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**THE CONCEPT OF EQUALITY IN
CIVIL PROCEDURE**

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THE CONCEPT OF EQUALITY IN CIVIL PROCEDURE

William B. Rubenstein*

INTRODUCTION

We are of two minds about the value of equality in civil procedure. On the one hand, we sense that equality is indispensable, a core concern that must be considered in the design and assessment of procedural systems. On the other, 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're 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,"² and by stating that "the degree to

* Acting Professor, UCLA School of Law. An earlier version of this Article was presented at the Stanford/Yale Junior Faculty Forum. I am indebted to Judith Resnik and Robert Mnookin -- the judges who selected the paper for presentation and who then each provided extremely helpful comments -- as well as to the other forum participants for their thoughts and suggestions. In addition, I would like to thank [names to follow].

¹See, e.g., Jerry Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981) (hereafter "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) (hereafter "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") and DUE PROCESS AND THE ADMINISTRATIVE STATES (1985) (reprinting "Dignitary Theory").

²Mashaw, *Three Factors*, *supra* note 1, at 52.

which procedures facilitate equal opportunities for the adversaries to influence the decision may be *the most important criterion* by which fairness is evaluated."³

Yet within a paragraph, Professor Mashaw is quick to caution that: "[E]quality of opportunity is not an exhaustive measure of procedural due process."⁴ 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.⁵

Professor Mashaw essentially summarizes the terrain with his lament that "equality is a notoriously slippery concept, and its procedural implications are puzzling."⁶

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, again in Professor Mashaw's words, equality is so "ubiquitous" and "intuitively plausible" "that no extended defense . . . seems appropriate."⁷) At the very least this much is clear -- although books and articles have been devoted to other procedural values,⁸ scholars have spent only a few

³*Id.* (emphasis added).

⁴*Id.*

⁵Mashaw, *Dignitary Theory*, *supra* note 1, at 901.

⁶*Id.* at 899.

⁷*Id.*

⁸*See, e.g.*, E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF*

paragraphs here and an occasional passage there explicating the general value of procedural equality.⁹

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 lessons emerge from this sustained consideration of

PROCEDURAL JUSTICE (1988) (on 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) (on the value of efficiency); Martin H. Redish and Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L. J. 455, 482-91 (1986) (on the value of impartiality).

⁹Equality, or consistency, is typically included on a list of procedural values and discussed briefly alongside discussions of other such values. See, e.g., Redish and Marshall, *supra* note x, at 482-91 (discussing equality, appearance of fairness, predictability, transparency, rationality, participation, revelation, and privacy-dignity); Mashaw, *Three Factors*, *supra* note x (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 x (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, effectuation values); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984) (discussing, *inter alia*, consistency, autonomy, impartiality, rationality, formality, finality, 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).

procedural equality. The Article's central message is that there is not one "procedural equality" but rather a host of "procedural equalities." I identify and explore three different forms of equality that are central organizing principles 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 proofs and arguments;¹⁰
- * *rule equality* (Part II): our procedural system rests upon the idea that like cases shall be processed according to like procedural rules; thus the system contains a commitment to apply procedural rules equally both across case types and within sovereignties;
- * *outcome equality* (Part III): our adjudicatory system endeavors 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

¹⁰I 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 Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights -- Part I*, 1973 DUKE L. J. 1153, 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., Resnik, *supra* note x, at 2131 ("Equipage for civil litigants -- from filing fees to investigation to counsel for experts -- is generally left either to the legislature or to the market.").

sought for distinct purposes. It is, therefore, not particularly illuminating to speak of "procedural equality" without addressing the clarifying question, "Equality of what?"¹¹ The broad topic of procedural equality encompasses a range of values that must be provided "equally." By examining some of these in depth, the Article provides more than a passing treatment of a singular idea of procedural equality; it creates a typology of procedural equalities.

Through each Part's examination of its particular type of procedural equality, the Article's second primary message emerges: our procedural systems contain an intricate web of architectural decisions that promote these various forms of equality. The Article shows how numerous procedural rules and approaches contribute to the forms of equality that are identified. This point is important because it augments the discussion of the ways in which equality matters by showing the ways in which equality is 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 forms of procedural equality identified here; though numerous, these challenges have had little success and little impact on the field of civil procedure.¹² By carefully delineating the meaning of equality in each

¹¹The question is Amartya Sen's. See AMARTYA SEN, *INEQUALITY REEXAMINED* viii (1992). See also AMARTYA SEN, *Equality of What?, in CHOICE, WELFARE AND MEASUREMENT* 353-369 (1982).

¹²This conclusion comports with that reached by John Leubsdorf in his seminal work, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579 (1984). However,

procedural domain, the Article provides an explanation for the constitution's impotence in procedure -- namely, that constitutional equality and these three procedural equalities are not the same thing.

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

this Article reaches 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* Leubsdorf, *supra*, at 581 (writing that "the Court rarely accepts cases raising issues of constitutional civil procedure, discouraging lawyers from raising these issues"). In fact, as the Article will demonstrate, there are a multitude of 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 about constitutional concerns with civil procedure. *See* Leubsdorf, *supra*, 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.

¹³*See, e.g.*, Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 249 (1983)(arguing 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").

¹⁴LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW ¶ 16-21 at 1514 (2d ed. 1988) (*citing* Owen Fiss, *Groups and The Equal Protection Clause*, 5 PHIL. & PUBLIC AFFAIRS 107, 108 (1976); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976)). *But see* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (defining command of equal protection clause in process-oriented, not substantive, terms).

constitutional answer is, "Equality of respect by the government."¹⁵ Constitutional equality aims to root out caste-like government practices.¹⁶ Generally speaking, this is not the work that 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.¹⁷ However, as the Article will demonstrate, the organizing equalities of civil procedure are not synonymous with the animating principle of the Fourteenth Amendment.¹⁸

Although my conclusion is that constitutional adjudication is generally not

¹⁵See Kenneth 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").

¹⁶See, e.g., Daniel Farber and Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996).

¹⁷See, 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).

