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## ENDANGERED CLAIMS

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### ABSTRACT

*Litigants—like organisms in an ecosystem—must evolve to survive our civil justice system. When procedural rules and doctrines that govern civil litigation change, litigants must respond. In some cases, litigants will adapt to the rules. In others, they will migrate to alternative fora to capitalize on the new environment’s rules. For those who cannot adapt or migrate, their claims will go extinct.*

*This Article chronicles the evolution story of federal civil litigation by examining how, in response to changing procedural rules and doctrines, parties and their claims adapt, migrate, or go extinct. It shows that throughout this evolution, claims by the most resourced parties survive while claims by less resourced parties do not. This leads to the Article’s second contribution, which concerns implications for*

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*policymakers. If policymakers understand that, despite the procedural rules or doctrines they adopt, the most powerful litigants will almost always find a way to survive, that understanding should change how policymakers approach their work. More specifically, this Article argues that policymakers should abandon their distorted survival-of-the-fittest approach to procedural reform and instead adopt an Endangered Claims Act approach. Using such an approach, policymakers' choices would be guided by meritorious claim conservation. Thus, if a procedural change would lead to claim extinction, policymakers would not pursue that change, even if it would otherwise benefit powerful litigants. Finally, to best implement this methodology, policymakers—like scientists observing a species in the wild—will need better information about how claims fare in our civil justice system. Obtaining that information will require greater data-gathering resources and a commitment to, where possible, funneling claims into public courts where they can be better monitored.*

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## INTRODUCTION

The Florida Panther, or *Puma concolor coryi*, is a 150-pound cat that once roamed the southeastern United States in great numbers.<sup>1</sup> With the advent of unregulated hunting and sprawling development into their natural habitat,<sup>2</sup> the number of panthers dwindled to a population size of approximately fifty cats.<sup>3</sup> In 1967, the Florida Panther was listed as endangered under the Endangered Species Act.<sup>4</sup> The population has since recovered to almost triple its low point.<sup>5</sup> The panther is still endangered, but conservation efforts are working to preserve this majestic animal.<sup>6</sup>

This Article argues that, much like the Florida Panther, claims made by federal litigants are subject to evolutionary pressures. These pressures emerge within the litigation habitat, and one significant source of pressure is procedure.<sup>7</sup> As procedural rules governing federal civil litigation change, parties must overcome them.<sup>8</sup> In some cases, the parties will adapt to the rules. In others, they will migrate to other fora to capitalize on the new environment's rules.<sup>9</sup> For those litigants who cannot adapt or migrate, their claims will go extinct.<sup>10</sup>

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1. *Florida Panther*, U.S. FISH & WILDLIFE SERVS., ENV'L CONSERVATION ONLINE SYS., <https://www.ecos.fws.gov/species/1763> [<https://perma.cc/F5BT-RP3T>].

2. *See Florida Panther Facts*, BIG CAT RESCUE (Jan. 10, 2020), <https://bigcatrescue.org/florida-panther-facts/> [<https://perma.cc/WEL2-MR33>]. Big Cat Rescue is the organization featured heavily in the recent Netflix phenom of a series, *Tiger King*. *See Tiger King: Murder, Mayhem and Madness*, (Netflix 2020), <https://www.netflix.com/title/81115994> [<https://perma.cc/A2AC-MJTU>].

3. *Florida Panther*, ENDANGERED SPECIES COAL., <https://www.endangered.org/animals/florida-panther/> [<https://perma.cc/SQF5-MBYU>].

4. Native Fish and Wildlife Endangered Species, 32 Fed. Reg. 4001 (Mar. 11, 1967).

5. *Florida Panther*, *supra* note 3.

6. *Florida Panther*, *supra* note 1.

7. Additional pressure points, while not the focus of this Article, are discussed briefly *infra* Part I.B.

8. *See generally* Joseph F. Marinelli, *New Amendments to the Federal Rules of Civil Procedure: What's the Big Idea?*, AM. BAR ASS'N (Feb. 20, 2016), [https://www.americanbar.org/groups/business\\_law/publications/blt/2016/02/07\\_marinelli](https://www.americanbar.org/groups/business_law/publications/blt/2016/02/07_marinelli) [<https://perma.cc/4NFV-PSEV>] (grappling with possible applications of the 2015 revisions to Federal Rules of Civil Procedure).

9. *See* Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 106 (1999).

10. *See id.* at 109-10.

Class action waivers in forced arbitration agreements show this evolution in action.<sup>11</sup> First, arguing that arbitration was a preferable form of resolving disputes and garnering federal courts' support to do so, corporate defendants migrated to arbitration.<sup>12</sup> Second, within arbitration, these same defendants sought an evolutionary advantage by including class action waivers in their agreements.<sup>13</sup> Third, plaintiffs initially fought both forced arbitration clauses and the class action waiver, but have since lost those battles, which resulted in some claims going extinct.<sup>14</sup> Finally, accepting their new environment but also believing in the advantage of collective action, some plaintiffs, like those in DoorDash and similar arbitrations, have banded together to file mass simultaneous individual arbitration claims.<sup>15</sup> This adaptation has enabled some parties to effectively aggregate their claims and gain back a portion of their lost advantage.<sup>16</sup>

But there are untold numbers of litigants who are unable to survive this and other similar procedural evolutions. Their claims are endangered and, without some form of intervention, will go

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11. J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1741 (2006).

12. *Id.* ("As judicial support of arbitration as a means of commercial dispute resolution grew, U.S. businesses quickly began imposing arbitration in contexts previously thought to prohibit the use of such a method of dispute resolution.")

13. *Id.* at 1746-47.

14. See generally Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 650 (2018) ("Between July of 2009 and June of 2014, we identified a total of 134 claims against AT&T, or an average of 27 per year brought by consumers. During that same time period, AT&T had between 85 and 120 million customers. By 2016, AT&T's customer base had grown to some 147 million. The 2014-2017 review identified 316 claims against AT&T (or 105 per year) closed in the three years ending June of 2017.")

15. Erin Mulvaney, *DoorDash Ordered into Individual Arbitration with 5,000 Workers*, BLOOMBERG L. (Feb. 10, 2020, 9:24 PM), <https://news.bloomberglaw.com/us-law-week/doordash-ordered-into-individual-arbitration-with-5-000-workers?context=article-related> [<https://perma.cc/TEP8-RNCD>]; see *infra* notes 258-60 and accompanying text.

16. However, the arbitration defendants have ensnared these actions in court with challenges to the validity of mass arbitration filings. See Alison Frankel, *Chegg Tries a New Way to Avert Mass Arbitration: Cancel Users' Contracts*, REUTERS (July 2, 2020, 3:52 PM), <https://www.reuters.com/article/legal-us-otc-massarb/chegg-tries-a-new-way-to-avert-mass-arbitration-cancel-users-contracts-idUSKBN24333W> [<https://perma.cc/HVR6-FM8D>] (chronicling arbitration defendants' responses, including the refusal to pay arbitration fees, the invocation of a class device (even after prohibiting it in the arbitration agreements), and the use of different courts when the answer sought is not forthcoming from the first court).

extinct. For every class action waiver and DoorDash response, there are myriad claims in which the parties are unable to adapt and survive.<sup>17</sup> The parties that endure often have abundant resources.<sup>18</sup> In contrast, those with endangered claims—the parties who lack financial backing and social power—do not.<sup>19</sup>

This hostile litigation environment is not some natural consequence of our civil justice ecosystem. To the contrary, the Supreme Court, Congress, and the Civil Rules Committee play a key role in this evolution because they collectively define the parameters of procedural doctrine.<sup>20</sup> Yet these policymakers have unclear motivations when it comes to the procedures they introduce.<sup>21</sup> In some cases, these policymakers ostensibly fail to recognize, or perhaps reject as inconsequential, the fact that a procedural change will force parties to adapt or else see their claims become extinct.<sup>22</sup> In other cases, policymakers seem to condone, and even encourage, this evolution whether it be migration of claims or complete extinction.<sup>23</sup> The result, this Article argues, is a litigation system that is fragmented, unfair, and undemocratic. Like extremist takes on Darwinism,<sup>24</sup> the evolution taking place in our federal civil justice system

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17. See Algero, *supra* note 9, at 104-05.

18. See Alex Campbell & Kendall Taggart, *Judge Dismisses Lawsuit Claiming Austin Illegally Jails Poor People*, BUZZFEED NEWS (Mar. 18, 2016, 11:38 AM), <https://www.buzzfeednews.com/article/alexcampbell/judge-dismisses-lawsuit-claiming-austin-illegally-jails-poor> [<https://perma.cc/ZL3S-PTA5>] (dismissing a class action lawsuit brought by individuals jailed for inability to pay without adjudicating the merits).

19. See *id.*

20. When the Court adjudicates a case before it, as opposed to participating in the civil rulemaking process as one of many bodies who approve the rules, it is not a policymaker per se. Yet, even when adjudicating, it relies on policy considerations to define procedural parameters. See Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 129 (2015) (“From *Wal-Mart* to *Twombly*, it is the fact-intensive, merits-determining tendency of the Roberts Court that defines the worst elements of its Rules decisions.”). Congress legislates procedural doctrines, and finally, the Civil Rules Committee is the primary body responsible for maintaining and amending the Federal Rules of Civil Procedure.

21. See Rhonda McMillion, *ABA Opposes Tort Reform Bills that Amend Court Rules and Limit Damages*, AM. BAR ASS’N (June 1, 2017, 12:40 AM), [https://www.abajournal.com/magazine/article/aba\\_opposes\\_tort\\_reform\\_bills](https://www.abajournal.com/magazine/article/aba_opposes_tort_reform_bills) [<https://perma.cc/6V2W-TZEE>].

22. See *id.*

23. See, e.g., Robert A. Levy, *Do’s and Don’ts of Tort Reform*, CATO INST. (May 1, 2005), <https://www.cato.org/commentary/dos-donts-tort-reform> [<https://perma.cc/ECR8-EXPU>].

24. See William Irons, *Darwin and Morality*, NW. UNIV., <https://www.northwestern.edu/onebook/the-reluctant-mr-darwin/essays/darwin-morality.html> [<https://perma.cc/WCH5-PDAR>] (“The core idea of Social Darwinism is that the wealthy and powerful enjoy the

is distressing. And like the endangered species on our planet, we should pay more attention to the plight of these endangered claims.<sup>25</sup>

This Article makes two contributions. First, it chronicles the evolution story of federal civil litigation by examining how, in response to changes in procedural rules and doctrines, parties and their claims adapt, migrate, or go extinct. What emerges from this story is that often only the strongest and most powerful parties survive, while those with fewer resources are less successful. These lost claims, like a lost species, should raise concerns. This leads to the second contribution, which concerns implications for policy-makers.

If policymakers understand that, despite the procedural rules or doctrines that are adopted, the most powerful litigants will almost always find a way to survive, that understanding should shift how policymakers approach their work. More specifically, this Article argues that policymakers should be guided by a commitment to meritorious claim conservation. The Endangered Species Act was adopted to protect our natural ecosystems by preventing animal extinction.<sup>26</sup> Similarly, policymakers should use an Endangered Claims Act framework to protect our civil justice system by conserving claims.

In action, policymakers must cease responding to power and instead respond to the claim. Meritorious claims, especially those that are the bulwark of our collective public interest—claims such

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privileges they do because they are more fit in terms of the traits favored by natural selection.... [I]t is best to let [the poor and powerless] perish since their elimination will represent natural selection.... This line of thinking ... was used to justify colonialism, extreme laissez-faire capitalism, ... aggressive militarism ... [and] sterilization of those deemed mentally or morally defective.”); François Haas, *German Science and Black Racism—Roots of the Nazi Holocaust*, 22 *FASEB J.* 332, 332-33 (2008); H.W. Koch, *Social Darwinism as a Factor in the ‘New Imperialism’*, in *THE ORIGINS OF THE FIRST WORLD WAR* 319, 337 (H.W. Koch ed., 2d ed. 1984).

25. See *Florida Panther Facts*, *supra* note 2.

26. See Jan G. Laitos & Andrew Swan, *The Growing Role of Nonuse Values in Land Use Planning and Environmental Law*, 63 *PLAN. & ENV'T L.* 3, 8 (2011) (“The federal Endangered Species Act (ESA) ... is the most familiar and heralded statute whose primary purpose is not to benefit humans, but to protect living things that inhabit the planet’s biosphere alongside humans. The purpose of the ESA is ‘to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.’” (quoting 16 U.S.C. §§ 668 dd-668 ee)).

as discrimination, product liability, and section 1983—should be subject to procedural rules that anticipate potential adaptations or migrations. By anticipating the effect a procedural rule change will have on meritorious claims, policymakers might re-think the changes they make. For instance, in the DoorDash example, adaptations by clever plaintiffs’ lawyers might allow some claims to survive;<sup>27</sup> yet, how many similar claims—where parties did not have the necessary resources and lawyers—have gone extinct? In addition, for the DoorDash claims that will be arbitrated (or adjudicated), how much time and money did the parties and the system waste to get to that point?<sup>28</sup> If policymakers are required to focus on the claim itself, they will better anticipate how meritorious claims might fare whenever a procedural change is made.

Anticipating how procedural reform will impact claims will require more than mere focus, though. To implement this Endangered Claims Act approach, policymakers will also need better information.<sup>29</sup> Some of this information can be gleaned by simply putting more resources behind data gathering in our federal civil justice system.<sup>30</sup> The Federal Judicial Center and the Administrative Office of the Courts already do some modest data gathering, but for policymakers to have the information they need, those entities will require robust support.<sup>31</sup> In addition, to maximize our ability to monitor how claims are faring, policymakers should endeavor to adopt procedural rules and doctrines that guide most claims into a

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27. See Mulvaney, *supra* note 15.

28. See Frankel, *supra* note 16.

29. See Clifton Barnes, *Tort Reform Momentum Slowed But Not Stopped*, AM. BAR ASS’N (2005), [https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2004\\_05/2906/momentum](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2004_05/2906/momentum) [<https://perma.cc/V2P6-HWCS>].

30. See *generally id.* (pointing to proponents of medical malpractice who claimed “frivolous lawsuits and high awards ... drive insurance cost up,” while data showed that average medical malpractice awards declined while insurance rates doubled).

31. Jennifer L. Thurston, *Black Robes, White Judges: The Lack of Diversity on the Magistrate Judge Bench*, 82 L. & CONTEMP. PROBS. 63, 67 (2019) (“[T]he AO reports only broad categories.... [T]he data from the FJC did not easily compare to the data provided by the AO.”); U.S. GEN. ACCT. OFF., GAO/GGD-95-236BR, THE FEDERAL JUDICIARY: OBSERVATIONS ON SELECTED ISSUES 96 (1995) (“[T]he AO ‘cannot hope in some circumstances to give a thoroughly objective appraisal of what needs to be done, because such an objective appraisal may meet with considerable criticism from members of the judiciary.’” (excerpting letter from Rya W. Zobel, Dir., Fed. Jud. Ctr., to Norman J. Rabkin, Dir., Admin. of Just. Issues 4 (Aug. 18, 1995))).



public court system. While imperfect, public courts are far more amenable to monitoring and data gathering than private dispute resolution fora like arbitration.<sup>32</sup> This is not to say that all claims must be adjudicated in public courts, but in procedural reform, policymakers should put a thumb on the scale in favor of more, not less, public adjudication.

Part I of the Article outlines the systemic and procedural pressures that work to endanger claims. Part II then examines the evolution of procedure in action. It chronicles some of the most prominent examples of litigants and their claims evolving, migrating, and even going extinct. Part III then problematizes this evolution by arguing that the current evolutionary environment favors traits like money, influence, and power, thereby endangering claims brought by those who are without such advantages. It argues that policymakers are preferencing the wrong evolutionary attributes. To optimize procedural reform, policymakers should instead use an Endangered Claims Act framework to consider how new procedures will impact claims.

### I. CIVIL LITIGATION SYSTEM INPUTS

The civil justice system is a complex ecosystem. The parties and lawyers that operate within the system are similarly complex. This Part examines how procedure—while only one factor affecting the ecosystem—is critical to determining how parties and their lawyers behave within the civil justice system. This Part also briefly outlines other non-procedure pressures that impact the system and notes that even if changes were made to how procedural reforms were implemented, those non-procedure pressures might still persist.

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32. *See generally* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 15 (2015), <https://www.epi.org/publication/the-arbitration-epidemic/> [<https://perma.cc/MTE9-3YBT>] (noting “data on the incidence of mandatory arbitration gathered in any of the official government surveys of employers” is not required to be reported).

