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Constitutional Economic Justice: Structural Power for "We the People"

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I. Beyond Constitutional Economic Minimalism

It is time for an ambitious constitutional vision of economic justice.[1] Since the end of the *Lochner* era, the prevailing constitutional narrative has taught that the Constitution generally should leave economic policy decisions to the legislative and executive branches. That structural theory treats economic justice as discretionary, separate from and subordinate to fundamental constitutional protections for political and civil justice. At most, that narrative supports constitutional protections against economic inequality as narrow exceptions subject to careful scrutiny and constraint.

As economic inequality has increased over recent decades, constitutional doctrine has become more firmly set against economic equality. Not only has the U.S. Supreme Court turned away from constitutional protection of those with modest resources,[2] but it also has increasingly (though often subtly) used the Constitution to limit political branches' discretion to promote equality.[3]

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1. *See, e.g.*, Panel at the American Constitution Society's 2015 Annual Convention: The Courts, the Constitution and the Disappearing American Dream (June 13, 2015) (discussing the need and possibilities for a progressive constitutional vision of political economy).

2. *See* Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, and Dialogic Default*, 35 FORDHAM URB. L.J. 629, 629 (2008) (showing that "[a]cross constitutional doctrines, poor people suffer diminished protections").

3. *See* Michele E. Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 401–44 (analyzing how a range of recent Supreme Court rulings have reinforced economic inequality).

In response, this Essay proposes a structural principle for constitutional economic justice centered on equal and broad access to collective political economic power. This theory of economic power for "we the people" adds to the principles guiding the balance of power among the branches of government: judicial, legislative, and executive, or state and federal. The proposed principle builds on two premises about constitutional economic justice.

First, government advances economic power not only by protecting individual freedom to choose among existing economic options but also by facilitating public and private collective action to *improve* people's choices by changing the terms, conditions, and quality of the available economic choices. Second, the post-*Lochner* principle of constitutional deference to the democratic political process is an important but incomplete constitutional approach to facilitating meaningful collective power for non-elite citizens' economic interests.

These two premises build on the Constitution's founding vision of "a more perfect union" creating a whole capable of doing more than representing the sum of its component parts. The Constitution aimed to simultaneously enhance and control power by reorganizing states into a more centralized, coordinated collective than existed under the Articles of Confederation. The Constitution developed the United States as an economic union as well as a political union, for example, by establishing national commerce, taxing, and spending powers by prohibiting state currencies and import duties.[4] These new limits on state sovereignty not only created a national government, but also potentially strengthened states' power (along with private economic power) by replacing destructive internal competition and fragmentation with a degree of cooperation and integration for mutual political and economic gain.[5] The Constitution's structure unites states and individuals to potentially improve their options, not just to aggregate and reflect the choices they would make separately. At the same time, by preserving states as an alternative source of collective power, subject to different kinds of institutional advantages and weaknesses, the Constitution's structure also has facilitated alternative channels of collective power with potential to contest, lead, or reinterpret that federal authority. The Constitution's structure further provides checks and balances on concentrated power by dividing the federal government into different institutional branches with different forms and processes, along with limits on collective power to protect individual rights.

Though this constitutional balance of powers has been open to interpretation, debate, and recalibration over time, its general structure clearly affirms that meaningful liberty and justice for all requires not just individual rights and limits on concentrated power, but also diverse processes of collective voice and

4. U.S. CONST. art. I, §§ 8, 10.

5. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427–30 (1819) (supporting federal limits on state power as a means of ensuring protection of state sovereignty against infringement by other states).

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power. Economic justice, like political justice, benefits from a complex balance of collective powers and processes, not just one fixed and absolute hierarchy of authority. The *Lochner* era's dubious and unequal constitutionalization of "freedom of contract" rights overriding legislative powers should be grounds for refining, not relinquishing, the Constitution's capacity to guide legislative processes toward fairer and more broadly beneficial economic policy.

Even if the electoral and legislative processes were restructured to reduce the influence of economic inequality, structural constitutional analysis should go further to recognize that the constitutional distribution of government powers pervasively affects the distribution of organized economic power. The capacity of legislative processes to promote economic justice depends on, for example, how the executive and judicial branches interpret and enforce those laws. Further, a democratic legislature's power over economic policy generally will be limited by the extent to which that legislature is part of decentralized federal or international political system in which it must compete with or submit to opposing economic interests of other governments. The post-*Lochner* principle of deference to legislative economic judgments does not adequately resolve that crucial question of which economic decisions deserve federal versus state power. In short, if constitutional economic justice is reduced to legislative decision-making, treating the interrelated functions and forms of different government branches as largely ill-suited or irrelevant to that goal, then we risk skewing the constitutional system toward processes and formal principles calibrated for economic injustice.

This Essay begins its challenge to longstanding constitutional economic minimalism in Part I by first considering the ambitious neoliberal economic constitutionalism that has gained influence in doctrine and theory in recent decades. This constitutional vision has supported and rationalized economic inequality by defining constitutional freedom and justice in terms of individualized choice under pressure of existing limited options. Part I then discusses how structural analysis focused on the Constitution's distribution of institutional economic power is central to understanding and challenging this individualized vision of constitutional economic justice.

In Part II, the Essay develops the structural principle of constitutional economic power for "we the people" with three doctrinal examples. First, the dormant commerce clause, which limits state and local government control of interstate business, should restrict state and local governments from competing to "buy" interstate private capital with escalating public subsidies. Second, the minimal rationality test for judicial review of executive or legislative economic policy should not rely on cost-benefit analysis as a meaningful measure of economic or political legitimacy. Third, individual rights to procedural due process should include meaningful access to class actions and public judicial process (beyond private arbitration) to support collective deterrence of unlawful economic gain. Each of these applications uses structural analysis to advance constitutional economic justice that goes beyond "redistributing" scarce resources to focus on opening, equalizing, and strengthening the fundamental processes that construct, alleviate, and govern economic scarcity.

A. Neoliberal Constitutional Economics

Although economic equality remains at the margins of mainstream constitutional jurisprudence, an influential constitutional vision of economics nonetheless has moved to center stage. Like the *Lochner* era's more overt embrace of substantive constitutional economic rights, this emerging neoliberal constitutionalism in effect defends economic inequality in the guise of fundamental freedom. A well-funded and well-organized movement has helped promote this new economic constitutionalism in academia, courts, Congress, and state governments as well as legal advocacy organizations and non-profit policy groups. And this constitutional vision has reached well beyond its wealthy patrons and their clients to give shape and inspiration to popular rage and fear about the injustices and failures of the American political and legal systems.

This resurging constitutional economics recognizes that the post-*Lochner* separation of economics from basic political or civil rights misses the problem that economics is intertwined with core questions of constitutional justice.[6] But this counter-narrative presents a misleading idea of economics as the basis for its integrated theory of constitutional political economy.

Neoliberal economic constitutionalism posits a system of apolitical individualized voluntary economic exchange as the overarching model for law and politics.[7] In this theory, government is not a realm for distinctly public or democratic values, processes, or powers separate from self-interested private transactions. Instead, in this view, the measure of government legitimacy is the extent to which political and legal rules and processes reflect what are imagined to be meta-level voluntary individual tradeoffs of general constraints on freedom for offsetting gains, determined by objective aggregation of individual values and preferences.[8] As economist James Buchanan prominently explained, this economic constitutionalism understands politics not as a system for producing and distributing power, but instead as a system for aggregating individualized consent to constraints based on individual choices among competing values.[9]

Though this theory is typically not explicit in judicial reasoning, constitutional rulings imposing new or expanded constitutional barriers to economic equality have to some extent tracked this understanding by treating public

6. For a discussion of popular movements from both left and right to link workers' economic rights to fundamental constitutional freedom, see SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014).

