their bargains, paying a mere fraction of the promised arbitration fees and blocking mass arbitration.[256] They argue that this new approach is an illegitimate means of extracting large settlements for dubious claims and that counsel are conflicted, ill-equipped, or unauthorized to represent these thousands of workers.[257] Opposition to enforcement of their own arbitration agreements, however, has not achieved success,[258] leading companies to settle most or all claims for many millions of dollars.[259]

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[252] Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood in*, BLOOMBERG L.: DAILY LAB. REP. (Feb. 11, 2019), https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in [https://perma.cc/U66A-ZHSF].

[253] *Id.*

[254] *Id.*

[255] Thomas E. Birsic, Max A. Gelernter, Wesley A. Prichard & Elizabeth A. Hoadley, *Mass Arbitration, Más Problems: Class-Action Procedures May Guide Solutions to Issues in Mass Arbitrations*, 24 J. CONSUMER & COM. L. 8, 9 (2021); Alison Frankel, *"This Hypocrisy Will Not Be Blessed": Judge Orders DoorDash to Arbitrate 5,000 Couriers' Claims*, REUTERS (Feb. 11, 2020) [hereinafter Frankel, *Hypocrisy*], https://www.reuters.com/article/us-otc-doordash/this-hypocrisy-will-not-be-blessed-judge-orders-doordash-to-arbitrate-5000-couriers-claims-idUSKBN2052S1 [https://perma.cc/4JGJ-SG3T]; *see, e.g.*, O'Connor v. Uber Techs., Inc., 904 F.3d 1087, 1088 (9th Cir. 2018) (holding the arbitration agreement enforceable and that the employer is responsible for fees).

[256] *See* Frankel, *Forced Arbitration*, *supra* note 249 (describing this trend and companies' failure to pay the required fees); Alison Frankel, *3,420 Lyft Drivers Claim the Company Won't Pay Arbitration Fees to Launch Their Cases*, REUTERS (Dec. 14, 2018) [hereinafter Frankel, *Lyft Drivers*], https://www.reuters.com/article/legal-us-otc-lyft/3420-lyft-drivers-claim-the-company-wont-pay-arbitration-fees-to-launch-their-cases-idUSKBN1OD2KC [https://perma.cc/2ADE-NXEE].

[257] *See* Frankel, *Lyft Drivers*, *supra* note 256 (noting that Lyft accused plaintiffs' counsel of being "hopelessly conflicted"); Dean Seal, *Drivers at Fault for Their Own Stalled Arbitrations, Uber Says*, LAW360 (Jan. 15, 2019), https://www.law360.com/articles/1118931/drivers-at-fault-for-their-own-stalled-arbitrations-uber-says [https://perma.cc/BQ9Q-XW5A]; Alison Frankel, *Beset by Arbitration Demands, Postmates Resorts to Class Action to Settle Couriers' Claims*, REUTERS (Nov. 19, 2019) [hereinafter Frankel, *Beset*], https://www.reuters.com/article/us-otc-massarb/beset-by-arbitration-demands-postmates-resorts-to-class-action-to-settle-couriers-claims-idUSKBN1XT2UV [https://perma.cc/5AXS-GZTG]; Frankel, *Hypocrisy*, *supra* note 255; Mulvaney, *supra* note 250 (explaining DoorDash's contention that "the serial arbitration strategy amounted to a 'shakedown'").

[258] *See, e.g.*, Alaina Lancaster, *"Poetic Justice": Judge Alsup Berates DoorDash for Trying to Escape Its Own Arbitration Agreement*, LAW.COM: THE RECORDER (Nov. 26, 2019), https://www.law.com/therecorder/2019/11/26/poetic-justice-judge-alsup-berates-doordash-for-trying-to-escape-its-own-arbitration-agreement/ [https://perma.cc/5XXF-ZMWK] (noting that DoorDash's efforts to navigate 2,236 individual arbitrations after trying to keep workers out of court for thirty years is "poetic justice"); Transcript of Proceedings at 27, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D.

It is unclear whether mass arbitration is an antidote to class arbitration bans. The strategy has diminished one traditional barrier to some workers' ability to arbitrate individually small-value claims—the incentive to attract a lawyer.[260] Now, well-resourced, highly credentialed, and entrepreneurial former-defense lawyers have begun fronting individual workers' costs and forcing employers to pay theirs, leveling the playing field[261] and leveraging mass arbitration to encourage settlement negotiations.[262]

Although mass arbitration is growing and garnering support, its long-term viability is uncertain.[263] Initiating individual arbitrations *en masse* is relatively expensive and burdensome compared to filing a class action.[264] The tactic is risky and onerous for plaintiffs' counsel, of which there are few.[265] Moreover, notice to workers depends on attorney outreach rather than on class membership.[266] Plaintiffs' lawyers themselves disagree over whether massive numbers

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Cal. 2020) (No. C 19-07545) ("[T]here is a lot of poetic justice here."); Ryan, *supra* note 251 (responding to DoorDash's tactic, judge balks, "This hypocrisy will not be blessed, at least by this order"); Mulvaney, *supra* note 250 (noting that Postmates' refusal to pay fees was challenged as "contempt"); *see also* Turner v. Chipotle Mexican Grill, Inc., No. 1:14-cv-02612, 2018 WL 11314702, at *3 (D. Colo. Nov. 20, 2018) (calling resistance "unseemly").

[259] *See* Andrew Wallender, *Uber Settles "Majority" of Arbitrations for at Least $146M*, BLOOMBERG L.: DAILY LAB. REP., https://news.bloomberglaw.com/daily-labor-report/uber-sees-wage-suits-dropped-including-12-501-arbitration-claims [https://perma.cc/H2US-MBY2] (May 9, 2019) (explaining that a "large majority" of 60,000 Uber drivers dismissed their claims for a $146 million to $170 million settlement); *see, e.g.*, Notice of Voluntary Dismissal Without Prejudice, Abadilla v. Uber Techs., Inc., No. 3:18-cv-07343 (N.D. Cal. May 8, 2019); Notice of Voluntary Dismissal Without Prejudice, Abarca v. Lyft, Inc., No. 3:18-cv-07502 (N.D. Cal. Mar. 1, 2019).

[260] *See* Ryan, *supra* note 251; Max Kutner, *Postmates, Couriers Agree to End Mass Arbitration Appeals*, LAW360 (Apr. 8, 2021), https://www.law360.com/articles/1373233/postmates-couriers-agree-to-end-mass-arbitration-appeals [https://perma.cc/E8NY-PEUW].

[261] Ryan, *supra* note 251; Kutner, *supra* note 260.

[262] *See* Ryan, *supra* note 251; *see also* Frankel, *Beset*, *supra* note 257 (noting that Postmates prevents employees from suing as a class but is itself trying to use a class action to settle thousands of individual claims); Kutner, *supra* note 260 (compelling Postmates to arbitrate thousands of individual claims, costing $11,000,000 in arbitration fees, led to the settlement).

[263] Ian Millhiser, *DoorDash's Anti-worker Tactics Just Backfired Spectacularly*, VOX (Feb. 12, 2020), https://www.vox.com/2020/2/12/21133486/doordash-workers-10-million-forced-arbitration-class-action-supreme-court-backfired [https://perma.cc/29KQ-M4P8] ("[I]t's not all clear that this tactic can be expanded into a broader attack on forced arbitration."); Charlotte Garden, Opinion, *DoorDash's Multimillion-Dollar Arbitration Mistake*, WASH. POST (Feb. 16, 2020), https://www.washingtonpost.com/opinions/2020/02/16/doordashs-multimillion-dollar-arbitration-mistake/ [https://perma.cc/J57D-8TAX] ("[E]fforts to harness the power of numbers and the upfront costs of arbitration are not a comprehensive solution.").

[264] *See, e.g.*, Garden, *supra* note 263 (noting that the DoorDash arbitration fee per worker was $300 ($1,200,000 total), whereas the class action filing fee is $400).

[265] Millhiser, *supra* note 263 ("[A]rbitrating thousands of cases on behalf of workers with small claims is a terrible way for a lawyer to earn a living.").

[266] Mulvaney, *supra* note 250 (noting that outside a class action, "most affected employees will never know" of their rights and potential relief).

of individual arbitrations can realistically be resolved seriatim, with some claiming the tactic's only utility is leveraging employers to negotiate and settle cases.[267] As scholars have noted, the mass arbitration "work-around" is unlikely to be sustainable or its successes "scalable"—thereby justifying a more permanent legislative fix.[268]

Ironically, in the face of mass arbitration, some companies realize the benefit of class actions and class relief after having forced workers to act alone in arbitration.[269] The efficiency, cost savings, finality, and reputational costs inure to defendants' benefit. Indeed, some defendants have settled massive quantities of individual arbitration claims on a class-wide basis, using aggregation defensively while unfairly denying workers the tool offensively.[270]

For example, in a situation that can only be called "irony upon irony,"[271] DoorDash sought class relief after compelling individual arbitration pursuant to its adhesion contract with 5,010 couriers alleging wage-and-hour violations.[272] Faced with ten million dollars in arbitration filing fees, DoorDash attempted to stay arbitration and have its couriers join a pending state class action settlement.[273] The federal district court judge, citing decades of employer-imposed arbitration and class action bans, balked at this novelty, concluding: "This hypocrisy will not be blessed, at least by this order."[274] Of course, what's good for the goose should be good for the gander, and access to aggregation should be contractually available to worker and employer alike. The fact that corporations themselves are turning to class resolution belies its utility.

The impact of the Court's obstructionist arbitration jurisprudence may in fact be understated.[275] Although there is significant evidence that mandatory arbitration is flawed, it is hard to grasp the full extent of the problem[276] be-

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[267] *See id.* (noting that the counsel for DoorDash couriers in a $39,000,000 state class action settlement claims that "pursuing thousands of claims at once is a 'farce'" and "game playing").

[268] Garden, *supra* note 263.

[269] Ryan, *supra* note 251; *see, e.g.*, Frankel, *Beset*, *supra* note 257 ("[W]hen the alternative is worse, companies don't really think class actions are so bad."); Frankel, *Hypocrisy*, *supra* note 255.

[270] *See* Frankel, *Beset*, *supra* note 257.

[271] Order Re: Motion to Compel Arbitration, Motion to Stay Proceedings, and Motion to Seal at 8, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020) (No. C 19-07545) [hereinafter Order Re: Motion to Compel Arbitration].

[272] Frankel, *Hypocrisy*, *supra* note 255.

[273] *Id.*; Mulvaney, *supra* note 250.

[274] Order Re: Motion to Compel Arbitration, *supra* note 271, at 8.

[275] *See* Estlund, *supra* note 229, at 688–89 ("[D]ata on case outcomes are hotly contested . . . .").

[276] *See id.*; Estreicher et al., *supra* note 230, at 385 (comparing studies on arbitration versus litigation outcomes).

cause of the forum's confidential nature.[277] Without a requirement that employers share data, systemic information is largely unavailable.[278]

Notwithstanding this information shortfall, the groundswell of dissatisfaction over mandatory arbitration among everyday workers and consumers, advocacy rights groups, scholars, and judges (Justices included) has percolated to the point where a legislative course correction is necessary.[279] Indeed, Congress recently passed, with bipartisan support, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,[280] which represents an important start.

In sum, the Court has interpreted federal procedural law inconsistent with the drafters' intentions to provide facile access to the court system, frequent determination on the merits, and extensive joinder of parties for civil rights claims. This detachment has occurred not only in pleadings, aggregate litigation, and arbitration, but also in other procedural mechanisms like summary judgment, discovery, and sanctions.[281] The cumulative effect harms robust constitutional and civil rights enforcement, necessitating a broad new procedural civil rights act.

The precipice has been reached. It is time to resuscitate process to protect the pursuit of constitutional and civil rights. The next Part explores how.

II. Institutional Competencies: Why Congress Should Make the Course Correction

The preceding Part established that the civil justice system has reached a tipping point where the quantity and quality of procedural barriers is too high for many claimants to effectively and robustly pursue remedies for civil rights harms. Having concluded that the pendulum should swing back toward greater court access, the next question is what institution and tools are best suited to do this. This Part examines the institutional competencies of the Court, rulemakers, and Congress vis-à-vis each other and concludes that the latter is best

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[277] *See* Estlund, *supra* note 229, at 686 (describing how a "veil of secrecy . . . shields arbitration from public scrutiny" and hides its problems). Such secrecy also stunts public knowledge and development of the law. *Id.* at 679.

[278] Stone & Colvin, *supra* note 224, at 15. The same is true in the consumer context. In 2018, there were 826,537,000 consumer arbitration agreements in force. Szalai, *supra* note 223, at 238.

[279] *See, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 477 (2015) (Ginsburg, J., dissenting); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 252 (2013) (Kagan, J., dissenting).

[280] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2021).

[281] Malveaux, *supra* note 22, at 508–18 (describing disparate impact on civil rights); Briana Lynn Rosenbaum, *The Legislative Role in Procedural Rulemaking Through Incremental Reform*, 97 Neb. L. Rev. 762, 767 (2019). A full examination of these other procedural barriers is beyond the scope of the Article.

suited to solve this problem.[282] Section A will compare the institutional competencies of the Supreme Court and the rule-makers.[283] Section B will compare the rule-makers and Congress.[284] Section C will conclude that Congress is best suited to offer a solution.[285]

A. Supreme Court Versus Rule-Makers

The Court is less suited to reform civil process than the rule-makers.[286] Numerous scholars have recognized the Court's relative shortcomings[287] and the superiority of the formal rulemaking process.[288] Although the Supreme Court has the authority to set policy regarding procedural rules,[289] its institutional capacity wanes compared to the Advisory Committee in key ways: (1) access to resources and data; (2) practical experience and expertise; and (3) democratic representation.

First, the Court has minimal resources and data collection capacity, which can result in procedural jurisprudence untethered to empirical reality.[290] For example, absent empirical support, the Court concluded in *Twombly* that an elevated pleading standard was the antidote to exorbitant discovery costs.[291] Not only was this conclusion devoid of objective support, but it also encouraged district court judges to determine plausibility devoid of objective standards[292]—by using their "judicial experience and common sense."[293] *Twombly*'s reliance on select, incomplete, and sparse data led to two errors, which *Iqbal* cemented.[294] The Court not only identified the wrong cure (a higher pleading bar) but misdiagnosed the disease (exorbitant discovery costs, pressure on

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[282] *See infra* notes 286–390 and accompanying text.