### A. Procedural Inputs

The Federal Rules of Civil Procedure and related procedural doctrines shape litigation in the federal courts. Prior to the adoption of the Federal Rules in 1938, a federal court followed the same procedures as the state courts where that federal court sat.<sup>33</sup> In this way, the parties and lawyers in each state had an advantage because they knew the rules of their game better than any outsiders.<sup>34</sup> The adoption of the 1938 rules changed the environment in federal courts.<sup>35</sup> State-centric lawyers and their federal-court clients lost their procedural advantage.<sup>36</sup> Consequently, lawyers who could become experts in the now-uniform federal rules gained an advantage over those parochial attorneys who knew only their home-court rules.

In this way, the advent of the 1938 rules was the first point of adaptation in our modern procedural regime. Those lawyers and their clients who adapted to the uniform set of federal procedural rules had an advantage over those who did not.<sup>37</sup> As this Article will discuss, the evolution did not stop once the new federal rules were adopted.<sup>38</sup> Procedure remains a driving force behind how the civil justice system works.<sup>39</sup> Studies show that attorneys and their clients prefer federal or state court, for example, based in part on what they perceive to be a procedural advantage.<sup>40</sup> They might know the rules

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33. Before the 1938 rules, federal courts under the Conformity Act of 1872 were required to apply the procedural rules of the state in which they sat. Conformity Act of 1872, ch. 255, § 6, 17 Stat. 196, 197.

34. Although, even local lawyers were often frustrated by practicing under the Conformity Act. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1041 (1982) (“[A] federal practitioner ‘even in his own state, f[el]t not more certainty as to the proper procedure than if he were before a tribunal of a foreign country.’” (alteration in original) (quoting 19 A.B.A. REP. 411, 420 (1896))).

35. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 708 (2016).

36. *See id.* at 734.

37. *See id.*

38. *See infra* Part II.

39. *See* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2162 (2019).

40. *Id.* (“Since the early 1990s, however, a series of studies exploring attorney preferences has consistently found that plaintiffs’ attorneys prefer to litigate in state court and institutional defendants in federal court.”); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 395-

better or simply believe that the rules benefit them.<sup>41</sup> Whatever the reason, the rules matter.

Lobbying efforts on behalf of legal interest groups demonstrate litigants' beliefs that procedure is an important lever in civil litigation.<sup>42</sup> For example, when the 2016 discovery amendments were under consideration, over 2,300 comments were received and 120 individuals testified to the rulemaking committee.<sup>43</sup> The list of commentators is chock full of corporate general counsel, chambers of commerce, plaintiffs' groups, and academics.<sup>44</sup> Similar lobbying efforts in Congress have led to sweeping procedural reform through legislation such as the Class Action Fairness Act.<sup>45</sup> If procedure was inconsequential, these rule changes and legislation would go largely unnoticed. That is hardly the case.

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96 (1992) (presenting survey results of defendants' preference for federal court).

41. See Miller, *supra* note 40, at 395-96.

42. See, e.g., Barnes, *supra* note 29.

43. Paul W. Grimm, *Introduction: Reflections on the Future of Discovery in Civil Cases*, 71 VAND. L. REV. 1775, 1777 (2018) ("And certainly, from the more than 2,300 written comments and testimony of 120 witnesses at the public hearings, the proportionality requirement was the one that drew most of the attention—both positive and negative."); CTR. FOR CONST. LITIG., PRELIMINARY REPORT ON COMMENTS ON PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE 2 (2014), [http://www.cclfirm.com/files/Report\\_050914.pdf](http://www.cclfirm.com/files/Report_050914.pdf) [https://perma.cc/P6K9-LS6H] (noting that more than 2,300 comments were received in response to the Civil Rules Committee's proposed amendments); Email from Valerie M. Nannery, Senior Litig. Couns., Ctr. for Const. Litig., to David G. Campbell, Chair, Civ. Rules Advisory Comm. 2 (Apr. 9, 2014), [http://www.cclfirm.com/files/040914\\_Comments.pdf](http://www.cclfirm.com/files/040914_Comments.pdf) [https://perma.cc/8SSU-Q8ZK] (noting that most of the comments received were related to the discovery amendments).

44. See *Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 3-4 (2014), <https://www.uscourts.gov/sites/default/files/civil-rules-public-hearing-transcript-phoenix-az.pdf> [https://perma.cc/T6B5-5VSM] (testimony of William F. Hamilton, Quarles & Brady, LLP; Timothy A. Pratt, Fed'n of Def. & Corp. Couns., Bos. Sci. Corp.; Professor Arthur Miller, N.Y.U. Sch. L.; David M. Howard, Microsoft Corp.; Jocelyn D. Larkin, Impact Fund; and Paul V. Avelar, Inst. for Just., Ariz. Chapter).

45. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1441 (2008) ("Some of the political and social implications of the Class Action Fairness Act of 2005 (CAFA) are hard to miss. That statute, after all, resulted from years of intense lobbying (on both sides of the aisle by interest groups associated with both plaintiffs and defendants), partisan wrangling, and, following two successful filibusters, fragile compromises." (footnotes omitted)).

Finally, the Supreme Court's docket is peppered with procedural cases.<sup>46</sup> For example, the 2018-19 term saw three arbitration cases,<sup>47</sup> and the 2019-20 term included two personal jurisdiction cases.<sup>48</sup> The previous decade has been marked by controversial procedure cases ranging from personal jurisdiction to pleading to subject matter jurisdiction.<sup>49</sup>

In sum, procedure matters, not just to the courts but to the parties and their attorneys. When entering the civil justice system, procedure is a key consideration, and one that impacts how the parties and their lawyers evolve.

### *B. Political, Ideological & Attitudinal Inputs*

Procedure is not the only input, however. Our civil justice system is the product of other critical inputs as well. This Section is not an exhaustive discussion of these inputs, but a highlight reel of how procedure fits in this mosaic. Primarily, this Section will discuss how politics, ideology, and attitudes affect our civil justice system.

Civil litigation was not a hot button issue when the 1938 rules were adopted.<sup>50</sup> To the contrary, civil litigation—while important—took a back seat to other notable controversies and world events.<sup>51</sup> It was not until the Civil Rights Movement of the 1960s that the public, and thus politicians, turned their attention to the civil justice system and the courts' role in enforcing norms.<sup>52</sup> At the peak

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46. See Dodson, *supra* note 35, at 713.

47. Amy Howe, *Opinion Analysis: Employers Prevail in Arbitration Case*, SCOTUSBLOG (May 21, 2018, 11:35 AM), <https://www.scotusblog.com/2018/05/opinion-analysis-employers-prevail-in-arbitration-case/> [<https://perma.cc/8VMQ-3NQT>].

48. Brett F. Clements & Elizabeth Runyan Geise, *Supreme Court Will Address Personal Jurisdiction After States Courts Interpret BMS Decision*, NAT'L L. REV. (Apr. 7, 2020), <https://www.natlawreview.com/article/supreme-court-will-address-personal-jurisdiction-after-states-courts-interpret-bms> [<https://perma.cc/H9KC-55U9>].

49. Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314-15 (2012).

50. See Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 277, 286 (2008).

51. See Stephen C. Yeazell, Brown, *The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1978 (2004) (noting that New Deal reform was one such controversy during the time).

52. *Id.* at 1983, 2000 (discussing the impact of *Brown v. Board of Education* and the Civil Rights Movement on the culture of lawyers and the civil justice system).

of the Civil Rights Movement, Congress began to pass an extraordinary array of laws aimed at achieving equality.<sup>53</sup> Laws like the Civil Rights Act,<sup>54</sup> the Voting Rights Act,<sup>55</sup> and the Fair Housing Act<sup>56</sup> became significant vehicles for individuals who wanted to achieve equality.<sup>57</sup> The laws were, of course, enforced through the courts, meaning that litigation perceptibly increased.<sup>58</sup>

Federal courts predicted an insurmountable surge in litigation by the twenty-first century, and for good reason.<sup>59</sup> Between 1960 and 1986, civil filings in federal court grew by almost 400 percent.<sup>60</sup> With this future predicted, the battle lines were then drawn in a way they had not been before. For those who believed in these laws, litigation to enforce them seemed legitimate and necessary.<sup>61</sup> To those who questioned the need for these laws, this same litigation appeared frivolous and abusive.<sup>62</sup> The empirical evidence suggests that frivolous litigation, while real in some cases, did not increase in step with the increase in court filings.<sup>63</sup> Yet, that nuance did not matter so much once the issue was presented so starkly to the American public and its political leaders.<sup>64</sup>

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53. *Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in Congress*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/> [<https://perma.cc/J2MW-8S9W>] (providing a list of laws enacted by Congress during the Civil Rights Movement).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Cf.* Yeazell, *supra* note 51, at 2000.

58. *See id.* at 1983 (quoting ARYEH NEIER, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 5 (1982)).

59. *See* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 4-5 (1986) (describing the excessive amount of litigation that occurs in America).

60. Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1178.

61. *See* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 718 (1998).

62. *Id.* at 719 (“Starting in the 1970s, unease among elites about the expansion of law joined with interest group concern to curtail liability and to promote campaigns deriding law and lawyers. Such campaigning intensified in the mid-1980s with corporate spokesmen and their political allies mournfully reciting the woes of a legal system in which Americans, egged on by avaricious lawyers, sue too readily, and irresponsible juries and activist judges waylay blameless businesses at enormous cost to social and economic well-being.”).

63. *Id.* at 740-47 (summarizing studies demonstrating that perception and media portrayals of litigation abuse overstate such abuse).

64. *See id.* at 748.

At the same time, with the rise of the middle class, more and more Americans had access to lawyers and courts to resolve their civil disputes.<sup>65</sup> Muscular federal administrative agencies also became more active in the courts.<sup>66</sup> Businesses—large and small—began to feel the stress of increased litigation.<sup>67</sup> Lawyers became more specialized and organized themselves along partisan lines.<sup>68</sup> The “generalist” lawyer became a vestige of the past as groups like the Association of Trial Lawyers of America (ATLA, now American Association for Justice) began to take the lead.<sup>69</sup> Simultaneously, business groups such as the Chamber of Commerce began to organize around pushing litigation reform that would benefit defendant corporations.<sup>70</sup> And many of the new rights established by Congress provided for the payment of attorneys’ fees, something that immediately increased attorney engagement and public skepticism.<sup>71</sup> The stage was set for a battle that, while about the courts, would take place far outside of them in the public square.

The 1970s through the 1990s ushered in a litigation tsunami of sorts. Concerns of a litigation “hyperlexis”<sup>72</sup> inspired policymakers to restrict the number of “frivolous”<sup>73</sup> cases making their way through the federal court system.<sup>74</sup> Groups like the Chamber of

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65. See generally *id.* at 717-18 (discussing how shifts in American legal and social culture provided access to the civil system to those previously excluded from it, including “injured workers and consumers, blacks, [and] women”).

66. See Galanter, *supra* note 59, at 17-18.

67. See *id.* at 4.

68. See *id.* at 28.

69. ATLA was founded in 1946, but really took off in the 1950s. See *About Us*, AM. ASS’N FOR JUST., <https://www.justice.org/about-us> [<https://perma.cc/5BM8-AHW4>].

70. Galanter, *supra* note 61, at 749.

71. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 396-97 (1982) (“Finally, Congress has provided for the payment of attorneys’ fees to various classes of victorious plaintiffs and has thereby created new incentives to litigate.”).

72. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 6 (1983).

73. Galanter, *supra* note 61, at 717.

74. There is scant evidence that such a hyperlexis occurred—in fact, empirical work done in reflection on this time in our nation’s legal history reveals that the number of cases filed was actually to be expected given our nation’s population and GDP. Galanter, *supra* note 72, at 5 (“Data on the prevalence and processing of disputes and litigation are assembled and analyzed. They show that only a small portion of troubles and injuries become disputes; only a small portion of these become lawsuits. Of those that do, the vast majority are abandoned, settled or routinely processed without full-blown adjudication. Comparison of current with

Commerce began to lobby against this perceived trend.<sup>75</sup> Politicians and the public followed.<sup>76</sup> Gone were the days of the Atticus Finch-type lawyer and the idea of litigation as a vehicle for justice. Instead, politicians began to deride the legal profession and the litigation it spawned.<sup>77</sup> Then-Vice President Dan Quayle, in a 1991 speech to the American Bar Association, posited that there were “too many lawyers, too many lawsuits, and too many excessive damage awards.”<sup>78</sup> This problem within our civil justice system, according to Quayle, made the United States less competitive in the global marketplace and hurt our economy.<sup>79</sup> Quayle provided no empirical evidence for his statements, but that did not matter so much.<sup>80</sup> Quayle was simply reflecting what had already become a common trope about the civil justice system.<sup>81</sup> That is, there were too many lawyers taking on too many frivolous cases, and those lawyers and cases were draining our economy.<sup>82</sup>

Whether Quayle was right or not, the public, including a number of lawyers, believed him.<sup>83</sup> This remains true today.<sup>84</sup> Nearly 80

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past litigation rates shows a recent rise, but present levels are not historically unprecedented.”); Galanter, *supra* note 59, at 5 (“Per capita rates of filing civil cases have risen in most localities during recent decades. Before these increases are taken as proof of runaway litigiousness, it should be noted that these rates are not historically unprecedented. Several studies document higher per capita rates of civil litigation in nineteenth and early twentieth century America, as well as in colonial times.” (footnotes omitted)). See generally STEPHEN C. YEAZELL, *LAWSUITS IN A MARKET ECONOMY: THE EVOLUTION OF CIVIL LITIGATION* 2-3 (2018) (arguing that, in the main, civil litigation is both driven by the market economy and relatively efficient).

75. Galanter, *supra* note 61, at 749. Then-president of the United States Chamber of Commerce admitted:

[T]he single, universal thing I get a positive response on—from small companies and big companies, from individual proprietors and multinationals—is that something has gone seriously wrong with our legal system, that we’ve become a society where there always must be someone who’s wrong and there always must be someone to sue.

*Id.*

76. *Id.* at 720.

77. *Id.* at 748.

78. David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES (Aug. 14, 1991), <https://www.nytimes.com/1991/08/14/us/address-by-quayle-on-justice-proposals-irks-bar-association.html> [<https://perma.cc/VWVG3-DQNZ>].

79. *Id.*

80. See *id.*

81. See *id.*

82. *Id.*

83. *Score One for Dan Quayle: Too Many Lawyers, Suits*, DESERET NEWS (July 21, 1992,

percent of the public believes too many frivolous lawsuits are filed.<sup>85</sup> Similarly, lobbying groups continue to aggressively pursue the narrative of frivolous litigation.<sup>86</sup>

The combination of politicians, the public, and lobbying groups aiming their collective disdain at the civil justice system has had consequences. As this Article will discuss, Congress and other policymakers have focused on curbing frivolous lawsuits through procedural mechanisms. These attitudinal, ideological, and, in some cases, political viewpoints permeate our citizenry, our politicians, and our judiciary, making it easier to justify procedural reform. And while hostility to litigation certainly manifests in ways beyond procedural changes, procedure remains a primary catalyst for bias against litigation.<sup>87</sup>

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12:00 AM), <https://www.deseret.com/1992/7/21/18995563/score-one-for-dan-quayle-too-many-lawyers-suits> [<https://perma.cc/9WNE-767L>] (referring to a California Lawyer poll, which found that 76 percent of the lawyers who responded agreed with Quayle's assessment).

84. Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 449-50 (2004).

85. *Id.*

86. For example, in 2002, the American Tort Reform Foundation began releasing its annual "Judicial Hellholes" report, which purports to document "various abuses within the civil justice system, focusing primarily on jurisdictions where courts have been radically out of balance." *Judicial Hellholes*, AM. TORT REFORM FOUND., <https://www.judicialhellholes.org/about/> [<https://perma.cc/QWV6-YMPW>]. For a taste of how this group reflects its ire, the state of California regularly comes in at the top of the judicial hellhole list. *Judicial Hellholes 2020-2021 Executive Summary*, AM. TORT REFORM FOUND., <https://www.judicialhellholes.org/reports/2020-2021-executive-summary/> [<https://perma.cc/MJ8Z-B8TT>]. The group claims that the jurisdictions on which it focuses "systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits." *Judicial Hellholes*, *supra*.

87. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006) ("It also argues more cautiously for the proposition that—while a reinvigorated federalism, an agenda-driven conservatism, and a constitutionally fixated judicial supremacy are all part and parcel of the legacy of the Rehnquist Court—hostility to litigation has been, in the end, the most historically significant and all-encompassing theme of the Rehnquist era."); Lee Epstein, William M. Landes & Richard A. Posner, *When It Comes to Business, the Right and Left Sides of the Court Agree*, 54 WASH. U. J.L. & POL'Y 33, 33 (2017) ("Because the current Democratic and Republican appointees support business at record levels, the fraction of unanimous pro-business decisions—the 'Business Favorability Index'—has never been higher. What with the left and right side of the bench favoring business at levels unprecedented in the last 70 years, it is fair to continue to characterize the Roberts Court as 'pro-business.'").