7. *See* James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONST. POL. ECON. 1 (1990) (explaining how orthodox economics' ideal of free exchange can be extended to collective decisions of government).

8. *See* James M. Buchanan, Prize Lecture at the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel: The Constitution of Economic Policy, at Part IV (1986), http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates 1986/buchanan-lecture.html [http://perma.cc/7P8S-9Q42].

9. *Id.*

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democratic choice as nothing greater than (and often much worse than) the sum of individualized market choices. This core ideal of the essential superiority and neutrality of individualized rational choice underlies the recent expansion of constitutional rulings advancing what Robin West terms the individualized right to exit.[10] This framework also grounds rulings expanding the rights of corporations, governments, and wealthy individuals to protection against democratic political and legal processes (such as campaign finance laws). In this frame, individualized private choices (for example, the choice of wealthy campaign donors to effectively buy political access) are the most legitimate and objective measures of freedom and justice, even though this private "free choice" constrains others' political economic opportunities and interests.

B. Rethinking Constitutional Political Economy

Constitutional law pervasively shapes economic justice by producing and distributing that collective economic power to change, rather than accept or exit, existing constraints. For example, the Court makes choices about economic justice when it decides which organizations deserve which kinds of constitutional protections or limits, or whose economic insecurity or loss is too speculative, diffuse, or complex to be justiciable through the organized power of courts. Similarly, the Court makes choices about economic justice when it answers specific questions about whose private power over others counts as coercion that violates fundamental freedoms, or what forms of public collective power can be mobilized by economic "winners" and "losers" to protect their interests, with what constraints and privileges.

This understanding clarifies that economic inequality is not simply a by-product of market processes maximizing individualized freedom and gain. To a significant extent, economic inequality arises from efforts to institutionalize political economic structures that favor particular interests and ideologies, so that these privileges and penalties appear as neutral principles or formal processes. The familiar framework that divides law's goals into "redistribution" or "efficiency" is one ideological construct that obscures analysis of inequality by often singling out policies benefiting disadvantaged groups as costly and coercive "redistribution," while presuming gains to those at the top of the economic ladder result from neutral, natural, and beneficial market "efficiency."[11] Further, by focusing law on an imagined choice between maximizing or dividing resources subject to existing naturalized scarcity, that framing division closes off analysis

10. Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 897–905 (2014) (discussing recent expansions of the right to bear arms as examples of rights to exit, and arguments about the rights to refuse participation in government health insurance, public schools, and in civil rights requirements).

11. *See* Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 787–93 (2003) (explaining how neoliberal uses the problematic rhetorical distinction between redistribution and efficiency to revive *Lochner*'s naturalization of economic inequality).

of how law pervasively produces and mediates scarcity through societal institutions.

The skewed denial of institutional power has helped constitutionalize economic *in*equality in the name of formal neutrality and individual freedom without seeming to return to *Lochner*'s dubious assertion of substantive constitutional economic rights. Formal principles of constitutional process and structure have been readily and unevenly deployed to constitutionalize substantive inequalities in the guise of limiting government power, as critical legal scholar Kenneth Casebeer has astutely analyzed.[12] For example, the Court has protected unequal institutionalization of substantive economic power by constructing organized electoral spending as the individual political right of free speech, or by selectively using formal principles of federalism or separation of powers to restrict each branch of government from redressing institutional inequalities.[13]

Despite rhetoric about originalism and textualism, structural arguments are the primary interpretive rationale for the important recent changes in constitutional doctrine imposed by what critics have called the One Percent Court.[14] Every constitutional controversy involves not only the substance of what the Constitution means, but also the overarching question of who has authority to clarify and apply that meaning. Structural interpretation focuses on how the Constitution should create a system of meaningful checks and balances on that authority to decide constitutional controversies.

Contrary to conventional understanding, the emerging constitutionalization of inequality is not based on consistent structural preferences for states' rights, individualism, or majoritarian politics (or the reverse). Instead, this neoliberal structural change tends to privilege elites' public and private collective

12. *See* Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247, 249 (2000) (giving principles for engaging substantive judgments behind constitutional decisionmaking about equality); Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 BUFF. L. REV. 1453, 1464–67 (2006) (analyzing the inevitable substantive reasoning behind legal formalism).

13. *See, e.g.*, ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 238 (2010) (discussing the unequal substantive impact of procedural or technical doctrines like sovereign immunity and standing); MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 243–68 (2016) (discussing how seemingly technical changes in doctrines such as free speech protected business interests at the expense of economic inequality); Gilman, *supra* note 3, at 436 (noting uneven use of states' rights contributing to constitutional protection of "the one percent"); Martha T. McCluskey, *Toward a Fundamental Right To Evade Law?: Protecting the Rule of Power in* Shelby County *and* State Farm, 17 BERKELEY J. AFR.-AM. L. & POL'Y 216, 216–18 (2015) (critiquing the uneven vision of states' rights).

14. *See, e.g.*, Gilman, *supra* note 3; Bill Moyers & Bernard A. Weisberger, *The 1 Percent Court*, NATION (Sept. 13, 2012), http://www.thenation.com/article/1-percent-court/ [http://perma.cc/B96L-9UD4].

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centralized power to change economic constraints in their favor, and to impede access to collective power for ordinary people. In this context, a robust vision of constitutional economic justice must go beyond the post-*Lochner* structural emphasis on deference to the political process to develop a broader and deeper structural analysis of the distribution of institutional power. That analysis should reject the neoliberal idea of democratic power and freedom as the individualized choice to pay up or exit, taking or leaving the "prices" extorted by others' organized power. Instead, freedom and democratic citizenship require access to meaningful collective voice and control directed at creating better political economic choices, as a number of constitutional scholars have analyzed, particularly in the context of workers' rights.[15]

Lochner's flaw was not that the Court made economic substance fundamental to constitutional justice, but rather that it reduced the Constitution's substantive economic justice to an individualized right to contract subject to existing institutional constraints. *Lochner* denied the Constitution's design for enabling broad access to collective political power to change existing contractual choices. We should reframe the post-*Lochner* principle of judicial deference so that it does not rest on minimizing the Constitution's role in advancing economic justice. That deference should instead be understood as a means toward the more fundamental constitutional value of fair and democratic access to collective economic control.

The precept that economics and politics are thoroughly intertwined means that no one branch of government or kind of process has a general formal advantage in avoiding bias and distortion from political economic power. As William Forbath and Joseph Fishkin have written, for example, economic inequalities can distort the democratic process, justifying heightened equal protection and due process scrutiny for anti-democratic uses of big money and for barriers to political participation for those with modest resources.[16]

This Essay proposes a structural principle focused on giving "we the people" fair access to substantive power to shape the political economy. This principle affirms both the legislative process and also the protection of the legislative process from anti-democratic institutional power. This normative principle should not be confused with a communitarian or socialist ideal. Rather than discounting individual rights, it recognizes that individual freedom and dignity

15. *See* Kenneth M. Casebeer, *"Public . . . Since Time Immemorial": The Labor History of* Hague v. CIO, 66 RUTGERS L. REV. 147, 175–77 (2013) (analyzing the First Amendment freedom of assembly as a right to collective power); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1536–45 (2010) (showing how meaningful protection against involuntary servitude under the Thirteenth Amendment can require more than simply the right to quit); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010) (showing the original intent of the Amendment to link economic equality to fundamental freedom).

16. Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014).

depend on collective enforcement and coordination as well as protection against collective power.

II. Toward a Structural Principle of Equal Collective Power

By applying this structural principle of equal organized economic power to three doctrinal examples, this Part suggests steps for constitutionalizing economic justice consistent with basic constitutional values and text. These examples show that economic justice does not turn on an absolute formal preference for centralized versus local control, public versus private power, or majoritarian versus judicial judgment. Instead, the three examples suggest how the principle of equal access to collective economic power can provide a more nuanced and convincing answer to these structural tensions.

Each example involves a constitutional doctrine haunted by post-*Lochner* concerns about restraining judicial power over substantive economic policy. Despite this concern about minimizing constitutional economics, each doctrine has developed thin and shaky lines that support or even expand judicial power to invalidate economic policy. Each example shows how these existing or emerging doctrinal lines tend to impede equal access to organized economic power.

First, the dormant commerce clause mediates the Constitution's vexing tension between the goals of maintaining an interstate economy and limiting judicial interference with democratic and decentralized economic policy. By considering the relationship of organized economic power to both goals, this section suggests how the dormant commerce doctrine could be refined to control unjust and unproductive interstate economic development "subsidy wars" consistent with the doctrine's divergent constitutional values.

Second, the Fourteenth Amendment doctrine of rational basis review of economic policy enshrines the post-*Lochner* principle of constitutional economic minimalism, but nonetheless opens the door to a new *Lochner*ism defining minimal economic rationality as protection of existing inequalities. The structural principle of economic power for "we the people" refines rationality review to foreground the constitutional and economic values served by government efforts to change rather than entrench existing distributions of economic power. At the same time, that principle leaves room for rationality review to more surgically limit economic policies aimed at systemic exclusion and disadvantage.

Third, the Court has drawn on skepticism about judicial power to question the fundamental fairness of public judicial process. By focusing procedural due process on private individualized choice, the Court has restricted access to civil justice protection for the economic rights of ordinary consumers and workers, even while it has expanded due process protections for corporations. A structural analysis of collective economic power can challenge this increasing inequality in access to justice by instead affirming meaningful institutional enforcement as the foundation of individual rights.

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A. Equalizing Collective Power in the Dormant Commerce Clause

First, the dormant commerce clause doctrine should be interpreted to restrict state and local government subsidies that allow nationally (or globally) organized business to extract unequal government support from more dispersed and localized economic interests, as legal scholar Peter Enrich has astutely argued.[17] Though governments offer these subsidies to attract vital local economic development, these subsidies largely operate as a race to the bottom that tends to undermine meaningful and sustainable growth while increasing inequality and austerity for small businesses and middle or lower income residents.[18]

Though the dormant commerce doctrine is frequently criticized for giving courts arbitrary power to invalidate state and local regulation of business, its goal of maintaining an open, productive, and coordinated national economy remains a vital underpinning of the U.S. federal system.[19] By limiting destructive state efforts to undermine other states' economies, the doctrine provides a structural correction for the collective action problem posed by a federal system in an integrated national political economy. The doctrine has traditionally tended to focus on the danger that local economic interests will use the organized power of state and local government to inflict undue harm on out-of-state interests. The structural principle of economic control for "we the people" helps strengthen the constitutional basis for correcting the similar collective action problem underlying the interstate competition for business subsidies.[20]

Current dormant commerce doctrine generally upholds government subsidies for local business,[21] though the Court has not specifically ruled on the merits of location incentives offered to attract business to a particular jurisdiction.[22] In sharp contrast to protectionist regulations that are the standard target for

17. *See generally* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996) (surveying and critiquing these incentives).

18. Martha T. McCluskey, *Framing Middle-Class Insecurity: Tax and the Ideology of Unequal Economic Growth*, 84 FORDHAM L. REV. 2699 (2016) (examining how these tax incentives contribute to a new ideology of middle class sacrifice and subordination).

19. *See* Michael S. Greve, *The Dormant Coordination Clause*, 67 VAND. L. REV. EN BANC, 269, 271–77 (2014) (summarizing longstanding criticisms and explaining legitimate reasons for the doctrine's continuing role).

20. *See* Enrich, *supra* note 17, at 396 (explaining that these tax incentives create a classic "prisoner's dilemma").

21. *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 198 (1994) (distinguishing this general principle from a subsidy for local milk producers funded by a tax on out-of-state business).

22. *See* Enrich, *supra* note 17, at 407–13 (discussing the barriers to challenging these incentives by businesses).

dormant commerce limits, these subsidies for local economic development seem to support rather than penalize out-of-state commerce.[23] Further, because the costs of these economic development incentives are disproportionately borne directly by local residents and taxpayers, the conventional structural reasoning concludes that local or state political process should sufficiently check the dangers of unduly harmful advantages.[24] These incentives therefore have been considered a legitimate choice of majoritarian politics and state "laboratories of democracy" deserving constitutional deference.[25] Finally, these subsidies have been justified under the doctrine's market participant exception, which allows governments to favor local businesses by acting as a buyer rather than as a regulator of private transactions.[26]

Adding a structural analysis of collective economic control helps counter this reasoning by directing closer attention to how these subsidies actually function. The assumption that out-of-state businesses uniquely deserve special constitutional protection against local political disadvantages ignores that the contemporary interstate economy normally involves large business enterprises with owners and executives who vote and build political coalitions in states across the nation. Further, under contemporary law, political participation significantly depends on access to political spending as well as voting, so that interstate businesses often have overwhelming advantages over ordinary citizens in protecting their economic interests in the political process in every state as well as in the national government.

In this context, interstate businesses, not merely local interests, can exclude others from the gains of the interstate economy. Discussing the intent of the dormant commerce clause, Justice Jackson famously explained that "every farmer and every craftsman should be encouraged to produce by the certainty that he will have free access to every market in the nation."[27] The interstate "subsidy wars" instead tend to operate like taxes or import duties extracted from individual farmers, workers, and entrepreneurs to support businesses able

23. *See* Philip M. Tatarowicz, *Federalism, the Commerce Clause, and Discriminatory State Tax Incentives: A Defense of Unconditional Business Tax Incentives Limited to In-State Activities of the Taxpayer*, 60 TAX LAW. 835, 903, 910 (2007) (arguing that tax incentives should only be invalid under the dormant commerce clause if they disproportionately burden, rather than benefit, interstate commerce).

24. *See id.* at 866; Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 926 (1986) (making this argument to defend the constitutionality of tax preferences for local economic development).

25. *See* Tatarowicz, *supra* note 23, at 849 (noting the variety of incentives as evidence of experimentation).

26. *Id.* at 867, 904–05 (explaining the market participant theory and its protection of direct subsidies and arguing that this exception should similarly apply to tax incentives).

27. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 535, 539 (1949).

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to use nationalized market power to exclude or exploit localized suppliers and workers.

