THE CONCEPT OF EQUALITY IN CIVIL PROCEDURE

*William B. Rubenstein**

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INTRODUCTION

We are of two minds about the value of equality in civil procedure. We sense that equality is indispensable, a core concern that must be considered in the design and assessment of procedural systems. Yet, we are not always sure what is meant when the concept of equality is deployed and we are perplexed by its seemingly endless ramifications. In short: we know we cannot live without equality, but we are not entirely certain what it means to live with it.

These dual impulses suffuse the rare discussions of procedural equality that exist in the academic literature. Consider, for example, Professor Jerry Mashaw's definitive work on procedural values.[1] Professor Mashaw begins one brief examination of equality by noting that "justice in a formal philosophical sense is often defined as equality of treatment," and by stating that "the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be *the most important criterion* by which fairness is evaluated."[2] Yet, within a paragraph, Professor Mashaw is quick to caution that "equality of opportunity is not an exhaustive measure of procedural due process."[3] And later, Mashaw concludes on this decidedly skeptical note, far from his original endorsement: "If we provided everyone confronting any administrative decision with the process made available to K in [Kafka's] *The Trial*, equality would be maintained, but the protection afforded individual self-respect would be modest indeed."[4] Professor Mashaw essentially summarizes the terrain with his lament that "equality is a notoriously slippery concept, and its procedural implications are puzzling."[5]

Perhaps because equality is so slippery and its implications so puzzling, the procedural literature contains no thorough examination of its significance. Yet even this explanation for the absence of writing on procedural equality is contested; perhaps,

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[1] *See, e.g.*, Jerry Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981) [hereinafter Mashaw, *Dignitary Theory*]; Jerry L. Mashaw, *The Supreme Court Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46-57 (1976) [hereinafter Mashaw, *Three Factors*]. The discussions of equality in these articles are substantially reprinted in Professor Mashaw's books BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (reprinting *Three Factors, supra*) and DUE PROCESS AND THE ADMINISTRATIVE STATES (1985) (reprinting *Dignitary Theory, supra*).

[2] Mashaw, *Three Factors, supra* note 1, at 52 (emphasis added).

[3] *Id.*

[4] Mashaw, *Dignitary Theory, supra* note 1, at 901.

[5] *Id.* at 899.

again in Professor Mashaw's words, equality is so "ubiquitous" and "intuitively plausible" "that no extended defense . . . seems appropriate."[6] At the very least this much is clear—although books and articles have been devoted to other procedural values,[7] scholars have spent only a few paragraphs here and an occasional passage there explicating the general value of procedural equality.[8]

This Article seeks to fill that void. It provides a sustained treatment of the complex role that equality plays in procedural thought. What do we mean when we talk about "procedural equality"? In what ways does the concept of equality arise in procedure? By what mechanisms is it approached or achieved? How important is the concept of equality in assessing the fairness of procedural systems?

Three primary points emerge from this in-depth consideration of procedural equality. The Article's organizing principle is that there is not one form of "procedural equality" but rather a host of "procedural equalities." I identify and explore three different forms of equality that are central structural features of civil procedural systems:

- *Equipage equality* (discussed in Part I): Our adversary system is premised upon the idea that the most accurate and acceptable outcomes are produced by a real battle between equally-armed contestants; thus the adversary system requires, if it is to achieve these goals, some measure of equality in the litigants' capacities to produce their

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[6] *Id.*

[7] *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (discussing the value of participation); Robert Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) (same); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399 (1973) (discussing the value of efficiency); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L. J. 455, 482-91 (1986) (discussing the value of impartiality).

[8] Equality, or consistency, is typically included on a list of procedural values and discussed briefly alongside discussions of other such values. *See, e.g.*, Redish & Marshall, *supra* note 7, at 482-91 (discussing equality, appearance of fairness, predictability, transparency, rationality, participation, revelation, and privacy-dignity); Mashaw, *Three Factors, supra* note 1 (criticizing the Supreme Court's use of a three-factor cost-benefit analysis and discussing four additional values of procedure: utilitarianism, individual dignity, equality, and tradition); Mashaw, *Dignitary Theory, supra* note 1 (discussing equality, predictability, transparency, rationality, participation, privacy, and residual values); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153 (discussing dignity values, participation values, deterrence values, and effectuation values); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984) (discussing, *inter alia*, consistency, autonomy, impartiality, rationality, formality, finality, and economy); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 20-27 (1974) (discussing participatory governance, process legitimacy, peacefulness, humaneness and respect for individual dignity, privacy, consensualism, fairness, legality, rationality, timeliness, and finality).

proofs and arguments;[9]

- *Rule equality* (discussed in Part II): Our procedural systems rest upon the idea that adversarial litigants in a single case should be accorded equivalent procedural opportunities and upon the proposition that like cases should be processed according to like procedural rules; thus, these systems contain a commitment to apply procedural rules with an even-hand within a case, and equally across case types and within sovereignties;
- *Outcome equality* (discussed in Part III): Our adjudicatory systems endeavor to ensure that like cases reach like results; thus, proper procedural rules are those that achieve consistent outcomes in like cases.

What each of these equalities equalizes differs, and in each instance equality is sought for distinct purposes. It is not, therefore, particularly illuminating to speak of "procedural equality" without addressing the clarifying question: "Equality of what?"[10] The broad topic of procedural equality encompasses a range of things that are provided "equally," for a variety of different reasons. By examining some of these in depth, this Article provides more than a passing treatment of a singular idea of procedural equality; it creates a typology of procedural equalities.

Through an examination of each particular type of procedural equality, the Article's second fundamental message emerges: our procedural systems contain an intricate web of architectural decisions that can help to promote these various forms of equality. The Article shows how numerous procedural rules and approaches can foster the types of equality that are identified, even if such rules were not intentionally selected for that purpose. This point is important because it augments the discussion of the many ways in which equality matters by showing the many ways in which equality

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[9] I label this the concern of "equipage" equality because what we are worried about is whether parties are equally "equipped" to engage in adversarial adjudicatory procedures. Frank Michelman appears to have initiated the use of the term in civil procedure discourse. *See* Michelman, *supra* note 8, at 1159. Professor Michelman differentiated state-mandated "access fees" from the "legally optional, yet practically essential, *equipage* often needed for an effective presentation once the case is filed—attorneys' fees, chiefly, but consultant, expert witness, investigational, stenographic, and printing costs as well." *Id.* (emphasis supplied). In utilizing the term here, I use it to refer generally to *all* costs associated with litigation. Other scholars who use the term also employ it in this broader sense. *See, e.g.*, Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2136 (2000) ("Equipage for civil litigants—from filing fees to investigation to counsel for experts—is generally left either to the legislature or to the market.").

[10] This question is Amartya Sen's. *See* AMARTYA SEN, INEQUALITY REEXAMINED viii, x (1992); *see also* AMARTYA SEN, *Equality of What?*, *in* CHOICE, WELFARE AND MEASUREMENT 353-69 (1982).

can be addressed. It adds an examination of institutional actors and of their activities to the more theoretical discussion of adjudicative ideals.

It is especially important to appreciate both the forms of procedural equality and the mechanisms by which equality is approached in procedure because litigants regularly make the mistake of confusing the assorted procedural equalities with the form of equality embodied in the Fourteenth Amendment. Aggrieved litigants often raise equal protection challenges to procedural rules and practices that violate the types of procedural equality identified here; though numerous, these challenges have had little success and little impact on the field of civil procedure.[11] By carefully delineating the meaning of equality in each procedural domain, this Article explicates a third point, one that provides an explanation for the constitution's impotence in civil procedure—namely, that constitutional equality and these three procedural equalities are usually not the same thing.

The concept of equality employed in American constitutional law is one with a particular historical meaning,[12] "some variety of [an] antidiscrimination principle."[13] If the clarifying question—"Equality of what?"—is posed, the constitutional answer is: "Equality of respect by the government."[14] Constitutional equality

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[11] This conclusion comports with that reached by John Leubsdorf in his seminal work, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579 (1984). However, I reach that conclusion by a different route than did Professor Leubsdorf. Leubsdorf's conclusion was based upon his claim that there were very few constitutional cases involving civil procedure, that judges had rarely been asked to strike down civil procedures. *See id.* at 581 (writing that "the Court rarely accepts cases raising issues of constitutional civil procedure, discouraging lawyers from raising these issues"). In fact, as this Article will demonstrate, there are many cases in which equal protection claims have been brought against civil procedures. In fairness to Professor Leubsdorf, he based his conclusion on the few Supreme Court cases involving constitutional concerns with civil procedure. *Id.* at 583 (noting that these few cases "do not form the tip of an iceberg, but are scattered icecubes floating in an empty sea"). The cases I excavate and discuss are primarily, though not exclusively, lower court decisions. Many of these also post-date Professor Leubsdorf's 1984 article. Nonetheless, my conclusion that the Constitution has had little effect on procedural equalities does not rely on the absence of constitutional law; rather, I reach this conclusion by arguing that constitutional equality is generally a different form of equality than these procedural equalities.

[12] Ken Karst has demonstrated that equality, as used in American jurisprudence, is "not derived from dictionaries or deductive logic, but from centuries of American experience. It is not a philosopher's universal, but a culturally specific and evolving ideal." Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 249 (1983).

[13] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1514 (2d ed. 1988) (citing Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976), and Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976)).

[14] *See* Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under The Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) (defining the constitutional principle as "the right to be treated by organized society as a respected, responsible, and participating member").

aims to root out caste-like government practices.[15] Generally speaking, this is not the work that the concept of equality does in the field of procedure. Without a doubt, this form of equality—concern about the stigmatizing effects of government actions—can and does arise in procedure. A procedural system that denies jury service to blacks on the basis of their race, or women on the basis of their sex, surely triggers precisely this constitutional form of inequality.[16] However, as this Article will demonstrate, the organizing equalities of civil procedure are not synonymous with the animating principle of the Fourteenth Amendment.[17]

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[15] To restrict the Fourteenth Amendment to concerns about caste-creating government action may be neither precise, as a descriptive matter, nor satisfying, as a normative one. That equal protection law emanates from the anti-caste principle is most evident in the practice of applying "strict scrutiny" to laws that disfavor groups that have suffered a history of prejudicial treatment. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); *see generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §14.3 (6th ed. 2000). Yet several aspects of equal protection jurisprudence appear to exceed the anti-caste principle.

Fundamental rights equal protection law urges strict scrutiny of government actions that burden certain rights no matter what group's ox is being gored. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (fundamental right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right to travel). It is the nature of the oxen, not the caste of the owner, that triggers equal protection concern. Equal protection law also protects "classes of one"—single individuals harmed by state actions, regardless of their class status. *See* Village of Willowbrook v. Olech, 528 U.S. 562 (2000). This too would suggest a state of equal protection law that exceeds the anti-caste principle. And the Court's recent application of strict scrutiny to affirmative action programs, *see, e.g.,* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. Croson, 488 U.S. 469 (1989)—laws that arguably discriminate, if discrimination it is, against the class of white persons—do not seem to follow from an anti-caste principle. Yet all of these aspects of equal protection law are highly contested. Arguably, our discomfort with them emanates, in part, from the very fact that they deviate from the core anti-caste principle.

Not only *does* the equal protection clause police more than pure caste-like practices, perhaps it *should*. To be clear: many scholars' concern about equal protection jurisprudence is not with the anti-caste principle, per se, but rather with the narrow manner in which the Court has identified caste-creating practices. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (criticizing the Court's narrow definition of racially-discriminatory motivations). This scholarship does not detract from my characterization of the equal protection clause as caste-based. Other commentators do, by contrast, conceptualize the equal protection clause in ways that provide it with more breadth than that of rooting out pure caste-like practices. *See, e.g.*, Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949) (defining, at a more abstract level, the concept of "fit" and the related notions of overbreadth and underinclusion).

Characterizing the Fourteenth Amendment as an "anti-caste" principle may therefore be both an imprecise description and an insufficient aspiration. However, it is a short-hand that sufficiently captures the core aspect of equal protection for purposes of comparing that clause's history and jurisprudence to the other forms of equality identified here.

[16] *See, e.g.,* Strauder v. West Virginia, 100 U.S. 303 (1879) (holding unconstitutional a West Virginia statute excluding any but "white male persons" from juries).

[17] Since scholars rarely argue that the Fourteenth Amendment does or should influence the field, my contention that the Fourteenth Amendment primarily polices only one aspect of procedural inequality may seem like an attack upon a straw man. This criticism is

By clarifying the distinctive nature of various procedural equalities, the Article transforms our rather abstract and inchoate instincts about procedural equality into a grounded set of specific procedural practices. Part IV then considers what implications can be drawn from this descriptive exercise by engaging in thought experiments involving two sets of institutional actors. The first are those who design procedural systems. If my argument is correct—that there are many forms of procedural equality, that they are central to currently-accepted adjudicatory practices, and that realization of these norms is the particular province of procedural designers—it should follow that procedural designers would see that these forms of equality are essential to their work. This is critically important in current debates about alternative dispute resolution ("ADR") systems. Employers and businesses are increasingly creating such systems to handle a vast array of legal claims brought against them by their employees and customers. The implication of this Article for ADR designers is straightforward: the less respect that your system gives to these familiar forms of procedural equality, the less likely it is that your efforts will command respect. I demonstrate the strength of this suggestion in Part IV by reviewing a series of cases in which courts have analyzed the fairness of ADR systems. Although courts and commentators do not always frame their arguments in these terms, this Article helps to reveal that various forms of procedural equality are a central concern in the judicial review of ADR systems.

The second set of institutional actors that Part IV addresses are those who muck with procedural design, in particular, state and federal legislators. Generally speaking, civil procedures are formulated by judges, lawyers, and academics who possess knowledge of whole procedural systems and who develop procedural rules with this systemic picture in mind.[18] By contrast, lawmakers are procedural exceptionalists—they only occasionally

unwarranted. First, as the Article will demonstrate, litigants frequently deploy the equal protection clause to challenge all types of procedural inequities. Thus, courts are regularly called upon to interpret the relationship between constitutional equality and procedural equalities. Second, the fact that the Constitution has little effect on civil procedure—even if widely known—remains perplexing, has rarely been addressed directly, and has never been explained. Finally, constitutional equality is a useful foil because it helps demonstrate that equality has different applications and thus helps elucidate the argument that there are different forms of procedural equality.

[18] For an overview of the origins and history of the Federal Rules of Civil Procedure, see Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988*, 137 U. PA. L. REV. 1873-2259 (1989). As many of the articles in this Symposium make clear, procedural designers are not without their own agendas. Yet generally speaking the process of procedural rule-making is somewhat less politicized than the process by which Congress occasionally tweaks procedural rules for short-term political purposes.

meddle in the design of procedural systems and they do so with particular political purposes in mind. Congress, for example, has enacted a whole series of unequal civil procedures in the past decade. Congress has barred federal courts from entering consent decrees in cases challenging prison conditions, thus limiting prison condition litigants to fewer remedies than those available to all other litigants.[19] Congress has prohibited legal services attorneys from filing class action lawsuits, thus essentially limiting their clients to fewer procedural forms than those available to all other litigants.[20] And Congress has re-worked the rules for securities class actions, requiring securities fraud plaintiffs to jump over procedural hurdles more elevated than those facing all other class action litigants.[21] Myriad state rules can be added to these federal examples.[22]

The descriptive parts of this Article provide some comfort to legislators engaged in these efforts by demonstrating that the Equal Protection Clause will offer little assistance in challenges to these exceptional procedural regimes. But because these procedural equalities do not always, or only, implicate constitutional equality, and precisely because, therefore, the equal protection clause does so little work in furthering these forms of equality, I suggest in Part IV that legislators considering selective or unequal procedural rules have a special duty: when they consider statutory proposals for selective civil procedures, legislators should approach such laws with greater concern about their effects on procedural equalities than they have in the past.

This Article is thus meant to be both clarifying and prescriptive. It is said that people "do not really want to define

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[19] *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified at 18 U.S.C. § 3626(b)(2) (1996)).

