

# Is the Arc of Procedure Bending Towards Injustice?

Linda S. Mullenix\*

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## ABSTRACT

*A perpetual frustration of procedural scholars is the seeming lack of attention paid by the media and the general academic community to major procedural decisions issued by the Supreme Court. Lacking the sex appeal of Bill of Rights constitutional litigation, procedural decisions induce ennui except among the most committed procedure aficionados. Yet dedicated proceduralists understand that substantive justice is driven and shaped by procedural rulings. While Congress and the Court may fashion substantive rights, these rights remain empty vessels unless sustained by procedural means to enforce those rights. Thus, the social justice narrative that relies completely on substantive legal rulings is incomplete without consideration of the procedural framework that supports or inhibits litigants' abilities to effectuate substantive justice.*

*The 1960s and 70s ushered in an era of progressive procedural decisions that enhanced litigants' ability to enforce an array of substantive rights created as part of the Great Society legislative program. Central to this procedural revolution was*

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\* Morris & Rita Atlas Chair in Advocacy, The University of Texas School of Law.

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*the Court's articulation of a jurisprudence of procedural due process that opened the courthouse doors to the poor, the disenfranchised, the discriminated, and the disfavored. During this golden age of procedural law, the Court attempted to level the playing field between well-heeled corporate litigants and weaker, less powerful members of American society. Procedural law, then, became the handmaiden and a powerful tool in the pursuit of substantive social justice.*

*With the Court's ideological shift to the right during the twenty-first century, legal observers have noted not only the Court's restrictions of substantive rights, but concomitant constraints on procedural law. Surveying the Court's procedural pronouncements of the past two decades, procedure scholars have developed a grim narrative centered on themes of the closing of the courthouse doors and denial of claimants' access to justice. Regarding the arc of procedural justice, academic scholars advance an unrelenting negative portrait of a pro-corporate Court determined to thwart substantive and procedural justice. And certainly, it is easy to assemble an illustrative litany of anti-consumer, anti-plaintiff decisions that support this narrative.*

*Is the arc of procedure increasingly bending towards injustice? Is there an alternative narrative to the prevalent pessimistic story voiced by procedure scholars? This article explores whether, during the period of the dark narrative, the Court's procedural jurisprudence has accomplished anything positive. This article suggests that, in the procedural arena, sometimes the Court gets things right, sometimes the Court remedies procedural problems, and sometimes the Court recognizes its limits and exercises restraint in fashioning procedural rules. Additionally, the Advisory Committee on Civil Rules, whatever its faults and limitations, has fashioned admirable rule changes in this era. Finally, this article suggests that contrary to the Court's most hyperbolic detractors, the sky is not falling in the practical application of many criticized procedural decisions.*

### I. INTRODUCTION

As procedure scholars are well-aware, each year academics, the media, and the public devote an overwhelming amount of attention to the Supreme Court's substantive rulings that affect people's everyday lives.<sup>1</sup> Thus, Court watchers, the media, and various legal commentators chiefly focus their interest on the Court's pronouncements relating to an array of social justice issues, including voting rights, election financing, religious liberty, free speech, privacy concerns, criminal

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1. See, e.g., Adam Liptak & Alicia Parlapiano, *The Supreme Court's Biggest Decisions in 2018*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/18/us/politics/supreme-court-decisions.html> (on file with *The University of the Pacific Law Review*) (reviewing decisions dealing with labor unions, travel bans, pregnancy centers and abortion, digital privacy, internet sales taxes, partisan gerrymandering, voting rights, gay rights and religion, workplace arbitration, sports betting, human rights violations, and immigration). Notably absent was any commentary on procedure appeals decided by the Court.

procedure, and gun rights, among many other substantive matters.<sup>2</sup>

Perhaps because procedural issues have a less sexy appeal—or seem to involve more arcane legal principles—the Court’s procedural pronouncements recede into the back pages of secondary law reviews or are issued by law firms as practice alerts to their clients.<sup>3</sup> Rarely do the Court’s procedural cases garner the publicity devoted to the Court’s prominent social justice issues *du jour*.<sup>4</sup> Procedural issues and the importance of procedural rulings are difficult to explain, which induces a kind of systemic boredom and avoidance among commentators.

Dedicated procedure scholars realize otherwise, understanding the pervasive impact the Court’s procedural rulings—at the threshold—have on the ability of aggrieved individuals or entities to pursue legal relief.<sup>5</sup> In particular, scholars who focus exclusively on the importance of substantive rulings frequently miss or overlook the equally important context afforded by procedural principles. In contrast, procedure scholars appreciate that the procedural framework in which substantive rights are pursued often plays a determinative role in ultimate outcomes.

Against this background, procedure scholars—for the last decade at least—have sounded alarms at the Court’s trend in the procedural arena.<sup>6</sup> This general narrative posits that the Court has retreated from a postwar era of liberalized procedural justice, to an increasingly parsimonious jurisprudence that is calculated to deny access to courts and justice.<sup>7</sup> The general theme of the Court’s direction in the procedural arena is that of closing the courthouse doors.<sup>8</sup> Corollaries to this narrative suggest that the Court’s restrictive procedural pronouncements are part-

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2. See, e.g., Clay Calvert, *Beyond Headlines & Holdings: Exploring Some Less Obvious Ramifications of the Supreme Court’s 2017 Free-Speech Rulings*, 26 WM. & MARY BILL RTS. J. 899 (2018); John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1 (2015).

3. See Hirschfeld Kraemer, *Client Alert: Supreme Court Upholds Class Action Waivers – Again!*, (May 21, 2018), <https://www.hkemploymentlaw.com/news-event/client-alert-supreme-court-upholds-class-action-waivers-again/> (on file with *The University of the Pacific Law Review*); Shumaker, Loop & Kendrick, LLP, *Client Alert: Supreme Court Allows Employers to Prevent Class Action Lawsuits through Properly Drafted Arbitration Agreements*, JDSUPRA (Aug. 8, 2018), <https://www.jdsupra.com/legalnews/client-alert-supreme-court-allows-46631/> (on file with *The University of the Pacific Law Review*).

4. See Liptak & Parlapiano, *supra* note 1.

5. See generally Arthur R. Miller, *What Are Courts For? Have We Forgotten the Procedural Gold Standard?*, 78 LA. L. REV. 739 (2018).

6. See, e.g., Alexander A. Reinert, *The Supreme Court’s Civil Assault on Civil Procedure*, 41 ABA HUMAN RGTS. MAG. 1 (2015) (commenting on the Court’s *Twombly* and *Iqbal* decisions); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice; The Disparate Impact on Civil Rights and Employment Cases*, 158 U. PA. L. REV. 517 (2010); Sarah Staszak, *Procedural Change in the First Ten Years of the Roberts Court*, 38 CARDOZO L. REV. 691 (2016).

7. Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH. L. REV. 587 (2011); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012).

8. ERWIN CHERMERINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (Yale Univ. Press 2017).

and-parcel of the Court's pro-corporate and anti-consumer bias.<sup>9</sup>

The generally negative appreciation of the Court's procedural jurisprudence by academic scholars as well as public interest groups raises the question whether the arc of procedure has indeed been bending towards injustice. The selective focus by commentators on clusters of decisions would seem to support the thesis that the Court has been retreating from broader justice concepts.<sup>10</sup> The question remains, however, whether the Court's efforts in the procedural arena are as grim as scholars and public interest lawyers would have us believe.

This article explores whether the Court has accomplished anything positive in the same period in which the procedural Cassandras would have us believe that the Court's procedural pronouncements have been headed on a consistently downward arc. This article suggests that in the procedural arena, sometimes the Court gets things right, sometimes the Court fixes problems, and sometimes the Court knows its limits in affecting procedure.

The almost exclusive focus by commentators on certain of the Court's procedural rulings to construct a negative narrative, however, also misses the role of procedural rulemaking to likewise affect procedural justice.<sup>11</sup> This article explores the Advisory Committee on Civil Rules' functioning in this period, to canvas both good and negative rulemaking as an important part of the procedural justice narrative. While critics have assailed various rulemaking initiatives as further restrictions on procedural fairness,<sup>12</sup> the Advisory Committee has nonetheless promulgated rule changes (largely unheralded) that have improved the litigation process.

Finally, this article explores whether the Court's procedural rulings have significantly eroded procedural justice by closing the courthouse doors or denying access to justice, as claimed by many prominent academics and other public interest actors. The purpose of this article is not to deny or refute this thesis; certainly, commentators have proven very capable of constructing a disturbing narrative by parsing the Court's procedural decisions.<sup>13</sup>

Instead, this discussion assesses whether the claims made by the alarmed critics of the Court's procedural pronouncements find empirical support in the practical workings of the judicial system. This analysis concludes that while a

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9. See Max N. Helveston, *Judicial Deregulation of Consumer Markets*, 36 CARDOZO L. REV. 1739, 1740 (2015) (noting the pro-business, anti-consumer tilt of the modern Supreme Court); cf. Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997 (2009).

10. MICHAEL VITIELLO, *ANIMATING CIVIL PROCEDURE* (Carolina Acad. Press 2017) (collecting and analyzing negative impacts of major Supreme Court decisions relating to jurisdiction, pleading, discovery, class actions, summary judgment, forum selection clauses, and arbitration agreements).

11. See Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on the Experience*, 60 DUKE L.J. 597 (2010) (suggesting Congress needs to constrain pro-corporate bias of Advisory Committee members in procedural rulemaking).

12. *Id.*; see also 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. CINN. L. REV. 1083 (2015).

13. VITIELLO, *supra* note 10.

facial reading of the Court's rulings might lend itself to dire predictions (and hence repetition of the pervasive negative narrative), in actuality many lower courts either disregard signals from the Court or have found creative ways to evade extreme applications of seemingly harsh rulings. In the end it remains an open question whether, as critics would claim, the arc of procedure is bending towards injustice.

## II. THE NARRATIVE OF RISING PROCEDURAL INJUSTICE

### A. *The Golden Age of Procedural Due Process*

The contemporary pessimistic critique of the Court's procedural pronouncements—the narrative of rising injustice—needs the contrast provided by a former era of procedural progress. This contrast is best supplied by the flurry of Supreme Court decisions in the 1970s that ushered in a golden age of procedural justice. Not coincidentally, many contemporary academic critics of the current Court's procedural parsimony were law students or young attorneys during this era, and therefore were nurtured on the virtuosity of this body of decisional law.<sup>14</sup>

Throughout the 1970s, the Court's procedural due process jurisprudence addressed varying problems involving the taking or forfeiture of a litigant's property without procedural due process, generally defined as requiring notice of the action, an opportunity to be heard at an oral hearing, and the right to confront and cross-examine witnesses. The Court elaborated the contours of the requirements of procedural due process in cases dealing with garnishment of wages,<sup>15</sup> termination of government welfare benefits,<sup>16</sup> seizure of goods or chattels through a writ of replevin,<sup>17</sup> and termination of Social Security benefits.<sup>18</sup> The enduring legacy of the Court's procedural due process decisions extended through the early 1990s, when the Court reaffirmed procedural due process requirements relating to statutory pre-judgment attachment of an individual's property.<sup>19</sup>

Perhaps the Court's two most emblematic procedural due process decisions in the 1970s were *Goldberg v. Kelly*<sup>20</sup> and *Matthews v. Eldridge*.<sup>21</sup> In *Goldberg*, the

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14. *Id.* at 15 (“Many lawyers of my generation who came of age during the heyday of the Warren Court saw federal judges as protectors of liberty and the rights of minorities.”). Justice Warren retired from the Court in 1969, but the impact of the liberal Warren Court continued throughout the 1970s.

15. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (employee's garnishment of wages).

16. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

17. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (seizure or replevin of furniture purchased on installment plan); *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974) (seizure of the plaintiffs' refrigerator, range, stereo, and washing machine for unpaid overdue installment payments).

18. *Matthews v. Eldridge*, 424 U.S. 319 (1976) (termination of social security benefits).

19. *Conn. v. Doehr*, 501 U.S. 1 (1991) (statutory pre-judgment attachment of property and requirement of posting bond violated Fourteenth Amendment due process).

20. 397 U.S. 254.

21. 424 U.S. 319.

Court held that before a recipient could be deprived of statutorily-defined government benefits—in this case public assistance for food, clothing, housing, and medical care—the recipient was entitled to timely, adequate notice of the reasons for termination. The recipient was entitled to a hearing before an impartial tribunal, to a written statement setting forth the evidence supporting the denial of benefits, as well as the legal basis for the decision to terminate benefits. In addition, the claimant had a right to a hearing prior to the termination, along with the ability to confront and cross-examine witnesses. An informal hearing did not satisfy the requirements of procedural due process, thereby violating the Fourteenth Amendment to the Constitution.<sup>22</sup>

In *Matthews*, the Court elaborated on its prior procedural due process jurisprudence, setting forth a three-part framework for tribunals to assess whether a claimant was afforded appropriate due process.<sup>23</sup> First, a court was to assess a claimant's interest in retaining their property and the injury that would accrue as a consequence of a denial of that property. Second, a court needed to evaluate the risk to the claimant of inadequate or improper procedures, and the value of any additional procedures or safeguards to mitigate the risk. Third, the court was to assess the costs of additional procedures and the interests of the government in the efficient adjudication of claims.<sup>24</sup> The Court had introduced a balancing test of interests to the due process calculus.

The Court's liberal procedural due process jurisprudence exemplified the Court's concern for and protection of the poor, the disadvantaged, the underprivileged, and society's have-nots. Liberal academic commentators heralded the *Goldberg* case line.<sup>25</sup> The procedural due process decisions leveled the playing field for ordinary citizens who found themselves pitted against the vast authority of the administrative state and the considerable resources of powerful corporations. However, notwithstanding the Court's 1991 decision in *Connecticut v. Doehr* reaffirming procedural due process principles,<sup>26</sup> the Court's enthusiasm for procedural due process began to wane by the early 1980s.<sup>27</sup> As indicated above, many contemporary law professors, critics of the Court's increasingly restrictive approach to procedural justice, were nurtured on the *Goldberg* case line,<sup>28</sup> which

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22. *Goldberg*, 397 U.S. at 261.