A *New York Times* investigation found that by 2012, state and local governments were paying $80 billion a year in tax and spending incentives to influence the location of private development.[28] These escalating subsidies have shifted massive portions of state and local resources away from public spending on education, health, public employees, and public infrastructure, increasing austerity for middle- and low-income citizens.[29] For instance, the investigation found that Oklahoma and West Virginia each gave up about one-third of their state budgets to business incentives.[30]

The vast majority of this money goes not to small businesses but instead to very large national and global corporations, such as Walmart, Microsoft, Berkshire Hathaway, IBM, General Motors, Verizon, FedEx, and Google.[31] In many sectors of the economy, business strategy now routinely involves seeking competitive advantages by demanding bigger and more innovative (and often corrupt) forms of local government support. Many subsidies are made without meaningful enforcement of reciprocal obligations, without clear public information about the details, and without substantial evidence that the promised economic development will ever materialize or pay off, or that it would not have taken place without subsidies.[32]

This closer substantive analysis not only shows that these subsidies function as economic barriers, but also distinguishes these subsidies from local preferences that satisfy the dormant commerce doctrine's market participant excep-

28. Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price,* N.Y. TIMES (Dec. 1, 2012), http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html [http://perma.cc/U7NV-9Q87].

29. *See* Louise Story, *Lines Blur as Texas Gives Industries a Bonanza*, N.Y. TIMES (Dec. 2, 2012), http://www.nytimes.com/2012/12/03/us/winners-and-losers-in-texas.html [http://perma.cc/2AXD-57QB] (attributing cuts in education spending to fiscal pressures resulting from state economic development tax breaks).

30. Story, *supra* note 28.

31. *Subsidy Tracker 3.0*, GOOD JOBS FIRST, http://www.goodjobsfirst.org/subsidy-tracker [http://perma.cc/U4L2-MGRK].

32. *See* Philip Mattera et al., *Money for Something*, GOOD JOBS FIRST (Dec. 2011), http://www.goodjobsfirst.org/moneyforsomething [http://perma.cc/ZTQ3-N4VC] (reporting that many state economic development subsidies require little if any job creation); *see also* Philip Mattera, Kasia Tarczynska & Greg Leroy, *The Largest Economic Development Subsidy Packages Ever Awarded by State and Local Governments in the United States*, GOOD JOBS FIRST (June 2013), http://www.goodjobsfirst.org/sites/default/files/docs/pdf/megadeals_report.pdf [http://perma.cc/P4ED-TVE4] (reporting an average cost of $456,000 in government expenditures per job in a survey of 240 subsidies costing $75 million or more).

tion.[33] For many if not most subsidy programs, government enforcement of conditions on subsidies tends to be limited and inconsistent. That means state and local governments are not engaging in meaningfully reciprocal market exchanges, but instead are acting as regulators attempting to change private capital location decisions by lowering the costs for private investors of doing business with other private economic actors.[34] The market participant exception should be more sharply aimed to permit government favoritism for local enterprises under government ownership or control, or for payments made in exchange for enforceable rights to specific reciprocal goods or services.

Drawing on Professor Enrich's doctrinal analysis, a group of taxpayer plaintiffs used the dormant commerce clause to challenge $280 million in tax incentives for an auto manufacturer to relocate to Toledo, Ohio.[35] The Supreme Court's 2006 ruling in the case, *DaimlerChrysler v. Cuno*, barred the taxpayers' claims on constitutional standing grounds, reasoning that their asserted injury of lost resources for spending on education was too diffuse and speculative to constitute a case or controversy under Article III.[36] The Court justified this narrow standing interpretation in part with the structural reasoning that courts should refrain from interfering with state policymakers' discretion over fiscal matters, and that this judicial respect for political discretion should preclude any assumption about the effect on fiscal policy of hundreds of millions in tax incentives.[37]

This ruling is an example of how formal structural analysis focused on judicial deference has constitutionalized substantive economic inequality. By instead directing structural analysis beneath nominal local fiscal choice to examine the institutional power limiting local fiscal control, the harmful effects of interstate business incentives can be distinguished as both more distorted and more predictable than standard taxpayer injuries from fiscal policy. In that deeper analysis, local fiscal sovereignty should include not only the constitutional power to make tough tradeoffs between (for instance) funding education and funding interstate business, but also the constitutional power to avoid that extortionate price for access to the interstate economy.

If the dormant commerce clause were instead applied to restrict these incentives, multistate business organizations would still be free to access local

33. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 436–37 (1980) (applying the market participant exception to uphold a state-owned cement plant's preference for local buyers).

34. *See id.* (distinguishing states as market participants from states as regulators as the basis for determining the validity of preferences for local commerce).

35. *See* Enrich, *supra* note 17, at 413–21 (analyzing a standing strategy for taxpayers and citizens); *id.* at 433–40 (explaining the commerce clause theory for invalidating these incentives).

36. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344–46 (2006).

37. *Id.* at 346.

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markets, only at unsubsidized prices.[38] Acting collectively under the doctrine's federal judicial protection, states would not lose access to interstate capital, but rather could better ensure that this access allows broad local participation in the gains as well as the costs of an open interstate economy.

B. Equalizing Collective Power Against the Cost-Benefit State

A second example of stealth constitutionalization of inequality through misleading structural interpretation is what constitutional law scholar and former Obama administration "regulatory czar" Cass Sunstein approvingly calls the Cost-Benefit State.[39] An influential movement aimed at rolling back the New Deal has been promoting the idea that due process requires subjecting administrative agencies and legislatures to cost-benefit review to ensure minimal rationality of public policy. Over the last quarter century or so, this principle has become quasi-constitutionalized in legislation and executive orders subjecting federal regulation to non-democratic scrutiny.[40]

Current constitutional doctrine has made some partial steps in this direction by using cost-benefit analysis to guide statutory interpretation and to limit judicial deference to administrative agency decisions. For example, in a 2015 ruling striking down the EPA's mercury emissions rule, the Supreme Court interpreted the statutory requirement of "appropriate and necessary" to impose a more extensive cost-benefit requirement than the EPA had used.[41] According to Justice Scalia, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dol-

38. For an insightful analysis of European approaches to regulating these economic development subsidies and possible alternatives for U.S. law reform, see Tracy A. Kaye, *The Gentle Art of Corporate Seduction: Tax Incentives in the United States and the European Union*, 57 KAN. L. REV. 93, 100–44 (2008).

39. *See* Cass R. Sunstein, *Thanks, Justice Scalia, for the Cost-Benefit State*, BLOOMBERG VIEW (July 7, 2015, 9:00 AM), http://www.bloombergview.com/articles/2015-07-07/thanks-justice-scalia-for-the-cost-benefit-state [http://perma.cc/DT5E-6VDH] (discussing the Supreme Court's ruling in *Michigan v. EPA*, 135 S. Ct. 2699 (2015)).

40. *See* Cass R. Sunstein, *The Stunning Triumph of Cost-Benefit Analysis*, BLOOMBERG VIEW (Sept. 12, 2012, 6:30 PM), http://www.bloombergview.com/articles/2012-09-12/the-stunning-triumph-of-cost-benefit-analysis [http://perma.cc/9MMP-34HP] (approvingly stating that "cost-benefit analysis has become part of the informal constitution of the U.S. regulatory state"); *see also* Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment*, CTR. FOR PROGRESSIVE REFORM (Nov. 2011), http://www.progressivereform.org/articles/oira_meetings_1111es.pdf [http://perma.cc/9MWY-AV84] (explaining the extensive, non-transparent, and industry-biased power of the Office of Information and Regulatory Affairs in its cost-benefit oversight of administrative agencies).

