Recasting the Corporate Bias of Civil Procedure: A Neoliberal Theory

Author : Linda S. Mullenix

Date : October 20, 2021

Luke Norris, *Neoliberal Civil Procedure*, 12 **U. C. Irvine L. Rev.** ___ (forthcoming, 2022), available at SSRN.

In discussing federal rulemaking, civil procedure teachers have long pointed out prevailing norms of impartiality and neutrality. But most understand that the promise of neutral rules, as applied, often falls short of these aspirational goals. This realization prompts students to think beyond case outcomes and to reflect on the interests that courts serve by their judicial decisions. Commentators have analyzed the Court's embedded political preferences, centering on the Court's pro-corporate and anti-plaintiff bias that denies access to justice and "closes the courthouse doors."

In *Neoliberal Civil Procedure*, Luke Norris pursues this enquiry, setting forth a sophisticated explanation grounded in neoliberal economic theory. His general themes and conclusions are the same as the "access to justice" crowd: that the way in which the Court has interpreted procedural rules has placed barriers to citizens seeking to vindicate rights in civil litigation. Norris endeavors to move the discussion beyond the simple incantation that the Court is pro-corporate and anti-plaintiff. Instead, Norris explains how neoliberalism has become a prevailing model in the Court's application of procedural rules.

According to Norris, neoliberalism describes the revival of doctrines of classical economic liberalism. Neoliberalism is based on market-models of efficiency and autonomy, market arrangements, and the reduction of citizens to consumers and atomistic individuals rather than social agents. This market-model exceptionalism conflicts with democratic values such as distributive fairness, workplace security, economic opportunity, civic equality, and community solidarity. Neoliberalism is hostile to questions of power, structure, or vulnerability, and sidelines issues of coercion, subordination, and domination. It seeks to construct a law and politics that shields market relations from democratic control. Consequently, the infusion of neoliberalism into procedural decisions has made it increasingly difficult for plaintiffs to enforce regulatory laws such as antitrust, consumer protection, and anti-discrimination statutes.

Norris applies this theory of neoliberalism to four parts of the Court's procedural jurisprudence: summary judgment, pleading, arbitration, and class actions. These decisions represent the low-hanging fruit for critics of a corporate-leaning Court; Michael Vitiello's *Animating Civil Procedure* used the same examples to describe the Court's pro-corporate bias. Norris examines these decisions through a neoliberalism lens.

Norris's star example of neoliberalism at work is the Court's 1986 summary judgment decision Matsushita Electric Industrial Co. v. Zenith Radio Corp., an antitrust case. Norris characterizes the decision as "perhaps the zenith of procedural interpretation that is market naturalizing, allowing judges to bring economic theory into their decision-making to construct market rationality." In granting the defendant's motion, the Court asked whether the plaintiff's claim made economic sense. The Court constructed what it thought was plausible through the lens of efficiency, focusing on Chicago-school economic theory about how rational, profit-maximizing companies act. This increased plaintiffs' procedural burdens in antitrust cases.

In the pleading arena, Norris finds neoliberalism infusing 2007's Bell Atlantic v. Twombly, another antitrust decision. In dismissing the plaintiffs' case for a lack of plausible pleading, "the Court again constructed its own view of efficient market rationality . . . and used that view to naturalize market behavior and insulate it from regulatory litigation." In addition, the Court's focus on discovery costs and burdens on institutional defendants was consistent with a market-efficiency rationale. Norris notes that while *Matsushita* represented a "foray into economic theory," the Court there had relied on a well-developed record. The *Twombly* Court decided the motion on a record bereft of evidence. The Court

"inserted itself . . . into reasoning about what was plausible within the market and whether market relationships evinced anticompetitive conduct at the pleading stage." In dissent, Justice Stevens argued that the Court's decision would invite lawyers to debate economic theory to conclusively resolve antitrust suits without any evidence. Needless to say, numerous critics piled on *Twombly* for its anti-plaintiff impact.

Regarding arbitration, Norris discusses the Court's 1985 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. decision. That litigation asserted claims under the Sherman Act and involved a general arbitration clause. The Court interpreted the arbitration clause to include statutory rights and declined to allow the litigation to proceed in court. Norris suggests that *Mitsubishi* illustrates the Court's lack of concern about power and parity: a lack that the Court would repeatedly manifest in many subsequent arbitration decisions.

Norris identifies two class action decisions reflecting the neoliberal approach to judicial decisionmaking. Norris's prime example is Judge Posner's 1995 Seventh Circuit decision in In re Rhone-Poulenc Rorer Inc. overturning a class certification, a decision infused with economic concepts such as settlement blackmail, which Norris contends persisted to impose hurdle after hurdle on class action plaintiffs. The Court's 2011 Wal-Mart Stores v. Dukes demonstrates that the Court "trains its eye on the individual citizen consumer and thwarts and dampens collective or aggregate litigation."

Norris speculates that this neoliberal age may be another passing civil procedure era. Understanding the logic and pull of neoliberalism puts reformers in a better position to effectuate change. But resisting the pull of neoliberalism "would require a profound shift, a democratic reordering that is unlikely to occur without a new governing coalition." Norris rather grandiosely suggests that civil procedure for a revitalized democratic regulatory era would shift the normative focus beyond efficiency, involve rethinking the governmental role as a procedural facilitator, and develop a politics of procedure. This article is worth reading for the insight he brings to procedural developments and for the numerous debatable points and interpretations he suggests.

Cite as: Linda S. Mullenix, *Recasting the Corporate Bias of Civil Procedure: A Neoliberal Theory*, JOTWELL (October 20, 2021) (reviewing Luke Norris, *Neoliberal Civil Procedure*, 12 **U. C. Irvine L. Rev.** ___ (forthcoming, 2022), available at SSRN), https://courtslaw.jotwell.com/recasting-the-corporate-bias-of-civil-procedure-a-neoliberal-theory/.