[283] *See infra* notes 286–333 and accompanying text.

[284] *See infra* notes 334–367 and accompanying text.

[285] *See infra* notes 368–390 and accompanying text.

[286] This is distinct from the Court's role in formal rule-making. *Overview for the Bench, Bar, and Public*, U.S. COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/KQL9-9LKB].

[287] *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 883–85 (2010); Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules*,*"* 2009 WIS. L. REV. 535, 537; *Federal Jurisdiction and Procedure*, *supra* note 75, at 309–10, 313; Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1133–36 (2002).

[288] Lumen N. Mulligan & Glen Staszewski, *Institutional Competence and Civil Rules Interpretation*, 101 CORNELL L. REV. ONLINE 64, 79–83 (2016) (available through HeinOnline).

[289] *See id.* at 75, 82–83; Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 154 (2015); Mulligan & Staszewski, *supra* note 47, at 1190, 1194, 1213.

[290] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007).

[291] *See id.* at 559–60.

[292] *Federal Jurisdiction and Procedure*, *supra* note 75, at 313–14.

[293] Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

[294] *See Twombly*, 550 U.S. at 558–59.

"cost-conscious defendants to settle even anemic cases,"[295] and judges' incapacity to manage the situation).[296] Relying on observations about judicial management almost two decades old[297] and on discovery costs largely applicable to antitrust cases,[298] *Twombly* concluded that discovery costs reached the point where *Conley*'s half-century old pleadings standard had to retire.[299] The Court's concern over the enormity and pervasiveness of discovery costs, however, seems overblown.[300] Many empirical studies do not support the familiar sky-is-falling trope.[301] Consequently, some have concluded that folklore is largely driving the Court's pleading jurisprudence.[302] Given the Federal Rules' trans-substantivity, the court-access problem is exacerbated because the plausibility standard applies to *all* civil actions, despite its shaky foundation.[303]

The Court is further hampered by the need to make decisions based on a limited record, relying on piecemeal, idiosyncratic, individual cases as the basis for systemic procedural reform.[304] Professor Suja A. Thomas has noted that outlier cases rarely make good law for trans-substantive application.[305] Potentially massive discovery costs in *Twombly*, the horrific 9/11 terrorist attack undergirding *Iqbal*, and the one-and-a-half million member class action brought against Wal-Mart can create sharp edges and extreme postures. Instituting broad, sweeping procedural reform from the margins undermines the legitimacy of rule trans-substantivity and the legitimacy of applicable case law.

The Court's information deficit may be tempered by its ability to select cases through certiorari and by amici who elucidate issues and diverse perspec-

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[295] Mulligan & Staszewski, *supra* note 47, at 1219–20 (explaining that "no brief . . . set forth any data to support the Court's finding of this legislative fact" and that the Court relied on "untested folk wisdom" (citing Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 848 (2010)).

[296] Twombly, 550 U.S. at 559–60.

[297] *See id.* at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)).

[298] *See id.* at 558–59.

[299] *See id.* at 563.

[300] *See* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1111–12 (2012).

[301] *See* Malveaux, *supra* note 22, at 517 n.380; *see also* Mulligan & Staszewski, *supra* note 47, at 1220 (citing "studies paint[ing] a far different picture of discovery costs").

[302] *See* Clermont & Yeazell, *supra* note 295, at 848.

[303] Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009).

[304] *See* Mulligan & Staszewski, *supra* note 288, at 76; Mulligan & Staszewski, *supra* note 47, at 1207–09.

[305] *See* Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law* (*See, e.g., the Lack of Judicial Restraint in* Wal-Mart*,* Twombly*, and* Ricci), 48 WAKE FOREST L. REV. 989, 1006–08 (2013); Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 215–17.

tives.[306] The Court's discretion gives it some control over its agenda. But the Advisory Committee also has the resources to conduct impact studies and statistical analyses for studying procedural issues and recommending rule amendments.[307]

Second, the Court's expertise lies in statutory and rule interpretation, not rule creation and civil litigation.[308] The Court lacks the practical experience and familiarity with litigation practice in comparison to the Judicial Conference and the thousands of members of the bench, bar, and academia who participate in rulemaking through recommendations and the public comment process.[309] The rule-makers are uniquely positioned and better poised to engage in rule analysis and amendment.[310] Indeed, the Judicial Conference, aided by the Federal Judicial Center, is *required* to "carry on a continuous study of the operation and effect of the general rules of practice and procedure."[311] Promulgating a rule change, from inception to enactment, usually spans two to three years, and involves significant participation from various stakeholders.[312]

Granted, this rulemaking process can be more cumbersome, expensive, and time-consuming than adjudication, which also makes systemic, transsubstantive change through precedent.[313] But the Court is no match for the Advisory Committee. As Justice Stevens noted, the Court was the wrong forum to take on the ambitious enterprise of rewriting the pleadings rules, which im-

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[306] By way of illustration, the Supreme Court grants only one percent of all certiorari petitions filed. *See* Ralph Mayrell & John Elwood, *The Statistics of Relists Over the Past Five Terms: The More Things Change, the More They Stay the Same*, SCOTUSBLOG (Jan. 4, 2022), https://www.scotusblog.com/2022/01/the-statistics-of-relists-over-the-past-five-terms-the-more-things-change-the-more-they-stay-the-same/ [https://perma.cc/XR8R-EC5G]. Moreover, the average number of amicus briefs filed per case in the 2019–2020 term was about sixteen. *See* Mark Walsh, *When the Supreme Court Cites Your Amicus Brief*, ABA J. (Aug. 26, 2021), https://www.abajournal.com/web/article/when-the-supreme-court-cites-your-amicus-brief [https://perma.cc/AA6Y-WC8J].

[307] *See Overview for the Bench, Bar, and Public*, *supra* note 286.

[308] *Federal Jurisdiction and Procedure*, *supra* note 75, at 313; Mulligan & Staszewski, *supra* note 288, at 78.

[309] *Overview for the Bench, Bar, and Public*, *supra* note 286.

[310] *See id.*

[311] *Id.* (quoting 28 U.S.C. § 331).

[312] *About the Rulemaking Process*, U.S. COURTS, http://www.uscourts.gov/RulesandPolicies/rules/about-rulemaking.aspx [https://perma.cc/B9JS-H2GB].

[313] Mulligan & Staszewski, *supra* note 47, at 1214–15, 1237–40 (describing complaints, political unaccountability, burdensomeness, inefficiency, and ossification); Mulligan & Staszewski, *supra* note 288, at 84–85, 88, 89 (calling the rulemaking process "ossified" and time consuming); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 907–09 (1999) (describing legitimacy and efficacy critiques of rule-making process); Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 244–46 (1997).

pacts not only the federal courts, but state courts as well.[314] Just months before *Twombly*, the Court itself conceded the impropriety of revising the Rules outside the formal rulemaking process.[315] The Court, however, breached its own norm in *Twombly* and *Iqbal* by creating a plausibility threshold for all claims made pursuant to Rule 8.[316]

The potential policy implications of the Court's adjudicative rulemaking are troubling and far-reaching.[317] The Court diagnosed the problem as a discovery system rife with unreasonable costs, which, if true, could have justified various access-oriented prescriptions.[318] Because the Advisory Committee studies and amends the Rules within an interrelated system, it is better positioned to appreciate the global impact a rule change may have and to craft efficient solutions responsive to the entire civil justice system.[319] It is safe to say that, relative to the Court, the rulemaking machinery offers better raw materials to craft and fix the civil rules.

Third, under a majoritarian theory of democracy, court adjudication is less democratic than the rulemaking process because the latter offers greater opportunity for public participation.[320] Public solicitation of input from over ten thousand stakeholders, an extensive public notice-and-comment period, open hearings, published proceedings, and multiple levels of review invite widespread participation, transparency, and accountability.[321] Although the formal rulemaking process has its drawbacks,[322] it functions more democratically and is more accountable to the people.[323] Although the participation of diverse amici may temper the Court's isolation, this is no match for the more democratic,

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[314] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 579 (2007) (Stevens, J., dissenting) ("I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established [the rule-making process] for revisions of that order." (citing 28 U.S.C. §§ 2072–2074 (2000 & Supp. IV))).

[315] Jones v. Bock, 549 U.S. 199, 215–16 (2007).

[316] *See* Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 334 (2012).

[317] *See* Mulligan & Staszewski, *supra* note 47, at 1196–97.

[318] *See, e.g.*, Malveaux, *supra* note 47, at 107.

[319] Mulligan & Staszewski, *supra* note 288, at 76; Mulligan & Staszewski, *supra* note 47, at 1209.

[320] *See* Mulligan & Staszewski, *supra* note 47, at 1201–02, 1207–09, 1244.

[321] *See id.*

[322] *See* Carrington, *supra* note 30, at 617–18, 621, 633–34, 656–57; Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1596–97, 1613–14 (2014); Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 279–81, 283–84, 287, 290–92 (2009); Bone, *supra* note 313, at 909, 954; Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 449–51, 455, 460–61, 466, 468–73 (2013).

[323] *See* Mulligan & Staszewski, *supra* note 47, at 1245–46; Resnik, *supra* note 8, at 88.

far-reaching rulemaking apparatus.[324] Thus, to the extent the Court's interpretation of the Rules runs counter to the intent of the rule-makers, the democratic process is undermined.[325] The majority's will is replaced with the will of nine unelected, life-tenured Justices, relatively unaccountable to the citizenry.[326]

Alternatively, under a counter-majoritarian conception of democracy—where the Court would protect the minority by preserving court access—the Court is also falling short.[327] The Court's procedural jurisprudence is particularly insidious for disenfranchised groups, which have at times disproportionately relied on federal court intervention and independence when politics disfavor them.[328] The Court has an opportunity to protect constitutional and civil rights, rights that go to the heart of America's aspirational identity and democratic ideals.[329]

More recently, however, the Court has abdicated this guardian role in the procedural space, for example, by elevating the court-access bar to save corporations from large discovery costs[330] or shield government officials from litigation.[331] Professor Judith Resnik has noted how the key rulings of *Concepcion* and *Wal-Mart* also "make plain that the constitutional concept of courts as a basic public service provided by government is under siege."[332] This favoritism

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[324] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4649 (1988).

[325] Several commentators contend the Court's decisions are political. *See, e.g.*, David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 413 (2018); Benjamin Johnson, *The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law*, 50 CONN. L. REV. 581, 609–22 (2018); Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html [https://perma.cc/QDT3-EAXC].

[326] *See* Mulligan & Staszewski, *supra* note 47, at 1244.

[327] *See id.* at 1247.

[328] *See, e.g.*, Roy L. Brooks, Conley *and* Twombly*: A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 59–60 (2008).

[329] *See generally* Erwin Chemerinsky, *The Inescapability of Constitutional Theory*, 80 U. CHI. L. REV. 935, 950–51 (2013) (reviewing J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012)) (criticizing Judge Wilkinson's approach); Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1210 (1984) (arguing that protection from the tyranny of the majority is essential to democracy). *But see* John E. Nowak, *Attacking the Judicial Protection of Minority Rights: The History Ploy*, 84 MICH. L. REV. 608, 609–11 (1986) (book review).

[330] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007); *id.* at 596 (Stevens, J., dissenting) (stating that a "transparent policy concern" of the Court's decision was "protecting antitrust defendants—. . . some of the wealthiest corporations in our economy").

[331] *See* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009).

[332] Resnik, *supra* note 8, at 80.

for the powerful runs counter to the Court's protective democratic function, thereby making the rule-makers and their process more appealing.[333]

B. Rule-Makers Versus Congress

The Court's institutional shortcomings suggest that the Advisory Committee should solve the court-access problem. The rule-makers bring unparalleled resources, expertise, and opportunity for public participation.[334] The formal rulemaking process, however, has its drawbacks, many of which Congress can better address.[335]

Although deference to the Advisory Committee's judgment in rulemaking is appropriate, a word of caution is warranted against blind subjugation to monopoly rulemaking power.[336] The rule-makers can broker power and propose rules that further policy objectives too, as a study of Advisory Committee proposals from 1960 to 2014 demonstrates.[337] For example, the Committee that Chief Justice Earl Warren appointed in 1960 set forth rule proposals that favored plaintiffs and private enforcement, resulting in amendments in 1961, 1963, 1966, 1970, and 1971.[338] Chief Justice Warren selected a Committee primarily comprised of practitioners, then academics, and finally judges.[339] Significantly, the Committee designed the 1966 revised class action rule, Rule 23(b)(2), to counter segregationists who used pupil-assignment laws to prevent class certification and thwart systemic integration.[340] Similarly, the 1970 amendment broadened the scope of discovery, enhancing plaintiffs' capacity to enforce substantive law like civil rights.[341]

Starting in the 1970s, in response to the 1960s civil rights movement and concomitant public interest litigation boom, the Advisory Committee—which Chief Justice Warren Burger reconstituted—sought to roll back this progress.[342] The Committee, containing Republican-appointed federal judges and corporate defense lawyers,[343] considered various obstructionist proposals at the behest of Republican-appointed Chief Justices Warren Burger, William Rehnquist, and

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[333] *See* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 91 (2017).

[334] *See* Mulligan & Staszewski, *supra* note 47, at 1201–02, 1207–09, 1244.

[335] *See id.* at 1199, 1204.

[336] BURBANK & FARHANG, *supra* note 145, at 109.

[337] *Id.* at 83 ("[T]he rulemaking proposals most likely to elicit ideological behavior are precisely those that will affect private enforcement.").

[338] *Id.* at 71–72.

[339] *Id.* at 78–79.

[340] *See* Marcus, *Flawed*, *supra* note 90, at 684–85, 695–96; Malveaux, *supra* note 87, at 332.

[341] BURBANK & FARHANG, *supra* note 145, at 77.

[342] *Id.* at 97–99.

