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## Civil Procedure and Economic Inequality

Maureen Carroll

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# CIVIL PROCEDURE AND ECONOMIC INEQUALITY

Maureen Carroll\*

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*How well do procedural doctrines attend to present-day economic inequality? This Essay examines that question through the lens of three doctrinal areas: the “irreparable harm” prong of the preliminary injunction standard, the requirement that discovery must be proportional to the needs of the case, and the due process rights of class members in actions for injunctive relief. It concludes that in each of those areas, courts and commentators could do more to take economic inequality into account.*

## INTRODUCTION

*«The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.»*

*Anatole France*

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\* Assistant Professor of Law, University of Michigan Law School. I owe many thanks to Bob Clifford, Stephan Landsman, and the participants in the Twenty-Fifth Annual Clifford Symposium. I am also grateful for helpful comments and suggestions from Yonathan Arbel, Nick Bagley, Sherman Clark, Ed Cooper, Rich Friedman, Marc Galanter, Michele Goodwin, and Margo Schlanger.

I teach first-year Civil Procedure. Students often begin the course expecting it to be dry and value-neutral, with lots to memorize and little to debate. One of my goals is to show them how procedural doctrines are inextricably bound up with value-laden questions about which cases matter—what kinds of disputes, and what kinds of litigants, the federal courts should accommodate. Procedure does not only ask who can be haled into court, where, and by whom. It also asks how much effort should be invested in resolving a particular litigant's claims or defenses, and how much should be required of that litigant in turn.

Because of economic inequality, superficially uniform answers to these types of questions can have widely divergent effects. Consider, for example, the current \$400 filing fee for federal civil cases.<sup>1</sup> Hundreds of thousands of American households live on less than \$2, per person, per day;<sup>2</sup> for someone in one of those households, \$400 represents more than six months of the total support available to them. For someone working full time at the federal minimum wage of \$7.25 per hour, \$400 represents more than a week's pay.<sup>3</sup> For a federal judge, \$400 amounts to less than a day's income (even when viewing the judicial salary as spread over 365 days per year). And for the typical CEO, \$400 means almost nothing at all.

The federal *in forma pauperis* statute<sup>4</sup> reflects an awareness, however poorly translated into practice,<sup>5</sup> that the same amount of money can mean different things to differently situated people. It thus attempts to respond to the realities of economic inequality in a context where the connection between money and access to justice is straightforward and clear. By contrast, this Essay aims to dig into the doctri-

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1. This amount includes a \$350 statutory fee and a \$50 administrative fee. See 28 U.S.C. § 1914 (2006) (\$350 fee); Administrative Office of the U.S. Courts, *District Court Miscellaneous Fee Schedule* (effective Oct. 1, 2019) (\$50 fee), <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

2. KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA xvii (2013) (finding that, in 2011, more than 1.5 million households were living on less than two dollars per person per day); see also Bruce D. Meyer, Victoria Mooers & Derek Wu, *The Use and Misuse of Income Data and the Rarity of Extreme Poverty in the United States*, 1, 39 (June 21, 2018), <https://www.irp.wisc.edu/newsevents/workshops/SRW/2018/participants/presentations/21-Meyer-Extreme-Poverty.pdf> (finding that about 0.24% of U.S. households live on less than two dollars per person per day).

3. See U.S. DEP'T OF LABOR, CONSOLIDATED MINIMUM WAGE TABLE, <https://www.dol.gov/whd/minwage/mw-consolidated.htm> (last revised July 1, 2019).

4. 28 U.S.C. § 1915 (2012) (providing for a waiver of the filing fee upon a showing of the claimant's inability to pay).

5. See generally Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019) (describing uneven and ill-considered applications of the *in forma pauperis* standard).

nal weeds, looking for those contexts in which inequality may be affecting procedure in ways that are less immediately apparent.

Two implications of economic inequality are most relevant to this project. First, high levels of inequality make for a large gap, in both dollars and consciousness, between those nearer to the top of the economic hierarchy and those nearer to the bottom. Law professors and federal judges might not believe themselves to be rich, for example, but an average member of either group earns an individual salary that is more than double the median U.S. household income.<sup>6</sup> Discrepancies like those have the effect of estranging judges and law professors from the financial circumstances of more economically typical individuals. Second, attorneys might believe their rates to be reasonable,<sup>7</sup> but the median attorney in Michigan (for example) charges more per hour than the median household in that state makes in a day.<sup>8</sup> Discrepancies like those have the effect of pricing out claimants, including those with moderate incomes, from the market for legal services.<sup>9</sup>

Federal judges cannot (and need not) equalize the resources of the litigants who appear before them, but they can (and should) be attentive to the potential blind spots caused by their own positions in the economic hierarchy, the barriers to suit for the non-wealthy (including members of the middle class), and other financial realities. In doing so, they should generally attempt to avoid doctrinal approaches that misconstrue a typical individual's economic circumstances,<sup>10</sup> allow resource disparities between a particular set of litigants to exacerbate

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6. See 2017–18 SALT Salary Survey, SALT EQUALIZER (Oct. 2018), <https://www.saltlaw.org/wp-content/uploads/2018/11/SALT-salary-survey-2018-final.pdf> (law professors); *Judicial Compensation*, UNITED STATES COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-compensation> (last visited Dec. 2, 2019) (federal judges); U.S. CENSUS BUREAU *Income, Poverty and Health Insurance Coverage in the United States: 2017* (Sept. 12, 2018), <https://www.census.gov/newsroom/press-releases/2018/income-poverty.html> (median household income in 2017 was \$61,372).

7. Cf. MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 2018) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . .").

8. See *Historical Income Tables: Households*, U.S. CENSUS BUREAU, TABLE H-8. MEDIAN HOUSEHOLD INCOME BY STATE: 1984 TO 2018, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html> (last revised Aug. 29, 2019) (\$57,700 median household income in Michigan in 2017); *Economics of Law Practice in Michigan: 2017 Attorney Income and Billing Rate Summary Report*, STATE BAR OF MICHIGAN, 1, 4 (\$250 median hourly rate in Michigan in 2017).

9. This pricing-out effect is both long-standing and well-established: "For decades, bar studies have consistently estimated that . . . a majority of the needs of middle-income Americans remain unmet." Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013).

10. See *infra* Part I.

existing barriers to suit,<sup>11</sup> or rely on unrealistic assumptions about access to representation.<sup>12</sup>

This Essay will work through three examples to illustrate where civil procedure might be falling short, in terms of attending to economic inequality, and what it might look like for it to do better. Part I looks at the preliminary injunction standard and, in particular, the doctrinal barriers to establishing that loss of income constitutes irreparable harm. Part II examines the rule that discovery must be proportional to the needs of the case and, in particular, courts' application of the "amount in controversy" factor of the proportionality analysis. Part III turns to the due process rights of absent class members and, in particular, the Supreme Court's recent suggestion that mandatory Rule 23(b)(2) class actions for injunctive relief might be unconstitutional.

This Essay is as much a thought experiment as an analysis of these particular procedural doctrines. I do not purport to exhaust the areas in which economic inequality might matter to civil procedure, and even within the areas discussed, my purpose is not to propose specific doctrinal changes. Rather, I want to nudge courts and commentators—including those of us who teach and write about civil procedure—toward a way of thinking that is more attentive to modern economic disparities.<sup>13</sup>

## I. PRELIMINARY INJUNCTIONS AND IRREPARABLE HARM

In order to obtain a preliminary injunction, a plaintiff must make a four-part showing: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."<sup>14</sup>

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11. See *infra* Part II.

12. See *infra* Part III.

13. I do not mean to suggest that I am the first to draw a connection between civil procedure and economic inequality. Marc Galanter's seminal article about the structural advantages enjoyed by "repeat players" relative to "one-shotters" provides a powerful example of such analysis. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 97 (1974). Indeed, "[m]any procedure scholars now share the view that we cannot understand the Rules without understanding their interrelationship with structures of social and economic oppression, human psychology, and economic incentives." William N. Eskridge, Jr., *Metaprocedure*, 98 *YALE L.J.* 945, 949 (1989). Moreover, I am sure that many who teach Civil Procedure do address high-level issues related to economic inequality, such as the unmet legal needs of those with low to moderate incomes. Those issues have tremendous importance, but they should not take the place of a more granular focus on the potential effects of economic inequality on particular procedural doctrines.

14. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

This Part focuses on the irreparable harm prong of this test. It analyzes how courts apply that requirement in employment cases in which the prospective harm results from the plaintiff's loss of income. As discussed below, some courts make it exceptionally difficult to establish irreparable harm in those circumstances.