[20] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, at 1321-53 to 1321-56. This restriction on the activities of lawyers who receive legal services money is only one of a host of subject-specific restrictions contained in legal services funding. For instance, the same law enacting the class action ban also prohibits such attorneys from "litigation or activity involving political redistricting," *id.* § 504(a)(1), and from litigation "with respect to abortion," *id.* § 504(a)(14). *See also* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1792, n.37 (2001) ("Legal aid programs that accept federal funds also may not accept entire categories of cases or clients who seldom have anywhere else to go, such as prisoners, undocumented immigrants, or individuals with claims involving abortions, homosexual rights, or challenges to welfare legislation.") (citing 45 C.F.R. §§ 1610-42 (1999). In *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), the Supreme Court held that one of these restrictions—barring funded lawyers from challenging the validity of welfare laws—violated the First Amendment.

[21] *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-352, 112 Stat. 3227 (1998); Private Securities Litigation Reform Act of 1995 (codified at 15 U.S.C. §§ 77z-1-78j-1 (2000)).

[22] *See infra* Part II & App. A.

[concepts like equality] too closely, lest they lose emotional steam."[23] My goal in this Article is to define "procedural equality" more closely precisely so it gains emotional steam.

I. INEQUALITY BROUGHT TO ADJUDICATION: THE PROBLEM OF UNEQUAL ADVERSARIES

The structure of our adjudicatory system presents an initial domain in which to explore the concept of procedural equality. In American law, disputes are generally resolved in an adversarial fashion: a neutral arbiter resolves a dispute between competing parties following an adversarial demonstration of privately developed facts and zealously presented legal arguments.[24] This adversarial approach is defended as the best method for obtaining accurate and acceptable resolution of legal disputes.[25]

Our decision to determine legal cases in such a manner commits us to a method of dispute processing that triggers several equality concerns.[26] First, because an adversary system relies upon the parties to produce the facts and legal arguments that will be forwarded on their behalf, for such a system to function properly, the parties must be somewhat equally capable of producing their cases.[27] If one side in adversarial adjudication is ill-equipped—it cannot afford access to the system, or has less time and money to pursue evidence, or less skill in developing legal claims—then what emerges as the stronger case might not necessarily be the better

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[23] George E.G. Catlin, *Equality and What We Mean By It*, *in* NOMOS IX: EQUALITY 99 (J. Roland Pennock & John W. Chapman eds., 1967).

[24] *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Ken Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975); AMERICAN BAR ASSOCIATION SECTION ON LITIGATION, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (Stephan Landsman ed., 1988) [hereinafter ABA READINGS].

[25] *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981) ("[O]ur adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests . . . "). *See generally* Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 39 (H. Berman ed., 1971)(arguing that an adversary presentation contributes to "a properly grounded decision, a decision that takes account of all the facts and relevant rules").

[26] *See* ABA READINGS, *supra* note 24, at 2-5.

[27] That parties have equal opportunities to produce their proofs and arguments is not a necessary aspect of all forms of dispute resolution. Inquisitorial systems, for example, delegate much of the adjudicatory work—particularly that of fact development—to the judge. In such a system, the fact that one party has a poorer advocate or far less resources to devote to the case is of secondary importance. The factual development and, to some extent, legal evaluation, are considered public functions. *See generally* John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

case.[28] Second, the parties must be given relatively equal opportunities to present their case.[29] Finally, the arbiter must be neutral; the command that the arbiter not be biased towards one party or the other insists that she approach each party equally.[30]

Adversarial adjudication's commitment to these indicia of equality is a commitment to a particular instrumental form of equality. Equality is important in this schema because it is thought to contribute to accurate and acceptable dispute resolution. Equality is desired not (just) to combat caste-like structures, but rather to help secure sound adjudicative outcomes.[31] If the question "Equality of what?" is posed, one answer in this domain would be "equality of litigant equipage sufficient to produce the desired adjudicative accuracy."[32]

Of course, the aspiration of equipage equality exists within the framework of a political and economic system that condones gross disparities of wealth and that is resistant to redistributive financial

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[28] Thus, in the context of child neglect proceedings, the Supreme Court has expressed concerns about the accuracy of proceedings in which a state government is pitted against an unrepresented parent:

> If, as our adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps be best served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.

Lassiter, 452 U.S. at 28. *Accord* Santosky v. Kramer, 455 U.S. 745 (1981) (holding that due process requires more than a "preponderance of the evidence" standard in neglect proceeding because of the risk, due to equipage disparities between the government and parents, of inaccuracy under this standard civil evidentiary test).

[29] *See* Mashaw, *Three Factors*, *supra* note 1, at 52 ("[I]nsofar as adjudicatory procedure is perceived to be adversarial and dispute resolving, the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated.").

[30] *See, e.g.*, Hayes v. Missouri, 120 U.S. 68, 70 (1887) (noting that juror impartiality "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution," such that "[b]etween [the accused] and the state the scales are to be *evenly* held") (emphasis supplied).

Some commentators have argued that a neutral arbiter is not only a necessary condition to achieve the values of due process of law, but that it may be a sufficient condition. *See* Redish & Marshall, *supra* note 7, at 457. Whether Redish and Marshall are correct in theory that an impartial arbiter alone is sufficient, our practices of civil justice still retain the additional procedural components set forth in the text. *See id.* at 479.

[31] I am indebted to John Leubsdorf for reminding me that litigant equality need not be limited to serving these goals; arguably, equal access to the adjudicatory system is a essential feature of citizenship itself. This is particularly true, as the Supreme Court has acknowledged, in cases challenging the constitutionality of state actions. *See, e.g.*, *In re* Primus, 436 U.S. 412, 423-26 (1978); NAACP v. Button, 371 U.S. 415, 429 (1963). *See generally* Michelman, *supra* note 8, at 1172 (arguing that the opportunity to litigate promotes "self-respect" and a sense of having one's voice "'counted' in societal decisions").

[32] For more philosophical explorations of the argument, see Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFFAIRS 303 (1988); Ronald Dworkin, *Principle, Policy, Procedure*, *in* A MATTER OF PRINCIPLE 72 (1985).

policies, particularly judicially-imposed redistributive rules.[33] Because equipage equality focuses our attention on these types of social inequalities, it has the tendency to feel very similar to the concept of equality embodied in the Fourteenth Amendment. And sometimes it is quite close. But it is helpful to appreciate the different ends which each form of equality serves. Consider a seemingly neutral procedural practice, say one that requires evidence to be submitted in writing and not orally.[34] Such a rule may have a harsher impact on under-equipped litigants, as their ability to produce written documents may be limited.[35] We might even conclude that this rule treats such individuals unequally.[36] But procedural equality would arrive at the conclusion because it is skeptical that an accurate or acceptable result will be reached if one of the parties has a significant presentation disadvantage.[37]

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[33] *See, e.g.*, Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (recognizing that the Constitution "generally confer[s] no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"); Lindsey v. Normet, 405 U.S. 56, 75 (1972) ("[T]he Constitution does not provide judicial remedies for every social and economic ill."); Douglas v. California, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting) ("[T]he Equal Protection Clause does not impose on the States an 'affirmative duty to lift the handicaps flowing from differences in economic circumstances.'"); Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in the judgment) ("[o]f course a State need not equalize economic conditions . . . .").

[34] *Cf.* Mathews v. Eldridge, 424 U.S. 319 (1976) (upholding administrative process that did not include oral hearings prior to termination of disability benefits on the basis that disability claims are generally claims that can be adjudicated on a paper record).

[35] This appears to be the conclusion of the Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), wherein Justice Brennan states that:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.

Id. at 268.

[36] *See* Mashaw, *Three Factors*, *supra* note 1, at 53 (suggesting that administrative agency assessments of disability claims "based on documents" may be "particularly disadvantageous for certain classes of claimants"); *Geaminea v. Nebraska*, 206 F. Supp. 303 (D. Neb. 1962) (finding equal protection violation in rule that prisoner seeking habeas corpus must file printed brief when no provision made for indigent prisoners). *But see Mirin v. Justices*, 415 F. Supp 1178 (D. Nev. 1976) (rejecting equal protection challenge to a rule that selectively denied right to oral argument to certain litigants).

[37] *See* Lassiter v. Dep't of Soc. Srvcs., 452 U.S. 18, 28-30 (1981) (describing, as a matter of due process analysis, why inaccuracy is a likely consequence of unequal equipage). *Accord*, Little v. Streater, 452 U.S. 1, 14 (1981) (holding that denial of DNA testing in paternity case because indigent father could not afford to pay for it denied due process as "access to [blood

Constitutional equality might, instead (or in addition), be concerned that not permitting ill-equipped, or unrepresented, individuals to testify orally stigmatizes such individuals in a manner prohibited by the Fourteenth Amendment.[38] Using either definition of equality, we might reach the same conclusion, but we would arrive there via different roads.

What makes this distinction even more pertinent, though, are those situations in which procedural equality and constitutional equality might reach different conclusions. For example, it is highly likely (given the current jurisprudence of equal protection) that the example provided above would not be found to violate the Fourteenth Amendment.[39] However, it is plausible that the presentation rule could nonetheless violate the type of equality required in an adversary system. The latter may not be protected by the history and tradition of the Fourteenth Amendment's Equal Protection Clause. Yet, an acknowledgement of the consequences that this form of inequality might have on adversarial accuracy ought, nonetheless, to inform the choices that are made in designing

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tests] for indigent defendants... would help to insure the correctness of paternity decisions").

[38] *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 110-113 (1996) (discussing procedural cases that address the "age old problem" of "providing equal justice for poor and rich, weak and powerful, alike"); Boddie v. Connecticut, 401 U.S. 371, 386 (1971) (Douglas, J., concurring in the result) (arguing that court access fee in divorce cases violated equal protection clause, not just "due process" as found by the majority, because such a fee constitutes "invidious distinction based on wealth" and because "[a]ffluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate"); *id.* at 386-389 (Brennan, J., concurring in part); United States v. Kras, 409 U.S. 434, 458 (1973) (Douglas, J., and Brennan, J., dissenting) (arguing that court access fee in bankruptcy case constitutes "invidious discrimination based on wealth"); Ortwein v. Schwab, 410 U.S. 656, 662 (1973) (Douglas, J., dissenting) (arguing that court access fee for appeal of administrative decision constitutes "invidious discrimination against the poverty-stricken" that is "proscribed by the Equal Protection Clause of the Fourteenth Amendment").

[39] Indeed, most of the citations in the preceding footnote are to dissenting opinions. Under current law, if the "evidence-in-writing" rule were found to have a disparate impact based on wealth, it would be unlikely to therefore run afoul of the Equal Protection Clause. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that wealth-based classifications generally trigger only rationality review). This is especially true in the absence of some demonstrable invidious purpose. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) ("[Where] the discretion that is fundamental to [procedure] is involved, we decline to assume that what is unexplained is invidious."); Washington v. Davis, 426 U.S. 229, 240, 242 (1976) (holding that the disparate impact of a facially neutral law "does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny," unless it can "ultimately be traced to a racially discriminating purpose"). Similarly, if the procedural rule were found to have a disparate impact on illiterate individuals, it also would likely be sustained as the Court has never constitutionally barred states' utilization of literacy requirements in the (arguably more fundamental) context of voting. *See* Louisiana v. United States, 380 U.S. 145 (1965); Alabama v. United States, 371 U.S. 37 (1962); Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959).

an adjudicative system.[40]

Indeed, let me amplify this point by identifying the many procedural choices that have the potential to dampen the impact of equipage disparities. (After doing so, I will return to the Constitution and demonstrate that this complex set of practices far exceeds the sparse accomplishments of constitutional law in this domain.) A web of programs and rules attempts to address the social fact that many litigants cannot afford filing fees, much less attorneys, in civil matters. Statutes enabling the waiver of filing fees for indigent litigants offer some access to under-equipped litigants.[41] Congress and states supply attorneys for those who cannot afford them in certain circumstances.[42] The private bar maintains programs that provide free counsel to indigent litigants and that encourage private lawyers to perform pro bono activities on behalf of the indigent.[43] Rules governing attorneys' fees can also help

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[40] Occasionally, the Court has ruled that equipage inequality may violate the Due Process Clause because of its effects on accuracy. *See, e.g., M.L.B.*, 519 U.S. at 121-22 (noting—in holding that the State must provide an indigent parent deprived of parental rights a transcript of trial proceedings so as to enable an appeal—that "[o]nly a transcript can reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence to support his stern judgment"); *see also Little*, 452 U.S. at 1. These cases arguably constitutionalize equipage inequality as a matter of due process law. However, these decisions are so exceptional that it is fair to conclude that the Due Process Clause, like the Equal Protection Clause, has only rarely addressed problems of equipage equality. *See infra* text accompanying notes 66-71. To say this is *not* to suggest approval of the scant accomplishments of due process jurisprudence in this area. It is simply to acknowledge the Court's reluctance to apply the constitution more generously, and, as I do in Part IV, to therefore explore alternative methods of addressing procedural equalities.

Before leaving the presentation hypothetical, I want to note several other nuances that it adds to an appreciation of procedural equality. The presentation rule that requires all litigants to submit evidence only in writing might be said to be a version of "formal equality" in that it facially treats all litigants equally. Yet once probed, it may become apparent that such a rule differently affects under-equipped litigants. In this sense, the rule would violate the notion of "substantive equality." On the distinction between formal and substantive versions of equality in constitutional discourse, see, e.g., Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimacy in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); as applied in procedure, see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1569 (1991) ("Equating fairness in mediation with formal equality results in, at most, a crabbed and distorted fairness on a microlevel; it considers only the mediation context itself. There is no room in such an approach for a discussion of the fairness of institutionalized societal inequity.").

Alternatively, the presentation rule might be said to comport with a form of "rule equality," see *infra* Part II, in that as a rule it treats each party equally; however, the rule might nonetheless violate the norm of equipage equality, as discussed in the text. Under either lexicon (formal-substantive or rule-equipage), this example demonstrates that different concepts of equality are often in tension with one another. *See generally* DOUGLAS RAE ET AL., EQUALITIES (1981). The guarantee of formal equality or rule equality, appears to violate the promise of substantive or equipage equality—and visa versa. I consider the subject of competing equalities *infra* Part IV.

[41] *See, e.g.*, 28 U.S.C. § 1915 (1994 & Supp. 1997).

[42] *See* Legal Services Corporation Act, 42 U.S.C. § 2296 (1994).

[43] Among other programs, between 1981 and 1998, nearly every state took advantage of

provide counsel for unarmed parties. The availability of contingent fees, fee-shifting,[44] and statutory fees[45] encourages attorneys to invest resources in cases that clients themselves may be unable to fund. Finally, needy clients are better able to identify such attorneys since the courts and bar have loosened traditional restrictions on attorney advertising.[46] Rules governing cost-shifting may have analogous, though less dramatic, equalizing effects.[47]

Fee- and cost-shifting may, of course, exacerbate, not ameliorate, the negative procedural consequences of unequal litigant wealth. This would happen if a poorer litigant were required to reimburse a richer litigant's costs, and if poorer litigants (even meritorious ones) were thereby deterred from the adjudicatory process.[48] Moreover, the effects of all of these programs and rules are limited, and the strength of our societal commitment to them has been underwhelming;[49] nonetheless one may conclude that these programs are important design features

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changes in banking regulations by using the interest earned on lawyers' client trust accounts ("IOLTA" fees) to fund legal programs for the poor. *See* Phillips v. Washington Legal Found., 524 U.S. 156, 159 (1998) (noting that forty-nine states and the District of Columbia had developed such programs). In *Phillips*, the Court cast serious doubt on the continued operation of such programs by ruling that IOLTA funds were "private property" and hence could not be "taken" without "just compensation." *Id.* at 172. The Court remanded for consideration of whether IOLTA programs amounted to a taking and, if so, for assessment of what compensation was due. *See id.* On remand, the District Court concluded that the program did not effectuate a "taking" of private property. *See* Washington Legal Found. v. Texas Equal Access to Justice Found., 86 F. Supp. 2d 626, 646-47 (W.D. Tex. 2000).

