

CLASS WARFARE: THE DISAPPEARANCE OF LOW-INCOME LITIGANTS FROM THE CIVIL DOCKET

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At root, equal justice is simply the notion that law and the courts should be fair, even if life isn't.

—Justice Earl Johnson, Jr., California Court of Appeal

ABSTRACT

In recent years, much attention has been paid to the startling disparities in income and wealth in contemporary U.S. society. The enormous concentration of economic power in the top 1% is the culmination of decades of significant income and wealth gains for the top, combined with stagnant or decreasing growth for the majority—a trend that continues apace. The implications of this wealth gap reverberate across the socio-legal landscape, but nowhere is the gap more glaring than in the civil docket, where litigation—particularly class actions brought by or on behalf of low-income consumers and employees—is on the verge of disappearing.

To be sure, the decline in class actions is only part of the larger story, as procedural and substantive constraints on legal access are visible everywhere—from problems of non-representation, to cuts in funding for legal aid and court administration, to heightened pleading standards, increasingly restrictive views of standing to sue, and the privatization of justice. But the thesis of this Essay is that the unavailability of class litigation is disproportionately more harmful to low-income groups than any other legal impairment, for a number of reasons. The first is sadly obvious: economically disadvantaged groups are more susceptible to abusive practices in the marketplace and the workplace, suffering disproportionate instances of predatory lending, consumer fraud, unfair wages, and discrimination. Without a mechanism for aggregating these low-value claims, the rights of low-income individuals would simply slip through the legal cracks, unvindicated. But, more brutally, recent studies show that, to a large and disturbing extent, the poor stay poor: when members of low-income groups suffer from group-based

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wrongdoing, they are likely to experience the same or similar wrongdoing again in the future. The failure to detect and deter bad actors who prey on the poor only promotes chronic exploitation and the perpetuation of intractable poverty. And again, class litigation is often the best or only means of bringing these claims.

This Essay ends by examining an important by-product of the disappearance of low-income claimants from the civil docket: as contemporary judges see fewer civil cases brought by or on behalf of poor people, one might expect that they will grow further out of touch with and more ill-equipped to manage these claims; and as this reservoir of wisdom empties, judicial attitudes towards the poor may harden, growing disdainful and ungenerous. Accordingly, when judges are sporadically faced with the legal claims of low-income groups, it becomes harder to spot (or easier to ignore) patterns of exploitative, abusive conduct by corporate or governmental actors.

INTRODUCTION

In recent years, much attention has been paid to the startling disparities in income and wealth in contemporary U.S. society.¹ The enormous concentration of economic power in the top 1% is the culmination of decades of significant income and wealth gains for the top, combined with stagnant or decreasing growth for the majority—a trend that continues apace.² The widening wealth gap recently led Federal Reserve Chairwoman Janet Yellen to wonder aloud whether “this trend is compatible with values rooted in our nation’s history, among them the high value Americans have traditionally placed on equality of opportunity.”³

¹ See, e.g., Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* (Nat’l Bureau of Econ. Research, Working Paper No. 20625, 2014), <http://gabriel-zucman.eu/files/SaezZucman2014.pdf> (showing that the share of total income earned by the top 1% of Americans exceeded 20% as of the end of 2012); Richard Fry & Rakesh Kochhar, *America’s Wealth Gap Between Middle-Income and Upper-Income Families Is Widest on Record*, PEW RES. CTR.: FACT TANK (Dec. 17, 2014), <http://www.pewresearch.org/fact-tank/2014/12/17/wealth-gap-upper-middle-income/> (reporting that in 2013 the median wealth of the nation’s upper-income families (\$639,400) was nearly seven times the median wealth of middle-income families (\$96,500)).

² Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC’Y 152, 155–58, 163–64 (2010) (showing that the wealthiest 1% of households have seen significant and repeated income gains since 1980, while lower and middle-income wages have remained stagnant or worse).

³ Janet L. Yellen, Chairwoman, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Conference on Economic Opportunity and Equality 2–3 (Oct. 17, 2014), <http://www.federalreserve.gov/newsevents/speech/yellen20141017a.pdf>.

This great gap between the very rich and everyone else has grown only more pronounced in the wake of the recent financial crisis, which ravaged the value of assets held by low-income families⁴ and devastated the labor markets,⁵ as companies sent thousands of lower-skilled, labor-intensive jobs overseas.⁶ The resulting financial pressures pushed many already fragile communities over the poverty threshold,⁷ where compounding injustices have recently sparked violence and rioting.⁸

The financial crisis also generated turmoil within low-income groups relating to, among other things, consumer credit, housing, and employment—exacerbating existing economic disadvantages. For example, owing to the

⁴ See, e.g., Elyse Cherry, Opinion, *Where the Housing Crisis Continues*, N.Y. TIMES (June 3, 2015), <http://www.nytimes.com/2015/06/03/opinion/where-the-housing-crisis-continues.html> (observing that “[i]n many areas, housing prices are stuck below their inflated, pre-bubble levels,” which leads “entire communities to struggle with high foreclosure rates and a lack of economic mobility”).

⁵ See, e.g., CLAIRE MCKENNA & IRENE TUNG, NAT’L EMP’T LAW PROJECT, OCCUPATIONAL WAGE DECLINES SINCE THE GREAT RECESSION: LOW-WAGE OCCUPATIONS SEE LARGEST REAL WAGE DECLINES (2015), <http://www.nelp.org/publication/occupational-wage-declines-since-the-great-recession/> (showing that workers in the lowest-earning jobs have been hardest hit by stagnant wages).

⁶ See, e.g., BETH MACY, *FACTORY MAN: HOW ONE FURNITURE MAKER BATTLED OFFSHORING, STAYED LOCAL—AND HELPED SAVE AN AMERICAN TOWN* (2014) (chronicling widespread effects of hundreds of thousands of furniture-making jobs sent overseas in the mid-2000’s); Binyamin Appelbaum, *Perils of Globalization When Factories Close and Towns Struggle*, N.Y. TIMES (May 17, 2015), <http://www.nytimes.com/2015/05/18/business/a-decade-later-loss-of-maytag-factory-still-resonates.html> (detailing decline of Galesburg, Ill. in the wake of closure of Maytag factory that was its largest employer).

⁷ LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (reporting that U.S. Census Bureau estimates that the number of Americans living below 125% of the federal poverty level increased from 49.6 million in 2005 to 53.8 million in 2008); see also JENNIFER BROOKS ET AL., CORP. FOR ENTER. DEV., TREADING WATER IN THE DEEP END: FINDINGS FROM THE 2014 ASSETS & OPPORTUNITY SCORECARD 6 (2014), http://assetsandopportunity.org/assets/pdf/2014_Scorecard_Report.pdf (reporting that 2011 median household net worth continued to decline nationally and in twenty states—down 29% from the pre-recession level; and that “the inability to save, as measured by ‘liquid asset poverty,’ remained more than double the income poverty rate in 2011 in nearly every state”).

⁸ The riots in Ferguson, Baltimore, and Cleveland in the wake of police shootings of unarmed black citizens were at least partly the result of frustration and anger by these disadvantaged communities, tired of the “devastating effects of extreme and rising inequality.” Paul Krugman, *Race, Class and Neglect*, N.Y. TIMES (May 4, 2015), <http://www.nytimes.com/2015/05/04/opinion/paul-krugman-race-class-and-neglect.html>. Although this Essay will not separate out blacks or other racial minorities from the broader category of economically disadvantaged citizens, it is noteworthy that the financial and other pressures discussed here are often more potent for minority groups. See, e.g., Lydia Polgreen, *From Ferguson to Charleston and Beyond, Anguish About Race Keeps Building*, N.Y. TIMES (June 20, 2015), <http://www.nytimes.com/2015/06/21/us/from-ferguson-to-charleston-and-beyond-anguish-about-race-keeps-building.html> (“[T]he Great Recession wiped out twice as much black wealth as it did white,” and over the course of the twentieth century, blacks have been “overwhelmingly excluded from the largest opportunities for wealth creation . . . from federally subsidized homeownership . . . to the job training programs that create millions of middle-class livelihoods.”).

received wisdom (quite wrong as it happens) that lending to the poor was a primary cause of the recession, the credit markets available to low-income individuals came to a near-standstill by 2011. Accordingly, these groups became increasingly dependent upon unscrupulous and high-priced alternatives to traditional credit sources—i.e., payday lenders, check-cashing services, phone cards, and other predatory business practices. And escalating debt often creates problems for low-wage workers, as many employers have come to routinely run credit checks to eliminate applicants with credit problems from consideration.⁹ These successive calamities have created a downward spiral that has hampered the recovery of low-income populations, even as top income brackets have fully rebounded from losses suffered during the Great Recession.¹⁰

These disparities are projected in myriad ways across the contemporary socioeconomic landscape: fewer low-income families own their homes¹¹ or are even able to rent in decent neighborhoods (i.e., places with good schools, parks, and transportation options¹²); fewer have ready access to the internet, fresh food, green space, or adequate medical care;¹³ fewer go to college and

⁹ ANGELA PADILLA & ALICIA ATKINSON, NAT'L IMMIGR. L. CTR., *THE USE (AND OVERUSE) OF CREDIT HISTORY* (2014), http://cfed.org/blog/inclusiveeconomy/Credit_Use_Overuse.pdf (citing Catherine Ruetschlin & Dedrick Asante-Muhammad, *The Challenge of Credit Card Debt for the African American Middle Class*, DEMOS & NAACP, Dec. 2013).

¹⁰ Saez & Zucman, *supra* note 1, at 1, 3, 24–25, 32 tbl.2 (reporting that as of 2013, the top 0.1% of the population, which owns over 22% of the country's wealth—roughly the same share of wealth as the bottom 90%—had fully rebounded from losses suffered during the Great Recession; meanwhile, increased debt, stagnant wages, and higher costs have kept the lower 90% from making any real post-recession gains); see also *The Richest 10% in Developed Countries Earn Nearly 10 Times the Bottom 10%*, FIN. POST (May 21, 2015), <http://business.financialpost.com/news/economy/the-richest-10-in-developed-countries-earn-nearly-10-times-bottom-10-and-thats-stunting-growth> (reporting on study by the Organization for Economic Corporation and Development, finding that between 2008 and 2013, average household disposable income at the top 10% rose 10.6%, while in the bottom 10% it fell 3.2%"); Yellin, *supra* note 3 (observing that those at the very top recovered from the recession “as the stock market rebounded” but that lower-income groups continued to suffer as “wage growth and the healing of the labor market have been slow, and the increase in home prices has not fully restored the housing wealth lost by the large majority of households, for which it is their primary assets”).

¹¹ See, e.g., Lisa Prevost, *Gap Persists in Homeownership: Low-Income and Minority Households Far Behind in Homeownership*, N.Y. TIMES (Feb. 6, 2015), <http://www.nytimes.com/2015/02/08/realestate/low-income-and-minority-households-far-behind-in-homeownership.html>.

¹² See, e.g., David Leonhardt, *Middle-Class Black Families, in Low-Income Neighborhoods*, N.Y. TIMES (June 24, 2015), <http://www.nytimes.com/2015/06/25/upshot/middle-class-black-families-in-low-income-neighborhoods.html>.

¹³ See, e.g., *FCC Head Unveils Proposal to Narrow 'Digital Divide,'* ASSOCIATED PRESS (May 28, 2015), <http://www.timesfreepress.com/news/national/business/story/2015/may/28/fcc-head-unveils-proposal-narrow-digital-divi/306721/>. The Affordable Care Act has had tremendous impact by providing health insurance to lower middle-class and poor Americans who could not have afforded it otherwise. But even with

graduate;¹⁴ fewer obtain stable, middle-class jobs;¹⁵ and fewer live to old age.¹⁶ But nowhere is the gap more glaring than in the civil docket, where class actions brought by or on behalf of low-income consumers and employees are on the verge of disappearing.

Because individual lawsuits often cost more to bring than the victim would recover, class actions have historically enabled lawyers to “aggregate these small claimants into an efficient procedural vehicle for common litigation.”¹⁷ For low-income groups in particular, aggregating claims has provided significant access to justice, as individual members of these groups may be “in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.”¹⁸ Equally important,

recent decisions upholding important aspects of the law, conservatives will continue to seek ways to upturn these provisions. *See, e.g.,* King v. Burwell, 135 S. Ct. 2480 (2015); Editorial, *The Fight for Health Care Isn't Over*, N.Y. TIMES (June 27, 2015), <http://www.nytimes.com/2015/06/28/opinion/sunday/the-fight-for-health-care-isnt-over.html> (reporting that a “prominent lawsuit filed in the name of the House of Representatives is working its way through the courts . . . [which] seeks to block the administration’s right to reimburse insurers that provide cost-sharing subsidies for very poor people”). And, in other areas of healthcare policy, poor people continue to face great difficulty. *See, e.g.,* Gail Collins, Opinion, *Battle of the Abortion Decisions*, N.Y. TIMES (June 11, 2015), <http://www.nytimes.com/2015/06/11/opinion/gail-collins-battle-of-the-abortion-decisions.html> (reporting on the difficulty poor women face in accessing safe abortions, and observing that “[p]oor pregnant women in anti-abortion states . . . [are] often the most desperate, and these days some are resolving the situation with at-home abortions, using pills found on the Internet”).

