

# A Decade of Procedural Despair: Denying Access to Justice and Closing the Courthouse Doors

**Author :** Linda S. Mullenix

**Date :** November 23, 2018

Michael Vitiello, **Animating Civil Procedure** (2017).

For civil procedure teachers seeking to accompany their casebook with an insightful account of procedural justice, Michael Vitiello's *Animating Civil Procedure* provides an excellent complement to case-centric courses. Among its many virtues, Vitiello's book weaves a compelling procedural-justice argument around the leading procedure cases all first-year students encounter in their introduction to the American legal system.

Vitiello's main thesis details how the Supreme Court's procedural jurisprudence – especially in the last decade—effectively denies plaintiffs' access to justice and represents a closing of the courthouse doors. While these themes are manifestly familiar to the professoriate and comprise the dominant narrative among commentators, the impact of procedural law may not be so apparent to new law students. By focusing on the compelling importance of procedure in shaping substantive justice, Vitiello's book provides a useful resource to bridge a novice's gap in knowledge and understanding.

At the outset, Vitiello rightly frames his book with the observation dear to the heart of all civil procedure teachers: that procedure is as important, if not more so, than the substantive law that occupies so much of the first-year curriculum. He observes how—in contrast to headline-grabbing substantive issues such as gun control, same-sex marriage, and campaign financing—the Court's procedural decisions go largely unnoticed and unheralded. Vitiello illustrates the point with the famous story of how *The New York Times* and other newspapers failed to report the Court's 1938 decision in [Erie R.R. v. Tompkins](#), completely missing the significance of that decision.

Having established the central case for the importance of procedure, Vitiello's book segues into separate chapters advancing his argument that the Court's recent procedure jurisprudence has largely been anti-plaintiff and pro-corporate defendant. He focuses on seven areas of procedural law to illustrate this thesis: personal jurisdiction, pleading, discovery, summary judgment, transfer of venue, class actions, and arbitration. In reviewing the Court's leading decisions, he analyzes the holdings in the context of the Court's liberal-conservative ideological divide.

Each chapter presents a veritable hit-parade of the Court's most controversial procedure decisions during the past decade. In discussing the Court's increasingly constrictive views on personal jurisdiction, he focuses on the infamous trilogy of courthouse-closing cases: [Goodyear Dunlap Tires Operations, S.A. v. Brown](#), [Daimler AG v. Bauman](#), and [J. McIntyre Machinery, Ltd. v. Nicastro](#). As all procedure teachers appreciate, nothing engages students more than the saga of Mr. Nicastro of the severed four fingers, with the Court telling him he has nowhere to sue. Vitiello employs these cases to point out the increasing inability of injured plaintiffs to enter the courthouse to hold bad-actor corporate defendants accountable for wrongdoing.

Vitiello's chronicle of the Court's personal jurisdiction jurisprudence sets the tone for ensuing chapters, perhaps none so scathing as that on pleading under the Federal Rules. He first sets out the historical basis for nineteenth-century pleading reforms as the precursor of modern federal notice pleading,

providing a succinct summary of the context for understanding the philosophy of modern pleading that students may not otherwise receive. The pleading backstory is a procedural tease, coming undone in [Bell Atlantic Co. v. Twombly](#) and [Ashcroft v. Iqbal](#). In truth, attacking the Court's *Twombly/Iqbal* decisions is picking-off low-hanging fruit, although they are the archetypes of the Court's anti-plaintiff, pro-corporate bias.

The twin themes of denying access to justice and closing the courthouse doors frame the discussion in Vitiello's remaining chapters on summary judgment, transfer and venue, and class action litigation. Similar to his jurisdiction and pleading chapters, Vitiello's book ranges over a collection of prominent, challenging, and dubious Court decisions, including [Scott v. Harris](#) (on summary judgment) and [Atlantic Marine Construction Company v. U.S. District Court](#) (on transfer of venue). Vitiello's discussion provides students with a thoughtful analysis of the impact of these somewhat arcane procedural mechanisms.

The Court's recent class action jurisprudence comes in for especial notoriety, focusing predictably on the Court's decision in [Wal-Mart Stores, Inc. v. Dukes](#), which narrowed the interpretation of the Rule 23(a) commonality requirement. And, not to be outdone by the anti-class action animus embedded in *Dukes*, Vitiello singles out the Court's class action waiver decisions in [AT & T Mobility LLC v. Concepcion](#) and [American Express Co. v. Italian Colors Restaurant](#) as further evidence of the Court's pro-corporate bias in upholding arbitration clauses with class action waivers. Vitiello acknowledges that the Court's class action jurisprudence has been a mixed bag, leaving open the ultimate conclusion to be drawn from this universe of cases.

Finally, Vitiello notes that procedural justice derives not only from the Court's decisions, but from rulemaking initiatives by the Advisory Committee on Civil Rules. He focuses on the Committee's recent excursions into amending the discovery rules, which he argues deny access to justice for plaintiffs with fewer resources. This chapter provides students with useful insight into other sources of procedural justice and offers a good springboard to discuss the philosophy of transsubstantive and neutral rulemaking.

Vitiello's *Animating Civil Procedure* is an excellent companion to a first-year casebook. It is easy to read, well-written, and not overly long. Not only does it discuss the most recent leading procedure cases, but it challenges students to think about the broader implications of those cases. Although the book leaves scant room for disagreement with his conclusions, Vitiello should be commended for demonstrating the overarching importance of procedure to a system of substantive justice.

Cite as: Linda S. Mullenix, *A Decade of Procedural Despair: Denying Access to Justice and Closing the Courthouse Doors*, JOTWELL (November 23, 2018) (reviewing Michael Vitiello, **Animating Civil Procedure** (2017)), <https://courtslaw.jotwell.com/a-decade-of-procedural-despair-denying-access-to-justice-and-closing-the-courthouse-doors/>.