Michigan Law Review

Volume 122 | Issue 1

2023

The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline

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Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1 (2023).
Available at: https://repository.law.umich.edu/mlr/vol122/iss1/2

https://doi.org/10.36644/mlr.122.1.oligarchic

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THE OLIGARCHIC COURTHOUSE: JURISDICTION, CORPORATE POWER, AND DEMOCRATIC DECLINE

Helen Hershkoff & Luke Norris***

Jurisdiction is foundational to the exercise of judicial power. It is precisely for this reason that subject matter jurisdiction, the species of judicial power that gives a court authority to resolve a dispute, has today come to the center of a struggle between corporate litigants and the regulatory state. In a pronounced trend, corporations are using jurisdictional maneuvers to manipulate forum choice. Along the way, they are wearing out less-resourced parties, circumventing hearings on the merits, and insulating themselves from laws that seek to govern their behavior. Corporations have done so by making creative arguments to lock plaintiffs out of court and push them into arbitration, and failing that, to lock plaintiffs into federal court rather than state court, or to punt federal cases to administrative agencies that may lack the power or will to resolve the underlying issues in the case. These efforts have largely been successful. This Article offers a panoramic view of how over recent decades federal courts have acquiesced in a corporate-driven effort to leverage jurisdictional doctrines to their unique private advantage, and contends that together, these doctrinal changes constitute an inflection point in U.S. law and procedure. We argue that corporate adjudicatory practice has slanted judicial power in favor of deregulatory efforts that undermine legal commitments to equality, dignity, and participation. The shifts in jurisdiction, which may seem to be merely technical and apolitical, are a core part of the architecture of what we call the oligarchic courthouse—one where courts as public institutions transform their procedures to meet private, corporate interests at the expense of public goals, thereby cementing economic power and translating it into concentrated political power that undermines the possibility of robust democratic life.

The trends we describe in federal subject matter jurisdiction resonate with earlier corporate battles at the turn of the twentieth century. But the construction

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of today's oligarchic courthouse holds implications for democracy that are not simply a reprise of earlier corporate efforts. To show the scope of the implications, the Article steps back and clarifies why jurisdiction matters to democracy. Drawing on law and social mobilization literature, we argue that jurisdiction functions as a political resource that facilitates opportunities for democratic contestation and both reflects and shapes the openness and closedness of the state. Having centered jurisdiction in a larger account of democracy, we explore how the oligarchic courthouse, by entrenching economic power and narrowing participatory options for workers, consumers, and other less-resourced litigants, can be nested in a larger account of democratic decline in the United States.

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INTRODUCTION

Marc Galanter's essay, *Why the "Haves" Come Out Ahead*,[1] is one of the most cited pieces in legal scholarship.[2] As is well-known, Galanter explained how repeat litigation players, typically corporate litigants, are able to leverage the dull rules of court process to their advantage, effectively creating a caste of perpetual courthouse losers.[3] Some commentators have argued that ordinary folks can beat the system through strategic use of "jurisdictional redundancy"—filing suit in the most hospitable court from among those with overlapping and concurrent power.[4] Indeed, commentators also urge litigants to devise strategies that explicitly combine and coordinate adjudication in multiple fora, thereby drawing advantages from both state and federal courts.[5] These arguments recognize that although forum shopping often smacks of gamesmanship, selecting an appropriate judicial forum also can promote litigant autonomy and serve regulatory goals.[6] Indeed, the ability to forum shop is baked into the American legal system as a longstanding practice with roots in federalism and Article III of the Constitution.[7]

Yet in the nearly half century since Galanter published his article, a funny thing has happened on the way to the judicial forum.[8] Corporate litigants have come to enjoy a distinct advantage in deploying jurisdictional redundancy, repeatedly defeating the forum choices of their opponents. Consider three routine scenarios. Suppose a worker files suit in state court, alleging that a

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1. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

2. As of 2012, Galanter's essay was the thirty-seventh most-cited law review article of all time. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 (2012).

3. *See* Richard Lempert, *A Classic at 25: Reflections on Galanter's "Haves" Article and Work It Has Inspired*, 33 LAW & SOC'Y REV. 1099, 1103 (1999) (explaining that Galanter "noted the existence of repeat losers").

4. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). Some scholars have also highlighted the normative benefits of litigation pluralism. *See, e.g.*, Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2371–72 (2008) (emphasizing the normative value of "multiple centers of adjudication").

5. *See* Judith Resnik, *Partial "Global Peace": Federalism and the Long Tail of Remedies in Opioid Litigation*, 70 DEPAUL L. REV. 407 (2020) (reporting on the underutilization of judicial coordination in mature tort cases). On the systemic benefits of concurrent judicial authority, see, for example, Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1444 (1999), discussing the capacity for "cross-pollination" between state and federal courts.

6. *See* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

7. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) ("The name of the game is forum-shopping. In the American civil litigation system today, few cases reach trial. After perhaps some initial skirmishing, most cases settle. Yet all cases entail forum selection, which has a major impact on outcome."); Schapiro, *supra* note 5.

8. *See* A FUNNY THING HAPPENED ON THE WAY TO THE FORUM (United Artists 1966).

corporate employer has violated federal labor and employment law. The corporate defendant predictably will remove the action to federal court (where the judge may well dismiss the complaint as conclusory under prevailing interpretations of the Federal Rules of Civil Procedure). Alternatively, the corporate defendant may move the federal court to abstain and defer to the jurisdiction of an administrative agency (where the lawsuit likely will take a back seat to a protracted rulemaking proceeding, if the agency considers the issue at all). Suppose, instead, that the worker initially files in federal court. Now the corporate defendant can be expected to move to compel arbitration (where the claim will be decided behind closed doors).

Each of these situations turns on the corporate party's strategic use of jurisdictional rules, not so much to be in a particular forum, but rather to achieve a predictable substantive goal: circumventing a hearing on the merits and blocking the claimant's shot at redress. Jurisdictional maneuvering drives up the transaction costs of litigation and can facilitate a significant wealth transfer to the corporate defendant.[9] Such maneuvering compels plaintiffs to absorb the financial and psychic loss caused by the corporation's alleged wrongdoing, and it generates demoralization costs along the way.[10] Damaging consequences such as these are not just confined to the private parties. Rather, these jurisdictional decisions serve to chip away at regulatory laws that the corporation would prefer to avoid wholesale (but which, at least for now, continue to be immune from constitutional challenge under the precarious New Deal equilibrium).[11] Thus, while regulatory statutes remain on the books, corporations enlist the courts in a practice of nonenforcement or diminished enforcement. This practice insidiously promotes deregulatory efforts to hollow out laws intended to constrain markets, protect the environment, and combat discrimination against marginalized groups, including those facing discrimination on the basis of race, ethnicity, sex, gender and gender identity, and sexual orientation.[12] Outside the courthouse, the same corporations, allied with like-minded business groups and professional organizations, enhance their jurisdictional advantage by leveraging their resources to encourage the

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9. With respect to the dismissal of potentially meritorious claims under prevailing interpretations of federal pleading rules, see *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting), asserting that "[t]he transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery."

10. With respect to the wealth transfers embedded in arbitration, see Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 502 (2017), referring to mandatory arbitration terms as "wealth transfers" from workers to employers.

11. *See infra* note 173 and accompanying text.

12. Among other things, the procedural decisions send a false signal to the political branch about the value and necessity of the plaintiff's suit and regulatory regime, thus altering the overall information context in which regulatory norms take shape. *Cf.* Helen Hershkoff, *Early Warnings, Thirteenth Chimes: Dismissed Federal-Tort Suits, Public Accountability, and Congressional Oversight*, 2015 MICH. ST. L. REV. 183, 190 (using the term "retreatism" to discuss the negative spillover and information effects of procedural and jurisdictional dismissals of Federal Tort Claims Act suits on legislative action).

appointment of Article III judges who, sharing their worldview and ideological perspective, carry forward this regime.[13]

This Article describes a set of jurisdictional doctrines that consistently disfavor the litigation options of less-resourced parties—persons with limited bargaining power, financial resources, or market clout—who find themselves locked out of court because of arbitration, locked into federal court because of removal jurisdiction, or tossed out of federal court because of administrative primary jurisdiction.[14] These doctrines favor corporate interests in forum choice, delay, and avoiding adjudication on the merits. We call this phenomenon jurisdictional abuse because, as we explain, we see courts' acceptance and even encouragement of the practice as an abuse of democratic values and as a threat to democratic governance. In elaborating the doctrines that define jurisdictional abuse, our focus is not on traditional questions about the limits of subject matter jurisdiction—about the constraints that the Constitution and statutes interpreting it place on federal courts' power to hear claims—although we engage with the values that ought to animate subject matter jurisdiction.[15] Nor is our focus on personal jurisdiction and the evolving doctrines and issues concerning where corporations may be haled into court—although, again, the

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13. See Kate Andrias:

> [A]t least some portion of judges might be predisposed to favor wealth. Wealthy interest groups influence judicial appointments . . . [a]nd judges, perhaps even more so than elected officials, are drawn from the elite. Though Article III judges are not subject to the same capture and corruption mechanisms at work in the political branches, they too are likely to bring their own beliefs and experiences to bear on decisions they make.

Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 492 (2015). For a discussion of the vulnerability of administrative agencies to corporate capture see, for instance, Jennifer Arlen:

> Civil enforcement [by administrative agencies] is more vulnerable to companies' political influence channeled through the President or Congress than criminal enforcement because the President and Congress are each better able to use their influence [over] the identity—and thus ideology—of enforcement agencies' senior leadership to reduce the intensity of corporate civil enforcement.

Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861, 864 (2022).

14. Importantly, these doctrines and examples do not exhaust corporate efforts to manipulate procedural doctrines in their favor. *See infra* note 182 and accompanying text (exploring other areas of procedural retrenchment sought and achieved by corporate actors); Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. 969 (2021) (exploring how private companies are seeking the benefits of the federal government's "sovereign shield" by exploiting preemption, derivative sovereign immunity, and intergovernmental immunity doctrines).

15. The traditional bases for subject matter jurisdiction are federal question and diversity jurisdiction. *See* 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1332 (diversity jurisdiction). Federal courts also have discretionary power to exercise supplemental jurisdiction over nondiverse state law claims in certain instances. *See* 28 U.S.C. § 1367.

Article implicates the democratic significance of these rules.[16] Instead, we focus on a series of ways that the federal courts, reading statutes or deploying prudential doctrines, have expanded or contracted their subject matter jurisdiction to hear and adjudicate claims in ways pushed for by corporate parties. As corporations have sought to manipulate jurisdiction, federal courts have facilitated their efforts with creative and often strained doctrinal analyses.[17] Federal courts have not been uniform in allowing these tactics, but the trend line clearly evinces a wide-ranging judicial acceptance of them.[18] Our effort is thus to connect a series of doctrinal shifts—some of which will be familiar to scholars of procedure and aspects of which have been explored in isolation by scholars. By linking them together, we reveal the larger architecture of the pro-corporate turn in jurisdiction, generalize about its causes, place it in historical context as a procedural inflection point, and draw sharper normative conclusions about its relationship to processes of democratic decline in the United States.

Jurisdictional abuse today has important precursors that aid in making sense of the practice and situate it in a dynamic story of jurisdiction and corporate power. Indeed, this is not the first inflection point where federal courts have substantially transformed their jurisdictional doctrines to favor corporate interests. At the turn of the twentieth century, federal court jurisdiction was implicated in the struggle over corporate power and the advent of the modern regulatory state. As part of a strategy of economic nationalism focused

16. As a matter of constitutional law, the Fourteenth Amendment limits the exercise of personal jurisdiction by state courts and by federal courts when they rely upon state long-arm statutes. *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021) ("The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant."). When assessing whether constitutional limits are met, the Supreme Court has drawn a distinction between general "all-purpose" personal jurisdiction and specific personal jurisdiction with respect to the claim in dispute. *See, e.g.*, Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915, 919 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945))); *id.* ("Specific jurisdiction, on the other hand, depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." (alteration in original) (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1136 (1966))). For critical commentary on the narrowing of the reach of the doctrine of personal jurisdiction in ways that reduce litigant access and promote litigant inequality, see, for example, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 347–53 (2013), discussing the potential beneficial effects of the narrowing of the Court's personal jurisdiction doctrine on commercial entities.

17. Stephen Vladeck has described a similar trend of the Supreme Court acquiescing in, and even "enabling (if not affirmatively encouraging)" aggressive litigation techniques by the solicitor general during the Trump administration. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 127 (2019).

18. As we explore below, in the snap removal and arbitration contexts, not all federal judges have permitted these practices. *See infra* notes 87, 108 and accompanying text.

on fostering the growth of large-scale enterprises and resisting regulatory policies at the state and federal level, legislators and judges expanded the power of the federal courts to hear cases involving corporations—facilitating efforts of corporations to remove cases out of state courts and into federal courts perceived to be " 'forums of order' for national commercial interests."[19] The strategy paid off in the years to come as the federal judiciary issued a series of decisions promoting economic nationalism and overturning regulatory enactments.[20] This history prompted then-Professor Felix Frankfurter to reflect that "under the guise of seemingly dry jurisdictional and procedural problems, majestic and subtle issues of great moment to the political life of the country are concealed."[21]

Frankfurter's words aptly describe today's jurisdictional battleground. But today, the terrain is different. While the earlier century's effort to cement large-scale enterprises succeeded, the efforts to resist the advent of the modern regulatory state were short-lived and at the time largely failed in the constitutional confrontation of the New Deal. The New Deal was characterized by an effort to rein in excessive economic power and fight against oligarchy—that is, economic power translating into political power and undermining democracy—by passing a series of regulations governing the marketplace, protecting workers, and safeguarding the environment.[22] The Supreme Court ultimately upheld landmark pieces of New Deal legislation, ushering in the modern regulatory state.

But the old struggle has new life today. As the regulatory state has grown since the New Deal, litigation has come to play a substantial—and in some ways outsize—role in making regulatory governance function: Congress has placed hundreds of private rights of action in a bevy of regulatory statutes over the past seventy-five years.[23] And states, likewise, have enacted state-specific laws allowing citizens to bring suit.[24] Under the banner of efficiency, business interests have sought to defang the regulatory state by securing changes to procedure, both to the rules of practice and to their interpretation by the courts,

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19. Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 517 (2002).

20. *See infra* Section II.A.

21. The letter is quoted and discussed in Edward A. Purcell, Jr., *Reconsidering the Frankfurtian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 685–86 (1999); *see also* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 2 (1927) ("So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is the means of effectuating policy. Particularly true is this of the federal courts.").

22. *See infra* notes 168–172 and accompanying text.

23. *See infra* notes 179–182 and accompanying text.

24. *See* Zachary D. Clopton & David L. Noll, *Litigation States* (working paper) (on file with author) (finding more than 3,000 provisions in state laws authorizing attorneys' fees or enhanced damages—both of which are statutory features that encourage private enforcement); Diego Zambrano, Neel Guha, Austin Peters & Jeffrey Xia, *Private Enforcement in the States*, 171 U. PA. L. REV. (forthcoming 2023) (finding more than 3,500 private rights of action in the states).

that make it more difficult for plaintiffs to enforce statutory protections. These efforts, although defended as neutral and apolitical, have resulted in the "corporatization of procedure," to borrow from J. Maria Glover,[25] and are used instrumentally to promote business interests.[26] As scholars have explored in various areas, procedure has provided both a shield and a sword for corporate defendants to block regulatory enforcement.[27]

This Article argues that jurisdictional abuse is an important yet insufficiently acknowledged part of this evolving, modern backlash against the regulatory state. It is also a story with nuance. Unlike the earlier economic nationalist struggle directed initially against state regulatory efforts and then against federal New Deal legislation, today's pro-corporate jurisdictional shifts are not solely directed at expanding federal jurisdiction as a mode of resistance. The shifts are more dynamic. At times, Congress and the federal courts have expanded federal jurisdiction,[28] and at others, the federal courts have contracted jurisdiction even when statutes have remained the same.[29] The through line, however, is that the expansions and contractions track corporate interests in manipulating forum choice to gain advantages and to diminish the role of litigation, and thus of public law, in regulating their affairs.

And now, as before, what Frankfurter dubbed "dry jurisdictional and procedural problems" are implicated in something deeper—a modern struggle over oligarchy and democracy. Our core analytic claim is that the corporate abuse of jurisdiction is part of—and helps to shed light on the dynamics of—rising oligarchic conditions and democratic decline in the United States. The threat of oligarchy is that concentrated economic power bleeds into political power and undermines prospects for democratic self-government.[30] The threat is receiving renewed scholarly attention today, largely outside the realm

25. J. Maria Glover, *"Encroachments and Oppressions": The Corporatization of Procedure and the Decline of the Rule of Law*, 86 FORDHAM L. REV. 2113 (2018).