¹⁴ *See, e.g.,* Susan Dynarski, *For the Poor, the Graduation Gap Is Even Wider than the Enrollment Gap*, N.Y. TIMES (June 2, 2013), <http://www.nytimes.com/2015/06/02/upshot/for-the-poor-the-graduation-gap-is-even-wider-than-the-enrollment-gap.html>; *see also* Brent Staples, Editorial, *Shut Out of Higher Education*, N.Y. TIMES: TAKING NOTES (Oct. 27, 2014), <http://takingnote.blogs.nytimes.com/2014/10/27/shut-out-of-higher-education/> (reporting that reduced government support of public colleges has impacted “low-income and working-class Americans who are increasingly finding themselves shut out of higher education”).

¹⁵ *See, e.g.,* GREG J. DUNCAN & RICHARD J. MURNANE, *RESTORING OPPORTUNITY: THE CRISIS OF INEQUALITY AND THE CHALLENGE FOR AMERICAN EDUCATION* (2014); Patricia Cohen, *Public-Sector Jobs Vanish, Hitting Blacks Hard*, N.Y. TIMES (May 24, 2015), <http://www.nytimes.com/2015/05/25/business/public-sector-jobs-vanish-and-blacks-take-blow.html>; *see also* Krugman, *supra* note 8 (observing that “[l]agging wages . . . and work instability” are persistent problems that are often “followed by sharp declines in marriage, [and] rising births out of wedlock”).

¹⁶ *See, e.g.,* Sabrina Tavernise, *Disparity in Life Spans of the Rich and the Poor Is Growing*, N.Y. TIMES (Feb. 12, 2016), <http://www.nytimes.com/2016/02/13/health/disparity-in-life-spans-of-the-rich-and-the-poor-is-growing.html> (reporting a fourteen-year difference in life expectancy between the top 10% of wage earning males born in 1950 and the bottom 10%); Justin Wolfers, David Leonhardt & Kevin Qualey, *1.5 Million Missing Black Men*, N.Y. TIMES (Apr. 20, 2015), <http://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html>; *see also* ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 18 (1990) (discussing environmental racism—the dumping of toxic waste near poor and minority neighborhoods—and the resulting, long-term health effects).

¹⁷ JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 3 (2015).

¹⁸ Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1347 (2007) (quoting Harry Kalven & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941)).

class actions can secure relief “that is not only longer-lasting but also broader-based,” of critical importance to communities that are constantly confronted with nefarious business practices.¹⁹

In prior eras, the class action device has been used to achieve precisely these ends.²⁰ But in recent decades, access to class-wide relief for low-income groups has declined precipitously. First, and most dramatically, in 1996, Congress imposed restrictions on the ability of the Legal Services Corporation (LSC)—a primary funder of civil legal aid for low-income groups—to participate in class actions.²¹ In the wake of the restrictions, LSC-funded lawyers were forced to resign from hundreds of class cases, involving hundreds of thousands of clients.²² Second, and more recently, judicial and legislative constraints have all but eliminated the availability of class and representative actions brought by private attorneys seeking to represent low-income groups to obtain damages and injunctive relief.

To be sure, the decline in class actions is only part of the larger story, as procedural and substantive constraints on legal access now litter the doctrinal landscape. The “justice gap” and problems of non-representation;²³ cuts in

¹⁹ Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 17 (1984); see also William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1881 (2002) (“Rules enabling liberal party joinder and representative litigation have equalizing consequences because these rules essentially allow parties to pool resources in prosecution of a common claim.” (footnotes omitted)); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (arguing that class actions remedy some of the disadvantages faced by poor litigants).

²⁰ See, e.g., Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN ST. L. REV. 1, 10 n.46 (2005) (citing Barbara Rabinowitz, *Servicing the Poor*, MASS. LAW. WEEKLY, May 10, 1993, at 29 (discussing the capacity of Boston’s Legal Services Corporation to acquire benefits for the poor through the use of class actions)); *id.* (citing William J. Dean, *Success Story*, 5/29/93 N.Y. L.J. 3 (1993) (noting that class actions can be used to aid the homeless)); Gordon Bonnyman, *Adapting Without Accepting: The Need for a Long-Term Strategy for “Full Service” Representation of the Poor*, 17 YALE L. & POL’Y REV. 435, 437 (1998) (asserting that “we cannot forget why it is that the particular advocacy activities that Congress prohibited remain so indispensable to the poor”).

²¹ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321-50 to -55 (codified as amended at 42 U.S.C. § 2996 (2012)).

²² Blank & Zacks, *supra* note 20, at 17–18 (noting that “[f]or every class action case that Legal Services programs abandoned, there are countless others that they will never take, depriving thousands of potential clients of the representation they otherwise could expect from Legal Services lawyers” (alteration in original) (quoting David Udell, *Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor*, 25 FORDHAM URB. L.J. 895, 906 (1998) (then-Director of the Brennan Center for Justice))).

²³ An enduring explanation for the inability of lower-income populations to effectively access the legal system is the “justice gap”—the inability of low-income individuals to find lawyers to represent them in legal disputes involving housing, consumer transactions, immigration, domestic violence, and employment. Some

funding for legal aid²⁴ and court administration;²⁵ heightened pleading standards and expensive discovery;²⁶ increasingly restrictive views of standing to sue;²⁷ the co-opting of small claims court by businesses seeking to collect debts; the modern penchant for the privatization of justice; among many other developments have erected near-impossible obstacles in the path to the courthouse for economically disadvantaged groups. But the thesis of this Essay is that the unavailability of class litigation is disproportionately more harmful to low-income groups—in ways both real and expressive, short- and long-term—than any other single factor. The reasons, I submit, are threefold and interrelated.

First, I posit that economically disadvantaged groups are more susceptible to abusive practices in the marketplace and the workplace, suffering disproportionate instances of predatory lending, consumer fraud, unfair wages, and discrimination. This overexposure is likely the result of a confluence of factors: low bargaining power, if any; bad credit history; limited choices; and obstacles to processing information. But whatever the root causes, my argument here is simply that low-income groups are more likely to experience violations of statutory rights that give rise to class-wide and collective legal claims.

studies estimate that over 80% of low-income Americans cannot access the civil court system to press their claims or protect their interests. *See, e.g.*, LEGAL SERVS. CORP., *supra* note 7, at 17 (reporting that less than 20% of low-income individuals get the legal assistance they need); Theresa Amato, Opinion, *Put Lawyers Where They're Needed*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/06/17/opinion/put-lawyers-where-theyre-needed.html> (observing that “the United States ranks 65th for the accessibility and affordability of its civil justice system[,] . . . tied with Botswana, Pakistan and Uzbekistan, not far behind Moldova and Nigeria”).

²⁴ *See, e.g.*, Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 140 (2010) (finding that there were only 6,581 legal aid attorneys—representing only one-half of one percent of all lawyers in the United States—providing civil legal services); David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 211 (2003) (reporting that there is one lawyer for every 9,000 Americans who qualify for legal aid).

²⁵ *See, e.g.*, RESPONSIVE LAW, ISSUES PAPER ON THE FUTURE OF LEGAL SERVICES 3 (2014), http://www.americanbar.org/content/dam/aba/images/office_president/responsive_law.pdf (observing that the crisis in access is caused by the “complexity of American legal process, cuts to court budgets[,] . . . limited legal aid funds . . . [and] the high cost of legal services”).

²⁶ *See, e.g.*, Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014) (presenting empirical proof that Supreme Court cases on summary judgment and on pleading had palpably negative effects on plaintiffs).

²⁷ *See, e.g.*, Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002) (criticizing implementation of Article III standing rules that disadvantage poor claimants).

Second, the impact of class relief is more acutely felt by low-income groups. Compensatory damages—in predatory lending, employment, and other cases—can make a discernible difference in the lives of people living on the economic margins. But of vastly greater consequence for this population is the deterrent effect of class actions upon future wrongdoers. This is because recent studies show that, to a large and disturbing extent, the poor stay poor.²⁸ A modern consequence of the “birth lottery” is that children who are born at or below the poverty line are very likely to remain there throughout their lifetimes.²⁹ As such, when members of low-income groups suffer from group-based wrongdoing, they are likely to experience the same or similar wrongdoing again in the future. Accordingly, the failure to detect and deter bad actors who prey on the poor only promotes chronic exploitation and the perpetuation of intractable poverty. In sum, the decline in class actions not only leaves economically fragile populations without a potent remedy for past wrongdoing, it leaves them far more vulnerable to future exploitation.

Third, as low-income plaintiffs find themselves blocked from bringing class actions, whole categories of legal claims are disappearing from the docket—private claims sounding in abusive debt collection, predatory lending, consumer scams, illegal foreclosures, unfair or unpaid wages, and employment discrimination.³⁰ These are among the types of legal issues that economically vulnerable populations are very likely to encounter;³¹ these are also the types of claims that have driven many important doctrinal and policy advances in consumer, employment, and other areas of law over the past half-century. As such, much *law*—in the form of precedents, doctrines, rules, guiding principles, informative discussions and debates—is lost when low-income disputants are no longer able to file claims in public courts.

Relatedly, when low-income claims disappear from the docket, it is reasonable to worry that judges will lose important opportunities to engage

²⁸ Raj Chetty et al., *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility* (Nat'l Bureau of Econ. Research, Working Paper No. 19844, 2014), http://scholar.harvard.edu/files/hendren/files/trends_in_intergenerational_mobility_pdf.pdf?m=139091954.

²⁹ *Id.*

³⁰ This Essay will focus on private enforcement of consumer and employment statutes, rather than claims against government actors sounding in violations of state and federal constitutional and statutory rights. However, the latter are also in decline. For an excellent discussion of recent developments, see David Marcus, *The Public Interest Class Action*, 104 *GEO. L.J.* 777 (2016).

³¹ Omri Ben-Shahar, *Arbitration and Access to Justice: Economic Analysis* 18 (Chicago Inst. for Law and Econ., Working Paper No. 628, 2013) (surmising that “weak consumers are disproportionately likely to seek remedies in court . . . [because] [t]he poor and the less sophisticated endure more abuse and exploitation by dealing with lower quality vendors”).

with these categories of issues and litigants. Back in the 1960s and 1970s, the nation committed to a domestic War on Poverty and an end to racial discrimination, which “focused attention on the plight of poor Americans.”³² These social movements energized and empowered judges to actively respond to claims brought by and on behalf of the poor and politically marginalized.³³ But as contemporary judges see fewer civil cases brought by or on behalf of poor people, one might expect that they will grow further out of touch with and ill-equipped to manage these claims; and as this reservoir of wisdom empties, judicial attitudes towards the poor harden, growing disdainful and ungenerous.³⁴ Accordingly, when judges *are* sporadically faced with the legal claims of low-income groups, it becomes harder to spot (or easier to ignore) patterns of exploitative, abusive conduct by corporate or governmental actors. As David Luban once wrote, “[L]itigants serve as nerve endings registering the aches and pains of the body politic The law is a self-portrait of our politics, and adjudication is at once the interpretation and the refinement of the portrait.”³⁵ Today, whole swaths of the population are glaringly absent from that self-portrait, and one might predict that the judicial nerve endings grow numb to their complaints.

This Essay will explore these three, interconnected implications of the decline of class actions and their impact on low-income groups.

I. THE VULNERABILITIES OF LOW-INCOME GROUPS

This Essay begins with the premise that class actions and other aggregative forms of litigation greatly benefit lower-income groups—and concomitantly, that the curtailing of such litigation will do these groups great harm. This premise initially follows from the common wisdom that, no matter one’s income bracket, aggregating small-value claims overcomes “the problem that

³² Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 958–59 (1986) (attributing this focus on the convergence of LBJ’s War on Poverty, the civil rights movement, and the birth of the consumer movement).

³³ *Id.* at 959 n.122 (reporting that Justice Skelly Wright, who wrote the famous unconscionability decision *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), had observed that “a socially conscious atmosphere helped to spur his activist school desegregation decisions”).

³⁴ In an analogous context, Charles Lawrence has observed that judges are not immune from experiencing and acting upon “cultural disdain,” and “may well be insensitive or even antagonistic toward the values, needs, and experiences” of groups with which they cannot relate. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 380 (1987).