41. Michigan, 135 S. Ct. at 2704.

lars in health or environmental benefits." He added, "No regulation is 'appropriate' if it does significantly more harm than good."[42]

Despite this common sense appearance, law scholar David Driesen explains that this principle moves back toward *Lochner*'s substantive economic due process principle,[43] effectively giving a constitutional entitlement to heightened scrutiny of public policies that might harm industry profits. Cost-benefit review has become a major impediment to strong environmental, consumer, labor, and financial protections important to the economic well-being of ordinary citizens. Perversely, this anti-democratic due process right is promoted as a structural solution to political process failures from the influence of powerful private interests.[44] Cost-benefit analysis is attractive because it seems to replace contested, corrupt politics with neutral, scientific economics. This reflects neoliberalism's replacement of deference to the political process with the idea of deference to an imagined market where inequality can be presented as the natural and inevitable result of individual choice.

A structural principle of equal access to collective power helps reveal the substantive inequality beneath the surface of the seemingly neutral rule that reasonable public policy must deliver more benefits than costs. That rule is skewed because costs and benefits are the result of particular distributions of institutional power and privilege that should not presumptively merit special constitutional protection. The Cost-Benefit State functions to restrict collective power of ordinary citizens to change and control "prices" in their interests.

The problem is not only that quantifying costs and benefits favors monetized financial assets over the human, social, and planetary resources that are the major direct source of wealth and well-being for most Americans.[45] More sweepingly, a cost-benefit due process standard assumes a constitutional baseline of inequality, making policies promoting equality appear fundamentally and falsely irrational. Evidence of quantifiable costs inevitably reflects not simply unconstrained timeless individual choices, but also the limits on those choices imposed by existing or past economic conditions subject to numerous particular legal privileges and penalties. If stronger regulations will reduce the profits financial firms can get from cheating consumers, then that lost opportunity for fraudulent gain counts as a "cost" to be weighed against the benefits

42. *Id.* at 2707.

43. David M. Driesen, *Regulatory Reform: The New Lochnerism?*, 36 ENVTL. L. 603 (2006).

44. *See* Michael A. Livermore & Richard L. Revesz, *Can Executive Review Help Prevent Capture?*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 420 (Daniel Carpenter & David A. Moss eds., 2014) (arguing that cost-benefit analysis helps improve regulatory systems dominated by special interests).

45. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 207–15 (2004) (criticizing cost-benefit analysis for the misleading quantification of health and environmental values).

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of enforcing the law. If workers of color have in the past accepted shortened lives and impaired health as the going price for jobs sufficient for decent family housing and education, then a typical cost-benefit review can take that as quantitative evidence that workers do not value the better health that stronger regulations might bring[46]—not as evidence of historic inequality due to organized racism, concentrated capital, and policies permitting high unemployment. Cost-benefit analysis impedes the democratic power of "we the people" to collectively produce better socioeconomic conditions, for example by inducing businesses to pursue innovations and "high road" competition that will result in healthier production, higher profits, and lower costs to workers and communities.[47]

The inherent ideological bias of cost-benefit analysis should not lead to the conclusion that legislative and administrative judgments about economic policy always deserve constitutional deference. Instead, it shows the need for a different, fairer measure of legitimate judicial review of the basic rationality of public policy. The constitutional doctrine of rationality review reflects the wisdom that the democratic political process should facilitate collective choices among competing interpretations of the public good, but should not direct collective power toward "the bare desire to harm" a particular interest.[48] A structural principle of collective power for "we the people" helps illuminate why policies that lack proof of quantifiable net gains under existing conditions nonetheless can be very reasonable or even compelling interpretations of the public good. Public policies typically impose costs on some existing organized business interests, and the democratic political process should have free reign to favor alternative interests even if based on imperfectly proven or contestable judgments about the future public benefits of competing socioeconomic opportunities and goals.

In short, the Constitution should embrace rather than restrict the democratic use of legislative and administrative policy to change existing "market" constraints as part of the central purpose of government. Other structural changes can better improve the rationality of public policy by focusing on reforms such as improved ethics and transparency rules that would increase access to legislative and administrative processes for interests lacking the resources and institutional power of organized business.

46. *See* Douglas Kysar, *As the VSL Turns...: In Value of a Statistical Life Debate at EPA, Moral Decisions Hide Behind Technical Jargon*, CTR. FOR PROGRESSIVE REFORM BLOG (Mar. 24, 2011), http://www.progressivereform.org/CPRBlog.cfm?idBlog=E9A19307-D514-6CC8-7A00840F4A70A7F4 [http://perma.cc/W4ML-XPLT] (criticizing wage-risk premium studies claiming to objectively measure how much workers value their own lives and safety).

47. *See* DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF LAW 206–07 (2012) (using the example of climate change to show how cost-benefit analysis impedes sound evaluation of the potential for technological change).

48. *See* Romer v. Evans, 517 U.S. 620, 632–33 (1996) (explaining that the rational basis test of the equal protection doctrine prohibits policies directed at producing harm unrelated to any other asserted benefits).

C. Equalizing Collective Power in Due Process of Law

In a final example, the principle of structural constitutional protection for collective economic power can develop procedural due process doctrine to better protect the economic rights of non-wealthy persons. The constitutional right to due process in the Fifth and Fourteenth Amendments reflects the fundamental ideal that law, not arbitrary or irrational power, should control government action that deprives people of life, liberty, or property. The general idea that courts should focus on procedural rather than substantive protection for economic rights has been central to the post-*Lochner* constitutional vision.

Describing the constitutional ideal of due process, Justice Frankfurter emphasized its expression of "respect enforced by law for that feeling of just treatment" based on "stout confidence in the strength of the democratic faith."[49] The Court has often invoked the principle of the individual right to a "day in court" as a guide to its doctrine.[50] Procedural due process doctrine focuses on the authority, quality, and equality of government decision-making, with varying levels of protection for notice, participation in evidentiary hearings, and review depending on the context.[51] That constitutional protection only applies to government (rather than private) deprivation of established economic rights (not general expectations or interests).

Legal scholar Judith Resnik explains that the expansion of due process rights extended twentieth-century democratization beyond the political process to also include improving and equalizing access to participation in the judicial process.[52] In that due process vision, courts are not merely anti-majoritarian threats to democracy, but rather should be structured as vital democratic institutions in themselves.[53] Nonetheless, that ideal has not operated to provide a broad constitutional right to access civil courts to remedy the violation of economic rights. Despite substantial legal and political concern about unequal access to civil justice due to cost barriers, the Court has narrowly limited its 1971

49. Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 548 (2012) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring)).

50. *Id.* at 548–49 (discussing recent Court opinions on individual due process rights in class actions).

51. *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 82–87 (2011) (surveying the types of due process protections addressed in case law).

52. *Id.* at 88–91 (noting that the democratic transformation of the courts reflects an understanding of courts as democratic institutions themselves, not simply anti-majoritarian threats to democracy).

53. *Id.* at 88.