¹⁸Some readers may find the Article's emphasis on the work of the Fourteenth Amendment in the field of procedure as off the mark. Since little has been written arguing that the Fourteenth Amendment influences the field, my contention that the Amendment is inconsequential may be experienced as an attack upon a straw man. This criticism is unwarranted. First, as the Article will demonstrate, litigants frequently deploy the equal protection clause to challenge civil procedures. 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 meanings and thus helps elucidate the argument that there are different procedural equalities.

a successful, nor even germane, method for achieving procedural equalities, the Article nonetheless contains a normative agenda. Indeed, by clarifying the unique nature of procedural equality, the Article helps translate a general, inchoate, instinct about procedural equality into certain specific prescriptions. Thus Part IV provides suggestions to two sets of institutional actors. The first are those who design procedural systems. By identifying the forms of equality that are central to civil procedure and by emphasizing that realization of these norms is the particular province of procedural designers, the Article emphasizes, to them, the extent to which the forms of equality are essential to their work. This is critically important in current debates about alternative dispute resolution 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 suggestion this Article makes to designers of these employee ADR systems is straightforward: if you do not respect these forms of equality in designing your ADR procedures, your efforts will not 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 raised by ADR systems.

The second set of institutional actors the Article 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 their rules with this systemic picture in mind. By contrast, lawmakers are procedural exceptionalists -- they only occasionally meddle in the design of procedural systems and they only then do so with particular political purposes in mind. Take

Congress. In the past decade, it has enacted a whole series of unique and unequal civil procedures. 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 provide little assistance in challenges to these exceptional procedural regimes. But because these procedural equalities are not constitutional equality, and precisely because, therefore, the equal protection clause does so little work in furthering these forms of equality, I contend in Part IV that legislators considering selective or unequal

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

²⁰See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, at 1321-53-56. 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," § 504(a)(1), and from litigation "with respect to abortion," § 504(a)(14).

²¹See 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).

²²See Part II, *infra*.

procedural rules have a special duty: when they consider statutory proposals for civil procedures, these occasional-rulemaking legislators should approach these laws with greater concern about their effects on procedural equalities than they have in the past.

The Article is thus both clarifying and prescriptive. It is said that people "do not really want to define [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.

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

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 private parties following an adversarial demonstration of privately developed facts and zealously presented legal arguments.²⁴ The 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 -- they cannot

²⁴See 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) [hereafter *ABA Readings*].

²⁵See, e.g., 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").

²⁶See ABA Readings, *supra* note x, at 2-5.

²⁷That parties have equal opportunities to produce their proofs and arguments is not an inevitable aspect of a dispute resolution system. Inquisitorial systems, for example, imagine much of the adjudicatory work -- particularly that of fact development -- be undertaken by 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

afford access to the system, or have 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 case. Second, the parties must be given relatively equal opportunities to present their case.²⁸ And 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.²⁹

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 to combat caste-like structures, but rather to help secure legitimate adjudicative outcomes. If the question is posed, "Equality of what?" one answer in this domain would be "equality of litigant equipage

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).

²⁸*See* Mashaw, *supra* note x, 44 U. CHI. L. REV. at 52 ("insofar 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").

²⁹*Cf. 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 "Between [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 x, 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.

sufficient to produce the desired adjudicative accuracy."

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 policies, particularly judicially-imposed redistributive rules.³⁰ 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.³¹ Such a rule may have a harsher impact on litigants who are less well equipped in that their ability to produce written documents may be limited.³² We might even conclude that this

³⁰*See, e.g.,* *Deshaney v. Winnebago County Dept. of Social 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) ("the Constitution does not provide judicial remedies for every social and economic ill"); *Douglas v. California*, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting) ("the 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) ("Of course a State need not equalize economic conditions . . .").

³¹That disability claims are generally paper claims was one of the factors sustaining the Supreme Court's decision that formal hearings are not required prior to disability terminations. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

³²This 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

rule treats such individuals unequally.³³ But procedural equality would arrive at the conclusion because it is skeptical that an accurate or acceptable result will be reached if the one of the parties has a significant presentation disadvantage. Constitutional equality might, instead (or in addition), be concerned that not permitting ill-equipped, or unrepresented, individuals to testify orally stigmatized such individuals in a manner prohibited by the Fourteenth Amendment. Using either definition of equality, we might reach the same conclusion, but we would arrive there via different roads.

What's even more pertinent about this distinction, 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.³⁴ However, it is plausible that the

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.

³³See Mashaw, *Three Factors*, *supra* note x, at 53 (suggesting that an administrative agency assessments of disability claims "based on documents" may be "particularly disadvantageous for certain classes of claimants").

³⁴If the procedural 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 trigger only rationality review). Similarly, if the procedural rule were found to have a disparate impact on illiterate individuals, it also would likely be sustained the Court has never constitutionally barred states' utilization of literacy requirements in the (arguably more fundamental) context of

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. But our acknowledgement of the consequences that this form of inequality might have on adversarial outcomes would still inform the manner in which we design an adjudicative system.³⁵

Indeed, let me amplify this point by identifying the many procedural rules and practices that tend to dampen the impact of equipage disparities. (After

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).

³⁵The presentation hypothetical adds several other nuances 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 (1991) (stating that "[e]quating 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, rule-equipage), what this example demonstrates is that different types of equality are in tension with one another. 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 in Part IV, *infra*.

doing so, I will return to the constitution and demonstrate that this complex web of practices far exceeds the meager 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.³⁶ Congress and states supply attorneys for those who cannot afford them in certain circumstances.³⁷ The private bar maintains programs that provide free counsel to indigent litigants and that encourage private lawyers to perform pro bono activities in behalf of the indigent.³⁸ Rules governing attorneys fees can also help provide counsel for unarmed parties. The availability of contingent fees, fee-shifting,³⁹ and statutory fees,⁴⁰ encourage attorneys to

³⁶See, e.g., 28 U.S.C. §1915 (1994 & Supp. III 1997).

³⁷See Legal Services Corporation Act, 42 U.S.C. § 2296 (1994).