³⁵ David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2638 (1995).

small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”³⁶ When these individual claims are worth less than the cost of litigation, “aggregation renders them marketable and incentivizes a plaintiff’s lawyer to bring suit.”³⁷

This practical reality of aggregation is only amplified where the victims of wrongdoing are economically vulnerable. This is largely because lower-income groups are more regularly and perilously exposed to abusive practices by private business interests—abuses that often result in small-dollar consumer injuries or group-based workplace harms.³⁸ As one writer put it, living in poverty “creates an abrasive interface with society; poor people are always bumping into sharp legal things.”³⁹ And because the harm that results from these conflicts in both the marketplace and workplace weighs more heavily upon low-income individuals—whose margins are thinner, with more to lose—it follows that these groups are more likely to benefit from legal action taken to address abusive conduct in the marketplace and workplace.⁴⁰

A. *Low-Income Consumers*

In the marketplace for goods and services, poor and uneducated consumers suffer the disproportionate burden of fraud and other abusive practices. Among other things, economically disadvantaged groups are more susceptible to the scourges of predatory lending, reverse redlining, abusive mortgages, exorbitant student loans, subprime car loans, and other unfair and deceptive consumer

³⁶ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); see also *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”); *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 345–46 (S.D. Ga. 1996) (noting that an essential purpose of class actions is “to provide a feasible means for asserting the rights of those who ‘would have no realistic day in court if a class action were not available’” (quoting *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985))).

³⁷ *Marcus*, *supra* note 30, at 31.

³⁸ See, e.g., Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231, 1236 (1988) (“[E]conomic actors may systematically take advantage of low-income persons because of their inability to exercise their rights in the judicial arena. For instance, it may be profitable for a merchant systematically to charge usurious interest for essential items purchased on credit, knowing that this practice will never be challenged in court.”).

³⁹ Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1050 (1970).

⁴⁰ Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 377 (2004) (“Individuals at the economic margin are much less able to ‘lump it’ when faced with a denial of rights or benefits.”).

practices.⁴¹ As Professor Ben-Shahar has observed, “The poor and the less sophisticated endure more abuse and exploitation by dealing with lower quality vendors.”⁴² These experiences regularly recur because low-income groups face significant structural barriers to accessing traditional credit markets; as such, these groups are heavily reliant upon high-cost, lightly regulated “fringe banking” options—such as payday loans, money orders, pawnshops, rent-to-own stores and high-interest-rate credit cards. These alternatives often leave low-income individuals in even greater debt, as exploitative providers target these groups for especially abusive practices.⁴³

Payday lending, in particular, has caught many low-income borrowers in a “turnstile of debt”: unable to repay short-term, high-interest-rate loans within the typical two-week loan period, low-income borrowers are forced to keep borrowing at higher and higher rates.⁴⁴ With storefronts “[s]trategically located in low-income neighborhoods”⁴⁵ and close to military bases,⁴⁶ the

⁴¹ See generally JOHN P. CASKEY, FRINGE BANKING: CHECK-CASHING OUTLETS, PAWNSHOPS, AND THE POOR (1994). “Reverse redlining is the practice of extending credit on unfair terms” to “specific geographic areas based on the income, race, or ethnicity of residents.” *Assocs. Home Equity Servs., Inc. v. Troup*, 778 A.2d 529, 537 (N.J. Super. Ct. App. Div. 2001).

⁴² See, e.g., Ben-Shahar, *supra* note 31, at 18.

⁴³ Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending*, 87 MINN. L. REV. 1, 5 (2002) (arguing that “a large number of payday lenders engage in predatory practices”); Angela Littwin, *Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers into Less Desirable Lending Alternatives?*, 2009 U. ILL. L. REV. 403, 425–29 (discussing credit cards as a problematic form of credit for low-income borrowers); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 901–05 (2007) (proposing that payday lending regulations increase transparency of lending services and increase common disclosures among lenders to those using payday-lending services); Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563 (2010) (proposing federal usury cap on payday-lending industry); Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 MO. L. REV. 41 (2012) (describing the need for greater regulation and arguing for more regulations to protect lower class credit products).

⁴⁴ Repeat-payday loans account for \$3.5 billion in fees each year. *Phantom Demand: Short-Term Due Date Generates Need for Repeat Payday Loans, Accounting for 76% of Total Volume*, CTR. FOR RESPONSIBLE LENDING (July 9, 2009), <http://www.responsiblelending.org/research-publication/phantom-demand-short-term-due-date-generates-need-repeat-payday-loans>. It is estimated that 90% of the payday-lending business is generated by borrowers with five or more loans per year, and over 60% of business is generated by borrowers with 12 or more loans per year. GA. WATCH, DON’T FIX WHAT AIN’T BROKE: GEORGIA’S PAYDAY LOAN BAN WORKS (2015), <http://www.georgiawatch.org/wp-content/uploads/2015/01/Georgia-Watch-Payday-Lending-Report.pdf>. Meanwhile, loans to non-repeat borrowers account for just 2% of payday-loan volume. *Predatory Lending Practices Fact Sheet*, IMPACT AM., <http://impactamerica.com/predatory-lending-practices-fact-sheet/> (last visited May 18, 2016).

⁴⁵ *Payday & Other Small Dollar Loans*, CTR. FOR RESPONSIBLE LENDING, <http://www.responsiblelending.org/issues/payday-other-small-dollar-loans> (last visited May 18, 2016).

payday-lending industry is concentrated in the poorest counties of the poorest states—luring “unsophisticated shoppers by the hundreds of thousands into a thicket of debt from which many never emerge.”⁴⁷ And while there have been some efforts to regulate the industry via legislation⁴⁸ and enforcement actions,⁴⁹ private litigation on behalf of borrowers has been critical in detecting and reforming abusive industry practices.⁵⁰

For example, in 2002, federal bank regulators investigated California-based Goleta Bank and its payday-lending arm, ACE Cash Express, for “unsound” lending practices; the bank eventually settled with regulators for \$325,000 in fines and penalties.⁵¹ But a year later, a nationwide class action brought by borrowers against Goleta and ACE detailed widespread exploitation of economically vulnerable, low-income consumers in the collection of high interest loans, “flipping” practices, and deceptive marketing.⁵² The class was certified and ultimately settled for \$54.5 million in cash and debt forgiveness for class members.⁵³ Equally important, Goleta agreed as part of the settlement to halt its payday-lending program.⁵⁴

⁴⁶ Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of “Payday Loans” in Military Towns*, 66 OHIO ST. L.J. 653 (2005) (finding high concentrations of payday lending businesses in counties, ZIP codes, and neighborhoods in close proximity to military bases).

⁴⁷ Brian Grow & Keith Epstein, *The Poverty Business*, BLOOMBERG (May 20, 2007, 11:00 PM), <http://www.bloomberg.com/bw/stories/2007-05-20/the-poverty-business>.

⁴⁸ Fourteen states and the District of Columbia have enacted double-digit rate caps on payday loans. See *Small Dollar Loans: Our Policy Positions*, CTR. FOR RESPONSIBLE LENDING, <http://www.responsiblelending.org/issues/payday-other-small-dollar-loans/small-dollar-loans-policy> (last visited May 18, 2016).

⁴⁹ See, e.g., FTC v. AMG Servs., Inc., No. 2:12-cv-00536-GMN-VCG, 2015 WL 4073192, at *1 (D. Nev. July 2, 2015). *AMG Services, Inc.* involved an action brought by the FTC alleging that payday lending company’s loans violate § 5 of the Federal Trade Commission Act of 1914, 15 § U.S.C. 45(a)(1) (2012), the Truth in Lending Act of 1968, 15 U.S.C. § 1601(a) (2012), and Regulation Z, 12 C.F.R. § 1026(a) (2015)). The CFPB has also monitored payday lenders. *AMG Servs., Inc.*, 2015 WL 4073192, at *1; see, e.g., Barbara Mishkin, *CFPB Files Lawsuit Against Internet Payday Loan Companies*, CONSUMER FIN. PROT. BUREAU MONITOR (Aug. 5, 2015), <https://www.cfpbmonitor.com/2015/08/05/cfpb-files-lawsuit-against-internet-payday-loan-companies/>.

⁵⁰ See, e.g., *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1308 (D. Nev. 2014) (certifying class action brought by consumers against payday lenders alleging violations of the Telephone Consumer Protection Act); *Mitchem v. GFG Loan Co.*, No. 99-C-1866, 2000 WL 294119, at *3, *6 (N.D. Ill. Mar. 17, 2000) (in consolidated claims by borrowers, court found that the Truth in Lending Act’s provisions required disclosure in that case and accordingly partially denied the defendant’s motion to dismiss).

⁵¹ *Payday Loan Program Halted*, L.A. TIMES (Oct. 30, 2002), <http://articles.latimes.com/2002/oct/30/business/fi-goleta30>.

⁵² *Purdie v. ACE Cash Express, Inc.*, No. Civ.A. 301CV1754L, 2003 WL 22976611, at *1 (N.D. Tex. Dec. 11, 2003).

⁵³ *Id.* at *2.

⁵⁴ *Fed. Judge OKs Settlement of National ‘Payday Loan’ Class Action*, 9 ANDREWS’ BANK & LENDER LIABILITY LITIG. REP. 8 (2004).

Studies confirm that lower-income groups are specifically targeted by a host of shady businesses for various other types of economic exploitation,⁵⁵ presumably because perpetrators perceive these groups as financially unsophisticated and therefore less likely to seek legal or other assistance to combat abusive tactics.⁵⁶ And the unremitting exposure to abusive practices only worsens existing economic vulnerabilities, rendering low-income groups further weakened and with fewer choices or alternatives. As Michael Barr found in a study of low-income households in Detroit, unscrupulous businesses can impose “high transaction costs on lower-income households, increase their costs of credit, and reduce their opportunities to save.”⁵⁷ Similarly, the Consumer Financial Protection Bureau (CFPB) has recently begun to regulate unfair and deceptive practices in the nonbank auto-loan market.⁵⁸ The CFPB has found that predatory car lenders have systematically targeted minority and low-income consumers,⁵⁹ exposing these groups to “higher odds of default and repossession . . . which can endanger the ability of those borrowers to get and hold jobs.”⁶⁰ As the result of this over-exposure to unfair and deceptive practices, low-income groups are more likely to have credit-card delinquencies, unpaid medical bills, overdraft fees leading to closed bank accounts, and repeated bankruptcies.

In response, federal and state legislators have sought to empower low-income consumers by enacting consumer-protection legislation that expressly contemplates class action litigation as a means of enforcement and redress. The Truth in Lending Act (TILA),⁶¹ Fair Credit Reporting Act,⁶² and

⁵⁵ Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1509 nn.43–44 (2008) (listing and describing lending studies).

⁵⁶ See, e.g., Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 356 (2006) (“Predatory lenders market their products to people who have little or no experience with mortgage loans and who do not have sufficient skills to untangle the maze of contract terms and engage in meaningful assessments of their options.” (footnotes omitted)).

⁵⁷ MICHAEL S. BARR, NO SLACK: THE FINANCIAL LIVES OF LOW-INCOME AMERICANS 8 (2012).

⁵⁸ *CFPB to Oversee Nonbank Auto Finance Companies*, CONSUMER FIN. PROT. BUREAU (June 10, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-to-oversee-nonbank-auto-finance-companies/>.

⁵⁹ *Putting an End to Abusive Car Loans*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/opinion/sunday/putting-an-end-to-abusive-car-loans.html> (reporting on enforcement actions resulting in fines totaling \$18 million and in payments totaling \$136 million to 425,000 black, Hispanic and Asian borrowers who were charged higher auto-loan interest rates than comparable white borrowers).

⁶⁰ *Id.*

⁶¹ 15 U.S.C. § 1640(a)(2)(B) (2012). TILA regulates the disclosure of credit terms and discrimination in determining credit limits, and it specifically provides that plaintiffs may recover “in the case of a class action, such amount as the court may allow.” *Id.* § 1640(a)(2)(B).

various other federal consumer-protection laws⁶³ specifically envision that collective litigation efforts will comprise a central mechanism of statutory enforcement. Similarly, nearly every state has laws on its books to protect small-claims consumers,⁶⁴ and many of these statutes expressly anticipate consumer class actions as a principal means of enforcement.⁶⁵ Explicit in these statutory grants of authority is the concept of the “private attorney general”—i.e., enabling economically disadvantaged groups harmed by private conduct to spread litigation costs across a large number of plaintiffs, significantly reducing the cost per litigant and allowing lower-income plaintiffs to share in any compensatory recovery, as well as authorizing injunctive relief to reform abusive practices.⁶⁶

B. *Low-Wage Workers*

Similarly, the working poor, as a group, are disproportionately more likely to experience abusive employment practices than their better-off counterparts.⁶⁷ As with low-income consumers, researchers surmise that employers engage in misconduct against low-wage and unskilled workers because they have less bargaining power and are less likely to sue.⁶⁸ Studies of

⁶² 15 U.S.C. §§ 1681a–1681x; see *White v. E-Loan, Inc.*, No. C 05-02080 SI, 2006 WL 2411420, at *9 (N.D. Cal. Aug. 18, 2006) (“[W]ithout class actions, there is unlikely to be any meaningful enforcement of the FCRA by consumers whose rights have been violated.”).