### A. Current Doctrine

The Supreme Court addressed the relationship between loss of income and irreparable harm in its 1974 decision in *Sampson v. Murray*.<sup>15</sup> There, a federal agency notified a probationary employee that it would be terminating her employment the following week.<sup>16</sup> The employee sued alleging that the agency had failed to provide her with the procedural protections owed to her in advance of a dismissal.<sup>17</sup> In addition to permanent injunctive and declaratory relief, the plaintiff sought a temporary restraining order against her prospective discharge.<sup>18</sup>

In rejecting the district court's grant of preliminary relief, the Court wrote that "the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury."<sup>19</sup> The Court allowed that there might be "extraordinary cases" in which "the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." It emphasized, however, that "an insufficiency of savings or difficulties in immediately obtaining other employment . . . will not support a finding of irreparable injury, however severely they may affect a particular individual."<sup>20</sup>

Due in part to its references to separation-of-powers concerns, the *Sampson* decision can be read to apply only to employment with the federal government.<sup>21</sup> The Court discussed "the obviously disruptive effect which the grant of the temporary relief awarded here was likely to have on the administrative process."<sup>22</sup> It also noted that "the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'"<sup>23</sup> and referred to "the *type* of

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15. *Sampson v. Murray*, 415 U.S. 61 (1974).

16. *Id.* at 63.

17. *Id.* at 64.

18. *Id.* at 63.

19. *Id.* at 90.

20. *Id.* at 92 n.68.

21. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 740 (1990) (characterizing *Sampson* as "[a] clear example of deference to the executive").

22. *Sampson v. Murray*, 415 U.S. 61, 83 (1974).

23. *Id.*

irreparable injury which is a necessary predicate to the issuance of a temporary injunction in *this type of case*.”<sup>24</sup> In the intervening decades, the Court has not clarified the scope of its holding.

In the absence of further guidance, courts have demonstrated varying degrees of willingness to find that loss of income constitutes irreparable harm.<sup>25</sup> For example, in *Lee v. Christian Coalition of America*,<sup>26</sup> the district court acknowledged that “it is well-settled that economic loss alone will rarely constitute irreparable harm.”<sup>27</sup> The court nonetheless held that the plaintiffs “ha[d] demonstrated that because they are so poor, the loss of their jobs would rise to the level of irreparable harm.”<sup>28</sup> The court noted that the plaintiffs earned only about \$6,825 per year, and losing those “subsistence” wages would put them at risk of eviction and render them unable to meet other basic needs.<sup>29</sup> In addition, the court observed that the public assistance program available to the plaintiffs—Temporary Assistance for Needy Families—limited the total benefits an individual could receive during his or her lifetime.<sup>30</sup> Accordingly, the court recognized that if it were to deny preliminary relief, “the plaintiffs might well be forced to use up some of their irreplaceable [five]-year lifetime limit” for those benefits.<sup>31</sup>

Other courts have taken a more categorical approach. The Seventh Circuit, for example, has interpreted *Sampson* to mean that “neither a loss of income nor a loss of status, nor even difficulty in finding another job while the suit continues, is ‘irreparable injury’ supporting

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24. *Id.* at 91–92 (emphases added); see also Laycock, *supra* note 21, at 741 (arguing that the Court deemed the asserted injuries, though irreparable, insufficient to “justify judicial interference with the government’s control over its own work force” because “they were ‘common to most discharged employees,’ and an injunction would undermine Congress’ intent that the Back Pay Act be ‘the usual, if not the exclusive, remedy for wrongful discharge’” (quoting *Sampson*, 415 U.S. at 92 n.68, 91)).

25. See Robert Belton, *Harnessing Discretionary Justice in the Employment Discrimination Cases: The Moody and Franks Standards*, 44 OHIO ST. L.J. 571, 603 n.225 (1983) (collecting cases). Surveying the case law about loss of income and preliminary relief, one district court determined that “[i]rreparable injury along these lines can only be established by a clear demonstration that the plaintiff (1) has little chance of securing future employment; (2) has no personal or family resources; (3) has no private unemployment insurance; (4) is unable to finance a loan privately; (5) is ineligible for public assistance; and (6) there are no other compelling circumstances weighing heavily in favor of [sic] interim relief.” *Shady v. Tyson*, 5 F. Supp. 2d 102, 109 (E.D.N.Y. 1998) (citing *Williams v. State Univ. of N.Y.*, 635 F. Supp. 1243, 1248 (E.D.N.Y. 1986)).

26. *Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14 (D.D.C. 2001).

27. *Id.* at 31.

28. *Id.*

29. *Id.* at 32.

30. *Id.* at 33.

31. *Id.*

interlocutory relief.”<sup>32</sup> The court has applied that prohibition to employee benefits, including health insurance,<sup>33</sup> notwithstanding that (as one district court in the Seventh Circuit put it) the loss of such benefits may result in “a denial of adequate medical care.”<sup>34</sup> In support of its approach, the Seventh Circuit has written that “[f]alse negatives in discharge cases are not particularly costly; damages and prejudgment interest make up to prevailing plaintiffs what they lose if they are unemployed in the interim.”<sup>35</sup>

Whether implicitly or explicitly, judges’ understandings about typical versus atypical economic circumstances have sometimes driven their analysis of the relationship between loss of income and irreparable harm. For example, in a case involving benefits under the Aid to Families with Defendant Children program, a district judge wrote that

[w]hile the loss of money is normally not considered irreparable, this Court must point out that in this case those affected are *not the average citizens* but rather *those who are in the grip of poverty*. The loss to them of a certain sum of money each month is much more of an injury than it is to the average individual. And it is this average individual who is the basis for the rule that the loss of money is not considered irreparable harm.<sup>36</sup>

This distinction—like the default rule established in *Sampson*—makes sense only if “the average citizens,” who are not “in the grip of poverty,” can suffer a temporary loss of income without experiencing harm that cannot be undone by a final judgment in their favor.

### B. Variations in Economic Resiliency

The median civil case in federal court takes about eleven months to resolve.<sup>37</sup> In the United States today, it is far from extraordinary for a

32. *Hetreed v. Allstate Ins. Co.*, 135 F.3d 1155, 1158 (7th Cir. 1998). The Seventh Circuit is not alone in this respect. *See, e.g., Peck v. Montefiore Med. Ctr.*, 987 F. Supp. 2d 405, 412–13 (S.D.N.Y. 2013) (“[T]he law is clear that a discharge from employment and the injuries that may flow therefrom (e.g., lost income, damage to reputation, and difficulty finding future employment) do not constitute the irreparable harm necessary to obtain a preliminary injunction.”).

33. *Ciechon v. City of Chi.*, 634 F.2d 1055, 1058 (7th Cir. 1980); *Lasco v. Northern*, 733 F.2d 477, 481 (7th Cir. 1984). Other courts have disagreed. *See, e.g., Risteen v. Youth For Understanding, Inc.*, 245 F. Supp. 2d 1, 16 (D.D.C. 2002) (“The loss of health insurance benefits—particularly for those who are unemployed—constitutes irreparable harm for purposes of a preliminary injunction.”).

34. *D’Acquisto v. Washington*, 640 F. Supp. 594, 625–26 (N.D. Ill. 1986).

35. *Hetreed*, 135 F.3d at 1158.

36. *Nelson v. Likins*, 389 F. Supp. 1234, 1237 (D. Minn. 1974), *aff’d*, 510 F.2d 414 (8th Cir. 1975) (emphasis added).

37. *See* U.S. COURTS, TABLE C-5—U.S. DISTRICT COURTS—CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS (Mar. 31, 2019), <https://www.uscourts.gov/statistics/table/c-5/federal-judicial-caseload-statistics/2019/03/31>.

loss of income of that duration to leave a household in dire straits. Consider, for example, the effects of the government shutdown that began on December 22, 2018 and ended on January 25, 2019. Though it lasted for only about a tenth of the time of the average lawsuit, the paychecks that federal workers missed over those several weeks caused them significant harm. Many of the furloughed workers shared stories about their inability to provide themselves and their families with basic necessities;<sup>38</sup> some went to food banks,<sup>39</sup> failed to pay their rent or mortgages,<sup>40</sup> or pawned their family heirlooms and other possessions.<sup>41</sup> The D.C. City Council passed emergency legislation to protect furloughed workers from eviction and foreclosure.<sup>42</sup>

Studies show that those furloughed workers are not alone in their inability to tolerate an economic shock like the temporary loss of income. For example, the Federal Reserve's annual report on economic well-being showed that in 2018, approximately four in ten adults faced with an unexpected expense of \$400 either would not be able to cover the expense at all (twelve percent) or would have to sell something or borrow money in order to cover it (twenty-seven percent).<sup>43</sup> On the one hand, whether the harm to those four in ten adults could be deemed irreparable would depend on what happened as a result of the shortfall, what was sold to cover it, and so on. On the other hand, even for a worker earning minimum wage, eleven months of lost wages would amount to far more than \$400.