[44] *See* FED. R. CIV. P. 68 (authorizing shifting of fees to plaintiff who recovers less than offer made by defendant within ten days before trial and prohibiting plaintiff to collect costs incurred after offer).

[45] *See, e.g.*, 28 U.S.C. § 2412 (providing that a court shall award fees to a party that prevails against the United States unless the government's position was "substantially justified"); 42 U.S.C. § 1988(b) (providing for reasonable attorneys fees to the "prevailing party" in cases arising under federal civil rights statutes); CAL. CIV. PROC. CODE § 1021.5 (1999) (authorizing courts to award fees to parties "in any action which has resulted in the enforcement of an important right affecting the public interest").

[46] Deborah Rhode and David Luban argue that such restrictions originated in early twentieth century attitudes towards the commercialization of the bar; although therefore of relatively recent origin, advertising restrictions quickly grew to encompass prohibitions on everything from Christmas cards to matchbook covers. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 622-23 (1995). The situation changed dramatically after the Supreme Court ruled in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), that lawyer advertising was entitled to some First Amendment protections. *See also* Peel v. Attorney Registration and Disciplinary Comm'n., 496 U.S. 91 (1990); Shapero v. Kentucky Bar Ass'n., 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); *In re* R.M.J., 455 U.S. 191 (1982).

[47] *See, e.g.*, FED. R. CIV. P. 54(d); 28 U.S.C. § 1920 (1994).

[48] *See* John M. Blumers, Note, *A Practice in Search of a Policy: Considerations of Relative Financial Standing in Costs Awards Under Federal Rule of Civil Procedure 54(d)(1)*, 75 B.U. L. REV. 1541 (1995).

[49] For an overview of the narrow nature of such "cross-litigant wealth transfer," see Resnik, *supra* note 8, at 2137-44; *see generally* Rhode, *supra* note 20.

with the potential to reduce equipage disparities.

Modern procedural practices themselves can also have equality-enhancing consequences. This is most obvious in the Federal Rules' embrace of notice pleading and liberal discovery. Notice pleading enables any litigant, even one without an attorney, to gain access to the adjudicatory system and to proceed to discovery by requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief."[50] The classic case of *Dioguardi v. Durning*[51] demonstrates the proposition. In *Dioguardi*, the plaintiff had a "limited ability to write and speak English," yet his confused complaint was deemed sufficient to satisfy the low threshold of notice pleading.[52] The purpose behind the adoption of notice pleading in the federal courts was the "hope[] that cases would turn on their substantive merits rather than the lawyers' technical and tactical skills,"[53] again highlighting the leveling effect such a system is meant to have on party disparity. But there is even a more nuanced, equalizing aspect of notice pleading. Not only does it check the consequences of attorney disparities, notice pleading also facilitates the pursuit of certain lawsuits, cases that are primarily prosecuted by less advantaged parties against those with greater resources:

> Imposing on a plaintiff a requirement that the claim be articulated in detail means that only claimants who have access to such detail are in a position to state a claim.... [A] liberal rule ... allows ... claimants to bring litigation when they may have only suspicions as to the facts.... For example, a passenger injured in a train wreck is unlikely to have any knowledge of what caused the wreck, whereas the railroad probably has this information and will ordinarily conduct a field investigation immediately after the event. If a passenger's complaint must state the cause of the wreck in detail, without the benefit of the discovery procedures that become available after the complaint is filed, few passengers will be able to state a viable claim and thereby stay in court. The same would be true

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[50] *See* FED. R. CIV. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (embracing "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). The move away from requiring technically precise pleadings that the federal rules represent is emphasized by the forms that accompany the rules; these forms underscore the ease with which access to the federal courts is provided. *See* FED. R. CIV. P. 84 (stating that form pleading is sufficient).

[51] 139 F.2d 774 (2d. Cir. 1944).

[52] *Id.* at 775-76. The case is perhaps most famous because the author of the Second Circuit decision, Judge Charles Clark, was also the moving force behind adoption of notice pleading in the federal courts. *See* Charles Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177 (1958).

[53] JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.1, at 244 (3d ed. 1999).

for plaintiffs in most products liability and toxic torts cases.[54]

Notice pleading is accompanied in the Federal Rules by a discovery regime that enables broad factual discovery with relative ease. Discovery under the federal rules is characterized as "extremely broad,"[55] in that information can be obtained "regarding any matter, not privileged, that is relevant to the subject matter involved in the action, whether or not the information sought will be admissible at trial, just so long as it is reasonably calculated to lead to the discovery of admissible evidence."[56] Broad discovery has the effect of equalizing the information available to each side in the lawsuit. Gathering information, even from an adversary under the discovery rules, can nonetheless be expensive. But several of our practices help to spread costs. First, the party producing the discovery sought bears the costs of doing so. A poor plaintiff can require a rich defendant to do an enormous amount of free work for her through the process of formal discovery. This has the intended effect of "requiring one party to bear the burden and cost of helping to prepare another's case."[57] Second, rules requiring "initial disclosure"[58] of relevant information arguably assist under-equipped litigants even more. They require an adversary to turn over certain factual material before a properly-drafted request has even been made.[59] Third, broad discovery also assists unequipped litigants because it is likely that the better-equipped party (typically a corporate defendant) has far more to disclose than its poorly-equipped adversary.

It is true, of course, that liberal discovery can also work against poorer litigants—they can be flooded with discovery requests and out-maneuvered by the resources of wealthier opponents. This is the stuff of *A Civil Action*,[60] but what makes *A Civil Action* so believable is its familiarity—it is a script that unfolds, albeit less dramatically, in the daily lives of litigators. At the same time, though, the facially-neutral rules of discovery operate in a sphere of information inequality. It is therefore not unfair to guess—though guess it is—that more often than not liberal discovery rules create a

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[54] FLEMING JAMES, JR., ET AL., CIVIL PROCEDURE § 3.1, at 140 (4th ed. 1992).

[55] FRIEDENTHAL ET AL., *supra* note 53, at 388.

[56] *Id.* at 388-89 (citing FED. R. CIV. P. 26(b)).

[57] JAMES, JR., ET AL., *supra* note 54, at 236.

[58] *See* FED. R. CIV. P. 26(a).

[59] The 2000 Amendments to Rule 26(a)(1) limit this benefit to underequipped litigants by exempting several sets of cases that uniquely involve poor litigants from these initial disclosure requirements. *See id.* 26(a)(1)(E) (stating that initial disclosure requirements do not apply to habeas corpus cases nor to cases involving unrepresented prisoners). Yet even in its current limited form, the requirement of initial disclosures can serve the purposes identified in the text.

[60] JONATHAN HARR, A CIVIL ACTION (1995).

real world transfer of information (and power) from richer to poorer. Most broadly, as with notice pleading, liberal discovery does more than help level the adjudicative field, however; it can also enable litigation in certain fact-bound situations:

> It makes possible the prosecution and defense of actions that would be impossible without it. With wide-ranging discovery, an action or defense can be maintained that is dependent on witnesses or documents known only to the opponent—for example, a medical malpractice claim that must be proved through the testimony and records of the treating medical staff, or an antitrust action based chiefly on the records of the alleged offender.[61]

Procedural rules governing party status can also indirectly reduce equipage disparities. Rules enabling liberal party joinder[62] and representative litigation[63] have equalizing consequences because these rules essentially allow parties to pool resources in prosecution of a common claim. The equalizing power of these devices has often been noted.[64] While class action lawsuits serve various different ends, such aggregative mechanisms—by leveling equipage disparities—can often help produce more accurate adjudicative results.[65]

Each of these procedural practices—the government provision of attorneys, pro bono programs, fee rules, attorney advertising, notice pleading, liberal discovery and party joinder rules—have equality-inducing consequences in regard to equipage disparities. Sometimes they are adopted with a sense that they provide dignity and check the caste aspects of our socio-economic system. But generally, a central by-product of these procedural practices is that they help generate greater equipage equality, which in turn helps ensure the accuracy and acceptability of adjudicative outcomes.

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[61] JAMES, JR., ET AL., *supra* note 54, at 236.

[62] *See* FED. R. CIV. P. 20 (enabling all persons with similar claims arising out of the same transaction or occurrence to join as parties in one lawsuit).

[63] *See id.* R. 23 (class actions).

[64] *See, e.g.*, Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (arguing that "[M]odern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive."); *see also* Marc Galanter, *Why the "Haves" Come out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (arguing that class actions help level the playing field between the "haves" and "have nots").

[65] *See, e.g.*, *Contract Buyers League v. F & F Inv.*, 48 F.R.D. 7, 13 (N.D. Ill. 1969) (stating, in certifying class, that "the relative financial interest in the outcome of this litigation is such that greater parity of ability is obtained by a joinder of plaintiffs") (quoting Weeks v. Bareco Oil. Co., 125 F.2d 84, 90 (7th Cir. 1941)). Richard Nagareda describes the process in mass torts whereby aggregation among plaintiffs can help level the adjudicative playing field and lead to more merit-based outcomes. *See* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 760-762 (2002).

Because this outcome—in addition to a more general social equality—is the core aspiration of equipage equality, procedural practices have contributed as much to producing it as has the anti-caste principle of the Fourteenth Amendment.

Indeed, equal protection law has played a minimal role in curing equipage inequalities. First, the Court has held that the Constitution renders access fees invalid only in very rare situations.[66] Second, only in a small band of family law cases has the Court required the government to provide counsel, discovery assistance, and appellate transcripts.[67] Third, courts have uniformly rejected the argument that the Equal Protection Clause requires the provision of counsel in general civil proceedings.[68] All of this equal protection law has, therefore, done little to alter equipage disparities in civil adjudication.[69] It is true that this small body of

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[66] In 1971, the Court ruled in *Boddie v. Connecticut*, 401 U.S. 371 (1971), that the state could not deny a divorce to a married couple based on their inability to pay court costs. The Court's holding was based on the Equal Protection *and* Due Process clauses. *See id.* While *Boddie* might have heralded a revolution in civil court access, the Court quickly limited its holding in two subsequent cases. In *Kras v. United States*, 409 U.S. 434 (1973), the Court ruled that filing fees need not be waived for bankruptcy petitioners, and in *Ortwein v. Schwab*, 410 U.S. 656 (1973), the Court ruled that filing fees did not have to be waived when government beneficiaries sought judicial review of a reduction in their benefits. Only occasionally since then—and generally only in the context of family disputes—has the Court affirmed the essence of its holding in *Boddie*. *See* M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (noting that "the Court has consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships"); *id.* at 128 (Kennedy, J., concurring in the judgment) ("the cases most on point... are the decisions addressing procedures involving the rights and privileges inherent in family and personal relations"). Indeed, the Court recently noted that these cases "clarified that a constitutional requirement to waive court fees in civil cases is the exception, not the general rule." *Id.* at 114.

Lindsey v. Normet, 405 U.S. 56 (1972), is something of an outlier. Plaintiffs challenged an Oregon statutory requirement that tenants seeking to appeal evictions post a double-bond. The Court struck down this wealth-based rule. Nonetheless, I categorize the case among those involving substance-specific rules, *infra* at text accompanying notes 97-104, because the Court's ruling turned on the fact that the procedural requirement of a double-bond applied selectively to eviction actions. *See Lindsey*, 405 U.S. at 79.

[67] The Court has required states to provide genetic testing before imposing paternity obligations on indigent putative fathers, *see* Little v. Streater, 452 U.S. 1 (1981), and has required states to provide transcripts for appellate review in parental termination proceedings. *See M.L.B.*, 519 U.S. at 119-121. However, in *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981), the Court refused to adopt a broad rule requiring states to provide counsel in child deprivation proceedings, instead leaving the Due Process evaluation for a case by case analysis. *But see* Santosky v. Kramer, 455 U.S. 745 (1981) (holding that due process requires more than a "preponderance of the evidence" standard in neglect proceeding because of the risk, due to equipage disparities between the government and parents, of inaccuracy under this standard civil evidentiary test).

[68] *See, e.g.*, Miranda v. Sims, 991 P.2d 681 (Wash. Ct. App. 2000); Los Angeles County v. Estes, 158 Cal. Rptr. 123 (1979); Retz v. Retz, 405 N.E.2d 313 (Ohio Ct. App. 1978); *In re* Hoffman's Adoption, 338 N.E.2d 862 (Ill. 1975); Menin v. Menin, 359 N.Y.S.2d 721 (Sup. Ct. 1974). *But see* Payne v. Superior Court, 553 P.2d 565 (Cal. 1976).

[69] Indeed, isolating the concept of equality helps demonstrate the particular features that animate the Court in these cases. The precedents do attempt to level the playing field among

civil procedure caselaw is fully consistent with the Court's more general refusal to apply strong equal protection review to wealth-based disparities anywhere in society.[70] Perhaps the insignificance of equal protection law in this domain of civil procedure simply reflects this larger social pattern. However, my point in this section is to offer a different, or additional, explanation: the Equal Protection Clause has done little in this realm because procedure's interest in equality here (to serve accuracy and acceptability) is not precisely the same as the Constitution's interest (to serve dignity and to protect certain important or fundamental interests). While constitutional equality occasionally affects equipage disparities, the absence of a strong constitutional norm of wealth equality ought not exhaust the search for equipage equality. In Part IV, I return to this task by considering non-constitutional mechanisms that can address inequality.

In sum, then, equipage equality is pursued—with varying commitments in different places and time periods—through institutional design. However, equipage equality has rarely been

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unequally equipped litigants in a small run of cases. And the Court has emphasized that the cases were based on "the equal protection concern relate[d] to fencing out would-be appellants based solely on their inability to pay core costs." *M.L.B.*, 519 U.S. at 120; *see also id.* ("'[M]ost decisions in this area' we have recognized, 'res[t] on an equal protection framework.'") (quoting Ross v. Moffitt, 417 U.S. 600, 665 (1974)). Yet the only situations in which the Court has demonstrated concern for "the inability [of civil litigants] to pay core costs" are in those few cases involving "state-ordered proceedings anterior to adverse state action." *Id.* It is more precise to say that the central concerns that bind these cases together are (1) the important underlying interest (e.g., parental termination); (2) the extraordinary disparity of power between the parties (i.e., the state and an indigent citizen); and (3) occasional concerns about the accuracy of the resulting decision. These few constitutional cases do not express any more general concern about either caste-like wealth disparities or inaccuracy-producing resource disparities among private civil litigants more generally.

[70] During the 1950s and 1960s, the Court had expressed disfavor of laws disadvantaging the poor with respect, especially, to the exercise of fundamental rights. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 17 (1956) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) ("[Voting] [l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."). By the late 1970s, the Court had tempered its approach, writing in *Maher v. Roe*, 432 U.S. 464, 471 (1977), that "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." *Accord* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 89 n.50 (1973) ("[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."). For an overview, compare Frank Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, with Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695.

Thus, in the field of procedure, the Court in the 1960s held that the state had to provide an indigent person with a lawyer for appeal of a criminal conviction, see *Douglas v. California*, 372 U.S. 353, 357 (1963), but then held a decade later that this benefit did not extend beyond a first right of appeal to guarantee a lawyer for further discretionary appeals. *See* Ross v. Moffitt, 417 U.S. 600 (1974). And, as discussed above, see *supra* text accompanying notes 67-68, the Court has rejected most attempts to apply equal protection doctrine to the provision of attorneys in the civil context.

acknowledged in constitutional adjudication. This reflects the differing natures of these forms of equality. The Equal Protection Clause means to root out caste-like practices. The concept of adversarial equality strives to ensure accurate and acceptable adjudicative outcomes by creating a relatively level playing field among litigative opponents. Inequalities of the latter type may well exceed inequalities of the former. Thus, our efforts at ensuring equality through procedural design exceed the limited work done, to date, by the Equal Protection Clause.