## II. THE EVOLUTION OF PROCEDURE

Modern procedure emerged in the late 1930s with the adoption of a uniform set of procedural rules under the Rules Enabling Act.<sup>88</sup> Codified in Rule 1's "just, speedy, and inexpensive" language, the rules exemplified the values that were to underpin the federal civil justice system.<sup>89</sup> Justice and efficiency were to be the foundation of procedure within the federal courts.<sup>90</sup> It is worth remembering, however, that the new rules also presented an incredible environmental shift for attorneys and their clients at the time.<sup>91</sup> Yet, attorneys adapted and there was a semblance of equilibrium within the federal court system for the next forty years.<sup>92</sup>

As discussed in the previous Part, however, starting in the 1960s, Congress adopted an unprecedented set of substantive laws in areas like antitrust, discrimination, and the like, resulting in more cases being filed.<sup>93</sup> As the number of cases filed in the federal and state court systems increased, and as the perception of an outbreak of frivolous litigation took hold, procedure became a critical focus for policymakers.<sup>94</sup>

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88. See Resnik, *supra* note 71, at 396.

89. FED. R. CIV. P. 1.

90. See Resnik, *supra* note 71, at 396.

91. See *id.* at 396-97.

92. See *id.* at 397.

93. *Id.* at 396 ("Congress has created and the courts have articulated a multitude of new rights and legally cognizable wrongs.").

94. For example, in *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court articulated its concern that additional substantive rights invite "bad" or frivolous cases. 570 U.S. 338, 358 (2013). The Court explained that it rejected lessening the causation standard in the Title VII context because properly terminated employees would take advantage. It reasoned:

Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage.

From that time to present day, federal court civil procedure has markedly changed. The “restrictive ethos” of modern procedure is well documented and punctuated by the most recent changes: pleading requirements under *Twombly* and *Iqbal* and proportionality in discovery through the Rule 26 amendments.<sup>95</sup> But the restrictive trend began much earlier, in the 1980s.<sup>96</sup> Starting in that decade, the Supreme Court trumpeted summary judgment.<sup>97</sup> The rulemaking committees buttressed Rule 11 sanction rules and restricted discovery.<sup>98</sup> Federal judges began to manage federal cases instead of adjudicating them,<sup>99</sup> and civil trial rates precipitously decreased.<sup>100</sup> In other words, the rules of the game changed, and quite drastically.

As they always have, parties and their claims evolved. This Part will chronicle and examine how, in response to procedural reforms, litigants have adapted, migrated, and gone extinct. It will also highlight how the evolution of procedure has worked to endanger particular claims more than others.

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*Id.* See generally SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017) (discussing this phenomenon of the Court's obsession with the idea that frivolous cases abound).

95. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 359 (2010) (“The major counter-value within the restrictive ethos is a threshold skepticism that yields an interest in excluding or discouraging claims rather than supporting and encouraging them.”).

96. *Id.* at 359-60.

97. In 1986, the Supreme Court decided *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). For a critical commentary of these cases, see Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99 (1988).

98. See Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court's 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 100-01 (1993) (discussing the evolution of Rule 11); Brooke D. Coleman, *Discovering Innovation: Discovery Reform and Federal Civil Rulemaking*, 51 AKRON L. REV. 765, 772-80 (2017) (summarizing the committee's history of discovery reform).

99. See Resnik, *supra* note 71, at 376.

100. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 500-01 (2004) (documenting the decrease in trial rates).

### A. Adaptation

When procedures change, parties and their attorneys must respond. In order to survive and see another day in court, certain parties and their attorneys have adapted within the civil ecosystem. When one door closes, they find another open one. That is the case with the development of multidistrict litigation where adaptive parties and their attorneys found a way to aggregate claims even when the stand-alone modern class action was on the decline. In other cases, however, parties and their attorneys adapt not by finding a different procedural opening; instead, they change the rules of the ecosystem altogether. By influencing the civil rule-making system, these parties and their attorneys have effectively modified the rules of the entire civil litigation game.<sup>101</sup> Discovery reform is an example of this adaptive behavior.<sup>102</sup>

#### 1. Multidistrict Litigation

The stand-alone modern class action has declined while multidistrict litigation has grown.<sup>103</sup> Though, to simply say multidistrict litigation, or MDL, has grown is an understatement—MDLs have flourished.<sup>104</sup> Currently, MDLs make up approximately 50 percent of the federal docket.<sup>105</sup> This uptick in multidistrict litigation is not

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101. See, e.g., Spencer, *supra* note 95, at 361-66.

102. See *id.* at 359-60.

103. Of course, the growth of class actions was also a prime example of procedural evolution. The class action creature was created and used to fill a vacuum in the litigation landscape. Whether that vacuum was what Dave Marcus has labeled a “regulatory” one or an “adjectival” one remains debatable. David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 590 (2013). Either way, the device was adopted to fill a void. See *id.* at 592-94 (“The regulatory conception treats Rule 23 as ‘an evolutionary response to the existence of injuries unremedied by the regulatory action of government,’ to quote Warren Burger’s classic description.... The adjectival conception begins with the premise that Rule 23, like any other joinder rule, serves classically procedural goals.”).

104. Daniel Fisher, *Multidistrict Litigation Swamps Courts as Rules Struggle to Catch Up: Is Reform on the Way?*, LEGAL NEWSLINE, (Mar. 21, 2019), <https://legalnewsline.com/stories/512312998-multidistrict-litigation-swamps-courts-as-rules-struggle-to-catch-up-is-reform-on-the-way> [<https://perma.cc/9CRW-4HWB>].

105. *Id.* (“Cases consolidated into MDLs comprised 52 percent of civil lawsuits at the end of 2018, according to Lawyers for Civil Justice, the highest level since multidistrict litigation was created by federal statute 50 years ago.”).

some fluke. Instead, it is the product of litigants evolving to a changing procedural landscape—one that made the traditional class action much harder to achieve and left the door open to using MDL as an alternative device.<sup>106</sup>

Multidistrict litigation allows for the transfer of an infinite number of related cases to one federal judge who can collectively resolve all of the pretrial matters related to those actions.<sup>107</sup> By design, the multidistrict transferee judge is supposed to resolve all of these pretrial matters and then remand the individual cases back to their original courts for trial, but practice is quite different.<sup>108</sup> Most multidistrict cases settle or are dismissed before the transferee judge, with only 3 percent of cases going before their original court for trial.<sup>109</sup>

The MDL statute was adopted in 1968, a mere two years after the modern class action rule, Rule 23, came into being.<sup>110</sup> While both options provided an efficient way to aggregate claims, plaintiffs initially chose Rule 23.<sup>111</sup> Rule 23 enjoyed a good ride, but like other rules within the civil litigation system, it came under increased scrutiny in the early aughts.<sup>112</sup> Scholars, politicians, and the public had many concerns about class action lawsuits, including attorney incentives and litigation abuse.<sup>113</sup> These concerns were also

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106. *See id.*

107. *See generally* Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 843-45 (2017) (providing a history of multidistrict litigation).

108. *See id.*

109. *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (“[T]he reality is that just 2.9 percent of cases return to their original districts.”); Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, 107 KY. L.J. 467, 474-76 (2019) (arguing that while only a small number of cases are remanded back for trial in MDL, that does not mean that all the remaining cases settle—many are dismissed once the court has done some sifting of the claims).

110. Bradt, *supra* note 107, at 838.

111. *Id.* at 844-45; *see also* Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES L. 1, 8 (2018) (providing a history of the modern class action).

112. *See* David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 FORDHAM L. REV. 1785, 1789-90 (2018) (“[T]he class action’s second era fueled the tumult of its third. According to one prominent theory, a particular policy changes disjointedly, with periods of quiet stability punctuated by abrupt dislocations.”).

113. *See* John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 856 (1995); Marcus, *supra* note 112, at 1828-29 (“A *New York Times* op-ed in 1985 castigated ‘[c]lass-action shakedowns,’ citing litigation against ‘the

expressed in the courts.<sup>114</sup> Federal judges were skeptical of certifying classes, and their decisions began to constrain the reach of the modern class action rule.<sup>115</sup> In addition, Congress passed legislation to limit the viability of class actions in state court.<sup>116</sup> The Class Action Fairness Act of 2005 effectively pulled a number of state-filed class actions into federal court where a harsher judicial eye would be cast on the certification question.<sup>117</sup> There are very few studies of the decline in class actions, but most scholars agree that the Rule 23 class action is a wounded aggregation device.<sup>118</sup>

The fact that Rule 23 class actions are less common does not mean that the systemic demand for the aggregation of claims has waned. To the contrary, if litigants and attorneys desire a comprehensive resolution of claims—or as one commentator put it, “[n]ational litigation,”—they have to find another way.<sup>119</sup> Some adaptive litigants have found their answer in multidistrict litigation.

Yet, there are some meaningful differences between class actions and MDLs.<sup>120</sup> Some MDLs consolidate class actions that a transferee

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morning sickness drug Bendectin’ as an example, despite the fact that Bendectin’s manufacturer had actually filed the class-certification motion. A prominent pundit complained that the *Breast Implants* class action had ‘bludgeoned’ Dow Corning ‘into throwing \$2 billion into a “global” settlement[] that destroyed the company,’ apparently oblivious to the fact that Dow Corning had pursued a class action settlement to avoid bankruptcy.” (footnotes omitted).

114. Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1612 (2016) (“[S]tarting in the mid-1990s, many federal judges began to take a skeptical view of class actions.”).

115. *Id.*

116. See Burbank, *supra* note 45, at 1511.

117. See Class Action Fairness Act of 2005, 109 Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1711-1715); see also Burbank, *supra* note 45, at 1511 (describing the history and adoption of the Class Action Fairness Act).

118. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (stating that “class actions will soon be virtually extinct”); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 423 (2014).

119. See Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1682 (2017); Bradt, *supra* note 107, at 833 (“With the Supreme Court and lower courts cutting back the viability of the class action under Rule 23 for decades and with Congress providing for expanded jurisdiction over class actions in the federal courts, MDL has become the leading mechanism for resolving mass torts.”).

120. Some class actions are certified within an MDL. When they are not, there are no Rule 23 protections. Burch, *supra* note 109, at 71 (explaining that attorneys, appellate courts, and—in some cases—defendants protect classes to some degree, “[b]ut even these safeguards crumble in non-class, multidistrict proceedings”). While some MDL judges still apply class-

judge must then resolve, but a number of MDLs do not implicate the class action rule or include only a few class actions within the mix of aggregated cases.<sup>121</sup> This means that many of the due process protections that had been built into Rule 23 often do not apply in the MDL context.<sup>122</sup> There is no Rule 23(a)(4) requirement to assess adequacy of representation, no Rule 23(g) appointment of counsel, and no Rule 23(e) fairness assessment for a proposed settlement.<sup>123</sup> For this reason, MDLs have been described by some as the “Wild West” of aggregate litigation—a place where the rules are not defined and where those with the biggest guns survive.<sup>124</sup>

This raises the question of which litigants choose MDLs. Stated differently, which litigants are able to adapt and fit themselves into this alternative aggregation device? At first, innovative defendants looked to be the winners.<sup>125</sup> They could use the device to achieve the benefits of aggregation (like some form of a global settlement) without some of the headaches of the class action (the plaintiffs’ control over who was certified into the class, for example).<sup>126</sup> That trend no longer appears to apply.<sup>127</sup> Instead, innovative plaintiffs and defendants are putting the device to good use in what appears to be fairly equal measure.<sup>128</sup> This narrative cuts against the traditional plaintiffs’ bar versus defense bar tropes.<sup>129</sup> MDL, it turns out, is a great

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action-like protections, they are not required to do so. Gluck, *supra* note 119, at 1692 (“Some academics have been critical of these borrowed tools, especially where judges pick and choose among safeguards without including the full protections of the class action or other procedure.”).

121. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 78-79 (2015).

122. Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1294 (2012) (“Class actions contain built-in protections that help to guard against collusion .... Nonclass aggregation, on the other hand, lacks these safeguards.”).

123. See *id.*

124. See Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015) (observing that “MDL involves something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies”).

125. See Burch, *supra* note 121, at 78-79.

126. See, e.g., *id.*

127. See Fisher, *supra* note 104.

128. Cf. Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1715-18 (2019).

129. There is now a movement by the defense bar to put some restrictions on MDL that might hamper plaintiffs’ abilities to succeed. See *id.* at 1715 (“[T]he movement to ‘reform’ MDL [is] spearheaded by the corporate-defense bar.”). Rules4MDLs is just one example.

equalizer in this respect.<sup>130</sup> That does not mean that all litigants and attorneys benefit, however. As I have argued elsewhere, the great benefactors of MDL are elite lawyers and, at least with respect to corporate defendants and powerful plaintiffs, their clients.<sup>131</sup>

A study by Elizabeth Chamblee Burch revealed that MDLs are a bastion for repeat player attorneys and their law firms—on both sides of the “v.”<sup>132</sup> These elite attorneys frequent the MDL device in staggering numbers.<sup>133</sup> This has led many commentators to question whether there are sufficient safeguards in place to prevent attorneys from sacrificing their clients’ best interests for their own.<sup>134</sup>

The key takeaway with respect to MDLs is that it demonstrates how the most-resourced attorneys and clients find optimal ways to resolve their grievances. When one device—the class action—was effectively no longer available, the litigants and attorneys who still wanted the benefit of some form of aggregation adapted into multidistrict litigation.<sup>135</sup> When those attorneys and clients did so, attorneys and clients who might have benefitted from a class action lost out. For example, the first client and attorney to file a claim often now find themselves swept up, or perhaps left behind, when their case is consolidated into an MDL.<sup>136</sup> Those who had the

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About, RULES4MDLS, <https://www.rules4mdls.com/> [<https://perma.cc/XQL9-9JNH>]. But other than that, the device is largely seen as presenting an equal opportunity for both plaintiffs and defendants.

130. See Clopton & Bradt, *supra* note 128, at 1715-18.

131. Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1036 (2016).

132. Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1453-54 (2017) (“Much of the literature surrounding repeat players contemplates litigants as the repeat players—Walmart, Merck, or Johnson & Johnson. And it is true that major corporate defendants are repeat actors in multidistrict litigation. But they are not the only ones. Many plaintiffs’ and defense attorneys are repeat players, too.” (footnote omitted)).

133. See *id.*

134. See *id.* at 1454-55.

135. See Bradt, *supra* note 107, at 843-45.

136. See Burch, *supra* note 121, at 96. In many cases, the attorneys that file the smaller cases swept up in an MDL are not placed on the powerful leadership committees that run and have the most to benefit from the MDL. *Id.* (“Although only 31% of individual attorneys involved in multidistrict litigation were named to one or more leadership positions, the total number of positions this small group occupied is more revealing: repeat players held 749 out of 1177 available leadership positions, or 63.6%. Fifty attorneys were named as lead lawyers in five or more multidistrict litigations and claimed 30% of all leadership roles.”).

resources to adapt moved on, leaving those who could not adapt in the dust.

That is not to say MDLs do not provide relief for individuals that might not have otherwise been able to achieve relief. Like the modern class action, aggregation within MDLs allows for parties to recover together in ways that they might not have individually.<sup>137</sup> The difference is that MDLs have shown themselves to be an exclusive club for attorneys.<sup>138</sup> Further, there are far fewer protections in MDL for marginalized parties.<sup>139</sup> Thus, while some of the most resource-rich parties and attorneys have been able to adapt into MDL in a way that is beneficial, those without such resources have not.

## 2. *Discovery Reform*

MDL is an example of an adaptation that occurred within the court system. Powerful parties used a tool already at their disposal—the MDL statute—to good effect.<sup>140</sup> But adaptations also occur outside the court ecosystem. There, parties can use processes tangential to the civil justice system, but outside the actual courts, to create new advantages useful within the courts.<sup>141</sup> One example is how parties have advocated within the civil rulemaking process for changes to discovery rules.

The civil rulemaking process is predominantly conducted through committees comprised of judges, lawyers, and academics who are appointed by the Chief Justice of the United States Supreme Court.<sup>142</sup> The committees' work is not per se political, but because it is open to the public, it is susceptible to lobbying efforts by powerful litigants.<sup>143</sup> By adapting, these litigants have figured out how to maximally affect how the Federal Rules of Civil Procedure, and specifically the discovery rules, develop.

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137. See Burch & Williams, *supra* note 132, at 1458.