Even without an unexpected economic shock, a large number of American households struggle to make ends meet. According to the Federal Reserve, for example, nearly a fifth of adults (seventeen per-

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38. Christina Caron & Mihir Zaveri, *Federal Workers, Some in 'Panic Mode,' Share Shutdown Fears on Social Media*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/2018/12/26/us/government-shutdown-stories.html>.

39. See Darran Simon, *Federal Employees Turn to Food Banks to Feed Their Families During Shutdown*, CNN (Jan. 20, 2019), <https://www.cbs58.com/news/federal-employees-turn-to-food-banks-to-feed-their-families-during-shutdown>.

40. The Office of Personnel Management (OPM) provided sample letters for employees to use when informing creditors and mortgage companies of their inability to pay. See PAY & LEAVE: FURLOUGH GUIDANCE, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/> (last visited Dec. 2, 2019).

41. See Mihir Zaveri, *Federal Employees Turn to Pawnshops Amid Shutdown's Financial Pinch*, N.Y. TIMES (Jan. 19, 2019), <https://www.pulse.ng/the-new-york-times/world/federal-employees-turn-to-pawnshops-amid-shutdowns-financial-pinch/c0jfx6>.

42. D.C. Act 23-5. *Federal Worker Housing Relief Emergency Act of 2019*, <https://code.dccouncil.us/dc/council/acts/23-5.html>.

43. BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, 2 (May 2019).

cent) “are not able to pay all of their current month’s bills in full,”<sup>44</sup> and a quarter of adults “skipped necessary medical care in 2018 because they were unable to afford the cost.”<sup>45</sup> These struggles sometimes result in families going hungry; according to the U.S. Department of Agriculture, “11.8[%] (15.0 million) of U.S. households were food insecure at some time during 2017.”<sup>46</sup>

A court fails to demonstrate an awareness of these economic realities when it asserts, categorically, that the harm caused by a loss of income can be wholly remedied by a later award of damages.<sup>47</sup> In light of federal judges’ position in the current economic hierarchy, this lack of awareness is perhaps unsurprising. Most federal judges are not billionaires, but they do make more than \$200,000 per year,<sup>48</sup> which is more than three times the median U.S. household income.<sup>49</sup> Making money is not a moral failing, but it does have the potential to create blind spots that require moral imagination to overcome.

A temporary loss of income would tend not to be nearly as alarming to someone making more than \$200,000 as it would to someone making a fraction of that amount. Higher income levels tend to entail a greater ability to build up savings, and even in the absence of a significant savings cushion, a higher-earning person will tend to have a greater ability to convert their assets or earning potential into cash.<sup>50</sup> More generally, it can be difficult for the dramatically better-off to

44. *Id.* “Altogether, 3 in 10 adults are either unable to pay their bills or are one modest financial setback away from hardship . . . .” *Id.* at 21.

45. *Id.* at 2. “Among those with family income less than \$40,000, 36[%] went without some medical treatment in 2018 . . . . This share falls to 24[%] of those with incomes between \$40,000 and \$100,000 and 8 percent of those making over \$100,000.” *Id.* at 23.

46. USDA: ECON. RESEARCH SERV., FOOD SECURITY STATUS OF U.S. HOUSEHOLDS IN 2018, <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx> (last updated Sept. 4, 2019).

47. See *supra* notes 32–35 and accompanying text (discussing some courts’ categorical approach to the relationship between loss of income and irreparable harm). Similarly, those of us who teach and write about Civil Procedure fail to demonstrate such an awareness if we uncritically relate this doctrinal approach.

48. U.S. COURTS, *Judicial Compensation*, <https://www.uscourts.gov/judgesjudgeships/judicial-compensation> (last visited Dec. 2, 2019).

49. U.S. CENSUS BUREAU, *Income, Poverty and Health Insurance Coverage in the United States: 2017* (Sept. 12, 2018), <https://www.census.gov/data/tables/2018/demo/income-poverty/p60-263.html> (median household income of \$61,372 for 2017).

50. Differences in access to credit help to explain why Commerce Secretary (and multi-millionaire) Wilbur Ross provoked controversy when, during the government shutdown, he said that he did not “really quite understand why” furloughed employees were visiting food banks rather than taking out low-interest loans. See David J. Lynch & Damian Paletta, *Wilbur Ross says furloughed workers should take out a loan. His agency’s credit union is charging nearly 9%*, WASH. POST (Jan. 24, 2019), [https://www.washingtonpost.com/business/economy/wilbur-ross-says-furloughed-workers-should-take-out-a-loan-his-agencys-own-credit-union-is-charging-nearly-9-percent/2019/01/24/be1c9f1e-2020-11e9-8b59-0a28f2191131\\_story.html](https://www.washingtonpost.com/business/economy/wilbur-ross-says-furloughed-workers-should-take-out-a-loan-his-agencys-own-credit-union-is-charging-nearly-9-percent/2019/01/24/be1c9f1e-2020-11e9-8b59-0a28f2191131_story.html).

understand the common reality of living paycheck to paycheck.<sup>51</sup> For those who can see how much higher the economic ladder reaches above them, it may even be difficult to understand how well-off they are, relative to those in more typical economic circumstances.<sup>52</sup> One can see indications of this effect with federal judges:<sup>53</sup> Many have complained that their salaries are inadequate,<sup>54</sup> and some have stepped down because they feel that they cannot afford to stay.<sup>55</sup>

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51. A survey conducted in 2017 showed that more than three quarters of U.S. workers were living paycheck to paycheck. See Zach Friedman, *78% Of Workers Live Paycheck to Paycheck*, FORBES (Jan. 11, 2019), <https://www.forbes.com/sites/zackfriedman/2019/01/11/live-paycheck-to-paycheck-government-shutdown/#19399d6e4f10>. Not all of those living paycheck to paycheck had low incomes, but among those making \$100,000 or more, the percentage living paycheck to paycheck was more than five times lower than it was among those making less than \$50,000. See Press Release, *Living Paycheck to Paycheck is a Way of Life for Majority of U.S. Workers, According to New CareerBuilder Survey*, CAREERBUILDER (Aug. 24, 2017), <http://press.careerbuilder.com/2017-08-24-Living-Paycheck-to-Paycheck-is-a-Way-of-Life-for-Majority-of-U-S-Workers-According-to-New-CareerBuilder-Survey>.

52. Most Americans “prefer to call [their] incomes ‘average,’ even when, statistically speaking, they’re not.” Kevin Quealy, Roberg Bebeloff, & Rumsey Taylor, *Are You Rich? This Income-Rank Quiz Might Change How You See Yourself*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/interactive/2019/08/01/upshot/are-you-rich.html>. When a 2018 survey asked how high someone’s annual income would have to be for them to be considered “rich,” for example, “the higher a respondent’s income, the higher he or she set the bar.” *Id.* In another survey, “[m]ore than a third of respondents in the 90th percentile described their income as ‘average’ compared with Americans in general.” *Id.*

53. Federal judges are likely to be highly aware of how much higher the economic ladder reaches above them; although they make several times more than the median American household, they make several times less than partners at large law firms. See Albert Yoon, *Federal Judicial Tenure*, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 70, 90 (Lee Epstein & Stefanie A. Lindquist, eds. 2017) (“In 1970, at the time of the peak in (real) judicial salaries, judges earned salaries comparable to partners at most large law firms. Since that time, however, the disparity has dramatically increased. In 2014, partners at law firms ranked in the Top 100 in American Lawyer earned average profits of \$1.47 million.”) (internal citations omitted).

54. See, e.g., John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary, Third Branch*, ADMIN. OFFICE OF THE U.S. COURTS (Washington, D.C.) (Jan. 2007), <https://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf>; see also Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, 52 U. CHI. L. REV. 1146, 1148 (1985) (“Federal judges, as a group, complain more about their pay than any other group I have ever encountered.”).