II. INEQUALITY IN ADJUDICATION: THE PROBLEM OF NON-GENERAL RULES OF CIVIL PROCEDURE

The content of the procedural rules that govern civil adjudication presents a second domain in which to examine how the concept of equality is deployed. Procedural rules are the rules of the game, the rules by which adjudication is to be conducted. If adjudication is to be an acceptable form of dispute resolution, its internal rules must accomplish at least two tasks: they must be relatively efficient and they must be (or appear to be) relatively fair.[71] To serve these dual purposes, we have created procedural systems that insist upon several particular forms of equality.[72] First, adversarial adjudication is predicated upon a commitment to provide competing parties comparable procedural opportunities in a given lawsuit.[73] Second, we have chosen to maintain procedural rules that are "trans-substantive" in nature. Such rules guarantee

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[71] *See, e.g.*, FED. R. CIV. P. 1.

[72] *Cf.* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2006 (1987) (noting that "uniform federal rules" have four strands: interdistrict court uniformity, intrastate uniformity, trans-substantive uniformity, and . . . uniformity of result").

[73] This commitment not only appears "fair," it is also connected to a belief that the most accurate outcome evolves out of providing each side a relatively equal opportunity to present its case. *See supra* Part I. In an adversary system, the baseline assumption is that plaintiffs and defendants are treated equally, that procedural rules ought to provide equal opportunities to the competing parties to present their proofs and arguments. Of course, procedural rules distinguish between seemingly generic plaintiffs and defendants in a variety of ways. For example, a plaintiff has great latitude over the choice of a forum. By contrast, defendants retain some choice (in federal court) in terms of removal, transfer, and forum non conveniens motions. Plaintiffs are favored on motions to dismiss which assume the facts as pleaded, but of course the burden of proof is ultimately upon them on most substantive matters, a significant thumb on the defendant's side of the scale. *See* Resnick, *supra* note 9, at 2131 ("If the rules of civil procedure sometimes tilt towards plaintiffs (for example, when evaluating complaints for dismissal) or towards defendants (for example, when imposing burdens of proof), neutrality results from the assumption that plaintiffs and defendants are themselves revolving sets of players, interchangeable from one case to another.").

tort litigants and contract litigants, for example, the same procedural opportunities and hurdles.[74] Finally, we have generally selected procedural rules that are "trans-venue" in nature, meaning that civil cases in Chicago will be processed in the same manner as civil cases in Peoria.[75]

The work that these forms of equality actually do can be seen by focusing on the trans-substantive nature of our adjudicative rules.[76] First, trans-substantive rules are efficient. If the same set of procedural rules govern every form of action, lawyers and judges need only master this one form. Moreover, trans-substantive rules are efficient in that adjudicatory resources do not have to be expended determining which rules of procedure to apply to a given action. Second, trans-substantive rules make procedure more transparent and adjudication on the merits more likely, because the time not spent on selecting the appropriate procedural rules can instead be spent assessing the merits of the action.[77] Finally, trans-substantive rules appear fair because all cases are treated "equally."

Our commitment to these indicia of equality is, again, a

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[74] Robert Cover appears to have coined the term "trans-substantive," *see* Robert M. Cover, *For Wm. James Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718 (1975), though in so doing, he meant to challenge the assumption it embodies, writing:

> It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available procedures.

Id. at 732-33.

[75] I introduce the term "trans-venue" so as to have a linguistic device similar to the familiar term "trans-substantive." By "trans-venue" I mean across the venues of a single sovereignty. Our procedural rules are decidedly not trans-sovereign, although many states have now conformed civil procedures to the Federal Rules of Civil Procedure.

[76] *See* Subrin, *supra* note 73, at 2001 ("When the proponents of the Enabling Act and the Federal Rules talked and wrote about uniformity they either explicitly or implicitly utilized several interconnected themes: efficiency, professionalization, federalism or nationalism, effective law application, power, and politics.").

[77] *See, e.g.*, Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Transubstantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2081 (1987) (noting that "complexity resulting from categorization of procedures in courts of general or broad subject matter jurisdiction produces wasteful disputes as to which set of procedural rules apply") (citing Carrington, *Civil Procedure and Alternative Dispute Resolution*, 34 J. LEG. ED. 298, 302 (1984)); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1977 (1989) (writing that the framers of the federal rules "wanted to eliminate petty haggling over pointless distinctions among types of cases" and that "the drive for uniformity also embraced some effort to treat cases as at least presumptively alike rather than to encourage the parties to take up time fighting over what kind of case they were dealing with"); Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961-65 (1987) (attributing to Charles E. Clark, the Rules Reporter, the position that non-transubstantive rules caused "needless disputes over distinctions and lines, and interfered with cases getting heard on the merits").

commitment to a particular instrumental form of equality. Equality is important in this schema because it is thought to contribute to an efficient and legitimate resolution of legal controversies. Equality is desired not (just) to combat caste-like structures but rather to help achieve acceptable adjudicative outcomes. If the question "Equality of what?" is posed, the answer in this domain would be "equality of litigative rules sufficient to produce efficient and fair dispute resolution." What rule equality equalizes, therefore, is not precisely the same as what equipage equality equalizes, nor as what constitutional equality equalizes. Equipage equality seeks to enable a fair contest between adversaries to produce accurate outcomes; rule equality also sometimes serves this purpose by enabling, for example, both plaintiffs and defendants the same opportunities of discovery. In its trans-substantive and trans-venue aspirations, however, rule equality serves legitimacy and efficiency purposes that are distinct from the accuracy goals of equipage equality. Moreover, rule equality is not solely an anti-caste principle, though it may sometimes serve that function, a point to which I will return later.

Consider first the source of rule equality—procedural designers. For example, the framers of the Federal Rules of Civil Procedure explicitly aimed for a simple and uniform body of trans-substantive rules.[78] And, their accomplishment is famously trans-substantive: the same set of rules applies to all types of cases.[79] In this sense, the federal rules treat all cases "equally."[80] The codification of the federal rules closed an historical period during which federal courts employed different procedural rules for legal, equitable, and admiralty cases.[81] The federal rules also explicitly

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[78] *See* Symposium, *supra* note 18.

[79] *See* FRIEDENTHAL ET AL., *supra* note 53, § 5.1, at 244 (noting that "a vital aspect of pleading reform was the application of a uniform set of rules to all cases, regardless of the nature of the substantive cause").

[80] Professors Cover and Fiss write:

> [Procedural discourse], and [procedural] rules, are often intended to be "trans-substantive" in character and effect—that is, they are intended to be *equally* or similarly *relevant to many different sorts of substantive disputes*. The idea of trans-substantive procedural values and rules is related to, but not identical to, the ideal of procedural autonomy and procedural "neutrality" (here speaking of the neutrality of the process rather than of the decisionmaker)—an ideal that lies at the heart of John Rawls' attempt to lay the philosophic foundation of the liberal-egalitarian institutions of contemporary American society.

ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE 75 (1979) (emphasis supplied).

[81] *See* FED. R. CIV. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty. . . .").

disclaim any affiliation with the forms of action.[82] From the perspective of trans-substantivity, the forms of action seem to violate the concept of rule equality—if each cause of action has its own set of procedural rules, there is no equality across case type.[83]

Not only are the federal rules trans-substantive, they are also designed to be trans-venue, applying in the same manner to all cases throughout the sovereignty of the federal government. Thus, a tort case litigated in a federal court in Miami and a contract case litigated in a federal court in Anchorage will be litigated according to the same set of procedural rules.[84] While each federal court also maintains a set of local rules, the historic periods during which these local rules become predominant are occasions for complaint that

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[82] *See* FED. R. CIV. P. 2 ("There shall be one form of action to be known as "civil action."). Under the "forms of action," different "forms" (procedural paths) were applied to different "actions" (types of cases). Frederick Maitland provided the classic exposition. FREDERICK W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (1909). In brief:

> The differences among the forms of action reflected differences far greater than variations in the language of initiating writs. The entire ensuing procedure depended on which form of action the plaintiff had chosen. A modern analogy may help to illuminate the importance of variations among the forms of action. Today all U.S. jurisdictions use difference rules of procedure for civil and criminal cases. Early common law carried this one step further by having separate procedures for different writs. These procedures differed in the way of commencing suit and proving disputed facts and offered different remedies. It is as if there were different Federal Rules of Civil Procedure—setting forth different processes—for different kinds of claims. The writ system thus reflected a very sophisticated and specialized conception of procedure in which each claim had its own form of procedure.

CIVIL PROCEDURE 388 (Stephen C. Yeazell ed., 5th ed., 2000).

[83] From a different perspective, it can be argued that the forms of action better comport with the concept of equality. If different types of cases present distinct sorts of procedural issues, to treat them all with one trans-substantive set of procedural rules is to treat unlike cases alike. This is not equality. The concept of equality demands that like things be treated alike and logically entails that unlike things not be treated as if they were alike. *Cf.* Cover, *supra* note 74, at 731-32.

[84] David Shapiro writes that the drafters of the 1934 Federal Rules of Civil Procedure wanted lawyers who went into any federal court (and a growing number of lawyers had practices that focused on the federal courts in a number of states, rather than on federal and state courts within a single state) to know what to expect and not to have to undergo an initiation period or to rely heavily on the wisdom of local practitioners.

Shapiro, *supra* note 78, at 1974.

This form of uniformity—across federal courts—created disjunctures for lawyers practicing in one geographic location who now had to master federal and state rules in that area. *See* Subrin, *supra* note 73, at 2008 (noting that uniformity replaced "an intrastate uniformity that helped most lawyers with an interstate uniformity in federal courts, which would help only the few lawyers who practiced in the federal courts of more than one state"). However, many states have adopted the federal rules and have done so precisely for the efficiency gains achieved by a single set of procedural rules. For example, John Frank has stated that in his state of Arizona, conforming state rules to the federal rules "has been an article of faith with us" and that "the why of all this conformity was clear enough. Our goal was to make life as simple as possible for our lawyers . . . ." John P. Frank, *Local Rules*, 137 U. PA. L. REV. 2059 (1989).

the trans-venue aspirations of the federal rules are being undermined.[85] Moreover, this design feature, when juxtaposed with the *Erie*[86] command that state substantive law govern diversity cases tried in federal court, suggests the high value placed upon trans-venue procedural uniformity.

In sum, the federal procedural system was designed with several types of equality—trans-party, trans-substantive, and trans-venue—in mind. These rules were neither inevitable nor haphazard. They were deliberate design choices that lie at the core of the achievement of the Federal Rules of Civil Procedure. The selection of these forms of equality was made to serve goals of efficiency and fairness. And these particular design features are largely replicated within the procedural regimes of most state courts.[87]

Needless to say, however, inequality and disuniformity persist. Within a trans-substantive rule regime, for example, substance-specific procedural rules are exceptional and conceptually "unequal."[88] In the federal rules, some examples are that fraud cases must be pleaded with greater specificity than other types of cases;[89] shareholder derivative suits are subjected to unique pleading requirements;[90] and, in a variety of places, admiralty and maritime cases retain special procedural characteristics.[91] A number of the statutes mentioned at the outset of this paper also fit into this subcategory of the typology.[92] Congress' new rules governing securities class actions create substance-specific rules of procedure for these cases,[93] as does the command that federal courts limit

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[85] John Frank's condemnation is particularly strong:

> Local rules stick in the teeth of our objectives.... When the local rules vary from district court to district court within a jurisdiction, the situation becomes a downright abomination. I cannot report on the Denver situation at the moment, but the last time I looked into it, a litigation office needed an entire wall plastered with the separate local rules for each of the district courts in that community. This kind of divergence, I would say bluntly, is the product of sheer arrogance and irresponsibility . . . . In the fundamental terms of the cost of practicing law, it is more important to be uniform than to be right.

Frank, *supra* note 84, at 2060.

[86] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[87] *See* FRIEDENTHAL ET AL., *supra* note 53, § 5.1, at 246, n.14 (noting that a majority of the states have adopted pleading regimes with attributes similar to those in the federal rules).

[88] *Cf. id.* § 5.9 (characterizing special pleading rules as "surprising" and "not easy to justify" given the federal rules' trend towards uniform procedures).

[89] *See* FED. R. CIV. P. 9(b).

[90] *See id.* R. 23.1.

[91] *See id.* R. 8(h), 14(c), 38(e).

[92] *See supra* text accompany notes 19-21.

[93] For example, the 1998 Securities Law attempts, by procedural means, to preempt state securities laws. In the ordinary course of litigation, a claim filed in state court based on state law cannot be removed to federal court on the grounds that there exists a *defense* that will

consent decrees in prison condition cases.[94]

The type of equality these laws violate is the type of equality embodied in the trans-substantive norm: an equality that strives for an efficient and fair resolution of civil disputes. Sometimes, non-trans-substantive rules are justified as serving, rather than departing from, these goals. For example, heightened pleading requirements in prisoner cases are sometimes rationalized on efficiency grounds—these cases, it is argued, are so rarely meritorious, that it is inefficient to provide the benefits of notice pleading (i.e., discovery) to them.[95] Similarly, the heightened pleading requirement in fraud cases is generally traced to the exceptional nature of the fraud claim, a nature that would make the application of standard pleading rules "unfair" to fraud defendants.[96] More often, however, non-trans-substantive rules are challenged on the grounds that they violate the Equal Protection Clause and defended on the grounds that they do not.

Rule equality may indeed feel somewhat akin to Fourteenth Amendment equality. While it is not intuitively obvious that tort cases and contract cases ought to be processed according to the same procedural rules, once this is the baseline assumption, procedural rules adopted for only one form of action become exceptional and require explanation.[97] The litigant in an exceptional case perceives that her case is not being treated equally.[98] To that litigant, non-trans-substantivity seems analogous to constitutional inequality in that it feels as though she has been selected out for differential treatment, perhaps in ways that will be perceived as discriminatory.[99]

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arise under federal law. This is so because of the so-called well-pleaded complaint rule, an interpretation of the removal statute, 28 U.S.C. § 1441 (Supp. 2000), by the Supreme Court in *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). The new federal securities law, however, creates a federal defense to a state securities fraud class action (i.e., federal law now preempts such claims, which, once removed, are to be dismissed by the federal court, 15 U.S.C. § 77p) and then authorizes a defendant to remove such a case to federal court on the basis of the federal defense. The law thus exempts out of the general *Mottley* rule a band of cases based on their subject matter. *See* CIVIL PROCEDURE, *supra* note 82, at 259.

[94] *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified at 18 U.S.C. § 3626(b)(2) (1996)).

[95] *See* FRIEDENTHAL ET AL., *supra* note 53, § 5.9, n.2, at 262-63.

[96] *See id.* at 263-64 (noting that fraud was a "disfavored action" at common law because "it raised questions of defendant's morality" and thus special pleading requirements were meant to suppress unjustifiable claims).

[97] *See* Subrin, *supra* note 73, at 2006 (noting that had the Supreme Court proposed non-trans-substantive rules "[i]t would have raised sensitive political questions concerning the rationale for applying different procedure to different types of cases").

[98] *See* Carrington, *supra* note 78, at 2074 ("Procedural rules that are, or are even seen to be, designed to favor one set of litigants produce outcomes that are less acceptable to their adversaries.").

[99] *Id.* ("In the larger and most traditional senses of the phrase, Equal Protection of the

Not surprisingly, then, when procedural rules stray from the baseline assumption of trans-substantivity, such rules have often been challenged as violating the Equal Protection Clause. There are thousands of such constitutional cases. Every aspect of procedure—from rules governing case-filing through rules governing judgment-enforcement, and practically every procedural rule in between—has been the subject of an equal protection challenge. But again, equal protection doctrine has done relatively little to shape the field of procedure. Our commitments to party-neutral, trans-substantive, and trans-venue rules have generally not been constitutionalized. In what follows, I explore the ramifications of that conclusion. Those readers who desire a fuller account of the thousands of decided cases in this area are directed to Appendix A.

What you will find there is a huge set of cases in which it is alleged that unequal procedural rules violate the Constitution's Equal Protection Clause. Most of these cases share certain key characteristics. First, procedural rulemakers opted for baseline procedural rules that were neutral—trans-party, trans-substantive, or trans-venue. Second, legislatures, in response to various forms of political pressure, then adopted exceptional procedural rules for one type of case. This tends to bear out the thesis that the process and nature of procedural rulemaking is distinct from the nature of political lawmaking; the former is less likely to yield substance-specific, politically-driven laws than the latter.[100] Rulemakers are procedural generalists, lawmakers tend to be procedural exceptionalists. Yet, to say that these non-trans-substantive procedural rules were politically-motivated does not tell us conclusively whether they violate norms of equality, nor which types of equality.