23. *Matthews*, 424 U.S. at 334–35.

24. *Id.*

25. See, e.g., Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805 (1990); Symposium, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective*, 56 BROOK. L. REV. (1990).

26. *Conn. v. Doehr*, 501 U.S. 1 (1991).

27. See generally Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1044 (1984) (“If ever a constitutional doctrine has fallen from grace, it is the doctrine of procedural due process.”).

28. See William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945 (1989) (reviewing ROBERT M. COVER ET AL., PROCEDURE (1988) and commenting on Yale law professors' use of *Goldberg* as the focal point for teaching civil procedure); Linda S. Mullenix, *God, Metaprocedure and Metarealism at Yale*, 87 MICH. L. REV. 1139, 1158 (1989) (reviewing the structural focus on *Goldberg*); Mark V. Tushnet, *Metaprocedure?*, 63 S. CAL.

provides the contrasting context for the Court's increasing tilt towards the ideological right.<sup>29</sup>

*B. The Downward Slide: Closing the Courthouse Doors and Denying Access to Justice*

Undoubtedly, any two randomly-picked procedural scholars most likely would disagree as to precisely—or even approximately—when the Court's procedural jurisprudence began a downward slide towards procedural injustice.<sup>30</sup> However, many procedural scholars might readily agree that in the decade since 2007, the Court has issued a striking series of procedurally restrictive (if not lamentable) decisions.<sup>31</sup> To mix culinary metaphors, the Court has provided so much low-hanging procedural fruit for critics since 2007 that it is like shooting fish in a barrel to support the argument for procedural unfairness.

The contention for the Court's procedural rightward swing focuses primarily on a cluster of procedural matters: personal jurisdiction,<sup>32</sup> pleading,<sup>33</sup> discovery,<sup>34</sup> summary judgment,<sup>35</sup> transfer of venue,<sup>36</sup> class actions,<sup>37</sup> and arbitration and forum selection clauses.<sup>38</sup> For good measure, some critics throw in skepticism concerning the relative futility of legislative initiatives to turn the tide of encroaching procedural injustice.<sup>39</sup> Arguably, these arenas of procedural law embrace the entire terrain of procedural justice; hence the cumulative, grim narrative of the Court's recent procedural jurisprudence.

Within the last decade, the Court has given us an arguable parade of horrors within each subset of procedural concerns. To begin, the woeful litany in the

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L. REV. 161, 164 (1989) (reviewing ROBERT M. COVER ET AL., PROCEDURE (1988) and noting that the casebook begins with and centers on discussion of *Goldberg* as the vehicle to introduce students to the value of procedure).

29. A fair argument could be made that the current law school professoriate that was nurtured during the *Goldberg* glory days have transmitted this procedural justice framework to subsequent generations of their students; this would seem to be especially true for the cohort of Yale law students of Professors Cover, Fiss, and Resnik. *See id.*

30. *See, e.g.,* VITIELLO, *supra* note 10, at 32 (pegging the decline of the Court's personal jurisdiction jurisprudence with *Shaffer v. Heitner*, 433 U.S. 186 (1977) ("In retrospect, *Shaffer v. Heitner* began the process of retrenchment.")) The choice of *Shaffer* as the beginning of the personal jurisdiction slide undoubtedly might inspire a good drinking party debate among procedure colleagues.

31. The year 2007 is a convenient marker in which the Court issued its decision in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (repudiating the liberal pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), setting forth a new "plausible pleading" standard).

32. *See* discussion *infra* notes 40–44.

33. FED. R. CIV. P. 8 (a)(2). *See* discussion *infra* notes 45–52.

34. FED. R. CIV. P. 26–37. *See* discussion *infra* notes 56–60.

35. FED. R. CIV. P. 56. *See* discussion *infra* notes 61–66.

36. 28 U.S.C.A. § 1404(a) (Westlaw through Pub. L. No. 116-5). *See* discussion *infra* notes 67–71.

37. FED. R. CIV. P. 23. *See* discussion *infra* notes 72–79.

38. *See* discussion *infra* notes 80–82.

39. VITIELLO, *supra* note 10, at 200–05.

personal jurisdiction arena is readily caricatured as lacking in empathy towards plaintiff victims. Thus, the Court closed North Carolina’s state courthouse doors to grieving parents whose children were killed by a defective Goodyear Dunlop bus tire in Paris.<sup>40</sup> It closed the doors to the survivors of human rights violations committed during the Dirty War in Argentina by the Argentinian government in coordination with Daimler-Chrysler subsidiaries.<sup>41</sup> And perhaps most infamously, denied Robert Nicastro of New Jersey any forum at all in the entire United States to sue to recover for his four severed fingers as a result of an accident with a U.K.-manufactured metal shearing machine.<sup>42</sup> Commentators have roundly criticized the Court’s evolving personal jurisdiction jurisprudence—derived from this trilogy of cases—for the doctrinal incoherence of the Court’s concepts of general and specific jurisdiction.<sup>43</sup> More importantly, critics have argued that “the Court’s new personal jurisdiction case law narrows access to court and may leave a plaintiff without a convenient forum.”<sup>44</sup>

In the pleading arena, the Court in 2007 and 2009 issued its infamous twin decisions in *Bell Atlantic Corp. v. Twombly*<sup>45</sup> and *Ashcroft v. Iqbal*,<sup>46</sup> stunning the practicing bar and the legal academy. In *Twombly*, the Court repudiated the longstanding “no set of facts” pleading rule from *Conley v. Gibson*,<sup>47</sup> ending the fifty-year reign of liberal pleading in federal courts. The Court replaced the *Conley* rule with a new “plausibility standard.”<sup>48</sup> In *Iqbal*, the Court reaffirmed the plausibility standard, indicating that the new rule was not restricted to antitrust litigation but applied to pleading in all cases.<sup>49</sup> As a consequence of the

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40. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) (narrowing the scope of general jurisdiction); see VITIELLO, *supra* note 10, at 47–49. See generally, Collyn A. Peddie, *Mi Casa Es Tu Casa: Enterprise Theory and General Jurisdiction Over Foreign Corporations After Goodyear Dunlop Tires Operations S.A. v. Brown*, 63 S.C. L. REV. 697 (2012).

41. Daimler AG v. Bauman, 571 U.S. 117 (2014) (restricting further application of general jurisdiction set forth in *Goodyear*); see VITIELLO, *supra* note 10, at 49–53; see generally Linda S. Mullenix, *Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts*, 45 U. TOL. L. REV. 705 (2014).

42. J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873 (2011); see VITIELLO, *supra* note 10, at 58–61. See generally Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245 (2011).

43. See generally Borchers, *supra* note 42; Judy M. Cornett & Michael H. Hoffheimer, *Good-bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101 (2015); Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court’s New Personal Jurisdiction Case Law*, U.C. DAVIS J. INT’L LAW & POL’Y 209 (2015).

44. VITIELLO, *supra* note 10, at 64. See generally *id.* at 67–71 (critiquing the Court’s right-wing Justices with regard to these opinions); *id.* at 70–71 (“For now, the Court’s new personal jurisdiction rules . . . favor defendants, especially large corporations . . . A great deal is at stake: a person may have a host of substantive rights, but absent a convenient forum, those rights are meaningless . . . But the Court can undercut those rights by shutting the courthouse door.”).

45. 550 U.S. 544 (2007).

46. 556 U.S. 662 (2009).

47. 355 U.S. 41, 45–46 (1957).

48. *Twombly*, 550 U.S. at 555–56.

49. *Iqbal*, 556 U.S. at 679.



*Twombly/Iqbal* decisions, the Advisory Committee abrogated Federal Rule of Civil Procedure 84, which provided that pleading through the use of illustrative forms created a presumptively sufficient complaint.<sup>50</sup> The reaction of the bar and the legal academy to the *Twombly/Iqbal* decisions was swift and overwhelmingly negative,<sup>51</sup> centering on the twin themes of “closing the courthouse doors to plaintiffs” and a consequent denial of access to justice.<sup>52</sup>

A third chapter in the regressive procedural story rests not on Supreme Court decisions but rather on the actions by the Advisory Committee.<sup>53</sup> This narrative focuses on the purported pro-corporate composition of the Committee<sup>54</sup> as well as on the purported efforts of it to refashion the discovery rules to favor corporate interests.<sup>55</sup> In this telling, the Advisory Committee’s efforts in the past decade largely have been devoted to curbing the pre-existing liberal discovery regime contemplated by the original rules’ drafters,<sup>56</sup> and narrowing the rules to address corporate objections to plaintiffs’ discovery abuses.<sup>57</sup> The emblematic initiative of this critique was the Advisory Committee’s 2015 enactment of the “proportionality

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50. FED. R. CIV. P. 84. See generally Justin Olson, Note, *If It (Ain't) Broke, Don't Fix It*; *Twombly, Iqbal, Rule 84 and the Forms*, 39 SEATTLE I.L. REV. 1375 (2016).

51. See, e.g., Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1811–12 (2008) (“Thus, when the Supreme Court recently spoke on this issue in the case of *Bell Atlantic Corp. v. Twombly*, the American bar rightfully took notice.” (footnote omitted)); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474 (2010) (“Scholarly reaction to *Twombly* has been largely critical. . . .”); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1063 (2009) (“No decision in recent memory has generated as much interest and is of such potentially sweeping scope as the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*.”). There is an enormous academic literature discussing the *Twombly/Iqbal* decisions and their impact on federal pleading and access to justice.

52. VITIELLO, *supra* note 10, at 102 (“Not only are lower courts uncertain how to apply the new pleading standards, but those standards have produced winners and losers. *Twombly* and *Iqbal* are not value-neutral. Instead, typically, increasing the pleading bar favors the powerful over the less powerful. Data suggest that the weight of those cases falls most frequently on plaintiffs in civil rights cases, such as employment and housing discrimination cases and in cases involving disabilities.”).

53. Although the Supreme Court does not formulate rule changes, the Court does have a role in the rulemaking process and ultimately must sign on to proposed changes proposed by the Advisory Committee. See *id.* at 128.

54. See, e.g., Brooke D. Coleman, *#Sowhitemale: Federal Civil Rulemaking*, 113 NW. U. L. REV. ONLINE 52 (2018); see also Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1115–19 (2016); 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. CINN. L. REV. 1083 (2015); VITIELLO, *supra* note 10, at 128.

55. VITIELLO, *supra* note 10, at 128–29 (“Beyond the composition of the Advisory Committee is the reality that reforming the federal rules, especially those governing liberal discovery, has long been part of the Federalist Society’s agenda. The reasons that its members favor those reforms are not hard to find; increasingly, it has coordinated its activities with a host of defense-oriented groups, including groups that favor tort reform. The net effect . . . is that such reforms close the courthouse door on many injured parties.”).

56. Miller, *supra* note 5, at 768.

57. See David Crump, *Goodbye, “Reasonably Calculated,” You’re Replaced by “Proportionality”*: *Deciphering the New Federal Scope of Discovery*, 23 GEO. MASON L. REV. 1093, 1094 (2016); Craig B. Shaffer, *The “Burdens” of Applying Proportionality*, 16 SEDONA CONF. J. 55 (2015) (discussing discovery abuse).

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rules,”<sup>58</sup> which require courts to balance the proportional costs and benefits of discovery requests to parties on either side of a dispute.<sup>59</sup> Similar to the reactions to the new pleading standards, the plaintiffs’ bar and liberal academics attacked the Advisory Committee’s efforts regarding discovery rules as pro-defendant, effectively denying plaintiffs’ access to justice as a consequence of limited access to information.<sup>60</sup>

Likewise, the Court’s efforts since 1986 to increase judicial deployment of summary judgment has contributed to the negative procedural chronicle.<sup>61</sup> The summary judgment rule confers on judges the ability to dismiss a lawsuit prior to trial,<sup>62</sup> effectively “taking the case away from the jury.” Throughout history, judges largely disfavored summary judgment motions and were inclined not to grant them. A prevailing interpretation of the Court’s 1986 summary judgment trilogy was that the Court was signaling lower court judges to use summary judgment practice more robustly (to the detriment of plaintiffs),<sup>63</sup> even though in the intervening three decades this has not turned out to be true.<sup>64</sup> This anti-plaintiff refrain regarding the Court’s summary judgment jurisprudence was amplified by the Court’s 2007 decision in *Scott v. Harris*,<sup>65</sup> which critics quickly seized upon as unfairly vesting too much unbridled discretion in judges to evaluate evidence—the proper function of a jury.<sup>66</sup>

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58. See FED. R. CIV. P. 26(b)(1), (b)(2)(C)(iii). See generally Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647 (2015) (discussing the revision to the rules); Gregory L. Waterworth, Comment, *Proportionality Discovery’s Anticipated Impact and Unanticipated Obstacle*, 47 U. BALT. L. REV. 139 (2017).

59. See generally Matthew T. Ciulla, Note, *A Disproportionate Response? The 2015 Proportionality Amendments to Federal Rule of Civil Procedure 26(b)*, 92 NOTRE DAME L. REV. 1395 (2017) (describing the background and nature of rulemaking on proportionality).

60. VITIELLO, *supra* note 10; see also *Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?: Hearing Before the Subcomm. on Bankr. & the Courts of the S. Comm. on the Judiciary*, 113th Cong. 7 (2013), available at <https://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg89395.pdf>. (on file with *The University of the Pacific Law Review*).

61. See *Celotex v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (collectively known as the “summary judgment trilogy”).

62. FED. R. CIV. P. 56.

63. See generally D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court’s New Approach to Summary Judgment*, 54 BROOK. L. REV. 35 (1988) (highlighting the pro-defendant thrust of the Court’s 1986 summary judgment decisions).

64. See Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561 (2012) (presenting an empirical study demonstrating the limited impact of the summary judgment trilogy on rates at which judges granted summary judgment).

65. 550 U.S. 372 (2007).