³⁸Among other programs, between 1981 and 1998, nearly every state took advantage of 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 Foundation*, 524 U.S. 156, 159 (1998) (noting that 49 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. *Id.* On remand, the District Court concluded that the program did not effectuate a "taking" of private property. See *Washington Legal Foundation v. Texas Equal Access to Justice Found.*, 86 F. Supp.2d 626, 646-47 (W.D. Tex. 2000).

³⁹See Fed. R. Civ. P. 68 (authorizing shifting of fees to plaintiff who recovers less than offer made by defendant within 10 days before trial and prohibiting plaintiff to collect costs incurred after offer).

⁴⁰See, e.g., 28 U.S.C. §2412 (Equal Access to Justice Act provides that a court shall award fees to a party that prevails against the United States unless the

invest resources in cases that clients themselves may be unable to fund. And needy clients are better able to identify such attorneys since the courts and bar have loosened traditional restrictions on attorney advertising.⁴¹ Rules governing cost-shifting may have analogous, though less dramatic, equalizing effects.⁴² The effects of these programs and rules are limited, and the strength of our societal commitment to them varies,⁴³ but one may nonetheless conclude that these programs are important design features often, if not always, aimed at ameliorating equipage disparities.

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. Code Civ. P. §1021.5 (Deering 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").

⁴¹Deborah 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 AND DAVID LUBAN, LEGAL ETHICS 622-623 (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); *Shapiro v. Kentucky Bar Assn.*, 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).

⁴²See, e.g., Fed. R. Civ. P. 54(d); 28 U.S.C. § 1920 (1994). Cost-shifting can, of course, exacerbate as well as ameliorate unequal wealth among litigants if a poorer litigant is required to reimburse a richer litigant's costs. For an overview, 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).

⁴³For an overview of the narrow nature of such "cross-litigant wealth transfer" see Resnik, *supra* note x, at 2137-2144.

Modern procedural practices themselves also have equality-enhancing consequences. This is most obvious in the federal rules' embrace of notice pleading and liberal discovery. Notice pleading, by requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief,"⁴⁴ enables any litigant, even one without an attorney, to gain access to the adjudicatory system and proceed to discovery.⁴⁵ The classic case of *Dioguardi v. Durning*⁴⁶ demonstrates the proposition: there the plaintiff formulated his complaint in "confused and broken English," yet it was deemed sufficient to satisfy the low threshold of notice pleading.⁴⁷ The purpose of the move to notice pleading was the "hope[] that cases would turn on their substantive merits rather than the lawyers' technical and tactical skills,"⁴⁸ again highlighting the levelling effect such a system is meant to have on party disparity. But there is even a more nuanced, equalizing effect of notice pleading. Not only does it check the consequences of attorney disparities, it also enables certain lawsuits that will

⁴⁴Fed. R. Civ. P. 8(a)(2).

⁴⁵*See 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; the forms underscore the ease with which access to the federal courts is provided. *See* Fed. R. Civ. P. 84 (form pleading is sufficient).

⁴⁶139 F.2d 774 (2d. Cir. 1944).

⁴⁷The 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).

⁴⁸FRIEDENTHAL, ET AL., *supra* note x, at 244.

primarily be brought 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 for plaintiffs in most products liability and toxic torts cases.⁴⁹

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,"⁵⁰ 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."⁵¹ 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

⁴⁹FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR., AND JOHN LEUBSDORF, CIVIL PROCEDURE ¶3.1 at 140 (4th ed. 1992).

⁵⁰FRIEDENTHAL ET AL., *supra* note x, at 388.

⁵¹*Id.* at 388-89 (*citing* Fed. R. Civ. P. 26(b)).

several of our practices help spread costs. First, generally speaking 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."⁵² Second, rules requiring "initial disclosure"⁵³ of relevant information arguably assist under-equipped litigants even more. They require an adversary to turn over relevant factual material before a properly-drafted request has even been made.⁵⁴ 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; the "neutral" rules of discovery operate in a sphere of information inequality, thus creating a real world transfer of more information in one direction than the other. Most broadly, as with notice pleading, liberal discovery does more than level the adjudicative field, however; it also enables litigation in certain fact-bound situations:

⁵²JAMES ET AL., *supra* note x, at 236. Of course, this same rule can work against poorer litigants -- they can be flooded with discovery requests and out-manuevered in discovery by the resources of wealthier opponents.

⁵³*See* Fed. R. Civ. P. 26(a).

⁵⁴The 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* 26(a)(1)(E) (2000) (initial disclosure requirements do not apply to habeas corpus cases nor to cases involving unrepresented prisoners).

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.⁵⁵

Procedural rules governing party status can also indirectly reduce equipage disparities. Rules enabling liberal party joinder,⁵⁶ and representative litigation,⁵⁷ have an equalizing effect in that they essentially allow parties to pool resources in prosecution of a common claim. The equalizing power of these devices has often been noted.⁵⁸

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 effects in regard

⁵⁵JAMES ET AL., *supra* note x, at 236.

⁵⁶*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).

⁵⁷*See* Fed. R. Civ. P. 23 (class actions).

⁵⁸*See, e.g.,* Harry Kalven, Jr. and Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (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").

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 speaking, a central rationale for these procedural practices is to produce a sufficient amount of equipage equality to ensure the accuracy and acceptability of adjudicative outcomes. Because this -- and not a more general social equality -- is the concern of equipage equality, procedural practices have contributed more to producing it than 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.⁵⁹ Second, only in a small band of family law

⁵⁹In 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. *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 welfare recipients sought judicial review of a reduction in their benefits. Only occasionally since then -- and generally only in the context of family disputes, see *M.L.B.*, 519 U.S. at 116 (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") -- has the Court affirmed the essence of its holding in *Boddie*. 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." *M.L.B. v. S.L.J.*, 519 U.S. 102, 114. (1996).

Lindsey v. Normet, 405 U.S. 56 (1972), is an outlier. Plaintiffs challenged an Oregon statutory requirement that tenants seeking to appeal

cases has the Court required the government to provide counsel, discovery assistance, and appellate transcripts.⁶⁰ Third, courts have uniformly rejected the argument that the equal protection clause requires the provision of counsel in general civil proceedings.⁶¹ All of this equal protection law has therefore done little to alter equipage disparities in civil adjudication.⁶² It is true that this small

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 xx, because the Court's ruling turned on the fact that the procedural requirement of a double-bond applied selectively to eviction actions. *Lindsey*, 405 U.S. at 79.