⁶³ See, e.g., Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended at 15 U.S.C. § 1601); Consumer Leasing Act of 1976, 15 U.S.C. §§ 1667–1667f; Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f; Fair Housing Act, 42 U.S.C. §§ 3601–3619.

⁶⁴ See William L. Stern, *The Reliance Element in State Consumer-Fraud Class Actions*, 23 REV. BANKING & FIN. SERVS. 1, 2 (2007).

⁶⁵ See, e.g., IND. CODE ANN. § 24-5-0.5-4 (West 2015) (authorizing class actions in deceptive sales act); FLA. STAT. ANN. § 501.211 (2010); N.Y. GEN. BUS. LAW §§ 342-b, 349 (McKinney 2012); WIS. STAT. § 100.20 (2013–14), <http://docs.legis.wisconsin.gov/2013/statutes/statutes/100.pdf>.

⁶⁶ Ben-Shahar, *supra* note 31, at 19, 21 (observing that class actions may “enable the poor to piggyback on the litigation effort of others, and collect the recovery that every member of the class is entitled to without any deliberate effort,” but also warning of “disproportionately low participation rate[s]” by the poor, who often “do not read the boilerplate notices about the settlements”).

⁶⁷ In 2012, U.S. households earning less than \$30,000 constituted approximately 33% of the population. AARON E. COBET, U.S. BUREAU OF LABOR STATISTICS, HIGH-INCOME HOUSEHOLD SPENDING AND THE ECONOMIC RECOVERY 7 (2014), <http://www.bls.gov/spotlight/2014/high-income-spending-economic-recovery/pdf/high-income-spending-economic-recovery.pdf>; see also ORG. FOR ECON. CO-OPERATION & DEV., OECD EMPLOYMENT OUTLOOK 2014, at 287 tbl.N (2014), http://www.keepeek.com/Digital-Asset-Management/oecd/employment/oecd-employment-outlook-2014_empl_outlook-2014-en#page289 (finding that 25.3% of U.S. workers qualify as “low wage earners”).

⁶⁸ See, e.g., Elizabeth Kristen, Blanca Banuelos & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 170 (2015) (observing that most workers “remain silent and never pursue justice against transgressor employers”); see also David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB.

workplace design have shown, for example, that employers utilize “fewer preventative tools to combat sexual harassment among low-income workers,” safely assuming these workers are too fearful of losing their jobs or too intimidated by the legal system to actually file a lawsuit alleging violations of Title VII.⁶⁹

Economists provide other explanations for why low-wage workers may suffer disproportionate harm in the workplace, including a lack of information about alternative employment and rational risk-aversion—i.e., the desperate need for low-income workers to retain their jobs, no matter the mistreatment, because they lack any financial cushion whatsoever.⁷⁰

Whatever the underlying reasons for the overexposure to workplace abuse, the powerful impact of these abuses on economically vulnerable groups is clear. Studies show, for example, that lower-income groups earn less money for similar work as their better-off counterparts, receive fewer benefits, experience less job security, and suffer greater discrimination in the workplace.⁷¹ “Wage theft” is especially pervasive, as practices such as “[o]ff-the-clock work, meal and overtime violations, and time-shaving” by unscrupulous employers unfairly shortchange low-wage workers.⁷² One study found that over two-thirds of low-wage workers had “experienced at least one pay-related violation in the previous work week,”⁷³ and “[c]laims by workers

L. & POL’Y J. 59, 83–84 (2005) (compiling studies indicating that workers do not report employer misconduct out of fear of retaliation).

⁶⁹ Philip L. Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 419, 420–21, 449–50 (2002).

⁷⁰ See Simon Deakin & Frank Wilkinson, *Minimum Wage Legislation*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 561, 561–71 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

⁷¹ See, e.g., *Pay Equity and Discrimination*, INST. FOR WOMEN’S POL’Y RES. (2010), <http://www.iwpr.org/initiatives/pay-equity-and-discrimination>; see also Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 54–55 (2007).

⁷² Nantiya Ruan, *What’s Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1104. The author also notes that “[u]npaid minimum wages, misclassification of workers as ‘salaried’ and therefore ineligible for overtime . . . illegal deductions, failure to pay final paychecks” are also among the “unlawful practices result[ing] in millions of dollars of lost money for workers who can least afford it.” *Id.* at 1106–07.

⁷³ ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* 5 (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>; see also ANNETTE BERNHARDT, SIOBHÁN MCGRATH & JAMES DIFILIPPIS, BRENNAN CTR. FOR JUSTICE, *UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY* 10, 12 (2007), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_49436.pdf (documenting violations in many New York City industries that employ workers directly, including discount stores, restaurants, dry cleaners, and construction); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2744 (2008) (noting that 60% of nursing homes

that their employers fail to pay them correctly have quadrupled over the last decade.”⁷⁴ A recent economic study estimated that wage theft accounts for \$50 billion a year in lost income—“a transfer from low-income employees to business owners that worsens income inequality.”⁷⁵

Low-wage workers have traditionally looked to collective litigation to protect themselves from these sorts of abuses for a number of reasons. First, the claims of low-wage workers generally involve relatively small per-person damage which, unless they are aggregated, “fail to capture the attention of a plaintiff’s attorney” or the defendant;⁷⁶ and certainly low-income workers “simply cannot afford the time and expense it would take to prosecute” these small-value claims individually.⁷⁷ Professor Ben-Shahar, for example, observes that “there are almost no cases of successful [individual] litigation commenced by lower-paid wage workers”⁷⁸—a view confirmed by numerous

and 100% of poultry processing plants were out of compliance); David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. 238, 244–46 (2005) (noting that fewer than half the garment contractors in Los Angeles paid the minimum wage and more than a quarter of their workers had “experienced some degree of underpayment”).

⁷⁴ Ruan, *supra* note 72, at 1107; *see also* Liz Robbins, *New Weapon in Day Laborers’ Fight Against Wage Theft: A Smartphone App*, N.Y. TIMES (Mar. 1, 2016), <http://www.nytimes.com/2016/03/02/nyregion/new-weapon-in-day-laborers-fight-against-wage-theft-a-smartphone-app.html> (reporting that an immigrant rights group has developed an app that will enable workers to “rate employers (think Yelp or Uber), log their hours and wages, take pictures of job sites, and help identify . . . employers with a history of withholding wages”).

⁷⁵ DEEPAK GUPTA & LINA KHAN, AM. CONSTITUTION SOC’Y FOR LAW & POLICY, ARBITRATION AS WEALTH TRANSFER 9 (2016), <https://www.acslaw.org/publications/issue-briefs/arbitration-as-wealth-transfer> (quoting Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL’Y INST. (Sept. 11, 2014), <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>).

⁷⁶ Ruan, *supra* note 72, at 1118–19, 1118 n.91 (“[I]ndividual wage and hour claims might be too small in dollar terms to support a litigation effort.” (quoting *Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005))); *see also* *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (“conclud[ing] that a class action is the superior method” for bringing plaintiffs’ overtime claims, in part, because “the cost of individual litigation is prohibitive”); *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D. 81, 85–86 (S.D.N.Y. 2001) (noting that individual suits, as an alternative to class litigation, may not be feasible based on class members’ lack of financial resources and disincentives for attorneys); *Sav-on Drug Stores, Inc. v. Superior Court*, 96 P.3d 194, 209 (Cal. 2004) (observing, in an overtime action, that “the class suit . . . provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation” (quoting *Richmond v. Dart Indus., Inc.*, 629 P.2d 23, 27 (Cal. 1981))).

⁷⁷ Ruan, *supra* note 72, at 1119; *see also* *Blank & Zacks, supra* note 20, at 13 (describing the facts of *Robinson v. Caulkins Indiantown Citrus Co.*, 771 F. Supp. 1205 (S.D. Fla. 1991), in which a low-wage worker brought suit on behalf of hundreds of similarly situated African American employees to force the defendant-employer “to pay for the social and economic harms it [had] caused”).

⁷⁸ Ben-Shahar, *supra* note 31, at 18.

scholars.⁷⁹ Second, class actions afford anonymity to individual workers who might fear retaliation should they pursue a claim individually. Obscuring individual worker identities is the only way to empower low-wage workers to exercise their rights without fear of reprisal⁸⁰ or raising questions of individual credibility.⁸¹

Finally, federal and state agency enforcement measures have generally proven inadequate to the task of protecting workers from wage theft and other abusive practices due to a lack of resources and shifting partisan preferences.⁸² When “[l]aws against wage theft are massively under enforced,” workers are left with only class action litigation as a means of securing redress.⁸³ According to a recent study, between 1997 and 2012, private plaintiffs filed forty-eight times more employment cases than the U.S. Equal Employment Opportunity Commission (EEOC), and thirty-eight times more Fair Labor Standards Act cases than the U.S. Department of Labor Wage and Hour Division.⁸⁴ And the bulk of these cases were class and collective actions.⁸⁵ In

⁷⁹ See, e.g., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf> (finding that 78% of low-income households did not seek legal help for employment-related problems); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 45 (explaining that the absence of such cases is due to “the fact that lower-paid employees seem to lack ready access to court”).

⁸⁰ See, e.g., Ruan, *supra* note 72, at 1106 (“Collective actions . . . have the advantage of protecting vulnerable workers from drawing attention to their individual participation and subjecting them to retaliatory measures.”); Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1349 & n.243 (observing that employee fears of retaliation “may be well founded,” given the high incidence of retaliation claims filed before the EEOC).

⁸¹ Bartlett, *supra* note 69, at 438 (observing that “lower-income employees [may] have a harder time finding witnesses because their fellow employees fear losing their jobs,” whereas “[h]igher-income employees, who likely have greater skills and greater job opportunities, may not be as deterred by the risk of losing their jobs” because they “tend to be more mobile, and thus more able to find work”).

⁸² See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 376 (2005) (“Private lawsuits can potentially help to fill the enforcement gap left by the undercommitment of public resources; indeed, they can sometimes supply a big gun where public enforcement has none to wield.”); see also Ruan, *supra* note 72, at 1112–14 (citing statistics reflecting a decline in the number of workers served by the Department of Labor and state regulatory agencies).

⁸³ GUPTA & KHAN, *supra* note 75, at 9.

⁸⁴ Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1070 n.2 (2014). Further, the author’s note that almost all the lawsuits brought by the EEOC and the U.S. Department of Labor began as worker-filed charges rather than agency-initiated investigations. *Id.* at 1070 n.3.

⁸⁵ The FLSA provides that either aggrieved workers or the Secretary of Labor may sue in federal court to hold employers liable for violations, and provides for double damages and fee shifting. 29 U.S.C. § 216(b) (2012). It also allows workers to aggregate their claims into “collective actions,” though it requires them to opt-in to representation rather than following the typical opt-out procedure for federal class actions. *Id.*

all, collective litigation has resulted in hundreds of millions of dollars repaid to injured workers and countless reforms implemented in American workplaces.⁸⁶

* * *

One final real-world point: observers often point out that litigation is only one of many ways to address the problems facing low-income groups. And, to be sure, administrative advocacy, legislative and lobbying efforts, coalition-building, publicity, grass-roots community organizing and education, public and non-profit enforcement actions, and a host of other strategies have undeniably sought to improve conditions in various and important ways.⁸⁷ But for the most part, low-income consumers and workers generally lack the political power with which to reliably resolve or reform widespread abuses through these other avenues, and so they *must* rely on the courts.⁸⁸

The poor vote in lower numbers than the well-to-do and “often suffer from policies that reduce their political influence, such as onerous voter registration requirements, demands for government identification at the polls, and long waiting times to vote on Election Day.”⁸⁹ Further, low-income populations and their advocates have limited ability to petition legislatures for help because

⁸⁶ See, e.g., *In re Staples Inc. Wage & Hour Emp’t Practices Litig.*, No. 08-5746 (KSH), 2011 WL 5413221 (D.N.J. Nov. 4, 2011) (approving \$42 million settlement between misclassified assistant store managers and employer); Ruan, *supra* note 72, at 1109 n.28 (citing *Chao v. Atlantic Auto Care Ctr., Inc.*, No. 1:05-cv-06786-BSJ (S.D.N.Y. Dec. 15, 2009), as “settling \$3.6 million between workers and car wash employer after employer failed to pay wages and overtime”); see also Steven Greenhouse & Stephanie Rosenbloom, *Wal-Mart Settles 63 Lawsuits Over Wages*, N.Y. TIMES (Dec. 23, 2008), <http://www.nytimes.com/2008/12/24/business/24walmart.html> (reporting that Wal-Mart agreed to pay between \$352 and \$640 million to settle sixty-three cases pending in state and federal courts in forty-two states alleging the company forced employees to work unpaid off the clock, erased hours from time cards and prevented workers from taking lunch and other breaks); GUPTA & KHAN, *supra* note 75, at 10 (reporting that New Jersey truck drivers filed suit alleging wage theft and “recovered \$2 million in back wages, New York car wash workers \$3.5 million, and cheerleaders for the Oakland raiders \$1.25 million”).