66. See George M. Dery III, *The Needless “Slosh” Through the “Morass of Reasonableness”: The Supreme Court’s Usurpation of Fact Finding Powers in Assessing Reasonable Force in Scott v. Harris*, 18 GEO. MASON U. CIV. RTS. L.J. 417 (2008); Tobias Barrington Wolff, *Scott v. Harris and the Future of Summary Judgment*, 14 NEV. L.J. 1351 (2015); see also VITIELLO, *supra* note 10, at 145, 153 (“A jury’s determination is superior to a judge’s assessment of negligence because it reflects community values. Viewed in that light, *Scott*

Even the Court's somewhat arcane decisions relating to transfer of venue and forum selection have been co-opted into the critics' grim procedural plot line, in which decisions are construed as yet further evidence of the right-wing Court's anti-plaintiff, pro-corporate bias.<sup>67</sup> The two emblematic cases illustrating the Court's decline into litigant partiality are *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*<sup>68</sup> and *Carnival Cruise Lines v. Shute*.<sup>69</sup> Both cases required the Court to determine the validity and enforceability of contractual forum selection clauses, which the Court proceeded to uphold, thereby depriving the plaintiffs' choice of forum in favor of the defendants' pre-chosen venue for adjudication.<sup>70</sup> However, these cases do not fit comfortably into the "closing the courthouse doors" narrative (because the doors are open elsewhere); instead, the decisions are conflated into the larger "anti-plaintiff denial of justice" theme.<sup>71</sup>

Rounding out the portrait of declining procedural justice, commentators have also fixated on the Court's recent class action jurisprudence. Indeed, since 2010, the Court has shown a particular interest in class litigation, deciding 20 appeals relating to Rule 23.<sup>72</sup> Class action litigation especially engages procedural justice

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begins to look more like an intrusion into the realm of a different governmental actor . . . [H]ere again the Court is closing the courthouse doors to injured plaintiffs.").

67. VITIELLO, *supra* note 10, at 161–62 (criticizing the Court's decision as enhancing the ability of defendants to exert control over the chosen litigation forum, and impairing the rights of injured plaintiffs to their preferred choice of forum).

68. 571 U.S. 49 (2013).

69. 499 U.S. 585 (1991).

70. *Id.*; *Atlantic Marine*, 571 U.S. 49.

71. Both decisions in *Carnival Cruise Lines* and *Atlantic Marine* have inspired a raft of negative criticism. See generally Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines v. Shute*, 12 NEV. L.J. 553 (2012); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in Federal Courts*, 82 TUL. L. REV. 973 (2008); Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 370 (1992); Adam Steinman, *Atlantic Marine Through the Lens of Fire*, 66 HASTINGS L.J. 795 (2015).

72. See FED. R. CIV. P. 23; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Fair Labor Standards Act employment case; contractual class action waiver); *China Agritech Inc. v. Resh*, 138 S. Ct. 1800 (2018) (class action tolling); *Cal. Pub. Employees v. ANZ Sec.*, 137 S. Ct. 2042 (2017) (shareholder derivative suit); *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (consumer credit class action); *Menominee Indian Tribe v. U.S.*, 136 S. Ct. 750 (2016) (Native Americans); *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016) (small claims consumer class action); *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (employment/labor class action); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (arbitration class action waiver); *Dart Cherokee Basin v. Owens*, 135 S. Ct. 547 (2014) (interpretation of CAFA removal); *Halliburton Co. v. Erica Fund*, 573 U.S. 258 (2014) (shareholder derivative litigation; fraud on the market presumption); *Oxford Health Plans v. Sutter*, 569 U.S. 564 (2013) (arbitration; class action waiver); *Amgen Inc. v. Conn. Retirement*, 568 U.S. 455 (2013) (shareholder derivative class action); *Comcast v. Behrend*, 569 U.S. 27 (2013) (antitrust class action); *Am. Express v. Italian Colors Rest.*, 570 U.S. 228 (2013) (arbitration; class action waivers); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011) (parallel federal-state class litigation); *Erica P. Fund v. Halliburton*, 563 U.S. 804 (2011) (shareholder derivative suit; fraud on the market presumption); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (employment class action); *AT&T Mobility v. Conception*, 563 U.S. 333 (2011) (arbitration; class action waivers); *Stolt-Nielsen v. Animal*

advocates, precisely because class lawsuits aggregate thousands of claimants seeking remediation.<sup>73</sup> Thus, any judicially-imposed restrictions on the ability to seek class-wide relief exponentially magnifies procedural injustice, involving not simply an individual litigant, but large numbers of injured plaintiffs.<sup>74</sup>

Critics have especially focused on the Court's 2011 opinion in *Wal-Mart Stores, Inc. v. Dukes*<sup>75</sup> as illustrative of the Court's imposition of limitations on the claimants' ability to accomplish class certification.<sup>76</sup> In *Wal-Mart*, the Court reversed a Ninth Circuit decision upholding certification of a nationwide class of female Wal-Mart employees alleging pay and promotion discrimination.<sup>77</sup> In so doing, the Court's majority reinterpreted Rule 23(a)(2)'s commonality requirement, repudiating the plaintiffs' attempt to satisfy that requirement through expert statistical testimony.<sup>78</sup> Detractors skewered these rulings as the Court's attempt to impose a Rule 23(b)(3) predominance requirement into the threshold commonality inquiry, thereby setting such a high bar at the outset of litigation to prevent a plaintiff's class from getting past class certification.<sup>79</sup>

Finally, in the class action arena, critics also focused on the Court's repeated affirmation of class action waivers included in mandatory arbitration clauses. Similar to views concerning the Court's general class action jurisprudence, the Court's rulings on class action waivers are construed as part of the Court's pro-corporate, anti-plaintiff bias.<sup>80</sup> Class action waivers require individuals who are

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Feeds, 559 U.S. 662 (2010) (arbitration; class action waivers); and *Shady Grove Orthopedic v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (breach of contract action; narrow New York state class action rule).

73. VITIELLO, *supra* note 10, at 187 ("Class actions have been a powerful device for enforcing an array of state and federal laws. Public agencies may lack resources to pursue those violations. Even in cases where individual plaintiffs lack sufficient injuries to bring suit, class plaintiffs become private attorneys general . . . the Supreme Court has curtailed the availability of class action suits in a variety of settings.")

74. *Id.* at 164 ("[T]he Court's important limitations fit into the overall pattern of this book: too often, the Court is closing the courthouse door in ways that favor powerful corporate interests over the interests of injured plaintiffs."); *id.* at 179 ("[T]he right wing of the Court has eroded class actions in several important rulings.")

75. *Wal-Mart*, 564 U.S. at 356 (reinterpreting the commonality requirement for class certification pursuant to Fed. R. Civ. P. 23, and reversing class certification of employment class pursuant to Fed. R. Civ. P. 23(b)(2)).

76. See, e.g., Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U.L. REV. COLLOQUY 34, 37 (2011) ("The *Dukes* class certification standard jeopardizes potentially meritorious challenges to systemic discrimination. By redefining the class certification requirements for employment discrimination cases . . . the Court compromises employees' access to justice."); Elizabeth Tippet, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOF. LABOR & EMP. J. 433, 434–35 (2012) (describing *Dukes* as a "setback to the plaintiff's bar" and "problematic for those who view subjective decision-making as the prime suspect for continued discrimination in the workplace").

77. *Wal-Mart*, 564 at 345–46.

78. *Id.* at 356.

79. VITIELLO, *supra* note 10, at 183.

80. VITIELLO, *supra* note 10, at 184 (commenting on *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*: "[T]he right wing of the Court read the Federal Arbitration Act broadly to prevent plaintiffs from seeking an effective remedy for their claims. As with other procedural rulings, the Court's arbitration decisions favor corporate America over injured plaintiffs."); see also Nan Aron, *AT&T Mobility v. Concepcion: The Corporate Court Does It Again*, HUFFINGTON POST (Apr. 29, 2011),

subject to arbitration clauses to pursue arbitration relief individually, and concomitantly prohibit class-wide arbitration of disputes. Since 2010, the Court has upheld mandatory arbitration clauses and class action waivers in five decisions.<sup>81</sup> As with various other procedural rulings, social justice advocates have condemned the Court's recent decisions relating to mandatory arbitration clauses that include class action waivers.<sup>82</sup>

### III. THE PROCEDURAL JUSTICE FILES: ALTERNATIVE STORIES

The discouraging procedural justice narrative—with its twin themes of closing courthouse doors and denying of access to justice—is indeed compelling. However, upon examination one might discern that critics base this chronicle on approximately a dozen notorious Supreme Court decisions, derided for the decisions' assumed negative impact on potential plaintiffs. The framework for this narrative assumes a partisan Court, with right-wing Justices reflexively rendering pro-corporate, anti-plaintiff procedural opinions. What the narrative lacks in nuance, it makes up for in righteous indignation. This saga of evolving procedural injustice offends us not only for the Court's unseemly partisan nature, but because it transgresses the promise of the Federal Rules of Civil Procedure: that the transsubstantive rules are intended to be neutral in text and application.

Has a partisan Court abandoned the fundamental principles of procedural justice? Is the arc of procedure bending towards injustice? The dominant negative narrative—prevalent among public interest attorneys and throughout the legal academy—tells only a partial story of the Court's procedural rulings. In the procedural arena, sometimes the Court gets it right, and sometimes the Court fixes procedural problems in a non-partisan fashion. In addition, the Court often recognizes the limits of its judicial powers to rewrite procedural law, deferring instead to co-equal branches of government to remedy procedural unfairness. The Advisory Committee on Civil Rules, for many years, has quietly effectuated rule amendments that have improved the adjudicatory process for all litigants. Finally, the Court's detractors may have overstated the presumed pro-corporate, anti-plaintiff bias of the Court's procedural decisions. An examination of the actual impact of many of the Court's reviled procedural decisions reveals a somewhat

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[http://www.huffingtonpost.com/nan-aron/att-mobility-v-concepcion\\_b\\_855161.html](http://www.huffingtonpost.com/nan-aron/att-mobility-v-concepcion_b_855161.html) (on file with *The University of the Pacific Law Review*); Andrew Cohen, *No Class: The Supreme Court's Arbitration Ruling*, THE ATLANTIC (Apr. 27, 2011), <http://www.theatlantic.com/national/archive/2011/04/no-class-the-supreme-courts-arbitration-ruling/237967> (on file with *The University of the Pacific Law Review*).

81. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Oxford Health Plans v. Sutter*, 569 U.S. 564 (2013); *Am. Express v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility v. Conception*, 563 U.S. 333 (2011).

82. See Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 317 (2012); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015) (commenting on the anti-consumer impact of *AT&T Mobility* and *Italian Colors Restaurant*); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Conception Impedes Access to Justice*, 90 OR. L. REV. 703 (2012) (same).

different story than the critics' portended impact.

A. *The Court Sometimes Gets It Right*

It is easy to caricature the current Court as a defendant-favoring institution that has been rewriting procedural law to favor corporate interests.<sup>83</sup> However, in the procedural arena, the Court sometimes effectively corrects problematic precedents, contributing to an improved procedural jurisprudence that is party-neutral in its implications. In short, the Court sometimes gets its procedural law right, to the benefit of all parties and the justice system. Four landmark Supreme Court decisions illustrate this point. Although two of these fall outside the recent-decade framework, these decisions nonetheless elucidate how the Court can fundamentally reconsider longstanding precedent in order to provide a more equitable system of procedural justice.

The Court's 1938 decision in *Erie Railroad v. Tompkins* amply illustrates how the Court sometimes can reverse longstanding jurisprudence in an auspicious way.<sup>84</sup> Famously, the Court in *Erie* repudiated the century-old concept of general federal common law, overturning the Court's decision in *Swift v. Tyson*,<sup>85</sup> which had authorized such general federal common law. As the Court noted in *Erie*, the inconsistent and varying ways in which federal judges had arrogated to themselves interpretations of general federal common law had led to inconsistent (if not unfair) mischief.<sup>86</sup> As a purely philosophical matter, the Court agreed with Justice Holmes's suggestion that general federal common law did not consist of some "brooding omnipresence in the sky."<sup>87</sup> Thus, the Court in 1938 got it right when it decided to jettison judicial reliance on judges' abstract and varying notions of general federal common law, and to declare that there is no general federal common law.<sup>88</sup>

In particular, the Court also—in abandoning the era of *Swift v. Tyson*—struck a blow in favor of procedural fairness by rejecting the partisan gamesmanship that *Swift* had encouraged.<sup>89</sup> Thus, the Court identified a core evil of the *Swift* era as the ability of litigants to forum-shop for a better choice of law by simply crossing state lines and re-incorporating in another forum.<sup>90</sup> The Court eschewed such

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83. The caricature verges on implying a right-wing conspiracy to accomplish this goal.

84. 304 U.S. 64 (1938).

85. 41 U.S. 1 (1842).

86. *Erie*, 304 U.S. at 73–74 (noting widespread criticism of the doctrine).

87. *Id.* at 80 (citing Holmes's decisions in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370–37–72 (1910) and *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 535–36 (1928)).

88. *Id.* at 78.

89. *Id.* at 74–75.

90. *Id.* at 76–77.

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual

tactics, holding that under the newly-articulated *Erie* doctrine, litigants could not game the system in a search for a more favorable outcome.<sup>91</sup>

Clearly, the decision inspired manifold subsequent interpretative problems centering on legalistic distinctions between substantive and procedural law.<sup>92</sup> But in the main, the Court got it right to repudiate the longstanding, malleable reign of general federal common law, and to attempt to cabin litigant gamesmanship—a repeated theme in the Court’s jurisprudence.<sup>93</sup>

A second historical example where the Court got it right was in its 1977 decision in *Shaffer v. Heitner*,<sup>94</sup> which effectively ended the doctrinal confusion surrounding standards for personal jurisdiction based on *in rem*, *quasi in rem*, and *in personam* jurisdiction.<sup>95</sup> Similar to the Court’s *Erie* decision, the majority’s *Shaffer* opinion cleared away the cobwebs surrounding approximately 100 years of categorical exegesis.<sup>96</sup> In *Shaffer*, the Court simply (and clearly) held that henceforth all assertions of personal jurisdiction—be they *quasi in rem* or *in personam*—were to be based on the same due process standards mandated by the Court’s famous opinion in *International Shoe Co. v. Washington*.<sup>97</sup> Thus, in one fell swoop, the Court simplified the analytical task of evaluating personal jurisdiction based on *quasi in rem* theories, effectively conflating that ancient

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citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the state could avail itself of the federal rule by reincorporating under the laws of another state, as was done in the Taxicab Case.