138. See *id.*

139. See *supra* note 123.

140. See Burch & Williams, *supra* note 132, at 1453-54.

141. See Gluck, *supra* note 119, at 1690-91.

142. See Coleman, *supra* note 131, at 1015-17.

143. See *id.* at 1023.



The discovery rules of 1938 were a sea change for parties and attorneys in federal court. Previously, the parties were left to their own devices in tracking down evidence and moving their case forward, but the 1938 rules completely upended that system.<sup>144</sup> The new rules provided for a fairly open exchange of information between the parties.<sup>145</sup> At first, and for many decades, the parties and their lawyers were able to manage discovery on their own without much input from judges.<sup>146</sup> Judith Resnik referred to the period from 1938 until the early 1960s as a “honeymoon’ of sorts” for judges and litigants as “[b]oth groups gradually learned how to use the new rules.”<sup>147</sup>

With the perception of a crisis within the judicial system, however, came the perception that discovery might be one major source of the problem.<sup>148</sup> Adapting to the environment around them, parties and their attorneys set their sights on discovery reform.<sup>149</sup> A sustained campaign that began in the early 1980s and continues to this day has had a substantial impact on discovery rules.<sup>150</sup> The litigants that adapted to this reality—the power that the rulemaking process has over how the rules develop—are the litigants that have gained the most.

Rule 26 of the 1938 discovery rules altered the status quo by allowing for discovery of all relevant information related to the subject matter of the litigation. The new discovery regime reflected the committee’s commitment to a litigation system that would encourage the free exchange of information.<sup>151</sup> Under the new civil

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144. See Dodson, *supra* note 35, at 708.

145. See Resnik, *supra* note 71, at 397.

146. See *id.* at 377-78.

147. *Id.* at 397. As Resnik observed in her seminal 1982 article *Managerial Judges*, reformers pushed a solution that would require judges to take on a larger administrative role. *Id.* at 377-78. Much of this managerial role manifested in how the judge and the litigants engaged over discovery. *Id.* at 378-79. Resnik’s article focused on how the judiciary’s role in litigation was impacted by this shift. *Id.* at 379-80. Less examined is how the litigants themselves adapted over time.

148. *Id.* at 397.

149. See *id.* at 395-96.

150. See Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579, 585-86; Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. BAR ASS’N FOUND. RSCH. J. 217, 219-22.

151. The Advisory Committee note to the original Rule 26 explained, “[w]hile the old

rules, each party could obtain the information it needed as long as the information was relevant and not privileged.<sup>152</sup> As stated earlier, litigants adapted quite well to this change, and there was a semblance of equilibrium for some time.<sup>153</sup>

While the grumblings of discovery reform emerged in the 1960s,<sup>154</sup> concerted efforts to change the Federal Rules of Civil Procedure really took hold in the 1980s.<sup>155</sup> In 1983, the committee responded to what it called “over-discovery” by amending Rule 26(b)(1).<sup>156</sup> The revised rule articulated the first version of our current “proportionality” language by requiring a judge to, in appropriate cases, weigh the costs and benefits of the discovery in question.<sup>157</sup> The committee expressed concern that judges had “been reluctant to limit the use of the discovery devices” in the past.<sup>158</sup> This rule change did not come out of thin air; to the contrary, the rule’s origin had much to do with the American Bar Association Section of Litigation.<sup>159</sup> In the late 1970s, that section commissioned a Report of the Special

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chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation.” FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1937 amendment. In addition, Rule 26(b)(1) was amended in 1946 to clarify that parties could use discovery to seek out inadmissible evidence. *See* FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1946 amendment. The Advisory Committee note stated, “[t]he purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.” *Id.*

152. *See* Resnik, *supra* note 71, at 378-79 (describing the culture of the discovery system during this era as “give your opponent all information relevant to the litigation”). In 1970, the committee codified work product protection, or trial preparation material protection, to bring the rules in line with the Supreme Court’s 1947 decision in *Hickman v. Taylor*. FED. R. CIV. P. 26(b)(3) advisory committee’s note to 1970 amendment; *see* 329 U.S. 495, 511-12 (1947).

153. *See* Resnik, *supra* note 71, at 396-97.

154. *See Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 942 (1961).

155. *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1784-85 (2015).

156. FED. R. CIV. P. 26(b) advisory committee’s note to 1983 amendment.

157. FED. R. CIV. P. 26(b)(1) (1983) (stating in part that a judge must assess whether “the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation”).

158. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1983 amendment. This new rule language, the Committee hoped, would “guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.” *Id.*

159. ADVISORY COMM. CIV. R., MINUTES OF THE DECEMBER 12-13, 1977 MEETING 13-15 (1977) (statement of Paul R. Connolly, former Chairman of the American Bar Association Section of Litigation), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV12-1977-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV12-1977-min.pdf) [<https://perma.cc/SH7E-ER87>].

Committee for the Study of Discovery Abuse, which was distributed to the bench and bar and became the jumping off point for the committee's work.<sup>160</sup> While the special committee was comprised of an array of attorneys, it was mostly skewed in a corporate defense-centric way.<sup>161</sup> Even still, the ABA did not profess a particular viewpoint or ideology, and in that way, the proposals were not directly motivated by particular client interests.<sup>162</sup>

The 1983 amendments to Rule 26 did not stem the tide of criticism aimed at discovery.<sup>163</sup> Thus, in 1993, Rule 26 was once again amended, primarily to require Rule 26(a)(1)'s mandatory initial disclosures.<sup>164</sup> Under that rule, the parties were now required to disclose certain documents, witnesses, and damage computation information.<sup>165</sup>

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160. *Id.* at 13; *see also* SECTION LITIG. AM. BAR ASS'N, SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE, 92 F.R.D. 137 (1980); Weyman I. Lundquist, *In Search of Discovery Reform*, 66 AM. BAR ASS'N J. 1071, 1071-73 (1980).

161. The special committee was chaired by Joseph Ball, a renowned trial lawyer who represented clients such as Watergate's John D. Erlichman, Saudi Arabian arms dealer, Adnan Khashoggi, and a senior partner at Heller Erhman, Weyman I. Lundquist. *See* Elaine Woo, *Attorney Joseph A. Ball Dies; Played Key Warren Commission Role*, L.A. TIMES (Sept. 23, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-sep-23-me-25521-story.html> [<https://perma.cc/8SH3-T6K6>]; Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 754 n.35, 762 n.83 (1998).

162. *See generally* SECTION LITIG. AM. BAR ASS'N, *supra* note 160.

163. *See* Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 769 (1985).

164. FED. R. CIV. P. 26(a)(1). Rule 11 was simultaneously amended. *See* FED. R. CIV. P. 11(b)-(c) advisory committee's note to 1993 amendment. The 1993 version of Rule 11—the version still in place today—provided that sanctions were discretionary and meant to serve a deterrent, not punitive, purpose. *See* FED. R. CIV. P. 11(c)(4). In addition, the revised Rule 11 provided for a 21-day safe harbor in which a litigant could pull an offending paper without consequence. FED. R. CIV. P. 11(c)(2). This rule change was exceedingly controversial. Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 295 (1994) (“The 1993 revisions of the Federal Rules of Civil Procedure evoked more vigorous opposition than any rule revision ever promulgated by the Supreme Court of the United States, save the single exception of the Federal Rules of Evidence. Much, but by no means all, of the criticism has been directed at ... Rule 26(a)(1).”).

165. *See* FED. R. CIV. P. 26 advisory committee's note to 1993 amendment. The factors adopted in 1983 were also now split from Rule 26(b)(1) into new Rule 26(b)(2). *See* FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

The disagreement over this rule change came from all sides.<sup>166</sup> Defense lawyers worried that required disclosure of this information was antithetical to civil litigation's adversarial ethos. That opposition was led by a powerful player in the rulemaking process, Alfred Cortese, Jr., a partner at Pepper, Hamilton & Scheetz, who frequented rulemaking meetings and functioned as a representative of the American Tort Reform Association.<sup>167</sup> This episode marked the beginning of direct lobbying efforts within the rulemaking system.<sup>168</sup>

Following the 1993 amendments, many criticized rulemakers' lack of reliance on adequate empirical evidence.<sup>169</sup> The rulemaking committee, after engaging in a self-study, committed to requesting and using more empirical work before engaging in rule reform.<sup>170</sup> The committee's first test was with discovery where it formed a subcommittee to examine the subject in greater detail.<sup>171</sup> Committee members sought out empirical research to determine how the mandatory initial disclosure rule worked in practice.<sup>172</sup> Both the Federal Judicial Center and the RAND Corporation produced studies.<sup>173</sup> In addition, the committee held conferences in major cities where it could interact with members of the bar, judges, and the academy over potential rule proposals.<sup>174</sup>

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166. See Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 549 (2001).

167. *Id.* at 564 n.202.

168. See, e.g., *id.* at 565-69. To be fair, however, plaintiffs' lawyers disliked the rule as well, worrying that it only required production for issues pleaded with particularity, language that could be gamed to decrease actual disclosure. See *id.* at 563-64. To mitigate the overall controversy, the new rule explicitly allowed for a district court to "opt out" of the rule. See FED. R. CIV. P. 26 advisory committee's notes to 2000 amendment. See generally Stempel, *supra* note 166, at 554-55 n.141 (discussing how many districts opted out of the federal rules in favor of their own).

169. See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 845 (1993) ("Again, there was little relevant empirical evidence.").

170. A SELF STUDY OF FEDERAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 699 (1995).

171. See *id.*

172. See *id.* at 711.

173. See Stempel, *supra* note 166, at 555.

174. See *id.*

Yet the use of empirical evidence opened the committee up to a different kind of outside influence.<sup>175</sup> For example, in the 2000 amendments, the mandatory disclosure provision was limited to claims or defenses made by the disclosing party.<sup>176</sup> The limitation meant that information that might have been helpful to the other side did not have to be automatically disclosed.<sup>177</sup> At least one scholar worried that the committee had succumbed to effective lobbying by powerful attorney groups—groups that could afford to closely follow rulemaking efforts and could also afford to fund studies that were beneficial to their position.<sup>178</sup> Jeff Stempel, a commentator, argued that “the empirical data available suggested that the current broad scope of discovery was not viewed as a problem by lawyers.”<sup>179</sup> More specifically, Stempel pointed out that “[a] fair reading of the FJC and RAND studies [did] not suggest that the current ‘subject matter’ scope of discovery [was] a particular problem.”<sup>180</sup> In other words, the committee used the empirical evidence pushed on them by outside groups. Consequently, it minimized empirical evidence from neutral groups like RAND and the Federal Judicial Center that was contrary to the narrative pushed by litigants most interested in a narrow disclosure rule.<sup>181</sup>

Throughout the early 2000s, the perception that the civil justice system was in crisis and that discovery was a major cause of this discord persisted.<sup>182</sup> In 2010, the committee convened the Duke

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175. *See id.* at 571, 578, 618 (“In short, the Advisory Committee vote on scope of discovery, despite a debate of considerable sophistication, in the end resembled Capitol Hill as much as a judicial deliberation.”).

176. *See id.* at 552. This change mirrored changes to the scope of discovery under Rule 26(b)(1), which was also modified to only include a party’s claim or defense, allowing the party to expand its inquiry to the subject matter of the claim upon a showing of good cause. The Committee note explained that “[c]oncerns about costs and delay of discovery have persisted” in spite of previous revisions to the discovery provisions. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2000 amendment.

177. *See Stempel, supra* note 166, at 569-70.

178. *See id.* at 613-14, 616-17.

179. *Id.* at 571.

180. *Id.* at 578.

181. *See id.* at 613-14.

182. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1099 (2012) (noting that even during the adoption of the 2000 discovery amendments, where there was evidence that “[d]iscovery seems to be working quite well in general[,]” the amendments passed because “[t]he view that discovery

Conference on Civil Litigation.<sup>183</sup> The conference provided a forum for debate about civil litigation, especially discovery, but it also provided an opportunity for the committee and other attendees to produce volumes of empirical research.<sup>184</sup> This research reinforced the chasm between reality and perception in civil litigation. For example, one Federal Judicial Center study found that the median discovery costs for plaintiffs amounted to \$15,000 and the median costs for defendants amounted to \$20,000.<sup>185</sup> A related study determined that higher discovery costs are meaningfully associated with cases where the parties have more at stake.<sup>186</sup> In contrast, an Institute for the Advancement of the American Legal System (IAALS) survey of corporate legal counsel found that counsel believed that discovery costs in federal court were not proportional to the value of the case 90 percent of the time.<sup>187</sup>

These two sets of studies presented polar views, but they were also qualitatively completely different kinds of studies. The Federal Judicial Center study relied on an actual accounting of cases—what amount of money was spent in a set of standard federal cases and what accounted for a precipitous increase in discovery costs in the out-of-norm case.<sup>188</sup> The IAALS study relied on the perception of

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was ‘out of control’ was once again assumed without any effort to examine whether that was true”).

183. *2010 Civil Litigation Conference Purpose Statement*, U.S. CTS., <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> [<https://perma.cc/JZ48-ME8Y>].

184. *See id.*

185. EMERY G. LEE & THOMAS E. WILLGING, FED. JUD. CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), <https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf> [<https://perma.cc/MA8Y-MXEJ>].

186. EMERY G. LEE & THOMAS E. WILLGING, FED. JUD. CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS—REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON THE CIVIL RULES 5, 7 (2010), <https://www.fjc.gov/sites/default/files/2012/CostCiv1.pdf> [<https://perma.cc/QS36-JHB8>]. The study found that for both plaintiffs and defendants, a 1 percent increase in stakes was associated with a 0.25 percent increase in total discovery costs. *Id.* at 5.

187. DUKE CONF. SUBCOMM., ADVISORY COMM. ON CIV. RULES, REPORT OF THE DUKE CONFERENCE SUBCOMMITTEE 79, 83 (2014), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV2014-04.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV2014-04.pdf) [<https://perma.cc/39WN-M9WA>] [hereinafter DUKE REPORT]. Another study by the American College of Trial Lawyers Task Force on Discovery found that almost half of the respondents “believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers.” *Id.*

188. *See id.*

corporate legal counsel; a perception that was valid, but should have been skeptically considered by the committee because it was just that—a perception.<sup>189</sup>

Nevertheless, the opinions of powerful groups like the corporate general counsel represented in the IAALS study persuaded the rulemakers.<sup>190</sup> And in 2015, another set of controversial discovery rules went into effect.<sup>191</sup> The most notable of those rules was revised Rule 26(b)(1), which was amended to include proportionality within the definition of the scope of discovery.<sup>192</sup> This new proportionality rule was extraordinarily controversial, largely because many believed that it would solely benefit defendants.<sup>193</sup> And, indeed, repeat-player defendants had consistently pushed the rule and successfully brought it to fruition.<sup>194</sup> The original proposals for a proportionality rule emerged from the advocacy at the Duke Civil Litigation Conference.<sup>195</sup> Moreover, the support for the rule through the rule-making comment and testimony stage came from large corporate general counsel, groups aligned with the Chamber of Commerce, and big-law law firms.<sup>196</sup> These groups heavily influenced the development of proportionality and will no doubt continue to exercise that influence going forward.<sup>197</sup>

What the discovery reform story demonstrates is that, over time, particular litigants and their attorneys determined that they could impact the civil rules themselves by influencing the civil rulemaking process. They stand to benefit from modern changes to discovery

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189. See Coleman, *supra* note 98, at 778-79. For a discussion of how social science explains why these study outcomes differed, see Reda, *supra* note 182, at 1107-08.

190. See DUKE REPORT, *supra* note 187, at 83; Coleman, *supra* note 131, at 1060-61.

191. See Coleman, *supra* note 131, at 1022.

192. See *id.* at 1023. Five of these factors were taken directly from then-Rule 26(b)(2)(C), which was a section of the discovery rules that explicitly granted the court power to limit discovery. Those factors—whether the “burden or expense of the proposed discovery outweighs its likely benefit,” “the amount in controversy,” “the parties’ resources,” “the importance of the issues at stake,” and the “importance of discovery in resolving the issues”—were joined by one additional factor: “the parties’ relative access to relevant information.” FED. R. CIV. P. 26(b)(1).

193. For a broader discussion of the controversy, see 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 (2015).

194. See Suja A. Thomas, *Via Duke, Companies are Shaping Discovery*, LAW360 (Nov. 4, 2015, 2:41 PM), <https://www.law360.com/articles/723092/> [<https://perma.cc/BS47-5EUH>].