⁶⁰In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Court held that the state could not deprive a parent of child custody consistent with the Due Process Clause without first providing her with some form of counsel. The Court has similarly required states to provide genetic testing before imposing paternity obligations on indigent putative fathers, *Little v. Streater*, 452 U.S. 1 (1981), and has required states to provide transcripts for appellate review in parental termination proceedings. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). See also, *Reist v. Bay County Circuit Judge*, 241 N.W.2d 55 (Mich. 1976).

⁶¹See, e.g., *Miranda v. Sims*, 991 P.2d 681 (Wash. App. 2000); *Los Angeles County v. Estes*, 96 Cal.App.3d 513 (1979); *Retz v. Retz*, 405 N.E.2d 313 (Ohio 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).

⁶²Indeed, isolating the concept of equality helps demonstrate that this value is not really what animated the Court in these cases. The cases do attempt to level the playing field among 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

body of 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.⁶³ Perhaps the insignificance of equal protection law in this domain of civil procedure simply reflects this larger social pattern. However, my

proceedings anterior to adverse state action." *Id.* It is more accurate to say that the central concern that binds these cases together is one of due process, not equal protection -- at their heart, these cases are about the enormous power of the state over individual litigants in these proceedings, not equipage disparities among private civil litigants more generally. *See, e.g., M.L.B.*, 519 U.S. at 129 (Kennedy, J., concurring in the judgment) (noting that relevant precedent rely on Due Process Clause and stating that "due process is quite a sufficient basis for our holding").

⁶³During 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 (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 Board of Elections*, 383 U.S. 663 (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 (1977), that "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." *Accord San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) ("at 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, *Douglas v. California*, 372 U.S. 353 (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, *Ross v. Moffitt*, 417 U.S. 600 (1974). And, as discussed above, see *supra* text accompanying notes xx-xx, the Court has rejected most attempts to apply equal protection doctrine to the provision of attorneys in the civil context.

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). While the pursuit of constitutional equality might have consequences for equipage disparities, the absence of a strong constitutional norm of wealth equality ought not exhaust our search for equipage equality. In Part IV, I return to the normative claim that procedural design mechanisms promote equipage equality and must be continually pursued if adversarial adjudication is to achieve its goals.

* * *

In sum, then, the concept of equipage equality is pursued -- with varying commitments in different places and time periods -- through institutional design; it has not been realized through 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 -- and thus our efforts at ensuring equality through procedural design exceed the work done 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.⁶⁴ To serve these dual purposes, we have created procedural systems that insist upon several particular forms of equality.⁶⁵ First, adversary adjudication is predicated upon a commitment to provide plaintiffs and defendants comparable procedural opportunities;⁶⁶ second, we have chosen to maintain procedural rules that are "trans-substantive" in nature, rules that guarantee tort litigants and contract litigants, for example, the same procedural opportunities and hurdles;⁶⁷ and third, we have generally

⁶⁴*See, e.g.*, Fed. R. Civ. P. 1.

⁶⁵*Cf.* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2006 (noting that "uniform federal rules" have four strands: interdistrict court uniformity, intrastate uniformity, trans-substantive uniformity, and . . . uniformity of result").

⁶⁶This commitment not only appears "fair," it is also connected to a belief that most accurate outcome evolves out of providing each side a relatively equal opportunity to present its case. *See supra* Part I.

⁶⁷Robert 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-

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.⁶⁸

The work that these forms of equality actually do can be seen by focusing on the trans-substantive nature of our adjudicative rules.⁶⁹ 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, adjudication on the merits more likely, in that the diminished attention as to the selection of appropriate procedure rules augments a court's capacity to focus on the merits of the action.⁷⁰ Finally, trans-substantive rules appear fair: all cases are treated

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.

⁶⁸I 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 sovereigns have now conformed civil procedures to the Federal Rules of Civil Procedure.

⁶⁹See *Subrin, supra* note x, 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").

⁷⁰See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Transsubstantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2081 ("complexity resulting from categorization of procedures in courts of general or broad subject matter

"equally."

Our commitment to these indicia of equality is, again, a 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 is posed, "Equality of what?" 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 real contest between adversaries to produce accurate outcomes; rule equality sometimes serves this purpose (enabling, for example, both plaintiffs and defendants the same opportunities of discovery). In its trans-substantive and trans-venue aspirations, however, rule equality serves legitimating 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 return below.

Consider first the source of rule equality -- procedural designers. The

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 rule "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").

framers of the federal rules of civil procedure, for example, explicitly aimed for a simple and uniform body of trans-substantive rules.⁷¹ And indeed, their accomplishment is famously trans-substantive: the same set of rules applies to all types of cases.⁷² In this sense, the federal rules treat all cases "equally."⁷³ The codification of the federal rules closed an historical period during which federal courts employed different procedural rules for legal, equitable, and admiralty cases.⁷⁴ The federal rules also explicitly disclaim any affiliation with the forms of action.⁷⁵ From the perspective of trans-substantivity, the forms of action seem to

⁷¹For an interesting set of articles about the 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. 1873-2258 (1989).

⁷²See JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE ¶5.1 at 244 (3d ed. 1999) (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").

⁷³Professors 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 AND OWEN M. FISS, THE STRUCTURE OF PROCEDURE 75 (1979) (emphasis supplied).

⁷⁴See 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 . . .").

⁷⁵See FED. R. CIV. P. 2 ("There shall be one form of action to be known as

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.⁷⁶

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 federal court in Miami and a contract case litigated in federal court in Alaska will be litigated according to the same set of procedural rules.⁷⁷ While each federal court also

"civil action."). Under the "forms of action," different "forms" (procedural paths) were applied to different "actions" (types of cases). The classic exposition is FREDERIC 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.

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

⁷⁶From 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 x, at 731-2.