The second unifying feature of the cases is that courts have analyzed the non-trans-substantive rules in Fourteenth Amendment terms—the only adjudicative equality norm available to the aggrieved parties. The courts have, therefore, at least in theory, assessed the validity of these non-neutral procedural rules against the anti-caste principle. Assessing the claims made in many of these

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Law requires a 'level playing field' in legal dispute resolution.").

[100] Thus, Professor Carrington argues that

> [t]he pursuit of political neutrality necessitated by the nature of rulemaking institutions, with the principles of generalism and flexibility derived from that pursuit, make [rulemaking] unfit to bear substance-specific provisions designed to advance interests organized around external political aims. Thus, no Civil Rule or amendment finding its way up the long ladder of rulemaking has ever evoked a significant substantive political conflict in Congress.

Id. at 2085-86. *Accord id.* at 2080 ("No [substance-specific procedural rule] has ever been made in the circumstance of a political contest between competing adversarial groups over a procedural advantage sought by one over the other.").

cases by the anti-caste principle cannot help but bring to mind Justice Holmes's famous adage that the Equal Protection Clause is "the usual last resort of constitutional arguments."[101] For example, a rule that tolls the statute of limitations for tort cases after three years but for contract cases after four treats these two types of cases unequally. But one can imagine Justice Holmes feeling that he had not fought in the Civil War to secure this form of equality. When wrapped in constitutional garb, most rule equality challenges seem trivial.

Yet, I want to argue here for two critical refinements on that summary conclusion. First, and least controversially: some rule equality cases actually do strike close to the heart of the Fourteenth Amendment's command of equal treatment. Consider the cases challenging the Congressional statute—the Prison Litigation Reform Act—that limits federal judges' capacity to enter consent decrees in prison condition disputes.[102] The statute creates a remedial limitation that applies in only this one type of case. The Act has survived equal protection challenges in eight federal circuit courts.[103] In each, the federal courts have applied only rationality review, finding that prisoners do not constitute a suspect class, and that the remedial aspects of procedure do not implicate a fundamental right. In each, the federal judges have found the rationale for the consent decree limitations in Congress' supposed desire to clip their own wings, that is, to honor federalism by keeping federal judges out of the business of running local prisons.[104] In none of these cases did the courts explain why this rationale applies only to prison litigation and not to other forms of federal adjudication that could result in consent decrees; nor did any of the courts explain how federal judges are meddling in local affairs when, by definition, a state or local government consents to federal oversight by entering into a consent decree. My own opinion is that the rules treating prisoner condition litigation differently than other forms of adjudication that might result in a consent decree evolves out of a societal disdain for the individuals likely to find themselves

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[101] Buck v. Bell, 274 U.S. 200, 208 (1927).

[102] 18 U.S.C. § 3626 (1996).

[103] *See* Berwanger v. Cottey, 178 F.3d 834 (7th Cir. 1999); Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999); Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997), *vacated on rehearing*, 172 F.3d 144 (2d Cir. 1999) (en banc); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996).

[104] *See, e.g., Plyler*, 100 F.3d at 374 ("Congress has a legitimate interest in preserving state sovereignty by protecting states from overzealous supervision by the federal courts in the area of prison conditions litigation.").

prisoners.[105] The reader need not agree with my analysis of this particular example, however, to concur in the general conclusion that rule equality cases could actually trigger core Fourteenth Amendment concerns, that the rules of the game might well be perverted to further the oppression of a particular group.

The second refinement to the easy ridicule of rule equality cases, though, is more pertinent to this Article's central point—that there are many different equalities. Because rule equality challenges arise in the shadow of the Fourteenth Amendment, and often seem trivial in light of the larger purposes of the Fourteenth Amendment, we may be too quick to dismiss the concerns that they raise. It seems easy to conclude that different statutes of limitation for contract and tort claims do not violate the Fourteenth Amendment. But should that be the end of the story? I think not. If we have created a system of trans-substantive rules to serve efficiency and fairness goals, then the absence of caste-like implications ought not forgive all other concerns about substance-specific rules. Given our commitment to the efficiency and legitimacy functions of rule equality, there should be a metric by which to assess, and a forum in which to discuss, the fairness of substance-specificity beyond the metric of constitutional law and the forum of a constitutional court. This is the task to which I turn in Part IV.

In sum, the concept of rule equality is pursued through institutional design choices like those favoring trans-party, trans-substantive, and trans-venue procedural rules. It has not been realized through constitutional adjudication. This reflects the differing natures of these forms of equality. The Equal Protection Clause means to excise caste-like practices. The concept of rule equality strives to ensure efficient and acceptable adjudicative outcomes by applying similar procedural rules to similarly situated parties and cases. Inequalities of the latter type may well exceed inequalities of the former—and, thus, our efforts at ensuring rule equality through procedural design exceed the work done by the Equal Protection Clause.

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[105] This seems particularly true because the usual justification for prisoner-specific procedural rules—that prisoner litigation is often spurious—does not generally apply to the types of class-based cases that result in consent decrees. The consent decree cases are challenges to systemic prison conditions, typically litigated as class actions by skilled attorneys. They are often cases that states and municipalities are likely to settle because of, not in spite of, the strength of the underlying claims. The efficiency values that might support differential treatment of pro se prison filings do not really support the consent decree limitation.

III. INEQUALITY CREATED BY ADJUDICATION: THE PROBLEM OF INCONSISTENT OUTCOMES

The third domain of procedural equality is case outcomes. A common shibboleth of procedural justice is that "like cases should be treated alike." This could be interpreted to mean that similar cases should be adjudicated according to similar procedural rules, the subject of the last section of this Article. Generally, though, the "treated alike" phrase is thought to capture the related concept that cases with relatively similar facts ought to reach relatively similar outcomes.[106] This core principle commits us to rules and methods of dispute processing that further a particular form of equality-consistent outcomes in similar cases.

Why have we selected this baseline assumption? What work does the concept of equality do in the domain of case outcomes? There seems to be only one answer to this question, the one that Professor Mashaw identified as so "intuitively obvious" that "no extended defense seems appropriate."[107] Like cases should reach like outcomes for purposes of fairness. If a dispute resolution system processes similar cases to disparate outcomes, there is something wrong with the process. Litigants will lose faith in adjudication as a means of dispute resolution if outcomes appear to be random, or worse, if they appear to be biased.[108]

Our commitment to this form of equality is, again, a commitment to a particular instrumental form of equality. Outcome equality is important because it is evidence of a consistent, and hence legitimate, dispute resolution system. Equality is desired not to guard against caste-like practices, but rather to assist in the project of achieving acceptable adjudicative outcomes. If the question "Equality of what?" is posed, the answer in this domain would be "Equality of litigative outcomes sufficient to produce an acceptable system of dispute resolution."

The most familiar instances of outcome disparity occur when a set of similarly situated parties adjudicate the same harm independently. A mass accident is one example. If a plane crashes, several hundred individual tort cases are likely to follow. It is

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[106] *See, e.g.*, Subrin, *supra* note 73, at 2047 ("[T]he primary goal of uniform rules in non-test case litigation should be to help similar cases end up with similar results in an efficient and economic manner.") (citing Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 982-91 (1987)).

[107] Mashaw, *Three Factors*, *supra* note 1, at 52.

[108] Thus, the Restatement of Judgments (Second), in discussing the purposes of issue preclusion, notes that producing consistent outcomes promotes confidence in the accuracy of judicial determinations. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29, cmt. F (1982).

possible that some of these cases will end in a determination that the carrier is not liable for the accident, while others will reach verdicts for the plaintiff. From the point of view of a losing litigant this can be an especially sharp instance of inequality.[109]

A host of procedural design choices and procedural rules, more or less implicitly, attempt to protect against outcome disparities. Two sets of such practices are exemplary: rules governing parties to an action and rules governing collateral estoppel. Liberal party joinder and class action rules encourage parties with similar legal claims to litigate with one another. The federal rules enable "all persons" who have similar legal claims arising out of the same transaction and occurrence to join in one action.[110] If similarly situated litigants are too numerous to join in one action, the rules enable a representative suit to be brought on their behalf.[111] Consistency is also generated by rules enabling the joinder of indemnification claims,[112] the intervention of interested parties,[113] and through more complex devices like interpleader.[114] These sorts of rules are typically justified on grounds of efficiency.[115] Yet an important by-product, if not motivating factor, is that both types of rules promote consistency of outcome across similar cases.[116]

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[109] Writing, in the context of a discussion of forum selection clauses, of a ship accident which could give rise to many lawsuits in different jurisdictions, two commentators state that:

> [T]he ship's liability to its passengers for a disaster would differ radically according to the jurisdiction from which they came. Co-passengers suffering identical injuries in a common accident might receive vastly different settlements. *This consideration would seem to warrant some form of procedural accommodation*, whether by enforcing a forum selection clause or by other means, such as transfer, class action, or interpleader.

Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 357 (emphasis added) (citations omitted).

[110] FED. R. CIV. P. 20(a).

[111] *See id.* R. 23.

[112] *See id.* R. 14.

[113] *See id.* R. 24.

[114] *See id.* R. 22; 28 U.S.C. §§ 1335, 1397, 2361 (Supp. 2000).

[115] *See, e.g.*, JAMES, JR., ET AL., *supra* note 54, at 475 ("[Liberal party rules] ultimately established trial convenience as the guide for joinder."); FRIEDENTHAL ET AL., *supra* note 53, at 341 ("[T]he underlying policy of Federal Rule 20 and similar joinder rules is to enhance judicial economy.").

[116] Thus, for example, the advisory committee that recommended Rule 23 in 1966 wrote that "Section (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and *promote uniformity of decision as to persons similarly situated,* without sacrificing procedural fairness or bringing about other undesirable results." Advisory Committee's Notes, Rule 23, 39 F.R.D. 69, 102-03 (1966) (emphasis supplied). *See also* Cullen v. Whitman Med. Corp., 188 F.R.D. 226, 237 (E.D. Pa. 1999) (noting that class action mechanism "exists to protect potential claimants and to provide equality of treatment"); *In re* Fed. Skywalk Cases, 97 F.R.D. 380, 387-89 (W.D. Mo. 1983) (considering equality of treatment among classmembers in approving class action settlement, and also considering equality between classmembers in federal class action and in parallel state court action); Payton v. Abbott Labs, 83 F.R.D. 382, 290 (D. Mass. 1979) (stating, in

Consistency of outcome is also furthered by rules permitting non-mutual collateral estoppel. Before the breakdown of the mutuality doctrine,[117] if a mass accident case gave rise to a series of individual lawsuits, the repeat-playing defendant could continually re-litigate its defenses in each subsequent suit. Because the plaintiff in a later suit had not been a party to any of the earlier lawsuits, she could not take advantage of any issues that were decided against the defendant. Interestingly, mutuality was defended on the grounds of equality—namely, that it created intra-litigant equality (of the types discussed *supra* Parts I and II) by disabling a plaintiff from using a procedural rule (estoppel) against a repeat-playing defendant who could not use the same procedural rule against the new plaintiff.[118] The equality of mutuality (intra-litigant), however, eventually gave way to the equality of (inter-litigant) outcomes: mutuality has largely been abandoned in the past half-century, first on the strength of Justice Traynor's decision in the *Bernhard* case[119] and subsequently on the authority of the Supreme Court's decisions in *Blonder-Tongue*[120] and *Parklane Hosiery*.[121] In many cases, now,

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certifying a mass tort class, that "[a] fundamental aspect of justice is parity of treatment. Persons similarly situated and aggrieved should be similarly treated."). It may be that joinder rules are not defended on the grounds of consistency because they do not themselves *guarantee* similar outcomes. *See, e.g.*, JAMES, JR., ET AL., *supra* note 54, at 476 ("[T]o be sure, separate questions of damage will arise for each plaintiff, and defenses may be available against some and not others."). Nonetheless, it is far more likely that joined cases will reach similar outcomes than non-joined actions arising out of the same occurrence. *See* Resnik, *supra* note 8, at 2152-53 ("[W]ithout aggregation . . . the civil justice system could aspire to inter-case equity, but, given sequential case-processing across an array of courts, had no real means to implement it . . . ."); Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 243-46 (1991).

[117] The mutuality doctrine allowed only parties and privies to a prior lawsuit to take advantage of the decree from that lawsuit in a subsequent action. *See generally* FRIEDENTHAL ET AL., *supra* note 53, § 14.14 (discussing the Doctrine of Mutuality). On the history of the mutuality doctrine, see Robert W. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41 (1940).

[118] Thus, the mutuality doctrine was historically "premised upon the notion that all litigants should be treated equally, that no person should benefit from a judgment when he stood to lose nothing by it." FRIEDENTHAL ET AL., *supra* note 53, at 704-705. In other words:

> Since someone who was a party to the first proceeding could not assert any judgment that was entered against a nonparty because that person had no opportunity to present evidence or argument at the first trial, the nonparty likewise should not be able to use the judgment against the party . . . [Mutuality] sacrifices judicial economy and raises the possibility of inconsistent results, all in an attempt to treat litigants *equally*.

Id. (emphasis added).

[119] Bernhard v. Bank of Am. Nat'l Trust and Savings Ass'n, 122 P.2d 892 (Cal. 1942).

[120] Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found., 402 U.S. 313 (1971) (allowing the use of defensive non mutual collateral estoppel in patent cases).

[121] Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (allowing offensive non-mutual collateral estoppel in certain circumstances).

plaintiffs can bar defendants from re-litigating defenses that they had a full and fair opportunity to litigate in prior adjudication of the same question. What this means is that once one plaintiff has prevailed, the technical rules of collateral estoppel operate to ensure a consistent outcome for later plaintiffs. This is, thus, yet another way in which the legal system architecturally achieves equality between similarly situated parties.[122]

By contrast, constitutional equal protection doctrine has not directly contributed to ensuring adjudicative outcome equality. Indeed, outcome inequality has, perhaps, the least obvious connection to constitutional inequality. That some tort plaintiffs win lawsuits while others lose is usually not seen as stigmatizing to the losers. It is simply seen as unfair.[123] Not surprisingly, then, the pattern described throughout this paper is repeated in this domain. The point, having been rehearsed twice now, need not detain us for long. There are a small set of cases that raise equal protection challenges to disparate cases outcomes, nearly all of which lose. A typical recent example is the silicon breast implant settlement, In re *Dow Corning Corporation*.[124] According to the terms of the settlement, non-American claimants received only 35-60 percent of the personal recovery made available to American claimants.[125] Nonetheless, the court rejected challenges to the settlement raised

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[122] The problem of prior inconsistent outcomes—the classic treatment of which is Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957)—actually emphasizes the value of outcome consistency. Professor Currie's infamous hypothetical presented the situation of a train wreck that gave rise to fifty separate claims against the railroad for negligence. *See id.* at 285-86. Assuming the railroad prevailed in the first twenty-five actions, but lost the twenth-sixth, Professor Currie argued that it would be "an absurdity" to argue that the remaining twenty-four plaintiffs could assert non-mutual offensive collateral estoppel to prevail on the tail of the one prevailing plaintiff. *See id.* at 286. What's difficult about the Currie hypothetical is that it creates a situation in which collateral estoppel cannot serve outcome consistency; by definition, consistency with one prior case outcome will be inconsistency with at least one other. Because issue preclusion cannot generate outcome consistency in these circumstances, its application is unwarranted. Thus, the Restatement (Second) of Judgments lists this circumstance as one in which non-mutual collateral estoppel might not be appropriate. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 88(4), cmt. F. Courts have generally concurred. *See, e.g.*, *In Re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305 (6th Cir. 1984) (finding offensive collateral estoppel inappropriate in mass-tort litigation); Setter v. A.H. Robins Co., 748 F.2d 1328, 1330 (8th Cir. 1984) (upholding trial court's refusal to apply offensive collateral estoppel because defendant IUD manufacturer had prevailed in twelve of twenty-one prior cases); Hoppe v. G.D. Searle & Co., 779 F. Supp. 1425, 1427 (S.D.N.Y. 1991) (refusing to allow collateral estoppel where there were prior inconsistent judgments); Amore v. G.D. Searle & Co., 748 F. Supp. 845 (S.D. Fla. 1990) (accord); Harrison v. Celotex, 583 F. Supp. 1497, 1503 (E.D. Tenn. 1984) (accord).