*Id.*

91. See *supra* notes 89–90.

92. See, e.g., Lawrence Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

*Erie* and its progeny created a task for courts and commentators, establishing criteria that sort substance from procedure. Every lawyer educated in American procedure knows that this task created an enduring problem for judges and lawyers. Justice Reed’s concurring opinion in *Erie* stated that problem succinctly: “The line between procedure and substance is hazy. . . .” Hazy, indeed, as generations of American law students have learned to their chagrin. More than sixty years of *Erie* jurisprudence has yet to result in any clear consensus on the distinction between substance and procedure.

*Id.*

93. See Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 380 (2017).

Two recent opinions by former Civil Procedure Professor, now Supreme Court Justice, Ginsburg illustrate the Court’s intolerance for perceived gamesmanship on both sides. On the one hand, the Court has rejected defendants’ manufacturing mootness of putative class actions by paying off named plaintiffs’ individual claims. On the other hand, the Court has rejected plaintiffs’ circumventing the discretionary interlocutory appellate process for certification denials by voluntarily dismissing their individual cases. The Court’s rulings have identified the envelope’s edge as both the defense and plaintiffs’ bar attempt strategies that promote the interests of their client base.

*Id.*

94. 433 U.S. 186 (1977).

95. *Id.* at 206.

96. *Id.* at 196–207.

97. *Id.* at 212.

distinction into *in personam* jurisdictional bases. The Court got it right when it noted the validity of this approach, asserting that *quasi in rem* jurisdiction was, in the Court's view, merely an elliptical way of asserting a person's interest in a thing.<sup>98</sup>

*Erie* and *Shaffer* represent two landmark decisions from an earlier era where the Court engaged in significant course-correction. Within the last decade the Court has also issued at least two landmark decisions where the Court got it right, either rectifying prior doctrine or saving federal procedure generally.

Perhaps the most controversial example of doctrinal revision is the Court's 2007 decision in *Bell Atlantic Co. v. Twombly*,<sup>99</sup> a decision largely reviled for its presumed anti-plaintiff bias.<sup>100</sup> In *Twombly* (and its twin decision *Iqbal*<sup>101</sup>), the Court set forth a new federal pleading doctrine commonly known as the "plausibility standard."<sup>102</sup> In articulating this new pleading standard, the Court repudiated the historic *Conley* "no set of facts" standard upon which a pleader could obtain relief.<sup>103</sup> For nearly 70 years, federal and state courts applied the *Conley* "no set of facts" standard. In *Twombly*, however, the Court rejected this formulation as unclear, unworkable, and unjust.<sup>104</sup> The Court pointed out that the "no set of facts" standard had been difficult to apply and widely criticized.<sup>105</sup> Consequently, very elastic judicial interpretations of the *Conley* rule had resulted in allowing virtually every federally-pleaded complaint to pass muster in federal courts.

Although, as Justice Ginsburg noted in dissent,<sup>106</sup> the *Conley* decision deserved a more dignified interment after 70 years, the Court got it right in repudiating the "no set of facts" standard. As any civil procedure professor might attest, multiple meanings might be assigned to that problematic language. Thus, in many cases and by default, courts consistently have permitted all federal complaints to proceed on the merits. This is not to suggest that the new *Twombly* plausibility standard is to be lauded for greater precision than the *Conley* standard it replaced. This is merely to suggest that the Court got it right to retire the "no set of facts" standard. Moreover, it remains to be seen the extent to which the new

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98. *Id.* at 207.

99. 550 U.S. 544 (2007).

100. See, e.g., Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014) (arguing that the Court's *Twombly-Iqbal* pleading decisions had an anti-plaintiff impact in federal courts); Lonny S. Hoffman, *Burn Up the Chaff With the Unquenchable Fire: What Two Doctrinal Decisions Can Teach Us About Judicial Power Over Pleadings*, 88 B.U.L. REV. 1217, 1258 (2008) (noting the anti-plaintiff influence emanating from the Court's *Twombly* decision).

101. 556 U.S. 662 (2009).

102. *Twombly*, 550 U.S. at 556.

103. *Id.* at 561–64.

104. *Id.* at 562–63.

105. *Id.*

106. *Id.* at 578 (Ginsburg, J., dissenting) ("If *Conley*'s 'no set of facts' language is to be interred, let it not be without a eulogy.")



*Twombly/Iqbal* pleading standards have denied plaintiffs access to court—as critics of these decisions argue.<sup>107</sup> This is an empirical question and early studies suggest a mixed portrait of the effects of the *Twombly-Iqbal* pleading decisions.<sup>108</sup>

Finally, in 2010 the Court got it right in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*<sup>109</sup> To be sure, the Court’s multiple opinions in *Shady Grove*—lacking a majority decision—make parsing this appeal difficult.<sup>110</sup> Nonetheless, the nub of the problem presented in *Shady Grove* centered on whether the Court was going to permit a more restrictive New York state court class action rule to trump Federal Rule of Civil Procedure 23.<sup>111</sup> The plurality opinion, joined by others, affirmatively and correctly decided that the federal class action rule prevailed.<sup>112</sup> Thus, the Court effectively saved federal procedure from incursions by less favorable state court procedural rules.

The Court’s *Shady Grove* decision also may rightly be viewed as a plaintiff-favoring result. In federal court, the defendant urged that the requirements of the narrower New York state class action rule applied and requested dismissal of the class action. If the Court had agreed and applied the more restrictive state rule, the plaintiff would have been out of court. And, in at least one interpretation of *Shady Grove*, the Court was able to save the federal class action rule based on *Erie* doctrine—our first example where the Court got it right.

#### B. The Court Sometimes Fixes Problems

Set against the grim narrative of the Supreme Court’s negative, pro-corporate jurisprudence, it is important to remember that the Court often fixes longstanding procedural problems that actually benefit plaintiffs. Rather than denying plaintiffs access to justice, some of the Court’s decisions enhance litigants’ ability to pursue

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107. See *supra* note 100.

108. See, e.g., Lonny Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011) (questioning and criticizing the early data collected by the Federal Judicial Center regarding the incidence of motions to dismiss subsequent to the Court’s *Twombly* and *Iqbal* decisions).

109. 559 U.S. 393 (2010).

110. There is no majority opinion in *Shady Grove*, but rather a dizzying array of opinions in which various Justices joined parts of the opinions of other colleagues. Justice Scalia announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II–A, in which Chief Justice Roberts and Justices Stevens, Thomas, and Sotomayor joined; an opinion with respect to Parts II–B and II–D, in which Chief Justice Roberts and Justices Thomas and Sotomayor joined; and an opinion with respect to Part II–C, in which Chief Justice Roberts and Justice Thomas joined. Justice Stevens filed an opinion concurring in part and concurring in the judgment. Justice Ginsburg filed a dissenting opinion, which was joined by Justices Kennedy, Breyer, and Alito.

111. *Shady Grove*, 559 U.S. at 397. *Shady Grove* sued Allstate in federal district court in New York to recover unpaid statutory interest that it alleged Allstate owed to it. The district court dismissed the case based on the N.Y. C.P.L.R. § 901(b), which precluded statutory penalty cases being brought as class actions. The Second Circuit affirmed.

112. *Id.* at 398–99.

relief in federal court. And, needless to say, when the Court fixes problems, it frequently also gets it right. Three examples illustrate how, in the past decade, the Court has fixed problems to benefit federal court plaintiffs.

The Court's 2005 decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*<sup>113</sup> illustrates a case in which the Court—contrary to prevailing stereotypes about the Court's anti-plaintiff class action bias—favorably changed rules governing the ability of plaintiffs to pursue a Rule 23 class action.<sup>114</sup> Prior to the Court's majority opinion in *Exxon Mobil*, a court would not certify a diversity-based class action unless all claimants in the proposed class each separately satisfied the requisite \$75,000 amount in controversy.<sup>115</sup> The so-called *Zahn* rule, after the Court's decision in *Zahn v. International Paper Co.*,<sup>116</sup> provided defendants with a ready-made challenge to damage class actions (especially mass tort class actions). Thus, until the Court decided *Exxon Mobil*, the *Zahn* rule served as a significant impediment to plaintiffs in pursuing class-wide relief. For the Court's critics, the *Zahn* rule was an emblematic principle denying plaintiffs' access to justice through aggregative procedures.<sup>117</sup>

In *Exxon Mobil*, the Court held that federal courts could certify a diversity class action where individual class members could not each satisfy \$75,000 in damages, provided that the named class representatives did.<sup>118</sup> As long as the class members' claims constituted "one constitutional case" with the representatives' claims, the supplemental jurisdiction statute provided the basis for bootstrapping the class members' claims along with the validly-pleaded representatives' claims.<sup>119</sup> In reaching this conclusion, the Court's majority agreed that the supplemental jurisdiction statute, enacted in 1990, overruled the non-aggregation rule set forth in *Zahn*.<sup>120</sup>

Hence, the Court's *Exxon Mobil* majority decision is a good illustration of the Court reversing its own precedent that previously favored corporate defendants and was detrimental to plaintiffs' ability to pursue damage class litigation. The Court fixed the *Zahn* problem. In so doing, the Court in *Exxon Mobil* eliminated the amount-in-controversy barrier to plaintiffs pursuing diversity damage class actions, and removed a wide-ranging impediment that affected thousands of federal court claimants.

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113. 545 U.S. 546 (2005).

114. *Id.*

115. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973).

116. *Id.*

117. See Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy and Diversity of Citizenship in Class Actions*, 53 EMORY L.J. 55, 62 (2004) (noting that the overwhelming weight of academic commentary harshly criticized *Zahn*); Brian Mattis & James S. Mitchell, *The Trouble with Zahn: Progeny of Snyder v. Harris Further Cripples Class Actions*, 53 NEB. L. REV. 137, 191–94 (1974).

118. *Exxon Mobil*, 545 U.S. at 558–59.

119. *Id.* at 559–60.

120. *Id.* at 565–66.

Another Court decision that fixed a problem affecting federal court plaintiffs is the Court's 2009 judgment in *Krupski v. Costa Crociere S.P.A.*<sup>121</sup> This litigation involved the proper application of the Rule 15(c) provision that permits a litigant to amend his or her complaint after the statute of limitations has expired.<sup>122</sup> The plaintiff in *Krupski* attempted to sue the cruise line for injuries that allegedly occurred onboard a ship during a trip. The plaintiff's attorney, through various mistakes and errors, failed to name the proper corporate defendant within the relevant statute of limitations time period.<sup>123</sup> The plaintiff's attorney sought to remedy its misunderstanding about the proper defendant by availing itself of Federal Rule of Procedure 15(c), which permits a mistaken litigant to amend a complaint which then "relates back" to the original pleading filed within the statute of limitations.<sup>124</sup> Applying Rule 15(c), lower federal courts denied the plaintiff's request to amend his complaint to name the proper defendant, effectively throwing *Krupski* out of court.<sup>125</sup>

Prior to *Krupski*'s appeal, federal courts took a very cramped view of Rule 15(c), narrowly construing its applicability to restricted categories of mistake.<sup>126</sup> On appeal, the Court ruled in favor of *Krupski*, holding that relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or timeliness in seeking to amend the pleading.<sup>127</sup> In so ruling, the Court liberalized the application of Rule 15(c)(1)(C) and untethered the rule's remedial provisions from the plaintiff's understanding of a misnomer.

Hence, similar to the Court's decision in *Exxon Mobil*, the Court's judgment in *Krupski* favored plaintiff's ability to pursue federal litigation even after committing a seeming blameworthy mistake as to a defendant's true identity. The considerable body of Rule 15(c) case law had largely favored defendants in their ability to have improperly pleaded complaints thrown out of court.<sup>128</sup> The *Krupski* decision, therefore, made significant inroads on the body of lower court opinions that traditionally had taken a very narrow, constricted view of when Rule 15(c) might be applied to save a plaintiff's complaint for misnomer of a defendant. Rather than adopting a punishing construction of the amendment rule, the Court's

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121. 560 U.S. 538 (2010).

122. FED. R. CIV. P. 15(c).

123. *Krupski*, 560 U.S. at 544–45.

124. *Id.* at 545–46.

125. *Id.* at 546.

126. See generally Robert A. Lusardi, *Rule 15(c) Mistake: The Supreme Court in Krupski Seeks to Resolve a Judicial Thicket*, 49 U. LOUISVILLE L. REV. 317 (2011) (summarizing conflicting views of relief from pleading mistakes in naming parties to litigation).

127. *Krupski*, 560 U.S. at 549–50.

128. See, e.g., Nathan M. Grundy, Note, *Schiavone v. Fortune: A Clarification of the Relation Back Doctrine*, 36 CATH. U.L. REV. 499, 525 (1987) (noting the Court's concern for prejudice to defendants of liberal interpretation of Rule 15(c)); Laurie Helzick, *Looking Forward: A Fairer Application of the Relation Back Provisions of Federal Rule of Civil Procedure 15(c)*, 63 N.Y.U. L. REV. 131, 146–47 (1988) (same).

*Krupski* decision instead manifested a desire that courts not routinely throw a plaintiff out of court for minor error.