⁷⁷David Shapiro writes that the drafters of the 1934 Federal Rules of Civil Procedure:

maintains a set of local rules, the historic periods during which these local rules become predominant are occasions for complaint that the trans-venue aspirations of the federal rules are being undermined.⁷⁸ Moreover, this design feature, when

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 x, 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 x, 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).

⁷⁸John 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 x, at 2060.

juxtaposed with the *Erie* 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.⁷⁹

Needless to say, however, inequality, disuniformity, persists. Within a trans-substantive rule regime, for example, substance-specific procedural rules are exceptional and conceptually "unequal."⁸⁰ In the federal rules, some examples are that fraud cases must be pleaded with greater specificity than other types of cases;⁸¹ shareholder derivative suits are subjected to unique pleading requirements;⁸² and in a variety of places, admiralty and maritime cases retain special procedural characteristics.⁸³ A number of the statutes mentioned at the

⁷⁹See FRIEDENTHAL ET AL., *supra* note x, ¶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).

⁸⁰*Cf.* FRIEDENTHAL, ET AL., *supra* note x, at ¶5-9 (characterizing special pleading rules as "surprising" and "not easy to justify" given the federal rules' trend towards uniform procedures).

⁸¹See FED. R. CIV. P. 9(b).

⁸²See FED. R. CIV. P. 23.1.

⁸³See FED. R. CIV. P. 8(h); 14(c); 38(e).

outset of this paper also fit into this subcategory of the typology.⁸⁴ Congress's new rules governing securities class actions create substance-specific rules of procedure for these cases,⁸⁵ as does the command that federal courts limit consent decrees in prison condition cases.

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.⁸⁶ 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.⁸⁷ More often, however, non-

⁸⁴See text accompany notes xx-yy, *supra*.

⁸⁵For 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 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, by the Supreme Court in *Louisville & Nashville Railroad 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 Yeazell, *supra* note x, at 259.

⁸⁶See FRIEDENTHAL, ET AL., *supra* note x, §5.9 n.2 at 262-63.

⁸⁷See Friedenthal et al., *supra* note x, at 263-64 (noting that fraud was a

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.⁸⁸ The litigant in an exceptional case perceives that her case is not being treated equally.⁸⁹ 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.⁹⁰

Not surprisingly, then, when procedural rules stray from the baseline assumption of trans-substantivity, they 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

"disfavored action" at common law because "it raised questions of defendant's morality" and thus special pleading requirements were meant to suppress unjustifiable claims).

⁸⁸See Subrin, *supra* note x, 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").

⁸⁹See Carrington, *supra* note x, 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").

⁹⁰*Id.* ("In the larger and most traditional sense of the phrase, Equal Protection of the Law requires a 'level playing field' in legal dispute resolution.").

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. These cases share certain key characteristics. First, generally speaking, in most of these cases, procedural rulemakers had opted for baseline procedural rules that were neutral -- trans-party, trans-substantive, trans-venue. Yet in each, legislatures, in response to various forms of political pressure, 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 law making; the former is less likely to yield substance-specific, politically-driven laws than the latter.⁹¹ Rulemakers are procedural generalists, lawmakers tend to be procedural exceptionalists. To say that these non-trans-substantive procedural rules were

⁹¹Thus, 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 findings its way up the long ladder of rulemaking has ever evoked a significant substantive political conflict in Congress.

Carrington, *supra* note x, at 2085-86. *Accord id.* at 1080 ("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").

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 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."⁹² 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 hardly fought in the Civil War to protect against this form of inequality. 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. 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.⁹³ In each, the federal courts have

⁹²*Buck v. Bell*, 274 U.S. 200 (1927).

⁹³See *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), *overruled by*, 172 F.3d 144

applied only rationality review, finding prisoners not to constitute a suspect class, nor the remedial aspects of procedure a fundamental right. In each, the federal judges have found the rationale for the consent decree limitations in Congress's supposed desire to clip their own wings, that is, to honor federalism by keeping federal judges out of the business of local running prisons.⁹⁴ 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. As is, no doubt, apparent, 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 prisoners.⁹⁵ 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.

(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).

⁹⁴*See, e.g., Plyler*, 100 F.3d at 374 (holding that "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").

⁹⁵This 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.

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 is easy to conclude that differential 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 legitimating functions of rule equality, there should be a metric by which to assess, and a forum in which to argue, 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, then, 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 similar 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.

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.⁹⁶ This core principle commits us to rules and methods of dispute processing that guarantee 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."⁹⁷ Like cases should reach like outcomes for purposes of fairness. If similar cases reach disparate outcomes, something seems wrong with the adjudicatory system itself. 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.⁹⁸

⁹⁶See, e.g., Subrin, *supra* note x, 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 the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 982-991 (1987)).

⁹⁷See text accompanying note x, *supra*.

⁹⁸Thus, 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 Comment F (1982).

Our commitment to this form of equality is, again, a commitment to a particular instrumental form of equality. Outcome equality is important because it helps legitimate a 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 is posed, "Equality of what?" 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 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.⁹⁹

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

⁹⁹Writing, 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 and Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 357 (emphasis supplied, citations omitted).

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.¹⁰⁰ If similarly situated litigants are too numerous to join in one action, the rules enable a representative suit to be brought on their behalf.¹⁰¹ Consistency is also generated by rules enabling the joinder of indemnification claims,¹⁰² the intervention of interested parties,¹⁰³ and through more complex devices like interpleader.¹⁰⁴ These sorts of rules are typically justified on grounds of efficiency.¹⁰⁵ Yet an important by-product, if not motivating factor, is that both types of rules promote consistency of outcome across similar cases.¹⁰⁶

¹⁰⁰Fed. R. Civ. P. 20(a).

¹⁰¹Fed. R. Civ. P. 23.

¹⁰²*See* Fed. R. Civ. P. 14.

¹⁰³*See* Fed. R. Civ. P. 24.

¹⁰⁴*See* Fed. R. Civ. P. 22; 28 U.S.C. §§ 1335, 1397, and 2361.