[343] *Id.* at 79–82, 84–85.

John Roberts.[344] For example, proposed amendments restricting Rule 23 class actions, limiting Rule 26's discovery scope, expanding Rule 11's attorney sanctions, and incentivizing Rule 68's settlement goals obstructed private rights enforcement and supported an anti-civil rights enforcement agenda.[345]

In general, Committee proposals that impacted private enforcement between 1960 and 2014 fell into three periods: 1960–1971 (favoring plaintiffs), 1971–1991 (favoring plaintiffs and defendants), and 1991–2014 (favoring defendants).[346] The overall trend, however, was a steady decline of Committee proposals favoring plaintiffs, from 87% to 19%.[347]

This favoritism works because the nature of process text masks such policy preferences. Shielded by technical jargon and the language of neutrality, rule-makers have wide girth to propose seemingly innocuous, but harmful, rules.[348] Because the rules exist at a high level of generality and cut across varied substantive law, they perform as "neutral" standard-bearers. This licenses judges to "interpret" them in ways that serve policy interests and lead to exclusionary outcomes with impunity.[349]

Although more democratic than court adjudication, the rulemaking process is not as democratic as the legislative process. The Chief Justice's appointees comprise the Judicial Conference. This unelected, select group of judges, lawyers, and academics functions relatively independently and beyond view of the general public. Thus, potential bias and political influence may taint the democratic nature of formal rulemaking. Moreover, the notice-and-comment process may itself be captured by interest group politics, resulting in the loudest voices having the greatest ear of the Advisory Committee.[350]

Not only is the rule-maker selection process less democratic, but the composition of the rule-makers is also less representative than Congress. Professors Stephen B. Burbank and Sean Farhang have found that from 1971 through 2014, Republican-appointed judges "held [seventy percent] of Article III judge seats" on the Advisory Committee, were over twice as likely to serve on the Committee, and constituted a majority in forty-one years of the forty-

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[344] *Id.* at 66–67.

[345] *Id.* at 66–67, 102, 104; Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1144–52 (2015); *see id.* at 1140 ("[D]efense speakers . . . at the [2010] Duke Conference outnumbered plaintiffs' speakers almost two-to-one." (citing ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRAC. & PROC., THE JUDICIAL CONF. OF THE U.S., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES 19–23 (2010))).

[346] BURBANK & FARHANG, *supra* note 145, at 94.

[347] *Id.* at 94–95.

[348] *Id.* at 67–68.

[349] *See id.* at 68.

[350] *See* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 837 (1991).

three year period.[351] Moreover, members of the Committee are 331 times more likely to be chosen as Committee Chair, who sets the rule-making agenda.[352] Because of this pipeline, Republicans have occupied eleven of the twelve chairs during this period.[353]

Not only have Republican-appointed judges dominated the Committee—so have white men.[354] From 1971 through 2017, white judges were five times more likely than those of color to serve on the Committee.[355] White judges accounted for "89% of the judge-years and 98% of both committee service-years and appointments or reappointments."[356] Not surprisingly, the racial demographics of the Chair of the Committee are even worse: the "inexorable zero"![357]

The lack of political and demographic diversity matters to civil rights outcomes.[358] Studies indicate that factors like gender and race impact judicial decision-making for certain key civil rights issues.[359] Moreover, Democrats have generally favored private rights enforcement as essential to civil rights, whereas Republicans have either opposed or selectively favored it to promote a socially conservative agenda.[360]

Finally, formal rulemaking is not the antidote because it risks violating the Rules Enabling Act's prohibition against creating rules that alter substantive rights.[361] The Act empowers the Committee to: (1) "prescribe general rules of practice and procedure," (2) so long as they do "not abridge, enlarge or modify any substantive right."[362] This two-pronged prescription limits the rule-makers' authority to impact substantive rights.

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[351] BURBANK & FARHANG, *supra* note 145, at 85, 87–88.

[352] *Id.* at 89–91.

[353] *Id.* at 91.

[354] *Id.* at 83–88; *see* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1065 (2016) (criticizing the rule-making process's homogeneity). Chairwoman Judge Lee Rosenthal, a white woman, and Committee member Dean and Professor A. Benjamin Spencer, an African-American man, are notable exceptions.

[355] BURBANK & FARHANG, *supra* note 145, at 88.

[356] *Id.*

[357] *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977) (quoting United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 315 (5th Cir. 1975)); BURBANK & FARHANG, *supra* note 145, at 89; Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. ONLINE 52, 60–66 (2018), https://northwesternlawreview.org/articles/sowhitemale-federal-civil-rule-making/ [https://perma.cc/YJ8X-RY89].

[358] Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 613–14 (2001) ("[Rule-makers] ha[ve] become distinctly more conservative in both ideology and social background.").

[359] BURBANK & FARHANG, *supra* note 145, at 86.

[360] *Id.* at 86, 96.

[361] 28 U.S.C. §§ 2072–2074.

[362] *Id.* § 2072(a)–(b). The REA sets forth the rule-making process. *Id.* §§ 2071–2077.

Much of the reforms suggested would implicate the Rules Enabling Act ("REA"). For example, the Court has concluded that its interpretation and application of Rule 23 has the potential to breach the REA.[363] In *Wal-Mart*, the Court rejected plaintiffs' efforts to use a sampling method that would determine back pay for class members in place of individualized Title VII hearings because it would enlarge the class members' substantive rights under the REA.[364] Although the Justices disagree over how to apply the REA, a rule focused on bolstering court access for constitutional and civil rights claims risks running afoul of the REA.[365]

Despite the Committee's overall anti-plaintiff trend from 1960 to 2017, it has not fundamentally amended the Rules to achieve exclusionary outcomes given the REA's parameters.[366] Attempts at amending rules regarding notice pleading, broad discovery, class actions, summary judgment, and settlement initiatives have only gone so far.[367]

C. Congress as Solution

Because of the limited institutional capacities of the Court and rulemakers, Congress must step into the breach.[368] By tailoring procedure to constitutional and civil rights claims, legislation can swing the pendulum back to where courts can hear these claims robustly, determine them on the merits, and

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[363] *See, e.g.*, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1046 (2016); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011); Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997).

[364] *Wal-Mart*, 564 U.S. at 367; *see Tyson Foods*, 136 S. Ct. at 1048 (quoting *Wal-Mart*, 564 U.S. at 367).

[365] *Compare* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 665, 661–72, 686 (2019) (exploring the scope of the REA), *and* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 424–25 (2010) (Stevens, J., concurring in part and concurring in the judgment) (emphasizing that the REA does not allow the Court to affect substantive rights), *with Shady Grove* at 406–07, 411 (plurality opinion) (claiming that it is insignificant whether a rule affects substantive rights).

[366] BURBANK & FARHANG, *supra* note 145, at 97–103, 116–19.

[367] *Id.* at 103–12, 116–19. The 2015 amendments, which incorporate a proportionality requirement into discovery, may be an exception. According to Chief Justice Roberts, these are a "big deal" and "mark a significant change." JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4, 5 (2015).

[368] *See* Carrington, *supra* note 30, at 666–67 ("Congress must act or many of its laws will go down the drain of weak enforcement . . . ."). Congressional action, however, is only appropriate when following an inclusive, democratic process. This was not done following modest class action rule reforms, leading to the demise of the Fairness in Class Action Litigation Act (FICALA) of 2017. H.R. 985, 115th Cong. § 105 (2017) (passed by the House on Mar. 9, 2017); *see* Jessica Erickson, *Heightened Procedure*, 102 IOWA L. REV. 61, 64 (2016) (arguing that Congress can use procedural tools and principles to address cost asymmetry and frivolous litigation); Glover, *supra* note 11, at 2129–30 (stating that procedural reform is appropriate through substantive law or rule-making, not the courts).

systemically enforce them. Congress is institutionally better poised to correct regressive procedural rulings for a number of reasons.

First, empowered to make substance-specific procedure and to access empirical data, Congress is equipped to address the obstructionist trend.[369] Although the process from bill to law is far more complex than School House Rock suggests, a statute could squarely address the backlash.[370] Corrective legislation plays an important regulatory function, reining in jurisprudence that has veered too far from the drafters' original intent.

Course corrections can be broad, as the Civil Rights Act of 1991 illustrates,[371] or surgical, as the Lilly Ledbetter Fair Pay Act illustrates.[372] Drafters crafted such legislation to address, *inter alia*, procedural deficiencies in the civil litigation system vis-à-vis civil rights enforcement. They convey restorative legislation's capacity to address Court obstructionism.

Admittedly, there must not only be the way, but the will to enact inclusionary process. When the rule-makers first promulgated the Federal Rules, Congress played a de minimis role in the development of procedure.[373] It entered the fray in the 1980s to promote court access and private rights enforcement,[374] but then later to secure retrenchment.[375] For example, a Republican-led Congress enacted major procedural reform laws like the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[376] the Prison Litigation Reform Act of 1995 ("PLRA"),[377] and the Class Action Fairness Act of 2005 ("CAFA")[378]—all obstructionist statutes.

Second, Congress—like the rule-makers—has the advantage of a coercive power to create broad, uniform, predictable outcomes.[379] Although civil rights

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[369] *See* Charlton C. Copeland*, Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 813 (2020).

[370] *See id.*

[371] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 and 42 U.S.C.); *see also* Americans With Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 42 U.S.C.) (creating new standards to combat discrimination).

[372] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

[373] Glover, *supra* note 11, at 2113.

[374] *Id.* at 2113–14.

[375] *Id.* at 2114.

[376] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (enacting heightened pleading standards).

[377] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).

[378] Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.); *see* Richard L. Marcus, *Modes of Procedural Reform*, 31 HASTINGS INT'L & COMP. L. REV. 157, 175–84 (2008) (discussing CAFA, PSLRA, and the Civil Justice Reform Act of 1990).

[379] *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

counsel and some lower courts have dexterously navigated the obstacles the Court has placed on the procedural course, this does not countenance inaction. Such legal strategies and judicial interpretations are discretionary. Restorative legislation, by contrast, would enhance predictability, uniformity, and fairness of results across constitutional and civil rights cases by requiring a lower procedural floor.[380]

Admittedly, corrective legislation presumes Congress can fix the problems discussed above by yet another law. If the Court's interpretive lens is skewed in an obstructionist direction, the Court may overreach or interpret a *new* law in the same way. For example, although the Civil Rights Act of 1991, discussed below, re-anchored a recalcitrant Court to Congress's original desire for robust civil rights enforcement, the Act did not eliminate judicial resistance to this objective. As scholars have concluded, although the Act "had a meaningful restraining effect on the Supreme Court's jurisprudence[,] . . . in the most ideological cases . . . the Court has remained decidedly pro-defendant."[381] Thus, like any legislation, a new civil rights law fixes the problem of obstructionist jurisprudence only to the extent the Court more generally recognizes congressional authority.

Third, as discussed above, Congress benefits from greater representativeness and democratic legitimacy.[382] As the branch tasked with expressing the will of a pluralistic society, Congress can craft process that reflects the public's priorities. Even so, given the large role that powerful special interest groups and wealthy corporations play in modern politics, Congress risks being captured.[383] Outcomes may reflect resource and power differentials more than majority rule.[384] To the extent that such stakeholders exert disproportionate influence on the lawmaking process, the benefits of Congress's representativeness and democracy are lost. Thus, the law as salve is limited and a variety of approaches are needed to make systemic change. The bottom line is that Congress, though itself flawed, *institutionally* ranks ahead on the democracy front.[385]

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[380] *But see* Rosenbaum, *supra* note 281, at 804–18 (noting that Congress's legislating procedural reforms alters remedies for substantive claims, lacks transparency, and is "unmoored from adjudication and practice-based normative values").

[381] *See, e.g.*, Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 282, 290–91 (2011).

[382] This notion is admittedly idealistic and aspirational. The electorate excludes many members of American society, including: some felons, non-English speakers, persons with disabilities, and younger people. Voter suppression efforts further undermine true representation.

[383] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[384] *See* Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislation Fact-Finding*, 84 IND. L.J. 1, 16 (2009).

[385] *See id.*

Finally, Congress is better suited to set and promote societal norms and values. A new procedural civil rights law would signal and reaffirm to the public the nation's commitment to equality, democracy, and due process. Although procedural jurisprudence seeks to address efficiency-oriented problems like judicial case overload[386] and resource limitations, process law should also address issues of inequitable access, exclusion, and rights underenforcement.[387] The very first rule sets the expectation: rules are meant to ensure not only "speedy, and inexpensive" outcomes, but "just" ones too.[388]

Statutory law plays a vital role in allocating power and signaling who matters in society.[389] As scholars have noted, "[r]eforms that discourage court access for minorities asserting 'marginal' rights claims reflect value judgments about the purposes of adjudication and the desirability of broad-based participation in the litigation process."[390] It is time for the law to reflect that the experiences of marginalized people matter.

The next Part examines the extent to which restorative legislation could succeed today, drawing on two catalysts to civil rights restorative statutes.

III. It Is Time for a New Civil Rights Act

Having determined that Congress is the appropriate driver and that legislation is the appropriate vehicle to counteract procedural law undermining civil rights enforcement, the next question is whether this is the right time for a new law.[391] Section A first considers some catalysts for corrective civil rights legislation.[392] Section B then examines contemporary conditions similar to those that existed when Congress passed other corrective civil rights legislation—the sweeping Civil Rights Act of 1991 and the more targeted Lilly Ledbetter Fair Pay Act[393]—was passed.[394] Section C ends with an analysis of conditions that

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[386] A litigation "explosion" may result from the paucity of other options available to the marginalized. *See* A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 87, 87–88 (A. Leo Levin & Russell R. Wheeler eds., 1979); William T. Gossett, Bernard G. Segal & Chesterfield Smith, *Foreword to* THE POUND CONFERENCE, *supra*, at 11.

[387] *See* THE POUND CONFERENCE, *supra* note 386, at 87–110 (reciting Dean Pound's assertion that "in discouraging litigation we encourage wrongdoing" (quoting ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 134 (1921))).

[388] *See* FED. R. CIV. P. 1.