26. Some commentators have criticized these trends for their anti-litigation stance, but in practice the rules are anti-litigation only when parties seek to enforce rights against corporate parties. *Compare* Arthur R. Miller, *What Are Courts For?: Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 798 (2018) (stating that "certain conservative and pro-business political and defense interests have been energetically waging an anti-litigation war for many years"), *with* Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657, 686 (2021) (discussing the "instrumental" approach to litigation by business and progressive groups).

27. *See infra* notes 177–179 and accompanying text.

28. For a synthesis of congressional efforts that expanded federal court power through the grant of diversity jurisdiction, see Richard D. Freer, *The Political Reality of Diversity Jurisdiction*, 94 S. CAL. L. REV. 1083 (2021).

29. *See, e.g.*, F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 909–14 (2009) (discussing federal courts' inconsistent readings and dynamic interpretations of 28 U.S.C. § 1331 since its inception).

30. *See, e.g.*, JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION 8 (2022) ("[T]he threat of oligarchy[is] the danger that, because concentrations of economic and political power are mutually reinforcing, if they become sufficiently extreme, they threaten the Constitution's democratic foundations." (emphasis removed)).

of civil procedure.[31] Procedure scholars have usefully explored various ways in which economic inequality has shaped and infects modern procedural evolutions.[32] But the corporate transformation of procedure can also be embedded in a larger account of increasing oligarchic conditions.[33] We argue that federal courts' doctrines and decisions sanctioning corporate efforts to manipulate subject matter jurisdiction are part of the growing architecture of what we call "the oligarchic courthouse"—a judicial system in which corporate actors are permitted to leverage their private economic power into not only greater wealth, but also self-serving public institutional policy, without due regard to the democratic costs of their adjudicative conduct. Today's jurisdictional battles are part of a corporate effort to commandeer the state's procedures for themselves precisely because procedure can determine whether laws on the books are or are not applied in ways that meaningfully regulate corporate affairs and protect the intended beneficiaries.

These efforts highlight that oligarchy is about the ability of the powerful to shape not only "substantive" policies, but also the procedures for implementing—and blocking—enforcement of those policies. In particular, corporations pushing for the construction of the oligarchic courthouse are engaging in what sociologists refer to as "opportunity hoarding"—the use of power to control public resources and to deploy them as a means of exploitation.[34] Such hoarding is part and parcel of how economic power translates into political power—of how oligarchy comes into shape—and can facilitate and reflect a

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31. *See also infra* note 207 and accompanying text. *See generally* FISHKIN & FORBATH, *supra* note 30.

32. *See, e.g.*, HELEN HERSHKOFF & STEPHEN LOFFREDO, GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME ch. 9 (2020); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183 (2022); Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509 (2022); Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269 (2020); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016); Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011); Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325 (2007); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462 (2017); Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471 (2022); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704 (2022). For a discussion of how procedural enforcement mechanisms affect intellectual property entitlements, see, for instance, Ira S. Nathenson, *Civil Procedures for a World of Shared and User-Generated Content*, 48 U. LOUISVILLE L. REV. 911 (2010), describing how procedures used to enforce copyright rights can terrorize users, chill creativity, censor discourse, narrow participation, and concentrate property wealth.

33. *See* Luke Norris, *Procedural Political Economy*, LPE BLOG (Apr. 27, 2022), https://lpeproject.org/blog/procedural-political-economy/ [perma.cc/D4HE-H8VE] (laying the groundwork for exploring the relationship between civil procedure and oligarchy).

34. *See* CHARLES TILLY, DURABLE INEQUALITY 10 (1998) (using the term opportunity hoarding to describe a practice by which "members of a categorically bounded network acquire access to a resource that is valuable, renewable, subject to monopoly, supportive of network activities, and enhanced by the network's modus operandi").

broader process of democratic decline and deconsolidation. And when public resources do not usefully serve business interests, corporate parties seek to narrow the power of the state, to shrink the public realm, and to remit dispute resolution to a private forum such as arbitration that dilutes the force and efficacy of public regulation. The rise of the oligarchic courthouse shows how seemingly abstruse jurisdictional and procedural doctrines contribute to the consolidation of economic power through abuse of our public institutions, and so enlist the mechanisms of democracy toward anti-democratic ends.

But why would federal courts participate in this project? The oligarchic courthouse has been built in subtle and multifaceted ways over time, and the account we give is not a standard one of corporate forces capturing a public institution.[35] While the literature on institutional capture informs our thinking, the story we tell is more multilayered, dynamic, and attuned to the distinctive structural features of courts and adjudicative process. In particular, we explore a set of institutional, organizational, and cultural explanations for the rise of the oligarchic courthouse. Some of the explanations involve the role of legal organizations, with commitments that align with anti-regulatory corporate agendas, in shaping the views of judges and the bar. Others relate to the composition of the judiciary, including a longstanding practice—only now showing cracks—of favoring the appointment of Article III judges who come from corporate law backgrounds and may be more predisposed to view corporate claims favorably. A series of cultural factors also help to explain what might predispose judges to construct the oligarchic courthouse—including group identity, status affiliation, and relationship networks. And, finally, pro-corporate actors are able to leverage the institutional dynamics of court adjudication and procedural rulemaking to produce an information flow and narrative about litigation that may contribute to the pro-corporate turn in jurisdictional doctrine.

The rise of the oligarchic courthouse has troubling implications for democratic governance—and, indeed, can be nested in a larger account of democratic decline and erosion in the United States today. To critique the rise of the oligarchic courthouse and show its relationship to democratic decline, we first center jurisdiction in democracy in a way that departs from conventional accounts. In the late twentieth century, it was commonplace to valorize litigation as a private good and to criticize or disregard its worth as a public good. On this view, courts constituted a market offering services to businesses, and

35. For a public choice perspective on the question of judicial capture, see, for instance, Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 355 (1999), arguing that "the judicial process is more susceptible to manipulation by narrow interests than are the more democratic branches of government." Cross emphasizes the ability of well-resourced groups to have a special advantage to engage in "precedent purchase." *See id.* at 367 ("While litigants may be unable to purchase the judge's favors directly, they can achieve the same end indirectly . . . .").

procedure was a technical mechanism best designed to achieve efficient results.[36] The approach gave little weight to the negative spillover effects of litigation on public life and effectively suppressed discussion of the democratic role of litigation and procedure within a political system.[37] After exploring the forces that helped build the oligarchic courthouse, this Article provides a democratic account of litigation by engaging with the argument that adjudication—and jurisdiction as a core aspect of it—is a political resource and that its accessibility can dynamically affect the possibilities for democratic contestation and mobilization. Having laid this foundation, we show how the rise of the oligarchic courthouse undermines jurisdiction as a political resource and can be understood as contributing to larger processes of democratic decline in the United States today by deepening concentrations of corporate power, exacerbating inequality, and undermining participatory capacity.

This Article proceeds in three Parts. Part I sketches out the doctrinal shifts in jurisdiction—arbitration, removal jurisdiction, and primary jurisdiction—that have promoted the interests of what Galanter a half century ago called the "haves." Part II explains how these shifts contribute to the construction of the oligarchic courthouse and explores the factors contributing to its rise. Part III critiques the shifts, arguing that jurisdictional abuse erodes democracy. A brief Conclusion offers thoughts on what deconstructing the oligarchic courthouse and reconstructing it as a democratic courthouse might entail.

I. JURISDICTIONAL SHIFTS

This Part forms the core of the Article's descriptive inquiry, and it sketches out how federal courts are expanding and contracting their subject matter jurisdiction in ways that follow corporate interests and support an anti-regulatory agenda. In particular, this Part tracks three doctrinal shifts in jurisdiction. First, it focuses on how arbitration doctrine locks plaintiffs (usually workers, consumers, and small businesses) out of court. Second, it explores how removal locks less-resourced parties into federal court and out of state courts perceived to be friendlier to their claims. And third, it explains how primary jurisdiction decisions throw these claimants out of federal court in ways that serve to delay and obfuscate rather than further regulatory enforcement. The overall effect of these doctrinal shifts, slowly and in incremental steps, has been to support deregulatory efforts that narrow federal laws intended to protect workers, consumers, and the environment, and undercut principles of equality and inclusion embedded in anti-discrimination and other laws.

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36. The canonical article defending this stance is William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

37. This alternative view, pressed earlier by Frankfurter, see *supra* note 21 and accompanying text, threaded through European approaches to litigation in the post-World-War-II period. *See, e.g.*, PIERO CALAMANDREI, PROCEDURE AND DEMOCRACY (John Clarke Adams & Helen Adams trans., 1956); *see also* Paul D. Carrington, *Teaching American Civil Procedure Since 1779*, *in* LEGAL CANONS 155, 159 (J.M. Balkin & Sanford Levinson eds., 2000) (discussing Tocqueville's view of law, lawyers, and courts as "institutions of democratic government").

A. *Lock Out: Arbitration*

By now it is familiar fare that the Supreme Court has transformed the Federal Arbitration Act (FAA) into a coercive mechanism that allows corporate entities to avoid liability by locking claimants out of federal and state court—giving corporate parties a proverbial "get out of jail free" card, to borrow Judge Moore's provocative description.[38] Indeed, the Congress that enacted the FAA in 1925 would not recognize the Court's statute as its own.[39] The FAA was a narrow, tailored statute, borne of particular circumstances. Before the FAA, federal courts permitted parties who had agreed to arbitrate their disputes to "revoke" the agreement at any time before an arbitral award was issued.[40] Federal courts created this revocability doctrine to blunt concerns that rising arbitration among commercial parties might "oust" them of their jurisdiction.[41] Congress passed the FAA to thwart federal courts from "jealous" protection of their jurisdiction and to ensure that they honored commercial parties' agreements.[42] The FAA also was part of a movement for procedural reform.[43] The framers of the FAA explicitly designed it not to apply to employment contracts in interstate commerce and they had consumer arbitration nowhere in mind in drafting the statute; it was designed and intended to promote the enforcement of commercial arbitration agreements.[44]

Today, the Supreme Court and federal courts have expansively interpreted the FAA to allow corporations to "contract" out of federal and state jurisdiction in ways that are neither sanctioned nor envisioned by the FAA. The

38. Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 868 (Cal. Ct. App. 2002).

39. As Justice O'Connor put it, the Court has "abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation." Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., dissenting).

40. Luke P. Norris, *The Parity Principle*, 93 N.Y.U. L. REV. 249, 258–59 (2018) (exploring the history of the revocability doctrine).

41. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926).

42. *See* Norris, *supra* note 40, at 259.

43. At the time, when federal courts generally followed the labyrinthian procedures of the state courts in the state in which they sat, the FAA "was part of the process by which reformers sought to simplify procedure in order to let parties more swiftly and effectively adjudicate disputes on the merits." *Id.* at 261–62; *see* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1978–80 (2014) (linking the FAA to procedural simplification and reform efforts); Imre S. Szalai, *An Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure*, 2010 J. DISP. RESOL. 391, 411–19 (arguing that the FAA was an "outgrowth" of procedural reform efforts linked to "dissatisfaction with the confusing, technical procedural landscape during the early 1900s").

44. Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 125–26 (2001) (Stevens, J., dissenting) ("[N]either the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contains any evidence that the proponents of the legislation intended it to apply to agreements affecting employment.").

Court has interpreted the statute to compel workers, consumers, small businesses, and patients to be bound by adhesive contractual terms mandating arbitration, to restrict these often less-resourced parties from engaging in group or collective arbitral actions, and to limit the scope of permissible federal court appellate review of arbitral decisions.[45] To be sure, corporate parties are beginning to meet some resistance to these trends, as some claimants' counsel bundle arbitral claims and file them in bulk, with each individual claim requiring the corporation to pay its portion of the arbitrator's fee under some arbitration rules. Faced with rising transaction costs, corporate parties are rethinking their forum preferences by reneging on arbitral promises, trying to rewrite the rules of arbitration, and seeking to compel litigation in federal court.[46]

1. "Contracting" Around Court Jurisdiction

The Court's atextual, and in our view, anti-democratic, transformation of the FAA departs sharply from Congress's design of the statute, the FAA's primary goal, and its initial, more faithful judicial interpretation. Current doctrine negatively impacts the rights of employees, consumers, and other less-resourced parties who are hampered in enforcing legitimate statutory claims in court. But the Court's doctrine also produces perverse and negative effects on the Article III system itself. The FAA was never intended to deprive federal courts so sweepingly of adjudicative power. Indeed, at the time of the statute's enactment and for decades to come, the statute was interpreted to preserve significant aspects of federal court jurisdiction, especially where questions of the interpretation of public law and deep power disparities were involved.[47]

This emphasis on courts' retaining jurisdiction is baked into the FAA itself. While the statute directs federal courts to enforce arbitration agreements and had commercial agreements in mind, Section 1 of the statute excepts those agreements involving employees in interstate commerce.[48] The framers of the FAA thus preserved federal court jurisdiction for employment disputes because they worried that workers would be compelled to accept take-it-or-

45. *See infra* notes 68–69, 79–81 and accompanying text.

46. *See infra* notes 85–86.

47. *E.g.,* Norris, *supra* note 40, at 263 ("The FAA . . . was not designed to allow parties to evade the dictates of law or regulation, but as a simplifying reform . . . ."); Wilko v. Swan, 346 U.S. 427 (1953); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

48. 9 U.S.C. § 1 (2012) ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."); *see also* Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022) (holding that a ramp supervisor for a domestic airline company belongs to the class of transportation workers in interstate commerce falling under Section 1's exemption).

leave-it arbitration clauses as a condition of employment and would therefore lose the benefits and protections of public process.[49]

The emphasis on retaining jurisdiction also animated the Supreme Court's earlier decisions involving statutory enforcement claims. In *Wilko v. Swan*, the Court declined to enforce an arbitration provision governing a Securities Act claim because the statute "was drafted with an eye to the disadvantages under which buyers [of securities] labor"; arbitral awards, unlike judicial ones, could be issued without explanation or the right to appeal the arbitrator's "conception of the legal meaning of . . . statutory requirements."[50] The Court also noted that a securities buyer would be giving up a wider choice of courts and venue and that arbitrators may not have the "judicial instruction on the law" possessed by judges.[51] It thus concluded that the "protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness."[52] As Judith Resnik put it, in *Wilko* "[t]he arbitrator as dispute resolver was posited as a potential hazard to the state, as lawmaker."[53]

This view continued in *Alexander v. Gardner-Denver Co.*, where the Court held that an employee's statutory right to bring a Title VII claim alleging workplace discrimination was not foreclosed by previously submitting the claim to grievance arbitration under a collective bargaining agreement's nondiscrimination clause.[54] The Court once again focused on the significance of having federal judges apply and interpret the statute.[55] It stressed both the important role played by civil litigants in developing anti-discrimination law and the fact that judges were better suited than arbitrators to resolve statutory and constitutional issues "whose broad language frequently can be given meaning only by reference to public law concepts."[56]

In the 1980s, however, the Court did an about-face and began to endorse arguments put forward by corporate litigants that radically revised the FAA. Through strained statutory interpretation, the Court relinquished federal and state courts' power to hear a sea of claims involving workers and arising under

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49. *See* Norris, *supra* note 40; *see also* Helen Hershkoff & Judith Resnik, *Contractualisation of Civil Litigation in the United States: Procedure, Contract, Public Authority, Autonomy, Aggregate Litigation, and Power*, *in* CONTRACTUALISATION OF CIVIL LITIGATION (Anna Nylund & Antonio Cabral eds., forthcoming October 2023) (on file with authors).

50. *Wilko*, 346 U.S. at 435–36.

51. *Id.* at 436.

52. *Id.* at 437.

53. Judith Resnik, *Many Doors? Closing Doors?: Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 224 (1995).

54. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

55. The Court there focused on the importance of courts and civil litigation in enforcing Title VII, and on how arbitration, with its emphasis on effectuating contractual intent, was "comparatively inferior to judicial processes" for resolving Title VII disputes. *Id.* at 56–57. Arbitrators were competent in "the law of the shop, not the law of the land," whereas courts had expertise in resolving statutory and constitutional issues. *Id.* at 57.