55. See John W. Dean, *Underpaid and Overworked: The National Disgrace of Undercompensating Federal Judges, While Allowing Their Workload to Balloon*, FINDLAW (Nov. 3, 2006), <https://supreme.findlaw.com/legal-commentary/underpaid-and-overworked-the-national-disgrace-of-undercompensating-federal-judges-while-allowing-their-workload-to-balloon.html> (collecting examples of judges who cited financial concerns as a reason for leaving the bench); see also Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 15 (2012) (finding that fourteen judges explicitly referred to inadequate salary as their reason for resigning to enter private practice between 1970 and 2009, and that “compensation was probably at least a factor” for twenty-eight others who resigned to take jobs outside of the public sector during that period).

### C. *Reconsidering the Baseline*

The economic realities discussed above call into question whether courts should apply an “extraordinary case” limitation, let alone a flat prohibition, on finding that a plaintiff’s loss of income would cause irreparable harm.<sup>56</sup> A high bar to such a finding may well be reasonable for those employees who make hundreds of thousands of dollars per year, but its justification is less clear for the more typical workers whose families live paycheck to paycheck, or who struggle to pay their bills, even without any interruption in income.

Perhaps a court might believe that the social safety net will prevent the irreparable harm that a loss of income could otherwise cause. In some ways, the Supreme Court’s 1970 decision in *Goldberg v. Kelly*<sup>57</sup> could be read as hinting at such a view. The Court drew a contrast between a welfare recipient facing a termination of benefits, on the one hand, and “the discharged government employee . . . or virtually anyone else whose governmental entitlements are ended,” on the other.<sup>58</sup> According to the Court, the former stood apart because “termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.”<sup>59</sup>

The public benefits system does not look the same in 2019 as it did in 1970. Legislation passed in 1996 aimed to “end welfare as we know it” by replacing an open-ended entitlement to cash assistance with a new program that “imposed lifetime limits on receiving aid, subjected able-bodied participants to work requirements, incentivized states to cut welfare rolls, and transformed welfare into a block grant program that gave states wide flexibility in how they spend welfare funds.”<sup>60</sup> The current system does not aim to “provide[ ] the means to obtain essential food, clothing, housing, and medical care”<sup>61</sup>—at least, not immediately, comprehensively, or indefinitely.<sup>62</sup> More important for

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56. Others have criticized the premise that loss of income cannot constitute irreparable harm as well. See Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. REV. 623, 642–43 (1990) (arguing that, especially for impoverished plaintiffs, the “primary harm” of loss of income can cause “secondary harm” that may be irreparable); Laycock, *supra* note 21, at 741 (arguing that “the injury from financial distress is often irreparable” because the defendant “would not be liable for the value of a home or goods lost to creditors, or even for interest paid on borrowed funds”).

57. 397 U.S. 254 (1970).

58. *Id.* at 264.

59. *Id.*

60. Sara Sternberg Greene, *The Bootstrap Trap*, 67 DUKE L.J. 233, 236 (2017).

61. *Goldberg*, 397 U.S. at 264.

62. *Cf. Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14, 31–33 (D.D.C. 2001) (noting that the plaintiffs’ receipt of public benefits would use up a portion of their “irreplaceable 5-year

current purposes, although there is overlap between those living in poverty and those experiencing irreparable harm, the two groups are not fully coextensive. Accordingly, even if a plaintiff can obtain public benefits sufficient to keep her family above the poverty level, she may nonetheless suffer irreparable harm due to the loss of her income—for example, by losing her home to foreclosure.<sup>63</sup>

To be clear, I am not suggesting that a court must blindly accept a plaintiff's bare assertion that the loss of her income would cause irreparable harm. A plaintiff seeking a preliminary injunction bears the burden of establishing each of the four requirements for such relief,<sup>64</sup> including irreparable harm. Nor do I mean to suggest that it should be easy for a plaintiff to get a preliminary injunction against the termination of her employment; indeed, there are reasons to think that obtaining such relief should be somewhat difficult.

Those reasons relate not to the question whether the plaintiff will suffer irreparable harm due to the loss of her income, however, but to other prongs of the preliminary injunction standard. For example, an employer may fear that even if it ultimately wins the case, it will not be able to recoup the compensation it has paid to the employee in the interim. That possibility is appropriately considered as part of the balancing of the equities, which requires the plaintiff to show that the harm she would suffer if the court were to deny the preliminary injunction would be greater than the harm the defendant would suffer if the court were to grant it. It is also mitigated, though not eliminated, by the requirement that the plaintiff show a likelihood of success on the merits. Accordingly, a court need not treat a plaintiff's loss of income as less severe than it actually is in order to reach just and sensible results in these types of preliminary injunction decisions. Reaching such results may require attending to the effects of modern economic inequality, under which a temporary loss of income may cause trivial harm to some (including some federal judges) but irreparable harm to a great many others (including many low-wage and middle-class workers).

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lifetime limit" for those benefits); EDIN & SHAEFER, *supra* note 2, at 9–10 (describing the inadequacy of public assistance to meet basic needs).

63. "[T]he loss of real estate is always irreparable." Laycock, *supra* note 21, at 741.

64. See, e.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (characterizing a preliminary injunction as "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief").

## II. PROPORTIONALITY AND THE AMOUNT IN CONTROVERSY

The Federal Rules of Civil Procedure create a discovery process by which a litigant can obtain information from an adversary or third party in order to prove a claim or defense. Rule 26(b) defines the scope of the discovery that a litigant may obtain.<sup>65</sup> In its current form, the rule limits the scope of discovery to information that is relevant, non-privileged, and proportional.<sup>66</sup> This Part focuses on the proportionality prong of this standard. According to Rule 26(b)(1), the considerations relevant to proportionality include “the importance of the issues at stake in the action, *the amount in controversy*, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>67</sup> As discussed below, economic inequality can affect a court’s application of the amount in controversy factor in significant, yet largely unrecognized, ways.

### A. Current Doctrine

Though not as long-standing as relevance or privilege, proportionality has been part of the discovery landscape for quite a while now. The concept was first introduced to the discovery rules in the 1983 amendments to Rule 26.<sup>68</sup> Among other changes, those amendments added a requirement that a court must limit discovery to keep it from becoming “unduly burdensome or expensive” in light of an enumerated set of considerations.<sup>69</sup> The Advisory Committee Note to the 1983 amendments stated that the changes were intended to prevent discovery that was “disproportionate” in the sense of being “excessively costly and time-consuming.”<sup>70</sup>

More recently, a set of amendments that took effect in December 2015 moved proportionality to the forefront of the discovery standard. Instead of merely allowing the court to act as a backstop against disproportionate discovery, Rule 26(b)(1) now affirmatively defines the scope of discovery as “any nonprivileged matter that is relevant to any

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65. See generally FED. R. CIV. P. 26(b).

66. FED. R. CIV. P. 26(b)(1).

67. *Id.* (emphasis added).

68. Brooke D. Coleman, *Discovering Innovation: Discovery Reform and Federal Civil Rulemaking*, 51 AKRON L. REV. 765, 773 (2017) (noting that the 1983 amendments “provided the first iteration of ‘proportionality’ language”).

69. The considerations set forth in the 1983 version of Rule 26 are similar to those listed in the current version of the rule: “the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.” *Id.*

70. FED. R. CIV. P. 26, Advisory Committee Notes to the 1983 Amendment.

party's claim or defense *and proportional to the needs of the case.*"<sup>71</sup> As noted above, the rule sets forth a list of considerations that bear on proportionality, including "the amount in controversy."<sup>72</sup>

Much of the debate about proportionality has centered on the extent to which the amount in controversy should drive the analysis. Even before the 2015 amendments went into effect, some had complained that courts were placing too much weight on the amount in controversy, relative to the other listed considerations, when making proportionality determinations.<sup>73</sup> An early draft of the 2015 amendments listed the amount in controversy first among the proportionality factors, leading to further concerns that the change would cause courts to give the amount in controversy even greater weight in the analysis.<sup>74</sup> In response to those concerns, the Advisory Committee switched the amount in controversy factor with the one addressing "the importance of the issues at stake in the action," which is now listed first.<sup>75</sup>

In addition to reordering the list of considerations bearing on proportionality, the Advisory Committee took pains to emphasize in its note to the 2015 amendments that "the monetary stakes are only one factor, to be balanced against other factors" in evaluating proportionality:<sup>76</sup>

The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.<sup>77</sup>

Notwithstanding these cautions in the 1983 and 2015 Advisory Committee Notes, some courts have required a direct relationship between discovery costs and the amount in controversy, without regard

71. FED. R. CIV. P. 26(b)(1) (emphasis added).

72. See *supra* text accompanying note 67.

73. See, e.g., Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 60–61 (2015); see also John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 464 (2010) (warning of "the danger that monetary value of a case, alone, will control the proportionality analysis, impeding the discovery efforts of parties with limited resources and failing to acknowledge the non-pecuniary importance of public policy-related suits").