195. See *id.*

196. See Hatamyar Moore, *supra* note 193, at 1140-41.

197. See *id.*

rules, and that is no accident. From rule proposals to lobbying, powerful litigants have ensured that their voices are heard and that reforms beneficial to them are adopted. These adaptive parties and attorneys, by working outside the court system, have effectively influenced the rules that apply inside the courts.<sup>198</sup>

### *B. Migration*

Adaptation is not the only evolutionary process though. When litigants believe a forum and its rules are too cumbersome, those litigants might migrate to another forum.<sup>199</sup> For example, despite the steady stream of restrictive procedural changes within the federal courts, some policymakers and litigants were—and still are—dissatisfied.<sup>200</sup> In response, these attorneys and their clients have migrated to different ecosystems with the full support—and sometimes the hastening—of policymakers like the Court and Congress.<sup>201</sup>

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198. These same business interests have achieved the same by working through the Chamber of Commerce to influence the Supreme Court and its jurisprudence. See Joanna C. Schwartz, *The Cost of Saving Business*, 65 DEPAUL L. REV. 655 (2016) (exploring the connection between the arguments made in Chamber of Commerce amici filings and the Supreme Courts mirror-image description of litigation in its decisions).

199. See, e.g., *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 415 (2009); see also David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1061 (2021) (“[B]y and large, American courts accept forum shopping as an intrinsic part of the system. An obvious exception, of course, is the *Erie* doctrine, which is explicitly structured around curtailing law-based incentives for forum-shopping as between federal and state courts. But beyond *Erie*, and despite occasional judicial outbursts noting ‘the danger of forum shopping’ or declaring it ‘evil,’ the underlying doctrinal story, from the Supreme Court on down, is a far more accommodating one.” (footnotes omitted)).

200. See, e.g., Levy, *supra* note 23.

201. See *id.*; see also Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1530 (2005) (“Three points about forum shopping are worth emphasizing. First, every lawyer does it, or at least contemplates doing it, in every case: it would be malpractice not to try to gain every advantage for your client that the law permits. Second, perceptions about whether federal or state courts are better for plaintiffs or defendants change over time as circumstances in the different court systems change. Third, whatever limitations are imposed on forum shopping must come from those who make the rules (either the judicial or legislative branches) because lawyers will never restrain themselves for the good of the system, but will (and should) put the interests of their clients first.”).



Just as with adaptation, both plaintiffs and defendants have migrated. They have not chosen the same fora, but at least in some cases, they have both willingly fled the federal civil courts.<sup>202</sup> For example, defendants have migrated to arbitration while plaintiffs have migrated to state courts and federal agencies.<sup>203</sup>

Forum shopping is a tactic that is at once maligned and common. There is the forum shopping that the system accepts—good strategic forum shopping that is within the system’s ethical guardrails.<sup>204</sup> And there is the unethical forum shopping that the system attempts to dissuade, and when it can, prohibit.<sup>205</sup>

Litigants began pushing the bounds of forum shopping during the heyday of expansive personal jurisdiction. Plaintiffs, using a generous view of minimum contacts under *International Shoe v. State of Washington*, filed cases in places where a national or multinational company might have rather thin contacts, but where the plaintiff perceived an advantage.<sup>206</sup> With *World-Wide Volkswagen Corp. v. Woodson*, the Court began to fracture over how expansively to read a state’s power to bring a defendant into its borders.<sup>207</sup> In that case, the Court drew a new line in the sand.<sup>208</sup> The national car manufacturer might be subject to personal jurisdiction for its defective car’s damage in Oklahoma, but the northeast regional car distributor and New York state dealership certainly could not be.<sup>209</sup> How finely to read such a distinction came before the Court again in *Asahi Metal Industry Co. v. Superior Court of California*, but there the Court’s division was stark.<sup>210</sup> Four justices would find personal jurisdiction only if the component part manufacturer had done “something more” in California,<sup>211</sup> while four other justices

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202. See *Shady Grove*, 559 U.S. at 415.

203. See Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 274-75 (2015); cf. Hatamyar Moore, *supra* note 193, at 1085-87.

204. *Shady Grove*, 559 U.S. at 415 (explaining that the civil justice system tolerates some kinds of forum shopping).

205. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (“The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”).

206. See 326 U.S. 310 (1945).

207. 444 U.S. 286, 318-19 (1980) (Blackmun, J., dissenting).

208. See *id.* at 291 (majority opinion).

209. *Id.* at 299.

210. 480 U.S. 102 (1987).

211. *Id.* at 111-12.

would have only required the manufacturer to have knowledge of its part reaching the state.<sup>212</sup>

The Court's decades-long personal jurisdiction fissures have left lower courts, commentators, and litigants without a clear personal jurisdiction test. Amid this uncertainty, some litigants began to take a different tack; they determined in advance in which forum the would-be litigants would be willing to litigate, and with that move, the contractual forum-selection clause was born.<sup>213</sup> At first, when entering into such clauses, parties would negotiate at arms' length to determine their litigation forum.<sup>214</sup> With the success of those clauses, however, enterprising litigants began to insert these same clauses into contracts that were not negotiated.<sup>215</sup> Consumer contracts—almost always contracts of adhesion—began to include language dictating the forum for any potential litigation.<sup>216</sup> And, at the height of the confusion over the scope of personal jurisdiction, the Court notably blessed these forum selection clauses in *Carnival Cruise Lines, Inc. v. Shute*.<sup>217</sup>

In other words, the Court washed its hands of the uncertainty its personal jurisdiction jurisprudence created and instead gave powerful litigants a new tool. Well-resourced potential litigants could now dictate—through contract—which federal or state court in

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212. *Id.* at 120 (Brennan, J., concurring).

213. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591-92 (1991). Before then, courts were generally not in favor of such clauses. Christine P. Bartholomew, *James A. Wooten, The Venue Shuffle: Forum Selection Clauses and ERISA*, 66 UCLA L. REV. 862, 870 (2019) (“Through the first six decades of the twentieth century, courts in the United States were generally skeptical of or even hostile to forum selection clauses.”).

214. *See Carnival Cruise Lines*, 499 U.S. at 591-93; Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1295 (2019) (“[T]he Court identified forum selection provisions as a potent tool for informed parties in transactions involving ‘arm's-length negotiation by experienced and sophisticated businessmen.’” (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972))).

215. *See Carnival Cruise Lines*, 499 U.S. at 596.

216. *See id.* at 590.

217. *Id.* at 595; *see* Kastner & Lieb, *supra* note 214, at 1294 (“The history of the doctrinal acceptance of forum selection offers one more example of the phenomenon of creep from similarly situated negotiating parties to general contract law.”); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 360-61 (1992) (“When the *Carnival Cruise Lines* majority opinion is coupled with the Supreme Court's 1988 decision in *Stewart Organization, Inc. v. Ricoh Corp.*, it is clear what prudent counsel ought to advise any prospective defendant, especially any business enterprise: draft a fine-print, obscure combined choice-of-forum, choice-of-law clause.” (footnote omitted)).

which they wished to litigate. They could migrate a large portion of the litigation against them into one chosen—and presumably beneficial—location. The Court, to the surprise of many commentators, went along with this innovation, arguing that it provided certainty and efficiency for all litigants.<sup>218</sup> Moreover, the Court stressed that despite the nature of contracts of adhesion, the potential litigants had consented to these fora.<sup>219</sup>

Yet even when parties—mostly defendants—now had the power to dictate ahead of time which federal or state court they would litigate in, many defendants were still frustrated with traditional courts and wanted to migrate.<sup>220</sup> But this time, they did not just want to migrate to a pre-chosen state or federal court; they wanted to migrate out of the court system altogether.<sup>221</sup>

Defendants had long advocated for alternatives to what they viewed as an expensive and wasteful federal civil court system.<sup>222</sup> These litigants initially sought relief within the federal court system by lobbying local courts to adopt robust alternative dispute resolution referral systems.<sup>223</sup> In these systems, judges routinely referred

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218. *Carnival Cruise Lines*, 499 U.S. at 593-94 (“Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.”); John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1793 (2019) (“Forum selection clauses ... are now regularly written into commercial contracts in the United States. Although U.S. courts were historically reluctant to enforce such clauses, this is no longer the case. Modern courts will generally give effect to these provisions so long as they are not unjust, contrary to public policy, or the product of fraud or overreaching.” (footnotes omitted)).

219. *Carnival Cruise Lines*, 499 U.S. at 593 (“As an initial matter, we do not adopt the Court of Appeals’ determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining.”).

220. See Leslie, *supra* note 203, at 270-71.

221. See *id.*

222. Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 244 (2008) (“[C]ourts and legislatures perceived arbitration as a renegade, even bastardized form of adjudication.”); Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 117 (“The individuals who were involved had passionate, sincere beliefs about the use of arbitration to resolve commercial disputes.”). Charles Bernheimer “devoted almost decades of his life and his personal finances to lobbying for arbitration laws, as well as advocating for the use of arbitration.” *Id.* at 138.

223. 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, 2840 (2015).

cases to mediation or arbitration early in the process.<sup>224</sup> More recently though, defendants have completely circumvented federal courts by requiring arbitration in their standard form contracts.<sup>225</sup> And federal courts have cheerfully supported this migration, upholding forced arbitration clauses along with clauses that prohibit the filing of aggregate claims in arbitration.<sup>226</sup> The Court initially blessed forced arbitration clauses in a federal securities fraud case in 1985.<sup>227</sup> From that point on, the Supreme Court's initial posture of limiting arbitration to disputes between merchants has expanded exponentially.<sup>228</sup>

Many commentators were shocked not just by the Court's willingness to read the Federal Arbitration Act (FAA) so broadly, but also by its willingness to accept that parties could contract into these provisions even when one party really did not have the power to negotiate its terms.<sup>229</sup> In *Lamps Plus, Inc. v. Varela*, the Court reasoned that "[c]onsent is essential under the FAA because arbitrators wield only the authority they are given."<sup>230</sup> According to the Court, "[p]arties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, [and] the rules by which they will arbitrate."<sup>231</sup> In *Varela*, the employee signed an employment agreement with his

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224. *Id.* ("Beginning in the 1970s, the flexibility and informality of various forms of ADR (not only arbitration) came to be praised as virtues—juxtaposed against the formal and public obligations of adjudication which were, in turn, gaining the negative valence of imposing undue costs on both disputants and the courts. Congress enacted statutes and agencies promulgated regulations commending arbitration, mediation, and other ADR methods for use by administrative agencies and in the federal courts."). To a large extent, this trend continues today. Karen Wells Roby, *Ethics in Settlement: The Effect of Material Misrepresentation*, 59 FED. LAW. 42, 42 (2012) ("In federal courts across the United States, it is common for litigants and their counsel to be required to participate in either private mediation or court-ordered mediation before a U.S. magistrate judge.").

225. See Leslie, *supra* note 203, at 270-71.

226. See *id.* at 275-77.

227. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 215, 223-24 (1985).

228. Leslie, *supra* note 203, at 273 ("After decades of holding that arbitration clauses did not apply to federal statutory claims, the Supreme Court changed course in the 1980s.").

229. See Gilles, *supra* note 118, at 395 ("In sum, the Supreme Court's arbitration jurisprudence over the past thirty years has evinced an incredibly expansive view of the FAA. And while the full import of this national policy favoring arbitration has been criticized by many, including members of the Court itself, there is no reason to believe the Court will swing back to a more nuanced interpretation of the FAA." (footnotes omitted)).

230. 139 S. Ct. 1407, 1416 (2019).

231. *Id.*

employer, Lamps Plus, that included the forced individual arbitration provision.<sup>232</sup> The idea that he actually “consented” to that provision is untenable; yet the Court relied on that reasoning.<sup>233</sup> Indeed, the Court has repeatedly held that these types of provisions—like the forum selection clauses that came before them—are voluntary and consensual.<sup>234</sup>

Powerful parties continue to push for even bigger advantages. Once the forced arbitration clause was solidified, enterprising plaintiffs began to adapt. If a case had to be resolved in arbitration, plaintiffs’ lawyers attempted to resolve those disputes by aggregating multiple claims within arbitration.<sup>235</sup> This move ostensibly increased defendants’ risk because appellate review of arbitration decisions is so limited.<sup>236</sup> To mitigate this potential downside for defendants—the chance that a big-dollar arbitration loss would have limited appellate review—enterprising defendants began to include class action waivers in their forced arbitration clauses.<sup>237</sup> This adaptation made it far less likely that anyone would arbitrate small-dollar cases at all.<sup>238</sup> And, again, the Court blessed these clauses—and repeatedly so.<sup>239</sup> Starting with *AT&T Mobility LLC*

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232. *Id.* at 1413.

233. *Id.* at 1416-19.

234. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 662-63 (1996).

235. Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 454 (2014) (noting that, for example, Consumers Count attempts to “help multiple consumers bring claims against companies without resort[ing] to class actions ... once a ‘critical mass’ of consumers have complained about the same practice, Consumers Count will ‘spring into action’ and refer the complaints to a law firm which can then enter into fee agreements with the multiple consumers and attempt to pursue their claims ... in arbitration”).

236. Brian T. McCartney, *Rethinking Appeal of Arbitrability Decisions: When to Review “That Which Long Process Could Not Arbitrate”*, 1997 J. DISP. RESOL. 229, 229 (“[T]he court of appeals lacked jurisdiction to review the issue of arbitrability until the arbitrator’s final decision had been confirmed or vacated by the district court .... [O]nce an affirmative determination of arbitrability has been made, judicial involvement in the arbitration process is minimized.”).

237. See Gilles, *supra* note 118, at 398-99 (discussing the collusive efforts by business interests to adopt class action waivers in arbitration).

238. *Id.* at 396 (“Indeed, by the early 1990s an ADR cottage industry was in full bloom, fueled not by people interested in ‘alternative dispute resolution’—a sunny moniker reflecting the earnest, academic roots of the movement in the 1960s—but by corporations seeking ways to decrease their liability risks.” (footnote omitted)).

239. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

*v. Concepcion*, the Court articulated its bleak vision of the federal civil justice system broadly and class actions more specifically.<sup>240</sup> Arguing that permitting class relief within arbitration would thwart the efficiency gains of that system, the Court held that class action waivers—again, even when found in contracts of adhesion—were permitted.<sup>241</sup>

The impact has been layered. First, the number of claims that can be filed in court profoundly decreased because these provisions proliferated.<sup>242</sup> Second, when these cases do go to arbitration, defendants overwhelmingly win.<sup>243</sup> A study by The Economic Policy Institute estimates that “workers subject to mandatory arbitration win just 38 percent as often as they would in state court and 59 percent as often as they would in federal court.”<sup>244</sup> And finally, while the number of contracts with this language might have resulted in an arbitration boom, that explosion has been muted because many of these cases are simply no longer filed at all.<sup>245</sup> For example, between 2014 and 2017, 316 individual arbitration claims were filed against AT&T, yet their customer base reached 147 million people.<sup>246</sup> In other words, defendants—with the blessing of the Court—managed to disappear a large number of cases, not just from the federal court system, but from the universe. For many plaintiffs, defendants’ migration to arbitration has meant not just endangerment but extinction.

Well-resourced plaintiffs have not stood idly by. Instead of seeking arbitration as a forum, some plaintiffs have sought relief in state courts.<sup>247</sup> So, while federal civil filings have only slowly increased—

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240. *Id.* at 344 (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”).

241. *Id.*

242. See Hatamyar Moore, *supra* note 60, at 1229-30.

243. Sejal Singh & Andre Manuel, *Harvard Law Students Are Taking on Forced Arbitration*, THE NATION (Apr. 15, 2019), <https://www.thenation.com/article/archive/harvard-law-students-are-taking-on-forced-arbitration/> [<https://perma.cc/TKY9-Y89Y?type=image>].

244. *Id.*

245. See, e.g., Resnik, *supra* note 14, at 650-51.

246. See *id.*

247. The state court caseload is not all federal plaintiffs fleeing federal court. In state court, many plaintiffs are debt collectors and landlords, which are atypical federal court plaintiffs. NAT’L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 19 (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<https://perma.cc/3232-HRR7>] (finding that nearly two-thirds of state court cases were contract cases,

or in some years, remained stagnant—state court filings have risen exponentially.<sup>248</sup> At least one commentator, Patricia Hatamyar Moore, found that between 1986 and 2015, federal court civil filings increased by only 9 percent, a number that is less than the growth in population and growth in disposable income per capita during that same period.<sup>249</sup> This is in stark contrast to state courts where there has been an incredible increase in civil case filings, by some estimates as much as 350 percent for a similar period.<sup>250</sup>

In addition, migration does not mean that evolution stops. To the contrary, even in these new ecosystems, the parties who can do so evolve. Because of forced arbitration agreements and the class action waivers within them, plaintiffs have a twin-procedural challenge: the inability to litigate in court and the requirement to individually arbitrate. In response, some parties are adapting. For example, in the DoorDash misclassification case, employees were ordered into individual arbitration because their agreements prohibited the aggregation of arbitrable claims.<sup>251</sup> In response, the DoorDash workers filed five thousand individual arbitration claims, putting increased pressure on DoorDash to engage.<sup>252</sup> This is but

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and of those, 37 percent were debt collection, 29 percent were landlord/tenant, and 17 percent were foreclosures).