[389] MICHÈLE ALEXANDRE, THE NEW FRONTIERS OF CIVIL RIGHTS LITIGATION, at xix–xxviii (2019).

[390] 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).

[391] *See infra* notes 396–542 and accompanying text.

[392] *See infra* notes 396–404 and accompanying text.

[393] A full examination of all of the factors that lead to ameliorative legislation (including these two exemplars) is beyond the scope of this Article.

may signal whether a restorative procedural civil rights act could prevail today.[395]

A. Catalysts for Corrective Civil Rights Legislation

There are numerous conditions that catalyze corrective civil rights legislation to obstructionist jurisprudence. As scholars have observed, the creation of law involves interaction among a variety of stakeholders such as judges, lawyers, politicians, social activists, and media figures.[396] This complex contextual interaction accounts for why and when restorative statutes arise.

The initial catalyst is the Court's own errant jurisprudence. The quantity and quality of its regressive cases are the starting points. A great number of regressive cases or just one particularly egregious one can tip the scales.

Second, the Court itself may flag its own potential error from within, foreshadowing the propriety of corrective legislation. The presence of a strong dissent often achieves this.[397] Professor Lani Guinier identifies dissenting opinions as an opportunity for Justices to "play a democracy-enhancing role" by inviting in those "unlearned in the law" to join the conversation.[398] This is an act of "democratically-oriented jurisprudence" or "demosprudence"—the philosophy that "lawmaking is a collaborative enterprise between formal elites . . . and ordinary people" and that "the wisdom of the people" should be front and center of this enterprise.[399] The goal of a demosprudential dissent is making sure that the views of the judicial majority do not squash political dialogue.[400] When done right, the dissenter signals not only the interventionist role of Congress, but that of nonlegal actors and "role-literate participants"[401] in the lawmaking process.[402] Scholars have noted how the "Court can catalyze change" through dissent by speaking clearly and plainly to mobilized constituencies

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[394] *See infra* notes 405–470 and accompanying text.

[395] *See infra* notes 471–542 and accompanying text.

[396] *See* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 210, 266 (2011).

[397] Even some majority opinions can play this role and urge congressional action.

[398] Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 546 (2009).

[399] *Id.* at 544–45; *see also* Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 582 (2009) ("[C]ourts do not end democratic debate about the meaning of rights and the law; they are participants within that debate.").

[400] Guinier, *supra* note 398, at 547.

[401] *Id.* at 554; *see* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1339–48 (2006).

[402] Guinier, *supra* note 398, at 543, 546, 548–49.

and ordinary people.[403] The law is thus shaped via grassroots activism, media exposure, and political mobilization.

Finally, and most pragmatically, the party affiliations of the chambers of Congress and the President, their degrees of partisanship,[404] and the collective political context influence the likelihood that Congress will enact restorative civil rights legislation. The extent to which parties dominate and operate lockstep or find common ground foreshadow whether corrective civil rights legislation is possible.

B. Exemplar Restorative Civil Rights Acts

The aforementioned catalysts offer lessons and presage whether a new procedural civil rights act would be successful today. This Section briefly examines catalysts vis-à-vis two distinctly different restorative civil rights statutes: the Civil Rights Act of 1991 and Lilly Ledbetter Fair Pay Act.[405]

1. The Civil Rights Act of 1991

The most sweeping and comprehensive restorative civil rights law in American history—the Civil Rights Act of 1991—has much to teach us about the propriety of one today. As an initial matter, the quantity and quality of Supreme Court decisions undermining Congress's intent to provide robust civil rights enforcement convinced Congress of the need for corrective legislation.[406] With the Civil Rights Act of 1991, Congress overturned eight Supreme Court cases with a "ferocity" not exhibited since Congress's repudiation of *Dred Scott v. Sandford*,[407] via the post-Civil War amendments.[408] The Civil Rights Act of 1991 followed a series of eight other restorative civil rights laws enacted from 1978 to 1990, in response to serious and consistent statutory misinterpretation.[409] Thus, within a fifteen year period, Congress passed a total of nine civil rights statutes to correct sixteen Supreme Court decisions.[410] This

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[403] *Id.* at 554; *see id.* at 550, 557, 559–60.

[404] A full examination of this issue is beyond the scope of this Article. *See* Copeland, *supra* note 369, at 809 ("The existence and scope of partisan polarization in Congress has become one of the most studied issues in American politics.").

[405] This Article considers two exemplars, but others are possible. Consider the sweeping Americans with Disabilities Act Amendments Act of 2008, 42 U.S.C. § 12101 (2008) (correcting rulings misaligned with congressional intent), and the more targeted Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000(e) (amending Title VII to include pregnancy within sex discrimination).

[406] Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1095–96 (1993).

[407] 60 U.S. 393 (1857).

[408] Schnapper, *supra* note 406, at 1095–96.

[409] *Id.* at 1096–98.

[410] *Id.*

massive legislative course correction suggests the flawed nature of the Court's jurisprudence and statutory interpretive approach.[411]

In addition to the sheer volume, the subject matter of the cases the Civil Rights Act of 1991 corrected was significant. Although Title VII of the Civil Rights Act of 1964 had been amended before, the 1991 Act was by far the most comprehensive.[412] The 1991 Act responded to the Court's "deeply conservative turn on issues of civil rights," especially pertaining to employment discrimination.[413] Although the 1991 Act reversed eight cases, it focused primarily on three that the Supreme Court decided in 1989: *Patterson v. McLean Credit Union*;[414] *Martin v. Wilks*;[415] and *Wards Cove Packing Co. v. Atonio*.[416] These three major cases, in combination with others, made it harder for plaintiffs challenging discrimination to obtain relief.[417] Not only did Congress's restorative legislation overturn substantive law barriers, but it also eliminated procedural ones.[418]

Not surprisingly, a dissenting opinion foreshadowed the birth of the Civil Rights Act of 1991 in one of the most controversial and significant cases that the Act overturned.[419] Justice Stevens's dissent in *Wards Cove* set the record straight regarding Congress's intent underlying Title VII.[420] There, he noted the statute's goal to prohibit not only intentional discrimination, but also neutral employment practices that have a negative disparate impact on the job opportunities of protected classes of people.[421] Justice Stevens contended that Con-

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[411] *Id.* at 1098–1100.

[412] Selmi, *supra* note 381, at 281.

[413] *Id.* at 283.

[414] 491 U.S. 164, 168–71(1989) (restricting race discrimination claims to contract formation under § 1981 of the Civil Rights Act of 1866); *see* Selmi, *supra* note 381, at 283 (noting that "the Court limit[ed] the statute's reach . . . aggressively and on its own initiative"); *see also* John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1138–39 (1990) (underscoring the Court's efforts to undermine § 1981).

[415] 490 U.S. 755, 758–59, 761–63 (1989) (undermining consent decree finality and remedial provisions in a discrimination case by permitting intervenors' collateral attack). *See generally* George M. Strickler, Jr., Martin v. Wilks, 64 TUL. L. REV. 1557 (1990) (critiquing *Martin v. Wilks*).

[416] 490 U.S. 642, 660 (1989) (imposing the burden of proving business-necessity defense on plaintiffs in disparate impact cases).

[417] Selmi, *supra* note 381, at 286–87.

[418] *See, e.g.*, Lorance v. AT&T Techs., Inc., 490 U.S. 900, 911–12 (1989) (holding that a claim against a seniority system accrues at the time of adoption, not application).

[419] *See* Schnapper, *supra* note 406, at 1099 n.39; W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 111–16 (1991) (Stevens, J., dissenting) (outlining Congress's correction of the Court's literal reading of civil rights statutes, concluding "[o]nly time will tell" regarding § 1988's "prevailing party" language); *see also* United Air Lines, Inc. v. McMann, 434 U.S. 192, 218 (1977) (Marshall, J., dissenting) ("The mischief the Court fashions today may be short lived. Both the House and Senate have passed amendments to the [Age Discrimination in Employment Act of 1967].").

[420] 490 U.S. at 672 (Stevens, J., dissenting).

[421] *Id.* at 662–69.

gress put the burden of proof on the employer to prove the business necessity affirmative defense—a weighty standard[422] that was rejected by the majority.[423]

Justice Stevens's dissent concluded its analysis with a signal to Congress that it can, and perhaps should, make the next move: "Congress frequently revisits this statutory scheme and can readily correct our mistakes if we misread its meaning."[424] This signal sounds in Guinier's demosprudence. The dissent situates *Wards Cove* in the larger context of the Court retrenchment of civil rights through statutory misinterpretation and Congress's resurrection of rights through restorative laws that protect everyday people's interest. The dissent moves the pendulum closer toward court access, law enforcement and democratic goals.

Another major catalyst for the passage of this historical course correction was the political context in which the legislation unfolded. With the Democrats controlling both the House and Senate, Congress moved quickly to pass the Civil Rights Act of 1990.[425] Republican President George H. W. Bush, however, vetoed the Act, responding to the spurious political argument that the Act's strong disparate impact theory would strengthen affirmative action and force innocent employers to adopt quotas to avoid liability.[426] Democrats were unable to stave off the veto, falling short by one vote.[427]

This legislative setback sent Congress back to the negotiation table, with little prospect of a different outcome—until the Clarence Thomas Senate Judiciary hearings, which significantly shifted the political landscape and therefore increased the likelihood of restorative civil rights legislation.[428] Professor Anita Hill's accusations of sexual harassment against Supreme Court nominee Clarence Thomas resulted in public hearings on the matter specifically and in a national conversation about the problem of sexual harassment more generally. As scholars have concluded, "Those hearings ultimately contributed to the pas-

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[422] *Id.* at 664–67; *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[423] *Wards Cove*, 490 U.S. at 671–72 (Stevens, J. dissenting).

[424] *Id.* at 672 (first citing Johnson v. Transp. Agency, 480 U.S. 616, 644 (1987) (Stevens, J., concurring); then citing Runyun v. McCrary, 427 U.S. 160, 190–92 (1976) (Stevens, J., concurring); then citing McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting); then citing Comm'r v. Fink, 483 U.S. 89, 102–05 (1987) (Stevens, J., dissenting); and then citing Rodriquez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 486 (1989) (Stevens, J., dissenting)).

[425] Selmi, *supra* note 381, at 287.

[426] *Id.* at 287–88; *see* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 706, 763–67 (2006); Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1489–90 (1996).

[427] Selmi, *supra* note 381, at 288 n.38; *see* Neil A. Lewis, *President's Veto of Rights Measure Survives by 1 Vote*, N.Y. TIMES, Oct. 25, 1990, at A1.

[428] *See* Selmi, *supra* note 381, at 288–89.

sage of the [1991 Civil Rights Act]" and indeed, it probably would not have been enacted without them.[429]

To punctuate this public tutorial, the Seventh Circuit Court of Appeals issued a ruling at the time illustrating the inadequate legal protections for sexual harassment victims.[430] In 1989, in *Swanson v. Elmhurst Chrysler Plymouth, Inc.*,[431] the Seventh Circuit reversed the district court's $1.00 award of nominal damages and attorney's fees, although Diane Swanson proved that she was sexually harassed, that this impacted her psychological well-being, and that this was a term and condition of her employment.[432] Because Title VII did not provide damages, the Seventh Circuit not only denied her nominal ones, but took the employer's court costs out of her paycheck.[433] The *Swanson* court made clear that it was merely enforcing Title VII as written, which signaled the need for statutory reform, much like a demosprudential dissent.[434]

Republican opposition to the restorative civil rights bill waned with the confirmation hearings and growing public concern over sexual harassment.[435] Racial bias also tainted Republican leadership. The specter of Ku Klux Klan member David Duke's run for governor of Louisiana during this period stained the Republican Party's reputation, encouraging Republicans to reconsider the embattled civil rights restorative bill,[436] whose primary catalysts were the race cases *Patterson*, *Wilks*, and *Wards Cove*.[437]

This complex confluence of factors, among others, contributed to the passage of the momentous Civil Rights Act of 1991.

2. The Lilly Ledbetter Fair Pay Act

Another instructive restorative civil rights law is the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act"),[438] the first law passed under the Obama Administration. In contrast to the sweeping Civil Rights Act of 1991, the

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[429] *Id.* ("[W]ithout the hearings, there may not have been a [1991 Civil Rights Act]."); *see also* Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 965 (1993) (emphasizing the importance of the Clarence Thomas hearings on the passage of the bill).

[430] *See* Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235, 1240 (7th Cir. 1989).

[431] *Id.*

[432] *Id.* at 1239–40.

[433] *Id.* at 1240; Selmi, *supra* note 381, at 289.

[434] *See Swanson*, 882 F.2d at 1240 ("If Congress wishes to amend the provisions of Title VII to provide a remedy of damages, it can do so." (quoting Bohen v. City of East Chicago, 799 F.2d 1180, 1184 (7th Cir. 1986))).

[435] *See* Culp, *supra* note 429, at 965.

[436] Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 996 (1993).

[437] Selmi, *supra* note 381, at 294.

[438] Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000e-5 note).

Ledbetter Act was a targeted strike to correct a purely procedural problem. Although the Act's purpose and scope were narrower, it nevertheless illustrates conditions in which corrective civil rights legislation may succeed.

Unlike the 1991 Act, the Ledbetter Act was enacted in response to a single 2007 Supreme Court case, *Ledbetter v. Goodyear Tire & Rubber Co.*,[439] which held that the statute of limitations had run, thereby foreclosing Lilly Ledbetter's claim of gender discrimination in pay against her longtime employer Goodyear. After working at the Alabama plant for almost two decades, Ledbetter discovered that she was significantly underpaid compared to her male counterparts, including those she had trained and those with far less seniority.[440] By the end of her career, Ledbetter was being paid fifteen-to-forty percent less than her similarly situated male colleagues.[441] Ledbetter did not realize this insidious incremental growing pay gap until she received an anonymous tip.[442] Upon learning of this inequity, she filed a charge with the Equal Employment Opportunity Commission ("EEOC") and a federal lawsuit, alleging sex discrimination in violation of, *inter alia*, Title VII of the Civil Rights Act of 1964.[443] The jury returned a verdict in her favor, awarding $223,776 in backpay and over $3,000,000 in punitive damages.[444]

The Eleventh Circuit Court of Appeals reversed on the ground that Ledbetter's pay discrimination claims were time-barred.[445] The Supreme Court agreed.[446] It rejected Ledbetter's argument that every time Goodyear issued her a paycheck, this constituted a discriminatory act within the statute of limitations.[447] Instead, the Court held that each pay-setting decision was the discrete act that triggered her obligation to file her EEOC charge within the 180-day statute of limitations.[448] According to Ledbetter, by nullifying the jury verdict, the Court had "sided with big business" and put her in the untenable position of requiring her to file before learning of the gross pay disparity.[449]

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[439] 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009.