⁸⁷ See Ann Southworth, *Lawyers and the “Myth of Rights” in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 481 (1999).

⁸⁸ See generally Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 2 (1987) (discussing “the poor’s continuing political powerlessness”); Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL’Y 69, 70 (1991) (“[C]ommunities comprised of low-income and working class people with no more than a high school education are not as effective at marshaling [political] opposition as communities of middle or upper income people.”); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 600 (1994) (“Winning the battle in the courts rather than in the legislatures does not violate democratic principles because the courts are intervening on behalf of groups that are under-represented in the legislatures.”).

⁸⁹ Bruce Bartlett, *Wealth Inequality and Political Inequality*, N.Y. TIMES: ECONOMIX (Apr. 30, 2013, 6:00 AM), <http://economix.blogs.nytimes.com/2013/04/30/wealth-inequality-and-political-inequality/>.

they often “cannot afford to hire lobbyists to represent their views”⁹⁰ and lack “the organization, financial resources or personnel to mount and sustain effective long-term” campaigns for legislative change.⁹¹ So while judicial decision-making is certainly not the only method by which law is made or clarified, as both legislatures and agencies play an important role in developing doctrine,⁹² it may be so for low-income groups with less influence on those branches of government.

Neither do low-income groups have alternative avenues for vindicating their rights. For example, small claims courts—which flourished in the first half of the twentieth century with the promise of “speedy and inexpensive justice for the poor litigant”⁹³—are today primarily used by business interests as fora for the collection of debts.⁹⁴ Nor can low-income groups reliably count on state attorneys general or federal agencies to effectively investigate, litigate, and remedy the universe of harms they face, as these public enforcers often lack the resources or political will to enforce the “law of the poor” consumer or employee.⁹⁵

⁹⁰ Teri J. Dobbins, *The Hidden Costs of Contracting: Barriers to Justice in the Law of Contracts*, 7 J.L. SOC’Y 116, 118–19 (2005).

⁹¹ Frank B. Cross, *The Subtle Vices Behind Environmental Values*, 8 DUKE ENVTL. L. & POL’Y F. 151, 155–56 (1996) (observing that in “battle[s] of political power, the poor usually lose out”); see also Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 601 (1997) (“The poor have almost no role in the process of enacting laws that they must live by and that will govern any court case involving them. They have no money to contribute to the campaigns of elected officials. They vote in disproportionately small numbers . . . and nearly all of the lawyers available to them through legal services are prohibited from advocating for them in the legislative process.”).

⁹² See, e.g., Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 208 (2006) (“Is publicly made law superior to privately made law? To what extent can legislatures and regulatory agencies satisfactorily fill in for ‘lost’ judicial decisions?”); Stephen J. Ware, *Is Adjudication a Public Good? “Overcrowded Courts” and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 911 (2013) (“[P]recedents created by adjudication are not the only way to clarify law; legislatures and regulatory agencies can clarify law by amending statutes and regulations to resolve previously open issues.”).

⁹³ John Montague Steadman & Richard S. Rosenstein, *“Small Claims” Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study*, 121 U. PA. L. REV. 1309, 1309 (1973).

⁹⁴ See, e.g., Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. REV. 269, 272 (1994) (observing that “small claims courts merely provide an inexpensive collection method for businesses” rather than an accessible dispute resolution forum for the poor).

⁹⁵ See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 626 (2012) (observing that federal, state and local enforcement agencies generally lack the resources to “redress frauds and other harms perpetuated on the general public”); see also Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 664 (2008) (“Recognizing the resource limitations of government agencies, many consumer laws provide a private right of action so individual consumers also can litigate violations of these laws. Many of these laws also provide class actions and statutory damages which encourage consumers to act as ‘private attorneys

In sum, low-income groups face a paucity of political power and a dearth of alternative enforcement options—leaving them with little choice but to rely on private enforcement through aggregate litigation to resolve many forms of systemic harm.

II. THE SIGNIFICANCE OF CLASS RELIEF

Part I demonstrates that low-income groups are more likely to experience violations of statutory rights that give rise to class-wide and collective legal claims. In this Part, I posit that the impact of class relief, when achieved, is more acutely beneficial to low-income groups; and concomitantly, that recent judicial and legislative decisions restricting collective litigation visit great harm upon these groups.

A. *Directing the Deterrent Function of Class Actions at Low-Income Groups*

Without diminishing the potential significance of compensatory damages secured through class actions brought by or on behalf of low-income individuals—damages that may prove crucial in certain scenarios⁹⁶—this subpart posits that the deterrent function of class actions is of far greater benefit to this cohort.⁹⁷ In general, deterrence is the best and highest use of small-value class actions, which otherwise are quite poor vehicles for efficiently distributing tiny per-person damages.⁹⁸ But in the context of low-income groups, the deterrence function of class litigation takes on heightened significance.

general.”); David B. Wilkins, *Rethinking the Public–Private Distinction in Legal Ethics: The Case of “Substitute” Attorneys General*, 2010 MICH. ST. L. REV. 423, 427 (chronicling the problem of “shrinking state budgets and the growing list of potential big-ticket claims involving alleged harms to consumers or the environment” that face public enforcers).

⁹⁶ See, e.g., Ruan, *supra* note 72, at 1118–19 (observing that, for low-wage workers, even small-dollar damages for lost wages “are crucial to the workers themselves”).

⁹⁷ Indeed, some scholars have affirmatively rejected the idea that low-income groups receive much compensatory benefit from class actions given the complexity of claims-distribution procedures. See, e.g., Ben-Shahar, *supra* note 31, at 22–23 (warning of “disproportionately low participation rates by the poor” in claims recovery programs commonly established to distribute class settlement funds); Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 749–51, 757 (1988) (arguing that lower-income class members are less likely to reap the benefits of class action remedies because claims procedures favor more affluent claimants).

⁹⁸ Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) (“All that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions.”).

This claim stems from recent research showing that, to a dreadful extent, the poor tend to stay poor. Economic mobility can be examined along two dimensions: (1) short-term mobility, which examines how an individual or a family's income changes year to year; and (2) intergenerational mobility, or "the degree to which the economic success of children is independent of the economic status of their parents."⁹⁹ Examinations of both facets reveal severe declines in contemporary American society as economists postulate that growing income inequality "may be choking off opportunity."¹⁰⁰ On short-term mobility, one well-respected study concluded that 70% of low-income individuals remained stuck at or below the poverty line as adults.¹⁰¹ Other studies have reached similar results.¹⁰² And, even more disturbing, recent research reveals that children born to poor parents are themselves likely to remain poor throughout their lives.¹⁰³ Not surprisingly, on the other end of the wealth spectrum, American elites are passing their economic and educational advantages on to their children.¹⁰⁴

This high "intergenerational elasticity of earnings" means that there is considerable "stickiness" at the lower end of the income distribution, "such that the chances of moving from one extreme to the other in a generation are very low."¹⁰⁵ This current research stands in stark contrast to earlier views of

⁹⁹ TOM HERTZ, CTR. FOR AM. PROGRESS, UNDERSTANDING MOBILITY IN AMERICA i (2006), https://www.americanprogress.org/wp-content/uploads/kf/hertz_mobility_analysis.pdf.

¹⁰⁰ Timothy Noah, *The Mobility Myth*, NEW REPUBLIC (Feb. 8, 2012), <https://newrepublic.com/article/100516/inequality-mobility-economy-america-recession-divergence>. The relationship between inequality and earnings mobility is termed "The Great Gatsby Curve," and is heavily debated in economic circles. *Id.* Compare Cecilia García-Peñalosa & Stephen J. Turnovsky, *Income Inequality, Mobility, and the Accumulation of Capital*, 19 MACROECONOMIC DYNAMICS 1332 (2015) (finding a relationship between inequality and mobility), with Deirdre Bloome, *Income Inequality and Intergenerational Income Mobility in the United States*, 93 SOC. FORCES 1047 (2015) (finding no statistical relationship between inequality and mobility).

¹⁰¹ *Moving on Up: Why Do Some Americans Leave the Bottom of the Economic Ladder, but Not Others?*, PEW CHARITABLE TR. (Nov. 2013), <http://www.pewtrusts.org/~media/assets/2013/11/01/movingonuppdf.pdf>.

¹⁰² See HERTZ, *supra* note 99.

¹⁰³ *Id.* at i (reporting that children from low-income families have only a 1% chance of reaching the top 5% of the income distribution); Chetty et al., *supra* note 28. *But see* Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* (unpublished manuscript) (on file with Harvard University), http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf?m=1430722623 (showing that poor children who grow up in some cities have sharply better odds of escaping poverty than similar poor children elsewhere).

¹⁰⁴ *America's Elite: An Hereditary Meritocracy*, ECONOMIST (Jan. 24, 2015), <http://www.economist.com/node/21640316/print>.

¹⁰⁵ HERTZ, *supra* note 99, at 2, 4 (emphasis omitted) (observing that differences in education, race and health have high salience in predicting intergenerational mobility).

poverty as a transient “point on a continuum, rather than a sharp, clearly demarcated category of social experience.”¹⁰⁶

Setting aside the serious implications of this research for belief in the “American Dream,”¹⁰⁷ the practical reality is that, when members of low-income groups suffer group-based harm, there is a high likelihood that precisely the same individuals will suffer precisely the same harm in the future given the inability to escape poverty. And further, it is likely that their children (and possibly grandchildren) will also suffer the same harms in the more distant future.¹⁰⁸

Accordingly, the failure to detect and deter bad actors who prey on the poor promotes ongoing, impending, and consistent exploitation. The availability of class and collective litigation counteracts this concern by first generating sufficiently massive and certain economic liabilities against those who regularly exploit low-income groups so as to deter future wrongdoing. In other words, when “the violator is confronted with the costs of his violation,” others in his cohort are put on notice and can therefore determine whether to reform their practices to avoid such costs.¹⁰⁹

Class actions caution potential violators that certain conduct is prohibited and announce to potential victims the merits of their claims. Finally, class-wide remedies may include broad-based injunctive relief to reform problematic practices—which then allows a presiding court “to ensure that low-income

¹⁰⁶ MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 277 (1986) (describing a study conducted in Michigan in the 1980s which showed that poverty “lasted relatively briefly, and children whose parents relied on welfare were no more likely to need public assistance as adults than were others in the sample”).

¹⁰⁷ See, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 122 (2009) (“[T]he American Dream is that, through hard work, a person can rise from even a seriously disadvantaged background.”). Some research has posited that the prospect of upward mobility may explain why low-income groups are not especially strong advocates of redistributive policies because of the belief that they, or in the least their children, are likely to climb the income ladder. Roland Bénabou & Efe A. Ok, *Social Mobility and the Demand for Redistribution: The Pout Hypothesis*, 116 Q.J. ECON. 447, 447 (2001).

¹⁰⁸ Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2135 (1994) (“Poverty is also powerlessness: being trapped, relegated to a status from which one cannot escape, impotent to change circumstances that affect one’s fate and unable to alter the conduct of others that impacts adversely on oneself, one’s family, one’s neighborhood. Poverty is ultimately economic, social, and civic disenfranchisement.”).

¹⁰⁹ RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 349–50 (1972); see also Gilles & Friedman, *supra* note 98.

persons learn of court-ordered remedies that may be available to them.”¹¹⁰ Individual litigation rarely can achieve similar outcomes—indeed, the results of individual suits are often settled in secret, known only to the parties themselves.¹¹¹

So while some legal scholars have debated the deterrence value of class action litigation in other settings, there seems little doubt that such litigation may serve as a significant constraint against the cycle of exploitation that perpetuates in poverty.¹¹²

B. The Decline in Class Actions and Collective Litigation

Recent decades have witnessed a gradual dismantling of aggregative proceedings and, indeed, access to courts in non-aggregative settings as well¹¹³—much of which has been meticulously chronicled and dissected by legal scholars.¹¹⁴ The fairly obvious point here is that the impact of these developments on low-income groups is especially severe as it leaves them markedly vulnerable to abuse.

In particular, recent decisions enforcing class action bans in standard-form contracts may mark the end of many class actions based on contractual relationships.¹¹⁵ Without question, the rights of *all* would-be litigants are

¹¹⁰ Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 *FORDHAM URB. L.J.* 873, 882 (2002).

¹¹¹ See generally Myriam Gilles, *Individualized Injunction and No-Modification Terms: Challenging “Anti-Reform” Provisions in Arbitration Clauses*, 69 *U. MIAMI L. REV.* 469 (2015).

¹¹² But see Bartlett, *supra* note 69, at 435 (observing that “if low-income employees are primarily concerned with having a job and feeding their families, and only worry about the job environment as a secondary concern” then “[t]his could affect the employee’s estimation of the value of injunctive relief, leading higher-income employees to view injunctive relief as providing a greater benefit, perhaps, than lower-income employees”); Ben-Shahar, *supra* note 31, at 40 (noting that “it is it is questionable whether businesses that specialize in deliberate advantage taking of ignorant and poor borrowers . . . would be effectively deterred by the threat” of class litigation and that “[t]he worst wrongdoers may not be the ones with the deepest pockets that attract private actions”).