¹⁰⁵*See, e.g.,* JAMES, ET AL., *supra* note x, at 475 ("[liberal party rules] ultimately established trial convenience as the guide for joinder"); FRIEDENTHAL ET AL., *supra* note x, at 341 ("the underlying policy of Federal Rule 20 and similar joinder rules is to enhance judicial economy").

¹⁰⁶It 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 ET AL., *supra* note x, at 476 ("to 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 x, at 2152-53 (noting that "without 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 . . .").

Consistency of outcome is also furthered by rules permitting non-mutual collateral estoppel. Before the breakdown of the mutuality doctrine,¹⁰⁷ 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 is created intra-litigant equality (of the types discussed in Parts I and II above) by disabling a plaintiff from using a procedural rule (estoppel) against a repeat-playing defendant who could not use the same procedure rule against the new plaintiff.¹⁰⁸ 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

¹⁰⁷The 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 x, at ¶14.14 (The Doctrine of Mutuality). On the history of the mutuality doctrine, see Miller, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41 (1940).

¹⁰⁸Thus, 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 x, 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 supplied).

decision in the *Bernhard* case¹⁰⁹ and subsequently on the authority of the Supreme Court's decisions in *Blonder-Tongue*¹¹⁰ and *Parklane Hosiery*.¹¹¹ In many cases, now, 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.¹¹²

¹⁰⁹*Bernhard v. Bank of America National Trust and Savings Association*, 122 P.2d 892 (Cal. 1942).

¹¹⁰*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (allowing the use of defensive non mutual collateral estoppel in patent cases).

¹¹¹*Parklane Hosiery Company v. Shore*, 439 U.S. 322 (1979) (allowing offensive non-mutual collateral estoppel in certain circumstances).

¹¹²The 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 50 separate claims against the railroad for negligence. *Id.* at 285-86. Assuming the railroad prevailed in the first 25 actions, but lost the 26th, Professor Currie argued that it would be "an absurdity" to argue that the remaining 24 plaintiffs could assert non-mutual offensive collateral estoppel to prevail on the tail of the one prevailing plaintiff. *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), Comment F. Courts have generally concurred. See, e.g., *In Re Bendectin Products Liability Litigation*, 749 F.2d 300, 305 (6th Cir.1984) (offensive collateral estoppel inappropriate in mass-tort litigation); *Setter v. A.H. Robins*

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.¹¹³ 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.¹¹⁴ 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.¹¹⁵ But systemic challenges to such situations are rare. The equal protection caselaw is more focused on individual case disparities and is universally

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 12 of 21 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).

¹¹³Judith 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 x, at 2153.

¹¹⁴A typical recent example is the silicon breast implant settlement, *In re Dow Corning Corp.*, 255 B.R. 445, 512 (E.D. Mich. 2000). According to the terms of the settlement, non-American claimants received only 35-60% of the personal recovery made available to American claimants. Nonetheless, the court rejected both claims raised under both the bankruptcy statute's and constitution's guarantees of equal treatment.

unsuccessful.

Yet the case just cited, in which an equal protection challenge to outcome equality was rejected, deserves a closer look. The settlement at issue provided much less relief for foreign claimants of similar injuries than what domestic claimants received. Even accepting the fact that the distinction does not violate the equal protection clause,¹¹⁶ 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? Why would the former conclusion necessarily foreclose all concerns? Might there, again, not be a metric and forum for analyzing outcome inequities that exceed the constitutional ones? 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 exceed inequalities of the former -- and thus our efforts at ensuring outcome equality through procedural design exceed the work done by the equal protection clause.

¹¹⁵*See, e.g.,* Grillo, *supra* note x, *passim*.

¹¹⁶Some readers might argue that it should, on the grounds that foreigners deserve equal treatment in American courts. For an overview of the Court's equal protection jurisprudence concerning alienage classifications see generally, JOHN E. NOWAK AND RONALD E. ROTUNDA, CONSTITUTIONAL LAW (6th ed. 2000) ¶14.12.

IV. LESSONS OF PROCEDURAL EQUALITY

This Article has demonstrated that American civil adjudication is characterized by an intricate web of design choices that strive for at least three distinct forms of equality. What these forms of procedural equality equalize are not the same values that constitutional equality equalizes. The institutional mechanisms that address inequalities, then, are also distinct from the ways in which constitutional inequalities are addressed. Constitutional litigation challenging procedural inequality has largely been unsuccessful. Where procedural inequalities exist, they are most likely to be remedied through further design choices or legislative action. This Part, accordingly, addresses itself to two sets of institutional actors: designers of procedural systems and legislators.

A. For Procedural Designers

We live in a time of procedural design. Alternative dispute resolution systems are proliferating.¹¹⁷ With the blessing of the Supreme Court, forced arbitration has become a manner by which a multitude of previously-litigated

¹¹⁷ 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.

disputed are now processed.¹¹⁸ Private companies (employers, health maintenance organizations, manufacturers) are therefore in the business of creating dispute resolution systems. They are today's proceduralists.

The lesson of this Article for procedural designers is a simple one. Because the three forms of procedural equality set forth here are baseline assumptions of American adjudication, the further ADR systems stray from them, the less likely they are to be affirmed if and when they are reviewed by courts. This section demonstrates the point by looking at a series of court decisions that assess the validity of ADR systems.¹¹⁹ Challenges to ADR systems raise various

¹¹⁸Throughout 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/American Express Co.*, 490 U.S. 477 (1989) (enforcing agreement to arbitrate federal securities act claims); *Shearson/American 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 611 (Stephen C. Yeazell ed., 5th ed. 2000). 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 arbitral 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).

¹¹⁹Courts 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 that parties to resort to a non-adjudicative forum. *See generally*, CIVIL PROCEDURE ¶5.19 at 347-48 (Fleming James, Jr., et al. eds., 5th ed. 2001) ("A party may go to court to compel

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 contract¹²⁰ -- this type of equality is not exactly one of the forms of equality emphasized here.¹²¹ Rather, the cases, and portions of cases, that are of particular interest here are those that scrutinize the nature of the dispute resolution system that is provided through the arbitration mechanism.¹²² 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* 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

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. . . ").