[440] *Justice Denied? The Implications of the Supreme Court's* Ledbetter v. Goodyear *Employment Discrimination Decision: Hearing Before the H. Comm. on Educ. & Lab.*, 110th Cong. 10, 12 (2007) [hereinafter *Ledbetter Hearing*] (statement of Lilly Ledbetter); *Ledbetter*, 550 U.S. at 643 (Ginsburg, J., dissenting).

[441] *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting).

[442] *Ledbetter Hearing*, *supra* note 440, at 10.

[443] *Id.*

[444] *Ledbetter*, 550 U.S. at 644 (Ginsburg, J., dissenting) (quoting record below); *Ledbetter Hearing*, *supra* note 440, at 10.

[445] *Ledbetter*, 550 U.S. at 622–23 (majority opinion).

[446] *Id.* at 621.

[447] *Id.*

[448] *Id.*

[449] Lilly Ledbetter, Address to the Democratic National Convention (Aug. 26, 2008) (transcript available at https://www.c-span.org/video/?c4790709/user-clip-lilly-ledbetter-dnc [https://perma.cc/Z9QQ-QAWA]); *see Ledbetter Hearing*, *supra* note 440, at 10.

Congress reversed course by enacting the Lilly Ledbetter Fair Pay Act, which clarified that each paycheck issued constituted a discrete, discriminatory act that started the statute-of-limitations clock.[450] Congress amended Title VII of the Civil Rights Act, along with others, surgically striking the Court's cramped interpretation of what triggers an employee's duty to file.[451] Congress found that *Ledbetter* significantly undermined statutory protections against discrimination "by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions," contrary to Congress's intent.[452]

Although the Act targets a single case, the restorative statute more broadly highlighted the all-male majority's disconnect with gendered workplace dynamics and checked its narrow understanding of Title VII's vision.[453]

Justice Ruth Bader Ginsberg's strong Ledbetter dissent encouraged this restorative civil rights statute in no small measure, which is a perfect example of demosprudence.[454] Ginsburg, the only female justice on the Court at the time, read her dissent out loud from the bench—an act reflecting the gravity and magnitude of the majority's error. Indeed, her oral dissent made the front page of the Washington Post.[455] In her dissent, she spoke not only to her colleagues, but to women across the country about the ramifications of the Court's decision for women's capacity to challenge sex-based pay disparities:[456]

> [I]nitially you may not know that men are receiving more for substantially similar work. . . . If you sue only when the pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cutoff at the court's threshold for suing too late . . . .[457]

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[450] Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000e-5 note).

[451] *See id.*

[452] *Id.* § 2(1).

[453] *See id.* § 2, 2(2) ("Congress finds . . . [t]he limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.").

[454] *See generally* Guinier, *supra* note 398 (describing the importance of Ginsberg's dissent).

[455] *See* Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST (May 30, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900740.html [https://perma.cc/LP65-ME4B].

[456] *See* Guinier, *supra* note 398, at 540–41.

[457] Oral Dissent of Justice Ruth Bader Ginsburg at 4:25, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (No. 05-1074), http://www.oyez.org/cases/2000-2009/2006/2006_05_1074/opinion [https://perma.cc/DH32-FCSA]; Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 40–41 (2008).

If, however, you "sue early on," before knowing if sex-discrimination is afoot, "you will likely lose such a less-than-fully baked case."[458] Referencing a similar misinterpretation of Title VII that led to the Civil Rights Act of 1991, Ginsburg's dissent signaled that Congress should take it from here, concluding, "Once again, the ball is in Congress' court."[459]

Ginsburg's dissent not only invited Congress to react, but also acted as a "clarion call" to "role-literate participants" like the National Women's Law Center and other women's rights advocates incentivized to redirect the law toward robust legislative remedies and enforcement.[460] Moreover, by addressing women directly and individually by using the term "you," Ginsburg's dissent invited the greater public into the lawmaking process.[461] It mobilized activists, advocates, and Lilly Ledbetter herself to push for restorative civil rights legislation.[462] A grassroots campaign, spearheaded by Ledbetter and showcased by the media, took hold.[463] As scholars note, Ginsburg's dissent is a prime example of demosprudence.[464]

Finally, partisan politics played a key role in the Ledbetter Act's passage. Shortly after Ginsburg's dissent, House Democrats passed the Ledbetter Fair Pay Act of 2007.[465] The bill would have enabled employees to timely sue based on receipt of each discriminatory paycheck. Republicans, however, opposed the bill, arguing, *inter alia*, that it was anti-business.[466] Republican opposition, led by presidential candidate Senator John McCain (R-A.Z.), squashed the bill in the Senate.[467] McCain's opposition to the bill catalyzed Ledbetter, a force majeure, to back the presidential bid of Barack Obama, who supported the legislation.[468] With an upcoming presidential election, the con-

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[458] Ruth Bader Ginsburg, Address at the 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_10-21-07.html [https://perma.cc/NC6T-YZRW]).

[459] *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting) ("As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.").

[460] Guinier, *supra* note 398, at 543–45 (quoting Jessica Savage, *Ginsburg's Famous White Gloves Finally Come Off*, MOTHER JONES (June 1, 2007), http://www.motherjones.com/ mojoblog/archives/2007/05/4556_ginsburgs_famou.html [https://perma.cc/AU62-MT67]). Professor Guinier notes that "Ginsburg's dissent did not *cause* Congress to pass the Lilly Ledbetter Fair Pay Act, but did play a role." *Id.* at 556.

[461] *Id.* at 541–42.

[462] *See id.* at 542.

[463] *Id.* at 543–45.

[464] *Id.* at 544–45.

[465] H.R. 2831, 110th Cong. (2007).

[466] *See* Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES (Apr. 24, 2008), https://www.nytimes.com/2008/04/24/washington/24cong.html [https://perma.cc/4DCR-P9QC].

[467] *See id.*

[468] Guinier, *supra* note 398, at 541–42.

text was ripe for the bill's politicization. Pay equity for women became a rallying cry for the Obama campaign, and ultimately led Congress to pass the Lilly Ledbetter Fair Pay Act of 2009, the first statute enacted under the first Black president.[469] With the presidency and both houses of Congress Democratically controlled, this historic civil rights law broke a ten-year streak in which Congress had not checked the Court through corrective legislation.[470]

In sum, this complicated confluence of factors, among others, gave Congress the capacity to launch its surgical strike at a procedural hurdle blocking pay equity claims.

C. The New Civil Rights Act

Although the Civil Rights Act of 1991 and Lilly Ledbetter Fair Pay Act are markedly different in scope, purpose, and history, Congress ultimately succeeded in enacting these distinct restorative civil rights bills to address regressive procedural civil rights jurisprudence. Today, the underlying conditions for like restorative legislation are similarly complex and wildly in flux. Although this Article does not purport to predict the likelihood of a restorative procedural civil rights act today, it offers insights into the sparks that may catalyze the flame.

First, it seems clear that the quantity and quality of Supreme Court decisions countenance restorative law. As demonstrated in Part I, the cumulative effect of procedural jurisprudence over the last several decades has been to incrementally undermine robust constitutional and civil rights enforcement.[471] This obstructionist trend is comprised of at least a dozen cases, all of which significantly impact the future of constitutional and civil rights enforcement. For example, *Twombly* and *Iqbal* block initial court access via a more arduous pleading standard.[472] Additionally, *Wal-Mart* undermines collective action via tougher class certification, whereas *TransUnion* denies standing to greater class members.[473] Moreover, the arbitration caselaw is sweeping; from *Circuit City* to *Gilmer* to *EEOC v. Waffle House*,[474] which make Title VII, Age Discrimination in Employment Act ("ADEA"), and ADA civil rights claims arbi-

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[469] *Id.* at 544.

[470] *Id.*

[471] *See, e.g.*, Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 131–32 (2001) (Stevens, J., dissenting) (observing that "a number of this Court's cases . . . have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration," expanding the scope "far beyond the expectations" of the FAA's drafters).

[472] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–63 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 684–85 (2009).

[473] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355 (2011); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200, 2208–09 (2021).

[474] 534 U.S. 279 (2002).

trable respectively; to *Concepcion* and *DIRECTV* which authorize FAA preemption of state law; to *Italian Colors* and *Epic Systems* which permit class arbitration bans. The obstructionist arbitration bench is even deeper than the aforementioned. Thus, the caselaw trend justifies corrective legislation.

Second, some Justices have signaled that the Court has gone off-track in its procedural jurisprudence. In powerful dissents, and even majority opinions, Justices have emphasized the Court's need to defer to lawmakers and Congress's need to correct the Court when it's wrong.

For example, Justice Stevens's dissent in *Twombly* strongly rebukes the Court's creation of a new pleading standard, contrary to legislative intent:

> This is a case in which the intentions of the drafters . . . all point unmistakably in the same direction, yet the Court marches resolutely the other way. . . . [T]hat the Court has announced a significant new rule that does not even purport to respond to any congressional [or rule] command is glaringly obvious.[475]

In *TransUnion*, the liberal wing joins Justice Thomas in his criticism of the Court's denial of standing to class members whose rights were clearly violated under federal consumer law.[476] Thomas concludes that this "remarkable" opinion rebukes precedent going back to the country's founding and improperly "relieve[s] the legislature" of its charge to engender and shape rights.[477]

Moreover, there has been significant criticism of the Court's arbitration jurisprudence, especially at the intersection with class actions.[478] For example, Justice Elena Kagan issued a strong dissent in *Italian Colors*, criticizing the majority for undermining the goals of the FAA, the Sherman Act, and other federal statutes—in contravention of congressional intent.[479] Her dissent admonishes the Court for its "betrayal of" the law and for enabling arbitration to be used to "chok[e] off a plaintiff's ability to enforce congressionally created rights."[480] She also criticizes the Court's disdain for class actions.[481]

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[475] *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting).

[476] *TransUnion*, 141 S. Ct. at 2218, 2221 (Thomas, J., dissenting).

[477] *Id.* at 2221; *see also id.* at 2226 (Kagan, J., dissenting) ("[C]ourts should give deference to those congressional judgments.").

[478] *See* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 132 (Stevens, J., dissenting) ("There is little doubt that the Court's interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it." (first citing Southland Corp. v. Keating, 465 U.S. 1, 17–21 (1984) (Stevens, J., concurring in part and dissenting in part); and then citing *id.* at 21–36 (O'Connor, J., dissenting))).

[479] *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 253 (2013) (Kagan, J., dissenting); *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 361–62 (2011) (Breyer, J., dissenting) (arguing that the Court should interpret the FAA consistent with congressional intent).

[480] *Italian Colors*, 570 U.S. at 240 (Kagan, J., dissenting); *see also* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 476, 478 (2015) (Ginsburg, J., dissenting) (criticizing *DIRECTV* for going "beyond

Similarly, Justice Ruth Bader Ginsburg issued a scathing rebuke of *Epic Systems*, calling the decision "egregiously wrong" and reading her dissent from the bench in defiance.[482] In a dissent longer than the majority opinion, Ginsburg bemoaned that the latter would pilot "underenforcement of . . . statutes designed to advance the well-being of vulnerable workers."[483] Thus, "[c]ongressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order."[484] Indeed, both the *Epic Systems* majority and dissent call for congressional action. Justice Gorsuch's majority opinion acknowledged that the case raised policy concerns, but that it was not the Court's job to substitute its preferences for those of the people; meaning that Congress could amend the FAA.[485] Commentators on both sides echo the Gorsuch-Ginsburg plea to Congress.[486]

In toto, these dissents are demosprudential "clarion calls"[487] for legislative reform, reflecting disapproval of the Court's move away from congressional and rule-maker intent. These opinions may in fact understate the extent of judicial discontent. Given the acute partisanship and congressional gridlock today, Justices may be less likely to recommend that Congress take corrective action.

Finally, the current complexity of the political landscape and degree of societal turmoil admittedly make it difficult to project whether restorative procedural law could succeed today. Contemporary American society has been situated in an economic crisis, global pandemic, and robust civil rights and racial justice movements. On many fronts, principled leadership has been replaced with bias, ignorance, and untruthfulness, leading to chaos, instability, and conflict.

Concepcion and *Italian Colors*" in expanding the scope of the FAA to benefit "powerful economic entities" and "further degrade[] the rights of consumers").

[481] *See Italian Colors*, 570 U.S. at 252 (Kagan, J., dissenting).

[482] Howe, *supra* note 248.

[483] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting).

[484] *Id.* at 1633.

[485] *Id.* at 1632 (majority opinion).

[486] *Compare* Benjamin Robbins, *Symposium: The Federal Arbitration Act and the National Labor Relations Act Are Two Ships That Pass in the Night*, SCOTUSBLOG (May 21, 2018), https://www.scotusblog.com/2018/05/symposium-the-federal-arbitration-act-and-the-national-labor-relations-act-are-two-ships-that-pass-in-the-night/ [https://perma.cc/X8DH-46DF] ("Congress, and Congress alone, is free to respond to the decision by amending either [the FAA or NLRA]."), *with* Nicole G. Berner & Claire Prestel, *Symposium: Latest Assault Against Workers by the Supreme Court*, SCOTUSBLOG (May 22, 2018), https://www.scotusblog.com/2018/05/symposium-latest-assault-against-workers-by-the-supreme-court/ [https://perma.cc/VQ2G-QK5Z] ("We must now call upon our elected officials to stand with everyday working Americans to reverse the damage of yesterday's ruling.").

[487] Guinier, *supra* note 398, at 543.