[123] Judith Resnik notes that inter-class inequity might occur "because of the variable quality of lawyering [and] because of the happenstance of the time and place of filing." Resnik, *supra* note 8, at 2153.

[124] 255 B.R. 445 (E.D. Mich. 2000).

[125] See id. at 512.

under both the bankruptcy statute's, and the Constitution's, guarantees of equal treatment. Some outcome inequality surely is a result of, and contributes to, stigmatizing social hierarchies. For example, the argument that women are persistent losers in adversarial systems (or, conversely, mediation systems) suggests that such systems violate the Fourteenth Amendment's anti-caste principle.[126] But systemic challenges to such situations are rare. The equal protection caselaw is more focused on individual case disparities and the claimants are universally unsuccessful.

Yet the breast implant case just discussed—in which the equal protection challenge to outcome equality was rejected—deserves a closer look. The settlement at issue provided much less relief for foreign tort claimants despite the fact that they were similarly situated to domestic claimants. There is a strong argument that this type of discrimination is invidious, in violation of the core principle of the Fourteenth Amendment, even though the current Supreme Court would be unlikely to so hold.[127] But even if the Court's Fourteenth Amendment jurisprudence does not encompass distinctions based on alienage, should that be the end of the story? Is the conclusion that differing outcomes do not trigger caste-like implications enough to satisfy us that outcome inequity is not a problem for *procedural equality*? Why would the former conclusion necessarily foreclose all concerns? Might there, again, not be a distinct metric—and forum—for analyzing outcome inequities? These are the questions to which I will now turn in Part IV.

In sum, then, the concept of outcome equality is pursued through institutional design choices like those favoring joinder and non-mutual issue preclusion; it has not been realized through constitutional adjudication. This reflects the differing natures of these forms of equality. The Equal Protection Clause seeks to expunge caste-like practices. The concept of outcome equality strives to ensure consistent and acceptable adjudicative outcomes. Inequalities of the latter type may well exist even in the absence of inequalities of the former—and thus our efforts at ensuring outcome equality through procedural design are required to augment the work done by the Equal Protection Clause (if any) in this domain.

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[126] *See generally* Grillo, *supra* note 40.

[127] For an overview of the Court's equal protection jurisprudence concerning alienage classifications, see NOWAK & ROTUNDA, *supra* note 15, §14.12.

IV. IMPLICATIONS OF PROCEDURAL EQUALITIES

What are the implications of this Article's central points? Is there a pay-off that comes from the richer description of procedural equalities that this Article provides? I believe there is, though the pay-off is admittedly tentative. The next two sub-sections engage in what are essentially two "thought experiments" to demonstrate the salience of the descriptive aspects of this Article for those who design procedural systems. This part addresses itself to two sets of institutional actors: designers of ADR systems and legislators.[128] These thought experiments do not provide profound or definitive solutions for procedural designers so much as they identify new problems that have been brought to the surface by the Article's descriptive insights.

A. *For Procedural Designers*

We live in a time of procedural design. Alternative dispute resolution systems are proliferating.[129] With the blessing of the Supreme Court, forced arbitration has become a manner by which a

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[128] This Part does not specifically call on judges to change their constitutional analysis. It might have done so. While this Article demonstrates that procedural equality is not always the same equality as that governed by the equal protection clause, it is also the case that, occasionally, judges read the Due Process Clause to protect some of the forms of equality that are identified here. *See supra* note 40. This Part could, therefore, simply include a call for normative change through a more robust embrace of these values by judges in constitutional, albeit due process, adjudication. While I might welcome such an outcome, I have several reasons for not emphasizing it. First, given the due process jurisprudence to date, significant change through constitutional adjudication is, I think it is fair to predict, unlikely to happen. Second, over-constitutionalization can restrict other avenues for achieving particular goals. Thus, third, by identifying procedural practices that can be equality-enhancing and by identifying procedural designers who can encourage such rule choices, I mean to expand the conventional focus of law reform beyond constitutional adjudication. I do not intend to disparage the latter, only to augment it.

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> Pre-dispute arbitration clauses have become increasingly commonplace in a number of fields of commerce. For decades the securities industry has employed arbitration clauses for brokerage employees seeking to register with exchanges, as well as customers. More recently, the health care and health insurance industries require customers to agree to binding arbitration as a condition of using hospital services or applying for health insurance. Arbitration clauses also commonly appear in standard form consumer contracts employed by the banking and finance industries. Finally, arbitration clauses are being used increasingly in employment contracts for non-unionized employees.

David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 53-54 (citations omitted).

multitude of previously-litigated disputes are now processed.[130] Private companies (employers, health maintenance organizations, manufacturers) are therefore in the business of creating dispute resolution systems. They are today's proceduralists.

One implication of this Article for procedural designers is straight-forward. The three forms of procedural equality set forth make important demands. These forms of procedural equality are baseline assumptions of American adjudication. ADR systems that stray far from them will be (at best) puzzling to courts and less likely, therefore, to pass judicial scrutiny. This section demonstrates the point by looking at a series of court decisions that assess the validity of ADR systems.[131] Challenges to ADR systems raise various types of legal arguments, many of which focus on the legality of the arbitration agreement itself; although these cases tend to scrutinize a particular form of equality—the equality of bargaining power among the parties to the contract[132]—this type of equality is not exactly one of the forms of equality emphasized here.[133] Rather, the cases, and portions of cases, that are of

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[130] Throughout much of the twentieth century, arbitration had primarily been a form of dispute resolution for labor grievances arising out of collective bargaining agreements, but it now displaces adjudication with respect to a host of statutorily-created rights as well. *See* Circuit City Stores, Inc., v. Adams, 121 S. Ct. 1302 (2001) (holding that Federal Arbitration Act requires enforcement of arbitration clauses in employment contracts); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (enforcing agreement to arbitrate federal age discrimination in employment claims); Rodriguez de Quijas v. Shearson/Am. Express Co., 490 U.S. 477 (1989) (enforcing agreement to arbitrate federal securities act claims); Shearson/Am. Express Co. v. McMahon, 482 U.S. 220 (1987) (enforcing agreement to arbitrate securities claims). In reaching these decisions, the Court "overruled or distinguished older cases that had refused to permit arbitration of federal statutory claims." CIVIL PROCEDURE, *supra* note 83, at 611. In so doing, the Court held that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbital forum, the statute will continue to serve both its remedial and deterrent function." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 637 (1985).

[131] Courts are called upon to assess the validity of ADR systems in several ways. Sometimes, courts are asked to enforce a judgment rendered by an alternative system and the party resisting the judgment challenges the legality of the alternative system. In other cases, parties chose to not use the system that they had contracted for and courts are forced to decide whether to entertain their claims or to enforce the contracts that would require the parties to resort to a non-adjudicative forum. *See generally* CIVIL PROCEDURE, *supra* note 83, § 5.19, at 347-48 ("A party may go to court to compel arbitration under a contractual arbitration clause or to enforce an arbitral decision. A party may also ask a court to set aside an arbitration agreement or award . . . .").

[132] Paul Carrington and Paul Haagen state, succinctly, that: "Under the law [approving arbitration agreements] written by the [Supreme] Court, birds of prey will sup on workers, consumers, shippers, passengers, and franchisees . . . ." Carrington & Haagen, *supra* note 112, at 401; *see also* Schwartz, *supra* note 129.

[133] Unequal bargaining power with respect to contract formation is similar to the issue of unequal equipage discussed in Part I, *supra*. However, as described there, the commitment to equipage equality is instrumental to achieving accurate and acceptable adjudicative outcomes. The concern for equal bargaining power in contract formation also serves a legimitizing function, but what it legitimates (the contract) is distinct from the legitimating

particular interest here are those that scrutinize the nature of the dispute resolution system that is provided through the arbitration mechanism.[134] These cases put courts in the position of defining the essential components of procedural fairness. Review of these cases shows that each of our three forms of procedural equality are central concerns courts raise about ADR systems.

The California Supreme Court's recent *Armendariz*[135] decision—which assesses, in some detail, whether an arbitration system provided an adequate forum for resolution of an employee's state-based civil rights—is a good example of courts' efforts in overseeing arbitration.[136] *Armendariz* identifies five "minimum requirements for lawful arbitration," writing that "an arbitration agreement is lawful if it:"[137]

(1) provides for neutral arbitrators,

(2) provides for more than minimal discovery,

(3) requires a written award,

(4) provides for all of the types of relief that would otherwise be available in court, and

(5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.[138]

The three primary forms of procedural equality set forth here—equality brought to adjudication, equality in adjudication, and equality created by adjudication—are crucial aspects of these analyses.

First, as to equality brought to adjudication: the first part of this Article canvased the ideal of equipage equality as a form of equality central to adjudication. The concern of this form of equality was that socio-economic disparities brought to the adjudicative forum

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function that equipage equality performs in adjudication.

[134] *See, e.g.*, Circuit City Stores, Inc., v. Adams, No. 98-15992, 2002 WL 152986, at *1 (9th Cir. Feb. 4, 2002); Ticknor v. Choice Hotels Int'l Inc., 265 F.3d 931 (9th Cir. 2001); Armendariz v. Found. Health Psychcare, 6 P.3d 669 (Cal. 2000); Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).

[135] Armendariz v. Found. Health Psychcare, 6 P.3d 669 (Cal. 2000).

[136] *Armendariz* is helpful because it relies on the D.C. Circuit's decision in *Cole*, 105 F.3d at 1465, which in turn drew its principles from the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991). *Armendariz* thus provides a recent synthesis of the developing caselaw.

[137] *Armendariz*, 6 P.3d at 682.

[138] *Id.*; *see also Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1679-82 (1996) [hereinafter *Developments in the Law*] (noting six "commonly expressed concerns about arbitration procedures"—employee voice in arbiter selection; arbiter neutrality; arbiter training; extent of discovery; limitation on remedies; requirement of written record).

rendered the resulting adversarial dispute resolution process problematic. As noted in Part I,[139] arbiter bias is a related form of inequality—it is an inequality brought to the system by, in this case, the supposedly neutral arbiter. The command that the arbiter not be biased towards one party or the other implies that she approach each party equally.[140] Adversarial theory requires this form of equality because it contributes to an accurate and acceptable resolution of legal controversies.

Courts have struck down ADR systems in situations that fail to meet this basic index of equality.[141] For example, in *Hooters of America v. Phillips*,[142] the Fourth Circuit refused to enforce an agreement to arbitrate sexual harassment claims on the grounds that "Hooters [had] set up a dispute resolution process utterly lacking in the rudiments of *even-handedness*."[143] Though the Fourth Circuit found the Hooters system offensive in a number of ways, it was particularly troubled by the arbiter selection process.[144] As is

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[139] *See supra* text accompanying note 30.

[140] Indeed, the ABA's Code of Judicial Conduct conceptualizes impartiality in the specific language of non-discrimination law. Canon 3—entitled *A judge shall perform the duties of judicial office impartially and diligently*—describes the judge's adjudicatory responsibility in the following terms:

> A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

ABA CODE OF JUDICIAL CONDUCT, Canon 3(B)(5) (1990).

[141] *See* Rosenberg v. Merrill Lynch, 995 F. Supp. 190, 206-11 (D. Mass. 1998) (finding that securities arbitration suffered "structural bias" because it was dominated by the securities industry), *rev'd*, 170 F.3d 1, 14-16 (1st Cir. 1999); McConnell v. Howard Univ., 818 F.2d 58, 68 (D.C. Cir. 1987) (disapproving of arbitration system that made Board of Trustees arbitrator of disputes); Sam Kane Packing Co. v. Amalgamated Meat Cutters & Butcher Workmen of N. Am., 477 F.2d 1128, 1136 (5th Cir. 1973) (disapproving of system that consisted of a single, union-appointed arbitrator); Bill Graham v. Scissor-Tail, Inc., 623 P.2d 165, 207 (Cal. 1990) (finding that "minimum levels of integrity" are not met when contract designates the union representing one side of disputes as arbiter); Smith v. Rubloff, Inc., 370 S.E.2d 159, 160 (Ga. Ct. App. 1988) (disapproving of arbitration agreement that provided for a panel made up of an employee and two associates of one party); Chimes v. Oritani Motor Hotel, Inc., 480 A.2d 218, 223 (N.J. Sup. Ct. App. Div. 1984) (following *Graham*); *In re* Cross & Brown Co., 167 N.Y.S.2d 573, 576 (N.Y. App. Div. 1957) (disapproving of arbitration before the employer's Board of Trustees); Bennish v. N.C. Dance Theater, 422 S.E.2d 335, 337-38 (N.C. Ct. App. 1992) (disapproving of arbitration agreement in which panel contained both a trustee and a staff member of the defendant); Manes v. Dallas Baptist Coll., 638 S.W.2d 143, 145 (Tex. App. 1982) (disapproving of arbitration before the employer's Board of Trustees); *see generally* IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 28 (1994) (stating that Federal Arbitration Act will not permit agreements that allow one party to select arbiters who are "intimately connected to it").

[142] 173 F.3d 933 (4th Cir. 1999).

[143] *Id.* at 935 (emphasis added).

[144] *Id.* at 940 ("We hold that the promulgation of so many biased rules—especially the

conventional in arbitration, the employee and Hooters each selected one arbiter from a set list and the two selected then jointly picked the third. What was unique about Hooters' system, though, is that the company alone maintained the list of available arbiters and they could place anyone including company employees on the list and remove anyone from the list.[145] One expert testified that the "mechanism [for selecting arbitrators] violates the most fundamental aspect of justice, namely an impartial decision maker."[146]

The *Hooters* case also exemplifies the manner in which ADR systems can run afoul of the premise of rule equality—that is, that the rules of the game apply equally to equally situated litigants. This form of equality finds expression in two ways in courts' assessment of the fairness of ADR systems. The first is that the internal rules of these systems might simply violate the norm of rule equality. Again, Hooters' system is instructive:

- the plaintiff had to plead but the defendant was not required to answer;
- the plaintiff initially had to disclose fact witnesses, but the defendant was not required to do so;
- the defendant, but not the plaintiff, could expand the scope of the arbitration;
- the defendant, but not the plaintiff, could move for summary judgment;
- the defendant, but not the plaintiff, could appeal.[147]

Such rule inequality shocked the conscience of the Fourth Circuit.

The *Armendariz* factors outlined above imply another form of rule equality that also matters to courts in the assessment of ADR systems—equality between the rules of ADR and the rules that would apply in adjudication absent ADR. This form of rule

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scheme whereby one party to the proceeding so controls the arbital panel—breaches the contract entered into by the parties.").

[145] Specifically, the court wrote:

> [The arbitration agreement] gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result.

Id. at 939.

[146] *Id.*

[147] *Id.*

equality is similar in type to the norms creating "trans-substantive" and "trans-venue" procedural rules. If different procedural rules govern tort and contract cases, they give rise to concerns about whether the disparate cases are being handled evenly. By analogy, if disparate procedural opportunities apply in the ADR, as opposed to those used in the litigation arena, these too give rise to concerns that the ADR cases are not being handled fairly.[148] Of course, a primary purpose of ADR is efficiency; so, by definition, court-based rules will be streamlined in "alternative" dispute resolution.[149] And, indeed, "[i]t is clear that the Supreme Court does not regard arbitration procedures as unfair merely because they differ from court procedures."[150] Nonetheless, judges assessing the validity of ADR procedures find themselves constantly comparing the procedural opportunities in these fora to those that would otherwise govern the adjudicative arena and assessing the fairness of the alternative forum in light of what is available in the litigative forum.[151] Therefore, ADR rules need not measure up to the full panoply of procedural opportunities available in adjudication. Inevitably, though, the legitimacy of the rules provided will be evaluated by comparison to, or in the context of, the default adjudicative results.