¹²⁰Paul Carrington and Paul Haagen make the point succinctly, stating 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 and Haagen, *supra* note x, at 401. *See also*, Schwartz, *supra* note x, *passim*.

¹²¹Unequal 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 legitimizing function, but what it legitimates (the contract) is distinct from the legitimating function that equipage equality performs in adjudication.

¹²²*See, e.g., Armendariz v. Foundation Health Psychcare*, 6 P.3d 669 (Cal. 2000); *Hooters of America v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Cole v. Burns Intern. Security Services*, 105 F.3d 1465 (D.C. Cir. 1997).

of courts' efforts in overseeing arbitration.¹²³ *Armendariz* identifies five "minimum requirements for lawful arbitration," writing that "arbitration is lawful if it:"¹²⁴

- (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.¹²⁵

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 canvassed 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 rendered the resulting adversarial dispute resolution process problematic. As noted in that Part,¹²⁶ arbiter bias is a

¹²³*Armendariz v. Foundation Health Psychcare*, 6 P.3d 669 (Cal. 2000). *Armendariz* is helpful because it relies on the D.C. Circuit's decision in *Cole v. Burns Intern. Security Sevices*, 105 F.3d 1465 (D.C. Cir. 1997), which in turn drew its principles from the Supreme Court's decision in *Gilmer*. *Armendariz* thus provides a recent synthesis of the developing caselaw.

¹²⁴*Armendariz*, 6 P.3d at 682.

¹²⁵*Id.* See also, *Development in the Law -- Mandatory Arbitration of Statutory Employment Disputes*, 109 HARV. L. REV. 1670, 1679-82 (1996) (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).

¹²⁶See Part I, *infra*, at x.

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.¹²⁷

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 indicia of equality.¹²⁸ For example, in *Hooters of America v. Phillips*,¹²⁹

¹²⁷Indeed, the ABA's Code of Judicial Conduct conceptualizes impartiality in the specific language of non-discrimination law. Canon 3 -- "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).

¹²⁸See *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); *Bill Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1990) (finding that "minimum levels of integrity" are not met when contract designates the union representing one side of disputes as arbiter); *McConnell v. Howard Univ.*, 818 F.2d 58 (D.C. Cir. 1987) (disapproving of arbitration system that made Board of Trustees arbitrator of disputes); *Sam Kane Packing Co. v. Amalgamated Meat Cutters and Butcher Workmen of N. Am.*, 477 F.2d 1128, 1136 (5th Cir.1973) (disapproving of system that consisted of a single, union-appointed arbitrator); *Bennish v. North Carolina Dance Theater*, 422 S.E.2d 335, 337-38 (N.C. App. 1992) (disapproving of arbitration agreement in which panel contained both a trustee and a staff member of the defendant); *Smith v. Rubloff*, 370 S.E.2d 159, 160 (Ga. 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. App. 1984) (following

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*."¹³⁰ Though the Fourth Circuit found the Hooters system offensive in a number of ways, it was particularly troubled by the arbiter selection process.¹³¹ As is 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.¹³² One expert testified that the "mechanism [for

Graham); *Manes v. Dallas Baptist College*, 638 S.W.2d 143, 145 (Tex. App. 1982) (disapproving of arbitration before the employer's Board of Trustees); *Cross & Brown Co. v. Nelson*, 167 N.Y.S.2d 573, 576 (App.Div. 1957) (same). 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").

¹²⁹173 F.3d 933 (4th Cir. 1999).

¹³⁰*Id.* at 935 (emphasis supplied).

¹³¹*Id.* at 940 ("We hold that the promulgation of so many biased rules -- especially the scheme whereby one party to the proceeding so controls the arbitral panel -- breaches the contract entered into by the parties").

¹³²Specifically, the court wrote that:

Th[e 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

selecting arbitrators] violates the most fundamental aspect of justice, namely an impartial decision maker."¹³³

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 had initially to disclose fact witnesses, but 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.¹³⁴

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

would be a surprising result.

Id. at 938-39.

¹³³*Id.* at 939.

¹³⁴*Id.* at 938-39.

ADR. This form of rule 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 litigative arena, these too give rise to concerns that the ADR cases are not being handled fairly.¹³⁵ Of course, a primary purpose of ADR is efficiency; so, by definition, court-based rules will be streamlined in "alternative" dispute resolution.¹³⁶ And, indeed, "It is clear that the Supreme Court does not regard arbitration procedures as unfair merely because they differ from court procedures."¹³⁷ Nonetheless, cases 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.¹³⁸ Therefore, ADR rules need not measure up to

¹³⁵ [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 ET AL., *supra* note x, at 348 (emphasis added). *See also id.* at n.35 (collecting cases).

¹³⁶*See Gilmer*, 500 U.S. at 31 (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, "An arbitral forum need not replicate the judicial forum").

¹³⁷DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 215 (Stephen B. Goldberg et al., eds., 2d ed. 1992).

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 equal remedies to court and that it not impose higher costs on plaintiffs than court would -- speak specifically to the concept of outcome equality. As with the second form of ADR rule equality, this is not precisely the form of outcome equality addressed earlier in the Article -- that is, a single procedural system producing disparate results in like cases.¹³⁹ Rather, the outcome inequality of ADR is 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.¹⁴⁰ The primacy of this outcome equality argument is seen in the fact

¹³⁸Thus, *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*, 6 P.3d at 684.

¹³⁹*See* Part III, *infra*.

¹⁴⁰Such challenges were raised, for example, in *Mitsubishi*, 473 U.S. at 628

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."¹⁴¹ 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 those that could be achieved in courts. To be

("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 arbitral, rather than a judicial, forum"); *Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611 (11th Cir. 2001) (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); and *Trumbull v. Century Mktg. Corp.*, 12 F.Supp.2d 683, 688 (N.D. Ohio 1998) (unlike Title VII, defendant's procedure precluded punitive damages).

¹⁴¹*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, supra* note x, at 1682. See also *Kinnebrew v. Gulf Insurance 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).

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 point of the Article brought home here is that our assessment of the legitimacy of adjudicatory systems necessarily imports these forms of equality into the analysis. This conclusion insists that such equality concerns, not just "due process" concerns,¹⁴² will always be an important way in which procedural justice is evaluated.