If Congress were to reform civil procedure, there is a risk that Congress may make it more exclusionary.[488] Some legislators prefer the status quo and support the Court's efforts to block access to a litigation system beleaguered by bourgeoning dockets, expensive and time-consuming discovery, and alleged meritless claims. They have spearheaded initiatives to diminish litigation[489] with varied success.[490]

There is also the risk that Congress would roll back civil rights by making it more difficult to bring and litigate cases, which it has tried. Such efforts include limiting remedies, diminishing fees for plaintiffs' lawyers, and eliminating fee-shifting provisions that incentivize lawyers to take civil rights cases.[491] Congress has also tinkered on the edges, accomplishing retrenchment through targeted actions.[492] It has sought to do procedurally what it could not do substantively.[493]

Despite past retrenchment efforts, corrective legislation should be tried. As illustrated by the Civil Rights Act of 1991 and the Ledbetter Act, it may take multiple attempts for restorative legislation to succeed. There are signs that it is time.

First, significant political shifts may offer an opportunity for procedural reform. The election of President Joe Biden, a Democrat, could enhance the prospect of a restorative civil rights bill—similar to that of Barack Obama's election and the Ledbetter Act. The congressional power shift is also salient. Republicans lost their majority in the House in the midterm election of November 2018, creating the first split between the two major parties between the

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[488] Glover, *supra* note 11, at 2114 ("[R]ecent procedural reforms . . . restrict access to justice and rule of law rather than preserve it.").

[489] *Id.* at 2130 (arguing that the rule of law is "under direct attack from elected members of [the] federal . . . government[]" due to corporate interests in procedural lawmaking).

[490] *Compare* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. (2016) (failing to become a law), *and* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (FICALA), H.R. 985, 115th Cong. (2017) (same), *with* Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (succeeding in becoming a law). *See* Glover, *supra* note 11, at 2119–25, 2128 (explaining how FICALA's multidistrict litigation reforms would infringe on judicial power and managerial discretion and repress rule-of-law norms that harm meritorious cases).

[491] *See, e.g.*, History and Tradition Protection Act of 2021, H.R. 2224, 117th Cong. (2021); Stop Trial Lawyer Pork Act, H.R. 7080, 110th Cong. (2008); Judicial Reform Act of 1982, S. 3018, 97th Cong. (1982); Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985; Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321, 1321-71 (codified as amended at 42 U.S.C. § 1997e) (enacted).

[492] Rosenbaum, *supra* note 281, at 765; *see also* Bone, *supra* note 313, at 921 (observing that Congress has "tinker[ed]" with the federal rules to address particular substantive areas, rather than doing an overhaul).

[493] Rosenbaum, *supra* note 281, at 765.

House and Senate in over three decades.[494] Moreover, Democrats and Republicans are now tied in the Senate—a rare feat.[495] With a Democratic Vice President, Kamala Harris, Democrats have the slimmest possible margin in the Senate to pass legislation.[496] To the extent that Republicans spearhead procedural retrenchment, this development bodes well for potential corrective legislation.

Second, the greater demographic and viewpoint diversity of Congress today may increase the likelihood of a procedural civil rights act.[497] The 117th Congress is the "most diverse ever" along axes including age, geography, gender, LGBTQ identity, veteran status, race, and ethnicity.[498] The previous Congress was also the "most diverse in congressional history, with more women and racial and ethnic minorities than any previous Congress. . . . [It also had] the largest number of new members who've served in the military in over a decade . . . ."[499] The change in demographics is not cosmetic; research shows that varied life experiences and backgrounds impact priorities and policy initiatives.[500] The addition of this diverse pool has not only improved the quality

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[494] *See Congress Profiles: 99th Congress (1985–1987)*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Congressional-Overview/Profiles/99th/ [https://perma.cc/6BBX-LX9D].

[495] Abigail Abrams, *What Really Happens When There's a 50-50 Split in the Senate?*, TIME (Jan. 12, 2021), https://time.com/5926759/senate-split-50-50-democrats/ [https://perma.cc/8C7U-9ABT].

[496] This majority has proved more fragile than expected. *See* Chris Cillizza, *Joe Biden Said Two Democratic Senators Vote with Republicans More Than Their Own Party. Is He Right?*, CNN, https://www.cnn.com/2021/06/02/politics/joe-biden-kyrsten-sinema-joe-manchin/index.html [https://perma.cc/V8Y4-EECJ] (June 2, 2021) (noting that Senators Joe Manchin (W. Va.) and Kyrsten Sinema (Ariz.) are "the two most likely Democrats to side with Republicans when it comes to critical votes").

[497] *See* KNOCK DOWN THE HOUSE (Netflix 2019).

[498] Maya King, *This Congress Is the Most Diverse Ever. But Hill Staffers Remain Overwhelmingly White.*, POLITICO, https://www.politico.com/news/2021/02/23/people-of-color-congress-hill-staffers-471019 [https://perma.cc/MPS2-7L98] (Feb. 23, 2021) (noting that there has been a ninety-seven percent increase in racial and ethnic diversity over the last ten Congresses); Brooke Minters, Eugene Daniels, Krystal Campos & Michael Cadenhead, *They're Coming in Hot: The Best Quotes from Our Interviews with Congress' Most Diverse Freshman Class*, POLITICO, https://www.politico.com/news/2021/04/26/new-117th-congress-freshman-members-diversity-2021-483987 [https://perma.cc/2FXW-MSZC] (Apr. 26, 2021) ("The past six congresses have increasingly bested the last . . . ."); Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/ [https://perma.cc/BKK9-U5GZ].

[499] Kenneth Lowande, Melinda Ritchie & Erinn Lauterbach, *Having the Most Diverse Congress Ever Will Affect More Than Just Legislation*, WASH. POST (Jan. 9, 2019), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/09/having-the-most-diverse-congress-ever-will-affect-more-than-just-legislation/ [https://perma.cc/98X8-WKJJ] (describing the 116th Congress).

[500] *See* Sarah Kliff, *The Research Is Clear: Electing More Women Changes How Government Works*, VOX, https://www.vox.com/2016/7/27/12266378/electing-women-congress-hillary-clinton [https://perma.cc/4XB7-H9VB] (Mar. 8, 2017); German Lopez, *This Is the Most Diverse Congress Ever. But It's Still Pretty White.*, VOX (Feb. 8, 2019), https://www.vox.com/policy-and-politics/2019/2/8/18217076/congress-racial-diversity-white [https://perma.cc/C5JK-KQR5]; Lowande et al., *supra* note 499.

of governing, but moved the dial toward grassroots-oriented representation and demosprudence.[501]

Third, there is common ground that cuts across political affiliation that may support significant procedural reform. On the one hand, the extremely polarized current political climate suggests that no matter how warranted a legislative fix, its passage is unlikely. "The [recent] level of congressional polarization is the highest since the Civil War."[502] Some characterize this as a period of "hyper-partisanship."[503] "Congress's productivity as a legal institution as measured in bills passed and enacted is down sharply" and "[a]nalysis of voting records shows almost complete elimination in recent years of the overlap in the center between the two parties."[504] Ideologically poled parties and "insecure" majorities have undermined bipartisan legislation. Although Democrats safely controlled Congress from 1955 to 1981, since then the two major parties have vied for Senate control.[505] As scholars have concluded, "All of this creates a partisan, polarized, and impotent Congress in a system of separated powers."[506] Thus, Congress's coalescing around corrective legislation seems unlikely.

On the other hand, some contend that pronounced congressional polarization is unexceptional in the United States,[507] and "although current levels of partisan misbehavior and media manipulation are undoubtedly high, they may

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[501] *See* KNOCK DOWN THE HOUSE, *supra* note 497; Lowande et al., *supra* note 499.

[502] Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1705 (2015); *see* James Willis, *Congressional Polarization Is Worse Than We Think*, MEDIUM (Sept. 2, 2018), https://medium.com/@jamesrawillis/congressional-polarization-is-worse-than-we-think-f799dcd2ebf6 [https://perma.cc/YC7T-22SJ] (noting that polarization has held steady from 2015 to 2018).

[503] Dakota S. Rudesill, *Hyper-Partisanship and the Law: Framing the Debate*, 10 GEO. J.L. & PUB. POL'Y 343, 343–46 (2012) (describing Congress's dysfunction due to hyper-partisanship).

[504] *Id.* at 343–44 (first citing Jennifer Steinhauer, *Congress Nearing End of Session Where Partisan Input Impeded Output*, N.Y. TIMES, Sept. 19, 2012, at A21; then citing Dylan Matthews, *17 Bills That Likely Would Have Passed the Senate if It Didn't Have the Filibuster*, WASH. POST BLOG (Dec. 5, 2012), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/05/17-bills-that-likely-would-have-passed-the-senate-if-it-didnt-have-the-filibuster/ [https://perma.cc/XN3J-HB9Q]; and then citing JAMES A. THOMPSON, A HOUSE DIVIDED: POLARIZATION AND ITS EFFECT ON RAND (2010), https://www.rand.org/pubs/occasional_papers/OP291.html [https://perma.cc/WR9U-9U8X]); *see* Willis, *supra* note 502 (observing there is "no longer overlap" between the parties); *see also* Barbara Sinclair, *Question: What's Wrong with Congress? Answer: It's a Democratic Legislature*, 89 B.U. L. REV. 387, 387–88 (2009) (noting there were "thirty-six filibusters in the 109th Congress (2005–06) and fifty-two in the . . . 110th Congress" (citing Barbara Sinclair, *The New World of U.S. Senators*, *in* CONGRESS RECONSIDERED 1, 7 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2009))).

[505] Copeland, *supra* note 369, at 815–17.

[506] *Id.* at 819.

[507] Farina, *supra* note 502, at 1702–03; *see id.* at 1705 (finding that perception of "'normal' levels of partisan conflict is skewed by an era of bipartisan harmony purchased with racial appeasement"); *see also* Willis, *supra* note 502 (examining the history of congressional polarization).

not be historical anomalies."[508] Indeed, despite the contemporary stalemate, Congress has been able to pass significant legislation,[509] such as the Violence Against Women Reauthorization Act of 2013,[510] the Preventing Sex Trafficking and Strengthening Families Act,[511] the Pay Our Military Act,[512] and the Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victim Compensation Fund Act.[513] As the coronavirus stimulus package recently demonstrated, it seems that during acute crises, fissures can narrow.[514] Five coronavirus relief laws were passed with substantial bipartisan support.[515] Prompted by a failing economy and worsening global pandemic, Congress passed the largest economic stimulus package in U.S. history.[516]

With the rarity of bipartisan legislation, what would compel cooperation over a subject like civil procedure? Demosprudence might provide a clue. As everyday people increasingly understand how procedure impacts their lives, restorative legislation becomes more possible. One of the most salient developments that could catalyze Congress to draft corrective civil rights legislation is the contemporary racial justice movement. The activism by Black Lives Matter ("BLM") and its allies across the country—and the world—pushes to the fore the need to challenge injustice and systemic racism in all its forms.[517] The grassroots demand for serious change suggests that the time is ripe for stronger civil rights protections.

This is not to diminish the significant backlash that the modern racial justice movement has experienced. The number of active hate groups rose signifi-

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[508] Farina, *supra* note 502, at 1705.

[509] *See* Sinclair, *supra* note 504, at 389 (noting that the 2001–2006 congressional sessions, although "characterized by gridlock. . . . produced some highly significant legislation").

[510] Pub. L. No. 113-4, 127 Stat. 54 (2013).

[511] Pub. L. No. 113-183, 128 Stat. 1919 (2014).

[512] Pub. L. No. 113-39, 127 Stat. 532 (2013).

[513] Pub. L. No. 116-34, 133 Stat. 1040 (2019); *see also id.* (continuing the September 11th Victim Compensation Fund of 2001's funding until 2092, passing the House 402–12 and the Senate 97–2).

[514] *See, e.g.*, Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. No. 116-123, 134 Stat. 146 (2020).

[515] *Id.*; Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

[516] Sarah D. Wire, *Senate Passes $2-Trillion Economic Stimulus Package*, L.A. TIMES (Mar. 25, 2020), https://www.latimes.com/politics/story/2020-03-25/vote-senate-on-2-trillion-economic-stimulus-package-coronavirus [https://perma.cc/3NTA-AXUF].

[517] *See, e.g.*, Kari Paul, *These Are All the Companies Trying to Stop White Supremacists from Raising Money*, MKT. WATCH (Aug. 20, 2017), https://www.marketwatch.com/story/discover-terminates-merchant-agreements-with-white-supremacist-groups-following-moves-by-paypal-and-godaddy-2017-08-16 [https://perma.cc/5E3X-MRSY].

cantly from 2008 to 2012, following President Barack Obama's election.[518] White nationalist hate groups rose fifty-five percent under the Trump administration.[519] FBI statistics also reveal that hate crimes jumped twenty percent during this time, with the vast majority committed by white supremacists.[520] Substantive civil rights like voting, affirmative action, and police reform along axes of race are under fierce attack.[521]

Other social justice movements have specifically targeted seemingly innocuous procedural tactics that strip vulnerable groups of meaningful court access. For example, #MeToo and Time's Up have challenged mandatory arbitration agreements, non-disclosure agreements ("NDAs"), and confidentiality provisions.[522] Gig economy workers have engaged in massive walkouts and put significant pressure on employers to reform.[523] In response, some private companies have dispensed with mandatory arbitration for sexual harassment, sexual assault, and other claims.[524] Some state legislatures have followed suit.[525]

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[518] *See* S. POVERTY L. CTR., THE YEAR IN HATE AND EXTREMISM 2020, at 3 (2020).

[519] Jason Wilson, *White Nationalist Hate Groups Have Grown 55% in Trump Era, Report Finds*, THE GUARDIAN (Mar. 18, 2020), https://www.theguardian.com/world/2020/mar/18/white-nationalist-hate-groups-southern-poverty-law-center [https://perma.cc/R83M-UBLH].