Similarly, and finally, two of the *Armendariz* factors—that the ADR forum guarantee remedies equal to those available in court and that it not impose higher costs on plaintiffs than court would—speak specifically to the concept of outcome equality. This is not precisely the form of outcome equality addressed earlier in this Article—that is, a single procedural system producing disparate results in like cases.[152] Rather, the outcome inequality of ADR is

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[148] [W]hen a powerful and sophisticated organization inserts arbitration clauses in contracts with customers or employees, it may obtain a tribunal more favorable to it than a judge or jury or *otherwise manipulate the process*. To the extent that one believes in the value of the many procedural safeguards of the judicial process, reducing those safeguards may also reduce the quality of the result.

JAMES, JR., ET AL., *supra* note 54, at 348 (emphasis added); *see also id.* at n.35 (collecting cases).

[149] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (noting that one important component of arbitration is "simplicity, informality, and expedition of arbitration" and rejecting argument that abbreviated discovery and lack of written opinions were reasons to inhibit arbitration of statutory claims); *Hooters*, 173 F.3d at 940 (noting that "[a]n arbitral forum need not replicate the judicial forum").

[150] DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 215 (Stephen B. Goldberg et al. eds., 2d ed. 1992).

[151] Thus, *Armendariz* states that "whether or not the employees in this case are entitled to the full range of discovery provided in Code of Civil Procedure [governing arbitration], they are at least entitled to the full range of discovery sufficient to adequately arbitrate their statutory claims, including access to essential documents and witnesses . . . ." Armendariz v. Found. Health Psychcare, 6 P.3d 669, 684 (Cal. 2000).

[152] *See supra* Part III.

that the alternative dispute resolution system produces an outcome disparate from that achievable in the default resolution system. Nonetheless, the reasons we safeguard outcome equality—that it speaks to the legitimacy of the dispute resolution system by ensuring that similarly situated litigants achieve similar outcomes—apply to this related form of outcome disparity. If an ADR system cannot, by definition, attain outcomes similar to the outcomes that *the very same litigant* might achieve in the default system, it seems suspect from the outset. Anti-ADR litigants often challenge these privatized systems on the grounds that they are literally unable to produce outcomes equal to those that would be available in court—for example, where the alternative systems cap damages or similarly limit otherwise available remedies.[153] The primacy of this outcome equality argument is seen in the fact that *Armendariz* and related decisions concerning arbitration of statutory rights emphasize it: *Armendariz* made this its initial factor and stated that "the principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorneys fees appears to be undisputed."[154] Given this premise, a central element in ADR assessment will continue to be an evaluation of outcome disparities between ADR-available relief and adjudicative-available relief.

In sum, courts are constantly required to deploy the concept of equality in assessing the legitimacy of ADR systems. Courts consider the extent to which inequities brought to adjudication render the contract one of adhesion and/or the arbiter-selection process biased; the extent to which the rules of arbitration treat parties in an even-handed way, and/or compare reasonably well with the rule available in adjudication; and finally, the extent to which the outcomes of ADR are consistent, and consistent with

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[153] Such a challenge was raised, for example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by a statute; it only submits their resolution to an arbital, rather than a judicial, forum."); *see also* Cunningham v. Fleetwood Homes of Ga., Inc., 253 F.3d 611 (11th Cir. 2001) (holding that by agreeing to arbitrate statutory claim, a party does not forgo substantive rights afforded by statute; it only submits to resolution in arbitral, rather than judicial, forum); Trumbull v. Century Mktg. Corp., 12 F. Supp. 2d 683, 688 (N.D. Ohio 1998) (holding that unlike Title VII actions, the defendant's procedure precluded punitive damages and was therefore unenforceable).

[154] *Armendariz*, 6 P.3d at 682. The premise does not seem to be as universally accepted as the California Supreme Court supposes. Some commentators have read the Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), for the proposition, albeit in dicta, that "it would have enforced the parties' intent if they had expressly precluded punitive damages." *Developments in the Law*, *supra* note 140, at 1682; *see also* Kinnebrew v. Gulf Ins. Co., 67 Fair Empl. Prac. Cas. (BNA) 189, 190 (N.D. Tex. 1994) (enforcing an agreement limiting punitive damages on the theory that such damages were not a "substantive" right).

those that could be achieved in courts.[155] To be sure, each of these forms of equality are compromised in various ways in ADR. My point is not that equality is the only metric by which to evaluate the legitimacy of ADR systems. Rather, the implication that can be drawn from this Article's exploration of procedural equalities is that these forms of equality will inevitably inform judicial assessments of ADR systems. While concerns about ADR are typically conceptualized as those of "due process,"[156] this Article identifies some more specific aspects of due process—those concerned with equality—that are an inevitable component of procedural assessment and procedural justice.

The secondary point of this Article is also brought home by this discussion: litigants who have framed their objections to ADR systems in constitutional terms have had little success. A typical case is *Koveleskie v. SBC Capital Markets, Inc.*[157] The plaintiff

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[155] These same themes are apparent in scholarly considerations of these issues, as well. *See, e.g.,* Note, *Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572, 1589-98 (2000); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1054-1091 (2000); *Development in the Law, Mandatory Arbitration of Statutory Employment Disputes*, 109 HARV. L. REV. 1670, 1685-1691 (1996). *See generally* American Bar Association, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 91 DAILY LAB. REP. (BNA), at E-11 (May 13, 1994); *JAMS/Endispute Issues Minimum Standards for Employment Arbitration*, 6 WORLD ARB. & MEDIATION REP. 50 (1995).

[156] "Due process" concerns are the generally accepted metric by which ADR systems are evaluated. Thus, for example, a recent casebook introduces the topic with the following overview:

> Courts have grappled with the problem of determining how far a party's and/or arbitrator's control over procedure in arbitration should go, and the extent to which courts should police such proceedings for minimum due process concerns. Questions arise such as, which elements of due process can the parties waive? Does the arbitrator have ultimate control over the proceeding, or will an award be vacated that does not rise to some minimal level of due process? If there is some due process minima that courts will impose on arbitration proceedings, of what is it comprised? Should courts require arbitration to provide a "full and fair hearing?" What are the elements of such a hearing? We cannot expect courts to import the entire Federal Rules of Civil Procedure into arbitration, for if they did so, arbitration would lose its distinctive advantages of providing flexibility, informality, and speed in the resolution of disputes. We expect arbitration procedures to be more informal and to contain fewer procedural protections than a full-blown trial. Yet the question remains, how relaxed can arbitration procedures be and still accord with fundamental notions of due process? Due process concerns are particularly salient now that courts are asked to defer to arbitration for the resolution of not only contractual but also statutory disputes. Are there minimal due process norms that courts must impose in order to justify such delegation of authority?

PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 602-03 (Katherine V.W. Stone ed., 2000).

[157] 167 F.3d 361 (7th Cir. 1999).

brought a Title VII sexual harassment claim in federal court against a securities firm for which she had worked. The defendant moved to compel arbitration. The plaintiff contended that a non-Article III tribunal could not adequately protect her congressionally-created rights and that to compel her to submit to such a tribunal would treat her differently than other, similarly-situated, Title VII claimants in violation of the Equal Protection Clause. In rejecting this argument, the Seventh Circuit acknowledged that "statutory rights require both a substantive protection and access to a neutral forum in which to enforce those protections,'"[158] but then stated simply: "[W]e are satisfied, as was the [Supreme] Court in *Gilmer*, that the arbitral forum adequately protects an employee's statutory rights, both substantively and procedurally."[159] The Supreme Court in *Gilmer* did not address an anti-ADR argument based on the Equal Protection Clause. Yet, the Seventh Circuit's summary dismissal of equal protection concerns makes this case exemplary: in many similar cases, courts have declined to use the Equal Protection Clause as a means for thoughtful consideration of the disparity between differently-structured dispute resolution mechanisms.[160]

Equality concerns pervade the field of procedure. ADR systems that fail to acknowledge the necessary role of these forms of procedural equality will be suspect, and perhaps illegitimate, in the eyes of reviewing courts. Although judges are unlikely to strike these systems down on equal protection grounds, they are likely to express concern, if not disapproval, of procedural designs and designers that fail to account for the critical forms of procedural equality.

B. *For Legislators*

The implications of this Article for legislators can be gleaned from a second thought experiment. The baseline assumptions of civil adjudication guarantee at least three distinct forms of procedural equality. These guarantees are built into the system in a variety of design choices carefully calibrated to accomplish this, as

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[158] *Id.* at 368-69 (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997)).

[159] *Id.*

[160] *See, e.g.*, Morse v. Marsh, 656 F. Supp. 939 (N.D. Ill. 1987) (upholding constitutionality of statute allowing referral of Title VII action to magistrate without showing of exceptional circumstances, although other referral required such a showing); Kimbrough v. Holiday Inn, 478 F. Supp. 566 (E.D. Pa. 1979) (affirming constitutionality of local experimental rule providing for compulsory, nonbinding arbitration as a prerequisite to jury trial in selective, monetarily-defined, subset of cases).

well as other goals. From time to time, legislators are asked to enact laws that carve out specialized procedures for certain types of cases, for certain geographical areas, for certain types of litigants. By definition, such selective civil procedures are facially violative of the norms discussed throughout this paper. Shouldn't the burden of proving the need for such selective procedures be placed on the legislators who seek to create them?

Legislators might take solace in the equal protection caselaw described herein. Among the multitude of constitutional challenges to civil procedures lie few victories. Indeed, the scorecard in this area would probably reflect a far greater winning percentage for legislatures than would nearly any other area of their activities (except perhaps tax and immigration cases). Yet I have argued throughout that the nature of the Constitution's check on legislative action is usually distinct from the nature of equality sought in procedure. Rules that violate the forms of procedural equality need not violate the norm of constitutional equality—but that hardly makes them acceptable.

The equality protected by trans-party, trans-substantive, and trans-venue rules serves a form of fairness distinct from the anti-caste principle. I concede that it is difficult to assess the precise measure of such fairness. Should it be judged in terms of the subjective assessment by litigants or in more "objective" terms? And what are those terms? My own sense is that the lawmakers developing non-trans-substantive rules owe the litigants to whom such rules apply an explanation for the exceptional treatment of their cases. This explanation should go beyond mere "rationality" review and truly explain away any lingering sense that the procedural exceptionalism simply serves powerful political interests. The reader may not accept that statement of the requirement of procedural fairness. But I need not convince you that my standard is the correct one; to prove my major premise, I need only prove that procedural fairness is not logically limited to constitutional equality and thus that any standard of procedural fairness will differ from the anti-caste principle. If I am correct, that procedural "fairness" is not the same form of "equality" as constitutional equality, then the multitude of cases described in Appendix A, for example, are more or less category errors in that they each employed a mode of analysis that could not, by definition, address a significant aspect of the equality concerns triggered by non-trans-substantive procedural rules.

To recognize that constitutional equality and procedural equalities are different forms of equality is not just to see that limiting the inquiry to equal protection analysis is something of a

category error. This insight also demonstrates that arguing rule inequality to courts, in constitutional adjudication, is something of an institutional error, as well. Since the type of inequality prohibited by trans-party, trans-substantive, trans-venue rules has not been made a part of constitutional law, litigants who focus on equal protection challenges are unlikely to find relief in court. A burdened litigant is generally well-advised to seek an explanation, if not relief, from the rule-making body—typically legislative—that enacted the selective rule. To the extent that litigants burdened by selective procedural rules are discrete and insular minorities, or become so by being constantly burdened by selective procedural rules, their claims may in fact transmute into Fourteenth Amendment claims. But in the short term, they are entitled to an explanation of why they have been treated differently, and it is the rulemakers, as well as the courts, that owe them that explanation. Thus legislators called upon to enact procedural rules that violate norms of procedural equality should be forced to explain the selective nature of their approaches.

This is not to say that non-trans-substantive rules, or venue specific rules, etc., are by definition unacceptable. On the contrary, such rules might be perfectly understandable in certain situations. The point is that such deviations from the baseline neutrality positions adopted in procedural design *require explanation.* The explanation that is required should not take the form of a denial of caste-like practices. Rather, the explanation that is required should affirmatively state the rationale for disparate rule-making. Once the explanation is offered it can be examined on its own merit. But so long as legislatures can hide behind equal protection rationality review, the three types of equality concerns that pervade procedure—all distinct from constitutional equality—will evade serious consideration.

This discussion avoids the question of who will force legislators to make such explanations. Arguably courts could do so, utilizing the Due Process Clause as a means for ensuring that the core commitments of procedural equality are addressed.[161] However, I noted above my skepticism about leaving this function solely in the hands of courts and these concerns solely in the province of constitutional adjudication.[162] Legislators are occasionally made to explain their actions by their colleagues and by their constituents. Most realistically in the realm of procedure, this task will fall to procedural specialists—law professors, lawyers, judges, and rules committees. Perhaps the ultimate implication of this Article's

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[161] *See supra* notes 40, 130.

[162] *See supra* note 130.

exploration of procedural equality is that by helping to clarify some of equality's perplexing nature, it has provided a richer, more nuanced, discourse through which to continue an exploration of the subject.

C. *Limitations*

This section has identified some implications that follow from the Article's extensive exploration of procedural equality. Let me be clear what this section does *not* do: it does not provide a "unified field theory" of how equality itself works or how it fits seamlessly together with other procedural values. This initial survey is not meant to render a general normative account of equality's role in procedure. The implications discussed in this Part are just that—implications, not firm prescriptions. Indeed, the analytical tactic deployed here—a quick feint from the "is" of Parts I-III to what might be construed as the gentle "ought" of Part IV—is, concededly, unsatisfying in a variety of ways. I want to acknowledge, and provisionally address, three of those.

First, Parts I-III themselves contained normative arguments in favor of the forms of equality identified—such equality furthered accurate decision-making, efficient and acceptable resolution of controversies, fair and legitimate outcomes. What is too easy about this, though, is that none of those values can be achieved without trade-offs. In each domain, the value of equality conflicts with other values. Thus, equipage equality promotes accurate decisionmaking, but at what financial cost? How much money are we willing to spend? And how will we gauge how much more accuracy it buys us? Outcomes may be equalizable—we could have a procedural rule that simply set tort compensations at the level achieved by the initial plaintiff in a mass accident case—but such a forced equality of outcome would cut sharply into the value of litigative autonomy. This Part's tentative embrace of procedural equalities in some ways, then, skirted hard choices. There is nothing about the exploration of equality alone that can tell us how to make these choices.

Second, not only does equality clash with other values, it clashes with itself as well. Equalizing one thing may make another less equal. This was evident in the discussion of mutuality.[163] Non-mutual issue preclusion, by definition, violates rule equality; it provides a procedural opportunity—the use of estoppel—non-mutually, that is, to one party but not the other. Yet non-mutual

[163] *See supra* Part III.

issue preclusion can contribute to the achievement of outcome equality. What is even worse than the fact that equalities clash, though, is that there is nothing about the nature of equality itself which can tell us how to select among these forms of equality.

Third, equality not only clashes with other values, but equality alone is rarely, if ever, a sufficient value. This brings us back to where we began, with Professor Mashaw's assertion of equality's perplexing nature.[164] Mashaw charged that equality is not an exhaustive measure of due process, and then proved his charge by positing a procedural system which provides to each litigant the exact procedures provided in Kafka's *The Trial*.[165] The essential message of this example is that equality cannot be the lone value of procedure, nor alone tell us *what* it is important to equalize.[166]

Although this section's discussion does not tackle these deeper problems, this Article may nonetheless further thinking in this area. By developing a new vocabulary of procedural equalities, the Article helps identify the trade-offs and value clashes in ways not heretofore generally apparent. The extant procedural literature has tended to under-identify the value of equality. By bringing equality out of the closet, this Article has shed light on how often this value is in the mix. Thus, even if the reader does not agree with the particular balances struck—the specific implications suggested in Part IV—this Article presents procedural concerns framed in richer ways. A slightly less modest appraisal of the Article's method suggests a slightly larger payoff: because there has not been a rich

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[164] *See supra* text accompanying notes 1-8.