The Court's 2010 decision in *Hertz Corp. v. Friend*<sup>129</sup> provides a third illustration of the Court fixing a doctrinal problem in the procedural arena, although the outcome in this case did not favor the immediate plaintiff. In *Hertz*, a plaintiff sued the corporate defendant over a wage and hour dispute in California state court, a forum in which the defendant had no desire to defend itself.<sup>130</sup> *Hertz* removed the case to federal court, alleging valid diversity jurisdiction based on *Hertz's* contention that it was a New Jersey citizen.<sup>131</sup> In response, the plaintiffs countered that there was no valid diversity jurisdiction because *Hertz* was a citizen of California.<sup>132</sup> To prove the location of its principal place of business, *Hertz* pointed to its contacts with California and its corporate presence in New Jersey.<sup>133</sup>

On appeal the Supreme Court ruled in favor of *Hertz*, declining to remand the litigation to state court.<sup>134</sup> In so doing, the Court took the opportunity to canvas the array of different tests that federal courts had developed to determine corporate citizenship.<sup>135</sup> Finding that the prevailing tests were confusing and had led to inconsistent results, the Court instead set forth a simple, black-letter rule, announcing that corporate citizenship henceforth was to be determined by the location of a corporation's headquarters, or the place where a corporation could be said to be "at home."<sup>136</sup>

The Court rarely announces black-letter rules, so the *Hertz* decision represents a welcome approach to clarifying a procedural backwater that for decades was rife with doctrinal uncertainty. While it is difficult to assess whether the Court's "at home" approach to corporate citizenship favors plaintiffs or defendants in their respective access to justice, the new rule allows for more certainty in determining the existence of diversity jurisdiction. By providing greater clarity, the *Hertz* approach to corporate citizenship should reduce costly satellite litigation over a corporate defendant's citizenship. The Court's *Hertz* decision, then, provides another example of the Court attempting to rein-in procedural gamesmanship, which the varying tests for corporate citizenship had invited in the past.

### C. *The Court Sometimes Knows Its Limits*

Among the positive things to be noted about the Supreme Court, the Court often recognizes its own limitations in judicial decision-making. Sometimes the

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129. 559 U.S. 77 (2010).

130. *Id.* at 81.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Hertz*, 559 U.S. at 92–94.

135. *Id.* at 89–92.

136. *Id.* at 94–96.

Court issues opinions in which it indicates that it lacks the authority to fix a problem by judicial fiat. In other cases, the Court recognizes its own limitations in the federal scheme of judicial authority. And finally, the Court sometimes recognizes that the doctrine of *stare decisis* limits its powers to overrule longstanding precedents, however much some Justices might desire to change the law in a particular direction. Again, three decisions illustrate how the Court has—perhaps laudably—recognized the limitations as a co-equal branch of government.

The Court's 1989 decision in *Finley v. United States*<sup>137</sup> represents almost a textbook example of the Court self-consciously acknowledging its own limitations. In *Finley*, the Court was called upon, for the second time in 13 years, to recognize pendent party jurisdiction as a means of supplemental jurisdiction in federal court.<sup>138</sup> The Court's unpopular 1976 decision in *Aldinger v. Howard*,<sup>139</sup> which rejected the concept of pendent party jurisdiction, was widely criticized as unsound by the academic community and practicing attorneys.<sup>140</sup> In addition, many rebellious lower federal courts evaded the *Aldinger* prohibition against pendent party jurisdiction, instead ruling in favor of allowing pendent parties to be added to litigation.<sup>141</sup>

Against this background of brewing doctrinal insurrection, the Court in *Finley* had the opportunity to fix what many believed to have been unforced judicial error in *Aldinger*. Instead, when confronted with a fact pattern highly similar to the *Aldinger* facts, the Court essentially double-downed on its conclusion for a second time.<sup>142</sup> In reasoning nearly identical to that set forth in *Aldinger*, the *Finley* majority again refused to endorse a theory of pendent party jurisdiction.<sup>143</sup>

Notwithstanding this conclusion, the Court's majority recognized that popular legal sentiment as well as the judgment of the legal academy favored recognition of pendent party jurisdiction. In closing remarks, Justice Scalia—the author of the Court's majority opinion—noted the probable dissatisfaction with the Court's result.<sup>144</sup> However, Scalia indicated that it was not within the Court's purview to set forth jurisdiction rules, and he invited disgruntled parties to take their case for pendent party jurisdiction to Congress to remedy—which they did.<sup>145</sup>

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137. 490 U.S. 545 (1989).

138. *Id.* at 547.

139. 427 U.S. 1 (1976).

140. See, e.g., Susan Irby Lasseter, Comment, *Pendent Party Jurisdiction After Finley v. United States: A Trend Toward Its Abolition*, 24 GA. L. REV. 447, 465–70 (1990) (criticizing the Court's rejection of pendent party jurisdiction).

141. See *id.* at 458 (noting federal courts applying pendent party jurisdiction); Deena Godshall Roth, Note, *Finley v. United States: Is Pendent Party Jurisdiction Still a Valid Doctrine?*, 39 AM. U. L. REV. 811, 822 (1990) (noting that by 1975, the Second, Third, Fourth and Fifth Circuits all endorsed a concept of pendent party jurisdiction; only the Seventh and Ninth Circuits refused to allow pendent party jurisdiction).

142. *Finley*, 490 U.S. at 556.

143. *Id.*

144. *Id.*

145. *Id.* (“Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of

In 1990, one year after the Court's *Finley* decision, Congress enacted the supplemental jurisdiction statute that embraced pendent party jurisdiction.<sup>146</sup> Hence, at Justice Scalia's direct invitation, Congress effectively reversed an unpopular Supreme Court decision. *Finley* is a fine example of the synergy between the Court and Congress, the Court recognizing its own limitations and the the legislative correcting the judiciary's doctrinal errors. It is perhaps worth noting that the Congressional course-correction in the supplemental jurisdiction statute has resulted in a plaintiff-favoring rule, which allows pendent parties to be joined in civil litigation where joinder previously was barred by judicial decision.

During the last decade, the Court's repeated endorsement of the "fraud on the market" presumption<sup>147</sup> in securities derivative litigation further illustrates how the Court, when confronted with the opportunity to limit or eliminate a plaintiff-favoring precedent, has declined to do so. In 2011 and 2014, the Halliburton Corporation asked the Court to reverse lower court class certification decisions where the plaintiffs relied on the fraud on the market presumption to secure class certification.<sup>148</sup> The Court originally articulated the fraud on the market presumption in *Basic v. Levinson*,<sup>149</sup> where the Court determined that plaintiffs pursuing a securities class action could rely on a rebuttable presumption that all class members relied on the same fraudulent or misleading statements in purchasing securities in the marketplace.<sup>150</sup> Without application of this presumption, securities class litigation would be impossible to certify: individual reliance issues would predominate over common questions of law, thereby defeating the court's ability to certify the action under the requirements of Rule 23(b)(3).<sup>151</sup>

The fraud on the market presumption clearly favors the plaintiff's ability to pursue class litigation under Rule 23. For years, defendants in securities class actions asked the Court to repudiate or restrict the presumption. Despite these attacks, the Court in the two *Halliburton* cases upheld the fraud on the market presumption.<sup>152</sup> Similar to the Court's *Exxon Mobil* decision, the Court's two *Halliburton* decisions favor plaintiffs over defendants in the class action arena, and

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course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

146. 28 U.S.C.A. § 1367(a) (Westlaw through Pub. L. No. 116-5).

147. See generally Dan Gold & Richard Gultinan, *Fraud-on-the-Market Lives: Takeaway Open Issues from Halliburton II*, 42 SEC. REG. L.J., no. 3. (2014) (discussing the fraud on the market presumption).

148. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); *Erica P. John Fund, Inc. v. Halliburton*, 563 U.S. 804 (2011); see also *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455 (2013) (upholding the fraud on the market presumption).

149. 485 U.S. 224 (1989).

150. *Id.* at 245–47.

151. *Id.* at 242 ("Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones.").

152. See *supra* note 148.

present additional evidence that the Court's record on class litigation is mixed and more nuanced than the Court's critics would admit.

The Court also recognized limitations on its own authority when the Court paid due respect to the role of federal courts in a dual-court federal system. Thus, in the 2011 decision in *Smith v. Bayer Corp.*,<sup>153</sup> the Court held that a federal district court exceeded its authority under the Anti-Injunction Act<sup>154</sup> when it attempted to enjoin a state court from considering a request for class certification.<sup>155</sup> The federal court had first denied class certification to a proposed class action. Subsequently, when different plaintiffs sought class certification of a factually similar class in state courts, the Court held that the district court's denial of class certification did not preclude other plaintiffs from proceeding in state court.<sup>156</sup> The Court, paying deference to state court jurisdiction and jurisprudence, held that it was improper for a federal court to enjoin state proceedings when it was unclear whether the certification issues were the same under the state rule, and the state plaintiffs had not been a party to the federal suit.

Broadly construed, the Court's decision in *Smith v. Bayer* is a plaintiff-favoring decision in the class action arena because the Court's ruling foreclosed the ability of federal courts to interfere with state class action proceedings. In other words, the Court refused to deny plaintiffs access to pursue their class claims in state court, as a consequence of an adverse certification decision in federal court. Thus, although a federal court might decline to allow plaintiffs access to a federal forum to adjudicate a class claims, that federal court could not—through application of the Anti-Injunction Act—frustrate plaintiffs' ability to seek aggregate relief under different state class action rules and jurisprudence. Similar to *Exxon Mobil* and the two *Halliburton* decisions, the Court's holdings in *Smith v. Bayer* present another example of plaintiff-favoring class action jurisprudence emanating from the Supreme Court.

#### *D. The Boring Advisory Committee*

A common theme promoted by the Court's critics is the refrain that the Advisory Committee on Civil Rules supports the Court's anti-plaintiff bias.<sup>157</sup> In this view, the Advisory Committee is populated with handpicked conservative jurists and other pro-corporate committee members, who enhance defendant

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153. 564 U.S. 299 (2011).

154. 28 U.S.C.A. § 2283 (Westlaw through Pub. L. No. 116-5).

155. *Bayer*, 564 U.S. at 302.

156. *Id.*

157. 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, 1086–87 (2015) (Advisory Committee members are “ideologically predisposed to think like Federalist Society members, demographically predisposed to think like elite white males, or experientially predisposed to think like corporate defense lawyers.”).

interests by proposing and enacting biased rule amendments.<sup>158</sup> Recent academic scholarship has devoted time and energy to parsing the biographical profiles and political affiliations of Advisory Committee members, in an attempt to correlate supposed non-neutral rule amendments with the pro-corporate predilections of Advisory Committee members.<sup>159</sup>

This complaint concerning non-neutral rulemaking has gained considerable traction in the past decade, tying into the broader themes of denial of access to justice and closing the courthouse doors.<sup>160</sup> The Advisory Committee rule amendments relating to electronic discovery and the so-called “proportionality rule” have been particularly vilified as anti-plaintiff amendments that are biased in application and impact.<sup>161</sup> The purported pro-defendant partiality of recent Advisory Committee rulemaking also is viewed as a betrayal of the promise of the Federal Rules of Civil Procedure; namely, that the rules are to be both transsubstantive and neutral in application and impact.<sup>162</sup>

Against this backdrop of rising criticism of the Advisory Committee’s role, it is perhaps noteworthy that the Committee has proposed and enacted rule amendments that have ameliorated problems or simplified procedure that have enhanced claimants’ ability to pursue relief in federal court. The Advisory Committee’s positive rule amendments, however, earn scant notice or commendation. A survey of unheralded rule amendments serves to illustrate the work of the Advisory Committee in carrying out the mission of promulgating simple, neutral procedural rules.

The Advisory Committee’s amendment of Rule 11<sup>163</sup> in 1993 represents a good example of it fixing a problematic rule that, over the course of a decade, had led to numerous abusive practices.<sup>164</sup> Rule 11 sets forth attorneys’ professional

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158. See Sarah Staszak, *Ten Years the Chief: Examining a Decade of John Roberts on the Supreme Court*, 38 CARDOZO L. REV. 691, 693–94 (2016) (describing pro-corporate, conservative Republican biases of judicial appointments to advisory committees).

159. See *id.*; Moore, *supra* note 157; Staszak, *supra* note 158.

160. See, e.g., Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 630 (2010) (“Professor Deborah R. Hensler assessed the [Council on Competitiveness’s broader proposals as going well beyond procedural reform; ‘[they] seek to change the current balance between individual plaintiffs and corporate defendants, in favor of the latter. That agenda,’ she observed, ‘is a political one, and it ought to be debated and decided on the floors of Congress and state legislatures.’”).

161. See generally Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141 (2015) (describing commentary on both sides of proposed amendments to the discovery rules).

162. Carrington, *supra* note 160, at 616–17 (“But some perceived that the 1934 vision of procedural rulemaking, as expressed in the structure of the first Advisory Committee and in the abstract, transsubstantive promise of Rule 1, aimed to avoid interest-group politics and concentrate on effective enforcement of the law. Those who opposed the change feared that lobbyists in our committee meetings might deprive the rulemaking process of its disinterest, and thus of its integrity and entitlement to public acceptance.”).

163. FED. R. CIV. P. 11.

164. See generally Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171 (1994) (providing background leading up to the 1993 amendment of Rule 11 and describing abuses under the previous version of Rule 11).



responsibility duties in filing pleadings, motions, and other papers in court, and is intended to secure truthful pleadings by counsel. The rule includes sanctions for attorney transgressions in court filings.