[520] Daniel Villarreal, *Hate Crimes Under Trump Surged Nearly 20 Percent Says FBI Report*, NEWSWEEK (Nov. 16, 2020), https://www.newsweek.com/hate-crimes-under-trump-surged-nearly-20-percent-says-fbi-report-1547870 [https://perma.cc/K365-EPXM]. There were 838 active hate groups in the United States in 2020. *See* S. POVERTY L. CTR., *supra* note 518, at 4.

[521] *See* Sherrilyn A. Ifill, Opinion, *Racial Justice Demands Affirmative Action*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/opinion/college-discrimination-whites-donald-trump-.html [https://perma.cc/XK3D-X7QP].

[522] *See generally* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155 (2019) (exploring how mandatory arbitration clauses have obstructed civil rights litigation, using #MeToo as a case study); Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2669–77 (2019) (discussing federal efforts to limit arbitration).

[523] *See supra* notes 250–280 and accompanying text.

[524] Adi Robertson, *Facebook Is Ending Forced Arbitration for Sexual Harassment Complaints*, THE VERGE (Nov. 9, 2018), https://www.theverge.com/2018/11/9/18079462/facebook-forced-arbitration-end-sexual-harassment-dating-policy-update [https://perma.cc/RNG4-MVBE] (stating that Facebook, Google, Microsoft, Uber, Lyft are no longer requiring arbitration of sexual harassment claims); Didi Martinez, *Facebook, Airbnb and eBay Join Google in Ending Forced Arbitration for Sexual Harassment Claims*, NBC NEWS (Nov. 12, 2018), https://www.nbcnews.com/tech/tech-news/facebook-airbnb-ebay-join-google-ending-forced-arbitration-sexual-harassment-n935451 [https://perma.cc/U92J-JQR4]; Casey Newton, *Google and Facebook Employees Are Teaming Up Against Their Bosses*, THE VERGE (Jan. 15, 2019), https://www.theverge.com/2019/1/15/18182974/google-forced-arbitration-protest-facebook [https://perma.cc/8FPW-GZZU] (stating that mandatory arbitration agreements "silenc[e] survivors, while shielding serial predators"); Levi Sumagaysay, *Google Ending Forced Arbitration After Worker Push, but Fight Isn't Over*, MERCURY NEWS, https://www.mercurynews.com/2019/02/22/google-ending-forced-arbitration-after-worker-push-but-fight-isnt-over/ [https://perma.cc/7SF7-JJT3] (Feb. 23, 2019) (ending mandatory arbitration and class arbitration bans as of March 21, 2019, while workers continue to seek legislation to expand their effort).

Procedural justice took center stage in the 2020 Democratic primary presidential campaign. Candidate Senator Elizabeth Warren's *My Plan to End Washington Corruption* proposed three action steps to "ensur[e] access to justice for all": banning forced arbitration agreements in civil rights, employment, and other cases; forbidding mandatory class action waivers in the same; and restoring fair pleadings standards to ensure that all those harmed have their "day in court."[526]

Congress has also responded piecemeal and with varied success.[527] It has achieved the most success in shielding favored groups from pre-dispute mandatory arbitration agreements under various statutes,[528] such as military families challenging draconian payday loans,[529] whistleblowers exposing violations of federal securities law,[530] and certain employees fighting sexual assaults and sexual harassment on the job.[531] Dozens of federal agencies under Republican and Democratic administrations have also regulated arbitration for constituencies such as "farmers, students, airline passengers, workers, and nursing-home patients, among others . . . ."[532]

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[525] *See, e.g.*, N.J. STAT. ANN. § 10:5-12.7(a), (b) (West 2022) (arbitration); *id.* § 10:5-12.8(a), (b) (NDAs); N.Y. C.P.L.R. 5003-b (McKinney 2022) (NDAs); VT. STAT. ANN. tit. 21, § 495h(h)(2) (2022) (arbitration); *id.* § 495h(g)(1) (NDAs); 2018 Wash. Sess. Laws 692; S.B. 697A, 2021–2022 Reg. Sess. (N.Y. 2021) (arbitration); Stand Together Against Non-Disclosures ("STAND") Act, S.B. 820 (Cal. 2018) (codified as amended at CAL. CIV. PROC. CODE § 1001 (West 2022)) (NDAs); Disclosing Sexual Harassment in the Workplace Act of 2018, H.B. 1596, 2018 Sess. (Md. 2018) (codified as amended at MD. CODE ANN., LAB. & EMPL. § 3-715 (LexisNexis 2018)) (arbitration).

[526] Elizabeth Warren, *My Plan to End Washington Corruption*, MEDIUM (Sept. 16, 2019), https://medium.com/@teamwarren/my-plan-to-end-washington-corruption-554c7f01aaa5 [https://perma.cc/RJR9-XUDA].

[527] *See, e.g.*, Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2010); Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. § 3(a) (2015); Restoring Statutory Rights and Interests of the States Act of 2016, S. 2506, 114th Cong. § 3(b) (2016); *see* McCullough, *supra* note 522, at 2669–77 (listing federal responses).

[528] *See, e.g.*, 15 U.S.C. 1226(a)(2) (covering auto dealers); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11005, 122 Stat. 1651, 2119 (codified at 7 U.S.C. § 197c(a)) (covering livestock producers).

[529] John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (codified at 10 U.S.C. § 987(f)(4)) (covering members of the armed forces and their dependents subject to payday loans); Military Lending Act, 10 U.S.C. § 987(e) (covering armed services members with consumer loans).

[530] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010) (codified at 15 U.S.C. § 78u-6).

[531] *See* Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454–55 (2009) (prohibiting defense contracts over $1,000,000 from having mandatory arbitration agreements covering Title VII and tort claims involving sexual assault or sexual harassment); Fair Pay and Safe Workplaces, Exec. Order No. 13,673, 3 C.F.R. 283 (2015) (extending the same to additional federal contractors).

[532] Brief of American Association for Justice as Amicus Curiae Supporting Respondents in Nos. 16-285 & 16-300 and Pet. in No. 16-307 at 8, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); *see id.* at 8–14 (describing various protective rules and beneficiaries).

In a rare moment of bipartisanship,[533] Congress recently passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which amends the FAA to bar pre-dispute arbitration agreements and joint action waivers[534] in cases involving sexual assault and sexual harassment claims.[535] Although the prohibition is only triggered by the presence of these specific claims, it covers all arbitration agreements (not just those in employment contracts), and covers all class action bans (not just those in arbitration). Characterized as "one of the most significant changes to employment law in years," the bill recognizes the deep flaws of these procedural mechanisms and protects a broader swath of victims in their wake.[536] Notably, Republican lawmakers fault these processes for being secretive, biased, unconscionable "legal traps" that protect sexual abusers and harassers, and prevent victims from coming "out of the shadows," getting their "day in court," and securing justice.[537]

The House report reveals the tipping point has been reached, with "[eighty-four percent] of Americans across the political spectrum support[ing] ending forced arbitration in employment and consumer disputes."[538] The bill's original 2017 co-sponsors, Senator Kirsten Gillibrand (D-N.Y.) and Senator Lindsey Graham (R-S.C.), successfully drew in fellow co-sponsors ranging from Texas to Colorado to California.[539] Notably, a bipartisan group of state attorneys general from all fifty states, D.C., and the U.S. territories backed the legislation.[540] Helping to bridge the political divide, broadcaster Gretchen Carlson—well-known for her sexual harassment lawsuit against Fox News CEO Roger Ailes—fought for the bill's passage.[541] The work of #MeToo, Time's Up, and others culminated in serious legislation, demonstrating that

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[533] The bill passed in the House 335–97—all opposition came from Republicans, though more Republicans voted for the bill than against it—and passed in the Senate unanimously by voice vote. *See* Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2021).

[534] For example, class action bans.

[535] Pub. L. No. 117-90, 136 Stat. 26 (2022).

[536] Debra Cassens Weiss, *Congress Passes Bill Banning Forced Arbitration of Harassment and Sexual Assault Claims*, ABA J. (Feb. 10, 2022), https://www.abajournal.com/news/article/congress-passes-bill-banning-forced-arbitration-of-harassment-and-sexual-assault-claims [https://perma.cc/6JWG-YJNM] (quoting Senate Majority Leader Chuck Schumer (D-N.Y.)).

[537] *See* Press Release, U.S. Rep. Kathy Castor (R-Fla.), Rep. Castor Helps Pass Groundbreaking Labor Bill to End Forced Arbitration for Sexual Assault and Harassment (Feb. 8, 2022), https://castor.house.gov/news/documentsingle.aspx?DocumentID=403786 [https://perma.cc/4A87-5ZML]; ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021, H.R. REP. NO. 117-234, at 3 (2022).

[538] H.R. REP. NO. 117-234, at 6 & n.29.

[539] Additional co-sponsors include Florida, Virginia, New York, Washington, Georgia and North Carolina.

[540] H.R. REP. NO. 117-234, at 11 n.68.

[541] Weiss, *supra* note 536.

demosprudence is alive and well.[542] It is time to go even further, to cover a greater array of procedural barriers and a broader swath of Americans. The next Part explores how this might proceed.

IV. WHAT WOULD A CIVIL RIGHTS PROCEDURAL RESTORATION ACT LOOK LIKE?

Although there are different ways to swing back the pendulum from a restrictive to liberal ethos, this Part flags strategies for consideration and sets forth broadly what a civil rights procedural restorative act might contain.[543] Section A puts forth several strategic suggestions for reform.[544] Section B makes specific suggestions for reform in the areas of pleadings, class actions, and arbitration.[545]

A. Strategic Guidance for Charting a New Path

First, corrective legislation should offer unambiguous text. Although the Court has significant interpretive discretion, a law can, at least facially, cabin such discretion by making substance-specific procedure explicit.[546]

Second, civil rights corrective legislation should address not only Supreme Court jurisprudence but that of lower federal courts, who plant the obstructionist seeds, decide most cases, and usually have the last word.[547] For example, scholars have documented that lower-court-created legal doctrine has stymied much anti-employment-discrimination law.[548] They have also documented the ways that lower-court judges justify pro-defendant outcomes in employment discrimination cases through decision heuristics.[549] Such jurisprudence may contribute to plaintiffs in employment discrimination cases winning less frequently at summary judgment, at trial, and on appeal than other civil

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[542] Carlson sums it up well: "Marching in the streets can inspire us. Editorials can open our minds. Hashtags can galvanize, but legislation is the only thing that lasts . . . ." Michelle L. Price, *Congress Approves Sex Harassment Bill in #MeToo Milestone*, ASSOCIATED PRESS (Feb. 10, 2022), https://apnews.com/article/joe-biden-business-kirsten-gillibrand-arts-and-entertainment-sexual-misconduct-e210bde4bd0efb3cbdb6bf344363d5eb [https://perma.cc/9CVD-RXET].

[543] *See infra* notes 546–604 and accompanying text.

[544] *See infra* notes 546–552 and accompanying text.

[545] *See infra* notes 553–604 and accompanying text.

[546] *But see* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 357 (2011) (Breyer, J., dissenting) (bemoaning federal preemption conclusion despite FAA's contrary savings clause).

[547] Selmi, *supra* note 381, at 301–04.

[548] *See* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 163 (2017).

[549] Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 116–23 (2012), https://www.yalelawjournal.org/forum/losers-rules [https://perma.cc/N5EF-VH59].

plaintiffs.[550] This trend suggests that corrective legislation should affirmatively target exclusionary jurisprudence from the ground up.

Third, restorative legislation should explicitly *protect* civil rights. This would compel detractors to oppose a pro-civil rights bill, a potentially politically costly move.[551]

Finally, Congress should ensure that any private cause of action in restorative legislation tracks a historical or common-law claim with a concrete injury similar to that under the federal statute to avoid a standing problem per *TransUnion*.[552]

B. Components of a Civil Rights Procedural Statutory Fix

Restorative civil rights legislation could go in numerous directions and take many forms.[553] For each of the three procedural areas examined above—pleadings, class actions, and arbitration—contrary Supreme Court precedents should be overturned and replaced with standards hewing closer to the intent of the rule-makers and legislators. Each of the areas is addressed in turn.

In the area of pleadings, corrective civil rights legislation should overturn *Twombly* and *Iqbal* to the extent that these cases exceed the notice pleading standard set forth in *Conley*.[554] Rather than requiring plaintiffs to show their claims are plausible, they need only show their claims are possible. Restoration of such notice pleading would realign the pleading standard with the drafters' intent to maximize court access and merits determinations, and discourage unchecked subjectivity built into the plausibility inquiry.[555]

In the event that such macro reform is unfeasible, Congress should instead strike surgically by addressing pleadings problems specific to constitutional and civil rights cases. For example, Congress could provide meaningful factors for judges to employ rather than just their "judicial experience and common sense," for determining claim plausibility.[556] For cases involving intentional discrimination allegations and informational asymmetry between the

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[550] Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209, 209 (2011).

[551] *See* BURBANK & FARHANG, *supra* note 145, at 50–54.

[552] *See* Part I.

[553] The precise contours are beyond the scope of this Article.

[554] *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–63 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 684–85 (2009).

[555] *See, e.g.*, Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009) (restoring *Conley* standard); Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2010) (overruling *Twombly* and *Iqbal* and advising against a heightened standard); *see* Mike Dorf, *Senator Specter's Notice Pleading Parting Shot*, DORF ON L. (Dec. 28, 2010), http://www.dorfonlaw.org/2010/12/senator-specters-notice-pleading.html [https://perma.cc/MC8F-VW8R].

[556] *Iqbal*, 556 U.S. at 679.

parties, Congress could make explicit judges' power to permit some limited discovery to discern plausibility before ruling on a Rule 12(b)(6) dismissal motion.[557]

In the area of class actions, corrective civil rights legislation should overturn *Wal-Mart* to the extent that it heightens the class certification standard for Title VII cases.[558] This would entail returning to a normal proof threshold for workers trying to meet the Rule 23(a) commonality standard when alleging systemic discrimination. Thus, employees would no longer have to produce "significant proof" that their employer "operated under a general policy of discrimination" to satisfy commonality.[559] Moreover, the common question would need not be central to the case, nor would common questions need to predominate outside a Rule 23(b)(3) class action.