74. Laporte & Redgrave, *supra* note 73, at 36.

75. *Id.* at 36–37.

76. FED. R. CIV. P. 26, Advisory Committee Notes to the 2015 Amendment.

77. *Id.* (quoting FED. R. CIV. P. 26, Advisory Committee Notes to the 1983 Amendment).

to the other proportionality factors. For example, in 2008, a magistrate judge for the District of Maryland presided over a Fair Labor Standards Act and wage-and-hour case brought by workers who made around \$6 to \$10 per hour.<sup>78</sup> The court expressed concern that “the discovery sought by the Plaintiffs might be excessive or overly burdensome” in light of “the relatively modest amounts of wages claimed” by each worker, among other considerations.<sup>79</sup> The court thus ordered the parties to create a “discovery budget” based on the “foreseeable range of damages” in the litigation.<sup>80</sup>

This approach amounts to a judgment that some claims, based on the dollar value sought, do not warrant significant amounts of discovery.<sup>81</sup> In some cases involving asymmetrical information, in which the defendant possesses the bulk of the information necessary to pursuit of both the plaintiff’s claims and its own defenses, viewing certain claims as unworthy of significant discovery has a potentially recursive effect. An attorney’s decision whether to file a lawsuit on a claimant’s behalf will often depend on the attorney’s view of the claim’s likelihood of success.<sup>82</sup> For cases involving information largely possessed by the defendant—including many employment discrimination and products liability actions—the claim’s likelihood of success depends, in turn, on the plaintiff’s ability to obtain information in discovery. Barriers to discovery can thus adversely affect not only those cases

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78. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

79. *Id.* at 364.

80. *Id.* In 2009, the judge who presided over that case was appointed to the Advisory Committee for the Federal Rules of Civil Procedure; he was thus a member of the committee that proposed the 2015 amendments. He has recently written a pair of law review articles promoting his approach to proportionality. Hon. Paul W. Grimm, *Introduction: Reflections on the Future of Discovery in Civil Cases*, 71 VAND. L. REV. 1775, 1779 (2018) (characterizing this approach as “developing a discovery ‘budget’ by estimating the range of plausible recovery and costs of discovery and using that estimate to figure out how many lawyer hours should be spent on discovery.”); Hon. Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117 (2017) (“By evaluating likely recovery and foreseeable expense, the court and the parties can arrive at a ‘discovery budget’ for a particular case.”).

81. Perhaps reflecting a similar type of judgment, Judge Thomas Hardiman of the Third Circuit Court of Appeals recently commented, “If I were able to do something unilaterally, I would probably institute a new federal rule that said all cases worth less than \$500,000 would be tried without any discovery.” Debra Cassens Weiss, *Judge on Trump’s Supreme Court Short List Proposes Discovery Ban for Cases Worth Less Than \$500k*, ABA JOURNAL (Dec. 10, 2018), [http://www.abajournal.com/news/article/judge\\_on\\_trumps\\_supreme\\_court\\_shortlist\\_proposes\\_discovery\\_ban\\_for\\_cases\\_wo](http://www.abajournal.com/news/article/judge_on_trumps_supreme_court_shortlist_proposes_discovery_ban_for_cases_wo).

82. Likelihood of success matters not only to attorneys evaluating whether to accept representation based on the possibility of a contingent percentage fee, but also to attorneys evaluating whether to accept representation based on the possibility of a statutory fee-shifting award. See generally Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. (forthcoming 2020).

that are filed, but also those that are contemplated, further reducing access to counsel for economically disadvantaged litigants.<sup>83</sup>

To be sure, it would be a mistake to equate broader discovery with greater access to counsel across the board. For one thing, plaintiffs are not only discovery requesters, but also discovery responders.<sup>84</sup> For another, defendants need access to counsel just as plaintiffs do. Moreover, unnecessarily expensive discovery can make obtaining counsel more difficult for plaintiffs and defendants alike. The impact of narrowing or broadening discovery thus depends on the characteristics of the particular case.<sup>85</sup>

### B. *What Dollar Values Can Conceal*

As the foregoing discussion suggests, the amount in controversy has played a central role in courts' application of the proportionality requirement. My focus here is not on whether that factor has been given too much weight (though such over-weighting would tend to exacerbate the issue that is my focus). Rather, the possibility that I want to raise is that comparing the dollar-value amount in controversy to the dollar-value costs of discovery—without considering the context of each of those dollar amounts—might sometimes be inequitable in its own right.

The source of this potential inequity is that the same monetary amount can have different levels of importance to differently situated people.<sup>86</sup> Even in a case involving contracts, torts, or another substan-

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83. As Myriam Gilles has explained, the list of other barriers is a long one, and includes “the ‘justice gap’ and problems of non-representation; cuts in funding for legal aid and court administration; heightened pleading standards and expensive discovery; [and] increasingly restrictive views of standing to sue.” Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1536–37 (2016).

84. See Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037, 2039–41 (2018) (offering examples of ways in which plaintiffs and defendants can raise each other's discovery costs). A 2009 study by the Federal Judicial Center found that, in cases involving the production of electronically stored information, “more than [forty] percent of plaintiff attorneys and more than [fifty] percent of defendant attorneys reported representing both a producing and requesting party.” EMERY G. LEE III & THOMAS E. WILLING, FEDERAL JUDICIAL CENTER, NATIONAL, CASE-BASED CIVIL RULES SURVEY 1 (2009).

85. Because of this particularity, one former federal judge noted that “[t]he notion of a ‘discovery budget’ is an interesting concept, but a limited one, because it calls for a global proportionality analysis rather than a specific one.” John L. Carroll, *supra* note 73, at 465. For a description of the “discovery budget” approach to proportionality, see *supra* notes 78–81 and accompanying text.

86. As Blackstone put it, “[t]he value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's.” Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 322 (2014) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*378).

tive area not generally deemed to have broad social significance,<sup>87</sup> the dollar value of the amount in controversy might mean much more to the plaintiff than it does to the defendant, the attorneys, or the court.<sup>88</sup>

Consider, for example, a hypothetical tort case involving a worker who makes the District of Columbia's minimum wage of \$14 per hour.<sup>89</sup> D.C.'s minimum wage is higher than that of any other state or territory, and it is nearly double the federal minimum wage of \$7.25 per hour,<sup>90</sup> but it corresponds to a full-time annual salary of only about \$28,000 per year.<sup>91</sup> If the worker seeks \$28,000 in damages based on a year of lost wages, a court might find discovery costs of \$30,000 to be disproportionate to the amount in controversy, especially if the litigation does not seem to implicate any significant non-monetary values.<sup>92</sup> That \$30,000 in discovery costs, however, might represent less than fifty hours of a highly experienced attorney's labor.<sup>93</sup>

For a court to deny a worker the opportunity to prove a claim for a year's worth of wages, on the basis that providing the discovery necessary to prove that claim would take just over a week of an attorney's

87. FED. R. CIV. P. 26, Advisory Committee Notes to the 1983 Amendment (providing examples of subject areas like "employment practices" and "free speech" that do have such significance); see also FED. R. CIV. P. 26, Advisory Committee Notes to the 2015 Amendment ("Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.").

88. During the comment period for the 2015 amendments to Rule 26, the Tennessee Employment Lawyers Association expressed concerns to this effect:

[M]any of our clients are minimum wage or low wage workers whose lives are upended by the discriminatory or retaliatory actions of their employers. In such cases, the amount in controversy may be relatively low as it deals with back pay and front pay damages calculated at the rate of \$7.25 an hour. These damages though significantly lower when compared to an executive who suffers a loss as a result of the same type of behavior are just as if not more critical to the low wage employee. By reducing the scope of discovery on this basis, the rules are creating the potential for litigation classes based on the plaintiffs' socio-economic standing.

Bryce Ashby, Comment on the United States Courts (USC) Proposed Rule: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 2014), <https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-1568>.

89. UNITED STATES DEPARTMENT OF LABOR, Consolidated Minimum Wage Table, <https://www.dol.gov/whd/minwage/mw-consolidated.htm> (last revised July 1, 2019).

90. *Id.*

91. This calculation is based on fifty full workweeks per year at forty hours per week.

92. *Cf. The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J., 289, 301 (2010) ("Plainly, in the many civil actions that are essentially private disputes (such as breach of contract or traditional tort actions), non-monetary factors [such as "the importance of the issues at stake"] may be irrelevant.").