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ruling that due process requires fee waivers to give indigent persons access to state divorce proceedings.[54]

Ironically, this constitutional emphasis on procedural economic justice has more recently become the basis for the Supreme Court to partly reinstate *Lochner*'s substantive vision reducing fundamental fairness to unequal individualized contractual bargaining. Professor Resnik warns that the Court's recent procedural rulings represent a larger ideological movement challenging the fundamental constitutional value of courts.[55] In this emerging vision of the constitutional structure, judicial power must be restrained not simply to protect the public political process (rejecting *Lochner*), but also, and especially, to favor private economic bargaining (reviving *Lochner*). As a result, in Professor Resnik's words, "procedure is being swallowed up by contract."[56]

As one aspect of this change, over the last three decades the Supreme Court has interpreted the 1925 Federal Arbitration Act (FAA)[57] as an expansive barrier to state protection of economic rights.[58] For example, in *AT&T v. Concepcion*, despite the federal arbitration statute's specific language preserving state contract powers, the Court broadly interpreted the federal law to preempt state law invalidating boilerplate waivers of class remedies as unconscionable contracts.[59] Writing for the majority, Justice Scalia rejected the structural principle of federalist deference to state law,[60] and instead asserted federal supremacy based on the federal statute's general intent to give commercial arbitration contracts similar legal status as other contracts.[61] The Court further construed the state's protection of class arbitration as a detriment to the purposes of arbitration, because it reasoned that aggregation makes arbitration too similar in nature to the rule-bound, cumbersome, and public judicial process.[62] To a significant extent,

54. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2825–27 (2015) (discussing the limited reach of the Court's decision in Boddie v. Connecticut, 401 U.S. 371 (1971)).

55. Resnik, *supra* note 51, at 80.

56. *Id.* at 93 (citing generally Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005)).

57. Federal Arbitration Act, 9 U.S.C. §§ 2–14 (2012).

58. Resnik, *supra* note 54, at 2808–10 (citing extensive criticism of the Court's interpretation of the FAA).

59. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011) (applying the statute's language supporting the validity of arbitration contracts save "upon such grounds as exist in law or equity for the revocation of any contract").

60. *See id.* at 367 (Breyer, J., dissenting) (arguing that statutory text and intent also aimed to incorporate rather than override state contract law).

61. *Id.* at 339 (majority opinion).

62. *Id.* at 348 (faulting class-based arbitration for the supposed disadvantages of cost, complexity, and delay); *see* Resnik, *supra* note 51, at 126–27 (criticizing this reason-

the majority constructed arbitration's essential value in terms of its success in rejecting rather than approximating public courts.

The Court's decisions on arbitration advance a narrative that faults judicial process for being too costly and too regulatory compared to arbitration governed by private bargaining.[63] The implication is that arbitration is fairer because it makes enforcement of economic rights a matter of private contractual choice, creating a market where (in theory) individuals can maximize gain by voluntarily trading off formal procedural protections and remedies.[64] Echoing *Lochner*'s unequal logic, the *AT&T* majority's special judicial protection of arbitration's contractual status begs the crucial question of which law, under control of which government authority, should determine the requirements for legitimate and consensual contracts.[65]

A second and overlapping aspect of the Court's recent revision of procedural justice is its erosion of class action enforcement of economic rights of consumers, workers, and small businesses, in civil procedure generally as well as in arbitration.[66] Class actions were formalized in a 1966 revision of the Federal Rules of Civil Procedure as a key part of the broader movement to democratize the judicial process.[67] Advocates of the class action rule aimed to protect the rights of consumers and others with claims for individually modest losses,[68] and also to supplement and check the public legislative and regulatory processes by identifying and correcting systemic problems and institutional failures.[69]

ing for failure to consider the potential arbitrariness and secrecy of this emphasis on informality).

63. Resnik, *supra* note 54, at 2848–49 (explaining these themes as one account of the recent promotion of arbitration both in the Court and in Congress).

64. *Cf. id.* at 2878 (noting that the case law does not explicitly rely on this market ideology).

65. *See* Resnik, *supra* note 51, at 128–29 (revisiting the theory that boilerplate agreements are not lawful contracts, as analyzed in Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132 (1970)).

66. *See* Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 766–69 (2015) (analyzing how federal courts have narrowed class action doctrine to create major barriers to consumers fraud and antitrust enforcement).

67. Resnik, *supra* note 51, at 141–42 (noting that the class action rule was designed to correct substantive inequalities rather than to produce neutral effects).

68. *Id.* at 142.

69. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686, 717–21 (1941) (noting that private class actions combined with robust public administrative agencies can complement and check the limitations of both to improve democratic government); *see also* Resnik, *supra* note 54, at 2908–09 (discussing recent empirical evidence showing the importance of class actions to government enforcement efforts).

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The Court has rolled back that vision by focusing primarily on class actions' potential to threaten formal individualized autonomy. It has developed new procedural barriers that have strengthened defendants' power to challenge class certification, expanded potential class members' rights to opt out or to bring collateral attacks on the class,[70] and narrowed the substantive claims that can be brought as a class.[71] From the start, the class action rule was designed to guide and balance aggregate litigation with specific procedural protections for individual class members' autonomy and equity.[72] Recent Court decisions have moved doctrine beyond fine-tuning these tensions between individual and class to instead firmly establish individualization as the Constitution's guiding ideal for fair process. For example, in the Court's opinion limiting employment discrimination class actions in *Wal-Mart v. Dukes*, Justice Scalia declared that class actions are an exception to the "usual rule that litigation is conducted by and on behalf of the individual named parties only."[73] The Court's decision in *AT&T* similarly emphasized the procedural superiority of "bilateral" dispute resolution.[74]

But as Professor Resnik and others have analyzed, civil litigation pervasively and historically depends on organizations, especially large-scale collectives such as corporations, insurers, trade associations, and governments, to provide the economic resources and legal expertise needed for meaningful protection of underlying individual economic rights.[75] By using due process to undermine the method of aggregation most likely to advance the rights of non-wealthy indi-

70. Lahav, *supra* note 49, at 549.

71. Bartholomew, *supra* note 66, at 766 n.165 (explaining how the Roberts Court undermined private class actions for antitrust violations); *see also* Resnik, *supra* note 51, at 149–50 (discussing the Court's limitation on class action employment discrimination claims for back pay, including the requirement of individual determinations of back pay in employment discrimination claims).

72. *See* Resnik, *supra* note 51, at 143 (discussing the requirements and oversight incorporated into the rule).

73. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011) (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)).

74. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348–49 (2011); *see also* Resnik, *supra* note 54, at 2890 (discussing the Court's assertion of this preference).

75. *See* Resnik, *supra* note 51, at 112, 135–40 (noting that the ability to use courts largely depends on institutional resources and situating class actions as one of many forms of aggregation that have long been normal and pervasive in civil justice); *see also* Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369 (2006) (showing how the institutionalized nature of corporate "artificial persons" leads to pervasive skewing of civil justice to the disadvantage of individual human litigants).

viduals, the Court is developing the doctrine to favor substantive economic inequality more than individual legal autonomy.[76]

In reality, the usual alternative to class actions and aggregate arbitration is not individualized enforcement of rights but rather no enforcement of economic rights for the majority of individual consumers and others of modest individual wealth.[77] Analyzing the available empirical evidence of individual arbitration claims, Professor Resnik shows that "almost no individual consumers use arbitration"[78] so that "arbitration works to erase rather than enhance the capacity to pursue rights."[79] Reasons for failure to use arbitration include high fees, lack of information about the process, and lack of compliance with awards.[80] This erasure of access to enforcement is exacerbated by the recent legal restrictions and reduced funding that have eroded the capacity of government agencies and legal service providers.[81]

Further, by effectively advancing arbitration as the solution to the problem of unequal access to justice, the Court has fostered a system where individuals' procedural rights are generally imposed en masse by businesses without meaningful consent or participation (either individually or collectively). As Professor Resnik explains, the Court's deregulation of arbitration contracts has made non-negotiable boilerplate waivers of rights a standard business practice, resulting in widespread use of nominal "contracts" that contradict traditional contract law requirements of individual consent and mutual understanding[82]—and that even give businesses unilateral ongoing rights to alter the terms.[83]

Professor Resnik concludes that, taken cumulatively, the Court's rulings expanding individualized arbitration constitute an unconstitutional denial of property rights and access to courts.[84] That conclusion does not require a new

76. *See* Bartholomew, *supra* note 66, at 774–82 (discussing how the Court's limits on class actions exacerbate substantive economic disadvantages of consumers with modest incomes).