248. See Hatamyar Moore, *supra* note 60, at 1226-27.

249. *Id.* at 1181.

250. Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren and Rehnquist*, 87 IND. L.J. 823, 832-33 (2012) (noting an increase from 7.7 million civil filings in 1978 to 25 million civil filings in 2008).

251. Mulvaney, *supra* note 15. Uber Drivers faced a similar fate. Joel Rosenblatt, *Uber Gambled on Driver Arbitration and Might Have Come up the Loser*, L.A. TIMES (May 8, 2019, 10:22 AM), <https://www.latimes.com/business/la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html> [<https://perma.cc/E6ZT-CWFP>]; Alison Frankel, *Forced into Arbitration, 12,500 Drivers Claim Uber Won't Pay Fees to Launch Cases*, REUTERS (Dec. 6, 2018, 2:17 PM), <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/F7JA-QZ29>].

252. Charlotte Garden, *DoorDash's Multimillion-Dollar Arbitration Mistake*, WASH. POST (Feb. 16, 2020, 6:00 AM), <https://www.washingtonpost.com/opinions/2020/02/16/doorsdashs-multimillion-dollar-arbitration-mistake/> [<https://perma.cc/3D7B-UGJM>]. The arbitration firm responsible for handling these claims charged DoorDash nearly \$12 million in fees. *Id.* Uber's arbitration provision similarly requires the company to pay the initial arbitration fees, a reality that has now stalled the progress of this dispute. Charlotte Garden, *Uber and Lyft Drivers Turn the Tables on Individual Arbitration*, ONLABOR (Jan. 8, 2019), <https://onlabor.org/uber-and-lyft-drivers-turn-the-tables-on-individual-arbitration/> [<https://perma.cc/CP9R-JYUX>]. The exorbitant cost of paying for thousands of arbitrations has led Uber to suggest bellwether arbitrations or other procedural solutions. *Id.*

one example of parties' ability to adapt not only to a new ecosystem—here, from courtroom to arbitration—but also to a new procedure—from aggregate litigation to mass individual filings.<sup>253</sup>

The same migration-adaptation pattern can be seen in plaintiffs' migration from federal to state court.<sup>254</sup> In the face of a hostile federal court environment for class actions, plaintiffs began filing more class actions in what they perceived to be a friendlier location—state courts.<sup>255</sup> Defendants, the forced migrators this time, responded by lobbying Congress to loosen the removal requirements for these cases.<sup>256</sup> In 2005, Congress passed the Class Action Fairness Act (CAFA), which did just that.<sup>257</sup> CAFA forced many state-court-filed mass and class actions to migrate to federal court.<sup>258</sup> But, evolution did not stop there. Plaintiffs who were still eager to be in state court found a way around CAFA by filing mass actions in state court with claimant numbers small enough to avoid CAFA's removal provisions.<sup>259</sup> This allowed plaintiffs to migrate their cases back into state court.<sup>260</sup> Undeterred, defendants challenged the personal jurisdiction of certain state courts in nationwide mass actions.<sup>261</sup> The Supreme Court, in *Bristol-Myers Squibb Co. v. Superior Court of California*, determined that in such mass actions, the plaintiffs must show a tight connection between the defendant and each mass action member's claim.<sup>262</sup> *Bristol-Myers* might now result in both adaptation and migration. First, plaintiffs who want to adjudicate

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253. See Frankel, *supra* note 251.

254. See *supra* notes 247-50 and accompanying text.

255. See *supra* notes 247-50 and accompanying text.

256. See PUB. CITIZEN, CLASS ACTION "JUDICIAL HELLHOLES": EMPIRICAL EVIDENCE IS LACKING 2 (2005), <https://www.citizen.org/wp-content/uploads/outlierreport.pdf> [https://perma.cc/J3D7-VVWV].

257. See Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 96-98 (2009).

258. 28 U.S.C. § 1453(b).

259. See Linda S. Mullenix, *The American Class Action Fairness Act and Forum Shopping American-Style*, 31 GENEVA PAPERS ON RISK & INS.—ISSUES & PRAC. 357, 372 (2006).

260. See *id.*

261. See CLEARY GOTTlieb, U.S. SUPREME COURT HOLDS THAT STATE COURTS LACK SPECIFIC PERSONAL JURISDICTION TO ENTERTAIN NON-RESIDENTS' CLAIMS FOR INJURIES NOT CONNECTED TO IN-STATE CONDUCT 2-3 (2017), <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/alert-memos/us-supreme-court-holds-that-state-courts-lack-specific-personal-jurisdiction-to-entertain-6-21-17.pdf> [https://perma.cc/3BA2-RKKQ].

262. 137 S. Ct. 1773, 1781 (2017).



in state court must file individually (or must file significantly smaller class actions).<sup>263</sup> They must adapt. And second, plaintiffs (and defendants) who want the benefit of nationwide aggregate litigation must migrate to federal court where their individual claims might be consolidated for national multidistrict litigation.<sup>264</sup>

Finally, federal executive agencies are witnessing a slower, yet similar migratory and adaption trend. The onset of the administrative state brought with it a large body of disputes.<sup>265</sup> Veterans, consumers, and immigrants rely on administrative agencies for substantive relief; yet because of the lack of funding and resources, many of these individuals' cases are delayed and, if decided, are decided inconsistently and with little hope of appellate oversight.<sup>266</sup> For example, when veterans' individual claims processing suffered incredible delays, a group of veteran plaintiffs brought a class action

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263. See *id.* at 1783.

264. There, of course, the claims may no longer be class actions, but they will still be aggregated to some degree as an MDL. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1256 (2018) ("After the Supreme Court's decision, we predict that cases like *Bristol-Myers* will not be split up and litigated in state courts all over the country, as the Court seemed to contemplate. Instead, they will wind up in MDL, which offers a means of centralizing cases filed around the country before a single federal judge.").

265. See, e.g., Reuel Schiller, *Administrative Law: Historical Origins of America's Administrative Exceptionalism*, 1 JUDGES' BOOK 5, 6-8 (2017).

266. Civil case filings in U.S. courts declined by 5 percent to 277,010 in 2018. *Federal Judicial Caseload Statistics 2018*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> [<https://perma.cc/4T6L-TC2J>]. Administrative cases are filed in far greater numbers. For example, with social security cases, 17,192 new cases were filed during fiscal year 2019 (October 2018 to September 2019). *National New Court Cases and Court Remand Activity FY 2019*, U.S. SOC. SEC. ADMIN., [https://www.ssa.gov/appeals/DataSets/archive/08\\_FY201908\\_September\\_National\\_New\\_Court\\_Cases\\_and\\_Remands.html](https://www.ssa.gov/appeals/DataSets/archive/08_FY201908_September_National_New_Court_Cases_and_Remands.html) [<https://perma.cc/2DX8-8HQ8>]. With immigration cases, there were 504,848 initial filings during fiscal year 2019. *Adjudication Statistics: New Cases and Total Completions*, U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV. (Jan. 23, 2020), <https://www.justice.gov/eoir/page/file/1238741/download> [<https://perma.cc/525V-B237>]. Finally, for veterans' benefits, within the U.S. Court of Appeals for Veterans Claims (claims that were already adjudicated within the Veterans' Affairs system then move here if appealed), 6,802 appeals were filed in the fiscal year 2018 (October 2017 to September 2018). U.S. CT. VET. APP., FISCAL YEAR 2018 ANNUAL REPORT: OCTOBER 1, 2017, TO SEPTEMBER 30, 2018 1 (2018), <https://www.uscourts.cavc.gov/documents/FY2018AnnualReport.pdf> [<https://perma.cc/Y724-QUTH>].

in federal court that argued the delay amounted to a systemic due process violation.<sup>267</sup> The Ninth Circuit held that it had no jurisdiction over the case, so some plaintiffs filed a class action in the Court of Appeals for Veterans Claims.<sup>268</sup> That court determined that it could not hear class actions, but the Federal Circuit reversed, leading the Court of Appeals for Veterans Claims to develop a class action rule.<sup>269</sup> The success of this migration and adaptation by veterans has led commentators like Adam Zimmerman and Michael Sant'Ambrogio to argue that agency litigation could improve if decisionmakers could resolve at least some cases through "agency" class actions.<sup>270</sup> Like private arbitration, some agency litigation has been driven out of federal court and into new fora, and the parties within that new system are adapting by pushing different procedural solutions.<sup>271</sup>

### C. Extinction

Even when migration and adaptation occur, as with evolution, not everyone can make it. The most vulnerable parties with endangered claims are now extinct. Many commentators have noted that the restrictive approach to procedure in federal courts has led to the extinction of claims like civil rights violations, for example.<sup>272</sup> Instead of serving as an environment where important substantive rights can be vindicated, commentators argue that federal courts are instead hostile.<sup>273</sup> For instance, commentators have shown that pleading restrictions under *Twombly* and *Iqbal* have impacted civil

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267. Michael J. Wishnie, "A Boy Gets into Trouble": *Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709, 1755 (2017).

268. *Id.* at 1756.

269. *Id.* ("In a significant decision, the Federal Circuit unanimously reversed, holding that the CAVC has the authority to certify class actions 'under the All Writs Act, other statutory authority, and the Veterans Court's inherent powers.'").

270. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1999 (2012) ("This Article argues that agencies should adopt aggregation procedures, like a civil class action, to resolve common claims raised by large groups of people in administrative courts.").

271. *See id.* at 2029-34.

272. Spencer, *supra* note 95, at 367 ("Greater access to courts naturally increases the volume of litigation the system must handle and presents a greater opportunity to put forth claims asserting seemingly tenuous or disfavored rights.").

273. *See Sant'Ambrogio & Zimmerman, supra* note 270, at 2029-34.

rights claims more than other claims such as contract and tort.<sup>274</sup> A similar trend was observed after the Court handed down its trilogy of summary judgment cases.<sup>275</sup> It might be that some of these claims have migrated to other fora, like state courts, but many have also simply disappeared.

Similarly, the impact of forced arbitration and class action waivers is difficult to measure, but as already discussed, in the wake of *Concepcion*, arbitrations against AT&T precipitously dropped following the Court's decision in that case.<sup>276</sup> The combination of requiring arbitration and prohibiting aggregation appears to have eliminated any incentive for litigants to file their smaller consumer claims. But AT&T is not the only potential defendant to use forced arbitration clauses with class-wide waivers.<sup>277</sup> A March 2015 study by the Consumer Financial Protection Bureau (CFPB) explored the impact of forced arbitration and class action waivers on consumers in the financial product market.<sup>278</sup> The study found that 75 percent of consumers did not even know they were subject to these clauses.<sup>279</sup> Yet, according to the study, tens of millions of consumers are bound by them.<sup>280</sup> The CFPB further found that while 32 million consumers were eligible for relief through consumer class action settlements, considerably fewer consumers actually obtained relief in arbitration.<sup>281</sup> Only 1,060 arbitration disputes were filed by consumers during the study period, and consumers recovered a combined total of \$175,000 in damages and \$190,000 in debt forbearance.<sup>282</sup>

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274. Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1195, 1227 (2014).

275. See Stempel, *supra* note 97, at 107-08.

276. See *supra* notes 249-53 and accompanying text.

277. See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 11-12 (2015), [https://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/HUJ4-NGZ9>].

278. *Id.*

279. Press Release, Consumer Fin. Prot. Bureau, CFPB Study Finds that Arbitration Agreements Limit Relief for Consumers, (Mar. 10, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/> [<https://perma.cc/RHR3-QXU5>].

280. *Id.*

281. *Id.*

282. *Id.*

Contrasted with the potential recovery in class action settlements, the CFPB determined that “arbitration clauses restrict consumer relief in disputes with financial companies by limiting class actions that provide millions of dollars in redress each year.”<sup>283</sup> Stated differently, these clauses drove these consumer claims to extinction. In response, the CFPB adopted a rule that would have eliminated forced arbitration contracts with class action waivers.<sup>284</sup> Yet, the rule never took effect because it was revoked by Congress and the Trump administration in 2017.<sup>285</sup> Assuming the validity of the CFPB study, many of the financial product consumer claims that existed before the proliferation of these arbitration clauses are now no longer viable.

With the use of these clauses now becoming standard, companies like Amazon and Netflix regularly include them as a matter of course in their consumer and employment contracts.<sup>286</sup> This leaves NFL cheerleaders,<sup>287</sup> Applebee’s service workers,<sup>288</sup> and Budget car renters<sup>289</sup> without the ability to proceed as a class in arbitration. Often, the lack of a class remedy means that claims are not brought at all.<sup>290</sup> With the advent of these clauses, it is entirely possible that many more potential plaintiffs’ claims will cease to exist.

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283. *Id.*

284. Arbitration Agreements, 82 Fed. Reg. 33210 (proposed July 19, 2017).

285. Arbitration Agreements, 82 Fed. Reg. 55500 (removed Nov. 22, 2017).

286. 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/VV6W-AGKZ>] (“Signs posted in a theater in Los Angeles and a hamburger joint in East Texas informed guests that, simply by walking in, they had agreed to arbitration. Consumer contracts with Amazon, Netflix, Travelocity, eBay and DirecTV now contain arbitration clauses. Even Ashley Madison, the online site for adulterers, requires that clients agree to them.”).

287. See David Barron, *Ex-Texans Cheerleaders Drop Lawsuit, Opt for Arbitration*, HOUS. CHRON. (July 11, 2018, 9:44 AM), <https://www.chron.com/sports/texans/article/Ex-Texans-cheerleaders-dismiss-lawsuit-opt-for-13064625.php> [<https://perma.cc/45M3-LDCZ>].

288. See Saranac Hale Spencer, *Applebees’ Squelches Class Action Through Arbitration Clauses*, ADR TOOLBOX (Dec. 30, 2013), <http://www.adrtoolbox.com/2013/12/applebees-squelches-class-action-arbitration-clause/> [<https://perma.cc/XS3R-WGLG>].

289. See *Your Guide To Sue Budget Rent A Car In Small Claims Court*, FAIRSHAKE, <https://fairshake.com/budget-rent-a-car/how-to-sue/> [<https://perma.cc/6BXA-CSX4>] (“Your user agreement probably says you can’t sue Budget Rent A Car in any court ... thanks to an arbitration clause.”).

290. See Silver-Greenberg & Gebeloff, *supra* note 286 (“But by assembling records from arbitration firms across the country, The Times found that between 2010 and 2014, only 505 consumers went to arbitration over a dispute of \$2,500 or less.”).

### III. ENDANGERED CLAIMS & PROCEDURAL POLICY

The pattern of adaptation, migration, and extinction raises the question of how policymakers should consider procedural changes in the federal courts. The answer is not altogether clear, but what is missing from the inquiry is the acknowledgment that lawyers and litigants—like living organisms—have a strong will to survive. But will alone is not enough. Parties who have an evolutionary advantage—in most cases, money and power—are better able to adapt or migrate.<sup>291</sup> Those with less power and means may go extinct.<sup>292</sup> In the absence of power to adapt, many claims are simply unenforceable.<sup>293</sup> These are endangered claims.

This Part unpacks what it means to be an endangered claim by addressing how the evolutionary forces of the litigation environment put some claims at higher risk than others. It then explores what policymakers can do to mitigate the loss of meritorious claims. First, by taking an Endangered Claims Act approach to procedural reform, policymakers can better anticipate and understand how procedural changes might impact some claims more than others. Second, efforts to implement an Endangered Claims Act approach will require maximal public monitoring—something that future reforms should contemplate.

#### A. *Endangered Claims*

Litigants adapting is not a recent phenomenon. Attorneys and their clients have always adapted to their environments to survive.<sup>294</sup> The civil litigation system's procedural rules and doctrines are significant aspects of this environment.<sup>295</sup> Thus, it is no wonder

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291. See Burbank, *supra* note 45, at 1442-43.

292. See, e.g., Silver-Greenberg & Gebeloff, *supra* note 286.

293. See *id.*

294. Burbank, *supra* note 45, at 1442 (“It has also long been clear that plaintiffs’ lawyers react to changes that make litigation more difficult in one court system by moving their cases to other court systems, while defense counsel seek forum advantages for their clients by using the tools available to them to affect the site of litigation.”).

295. As discussed in Part I, *supra*, procedural rules and doctrines are not the only internal or external factors that impact modern litigation. Politics, attitudes, and power dynamics, among other things, are significant as well.

that parties and their attorneys are adept at working through—and often around—procedural rules that get in their way. After all, adaptability is a distinct advantage in law and something that will remain constant.