The secondary point of the Article is also brought home by this

¹⁴²"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 602-603
(Katherine V. W. Stone ed., 2000).

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.*¹⁴³ The plaintiff 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"¹⁴⁴ 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."¹⁴⁵ 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, court have declined to use the equal protection clause as a means for thoughtful consideration of the disparity between differently-structured dispute resolution mechanisms.¹⁴⁶

¹⁴³167 F.3d 361 (7th Cir. 1999).

¹⁴⁴*Id.* at 368 (quoting *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997)).

¹⁴⁵*Id.*

¹⁴⁶*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,

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 Legislatures

The lesson of this Article for legislators is also straightforward. 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 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; this means that the burden of proving the need for such selective procedures ought to be placed on the legislators creating 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 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 distinct from the nature of equality sought in procedure. Rules that violate the

nonbinding arbitration as a prerequisite to jury trial in selective, monetarily-defined, subset of cases).

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 be 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-transsubstantive 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 interest. 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, if procedural "fairness" is not the same form of "equality" as constitutional equality, then the multitude of cases alluded to in Appendix A, for example, are more or less category errors in that they each compelled 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 the 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 would be unlikely to find relief from it in a constitutional 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 normatively 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, if available, 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.

V. SOME CONCLUDING THOUGHTS ON THE NATURE OF EQUALITY

I have argued that there is not 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 a value to be respected 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 three forms of equality are central to civil procedure -- 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 explains 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 provide the basis for a set of normative prescriptions: the first point identifies what forms of equality are important to procedure and the second point indicates the manner in which they are likely to be achieved. Procedural systems that fail to address equipage disparities, or that create a system of unequal procedural rules, or lead to inconsistent substantive outcomes are likely to be procedural systems that do not command respect. 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.

Let me end where we began, with Professor Mashaw's assertion of

equality's perplexing nature. 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*. These criticisms amount to an important caveat about equality -- that it is not a "sufficient" value. Equality cannot be the lone value of procedure, nor alone tell us *what* it is important to equalize.

To assert that equality is an insufficient value does not, however, demonstrate that equality is an unnecessary value. One argument often made in the procedural field is that there is no need for equal protection analysis because procedural values are adequately protected by the due process clause. This Article might further that thesis in two ways. First, I have demonstrated that what the equal protection clause equalizes is not generally the same thing that procedure seeks to equalize. Second, and more theoretically, if equality discourse depends upon identifying *what* is being equalized, why not simply focus on the *what* (due process) and forget equality? The answer is deceptively straightforward. *Equality is a "necessary" value because no matter what other metric is selected as valuable, we will inevitably worry about the unequal realization of that value.* While what it equalizes varies, the value of equality is omnipresent.

APPENDIX A

There are thousands of cases in which a constitutional claim of equal protection has been made against some civil procedure. 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;¹⁴⁷
- * selective statutes of limitations;¹⁴⁸
- * selective filing fee rules;¹⁴⁹

¹⁴⁷See, e.g., *Everett v. Goldman*, 359 So.2d 1256 (La. 1978) (rejecting equal protection challenge to statutory scheme that required medical malpractice claims to be filtered through a medical review panel).

¹⁴⁸See, 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).

¹⁴⁹See, 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) ("right of access" case 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

- * selective service of process rules;¹⁵⁰
- * selective pleading regimes;¹⁵¹
- * selective discovery practices;¹⁵²
- * selective summary adjudication rules;¹⁵³
- * selective evidence rules;¹⁵⁴

(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).

¹⁵⁰*See, e.g., Halloran v. U.S.*, 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).

¹⁵¹*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); *accord, Sakovich v. Dodt*, 529 N.E.2d 258 (Ill. App. 1988).

¹⁵²*See, e.g., Aeschliman v. State*, 973 P.2d 749 (Idaho 1999) (rejecting equal protection challenge to statute that limits 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).

¹⁵³*See, e.g., Morrell v. St. Luke's Medical Center*, 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); *Federal Trade Commission v. American Buyers Network*, 1991 WL 214163 (D. Colo. 1991) (rejecting equal protection challenge to federal court's use of summary proceedings in agency enforcement action).

¹⁵⁴*See, e.g., Salsburg v. State of 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

- * selective presentation rules;¹⁵⁵
- * selective judgment rules;¹⁵⁶
- * selective damages rules;¹⁵⁷
- * selective fees and costs regimes;¹⁵⁸

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).

¹⁵⁵*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).

¹⁵⁶*See, e.g., Kreft v. Fisher Aviation*, 264 N.W.2d 297 (Iowa 1978) (rejecting equal 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 shorted period for response to default in cases involving failure to respond to request for admission as opposed to other forms of discovery-related default).

¹⁵⁷*See, e.g., In re Paris Air Crash*, 427 F.Supp. 701 (C.D. Cal. 1977) (finding equal protection violation in provision of punitive damages in wrongful death cases but not in personal injury or property damage cases); *Winningham v. North American Resources*, 812 F.Supp. 1460 (S.D. Ohio 1992) (rejecting equal protection challenge to deduction of collateral source damages in personal injury case); *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).

¹⁵⁸*See, eg., Laudemberger v. Port Authority 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

* selective rules of appeal.¹⁵⁹

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.¹⁶⁰ A second paradigmatic set of cases challenge rules that apply only

cases).

¹⁵⁹See, 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. State of 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).

¹⁶⁰In 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 Resnik, *supra* note x, 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."). Under Rule 68, 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 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).

Rules treating plaintiffs and defendants in different ways have, without

to some cases and not others; these are cases that attempt to make trans-substantivity into a constitutional mandate.¹⁶¹ A third set of cases challenge rules that apply only in some venues and not others.¹⁶²

much success, been challenged as violating norms of equality. *See Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 146 (Pa. 1981).

¹⁶¹*See infra* Part II.

¹⁶²*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. State of 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). The concerns raised in these cases are similar to those raised in the cases challenging non-trans-substantive rules. *See* Part II, *supra*.