77. *See* Resnik, *supra* note 51, at 128 (discussing and quoting Justice Breyer and Judge Posner).

78. Resnik, *supra* note 54, at 2900.

79. *Id.* at 2893.

80. *See id.* at 2904, 2910–14 (discussing evidence that these problems result in underclaiming).

81. *See* Resnik, *supra* note 51, at 112, 145 (noting resource constraints on government agencies and restrictions on impact litigation in government-funded legal services programs).

82. Resnik, *supra* note 54, at 2870–73.

83. *See id.* at 2839–40 (giving an example in a cell phone contract); *see also* Curtis Bridgeman & Karen Sandrik, *Bullshit Promises*, 76 TENN. L. REV. 379 (2009) (criticizing the trend toward consumer contracts that allow the seller to unilaterally change or void the terms of the deal).

84. Resnik, *supra* note 54, at 2810–11, 2936.

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positive due process right to a remedy for private violation of economic rights. Resnik argues that legal claims constitute property rights under existing law, and that the Court has actively and arbitrarily deprived those rights without due process by outsourcing its constitutional responsibility for judicial process to a privatized nonconsensual system insulated from public view and from public oversight of the quality or equality of the process.[85]

The proposed structural principle of access to collective economic power further builds the constitutional foundation for this procedural due process argument and invites development of additional protections for meaningful access to civil justice. This principle counters the theory that public judicial process threatens constitutional values by substituting costly and coercive collective power for private individualized choice. Instead, it recognizes that the danger of judicial *Lochner*ism is a constitutional economic fundamentalism that uses illusory individual contractual choice to deny fair and equal access to the formal, public power of government (legislative or judicial).

The structural principle of economic power for "we the people" defends the legitimacy of judicial power not just to protect, but also to inform and transform private informal choices through meaningful public enforcement. The process for resolving disputes about economic rights inevitably affects the economic substance of those rights. Weak public enforcement of economic rights is likely to encourage not resource-maximizing individualized choice, but rather an economy where businesses compete by using fraud or other means to deny rational individual economic choices. The result is what economists George A. Akerlof and Robert J. Shiller describe as a destructive "phishing equilibrium,"[86] or what law and economics scholars William K. Black and June Carbone describe as a criminogenic environment where unlawful behavior has a systemic competitive advantage.[87] Due process doctrine should affirm the Constitution's general design to resist that dynamic by institutionalizing the rule of law to produce a better political economic order than would be available through arbitrary informal power.

In the *AT&T* ruling invalidating state protection for class-based arbitration, the Court faulted class remedies for giving consumers informal power to pressure corporate defendants into settlements not strictly limited to defendants'

85. *Id.*

86. *See* GEORGE A. AKERLOF & ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION & DECEPTION xi–xii (2015) (explaining that unregulated free markets produce a "phishing equilibrium" with results that "NO ONE COULD POSSIBLY WANT" (emphasis in original)).

87. *See* William K. Black & June Carbone, *Economic Ideology and the Rise of the Firm as a Criminal Enterprise*, 49 AKRON L. REV. 371, 375 (2015) (developing this economic theory to explain increased economic instability and corporate crime).

formal legal obligations.[88] All parties with sufficient resources to maintain litigation will have some power to induce pressure for informal settlement, and indeed virtually all federal and state litigation results in settlements rather than judicial or jury judgments.[89] The Court's special concern about corporate defendants being victimized by pressure for settlement by class actions is not supported by evidence of higher settlement rates for this form of litigation.[90] Nor is this concern about class action settlements consistent with the Court's emphasis on the benefits rather than the costs of using the informality of mandatory arbitration to economize on consumers' legal rights.[91]

Conversely, without consumer access to public class remedies or comparable forms of collective enforcement power, large-scale business organizations will have substantially more informal power to squeeze or deny consumers' legal rights in many, if not most, small-scale transactions.[92] The Court's reasoning favoring the unequal institutional power wielded by corporate defendants naturalizes an unequal distribution of private bargaining power as an implicit limit on civil justice. Instead, the structural principle of equal collective power emphasizes judicial responsibility for grounding procedural fairness in a more rational, open, and equal evaluation of the substantive economic effects of collective organization in civil litigation.

A separate recent development in due process doctrine further reveals the Court's unequal attention to the substantive economic harm from individualized enforcement processes. This new judicial interpretation of due process limits the power of state courts to award punitive damages to deter large-scale corporate wrongdoing.[93] The Court reasoned, in part, that fundamental

88. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011); *see* Resnik, *supra* note 51, at 127 (criticizing this reasoning for its inattention to the problem that consumers lack economic power to enforce legal rights without mass actions).

89. *See* Jed S. Rakoff, *Why You Won't Get Your Day in Court*, N.Y. REV. BOOKS (Nov. 24, 2016), http://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/ [http://perma.cc/5AZK-797J] (noting settlement rates of close to ninety-nine percent of cases, a decline from earlier twentieth century rates).

90. Bartholomew, *supra* note 66, at 761–62 (discussing evidence in Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 697 (2005)).

91. *See AT&T*, 563 U.S. at 348 (asserting the "principal advantage" of arbitration is its informality); Resnik, *supra* note 54, at 2886 (noting that the Court's decision has never invalidated an arbitration agreement for insufficiently vindicating the underlying rights).

92. *See* Resnik, *supra* note 54, at 2881 (noting that all members of the Court recognize the substantive impact of collective power, but that the Court's majority and dissent divided in *AT&T* on evaluating that impact).

93. *See* Martha T. McCluskey, *Constitutionalizing Class Inequality: Due Process in* State Farm, 56 BUFF. L. REV. 1035 (2008) (criticizing the Court's rationales for limiting state punitive damages against corporate defendants in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003)).

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constitutional fairness requires protecting multistate corporations from the risk that decentralized state punishment aimed at deterring wrongdoing motivated by nationwide gain would result in arbitrarily overlapping state punishments.[94] Justice Ginsburg countered by defending the rationality of awarding punitive damages sufficient to deter nationwide unlawful profit schemes by large-scale business that would likely evade enforcement if states are limited to addressing relatively modest localized harm on a disaggregated basis.[95] A structural analysis focused on the distribution of collective power to protect rights would further show the unequal economic substance of the Court's special constitutional protection for corporate tort defendants against the risks of disaggregated civil justice. Unlike the dispersed individual victims of corporate wrongdoing, multistate business defendants are likely to wield disproportionate centralized collective power in Congress, in the media, and in state political processes (including judicial elections), giving these defendants relative advantages in access to political protection against the risk of arbitrary economic harm.[96]

In a 2016 essay, U.S. District Court Judge Jed S. Rakoff wrote that unequal access to justice has reinforced fears that the courts are "simply a remote and expensive luxury reserved for the rich and powerful."[97] He argued that the judicial branch has a constitutional responsibility to counter this systemic denial of access by reversing recent rulings narrowing class actions and expanding mandatory arbitration. A structural principle of power for "we the people" pushes back against the idea that justice is a naturally scarce commodity. The judicial process, like other forms of institutional power, is a potentially productive asset, not simply a cost. The Constitution affirms the value of judicial process to protect law as a foundation for rational order and democratic faith (to recall Justice Frankfurter's due process vision).[98] The costs of a constitutional system designed to encourage widespread "opting out" of civil justice may be incalculably greater than the costs of making high-quality civil justice broadly affordable.[99]

94. *See State Farm*, 538 U.S. at 423 (invalidating a punitive damages award for an insurer's pattern of bad faith).