56. *See id.*

federal regulatory statutes governing broad swaths of American life. In a foundational departure, the Court read general arbitration clauses to encompass not only claims sounding in contract, but also those involving federal and state statutes.[57] As it increasingly allowed the arbitration of statutory claims, the Court erased from its decisions any notion that federal jurisdiction protected less powerful parties or was important to public law development,[58] first casting doubt on *Wilko*'s reasoning and ultimately effectively overruling it.[59] As part of this trend, the Court liberally enforced arbitration clauses involving consumer and antitrust regulatory issues.[60] It did so in part by reading atop the FAA a "liberal federal policy favoring arbitration" and celebrating what it dubbed the flexibility and informality of arbitration as a contractual choice.[61] These efforts have led to arbitration clauses becoming ubiquitous across core sectors of the economy, but the notion that contractual choice justifies the turn to arbitration is belied by the fact that arbitration clauses are frequently embedded in contracts of adhesion and other documents that do not reflect a "meeting of the minds."[62] Further tilting the needle towards arbitration and

57. The Court first made this move in a case about international arbitration. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (concluding that the parties' intentions should be "generously construed as to issues of arbitrability" and that "[t]here is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights"); *see also* Katherine V.W. Stone, *Arbitration—From Sacred Cow to Golden Calf: Three Phases in the History of the Federal Arbitration Act*, 73 LAB. L.J. 66, 80 (2022) (recounting changes in the Court's interpretation of the FAA and calling current doctrine "expressly pro-business"); Katherine V.W. Stone, *The Bold Ambition of Justice Scalia's Arbitration Jurisprudence: Keep Workers and Consumers Out of Court*, 21 EMP. RTS. & EMP. POL'Y J. 189 (2017) (chronicling developments in the Court's interpretation of the FAA).

58. *See* Norris, *Neoliberal Civil Procedure*, *supra* note 32, at 493–98 (exploring how in various decisions the Court erased considerations of power or of the benefits of public proceedings from its rationales).

59. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 243 (1987) (Blackmun, J., concurring in part and dissenting in part with regard to arbitration) ("In today's decision, however, the Court effectively overrules *Wilko* by accepting the Securities and Exchange Commission's newly adopted position that arbitration procedures in the securities industry and the Commission's oversight of the self-regulatory organizations (SROs) have improved greatly since *Wilko* was decided.").

60. *See, e.g.*, *id.* at 222–38 (majority opinion) (enforcing an arbitration clause involving Section 10(b) of the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act).

61. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011).

62. *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2869–70 (2015) (exploring how arbitration clauses deviate from fundamental components of contractual choice); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 962 & n.171 (1999) (showing a variety of instances where courts have upheld arbitration clauses "when consent is thin, if not outright fictitious," including cases involving "arbitration agreements that appear in a document incorporated into a contract by reference, even when one party had no opportunity to see or no reason to anticipate the incorporated term").

away from court jurisdiction, the Court has directed that arbitrators themselves resolve contractual ambiguities about whether arbitration was intended, and that they generally resolve any doubts about the "agreement" in favor of arbitration.[63]

And, against the text and history of Section 1 of the FAA and its restrictions involving employment contracts, the Court concluded in 2001 that the section prohibits federal courts only from enforcing arbitration agreements involving transportation workers, thus narrowing the ability of courts to hear claims arising from employment relationships.[64] At the time the Court ruled, a small fraction of nonunionized, private sector employees were bound by arbitration clauses—about a quarter.[65] By 2018, approximately 60% of such employees were bound by arbitration clauses, and by 2024, it is projected that 80% will be.[66]

2. Aggregate Litigation and Restricted Judicial Power

Even as it abdicated federal jurisdiction in favor of arbitral power, the Court made it tougher for less-resourced parties to receive redress through arbitration. Again, the Court's interpretive move was procedural in form but predictable in its substantive consequence: interpreting the FAA in ways that depress the ability of claimants—which typically include workers, consumers, patients, and small businesses—to combine together to bring regulatory actions as a group.

Consider *AT&T Mobility LLC v. Concepcion*, where the Court held that the FAA preempted a California unconscionability doctrine.[67] California courts had found that when class action waivers existed in certain adhesion contracts involving small amounts of damages, unequal bargaining power, and large numbers of harmed consumers, the waivers may be unconscionable and that California courts therefore should not enforce them and instead leave open the option of class-wide arbitration.[68] The Court held that the FAA

63. *E.g.*, *Moses Cone*, 460 U.S. at 24–25 ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . [D]oubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

64. Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

65. ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION 1 (2018), https://files.epi.org/pdf/144131.pdf [perma.cc/QM6L-DPLZ].

66. *Id.* at 3; KATE HAMAJI, RACHEL DEUTSCH, ELIZABETH NICOLAS, CELINE MCNICHOLAS, HEIDI SHIERHOLZ & MARGARET POYDOCK, UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK 3 (2019), https://files.epi.org/uploads/Unchecked-Corporate-Power-web.pdf [perma.cc/HQ9C-TXVX].

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

68. *Id.* at 340–41. Under the California *Discover* doctrine, when waiver was found in a contract of adhesion and "in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out

preempted this doctrine because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[69] For the Court, arbitration's attributes were ones of flexibility and informality, and aggregate proceedings impermissibly interfered with those attributes.[70] But, as the dissent argued, class-wide arbitration was neither inconsistent with the FAA nor unworkable, and the real impact of the decision would be to make it incredibly difficult for plaintiffs with small claims to get lawyers and proceed in arbitration.[71] California's unconscionability doctrine was an example of a state court preserving some of its jurisdiction and power of review: the doctrine maintained that certain unconscionable contracts banning aggregate dispute resolution should not be enforced and that the claim should proceed in aggregate form. The Court's reading of the FAA to preempt the doctrine both limits the power of state courts and legislatures to supervise arbitration and augments the power of federal courts to find that the FAA preempts state efforts to regulate arbitration and preserve judicial power in certain contexts.

Two other cases follow the trend. In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court enforced an arbitration clause banning classwide proceedings where an expert had opined that the cost of the plaintiff's proceeding on its own in arbitration would exceed any recovery it would receive by at least ten times,[72] making individual arbitration, in the words of Justice Kagan, "a fool's errand."[73] And, in *Epic Systems Corp. v. Lewis*, the Court held that arbitration clauses banning aggregate litigation or arbitration did not conflict with the provisions of the National Labor Relations Act protecting the right of workers "to engage in . . . concerted activities" for their "mutual aid or protection."[74] The Court so held against a history of viewing forms of collective worker action—whether petitioning Congress, making pleas to the media, or bringing lawsuits or other public claims—as encompassed within the statute's

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of individually small sums of money," then a court may find the waiver an unconscionable attempt to evade liability. *Id.* at 340 (quoting Discover Bank v. Superior Ct., 113 P.3d 1100, 1110 (Cal. 2005)).

69. *Id.* at 344.

70. *See id.* at 345.

71. *See id.* at 359–65 (Breyer, J., dissenting).

72. The Court stated:

> [R]espondents submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be 'at least several hundred thousand dollars, and might exceed $1 million,' while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled.

Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013) (quoting Declaration of Gary L. French, Ph.D., *Italian Colors*, 570 U.S. 228 (No. 12-133), *reprinted in Italian Colors*, 570 U.S. app. at 93).

73. *Id.* at 240 (Kagan, J., dissenting).

74. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018); 29 U.S.C. § 157.

protections.[75] Both of these cases bear upon the power and jurisdiction of courts. *Italian Colors* limits the ability of federal and state courts to inquire into whether arbitration clauses make dispute resolution practicably unworkable for the parties, further shrinking their role in supervising arbitration. And *Epic Systems* limits the ability of federal and state courts and arbitrators to hear collective claims protected by federal labor law.

3. Winnowing Appellate Jurisdiction

The Court has also winnowed the jurisdiction of federal courts to review arbitral awards. Arbitration is a largely private process, and its proceedings, and results, are closed to the public. Arbitrators do not publish their decisions on Westlaw or Lexis; in the usual situation, counsel for consumers or employees do not know how arbitrators cash out the value of particular kinds of claims. Instead, as Cynthia Estlund has put it, mandatory arbitration is a "black hole," lacking the transparency and publicity that are hallmarks of public process.[76] The Supreme Court has heightened the secrecy that surrounds arbitration, and, again, has done so by narrowing jurisdiction—in this situation, appellate jurisdiction—even when parties explicitly seek federal review. In *Hall Street Associates v. Mattel*, the Court considered whether the parties could contract to allow a court to vacate, modify, or correct an award where the arbitrator's conclusions of law were erroneous.[77] Section 10 of the FAA lists several, quite limited, bases—such as corruption and fraud—for a court to vacate, modify, or correct an arbitral award.[78] The question in the case was whether those bases were exclusive or whether the parties, since arbitration was a matter of contract, could choose other bases for federal court appellate review.[79] While the statute nowhere precluded such review by federal courts, the Court read the statute in a strained way: It held that the bases in Section 10 for vacating an arbitral award were exclusive and that appellate review was confined to those bases.[80]

By effect, *Hall Street* read the FAA to restrict contractual autonomy while enlarging the private sphere and insulating it from public scrutiny. In doing so, the Court removed from Article III courts the power to shine some light

75. *See Epic Sys. Corp.*, 138 S. Ct. at 1637–39 (Ginsburg, J., dissenting) (cataloguing the kinds of litigation and governmental activity that have been understood to fall within the statute's protections).

76. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

77. Hall St. Assocs. v. Mattel, 552 U.S. 576 (2008).

78. 9 U.S.C. § 10.

79. *Hall St.*, 552 U.S. at 578.

80. *Id.* at 583–88. The dissenting opinions took issue with the majority's textual argument that the statute was meant to be comprehensive. Rather, the question was whether the FAA *precluded* federal courts from enforcing an arbitration agreement that gives a court the ability to set aside an error of law. Since it did not, the parties should have been able to include the provision. *See id.* at 593–96 (Stevens, J., dissenting); *id.* at 596 (Breyer, J., dissenting).

into the black hole of arbitration through the exercise of appellate review. Because the grounds listed in Section 10 are so limited, arbitral awards that stray far from the meaning or commands of public regulatory laws are protected from judicial scrutiny. Moreover, the Court suppressed litigant choice, notwithstanding the FAA's silence, in cases in which choice would afford judges and public process a greater role in overseeing arbitral decisions. The case thus shows how corporate actors seek not only to control public process but also to dismantle or enervate it, substituting privatized procedures that better serve their interests at the expense of public values. Federal circuit courts are now split over whether an arbitrator's *manifest disregard* for the law—including disregard of laws that protect workers and consumers—is a permissible ground for vacating, modifying, or correcting an award.[81]

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One concern about the corporate push for arbitration has been that it is designed to suppress claims, not merely to shift them to private fora.[82] This concern is magnified by the prominence of arbitration clauses in settings involving Black and Brown, female, and low-wage workers.[83] Although data are limited and not easily accessible, available information confirms that injured parties are less likely to arbitrate than they are to litigate—in part because of the difficulty of finding a lawyer in arbitration—meaning that contracting around jurisdiction can amount to contracting around liability.[84] The Court's ban on aggregate mechanisms in arbitration has contributed to this process of claim suppression by decreasing lawyer incentives to provide representation.

81. Several circuits concluded that manifest disregard for the law is not a valid basis for vacating, modifying, or correcting an award. *See* Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008); S. Commc'ns Servs., Inc. v. Thomas, 720 F.3d 1352 (3d Cir. 2013); Jones v. Michaels Stores, 991 F.3d 614 (5th Cir. 2021); Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc., 660 F.3d 281, 285 (7th Cir. 2011); Med. Shoppe Int'l, Inc. v. Turner Invs., Inc., 614 F.3d 485 (8th Cir. 2010); Frazier v. CitiFinancial Corp., 604 F.3d 1313 (11th Cir. 2010). Others find that it survives in one form or another as a statutory basis for jurisdiction. *See* Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008); Comedy Club, Inc., v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009); Warfield v. ICON Advisers, Inc., 26 F.4th 666 (4th Cir. 2022); THI of N.M. at Vida Encantada, LLC v. Lovato, 864 F.3d 1080 (10th Cir. 2017).

82. *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 3, 21–22 (2015), https://files.epi.org/2015/arbitration-epidemic.pdf [perma.cc/2ARD-X67T].

83. COLVIN, *supra* note 65, at 2 (finding that arbitration clauses are more common in workplaces where workers earn lower wages and sectors that "are disproportionately composed of women workers and . . . African American workers"); *see also* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016) (finding claims brought by low-income private enforcers are disappearing from the dockets).

84. *See* STONE & COLVIN, *supra* note 82, at 21–22; *see also* Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611 (2020).

The result is that jurisdictional doctrines undermine the application and enforcement of regulatory law.

Recent trends suggest some push-back by segments of the bar. These attorneys are finding creative ways to design informal methods of aggregation that facilitate the filing of masses of individual arbitration claims, which at times enable them to represent thousands of plaintiffs individually.[85] And, true to form, corporate parties once again are attempting to take advantage of forum choice for their own benefit. Driven by calculations that court adjudication would be more favorable and less expensive than one-by-one arbitration often involving thousands of claims—even though one-by-one arbitration is what those corporate parties chose—these corporate actors are now attempting to weasel out of arbitration and get back into federal court.[86] While federal courts have not as of yet acquiesced in these efforts, the process of litigating these motions saps resources from plaintiffs and creates a system of delay and confusion.[87]

B. *Lock In: Removal*

The arbitration cases illustrate ways in which corporate parties seek to restrict judicial power to hear claims when an alternative, private forum effectively sounds the death knell for many of those claims. But the manipulation of jurisdiction also involves the expansion or robust exercise of federal court power in ways that conform with the interests of corporate parties. Absent an arbitration clause, it has long been understood that defendants tend to prefer having their claims heard in federal court rather than state court.[88] Federal courts are thought to be less solicitous of plaintiffs' claims than some state courts and federal courts' procedures are in many instances more restrictive than those in state court.[89] Thus, in settings where arbitration clauses are absent, corporations have sought to remove actions filed in state court to federal

85. J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022); Andrew B. Nissensohn, Note, *Mass Arbitration 2.0*, 79 WASH. & LEE L. REV. 1225 (2022).

86. *See, e.g.*, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020); Jef Feeley, *BuzzFeed Sues to Block Arbitration Claims over Initial Offering*, BLOOMBERG (Apr. 22, 2022, 2:48 PM), https://www.bloomberg.com/news/articles/2022-04-22/buzzfeed-sues-to-block-arbitration-claims-over-initial-offering [perma.cc/HHU5-2JQ3].

87. *Abernathy*, 438 F. Supp. 3d at 1064–66 (compelling arbitration for employees who had agreed to the arbitration clause and denying DoorDash's motion to stay the proceedings); *see also id.* at 1067–68 (noting the irony of the defendant demanding arbitration and then reneging when the workers actually sought to arbitrate).

88. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 604 (1998) (exploring how corporate defendants prefer removing to federal court rather than litigating in state court); Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 966 (1995) (reviewing empirical evidence on corporate party preference for litigating in federal court).

89. As Edward Purcell shows, these views and preferences are deeply rooted in U.S. legal history. *See* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY

court, effectively ending state courts' authority to hear the claims. Under the federal removal statute, defendants may seek to remove a case to federal court so long as the federal courts have concurrent jurisdiction (with a few exceptions).[90] Plaintiffs may later seek to remand the case back to state court if the federal court lacks jurisdiction or the removal was defective in some way.[91] Removal has been a battleground for jurisdictional power in numerous ways and has resulted in various adverse outcomes for plaintiffs.

1. Fraudulent and Erroneous Removal

Consider first fraudulent and erroneous removal. Fraudulent removal "occurs when a removing defendant's assertion of federal jurisdiction is made in bad faith or is wholly insubstantial."[92] For example, after a plaintiff files a claim in state court, defendants have removed to federal court only to file a motion to dismiss arguing that the federal court lacks subject matter jurisdiction over the case.[93] While plaintiffs may seek to remand the case back to state court, and sometimes successfully do, the process cuts into time and resources.[94] Worse still, in some instances, the federal court dismisses the removed case rather than remanding it, effectively allowing the defendant to end the litigation even though removal was improper.[95]

Fraudulent removal connects to a larger phenomenon of erroneous or dubious removal practices. Sometimes a defendant removes to federal court, apparently knowing that the forum lacks jurisdiction and that the case will likely be remanded, but does so strategically, in an effort to exhaust a weaker party. Theodore Eisenberg and Trevor Morrison studied this phenomenon of erroneous removal over a twenty-year period and found a growing tendency of defendants opting for the federal forum simply to "run up attorney fees and other costs, thus sapping the poorer party's litigation resources and harming its bargaining position."[96]

Another questionable removal practice involves the federal officer removal statute. The statute liberally allows the United States, any federal agency, or "any officer (or any other person acting under that officer) of the

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JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 87–103, 127–47 (1992) (detailing corporate battles over removal and against perceived local prejudice).

90. 28 U.S.C. § 1441(a).

91. *See id.* § 1446(d) (providing that after removal "the State court shall proceed no further unless and until the case is remanded").

92. Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. F. 87, 87–88 (2021).

93. *See id.* at 88.

94. *See id.* ("[F]raudulent removal wastes judicial resources, needlessly delays proceedings, and offends notions of federalism.").

95. *Id.* at 92 ("Worse yet, sometimes a case will be dismissed rather than remanded, triggering further adverse consequences for plaintiffs.").

96. Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 551–52 (2005).