¹¹³ See, e.g., Eisenberg & Clermont, *supra* note 26, at 193 (concluding that the Supreme Court’s imposition of heightened pleading requirements in *Twombly* and *Iqbal* “had palpably negative effects on plaintiffs”); see also Brooke D. Coleman, *The Vanishing Plaintiff*, 42 *SETON HALL L. REV.* 501 (2012); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 *GEO. WASH. L. REV.* 353 (2010).

¹¹⁴ See, e.g., Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights*, 114 *MICH. L. REV.* 893 (2016); Coffee, *supra* note 17; Gilles & Friedman, *supra* note 95, at 631; Robert H. Klonoff, *The Decline of Class Actions*, 90 *WASH. U. L. REV.* 729 (2013); Marcus, *supra* note 30.

¹¹⁵ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (rejecting the argument that a class action ban stripped plaintiffs of their rights under the antitrust laws because it forced each plaintiff to shoulder non-recoupable expert and other costs that vastly exceeded any amount the individual plaintiff could

greatly affected by class action bans. For example, the CFPB Arbitration Study found that nearly all arbitration clauses in consumer financial contracts contained class action bans.¹¹⁶ These bans mandate that all consumers, no matter their economic status, resolve disputes through individual arbitration rather than aggregate litigation.¹¹⁷ But given the certainty that low-income consumers and employees will almost never arbitrate small-dollar claims individually,¹¹⁸ or attract counsel on a contingent fee basis,¹¹⁹ such provisions effectively eliminate these groups' access to justice. More generally, judicial sanction of class action bans surely operates most harshly upon the poor, who (1) are more likely to be parties to standard-form contracts in which they lack any real power to understand, challenge, or negotiate terms¹²⁰ or make well-informed choices amongst alternatives;¹²¹ and (2) are less likely to fully

hope to win); AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1748, 1753 (2011) (striking down state law rule under which arbitration clauses were regarded as unconscionable unless they allowed for class proceedings, and dismissing the argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system").

¹¹⁶ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT § 1028(a), at 44 (2015) [hereinafter ARBITRATION STUDY], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

¹¹⁷ *Id.* at 44–46.

¹¹⁸ *See, e.g., id.* § 1.4.3, at 11–12 (concluding that from 2010 to 2012, consumers filed an average of 411 arbitrations in the consumer finance space, but that only 25 consumer arbitrations per year involved claims of less than \$1,000). *But see* 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, 2913 (2015) (observing that some states, such as California, have "required fee waivers for 'indigent consumers,' defined as those with incomes of less than '300 percent of the federal poverty guidelines'" (quoting CAL. CIV. PROC. CODE § 1284.3(b)(1) (West 2015))).

¹¹⁹ *See, e.g.,* Muhammad v. Cty. Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006) ("[c]lass-action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action. Class-action waivers prevent an aggregate recovery that can serve as a source of contingency fees for potential attorneys."); Lauren Weber, *More Companies Block Staff from Filing Suits*, WALL ST. J. (Mar. 31, 2015, 1:51 PM), <http://www.wsj.com/articles/more-companies-block-staff-from-filing-1427824287> (observing that where class actions are unavailable "workers frequently abandon claims because individual damages are too small to interest attorneys").

¹²⁰ *See generally* Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 239 (2002) (observing that poor, less-educated citizens are less likely to read and understand the terms of standard-form contracts because the "literacy required to comprehend the average disclosure form and key contract terms simply is not within the reach of the majority of American adults").

¹²¹ Max Helveston & Michael Jacobs, *The Incoherent Role of Bargaining Power in Contract Law*, 49 WAKE FOREST L. REV. 1017, 1025–26 (2014) (observing that "when the market does not provide the consumer an opportunity to obtain the good or service without agreeing to a particularly onerous contractual term," courts "have held that the lack of alternatives makes individuals so weak that they 'may not be deemed to have freely chosen to enter into the contract' and refuse to enforce the deal" (quoting *Barnes v. N.H. Karting Ass'n*, 509 A.2d 151, 154 (N.H. 1986)); *id.* at 1029 n.63 (citing *Anderson v. Ashby*, 873 So. 2d 168, 176 (Ala. 2003) (invalidating an arbitration provision partly because of an income/power disparity between the parties)).

appreciate the implications of such agreements—in particular, the elimination of their rights to collectively resolve legal claims in any forum and the long-term consequences of claims suppression.¹²² So, while studies show that consumers in all income brackets are generally unaware of class action bans in the contracts they sign,¹²³ as Jaime Dodge has observed, “[T]he weakest and most disempowered individuals . . . are the most willing to accept inferior terms.”¹²⁴

Similar concerns prevail in the employment context¹²⁵—particularly in wage-and-hour claims under the FLSA¹²⁶—as most low-wage employees cannot negotiate employment terms or afford to lose a job opportunity by refusing to sign an arbitration clause. Further, as Deepak Gupta and Lina Khan have recently shown, consolidation within many industries “has handed a relatively small number of companies outsized influence over the contractual terms that govern most transactions.”¹²⁷ As a result, class action bans have now

¹²² See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?”); see also Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 48 (2000) (“The vast majority of successful unconscionability claims involve poor, often unsophisticated, consumers challenging oppressive adhesion contracts foisted on them by retail merchants or credit sellers.”).

¹²³ See ARBITRATION STUDY, *supra* note 118, at 3–4, 19–24 (reporting that half of all respondents said they didn’t know whether they had the right to sue their credit-card issuer in court, and more than a third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court).

¹²⁴ Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 764 (2011); see also Eric W. Macaux, *Limiting Representation in the Age of Private Law: Exploring the Ethics of Limited-Forum Retainer Agreements*, 19 GEO. J. LEGAL ETHICS 795, 806–07 (2006) (asserting that “the plaintiffs most likely to be disadvantaged” by forced arbitration clauses “are those least able to protect their interests: low income individuals who depend on legal aid societies and other public interest organizations that in turn depend on statutory fees”).

¹²⁵ See, e.g., Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014) (asserting that “mandatory arbitration exacerbates” existing inequalities in the workplace).

¹²⁶ See, e.g., *D’Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 313–14 (D. Conn. 2011) (granting an employer’s motion to compel individualized arbitration of FLSA overtime claims brought on behalf of two exotic dancers who worked in the defendants’ clubs); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308(BSJ)(JLC), 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (concluding that *Concepcion* precludes the argument that there is a nonwaivable right to bring an FLSA collective action).

¹²⁷ GUPTA & KHAN, *supra* note 75, at 3–4; *id.* at 8 (asserting that Time Warner and Comcast both employ class action bans in their contracts with consumers, and that 63% of “Americans live in areas where they can choose only between these two providers”).

become standard in many industries,¹²⁸ rendering low-wage employees largely captive and with no realistic alternatives when confronted with such a clause, since “it is likely that most other employers in his field require their employees to sign similar agreements.”¹²⁹

Other judicial assaults on collective action litigation take the form of barriers to class certification. For example, whereas courts previously avoided any “preliminary inquiry into the merits” at the class certification stage,¹³⁰ recent years have seen the development of a standard under which plaintiffs are required to prove by a preponderance of the evidence—just as they would at trial—any fact necessary to meet the requirements of Rule 23, even if it also goes to the merits.¹³¹ In particular, the Supreme Court’s decision in *Comcast Corp. v. Behrend* has demanded that lower courts perform a “rigorous analysis” of class certification issues, even to the extent that they overlap with the merits of the case.¹³² The Court’s decision in *Wal-Mart Stores, Inc. v. Dukes* largely carried these heightened requirements over into the injunctive realm, by redefining the hitherto easy-to-satisfy commonality requirement of Rule 23(a)(2).¹³³ And the development in recent years of an “implicit requirement” of ascertainability, under which courts in consumer cases have refused to certify classes in the absence of “reliable proof of purchase or a knowable list of injured plaintiffs,” has sounded a death knell for many (if not most) class actions arising from small retail purchases.¹³⁴

¹²⁸ Sternlight, *supra* note 80, at 1330 & n.135 (citing statistics). For example, the percentage of companies using arbitration clauses to preclude employment class actions soared to 43% in 2014 from 16% in 2012. Weber, *supra* note 119.

¹²⁹ Iliza Bershad, *Employing Arbitration: FLSA Collective Actions Post-Concepcion*, 34 CARDOZO L. REV. 359, 362 (2012).

¹³⁰ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)).

¹³¹ See, e.g., *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41–42 (2d Cir. 2006) (rejecting the “some showing” standard and adopting a requirement that plaintiffs provide “definitive” proof, through “affidavits, documents, or testimony, to . . . [establish] that each Rule 23 requirement has been met”); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 316, 320 (“An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.”).

¹³² 133 S. Ct. 1426, 1432–33 (2013). The majority in *Comcast* found class certification inappropriate where each plaintiff’s damages calculations predominated over common liability issues. *Id.* at 1433.

¹³³ 131 S. Ct. 2541, 2550–57 (2011).

¹³⁴ Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 310 (2010); see, e.g., *Carrera v. Bayer Corp.*, 727 F.3d 300, 304 (3d Cir. 2013).

Finally, legislative actions have further depressed class action activity. As discussed above, congressional prohibitions on class actions by LSC-funded lawyers resulted in a significant drop in class cases representing low-income and poor populations.¹³⁵ More recently, the Class Action Fairness Act of 2005 (CAFA), which allows for the removal of most significant state class filings to federal court,¹³⁶ has also undercut state-law consumer class actions. And in 2015, Congress held hearings on tightening CAFA's requirements.¹³⁷

One possible counteractive force lies with the CFPB, which has authority under the Dodd–Frank Wall Street Reform and Consumer Protection Act to regulate or prohibit forced arbitration clauses in consumer financial contracts.¹³⁸ In March 2015, the CFPB released a study concluding that forced arbitration clauses have suppressed consumer claims and immunized financial services companies from liability for broad-scale harms.¹³⁹ In light of these findings, the CFPB is now considering rules that would ban companies from including class action bans in their consumer arbitration clauses. But even if the embattled agency were to promulgate rules prohibiting class action bans, its jurisdiction is limited to consumer finance;¹⁴⁰ and, of course, contractual class action bans are only one tool used in the broader dismantling of collective litigation.

¹³⁵ See BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER, http://brennan.3cdn.net/3cbbeedd52806583b1_osm6blo8g.pdf (documenting drop in class actions in the wake of 1996 restrictions). *But see* Henry Rose, *Class Actions and the Poor*, 6 PIERCE L. REV. 55, 63 (2007) (observing that prior to restrictions, “the number of class actions [in which LSC-funded lawyers participated] was very small,” and citing statistics indicating that LSC-funded class actions “had steadily declined from the late 1980s to 1995”).

¹³⁶ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4, 12–13 (codified at 28 U.S.C. § 1453 (2012)); *see also* Hershkoff, *supra* note 18, at 1345 (observing that “Congress[’s] decision to shift multi-state class actions into the federal courts pits large corporations against . . . plaintiffs who may be relatively under-resourced,” reflecting contemporary “social values that implicate the accessibility of federal courts for claimants with limited financial resources”).

¹³⁷ *State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015).

¹³⁸ 12 U.S.C. §§ 1414, 5518(b) (2012); 15 U.S.C. § 1639c(e). Section 5518(b) states that the agency may “prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties,” if it finds such a prohibition “in the public interest and for the protection of consumers.” *Id.* § 5518(b).

¹³⁹ ARBITRATION STUDY, *supra* note 116.

¹⁴⁰ *See* Gilles & Friedman, *supra* note 95, at 656 & n.150, 658 (observing two jurisdictional limits on CFPB authority: first, that Dodd–Frank mandates that any regulation limiting or prohibiting the use of arbitration provisions must be forward-looking rather than retroactive, and applicable only to agreements entered 180 days after the regulation’s effective date; and second, that the agency has authority only over enumerated statutes that involve consumer financial arrangements).

III. IMPLICATIONS FOR DOCTRINE AND PRACTICE

This Essay's first claim is that low-income groups are more susceptible to abusive practices in the marketplace and the workplace—practices that violate statutory rights and give rise to class actions and collective litigation. The second claim is that, because few members of low-income groups are able to achieve any earnings mobility, the poor generally stay poor. As such, members of this cohort are more likely to experience chronic instances of group-based wrongdoing, repeated over the course of their lives and possibly the lives of their children. Accordingly, in this era of high income inequality and low mobility, the deterrence function of class litigation takes on a critical role to prevent ongoing abuses directed towards an entire class of persons. And yet, in this same era, we are witnessing a judicial and legislative dismantling of the class action device in precisely the areas of greatest direct consequence to low-income groups.¹⁴¹

This final Part will reflect upon the consequences of these gloomy socioeconomic and doctrinal developments for the law writ large and the judges who superintend it.