For most of its history, Rule 11 was largely moribund and ignored by courts and attorneys alike.<sup>165</sup> By the early 1980s, however, based on perceived pleading abuses, the Advisory Committee decided to “put teeth” into the rule. The Committee amended Rule 11 in 1983 to provide stricter pleading standards and heightened sanctions for non-compliant lawyers. The 1983 modification required lawyers and litigants to make reasonable pre-filing inquiries into the facts and the law while certifying that their papers were factually well grounded and legally warranted.<sup>166</sup>

The 1983 version of Rule 11 also required that judges impose sanctions on attorneys and parties who failed to comply with these responsibilities. Courts inconsistently construed and enforced the 1983 Rule 11 revisions during the decade after Congress and the Court adopted the revisions.<sup>167</sup> The implied message from the Advisory Committee to judges—encouraging judges to better police filing violations—induced many judges to aggressively impose sanctions on non-compliant attorneys.<sup>168</sup> Bolstered by the attractive prospect of sanctioning litigation adversaries, many attorneys routinely filed Rule 11 motions for sanctions against the opposing party along with every motion filed in the course of litigation. Judges proved all too willing to impose large monetary sanctions on counsel.<sup>169</sup>

Thus, the judicial implementation of the 1983 alteration of Rule 11 fostered expensive, unnecessary satellite litigation over the language of Rule 11 and the kind and size of sanctions that courts could levy.<sup>170</sup> Moreover, empirical studies of Rule 11 litigation between 1983 and 1993 suggested that defendants sought—and courts granted—Rule 11 sanctions against civil rights plaintiffs more often than any other category of civil litigants.<sup>171</sup> These studies indicated that many judges stringently applied Rule 11 against civil rights plaintiffs or imposed large sanctions when they contravened Rule 11. Thus, critics of the 1983 Rule 11 argued that the rule had an unfair chilling effect, especially on civil rights litigants.<sup>172</sup>

By the early 1990s, it was apparent that the 1983 Rule 11 amendment was

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165. See generally D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some “Striking” Problems With Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976) (reviewing Rule 11’s pre-1975 history); Tobias, *supra* note 164, at 172 n.2 (“The original 1938 Rule, which fell into disuse because of a reluctance on the part of attorneys to invoke it and a reluctance on the part of judges to impose sanctions, had not been amended prior to 1983.”).

166. Tobias, *supra* note 164, at 172.

167. *Id.*

168. *Id.* at 173.

169. *Id.*

170. *Id.*

171. *Id.* at 175.

172. *Id.* at 173. See generally Carl Tobias, *Civil Rights Plaintiffs and The Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988/89).

doing more harm than good in federal practice. Against a backdrop of increasing criticism from the academy, bench, and bar, the Advisory Committee placed revision of Rule 11 on its agenda. The new amendment to Rule 11 became effective on December 1, 1993 and was intended to remedy the array of problems inspired by the 1983 version of the rule.<sup>173</sup>

The provisions of the 1993 amended Rule 11 were intended to remedy the most egregious abuses that had arisen under the 1983 version. First, the Advisory Committee changed the imposition of sanctions to a discretionary judicial function, rather than a mandatory requirement.<sup>174</sup> The amended rule de-emphasized monetary sanctions, instead supplying judges with an array of less less-punitive sanctions.<sup>175</sup> Under the amended rule, monetary sanctions were now intended to be the exception, rather than the routine punishment for pleading transgressions. In addition, the amended rule provided that requests for Rule 11 sanctions needed to be filed separately, a provision that effectively curbed the prior practice of attorneys routinely attaching Rule 11 sanction motions to every paper filed during the course of litigation.<sup>176</sup>

Perhaps the most important, positive revision to Rule 11 was the inclusion of a so-called “safe harbor” provision.<sup>177</sup> Pursuant to this provision, a party seeking Rule 11 sanctions against an opposing party must serve the opposing party with the motion, but not file it with the court. The opposing party then has 21 days to remedy the alleged pleading violation that transgresses Rule 11.<sup>178</sup>

The 1993 amendments to Rule 11 had an immediate, efficacious effect on federal court practice.<sup>179</sup> The sensible safe-harbor provision allowed litigants to identify and correct pleading defects early, and consequently to avoid litigation over non-compliance with Rule 11 requirements. The de-emphasis on monetary sanctions removed the threat of overly aggressive, disproportionate punishment for pleading defects, and mitigated the desire of parties to punish their adversaries with the prospect of harsh Rule 11 penalties. Hence, the incidence of parties seeking Rule 11 sanctions against opposing counsel dropped precipitously.<sup>180</sup> The decline

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173. See Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure – A Critical Analysis*, 12 *TOURO L. REV.* 7, 60–80 (1995) (describing how amendments to Rule 11 intended to remedy problems created under the 1983 version of Rule 11).

174. FED. R. CIV. P. 11(c)(1).

175. FED. R. CIV. P. 11(c)(4)–(5).

176. FED. R. CIV. P. 11(c)(2).

177. *Id.*

178. *Id.*

179. See Charles Yablon, *Hindsight, Regret, and Safe Harbors in Rule 11 Litigation*, 37 *LOY. L.A. L. REV.* 599, 600 (2004) (“[I]t is refreshing to report that the 1993 revisions to Rule 11 of the Federal Rules of Civil Procedure, which the Advisory Committee believed ‘should reduce the number of motions for sanctions presented to the court,’ appear to have done precisely that. Judges, commentators, and my own quick and dirty empirical research all support the conclusion that Rule 11 motions have indeed decreased significantly since 1993.”).

180. Laura Duncan, *Sanctions Litigation Declining: Decrease Attributed to 1-Year-Old Safe Harbor Amendments to Rule 11*, 81 *A.B.A. J.* 12 (Mar. 1995).

of Rule 11 motions relieved federal dockets and judges of burdensome satellite litigation, and allowed litigants to avoid costly tangential hearings over alleged Rule 11 violations. Altogether, the 1993 Rule 11 amendments constituted a common-sense, valuable approach to remedying a burgeoning, unnecessary (and self-inflicted) crisis in federal practice. As such, the neutral safe-harbor provision, applying equally to plaintiffs' and defendants' pleadings, ameliorated unnecessary and wasteful gamesmanship in the procedural arena.

The Advisory Committee similarly has amended Rule 16—most notably in 1993—dealing with pretrial conferences, scheduling, and judicial case management.<sup>181</sup> The Rule 16 amendments have facilitated the orderly and efficient procedural development of pending litigation. Amended rule provisions mandate that a judge issue a scheduling order within a short period of time after the filing of a lawsuit.<sup>182</sup> Judges must include limitations on the time for adding parties, amending pleadings, filing motions, and completing discovery.<sup>183</sup> Judges also may prescribe limitations on discovery.<sup>184</sup>

The amended rule also provides for multiple litigant pretrial conferences,<sup>185</sup> with the requirement that attorneys attending on behalf of a client be authorized to make stipulations and admissions about “all matters that can reasonably be anticipated for discussion at the pretrial conference.”<sup>186</sup> The provisions enumerate matters that a court may undertake during pretrial conferences, including but not limited to: formulating and simplifying issues, eliminating frivolous claims or defenses, amending pleadings, obtaining admissions or stipulations, making preliminary evidentiary rulings, determining appropriateness or timing of summary judgment, identifying witnesses, referring matters to a magistrate, disposing of pending motions, ordering severance of trial issues under Rule 42(b),<sup>187</sup> and generally “facilitating in other ways the just, speedy, and inexpensive disposition of the action.”<sup>188</sup>

Taken together, the Rule 16 amendments both mandate and authorize enhanced judicial case management over pending litigation, which provisions are transsubstantive and neutral in content. As such, the Rule 16 amendments are examples of Advisory Committee efforts to curb abusive litigation practices that result in added cost and delay and assist in effectuating the goals of Rule 1: that

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181. FED. R. CIV. P. 16. See generally Charles R. Richey, *Rule 16 Revised, and Related Rules: Analysis of Recent Developments for the Benefit of Bench and Bar*, 157 F.R.D. 69 (1994). Rule 16 was amended again in 2015. See Amii N. Castle, *A Comprehensive Overview: 2015 Amendments to the Federal Rules of Civil Procedure*, 64 U. KAN. L. REV. 837, 845 (2016) (discussing the change in timing of the issuance of the scheduling order).

182. FED. R. CIV. P. 16(b)(1)–(2).

183. FED. R. CIV. P. 16(b)(3)(B).

184. FED. R. CIV. P. 16(b), (c)(1)(F).

185. FED. R. CIV. P. 16(b)(4)(c).

186. FED. R. CIV. P. 16(b)(4)(c)(1).

187. FED. R. CIV. P. 16(b)(4)(c)(2)(A)–(O).

188. FED. R. CIV. P. 16(b)(4)(c)(2)(P).

the federal rules are construed, administered, and applied by courts and parties to achieve the just, speedy, and inexpensive disposition of every action and proceeding.<sup>189</sup>

In a similar vein, the amendments to Rule 26(f), which added a “meet-and-confer” provision, likewise is an example of another good rule amendment promulgated in 2006.<sup>190</sup> Rule 26(f) requires litigants to meet and confer as soon as practicable—or at least 21 days before a Rule 16 scheduling conference is held or scheduling order is due. The parties have a number of obligations:

[T]he parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.<sup>191</sup>

The Rule 26(f) amendments were intended to dovetail with the new discovery rules relating to the emerging problems of electronically stored information. The over-arching purpose of Rule 26(f) was to “encourage, if not mandate, parties to work together in addressing the difficult and complex issues regarding the

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189. FED. R. CIV. P. 1. See Robert E. Keeton, *Time Limits as Incentives in an Adversary System*, 137 U. PA. L. REV. 2053, 2056 (1989).

Rule 16 and its amendments, despite ambiguities and shortcomings, have advanced serious consideration of extrajudicial alternatives to traditional adversary trials. Whether meant to do so or not, they have also encouraged many judges and lawyers to think more seriously about judicially-supervised alternatives. Perhaps the time has come to give serious thought to changing rules in ways that will legitimate and encourage the development of judicially-supervised alternatives to traditional adversary trials.

*Id.* But cf. Michael E. Tigar, *Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137 (1994) (criticizing the amendments to Rule 16).

190. FED. R. CIV. P. 26(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”). See generally Lee H. Rosenthal, *Meeting and Confering*, 116 YALE L.J. Pocket Part 167 (2006).

The new amendments that provoked the least controversy, the expansion of the meet-and-confer under Rule 26(f) and the initial conference with the court under Rule 16, may turn out to be the most important. The amended meet and confer requirements serve crucial purposes: to identify potential problems early in litigation and to establish workable electronic discovery protocols. Courts are already expecting parties to come to the meet-and-confer prepared to discuss the details of electronic discovery and can be demanding in what they require counsel to know.

*Id.*

191. FED. R. CIV. P. 26(f).

preservation, collection, review and production of electronically stored information.”<sup>192</sup> The impact of the Rule 26(f) amendments, when tied together with the Rule 16 amendments, were to turn *pro forma* meet-and-confer conferences into substantive meetings that would meaningfully set the framework for ensuing litigation, with advantages to be gained by both plaintiffs and defendants from such mandated pre-trial procedures at the outset of litigation.<sup>193</sup>

Another especially fine example of the Advisory Committee solving a procedural problem by rule amendment was its 1998 addition of Rule 23(f), providing a means of interlocutory appeal of class certification orders.<sup>194</sup> Prior to 1998, Rule 23 contained no provision for appealing a judge’s certification order. Thus, a losing party on a class certification order had only limited means to immediately appeal the court’s order.<sup>195</sup> A judge could certify their own order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).<sup>196</sup> In the absence of a judge certifying their order, the only other recourse for a losing party was to bring a mandamus appeal against the ordering judge.<sup>197</sup>

During the 1990s and the heyday of mass tort class certification orders, litigants (most usually losing defendants) routinely used mandamus procedure to obtain review of unfavorable class certification orders.<sup>198</sup> Judge Richard Posner, in

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192. Moze Cowper & John Rosenthal, *Not Your Mother’s Rule 26(f) Conference Anymore*, 8 SEDONA CONF. J. 261 (2007) (“Historically, Federal Rule 26 Conferences have been *pro forma*, accomplishing little if anything of significance in terms of the conduct of the case. Essentially, counsel for each side showed up at the meet and confer, which everyone knew in advance would take about fifteen to twenty minutes. In the meeting, the parties agreed to a general discovery schedule, but agreed to disagree on everything else relating to discovery.”).

193. *Id.* at 262.

Most commentators agree that the changes to Rule 26(f) will dramatically transform the initial meet and confer process from a meaningless *pro forma* meeting in which little or nothing is achieved to a substantive meeting whose results will directly impact the conduct of the entire litigation. There are several reasons behind this dramatic transformation.

First, defendants (particularly large corporations) now have something to gain from the meet and confer by negotiating down the scope of the discovery of ESI and, thus, the associated risks and costs. For example, the conference can now be used to limit the time period, the systems and the number of custodians at issue. In a larger case, this can result in savings in the tens of thousands.

Second, plaintiffs also have something to gain. It is expensive not only to produce ESI but also to review ESI. The more sophisticated plaintiffs understand that if they are unreasonable in the scope of their request, they may just get their worst nightmare—what they asked for. Plaintiffs, therefore, have an incentive to negotiate down a reasonable scope of the discovery of ESI that will, in turn, limit the costs associated with the document review. This is particularly true where both the plaintiff and defendant are corporations and, thus, unreasonable and overbroad discovery requests they issue are likely to be put into the word process and turned back onto them.

*Id.*

194. FED. R. CIV. P. 23(f).

195. See generally Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f) —A Good Rulemaking*, 69 TENN. L. REV. 97 (2001) (describing the history of interlocutory appeals of class certification orders, leading up to the 1998 amendment to Rule 23).

196. 28 U.S.C.A. § 1292(b) (Westlaw through Pub. L. No. 116-5).

197. 28 U.S.C.A. § 1651 (Westlaw through Pub. L. No. 116-5).

198. See, e.g., *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1077 (6th Cir. 1996) (mandamus appeal of class

deciding an appeal of a nationwide class certification in the tainted blood products litigation,<sup>199</sup> famously contested the use of mandamus as a means to review class certification orders.<sup>200</sup> Noting that the use of mandamus to appeal class certification orders had been regularized, Judge Posner objected that the writ was to be applied only in extraordinary circumstances.<sup>201</sup> In response to Judge Posner's contentions, the Advisory Committee decided to amend Rule 23 to provide for a means of interlocutory appeal.

In 1998, the Advisory Committee added a new sub-provision to Rule 23. Rule 23(f) simply provides that:

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The new provision does not provide litigants with an absolute right of interlocutory appeal; the appellate courts retain discretion whether or not to hear an appeal from a district court certification order.