United States or of any agency" to remove an action to federal court.[97] Importantly, a federal officer may remove even when the only federal issue involved in the litigation is a federal defense. This standard deviates from the regular rule that federal court jurisdiction must be evident from the face of the plaintiff's well-pleaded complaint and not based on a defense.[98] Corporate defendants have jumped on the "acting under" language to argue that they are covered by the statute—namely, they claim in various instances that they are so heavily regulated and directed by government agencies that they "act under" agency authority.[99] And while many courts have rejected such claims, various federal district courts have permitted corporate defendants to remove their actions to federal court under the statute.[100] Moreover, the Supreme Court has made it advantageous for corporate defendants to seek removal under the federal officer statute, since that basis for jurisdiction allows for appellate review not otherwise available when cases removed under the general removal statute are remanded, and the Court has read the officer removal statute broadly, permitting review of all bases of removal jurisdiction set out in the order.[101]

97. *See* 28 U.S.C. § 1442(a)(1) (permitting removal when the action is against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity"); *see also* 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & HELEN HERSHKOFF, FEDERAL PRACTICE AND PROCEDURE § 3655 (4th ed. 2015) (stating that the federal officer removal statute "is to be interpreted liberally").

98. See, for example, *Louisville & Nashville Railroad Co. v. Mottley*:

> [A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action . . . .

Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

99. *See* Lonny Hoffman & Erin Horan Mendez, *Wrongful Removals*, 71 FLA. L. REV. F. 220, 225–26 (2020).

100. *See, e.g.*, Watson v. Philip Morris Cos., 420 F.3d 852 (8th Cir. 2005), *rev'd*, 551 U.S. 142 (2007).

101. *See* BP P.L.C. v. Mayor & City Council of Balt., 141 S. Ct. 1532 (2021) (interpreting 28 U.S.C. § 1447(d) to permit appellate review of all asserted grounds for removal, and not only of removal based on the federal officer statute, 28 U.S.C. § 1442, or the civil rights removal statute, 28 U.S.C. § 1443). *BP* involved a state court action filed by the City of Baltimore against oil and gas companies for misrepresentations contributing to climate change. As Justice Sotomayor warned in dissent, the majority's reading of the statute, which she found was not required by its text, could easily "reward defendants for raising strained theories of removal under § 1442 or § 1443 by allowing them to circumvent the bar on appellate review entirely." *Id.* at 1546 (Sotomayor, J., dissenting).

2. Snap Removal

"Snap" removal is yet another significant instance of corporate defendants manipulating forum choice. These defendants are able to do so because of their superior litigation resources and because courts allow them to deploy those resources in ways that are incompatible with the purposes of a specific jurisdictional grant. Typically, if a plaintiff brings an action in state court and a defendant is a citizen of that state, the defendant may not remove to federal court if the basis of removal is that the federal court has diversity jurisdiction.[102] The federal removal statute clearly states, "A civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[103] The logic is that federal courts exercise diversity jurisdiction to ward against local bias, but when a defendant is a citizen of the state in which the plaintiff has brought suit, such concerns are absent and the constitutional basis for removal is not present.[104]

Defendants, however, have jumped on the "properly joined and served" language to make creative—and often successful—arguments to get around the statute and remove local state cases to federal court. As various commentators have explained, the language was added to stop plaintiffs in state court from joining but never serving a nominal defendant who is a citizen of the forum-state, thus blocking an out-of-state defendant who is the real party-in-interest from being able to remove the action on the basis of diversity jurisdiction.[105] However, corporate defendants who are in-state defendants *and* real parties-in-interest have the resources to learn about a lawsuit—largely by monitoring electronic state dockets—even before they have been served. Then, these defendants have increasingly filed their notice of removal in the

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102. *See* 28 U.S.C. § 1441(b)(2).

103. *Id.*

104. *See, e.g.*, Thomas O. Main, Jeffrey W. Stempel & David McClure, *The Elastics of Snap Removal: An Empirical Case Study of Textualism*, 69 CLEV. ST. L. REV. 289, 293–94 (2021) (arguing that because diversity jurisdiction is based on bias, the limits on removal in the statute "prevent[] removal of a diversity case by a citizen of the forum state" because "a local defendant needs no escape from their home court").

105. *See, e.g.*, Hoffman & Mendez, *supra* note 99, at 223 ("It's clear that what Congress had in mind [in drafting the 'properly joined and served' language] was to stop a plaintiff from merely naming a non-diverse defendant solely to destroy complete diversity but intentionally never serving them, reflecting her lack of interest in actually including them as a party."). Adam Sopko also notes:

> Congress's intent in drafting § 1441 in general and the forum defendant rule in particular was to prevent bias. Specifically, judges and scholars argue the purpose was to prevent state court bias against out-of-state defendants by providing a means to access a neutral federal forum. The presence of a forum defendant obviates such a need.

Adam B. Sopko, *Swift Removal*, 13 FED. CTS. L. REV. 1, 9 (2021).

period between filing and service.[106] The argument is that removal is permissible because they have not yet been "properly joined and served." This practice of "snap" removal permits local defendants to remove on the basis of diversity jurisdiction, even though the case was filed in their local state court in a state where they are a citizen and the statute plainly bars their entry into federal court.

Many judges have adopted a wooden interpretation of the statute and permitted the practice, concluding that technically, the forum defendant, having not yet been served, could remove, even though, had that party been served, the provision would prohibit removal.[107] Other judges, however, have found that this interpretation goes against the purposes of diversity jurisdiction and facilitates the kind of gamesmanship the statutory provision was drafted to avoid.[108] The practice, however, has been allowed by an increasing number of federal courts, and the most recent study found that defendants who pursue

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106. *See* Sopko, *supra* note 105, at 7 (finding that "snap removals arise largely from electronic monitoring of state dockets, rather than from intentionally delivering the complaint before formal service").

107. See, for example, *Gibbons v. Bristol-Myers Squibb Co.*:

> Put simply, the result here—that a home-state defendant may in limited circumstances remove actions filed in state court on the basis of diversity of citizenship—is authorized by the text of Section 1441(b)(2) and is neither absurd nor fundamentally unfair. We therefore have no reason to depart from the statute's express language . . . .

Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 707 (2d Cir. 2019); Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 153 (3d Cir. 2018) ("Congress' inclusion of the phrase 'properly joined and served' addresses a specific problem—fraudulent joinder by a plaintiff—with a bright-line rule. Permitting removal on the facts of this case does not contravene the apparent purpose to prohibit that particular tactic." (quoting 28 U.S.C. § 1441(b)(2))); *see also* Main et al., *supra* note 104, at 290–98 (exploring how textualist methodology leads some judges to interpret the removal statute to permit snap removal).

108. *See, e.g.*, Little v. Wyndham Worldwide Operations, Inc., 251 F. Supp. 3d 1215, 1222 (M.D. Tenn. 2017) ("If, however, the [statute] is read to allow snap removals, this could encourage 'defendants to engage in a different gamesmanship—racing to remove before service of process is effected on the forum defendant.' " (quoting Magallan v. Zurich Am. Ins. Co., 228 F. Supp. 3d 1257, 1260 (N.D. Okla. 2017))). For another example, see *Fields v. Organon USA Inc.*:

> The result of blindly applying the plain 'properly joined and served' language of § 1441(b) is to eviscerate the purpose of the forum defendant rule. It creates a procedural anomaly whereby defendants can always avoid the imposition of the forum defendant rule so long as they monitor the state docket and remove the action to federal court before they are served by the plaintiff. In other words, a literal interpretation of the provision creates an opportunity for gamesmanship by defendants, which could not have been the intent of the legislature in drafting the 'properly joined and served' language.

Fields v. Organon USA Inc., No. 07-2922, 2007 WL 4365312, at *5 (D.N.J. Dec. 12, 2007) (footnote omitted).

snap removal succeed approximately 90% of the time in removing the cases.[109] The study shows that the practice is becoming more prevalent, is almost always used by in-state corporate defendants in suits brought by individual plaintiffs, and that it "increases existing asymmetries between litigants with economic resources and legal sophistication and those without."[110]

3. Waiver of Removal and Remand

It is also worth briefly mentioning waiver as it relates to forum choice and a party's strategic use of jurisdiction. Under judge-made doctrines, defendants can waive their rights to remove cases to federal court, just as plaintiffs can waive their rights to remand those cases back to state court.[111] A recent study by Joan Steinman compared the doctrines governing defendants' waiver of the right to remove and plaintiffs' waiver of the right to remand to analyze whether there was parity and consistency.[112] There was not. Steinman found that the doctrines substantially favor defendants, making it much harder for them to waive their right to remove and much easier for plaintiffs to waive their right to remand.[113] This asymmetrical approach to waiver means that it is easier for defendants to veto plaintiffs' choice of a state court and to keep a lawsuit in federal court than it is for plaintiffs to resist defendants' relocation of the action from state court to federal court. Steinman's study concludes that "courts have created bodies of law concerning waiver of the right to remove and waiver of the right to remand that are strongly skewed against plaintiffs and in favor of federal court adjudication, even in cases that raise only substantive state law issues."[114]

* * *

These removal practices result in increasing costs and delays for plaintiffs, exacting a toll on those plaintiffs without the resources or wherewithal to withstand jurisdictional gamesmanship. These practices also affect the merits (or the inability of a plaintiff to reach the merits and so obtain judicial redress). Significantly, plaintiffs have higher loss rates in removed cases than they do in

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109. *See* Sopko, *supra* note 105, at 35 (finding that the snap removal tactic prevailed in approximately 87% of the cases).

110. *See id.* at 5, 35–41; *see also id.* at 36 (reporting that "between 2018–2019 . . . approximately 92% of cases were snap removed by forum defendants").

111. Joan Steinman, *Waiving Removal, Waiving Remand—the Hidden and Unequal Dangers of Participating in Litigation*, 71 FLA. L. REV. 689, 695–96 (2019) (exploring the logic and evolution of waiver doctrines in the removal and remand contexts).

112. *See generally id.*

113. *See id.* at 691–92 (laying out her findings); *id.* at 707–61 (comparing and distinguishing the remand and removal waiver doctrines).

114. *Id.* at 691–92.

cases filed as an original matter in federal court.[115] Leading empirical studies (from 1998 and 2002, but showing trends over a thirty-year period) support the anecdotal view that forum choice matters to case resolution and that removal provides corporate defendants with a more favorable forum; they also suggest "the possibility of increasing abuse of removal as a forum-selection device."[116] Indeed, in a more recent study, Zachary D. Clopton has coined the phrase "catch and kill jurisdiction" to describe the general phenomenon of parties removing cases to federal courts where judges are "willing and able to expand federal jurisdiction," are potentially "hostile to a class of litigation or litigants," and—after asserting jurisdiction—are able effectively to "kill" the claim.[117]

These removal practices, when they involve statutory claims, contribute to a regime of nonenforcement and diminished enforcement in which regulatory protections are slowly gutted through the steady accretion of precedent dismissing cases even when the basis for dismissal is unrelated to the merits.[118] Removal of state law claims produces comparable effects on state regulatory authority, as shown by parallel experience under the Class Action Fairness Act of 2005 (CAFA).[119] Despite a sustained effort to abolish diversity jurisdiction in the 1960s through the 1980s,[120] CAFA opened up a federal forum to certain state law class actions on a theory of minimal diversity.[121] By expanding the scope of diversity jurisdiction, CAFA effectively shifted state law class actions to federal judges notwithstanding their comparative disadvantage relative to state judges in interpreting and applying state law and their purported lack of

115. *See, e.g.*, Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1928 (2009) ("The comparison of removal and transfer suggests a consistent *forum effect*, whereby the plaintiffs' loss of forum advantage by removal or transfer reduces their chance of winning by about one-fifth.").

116. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L REV. 119, 122 (2002); Clermont & Eisenberg, *supra* note 88.

117. Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171, 175 (2022).

118. *See id.*; *see also* Hershkoff, *supra* note 12 (explaining the process by which jurisdictional dismissals serve to ratify and conceal defendant's wrongdoing).

119. *See, e.g.*, JoEllen Lind, *"Procedural* Swift*": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 719 (2004) (arguing that "when Congress deploys minimal diversity to make access to federal courts available in class action and mass tort cases there are potential risks to the role of states in promoting the democratic values of political participation, transparency, and accountability").

120. *See* Freer, *supra* note 28, at 1084–85 (2021) (discussing the "determined" and "frontal assault" on diversity jurisdiction during this earlier period).

121. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1738 (2008) (explaining that CAFA's basing federal jurisdiction on a theory of minimal diversity will "make it easier to remove actions successfully by limiting the reasons for remand").

authority to create choice-of-law rules in diversity actions.[122] At the time, leading CAFA skeptics predicted the statute would gut state regulatory power;[123] Samuel Issacharoff and Catherine M. Sharkey posited "it [was] difficult to avoid the conclusion that" CAFA's provision of a federal forum for state law class actions "was designed to offer absolution to potential defendants in what are termed 'negative value' class actions, such as consumer cases."[124] Not surprisingly, today, commentators speak of the "hollowed out" common law that CAFA's federalization of state class actions has produced and its broader effect in narrowing litigation as a public good.[125]

C. *Throw Out: Primary Jurisdiction*

Our final example is that of primary jurisdiction, which involves federal courts' relinquishing—in theory only temporarily—their jurisdiction in favor of an administrative agency. Primary jurisdiction, initially devised as a narrow, discretionary abstention doctrine, permits a federal court to stay or dismiss a case without prejudice to allow an administrative agency the opportunity to address an issue in the litigation when "enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body."[126] The doctrine arose in rate-setting and labor disputes, where referring the issue to a federal agency was justified either by the agency's exclusive authority over the issues

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122. *See* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1869, 1888–89 (2008) (stating that CAFA's supporters understood the expansion of jurisdiction as a way to "terminate large numbers of class actions and prevent many more from ever being filed," and explaining that although CAFA "fits the classic mold of federal jurisdictional reform," it also "to a large extent [was] the product of three sweeping, interrelated, and relatively recent developments: the institutionalization of a powerful business-oriented 'tort reform' movement, a broad shift in the ideological assumptions that underlay American social and political thought, and the galloping processes of globalization").

123. *See, e.g.*, Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1517 (2008) ("There is reason for concern that CAFA will retard state regulation of harmful activity by including within its jurisdictional sweep not just multistate class actions, but also class actions that are of intense interest to individual states, whose law will govern all or most of the claims.").

124. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1417 (2006).

125. Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 614, 628, 635 (2020) (documenting that "the vast majority" of all types of contract cases are heard in federal, and not state, court, disrupting "the normal hierarchical ordering of the law" and reducing the production of law "as a public good").

126. Brief of Amici Curiae Law Professors in Support of Appellants and Reversal, Palmer v. Amazon.com, Inc., 51 F.4th 491 (2d Cir. 2022) (No. 20-3989) [hereinafter Brief of Amici Curiae Law Professors] (Hershkoff was one of the eleven professors of civil procedure and federal courts signing the amicus brief to the circuit court); Ellis v. Trib. Television Co., 443 F.3d 71, 81 (2d Cir. 2006) (quoting United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)); Mrs. W. v. Tirozzi, 832 F.2d 748, 758–59 (2d Cir. 1987) ("The [discretionary] doctrine is used to fix forum priority when the courts and an administrative agency have concurrent jurisdiction over an issue.").

in the litigation or a strong demand for the agency to answer the question to provide regulatory stability and coherence.[127] Today, primary jurisdiction is an emergent terrain for corporate entities to manipulate forum choice, drive up the costs of redressing claims, delay or derail litigation, and opt in favor of a decisionmaker likely to be more favorable to business interests, even on issues outside administrative expertise.

1. *Palmer* and State Law

Palmer v. Amazon is a prime example.[128] Plaintiffs were employees at an Amazon warehouse in New York City—larger than fourteen football fields and one of the largest in the nation—and their family members.[129] In June 2020, they brought claims arising from Amazon's failure to comply with New York state nuisance and health and safety law in responding to the COVID-19 pandemic,[130] including a violation of Amazon's duty under New York Labor Law § 200 to "provide reasonable and adequate protection to the lives, health and safety of all persons employed" at the facility.[131] Given the serious risks of infection that COVID-19 presented, time was of the essence.[132] Amazon sought to dismiss the claims, arguing that OSHA had primary jurisdiction over the matter. The district court granted the motion to dismiss, asserting that "courts are not expert in public health or workplace safety matters, and lack the training, expertise, and resources to oversee compliance with evolving industry guidance" and that the "[p]laintiffs' claims and proposed injunctive relief go to the heart of OSHA's expertise and discretion."[133]

The reading of primary jurisdiction asserted by Amazon and accepted by the district court is overly expansive and needlessly shrinks judicial power. First, this was not an area where OSHA had sought to regulate. OSHA both had not opined on and seemingly had no intent to opine on the workplace safety issues raised by plaintiffs.[134] While the agency supplied some guidance to workplaces with regard to COVID-19, it had not engaged in any rulemaking or given notice that it would. Referring the plaintiffs to OSHA thus made little sense. As one court put it in another case, "Common sense tells us that even when agency expertise would be helpful, a court should not invoke primary

127. Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO ST. L.J. 541, 541–47 (2017) (exploring the historical evolution of the doctrine).