93. The United States Attorney's Office Matrix lists an hourly rate of \$491 for 2018-19 for an attorney in D.C. with 11-15 years of experience. See *USAO Attorney's Fees Matrix — 2015-2019*, JUSTICE.GOV (2019), <https://www.justice.gov/usao-dc/file/796471/download>. At that rate, a client would pay about \$24,059 for forty-nine hours of the attorney's work.

time, strikes me as deeply troubling. That is especially so if more sensible staffing decisions by the defendant would result in a less-expensive attorney performing the work and taking the same amount of time to do so,<sup>94</sup> such that it would cost the proportionate-seeming \$15,043 rather than the disproportionate-seeming \$30,000.<sup>95</sup>

When the defendant's discovery costs cannot be meaningfully reduced—or if, as is likely, a court cannot say with any certainty that those costs can be reduced without harming the defendant's interests<sup>96</sup>—then the question of how to view the relationship between discovery costs and the amount in controversy becomes much harder. It implicates the very purposes of the proportionality requirement, including concerns about nuisance settlements, in which the defendant settles an untenable claim for more than it is worth but less than it would cost to defend. Comparing the dollar-value costs of discovery to the dollar-value amount in controversy can help a court to protect the defendant against nuisance settlements, because such comparisons can flag discovery requests for which the defendant's litigation costs will exceed the monetary value of the plaintiff's claim.

### C. *Broadening the Comparison*

What if, when comparing the costs of discovery and the amount in controversy for proportionality purposes, a court were to apply an hours-to-hours comparison in addition to a dollars-to-dollars comparison?<sup>97</sup> Because of the potential for undermining the goals of the proportionality requirement, including with respect to nuisance settlements, it would be unwise for courts to make an across-the-board change from dollars-to-dollars to hours-to-hours. In some circumstances, however, adding an hours-to-hours perspective to the analysis might helpfully inform a court's exercise of discretion with

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94. Many tasks will take less time for a more-experienced attorney to complete, relative to a less-experienced attorney. Some discovery tasks, however, can involve rote processing of large amounts data, and thus can take similar amounts of time for attorneys with different levels of skill or experience.

95. The United States Attorney's Office Matrix lists an hourly rate of \$307 for 2018–2019 for an attorney in D.C. with less than two years of experience. See *USAO Attorney's Fees Matrix — 2015-2019*, JUSTICE.GOV (2019), <https://www.justice.gov/usao-dc/file/796471/download>. At that rate, a client would pay \$15,043 for forty-nine hours of the attorney's work.

96. The views that some courts have expressed about plaintiffs' choice of counsel in statutory fee-shifting cases suggest that entrusting courts with this inquiry would be unwise. For example, one court criticized the plaintiff's counsel selection on the basis that it amounted to hiring "a limousine when a sedan could have done the job." *Simmons v. N.Y.C. Transit Auth.*, 575 F.3d 170, 176 (2d Cir. 2009).

97. By an hours-to-hours comparison, I mean that the court would compare the number of hours of an attorney's labor needed to respond to the discovery request to the number of hours of a party's labor represented in the amount in controversy.

regard to proportionality decisions. In particular, the supplemental comparison could highlight cases in which some versions of the proportionality requirement would pose an unusually high risk of exacerbating problems of access to justice.

Denying that our system is a capitalist system would be as inaccurate as denying the existence of economic inequality. It is certainly acceptable, in a capitalist system, for an employer or customer to say that one individual's time has a lower market value than another's. Moreover, when courts apply substantive law, they will sometimes need to reproduce capitalistic judgments about the value of an individual's time (e.g., when calculating damages due to lost wages) or, conversely, to engage in legal fictions about the marginal utility of wealth (e.g., when calculating damages due to pain and suffering).<sup>98</sup> I do not mean to make any sweeping pronouncements about the appropriateness of those choices; indeed, I do not mean to disturb them in any significant way.

I do want to raise the possibility, though, that civil procedure might be different in kind than some of the areas of substantive law in which the foregoing questions (i.e., about the marginal utility of money) have been answered. Procedure does not create substantive rights; instead, it governs their adjudication.<sup>99</sup> When a litigant seeks such adjudication, procedure aims to provide her (and her adversary) with a meaningful opportunity to be heard<sup>100</sup> and a "just, speedy, and inexpensive determination" of her claims (and her adversary's defenses).<sup>101</sup> If the opposing party has the information a litigant needs to prove her claims, the litigant's opportunity to be heard might not in fact be meaningful, and a fair determination of her claims might not in fact occur, unless the court requires her opponent to make that information available to her.

By including factors other than the amount in controversy, the proportionality standard already recognizes that the fair adjudication of some claims might call for discovery costs that are not strictly and

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98. See Mark Geistfeld, *Placing A Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 805 n.123 (1995) ("Plaintiffs who are wealthy presumably get less utility from each dollar of damages than do plaintiffs who are less wealthy, yet the current system does not make the plaintiff's wealth an explicit consideration in the pain-and-suffering damages calculation.").

99. Cf. 28 U.S.C. § 2072(b) (2012) (providing that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right").

100. See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 311–14 (1950).

101. See FED. R. CIV. P. 1.

directly proportional to the dollar value of the remedies sought.<sup>102</sup> In particular, the “importance of the issues at stake” factor recognizes that some cases “may have importance far beyond the monetary amount involved.”<sup>103</sup> Perhaps, in some cases, the right to be heard could be considered one of the issues at stake; if so, a court might incorporate an hours-to-hours comparison as an aid in identifying those cases.<sup>104</sup>

In effect, a strictly dollars-to-dollars approach to proportionality amounts to a decision that increasing access for economically disadvantaged plaintiffs can never warrant the downsides of an hours-to-hours approach, such as increasing the risk of nuisance settlements for economically advantaged defendants. If courts were to add an hours-to-hours perspective to their analysis, it is possible that the answer might change from “never” to “sometimes.”<sup>105</sup> In any event, courts and commentators—again, including those of us who teach and write about civil procedure—should be aware of the pitfalls of any version of proportionality that fails to take economic inequality into account.

### III. DUE PROCESS AND MANDATORY CLASS ACTIONS

When a court certifies a Rule 23(b)(3) class action for monetary relief, the Federal Rules of Civil Procedure guarantee absent class members the right to exclude themselves (i.e., opt out) from the class.<sup>106</sup> In contrast, when a court certifies a Rule 23(b)(2) class action for injunctive or declaratory relief, the rules do not guarantee absent class members the right to opt out.<sup>107</sup> This Part focuses on the implications that economic inequality may have for the question whether the lack of opt-out rights under Rule 23(b)(2) violates due process.

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102. See FED. R. CIV. P. 26(b)(1). The rule also lists “the parties’ resources” as a factor in evaluating proportionality, allowing the court the flexibility to protect litigants against discovery requests that they cannot afford to fulfill. *Id.*; see also Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1117 (2015) (noting that “[s]everal of the proportionality factors allow judges to soften the force of” approaches based on the relationship between discovery costs and the amount in controversy).

103. FED. R. CIV. P. 26, Advisory Committee Notes to the 2015 Amendment.

104. For example, the right to be heard might have more importance to a (low-wage or middle-class) David who is suing a (tremendously wealthy) Goliath than to one Goliath who is suing another. Such a conclusion would be consistent with the insight that, under a number of different views of procedural justice, “the inherent value of process . . . can vary from claimant to claimant.” Matthew J.B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79, 82 (2015) (emphasis omitted).

105. *Cf. id.* (arguing that claimant-specific differences in the inherent value of process can support “ration[ing] process among claimants according to need”).

106. See FED. R. CIV. P. 23(c)(2)(B).

107. See FED. R. CIV. P. 23(c)(2)(A).

### A. Current Doctrine

Plaintiff-class certification binds together the fortunes of every member of the class; regardless of whether the plaintiffs win or lose, the entire class will be bound by the result. Opt-out rights soften this effect by allowing those who fall within the class definition the opportunity to exclude themselves from the class. Because they are no longer part of the class, those who opt out are not bound by the result of the class proceedings. Any putative class member who opts out thereby retains the right to bring her own lawsuit; any putative class member who fails to opt out does not.

In 1985, the Supreme Court stated that the Due Process Clause guarantees absent class members the opportunity to opt out of certain class actions.<sup>108</sup> The Court reasoned that each class member individually possesses “a chose in action”—i.e., the right to sue—which is “a constitutionally recognized property interest.”<sup>109</sup> Because a certified class action extinguishes that right to sue for every member of the class, the Court held that absent class members must be afforded certain due process protections, including the opportunity to opt out.<sup>110</sup> The Court expressly limited its holding to class actions that involve “claims wholly or predominately for money judgments,” however, stating that it “intimate[d] no view concerning other types of class actions, such as those seeking equitable relief.”<sup>111</sup>

Rule 23(b)(2) governs some of those class actions seeking equitable relief.<sup>112</sup> By 1985, federal courts had been certifying Rule 23(b)(2) class actions for nearly twenty years, and they have continued to do so in the decades since. In 2011, however, the Court implied some doubt as to whether such actions violate absent class members’ due process rights:<sup>113</sup>

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108. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985).

109. *Id.* at 807.

110. *Id.* at 811–12. *But see* Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 GEO. WASH. L. REV. 798, 800 (2014) (noting that “the language in [*Shutts* and subsequent cases citing it] can be characterized as dictum”).

111. *Shutts*, 472 U.S. at 811 n.3.

112. Specifically, Rule 23(b)(2) applies when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” FED. R. CIV. P. 23(b)(2).

113. Even before 2011, the Court had “dropped the hint” that absent class members might have a due process right to opt out of a Rule 23(b)(2) class action. Andrew Bradt, “*Much to Gain and Nothing to Lose*” *Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 796–97 (2005-2006).

[Rule 23](b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (*rightly or wrongly*) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause.<sup>114</sup>

The Court made this statement in the course of holding that classes certified under Rule 23(b)(2) could not seek individualized monetary relief. It emphasized “the serious possibility” that the absence of notice and opt-out rights would violate due process in actions seeking such relief.<sup>115</sup> Its expression of doubt, however, also extended to class actions seeking only injunctive or declaratory relief.<sup>116</sup>

If the Court were to deem opt-out rights to be required for Rule 23(b)(2) class actions, some form of notice of class certification would be necessary to effectuate that right. Because plaintiffs must bear the costs of certification notice,<sup>117</sup> the expenses connected to such a requirement could significantly curtail civil rights organizations’ ability to bring these types of cases.<sup>118</sup> The loss of such actions would be harmful to civil rights enforcement; among other things, class treatment in injunctive civil rights cases can protect against mootness, help to ensure that the scope of the relief will match the scope of the violation, and promote enforceability by affected individuals other than the named plaintiffs.<sup>119</sup>

### B. *The Practical Value of a Right to Sue*

As explained above, the Court has not formally resolved the question whether Rule 23(b)(2) violates the due process rights of absent class members by failing to provide them with opt-out rights. Most scholars agree that this aspect of the rule does not offend the Due

114. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (emphasis added). As this passage suggests, the Court referenced the lack of obligatory class notice in Rule 23(b)(2) class actions in addition to the lack of opt-out rights. My focus here is only on the latter, though as noted *infra* notes 117–18 and accompanying text, a class would need to receive some type of notice in order for an opt-out right to be meaningful.

115. *Dukes*, 564 U.S. at 363.

116. *See id.* at 362–63; *see also* Klonoff, *supra* note 110, at 809 (“[T]he Court hinted that notice and opt-out rights may be required in (b)(2) actions even where the monetary claims in the case do not predominate.”).

117. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

118. When the Civil Rules Advisory Committee proposed an amendment that would have required certification notice for Rule 23(b)(2) class actions, civil rights organizations opposed the change on this basis. *See* Klonoff, *supra* note 110, at 828–29.

119. *See generally* Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 *CARDOZO L. REV.* 2017 (2015).

Process Clause,<sup>120</sup> but some have expressed a contrary view.<sup>121</sup> As discussed below, viewing the question through the lens of economic inequality could help to clarify why the absence of opt-out rights for injunction-only classes is constitutionally permissible.<sup>122</sup>

To begin, it is worth emphasizing the nature of procedural due process, which “is not a technical conception with a fixed content unrelated to time, place and circumstances.”<sup>123</sup> Rather, as the Supreme Court has repeatedly noted, it is a “flexible” doctrine that “calls for such procedural protections as the particular situation demands.”<sup>124</sup> Courts do not pretend that notice by publication is actually likely to be effective, for example, but they will nonetheless approve that form of notice “where it is not reasonably possible or practicable to give more adequate warning.”<sup>125</sup> Due process thus looks to the practicalities of a situation—the world as it is, not an idealized version.

The right to sue (which, as discussed above, is the property interest at issue in this context) is only as valuable as a claimant’s ability to exercise it.<sup>126</sup> Ideally, every individual in possession of a chose in action would have the ability to file a lawsuit if they wished. In the world as it is, however, that ability is limited indeed. The limitations are par-

120. See, e.g., Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59, 87–91 (2019); Sergio J. Campos, *The Class Action As Trust*, 91 WASH. L. REV. 1461, 1504–05 (2016); Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 611 (2011); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 232–33 (2003).

121. See, e.g., Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1575 (2007); Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 651–53 (2015). Others have expressed the view that *Dukes* “might augur the eventual invalidation of Rule 23(b)(2) on constitutional grounds.” John M. Husband & Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, COLO. LAW., Sept. 2011, at 53, 58; see also Sergio J. Campos, *The Uncertain Path of Class Action Law*, 40 CARDOZO L. REV. 2223, 2252 (2019) (reading *Dukes* as “send[ing] a signal that [the Court] is not completely convinced that mandatory class actions are justified in the context of claims for injunctive and declaratory relief under Rule 23(b)(2)”).

122. This analysis does not address Rule 23(b)(2) class actions that seek monetary relief, which present a more complicated question, not least because it is unclear whether any such classes can be certified. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (expressly declining to resolve that question).

123. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

124. *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), and citing *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)).

125. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 317 (1950).

126. Cf. Jack B. Weinstein, *Notes on Uniformity and Individuality in Mass Litigation*, 64 DEPAUL L. REV. 251, 265 (2015) (noting that “[t]he right of individuals to control the disposition of their legal disputes in court is often used to justify limits on class actions and claim aggregation” but in actuality, “individual litigants’ effective access to courts is restricted” by litigation deficiencies including “the unavailability of lawyers in civil cases for persons of limited means”).

ticularly severe for plaintiffs seeking the non-monetary relief that Rule 23(b)(2) embraces because the contingent percentage fee generally does not facilitate access to representation in such cases. As Stephen Yeazell put it, “The contingent fee market only functions if there are damages from which attorneys can collect fees. . . . The contingent fee market thus eliminates cases seeking an injunction or similar order.”<sup>127</sup> This market gap matters to the practical value of a right to sue, as multiple studies have found that “unrepresented claimants generally cannot sue successfully.”<sup>128</sup>

When it comes to injunctive and declaratory relief, class treatment does not fill the gaps in the contingent-fee market. In class actions for monetary relief, the common-fund doctrine allows courts to award class counsel a portion of the money that is recovered on behalf of the class. As with private-market contingency arrangements, however, the common-fund doctrine generally functions only if the litigation yields monetary relief (thus putting the “fund” in “common fund”).<sup>129</sup> Accordingly, although courts and commentators occasionally describe the class action as a device for creating economically viable litigation where it would not otherwise exist, that description does not generally apply to injunction-only cases.<sup>130</sup>

In theory, claimants seeking injunctive relief could pay for counsel out of pocket; but in practice, because of the implications of economic inequality for access to legal services, very few can afford to do so. As noted previously, four in ten American adults faced with an unexpected expense of \$400 would either not be able to cover it at all or would have to sell something or borrow money in order to cover it.<sup>131</sup> That amount represents only an hour or two of many attorneys’ time—enough to cover an intake and some brief counseling, perhaps, but not nearly enough to litigate a case to its conclusion. Presumably, a much greater proportion of adults would be unable to cover the out-of-pocket counsel fees required to file a lawsuit and see it through.

127. Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 709 (2006).

128. Charles Silver & David A. Hyman, *Access to Justice in a World Without Lawyers: Evidence from Texas Bodily Injury Claims*, 37 FORDHAM URB. L.J. 357, 376 (2010). As Deborah Rhode put it, “while law without lawyers is an increasing possibility for many Americans, it is frequently law without justice.” Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 404 (2004).

129. See William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:56 (5th ed. 2018) (“For a court to award a fee from a common fund, a common fund must exist.”).

130. See Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 870 (2016).

131. See *supra* note 43 and accompanying text.

In an effort to address the foregoing market gaps with respect to certain socially beneficial litigation, Congress has enacted a number of fee-shifting statutes. Section 1988, for example, allows a plaintiff who is a “prevailing party” in a constitutional tort case to recover a “reasonable” attorney’s fee from the defendant.<sup>132</sup> The efficacy of federal fee-shifting statutes, however, has been severely undermined by decades of restrictive judicial interpretations. To provide just a partial list of obstacles to obtaining representation based on the prospect of a fee-shifting award: A plaintiff who obtains her desired relief without a court order is not a “prevailing party” entitled to a fee shift; a plaintiff’s attorney can be obligated to accept a settlement offer that includes a complete waiver of attorney’s fees; expert witness fees must be excluded from some types of fee-shifting awards; and compensation for risk is prohibited, meaning that fee-shifting awards cannot exceed the amount that the plaintiff’s counsel would have received if payment were guaranteed from the start.<sup>133</sup> At most, such statutes currently enable litigation only for those claimants who are in a position to pay out of pocket (or obtain a loan) for the full cost of the litigation, knowing that the money they advance might never be repaid. Moreover, even if courts were to interpret fee-shifting statutes less restrictively, a claimant could use the potential fee entitlement to obtain representation only if a law firm deemed the claim sufficiently likely to prevail as to warrant its investment in the case. That level of access falls far short of enabling an individual in possession of a chose in action to file suit if she so chooses.

In light of the foregoing barriers to suit, I admit to having no small amount of impatience with those who would emphasize protecting a “right to sue” for people who cannot afford to sue to begin with.<sup>134</sup> Class certification has benefits for absent class members;<sup>135</sup> among other things, the absence of class certification can mean the absence of enforceable class-wide relief.<sup>136</sup> It is reasonable to think that most claimants would prefer such relief to the preservation of their “pristine due process rights,”<sup>137</sup> at least under an impractical and idealized

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132. 42 U.S.C. § 1988 (2012).

133. See generally Maureen Carroll, *supra* note 82.

134. *E.g.* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011).

135. See, e.g., William B. Rubenstein, 2 NEWBERG ON CLASS ACTIONS § 4:34 (5th ed. 2018) (“Class certification helps the absent parties—it guarantees that their interests will be adequately represented, and it provides them notice and an opportunity to be heard about any settlement and/or attorney’s fees request.”).

136. See *supra* note 119 and accompanying text.

137. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) (discussing the rejection of proposed class settlements in *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)).

view of those rights. Some types of protection can look an awful lot like harm.<sup>138</sup>

### C. *Taking Actualities Seriously*<sup>139</sup>

Any due-process analysis of the lack of opt-out rights under Rule 23(b)(2) should look to what absent class members actually stand to gain, in terms of mandatory class treatment, as well as what they actually stand to lose. With regard to the latter, what matters is the actual value of an absent class member's chose in action, not the value it would have in some hypothetical or idealized world. In actuality, as discussed above,<sup>140</sup> terminating an individual's right to sue for injunctive or declaratory relief may have little practical effect.

In addition to the general barriers to suit discussed above, particular barriers arise in the institutional reform cases that fall within the scope of Rule 23(b)(2).<sup>141</sup> Successfully litigating such a case can require a tremendous investment of attorney labor and direct costs; indeed, a court cannot appoint class counsel without taking into account "the resources that counsel will commit to representing the class."<sup>142</sup> Moreover, some types of institutional reform cases involve class members—for example, incarcerated persons or children in foster care—who face particular economic disadvantages. Those rights-holders are unlikely to be able to pay an attorney out of pocket at all, let alone at the level of investment such cases tend to require.

In some contexts, the Supreme Court has taken a formalist rather than a functionalist view of the right to sue. For example, the Court held in 2013 that the Federal Arbitration Act (FAA) required en-

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138. *Accord* J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221, 300–01 (2017) ("[Class action] jurisprudence rooted in individual autonomy has eliminated settlement deals and left plaintiffs without compensation; it has also provided defendants with a great deal of ammunition for preventing the certification of classes—and thereby preventing the economies of scale for claiming achievable under the class mechanism—under the auspices of 'protecting' the various class members' autonomy."); Campos, *supra* note 120, at 1505 ("[D]ue process does not require the protection of procedural rights like litigant autonomy when those procedural rights would actually harm the plaintiffs' entitlements rather than protect them.").

139. "Law addresses itself to actualities." Griffin v. Illinois, 351 U.S. 12, 23 (1956).

140. *See supra* Part III.B.

141. I do not mean to suggest that Rule 23(b)(2) applies *only* to institutional reform cases of the type that no individual outside of the one percent could afford to pursue. To the contrary, certification under the provision "also can enable the efficient, class-wide resolution of a purely legal question, involving no discovery at all." Maureen Carroll, *supra* note 130, at 872 (discussing *Doe v. Marion Cty.*, 705 F.3d 694 (7th Cir. 2013), in which the Seventh Circuit resolved the "single legal question" presented by the case only nineteen months after the complaint was filed).

142. FED. R. CIV. P. 23(g)(1)(A)(iv). This requirement applies to all class actions, not just those certified under Rule 23(b)(2). *See id.*

forcement of an arbitration agreement that contained a class waiver.<sup>143</sup> The Court rejected the argument that the “effective vindication” exception to the FAA required a contrary result,<sup>144</sup> reasoning that “the fact that it is not worth the expense involved in *proving* a statutory remedy [specifically, the high cost of an expert witness report] does not constitute the elimination of the *right to pursue* that remedy.”<sup>145</sup> At the same time, the Court allowed for the possibility of a more functionalist orientation, positing that the effective vindication doctrine “would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”<sup>146</sup> Moreover, procedural due process is far more contextual and pragmatic than the Court’s FAA doctrine—which, among other things, requires enforcement of arbitration agreements even at the expense of suppressing valid claims.<sup>147</sup> Admittedly, the Supreme Court’s arbitration cases do not inspire confidence that the Court would take a more functionalist view of the right to sue in the context of Rule 23(b)(2); but neither do those cases rule out the possibility that it would do so.

Perhaps the Court did not intend to invite litigation about the constitutionality of Rule 23(b)(2). And perhaps it will not push further in the direction of its ominous hint that Rule 23(b)(2) is “rightly or wrongly” thought to be constitutional.<sup>148</sup> So much hangs in the balance, however, that I am unwilling to be sanguine. In any event, if the question does become a live one in another case before the Court, economic inequality has a role to play in the analysis.

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143. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

144. This exception refers to the Court’s “willingness to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party’s right to pursue statutory remedies.” *Id.* at 235 (citation and alterations omitted).

145. *Id.* The Court also objected that a different view of effective vindication would require courts to evaluate “the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success” in order to identify negative-value claims. *Id.* at 238–39. This concern does not generally apply to claims for non-monetary relief; when money is not an available remedy, the costs of litigation necessarily exceed the monetary relief available.

146. *Id.* at 236.

147. *See id.* at 233–34; *see also* *AT&T Mobility LLC v. Concepción*, 563 U.S. 333, 351 (2011) (“States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”).

148. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011).

## CONCLUSION

This Essay has examined three procedural doctrines in which economic inequality can play an underappreciated role. These examples are meant to be illustrative rather than exhaustive; a similar analysis could be undertaken with respect to questions about whether Rule 23(b)(3) violates the Rules Enabling Act,<sup>149</sup> the costs and benefits of “percolation” in debates about the national injunction,<sup>150</sup> or the difficulty of satisfying the *Iqbal* “plausibility” standard.<sup>151</sup> I do not doubt that other areas could be readily identified.

Every federal judge, when being sworn in, takes an oath to “do equal right to the poor and to the rich.”<sup>152</sup> Judges cannot achieve that aspiration unless the judicial system employs procedures that treat richer and poorer litigants with some degree of equity.<sup>153</sup> At a minimum, courts should be clear-eyed about the possibility that economic inequality could have an impact on the quality of justice they provide to non-wealthy litigants. Those of us who teach and write about civil procedure should be clear-eyed about that possibility as well.

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149. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

150. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

151. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); see also Rory K. Schneider, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585 (2011) (discussing the effects of *Iqbal* on the Supreme Court’s admonition that documents filed pro se should be “liberally construed”).

152. See 28 U.S.C. § 453 (2012) (setting forth the language of this oath and requiring that every federal judge must take it before assuming office).

153. See Richard M. Re, “*Equal Right to the Poor*”, 84 U. CHI. L. REV. 1149, 1153 (2017) (“While barring group favoritism, the federal judicial oath may demand consideration of economic disparities that threaten justice or ‘equal right.’”). Richard Re refers to this component of the judicial oath as “the equal right principle,” pursuant to which “federal courts might interpret nonconstitutional procedural rules with an eye toward mitigating economic inequality’s effects on the adjudicative process,” among other implications. *Id.* at 1192.