A. *The End of Poverty Law?*

As low-income plaintiffs find themselves blocked from bringing class actions, whole categories of legal claims will quickly disappear from the docket—claims sounding in, for example, abusive debt collection, predatory lending, illegal foreclosures, and unfair or unpaid wages. These are among the legal issues that economically vulnerable populations are most likely to encounter; these are also the sorts of claims most efficiently brought as class actions, and therefore are most vulnerable to recent judicial and legislative restrictions on collective litigation. The impending disappearance of these cases from the civil docket has consequences beyond the denial of access to justice for the effected communities, as the legal regime is also bound to lose the information forcing and common law development generated by such litigation.¹⁴²

¹⁴¹ COFFEE, *supra* note 17, at 53 (observing that class actions have historically “empowered persons who otherwise lacked access to courts,” and given “a legal voice to the unrepresented”); *see also* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 101 (forthcoming) (arguing that the decline in class actions coupled with the turn towards private arbitration may mean that, for many areas of law, common law doctrinal development will cease).

¹⁴² *See, e.g.*, Alexandra Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3199 (2013) (“[L]itigation forces information into the public eye. . . . [and is] a particularly powerful

For example, in prior work focused on the effects of class action bans on developing legal doctrine, I engaged in the following thought experiment: Assume that every company that might reasonably be interested in avoiding class action exposure were to write arbitration clauses and class bans into all of its standard-form contracts. Given the private and non-precedential nature of arbitration, what implications does this hold for the development of the law? To answer this question, I took a typical state consumer protection statute—I chose the Illinois Consumer Fraud Act (ICFA)¹⁴³—and examined cases arising under that statute in both the Seventh Circuit and the Illinois Supreme Court from 2005 to 2014 to determine how many of these would be subject to class action bans under current law—and, by definition, no longer classable.¹⁴⁴ In the Seventh Circuit, my search yielded thirty-five ICFA cases, eighteen of which were class actions brought against, among others, mortgage banks,¹⁴⁵ savings & loans associations,¹⁴⁶ debt collectors,¹⁴⁷ insurance companies,¹⁴⁸ tax preparers,¹⁴⁹ rental companies,¹⁵⁰ credit reporting services,¹⁵¹ long-distance service providers,¹⁵² and telecom companies.¹⁵³ A search of the Illinois

means of information forcing, and even the threat of civil discovery can result in disclosure. By enabling litigation that cannot be brought individually, group litigation serves a critical role in a society that depends on litigation to unearth information. . . . [because] aggregate litigation empowers plaintiffs who otherwise would not be able to bring suit individually. Furthermore, the high profile nature of some class actions and other aggregate litigation also means that the information is publicized more readily than in individual litigation, which might receive less attention.”)

¹⁴³ 815 ILL. COMP. STAT. ANN. 505/1-12 (West 2016).

¹⁴⁴ Gilles, *supra* note 141, at 146–49.

¹⁴⁵ See *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601 (7th Cir. 2013) (class action by mortgage-holders against bank).

¹⁴⁶ *Courtney v. Halleran*, 485 F.3d 942 (7th Cir. 2007) (class action by depositors against directors of failed savings and loan association).

¹⁴⁷ *Johnson v. Pushpin Holdings, LLC*, 748 F.3d 769 (7th Cir. 2014) (class suit against debt collectors).

¹⁴⁸ *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525 (7th Cir. 2012) (class action by insureds against title insurer alleging kickbacks); *Greenberger v. GEICO Gen. Ins. Co.*, 631 F.3d 392 (7th Cir. 2011) (class action by insureds against insurer).

¹⁴⁹ *Marshall v. H&R Block Tax Servs. Inc.*, 564 F.3d 826 (7th Cir. 2009) (class action by consumers of tax preparers for false advertising).

¹⁵⁰ *The Home Depot, Inc. v. Rickher*, No. 06-8006, 2006 WL 1727749 (7th Cir. May 22, 2006) (consumer class action for sale of damage waivers in tool rental agreement).

¹⁵¹ *Clark v. Experian Info. Servs.*, 256 Fed. App'x 818 (7th Cir. 2007) (class action by consumers against credit reporting agency).

¹⁵² *Dreamscape Design, Inc. v. Affinity Network, Inc.*, 414 F.3d 665 (7th Cir. 2005) (class action against long-distance service provider for undisclosed fees).

¹⁵³ *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663 (7th Cir. 2008) (class action by consumers of telecommunications bundling service).

Supreme Court ICFA decisions produced similar results.¹⁵⁴

In my ICFA sample, plaintiff class members alleged violations of state and federal consumer protection statutes in the form of undisclosed fees, unfair and deceptive practices, false advertising, and fraud. And the decisions themselves include a controversial pronouncement by the Seventh Circuit that federal banking laws will not generally “preempt state laws of general applicability like the Illinois Consumer Fraud Act”;¹⁵⁵ a test for resolving “a conflict between a state rule of procedure and a federal rule of procedure” where facts pled under the ICFA do not meet the pleading standards under the federal rules;¹⁵⁶ and numerous, substantive Illinois Supreme Court rulings interpreting the ICFA.¹⁵⁷ This was consumer law in action, advancing forward in the great tradition of the common law.

Of course, this sample provided just a tiny illustration of the range of doctrinal developments that would be foreclosed if class action bans are universally adopted; and these findings are only heightened once the full range of obstacles to class litigation are taken into account. Further, the class actions in the ICFA sample were not brought specifically on behalf of low-income groups, as the legal violations asserted span the social and economic spectrum. But, again, low-income groups are more likely to fall victim to the types of abusive practices alleged and, as such, suffer disproportionately where legal claims seeking to address these injuries are blocked.

Moving beyond consumer claims, the unavailability of collective litigation for other areas that constitute the civil side of “poverty law”—housing, wage-and-hour, and employment discrimination—portends similar doctrinal consequences. Legal precedents in these disparate areas are constantly evolving in response to developments in the workplace, changing demographics, technology, and new theories of liability.¹⁵⁸ But once claims disappear from the public justice system—save only for the stray public enforcement or non-profit legal services cases—common law development in

¹⁵⁴ I found thirty-five ICFA cases decided by the Illinois Supreme Court since 2005, fourteen of which were garden-variety class actions brought by consumers of insurance products, mortgage services, telecommunications, utilities, and ordinary products. Gilles, *supra* note 144, at 146–47.

¹⁵⁵ *Courtney v. Halleran*, 485 F.3d 942, 951 (7th Cir. 2007).

¹⁵⁶ *Windy City Metal*, 536 F.3d at 671 (comparing FED. R. CIV. P. 8 (requiring only notice pleading) with 735 ILL. COMP. STAT. 5/2–601 (requiring that pleadings contain substantial allegations of fact)).

¹⁵⁷ Gilles, *supra* note 144, at 146–49 (reviewing ICFA cases decided by the Illinois Supreme Court).

¹⁵⁸ See, e.g., Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1550 (2005). “The body of employment law is therefore found in hundreds of separate statutes and thousands of court decisions,” and has “evolved through social practice, judicial doctrine, and statutory enactment.” *Id.*

these critical areas will simply cease, leaving judges a greatly impoverished body of decisional law to draw upon. The next section considers these and related consequences for the judiciary.

B. Judicial Blind Spots

When judges are no longer confronted regularly with the civil claims of the poor, a legitimate concern is that they will become unversed in and desensitized to the underlying factual issues that affect lower-income groups.¹⁵⁹ This inexperience, in turn, may compound an existing and unconscious predisposition against lower-income claimants.¹⁶⁰ Over time, one would expect this cognitive, cultural and political distance between jurists and economically vulnerable groups to grow and solidify, so that—eventually—judicial decisions exhibiting elements of classism may become altogether uncontroversial.¹⁶¹

Some forms of this claim have previously been made by scholars examining the effects of judicial blind spots in other areas of law.¹⁶² For example, both Janet Cooper Alexander and Rhonda Wasserman have suggested that, in the class action context where nearly all cases settle before a merits-based determination, judges often lack the substantive knowledge of the underlying facts as produced through adversarial litigation.¹⁶³ Over time, as more and more class actions are litigated only to the point of a class certification motion, there is less and less law on the underlying merits upon

¹⁵⁹ Further, if judicial experience with economically fragile communities becomes limited to criminal trials and sentencing, one might expect judges to grow ever more suspicious of and hostile towards civil claims brought by members of these groups. As it stands currently, “many members of society view poor people as responsible for their socioeconomic status,” a long-held perspective that some judges may already share. Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 147 (2013) (observing that “[t]his viewpoint has historical roots in the early American conception of poor people as lazy or immoral” and that “[t]he poor have traditionally been stereotyped as ‘welfare queens’ whose behavior merits the ‘reasonable suspicion and disdain of broader society’”).

¹⁶⁰ Mitchell F. Crusto, *Empathetic Dialogue: From Formalism to Value Principles*, 65 SMU L. REV. 845, 858 (2012) (describing the claim of “unconscious judicial classicism” that “judges unconsciously favor the powerful over the powerless”).

¹⁶¹ See, e.g., Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000) (describing the New Institutionalism claim that “routinized sequences of behavior eventually come to define normalcy, or more broadly, reality”).

¹⁶² See Neitz, *supra* note 159, at 146 (observing that “scholars have extensively considered racial and gender bias, but have placed little to no emphasis on socioeconomic bias in courtrooms”).

¹⁶³ Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 566 (1991); Rhonda Wasserman, *Secret Class Action Settlements*, 31 REV. LITIG. 889, 919–20 (2012).

which judges may reliably draw.¹⁶⁴ The dearth of doctrine may then disable judges from accurately adjudging whether a proposed settlement is really fair to all affected parties.¹⁶⁵ Professor Alex Reinert has similarly observed that “federal judges have extremely limited judicial experience to apply to merits-based decisions” at the pleading stage, as required by Supreme Court decisions in *Twombly* and *Iqbal*.¹⁶⁶ These “gaps in judicial experience,” he asserts, can result in an “impoverished landscape of actual merits-based determinations.”¹⁶⁷ And that is deeply problematic because

when we move away from public adjudication, we lose something important: information about how our justice system works to resolve disputes. This information, and the process by which it is divulged, is important not only for its own sake but also for reinforcing a democratic norm of equal accountability. What is sometimes overlooked, however, is that the information is important to ensuring legitimate and reliable future adjudication.¹⁶⁸

Taken together, these scholars’ commonsensical assertion is that deficiencies in judicial knowledge can have deleterious effects on the fair and just adjudication of claims.

My assertion is that judicial inexperience with the legal claims typically brought by low-income groups has far more disquieting consequences because, as contemporary judges see fewer civil cases brought by or on behalf of poor people, they may grow further out of touch with and become ill-equipped to manage these claims. Eventually, the inability to relate to these claimants and the systemic problems that face them will reveal itself in decisions exuding a

¹⁶⁴ Alexander, *supra* note 163, at 567.

¹⁶⁵ Wasserman, *supra* note 163, at 920 (“If settlements are routinely filed under seal, courts will lack the comparative data needed to gauge the fairness of settlements submitted for their approval.”).

¹⁶⁶ Alexander Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1769, 1772 (2014). Professor Reinert observes,

The end result of all of these trends is a federal judiciary that has very little experience evaluating the merits of claims. Trials have decreased and cases have been shunted away from federal court by arbitration doctrine. Information that might assist in assessing plausibility, such as discovery and settlement information, is increasingly inaccessible. And summary judgment adjudication cannot make up for this lack of information and experience.

Id. at 1785.

¹⁶⁷ *Id.* at 1769.

¹⁶⁸ *Id.* at 1785 (footnotes omitted).

lack of empathy or understanding concerning the lives of 90 million Americans.¹⁶⁹

C. Examining Judicial Indifference

A famous example of this phenomenon is *United States v. Kras*,¹⁷⁰ where an indigent debtor filed for relief under the bankruptcy laws, but was unable to pay the \$50 filing fee and was denied a hardship waiver.¹⁷¹ The debtor then brought a constitutional challenge to the filing fee, relying on a series of Supreme Court precedents invalidating such administrative fees in divorce and other cases on due process, access-to-justice grounds.¹⁷² But in *Kras* a divided Court upheld the bankruptcy filing fee as constitutional.¹⁷³ In doing so, the majority engaged in a series of revealing observations concerning the debtor's financial circumstances and its view that Kras ought to have been able to work (or talk) his way out of bankruptcy.¹⁷⁴

For example, Justice Blackmun's majority notes that the challenged filing fee—if it were paid in weekly installments of \$1.92 over three months—represented “less than the price of a movie and little more than the cost of a pack or two of cigarettes,”¹⁷⁵ implying that the debtor was making definitive

¹⁶⁹ Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 330 (2010) (observing that judges play “a singular and defining role in creating, maintaining, and assuring open, effective, and meaningful access to the system of justice they administer,” but that decisions ignoring the plight of low-income individuals challenge the legitimacy of that role).

¹⁷⁰ 409 U.S. 434 (1973).