[165] FRANZ KAFKA, THE TRIAL (Schocken Books 1988) (1925).

[166] To assert that equality is an insufficient value does not, however, demonstrate that equality is an unnecessary value. Scholars have argued, somewhat abstractly, that if equality discourse depends upon identifying *what* is being equalized, why not simply focus on the *what* and forget equality? *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). But the normative power of the abstract concept of equality is *not* captured by the substantive content that answers the question, "Equality of *what*?" The normative value of equality is the value that is achieved when a decisionmaker is forced to account for disparity. Frank Michelman makes this point in a concise two-sentence response to Westen's work. Professor Westen argues that when we say "equal justice under law" what we are really examining is "justice under law" and that the word "equal" adds nothing to the concept of "justice." *Id.* at 558. Or: if we say, for example, that citizens are entitled to liberty from intrusion in their private lives, the notion of liberty itself necessarily encompasses its applicability to all citizens. Professor Michelman responds as follows:

> [Westen's] view works only by pre-packing into the notion of substantive right a reach for universality that the formal idea of equal justice unpacks into a separate norm. Since I find it quite possible, if uncomfortable, to think up substantive rights as particularistic as you please, a norm that directs us towards universalization of rights—or towards a universalistic conception of the very idea of a right—seems to me not very empty.

Frank Michelman, *The Meanings of Legal Equality*, 3 HARV. BLACKLETTER L.J. 24, 27, n.10 (1986).

enough discourse of procedural equalities, these forms of equality have not been accorded their proper weight in the balances that must be struck. By sustaining a focus on procedural equalities, this Article amplifies an otherwise latent concern for this value.

CONCLUSION

I have argued that there is not only one thing equality equalizes in the field of procedure. There are various procedural equalities, equalities *of* different things. Because there are a series of procedural equalities, to say that "procedural equality" is an important value in the design and assessment of procedural systems is not a particularly illuminating statement. The question "Equality of what?" is not satisfyingly answered by the response "equality of procedure." It only begs the further question, "Equality of what aspects of procedure?" What Parts I, II, and III demonstrate is that at least three forms of equality are central to civil adjudication—the equality of equipage that serves accuracy; the equality of rules and the equality of outcomes that serve fairness and efficiency.

The Article has, secondarily, demonstrated that these three forms of equality are not synonymous with constitutional equality. What the Constitution equalizes is not always the same as what proceduralists seeks to equalize. This helps explain why the Equal Protection Clause has done little work ensuring the forms of equality proceduralists care about and why it is unlikely to do so in the future.

Together these two points suggest certain immediate ramifications: the first point illuminates the particular forms of equality that are most important to procedure and the second point identifies the peculiar manner in which these equalities are likely to be addressed. Procedural systems that fail to acknowledge equipage disparities, that create systems of unequal procedural rules, or that lead to inconsistent substantive outcomes are likely to be procedural systems in distress. Nonetheless, it is unlikely such systems will run afoul of the Fourteenth Amendment. The manner in which such inequities will be addressed is in the design and implementation of the systems themselves.

APPENDIX A

There are thousands of cases in which a constitutional claim of equal protection has been made against some civil procedure.[167] This is not surprising in that nearly every procedural rule imaginable has been written, at one time or another, in one place or another, to apply selectively to some cases and not others. Selective procedural rules have emerged from state legislatures and Congress, from rulemakers and courts. They are both recent and ancient. And they run the procedural gamut from filing to remedy.

Procedural rules that have triggered equality challenges include the following:

- selective rules of exhaustion of non-adjudicative remedies;[168]
- selective statutes of limitations;[169]
- selective jurisdictional and venue rules;[170]
- selective filing fee rules;[171]

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[167] Many of these cases can be accessed through West Keynote <92k249>. Keynote 92 collects cases concerning constitutional law; 92k, sections 209-250, are constitutional equal protection cases; 92k249 collects equal protection cases dealing with "civil remedies and proceedings." This section (92k249) is then subdivided into nine subsections: (1) in general; (2) jurisdiction and venue; (3) limitation or suspension of remedy; nonclaim statutes; (4) parties and process or notice; (5) pleading and evidence; discovery and witnesses; (6) provisional remedies; (7) trial or hearing; jury; (8) judgment and execution; and (9) appeal or other proceeding for review.

[168] *See, e.g.*, Everett v. Goldman, 359 So. 2d 1256 (La. 1978) (rejecting equal protection challenge to statutory scheme that required only medical malpractice claims to be filtered through a medical review panel); Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) (same); Eastin v. Broomfield, 570 P.2d 744 (Ariz. 1977) (same).

[169] *See, e.g.*, G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) (rejecting equal protection challenge to New Jersey scheme that removed the statute of limitations in suits against unrepresented foreign corporations but not in suits against New Jersey corporations or foreign corporations with New Jersey representatives); Vaughan v. Deitz, 430 S.W.2d 487 (Tex. 1986) (rejecting equal protection challenge to statute of limitations that differentiated between residents and foreigners); Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984) (finding (state) equal protection violation in statute that limited statute of limitations in medical malpractice cases); Barrio v. San Manuel Div. for Magna Copper Co., 692 P.2d 280 (Ariz. 1984) (same).

[170] *Compare, e.g.*, Burlington N. R.R. Co. v. Ford, 504 U.S. 648 (1992) (rejecting equal protection challenge to venue rule that applied selectively to out-of-state corporations); Cincinnati St. Ry. Co. v. Snell, 193 U.S. 30 (1904) (rejecting equal protection challenge to transfer rule available only to plaintiff and not defendant); Bain Peanut Co. v. Pinson, 282 U.S. 499 (rejecting equal protection challenge to Texas venue statute that distinguished between corporate and individual defendants), *with, e.g.*, Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927) (finding equal protection violation in venue rule that applied selectively to foreign corporations); Philco-Ford Corp. v. Holland, 548 S.W.2d 828 (Ark. 1977) (finding equal protection violation in venue statute that applied selectively to out-of-state corporations).

[171] *See, e.g.*, Mitchell v. Farcass, 112 F.3d 1483 (11th Cir. 1997) (rejecting equal protection challenge to federal statute that treats in forma pauperis filings by prisoners differently than those by non-incarcerated litigants); Cornett v. Donovan, 51 F.3d 894, 899 (9th Cir. 1995)

- selective service of process rules;[172]
- selective pleading regimes;[173]
- selective discovery practices;[174]
- selective summary adjudication rules;[175]
- selective evidence rules;[176]
- selective presentation rules;[177]
- selective judgment rules;[178]

(requiring state to provide institutionalized mentally ill an attorney for pleading purposes but no more; stating limit as equalizing the position of the institutionalized indigent with that of the non-institutionalized indigent); Manes v. Goldin, 400 F. Supp. 23 (E.D.N.Y. 1975) (three judge court) (rejecting equal protection challenge to New York state scheme that maintained higher filing fees for civil cases filed in Supreme Court in New York City than elsewhere throughout New York State).

[172] *See, e.g.*, Halloran v. United States, 817 F. Supp. 829 (N.D. Cal. 1993)(rejecting equal protection challenge to admiralty rule requiring "forthwith service" as opposed to regular service in cases involving private parties); Carson v. Mauer, 424 A.2d 825 (N.H. 1980) (finding equal protection violation in special notice provisions applicable only in medical malpractice cases); Owens v. I.F.P. Corp., 374 F. Supp. 1032 (W.D. Ky. 1974) (rejecting equal protection challenge to summons rule that treated in-state defendants differently from out-of-state defendants).

[173] *See, e.g.*, Everett v. Goldman, 359 So. 2d 1256 (La. 1978) (rejecting equal protection challenge to statutory scheme that prohibited an ad damnum clause in medical malpractice cases); Bloom v. Guth, 517 N.E.2d 1154 (Ill. App. 1987) (rejecting equal protection challenge to statute that required heightened pleading, in the form of attorney affidavit attesting to discussion with health practitioner that case is non-frivolous, in medical malpractice cases alone); Sakovich v. Dodt, 529 N.E.2d 258 (Ill. App. 1988) (same).

[174] *See, e.g.*, Aeschliman v. State, 973 P.2d 749 (Idaho 1999) (rejecting equal protection challenge to statute that limited discovery in post-conviction relief cases); McDole v. State, 6 S.W.3d 74 (Ark. 1999) (rejecting equal protection challenge to fact that criminal litigants had far fewer discovery mechanisms available to them than available to civil litigants).

[175] *See, e.g.*, Morrell v. St. Luke's Med. Ctr., 556 P.2d 334 (Ariz. App. 1976) (rejecting equal protection challenge to Arizona rule that medical malpractice plaintiff had to produce expert witness to survive summary judgment while plaintiffs in other malpractice cases did not have this burden); Fed. Trade Comm'n v. Am. Buyers Network, 1991 WL 214163 (D. Colo. 1991) (rejecting equal protection challenge to federal court's use of summary proceedings in agency enforcement action).

[176] *See, e.g.*, Salsburg v. Maryland, 346 U.S. 545 (1954) (rejecting equal protection challenge to Maryland scheme that permitted introduction of impermissibly obtained evidence in Anne Arundel and some related counties, but not in other counties throughout state); State v. Ward, 745 S.W.2d 666 (Mo. 1988) (en banc) (rejecting equal protection challenge to Missouri statute that vitiated the physician-patient privilege in civil actions involving child abuse); Sutphin v. Platt, 720 S.W.2d 455 (Tenn. 1986) (rejecting equal protection challenge to Tennessee law that required expert testimony in medical malpractice case be from a doctor licensed to practice in Tennessee or a contiguous state); Cohen v. Hurley, 366 U.S. 117 (1961) (rejecting equal protection challenge to evidentiary rule in disbarment proceeding that was more lax than that in criminal proceedings); Port v. Heard, 594 F. Supp. 1212 (S.D. Tex. 1984) (rejecting equal protection challenge to Texas rules of evidence that recognized spousal privilege but not parent-child privilege); Carson v. Mauer, 424 A.2d 825 (N.H. 1980) (rejecting equal protection challenge to statute requiring special qualifications for expert witnesses in medical malpractice cases).

[177] *See, e.g.*, Reed v. Schwab, 600 P.2d 387 (Ore. 1979) (en banc) (rejecting equal protection challenge to Oregon court rule that permitted appellate oral argument only by lawyers, while pro se litigants could only appear by submission).

[178] *See, e.g.*, Kreft v. Fisher Aviation, 264 N.W.2d 297 (Iowa 1978) (rejecting equal

- selective remedial rules;[179]
- selective damages rules;[180]
- selective fees and costs regimes;[181]
- selective rules of appeal.[182]

The cases challenging selective procedural rules can be characterized as raising three primary concerns. First, some cases challenge rules that apply to some parties and not others, for example, rules that burden plaintiffs and not defendants.[183] A

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protection challenge to default judgment scheme which provided different forms of default notice to different types of defendants); Billings v. Edwards, 174 Cal. Rptr. 722 (Cal. App. 1981) (rejecting equal protection challenge to statutory scheme that shortened period for response to default in cases involving failure to respond to request for admission as opposed to other forms of discovery-related default).

[179] *See, e.g.*, Truax v. Corrigan, 257 U.S. 312 (1921) (finding equal protection violation in Arizona anti-injunction statute applicable only in some labor cases).

[180] *See In re* Air Crash Near Chicago, 644 F.2d 594 (7th Cir. 1981) (rejecting equal protection challenge to statute that disallows punitive damages in wrongful death cases although such damages are recoverable in personal injury survival actions); *In re* Paris Air Crash, 622 F.2d 1315 (9th Cir. 1980) (same).

A host of challenges have been brought against laws capping damages in medical malpractice cases. *Compare, e.g.*, White v. State, 661 P.2d 1272 (Mont. 1983) (finding equal protection violation in statute that limited recovery in certain personal injury actions); Carson v. Mauer, 424 A.2d 825 (N.H. 1980) (same); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (same), *with, e.g.*, Bernier v. Burris, 497 N.E.2d 763 (Ill. 1986) (rejecting equal protection challenges to statute that authorized period payment of damages, permitted reduction of damages to account for money from collateral sources, and barred punitive damages in medical malpractice cases but not in other cases); Florida Patient's Comp. Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985) (rejecting equal protection challenge to statute that limited malpractice awards); Fein v. Permanente Med. Group, 695 P.2d 665 (Cal. 1985) (same); Am. Bank and Trust Co. v. Cmty. Hosp., 683 P.2d 670 (Cal. 1984) (same); Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550 (Iowa 1980) (same); State *ex rel.* Strykowski v. Wilkie, 261 N.W.2d 434 (Wis. 1978) (same). For a general overview of the many cases in this category, see David Randolph Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195 (1985).

[181] *See, e.g.*, Laudenberger v. Port Auth. of Allegheny County, 436 A.2d 146 (Pa. 1981) (rejecting equal protection challenge to court rule requiring defendant that did not offer settlement, or offered low settlement, to pay interest on plaintiff's recovery, but not requiring same of plaintiff); Bernier v. Burris, 497 N.E.2d 763 (Ill. 1986) (rejecting equal protection challenges to statute that limited contingent fees attorneys could take in medical malpractice cases but not in other cases); Roa v. Lodi Med. Group, Inc., 211 Cal. Rptr. 77 (Cal. 1985) (rejecting equal protection challenge to law establishing sliding scale for plaintiff's attorney's fees in medical malpractice cases); Carson v. Mauer, 424 A.2d 825 (N.H. 1980) (finding equal protection violation in special fee rules applicable only in medical malpractice cases); *see also* Karen M. Klotz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759 (2000).

[182] *See, e.g.*, Missouri v. Lewis, 101 U.S. 23 (1879) (rejecting equal protection challenge to Missouri rules creating different appellate structures for different parts of the state); Mallett v. North Carolina, 181 U.S. 589 (1901) (rejecting equal protection challenge to North Carolina criminal structure that created appeals from one part of state but not from other).

[183] For example, under Rule 68 of the Federal Rules of Civil Procedure, plaintiffs have to pay their opponents' subsequent costs if they reject an offer and recover less than the offer; no similar fee-shifting attaches in the opposite direction. *See* FED. R. CIV. P. 68. By

second paradigmatic set of cases challenge rules that apply only to some cases and not others; these are cases that attempt to make trans-substantivity into a constitutional mandate.[184] A third set of cases challenge rules that apply only in some venues and not others.[185]

contrast, only plaintiffs appear able to recover statutory fees as "prevailing parties" under federal civil rights statutes. *See* The Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. § 1988 (1994). A prevailing defendant is entitled to fees only when the plaintiff's case was "frivolous, unreasonable, or otherwise without foundation." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

Such rules treating plaintiffs and defendants in different ways have, without much success, been challenged as violating norms of equality. *See Laudenberger*, 436 A.2d at 146. *See generally Validity of Statutes Allowing Attorney's Fee to Successful Claimant but Not to Defendant, or Vice Versa*, 73 A.L.R. 515 (1976 & Supp. 1999) (collecting hundreds of such reported equal protection decisions).

[184] *See supra* Part II.

[185] *See, e.g., Missouri*, 101 U.S. at 30-31 (1879) (rejecting equal protection challenge to Missouri rules creating different appellate structures for different parts of the state); *Mallett*, 181 U.S. at 597-99 (1901) (rejecting equal protection challenge to North Carolina criminal structure that created appeals from one part of state but not from other); Witte v. Justices, 831 F.2d 362 (1st Cir. 1987) (rejecting equal protection challenge to New Hampshire marital master program alleged to work differently in different counties); Hayes v. Missouri, 120 U.S. 68 (1887) (rejecting equal protection challenge to Missouri law that had different peremptory challenge rules in different parts of state). The concerns raised in these cases are similar to those raised in the cases challenging non-trans-substantive rules. *See supra* Part II.