128. *See* Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 364 (E.D.N.Y. 2020).

129. *Id.* at 364–65.

130. *Id.* at 366.

131. Brief of Amici Curiae Law Professors, *supra* note 126 (quoting N.Y. LAB. LAW § 200 (McKinney 2022)).

132. As of February 2021, COVID fatalities in the United States exceeded 500,000. *See* Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of COVID: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 323–24 (2021).

133. *Palmer*, 498 F. Supp. 3d at 370.

134. For further development of this argument, see Brief of Amici Curiae Law Professors, *supra* note 126.

jurisdiction when the agency is aware of but has expressed no interest in the subject matter of the litigation."[135]

In addition, *Palmer* is about the meaning of state law, which should be interpreted by judges, not OSHA. Primary jurisdiction conventionally has provided a basis for abstention when federal courts must decide federal claims involving issues that Congress has committed to a federal agency.[136] However, courts have rightly been hesitant to apply the doctrine where the claims arise under state law.[137] The underlying federal statute empowering OSHA does not preempt state law claims or task OSHA with resolving state law workplace safety issues.[138] The workers' claims against Amazon involved issues of state nuisance law, and the interpretation of those laws was squarely outside OSHA's jurisdiction.[139] The district court's invocation of the doctrine stretched the primary jurisdiction doctrine beyond any sensible limit and created needless delay—which is especially harmful in litigation arising during a pandemic and based on risks to workers' health and safety.

The Second Circuit ultimately concluded that the district court improperly applied the doctrine.[140] In October 2022, the Second Circuit reasoned that the public nuisance claims in the suit were squarely within the district court's competence and that OSHA's expertise would not materially aid the resolution of the plaintiffs' claims.[141] But even this helpful intervention in some way proves the point about the dangers of primary jurisdiction as it is applied today: the Second Circuit's ruling came nearly two and a half years after the plaintiffs filed their complaint, a significant period of time during which their state law claims were left unaddressed as the pandemic roared on and workers

135. Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 761 (9th Cir. 2015).

136. Brief of Amici Curiae Law Professors, *supra* note 126, at 14 ("The paradigmatic application of the doctrine of primary jurisdiction is when a court faces a federal claim that depends on a question of federal law, the resolution of which Congress has committed to a federal agency." (emphasis omitted)).

137. *See, e.g.*, Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 305 (1976) (declining to apply primary jurisdiction to a state common law claim of fraudulent misrepresentation in part because "[t]he standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts").

138. The OSHA statute does not "diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4).

139. *See* Brief of Amici Curiae Law Professors, *supra* note 126, at 20 ("OSHA does not set New York law, and New York workplace safety and health requirements may exceed federal requirements—especially where, as here, OSHA has already declined to issue federal requirements.").

140. Palmer v. Amazon.com, Inc., 51 F.4th 491, 499 (2d Cir. 2022).

141. *Id.* at 506–10.

were left unprotected against a potentially fatal virus.[142] The elongated process of litigating primary jurisdiction claims can lead to delay and frustration for plaintiffs. Furthermore, concerns about casting plaintiffs off to agencies not only implicate forum choice but also implicate the merits, given a political context in which agencies are arguably less responsive to public claims-making by beneficiaries of regulatory statutes and in some contexts are actively working to undermine their own statutory mandates.[143]

2. "Circumforaneous Litigants"

Palmer both reflects and draws from a larger history of corporations seeking to expand primary jurisdiction well beyond its initial confines in order to affect substantive outcomes. In various cases, including some sanctioned by the Supreme Court, federal courts have relied upon the doctrine to permit an agency to offer advice on an issue that is tangential to the case—as in one case where the Supreme Court permitted referral to an agency to see if there was a violation of the rules of the Commodity Exchange Act that might bear upon the antitrust claims in the case.[144] In dissent, Justice Marshall questioned why the federal district court should "stay its hand pending action by an agency which in all likelihood lacks the statutory power to resolve an issue in the lawsuit" and reasoned that "[a]n agency cannot have primary jurisdiction over a dispute when it probably lacks jurisdiction in the first place."[145] Put otherwise, the case was about the Sherman Act, which the Court was well-positioned to interpret, not the Commodity Exchange Act.

Justice Marshall expressed concern, presciently, about the consequences of liberally dispatching plaintiffs to agencies that often had no obligation or even authority to respond to their claims. Among his concerns were situations "[w]here the plaintiff has no means of invoking agency jurisdiction, where the agency rules do not guarantee the plaintiff a means of participation in the ad-

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142. As of December 22, 2022, the number of COVID-19 deaths in New York City exceeded 37,000. *Number of COVID-19 Cases, Hospitalizations, and Deaths in New York City as of December 22, 2022*, STATISTA, https://www.statista.com/statistics/1109650/coronavirus-cases-deaths-hospitalizations-new-york-city [perma.cc/LS3X-AFEE].

143. *See generally* David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (2022) (exploring the various strategies agencies use to affirmatively undermine the programs they are charged with administering); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021) (exploring how presidential control systematically undermines the ability of agencies to fulfill their statutory mandates). Concerns about agency sabotage thus differ from those of administrative slack that dominated discussion a generation ago. *See* MCNOLLGAST (Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast), *Slack, Public Interest, and Structure-Induced Policy*, 6 J.L. ECON. & ORG. 203, 211 (1990) (explaining that "if political leaders seek a dramatic change in regulatory policy, one should expect an equally dramatic change in the normative values espoused by the people who are appointed to the agency").

144. *E.g.*, Ricci v. Chi. Mercantile Exch., 409 U.S. 289 (1973); Chi. Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973).

145. *Ricci*, 409 U.S. at 310 (Marshall, J., dissenting).

ministrative proceedings, and where the likelihood of a meaningful agency input into the judicial process is remote."[146] Yet federal courts, responding to motions made by corporations, abstain in favor of primary jurisdiction in precisely these situations. In various cases arising under California food-labeling law, for example, courts have invoked primary jurisdiction to dismiss or stay proceedings, sending plaintiffs off to the Food and Drug Administration, which has declined to respond to their inquiries.[147] In other cases, referrals have been made when the agency had no mechanism permitting a party to raise the issue, was not authorized to resolve the issue, or where the issue was not necessary or substantially relevant to resolving the claim.[148] Corporate use of primary jurisdiction as a forum-shopping strategy is still an emergent trend, and it is too soon to know whether the maneuver's main effects will be a delay in securing relief, a dismissal of claims, or an overall chilling of the filing of claims. Certainly, the doctrine can drain plaintiffs of resources and even end claims altogether. The circuit courts are divided on the doctrine's use; one federal court of appeals pointedly stated that the doctrine "'has created a confused class of circumforaneous litigants, wandering perplexedly from forum to forum in search of remediation.'"[149]

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Primary jurisdiction began as a doctrine about expertise and authority. But without a showing that abstention will promote regulatory goals, a court's reliance on the doctrine allows corporate parties to delay case disposition, drive up costs, and undermine statutory protection.[150] The costs of the delays for plaintiffs are significant. In some cases, litigants have been delayed from pursuing their actions in federal court for five or even ten years.[151] In other instances, defendants have used the delay created by the doctrine to seek

146. *Id.* at 321.

147. *See, e.g.*, *In re* Gen. Mills, Inc. Kix Cereal Litig., No. 12-249, 2013 WL 5943972, at *1 (D.N.J. Nov. 1, 2013); Barnes v. Campbell Soup Co., No. C 12-05185, 2013 WL 5530017, at *9 (N.D. Cal. July 25, 2013); Cox v. Gruma Corp., No. 12-CV-6502, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013); Astiana v. Hain Celestial Grp., Inc., 905 F. Supp. 2d 1013, 1016–17 (N.D. Cal. 2012), *rev'd*, 783 F.3d 753 (9th Cir. 2015); *see also* Winters, *supra* note 127, at 578–84 (describing a series of FDA cases involving primary jurisdiction).

148. Paula K. Knippa, Note, *Primary Jurisdiction Doctrine and the Circumforaneous Litigant*, 85 TEX. L. REV. 1289, 1305–06 (2007) (describing this "myth of 'referral'").

149. New Eng. Legal Found. v. Mass. Port Auth., 883 F.2d 157, 158–59 (1st Cir. 1989) (quoting Maine v. Thomas, 874 F.2d 883, 884–85 (1st Cir. 1989)).

150. Winters, *supra* note 127, at 541 (criticizing the use of primary jurisdiction as "a tool that permits courts to stay or dismiss a case while seeking agency advice on a particular issue, without a finding that such a referral is necessary to forward the purpose of the regulatory scheme").

151. Miss. Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412 (5th Cir. 1976) (involving an eleven-year delay due to primary jurisdiction; the case was resumed in *United Gas Pipe Line Co. v. Federal Energy Regulatory Commission*, 824 F.2d 417 (5th Cir. 1987)); *see also* Knippa, *supra* note 148 (describing common delays).

changes in the law that have mooted the litigation.[152] Even dismissals without prejudice pose the risk to plaintiffs that a claim will become time barred.[153] And from the public's perspective, federal courts' temporary abandonment of jurisdiction is another lost opportunity to enforce federal law, contributing further to a deregulatory campaign to undermine existing federal law.[154]

II. Constructing the Oligarchic Courthouse

How did these doctrinal jurisdictional shifts come to be, and what should one make of them together? In one sense, it is surprising that federal judges have acquiesced in, let alone supported, a corporate project to transform their subject matter jurisdiction. Federal judges enjoy political independence, professional prestige, and financial protection. As such, scholars generally view them as invulnerable to, or at least insulated from, raw forms of capture associated with administrative agencies and other non-Article-III decisionmakers.[155] Nevertheless, over time a set of jurisdictional practices has developed that constitute the infrastructure and circuitry of what we dub the oligarchic courthouse—a legalized system that, we argue, encourages economic and political concentration, thwarts democratic decisionmaking, and tilts in favor of market deregulation and against statutory protection of less-resourced persons. This Part connects these jurisdictional trends to earlier struggles over jurisdiction, describes the current form of the oligarchic courthouse, and explores factors exogenous to courts that have contributed to its rise and magnified its dangers to democratic life.

A. *Early Foundations: Jurisdiction and the Struggle Against Oligarchy*

The history of parties seeking to control forum choice is as old as the federal courts. However, the current moment of jurisdictional transformation perhaps has its closest analogue in the expansion of federal court jurisdiction

152. *See* Knippa, *supra* note 148, at 1291 n.16 (describing mooted cases).

153. *Id.* at 1305 (explaining that dismissals under the doctrine can "impose[] the very real risk that one's cause of action will become time barred by the running of the statute of limitations or that one's claim for injunctive relief may be rendered moot by the mere passage of time and absence of judicial oversight" (footnote omitted)).

154. The examples we give are hardly exclusive. For example, Lindsey Simon shows how companies are using the bankruptcy courts to funnel claimants "into a dispute-resolution trust system created by the debtor, complete with debtor-created evidentiary standards, appeals processes, claims-payment regimes, and arbiter selections." Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1154, 1159 (2022). She explores how these "resolution systems, on average, do not have the procedural protections that accompany Article III review in a class action or multidistrict litigation (MDL) proceeding." *Id.*

155. *See, e.g.*, Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. Rev. 827, 831 (exploring, through the lens of public choice theory, the institutional structures that make judges unlikely to be captured); Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, *in* Regulation Versus Litigation 11, 19–20 (Daniel P. Kessler ed., 2010) (exploring the features that make judges less likely to be captured than agencies).

at the turn of the twentieth century. At that time, jurisdiction came to be at the center of a struggle over corporate power and regulation that prompted a constitutional confrontation over oligarchy and democracy, in an episode that lays the foundations for understanding the rise of the oligarchic courthouse today.

Then, as corporations sought to cement their place in a national economy and to resist regulatory pressures, jurisdiction became a battleground for keeping claims out of state courts. And then, as now, federal courts adapted their jurisdictional practices to serve corporate interests. As part of a larger strategy of growing the national economy and resisting state and federal regulatory interventions, Congress passed a series of removal statutes in the decades after the Civil War, seeking to redirect litigation involving corporations into the federal courts.[156] Federal judges interpreted the laws broadly, as historian Howard Gillman has written, to "authorize the removal into federal courts of any case that raised an issue of federal law or that otherwise fell within the federal judiciary's Article III jurisdiction (such as diversity jurisdiction)."[157]

Scholars have connected these efforts to a larger Republican Party focus on economic nationalism—what Gillman has characterized as a " 'preoccupation with the defense of property' and 'economic respectability' for large-scale enterprise[s]," driven by a vision of building a national capitalist market largely free from regulatory control.[158] Republican leaders sought to enlist federal courts in promoting economic nationalism by "redirect[ing] civil litigation involving national commercial interests out of state courts and into the federal judiciary," believing that the federal courts would be " 'forums of order' for national commercial interests seeking a hearing free from the interests and perspectives that dominated state proceedings."[159]

To achieve this nationalist goal, Republicans thus sought to enlarge the federal courts' jurisdiction by expanding removal jurisdiction and vesting federal question jurisdiction. They also sought to staff the courts "with judges who

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156. Gillman, *supra* note 19, at 512, 515 (describing the passage of various removal statutes).

157. *Id.* at 518.

158. *Id.* at 516 (quoting ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863–1867, at 517, 522 (1988)). On the relation between Republican economic policies and Southern Reconstruction, see also MARK WAHLGREN SUMMERS, RAILROADS, RECONSTRUCTION, AND THE GOSPEL OF PROSPERITY: AID UNDER THE RADICAL REPUBLICANS, 1865–1877 (1984).

159. Gillman, *supra* note 19, at 517 (quoting TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY (1979)). The pro-business emphasis displaced the earlier Republican concern for judicial protection of freed Black people. *See, e.g.*, Freer, *supra* note 28, at 1095 ("The Republicans, who had championed the cause of freed slaves, now shifted their concern to providing courts that were pro-business."); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333, 341 (1969) (recounting how Republicans "substitute[d] sympathies for entrepreneurial interests in place of their earlier care for the freedmen").

were ideologically sympathetic to this new mission."[160] They favored judges with "social and professional backgrounds [that] disposed them towards the viewpoints advocated by corporations."[161] As Edward Purcell's research has confirmed, Republican appointees in the aftermath of the Civil War were "a remarkably similar, if not insular, social group" and were connected to "powerful political and economic actors" who were "[t]rained and experienced at the bar, steeped in the revered common law, and coming largely from the ranks of the corporate elite."[162]

Diversity jurisdiction also played a role in this project. In a national economy that increasingly exposed plaintiffs to wide-ranging corporate harms, diversity jurisdiction that treated corporations as citizens of their state of charter meant that plaintiffs were very often citizens of different states from corporate defendants.[163] This permitted corporate defendants to remove state actions liberally to federal court. This ability to remove was especially useful because at the time federal courts were considered more expensive and less convenient for plaintiffs; under the regime of *Swift v. Tyson*, their jurisdiction also provided a source for creating alternative rules of decision to those of the state courts.[164] Diversity jurisdiction and removal doctrines thus enabled corporations to, in the words of William Jennings Bryan, "[seek] shelter" in federal courts from state common law rules that were not at the time treated as law applicable in the federal courts.[165] And, for some time, corporations were able to secure favorable general common law decisions in federal court, with the "judiciary articulat[ing] legal principles that were consistent with the promotion of a more unfettered national market."[166] The enactment of "arising under" jurisdiction in the last quarter of the nineteenth century facilitated access to federal courts both as an original matter and on removal from state court. In turn, this doctrinal development provided corporations challenging state regulatory enactments governing the workplace and marketplace with a sympathetic forum, and led to the well-known Populist and Progressive criticisms of the Article III judiciary.[167]

Lochner is the familiar shorthand to describe the ensuing confrontation between the Court's corporate-protective doctrines and the Constitution—a

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160. Gillman, *supra* note 19, at 517.

161. *Id.* at 519.

162. EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 320 (2000).

163. *Id.* at 65.