The question this Article asks is how policymakers should weigh this evolution when engaging in procedural reform. Applying a simplified version of Darwin's natural selection to our planet, we can think of Earth as a natural system that rewards those who develop traits to survive. Yet we know that our ecological system does not develop free of outside influence. Human actions shape the environment and, therefore, affect how organisms respond.<sup>296</sup> Our planet and its inhabitants are not evolving in a vacuum. Human interference changes this natural development.<sup>297</sup>

The same is true in our civil justice system. It is not developing in a vacuum either and policymakers should be mindful of that reality. To do so, policymakers must think about what is valued in our civil justice system and how certain trajectories in the evolution discussed so far might endanger those values. For example, if public law cases are increasingly handled in private forced arbitration because the Court has blessed arbitration clauses in consumer and employment contracts,<sup>298</sup> how might that impact broader democratic values of participation and public discourse? Similarly, if only the most elite litigants can impact (and benefit from) civil rule-making,<sup>299</sup> how does that affect the legitimacy of both the rule-making process and the civil justice system?

To unpack this inquiry and problematize the current situation, this Section will discuss two related trends created by the evolution of procedure. First, this evolution—as it works now—benefits those who are already advantaged. This preference leads to questions about the entire system's legitimacy. Second, and relatedly, as more litigants and their attorneys migrate or go extinct, the federal civil justice system becomes increasingly homogeneous. This Section will discuss the negative implications of these two trends.

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296. See Burbank, *supra* note 45, at 1442.

297. Andrew P. Hendry, Kiyoko M. Gotanda & Erik I. Svensson, *Human Influences on Evolution, and the Ecological and Societal Consequences*, 372 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y B (Sept. 27, 2016).

298. See Silver-Greenberg & Geberoff, *supra* note 286.

299. See Burbank, *supra* note 45, at 1442-43.

First, the evolution of procedure currently benefits those who are already the strongest.<sup>300</sup> This evolution echoes a perversion of Herbert Spencer's "survival of the fittest."<sup>301</sup> Survival is the reward in evolutionary biology, but that reward is not just about who is the fastest or the strongest.<sup>302</sup> It is about which individual has the appropriate traits to best survive in a particular environment.<sup>303</sup> Sometimes the trait can be strength, but sometimes it is not. The environment is what sets the stage for which traits are "naturally" selected.<sup>304</sup>

In a previous article, I argued that procedures in the federal justice system tend to benefit the most elite parties and their attorneys.<sup>305</sup> That is because the rules are largely formulated by elite actors who have a certain kind of experience with litigation and who reflect that experience in their policy making.<sup>306</sup> As I argued then, one of the problems with elite-focused policy making is that it tends to underestimate, or miss entirely, how the rules that are adopted might negatively impact claims by non-elite parties.<sup>307</sup> It also makes room for policymakers who are indifferent or hostile to certain claims to create a system that will exterminate those claims altogether.<sup>308</sup> The same is true in our procedural system overall. To put it simply, the current procedural ecosystem rewards power.

Relatedly, where so much power is consolidated into one group without sufficient safeguards, opportunities for corruption increase. Elizabeth Burch's work on repeat players demonstrates that

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300. See Coleman, *supra* note 131, at 1013-14.

301. David Weinstein, *Herbert Spencer*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., 2019) (noting that in 1864 in *Principles of Biology*, Herbert Spencer coined the term "survival of the fittest" to describe Darwin's natural selection theory).

302. Heather Scoville, *Survival of the Fittest vs. Natural Selection*, THOUGHTCO. (Aug. 11, 2019), <https://www.thoughtco.com/survival-of-the-fittest-1224578> [<https://perma.cc/4ZGM-X6GB>].

303. *Id.* ("Individuals that survive aren't always the strongest, fastest, or smartest.... [Darwin] intended 'fittest' to mean the members of the species best suited for the immediate environment, the basis of the idea of natural selection.").

304. See *id.*

305. Coleman, *supra* note 131, at 1008.

306. *Id.* at 1009 ("[T]he entire civil litigation system is captured by lawyers, judges, and parties that, while participating in the rarest litigation, inevitably bend the rules of the civil litigation system toward their best interests.").

307. *Id.* at 1041 ("[P]rocedures designed by the one percent are concerning because they fail to account for how such procedures will affect different kinds of litigation.").

308. *Id.* at 1060-61.

unchecked power—on either the plaintiffs’ or defendants’ side—can create an environment where attorneys might not do what is best for their clients.<sup>309</sup> For example, in the NFL concussion litigation, there have been repeated allegations that the co-lead counsel in the case, while receiving most of the \$100 million in attorneys’ fees, has not put the plaintiffs’ best interests at the forefront.<sup>310</sup> Similar allegations have been made in other MDLs such as the vaginal mesh litigation.<sup>311</sup>

Further, even if these corruptive behaviors are rare, the legitimacy of the entire system is still called into question.<sup>312</sup> If marginalized litigants are unable to participate in a court process or are unable to access the court at all, they will question whether the system can work for them.<sup>313</sup> This perception can have a deteriorating effect on our society because a portion of our population is simply prohibited from accessing justice, and thus, further marginalized.<sup>314</sup>

Finally, along with legitimacy, there are structural problems. Biodiversity is necessary for natural environments to flourish.<sup>315</sup>

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309. Burch, *supra* note 109, at 95-101 (discussing the perverse incentives created by multidistrict litigation and how repeat-player plaintiff and defense attorneys are affected).

310. Dom Cosentino, *The NFL Concussion Settlement Just Keeps Getting Worse And Worse*, DEADSPIN (May 17, 2019, 12:14 PM), <https://deadspin.com/the-nfl-concussion-settlement-just-keeps-getting-worse-1834651117> [<https://perma.cc/75MS-AFAT>].

311. Matthew Goldstein, *Women Who Sued Makers of Pelvic Mesh Are Suing Their Own Lawyers, Too*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/business/pelvic-mesh-surgery-litigation.html> [<https://perma.cc/2JD4-7ZV9>] (noting that “the average \$60,000 settlement—before deducting legal fees and other costs—has prompted frustration” among vaginal mesh plaintiffs).

312. *See, e.g., id.* (demonstrating that the vaginal mesh suits brought attention to “some of the bad practices that can occur in mass tort cases, which sometimes operate like an assembly line, with lawyers rushing to sign up as many clients as they can and plaintiffs never getting a chance to speak to a lawyer”).

313. *See generally* Silver-Greenberg & Gebeloff, *supra* note 286 (describing one small restaurant owner’s disenchantment with the judicial system after bringing a simple antitrust lawsuit against American Express and facing strategized alliance of corporate superpowers).

314. ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 30 (2017) (noting that lawsuits enforcing individual rights “can [also] hold people and organizations accountable, and they can open the flow of information to the public and equalize the playing field in a way that reaffirms our collective commitment to mutual respect”).

315. Julie Shaw, *Why Is Biodiversity Important?* CONSERVATION INT’L (May 17, 2021), <https://www.conservation.org/blog/why-is-biodiversity-important> [<https://perma.cc/57YJ-PRXT>]; *Biodiversity & Human Well-being*, GREENFACTS, <https://www.greenfacts.org/en/biodiversity/l-3/1-define-biodiversity.htm> [<https://perma.cc/RF4M-QWBN>].



The same is true for the civil justice system because homogeneity may very well lead to an unsustainable environment. As particular procedures have taken hold and driven claims extinct or out of the system, we have already seen the nature of our civil justice system shift to one that serves only a chosen few.<sup>316</sup>

The failure to recognize these inherent inequities when adopting procedural reforms is problematic. First, it tips the scale in favor of parties who are already advantaged.<sup>317</sup> Second, it opens the civil justice system up to questions about its legitimacy.<sup>318</sup> And third, it leaves largely unchecked the power that proliferates in litigation.<sup>319</sup> In other words, because of policymakers' current approach to procedural reform, the civil justice system is open to corruptive behaviors and questions about whether it can legitimately resolve grievances when less advantaged parties litigate against bigger fish.

If the evolution of procedure continues as is, these problems will only increase. The parties and lawyers who are surviving are becoming more and more homogeneous over time.<sup>320</sup> And money and power are distinct advantages within litigation.<sup>321</sup> Yet the civil justice system is not some organic system out of our control. It is a system created by human beings, and thus, it is a system that can change what traits are rewarded.

### *B. An Endangered Claims Act Approach*

It is this inequity that should concern policymakers as they attempt to craft optimal procedures. Grievances will persist, claims will arise, and litigants with means will continue to pursue them. This is why who has access to that resolution and where that resolution takes place really matters. While not the exclusive influence, procedure plays a large role in determining both access and location.<sup>322</sup> Thus, if the goal is to design optimal procedure, we must

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316. See Coleman, *supra* note 131, at 1008.

317. See *id.* at 1009.

318. See Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141, 1156 (2015).

319. See Coleman, *supra* note 131, at 1029.

320. See Burch, *supra* note 121, at 86.

321. See Coleman, *supra* note 131, at 1029.

322. See *id.* at 1011.

consider the evolutionary advantages of some parties and their claims.

Currently, policymakers tend to take a reactive approach to procedural reform.<sup>323</sup> For example, the Court changed course on arbitration in response to an impulse that the civil litigation system is inefficient.<sup>324</sup> The civil rulemaking committee similarly engaged in discovery reform by responding to a small number of cases where discovery costs are outsized.<sup>325</sup> This reactivity by policymakers may arguably solve the issue right in front of them, but it does not account for the evolutionary reality of the entire environment in which procedure operates.

Procedural reform should protect claims; thus, we should think of claims as something of an endangered species. To that end, while an act of Congress is unlikely, policymakers should still approach their work in an Endangered Claims Act posture where claim conservation is paramount. Of course, not all claims can be saved. Saving all individuals in a species is not the goal of the Endangered Species Act either.<sup>326</sup> Instead, procedural reform should be undertaken with an appreciation that—to the extent possible—meritorious claims are to be protected.

Darwin's natural selection theory posited that any species with a trait that is most favorable to its current environment has a better chance of surviving and, thus, a better chance of passing that trait on to future generations.<sup>327</sup> He wrote that any "variation[ ] useful to

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323. See, e.g., Levy, *supra* note 23.

324. See *infra* notes 362-66 and accompanying text. The Court expressed similar concerns in its most recent pleading cases. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' ... given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." (citation omitted)); *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) ("We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery.").

325. See *supra* notes 190-205 and accompanying text.

326. See 16 U.S.C. § 1531; see also Michael A. DiSabatino, *Validity, Construction, and Application of Endangered Species Act of 1973 (16 U.S.C.A. §§ 1531-1543)*, 32 AM. L. REPS. FED. 332 (1977). The purpose of the Endangered Species Act of 1973 was to "provide for conservation, protection and propagation of endangered species" in a way that the previous Acts of 1966 and 1969 did not achieve. *Id.* § 2(a). The amended act promulgated an endangered list and broadened the protections for plant and animal species listed as threatened or endangered. *Id.*

327. CHARLES DARWIN, ON THE ORIGIN OF SPECIES 118 (1859).

any organic being” that occurred would give the individuals that had such a variation “the best chance of being preserved in the struggle for life.”<sup>328</sup> A critical question in evolutionary biology is at what level to place the unit of selection.<sup>329</sup> For example, when scientists observed lions and successful hunting patterns, all manner of evolutionary advantages were noted.<sup>330</sup> Lions have muscular jaws, sharp teeth, and speed; yet, some lions still starve to death.<sup>331</sup> What scientists discovered is that starving lions often hunted alone while the lions who hunted in packs thrived.<sup>332</sup> This led some scientists to determine that the unit of selection—the thing that makes the species most successful—is hunting in packs.<sup>333</sup> This trait benefits other levels of the species, of course. From the cells that make up the lion’s mere existence to the influence the pride of lions will have on their environment, the evolutionary impact of the animal cascades.<sup>334</sup> But some surmise that the unit of selection that privileges it all—at least with respect to lions—could very well be the trait of hunting by pack.<sup>335</sup>

As noted earlier, the Court, Congress, and rulemakers treat money and power as the meaningful units of selection in procedural reform. Their reforms reflect that influence.<sup>336</sup> The rulemakers’ discovery reform was driven by the litigants who had the most to gain from restrictive discovery.<sup>337</sup> In addition, courts repeatedly

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328. *Id.*

329. *See id.* at 119-20.

330. BRIAN BERTRAM, PRIDE OF LIONS 117, 119 (1978).

331. *See id.* at 242.

332. *See id.* at 97.

333. *See id.*

334. *Cf.* DARWIN, *supra* note 327, at 119-20.

335. BERTRAM, *supra* note 330, at 119-21; *see also* Bernard J. Crespi, *Selection: Units and Levels*, in ENCYCLOPEDIA OF LIFE SCIENCES 5 (2001), <https://ncbs.res.in/sitefiles/4.Levels-of-Selection.pdf> [<https://perma.cc/37PS-25FC>] (“Social cooperation and altruism within groups has evolved via selection for maximization of inclusive fitness by each individual, whereby within-group individual selfishness is countered more or less successfully by between-group advantages to cooperating. Mechanisms helping to enforce cooperation include recognition of group membership and joint suppression (‘policing’) of selfish individuals.” (citation omitted)).

336. *See* Coleman, *supra* note 131, at 1013-14.

337. *See supra* note 168 and accompanying text.

uphold forced arbitration agreements that often include class action prohibitions.<sup>338</sup> These agreements primarily benefit large corporations and repeat-player defendants.<sup>339</sup> Finally, congressional procedural reforms cater to well-resourced parties as well; for example, defendants who perceived state courts to be unfair class-action fora spearheaded the Class Action Fairness Act.<sup>340</sup>

To achieve claim conservation in the civil justice system, policymakers should consider the claim—not the party’s money and power—as the evolutionary unit of selection. An Endangered Claims Act approach would focus policymakers on substantive claims. While substantive rights are at the heart of the civil justice system, policymakers reward other units of selection, like the loudest lawyers and the most resourced clients.<sup>341</sup> They have focused on the muscular jaw of the lion, if you will, while giving short shrift to the pack-hunting advantage.<sup>342</sup> By refocusing policymakers on how many claims have become endangered, they might step away from the perverted “survival of the fittest” approach they seem to have embraced.<sup>343</sup> Doing so will force policymakers to think about how power operates. They would consider how they should be less concerned with the identity of the party, and more concerned with the impact a particular reform will have on valid substantive claims.

A recent procedural reform—the adoption of proportionality in the discovery rules—provides a ready example of how the unit of selection is the party and her attorney, not the claim.<sup>344</sup> There, the policymakers singularly focused on the most extreme litigation in which discovery costs are quite high.<sup>345</sup> But nowhere in the consideration of proportionality did the rulemakers consider the impact of proportionality on run-of-the-mill litigation.<sup>346</sup> Multiple attorneys testified that the proportionality change would negatively impact

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338. See, e.g., Singh & Manuel, *supra* note 243.

339. See Press Release, *supra* note 279.

340. See 28 U.S.C. § 1453(b).

341. See, e.g., Silver-Greenberg & Gebeloff, *supra* note 286.

342. See BERTRAM, *supra* note 330, at 121.

343. See Weinstein, *supra* note 301.

344. See Thomas & Price, *supra* note 318, at 1149.

345. *Id.*

346. *Id.* at 1155 (arguing that “[f]or many on the Committee, the ‘typical’ litigation experience appears to be the atypical case,” so rulemakers do not consider the impact of rule changes on cases with which they are unfamiliar).

their litigation, but the policymakers generally responded that district court judges could be trusted to manage that difficulty—a judgment that may very well be true in some cases, but not all.<sup>347</sup> Moreover, the Advisory Committee conducted no studies to determine the impact of proportionality on these cases, although there was good evidence that cases in the main otherwise worked just fine.<sup>348</sup>

Using the claim instead of the party as the unit of selection might have led to a different policy choice. Looking specifically at the kinds of cases that many commentators thought would be most affected—employment discrimination, product liability, and civil rights cases, for example—the policymakers might have determined that such a procedural reform should focus on those cases.<sup>349</sup> If proportionality would negatively impact those claims, maybe proportionality should be the exception, not the rule.<sup>350</sup> Stated differently, by looking at the claims impacted by this change and focusing less on the parties who stood to gain the most from the change, policymakers might have flipped the script. They could have left the current rules in place and empowered courts—in their discretion—to require proportionality in the minority of cases where it might make sense.<sup>351</sup> This kind of procedural reform would have given primacy to claims, not parties.

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347. *Id.* at 1156-57 (arguing that the proportionality changes will indeed impact cases such as employment discrimination cases more harshly than others); Hatamyar Moore, *supra* note 193, at 1140 (“The speakers during three days of public hearings before the Advisory Committee were almost perfectly polarized in their reaction to the proposed amendments: plaintiffs’ lawyers and legal academics against, defense lawyers and corporate representatives in favor.” (footnote omitted)).