95. *See id.* at 434–38 (Ginsburg, J., dissenting); McCluskey, *supra* note 13, at 223–24 (using Justice Ginsburg's reasoning to show the majority interprets due process to encourage corporate evasion of law).

96. *See* Galanter, *supra* note 75, at 1398–99 (discussing corporations' institutional advantages in judicial and political systems); McCluskey, *supra* note 93, at 1046.

97. Rakoff, *supra* note 89.

98. *See* Lahav, *supra* note 49, at 548.

99. *See* TAMAR FRANKEL, TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD 73–77 (2006) (discussing some of the costs of financial fraud and corporate dishonesty); *see id.* at 189–95 (discussing the role of law in producing a contemporary economic culture of fraud and dishonesty).

III. Raising Constitutional Expectations for Substantive Justice

The Court's unequal concern about arbitrary loss to corporate defendants from punitive damages is an example of how the "One Percent Court" subtly constitutionalizes unequal substantive economic power without overtly embracing *Lochner*-era substantive due process. But the lesson we should take from this example of the recent judicial trend toward constitutionalized inequality should not be the need to renounce the Court's authority to make judgments about economic power. As scholars have analyzed in depth, judgments about substantive political economic power inevitably pervade and direct the seemingly formalistic structural reasoning that has limited constitutional protection for those vulnerable to systemic economic, legal, and political exclusion and exploitation. Professor Casebeer astutely argues that the solution instead should be to push for constitutional interpretation that goes beyond superficial formalism to engage openly with the problems of unequal substantive power at stake in each case, giving close attention to how each ruling's distribution of power will advance democratic values in the specific context at issue.[100]

This Essay's proposed structural principle of equal access to economic power aims to build on the compelling ideas from Professor Casebeer and others for restoring a robust vision of constitutional justice. It also draws on legal scholar Martha Fineman's theory that law should be grounded in the basic reality of universal human vulnerability and interdependence. That theory revises the liberal construction of law as a formally neutral facilitator of individual self-reliance to instead understand that law necessarily produces and distributes the collective power and protection that forms the basis for human agency, capacity, freedom, and well-being.[101]

The three doctrinal applications of this principle show how economic justice depends on engaging, rather than denying, the inevitable constitutional governance of economic policy. These examples show how the influential neoliberal idea narrowing beneficial power to individualized competitive bargaining has helped shape each of the different doctrines toward economic inequality and insecurity. By instead recalibrating these doctrines to recognize and regulate the potential for collective organization both to enhance and limit individual choice, each doctrine can better serve the constitutional goal of rationalizing and equalizing collective power along with the goal of protecting individual freedom and diversity of substantive interests and ideals.

This more complex and complete understanding of the relationship between coordinated and fragmented power is broadly consistent with the found-

100. Casebeer, *supra* note 12, at 311–13 (developing principles for a "Substantive Carolene Products" to counter the use of formal constitutional principles to rationalize and obscure injustice).

101. *See generally* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2–5 (2008) (explaining the limits of formalism and developing vulnerability theory as a basis for substantive equality).

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ing and amended structural vision of the Constitution and also with widely accepted economic logic. The economic concept of the prisoner's dilemma, for example, explains how collective action can overcome the problem that each individual acting separately will be pressured to rationally act to the detriment both of their individual and aggregate interests (like a group of imprisoned co-conspirators induced to rat on each other when confessing separately). Legal rules and institutions pervasively improve rational action by facilitating public and private organizational forms (like corporations) that reduce the costs and risks of coordinated action to produce better choices. This Essay's three doctrinal examples show how the Constitution's structural division of power inevitably and pervasively distributes the economic advantages of support for collective action or the disadvantages of economic fragmentation, with profound effects on economic justice.

The dormant commerce clause example shows how the doctrine's unequal distribution of the benefits of economic integration has produced economic policies that exacerbate inequality by shifting resources upward from support for education, health, infrastructure, and small businesses to many of the world's wealthiest and largest corporations in a competition for government subsidies widely agreed to be irrational and destructive of both economic and political legitimacy. The example of cost-benefit analysis similarly uses the lens of equal collective power to illuminate how this approach to judicial rationality review would constitutionalize the existing gains to businesses from shifting risks of pollution, fraud, or injury to workers, consumers, or communities likely to have weaker private bargaining power due to their typically greater barriers to private collective action. Instead, consistent with the post-*Lochner* affirmation of democratic governance, rational basis review should leave open government processes for public collective action aimed at producing different public or private benefits. If proposed policy benefits are likely to impose substantial widespread losses on existing business organizations, those losses do not deserve special judicial protection, but rather should be defended as one of many possibly competing values subject to democratic judgment. Finally, the due process example shows how the principle of coordinated power for "we the people" can be applied to reduce collective action barriers that undermine the rule of law. Law itself risks becoming fundamentally irrational in a system that raises the costs of justice and the private gains from injustice by substantially relegating law enforcement to individualized and unequal private bargaining.

The principle of fair access to collective power may not be immediately useful for successful litigation in the current Court. But linking an expansive vision of economic justice to constitutional values and authority can be an important step toward building political coalitions capable of reshaping the Court. The success of neoliberal economic constitutionalism rests in part on convincing a broader public that collective economic power operates through mysterious, inevitable, and apolitical market forces—like global economic competition—beyond the reach of human knowledge or deliberate control. Beneath that disingenuous rhetoric, neoliberal economic constitutionalism deliberately aims to

seize unequal control of law from democratic majorities.[102] To challenge that strategic cynicism about law,[103] it is important to expose and confront the Court's role in constitutionalizing inequality and austerity under thin and inconsistent cover of formal structural principles.

As meaningful political economic power seems increasingly out of reach for many, if not most, Americans, fundamental justice appears to be increasingly narrowed to the power to "vote" to exit injustice with our limited individual wallets, feet, or guns,[104] even when this power seems mainly self-destructive and symbolic. Instead of minimizing the Constitution's role in protecting economic justice, we should insist that political economic freedom includes broad and equitable access to power to create better choices—so that "we the people" can lift the many political economic constraints that govern our lives under color of law.

102. *See* PHILIP MIROWSKI, NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN 68–70 (2013) (discussing neoliberalism's "double-truth" doctrine).

103. *See* Steven A. Ramirez, *Rodrigo's Abstraction: Capitalism, Inequality, and Reform over Time and Space*, 50 WAKE FOREST L. REV. 187, 217 (2015) (arguing that law has shaped the different forms of capitalism over time and space, and that legal reform can change the inequalities of the current U.S. economic system).

104. *See generally* ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2013) (advocating what he constructs as market choice over democratic politics).