164. Swift v. Tyson, 41 U.S. (1 Pet.) 1 (1842), *overruled by* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

165. PURCELL, *supra* note 162, at 67.

166. Gillman, *supra* note 19, at 519.

167. For an overview, see, for example, PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, THE FEDERAL COURTS 219–53 (2016), discussing Populist and Progressive criticisms of the federal courts and their role in the "overturning of state regulatory regimes."

confrontation that came to a head in the New Deal.[168] As William Forbath and Joseph Fishkin show in a magisterial book, *The Anti-Oligarchy Constitution*, this confrontation was in large part about oligarchy—about how powerful economic actors had amassed great political power, principally in and through the courts, and about resisting and rebalancing power through the legislative process.[169] The exercise of jurisdiction enabled federal courts to protect corporate interests by overturning regulatory laws that would provide some measure of economic security for workers and consumers who regularly dealt with corporations.[170] While the Republican project to instantiate large-scale enterprises in U.S. life largely succeeded,[171] in the clash of the New Deal, the Court ultimately turned away from its deregulatory project and upheld a series of regulatory actions—including the National Labor Relations Act, Social Security Act, and Fair Labor Standards Act.[172]

B. *The Rise of the Oligarchic Courthouse Today*

Constitutional scholars speak of the New Deal "settlement," in which the Article III courts have come to defer to Congress's exercise of its Article I powers in the economic sphere, largely upholding regulatory legislation as valid exercises of the federal commerce power.[173] However, the corporate struggle against regulation never died. To the contrary, courts and rules of procedure have remained a battleground as corporate actors have continued to resist laws aimed at curbing their power over workers, consumers, and the environment. Not surprisingly, corporate actors have resorted to new strategies and reinvigorated older approaches to regain any advantage they thought they had lost. In that effort, corporate resistance has reached a new inflection point through the practice of jurisdictional abuse.

Jurisdiction has centered in corporate anti-regulatory efforts in part because of the prominence of litigation in regulatory enforcement today. Congress and state legislatures have passed a multitude of laws regulating the workplace, environment, and marketplace, and have often at the same time

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168. For an overview of the labor struggles of the era as they related to *Lochner* and its anti-regulatory agenda, see generally, for example, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991), and Luke Norris, *Constitutional Economics*, 28 YALE J.L. & HUMANS. 1 (2016).

169. *See* FISHKIN & FORBATH, *supra* note 30, at 251–318.

170. *Id.* at 269–74.

171. *See id.* at 224, 229.

172. *See, e.g.*, Luke Norris, *The Workers' Constitution*, 87 FORDHAM L. REV. 1459 (2019) (recounting the histories of the enactment and upholding of the National Labor Relations Act, Social Security Act, and Fair Labor Standards Act).

173. *See, e.g.*, Laura Weinrib, *Breaking the Cycle: Rot and Recrudescence in American Constitutional History*, 101 B.U. L. REV. 1857, 1866 (2021) ("Many embrace the so-called New Deal settlement, commonly associated with footnote four of *United States v. Carolene Products Co.*, which calls for deference to legislators and administrators on social and economic issues coupled with judicial enforcement of minority rights and judicial policing of the integrity of the political process.").

invested the beneficiaries of those laws with procedural rights authorizing civil actions for enforcement and redress.[174] This system of private enforcement provoked a backlash—what Stephen Burbank and Sean Farhang have called a "campaign against private litigation as a tool of federal policymaking."[175] This campaign was led by officials during the Reagan administration who had pro-corporate, "free"-market, and anti-regulatory commitments and initially sought to disarm private enforcement by passing legislation to tame the beast.[176] Although legislative efforts generally failed, the project secured important support from the federal judiciary, as an increasingly conservative Supreme Court reinterpreted long-standing procedural doctrines—including those governing pleading, standing, and class actions—in restrictive ways that have made it more difficult for the beneficiaries of federal law to maintain regulatory claims against corporate actors.[177]

The backlash against regulatory enforcement litigation—of which the new phase of jurisdictional abuse is part—has its own pattern, constructed by courts and fueled by distinct yet overlapping interests. The effort is well-organized, well-funded, and epitomized by a memorandum prepared by future Justice Lewis Powell for the Chamber of Commerce in 1971, just before he assumed the bench, in which he argued that the American economic system was "under attack," and the culprit was litigation by civil rights groups, labor unions, and nonprofits that needed to be reined in.[178] A half century later, caseload data support the view that the campaign has paid off in terms of declining plaintiff victories, endangered claims, the winnowing of class actions, and various procedural barriers to regulatory enforcement.[179]

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174. *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE 10 (2010).

175. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION, at xix (2017).

176. *Id.* at 25–64 (exploring several failed, and a few successful, attempts to retrench litigation through the legislative process).

177. These decisions relate to a range of conventional rules of procedure. *See*, *e.g.*, *id.* at 130–91; Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (pleading); Judith Resnik, *From "Cases" to "Litigation*,*"* LAW & CONTEMP. PROBS., Summer 1991, at 5 (1991) (class actions); 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) (pretrial disposition); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 133 (2004) (arbitration).

178. Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com., Attack on American Free Enterprise System 1 (Aug. 23, 1971), https://scholarlycommons.law.wlu.edu/powellmemo/1/ [perma.cc/H453-HA5Z].

179. *See* Brooke D. Coleman, *Endangered Claims*, 63 WM. & MARY L. REV. 345, 351 (2021) (chronicling "the evolution story of federal civil litigation by examining how, in response to changes in procedural rules and doctrines, parties and their claims adapt, migrate, or go extinct" and how "often only the strongest and most powerful parties survive, while those with fewer resources are less successful"); *see also* Clermont & Eisenberg, *Litigation Realities*, *supra* note 116 (exploring declining plaintiff win rates); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (stating that "class actions will soon be virtually extinct"); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 423 (2014); David L. Noll,

And the jurisdictional decisions we have explored, together with those involving other procedural rules and adjudicative trends, have begun to assume a disturbing shape—what we call the oligarchic courthouse. The oligarchic courthouse is one where the rules for litigation are designed by and favor the interests of powerful economic parties. It is one where a public institution and its practices and policies are transformed to meet private interests at the expense of public goals. The oligarchic courthouse, in addition, has a particular place among other institutions in democracy. Although it often stands not far from legislatures that have created regulatory laws involving judicial enforcement, the oligarchic courthouse is wired to make it more difficult for the public to enforce those laws and to make real their commands in economic and social life. The oligarchic courthouse is now a substantial work in progress, clad with more than scaffolding, and it has been rising steadily over the past half century.[180]

The rise of the oligarchic courthouse in part reflects the magnitude of the jurisdictional shifts we have surveyed. Across three core areas of jurisdiction, we have described the extent to which corporations have succeeded in shifting claims out of court, shifting them to federal court, and punting them to agencies. The result is a jurisdictional doctrine that creates delay and confusion and can prematurely end litigation. The magnitude of these legal shifts connects them to the early twentieth-century example.[181] Now, as then, the political influence of the ultra-wealthy and corporate actors is increasingly

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Regulating Arbitration, 105 CALIF. L. REV 985 (2017) (discussing the "enforcement effects" of the Supreme Court's arbitration decisions). Arguably, the corporate strategy is now shifting from an assault on private enforcement to an assault on public enforcement as lawsuits invoke the separation of powers, nondelegation, and the major questions doctrine to challenge the validity of administrative decisionmaking and enforcement actions. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); West Virginia v. EPA, 142 S. Ct. 2587 (2022), Biden v. Nebraska, 143 S. Ct. 2355 (2023); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (per curiam); *see also* Helen Hershkoff & Luke Norris, Prometheus Bound: The Emerging Trend of Judicial Constraint on Sovereign Enforcement 3, 14 (unpublished manuscript) (on file with authors).

180. To borrow from the great English historian S.F.C. Milsom, we can think of each jurisdictional ruling as a dot, and the dots are unnumbered; how legal commentators choose to connect the dots requires imaginative and theoretical reconstruction. *See* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 8 (2d ed. 1981); *see also* David Ibbetson, *Milsom's Legal History*, 76 CAMBRIDGE L.J. 360, 361 (2017) (explaining that "[t]he dots may be fixed points, facts if you like, but we can only make sense of them against the background of the whole picture, and the picture can only be known in so far as it is reconstructed"). In our view, the larger concern of oligarchy and democracy ought to shape how the legal community connects these dots and understands the current situation. *See generally* PURCELL, *supra* note 89, at 3–4 (introducing the concept of a social litigation system).

181. *See generally* LARRY M. BARTELS, UNEQUAL DEMOCRACY (2d ed. 2016) (arguing that the United States has entered a "New Gilded Age"); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS (2010) (exploring the shift towards a "winner-take-all" economy in the United States).

becoming apparent,[182] as is the extent and nature of corporate concentration across various industries.[183] Similarly, we exist in a time where state capacity is used not only to further corporate interests, but also to narrow institutional paths for less-resourced individuals to contest the outsize influence of concentrated economic power on social and political life. Administrative law scholars have documented the extent to which agencies are closing their doors and undermining their mandates,[184] and scholars studying state courts have documented their participation in furthering economic and racial inequality and their solicitousness towards concentrated corporate interests.[185] Thus, while the story of courts and economic power is seemingly perennially complicated and very often troubling, our effort to demarcate this moment and connect it to an earlier one reflects the confluence of an array of forces in our institutions and shared life.

C. *Factors Contributing to Its Rise*

It is no surprise that corporate parties manipulate jurisdiction, seeking to redesign public rules to favor their interests; indeed, one would be surprised if it were otherwise. The question of why judges might participate in constructing the edifice of the oligarchic courthouse is a more complicated one. To answer the question, it is helpful to broaden the lens to consider the kinds of professional, institutional, and cultural forces that may have predisposed judges to accept corporate arguments and transform jurisdictional doctrines.

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182. *See* Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1461–65 (2016) (reviewing political science studies on the influence of monied interests in politics). *See generally* HACKER & PIERSON, *supra* note 181 (exploring the influence of wealthy interests in shaping U.S. policy and deepening inequality).

183. There is a robust literature on corporate concentration levels. Some examples include: José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. (SPECIAL ISSUE) S167 (2022); Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, 57 J. HUM. RES. (SPECIAL ISSUE) S251, S254 (2022); Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets*, AM. ECON. REV.: INSIGHTS, Mar. 2020, at 33; Yue Qiu & Aaron Sojourner, *Labor-Market Concentration and Labor Compensation*, 76 ILR REV. 475 (2023).

184. *See supra* note 143 and accompanying text; *see also* BLAKE EMERSON, THE PUBLIC'S LAW 172–73 (2019) (exploring the barriers for citizens to engage in agencies' processes); Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 797 (2021) ("Although formally quite open and democratic, in practice well-organized groups of sophisticated stakeholders often dominate public participation in notice and comment [rulemaking]." (emphasis omitted)).

185. *See, e.g.*, Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1247 (2022) (arguing that state courts are sites of racial capitalism that facilitate "the transfer and accumulation of assets from racialized individuals to majority-white corporations or the state itself"); Wilf-Townsend, *supra* note 32, at 1709 (exploring the prominence of "assembly-line litigation" in state courts, where corporate mega-filers bring claims against largely unrepresented litigants who default, resulting in judicial rubber-stamping of corporate claims and judicial "transfer [of] assets from unsophisticated, often-indigent persons to major corporations without seriously evaluating the merits of each case").

One answer relates to the organizational forces that translate political commitments into legal culture and influence decisionmaking.[186] As at the turn of the last century, Republicans today resist regulatory intervention as part of a pro-business agenda.[187] But one change has been the organizational channel for translating these ends into legal culture and doctrine. Today, conservative lawyers often affiliate with and organize themselves around the Federalist Society, which coordinates lawyers who share this worldview about markets and regulation while inculcating and nourishing the worldview among scholars, judges, and the media.[188] The Federalist Society thus functions as part of a larger "conservative agenda to reduce regulation and curtail civil litigation"[189] (or, to be precise, litigation on behalf of particular parties to enforce particular claims).[190] Its libertarian framing, emphasizing market freedom, personal autonomy, and meritocratic elitism, both attracts and arguably shapes legal decisionmakers who may be sympathetic to corporate efforts to transform jurisdictional doctrines in ways that construct an oligarchic courthouse favoring deregulation and supporting resource concentration.

The account, however, would be significantly incomplete if it focused only on the Republican Party's side of the ledger. The oligarchic courthouse also can be understood as a byproduct of longstanding judicial appointment decisions by Democratic presidents and the Democratic Party. Until recently, Democratic presidents have followed Republican presidents in appointing federal judges who come primarily from the corporate bar and prosecutorial positions.[191] There has been a dearth of judges on the federal district courts and courts of appeal who were plaintiff's attorneys, public defenders, civil

186. *See* David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 22–24, 63 (2018) (discussing the role of "social networks," including professional organizations, that create "social pressure toward certain sorts of institutional behavior" among members of the Article III judiciary).

187. *See, e.g.*, Burbank & Farhang, *supra* note 26, at 662 (explaining that Republicans largely resisted economic regulation between 1969 and 2008, "with business groups occupying an important position within the party coalition").

188. For a comprehensive account of the Federalist Society's role in American law and legal development, see generally STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008).

189. Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1871 (2014).

190. *See* Burbank & Farhang, *supra* note 26 (discussing conservative support for litigation to protect rights that conservatives favor).

191. ALL. FOR JUST., A FAIRER COURT 5 (2021), https://www.afj.org/wp-content/uploads/2021/12/A-Fairer-Court-How-President-Biden-and-Congress-Raised-the-Bar-in-2021.pdf [perma.cc/LX83-WBDV]; *see, e.g.*, Maggie Jo Buchanan, *The Startling Lack of Professional Diversity Among Federal Judges*, CTR. FOR AM. PROGRESS (June 17, 2020), https://www.americanprogress.org/article/startling-lack-professional-diversity-among-federal-judges [perma.cc/2M78-FAN2]; Norris, *Neoliberal Civil Procedure*, *supra* note 32, at 516–17 (exploring the professionally slanted nature of the federal bench).

rights lawyers, or "poor people's" lawyers before assuming the bench.[192] Although President Biden's judicial appointments have been more professionally diverse, the federal bench is still remarkably slanted toward business interests and will likely be for some time.[193] Judges who have spent their careers defending corporations may be more open to their views about the excesses of litigation, the benefits of privatization, and the value of forum choice in the federal courts. Similarly, many prosecutors leave their posts and go to law firms that represent corporate defendants and often know or expect that they will do so when they accept their positions as prosecutors.[194] Many are thus connected to the corporate defense bar, and these connections may also predispose them to be sympathetic to corporate claims-making.

The literature on agency capture provides a useful, albeit imperfect, analogue for understanding how judges with such backgrounds might be more disposed towards corporate efforts to transform jurisdiction. Courts are differently situated from agencies in various ways, including those we explored at the beginning of this Part relating to their life tenure and approach to resolving disputes. However, in the agency context, scholars have articulated a set of background forces that make regulators more susceptible to corporate claims, and those background forces also have some explanatory power in the judicial context. Scholars have focused on the cultural forces that dispose regulators to identify with regulated groups and view their claims sympathetically, including those related to group identification, status, and relationship networks.[195] Regulators may be disposed towards the views of regulated parties because they identify with them or view them as part of the same group, as having similar or high social status, and as operating within the same social networks as them. Group identity is a particularly important mechanism because membership in groups can help people organize their views about the world. Thus, a regulator who "identifies as an economically sophisticated steward of efficient financial markets will adopt different policy positions than someone who identifies as a defender of the 'little guy' against large, faceless

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192. *See, e.g.*, Buchanan, *supra* note 191.

193. According to a December 2021 report, approximately 20% of President Biden's nominees have civil rights experience, 14% have plaintiff-side experience, and 4% have legal services experience. ALL. FOR JUST., *supra* note 191, at 5, 26, 33.

194. *See, e.g.*, Douglas R. Richmond, *As the Revolving Door Turns: Government Lawyers Entering or Returning to Private Practice and Conflicts of Interest*, 65 ST. LOUIS U. L.J. 325, 325–26 (2021) ("Government lawyers regularly leave public service for private law practice—often through the same revolving door that launched their public careers.").

195. *See* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE 80–98 (Daniel Carpenter & David A. Moss eds., 2014) (exploring how cultural capture operates through shared identity, status, and relationships); *see also* J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1555 (2018) ("Cultural capture, where the informal influence of an industry along with the interpersonal relationships among agency employees, is a more amorphous type of capture but likely greatly influences regulators.").

corporations, even if both share the ultimate objective of increasing the economic welfare of ordinary people."[196]

Somewhat similar dynamics may help to explain judicial solicitude for corporate efforts to manipulate jurisdiction. Judges who hail from corporate practice have experience in the larger milieu of corporate counsel and may identify with corporate counsel as a group, may view other corporate counsel as being of high status, and likely have a roster of relationship networks both among corporate counsel and corporate actors. Similarly, prosecutors who have begun their legal careers at or plan to join corporate firms at a later point—as many prosecutors do upon leaving the government—may have similar forms of cultural affiliation, identifying as a matter of history or ambition with the corporate bar, especially as their peers go off to join corporate firms. In these ways, we can see how cultural context may predispose judges to view arguments made by corporate claimants favorably.