348. Thomas & Price, *supra* note 318, at 1145-46.

349. *See id.* at 1156-57.

350. *See* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. L. REV. 377, 392 (2010) (“About a half or a third of civil lawsuits (depending on the study) have no discovery, and the cases that utilize discovery frequently do not have more than two or three discovery incidents, perhaps a deposition or two and a set of interrogatories.”). Some preliminary studies have already shown that proportionality limited discovery for some litigants. Gregory L. Waterworth, Comment, *Proportional Discovery’s Anticipated Impact and Unanticipated Obstacle*, 47 U. BALT. L. REV. 139, 163 (2017) (“Although it is incredibly difficult to definitively say, the new Rule 26(b)(1) seems to be narrowing the scope of discovery.”) (citing studies).

351. Of course, arguably, that is how the rule read before the committee amended it. Rule 26(b)(2)(C) gave courts discretion to limit discovery that was disproportionate.

It is not only rulemakers who should be conscious claim conservators, however. The Supreme Court could have taken a different approach in its arbitration jurisprudence by looking at the nature of the claim, not the parties to the arbitration agreement. Setting aside the argument that the Court's arbitration jurisprudence is critically difficult to square with the original text and intent of the Federal Arbitration Act (FAA),<sup>352</sup> the Court could still better account for how procedure evolves by being less concerned with the potential litigants and more concerned with the nature of the claims covered by these agreements. The Court could have done this in *American Express Co. v. Italian Colors Restaurant*.<sup>353</sup> There, the Court determined that even though parties would not bring low-stakes antitrust claims individually, the FAA required enforcement of the class action waiver.<sup>354</sup> The Court held "a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."<sup>355</sup>

The Court could have instead determined that the enforcement of antitrust violations would be thwarted by a class action waiver in a forced arbitration agreement. That decision would have amplified the nature of the claim as the unit of selection and diminished the parties. Instead, the Court appeared to be more concerned that defendants should not be subject to the expense that class arbitration might create.<sup>356</sup> That concern motivated the decision in *Italian Colors*, as it had similarly done in most of the Court's arbitration jurisprudence.<sup>357</sup>

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352. June Lehrman, *On the Threshold of Arbitration: Whether A Court or Arbitrator Decides a Threshold Arbitration Issue Hinges on Whether the Issue Involves A Question of Arbitrability*, L.A. LAW., Dec. 2003, at 20-26, <https://www.lacba.org/docs/default-source/lal-back-issues/2003-issues/december-2003.pdf> [<https://perma.cc/NQN3-MB99>]; Lyra Haas, Note, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. REV. 1419, 1458 (2014).

353. 570 U.S. 228 (2013).

354. *Id.* at 236 ("The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938.").

355. *Id.* at 231.

356. *See id.* at 240-41 (Kagan, J., dissenting). This is a dubious policy reason, but we should set that aside as well. *See id.* at 244-46.

357. *See id.* at 231 (majority opinion).

But imagine if the Court took a different approach to its adjudication. Where evenly resourced parties negotiated arbitration clauses—and even class action waivers—the Court might enforce those agreements.<sup>358</sup> After all, the parties have chosen, with true consent, to opt out of the public civil justice system and into a private one.<sup>359</sup> However, where parties are unevenly resourced and the claim at issue is one of public concern, the Court might not enforce such arbitration agreements.<sup>360</sup> The Court might require that any enforcement be contingent on actual consent, meaning that arbitration clauses in contracts of adhesion would not be enforced. Similarly, the Court might enforce forced arbitration agreements, but not allow class action waivers where the prohibition of a class action would effectively eliminate the parties' ability to adjudicate the claim. For example, in *Italian Colors*, the dissent noted that the inability to arbitrate the claim as a class effectively eliminated the ability to arbitrate the claim at all.<sup>361</sup> In that way, the dissent gave primacy to the claim instead of the powerful parties who created the arbitration clauses in the first place.

Forum selection clauses are no different. Again, imagine a different world. Cases like *The Bremen v. Zapata Off-Shore Co.*, where evenly matched parties negotiated a forum selection clause at arms' length, would be decided similarly.<sup>362</sup> There, the breach of contract claim might be better decided in the designated forum. Moreover, the parties to the agreement both clearly chose that forum and method of resolution.<sup>363</sup> *Bremen*, however, is in direct contrast to *Carnival Cruise Lines, Inc. v. Shute*.<sup>364</sup> In that case, the Court enforced a forum selection clause in a contract of adhesion.<sup>365</sup> The

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358. *See id.* at 244-46 (Kagan, J., dissenting).

359. *See* Lehrman, *supra* note 352, at 20.

360. *See* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991) (Stevens, J., dissenting) (discussing uneven contracting in the forum selection clause context).

361. 570 U.S. at 249 (Kagan, J., dissenting) (“[T]he majority conjures a special reason to exclude ‘class-action waiver[s]’ from the effective-vindication rule’s compass.... [and] the majority notes, [Rule 23] became law only in 1938—decades after the Sherman Act. The majority’s conclusion: If federal law in the interim decades did not eliminate a plaintiff’s rights under that Act, then neither does this agreement.” (citation omitted)).

362. *See* 407 U.S. 1, 17-18 (1972).

363. *See id.*

364. *See* 499 U.S. at 600 (Stevens, J., dissenting).

365. *See id.*

parties did not negotiate at arms' length.<sup>366</sup> In addition, the claim—one of negligence on the part of a common carrier—is one that would be of greater public interest.<sup>367</sup> Individuals are more likely to purchase a ticket and unwittingly agree to such terms.<sup>368</sup> Had the Court prioritized the claim when thinking about this procedural reform, it would have enforced the forum selection clause in *Bremen* and rendered void the same clause in *Carnival Cruise Lines*.

Making the unit of selection in procedural reform the claim—and not the party—would benefit other levels of the civil justice system. Just as lions benefit from pack-hunting individually and as a species, the benefit of claim conservation can inure the entire civil justice system. A claim-based approach to procedural reform would not only better serve substantive claims, it would increase the legitimacy of the civil justice system.<sup>369</sup> Unstacking the deck against less resourced parties would have a functional impact and would benefit the perception of the whole system as well.<sup>370</sup>

Finally, using the claim as the unit of selection could completely change the transsubstantive nature of procedure.<sup>371</sup> As these examples show, if policymakers consider the claim as their primary concern instead of giving primacy to parties, there might be different rules for different claims. And because transsubstantivity works to cloak policymakers' nascent hostility to certain claims, policymakers would be less able to target some claims under the guise of targeting them all.<sup>372</sup> When a procedural change is made, policymakers can say that the reform has only "inadvertently" affected some claims more than others.<sup>373</sup> After all, the change is the same across the board. Increasingly, scholars have seriously questioned the necessity of transsubstantive procedure.<sup>374</sup> Perhaps a

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366. *See id.* at 597.

367. *See id.*

368. *See id.*

369. *See* Resnik, *supra* note 223, at 2835-36 (arguing that fair and open court proceedings create legitimacy).

370. *See id.*

371. *See* Subrin, *supra* note 350, at 392.

372. *See* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 334 (2008) ("[S]ubstantive policy is always a part of procedural justification.").

373. *See id.*

374. *See, e.g., id.* at 324, 333-34 (advocating against transsubstantivity as an "independent value" of the civil rules); Stephen B. Burbank, *The Transformation of American Civil*



consideration of endangered claims provides yet another argument for moving away from that norm.

### *C. Enforcing Claim Conservation*

An Endangered Claims Act approach to procedural reform will only be successful if it can be monitored. Just as the Endangered Species Act depends on an administrative agency and private parties to enforce it, rethinking policymakers' approach to procedural reform similarly requires monitoring. That monitoring requires two related changes in the current approach to procedural reform. First, policymakers must consider which fora are best suited for claim monitoring. Second, policymakers must have better information about what happens to claims once they are subject to procedural reforms.

To best monitor how claims are faring, we must be able to observe them like species in the wild. In the civil justice system, the optimal location for such scrutiny is in the courts.<sup>375</sup> There, the effectiveness of claim conservation can be more easily monitored simply because most of the proceedings are open to the public. This is in stark contrast to arbitration, which is veiled in privacy and without a public monitoring mechanism.<sup>376</sup>

Thus, instead of being agnostic, policymakers should give preference to courts. Claim conservation requires better monitoring and public courts offer that systemic advantage.<sup>377</sup> Courts, while still quite fallible, are required to manage evolutionary power dynamics in public, making their actions both accountable and traceable.<sup>378</sup>

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*Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1940 (1989) (“[U]niformity and trans-substantivity ... are a sham.”); David Marcus, *The Past, Present, and Future of Trans-substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 373 (2010) (discussing the history and precarious existence of transsubstantivity).

375. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 244-46 (2013) (Kagan, J., dissenting) (citing confidentiality provisions as a large part of the problem with arbitration agreements).

376. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 680 (2018) (“While it is important not to overstate the contrast between arbitration and litigation, there is no doubt that much more of the arbitral process is shielded from public view.”); Resnik, *supra* note 223, at 2836.

377. See Resnik, *supra* note 223, at 2836.

378. See *id.*

Individual judges might still favor better-resourced parties, but when they do so, they are being watched.<sup>379</sup>

Public access and accounting on their own are not enough though. In addition to simply having access to how claims are adjudicated, an approach that gives primacy to claims requires better information gathering. Scientists do not merely observe the environment; they gather data. Information is required to determine what is really happening in any particular fora to any particular species. Similarly, here, to better understand what claims are endangered and whether those claims are valid, we must put better information gathering mechanisms in place.

While there is some information currently available about cases filed in federal and state court, that information has limitations.<sup>380</sup> For example, in the federal courts, system-wide data on case disposition is tracked in two ways—pretrial and trial.<sup>381</sup> There is no system-wide tracking of how many cases end in motions to dismiss or motions for summary judgment.<sup>382</sup> That basic lack of information prevents us from understanding how specific procedural reforms are working on the ground. While one-off studies have been done to determine such information, policymakers should not have to rely on academic efforts or requested studies by the Federal Judicial Center to understand basic aspects of how our federal civil justice system works.<sup>383</sup>

If policymakers are armed with basic information about how the civil justice system functions, then they will be better able to foresee how procedural reforms might impact certain claims. This work can happen both before and after reforms are adopted. With better

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379. *See id.*

380. *See* Zambrano, *supra* note 39, at 2110-11.

381. *Table C-4, U.S. District Courts—Civil Cases Terminated by Nature of Suit and Action Taken, During the 12-month Period Ending June 30, 2019*, U.S. CTS. (June 30, 2019), <https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2019/06/30> [<https://perma.cc/AHD8-66RB>] (showing the disposition of cases organized by pretrial and trial).

382. *See id.*

383. For example, the Civil Rulemaking Committee requested a study of motion to dismiss rates following the Court's decision in *Iqbal*. *See* 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*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), <https://www.fjc.gov/sites/default/files/2012/MotionIqbal.pdf> [<https://perma.cc/B996-YNAY>].

information on the front end, policymakers might be able to make better predictions about how a procedural change will fare. Moreover, after a new procedure is adopted, a body like the Federal Judicial Center could track and monitor the impact of that procedural change on claims and share that information.<sup>384</sup> Policymakers would then understand how a change is actually working across all claims.

Of course, there are drawbacks to this approach. First, there is a danger in vesting courts with too much power. This might be especially true in state courts where many judges are elected and where there is more room for influence and corruption.<sup>385</sup> Second, while federal courts have stabilized in terms of workload, state courts have not.<sup>386</sup> State courts are far busier, and the influx of additional claims might so overwhelm those courts that procedural reforms will not make a difference.<sup>387</sup> Third, information is useful, but how the information is used matters more. As we have seen in other contexts such as civil rulemaking, money and power can still greatly influence how policymakers value particular kinds of information. Finally, other interventions might work better. It would be optimal, for example, if litigants had better access to lawyers and legal aid. Yet, because those types of interventions are quite unlikely in the current political climate, keeping claims in the public court system remains the best choice in our current ecosystem.

#### *D. Testing the Hypothesis*

The current global pandemic provides a ready natural experiment for the endangered claims hypothesis. In response to the pandemic, at the end of March 2020, the Judicial Conference of the United States provided temporary approval of video and teleconferencing access in civil and criminal proceedings.<sup>388</sup> Even the Supreme Court moved to livestreamed teleconferencing.<sup>389</sup> These

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384. See *supra* note 381 and accompanying text (describing current tracking activities).

385. See Zambrano, *supra* note 39, at 2146 (discussing scholarship on judicial elections).

386. See *id.* at 2189.

387. See *id.*; see also *supra* notes 247-50 and accompanying text.

388. *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. CTS. (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic> [<https://perma.cc/SMG9-F567>].

389. Press Release, U.S. Sup. Ct., Media Advisory Regarding October Teleconference

changes were made swiftly in response to the pandemic.<sup>390</sup> They were not lobbied for or sought after, but they benefited many.<sup>391</sup> Courts were able to resume many of their day-to-day operations while keeping the judges, court staff, parties, and lawyers safe.<sup>392</sup>

It is worth remembering, though, that advocates had long called for technological advances in court access and that most of the federal bench, led by the Supreme Court, had long resisted such calls.<sup>393</sup> Until now, the biggest technological advance by the federal judiciary had been its electronic case filing system.<sup>394</sup> The advent of remote court hearings in the COVID era has the potential to profoundly increase access to the courts, even after the pandemic ends. While there are downsides to the federal courts' response to the pandemic, such as an unwillingness to hold jury trials remotely and the insistence by some judges on in-person appearances,<sup>395</sup> overall, the response has been swift and inclusive.

Yet, this response to COVID-19 proves the endangered-claims point. The viability of these adaptations depended solely on the interests at stake. When elite judges and lawyers were at risk—as they were when the pandemic began—accommodating changes to court administrative procedures were made. Yet, marginalized individuals—those with disabilities or economic barriers to access—previously made such calls for reform.<sup>396</sup> The system saw fit to

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Argument Audio (Oct. 1, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/ma\\_10-01-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/ma_10-01-20) [https://perma.cc/YW9X-U33X].

390. *Courts Continue to Adapt to Covid-19*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19> [https://perma.cc/VP8P-D5F6].

391. *See id.*

392. *See id.*

393. Ariane de Vogue, *No Cameras, Please: How the Supreme Court Shuns the Spotlight*, CNN (Oct. 6, 2017, 6:16 AM), <https://www.cnn.com/2017/10/06/politics/supreme-court-tv-cameras-transparency/index.html> [https://perma.cc/K2S3-G476].

394. *See* Herbert B. Dixon Jr., *Technology and the Courts: A Futurist View*, AM. BAR ASS'N (July 1, 2013), [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2013/summer/technology\\_and\\_the\\_courts\\_a\\_futurist\\_view/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2013/summer/technology_and_the_courts_a_futurist_view/) [https://perma.cc/A5JM-TJUF].

395. Madison Alder, Jasmine Ye Han & Andrew Wallender, *Federal Courts Respond to Covid-19: Live Map*, BLOOMBERG L. (May 5, 2021, 5:14 PM), <https://news.bloomberglaw.com/us-law-week/arguments-axed-access-limited-courts-respond-to-covid-19-map> [https://perma.cc/9WDE-HT3F].

396. J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2010 (2017) (noting that many state courts have been considering reforms and that “technology-enhanced access is already on the minds of some state court

change only when powerful actors called for it. This response is evidence of the perverse survival-of-the-fittest approach at the heart of endangered claims.

What we now know and can learn from this natural experiment is that it need not be this way. Instead of responding to the most privileged, policymakers should engage in procedural reform by intentionally considering the ecological realities of our civil justice system. That means taking account of how those with the least power might fare.

### CONCLUSION

To sufficiently account for this inequity, policymakers must more seriously consider that in response to procedural change, parties will adapt, migrate, or go extinct. The current system of procedural reform rewards traits like money and power and endangers claims brought by those who lack resources. An optimal approach to reform would function quite differently. Policymakers, instead of taking a distorted survival-of-the-fittest approach, would adopt an Endangered Claims Act approach in which the focus would no longer be on the parties and their attorneys, but on meritorious claims. Claims, like organisms, function differently in variant environments. Thus, in order to understand how claims will fare when a new procedure is adopted, policymakers must have better information, and the claims, to the extent possible, must be observable in our public courts. Like environmental conservation efforts, applying an Endangered Claims Act methodology to procedural reform will return our civil justice system to one where more meritorious claims can flourish.

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reformers who see the part that court-access barriers play in denying people justice, even in more complex cases”).