The Rule 23(f) amendment illustrates a good rulemaking by the Advisory Committee, which solved an encroaching doctrinal problem among the lower federal courts. With promulgation of Rule 23(f), losing class litigants no longer have to risk alienating their presiding judge by challenging the judge's certification order. Losing litigants no longer have to run the risk of an appellate court declining mandamus jurisdiction. In addition, the Rule 23(f) amendment offers an interesting example of the Advisory Committee's responsiveness to the concerns of a renowned federal jurist.

As with many rule revisions, the introduction of Rule 23(f) as a means for interlocutory appeal is not without its own interpretive issues.<sup>202</sup> In particular, appellate courts have developed an array of factors they take into account in exercising their discretion to hear a Rule 23(f) appeal.<sup>203</sup> Notwithstanding these developing problems, the Rule 23(f) amendment, on balance, represents a positive exercise of rulemaking authority.

Finally, the amendment to Rule 26(a)<sup>204</sup>—although controversial when

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certification order); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 301 (6th Cir. 1984) (same).

199. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

200. *Id.* at 1294–95.

201. *Id.*

202. See generally Tanner Franklin, Note and Comment, *Rule 23(f): On the Way to Achieving Laudable Goals, Despite Multiple Interpretations*, 67 BAYLOR L. REV. 412 (2015) (assessing the impact of Rule 23(f) and noting different appellate court interpretations and applications of discretionary jurisdiction).

203. *Id.* at 417–23 (describing the differing approaches of all federal circuits in applying Rule 23(f)).

204. FED. R. CIV. P. 26(a).

proposed<sup>205</sup>—provides a further example of a good rulemaking.<sup>206</sup> Rule 26(a) provides that parties must, without awaiting a discovery request from the opposing party, provide four categories of information to their adversary.<sup>207</sup> This information generally includes: (1) contact information relating to persons who are likely to have discoverable information; (2) a copy or description and location of all documents or electronically stored information, or other tangible things that the disclosing party has in its possession; (3) a computation of each category of damages; and (4) underlying insurance agreements.<sup>208</sup>

Although some judges and attorneys resisted the proposed revision of Rule 26(a), in practice the requirements of mandatory disclosures has worked out well.<sup>209</sup> Rather than increasing the costs of discovery or delaying litigation, the Rule 26(a) provisions have eliminated much of the gamesmanship at the outset of a lawsuit. The rule simply requires parties to automatically disclose information that inevitably would have to be disclosed later in proceedings—after unnecessary skirmishing over discovery requests, refusals, and motions to compel. Attorneys quickly adjusted to the new Rule 26(a) regime, and the Rule 26(a) requirements have not overburdened judges.

#### *E. No, The Sky Is Not Falling*

The historical experience of the Rule 26(a) rulemaking illustrates a commonplace phenomenon that frequently occurs when the Supreme Court issues a decision in the procedural arena, Congress enacts a procedural statute, or the Advisory Committee on Civil Rules announces a proposed rule amendment. It is common for judges, attorneys, academics, and social justice advocates to quickly default to the negative justice narrative that permeates commentary in the procedural universe. Critics quickly announce that the Court's decision, Congressional statute, or proposed rule amendment negatively impacts plaintiffs, denies plaintiffs' access to justice, and further closes the courthouse doors to litigants. The counter-stereotype posits a pro-corporate institutional framework that inspires this anti-plaintiff animus. Thus, there is a reflexive chicken-little the "sky is falling" reaction to changes in the procedural *status quo*.

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205. See, e.g., Ashley L. Belleau, *A Critique of the "New Discovery Rules,"* 42 FED. L. 36 (July 1995) (describing the controversy over proposed Rule 26(a)(1)'s mandatory initial disclosure requirements with dissenting Supreme Court Justices); Michael J. Wagner, *Too Much, Too Costly, Too Soon? The Automatic Disclosure Amendments to Federal Rule of Civil Procedure 26,* 29 TORT & INS. L.J. 468, 470 *et seq.* (1994) (discussing the controversy over proposed Rule 26(a)(1)(A)'s mandatory disclosure requirements).

206. Rule 23(f) was amended in 1993 and again in 2000.

207. FED. R. CIV. P. 26(a)(1)(A)(i)–(iv).

208. *Id.*

209. See generally Robert E. Oliphant, *Four Years of Experience with Rule 26(A)(1): The Rule Is Alive and Well,* 24 WM. MITCHELL L. REV. 323, 326 (1998) (“[I]t is clear that Rule 26(a)(1) did not generate confusion or throw the existing judicial system into a chaotic state, as some critics had forecast. The Rule has proved manageable and, in general, appears to be working well in the District of Minnesota. There is evidence that the Rule has made a positive impact on the practice of law within this district.”).

Two points are worth noting. First, it often takes time for the impact of procedural decisions to manifest—to confirm or refute any initial dire negative predictions. Second, we know from history that procedural changes often operate through a pendulum effect: thus, courts may first swing out in one direction, over-compensate in the opposite direction, and finally come to equilibrium in the center. Therefore, assessing the actual impact of procedural change on litigants takes time, patience, and good empirical studies.

The hyperventilation from all quarters over the proposed Rule 26(a) amendments illustrates how exaggerated fears over a rule change can subsequently prove unfounded. Three other illustrations—drawn from decisional law—afford other examples where negative predictions turned out to be overstated or untrue.

In 1986, the Supreme Court issued its famous summary judgment trilogy of opinions.<sup>210</sup> Although the general purpose was to clarify the standards and burdens governing judicial evaluation of Rule 56 summary judgment motions,<sup>211</sup> the unstated policy goal embedded in the trilogy was the Court's nudging of lower federal judges to utilize summary judgment procedure more often, to weed out insubstantial cases before trial.<sup>212</sup> Prior to the summary judgment trilogy, federal judges viewed summary judgment as a "disfavored motion." For a variety of reasons, judges were reluctant to issue summary adjudications of cases on their dockets. Instead, judges preferred to deny summary judgment motions and to send cases to trial, shifting the burden to juries to weed out delinquent cases.<sup>213</sup>

The procedure commentariat swiftly responded to the summary judgment trilogy, reading the Court's implied message as anti-plaintiff (representing a further closing of courthouse doors to litigants).<sup>214</sup> Even though Rule 56 summary judgment motions could be pursued by either plaintiffs or defendants, critics nonetheless interpreted the summary judgment trilogy as manifesting a pro-defendant, anti-plaintiff bias—especially in civil rights cases.<sup>215</sup> The post-trilogy dire prediction was that courts would increase the use of summary judgment and

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210. FED. R. CIV. P. 56; see *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (shifting burdens of production, persuasion, and proof in Rule 56 summary judgment motions generally); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (Rule 56 summary judgment burdens in libel lawsuits); *Matsushita Elec. v. Zenith*, 475 U.S. 574 (1986) (Rule 56 summary judgment burdens in antitrust litigation).

211. *Celotex*, 477 U.S. at 322–24.

212. 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, 107–08 (1988) ("Implicitly, the Court also expanded a judge's power in the directed verdict context as well. In addition, the Court's rhetoric in these three cases changed the tone of judicial perspective on rule 56, creating a climate conducive to more frequent use and granting of the motion.").

213. See Linda S. Mullenix, *The Twenty-Fifth Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI L.J. 561 (2012).

214. See Samuel Isaacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990) (noting the differential impact of the summary judgment trilogy on plaintiffs and defendants).

215. *Id.*



dismiss more cases prior to trial.<sup>216</sup>

Empirical evidence suggests otherwise. In the 30 years since the Court decided the trilogy, there is scant but contested evidence that federal judges are issuing summary judgment dismissals with greater frequency than before the trilogy.<sup>217</sup> In fact, the history of summary judgment practice in the post-trilogy era exemplifies the pendulum effect of procedural change. What the studies suggest is in the years immediately after the Court announced the trilogy, there was a slight uptick in courts granting of summary judgments against plaintiffs. The courts then retreated to prior practice, and over time, judges have reached a kind of equilibrium regarding Rule 56 motions.<sup>218</sup> At any rate, the initial hyperbolic reaction to the summary judgment trilogy seems to have been an over-reaction in contrast to the actual implementation of the Court's rulings.

In hindsight, the critics' negative predictions relating to the summary judgment trilogy seems somewhat muted compared to the outrage engendered by the Court's pleading decisions in *Twombly* and *Iqbal*.<sup>219</sup> Detractors greeted these twin decisions with dismay at the anticipated impact on plaintiffs' ability to withstand early dismissal of their lawsuits challenged on Rule 12(b)(6) motions.<sup>220</sup> Commentators uniformly suggested that the new pleading standards would especially have a deleterious effect on civil rights plaintiffs<sup>221</sup>—echoing the same complaint leveled against the Court's 1986 summary judgment trilogy.<sup>222</sup> The legal community's initial reaction to the Court's pleading decisions reflect another example of the "sky is falling" approach to procedural change. As with the summary judgment trilogy, the immediate evaluation of the pleading decisions quickly defaulted to a procedural injustice narrative, with a binary view of litigation landscape as anti-plaintiff and pro-defendant. Consistent with this prevailing narrative, the pleading decisions were cast as further incursions on plaintiffs' access to justice and a closing of the courthouse doors.

The Court's pleading decisions illustrate the problems inherent with attempts to assess litigant impact within too short of a period from the issuance of decisions

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216. See generally Ann C. McGinley, *Credulous Courts and The Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993) (discussing the generally negative impact of the summary judgment trilogy on the early dismissal of civil rights cases).

217. See generally Eisenberg & Clermont, *supra* note 100 (finding data suggests a pro-defendant bias in the granting of summary judgment motions and anti-plaintiff animus); *but cf.* Mullenix, *supra* note 213.

218. See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882 (2007).

219. See *supra* notes 50–52.

220. FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim; generally, the motion used to challenge the sufficiency of the plaintiffs' allegations in a complaint).

221. See generally Elizabeth M. Schneider, *The Changing Shape of Federal Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 520 (2010) (citing studies highlighting the deleterious effect of *Twombly* on civil rights cases).

222. See McGinley, *supra* note 216.

that change or modify doctrine.<sup>223</sup> In the last decade—while some empirical studies focusing on civil rights litigation have documented an uptick in dismissals based on *Twombly/Iqbal* standards—other empirical studies suggest that the anticipated negative impact of the pleading decisions has not been as great as forecasted.<sup>224</sup> It simply may be too short a time frame to accurately assess the impact of these cases. Moreover, if the procedural universe functions on a pendulum-like system, then it is entirely possible that federal courts are, in this first post-*Twombly* decade, experiencing an outward arc of judicial enthusiasm toward the new pleading standards. Hence, in the coming years federal courts may experience a backwards correction, with pleading issues eventually coming to rest in some sensible equilibrium that resembles the pre-*Twombly* pleading era.

Post-*Twombly/Iqbal*, litigants continue to file complaints in federal courts. Litigants have adjusted their pleading behavior to conform to the requirements of the new pleading standards, understanding the ways in which different courts have interpreted and applied those standards.<sup>225</sup> The fact that many courts still deny Rule 12(b)(6) challenges to complaints is evidence that judges are exercising their authority and discretion in evaluating the sufficiency of allegations under *Twombly/Iqbal*. Also, a full account of the post-*Twombly/Iqbal* landscape ought to take into account judicial non-compliance with, or creative evasion of, the pleading standards that some lower court judges have disfavored.<sup>226</sup>

A final example of the “sky is falling” overreaction to evolving procedural

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223. See generally Hon. T.S. Ellis & Nitin Shah, *Iqbal, Twombly, and What Comes Next: A Suggested Empirical Approach*, 114 PENN. ST. L. REV. PENN STATIM 64, 68 (2010) (“Despite the rather dire forecasts from many camps, little empirical research has been performed to prove or disprove the predictions of the impact of *Iqbal* and *Twombly*. Of course, one possibility that must be considered is that *Iqbal* and *Twombly* will have very little effect on dismissal rates. If this is the case, it will be readily discernable from empirical research, but early results indicate that *Iqbal* has, in fact, significantly increased dismissal rates.”); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study of the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814–15 (2008) (preliminary findings suggest courts are not granting dismissals at a higher rate after *Twombly* except in one notable area: civil rights cases). *Id.* at 1836 n.161 (categorizing civil rights cases as any claims brought under 42 U.S.C. §§ 1981, 1983, 1985, *Bivens* claims, and Due Process and Equal Protection claims); see also Lonny Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011) (discussing the inadequacy of the Federal Judicial Center’s study of post-*Twombly/Iqbal* dismissals under Rule 12(b)(6)); Benjamin Sunshine & Victor Abel Pererya, *Access-to-Justice v. Efficiency: An Empirical Study of Settlement Rates After Twombly & Iqbal*, 2015 U. ILL. L. REV. 357, 363–71 (2015) (discussing nine empirical studies of the post-*Twombly/Iqbal* impact on pleadings and motions to dismiss, with conflicting findings).

224. *Id.*

225. See John S. Summers & Michael D. Gadarian, *Imagine the Plausibilities: Life After Twombly and Iqbal*, 37 LITIG. 35 (Winter 2011) (describing the varying approaches to pleading standards by different federal courts, with suggestions to attorneys for pleading under the new standards).

226. See, e.g., M. Todd Henderson & William H.J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the Securities Litigation Reform Act*, 44 J. LEGAL STUD. S87 (2015) (studying judicial compliance to statutory commands under securities statutes and finding judicial compliance not often, due to a mixture of ignorance of the rule, laziness, weak appellate oversight, and strong incentives from the litigants not to comply combine to minimize the observable enforcement of this statutory rule).

jurisprudence is the legal community's response to the Court's recent Rule 23<sup>227</sup> class action decisions. In the past decade, the Court has decided an unusually large number of class action appeals.<sup>228</sup> For social justice advocates, the general gloss on the Court's approach to class litigation draws significantly on twin themes of denial of access to justice and closing of the courthouse doors.<sup>229</sup> These themes are even more compelling with regard to class litigation. While bipolar cases involve single plaintiffs suing single defendants, class action litigation aggregates hundreds or thousands of claimants in a single lawsuit. Hence, restrictive class action decisions affect large numbers of putative litigants.