The agency capture literature provides another useful angle for explaining the success of the corporate effort to create an oligarchic courthouse. Scholars have explored how information flows and asymmetries might make regulators more susceptible to the claims of regulated parties.[197] These asymmetries result from classic collective action issues: small and motivated regulated parties have much more interest in shaping the flow of information to regulators than the diffuse public does.[198] In the literature on agencies, regulated parties can achieve informational capture by making regulators dependent on them for information, inundating them with information, or manipulating the quality and flow of information in self-serving ways.[199]

One can observe a somewhat different, yet similar dynamic in the judicial context, where pro-corporate actors leverage the institutional dynamics of court adjudication and procedural rulemaking to produce an overwhelming—and often, descriptively inaccurate or questionable—informational flow and

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196. Kwak, *supra* note 195, at 83; *see also* Edward A. Purcell, Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 169 U. PA. L. REV. 2583 (2021) (implicit racial bias); Helen Hershkoff, *Some Questions About #MeToo and Judicial Decision Making*, 43 THE HARBINGER 128 (2019) (implicit gender bias). For a discussion of similar trends in state courts, see JAMES L. GIBSON & MICHAEL J. NELSON, JUDGING INEQUALITY (2021).

197. *See* Anderson, *supra* note 195, at 1560–63 (describing the dynamics of informational capture); Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO 1, 5 (2010) (describing how an agency "might depend on information from the affected entities and lack the means or ability to review that information skeptically"); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1372 (2013) (exploring how disclosure requirements can lead to "information overload" in agencies); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1329–34 (2010) (exploring the dynamics of "information capture").

198. *See* Anderson, *supra* note 195, at 1552–53 (locating modern capture theory in problems of collective action); *id.* at 1561 (exploring the relationship between informational capture and collective action problems).

199. *See id.* at 1561–63 (exploring each of these dynamics and overviewing the literature on them).

narrative.[200] The structure of adjudication and procedural rulemaking facilitates these information flows. Courts move case-by-case and procedural rulemaking tends to be incremental and reactive.[201] These structures provide an opportunity for corporate actors to provide incomplete information that shapes the judicial view about litigation. For the past fifty years, a series of procorporate interests have advanced a negative view about litigation-as-regulation, the excesses of state courts, and liberal procedural rules that leverages the piecemeal nature of court adjudication and procedural rulemaking processes. Whether the topic has been pleading, class actions, discovery, or other procedural rules, these actors have painted a consistent narrative of litigation gone awry to support restrictive procedural standards.[202]

Information flows and asymmetries might similarly affect all of the jurisdictional doctrines surveyed above. Consider removal. In the class action context, narratives about runaway damages awards and corporate "blackmail" shaped the passage of the CAFA, which we discussed in Part I and which shifts most large class actions out of state court and into federal court.[203] The narratives around the statute cast dim light on state courts and more positive light on federal courts, thus turning the tide towards removal. Similarly, corporate defendants have advanced a narrative about litigation run amok and settlement pressure, which has supported the Supreme Court's restrictive procedural decisionmaking.[204] This meta-narrative about beleaguered corporate

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200. For a specific critique of the "cost and delay" narrative, see Alexander A. Reinert, *The Narrative of Costs, The Costs of Narrative*, 40 CARDOZO L. REV. 121 (2018), and see also Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012).

201. *See, e.g.*, Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 476–78 (1993) (critiquing the civil rulemaking process for following an incrementalist model that is piecemeal, restricted in scope, and remedial).

202. *See, e.g.*, Ronald J. Rychlak, Francis McGovern & William H. Pryor, Panel, *Regulation Through Litigation*, 71 MISS. L.J. 613, 621 (2001) ("[P]ublic officials . . . pursue lawsuits of dubious legal merit against businesses to extract settlement agreements that amount to thinly disguised tax increases and regulatory policy changes." (William H. Pryor)). *But see* Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People*, 30 CARDOZO L. REV. 1, 23 (2008) ("The advantages of leaving the avenue to the courts open to all with grievances heavily outweigh the disadvantages."); *see also* A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 WASH. & LEE L. REV. 233 (2007) (explaining that CAFA was created because of the pro-plaintiff bent of state courts and lack of proper scrutiny of class actions); Robin J. Effron, *Putting the "Notice" Back into Pleading*, 41 CARDOZO L. REV. 981, 985 (2020) (describing the conservative view of notice pleading as being a "court-access buzzword synonymous with the lower bar that a plaintiff had to clear").

203. *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 743–44 (2013) (exploring the statute's enactment history); Norris, *Neoliberal Civil Procedure*, *supra* note 32, at 505 ("[CAFA's] congressional record is full of statements about class actions being extortionate and unfair mechanisms for plaintiffs to exact resources and about state courts overreaching and federal courts being fairer and more neutral fora.").

204. Narratives about corporate defendants besieged by frivolous litigation and unnecessary discovery costs undergirded the Supreme Court's decisions to move to a more restrictive "plausibility pleading" regime in *Twombly* and *Iqbal* and bolstered rulemaking efforts to restrict

defendants may make judges more susceptible to corporate efforts to lock plaintiffs out of court, lock them into federal court rather than state court, or throw them out of court and into other fora.

These organizational, cultural, and institutional explanations are especially important because the construction of the oligarchic courthouse today differs from the turn-of-the-century episode in another important way: then, it was Congress that took the lead in enacting statutes expanding original jurisdiction and facilitating removal, with the federal courts building upon their efforts in interpreting the statutes.[205] Today, congressional behavior—including expanding diversity jurisdiction, establishing the Panel on Multidistrict Litigation, and failing to enact rules of recusal for the Court—has facilitated some of the trends that we emphasize. But the initiative has passed to the Article III courts themselves, with federal courts expanding and constricting jurisdiction largely on their own, drawing on older statutory provisions and prudential doctrines, and wielding interpretive discretion that has become virtually unconstrained—all of which raises questions about the background dynamics that might facilitate this judge-driven process.[206] Beyond any differences, however, what unites both eras is judicial use of jurisdiction to transform courts into forums that serve corporate interests by denying enforcement of regulatory laws, exiling under-resourced claimants from federal court when convenient to corporate interests, and enabling the "haves" to hoard and leverage adjudicative resources in ways that raise concerns about oligarchy and subvert democratic practice.

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access to discovery. *See, e.g.*, Norris, *Neoliberal Civil Procedure*, *supra* note 32, at 490–92 (exploring how these narratives shaped the pleading and discovery contexts and provided a rationale to restrict access to both). This narrative has persisted despite the fact that the best available data show that discovery time and costs are often either minimal or appropriately scaled to the nature and complexity of the case. *See, e.g.*, Subrin & Main, *supra* note 189, at 1850–51 ("In the majority of cases there is very little or no discovery and, in the other cases, the amount of discovery is, by any reasonable measure, proportionate to the stakes."); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 791 (1998) ("Cases involving extensive discovery are in fact relatively rare—the studies using actual file reviews uncovered very few cases involving more than ten discovery requests."); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684–86 (1998) (gathering studies showing there is little to no discovery in most litigation).

205. *See, e.g.*, Nicholas Jackson, Note, *When is an Agency a Court? A Modified Functional Approach to State Agency Removal Under 28 U.S.C. § 1441*, 49 U. MICH. J.L. REFORM 273, 275 (2015) (discussing the Judiciary Act of 1789, the Jurisdiction and Removal Act of 1875, and other federal statutes authorizing general federal question removal).

206. This is not to underestimate the importance of the 2002 Multiparty, Multiforum Trial Jurisdiction Act and CAFA, which "opened the federal courts to more litigation." *See* HOFFER ET AL., *supra* note 167, at 432–33 (discussing the litigation effects of these statutes).

III. CRITIQUING THE OLIGARCHIC COURTHOUSE: JURISDICTION AND DEMOCRACY

In the fifty years since Galanter warned that the "haves" systemically use their wealth to distort and reap unwarranted advantages from judicial proceedings, corporate power has continued, more and more rapidly, to translate into political power. Notably, the "haves" obtain significant support from courts to effect de facto changes to statutes and regulation through patterns of judicial nonenforcement, diminished enforcement, and forms of jurisdictional gerrymandering. Using the courts does not provide corporations with a sure-fire way to influence public policy; alone, it is not a silver bullet. But litigation based on a strategy of jurisdictional abuse provides an important plank in a broader pro-business, deregulatory campaign, supported by information flows that can sustain the practice and that can be especially useful when legislative change is not feasible because of its salience or cost. Given the longtime efforts of business interests to use courts to their political advantage, one might see the current use of jurisdiction as merely "business as usual." We argue, instead, that over time jurisdictional practice has altered democratic practice, contributing to oligarchic conditions that are turning democratic mechanisms, slowly but steadily, against democracy.[207]

Oligarchic conditions are most clearly understood—and critiqued—when powerful economic actors determine "substantive" public policy and shape it to their own ends. But when corporate forces play an outsized role in shaping the state's adjudicative procedures, they can undermine democracy in equally powerful, if more subtle, ways. In particular, judicial jurisdiction is a political resource, and the design and application of jurisdictional doctrines affect the

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207. On the rise of oligarchic conditions in the United States, Martin Gilens and Benjamin I. Page write:

> [U]sing a unique data set that includes measures of the key variables for 1,779 policy issues . . . [m]ultivariate analysis indicates that economic elites and organized groups representing business interests have substantial impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence. The results provide substantial support for theories of Economic-Elite Domination and for theories of Biased Pluralism, but not for theories of Majoritarian Electoral Democracy or Majoritarian Pluralism.

Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 564 (2014); *see also* Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSPS. ON POL. 731, 744 (2009) (analyzing empirical studies measuring the growth of inequality in the United States, and suggesting that it would be appropriate to move from discussions of inequality and to "think about the possibility of *extreme* political inequality, involving great political influence by a very small number of extremely wealthy individuals. We argue that it is useful to think about the US political system in terms of oligarchy."). For an argument that the "sphere of justice" is and ought to be autonomous from wealth, given American commitments to democracy, pluralism, and equality, see, for example, MICHAEL WALZER, SPHERES OF JUSTICE 20 (1983), stating that "[n]o social good *x* should be distributed to men and women who possess some other good *y* merely because they possess *y* and without regard to the meaning of *x*." (emphasis reversed).

possibilities for, and opportunity structure of, democratic mobilization and contestation, bearing upon the openness or closedness of the state. Manipulations of jurisdiction by powerful actors affect the ability of other, less-resourced persons to engage in democratic contestation over the meaning of rights and norms and to effectuate rights that democratic majorities have enacted on their behalf. As such, oligarchic conditions, and their increasing embeddedness in the form of an oligarchic courthouse, pose both a threat to democratic governance and contribute to larger processes of democratic decline in the United States.

A. *Jurisdiction as a Political Resource*

At the most basic level, jurisdiction is power;[208] litigation enables private parties to leverage public power for both private and public ends. In and of itself, there is nothing unusual about such conduct—indeed, it is a basic feature of the American adversarial system. In theory, the jurisdictional resources of the state are available to all who seek justice and meet the conditions that the state has imposed on the use of its power. Litigation is thus a hybrid public and private good. And the judges to whom litigants turn exercise public power in a democratic fashion in part because they further democratic governing by enforcing statutory rights and common law commands.[209] Precisely because private parties are permitted to use public power for their own ends, their use of such power is subject to constraint. These constraints are not only a matter of individual fairness; they also implicate federalism and the separation of powers. And they implicate the integrity of judicial process, the democratic nature of the courthouse, and the principle of political equality that is essential to democracy—namely, that certain public goods (such as the vote or the right to petition or to engage in free speech) are political resources that are, or at

208. While commentators have elaborated upon different conceptions of jurisdiction—see, for example, Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619 (2017), discussing jurisdiction as power, identity, and positive law—procedurally they converge upon a basic point: that jurisdiction "determines forum in a multiforum system," *id.* at 634, and so facilitates the litigation maneuvers described in Part I, *supra*.

209. Our approach understands democracy as encompassing more than ordinary electoral mechanisms and extending to a range of participatory practices. *See, e.g.*, Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right* in Vacuo*? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 BUFF. L. REV. 523, 547–48, 535–36 (2022) ("Although some would argue that democracy embraces no more than periodic elections and a rule of majoritarianism, . . . democracy . . . comprises and demands a more robust set of practices—[including] the right . . . to participate in the formation and effectuation of the policies, practices, and values that bind members of the polity."); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483 (2022) (exploring how progressive conceptions of democracy expand it beyond majoritarianism and encompass a broader set of ongoing practices of governance).

least ought to be, equally available to all. The U.S. legal system has long tolerated disparities in the provision of justice;[210] indeed, unequal access is sanctioned by the Court's interpretation of the Constitution.[211] Inequality by itself thus does not mark a transition from democracy to oligarchy, but unequal access to political resources can reflect oligarchic trends and contribute to them; over time, political-resource inequality can amplify other types of inequalities by concentrating political opportunities in the "haves" who are then even better positioned to use state power for their own ends.

Treating judicial jurisdiction as a political resource is an idea that threads implicitly through theories of social movements that focus on resource mobilization—on, that is, the resources available to citizens seeking to engage in democratic action.[212] In this area, scholars have focused on how litigation and features of the litigation process are political resources that can be deployed or diminished in democratic contestation.[213] Jefferey Sellers, for example, has focused on how social movements, individuals, and firms use litigation as an "opportunity structure" in seeking to shape democratic norms.[214] Procedural choices affect the overall opportunity structure through which litigation as a political resource operates. Sellers focuses on how features such as judicial review and attorneys' fees provisions structure or limit the opportunities for democratic contestation.[215] Legal procedures and conventions become "important 'strategies of action'" through which citizens assert rights and make

210. *See, e.g.*, Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1865 (2018) (documenting that "nonprisoner pro se litigants comprise a meaningful percentage of the federal docket"; that "pro se litigants show up in substantial numbers across many different types of litigation"; and that "in nearly all of those types of cases . . . overall, pro se plaintiffs are less than one-tenth as likely to win cases as represented plaintiffs, whereas pro se defendants are only about one-third as likely to win cases as represented defendants").

211. *See, e.g.*, William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1869 (2002) (discussing reasons "for the constitution's impotence in civil procedure"); HERSHKOFF & LOFFREDO, *supra* note 32, at 785–86 (explaining that current constitutional doctrine "does not mandate the assignment of publicly funded lawyers to civil litigants" and that "[w]ithout legal representation, there is a danger" that legal needs go unmet).

212. For summaries of resource mobilization theory, see Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 377 (2018), and Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 701–02 (2012).

213. Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663, 668 (2005); *see also* HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 71 (1996); Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 SOC. FORCES 944, 954–55 (1980); Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1687 (2014); Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 145 (Austin Sarat & Stuart A. Scheingold eds., 2006).

214. Jefferey M. Sellers, *Litigation as a Local Political Resource: Courts in Controversies over Land Use in France, Germany, and the United States*, 29 LAW & SOC'Y REV. 475 (1995).

215. *Id.*

democratic claims.[216] And legal procedures are part of the "institutional incentives and constraints that shape a group's ability and/or willingness to sue."[217] Scholars have also considered how features such as standing rules "are crucial in determining who mobilizes the law and who does not."[218] Legal procedures can thus "open or close windows for action."[219] And few procedures are more important than those governing jurisdiction. The entire opportunity structure of litigation is based upon the availability of jurisdiction and on the ability of the claimant to deploy that jurisdiction in a lawsuit.

Relatedly, theorists focus on political process: how the openness or closedness of the state and state institutions affects the prospects for democratic contestation.[220] For these theorists, changes in political environment, the accessibility of state structures, and elite views can open or close the doors for democratic contestation. Political opportunities are thus shaped by the "relative openness or closure of the institutionalized political system," elite alignments and shifts, and shifts in state capacity and the propensity for repression.[221] Political opportunity, then, encompasses "the formal institutional or legal structure of a given political system" and "the more informal structure of power relations that characterize the system at a given point in time."[222]

Jurisdiction as a political resource also bears upon the openness or closedness of the state. At the most basic level, jurisdictional doctrines either facilitate or thwart members of the democratic polity seeking to access the state and make claims in the forum of their choice that determine the meaning and application of legal norms. Jurisdictional doctrines shape and affect the prospects for democratic contestation by determining when, where, and whether members of the public can access courts and proceed with their claims. Manipulations of jurisdiction can therefore dynamically affect the ability of citizens to engage in democratic contestation over the meaning of rights and norms.

Understanding jurisdiction as a political resource clarifies what is at stake in current jurisdictional battles and why we characterize these jurisdictional shifts as an abuse of democracy and the foundation of an oligarchic court-

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216. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 6 (1994).

217. Lisa Vanhala, *Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home*, 40 LAW & POL'Y 110, 112 (2018).

218. *Id.* at 112; *see also* Hershkoff & Loffredo, *supra* note 209 (discussing the role of standing doctrine in reinforcing or undermining political representation).