Legislation should also clarify how commonality may be satisfied in employment discrimination cases. The Court concluded it was unbelievable that an "undisciplined system of subjective [decision-making]" could be the common thread in the case,[560] and could lead to most managers acting—even subconsciously—in a detrimental way to female employees' careers.[561] Legislation should make clear that an employer's decision to allow highly subjective, decentralized decision-making by local managers may constitute a "policy,"[562] thereby satisfying the commonality requirement. This fix would realign the commonality standard with the rule-makers' intent to make joinder of parties and claims generally easy and to make systemic civil rights cases more viable.

Corrective legislation should permit equitable forms of monetary relief, such as back pay, to qualify for Rule 23(b)(2) certification. The new law would correct *Wal-Mart*'s requirement that monetary relief be incidental to any injunctive or declaratory relief sought in a Rule 23(b)(2) class action[563]—a more rigorous standard than the one that rule-makers articulated.[564] The new law should also consider whether punitive damages, because of their aggregate nature, satisfy (b)(2). These changes would closer align the class certification standard with the drafters' intent to provide robust civil rights enforcement under Rule 23(b)(2).

A restorative civil rights law should also overturn *Epic Systems*,[565] which held that class actions were not the types of "concerted activities for the pur-

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[557] *See* Malveaux, *supra* note 47, at 132–41 (providing a blueprint for such a model).
[558] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353–55 (2011).
[559] *Id.* (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)).
[560] *See id.* at 355 (quoting Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990–91 (1988)).
[561] *See id.*
[562] *Id.* at 353.
[563] *Id.* at 359–60.
[564] FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment.
[565] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

pose of . . . mutual aid or protection"[566] that workers have a right to collectively participate in under the NLRA.[567] The statute should be amended to explicitly include class actions as qualifying.[568]

New legislation to promote private enforcement of civil rights claims could also resolve circuit splits over aggregation in important ways. The law should: clarify that a putative class need only be defined by objective criteria to satisfy ascertainability;[569] allow Rule 23(c)(4) issue certification of a systemic discrimination question under Rule 23(b)(3) while leaving individual damages determinations to separate trials; and clarify post-*Campbell-Ewald* that under Rule 68, tendering complete relief to an individual named plaintiff and entering judgment in their favor does not moot class claims in a putative class action.

In the area of arbitration, corrective legislation should swing the pendulum back so individuals challenging discriminatory practices are not unwittingly deprived access to the court system because of mandatory, pre-dispute arbitration agreements. The Court's jurisprudence would realign with the FAA drafters' intent that arbitration agreements be fairly assessed like other contracts, and be made voluntarily between entities of equal bargaining power to resolve ordinary commercial disputes in federal court.

In order to achieve this, first, corrective legislation could prohibit pre-dispute mandatory arbitration agreements involving constitutional, civil rights, and employment claims altogether. The FAA did not originally cover such substantive areas,[570] and they should remain outside the statute's scope.[571] This course correction would effectively overturn cases like *Circuit City*, *Gilmer*, and *Waffle House*, which acknowledged Title VII, ADEA, and ADA claims as arbitrable respectively.[572] This approach most directly and comprehensively addresses the myriad problems posed by compulsory arbitration.

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[566] *See* 29 U.S.C. § 157; *Epic Sys.*, 138 S. Ct. at 1625, 1632.

[567] *Epic Sys.*, 138 S. Ct. at 1632.

[568] *See* Protecting the Right to Organize ("PRO") Act of 2021, H.R. 842, 117th Cong. § 104 (2021).

[569] *But see* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 103 (passed by House, March 9, 2017, not acted on by Senate). When Congress sought to legislate ascertainability, the House required administrative feasibility. Rule 23(b)(2) suits seeking only injunctive or declaratory relief should be exempt from this. *See* Swadley, *supra* note 162, at 410–16, 421–22; *see, e.g.*, Shelton v. Bledsoe, 775 F.3d 554, 563 (3d Cir. 2015); Floyd v. City of New York, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013).

[570] Cohen & Dayton, *supra* note 187, at 281; Moses, *Misconstruction*, *supra* note 176, at 111.

[571] *See* Forced Arbitration Injustice Repeal ("FAIR") Act, S. 505, 117th Cong. §3 (2021); FAIR Act, H.R. 1423, 116th Cong. §3 (2019); *see also* Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017) (finding that the Supreme Court erroneously interpreted the FAA).

[572] *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 282, 298 (2002); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 109–10 (2001).

Alternatively, corrective legislation could target certain types of claimants and claims. For example, Congress could amend the FAA exemption clause[573] to clarify that the statute exempts *all* workers from its coverage. This would take employment-contract claims out of the arbitral forum, effectively reversing *Circuit City*.[574] As discussed *supra*, specific statutes already shield some claimants from pre-dispute mandatory arbitration, including those who bring cases involving sexual assault and sexual harassment claims.[575] In the recent Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Congress unequivocally condemns forcing victims to resolve their grievances in arbitration because of its severe flaws.[576] Remarkably, Republican lawmakers characterize the alternative forum as secretive, skewed, and lacking coveted procedural protections such as appellate review.[577] Republicans report that the advance agreements to use the forum are unconscionable "legal traps" that shield sexual abusers and harassers and deny victims choice, their "day in court," and justice.[578] Some Democrats have gone further, calling such agreements "almost medieval . . . ."[579] Lawmakers find such adhesion contracts implicating sexual misconduct so troubling that they have forbidden them not only in employment contracts, but also in nursing home agreements, property leases, ride-share application policies, and various service commitments.[580]

This bill and others beg the question: why stop there? If mandatory predispute arbitration is unacceptable for military families being exploited by usurious loans, or whistleblowers trying to protect the integrity of securities laws, or employees being sexually assaulted and harassed at work, why should it be acceptable for others where the consequences are similarly egregious or worse?[581]

A new civil rights act should build on the current bill—covering additional civil rights claims and claimants. This act should illuminate harassment and violence based on race, wage theft, and a range of discriminatory and unfair

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[573] *See* FAA, 9 U.S.C. § 1.

[574] *See* FAIR Act, S. 505, § 3; FAIR Act, H.R. 1423, § 3.

[575] *See* Section III.C.

[576] *See* H.R. 4445, 117th Cong. (2021).

[577] *See* Press Release, U.S. Rep. Kathy Castor (R-Fla.), *supra* note 537; ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021, H.R. REP. NO. 117-234 (2022).

[578] *See* Press Release, U.S. Rep. Kathy Castor (R-Fla.), *supra* note 537; H.R. REP. NO. 117-234.

[579] Price, *supra* note 542 (quoting Senate Majority Leader Chuck Schumer as noting the agreements force employees "to shut up, not tell anyone about it and not seek justice").

[580] Weiss, *supra* note 536. The Act covers all types of cases, including those challenging mandatory arbitration in employment, consumer, and commercial contracts. *See* H.R. REP. NO. 117-234.

[581] Unsuccessful efforts include: Fairness in Nursing Home Arbitration Act, H.R. 2812, 117th Cong. (2021) (covering nursing home residents); Automobile Arbitration Fairness Act of 2008, H.R. 5312, 110th Cong. (2008) (covering car purchasers and leasers).

labor practices.[582] Protecting only those who have the capital and power to lobby Congress—while leaving others to fend for themselves—risks creating procedural castes, where some are entitled to deluxe process and others substandard.

A restorative civil rights bill should at least ensure that those who participate in arbitration do so voluntarily. This means that precedent holding adhesion contracts enforceable—such as *Gilmer*[583] and *Epic Systems*[584]—would be overturned.[585] For example, conditioning employment on acceptance of predispute arbitration would be unlawful.[586] Workers would have the power to learn and discern whether arbitration benefits them. Permitting only post-dispute arbitration agreements would de-link a worker's livelihood from the decision to arbitrate. This approach protects employees' due process rights and meaningful freedom to contract, restoring integrity to process. Employers receive the advantages of arbitration—including "efficiency, privacy, cost saving[,] . . . litigation avoidance," and enhanced employee relations, which may in turn increase profits.[587] This change in focus relieves caseloads, promotes settlement, and reconciles the civil court and arbitral fora.[588]

A restorative civil rights bill should also overturn *Italian Colors* to breathe life back into the effective vindication rule, which allows arbitration so long as a claimant can effectively vindicate substantive rights.[589] The rule would apply not only to arbitration contract terms that forbid "the assertion of certain statutory rights," but also to terms that block the implementation of those rights.[590] This change prevents arbitration from "choking off a plaintiff's ability" to vindicate congressionally developed rights.[591]

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[582] *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 4445—ENDING FORCED ARBITRATION OF SEXUAL ASSAULT & HARASSMENT ACT OF 2021 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/HR-4445-SAP.pdf [https://perma.cc/9WWP-HECQ].

[583] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

[584] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1643 (2018) (Ginsburg, J., dissenting); Oral Dissent of Justice Ruth Bader Ginsburg at 1:15–1:18, *Epic Sys.*, 138 S. Ct. 1612 (No. 16-285) (Justice Ginsberg reading her dissent from the bench and rebuking "arm-twisted, take-it-or-leave-it contracts").

[585] *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 279 (1995); *Gilmer*, 500 U.S. at 26, 33.

[586] Adhesion contracts could be banned beyond the employment context to cover consumer and other transactions.

[587] Suzette M. Malveaux, *Is It the "Real Thing"? How Coke's One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 78.

[588] *See id.* at 78–79.

[589] *See* Part I.

[590] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013).

[591] *Id.* at 240 (Kagan, J., dissenting).

In the event that Congress does not prohibit pre-dispute arbitration agreements, it should at least amend the FAA to require certain protections. First, corrective legislation would be most powerful at the intersection of class actions and arbitration, as demonstrated by *Italian Colors*.[592] A new civil rights act should prohibit class arbitration bans, giving individuals the option to act collectively in this alternative forum. Thus, *Concepcion*—which prohibited a state from finding contracts with class arbitration bans unconscionable—would be overturned.[593] The new federal law or amended FAA would affirmatively state that class arbitration waivers are not allowed, especially where there is a significant power differential.[594] Permitting Rule 23 class actions and FLSA collective actions would close a large loophole in law enforcement. The recent Ending Forced Arbitration of Sexual Assault and Sexual Harassment Claims Act of 2021 forbids joint action waivers, which goes beyond class actions and beyond arbitration.[595]

Second, if pre-dispute arbitration agreements are permitted in employment contracts, one-way binding arbitration could be required. Under this arrangement, when an employee is required to use arbitration to resolve future workplace disputes, the employee is given the unilateral option of rejecting the arbitrator's decision and seeking relief in court.[596] This unilateral approach promotes arbitration while protecting employee choice and court access.[597]

Third, if workers and others are compelled to arbitrate, the pool of arbitrators should be more diverse. For example, the pool of consumer and employment arbitrators at the largest providers—the American Arbitration Association and JAMS—is 88% white and 77% male,[598] a disparity that impacts outcomes in cases involving discrimination, sexual harassment, and pay equity claims.[599]

Fourth, companies that shirk their obligation to pay individual arbitration fees in mass arbitration should risk financial fines or contempt.[600] A new federal law could benefit from what state laws are already doing.[601]

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[592] *See id.* at 233–35 (majority opinion).

[593] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336–37, 351–52 (2011).

[594] *See, e.g.*, FAIR Act, S. 505, 117th Cong. § 2(2) (2021); FAIR Act, H.R. 1423, 116th Cong. § 2(2) (2019).

[595] *See* H.R. 4445, 117th Cong. (2021).

[596] *See* Malveaux, *supra* note 587, at 80; *see also* Stone & Colvin, *supra* note 224, at 23–24 (explaining how one company has begun using this approach).

[597] Malveaux, *supra* note 587, at 78.

[598] Vivia Chen, *Is the White, Male World of Arbitration Ready for Diversity?*, BLOOMBERG L. (Aug. 13, 2021), https://news.bloomberglaw.com/business-and-practice/is-the-white-male-world-of-arbitration-ready-for-diversity [https://perma.cc/PU39-LDG5].

[599] *Id.* (describing alternative dispute resolution as "even more of a small, insular club than Big Law" (quoting Marcie Dickson)).

[600] Frankel, *Beset*, *supra* note 257.

Finally, given the lack of transparency in arbitration, employers should be required to provide information on whether they have mandatory arbitration agreements and embedded class action bans. The frequency and outcomes of arbitration and civil disputes would also be useful for comparative analysis. Reporting requirements to a federal agency would enable stakeholders to have a better understanding of problems and best practices. A federal law could follow similar state-law data collection requirements.[602]

Alternatively, if Congress does not provide greater protections and raise the floor on a federal level, it should allow states to do so. Instead of FAA preemption of state law—concretized in *Concepcion* and *DIRECTV*—the states would determine the propriety, scope, and characteristics of arbitration agreements, beyond the narrow check currently permitted.[603] In a nod to federalism, corrective legislation would overturn *Concepcion* and *DIRECTV* and expand the FAA's basis for invalidating an arbitration agreement—"grounds as exist at law or in equity for the revocation of a contract"—to include state law and court decisions that define unconscionability, no meeting of the minds, or other voiding contract law or policy.[604]

In sum, there is no dearth of creative ideas and ways Congress could draw the civil justice system circle wider. These turbulent times beckon Congress to open the courthouse doors for us all.

CONCLUSION

It is time for the pendulum to swing from an exclusive to an inclusive civil litigation paradigm. The Court's modern jurisprudence has veered far from where Congress and the federal rule-makers envisioned to ensure the proper balance between Rule 1's efficiency and justice values. With the enforcement of employment, constitutional, and civil rights in jeopardy, timing is of the essence. As reminded by Justice Ruth Bader Ginsburg, "Once again, the ball is in Congress' court."[605] It is time for a new civil rights act.

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[601] *See, e.g.*, 2019 Cal. Legis. Serv. Ch. 870, § 4 (West) (amending CAL. CIV. PROC. CODE § 1281.97 and adding § 1281.98).

[602] *See, e.g.*, *id.*

[603] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336–43, 351–52 (2011); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 465 (2015).

[604] *See* Restoring Statutory Rights and Interests of the States Act of 2019, S. 635, 116th Cong. § 3(c) (2019).

[605] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting).