# THEORIZING PROCEDURAL SUBORDINATION

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ABSTRACT

*This article conceptualizes a critical race theoretical framework for civil procedural subordination. Procedural subordination is the ways in which civil procedure facilitates white supremacy, misogyny, heteronormativity, transphobia, xenophobia, ableism, and the subordination of other marginalized groups. By drawing from social theory and caselaw examples to conduct a structural analysis of civil procedure, I conceptually map out: (1) the mechanisms through which modern day civil procedure furthers the subjugation of people of color and other marginalized groups and (2) what is obscuring this procedural subordination.*

*This development of a critical race theoretical framework for civil procedure follows from a decades-long history of explicit attempts to dismiss categorically or obstruct litigation that serves the interests of people of color and other marginalized groups—especially civil rights litigation. In a general sense, these obstruction attempts failed. Nonetheless, through mechanisms unique to procedure that I describe as "transsubstantive bind" and "procedural identity," these failed obstruction attempts have returned to entrench subordination within procedure, which purports to be evenhanded and justice-promoting. But the imposition—through transsubstantive bind and procedural identity—of more difficult procedural baselines for litigation brought to benefit members of marginalized groups is obscured due to the "order of retrenchment" and "judicial innocence." This nascent framework identifies structural impediments to equal justice under the law and attempts to reimagine civil procedure reform efforts to prevent further damage to marginalized groups.*

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*[A] court . . . will make every presumption in favor of human freedom, and look at the real substance of things . . . and will not suffer mere legal forms and technicalities, or the dress and drapery of transactions, to baffle the ends aimed at.*

– Porter v. Blakemore, 42 Tenn. 556, 564–65 (1865)[1]

*Rules are empty in themselves, violent and unfinalized; they are impersonal and can be bent to any purpose.*

– Michel Foucault[2]

## INTRODUCTION

In some ways, Critical Race Theory (CRT) is a set of tools to expose, understand, and work against structural racial subordination.[3] But at a conceptual level, scholars have yet to fully interrogate the racially subordinative aspects of civil procedure, the backbone of civil litigation.[4] Legal scholars have developed CRT

1. In this opinion, the Tennessee Supreme Court declared that several of my relatives were free and no longer enslaved. *Porter*, 42 Tenn. at 561. For further discussion of this case, another freedom suit brought by my ancestors, and more recent narratives of lived experiences with procedure that inspired this project, see *A Prologue to Theorizing Procedural Subordination*, which I began writing as a prologue to this article, but separated out as a companion piece. Portia Pedro, *Resistance Proceduralism: A Prologue to Theorizing Procedural Subordination*, 80 WASH. & LEE L. REV. 2039 (2024).

2. Michel Foucault, *Nietzsche, Genealogy, History*, *in* THE FOUCAULT READER 85–86 (Paul Rabinow ed., 1st ed. 1984).

3. *See* Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. 143, 153–54 (2021). For primers on CRT, see LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L. J. 2139, 2149–59 (2023); KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019); VICTOR RAY, ON CRITICAL RACE THEORY: WHY IT MATTERS & WHY YOU SHOULD CARE (2022).

For a rich description of antisubordination theory and its role in both progressivism and modern legal liberalism, see Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 654–61 (2024) (providing contextual and theoretical history); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 157 (1976) (a foundational article on antisubordination theory); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1398 (1991); *see also* Clark, *supra* note 3, at 2150–54; Llezlie Green Coleman, *Disrupting the Discrimination Narrative: An Argument for Wage and Hour Laws' Inclusion in Antisubordination Advocacy*, 14 STAN. J. C.R. & C.L. 49, 84–85 (2018); Sergio J. Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 588 n.11 (2008); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 336 n.37, 354–55, 374–77 (2006).

4. *See* Portia Pedro, *Forging Fortuity against Procedural Retrenchment: Developing a Critical Race Theoretical Account of Civil Procedure*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 23 (Brooke D. Coleman, Suzette M. Malveaux, Portia Pedro, & Elizabeth G. Porter eds., 2022). Many impressive scholarly works have examined the disproportionate effects of seemingly neutral procedural rules on cases brought to benefit members of certain marginalized groups. *See, e.g.*, Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) [hereinafter Schneider, *Changing Shape*]; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007) [hereinafter Schneider, *Dangers*].

in areas such as constitutional law, criminal law, family law, and education law.[5] And scholars have described the ways in which racism, or slavery, has distorted other areas of law or even other types of procedure.[6] Some procedural scholars have applied CRT insights to specific sub-areas of civil procedure.[7] And legal scholars and proceduralists have developed insightful theories about, or relevant to, civil procedure that are not specific to race, sex, or other similar aspects of identity.[8]

In this project, I conceptualize procedural subordination. Procedural subordination occurs when seemingly neutral and technocratic changes to the landscape of civil procedure effectively roll back constitutional and statutory civil rights in a way that cuts marginalized groups off from access to courts and the remedies needed to redress the wrongs that we suffer. Structural marginalization of people of color and other subjugated groups is one of the primary results of procedural subordination. My goal is to develop a theoretical framework for understanding

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5. *See* Pedro, *supra* note 3, at 153 nn.34–36 (citing Devon W. Carbado, *[E]racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (constitutional criminal procedure); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (property); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (antidiscrimination law); Clark, *supra* note 3 (education law)).

6. *See, e.g.*, Russell M. Gold, *Power Over Procedure*, 57 WAKE FOREST L. REV. 51, 64–65 (2022) (describing negative effects of race and class on procedure for criminal defendants); Harris, *supra* note 5 (examining how privilege associated with whiteness became a type of property that continues to distort legal doctrine); Anthony Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1 (1995) (describing the influence of race on understandings of contract law); James W. Fox Jr., *The Law of Many Faces: Antebellum Contract Law Background of Reconstruction-Era Freedom of Contract*, 49 AM. J. LEGAL HIST. 61 (2007) (exploring how contract law developed in the antebellum period); K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008) (examining copyright law as a tool for mass appropriation of Black artists' intellectual property rights); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022) (illuminating the central role of racial hierarchy and violence in the creation of the U.S. property law system and the erasure of that history from the recognized canon of property law).

7. *See* Pedro, *supra* note 4, at 23 nn.1–3.

8. Some of the theories and concepts that can, or do, explain some of the disparities in how different types of claims or plaintiffs may fare in civil litigation include managerial judging; the "haves" and "have-nots" or "repeat players" and "one-shotters"; restrictive ethos; procedural retrenchment; and access to courts literatures. *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (proposing a "managerial" judge as a more active type of judicial role and the effects of managerial judging on adjudication and procedure); Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (discussing advantages and disadvantages of procedural rules based on litigants belonging to differentially privileged groups, the "haves" or the "have-nots," and based on whether the parties are regularly in court or not, repeat players or one-shotters); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017) (discussing procedural retrenchment, restricting private enforcement of federal rights through procedural changes); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 101 (2018) (discussing access to justice); Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537 (2003) (discussing access to courts); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 21 (2010) (describing how a restrictive ethos in civil procedure disfavors claims brought by social outgroups that would undermine dominant interests).

how racial subordination, and the subordination of other marginalized groups, including Indigenous peoples, women, those who are LGBTQIA+,[9] people with

9. In this Article, this acronym refers to members of the lesbian, gay, bisexual, transgender, queer, intersex, and asexual community, and the "+" refers to people with sexual orientations or gender identities beyond those included in the other terms, such as people who are gender nonbinary. I use LGBTQIA+ or LGBTQ+ interchangeably to be inclusive and avoid erasure, acknowledging that identities and understandings may change over time, and to use terminology employed by self-advocates within the community. *See* Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243, 245 nn.5–7, 246 n.10 (2021); Kelsey Scarlett & Lexi Weyrick, *Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination*, 57 CAL. W. L. REV. 391, 421 n.173 (2021); Judith Butler, *Critically Queer*, 1 GLQ: J. LESBIAN & GAY STUD. 17, 21 (1993); Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (Jun. 21, 2018), https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html [https://perma.cc/C3QH-2LE7] (noting that "+" is "a denotation of everything on the gender and sexuality spectrum that letters and words can't yet describe"); OXFAM INT'L, INCLUSIVE LANGUAGE GUIDE 38 (Mar. 2023), https://policy-practice.oxfam.org/resources/inclusive-language-guide-621487/ [https://perma.cc/J88F-HG6T] (giving reasons for using "LGBTQIA+" and avoiding "LGBT" and "LGBTQIX"); *LGBTQIA Resource Center Glossary*, LGBTQIA RESOURCE CENTER, U.C. DAVIS, https://lgbtqia.ucdavis.edu/educated/glossary [https://perma.cc/6CMK-4GBH] (last visited Apr. 3, 2025) (defining and giving reasons for using "LGBTQIA+"); *GLAAD Media Reference Guide: Glossary of Terms: LGBTQ*, https://glaad.org/reference/terms/ [https://perma.cc/Z7PR-C8ZQ] (last visited Apr. 3, 2025) (defining and giving reasons for using "LGBTQ" or "LGBTQ+"); *Glossary of Terms*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/glossary-of-terms [https://perma.cc/4AA3-YM9T] (last visited Apr. 26, 2026) (defining and giving reasons for using "LGBTQ+"); OUTRIGHT INT'L, GUIDE TO INCLUSION OF LGBTI PEOPLE IN DEVELOPMENT AND FOREIGN POLICY 4 n.1 (2021) https://outrightinternational.org/our-work/human-rights-research/guide-inclusion-lgbti-people-development-and-foreign-policy [https://perma.cc/P62F-D2ZE] (defining and giving reasons for using "LGBTI" and sometimes "LGBTIQ"); *Glossary*, IT GETS BETTER, https://itgetsbetter.org/glossary/ [https://perma.cc/SF25-ZF6F] (last visited Apr. 26, 2026) (defining and referring to "LGBTQ+"). *But see* George, *supra*, at 246–47 (exploring the ways in which the LGBT and QIA social identities, movements, and legal strategies are not part of a cohesive whole).

Although Latinx has, at some points, been a self-identification, referring to the LGBTQ+ community as "LGBTQIX," "LGBTQXYZ," or "alphabet mafia" has largely been mocking or derogatory. *See* Richard Delgado & Jean Stefancic, *What's Your Name? I Don't like It, Please Change*, 15 ALA. C.R. & C.L. L. REV. 131 (2024); Helen Seitzer, *The Diffusion of Workplace Antidiscrimination Regulations for the LGBTQ+ Community*, *in* NETWORKS AND GEOGRAPHIES OF GLOBAL SOCIAL POLICY DIFFUSION: CULTURE, ECONOMY, AND COLONIAL LEGACIES 227 (Michael Windzio, Ivo Mossig, Fabian Besche-Truthe, & Helen Seitzer eds., 2022).

disabilities,[10] immigrants, and those from non-majority religions,[11] may be facilitated by civil procedure.[12] In this Article, I identify and describe potential patterns and the significance that those patterns may hold.

As I discuss below, I separate my analysis of procedural subordination into two categories: (1) mechanisms of subordination that are specific to civil

10. For reasons given by Professor Jasmine Harris, I use the terms, "'people with disabilities' or 'disabled people' interchangeably." Jasmine Harris, *Disability Employment Class Actions*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 75, 82 n.4 (Brooke D. Coleman, Suzette M. Malveaux, Portia Pedro, & Elizabeth G. Porter eds., 2022); Kristen L. Popham, Elizabeth F. Emens, & Jasmine E. Harris, *Disabling Travel: Quantifying the Harm of Inaccessible Hotels to Disabled People*, 55 COLUM. HUM. RTS. L. REV. F. 1, 4 n.4 (2023); *see also* Karen M. Tani, *The* Pennhurst *Doctrines and the Lost Disability History of the "New Federalism,"* 110 CAL. L. REV. 1157, 1159 n.5 (2022) (stating that the author uses identity-first language when referring to a broad category of people who live with some kind of mental or physical impairment "as is currently common among scholars, writers, and advocates who identify as disabled" and person-first language when referring to a sub-category of that group because the norm is less clear); Ella Maiden, *Centering Disability in the Law School Pedagogy: A Way to Include Disabled Law Students*, 52 J.L. & EDUC. 175, 177 n.1 (2023); Jennifer Safstrom & Joseph Mead, *Developing Inclusive Language Competency in Clinical Teaching*, 29 CLINICAL L. REV. 349, 388–89 (2023) (describing the opposite, and noting how there is often no clear consensus on the correct language to use *among* people with certain collective identities, and the continuous evolution of inclusive language requires individuals to constantly interrogate and adapt the language they use in response to debates within a certain community); Lydia X.Z. Brown, *The Significance of Semantics: Person-First Language: Why It Matters*, AUTISTIC HOYA (Aug. 4, 2011), https://www.autistichoya.com/2011/08/significance-of-semantics-person-first.html [https://perma.cc/PZY7-EV3C].

11. While this list is non-exhaustive and imperfect, I mention these groups for a number of reasons. Discrimination against many of these groups, or on these bases, can constitute a cause of action for lawsuits. People also have imposed systems of domination in the U.S. on these groups and other similar groups, and this subordination has resulted in inequalities between these marginalized groups and dominant groups. *See, e.g.*, Judith Resnik & David Marcus, *Inability to Pay: Court Debt circa 2020*, 98 N.C. L. REV. 361, 362 (2020); Darren Lenard Hutchinson, *New Complexity Theories: From Theoretical Innovation to Doctrinal Reform Symposium: Theorizing the Connections among Systems of Subordination: Responses & Commentary*, 71 UMKC L. REV. 431, 431 n.1 (2002–2003); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1288–89 (2011); Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 135–37 (2021).

12. In earlier discussions of these ideas, I used the term "procedural retrenchment" when I suggested that "we should expect attempts to retrench civil rights and the rights of marginalized groups to have a procedural focus." *See* Pedro, *supra* note 4, at 24. Of course, there is already a burgeoning literature that defines procedural retrenchment as restrictions on private enforcement of federal rights. *See, e.g.*, BURBANK & FARHANG, *supra* note 8, at 130, 146-47; SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006); Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537 (2003); Pamela S. Karlan, *Disarming the Private Attorney General*, U. ILL. L. REV. 83 (2003); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411 (2018); Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805 (2018).

I use the term procedural subordination in this article for several reasons. One understanding of my project could be to theorize how civil rights litigation (and other litigation brought to benefit members of marginalized groups) has come to represent a disproportionate amount of instances of procedural retrenchment, but my inquiry is broader than how others define procedural retrenchment. Although most examples in this article involve federal courts and rights, my interest in theorizing procedural subordination is not limited to the enforcement of federal rights and is similarly not limited to private enforcement of those rights.

procedure and (2) characteristics of subordination that mask its occurrence.[13] Regarding one of the methods of subordination, because civil procedure generally applies to all civil litigation,[14] attempts to impose obstacles for just one type of claim tend to only be implemented if changes are made such that the procedural obstacle is imposed on all types of civil claims and plaintiffs. I call this the "transsubstantive bind."[15] Efforts to procedurally disadvantage a disliked group or type of claim (for example, civil rights claims) will result in making it more difficult for all other types of marginalized groups to succeed on their claims as well. The other way that civil procedure contributes to the subordination of marginalized groups is through what I call "procedural identity."[16] Procedural identity is the manner in which procedural rules and doctrine skew to disfavor claims that tend to be brought to benefit marginalized groups.

But the existence and magnitude of procedural subordination is masked by what I call the "order of retrenchment"[17] and "judicial innocence."[18] I posit that procedural subordination tends to follow a particular order of retrenchment—the imposition of procedural hurdles (or removal of protections):

- Will, first, occur for certain types of plaintiffs, often seen as one-off unique circumstances or as business entities with no clear relation to marginalized social groups;
- Then, will be imposed on plaintiffs who are relatively more suspect, marginalized, smaller in number, or whose very existence might be in contest; and
- Only then, will the retrenchment be adopted for all other groups, including more widely recognized civil rights groups with decades if not centuries of social justice struggles and victories.[19]

Due to the order of retrenchment, it is not clear early on that any procedural subordination is happening. And, even when the subordination becomes clearer, the significance and import are likely to be underestimated because the subordination is imposed on a group with less political strength that is viewed with less compassion and empathy.

13. These latter characteristics likely exist in other areas of procedure (such as criminal), substantive law, and even outside of law and litigation. *See infra* Parts II, III.

It is not lost on me that the Supreme Court, in recent years, has been operating in what some might generously call an unconventional manner. When the Court is overturning long-standing, and even sometimes much more recent, substantive precedent without necessarily engaging in the previously typical reason-giving and respectful analysis of precedent, then, perhaps, neither the Supreme Court nor lower federal courts need to engage in some of the moves described in this article—if courts are turning substantive precedent on its head to reverse substantive law and results, then there may be much less need to engage in the theoretical concepts I describe here. When there is an active substantive counterrevolution, there may be less procedural subordination or the procedural subordination that does occur might not confine itself as much to the concepts I describe because there might be less respect for procedural precedent and rule of law as well.

14. *See infra* note 67 and accompanying text.
15. *See infra* Part II.0.
16. *See infra* Part II.0.
17. *See infra* Part III.0.
18. *See infra* Part III.0.
19. *See* Pedro, *supra* note 4, at 26–27.

The other mechanism that obscures the existence of procedural subordination is judicial innocence. Based on the CRT concept of white innocence,[20] judicial innocence is a compilation of rhetorical moves—or an ideology—that, together, mask these newly imposed procedural obstacles by forming an ignorance of the existence and breadth of the procedural change and its implications, especially for people of color[21] and other marginalized group members.

While understanding and recognizing how procedural subordination occurs will not right any societal wrongs or change sociopolitical structures, it is a necessary first step toward ending further marginalization through civil procedure. And because we also use process beyond the civil courtroom—from school disciplinary hearings to human resources reviews, prize or award selections, and boards and committees in our workplaces and communities—recognizing the theoretical underpinnings of procedural subordination can be a first, small step toward promoting equal justice in the various contexts where procedural injustices may currently occur.

In this Article, I explore and identify the mechanisms of *subordination* within procedure.[22] My project is to develop concepts to understand and indicate where and how white supremacy and other axes of subordination have done (or may do) the most harm in civil procedure in order to identify areas of civil procedure to reconfigure (or completely rethink anew) and to enable stronger defenses within areas susceptible to retrenchment of rights for people of color and other marginalized groups. I also identify some of the causes of the procedural changes that produce procedural subordination.

There are other well-established accounts of potential causes for some changes and shifts in civil procedure based on money and business interests, costs of litigation, the amount of litigation overwhelming judges, and structural elements that make similar changes less likely to occur politically, legislatively, or through rulemaking.[23] And other scholars have posited theories about why U.S. actors and institutions, at times, expand and at other times, restrict, rights for people of color and other marginalized groups and our ability to have courts enforce

20. In an overly concise summary, the CRT concept of white innocence is a, perhaps intentional and actively maintained, ignorance and disavowal of structural racism, its effects, and any responsibility for that structure. This false ideology (or rhetoric) posits various reasons that specific white people, or white people in general, do not have responsibility for white supremacy or its effects. Therefore, under white innocence, white people have neither an ability nor a responsibility to undo or prevent white supremacy or its effects. Accordingly, any steps to undo or prevent such effects purportedly unfairly, negatively affect innocent, uninvolved white people. For further discussion, *see infra* Part III.0.

21. I use the term "people of color" to refer to people who are Black, Latinx, Asian American, Arab American, Native American, other Indigenous peoples, and other racialized groups (people who are not white). Pedro, *supra* note 3, at 151 n.23 (giving reasons for use of the term despite shortcomings).

22. I leave to others, or set aside for future discussions, the task of hypothesizing the antisubordinative mechanisms of procedure. *See, e.g.*, Pedro, *supra* note 1, at 2047, 2069–75. By focusing on subordination, I do not imply that the civil procedural system only begets leveling down as some sort of inverse one-way ratchet. There could be ways of mitigating the damage that procedurally subordinative mechanisms inflict.

23. *See* sources cited *supra* note 8.

those rights.[24] Those other explanatory literatures are important parts of the account of procedural changes, access to courts, and the roles of social institutions in creating marginalization.

I am adding another layer of potential explanation and understanding to subordinative changes in civil procedure that are likely to be complex and to have more than one cause or causal story. This Article adds to those larger literatures by pushing forward our understanding of how social hierarchies based on race, sex, gender, gender identity, sexual orientation, disability, immigration status, national origin, and more are being developed and reproduced within civil procedure in order to build a more robust counter to those subjugating forces.[25]

By setting out a theoretical framework in this Article, I introduce several concepts that could explain many of the ways in which white supremacy and the subjugation of other groups along axes of identity and group membership are reinforced and produced within civil procedure.[26] I give labels or names to these concepts to build a theoretical framework that I hope others, and I, will test and

24. *See, e.g.*, Derrick Bell, *Brown v. Board of Education: Reliving and Learning from Our Racial History*, 65 U. PITT. L. REV. 21, 22, 26 (2004) [hereinafter Bell, *Brown v. Board*]; DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 40 (2004) [hereinafter BELL, AMERICAN LAW]; DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES OF RACIAL REFORM 51 (2005) [hereinafter BELL, SILENT COVENANTS]; Harris, *supra* note 5, at 1737–41; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

25. For the sake of marginalized populations, I hope that we do not wait to respond to procedural subordination until we are certain that we already have a complete and proven explanation and understanding of how all procedural subordination occurs and exists. Delaying the search for, and implementation of, a remedy until then would undoubtedly be too late. Not just for those who are irreparably affected in the meanwhile, but also because of G.W.F. Hegel's principle that tends to be translated similarly to "the owl of Minerva spreads its wings only at dusk." GEORG WILHELM FRIEDRICH HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 13 (Thomas Malcolm Knox trans., Oxford University Press 1942) (1820); *see also* Paul Gowder, *The Dangers to the American Rule of Law Will Outlast the Next Election*, 2020 CARDOZO L. REV. DE NOVO 126, 159–60 (2020). By the time there is consensus regarding a comprehensive understanding of how procedural subordination occurs and is masked, such a task would be one solely of historical purpose. The damage would already have been done and that structure will have already transformed into something else. *See* Robert P. Burns, *Is Our Legal Order Just Another Bureaucracy?*, 48 LOY. U. CHI. L.J. 413, 415 (2016) (declining to propose delaying action until provision of a complete theoretical account because "I recall Hegel's warning that a full theoretical elaboration of a form of life occurs only when the latter is at an end"); George A. Martinez, *Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities from the Class Action Device*, 33 J. LEGIS. 181, 196–97 (2007) ("The philosophy of Hegel provides support and an explanation for the critical insight that we cannot see the racism of our time. . . . 'Only when we have played it out do we understand what has been afoot all the time.' . . . The owl of Minerva represents the notion that we can understand what has happened in history only when a historical stage is played out." (quoting CHARLES TAYLOR, HEGEL AND MODERN SOCIETY 122 (1979))); Richard Delgado, *Rodrigo's Fifth Chronicle:* Civitas*, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581, 1585 (1993).

26. Each separate concept or theory could have—and probably deserves—its own article. I introduce these theoretical concepts together here, first, as a theoretical framework because there is something that strikes me as particularly important in the relationships between these concepts. Initiating this discussion with an article on only one of these concepts alone does not seem as effective for identifying the web of white supremacy and structural subordination.

apply, not only in civil procedure, but also in other areas of litigation procedure and in processes and areas of life outside of law and litigation.

The idea that white supremacy and other axes of subordination could be embedded within, and perpetuated by, civil procedure may seem counterintuitive.[27] Why would a set of neutral rules for civil litigation disadvantage certain groups or the types of claims they may bring? But structural racism and subordination along other axes of identity in procedure do not require bad actors or even rules that are explicitly subordinative.[28] We know from substantive racial discrimination's transformation from overt categorical prohibitions into more nuanced implicit discrimination through proxies that civil procedural rules can also range between overt and covert differential treatment. And even though civil procedure has enabled countless civil rights victories, especially for members of marginalized communities, whether, when, and how civil procedure subordinates or empowers members of marginalized communities is complex and remains understudied. Civil procedure may not be the primary cause or explanation of subordination, but procedure is not free from having some subordinative effects. Even though foundational principles of federal civil procedure can promote fairness, access, and equality,[29] the reality is that procedure reinforces existing social hierarchies because civil procedure is a key part of the U.S. sociolegal system.[30]

I draw from social theory, especially from CRT and queer theory, and caselaw that has produced the most significant recent detrimental changes in civil procedure for marginalized groups. While the marginalized status, or lack thereof, of any particular plaintiff in each of the specific cases is not wholly dispositive, I argue that, with this framing, we can begin to understand how procedural subordination occurs and why disagreement exists over its extent and effects.

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27. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 141 n.41 (1982) ("It is difficult for the majority culture to accept responsibility for the submergence of the minority culture, in part because the existence of a minority culture contradicts the larger society's formal values.").

28. *See, e.g.*, DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 9 (Duke Univ. Press rev. ed. 2015) (2009) ("Legal systems that have official rules of nondiscrimination still operate in ways that disadvantage whole populations—and this is not due solely, or even primarily, to individual bias."). Individualizing subordination to be "about bad individuals who intentionally make discriminatory choices" is a "(mis)understanding" that renders structural and systemic subordination invisible. *Id.* at 42.

29. Rule 1 of the Federal Rules of Civil Procedure calls for "the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. Some are of the opinion that a procedural system that is "just" would necessarily promote fairness, access, and equality. Professor Robert Bone proposes that procedure is supposed to fulfill "civil adjudication's core purpose [which] 'is to resolve cases according to the substantive law.'" David Marcus, *Substance In and Out of Procedure*, 102 TEX. L. REV. ONLINE 78, 80, 94–95 (2023) (quoting Robert G. Bone, Justifying Litigation Reform 70 (2023) (unpublished manuscript) (on file with Marcus)).

30. *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 71–72 (2010) ("the modes of civil procedure are the mechanisms for operating an important societal regulatory system"); *cf.* GUNNAR MYRDAL, AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY xliii, 11, 430, 444, 598 (1944) (describing the "American dilemma" as the conflict between racism or white supremacy and the "American Creed" norms of equality and liberty).

This Article proceeds as follows. In Part I, I describe the procedural and theoretical underpinnings of my project. I also propose a theoretical framework for a structural analysis of the axes of subordination within civil procedure and describe the critical theory concepts that I draw from to build that framework. In Part II, I move directly to my argument and I explain how procedural subordination is operationalized through the two mechanisms of subordination that are specific to civil procedure: transsubstantivity bind and procedural identity. In Part III, I describe how—through the order of retrenchment and judicial innocence—procedural subordination is masked. Principles at the core of procedure obscure the use of process to disadvantage civil litigation that would otherwise benefit marginalized group members. Throughout Parts II and III, I draw from cases as illustrations of mechanisms through which civil procedure facilitates the structural subordination of people of color and other marginalized groups and as examples of how procedural subordination is minimized and disguised by the order of retrenchment and judicial innocence.

## I.
## CONCEPTUAL VIEW OF MY THEORETICAL FRAMEWORK AND ITS UNDERPINNINGS

To theorize both how civil procedure, at times, further marginalizes subjugated people and how it is that such procedural subordination is, at best, not yet described or, perhaps worst, denied or disputed, I draw from concepts across a variety of social theories, particularly critical theories, including CRT, critical queer theory, and political theory. Before describing the details of my procedural subordination argument in Part II, in this Part, I present an intellectual genealogy of those practices and ideas to situate my analysis in its historic context. Given some unique attributes that allow civil procedure to serve as a gatekeeper for civil litigation success, some social, political, and critical theory concepts help to explain why, how, and when civil procedure can be a politically conservative force against litigation brought to benefit marginalized groups. After establishing civil procedure as a potentially subjugating mechanism, I provide a conceptual overview of my proposed subordinating mechanisms (transsubstantive bind and procedural identity) and concealing characteristics (order of retrenchment and judicial innocence) in the context of the social theory I draw from as their foundations.

### *A. Procedure as a Subordinating Mechanism*

In this section, I describe how civil procedure can be used as a way to constrain rights of subjugated groups. Then, I note a CRT concept that provides an explanation of when we should expect politically conservative efforts to constrict rights of subjugated peoples, some of which could be accomplished through procedural subordination. And, finally, I present a background of the neoliberal hegemonic forces at work within civil procedure before explaining my approach in the next section.

There are two types of forces at play behind procedural subordination. One is politically conservative in nature, including in a prudential or jurisprudential way, and the other is the neoliberal hegemony.[31] Understanding the ways in which civil procedure subordinates marginalized groups, and how that subordination is obscured, entails understanding both sets of forces and their effects. Regarding the force of sociopolitical conservativism, there is a history of efforts to have civil rights plaintiffs, especially those from marginalized communities, lose in court, at times, by imposing tougher procedural requirements on those cases.[32] Regarding the hegemonic force, neoliberalism or racial capitalism[33] infuse civil procedure just as they permeate every other social structure and institution.

Starting at least as far back as 1938, U.S. federal courts were described as having liberal pleading standards to promote access to courts.[34] But developments

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31. WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 17, 21, 28–30 (2015) (describing neoliberalism, which is ubiquitous in the U.S., as "a distinctive mode of reason" "that configures all aspects of existence in economic terms" despite potential consequences including "intensified inequality," "unethical commercialization of things and activities considered inappropriate for marketization," "ever-growing intimacy of corporate finance capital with the state," and "economic havoc").

> [N]eoliberal rationality disseminates the model of the market to all domains and activities—even where money is not at issue—and configures human beings exhaustively as market actors, always, only, and everywhere as homo oeconomicus. . . . When the construction of human beings and human conduct as homo oeconomicus spreads to every sphere, including that of political life itself, it radically transforms not merely the organization, but the purpose and character of each sphere, as well as relations among them.

*Id.* at 31, 34–35.

*See also* Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471, 472–76 (2021); Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1, 5–10 (2023); David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2511–13 (2021).

32. *See infra* Part I.**Error! Reference source not found.**; *infra* notes 99–121, 149–160 and accompanying text.

33. Racial capitalism is "a system of racialized 'dispossession, extraction, accumulation, and exploitation' for power and profit in which human elements are both commodified and devalued." Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg, & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1246 (2022) (quoting Angela P. Harris, *Foreword: Racial Capitalism and Law*, *in* HISTORIES OF RACIAL CAPITALISM, at vii (Destin Jenkins & Justin Leroy eds., 2021)); *see also* E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 U.C.L.A. L. REV. 1462, 1466 (2021) (defining racial capitalism as "regimes of power and violence that implicate racism, capitalism, and colonialism.").

Political theorist Cedric Robinson first introduced the concept of racial capitalism in his 1983 book, *Black Marxism: The Making of the Black Radical Tradition*. CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (Revised and updated third ed. 2020); *see* Brito, Sabbeth, Steinberg, & Sudeall, *supra*, at 1259–62. At the core of racial capitalism is the understanding "that there are deep connections between racism or racial inequality and capitalism" because they are fundamentally or inextricably intertwined and, perhaps, mutually constitutive. *Id.* at 1260–62, 1264–68 (quoting Julian Go, *Three Tensions in the Theory of Racial Capitalism*, 39 SOCIO. THEORY 38, 39 (2020)).

34. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1202, at 59 (1969); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990–97 (2003) ("Adopted in 1938, the Federal Rules are essentially a reform effort designed to ensure litigants have their day in court."); *see, e.g.* FED. R. CIV. P. 8(a)(2).

such as *Brown v. Board of Education*[35] and the Civil Rights Act might have changed the typical or perceived federal civil litigant and claim so much that detractors began to chip away at some implicit underpinnings of the foundation of the stated goals of the federal procedural system.[36]

Historically, both jurists and litigants have struggled over what types of cases, claims, and litigants should be in federal courts. In the past, many of these debates have explicitly centered on the propriety of litigation that would benefit marginalized groups.[37] Litigants, scholars, and jurists tend to focus on whether a plaintiff wins on the merits, but, in order to win on the merits, the plaintiff must be able to keep their claim in court. A plaintiff does not have a chance at winning on the substantive issues, however, if they cannot even overcome the structural and procedural obstacles that they must surpass to reach trial.

### *1. Procedural Equilibration*

Professor Daryl Levinson has explained the idea of remedial equilibration—constitutional rights are inevitably shaped by, and incorporate, remedial concerns.[38] A concept that I call procedural equilibration builds on this idea.[39] While it is true that there is only a right to the extent that there is a remedy for the injury to the right, it is similarly true that a right does not actually exist in any meaningful way except to the extent that the structure and procedure of federal courts allow a claim to redress that right to reach trial and a decision on the merits. Thus, the area of remedies is not the only locus of potential rights essentialism, but there is also rights essentialism in contexts where there are structural and procedural hurdles that prevent litigation of rights. Procedural equilibration renders civil procedure a site of potential rights restriction and allows process to subordinate marginalized groups by foreclosing the possibility to rectify violated rights through litigation.

### *2. Involuntary Sacrifice*

Professor Derrick Bell's theory of interest convergence—that the interests of Black people, or a subjugated group, tend to only be promoted in U.S. social structures and institutions when expanding the rights of the marginalized group coalesces with the interests of white people—likely explains expansions of procedural

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35. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

36. *See infra* Parts II.A.1, II.A.2.

37. *See Pedro, supra* note 4; *see also* Portia Pedro, The Death of Impact Injunctions?: Protecting Civil Rights against the Chancellor's New Clothes & the Government's Coronation (2026) (unpublished manuscript) (on file with author).

38. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999).

39. Pedro, *supra* note 4, at 25 ("If we bring a critical racial theoretical focus to areas such as pleading, discovery, and class actions, we may see a sort of procedural equilibration — courts and defendants chipping away at substantive rights of communities of color and other marginalized groups through imposing procedural hurdles either instead of or in addition to primarily substantive attacks. This supposed objective framing leaves civil rights, constitutional rights, and impact litigation vulnerable to retrenchment and may gain more traction than attempts to cut back the underlying substantive rights directly.").

protections and reductions in procedural hurdles. But, to illuminate the ways in which civil procedure may subordinate marginalized groups, Bell's complementary concept of involuntary sacrifice—that Black people, or subjugated groups, will tend to be further marginalized, or discriminated against, in U.S. institutions and structures when doing so would unify white, or other dominant interests, that have become polarized or fractured—can explain the specific timing of when and why there is likely to be more reductions in procedural protections and expansions of procedural hurdles.[40] One aspect of theorizing procedural subordination is that we can look to see where involuntary sacrifice has already occurred, and attempt to reverse it.[41] Perhaps a more important use of Bell's concept in civil procedure is to understand where and when involuntary sacrifice is most likely and take actions to prevent it, or stop it from affecting all of civil procedure and, thus, litigation affecting all marginalized groups. Due to variations in context and power dynamics, there may be circumstances where there is interest convergence between a dominant group and some marginalized groups (for instance, between U.S. white people, wealthy elites, and U.S. Black voters), but also a concurrent push for involuntary sacrifice of another group (perhaps transgender children or more recent immigrants to the U.S. from Central or South American countries). Theorizing the ways in which a change in civil procedure might, first, affect a corporate interest or subordinate a marginalized group with less interest convergence can help to forge our own fortuity by prompting more marginalized groups whose interests converge more with dominant groups to mobilize, take action, and even participate in that earlier litigation that will affect corporate interests or a different marginalized group.

### *3. Hegemonic Theoretical Underpinnings*

In addition to the political conservatism that can mobilize procedure to restrict the rights of subjugated communities, neoliberal hegemonic forces can similarly

40. Bell explains the "two-sided coin" nature to this expansion and retraction of rights. On one side of the coin is interest convergence: you tend to see the promotion of racial equality, the expansion of rights and protections for marginalized group members, and the elimination of barriers to racial equality and rights when the interests of white people, or a dominant group, converge with the interests of Black people, or a subjugated group. The other side of the coin is involuntary sacrifice: we tend to see an increase in inequality, the restriction of rights and protections for marginalized group members, and the imposition of barriers to racial equality and rights when there is an attempt to unify opposing factions of the dominant group. *See* BELL, SILENT COVENANTS, *supra* note 24, at 29; Bell, *Brown v. Board*, *supra* note 24, at 22, 26; BELL, AMERICAN LAW, *supra* note 24, at 40; *see also* Pedro, *supra* note 3, at 164 n.77; Pedro, *supra* note 4, at 24–25. Professor Cheryl Harris provides what seems to be a modern example of Bell's concept of involuntary sacrifice. *See* Cheryl I. Harris, *Reflections on* Whiteness as Property, 134 HARV. L. REV. F. 1, 6–7 (2020) (citing DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992)).

41. Other scholars have used aspects of Bell's racial fortuity concepts to understand the roles of interest convergence, involuntary sacrifice, and how to potentially forge fortuity to benefit specific marginalized communities. *See, e.g.*, Jeremiah A. Ho, *Queer Sacrifice in Masterpiece Cakeshop*, 31 YALE J. L. & FEMINISM 249, 267–68, 318–19 (2019) (building on Professor Anthony Michael Kreis's work revealing the role of interest convergence for gay rights to argue that Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. 617 (2018), is an example of involuntary *queer* sacrifice).

push procedure to subordinate marginalized groups. In the words of social theorist Michel Foucault, "humanity installs each of its violences in a system of rules and thus proceeds from domination to domination."[42] In a neoliberal system, procedure (like rights) undergoes economization such that procedure supports neoliberalism instead of primarily promoting any stated goals of procedure (including fulfilling any underlying substantive rights or redressing harms).[43] As neoliberalism has taken hold in procedure, it has produced certain knowledges and truths.[44] And the neoliberal economization of procedure does not stop at furthering the interests of corporations.[45] Under neoliberalism, civil litigation and procedure also diminish, minimize, or ignore other concerns and purposes for both substantive law and civil litigation. The presumed knowledge and truths of neoliberalism, such as the Chicago School of Economics' contemporary ideas of rationality, "exclude or invalidate other knowledges" such that reasoning and actions that are outside of neoliberalism are subjugated, which is to be rendered irrational or illegible.[46] As Queer Studies and American Studies Professor Lisa Duggan explains, "the *economy* cannot be transparently abstracted from the *state* or the *family*, from practices of racial apartheid, gender segmentation, or sexual regulation" because these systems of subordination are "the channels through which money, political power, cultural resources, and social organization flow."[47]

Recent instances of procedural subordination can be best understood if situated within the larger socioeconomic context. The most prominent examples of procedural subordination (namely, in pleading with *Ashcroft v. Iqbal*[48] and in summary judgment with *Scott v. Harris*[49]) were preceded by, or paired with, what

42. Foucault, *supra* note 2, at 85.

43. *See* Norris, *supra* note 31; *cf.* BROWN, *supra* note 31, at 66–67, 151–52 ("neoliberal juridical reason recasts political rights, citizenship, and the field of democracy itself in an economic register"). "The juridical gives form to the economic, and the economic would not be what it is without the juridical." MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–1979, 163 (Michel Senellart ed., Graham Burchell trans., 2008) (describing neoliberalism as "an economic-juridical order").

44. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 27 (Alan Sheridan trans., 2d ed. 1995) ("power produces knowledge . . . there is no power relation without the correlative constitution of a field of knowledge"); *cf.* Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85, 87–88 n.9 (2015) (arguing that some lawyering strategies "overestimate the objectivity of scientific and medical expertise" and discussing the ways in which both sociopolitical context and courts produce knowledge).

45. Because, under neoliberal rationality, human beings are primarily and only homo oeconomicus and, specifically, "'human capital' across all spheres of life—human capital is both our 'is' and our 'ought'—what we are said to be, what we should be, and what the rationality makes us into through its norms and construction of environments." BROWN, *supra* note 31, at 35–36, 37–40.

46. Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 399 n.211 (2004); *see* MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE, 1975–76, at 7–8 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., Picador Books 2003) (describing excluded knowledges or truths as "subjugated knowledges").

47. LISA DUGGAN, THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY, at xiv (2003) (emphasis in original).

48. Ashcroft v. Iqbal, 556 U.S. 662 (2009); *see infra* notes 133–148 and accompanying text.

49. Scott v. Harris, 550 U.S. 372 (2007)*; see infra* notes 213–229, 238–245 and accompanying text.

can be seen as a naturalization and adoption of neoliberal interests in procedure (respectively, *Bell Atlantic Corporation v. Twombly*[50] and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[51]).[52] It seems more than coincidence that what some could describe as a wholesale adoption of capitalist hegemonic interests in civil procedure arguably took place first in antitrust monopoly cases and, specifically, in the antitrust monopoly cases that precipitated remarkable procedural subordination in both pleading and summary judgment.[53]

The forces at work within the procedure of the U.S. civil litigation system are not merely courts, dealing with the crushing weight of their dockets while trying to minimize meritless excessive costs, or racist/sexist/homophobic/transphobic/ableist "bad actors."[54] White supremacy and neoliberal hegemony, sometimes combined as racial capitalism, are also forces at work within U.S. civil procedure.[55] White supremacy and neoliberal interests do not explicitly announce their roles within civil procedure or any specific case, and unsurprisingly, judges and Justices are not always inclined to declare, or even aware of, the roles of those interests in their opinions.[56] While changes may not always be made along strictly racial capitalist lines or have a clear racial capitalist effect, in some contexts, imposing new procedural hurdles or removing prior procedural protections serves both neoliberal interests and white supremacist interests, separately.[57] That courts

50. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); *see infra* notes 121–132 and accompanying text.

51. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); *see infra* notes 161–173 and accompanying text. For a discussion of *Matsushita's* role in the Supreme Court curbing anti-monopoly law when it "practically eliminated predatory pricing as a cause of action and granted large corporations the power to acquire and maintain market dominance through temporary below-cost pricing," *see* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 793, 797–98 (2019).

52. *See infra* Parts II.0; II.0.

53. *See supra* notes 48–51.

54. *Cf.* Jason S. Rathod, *Emerging Markets, Vanishing Accountability: How Populations in Poor Countries Can Use Aggregate Litigation to Vindicate Their Rights*, 24 TRANSNAT'L L. & CONTEMP. PROBS. 69, 74–75 (2014) (discussing the rule of law aid that began in the 1990s, "[t]here was another critique at the time that is now largely forgotten in legal literature. That critique placed the economic hegemony of the United States at the center of law and development's failings rather than just the naiveté and ethnocentrism of certain practitioners."); Maurice E. Stucke & Ariel Ezrachi, *Innovation Misunderstood*, 73 AM. U. L. REV. 1941, 1960 n.111 (2024) (noting that the *Twombly* Court mentioned the high cost of antitrust discovery, but arguing that the development, or undoing more like, of antitrust law is turning on specific problems, including the imposition of the Chicago School of economics' assumptions into antitrust decisions); *Twombly*, 550 U.S. at 558, 560 n.6 (explaining that antitrust discovery can be costly).

55. Professors Tonya Brito, Kathryn Sabbeth, Jessica Steinberg, and Lauren Sudeall have explored "how civil courts, as an arm of the state, function as sites of racial capitalism." Brito, Sabbeth, Steinberg, & Sudeall, *supra* note 33, at 1245.

56. *See, e.g.*, Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1203–06 (2022) (arguing that in contract law "many of the most influential cases involving Black people are the ones that do *not* talk about race").

57. This is not to argue that capitalism is not inherently racial or that racism can or should be treated "as separate from and incidental to capitalism," but acknowledging that there are moments where either racism (or another axis of marginalization) or capitalism are more easily discernible despite their mutually constitutive origins. Brito, Sabbeth, Steinberg, & Sudeall, *supra* note 33, at 1260.

have "interpreted" procedural rules and built standards in directions beneficial and entrenching for both capitalist and white supremacist interests does not seem to be a fluke.[58] Similar to how some say "American capitalism provided the model of development" in rule of law aid, it seems that U.S. (at times, racial) capitalism might be informing, and in some instances perhaps even providing, the model of procedure.[59] In addition to the force of racial capitalism, which has both historic and contemporary iterations, there seem to be twin hegemonic forces of racism and neoliberalism at work within civil procedure.[60] This Article's analysis includes a conceptual account of how white supremacy and other axes of subordination, often through racial capitalism and neoliberal interests, are reinforced, reproduced, and entrenched within civil procedure.

### *B. Conceptual Overview*

As the conceptual background of my framework, I describe my intersectional approach. Next, I summarize my theoretical framework. I identify two mechanisms unique to civil procedure that can lead to procedural subordination. I call them the transsubstantivity bind and procedural identity. I explain that these two mechanisms tend to be deployed with a particular order of retrenchment and with a mask of judicial innocence that disguise the subordination and its extent.

#### *1. My Approach*

I attempt to employ a theoretically intersectional approach—which some have referred to as a unique approach that is related to, but apart from,

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58. *See supra* notes 33, 55; *cf.* Vaheesan, *supra* note 51, at 808–09 (arguing that the Court "weakened private enforcement" for antitrust law by imposing heightened procedural barriers for plaintiffs, specifically within pleadings, summary judgment, and for class actions, in part, through *Matsushita* and *Twombly*).

59. Rathod, *supra* note 54, at 73 (quoting Francis G. Snyder, *The Failure of "Law and Development*," 1982 WIS. L. REV. 373, 377–83 (1982)); Stucke & Ezrachi, *supra* note 54, at 1944–45 (noting *Matsushita* as an example of courts imposing the economic ideologies of "the then-Chicago and Harvard School" "into the law" and "making important policy tradeoffs in its antitrust decisions" and entrenching these ideologies within U.S. jurisprudence).

60. *See generally* Brito, Sabbeth, Steinberg, & Sudeall, *supra* note 33 (discussing contemporary examples of racial capitalism in civil courts); Crenshaw, *supra* note 24 (discussing historical examples of neoconservativism and liberalism fostering the subordination of Black people); *see* Achiume & Carbado, *supra* note 33, at 1486, 1488–89.

intersectionality[61]—to understanding how civil procedure may further subordinate marginalized groups. Nearly 35 years ago, several legal scholars (primarily Black women and women of color) engaged in a set of scholarly inquiries, which Professor Kimberlé Crenshaw coined and conceptualized as intersectionality in her groundbreaking scholarship, which advises that categories such as race, gender, sexual orientation, class, are not wholly "exclusive or separable categories" and, instead, we should understand various aspects of these subjugations as "more multidimensional."[62] Much of intersectionality studies look at the effects of systems of subordination on individuals or groups due to their multiple interacting

61. Some may refer to this type of approach or perspective as multidimensionality. *See, e.g.*, Hutchinson, *supra* note 11; Darren Lenard Hutchinson, *Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309 (2001); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999); Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidisciplinary, and Responsibility in Social Justice Scholarship or Legal Scholars As Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1414–15 (1998); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 566 (1997); Francisco Valdes, *Under Construction: Latcrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1107 (1997); Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 811, 815–16 (2013).

Others may refer to approaches similar to this as cosynthesis, inter-connectivity, and assemblages. JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES (2007) (referring to assemblages); Jasbir K. Puar, *"I Would Rather Be a Cyborg than a Goddess": Becoming-Intersectional in Assemblage Theory*, 2 PHILOSOPHIA 49 (2012) (referring to assemblages); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997) (referring to cosynthesis); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUDIES 25 (1995) (referring to interconnectivity); *see* Carbado, *supra*, at 815–16.

62. Kimberlé Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 111, 114 (Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, & Kimberlé Williams Crenshaw eds., Routledge 2018); *see, e.g.*, Crenshaw, *supra* note 5; Crenshaw, *supra* note 25; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 37 (1990); Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 18 (1991).

This work, and intersectionality, builds on concepts long-discussed within Black feminism. *See, e.g.*, Brittney Cooper, *Intersectionality*, *in* THE OXFORD HANDBOOK OF FEMINIST THEORY 385, 387–90 (Lisa Disch & Mary Hawkesworth eds., 2016); ANNA J. COOPER, A VOICE FROM THE SOUTH: BY A BLACK WOMAN OF THE SOUTH 134 (Univ. of N.C. at Chapel Hill Libr. 2017) (1892) (mentioning the "unique position" of Black women due to facing issues of both race and gender); MARY CHURCH TERRELL, A COLORED WOMAN IN A WHITE WORLD (1940) (discussing facing the two obstacles of being Black and being a woman); Frances Beale, *Double Jeopardy: To Be Black and Female*, *in* WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN AMERICAN FEMINIST THOUGHT (Beverly Guy-Sheftall, ed., 1970); Deborah King, *Multiple Jeopardy: Multiple Consciousness: The Context of Black Feminist Ideology*, 14 SIGNS: J. WOMEN IN CULTURE & SOC'Y 42, 47 (1988) (positing "the multiplicative relationships among" multiple systems of domination). Sociologist Professor Patricia Hill Collins's "matrix of domination" focuses on the organization of intersecting oppressions in "structural, disciplinary, hegemonic, and interpersonal domains." PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 18 (2d ed. 2002).

identities. I look at the structure of civil litigation—civil procedure—to theorize where and how procedure may further subordinate one marginalized group and, potentially, subsequently expand to subordinate other marginalized groups. I have previously called this theoretically intersectional[63]—understanding how subordination of one group may be affected or shaped by subordination of another group requires building understandings and theories of how these different aspects of subordination interact. I attempt to theorize intersectionally in this Article in the context of civil procedure.

I focus not on one particular person, set of persons, or group, nor on one specific event, time, or case. Instead, I look at one procedural mechanism (for example, a Rule 12(b)(6) motion to dismiss) and look over time at different cases, at different types of claims, and across varying groups of interests or types of plaintiffs to see how different axes of subordination cumulatively may affect the specific procedural mechanism in a way that subjugates marginalized groups.[64] In this Article, I do not employ a common CRT approach of "looking to the bottom."[65] Instead, to build a more systemic and structural view of how process negatively affects people's lives and, more specifically, imposes hurdles to claims brought to benefit members of marginalized groups, I study the ways that the various interlocking systems of domination might cumulatively affect those procedural mechanisms.[66]

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63. I do not use Crenshaw's "structural intersectionality" as a term here because structural intersectionality, as she defines it, is "the material consequences of the interaction of these multiple hierarchies [such as race and gender] in the lives of women of color." Crenshaw, *supra* note 62, at 114–15; Crenshaw, *supra* note 24, at 1245–50.

Structural intersectionality looks at the effects of white supremacy, misogyny, hetero-supremacy, ableism, etc. on a person of color, for example, who is also a woman, or is queer, or has a disability. Instead, I am theorizing within one institution (civil procedure) about how detrimental changes to procedure for a case that involves some axes of marginalization (for example, for a plaintiff who is an immigrant man and a religious minority) may bring about subordinating changes to procedure for later cases involving other axes of marginalization (for future plaintiffs who are U.S. citizens and white women or people of color from dominant religious backgrounds).

It is not clear, however, that multidimensionality or some of these other concepts are "analytically or conceptually distinct from intersectionality." Sumi Cho, *Post-Intersectionality: The Curious Reception of Intersectionality in Legal Scholarship*, 10 DU BOIS REV. 385, 385–95, 387 (2013); *see also* Carbado, *supra* note 61, at 815–18; Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 341–42, 358 (2013); Mutua, *supra* note 3, at 372–74, 373 n.230.

64. My approach is something of a Foucauldian genealogical account. I am looking at both the descent—several of the various important shifts, or events, through which the procedural mechanism was formed—and the emergence—what the recent form of the procedural mechanisms are, due to those shifts. *See* FOUCAULT, *supra* note 46, at 8–10; Foucault, *supra* note 2.

65. This approach, coined by Professor Mari Matsuda, entails "adopting the perspective of those who have seen and felt the falsity of the liberal promise" and looking at the issue "from the position of groups who have suffered through history" and "have experienced discrimination." Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–25 (1987).

66. *Cf.* FOUCAULT, *supra* note 47, at 13, 27–28 (discussing the need "to understand power by looking at its extremities," where "power transgresses the rules of right that organize and delineate it," which has a similarity to "looking to the bottom").

### *2. Subordinating Mechanisms: Transsubstantive Bind & Procedural Identity*

Generally, that the Federal Rules of Civil Procedure are transsubstantive means that they "transcend the particular substantive type of claim at issue in the case and instead apply equally to all cases."[67] As I describe more fully below, the transsubstantivity of pleading standards protected plaintiffs of color and civil rights claims when the Court rejected[68] a torrent of attempts to impose a heightened pleading standard for only civil rights cases.[69] Now that the Supreme Court has raised the pleading standard for nearly all civil cases, scholars have scrambled to disaggregate different types of claims and litigants (especially claims deemed important for people of color and civil rights) to understand the specific ways in which some types of plaintiffs and claims may struggle more than others to meet the new transsubstantive requirements. People who previously may have argued that transsubstantivity shielded civil rights claims and plaintiffs of color from extraordinary pleading burdens may now argue that civil rights claims and marginalized group plaintiffs should be singled out to receive special treatment and protection.[70]

Due to the generally transsubstantive nature of civil procedure, the transsubstantivity bind that previously prevented civil rights plaintiffs, and plaintiffs from marginalized groups, from being singled out and subjected to stricter procedural requirements is no longer protecting those groups. More recently, the transsubstantive nature of procedure has, instead, become something of a danger for

67. David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1196 (2014) [hereinafter Marcus, *American Law*]; *see also* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010) [hereinafter Marcus, *Past, Present, and Future*] (a rule that "applies equally to all cases regardless of substance"); J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. PA. L. REV. 1625, 1654 (2017); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1746–47 (1992); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718, 725, 727–29, 731–35 (1975) (perhaps the first use of the term).

68. Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242, 253–54, 254 n.48 (2004) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002); Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168 (1993)).

69. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 122–29 (2010); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L. J. 99, 111–14 (2008); Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 948–60; C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 688–89 (1984). Granted, the protection was not complete or necessarily consistent.

70. Some scholars say that we need to change the rules of procedure because their transsubstantive feature has become a flaw. *See* David L. Noll & Luke P. Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1639, 1685–92 (2023); Marcus, *The Collapse of the Federal Rules System*, *supra* note 32, at 2515–16. But transsubstantivity, the Federal Rules, and the animating values behind the rules arguably worked relatively well for many years at keeping promising civil rights claims, and litigation brought to benefit members of marginalized groups, in court. Perhaps changing the rules, and even the principles behind them, will not necessarily help, and may even hurt, these marginalized groups.

litigation brought to benefit marginalized group members. After the failure of earlier attempts to impose higher burdens for civil rights claims only, detractors of civil rights claims needed to impose procedural hurdles across the board for all plaintiffs in all types of litigation in order to make it more difficult for civil rights and impact litigation to succeed. And they did. Because judges are making these procedural changes in a transsubstantive procedural system, the changes in one type of case often affect several types of, if not all of, civil litigation.

This potential for what had previously been protective features of transsubstantivity for civil rights claims to later become harmful for those same claims can breed confusion regarding whether there is a single procedural baseline for all cases, or if instead the judiciary has effectively imposed a separate procedural baseline for marginalized groups. This means that scholars, litigators, judges, and justices who are unaware of the structural implications of procedural mechanisms at issue in a civil case may unwittingly help to erect or resurrect barriers to litigation that serves the interests of people of color and other marginalized groups—including civil rights litigation.

The second mechanism through which civil procedure contributes to subordination is procedural identity. Procedural identity means that, depending on the marginalized group identity of plaintiffs in certain cases or types of claims, the rules and doctrine may develop in a way that makes it more difficult for that type of claim to survive procedural hurdles and reach trial. Procedural identity is an especially problematic and important mechanism to identify because for those cases—like police brutality claims—in which, historically, litigation benefits marginalized groups, civil procedure may often develop in ways that disfavor such litigation, claims, and plaintiffs.[71]

#### *3. Concealing Characteristics: Order of Retrenchment & Judicial Innocence*

These new baselines of procedural obstacles for litigation brought to benefit members of marginalized groups are obscured by two other features of procedural subordination: what I call the order of retrenchment and judicial innocence.

Some aspects and concepts from social theory outside of CRT seem helpful for understanding the ways in which systems of subordination regarding different marginalized groups might interrelate or even be played against each other. I look at how this network of intertwined dominations takes effect within the system of rules that is civil procedure. Although I do not mean to create any sort of hierarchy of identities or marginalized groups, understanding which marginalized groups might be especially vulnerable in the U.S. is relevant to theorizing how procedural subordination might occur.

Because neoliberal procedure likely subjugates along lines of race, sex, gender identity, sexual orientation, disability, national origin, etc., some

71. In building out this concept, I draw from ideas explained in Parts I.**Error! Reference source not found.**, 0.

antisubordination projects, including theory, "must take them on together."[72] In this Article, I draw from some social theory concepts—namely ungrievable lives, people whose very existences are impossibilities, and suspect communities—to theorize which types of marginalized groups' claims might be subjected to more difficult procedural baselines earliest after cases involving corporate entities. In what I call the order of retrenchment, I posit that it is likely that, after corporate cases, the first cases in which U.S. courts will engage in procedural subordination before spreading it to marginalized groups generally or litigants writ large are cases involving people (especially as plaintiffs) whose lives are considered less valuable, or maybe not even as lives at all.

Some people who, arguably, are not recognized as human beings include those who philosopher and Professor Judith Butler describes as "ungrievable lives"[73]—people not seen as having "rights that ought to be honored."[74] Such people would, thus, be more prone to procedural subordination as fewer judges or Justices, social movement and advocacy groups, and others would be likely to regard their substantive or procedural rights as worthy of protection (especially relative to those of their opponents in litigation).

Another way of understanding the groups that fit in this category is through organizer and Professor Dean Spade's related idea of "impossible people who cannot exist"—people who are transgender and their families.[75] Spade explains that transgender people's very existence "is impossible."[76] If a group's "lives are not a political possibility that can be conceived," and if the best-funded related advocacy groups often disregard the group or see them as more of a liability that hinders progress for others, then the group seems situated for earlier procedural subordination than others differently situated.[77]

Related to, but in some ways separate from ungrievable lives and impossible people, are those who are "deemed dangerous." Butler notes, regarding those deemed dangerous, that the state:

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72. Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2509 (2023) (discussing the mutually constitutive and interconnected nature of racism and capitalism to assert that "freedom struggles cannot succeed by approaching law narrowly, with trust, or in isolation").

73. JUDITH BUTLER, FRAMES OF WAR: WHEN IS LIFE GRIEVABLE?, at xix, 1, 4, 14–15, 23–24, 31 (2016) ("'lives' that are not quite—or, indeed, are never—recognized as lives"); *see also* George Yancy & Judith Butler, *What's Wrong With "All Lives Matter"?*, N.Y. TIMES: OPINIONATOR (Jan. 12, 2015), https://archive.nytimes.com/opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/ [https://perma.cc/5U8G-BXUH]; Judith Butler, *Precariousness and Grievability: When is Life Grievable?*, VERSO (Nov. 16, 2015), https://www.versobooks.com/blogs/news/2339-judith-butler-precariousness-and-grievability [https://perma.cc/WP52-PLP3]; JUDITH BUTLER, PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE, at xiv–xv (2004).

74. Butler, *Precariousness and Grievability*, *supra* note 73 ("Only under conditions in which the loss would matter does the value of the life appear. Thus, grievability is a presupposition for the life that matters.").

75. SPADE, *supra* note 28, at 12, 19.

76. *Id.* at 12; *see also* Dean Spade, *Trans Law and Politics on a Neoliberal Landscape*, *in* NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 21 (2015).

77. SPADE, *supra* note 28, at 12, 19.

> [Takes] them outside the jurisdiction of the law, depriv[es] them of the legal protections to which subjects under national and international law are entitled. These are surely populations that are not regarded as subjects, humans who are not conceptualized within the frame of a political culture in which human lives are underwritten by legal entitlements, law, and so humans who are not humans.[78]

Another articulation of a related concept is a "suspect community," such as Muslims in the U.S. Professor Arshad Ali explains that U.S history "has written the Muslim as threatening and a source of fear; . . . one who is outside the realm of the citizen, or the person."[79] Because U.S. "privileges of liberal citizenship do not apply" to Muslims, a Muslim is not able "to be seen and engage as a full member of the body politic—that is, [they are not] recognized as a full human."[80] Below, I draw from these concepts of ungrievable lives, impossible people, and suspect communities when I describe some groups as being more vulnerable, smaller, despised, suspect, or fringe.[81]

The notion of the order of retrenchment describes a sequence in which courts roll back (or retrench) structural and procedural protections. In prior works, I have called for an intersectional theoretical approach to CRT in civil procedure.[82] In this Article, I take steps toward fleshing out this theoretical approach by saying that, at least in civil procedure, there may tend to be a certain temporal order to the imposition of new obstacles to plaintiffs and the retrenchment of prior protections. Perhaps, modern-day subordination typically is:

- adopted initially in a case where the change seems to be limited to a specific type of claim, litigant, or context and where that unique circumstance seems wholly unrelated to marginalized groups or civil rights issues;

78. BUTLER, PRECARIOUS LIFE, *supra* note 73, at 77.

79. Arshad Imtiaz Ali, *The Impossibility of Muslim Citizenship*, 11 DIASPORA, INDIGENOUS, AND MINORITY EDUC. 110, 111 (2017) (drawing from notions of "the Muslim Other" and explaining how contemporary practices are related to "older epistemic traditions of Orientalism, in which Muslims are seen as irrational, enraged, and unpredictable simply because they are Muslim" (citing EDWARD W. SAID, ORIENTALISM (1st ed. 1979))).

80. Ali, *supra* note 79, at 112 (explaining that this anti-Muslim racism involves "all Muslim life, and those who might be interpellated as Muslim," including "non-Muslim South Asian and Arab communities"); *see also* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1594–95 (2002) (positing that, in the U.S., Muslim-appearing people "are interpellated as antithetical to the citizen's sense of identity" such that they have a diminished ability to exercise the rights of citizenship); SHERENE H. RAZACK, CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS 7 (2008) (asserting that "[c]ommunities without the right to have rights are significantly different from those who are merely discriminated against . . . by virtue of having no political community willing to guarantee their rights").

81. *See infra* Part III.0.

82. Pedro, *supra* note 4, at 26 (citing Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1030 n.7 (2019)).

This idea of doctrinal or theoretical intersectionality draws on Crenshaw's concept of intersectionality, but does so in a doctrinal and theoretical context instead of in a litigant-focused context. Crenshaw, *supra* note 62.

- often, first successfully expanded to "groups perceived as more vulnerable, smallest, or 'fringe' (for example, the transgender community) or more recently recognized rights (such as marriage equality)";[83]
- then, to "marginalized groups perceived as stronger, larger, or more traditional (such as Black people or women) or much longer recognized civil rights (such as the rights to free speech or voting)";[84]
- and then, may extend to plaintiffs generally.[85]

The other contributor to the difficulty in identifying the structural impediments to litigation brought to benefit members of marginalized groups is what I call judicial innocence—the ways in which the changes that the judiciary makes to procedural protections and obstacles are masked.

To develop the concept of judicial innocence, I draw from CRT literature on white innocence. CRT scholars have described white innocence in various ways—sometimes as an ideology, sometimes as linguistic rhetoric. White innocence is the promotion and maintenance of the idea that contemporary white people (specific individuals, certain groups, or as a whole)[86] are innocent[87] of and, thus, have no responsibility for any current effects of racism or white supremacy.[88] The rhetorical or ideological myth of white innocence posits that contemporary white people are innocent because racism and white supremacy, or at least the structures, systems, and actions that promote white supremacy:

83. Pedro, *supra* note 4, at 26 (internal citations omitted).

84. *Id.*

85. *See infra* Part III.0.

86. David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 644 (2019) (noting that white innocence claims may be made individually or in aggregate).

87. *See, e.g.*, Cecil J. Hunt II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 498–99 (2006).

88. *See* Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 2–7, 34–37 (1991) ("White innocence is the insistence on the innocence or absence of responsibility of the contemporary white person."); Neil Gotanda, *Reflections on* Korematsu*,* Brown *and White Innocence*, 13 TEMP. POL. & CIV. RTS. L. REV. 663, 669, 672–73 (2004); Hunt, *supra* note 87, at 496–517 (explaining white innocence as whiteness, and white people: (1) being innocent of having any race and, instead, being the only human norm who are "just people"; (2) lacking any racial perspective, being the neutral baseline; (3) being innocent of racism or any individual bias; and (4) not having received any benefit from white supremacy): Simson, *supra* note 86, at 643–45; Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign against Critical Race Theory, through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE GENDER & SOC. JUST. 61, 95 (2021); Clark, *supra* note 3, at 2155–57.

Professor Gloria Wekker's book, WHITE INNOCENCE: PARADOXES OF COLONIALISM AND RACE, describes the white Dutch attempt to maintain social superiority to people of color and Muslims while ignoring race and racism. Wekker posits that Dutch people disregard race and racism, in part, because they believe that racism, sexism, and colonialism only matter in the past (not in the present) or only in other countries (not in the Netherlands). GLORIA WEKKER, WHITE INNOCENCE: PARADOXES OF COLONIALISM AND RACE (2016).

- are, or occurred, in the past, not the present;[89]
- are located elsewhere (not in the U.S. or the specific context at issue);[90]
- are limited to some smaller subgroup of white people;[91] and
- have not benefitted the white people at issue.[92]

Due to this supposed innocence, white people are thought to have no responsibility to prevent or attempt to undo any effects of racism or white supremacy nor is there necessarily any awareness of, understanding of, or need to address structural or systemic racism. Moreover, this innocence is taken to mean that no one should make any attempts to redress or prevent effects of white supremacy or racism because doing so would harm, and be unfair to, innocent white people.[93] Below, I utilize the concept of white innocence to identify what the moves of white innocence are that are specific to judges or Justices and in the context of civil procedure—judicial innocence.[94]

I situate the concept of "white innocence" within the federal judiciary as a sort of "judicial innocence."[95] In part, because certain structural features formally restrict the ability of federal judges or justices to limit access to courts, judicial changes that make it more difficult to get in, or remain in, court through trial or to receive procedural protections or fair treatment may tend to be masked in certain ways:

- the judiciary presents itself as though it is not making any change to the relevant rules, but is instead only further clarifying, interpreting, or creating better standards to apply what Congress has legislated;
- judges writing the opinion do not necessarily predict that the opinion will change decisions in other cases or even in other similar cases;

89. Ross, *supra* note 88, at 5 (discussing how Justice Taney, in *Dred Scott v. Sandford*, 60 U.S. (19 HOW.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV "was able to push responsibility away from . . . contemporary whites . . . and back to the preceding generations"); Gotanda, *supra* note 88, at 672–73 (noting that white innocence involves separating current times and actions and knowledge from that in the past such that the current white person has no "responsibility for whatever harms may have occurred in the past"); Hunt, *supra* note 87, at 507–10 (describing the white innocence myth that racism is only in the past); Simson, *supra* note 86, at 644 (discussing a type of white innocence due to contemporary white people not being "active participant[s]" in the U.S. "history of racial discrimination"); Hamilton, *supra* note 88, at 95; WEKKER, *supra* note 88, at 72.

90. *See, e.g.*, WEKKER, *supra* note 88, at 72.

91. Hunt, *supra* note 87, at 507–08 ("because most Whites are no longer guilty of racism (with the exception of a few fringe outliers); they—and thus Whiteness itself—must be considered innocent of racism"); Simson, *supra* note 86, at 644 (discussing white innocence due to a white person "not being an active participant" in racism); Hamilton, *supra* note 88, at 95; WEKKER, *supra* note 88, at 72.

92. Hunt, *supra* note 87, at 513–17; Simson, *supra* note 86, at 644; Hamilton, *supra* note 88, at 95–96.

93. *See* Hunt, *supra* note 88, at 507–8; Simson, *supra* note 87, at 644–45; Hamilton, *supra* note 89, at 95–97.

94. *See infra* Part III.0.

95. Judicial innocence is also related to racial gaslighting—a process that uses "narratives that obfuscate the existence of a white supremacist state power structure" to "perpetuate[] and normalize[] a white supremacist reality through pathologizing those who resist." Angelique M. Davis & Rose Ernst, *Racial Gaslighting*, 7 POL., GRPS., AND IDENTITIES 761, 763 (2019).

- the change is likely to generally follow the order of retrenchment;[96]
- the new standard or rule tends to be written in ways such that it can seem difficult to disagree with the new standard or rule without being irrational or unreasonable; and
- the new standard or rule, to the extent that it gives discretion, does so by privileging and centering the experiences and perspectives of the judiciary (who tend to be white, male, heterosexual, cisgender, elite) by displacing the experiences of the litigants.[97]

With these characteristics, judicial innocence can, among other effects, cover up that there has been any change; insulate the change from criticism; and conceal the role of the judiciary, litigants, and litigation in structural, procedural, and remedial subordination or retrenchment.

## II.
## SUBORDINATING MECHANISMS UNIQUE TO CIVIL PROCEDURE

The following section proposes some understandings of the ways in which racial subordination, and marginalization along other axes of group identity, which is endemic in both U.S. law and social fabric, may also be reinforced within civil procedure.[98] The concepts of transsubstantive bind and procedural identity describe some of the ways in which facially neutral and transsubstantive procedure may warp over time to make vulnerable and cast out claims brought by plaintiffs whom procedure perhaps never intended to serve.

### *A. Transsubstantive Bind*

The effects of transsubstantivity can be manipulated and have changed. Although, at times, the transsubstantive bind—that all civil litigation is generally subject to the same rules and doctrines—in civil procedure can protect perhaps disfavored litigants or claims from being singled out for procedural subordination, when such efforts at retrenchment are unsuccessful, proponents of retrenchment may eventually attack civil litigation en masse as a way to claw back protections from the disfavored group (along with most other civil litigants). In doing so, those who are attacking the litigation brought to benefit those subordinated groups no longer need to argue that the litigation, claims, plaintiffs, or defendants are different in some way that requires special treatment. Instead, a broad change in rule or standard that is not specifically aimed at the (perhaps still targeted) group or type of claim will reach them by reaching nearly all civil litigation.

96. *See infra* Part III.A.
97. *See infra* Part III.0.
98. These concepts build on the work of Professor A. Benjamin Spencer identifying a dominant restrictive ethos in civil procedure that "weeds out" the claims of social out-groups, especially those "demand[ing] the reordering of established political, economic and social arrangements" despite maintaining "procedure's veneer of fairness and neutrality." Spencer, *supra* note 8, at 369–70; *see also* Brooke D. Coleman, *Iqbal & The Evolution of Procedural Scholarship*, 114 CAL. L. REV. 1009, 1025 (2026).

At different points in time and in different procedural areas, it could be useful for those working against procedural subordination to understand whether the transsubstantive nature of civil procedure is being used as a shield to defend, or as a sword to eliminate, procedural protections for those bringing litigation to benefit members of marginalized groups.

*1. Pleading*

When U.S. federal pleading rules were changed in 1938 to provide more liberal access to courts,[99] some wanted much more specific (or even code-type) pleading for all cases.[100] Shortly after the adoption of the modern version of Federal Rule of Civil Procedure 8(a), some argued that "special" or "big" cases should still have more detailed pleading requirements,[101] but those arguments failed. Rule 8 and pleading standards were (and largely still are) general, and apply to all civil litigation, so the transsubstantive bind meant that federal judges had to apply the same Rule 8 to all civil litigation, including special or big cases, including antitrust and other areas, and that liberal access of notice pleading was upheld for all types of civil litigants and claims.[102]

After *Brown v. Board of Education*,[103] the Court continued to uphold liberal notice pleading in cases brought to benefit Black people. In one such case, *Conley v. Gibson*,[104] Black railway workers sued their union for racial discrimination. The Court held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[105] In response to the argument that the plaintiffs had not set forth specific facts to support their discrimination claims, the Court responded that "all the Rules require is 'a short and plain statement of the claim.'"[106] Into the early 1980s, transsubstantivity sometimes served as a shield that protected civil rights claimants, often people of color, and other litigants who were disfavored or who were bringing claims that some others perceived to be extra or unwanted.

99. *See* FED. R. CIV. P. 8(a)(2); 5 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1202 (4th ed. 2008); Fairman, *supra* note 34, at 990–97; Spencer, *supra* note 69, at 101, 104.

100. *See* Charles E. Clark, *Review of Cases and Materials on Modern Procedure and Judicial Administration by Arthur T. Vanderbilt*, 62 YALE L.J. 292, 296 n.14 (1953) [hereinafter Clark, *Review of Cases*]; Charles E. Clark, *Special Pleading in the "Big Case*," 21 F.R.D. 45, 47 (1957) [hereinafter Clark, *Special Pleading*].

101. *See, e.g.*, Clark, *Special Pleading*, *supra* note 100, at 47–50 (discussing calls for, but no exceptions to liberal pleading requirements for the "Big Case," copyright and patent cases, and treble damage lawsuits); Spencer, *supra* note 69, at 111–14, 120–24; Marcus, *Past, Present, and Future*, *supra* note 67, at 410–11.

102. *See, e.g.*, Clark, *Special Pleading*, *supra* note 100, at 47–50, app.; Dioguardi v. Durning, 139 F.2d 774, 774–76 (2d Cir. 1944) (reversing district court judgment to dismiss complaint because it "fails to state facts sufficient to constitute a cause of action" because "there is no [such] pleading requirement," and the only requirements are "a short and plain statement of the claim showing that the pleader is entitled to relief" and stating "a claim upon which relief can be granted").

103. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

104. Conley v. Gibson, 355 U.S. 41 (1957).

105. *Id.* at 45–46; *see* Spencer, *supra* note 69, at 101–02.

106. *Conley*, 355 U.S. at 47.

After the Civil Rights Act, there were explicit arguments over whether civil rights claims were proper for federal court adjudication.[107] Such claims tended to be, or were perceived as being, brought more often by Black people or members of other marginalized groups. There was a stream of attempts to impose a heightened pleading standard for civil rights cases.108 Some saw it as a testament to the non-partisan charge of the Supreme Court that the Court explicitly rebuffed these attempts to increase pleading requirements solely for civil rights cases.[109]

Arguably, the two most prominent such cases were *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*[110] and *Swierkiewicz v. Sorema N.A.*[111] In these cases, respectively, the Court refused to adopt a heightened pleading standard for civil rights claims against municipalities and for claims of employment discrimination on the basis of national origin and age.[112] Both opinions were authored by politically and ideologically conservative justices for a unanimous Court.[113] In *Leatherman*, the Court held that federal courts may not apply "a 'heightened pleading standard'—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure—in civil rights cases alleging municipal liability under [§1983]."[114] Similarly, in *Swierkiewicz*, the Court held that employment discrimination claims do not need to meet a "heightened pleading standard" (by including facts sufficient to establish prima

107. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Alexander M. Bickel, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

108. Fairman, *supra* note 69; Seiner, *supra* note 69, at 122–29; Spencer, *supra* note 69, at 111–14; Blaze, *supra* note 69, at 948–60; Wingate, *supra* note 69, at 688–89.

109. Johnson, *supra* note 68, at 253–54, 254 n.48 (internal citations omitted); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (maintaining the notice pleading standard for a pro se Italian immigrant); *see also* Edward D. Cavanagh, *Rulemaking, Litigation Culture and Reform in Federal Courts*, 35 AM. J. TRIAL ADVOC. 49, 62 (2012); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1177 (1993); William B. Rubenstein, *The Concept of Equality in Civil Procedure Symposium - Batter Up - From the Baseball Field to the Courthouse: Contemporary Issues Facing Baseball Practitioners*, 23 CARDOZO L. REV. 1865, 1879 (2002).

110. 507 U.S. 163 (1993).

111. 534 U.S. 506 (2002).

112. *Id.* at 515; *Leatherman*, 507 U.S. at 163–64, 166–68.

113. *Leatherman*, 507 U.S. at 164 (Rehnquist, C.J.); *Swierkiewicz*, 534 U.S. at 507 (Thomas, J.).

114. *Leatherman*, 507 U.S. at 164; *see also* Spencer, *supra* note 69, at 114–15; Marcus, *Past, Present, and Future*, *supra* note 67, at 411–12. The claims at issue in *Leatherman* were *Monell* claims. *See infra* note 212. Whether Charlene, Kenneth, or Travis Leatherman were members of any marginalized group is not readily available information.

facie discrimination under the *McDonnell Douglas Corp. v. Green*[115] framework) in order to survive a Rule 12(b)(6) motion to dismiss.[116]

In an implicit nod to transsubstantivity in both opinions, the Court explained that all civil litigation complaints are treated the same, unless they are excepted by Rule 9.[117] The Court also explained in each opinion that the only way that federal courts can impose a heightened pleading requirement on any civil rights or discrimination claim that does not fit within Rule 9 is if Congress changes the Federal Rules of Civil Procedure to allow for the heightened pleading requirement for those types of claims.[118] In *Swierkiewicz*, the Court also noted that at the motion to dismiss stage, a judge "must accept as true all of the factual allegations contained in the complaint."[119] Thus, efforts to impose a heightened pleading standard for civil rights and discrimination claims were rebuffed, as the Court held that, generally, all civil claims are subject to the same pleading requirements and they only need to comply with Rule 8(a)'s requirement for a short and plain statement.[120]

These failed attempts, if successful, would have reinforced structural racism by denying people of color access to courts to litigate racial discrimination even though Congress had explicitly authorized such litigation without imposing a heightened pleading standard. It was clear at the time that the discussion was about civil rights and that civil rights often meant people of color and allegedly racist discrimination or discrimination against other marginalized groups.

Some fifty years later, in *Bell Atlantic Corp. v. Twombly*[121]— an opinion that did not focus on race and that was not specifically relevant to civil rights litigation—the Court started what some call a revolution in pleading. In that case, a putative class of local telephone and internet subscribers sued a group of corporations colloquially referred to as "Baby Bells" which had previously been regional local telephone service monopolies until that market was restructured to allow for competition.[122] The putative plaintiff class alleged that the defendant Baby Bells conspired to restrain trade in violation of § 1 of the Sherman Act.[123] The Court cited both *Monsanto Co. v. Spray-Rite Service Corp.*124 and *Matsushita v. Zenith*,[125] even though *Monsanto* discussed Sherman Act evidentiary requirements at

115. 411 U.S. 792, 802–03 (1973).

116. *Swierkiewicz*, 534 U.S. at 508, 512, 515; Spencer, *supra* note 69, at 117–18; Marcus, *Past, Present, and Future*, *supra* note 67, at 411–12. 53 year-old Akos Swierkiewicz was "a native of Hungary" and his complaint alleging age discrimination stated that the person who demoted him "wanted to 'energize'" the department and replaced Swierkiewicz with someone almost twenty years younger. *Swierkiewicz*, 534 U.S. at 508.

117. *Leatherman*, 507 U.S. at 168–69; *Swierkiewicz*, 534 U.S. at 512–15.

118. *Leatherman*, 507 U.S. at 168–69; *Swierkiewicz*, 534 U.S. at 515 (quoting *Leatherman*, 507 U.S. at 168).

119. *Swierkiewicz*, 534 U.S. at 508 n.1.

120. *Leatherman*, 507 U.S. at 168 (favorably citing Conley v. Gibson, 355 U.S. 41 (1957)); *Swierkiewicz*, 534 U.S. at 512 (same).

121. *Twombly*, 550 U.S. at 544.

122. *Id.* at 549–50.

123. *Id.* at 550, 551 n.2.

124. 465 U.S. 752 (1984).

125. *Matsushita*, 475 U.S. 574 (1986).

trial and *Matsushita* discussed requirements for summary judgment, both of which are very different (and more difficult to survive) procedural standards for non-movants and plaintiffs.[126] After referring to the Federal Rule of Civil Procedure 8 and *Conley*, the Court noted that it was going to require "plausible" allegations before announcing that it was retiring the *Conley* rule.[127]

Although there was not scholarly or judicial unanimity, many agreed that *Twombly* made some noticeable changes to the pleading standard.[128] The Court seemed to call for judges to weigh evidence and assess probability,[129] to make inferences only properly made after a full trial and by the factfinder or jury,[130] and to deliberately disregard evidence contrary to their presumptions and the theory that they think is probably more likely.[131] Some thought it was unclear whether *Twombly* would herald in a new era of pleading.[132]

The wait was relatively short, as many see *Ashcroft v. Iqbal*,[133] two years later, as responding clearly in the affirmative. In *Iqbal*, the Court did not limit the opinion's reach to civil rights litigation and made clear that the plausibility standard announced in the specific antitrust context of *Twombly* was a standard for all civil litigation.[134] The Court arguably, finally, imposed a heightened pleading standard for all civil litigation that was much like the lower court proposed standards, limited to civil rights or antidiscrimination cases, that the Court had previously overturned.[135] As announced in *Iqbal*, federal courts must, first, separate factual from conclusory allegations and then, decide whether the factual

126. *Twombly*, 550 U.S. at 554.

127. *Id.* at 556–61.

128. *See, e.g.*, *id.* at 563; *id.* at 573, 586 (Stevens, J., dissenting); Miller, *supra* note 30, at 12; *id.* at 14; Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 24 (2010). *But see* Miller, *supra* note 30, at 20; Spencer, *supra* note 69, at 124–25; Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 992–98 (2009); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1064–65 (2009); *see generally* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) (describing *Twombly*'s sweeping changes to the pleading standard).

129. *See, e.g.*, *Twombly*, 550 U.S. at 572–73 (Stevens, J., dissenting); Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1181–82 n.22 (2013); Miller, *supra* note 30, at 21, 24–25. Although the majority explicitly noted that its plausibility requirement was not a probability requirement, the not infrequent use of quotation marks about the "plausibility" standard could make one wonder if those were quotation marks of disbelief, scare quotes. *See Twombly*, 550 U.S. at 556; 550 U.S. 544 (Stevens, J., dissenting); Kaplow, *supra*, at 1181; Miller, *supra* note 30, at 14.

130. *See, e.g.*, Miller, *supra* note 30, at 26 (noting that the Court's discussion of an "obvious alternative" to the plaintiffs' proposition of illegal agreement was "strikingly analogous" to factfinders' reasoning at trial).

131. *See, e.g.*, *Twombly*, 550 U.S. at 564, 566–69 ("in form a few stray statements speak directly of the agreement"); *id.* at 571–72 (Stevens, J., dissenting) (noting that the "complaint describes a variety of circumstantial evidence and makes the straightforward allegation" of conspiracy and illegal agreement).

132. *See, e.g.*, Bone, *supra* note 128, at 892–98.

133. 556 U.S. 662 (2009); *see also* Bone, *supra* note 128, at 891–94 (discussing the racial and ethnic dimensions of *Iqbal*).

134. *Iqbal*, 556 U.S. at 684.

135. *See supra* notes 109–20 and accompanying text.

allegations constitute a plausible claim for relief.[136] Judges are to decide whether there is a plausible claim based on their "judicial experience and common sense."[137]

Many scholars view the *Iqbal* Court's changes to the pleading standard as significant and problematic.[138] Much of the concerns with the *Iqbal* decision include that it encourages, and somewhat requires, courts to take over the role of a juror at trial.[139] Some have argued that the majority seemed to call for judges to deliberately disregard evidence contrary to their presumptions and the theory that they think is probably more likely. As Professor Benjamin Spencer has explained, the only factual allegations that are actually conclusory are ones that "use[] legal terminology to describe conduct rather than factual statements."[140] Instead, "[t]he *Iqbal* majority is thus not using 'conclusory' to mean legalistic allegations lacking factual content, but rather has defined a conclusory assertion as one that lacks evidence under circumstances in which the Court feels that such evidence is required."[141] "In certain contexts, the Court does not feel that additional evidence is required because the factual assertion is not controversial, it is expected, or it is self-evident from the perspective of the Court."[142] And ignoring allegations based on the experiences and common sense of the federal judiciary will tend to favor governmental defendants and major corporations, while subjugating people from marginalized groups.[143]

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136. *See Iqbal*, 556 U.S. at 678–79.

137. *Id.* at 679.

138. *See, e.g.*, A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 186–87 (2010); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 859–62, 867–82 (2010).

139. *See, e.g.*, Miller, *supra* note 30, at 26 (noting that the Court's preferred explanation that it found was "more likely" than the plaintiffs' proposition of illegal agreement was "strikingly analogous" to factfinders' reasoning at trial); Bone, *supra* note 138, at 875 (claiming that "*Iqbal* frames the plausibility inquiry as inferring liability from facts in a way that evokes the jury's function at trial" and that, in doing so, *Iqbal* went beyond *Twombly*); Spencer, *supra* note 138, at 197 (claiming that "the *Iqbal* Court is treading on the traditional province of the jury").

140. Spencer, *supra* note 138, at 192. Thus, the disregarded allegations were undeniably "non-conclusory and factual in nature." *Id.* at 192–93. The main allegations that the Court ignored for supposedly being conclusory were that then-Attorney General John Ashcroft was the "principal architect" of the policy at issue in the case and that then-FBI Director Robert Mueller was "'instrumental in [its] adoption, promulgation, and implementation, adding that both 'approved' and 'agreed to' the policy." *Id.* at 193. Under Spencer's explanation of conclusory allegations, Iqbal's allegations would have been conclusory if they had been something more like "Ashcroft discriminated when designing the policy" or Mueller "discriminated when adopting, promulgating, and implementing the policy."

141. *Id.* at 195–96.

142. *Id.*

143. *Id.*

Although some doubt or debate whether *Twombly* or *Iqbal* made a significant difference,[144] others argue that the two cases made significant changes, especially together.[145] Moreover, the *Twombly* and *Iqbal* pleading changes are perceived by some as especially affecting civil rights and discrimination cases.[146] In sum, *Twombly* and *Iqbal* are illustrative of the way that the transsubstantive nature of civil procedure can be used to raise pleading standards for civil rights claims and marginalized groups by raising the standards for all plaintiffs, even though the Court blocked a similar change when directed only at civil rights claims. By requiring complaints to be judged based on "judicial experience and common sense,"[147] the Court ensures that the change will still disproportionately affect marginalized groups whose experiences and complaints will likely differ the most from the experiences of federal judges.[148]

*2. Summary Judgment*

Another illustration of the procedural transsubstantive bind (and some of its exceptions) is summary judgment, which allows the trial court to issue judgment in a party's favor on an issue if the party meets certain requirements to show that the issue does not require trial.[149] Since 1938, Rule 56 of the Federal Rules of Civil Procedure has provided that federal courts must grant litigants' motions for summary judgment if the movant demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[150] Additionally, courts must view all facts and make all reasonable

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144. *See generally* David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013); Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369 (2016) [hereinafter Gelbach, *Material Facts*]; Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663 (2014) [hereinafter Gelbach, *Rethinking Summary Judgment Empirics*]; William H. J. Hubbard, *Testing for Change in Procedural Standards with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35 (2013); Miller, *supra* note 30, at 15 n.53.

145. Clopton, *supra* note 12, at 416; Seiner, *supra* note 69, at 96–97; Miller, *supra* note 30, at 15 n.52, 17, 17–49; Thomas, *supra* note 128; *see generally* A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to* Twiqbal *Apologists*, 60 UCLA L. REV. 1710 (2013) (responding to others claiming that *Twombly* and *Iqbal* will not have a substantial, deleterious effect on pleading or litigation); Spencer, *supra* note 138 (describing the consequential effects of *Iqbal* in its relation to *Twombly*).

146. Miller, *supra* note 30, at 20 n.67; *see* Bone, *supra* note 130, at 879.

147. *Iqbal*, 556 U.S. 662, 679 (2009).

148. Still, white supremacy and subordination of marginalized groups are far from the only explanation of modern-day changes to civil procedure. In addition to changes due to procedural subordination, between *Conley* and *Iqbal*, many describe a "counter-revolution" in civil procedure, pushing against the liberal "notice pleading" regime. *See* Spencer, *supra* note 69, at 103 nn.17–18.

149. 10A WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE § 2711 (4th ed. 2016 & Supp. 2024).

150. Fed. R. Civ. P. 56(a). A version of the rule remarkably close to the present-day version was adopted in 1938. *See, e.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016–19 (2003); William W. Schwarzer, Alan Hirsch, & David. J. Barrans, *Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, F.R.D. 441, 1–3 (1992); WRIGHT & MILLER, *supra* note 145, § 2711.

inferences in the light most favorable to the nonmovants.[151] For a while, federal courts seemed very reluctant to grant summary judgment.[152] Similar to the earlier contests over the pleading standards as described in Rule 8, there were disagreements over the ease with which movants should be able to receive summary judgment after the creation and adoption of Rule 56.[153] The lasting contentious aspects of summary judgment include what the burdens are, what it means to construe all evidence in the light most favorable to the nonmovant, and whether certain inquiries necessarily involve federal judges improperly assessing at the summary judgment stage what is best left for trial. Also, arguably similar to pleading requirements and motions to dismiss, some of the earlier attempts to make it easier for defendants to win motions for summary judgment were made in civil rights cases.

In the most prominent of those cases, *Adickes v. S.H. Kress & Co.*,[154] Sandra Adickes sued Kress, a department store, under 42 U.S.C. § 1983 for violating her equal protection rights through racial discrimination in public accommodations. Hattiesburg, Mississippi police had arrested Adickes, a white teacher, after the store's lunch counter refused to provide her with service when she entered the restaurant with a number of Black students she was teaching at a civil rights movement "Freedom School."[155] Kress moved for summary judgment on one of Adickes's claims, arguing that Adickes could not prove an essential element of the claim regarding the refusal of service and subsequent arrest—that Kress had conspired with police, which would fulfill the requirement of state action.[156] The Court refused to subject civil rights claims to a higher standard than other claims. The Court found that, because what Kress had submitted "must be viewed in the light most favorable to the nonmoving party [Adickes]," Kress did not carry its burden of showing the absence of a genuine issue of material fact because Kress did not foreclose the possibility that a police officer may have been in the restaurant while Adickes was there and that the officer might have had "a meeting of the minds" with a Kress employee to establish conspiracy.[157] And, under *Diebold*,[158] the Court noted that it needed to draw inferences, and view the facts, in the light most favorable to the nonmovant.[159] Many interpreted *Adickes* as setting a high burden for defendants moving for summary judgment, essentially requiring that

151. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam); Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962).

152. *See, e.g.*, Schneider, *Changing Shape*, *supra* note 4, at 537; Schneider, *Dangers*, *supra* note 4, at 706; Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1904–05 (1998).

153. *See, e.g.*, Samuel Issacharoff & George Loewenstein, *Second Thoughts about Summary Judgment*, 100 YALE L.J. 73, 77–79 (1990); Schwarzer, Hirsch, & Barrans, *supra* note 150, at 2–5; Miller, *supra* note 150, at 1019–25; Leland Ware, *Inferring Intent from Proof of Pretext Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37, 43–44 (2000); Wald, *supra* note 152, at 1904 (noting efforts to protect certain types of cases and claims from summary judgment).

154. 398 U.S. 144 (1970).

155. *Id.* at 146–47.

156. *Id.* at 148; *see also* Miller, *supra* note 150, at 1025–26; Schwarzer, Hirsch, & Barrans, *supra* note 150, at 4–5; Issacharoff & Loewenstein, *supra* note 153, at 79–80.

157. *Adickes*, 398 U.S. at 158.

158. United States v. Diebold, Inc., 369 U.S. 654 (1962) (per curiam).

159. *Adickes*, 398 U.S. at 157; *Diebold*, 369 U.S. at 655.

such movants prove that the plaintiffs would be completely unable to prevail after a full trial.[160]

Less than two decades after *Adickes*, the Court issued three opinions[161] that marked what some call a revolution in summary judgment—the trilogy of *Matsushita v. Zenith*,[162] *Anderson v. Liberty Lobby*,[163] and *Celotex v. Catrett*.[164]

In March of 1986, the Court issued its opinion in *Matsushita*, an antitrust case brought by U.S. television manufacturers, including Zenith, against Matsushita and other Japanese television manufacturers. Plaintiffs alleged that defendants had violated antitrust law by illegally conspiring to set artificially high prices on television sets that defendants sold in Japan and artificially low prices on televisions that defendants sold in the U.S., such that defendants would eventually drive U.S. television manufacturers out of business and monopolize the U.S. television market.[165] The Court's discussion focused on antitrust law, specifically on limitations due to § 1 of the Sherman Act, and, to a lesser extent, on conspiracy.[166] The *Matsushita* Court based much of its reasoning on the substantive antitrust case

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160. *See, e.g.*, Issacharoff & Loewenstein, *supra* note 153, at 80; Wald, *supra* note 152, at 1906–07.

161. Although many commentators discuss these cases in a different order, presumably for conceptual reasons, the Court issued its decision in *Matsushita v. Zenith* in March of 1986, then issued the other two cases on the same day, with *Anderson v. Liberty Lobby* preceding *Celotex Corp. v. Catrett*. *Matsushita*, 475 U.S. 574 (1986); Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); *see, e.g.*, Miller, *supra* note 150, at 1029–41; Issacharoff & Loewenstein, *supra* note 153, at 79–87. Although scholars vary in how they refer to *Anderson v. Liberty Lobby*, I refer to the case and opinion as "*Liberty Lobby*" instead of as "*Anderson*" because summary reference to "*Liberty Lobby*" seems more readily identifiable. *See, e.g.*, Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 740–42 (1989). *But see* Issacharoff & Loewenstein, *supra* note 153, at 84.

162. *Matsushita*, 475 U.S. 574.

163. *Liberty Lobby*, 477 U.S. 242.

164. *Celotex*, 477 U.S. 317; *see* Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 FLA. ST. U. L. REV. 689, 703 (1996) ("the trilogy fundamentally altered the summary judgment landscape"); Marcus, *supra* note 161, at 739–40; Issacharoff & Loewenstein, *supra* note 153, at 84 (noting that, together, the three opinions "doctrinally approve[] a new era of summary adjudication"):

> As a consequence of the trilogy, the Court appears to have transformed summary judgment from a mechanism for assuring a modicum of genuine dispute in cases set for trial to a full dress-rehearsal for trial with legal burdens and evidentiary standards to match those that would apply at trial.

*Id.* at 87; Ware, *supra* note 153, at 45, 49 ("These cases represented the end of the era of reticence. The Supreme Court strongly encouraged lower courts to assume a more receptive posture in summary judgment proceedings. . . . The Trilogy cases relaxed considerably the requirements for obtaining summary judgment."). *But see, e.g.*, Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 163 (2000) (opining that the impact of the trilogy "may have been less to change the law of summary judgment than to consolidate a movement already underway").

165. *Matsushita*, 475 U.S. at 576–78.

166. *Id.* at 587–98. The *Matsushita* Court discussed *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), which held that, to prevail on a § 1 claim, "[t]here must be evidence that tends to exclude the possibility that [defendants] were acting independently"—plaintiffs must present "direct or circumstantial evidence that tends to prove that" defendants had a meeting of minds.

*Monsanto Co. v. Spray-Rite Service Corp.,*[167] and even though *Monsanto* neither decided nor mentioned plausibility or summary judgment,[168] the *Matsushita* Court opined that *Monsanto* meant that federal courts should grant summary judgment against antitrust plaintiffs if a judge finds that the inference of a conspiracy would be implausible based on the factual context and economic rationality.[169] Even if limited to the specific circumstances of the antitrust issues and the showing central to the case and the summary judgment motion, *Matsushita* was highly contentious and many scholars believed its reasoning was aggressive.[170] Justices and scholars opined that, in antitrust cases at summary judgment, the majority seemed to call for judges to weigh evidence and assess probability,[171] to make inferences only properly made after a full trial and by the factfinder or jury,[172] and to deliberately disregard evidence contrary to their presumptions and the theory that they think is probably more likely.[173]

The *Matsushita* majority framed its reasoning narrowly, emphasizing antitrust conspiracy claims under §1 of the Sherman Act and the evidentiary difficulties of proving motive.[174] Yet uncertainty remained about whether the decision would extend beyond that context, transsubstantively across all civil litigation. That uncertainty was resolved on June 25, 1986 in *Liberty Lobby* and *Celotex*.

In *Liberty Lobby*, the Court described the question presented as whether the *New York Times Co. v. Sullivan*[175] trial evidentiary standard for libel suits brought by public officials or figures—clear and convincing evidence of actual malice—

167. *Monsanto*, 465 U.S. 752.

168. *Id.*

169. *Matsushita*, 475 U.S. at 587, 593.

170. *See, e.g.*, Issacharoff & Loewenstein, *supra* note 153, at 86; Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 227 (1993).

171. *Matsushita*, 475 U.S. at 601 (White, J., dissenting) (noting that the majority's language seemed to "overturn[] settled law" by tasking federal judges in antitrust cases with making probability determinations when deciding summary judgment motions); McGinley, *supra* note 170, at 226–27; Marcus, *supra* note 161, at 741–42, 771 n.202 (noting that *Matsushita* involves the court evaluating evidence and "indicate[s] that judges are to scrutinize evidence in a way that resembles weighing, and . . . seem[s] to be so interpreted").

172. *Matsushita*, 475 U.S. at 601, 604 (White, J., dissenting) (noting that the majority assumed that, to win at trial, plaintiffs must prove that defendants conspired to set prices lower than necessary to sell their products or to set prices below "some appropriate measure of cost"); McGinley, *supra* note 170, at 226–27; Issacharoff & Loewenstein, *supra* note 153, at 86 (noting the Court "reach[ing] . . . into the realm of factfinding").

173. *Matsushita*, 475 U.S. at 601–03 (White, J., dissenting) (noting that the Court ignored the DePodwin Report, which contradicted the majority's economic and factual assumptions); McGinley, *supra* note 170, at 226; *see* Issacharoff & Loewenstein, *supra* note 153, at 86.

174. *Supra* note 166 and accompanying text.

175. 376 U.S. 254 (1964).

applies at summary judgment.[176] The Court's answer was not limited to First Amendment cases or the clear-and-convincing evidence requirement. Instead, the Court held that "ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at trial on the merits."[177] The Court also held that, even if only the defendant likely has specific evidence, plaintiffs "must present affirmative evidence in order to defeat a properly supported motion for summary judgment."[178] *Liberty Lobby* "by its terms applies to all summary judgment motions, irrespective of the burden of proof required and the subject matter of the suit."[179]

In the context of summary judgment and transsubstantive bind, *Liberty Lobby* seems to require a "full-blown paper trial on the merits" instead of the expedited summary decision intended by the Rules,[180] and it "erode[s] the constitutionally enshrined role of the jury."[181] Many have argued that *Liberty Lobby* would make, and has made, a significant difference in the way that federal courts decide summary judgment.[182] And some have asserted that the opinion increases the likelihood that federal courts will grant summary judgment, especially when defendants are the movants.[183]

*Celotex* was the first of the summary judgment trilogy for which the type of claim (wrongful death) was not necessarily a primary consideration in the Court's decision.[184] In *Celotex*, the Court held that, if the nonmovant will bear the burden of proof at trial, a movant does not have to support its summary judgment motion with affidavits or any other evidence showing nonexistence of the facts that the nonmovant would need to support a dispositive issue.[185] Put differently, the Court made the burdens at summary judgment match the ultimate burdens at trial such

176. Anderson v. Liberty Lobby, 477 U.S. 242, 244 (1986). The Court also opined that the directed verdict and summary judgment standards are largely one and the same and, thus, the directed verdict standard applies to summary judgment motions. *Id.* at 250–52, 255. Although, prior to *Liberty Lobby*, some already understood summary judgment and directed verdict standards to "call upon the court to make basically the same determination," "mak[ing] the standards parallel has been energetically criticized as unsupported." WRIGHT & MILLER, *supra* note 149, § 2713, at 615; Marcus, *supra* note 161, at 741 n.91; *see* Miller, *supra* note 150, at 1057 n.393.

177. *Liberty Lobby*, 477 U.S. at 252.

178. *Id.* at 256–57.

179. *Id.* at 257–58 n.1 (Brennan, J., dissenting).

180. *Id.* at 266–67; Miller, *supra* note 150, at 1061.

181. *Liberty Lobby*, 477 U.S. at 266–68 (Brennan, J., dissenting); *see also* McGinley, *supra* note 170, at 222; Marcus, *supra* note 161, at 741–42, 771 n.202; Issacharoff & Loewenstein, *supra* note 153, at 85 (arguing that *Liberty Lobby* expands judicial assessment and weighing of evidence at summary judgment); Miller, *supra* note 150, at 1061, 1082–83, 1090 (criticizing the decision as allowing judicial encroachment on jury decisions); But the *Liberty Lobby* Court purported to reinforce both the role of the jury and that courts should not invade that role. *Liberty Lobby*, 477 U.S. at 255; *see* Schwarzer, Hirsch, & Barrans, *supra* note 150, at 488–89; McGinley, *supra* note 170, at 241 (discussing *Liberty Lobby's* holding, which expands the role of judges in the summary judgment process).

182. *See, e.g.*, *Liberty Lobby*, 477 U.S. at 265–68 (Brennan, J., dissenting); *id.* at 272–73 (Rehnquist, J., dissenting); Issacharoff & Loewenstein, *supra* note 153, at 84–85, 88.

183. *See, e.g.*, Issacharoff & Loewenstein, *supra* note 153, at 84, 88–89; Miller, *supra* note 150, at 1041.

184. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

185. *Id.* at 324.

that defendant–movants can more easily win summary judgment on plaintiffs' claims.[186] Such defendant–movants can "rel[y] solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file,'" but plaintiff–nonmovants would need to defend against the summary judgment motion with material outside of the pleadings.[187]

The *Adickes* Court held that, to prevail on a summary judgment motion, a defendant–movant needed to present evidence tending to negate an essential element of the plaintiff's claim and, more likely, that a defendant must prove the inexistence of such evidence, such that the defendant–movant would prove the absence of any genuine issue of material fact.[188] But, in *Celotex*, the Court, despite similar circumstances, made obtaining summary judgment easier for defendant–movants.[189] Some commentators read *Celotex* as allowing courts, in some circumstances, to grant summary judgment when a movant makes only a conclusory assertion that there is not evidence in the record to support an essential element of the plaintiff's claim.[190]

*Celotex* minimizes the initial burden on certain defendants moving for summary judgment.[191] This contravenes the purpose for defendant–movants bearing the burden of proof for their summary judgment motions. When there is evidence suggesting that the plaintiff–nonmovant may *have* sufficient evidence to establish the essential elements of their claim at trial, a defendant–movant's bare assertion that the plaintiff–nonmovant's evidence is insufficient should not be seen as fulfilling the defendant–movant's initial burden of production for summary judgment. Courts should only consider the defendant–movant's burden satisfied after

186. Issacharoff & Loewenstein, *supra* note 153, at 84. In the litigation context, what each litigant needs to show is generally referred to as their burden of proof (or burden). There are initial burdens (or burdens of production) and ultimate burdens (or burdens of persuasion). Initial burdens always lie with the movant. The initial burden of production is what a litigant needs to demonstrate to shift the burden to the opposing party. If the movant does not meet their burden of production, their motion fails. But if the movant meets their initial burden, the burden of production then shifts to the nonmovant. Depending on the context, the burden of production can shift between opposing parties multiple times. Ultimate burdens of persuasion, however, always remain with the movant because they are the threshold that the movant must meet to win on their motion. 21B WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 5122 (2d ed. 2023). In the context of summary judgment, the initial burden of production is the minimum that the movant needs to submit in support of their summary judgment motion. If the movant meets their initial burden, the burden of production shifts to the nonmovant and, to defeat the motion for summary judgment, the nonmovant must demonstrate that there is a genuine issue of material fact. 10A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 2727 (4th ed. 2016 & Supp. 2024); *Celotex*, 477 U.S. at 330–31 (Brennan, J., dissenting).

187. *Celotex*, 477 U.S. at 324. The Court clarified that the nonmovant could defend against summary judgment with material in a form that would not necessarily be admissible at trial. *Id.*

188. *See supra* notes 154–160 and accompanying text.

189. Miller, *supra* note 150, at 1041; Issacharoff & Loewenstein, *supra* note 153, at 84.

190. *Celotex*, 477 U.S. at 332, 337 (Brennan, J., dissenting) (opining that, in *Celotex*, the Court should have denied summary judgment, but did not do so even though "the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim," and "the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party").

191. *Id.* at 337 (Brennan, J., dissenting).

they at least successfully challenge the adequacy of the evidence that is in the record.[192]

Nevertheless, the impact of *Celotex* on summary judgment was not immediately clear because Justice White, who provided the fifth, and thus potentially controlling, vote for the majority, wrote a concurrence indicating that, on remand, the lower court should reevaluate whether the defendant had discharged its initial burden.[193] According to Justice White, "[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."[194]

Although jurists and scholars differ regarding whether the summary judgment trilogy cases individually,[195] or in conjunction, changed the face of summary judgment,[196] there is strong support for the notion that, when Rule 56 made clear the modern standards for summary judgment in 1938, the idea of summary decision and its availability were still widely debated.[197] When some thought that courts should determine the availability of summary judgment differently for specific types of cases and claims,[198] the Court largely either ignored or rebuffed those efforts[199]—this is a transsubstantive civil procedural system, and no specific types of cases are carved out as exceptions unless explicitly so specified. When civil rights defendants initially attempted to receive special treatment by having federal courts grant summary judgment to civil rights defendants who had merely alleged that there was no evidence to support an essential element of the plaintiff's claim in the record (when evidence tending to support that element actually was in the record), the Court responded forcefully in the negative,200 to the point that many thought that defendants moving for summary judgment would need to definitively prove not only the inexistence of evidence to support such an element, but also to negate the possibility of the element existing.[201]

192. *Id.* at 331–36 (Brennan, J., dissenting) ("[T]here is simply no question that Celotex failed to discharge its initial burden of production."); Mollica, *supra* note 164, at 161–62 ("Celotex was not free to ignore supporting evidence that the record clearly contained.").

193. *Celotex*, 477 U.S. at 329 n.1 (Brennan, J., dissenting); *see id.* at 328 (White, J., concurring); Marcus, *supra* note 161, at 741 n.89.

194. *Celotex*, 477 U.S. at 328 (White, J., concurring).

195. *See supra* notes 171–173 (discussing changes some noted due to *Matsushita*), 180–183 (discussing changes some noted due to *Liberty Lobby*), 189–192 and accompanying text (discussing changes some noted due to *Celotex*). *But see supra* note 166 (noting that the *Matsushita* opinion focused on the Sherman Act context), 193 (admitting that the impact of *Celotex* was not immediately obvious) and accompanying text.

196. *See, e.g.*, *supra* note 164 and accompanying text. *But see* Jonathan Remy Nash & D. Daniel Sokol, *The Summary Judgment Revolution That Wasn't*, 65 WM. & MARY L. REV. 389 (2023) (arguing that the trilogy seemed to have a limited effect transsubstantively).

197. *See supra* note 153 and accompanying text.

198. Wald, *supra* note 152, at 1904.

199. Despite the suggestion that summary judgment should be "off limits" for cases involving "antitrust, patents, negligence, civil rights," and for "important public issues" or "complex cases," there is not evidence that the Court created separate summary judgment rules or doctrine for these different types of cases. *See* Wald, *supra* note 152, at 1904–07.

200. *See supra* notes 154–157 and accompanying text.

201. *See supra* text and accompanying note 160.

Early on, many thought that *Matsushita*'s potential for federal courts to grant summary judgment against plaintiffs—merely because judges believed a defendant's theory seemed more likely than a plaintiff's theory—would be limited to *Matsushita*'s specific facts, or at least to complex antitrust conspiracy cases.[202] But *Liberty Lobby*, which, in some ways, seemed highly driven by its specific First Amendment libel context, made clear that its charge to consider summary judgment based on the substantive evidentiary standards at trial would apply to all civil claims, regardless of area.[203] And the *Celotex* Court said little that could be read to limit its holding to the specific wrongful death context, so there was no question that *Celotex*'s reasoning (including if interpreted as easing summary judgment for defendant–movants) extended to all civil litigation alike.[204]

Although federal courts had previously offered some protection to civil rights plaintiffs such as Sandra Adickes, the trilogy altered summary judgment doctrine across civil litigation. As a result, civil rights plaintiffs are now more likely to need to present their full evidence and trial strategy to survive a summary judgment motion. This may be required even if the defendant–movants do not point to the inexistence of, or even challenge the adequacy of, evidence in the record to establish an essential element of the plaintiff's claim.[205] And, even if a nonmovant plaintiff does comport with the full documentary dress rehearsal of trial, if a court finds the defendant's theory and evidence more likely, a civil rights plaintiff will most probably suffer a fate like the plaintiffs in *Matsushita*.

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202. *See supra* text and accompanying note 166.

203. *See supra* text and accompanying notes 176–179.

204. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

205. But some assert that summary judgment is not transsubstantive and, instead, summary judgment differs based on subject matter or type of claim. Steven Alan Childress, *A Primer on Standards of Review*, 293 F.R.D. 156, 211 (2013). *But see* Wald, *supra* note 152, at 1916 (noting that, in the D.C. Circuit, the effects of *Celotex* were noticeable in summary judgment in a wide range of types of cases).

The argument that summary judgment is not transsubstantive is overstated. Similar to every other area of civil procedure, what a nonmovant needs to show to demonstrate that there is a genuine issue of material fact can differ based on subject matter. Much like what someone needs to allege in pleadings to have a cognizable cause of action differs by subject matter or type of claim. But the same procedural rules still apply in all contexts unless an area is excepted. This means that, just like Rule 8 for pleading requires every complaint to contain a short and plain statement of the claim showing that the plaintiff is entitled to relief in order to survive a motion to dismiss, Rule 56 requires every movant (regardless of type of claim) to show that there is no genuine issue of material fact such that the movant is entitled to judgment as a matter of law in order to obtain summary judgment.

Many agree that the trilogy made a significant difference for summary judgment as a whole.[206] But some argue that the changes in summary judgment are due to other causes, not the trilogy; others posit that we do not know whether the trilogy had a significant effect on summary judgment; and still others propose that the effects of the trilogy are insignificant outside the area of antitrust conspiracy.[207] Many posit that federal courts have applied the trilogy harshly to civil

206. Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 847 (2018) (noting that summary judgment changed when the trilogy "ma[de] clear that summary judgment should be more widely used" and "expanded the availability of summary judgment"); Childress, *supra* note 205, at 210–11 ("The Court's 1986 trilogy of cases made clear that the Rule 56 motion was to be given new life and should not be hesitantly granted when appropriate. Any litigant dealing with summary judgment must be aware of this important development of pretrial procedure, the Court's 1986 trilogy of cases, their application in each circuit, and the directions they continue today."); Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 628 nn.2–3 (2012) (noting that the trilogy "endorsed a broader and more frequent use of summary judgment and refined summary judgment doctrine in ways facilitating its greater use" and noting that lower federal courts applied this "more expansive approach to summary judgment"); Schneider, *Changing Shape*, *supra* note 4, at 537 & n.107, 541–45 (noting that the trilogy "provided impetus and encouragement to district courts to grant summary judgment more frequently" and that district courts heeded that call); Schneider, *supra* note 152, at 706–11, 706 n.8 (noting that federal judges became "more likely to grant summary judgment" after "the trilogy . . . encouraged district judges to view summary judgment as an appropriate and important vehicle to dispose of cases"); Miller, *supra* note 150, at 1048; Wald, *supra* note 152, at 1914–17; *cf.* 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, 2609–10, 2610 nn.113–14 (2021) (noting that summary judgment has "been used increasingly since the 1970s" and that the trilogy "praised the summary judgment procedure and encouraged the lower courts to use it more readily").

207. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, *supra* note 144, at 1689 (noting that available data did not demonstrate whether the trilogy changed summary judgment such that it significantly affected litigation or "erode[d] plaintiffs' access to justice in meritorious cases"); Childress, *supra* note 205, at 2610 n.114 (noting that some posit that the expansion in summary judgment may have had causes other than the trilogy); Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado about Very Little*, 43 LOY. U. CHI. L.J. 561, 584 (2012) (arguing that *Celotex* "has had small impact on the ways in which judges analyze and decide summary judgment motions" and noting studies showing that "the disposition rates (that is, favorable grants of summary judgment motions) have not increased in statistically significant ways in the aftermath of the trilogy"); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, J. EMPIRICAL LEGAL STUD. 591, 617–20 (2004) (noting that "the rate of case termination as a result of summary judgment rose substantially in federal first-instance courts as a whole in the period from 1960 to 2000," but it "may be that summary judgment has not contributed to the vanishing trials phenomenon in federal civil cases in some courts and/or some types of cases but that it has been a major driver in other courts and/or other types of cases" and that it does not seem that the 1986 trilogy was a turning point for summary judgment); Wald, *supra* note 152, at 1941 (noting that managerial judging and busy dockets also play a role in increasing use of summary judgment). *But see* Lahav, *supra* note 206, at 848 (explaining that, even though the likelihood of a litigant bringing a summary judgment motion increased before the trilogy, *Celotex* changed the way many understood summary judgment to move from "requir[ing] the defendant to demonstrate that she would prevail at trial" to significantly "lightening that burden" or "plac[ing] 'essentially no burden at all on a defendant seeking summary judgment'" (quoting Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 120 (2006), and noting that Professor Steinman disagrees with and argues against this interpretation of *Celotex*)).

rights and discrimination claims.[208] After the trilogy, some have argued that the influences of racial and other biases can be seen in summary judgment, particularly in the context of claims alleging police brutality.[209]

Looking at key post-trilogy summary judgment opinions in police violence[210] cases helps fill out our understanding of the role of transsubstantive bind in

208. Lahav, *supra* note 206, at 848–49 (noting that there are more concerns about the use of summary judgment in civil rights cases than in litigation generally and noting that there is support for the idea that federal courts treat civil rights cases differently than other litigation in ways that are more defendant-protective); Stempel, *supra* note 206, at 631 (characterizing scholarship suggesting that changes in summary judgment have been especially challenging for civil rights and discrimination claims as "particularly compelling"); Schneider, *Changing Shape, supra* note 4, at 541–45; Schneider, *supra* note 152 (noting the dangers of bias involving summary judgment in sex discrimination cases and other cases where women are plaintiffs); McGinley, *supra* note 170, at 206–09, 228–42 (noting that the trilogy has had a "profound effect of increased use of summary judgment in defeating civil rights claims" because the trilogy made "it easier for defendants to obtain summary judgment in cases of at least arguable discrimination"). But some courts of appeals have been described as hesitating to grant summary judgment in discrimination or civil rights cases. *See, e.g.,* Childress, *supra* note 205, at 212 ("[I]n discrimination cases involving state of mind, the Second Circuit has called for a 'sparing' use of summary judgment. . . . The Ninth Circuit has cautioned . . . that the 'implausibility inquiry' does not apply to true credibility calls and has called for a 'high standard for the granting of summary judgment' in discrimination cases.") (internal citations omitted).

209. *See* Purcell, Jr., *supra* note 206, at 2610–11; *cf.* Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 FORDHAM L. REV. 2241, 2252 (2018) (discussing susceptibility of summary judgment to racial biases); Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020).

210. Terms including "police misconduct," "police brutality," "police violence," and "excessive force" are a part of a wide array of terminology for referring to various police behaviors, some of which are crimes, including assault, battery, or even murder. When referring to law enforcement carrying out such behaviors, Professor Peter Davis suggests, instead, using a term such as "police criminality" to avoid further decriminalizing police behaviors. Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 286 (1994); *see also* Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1, 53 n.248 (2018).

Because the focus of this Article is civil litigation, I tend to use the terms "police brutality" and "police violence" interchangeably, instead of "police criminality," to refer to police-imposed Fourth Amendment violence, violations, and misconduct. I do so because the behaviors at issue may sometimes include crimes but sometimes do not and are not alleged to do so. Because these are civil claims, plaintiffs need to meet a much lower threshold to prevail on their claims than would occur in criminal prosecution. I worry that, in a society that already decriminalizes police criminality, referring to civil claims of police brutality and violence as "police criminality" would likely serve to raise the bar of evidence and proof that such civil plaintiffs seemingly must establish and may leave victims and survivors of police-imposed criminality and violence with a lower chance of prevailing on their civil claims, especially given the already low likelihood that the police perpetrators will be prosecuted, tried, convicted, and sentenced appropriately in the criminal system. *Cf.* Davis, *supra*, at 286 (positing that the decriminalization of police brutality in the U.S. involves holding the police to a less stringent standard of behavior to be considered criminal than others who engage in the same behaviors). In this Article, I sometimes use the terms "police officer" or "law enforcement officer" to refer to police officers, sheriffs, sheriffs' deputies, state patrol officers, or others involved in local and state aspects of the U.S. carceral state for what is typically referred to as law enforcement. *See* Rachel Moran, *Scofflaw Law Enforcement*, 69 WAYNE L. REV. 31, 32 n.3 (2023) (using the term "law enforcement officer" for police offers, sheriffs' deputies, and others responsible for enforcing laws); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 2 (2016) (referring to "America's carceral state: the police, sheriffs, and marshals responsible for law enforcement").

procedural subordination.[211] The two types of claims relevant for this discussion are: (1) claims brought against an individual officer under 28 U.S.C. § 1983 alleging police violence that violated the plaintiff's constitutional rights; and (2) § 1983 claims brought against municipalities alleging that the local government's law enforcement customs or practices caused police violence that violated the plaintiff's constitutional rights.[212] The major case relevant to this inquiry is *Scott v. Harris*.[213] A Georgia county deputy saw Victor Harris, a Black man,[214] speeding while driving and attempted to have Harris pull his car over, but Harris did not pull over, and, instead, continued to drive away above the speed limit.[215] Timothy Scott, who joined the pursuit at some point after the first deputy initiated the chase, rammed his police car into Harris' car, rendering Harris a person with

211. I set aside discussion of qualified immunity in police brutality cases because such immunity is defined as a substantive issue, not procedural.

In police brutality cases, qualified immunity jurisprudence requires that police officers not be subject to trial unless their conduct violated "clearly established" rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, in that context, the inquiry that determines whether a court grants summary judgment in favor of the officer due to qualified immunity is typically a question of whether the officer violated "clearly established" law. *Id.* If a court finds the officer's actions reasonable, then the officer did not violate clearly established law and the court will grant summary judgment. Courts determine whether the plaintiff has presented a law (or right), as well as whether a reasonable officer would have believed that the law was clearly established, whether a reasonable officer would have viewed the plaintiff as a threat such that the force would be justified, or whether a reasonable officer would have viewed the actions that the officer took as violating law. *See* Ziglar v. Abbasi, 582 U.S. 120, 152 (2017) (citing Saucier v. Katz, 533 U.S. 194, 202 (2001)).

To avoid the substantive realm of qualified immunity, I will explore how the courts involved determined facts for the purpose of the summary judgment motion, according to FED. R. CIV. P. 56 and the summary judgment trilogy. I will not analyze whether those facts constitute a Fourth Amendment violation, meaning whether the officers' actions were reasonable, or whether the violated right was "clearly established."

212. Schwartz, *supra* note 209, at 1550–51, 1550 nn.38–39. In *Monell v. Dep't of Social Services*, the Supreme Court held that entities could bring civil rights claims against municipalities under 42 U.S.C. § 1983. 436 U.S. 658, 693 (1978). The Court also provided the elements of making such a claim, now known as a *Monell* claim. Civil plaintiffs in police violence litigation most commonly allege a Fourth Amendment violation due to excessive force resulting in unreasonable seizure, but they sometimes also allege a Fourteenth Amendment violation, claiming that the excessive force was due to racial or other discrimination, which caused a lack of equal protection under the law. *Id.*

213. *Scott*, 550 U.S. at 381–85 (explaining that Scott, the police officer, did not violate Harris' Fourth Amendment rights).

214. Pedro, *supra* note 3, at 148 n.14 (citing sources indicating that Victor Harris was Black); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 648 n.114 (2018) ("The Court does not mention Victor Harris's race, but Harris is described as a nineteen-year-old African American male in other sources" and noting that Harris appears African American, or Black); Stempel, *supra* note 206, at 642 n.66 ("We know that Harris is black and Scott is white because they both appear (separately) in a most affecting video in which they give their respective accounts of the incident."); VIC2K3, *Why I Ran.* (YouTube, Dec. 8, 2009), https://www.youtube.com/watch?v=JATVLUOjzvM (featuring interview with Victor Harris) [https://perma.cc/3F4F-8CUM].

215. *Scott*, 550 U.S. at 374–75.

quadriplegia.[216] Harris sued Scott, a white county deputy,[217] and others under § 1983 for excessive force. The trial court denied Scott's motion for summary judgment and the Court of Appeals affirmed in relevant part.[218]

In 2007, the Supreme Court in *Scott v. Harris*[219] not only confirmed that the changes to summary judgment adopted by the Court in *Matsushita* and *Liberty Lobby* had extended to Fourth Amendment police violence cases, and presumably every other type of claim and litigation not explicitly excepted by rule or statute, but also took what some saw as the extreme holding in *Matsushita* even further.[220]

The Court recited the requirement from *Diebold* that, at summary judgment, "courts are required to view the facts and draw inferences 'in the light most favorable to the party opposing the [summary judgment] motion,'"[221] and correctly noted that "[i]n qualified immunity cases, this usually means adopting (as the

216. *Id.* Although Victor Harris's filings referred to him as "a quadriplegic," because I do not know how Harris would prefer his quadriplegia to be referred to some twenty years later given the changes in language due to the disability-rights and disability-justice movements, I will use a people-first ("person with quadriplegia") or identity-first term ("quadriplegic person") instead of using "quadriplegic" as a noun. Complaint at 23, Harris v. Coweta County (N.D. Ga. 2001) (No. 01-148); *see supra* note 37. It seems that Victor Harris passed away in 2018, so I cannot ask his preferences on terminology. *Obituary for Victor Harris*, THE ATLANTA J.-CONST., Sep. 7, 2018, at B6 (reporting that Victor Harris of Decatur, Georgia, died on September 3, 2018); *Disability Language Style Guide*, NAT'L CTR. ON DISABILITY & JOURNALISM, https://cronkite.asu.edu/ncdj/disability-language-style-guide [https://perma.cc/LE2P-B85V] (last visited Feb. 6, 2025); *UIC Inclusive Language Guide*, UNIV. OF ILL. CHI., https://marketing.uic.edu/marketing-toolbox/university-style-guide/inclusive-language-guide/ [https://perma.cc/L8V9-SVWJ] (last visited Feb. 6, 2025); *What Do I Say? A Guide to Language about Disability*, PEOPLE WITH DISABILITY AUSTRALIA, https://pwd.org.au/wp-content/uploads/2019/08/PWDA_LanguageGuide_A5_WEB.pdf [https://perma.cc/CZK2-43BW] (last visited Feb. 6, 2025); Jamelia N. Morgan, *Caged in: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 117–18 (2018); Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 969–70 (2019).

217. Pedro, *supra* note 3, at 148 n.14 (citing other sources indicating that Timothy Scott was white); Stempel, *supra* note 206, at 642 n.66 ("We know that Harris is black and Scott is white because they both appear (separately) in a most affecting video in which they give their respective accounts of the incident."); VIC2K3, *supra* note 214 (featuring interview with Timothy Scott) (although it is not indicated as such, it seems that the video contains content from WHY I RAN*: Christie/Victor* (A&E television broadcast, aired Oct. 12, 2008)) [https://perma.cc/3F4F-8CUM].

218. *Scott*, 550 U.S. at 376. Scott moved for summary judgment on the basis of qualified immunity. *Id.*

219. *Id.*

220. In addition to the *Scott v. Harris* majority citing to *Matsushita* and *Liberty Lobby*, some describe *Scott v. Harris* as continuing the trilogy's "transformation" to substitute summary judgment for trial. *Id.* at 380; *see, e.g.*, Lahav, *supra* note 206, at 851; Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1352 (2015) (arguing that the opinion "appears to erase the presumption in favor of non-moving parties altogether" and "push toward a requirement that the plaintiff identify a single 'version of the facts' in opposing a summary judgment motion, rather than being able to rely upon the more expansive range of possibilities"). Separately, some note that the Court adopted yet another new rule, related to the substantive determination of what police actions constitute constitutional violations. Note, *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706, 1723–24 (2009) (noting that the *Scott v. Harris* Court also included what it described as a new rule that specified circumstances under which police violence never violates the Fourth Amendment).

221. *Scott*, 550 U.S. at 378 (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

Court of Appeals did here) the plaintiff's version of the facts."[222] But the Court, with *Matsushita*-esque reasoning, credited the facts as presented by the movant, Scott, and declined to adopt the facts as Harris, the nonmovant, presented them. Because the majority thought that the videotape of the pursuit "clearly contradict[ed] the version of the story told by [Harris, the nonmovant,] and adopted by the Court of Appeals," the Supreme Court held that "no reasonable jury" could conclude that there was a genuine issue of material fact regarding whether the use of force in this context could be excessive.[223]

The Court also introduced a qualification to the principle from *Diebold* in a way that distorted the principle into circularity.[224] The Court noted that, "[a]t the summary judgment stage"—when courts are determining whether there is a genuine issue of material fact—"facts must be viewed in the light most favorable to the nonmoving party *only if* there is a 'genuine' dispute as to those facts."[225] But determining whether there is a genuine dispute as to those material facts *is* the primary summary judgment inquiry. It seems impossible for a court to view facts in the light most favorable to the nonmovants in order to determine whether there is a genuine dispute as to a material fact if a court can only view a fact in the light most favorable to a nonmovant if the court first determines that there is a genuine

222. *Scott*, 550 U.S. at 378. *But see* Wolff, *supra* note 220, at 1360 (pointing out that the Court conflated the two concepts).

223. *Scott*, 550 U.S. at 378–81, 386.In addition to changes due to the summary judgment trilogy, the Court's decision in *Scott v. Harris* likely also influenced by cognitive illiberalism coinciding with the availability of video. *See* Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838, 842–43, 895–97 (2009). Cognitive illiberalism, likely coined by Professor Dan Kahan, refers in this context to the psychological disposition of the Justices to view facts in a way that supported their group identities while not understanding that their own perceptions were value-motivated and perceiving any other view of the facts as entirely unreasonable. *Id.* Cognitive illiberalism is part of looking at cultural cognition within judicial decisionmaking. Stempel, *supra* note 206, at 635, 645–47 (discussing cognitive illiberalism as "part of a broader cultural cognition project" and mentioning Kahan's "coinage of the term"). Professors Kahan, David Hoffman, and Donald Braman posit that group identities "such as race, age, socioeconomic status, education, cultural orientation, and party affiliation all affected the viewer's interpretation of the video" in *Scott v. Harris* and that people in a group have a decreased ability to recognize that people who are not in that group and who are, instead, in other identity groups might have a different perspective. Developments in the Law, *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1813 (2015); Kahan, Hoffman, & Braman, *supra*, at 837, 838, 842–43, 895–97.

224. Wolff, *supra* note 220, at 1359 (calling the *Scott v. Harris* reformulation of the standard "shocking" and noting that it "would swallow the entire standard if taken seriously and applied as written").

225. *Scott*, 550 U.S. at 380. For this particular formulation of the principle from *Diebold*, the *Scott* majority only cites to Federal Rule of Civil Procedure 56. *Id.* Perhaps, the Court does so because it is citing to the Rule's genuine dispute of material fact language; there is clearly nothing else in the Rule that supports the proposition that, at summary judgment, the only circumstance under which judges should view facts in the light that favors the nonmovants is when the nonmovants have already proven that there is a genuine issue of material fact. *See* FED. R. CIV. P. 56.

dispute as to those facts.[226] *Diebold* and countless Supreme Court opinions since have noted that, when making that inquiry, federal courts must view the facts in the light most favorable to the nonmovant.[227]

Much like in *Matsushita*, the Court in *Harris* arguably called for judges to weigh evidence and assess probability,[228] to make inferences only properly made after a full trial and by the factfinder or jury,[229] and to deliberately disregard evidence contrary to their presumptions and the theory that they think is most likely. A danger more unique in the context of police brutality litigation than for other areas of laws more broadly is that the nonmovants disproportionately are (or are perceived as being) members of marginalized groups (Black, people of color, etc.), and the movants are always law enforcement officers or municipalities whose customs or practices purportedly caused the law enforcement violence at issue. Therefore, when federal courts move away from adopting the nonmovant–plaintiff's version of the facts in police brutality cases and in civil rights and employment discrimination cases, instead of only in antitrust conspiracy cases, the transsubstantivity of civil procedure binds already marginalized communities to decisions initially made only for antitrust conspiracy cases in a way that furthers procedural subordination.

### *B. Procedural Identity*

The second aspect of civil procedure that could contribute to procedural subordination is what I call procedural identity. Procedural identity is the idea that, over time, procedure may develop in a way that reinforces within litigation preexisting social subjugation based on litigants' actual or perceived membership in communities of color or other marginalized groups.[230] When plaintiffs in certain cases or types of claims tend to be, or are perceived as disproportionately being, people of color or members of other marginalized groups, procedural rules and

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226. Wolff, *supra* note 220, at 1359 (opining that "[t]he entire question in a summary judgment motion is whether there is a 'genuine' dispute of material fact"). This new version of the standard:

> "is the equivalent of saying that the non-moving party is entitled to this deference only if he can first show that he will prevail on the motion. A genuine dispute of fact is the very thing concerning which the non-moving party is entitled to have every reasonable inference drawn in his favor. If the non-movant were required to demonstrate a genuine dispute of fact before enjoying the benefit of that deference, then the non-movant would enjoy no deference at all-as, indeed, appears to have happened in *Scott*."

*Id.*

227. *See, e.g.*, *supra* notes 151, 157, 159, 221 and accompanying text.

228. Lahav, *supra* note 206, at 851 ("Rather than requiring that the video be viewed in the light most favorable to the nonmoving party, [in *Scott v. Harris*] the Court simply interpreted the video."); Stempel, *supra* note 205, at 633 n.19.

229. Lahav, *supra* note 206, at 851; Stempel, *supra* note 206, at 633–34, 640–41 n.19; Schneider, *Changing Shape*, *supra* note 4, at 547; Schneider, *supra* note 152, at 720.

230. Procedural identity could also operate, or be viewed and discussed, in a converse manner such that, due to the privileged status of defendants in certain cases or types of claims, the rules and doctrine may develop in a way that makes it easier for defendants to defend against that type of claim such that the claims do not survive procedural hurdles or reach trial.

doctrine for those types of cases or claims may tend to shift such that it is more difficult for that type of claim to survive procedural hurdles and reach trial. Due to procedural identity, there may be a new baseline, a new norm, of pushing litigation out of court by not providing the standard procedure or protections in cases to protect the interest of marginalized communities. This may be particularly true when the defendant is also representative of hegemonic interests (such as a governmental entity). Here, I introduce the idea of procedural identity and suggest strategies for litigants and courts to discuss the role of identity in the development of procedural standards.

In circumstances where we expect that the marginalized identity of a litigant has played a significant role in the development of the procedural rule, doctrine, principle, or precedent, perhaps we should approach the validity, fairness, and, hence, the enforcement of the rule with a significant amount of skepticism. Maybe in such circumstances, we should discard the procedural mechanism that reinforces subjugation and attempt to create a new procedure that, at the very least, is not going to disfavor claims and litigation brought to benefit marginalized groups.

*1. Summary Judgment in Police Violence Cases*

The standard for summary judgment in police brutality cases is an example of procedural identity. Generally, the federal standard post-trilogy is that courts ostensibly must grant summary judgment if the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law,"[231] and the movant, ultimately, has the burden of persuasion to establish that summary judgment is warranted. When making this determination, courts must view all facts, and make all reasonable inferences, in the light most favorable to the nonmovant.[232] Many have expounded on the importance of the summary judgment standard and the principles behind it. Federal courts do not grant summary judgment unless there is no genuine dispute of material fact such that the movant is entitled to judgment, in large part because granting summary judgment to defendant–movants when there is a genuine dispute of material fact would deprive plaintiffs of bringing meritorious claims through trial and, in some cases, would summarily deny plaintiffs remedies for their meritorious claims. No case in the summary judgment trilogy claimed to have altered these requirements for summary judgment, nor is it argued that they explicitly did so.

Plaintiffs in police brutality cases tend to be members of, or are perceived as disproportionately being members of, communities of color, and Black in particular,[233] and defendants tend to be police officers, police officials, and governmental entities. Scholars have posited that race influences summary judgment

231. FED. R. CIV. P. 56 (a); *see supra* note 150 and accompanying text.

232. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); *see supra* text and accompanying notes 151, 157-159, 221-222.

233. For purposes of brevity, I forego similarly striking analyses regarding police violence and other marginalized groups, such as people with disabilities, people with mental health issues, transgender people, and poor people.

decisionmaking in the context of police violence.[234] In applying the general standard to typical § 1983 police violence litigation, when defendant-police officers move for summary judgment, courts should grant summary judgment only if officers demonstrate that "there is no genuine dispute as to any material fact" and that they are entitled to judgment as a matter of law.[235] To determine whether there is a genuine dispute as to any material fact when officers have moved for summary judgment, courts should consider the record "in the light most favorable" to plaintiffs and should draw every reasonable inference in favor of plaintiffs.[236] That would be consistent with the summary judgment standard for all litigation. In the context of police violence cases, however, where plaintiffs tend to be, or tend to be seen as, disproportionately Black people and people of color, procedural identity has nearly flipped this standard favoring the nonmovants (plaintiffs in such cases) on its head.

Thus, the standard begins by favoring the nonmovant and only granting summary judgment where the movant demonstrates that there is no genuine issue of material fact (and that they are entitled to judgment as a matter of law). But, perhaps due to procedural identity, when in the context of police brutality, the standard switches to favoring police officers or the city when determining whether there is a genuine issue of material fact instead of favoring plaintiffs, who are or are perceived as, tending to be people of color.[237]

To see procedural identity at work, I offer some key police violence summary judgment cases where race was especially salient: *Scott v. Harris* and the lower court opinions in *Tolan v. Cotton*.[238] In these two cases, the plaintiff–nonmovants, who were also victims/survivors, were Black, and the defendant–movants, who were also police officer perpetrators of violence, were white.[239] In *Scott v. Harris*, instead of viewing all facts and making all reasonable inferences in the light most favorable to the plaintiff–nonmovant victim/survivor, the Court announced a complete reformulation of that rule, stating that, when determining whether there is a genuine issue of material fact, courts must view facts "in the light most favorable to the nonmoving party *only if*" the plaintiff–nonmovant has already established that "there is a 'genuine' dispute as to those facts."[240] Beyond this reformulation

234. *See, e.g.*, Purcell, Jr., *supra* note 206, at 2612–13; Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking,* 85 S. CAL. L. REV. 313, 346–47 (2012) (discussing effects of the race of judges and plaintiffs on summary judgment grant rates); *see also supra* note 208.

235. *See* FED. R. CIV. P. 56 (a); *supra* note 150and accompanying text.

236. *See Diebold*, 369 U.S. at 655; *supra* note 151 and accompanying text.

237. In pointing this out, I do not make any claims regarding the accuracy of the plaintiff as opposed to the defendants (typically police officers or cities). *Cf.* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1155 (2008) (declining to decide whether outsider perspectives were more accurate than insider perspectives where unnecessary for an argument).

238. Tolan v. Cotton, 572 U.S. 650 (2014).

239. *See supra* notes 214, 217, *infra* note 245, and accompanying text. By mentioning the race and ethnicity of these parties, I do not imply that defendant–movants in police violence litigation need to be disproportionately white, or be perceived as such, for procedural identity to obtain.

240. *Scott*, 550 U.S. at 380; *see supra* notes 224–225 and accompanying text.

of the standard not making logical sense,[241] it also means that plaintiff–nonmovants in the police violence context will rarely, if ever, get the benefit of facts and interpretations being viewed in the light most favorable to them. Because police violence summary judgment decisions are often fact-dependent, this means that nonmovant–plaintiff victims/survivors will often lose their cases at summary judgment because facts and inferences that would be drawn in their favor in another context are drawn against them due to their procedural identity.

Now, essentially, instead of the general rule that the movant has the burden of establishing that summary judgment is warranted, in police violence litigation, the nonmovant–plaintiff has "the burden of negating the assertion of qualified immunity."[242] Thus the rule, standard, and principles, which would generally be pro-plaintiff–nonmovant in any other context, have changed in this specific context to be pro-defendant–movant where defendants are often law enforcement officers alleged to have inflicted violence on Black people and people of color.[243] But courts may not explicitly mention race (or marginalized-group status) in written opinions, perhaps as part of being "polite"—pretending not to even be aware of race in the situation—or perhaps because they do not think race (or marginalized-group status) was important or do not want to portray it in that way.[244]

Where courts do not explicitly discuss race as part of their reasoning, they sometimes use proxies for race as substitutes, and those proxies can play significant roles in courts' decisions and, especially, in decisions reversing the typically pro-plaintiff–nonmovant standard and principles of summary judgment to be pro-defendant–nonmovant. For example, in *Tolan v. Cotton*, every court opinion granting, or affirming, summary judgment for the white officer (Cotton) because

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241. *See supra* notes 224–226 and accompanying text.

242. Purcell, Jr., *supra* note 206, at 2615. The *Tolan* lower court opinions show that:

> [A]n officer who moves for summary judgment on qualified immunity grounds "does not have the burden to establish it." Instead, it is the plaintiff who carries the burden of negating the assertion of qualified immunity. Those rules combine to essentially reverse the fundamental principle of summary judgment that "the facts and inferences to be drawn from them must be reviewed in the light most favorable to the nonmoving party.

*Id.* at 2616 (quoting Tolan v. Cotton, 854 F.Supp.2d 444, 462–63 (2012)).

243. Purcell, Jr., *supra* note 206, at 2616–18 (noting that the *Tolan* lower courts' "pro-police nature" to "dismiss the relevance of every fact that was unfavorable to the police" was predetermined by: (1) requiring the officer's actions to "be judged from the perspective of a reasonable officer on the scene"; (2) considering the very brief time window of the officer's immediate observations that led them to shoot to be the only relevant factual information; and (3) "repeatedly dr[awing] inferences in favor of the police officers while improperly dismissing the contradictory testimony that the Tolans presented" (quoting Tolan v. Cotton, 713 F.3d 299, 306 (2013)).

244. Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404 (2012); *see* Purcell, Jr., *supra* note 206, at 2632–36; Stempel, *supra* note 206, at 642–43 ("Quite amazingly, not one of the thirteen judges and Justices who reviewed the [*Harris*] case noted that Harris was African American while Scott was white. Surely, a reasonable jury could take this into account in deciding whether the force used by Scott, perhaps motivated by racial animus as well as anger over the damage to his vehicle, upset at what appeared to be scofflaw behavior, and agitated because of the adrenaline rush of the chase was excessive under the circumstances. The prospect that police in a state in the Deep South might be unduly aggressive when dealing with a black motorist in flight certainly cannot be dismissed and may help, along with other contextual factors, explain why Scott took action that seems (at least in retrospect) so excessive relative to the situation.").

no reasonable jury could find for Robbie Tolan also mentioned that Robbie Tolan was wearing a "hoodie" when Cotton shot him.[245] The Supreme Court did not address this reference in its opinion, even though stating that Robbie Tolan was wearing a "hoodie" was likely a proxy for stating that Robbie Tolan is Black. However, this likely proxy for race was part of what I call Robbie Tolan's "procedural identity," and it may be a key component of how courts make procedural decisions and shape procedural standards.

Thus, procedural identity may play a role in police violence cases, where Black people and people of color are disproportionately the plaintiffs, or are perceived as such, to make the procedural standard more difficult for plaintiff–nonmovants to survive summary judgment than is generally true for nonmovants outside of this raced area. Some argue that the differences in the summary judgment context for police brutality litigation do not have as deleterious an effect as might be expected, others dispute that. Regardless, the standard seems arguably different in important ways that counter the ideal dynamics of litigation in a way that furthers procedural subordination. Due to this happening iteratively and in ways for which the mechanism and effects are not fully clear, those serious about victims/survivors of police violence having at least the same procedural protections as other plaintiffs should advocate for specific protective rules explicitly for police violence litigation that reinstate the protections they should have. Merely arguing over whether a court is implementing the summary judgment standard as it should be is not going to solve issues due to procedural identity.

## III. CONCEALING CHARACTERISTICS OF PROCEDURAL SUBORDINATION

This Part describes aspects of the manner in which the procedural subordination mechanisms described above—transsubstantive bind and procedural identity—may go largely undetected, even by many who care about equality, fairness, and access to the civil litigation system. The concepts of order of retrenchment and judicial innocence, described below, are not specific to civil litigation, but there may be aspects of civil procedure that are especially conducive for the order of retrenchment and judicial innocence to mask procedural subordination.

### *A. Order of Retrenchment*

The order of retrenchment is the idea that the most significant instances of procedural retrenchment may tend to occur in a particular order.[246] The typical order may first impose new procedural obstacles, or remove procedural

245. *See* Purcell, Jr., *supra* note 206, at 2634–35 (noting that lower courts "readily accepted" the nonmovant–defendant-officer's justification for shooting that rested on "exploiting the racially loaded fact that Robbie was wearing a 'hoodie'—a commonly understood term associated with young Black men—to explain why Robbie seemed so dangerous" and that "Cotton's [hoodie] explanation was a classic example of the use of racially-evocative language to associate Black people with danger and violence"); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 10, 150, 203 (2017) (noting the connections between Black men wearing hoodies and police suspicion).

246. This concept might not hold true or be as prevalent in the current Trump presidential and judicial era.

protections, for litigants who are in groups that are not, or are not perceived as, the prototypical civil rights groups, before expanding to more traditionally-recognized civil rights groups, before expanding, perhaps, to all litigants. Before that first step, there is likely a "step zero" where there is a new procedural obstacle, or an eliminated protection, that might seem to be limited to the facts, or context, in a specific case. By "step zero," I mean an initially isolated doctrinal shift with broader implications for retrenchment that are not yet apparent. In this first departure, the claims and litigants are likely to be unconnected and unrelated to marginalized communities or litigation typically brought to benefit those communities. At that step zero point, many may assume that the change is not universally applicable and others may wonder.

At the time of a step zero, one cannot be sure if a step zero change will proceed through the rest of the order of retrenchment. It may be that some procedural changes start and end in areas that are largely unrelated to members of marginalized groups. Afterward, it is much easier to establish whether a case that did not explicitly involve civil rights or any marginalized group, and that maybe only involved one type of issue or claim, was nonetheless a step toward a change for procedure transsubstantively or toward procedural subordination. Step zero often appears in corporate litigation. In those cases, courts may adopt a neoliberal shift in procedure to accept the hegemonic theory of the case as the only valid perspective. As Professor Wendy Brown explains, in U.S. neoliberalism, the market, through whatever version of rational-choice theory is accepted by decisionmakers at the time, is *the* site for establishing truths that then govern, and even for establishing what reality itself is.[247]

The general ordering of procedural subordination likely follows this direction, where a change that rescinds an existing procedural protection or imposes a new procedural obstacle is:

- adopted in a case perceived as unrelated to marginalized groups or civil rights issues and, perhaps, in a context that seems in some way unique such that the change may be or seem limited to a specific type of claim, litigant, or unique circumstances;[248]

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247. BROWN, *supra* note 31, at 67–68 ("generalizing [the economic form of the market] through the social body and including the whole of the social system" transforms rational-choice theory into "the hegemonic model for social-science knowledge," which contributes to "the erasure of intelligible, legitimate alternatives to economic rationality" (quoting MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–79, at 243, 268–69 (Michel Senellart ed., Graham Burchell trans., 2004)) (alteration in original)).

248. There could be a question of whether there tends be another explanation, on its face unrelated to marginalized groups, for why a court is deciding as it is in these step zero cases—perhaps preventing the defendant from spending on extraneous discovery. But I posit that what is occurring in these cases is not exactly managerial judging; it is neoliberal judging. It is not primarily about the judge's time or docket pressures; it is often explicitly about the costs of discovery in cases that meet the current standard for litigation continuing.

Another explanation would be to serve actual or perceived neoliberal interests. Those interests include adopting the premises, assumptions, or theories of schools of economic thought that reinforce neoliberal hegemony as inherent or natural truths with such strong likelihood as to render any competing notions implausible even if they have logical possibility. This might be part of why this

- extended to claims brought to benefit "groups perceived as more vulnerable, smallest, [despised, suspect,] or 'fringe' (e.g., the transgender community) or more recently recognized rights (such as marriage equality)";[249]
- then, spread to claims brought to benefit "marginalized groups perceived as stronger, larger, or more traditional (such as Black people or women) or much longer recognized civil rights (such as the rights to free speech or voting)";[250]
- and may, then, extend to claims and plaintiffs generally, including white heterosexual cisgender male plaintiffs, and plaintiffs whose litigation is not necessarily brought to benefit any particular group;[251]
- but there may be a significant likelihood that the retrenchment (or subordination) will not negatively affect plaintiffs whose litigation would likely benefit extremely privileged groups (perhaps including large corporations).[252]

This is not to say that the order of retrenchment is intentionally strategized, but, when procedural subordination often requires at least two judges (for a court of appeals' panel), a plurality or majority of a circuit's judges (if sitting en banc), or a plurality or majority of Supreme Court Justices, procedural subordination occurring first with a disfavored group might be something of a path of least resistance (in comparison with litigants from other groups).

As many successful civil rights impact litigation strategies have revealed, who litigants are matters. But organizations and lawyers cannot always choose plaintiffs with whom U.S. society generally identifies or who are well-resourced. If, in some prior litigation, it worked to first recognize a right (and violation of that right) for a man as a path toward eventually recognizing the same right (and violation of that right) for a woman, then perhaps that is a partial explanation for why the inverse of the strategy might work best for clawing back procedural protections.[253] The earlier case would impose a new procedural hurdle for a member

step in the order of retrenchment may often include business entities and might often support a party accused of illegal antitrust or monopolistic behavior.

249. Pedro, *supra* note 4 (internal citations omitted). For a discussion of these groups, see *supra* Part I.B.3.

250. *Id.*

251. For explorations of the effects of class, poverty, and pro se representation, including for white litigants, see Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019); *cf.* Harris, *supra* note 40, at 6–8 (noting that racially hierarchical, neoliberal paradigms have hurt white working-class interests). Some may be satisfied with, or even choose, procedural subordination that operates against all litigants, including white people, due to a hope that whiteness will serve as protection or due to the promise of the "wages of whiteness"—supplementation of poor procedural protections with the promises of relative "material advantages," safe movement through public spaces, and being represented by, and receiving the responsiveness of, "the coercive apparatus of the state—police, the courts, law." *Id.* at 6–7 (citing W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION (1935)).

252. The order of retrenchment is similar to the inverse of a successful strategy used in civil rights litigation by Justice Ruth Bader Ginsburg when she was a lawyer—for example, to litigate for white men's rights in order to use that victory to advocate for women's rights.

253. *See supra* note 252.

of an ungrievable group and, only later, extend that new procedural hurdle to more powerful groups (such as women or Black voters). So it may be that stronger or more sympathetic groups, and their allies, do not know to take action until it is too late and the procedural hurdle applies to all litigation. What happens when the miner's canary for procedural subordination is a transgender woman; an immigrant, Muslim terrorism suspect; or a young Black man with a warrant out for his arrest who speeds away from a police officer?[254] If procedural subordination occurs first for the miner's canary, who U.S. society views as an "ungrievable" person or a person whose very life (including the rights that they are trying to assert) is seen as an impossibility, then the subordination will run rampant unless we recognize that pattern and stop it even for, and especially for, the supposed "ungrievable" and "impossible" people and rights.[255]

### *1. Pleading*

One example of the order of retrenchment is perhaps the biggest change in pleading since 1938. *Twombly* was, on its face, completely unrelated to civil rights or any identifiable marginalized group. It was a putative class of local telephone subscribers against an alleged monopoly of corporate entities.[256] Although scholars debate the decision's scope, there is significant speculation that the Supreme Court's decision in *Twombly* might have been limited to antitrust litigation.[257] At the very least, there were questions and debate about whether the seemingly-heightened pleading standard would be expanded to contexts such as civil rights litigation.[258]

Next came *Iqbal.* Javaid Iqbal, as a Pakistani Muslim immigrant allegedly held due to suspicion of his participation in the September 11, 2001, attacks, was a member of a group or groups who were, or were likely to be perceived as, relatively small, suspect, fringe, despised, and ungrievable.[259] Some explain that, after September 11, Muslims in the U.S., who had already been somewhat racialized,

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254. *Cf.* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2003) (proposing that people of color experiencing difficulties due to systemic racism can serve as an earlier warning signal for treacherous societal issues that will affect people more generally).

255. *See supra* notes 73–77 and accompanying text. While there might be examples that follow the order of retrenchment in many different contexts, this concept may have more salience in areas seen as more procedural and technical or rules-based as opposed to substantive areas. Within the substance of areas such as constitutional law, there are well-trodden battles, particularly between the Democratic and Republican parties, that may not be consistent with the order of retrenchment. For procedural subordination, however (as opposed to substantive retrenchment), a pattern that is consistent with the order of retrenchment might be more likely because it may be more noticeable and garner more objection if a court tried to, first, impose a more difficult procedural standard or remove a procedural protection from all litigants or from a group seen as a large, established, respected group protected by civil rights legislation (or the rights seen in similar ways).

256. *See supra* notes 121–123 and accompanying text.

257. *See supra* note 133.

258. *Id.*; *see supra* notes 128–132, *infra* note 293.

259. *See* Ali, *supra* note 79; Arshad Imtiaz Ali, *Citizens Under Suspicion: Responsive Research with Community Under Surveillance*, 47 ANTHROPOL. & EDUC. Q. 78 (2016); *see also supra* Part I.B.3.

became even more racialized as people of color, subject to anti-Muslim racism, and arguably became permanent suspects.260 Thus, Javaid Iqbal, due to religion, race, ethnicity, and nationality, was part of a more vulnerable group, perceived more with fear and danger than empathy and protection. In *The Lost Story of* Iqbal, Professor Shirin Sinnar highlights the ways that the Court, and thus, law and procedure, seem to have operated differently for Javaid Iqbal's case, including, in some ways, due to presumptions about his identity.[261] The Court then used Javaid Iqbal's lawsuit to clarify that the standard suggested in *Twombly* applied to all civil pleadings, including those for civil rights claims.[262]

Many cite both *Twombly* and *Iqbal*, or only cite *Iqbal*, for the new pleading standard. Only after the Supreme Court decided *Iqbal* did judges and lawyers try to determine what the new standard would mean for civil rights pleadings. While there is debate regarding whether *Iqbal*'s pleading standard changes had the devastating effects on civil rights litigation that some expected,[263] it seems salient that the Court announced this retrenchment in a case where the plaintiff was a person of color, a Muslim "foreigner," and a terrorism suspect instead of in a case with a Black elderly grandmother trying to vote.

### *2. Summary Judgment, Generally, and in Police Brutality Cases*

Summary judgment is a weaker, and more muddled, example of the order of retrenchment, but some of the troubles in describing summary judgment as a clear example of the order of retrenchment make it especially worthwhile to discuss.

When analyzing summary judgment generally and trying to identify if and how the order of retrenchment played out within summary judgment, the first step is to ascertain a step zero. *Matsushita*, and the summary judgment trilogy, seem to be the step zero. *Matsushita* fits the common characteristics of a step zero case well. As an antitrust conspiracy case brought under § 1 of the Sherman Act by U.S. television manufacturers against Japanese television manufacturers, *Matsushita* does not directly involve any marginalized groups and seems to be, instead, a business dispute regarding a specific, limited area of substantive law involving complicated economic theory.[264] Many view *Matsushita* as specific to antitrust conspiracy.[265] Of the other two trilogy cases, neither had any readily identifiable connection to a marginalized group. *Liberty Lobby* was a First Amendment libel

260. Ali, *supra* note 79; Ali, *Citizens Under Suspicion, supra* note 259. For further discussion, see the #IslamophobiaIsRacism Syllabus available at https://islamophobiaisracism.wordpress.com/ [https://perma.cc/F7LT-Q7LU].

261. Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 389–91 (2017); *see also* Coleman, *supra* note 98, at 1022-23, n. 84 (discussing Sinnar's exposition of the absence of a "heroic dissent" for Javaid Iqbal, as would typically be present in cases involving rights and procedure for more grievable racial minorities, and the lack of humanization).

262. *Iqbal*, 556 U.S. at 684 (2009); Bone, *supra* note 134, at 858 (noting that *Iqbal* made clear that *Twombly*'s plausibility standard applies transsubstantively).

263. *Supra notes* 144–145.

264. *See supra* notes 165–169, 166 and accompanying text.

265. *See supra* notes 165–169, 166 and accompanying text; *see also* Nash & Sokol, *supra* note 196 (arguing, in part, that *Matsushita* had a significant effect that was especially limited to antirust cases).

case brought by a public figure (a nonprofit corporation and its founder) against defendants regarding articles that *Investor* magazine published that "portrayed [defendants] as neo-Nazi, anti-Semitic, racist, and Fascist."[266] *Celotex* was a tort case where a widow brought a wrongful death action against her deceased spouse's prior employer due to that employer allegedly exposing her spouse to asbestos.[267] In addition, given that *Matsushita,* or the 1986 summary judgment trilogy, made a significant change in summary judgment that eventually affected claims brought to benefit members of marginalized group, then *Matsushita*, or the 1986 summary judgment trilogy, fits as step zero in the proposed order of retrenchment.

Although it is disputed, many propose that the trilogy changed the way in which federal courts determine motions for summary judgment.[268] More specifically, some argue that the trilogy has had a significant, negative effect on civil rights and employment discrimination claims, and especially on § 1983 claims of police violence.[269] For the purposes of contextualizing the possibility of the order of retrenchment, I continue as though the trilogy (or individual cases within it) have had an effect on summary judgment more generally and explore whether other tenets of the order of retrenchment, after step zero, have been borne out.

With *Matsushita*, or the entire trilogy, considered step zero in the order of retrenchment for summary judgment, then *Scott v. Harris*, and § 1983 police violence and excessive force litigation more generally, constitute the extension of those changes from an area that seems unrelated to marginalized groups or civil rights issues. *Scott v. Harris* and other police brutality cases extend the *Matsushita* and trilogy changes to claims brought to benefit a group of marginalized people who are, or at least are perceived as, more despised, suspect, and antisocial. Much excessive force police brutality litigation is, or is perceived as, being brought to benefit people who police say that they had reason to harm, often because the people were allegedly posing physical danger to the wellbeing of others. They are often suspected of being criminals.

Regarding Victor Harris, specifically, he is someone who was perceived as being more despised, suspect, and antisocial. Before Scott rammed the police cruiser into Harris's car, Harris was speeding while he was driving.[270] And, when a police officer tried to pull him over, he, instead, sped up.[271] Some think, based on the video, that Harris engaged in a "Hollywood-style car chase of the most frightening sort."[272]

266. Anderson v. Liberty Lobby, 477 U.S. 242, 244–45 (1986); *see supra* note 176 and accompanying text.
267. Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986); *see also supra* note 184 and accompanying text.
268. *See supra* notes 164, 197–207 and accompanying text.
269. *See supra* notes 208–209 and accompanying text.
270. *Scott*, 550 U.S. at 374.
271. *Id.*
272. *Id.* at 380.

The Court, then, used Scott Harris's lawsuit to confirm that the standard suggested in *Matsushita* and the trilogy applied to all summary judgment considerations and imposed additional procedural obstacles.[273]

* * *

The idea of the order of retrenchment is not to say that procedural subordination must always follow this pattern and cannot occur in any other way. Instead, this may give those who want to work against procedural subordination more tools to understand in what types of litigation retrenchment is most likely to occur, and to fight against it even when the specific litigant might not be as empathetic as others or the litigation or when the claim might seem inapposite to others' interests. In addition to identifying, in advance, cases in which courts may be more likely to restrict procedural protections or impose additional procedural requirements, the concept of order of retrenchment might help to better identify such subordination after it has occurred or to push for more solidarity and support across typical divisions. One might wonder what could happen—and what difference it could make—if those interested in civil rights or certain marginalized groups argued, intervened, or wrote as amici curiae in step zero litigation about the implications for civil rights litigation and implications for various marginalized groups.

### *B. Judicial Innocence*

This next inquiry and concept were motivated by a curiosity about why there is such disagreement over whether some procedural changes significantly or disproportionately impede litigation that is, or tends to be, brought to benefit marginalized communities and, at times, whether a particular procedural change even took place. I introduce the term judicial innocence to reflect the idea that judges—including the specific opinions and judgments that they write and issue—may not see themselves as, or be seen as, change agents who have imposed more difficult procedural standards and requirements and who have taken back some procedural protections, sometimes with the result of procedural subordination.[274] Drawing from the CRT concept of white innocence,[275] judicial innocence reinforces the false notions that structural racism, and marginalization along other axes of

273. *See supra* notes 214–229 and accompanying text.

274. Some scholars have discussed a judicial version of white innocence. Ross, *supra* note 88, at 5–6 (describing the "charade" of "the judicial helplessness version of white innocence"). Professor Ross argues that Justice Taney, in *Dred Scott*, reasoned to declare innocence for the Supreme Court and for contemporary white people by interpreting the Constitution in a way that the Founders did not give the contemporary Justices any "choice but to conclude that the Constitution could not have included the black person as a citizen." *Id.*; Hunt, *supra* note 87, at 506–07 (drawing from Professor Martha Minow's observation to imply that white innocence, as "a judicial stance," "makes other perspectives invisible and puts them beyond discussion" (quoting Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 15 (1987))).

275. *See supra* notes 18, 86–97 and accompanying text.

identity, only occurred in the past[276] or only in other systems.[277] Some unique aspects of civil procedure may combine with other factors to make it difficult to assess and agree upon whether there has been any procedural subordination.

Judicial changes, particularly those that further procedural subordination, may be concealed through the following moves when those changes make it more difficult to get into court, remain there through trial, or receive procedural protections until final judgment:

- judges or Justices emphasize the structural features that formally prevent the federal judiciary from changing the Federal Rules of Civil Procedure and/or posit that it is not changing any rule, but instead, it is only clarifying, interpreting, or developing standards to apply the rule that Congress has legislated;
- judges or Justices in the majority intimate that the opinion is limited to the specific circumstances, or area, of the case at-hand, or at least do not openly admit that the opinion will change decisions in other cases or even in procedure transsubstantively;
- the change is likely to proceed in a manner that is consistent with the order of retrenchment,[278] meaning that the change will likely manifest first in a case that does not have clear relevance for litigation brought to benefit marginalized communities, then the change will extend to a disfavored type of litigant or claim before it is likely clear that the change applies transsubstantively, and finally to strongly-recognized and represented marginalized groups and types of claims along with litigants and litigation generally;
- the new standard or rule tends to be written in ways such that it can seem difficult to disagree with the new standard or rule without being irrational or unreasonable; and
- the new standard or rule extends discretion by privileging and centering the experiences and perspectives of the judiciary (who tend to be white, male, heterosexual, cisgender, elite) by displacing the experiences of the litigants and/or jurors, who likely have much more diverse experiences and perspectives.

Because of these characteristics, judicial innocence can: (1) conceal that there has been any change; (2) obfuscate that the change is likely to spread such

276. Such as was the case with the procedural decision of *Dred Scott v. Sandford*. 60 U.S. (19 HOW.) 393, 403 (1857) (enslaved party) (holding that "a negro, whose ancestors were imported into this country, and sold as slaves," even if emancipated or "born of parents who had become free before their birth" could not "become a member of the political community formed and brought into existence by the Constitution of the United States" and, as a citizen, have the privilege of bringing suit in a federal court), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; Johnson, *supra* note 68, at 246–47 (discussing the determination of citizenship for purposes of establishing diversity jurisdiction in *Dred Scott v. Sandford*).

277. *See generally* Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000); Gold, *supra* note 6(discussing structural racism in criminal procedure). I do not argue that this unawareness of procedural subordination is intentional or some sort of well-strategized conspiracy.

278. *See supra* Part III.A.

that widespread adoption of the change is more likely; (3) insulate the change from criticism; (4) minimize the importance of civil procedure doctrines relative to the substance; and (5) obscure the role of the judiciary, litigants, and litigation in structural, procedural, and remedial subordination or retrenchment.

### *1. Judges Do Not Change Procedural Rules Through Opinions Because They Cannot*

One way in which civil procedure may uniquely lend itself to judicial innocence is because of the specific limitations regarding the ways in which the rules of civil procedure can be changed. According to the Rules Enabling Act,[279] the Supreme Court has "the power to prescribe general rules of practice and procedure" for U.S. district courts and court of appeals cases as long as those rules do "not abridge, enlarge or modify any substantive right."[280] Ostensibly, to amend a procedural rule or adopt a new rule involves a multi-stage process:

> A proposed rule is first considered by the Advisory Committee [on Civil Rules]. If the Advisory Committee approves the proposal, it is then reviewed by the Standing Committee and finally by the Judicial Conference before being forwarded to the Supreme Court. If the Supreme Court concurs, the proposal is transmitted to Congress, which then has roughly seven months to exercise a veto. In the absence of a veto, the proposed rule goes into effect.[281]

This means that, according to the Rules Enabling Act itself, no court, including the Supreme Court, can change the Federal Rules of Civil Procedure in an opinion or decision. That federal courts do not have the authority to change procedural rules by judicial fiat can make it seem as though courts never do change procedural rules by judicial fiat. This can appear particularly true when the Court has been vigilant, at times, about preventing lower courts from attempting to adopt such procedural rule changes without following the required process.[282]

Thus, when federal judges or Justices make a change to a procedural rule or adopt a new rule through an opinion, the judicial actors involved may tend to characterize the change, instead, as merely interpreting or clarifying the underlying rule or creating better standards to apply the procedural rule that Congress has already legislated, whether through the Rules Enabling Act process or through the adoption of some other statute. Judges and Justices may cast procedural rule changes as interpretation or implementation because, formally, they cannot make

279. 28 U.S.C. § 2072 (2000).

280. *Id.*

281. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 892 (1999) (citing 28 U.S.C. §§ 331, 2072–73 (1994)); *see also* Bone, *supra* note 128, at 877 n.9.

282. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("we have consistently declined similar invitations to revise established [the Federal Rules of Civil Procedure]").

changes to procedural rules.[283] Beyond the process requirements for rule changes, judges and Justices cannot change rules or adopt new rules in a way that would "abridge, enlarge, or modify any substantive right."[284] Not all procedural rule changes necessarily affect the contours of a substantive right, but rules such as those regarding pleading, preclusion, intervention, joinder, summary judgment, and motions to dismiss define who and what claims can remain in court to litigate their judicially cognizable harms and rights.

Of course, there is also the potential that a court has not changed a procedural rule, or adopted a new rule, in a way that skirts the Rules Enabling Act. A court could impose procedural subordination while leaving existing procedural rules in place and only interpreting the same rules in a different way or adopting a standard that affects determinations made while following the same rule.

### *2. The Opinion or Judgment at Issue Will Not Necessarily Affect Other Cases*

The general principle that a court need not decide more than the case before it can also be a building block of judicial innocence. Judges or justices saying in an opinion that they are only deciding the matter at hand based on the circumstances specific to the particular litigation can be a foundation for professed ignorance of judicial opinions producing procedural changes, including procedural subordination on the basis of race and other axes of marginalization.[285]

This principle may assuage the concerns that judges might otherwise have about the potential repercussions of the instant opinion in a way that might influence their opinions and decisions to be something other than what would be best in the matter at hand, in order to avoid undesired consequences in other future litigation. Judges may note this principle when there is lingering uncertainty about how lower courts might take up the change. Clarifying that the holding and decision is not intended to affect more than the instant case may discourage future courts from drawing from the decision and expanding it into other litigation or other contexts. But it could also be seen as a mere pro forma nod. If other courts in the future choose to rely upon prior holdings even though the earlier court noted that the procedural change was only for the prior case, the earlier disclaimer means

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283. When deciding about subject matter jurisdiction, the Supreme Court in *Dred Scott* claimed that it was fulfilling its duty, to only "interpret" when it opined that Black people "were never thought of or spoken of except as property." *Dred Scott v. Sandford*, 60 U.S. (19 HOW.) 393, 405, 410 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. The decision was singular for several reasons, including that it might not be commonly viewed as a procedure decision. After all, according to the majority opinion, the U.S. was formed by those recognized as citizens at the adoption of the Constitution and the U.S. is "for them and their posterity, but for no one else." *Id.* at 406. And the Court held that this "interpretation" was "conclusive" *id.* at 411, despite evidence to the contrary. *Id.* at 576 (Curtis, J., dissenting).

284. 28 U.S.C. § 2072(b).

285. I do not purport to suggest whether each judge or Justice who notes such a principle in an opinion is being disingenuous in doing so, is ignoring the likely consequences of the opinion, or whether the judicial innocence-reinforcing nature of such statements is intentional or not.

little if those later courts' adoptions of the prior change will not be corrected on appeal. After all, the Supreme Court's purpose is not one of error correction.[286]

This principle of attempting to limit the effects of an opinion to the litigation at hand may make broader procedural subordination more likely to occur because judges and justices may not be forced to think about the effects of their decisions. In a system with discretionary and very limited review at the Supreme Court level,[287] lower courts have fewer cases to look to for guidance. Lower courts may extend Supreme Court reasoning more broadly or more narrowly than the original opinion necessarily required. Again, due to the limited nature of review, that would mean that many cases would likely be affected by reasoning in opinions even if the Court did not intend for such vigorous or broad implementation.

All of the described dynamics can make procedural change or procedural subordination harder to identify. It may not even be clear, or agreed upon, whether a court made a procedural change or what the scope of the change is.

#### *3. Subordination May Often Occur in a Manner Consistent with the Order of Retrenchment*

If procedural subordination tends to occur by following the order of retrenchment, this might decrease both initial and more intermediate-term interest and concern about the change. The initial and intermediate-term level of interest or concern might differ depending on the group membership of the litigants.

There may be pressure against speaking up to protect that disfavored litigant or others like them. If judges make procedural changes (including subordination) in cases where there is a general sentiment against the party (including the racial or other group with which the party is identified) or a feeling that they might not be as deserving of the procedural protection, there might also be less of a concern that the same procedural change or retrenchment will occur for litigants with which more of U.S. society identifies and empathizes. If more despised or suspect litigants lose in the case that imposes new procedural obstacles or removes previously-existing procedural protections, it might seem fine for a court to figure out ways to limit access to courts for those types of plaintiffs and claims.

#### *4. Impossibility of Reasonable Disagreement with New Rule*

When designing the new or changed rule, judges might tend to include a key component of the rule that seems impossible to reasonably disagree with. This may be particularly true in opinions that change a procedural rule or adopt a new rule in a way that is at least in tension with, if not in violation of, the Rules Enabling Act. This may matter more, or be more likely to happen, in the Supreme Court than in lower courts. A proclamation that any other perspective would be

286. Pedro, *supra* note 38, at 53 n.242 (noting that the Court is not a court of error correction and that the Court denies most petitions for writs of certiorari).

287. *Id.* at 53 n.242, 90 n.430.

unreasonable, without more, is not necessarily exclusive to judicial innocence or even unique to cases where disagreement would be unreasonable or illogical, but the mere statement of impossibility of reasonable disagreement with a conclusion or opinion also does not necessarily make itself true.[288]

*5. The Change Reinforces Existing Hierarchies of Subordination*

Another way in which procedural changes may tend to reinforce judicial innocence is that the new or modified rule or standard may tend to privilege the already-privileged while displacing those in marginalized groups.

*6. Pleading Example*

As one example of judicial innocence in procedure, formally, pleading rules are amended by Congress rather than judicial rulemaking. In *Twombly*, the Court opined that it was imposing a plausibility requirement, not the heightened fact pleading that the Court had repeatedly rebuffed in earlier eras.[289] But many view the changes as, essentially, imposing a heightened pleading standard and changing the pleading rule and standard in ways that are in tension with Rule 8.[290]

The Court also implied that the requirement that courts not dismiss complaints "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"[291] from *Conley* was not a part of a rule or a pleading standard. Instead, the Court described this requirement as "language" from the case, a "famous observation," and a "phrase."[292] Thus, by "retiring" this plaintiff-friendly requirement, the Court maintains that it is not changing the pleading standard, but instead, is

288. The Supreme Court in *Dred Scott* opined that the view of the Constitution on all Black people was made clear "in plain words—too plain to be misunderstood" even though Justice Taney and the other Justices joining the opinion that he wrote for the Court knew that Dred Scott, his wife, and his daughters, along with other judges and Justices who decided otherwise, all disagreed. *Dred Scott*, 60 U.S. (19 HOW.) at 452; *id.* at 531, 572–73, 575 (Curtis, J., dissenting). Justice McLean notes that making a dispositive assumption in the case that Dred Scott is an enslaved person "is a short and an effectual mode of deciding the cause," but that it is not "sanctioned by any known rule of pleading." *Id.* at 532 (McLean, J., dissenting).

289. *Twombly*, 550 U.S. at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

290. *Id.* at 586 (Stevens, J., dissenting) (noting that the supposed "plausibility" standard "is irreconcilable with Rule 8 and our governing precedents"); *id.* at 588 (opining that the Court is applying a heightened pleading standard despite assurances that it is not doing so); *id.* at 595 (noting that, to make the change that the Court made, they should have "amend[ed] the Federal Rules—not our interpretation of them"); Spencer, *supra* note 128, at 453–54 (criticizing the Court for essentially changing the pleading standard through *Twombly* and doing so outside of the formal rulemaking process, which the Court had previously noted was the only proper way to change pleading standards); Spencer, *supra* note 141, at 1712 (noting that "the Court sidestep[ped] the established rule amendment process to produce a novel rule of pleading (overturning *Conley v. Gibson* in the process)"). *But see* Smith, *supra* note 128, at 1064–65 (opining that there was already a "logical coherence" requirement mandated by the Federal Rules such that *Twombly* only articulated a standard for that pre-existing requirement based on analyzing the Federal Rules).

291. Conley v. Gibson, 355 U.S. 41, 45–46 (1957); *see* Spencer, *supra* note 70, at 101–02.

292. *Twombly*, 550 U.S. at 562.

clarifying that courts should stop applying a phrase from one opinion as though it were a part of the pleading standard.

*Twombly* focused so extensively on §1 of the Sherman Act that Justice Souter, who wrote the opinion, may have intended or assumed that the changed standard would be limited to the antitrust context. From *Twombly* to *Iqbal*, the difference in scope or procedural change seemed so significant that, in only two years, Justice Souter moved from writing the majority opinion for *Twombly* to dissenting from *Iqbal*.[293]

As described above, summary judgment changes did tend to happen in an order that was consistent with the order of retrenchment.[294] Because the changes to pleading began with a case with a unique circumstance (antitrust conspiracy and the relevant portions of the Sherman Act) between a set of business entities and a putative class of local telephone service customers, a sense of alarm for procedural subordination, or even around the potential effects on civil rights or employment discrimination claims, might have been nil.

The new standard in both *Twombly* and *Iqbal* was written in a way that at least some part of it is difficult to disagree with without seeming unreasonable or irrational. It seems extremely difficult to rationally argue that a pleading should survive a motion to dismiss on failure to state a claim even if the pleading is implausible.[295] Perhaps that is a significant part of why the majority opinions in pleading and summary judgment emphasize the plausibility portion of the changes to the rules and standards.

The changes brought about in pleading by *Twombly* and *Iqbal* give discretion such that they center judges, privileged groups, and reinforce systems of subordination at the expense of marginalized groups, including litigants and, potentially, jurors.[296] The pre-existing motion to dismiss standard required courts to take the plaintiffs' allegations as true. The Court's decision in *Iqbal* modified that to impose a plausibility requirement. The way in which the Court noted that judges should determine whether a claim was plausible was based on "judicial experience

293. *Id.* at 548–52, 553–54, 557–59, 566–67; Miller, *supra* note 30, at 24 (noting that Justice Souter, author of *Twombly*, disagreed with significant portions of the new standard announced in *Iqbal* so much that he dissented from the *Iqbal* majority opinion); Bone, *supra* note 138, at 858 (describing the facts that Justice Souter wrote the primary dissent in *Iqbal* after writing the majority opinion for *Twombly* and that Justice Breyer also dissented in *Iqbal* after being in the majority for *Twombly* as "highly significant").

294. *See supra* Part III.0.

295. *See Twombly*, 550 U.S. at 561, 562, 570.

296. *Id.* at 595 (Stevens, J., dissenting) ("the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence"); Miller, *supra* note 30, at 22–23 (noting "a concern that some judges will allow their own views on various substantive matters to intrude on their decisionmaking and no longer will feel bound by the four corners of the complaint, as historically was true"); Spencer, *supra* note 138, at 186–87 (opining that *Iqbal* supplants the requirement to take the alleged facts as true with permission for judges to use their "experience and common sense" to disregard some alleged facts); *id.* at 197–201 (describing the bias in favor of a wealthy, social elite perspective in *Twombly*, *Iqbal*, and *Scott v. Harris* that would favor corporations, governmental defendants, police officers and others against "societal outgroups").

and common sense."[297] Thus, to determine what is plausible, the Court moved the focus of the inquiry from taking the plaintiff's allegation as true to focusing on judges' experience and judges' common sense. For allegations such as those that Javaid Iqbal made, it is likely safe to assume, or at least hope, that much of what he alleged is extremely far outside of most people's experiences, not to mention the experiences of members of our federal judiciary, which tend to be comprised of a more privileged group.[298] The manner in which *Twombly* and *Iqbal* made changes to pleading may obscure: that a change occurred; recognition that the change mattered (meaning that it had a substantial effect); or recognition that the substantial effect is in conflict with the Rule 8 principles regarding pleading and motions to dismiss, as well as the fundamental goals of civil procedure.[299]

### *7. Summary Judgment*

The summary judgment cases that are prominent in this Article, both the trilogy and the key police violence summary judgment cases, also have many of the concealing characteristics that comprise judicial innocence. Here, I will address the trilogy and *Scott v. Harris*.

The trilogy and *Harris* imply that they are not changing any rule of civil procedure but that they are instead only clarifying a rule, interpreting a rule, or giving a rule a manageable standard.[300] Where the *Matsushita* Court could be vulnerable to assertions that it was departing from settled law and making a change, the Court indicated that the putative change was not a change at all, but just a limit of substantive antitrust law on permissible inferences.[301] The *Matsushita* Court derived its summary judgment holding from *Monsanto* even though *Monsanto* was a substantive decision that mentioned neither summary judgment nor the plausibility requirement that *Matsushita* drew from it.[302]

In *Liberty Lobby*, the Court claimed to only be clarifying what judges consider at the summary judgment phase instead of changing the law.[303] The Court quoted and cited Federal Rule of Civil Procedure 56, *Adickes*, and other precedent interpreting the rule. It concluded that judges must consider the substantive trial standard governing a claim when deciding summary judgment for that claim, and

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

298. *Id.* at 668 (alleging that defendants beat him, subjected him to unnecessary repeated strip searches, deprived him of a functional toilet, disrupted his attempts to make prayer, and disconnected the phone when he spoke with his lawyer).

299. *See generally* Spencer, *supra* note 145 (describing arguments that the pleading standard did not change; that the standard did change, but that the change will not have significant effects; and that the changes are significant, but beneficial).

300. *See, e.g.*, *Matsushita*, 475 U.S. at 587 (quoting and citing FED. R. CIV. P. 56 and cases interpreting the rule, then opining that the holding "follows from these settled principles").

301. *Id.* at 587–88 (explaining potential deviation from the requirement that the underlying facts "must be viewed in the light most favorable to the party opposing the motion" (quoting U.S. v. Diebold, 369 U.S. 654, 655 (1962)).

302. *Id.* at 593; *see supra* notes 94–95and accompanying text.

303. *See* Anderson v. Liberty Lobby*,* 477 U.S. 242, 265 (1986) (Brennan, J., dissenting); *see also* McGinley, *supra* note 170, at 222 (noting that the *Liberty Lobby* Court "claimed that it was not changing the law but merely clarifying it").

that the summary judgment and directed verdict standards are the same.[304] But none of those sources included those holdings or conclusions. Thus, many opine that *Liberty Lobby* changed the law and created new requirements.305 The Court minimizes the change that it is making by indicating that it is only trying to determine "the proper focus of the inquiry," and that the proper focus (of requiring that a plaintiff's evidence at summary judgment meet the substantive threshold required at trial) is strongly suggested by Rule 56.[306] The Court notes several changes that it claims it does not make and reasserts some long-held principles that the opinion seems to upend.[307]

The *Celotex* Court reasoned that the "plain language of Rule 56(c)" requires courts to grant summary judgment against parties who do not establish an essential element for which they will ultimately have the burden of proof at trial; but the language of the Rule does not indicate that.[308] The Court confirmed its belief in the "literal" accuracy of *Adickes* and that Court's decision to deny the motion for summary judgment before it, but then the Court construed the language of *Adickes* to stand for a proposition almost diametrically opposite to what many view *Adickes* as proposing.[309] And the *Celotex* Court construed *Adickes* in a way that required the Court to grant a summary judgment motion in very similar circumstances to those under which *Adickes* denied summary judgment.[310] To the contrary, many agree that *Adickes* would indicate a very different result.[311]

Similarly, some opine that, in *Scott v. Harris*, "the Supreme Court did not make an express change to summary judgment rules."[312]

Regarding whether the summary judgment trilogy included indications that the holding was specific to the specific case at hand, a subject area or type of claim, or whether an author intended a limited scope, there is a great variation between the cases. *Matsushita* seemed the most circumscribed. The language in the opinion almost exclusively justified the holding based on substantive law, antitrust conspiracy limitations due to § 1 of the Sherman Act, and cases interpreting that substantive law.[313] *Liberty Lobby* explicitly applied to all areas.[314] Although *Celotex*

304. *Liberty Lobby*, 477 U.S. at 247–52

305. *See id.* at 265 (Brennan, J., dissenting); *see also* McGinley, *supra* note 170, at 222 n.76.

306. *Liberty Lobby*, 477 U.S. at 250.

307. The Court notes that its holding:

> [D]oes not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

*Id.* at 255.

308. Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986).

309. *Id.* at 325.

310. *See supra* notes 154–60 and accompanying text.

311. *Id.*

312. Amelia G. Yowell, *Race to Judgment? An Empirical Study of* Scott v. Harris *and Summary Judgment*, 85 NOTRE DAME L. REV. 1759 (2010).

313. *See supra* note 169 and accompanying text.

314. *See supra* notes 176–179 and accompanying text.

included no limitation on the scope of the holding, Justice White's concurrence seemed to indicate that the change would be more restrained and limited than the majority indicated.[315]

Jurists and scholars have mentioned the odd occurrence that Justice White provided the fifth vote for an opinion with which he appeared to substantially disagree.[316] He also seemingly hoped that his concurrence would be treated as controlling. Commentators have further observed that Justice White authored *Liberty Lobby* after dissenting from the majority's opinion in *Matsushita*.[317] As with pleading, some switching between a Justice who was the author for a majority opinion also dissenting from an opinion in the same major grouping of cases seems not to be extraordinary. That there has not been a consistent majority of Justices who agree with the outcome for the specific litigants; agree either with the rule change or that the opinion includes only interpretation, clarification, standard, or something other than a rule change; and agree with the scope of the effect of the case and how it interacts with precedent, can be taken as indication that there often is not a concerted effort by the same set of Justices to impose the change, procedural subordination, or to maintain judicial innocence.

As described above, summary judgment changes did tend to happen in an order that was consistent with the order of retrenchment.[318] Because the changes to summary judgment began with a case with a unique circumstance (antitrust conspiracy and the relevant portions of the Sherman Act) between business entities, a sense of alarm for procedural subordination, or even the potential effects on civil rights or employment discrimination claims, might have been nil. That the next cases in the trilogy somewhat similarly did not include any civil rights, employment discrimination claims, or relate to marginalized groups or litigation brought to benefit such groups could also explain some of the difficulty in identifying the changes in the trilogy or seeing how they might affect civil rights claims. But many did discuss their concerns for civil rights due to the trilogy.[319]

Given the standard that summary judgment should not be granted unless there is "no genuine issue of material fact," together with the principle of viewing all facts in the light most favorable to the nonmovant, the Court is almost compelled to describe doctrinal changes—especially those that make summary judgment easier to grant—using terminology that makes disagreement seem unreasonable, if not almost rationally impossible. Neither the trilogy opinions nor the major § 1983

315. *See supra* note 193 and accompanying text.

316. *See, e.g.*, *Celotex*, 477 U.S. at 329 n.1 (Brennan, J., dissenting) (noting that Justice White provided the fifth vote for the decision to reverse and remand—such that defendant met its initial burden to shift the burden such that the lower court would need decide whether the plaintiff met their burden, but that Justice White's concurrence indicated that he thought that the case should be vacated and remanded—because Justice White indicated that the lower court needed to reevaluate whether the defendant had met its initial burden for its summary judgment motion); Issacharoff & Loewenstein, *supra* note 153, at 82 n.48 (noting that part of Justice White's concurrence seemed to be "in apparent rejection of the majority holding").

317. *See, e.g.*, Issacharoff & Loewenstein, *supra* note 153, at 87 n.73.

318. *See supra* Part III.0.

319. *See supra* notes 208–209 and accompanying text.

cases regarding police brutality disappoint in this regard.[320] In *Matsushita*, the Court moved from the district court holding that "any inference of conspiracy was *unreasonable*," in part because of its finding that the evidence did not "rebut the *more plausible* inference" that did not include conspiracy[321]; to discussing which theories of motivation for the defendants' behavior might be "as plausible" or "[t]he most plausible"[322]; to discussing implausibility and economic rationality as the basis of the holding (and of the change in the rule).[323] Although the Court's understandings of "economic sense" and rationality seem to be based on economic assumptions of the Chicago School at the time, which was only one approach to, and understanding of, economic reasoning (and was itself a theory that was not conclusively proven), the Court introduced the idea of "implausibility" as a basis for granting summary judgment where the theory or claim necessary for a genuine issue of material fact is "implausible."[324] It seems completely unreasonable to argue that judges should deny summary judgment motions and allow litigation to continue to trial even when the genuine issue of material fact is completely implausible. The Court held that no "rational trier of fact" could find for the nonmovant despite four Justices dissenting from the opinion due to their perspective that a reasonable jury could find for the nonmovant.[325]

Perhaps in large part because Justice White dissented from *Matsushita* a few months prior to writing the opinion for the majority in *Liberty Lobby*, *Liberty Lobby* does not take up *Matsushita*'s banner of implausibility. Instead, *Liberty Lobby* seems to focus primarily on the terms in Rule 56 itself, specifically "genuine" and "material,"[326] and the typical way in which federal courts have decided summary judgment motions remains the core—what "a reasonable jury" could find.[327] The part of the opinion that seems most unassailable unless verging on unreasonableness is that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient."[328] However, the statement that a mere scintilla is insufficient is not as irrefutable as the requirement that the genuine issue of material fact be plausible.

320. *Celotex* is the only trilogy case that does not seem to engage in this specific judicial innocence move of having one nearly incontrovertible premise or assertion which would make someone seem unreasonable and irrational if they disagreed with that portion for the proposed standard. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

321. *Matsushita*, 475 U.S. at 579.

322. *Id.* at 581, 582 n.6.

323. *Id.* at 587.

324. *See id.* at 587; *supra* notes 167–165 and accompanying text. This was a specific idea of economic rationality popular in the Chicago School of economics at the time.

325. *Matsushita*, 475 U.S. at 588.

326. Anderson v. Liberty Lobby, 477 U.S. 242, 247–50 (1986) (noting that the standard set out by the "very terms" of Rule 56 "provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact").

327. *Id.* at 248, 255–57 (noting that courts must deny summary judgment "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

328. *Id.* at 251–52 (noting that the Court said this long ago and repeated it several times since Improvement Co. v. Munson, 81 U.S. (14 WALL.) 442, 448 (1872)).

To a certain extent, each of the trilogy cases privileges and centers the discretion and experiences of the judiciary by somewhat displacing the litigants, jurors, or both. In *Matsushita*, instead of denying summary judgment so jurors could assess credibility, evaluate the evidence, and weigh the probability of the theories of motivation for the behavior proposed by the evidence of the plaintiffs and the defendants, the Court took over this role for itself, and for all other federal judges. *Liberty Lobby* and *Celotex* were much less egregious in this regard. These two opinions, respectively, require courts to assess at summary judgment whether there is evidence in the record sufficient for the nonmovant to meet their trial evidentiary standard, and opine that courts should grant summary judgment to a defendant if they merely present evidence that tends to negate an essential element of the plaintiff's claim. Inevitably, both doctrinal shifts push courts to grant summary judgment in a broader swath of cases. This move, arguably, departs from, both, viewing the evidence in the light most favorable to the nonmovant and from allowing jurors to make credibility determinations, weigh evidence, and draw inferences from facts.

Similarly to the general summary judgment trilogy, summary judgment in the area of police violence, namely *Scott*, also has markers of judicial innocence. In this section, I posit, regarding *Scott*: (1) that the Court notes that there is no specific rule change despite some substantial departures from the way Rule 56 had previously been implemented; (2) some details of the case and the nature of the changes to procedure made it seem possible that the changes would apply to a limited range of cases; (3) changes in summary judgment arguably occurred in a manner consistent with the order of retrenchment; (4) the new standard or rule are changed in ways that easily make it seem impossible to reasonably disagree with; and (5) the change shifts discretion to judges, Justices, and privileged groups and takes away some of the protections and deference given to those identified as more vulnerable or who often tend to be, or are perceived as being, members of marginalized groups.[329]

The *Scott* majority recited the typical standards for federal courts deciding summary judgment and gave no explicit indication that it was changing, or departing from, any of those standards as specified in Rule 56, *Diebold*, and precedent.[330] The Court credited the facts as presented by the defendant movant, instead of in the light most favorable to the plaintiff nonmovant, and even announced a (problematic) limitation on some key summary judgment principles, noting that courts only need view facts in the light most favorable to the nonmovant if the court has already decided that there is a genuine issue of material fact. But the Court did not explicitly say that it was making a change to the principle from *Diebold* that requires federal courts to view facts in, and make inferences in, the light most favorable to the nonmovant.

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329. *See supra* Parts III.B.1–III.B.5.

330. Scott v. Harris, 550 U.S. 372, 378 (2007); *see* Wolff, *supra* note 220, at 1359 (noting that the opinion "was not written as an express statement of revolution in summary judgment practice"); Yowell, *supra* note 312, at 1760 (noting that the Court "did not make an express change to summary judgment rules").

Under the *Scott* majority's view, nearly all of the basis of its decision was entirely unique to the case and the underlying circumstances—the video. It would of course be next to impossible for the same video to be the basis of a summary judgment determination in completely unrelated litigation. The Court seemed to view its perspective of the video as a factual record of what happened, what Victor Harris did, and what risks he posed during the incidents that gave rise to the case.[331] The Court did not seem to acknowledge in any way that videos might often be a part of some types of summary judgment cases—most notably, police violence cases—or that the videos might be, similar to any other evidence, subject to interpretation, assessing, and weighing by the factfinder. So, the Court ended up arguably changing the way that courts determine summary judgment. Judges should not view facts in a manner that most favors nonmovants unless the judges agree that that interpretation is most likely and the court has already determined that there is a genuine issue of material fact for trial.

As described above, summary judgment changes did tend to happen in an order that was consistent with the order of retrenchment.[332] The changes started with *Matsushita*, and the trilogy, which were not expressly related to civil rights or litigation brought to benefit members of marginalized groups. Then, the changes spread to litigation brought to benefit people who tend to be viewed as more ungrievable (criminal, despised, feared).

The changes to summary judgment in *Scott* were written in a way that the significant parts of it are difficult to disagree with without being labeled unreasonable or irrational. The majority viewed its interpretation of the video as fact.[333] The majority treated its interpretation of the video as though it was actually visible by watching the tape.[334] The majority even noted that the plaintiff nonmovant's description of what had happened—saying that Harris was not driving so dangerously as to render reasonable Scott ramming him in the way that he did—was "blatantly contradicted by the record."[335] This means that anyone else who viewed the video and did not interpret it in the way that the majority did had an interpretation that was simply untrue because it countered the "facts" as the majority thought that the video presented them. What the majority saw was so clear and obvious and undeniable that "the majority saw no need to resort to reasoned elaboration of its position to rebut [Justice] Stevens's apprehension of facts 'no reasonable juror' could have seen."[336] Justice Stevens, in dissent, pointed out that the

331. *Scott*, 550 U.S. at 378 (noting that "[t]here is . . . an added wrinkle in this case," a video "capturing the events in question").

332. *See supra* Part III.0; *supra* note 318 and accompanying text.

333. Kahan, Hoffman, & Braman, *supra* note 223, at 845–46, 848 (noting that the majority opined that the videotape rendered the *Diebold* standard "visible fiction" (quoting *Scott*, 550 U.S. 372)).

334. *See Scott*, 550 U.S. at 379 (stating "we see" when describing the majority's interpretation of the video); Kahan, Hoffman, & Braman, *supra* note 223, at 840–41.

335. *Scott*, 550 U.S. at 380; *see* Wolff, *supra* note 220, at 1364–65 (describing the "blatantly contradicts" test that some lower federal courts began to apply after *Scott*).

336. Kahan, Hoffman, & Braman, *supra* note 223, at 840–41, 847.

majority "implicitly labeled the four other judges to review the case unreasonable."[337]

Many critics believe that the *Scott* Court substituted the opinions of its own privileged members at the costs of the viewpoints of jurors and those who are from marginalized groups.[338] While Justices in the majority did "not believe a reasonable jury could" find for Harris based on how the Justices interpreted the video, Justice Stevens noted that "[o]ur duty to view the evidence in the light most favorable to the nonmoving party would foreclose such speculation if the Court had not used its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment."[339]

* * *

In summation, the order of retrenchment and judicial innocence mask procedural subordination. Because the retrenchment arguably begins in corporate lawsuits with no clear marginalized community involved and then extends to an ignored, despised, or contested community, the order of retrenchment makes it difficult to discern that procedure is changing in a way that further subordinates marginalized communities or that renders people less empathetic and less likely to build alliances contesting the changes. Separately, judicial innocence masks that a change has occurred, the significance of the change, and the actors who, and opinions that, brought the change about.

## CONCLUSION

Approximately forty years ago, Professor Richard Delgado argued that his (white) scholarly contemporaries' focus, for civil rights litigation, on procedure in lieu of substance was not harmless, but was instead an attempt to rid legal scholarship of "excesses of passion" by producing scholarship that was "controlled,

337. *Scott*, 550 U.S. at 395 (Stevens, J., dissenting).
338. Kahan, Hoffman, & Braman, *supra* note 223, at 841–42 (noting that the Court "privilege[d] its own view" over that of various communities and groups who tended to see the facts differently, including Black people, low-income workers, liberals, and Democrats); Lahav, *supra* note 206, at 851 (noting that the Court adopted its own view of the video itself instead of viewing the video in the light most favorable to the nonmovant plaintiffs—here, Black people alleging police brutality).
339. *Scott*, 550 U.S. at 394–95 (Stevens, J., dissenting) (noting that "the Court has usurped the jury's factfinding function").

incremental, and seemingly nonideological."[340] By way of an asynchronous rejoinder, I would encourage that those of us who are passionate about working against the subordination of, and those of us situated within, marginalized communities not concede the area of procedure writ large, but instead, that we bring passion to procedure and reveal the subordination along axes of identity perpetuated by what could otherwise seem to be "controlled, incremental, and seemingly nonideological" rules and areas of procedure and court structure.

With this project to conceptualize procedural subordination—a theoretical framework for understanding how racial subordination, and the subordination of other marginalized groups, may be facilitated by civil procedure—now underway, perhaps it can be tested, expanded, and put to use within civil litigation and beyond. I expect that, once we have a name for these ideas, people can begin to identify aspects of these mechanisms as such within all sorts of procedural systems. When we have the tools to identify structural impediments to equal justice under the law and understand how it is that they came to be imposed, I hope that we can reimagine not only civil litigation, but also procedure as we experience it regularly, and focus our efforts to transform procedure into nonsubordinating or even antisubordinating roles in our lives.

340. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 568–69, 576 (1984). In that discussion, Delgado described an "inner circle" of white civil rights scholars (only or predominantly cisgender and heterosexual men) who largely ignored or avoided discussions of reparations, guilt, and complicity. *Id.* at 567, 576. I hope to embody a living, breathing rejoinder to Delgado's concern—a Black woman proceduralist who is inspired to deepen my understanding of reparations possibilities as I excavate my enslaved and formerly enslaved ancestors' interactions with civil procedure, and who leans into accepting responsibility and admitting guilt and works out complicity by writing articles such as this one in an attempt to map, predict, prevent, and dismantle white supremacy and other -isms embedded within procedure. *See* Pedro, *supra* note 3. And some of what I write in the area of procedure is far from controlled. It can range from a raw anger, to singeing, to exposing my deep sorrow and heartache. *Id.*