¹⁷¹ *Id.* at 437–38; see also Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1500 n.2 (1991) (quoting from Kras' affidavit: “Kras resides in a 2 1/2-room apartment with his wife, two children, ages 5 years and 8 months, his mother, and his mother's 6-year-old daughter. His younger child suffers from cystic fibrosis and is undergoing treatment in a medical center. . . . Kras [is] unemployed . . . He has diligently sought steady employment . . . The Kras household subsists entirely on . . . public assistance These benefits are all expended for rent and day-to-day necessities. . . . His sole assets are wearing apparel and \$50 worth of essential household goods He has a couch of negligible value in storage on which a \$6 payment is due monthly” (alterations in original)).

¹⁷² *Kras*, 409 U.S. at 444–45; see, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971) (invalidating a filing fee that “block[s] access to the judicial process” by the indigents as a violation of due process and equal protection); *Griffin v. Illinois*, 351 U.S. 12, 17–19 (1956) (invalidating a transcript-funding requirement to perfect an appeal in a criminal case, observing that the imposition of such costs would render the right of appeal a “meaningless [promise] to the poor” and would undermine our shared dedication “to affording equal justice to all and special privileges to none”).

¹⁷³ *Kras*, 409 U.S. at 446–47; *id.* at 450 (Burger, J., concurring); *id.* at 451 (Stewart, J., dissenting).

¹⁷⁴ *Id.* at 445 (majority opinion).

¹⁷⁵ *Id.* at 449. As Thomas Ross has asserted, when Justice Blackmun “assumed that Mr. Kras had the money for a weekly trip to the movies or cigarettes, he ignored the real differences in the circumstances of those in poverty and those outside the boundaries of poverty.” Ross, *supra* note 171, at 1500 n.2.

choices about how to spend his capital, rather than crediting the more realistic view that Kras simply had no money at all—whether to buy cigarettes or pay a bankruptcy filing fee.¹⁷⁶ Wagging its finger, the majority next asserts that “if [Kras] really needs and desires the [bankruptcy] discharge, this much available revenue should be within his able-bodied reach.”¹⁷⁷ Again, the scolding tone suggests that Kras had resolved to opt out of full employment, rather than recognizing—as detailed in petitioner’s briefs—that he had repeatedly sought and failed to find regular work.¹⁷⁸ And finally, the opinion patronizingly questions the very decision to file for bankruptcy, pondering why Kras (if he “really needs and desires the discharge”) didn’t simply seek to “adjust his debts by negotiat[ing] with his creditors” so as to avoid involving the courts in the first place.¹⁷⁹ Kras, who had little schooling and no funds to offer his creditors in settlement, could hardly be in a worse position to engage in the type of broad-shouldered deal making the Justices appear to have in mind. Thoroughly out of touch with the petitioner and others like him, the *Kras* majority decision is striking for its insistence that poverty is a choice; full employment is readily available for those who seek it; and creditors are interested in rational and collaborative cooperation with those in arrears.

A dissent by Justice Stewart pointed out that Kras’s income, such as it was, “barely suffices to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the courts.”¹⁸⁰ With no assets and “not even a sufficient prospect of income to be able to promise the payment of a \$50,” the bankruptcy offered Kras his only chance “to get out from under a lifetime burden of debt”; without it, Justice Stewart maintained, “Kras will remain in the totally hopeless situation he now finds himself.”¹⁸¹ The majority, he concluded, denied justice “to those who

¹⁷⁶ *Kras*, 409 U.S. at 460 (Marshall, J., dissenting) (“A pack or two of cigarettes may be, for [the poor], not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.”).

¹⁷⁷ *Id.* at 449 (majority opinion).

¹⁷⁸ *Id.* at 437, 449; *id.* at 451 (Stewart, J. dissenting); see also Nicholas Kristof, ‘Inequality Is a Choice,’ N.Y. TIMES, May 2, 2015, at SR11 (“I overheard one billionaire—who had gotten his start in life by inheriting a fortune—discuss with another the problem of lazy Americans who were trying to free ride on the rest . . .”).

¹⁷⁹ *Kras*, 409 U.S. at 445, 449 (majority opinion).

¹⁸⁰ *Id.* at 454 (Stewart, J. dissenting) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 372–73 (1971)).

¹⁸¹ *Id.* at 455–56.

need it most, to those who every day must live face-to-face with abject poverty—who cannot spare even \$1.28 a week.”¹⁸²

Justice Marshall dissented separately to chide the *Kras* majority’s insensitive and inaccurate understanding of the lives of the poor: “It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are.”¹⁸³ For Marshall, the majority’s “disgraceful” and “unfounded assumptions about how people live” were deeply consequential—he cited the 1970 census finding that 800,000 families lived on less than \$20 per week—and went far beyond the specifics of this case.¹⁸⁴ Rather, for Marshall, *Kras* involved the fundamental right of access to the courts, the opportunity for every person claiming a legal violation to be given a fair hearing. As such, the majority decision revealed, for Justice Marshall, the near-impossibility of securing that right for low-income litigants where judges were unwilling or unable to comprehend the systemic socioeconomic problems that regularly confront this group.

Kras was followed by numerous Supreme Court decisions exhibiting a cool detachment from the plight of the poor. In *Ortwein v. Schwab*, for example, the majority upheld a \$25 filing fee assessed to welfare applicants.¹⁸⁵ In dissent, Justice Douglas angrily accused the majority of perpetuating a justice system that had become “the private preserve for the affluent.”¹⁸⁶ As Gene Nichols has powerfully argued, decisions such as *Kras* and *Ortwein* reveal the Court’s willingness to retreat from “the core commitment” of meaningful access to justice in cases involving the poor.¹⁸⁷ The Court, and perhaps the rest of us as well, Nichols warns, “have become solidly comfortable with a scheme of civil

¹⁸² *Id.* at 457. William O. Douglas, another of the four dissenters, wrote about the case some months later in his memoir, observing, “Never did I dream that I would live to see the day when a court held that a person could be too poor to get the benefits of bankruptcy.” WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 175 (1974).

¹⁸³ *Id.* at 460 (Marshall, J., dissenting).

¹⁸⁴ *Id.* at 459–60.

¹⁸⁵ 410 U.S. 656, 656, 661 (1973) (per curiam).

¹⁸⁶ *Id.* at 661 (Douglas, J., dissenting) (quoting *Meltzer v. C. Buck Le Craw & Co*, 402 U.S. 954, 961 (1971) (Douglas, J., dissenting)). Justice Marshall also dissented on the grounds that “important benefits [have been] taken without affording them a chance to contest the legality of the taking in a court of law.” *Id.* at 666 (Marshall, J., dissenting); see also *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26–27, 31–32 (1981) (rejecting an indigent’s request for appointed counsel in a case brought by the state to terminate parental rights).

¹⁸⁷ Nichol, *supra* note 169, at 345 (quoting *Little v. Streater*, 452 U.S. 1, 5–6 (1981)).

justice that leaves millions out.”¹⁸⁸ And, comfort with this exclusion can easily develop into a stony disinterest in the underlying, systemic problems that face low-income groups.

More recently, the Ninth Circuit’s decision in *United States v. Pineda-Morena* reveals the persistence of judicial indifference to the issues facing low-income litigants.¹⁸⁹ There, the court upheld as permissible under the Fourth Amendment the DEA’s placement of a GPS-tracking device on the defendant’s car while it was parked outside his rented trailer home.¹⁹⁰ Despite the government’s concession that the defendant’s car was “parked within the curtilage of his home when agents attached the tracking device,” the court instead determined the car was “parked in his driveway, which is ‘only a semi-private area,’” and accorded little Fourth Amendment protection.¹⁹¹

Dissenting from the denial of rehearing en banc, Chief Judge Alex Kozinski rebuked his colleagues for failing to recognize the elitist nature of their vision of Fourth Amendment protection:

The very rich will still be able to protect their privacy with the aid of electric gates, tall fences, security booths, remote cameras, motion sensors and roving patrols, but the vast majority of the 60 million people living in the Ninth Circuit will see their privacy materially diminished by the panel’s ruling.¹⁹²

For Chief Judge Kozinsky, the panel’s finding that a low-income, Mexican American living in a rented trailer in a poor neighborhood had no right to privacy in his driveway reeked of cultural elitism and revealed the great gulf between federal judges and many of the litigants who come before them:

There’s been much talk about diversity on the bench, but there’s one kind of diversity that doesn’t exist: No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don’t live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that’s not how we and our friends live. . . . When you glide your BMW into your underground garage or behind an electric gate, you don’t need to worry that somebody might attach a

¹⁸⁸ *Id.* at 349.

¹⁸⁹ 591 F.3d 1212 (9th Cir. 2010).

¹⁹⁰ *Id.* at 1213, 1216–17.

¹⁹¹ *Id.* at 1215 (citing *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975)).

¹⁹² *United States v. Pineda-Morena*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting).

tracking device to it while you sleep. But the Constitution doesn't prefer the rich over the poor; the man who parks his car next to his trailer is entitled to the same privacy and peace of mind as the man whose urban fortress is guarded by the Bel Air Patrol."¹⁹³

Chief Judge Kozinski's critique of his colleagues is grounded in the inability of many judges to empathize with poor people because they have never been poor and have had no first-hand exposure to poor people. Indeed, the only reliable means by which judges are regularly exposed to those who are different—the poor, minorities, immigrants—is through the cases that appear by random assignment on their dockets. But if I am right that many of these claims are now vanishing from the docket, one would expect the cognitive, cultural and political distance between jurists and economically vulnerable groups to grow and solidify. And eventually, judicial decisions exhibiting elements of classism, decisions like *Kras* and *Pineda-Morena*, will no longer seem so controversial—indeed, they may even issue without strong dissents. And, at some point, the only cases in which judges will glimpse the lives of individuals living on the economic edge are criminal cases like *Pineda-Morena*.

CONCLUSION

The insights of this Essay borrow from many recent articles and books exploring the effects of various public- and private-sector policies on particularly vulnerable groups. For example, civil rights scholars have studied the millions of black men missing from their communities due to high incarceration and mortality rates, which is the result of systemic socioeconomic issues.¹⁹⁴ Economists have examined fiscal policies resulting in working-class and immigrant populations shut out from the ranks of entrepreneurs and job creators.¹⁹⁵ And feminists have long inveighed against

¹⁹³ *Id.* at 1123 (Kozinski, J., dissenting).

¹⁹⁴ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing the striking number of incarceration of African Americans in the United States and the violation of their human rights); Wolfers et al., *supra* note 16 (“African-American men have long been more likely to be locked up and more likely to die young, but the scale of the combined toll is nonetheless jarring. It is a measure of the deep disparities that continue to afflict black men—disparities being debated after a recent spate of killings by the police—and the gender gap is itself a further cause of social ills, leaving many communities without enough men to be fathers and husbands.”).

¹⁹⁵ P. Köllinger & M. Minniti, *Not for Lack of Trying: American Entrepreneurship in Black and White*, 27 *SMALL BUS. ECON.* 59 (2006) (reporting that minorities have a high propensity to attempt to start a business, but they are less likely to succeed due to numerous policy-based obstacles); Lloyd Blanchard, Bo Zhao & John Yinger, *Do Lenders Discriminate Against Minority and Woman Entrepreneurs?*, 63 *J. URB.*

employment practices which exclude women from high-profile workplaces—recently, Silicon Valley’s tech industry and Wall Street’s financial corridor.¹⁹⁶ These literatures share an obvious central premise: when entire groups vanish from public view, so too do their contributions, voices, and perspectives—all at potentially high cost to both the affected groups and society more broadly. Implicit, too, in these literatures is the recognition that public policies have ineluctably helped to produce or perpetuate discrepancies in access, and that only a reversal of those policies can begin to close these gaps.

The focus here is similarly on developments that have rendered low-income populations incapable of collectively accessing the civil justice system to resolve group-based harms. For low-income groups, aggregating claims has traditionally provided an important means of accessing justice. In an era of increasing poverty and a growing gap between rich and poor, these issues concerning access take on critical significance.¹⁹⁷

ECON. 467 (2008) (reporting that Black, Hispanic and low-income loan applicants experience less favorable outcomes than do white and middle-class applicants).

¹⁹⁶ For example, in March 2015, Ellen Pao brought a gender-discrimination claim against Kleiner Perkins Caufield & Byers, testifying about a clubby, all-male atmosphere that failed to respect women. While a jury found against Pao, other female employees have now filed gender-discrimination claims against Facebook and Twitter. See, e.g., Farhad Manjoo, *A Woman Disrupts How Silicon Valley Does Business*, N.Y. TIMES, Mar. 28, 2015, at B1.

¹⁹⁷ Paul A. Jargowsky, *Architecture of Segregation: Civil Unrest, the Concentration of Poverty and Public Policy*, <http://apps.tcf.org/architecture-of-segregation>. The number of people living in high-poverty areas nearly doubled between 2000 and 2013, to 13.8 million since 2000, and the number of people living in neighborhoods where the poverty rate is 40% or more has grown by 76%. *Id.*