Similar to the reactions to the Court's summary judgment trilogy and pleading decisions, critics have roundly attacked the Court's class action jurisprudence as consistently pro-defendant and anti-plaintiff.<sup>230</sup> The Court's class action rulings are viewed as an extension and logical result of the pro-corporate bias of the Court's recent membership.<sup>231</sup> The Court's anti-plaintiff, pro-corporate bias that is manifested in individual cases, then, becomes writ large in the class action arena. The Court's anti-class action stereotype is so pervasive that it is difficult to persuade otherwise.

However, a survey of the Court's 20 class action appeals since 2002<sup>232</sup> includes a surprising number of pro-plaintiff decisions, constituting nearly half of the Court's recent class action jurisprudence.<sup>233</sup> This universe of cases also embraces the rights of objectors to ensure the fairness of class action proceedings and

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227. FED. R. CIV. P. 23.

228. See *supra* note 72.

229. See, e.g., Omri Ben-Shara, *The Paradox of Access to Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1762 (2016) ("An important upshot of the denial of access to courts is the shutdown of class actions as a method for vindicating consumers' and employees' common complaints."); Francisco Valdes, *Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspectives*, 24 GA. ST. U.L. REV. 627, 654 (2008).

This intersection of the Rule 23 "holy war" with the larger campaign of the culture wars is acutely evident in the "strict scrutiny" that judges give to race-based class actions. This hostile scrutiny, as studies and scholars have shown, leads to the frequent and wrong denial of class certifications in these cases, which amounts to a denial of access to Rule 23 procedures. In effect, the practice means a race-based denial of access to justice. In effect, this judicial practice favors power, privilege, and even injustice.

*Id.*

230. See, e.g., Christine P. Bartholomew, *Redefining Prey and Predator in Class Action Litigation*, 80 BROOK. L. REV. 743, 766 (2015) (describing the pro-corporate class action bias of the Roberts's Court); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 795 (2016) (noting the pro-defendant trajectory of class action procedure since the mid-1990s).

231. Bartholomew, *supra* note 230.

232. The Court issued no class action decisions in 2000 or 2001, thus marking 2002 as the Court's initial 21st century class action decisions.

233. See *supra* note 72. Of the Court's 20 class action decisions, at least ten may fairly be characterized as pro-plaintiff. See discussion *infra* notes 245-49. Of the 20 decisions, seven deal with arbitration clauses. If the arbitration cohort is removed from consideration, then ten of the Court's 14 class action decisions have been pro-plaintiff. And, of the seven arbitration decisions, at least one favored plaintiffs. See discussion of *Oxford Health Plans v. Sutter*, *infra* notes 243-44.

settlements. For example, in *Devlin v. Scarlett*,<sup>234</sup> the Court held that a non-class member could appeal a district court's approval of a class action settlement, even though the non-class member had not previously intervened in the litigation.<sup>235</sup> In other words, the Court eschewed placing technical procedural barriers in the path of non-class members who wished to police settlement agreements negotiated between plaintiffs and defendants. Rather than reflexively side with corporate interests in preserving questionable settlement agreements, the *Devlin* decision ensures the rights of objectors to superintend settlement agreements.

As indicated above, the Court's 2005 *Allapattah* decision constituted a pro-plaintiff victory in overruling the *Zahn* non-aggregation rule.<sup>236</sup> This decision cleared the way for numerous class actions that previously had been non-sustainable because individual class members failed to satisfy the diversity amount in controversy requirement. In 2010, the Court in *Shady Grove* effectively "saved" the federal class action rule from encroachment by restrictive state class action rules,<sup>237</sup> which state rules defendants invoked in federal court to defeat class certification. In effect, *Shady Grove* saved Rule 23 for federal court plaintiffs and cut off defendants' ability to defeat plaintiffs' class litigation through forum-shopping for deleterious state class action rules.

In 2011, the Court issued two pro-plaintiff class action decisions: *Erica P. Fund v. Halliburton*<sup>238</sup> and *Smith v. Bayer Corp.*<sup>239</sup> As noted above, the Court in *Halliburton I* issued the first of three decisions upholding the "fraud on the market presumption" against a defendant's challenge to abrogate that longstanding plaintiff-favoring presumption in securities litigation.<sup>240</sup> And in *Smith v. Bayer*, the Court surprisingly held that a federal court could not, through application of the federal Anti-Injunction Act, interfere with a parallel state class action litigation.<sup>241</sup> *Bayer* presented a victory for state court class action plaintiffs who desired that their state court choice not be meddled with by federal interference.

The Court announced two additional pro-plaintiff class action decisions in 2013. In *Amgen Inc. v. Connecticut Retirement Plans and Trust Fund*,<sup>242</sup> the Court again upheld the fraud on the market presumption as against a renewed attack from the corporate defendant. And in *Oxford Health Plans LLC v. Sutter*,<sup>243</sup> a unanimous Court held that an arbitrator's interpretation of a contractual arbitration clause—that the parties intended to authorize class-wide arbitration—did not exceed the

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234. 536 U.S. 1 (2002).

235. *Id.* at 14.

236. *Exxon-Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 559, 567 (2005).

237. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

238. 563 U.S. 804 (2011).

239. 564 U.S. 299 (2011).

240. *Halliburton I*, 563 U.S. at 811, 814.

241. *Bayer*, 564 U.S. at 302.

242. 568 U.S. 455 (2013).

243. 569 U.S. 564 (2013).

arbitrator's powers.<sup>244</sup> In an otherwise bleak collection of class-wide arbitration decisions, the Court nonetheless handed plaintiffs a class-wide arbitration victory in *Oxford Health Plans*. The following year, the Court—for the third time—reaffirmed the pro-plaintiff fraud on the market presumption in *Halliburton II*.

The Court's 2016 term also was a good term for class action plaintiffs. In *Tyson Foods Inc. v. Bouaphakeo*,<sup>245</sup> the Court upheld a class action lawsuit brought by workers in a Tyson Foods chicken processing plant. The litigation concerned the company's alleged failure to pay workers for the time they used to "don and doff" the health and safety clothing necessary to perform their jobs.<sup>246</sup> The Court upheld the district court's certification of the class, indicating that the plaintiffs could rely on representative, statistical proof to show predominance of common questions across the class of employees.<sup>247</sup> The *Tyson Foods* holding not only benefitted the plaintiffs in the litigation but articulated a useful precedent for future Rule 23(b)(3) damage class litigants.

In the same year the Court decided *Tyson Foods*, the Court also decided *Campbell-Ewald v. Gomez*.<sup>248</sup> In *Campbell-Ewald*, the Court handed plaintiffs another victory. In a majority opinion written by Justice Ruth Bader Ginsburg, the Court held that "an unaccepted settlement offer has no force" and—under Federal Rule of Civil Procedure 68—does not render a lawsuit moot.<sup>249</sup> This holding subverted the defendants' ability to pick-off class action plaintiffs through settlement offers and thereby defeat class litigation.

Finally, critics of the Court's class action jurisprudence point to the Court's 2011 *Wal-Mart v. Dukes*<sup>250</sup> decision as the poster-child for the Court's anti-class action animus.<sup>251</sup> In the critics' rendition, the Court in *Wal-Mart* so circumscribed the interpretation of Rule 23(b)(2) commonality as to defeat certification of almost any future proposed class action.<sup>252</sup> But, as with other hyperbolic reactions to many of the Court's procedural pronouncements, it turns out that *Wal-Mart's* impact on class certification has not been as dire as predicted. Courts continue to certify class actions apace, often finding ways to comport facts within the Court's commonality ruling,<sup>253</sup> or suggesting that *Wal-Mart's* commonality analysis has limited

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244. *Id.* at 573.

245. 136 S. Ct. 1036 (2016).

246. *Id.* at 1042–43.

247. *Id.* at 1045, 1046–47.

248. 136 S. Ct. 663 (2016).

249. *Id.* at 666.

250. 564 U.S. 338 (2011).

251. See generally Malveaux, *supra* note 76, at 37 ("The *Dukes* class certification standard jeopardizes potentially meritorious challenges to systemic discrimination. By redefining the class certification requirements for employment discrimination cases in two major areas, . . . the Court compromises employees' access to justice.")

252. *Id.* at 44–45.

253. See, e.g., *Lacy v. Cook County Ill.*, 897 F.3d 847, 865 (7th Cir. 2018) (upholding class certification; finding commonality satisfied under *Wal-Mart* commonality standards); *DL v. D.C.*, 860 F.3d 713, 725–26 (D.C.

application to a particular set of facts before the court.<sup>254</sup>

If the Court's recent class action jurisprudence has indeed resulted in a calamitous curbing of plaintiffs' class litigation, one would expect a more gleeful response from the defense bar. It is telling, on the contrary, that the leading defense lobbying group before the Court—the United States Chamber of Commerce—has found cause for complaint about how lower federal courts are implementing the Court's class action jurisprudence. Thus, in the Court's most prominent 2018 class action appeal—dealing with *cy pres* settlements<sup>255</sup>—the Chamber took the unusual step of not aligning as an amicus with either the petitioner or the respondent.<sup>256</sup> Instead, the Chamber seized the occasion to complain to the Court to do something about lower court non-compliance with *Wal-Mart*-style class certification requirements: “More fundamentally, the Chamber seeks to highlight that the explosion of *cy pres* settlements in class action litigation is symptomatic of a much deeper problem – the failure of lower courts to comply with this Court's precedents and rigorously police the requirements of Rule 23.”<sup>257</sup>

#### IV. CONCLUSION

So, is the arc of procedure bending towards injustice? Well yes, no, maybe. It is certainly true that scholars, advocates, commentators, attorneys, judges, and other actors in the legal arena can put together a compelling brief that plaintiffs are being denied access to justice and that judicial decisions have effectively closed the courthouse doors. It is perhaps all too easy to assemble 20 prominent cases and

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Cir. 2017) (affirming class certification and upholding commonality; distinguishing *Wal-Mart*).

254. See *In re Deepwater Horizon*, 785 F.3d 1003, 1016 (5th Cir. 2015) (distinguishing *Wal-Mart* commonality on facts dissimilar to the underlying *Deepwater Horizon* litigation; upholding commonality in the settlement class).

255. *Frank v. Gaos*, 138 S. Ct. 1697 (2018) (cert. granted).

256. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Neither Party (No. 17-961), 2018 WL 3473993 (July 16, 2018).

257. *Id.* at \*2.

But there is a yawning gap between this Court's class-action precedents and how the lower courts have applied those precedents in practice. The unfortunate reality is that lower courts in plaintiff-friendly venues are routinely failing to apply the law. Many courts view the class-action device as an expedient for clearing cases from their dockets, recognizing that placing a heavy thumb on the scale in favor of class certification will often prompt settlement. As a result, courts often certify a class no matter how negligible class members' alleged injuries may be and with no concern for defendants' individualized defenses. Outside of the most egregious cases, courts are unwilling to discipline class-action abuse and, as a result, every potential misstep or regulatory violation, no matter how insignificant or how inventive a theory of liability may be required to plead a claim, becomes another opening for enterprising class counsel. Even defendants who are inclined to vigorously defend these cases are placed in an untenable position. Because courts that take a lenient approach to class actions rarely impose reasonable limits on the award of class counsel fees, the harder a defendant fights in its defense, the more it can ultimately expect to pay out in settlement. The result is that every year American business are forced to defend and settle thousands of meritless class actions that benefit no one except class counsel.

*Id.* at \*3.

several discovery rules to reach that conclusion. Part of this negative narrative dovetails with laments over the vanishing trial and the insidious invasion of mandatory arbitration clauses. The harshest conveyors of the procedural injustice narrative advance almost conspiratorial theories about judicial decision-making and administrative rulemaking.

The difficulty in assessing the justice-denial narrative, however, is that it is predicated on particular views of what constitutes justice, normative assumptions about modalities of dispute resolution, and good guy/bad guy stereotypes. The purpose here is not to refute the procedural injustice narrative that numerous critics have ably advanced in many forums. Instead, the aim is to suggest that the pervasive account of procedural injustice should perhaps be tempered with and complemented by some nuance.

We are perhaps better served by reflecting that not every procedural decision is ideologically motivated or reflexively pro-corporate and anti-plaintiff. Our appreciation of procedural justice might better be served by appreciating that not all rulemaking is purposefully calculated to defeat plaintiffs' ability to pursue federal litigation. Some good faith is perhaps in order to trust that our rulemakers fundamentally believe in the underlying philosophy of transsubstantive rulemaking with neutral intent.

What gets lost in the negative procedural narrative is that many times the Court—in the procedural arena—gets things right, fixes problems, and understands its own limits as a rulemaking or standard-setting institution. Amid all the *strum und drang* that typically accompanies proposed amendments, critics lose sight (or decline to acknowledge) the very many positive rule amendments that the Advisory Committee has quietly accomplished without fanfare.

Social justice warriors are simply too quick to deploy the procedural injustice narrative to virtually every procedural pronouncement, proposed rulemaking, or statutory initiative. Moreover, the recent, Javert-like obsessive academic preoccupation with tracking down and documenting the ideological affiliations of judges and rulemakers—to prove anti-plaintiff animus—appears unseemly and ill-conceived. Not all of the Court's procedural jurisprudence aligns with Justices' presumed ideological affiliations, and personal histories often are untrustworthy predictors of outcomes. So too for the rulemakers.

Finally, procedural justice critics are simply too quick to condemn the procedural outrage *du jour*, and accrete further "evidence" onto the procedural injustice narrative. Some humility is in order; often predictions of parades of horrors fail to materialize for any number of reasons having nothing to do with bad intentions or ideological crusading. If the long game has taught us anything, it is that it takes time to evaluate and understand the impact of decisional law and procedural rulemaking.

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