219. *See* ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS 7 (2005).

220. For summaries of political process theory, see Cummings, *supra* note 212, at 377, and NeJaime, *supra* note 212, at 702.

221. Doug McAdam, *Conceptual Origins, Current Problems, Future Directions*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 23, 27 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996).

222. *Id.* at 26.

house. When courts acquiesce in corporate efforts to manipulate jurisdiction—expanding or contracting judicial power to impede public claims-making and to support deregulatory efforts—they enhance and consolidate public power in the hands of a concentrated business minority and create conditions that diminish the ability of most of the public to engage in political contestation. The jurisdictional shifts we surveyed above exhibit this point. The arbitration decisions divest civil plaintiffs of the ability to make claims in state courts and divest courts of the ability to hear claims and exercise robust review to ensure that private adjudicators follow the law or that arbitral proceedings are workable and fair. They close off state institutions and processes and diminish jurisdiction as a political resource for plaintiffs. The removal decisions make it harder for plaintiffs to choose a forum; they also introduce levels of delay and obfuscation that can either end claims or sap plaintiffs of resources, thereby creating weary and worn-down litigants. And the primary jurisdiction decisions close courts—albeit temporarily—and direct litigants to other organs of the state that may be unwilling or unable to resolve their claims. These jurisdictional decisions exhibit that winning or losing a jurisdictional struggle is not the only way to affect its power as a political resource; the collateral consequences of this form of abuse—in terms of delay, complication, and obfuscation—can also wear out less-resourced parties and affect the overall power distribution and potency of litigation as a strategy of democratic contestation.

B. *Jurisdiction and Democratic Decline*

Forum shopping is a tried-and-true litigation tactic, and so it would be tempting to characterize jurisdictional abuse as ordinary rent-seeking by corporate powers attempting to leverage public power to maximize private gains—to be reined in, if at all, by narrow tweaks to procedural rules.[223] Reforms enacted in response to the battle over diversity jurisdiction at the turn of the twentieth century took just such a business-as-usual approach, relying on piecemeal, technical statutory changes—such as the definition of corporate citizenship—as a way to put the brakes on the business community's sharp litigation practices.[224] As Thomas M. Keck has explained, reforms of this sort may work when a court system is merely polarized—but not, however, when the judiciary is in the thrall of "an anti-system party," and the court is using its power "to assist that party in maintaining control without appealing to popular majorities"—in other words, to support oligarchy.[225] Our use of the term "oligarchic courthouse" is a strong indictment of the federal judiciary, and we

223. *See* Francesco Parisi & Barbara Luppi, *Litigation as Rent Seeking*, *in* COMPANION TO THE POLITICAL ECONOMY OF RENT SEEKING 293 (Roger D. Congleton & Arye L. Hillman eds., 2015) (discussing rent-seeking in litigation in terms of "transfer contests").

224. *See, e.g.*, PURCELL, *supra* note 89, at 91 (discussing the 1887 amendment to the diversity jurisdiction statute that raised the amount in controversy from $500 to $2,000).

225. Thomas M. Keck, *Court-Packing and Democratic Erosion*, *in* DEMOCRATIC RESILIENCE 141, 142 (Robert C. Lieberman, Suzanne Mettler & Kenneth M. Roberts eds., 2022).

use that term intentionally to locate current jurisdictional trends in a larger account of de-democratization and democratic erosion in the United States.

Consider first processes of de-democratization. Charles Tilly's pathbreaking work lays a foundation for understanding how the jurisdictional shifts we have explored fit within a series of movements away from democracy and how they—to use our term—abuse democratic norms and institutions. Tilly describes democratization and de-democratization as larger processes that have within them smaller processes of net movements towards and away from democracy.[226] To judge the degree of democracy, Tilly argues that we should "assess the extent to which the state behaves in conformity to the expressed demands of its citizens."[227] One of Tilly's core indicia of democratization is "how equally different groups of citizens experience a translation of their demands into state behavior."[228] The state is most democratic when citizens can participate in elections, lobbying, and other forms of direct contact or consultation with state officials and institutions.[229] In contrast, when powerful forces determine governmental actions—as is the case under oligarchic conditions, when economic elites determine those actions—there is less consultation and the state is less democratic.[230]

When certain parties seek to access the state and regularly yield self-serving advantages over others, they create and reproduce boundaries of inequality that undermine democracy.[231] Thus, increasing inequality gives certain groups the means and incentives to create beneficial relationships with state institutions and agents as a means to shield themselves from political obligations.[232] One particular concern for Tilly is that "privileged, powerful elites such as large landlords, industrialists, financiers, and professionals have much greater means and incentives than ordinary people to escape or subvert democratic compacts when those compacts turn to their disadvantage."[233]

Today, there are many examples of net moves away from democracy in the United States, including the undermining of free and fair elections, forms

226. *See* CHARLES TILLY, DEMOCRACY 12–14 (2007) (describing net movements towards and away from democracy).

227. *Id.* at 13.

228. *Id.*

229. *See id.* at 95 (explaining that in strongly democratic settings "[i]nterested citizens participate more actively, on the average, in elections, referenda, lobbying, interest group membership, social movement mobilization, and direct contact with politicians – that is, in consultation").

230. *See id.* ("[T]o the extent that rich, powerful people can buy public officials or capture those pieces of government bearing most directly on their interests, they weaken public politics doubly: by withdrawing their own trust networks and by undermining the effectiveness of less fortunate citizens' consultation.").

231. *See id.* at 111 (explaining how inequality "occurs when transactions across a categorical boundary (e.g., male-female) 1) regularly yield net advantages to people on one side of the boundary and 2) reproduce the boundary").

232. *Id.* at 118.

233. *Id.* at 195.

of lawmaking that consistently favor wealthy and concentrated interests, and instances of outright corruption.[234] The oligarchic courthouse and jurisdictional shifts that define it can be embedded in this larger story of net moves away from democracy. They take place against a backdrop of mounting economic inequality and illustrate instances of different groups experiencing their demands being translated into state behavior in ways that enforce and entrench that inequality.[235] Corporate parties have successfully translated their demands for courts to manipulate their jurisdictional doctrines by closing themselves off to civil plaintiffs or sending plaintiffs down circuitous routes.[236] As a result, the state—through its courts—is less responsive to claims-making, consultative processes are diminished for much of the larger public, and jurisdictional doctrines ensure that corporate parties regularly yield net procedural advantages that provide grounds for future procedural decisions in their favor.

These net procedural advantages can also entrench inequality and undermine democratic compacts. Jurisdiction has become a battleground for stunting democratic compacts—for using procedural decisionmaking to undermine the ability of the public to enforce and make real the demands of regulatory commitments. These compacts are often designed either to cabin excessive corporate power or to diminish inequality and level out power imbalances by providing anti-discrimination, workplace, and consumer protection guarantees to members of the public. When individuals find themselves wronged in the economy by powerful actors, recourse to courts is at times the only effective means of redress they have. And when jurisdiction is manipulated by corporate parties—with the acquiescence of courts—jurisdictional mazes and redirections can mean that rights and protections on paper lose real-world meaning and application. This, again, is why we use the term jurisdictional abuse—to surface how these jurisdictional transformations, by concentrating economic power and undermining the application and enforcement of democratic laws, abuse democratic values and undermine democratic governance. Jurisdictional abuse—along with the large architecture of procedural retrenchment, including more restrictive pleading standards, curtailment of aggregate litigation, and narrowed standing doctrines—forms part of the procedural story of de-democratization.[237] Together, these

234. *See* Hershkoff & Loffredo, *supra* note 209, at 525–26 (exploring how these features contribute to democratic erosion). For other accounts of how democratic erosion occurs or is occurring, see also STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018), Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018); and Ewan McGaughey, *Fascism-Lite in America (or the Social Ideal of Donald Trump)*, 7 BRITISH J. AM. LEGAL STUD. 291 (2018).

235. We acknowledge the complex and multifaceted causes of economic inequality. *See, e.g.*, Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 3–4 (2022) (reporting "de-unionization, globalization, immigration, labor market concentration, and technology" as causes of wage stagnation, income inequality, and "blockbuster profits" (footnotes omitted)).

236. Glover, *supra* note 25, at 2117.

237. *See supra* note 177 and accompanying text.

procedural shifts produce an oligarchic civil litigation architecture that favors corporate parties and incrementally closes off the state to the larger litigating public.

Beyond Tilly's frame, scholars have paid increasing attention to how declining participatory capacity and concentrated economic power are part of a larger constellation of forces eroding democracy in the United States today.[238] Democratic erosion, like de-democratization, often occurs through incremental, seemingly small changes and practices, including drifts away from democratic-procedural protections.[239] The oligarchic courthouse contributes to this larger process of erosion. Corporations have pushed for jurisdictional changes that cement and insulate their power and subvert democratically enacted commitments by constricting the possibilities for plaintiffs to participate in judicial enforcement processes and implement statutory law. Consistent with David Landau's theory of "abusive constitutionalism," the phenomenon of jurisdictional abuse uses the mechanisms of democracy—namely, judicial power—for anti-democratic ends in the sense of blocking off avenues of political participation, concentrating wealth, and insulating corporate wrongdoers from liability.[240]

Jurisdictional abuse is unlikely to get headline-grabbing attention, but it plays an especially potent and subversive role in protecting and deepening concentrated economic power.[241] Indeed, the technical and seemingly abstruse nature of doctrines such as jurisdiction makes their manipulation less likely to be politically salient, in turn making procedural reform a particularly promising way for powerful actors to protect their power and stunt processes of democratic contestation and law enforcement. Jurisdictional doctrines, like procedure generally, "fly under the radar," permitting corrosive effects that remain invisible to the public.[242] This fact once again summons Frankfurter's words, reminding us that "under the guise of seemingly dry jurisdictional and

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238. *See supra* note 234.

239. Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N.U. L. REV. 351, 355 (2018) ("[T]he steps in democratic backsliding are . . . incremental . . . . [T]he present danger today is not so much the sudden collapse of democracy, but instead its erosion in a series of small individual steps that, each on their own, may not appear alarming.").

240. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

241. *See* Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293, 295 (2016) ("[T]he Court's decisions on rights enforcement, because of their lower public visibility, are less constrained by public opinion and, therefore, less tethered to democratic governance."). For an unusual, but troubling, exception, see United States v. Donziger, 38 F.4th 290 (2d Cir. 2022), upholding the appointment of "special prosecutors" under Federal Rule of Civil Procedure 42(a)(2). *See also 55 Nobel Laureates Demand End to Judicial Attacks on U.S. Human Rights Lawyer Steven Donziger*, FRENTE DE DEFENSA DE LA AMAZONIA (Nov. 4, 2020), https://www.makechevroncleanup.com/press-releases/2020/11/4/55-nobel-laureates-demand-end-to-judicial-attacks-on-us-human-rights-lawyer-steven-donziger [perma.cc/SB35-JVFR].

242. Nathenson, *supra* note 32, at 953–54 (discussing copyright procedure as an illustration of this problem).

procedural problems, majestic and subtle issues of great moment to the political life of the country are concealed."[243]

CONCLUSION

Our focus in this Article has been on how corporations have sought to transform jurisdictional doctrines to their advantage and how the federal courts have facilitated these efforts. In doing so, corporations and courts have participated in constructing the oligarchic courthouse—one where procedure is manipulated to favor corporate interests in circumventing hearings on the merits and blocking claimants' efforts to enforce democratically enacted regulatory laws. Our exploration of these doctrinal transformations highlights how jurisdiction is implicated in struggles over political economy—over how democracy and law shape and are shaped by the economy and economic forces.[244]

It may be tempting to take away from this Article the conclusion that the best path forward is to separate jurisdiction from issues of political economy—to fashion jurisdictional doctrines without their economic effects in mind. But that separation is easier to imagine than it is to realize, and it is precisely this false sense of apolitical neutrality that has aided the emergence of the oligarchic courthouse. In a world where litigation ineluctably bears upon the economic rights and entitlements of parties—whether their damages in tort or their relief from impermissible workplace discrimination—questions of jurisdiction cannot be separated from issues of political economy. Jurisdiction goes to the heart of judicial power, and for better or worse, judicial power is deeply related today to how law shapes economic outcomes and ordering. The problem with the oligarchic courthouse, then, is not that jurisdiction has come to connect to economic goals, outcomes, or entitlements. It is that the political economy of jurisdiction is warped towards the economically powerful, essentially commandeering state processes *for* them. Our Article highlights the procedural dynamics of growing oligarchic conditions, not to suggest that procedure should be disentangled from larger battles over law and economic power, but instead to chart how courts have stretched procedure in one direction that undermines democratic governance.

The entwinement of jurisdiction and economic power underscores why conventional jurisdictional fixes would not quickly or easily dismantle the oligarchic courthouse. So long as that entanglement exists, powerful actors will

243. *See supra* note 21 and accompanying text.

244. Political economy refers to "the interrelationship between economics and politics." Barry R. Weingast & Donald A. Wittman, *The Reach of Political Economy*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY 3, 3 (Barry R. Weingast & Donald A. Wittman eds., 2008); *see also* K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1332 (2016) (defining political economy as "how our politics and economics relate to one another, how they are structured by law and institutions, and how they ought to be structured in light of fundamental moral values").

seek to bend jurisdictional doctrines to suit their interests. Still, it is worth reflecting on a few reorientations that might halt and prevent oligarchic drift. And because we are teachers of procedure and jurisdiction, our immediate audience is the legal academy.

First, the study of jurisdiction should be anchored in a democratic vision of the role of courts and law, and not presented as a merely technical feature of adjudication. We have hopefully contributed to this effort by defining jurisdiction as a political resource centered in a larger account of democratic contestation and mobilization—and by showing that its design and practice cannot be detached from democratic processes and the substantive commitments they entail. By centering jurisdiction as a significant means of facilitating democratic governance, teaching and scholarship can be better positioned to identify and critique jurisdictional doctrines that prevent parties, whether individually or in aggregate form, from influencing and carrying out legislative policy and making real democracy's demands on economic ordering.

Second, deconstructing the oligarchic courthouse requires the construction of networks that can counterbalance the structural, economic, informational, and cultural features that have made jurisdictional abuse possible—and, indeed, made it conventional not to perceive these jurisdictional shifts as a dangerous abuse of democracy. For too long, corporate-driven narratives about the putative cost, delay, and inefficiency of litigation have crowded out recognition of the importance of courthouse practice and procedure to realizing values of equality, inclusion, and fairness.[245] Remedying this requires building a culture that respects those values and where those who spend their time working on behalf of people other than the "haves" have a seat at the table.

Finally, to deconstruct the oligarchic courthouse, the democratic idea of participatory power must be placed at the center of jurisdictional design.[246] Private enforcement through courts is an important mechanism. But the design of the mechanism must ensure that otherwise diffuse, uncoordinated, and underresourced parties have the capacity needed to exercise countervailing power against the large-scale enterprises that resist such enforcement.[247]

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245. Helen Hershkoff & Stephen Loffredo, *Legal Culture, Optimal Delay, and Social Commitments: A Tribute to Vincenzo Varano*, *in* PROCESSO E CULTURA GIURIDICA, PROCEDURE AND LEGAL CULTURE 295, 306 (Vittoria Barsotti & Alessandro Simoni eds., 2020) ("Numerous studies have shown that U.S. procedural reforms adopted with the neutral goal of achieving efficiency have produced negative differential impacts on litigants in discrete groups, including women, people of color, the poor, and workers." (footnotes omitted)); Norris, *Neoliberal Civil Procedure*, *supra* note 32, at 476–78 (exploring how a neoliberal conception of neutrality influences and biases procedural decisionmaking).

246. For some efforts along these lines, see Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87 (2022), drawing on prison impact-lawyering to develop an account of participatory litigation, and Norris, *supra* note 209, developing a participatory democracy theory of private enforcement litigation.

247. *See* Helen Hershkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel's Approach to Reform of Public Education*, 28 N.Y.U. REV. L. & SOC. CHANGE 319, 320 (2003) (exploring the concept of countervailing power

When jurisdictional doctrines promote gamesmanship by more powerful parties that wears out weaker parties or frustrates them in their efforts to enforce regulatory law, then jurisdictional doctrines contribute to democratic disillusion and rot. The response must take seriously the structural and background capacities that members of the public bring to the litigation process and design jurisdictional doctrines to facilitate public participation and power.

These reorientations are largely directed to the legal community. Alone they are not sufficient to construct a participatory, democratic courthouse. We hope, however, that our effort has at least clarified the sweep and success of the corporate project to transform jurisdictional doctrines, the project's threat to democracy, and the importance of resisting it in the name of democratic governance.

in state court litigation); Norris, *Neoliberal Civil Procedure*, *supra* note 32, at 478–82, 544–52 (applying the concept of countervailing power to civil procedure).