

Distributing Civil Justice

MATTHEW A. SHAPIRO*

With growing economic inequality, questions of distributive justice have become increasingly prominent in legal scholarship, particularly public law scholarship. Civil procedure scholarship has been no exception, traditionally addressing such questions under the heading of “access to justice.” And yet, despite the ubiquity of the phrase, discussions of access to justice have tended to focus almost exclusively on how procedural resources and opportunities should be distributed and, accordingly, who should receive any given share of those resources and opportunities. Much less attention has been paid to what, exactly, is being distributed—which specific goods access to justice actually comprises. Perhaps because of this vagueness, proponents of access to justice have coalesced around a fairly stable set of policy positions on a wide range of procedural issues.

This Article shows that apparent consensus to be much less secure than scholars commonly assume. Only by abstracting from the specific goods associated with access to justice can scholars achieve such widespread agreement about which procedural rules and policies accord with distributive justice. In fact, scholars allude to multiple distinct goods when advocating broad access to justice. Though often treated as interchangeable or even synonymous, those goods, once distinguished, entail potentially conflicting implications for some of the doctrinal and policy issues that currently preoccupy civil procedure scholars, complicating the standard access-to-justice position on each one. Whether a particular policy promotes access to justice and satisfies the demands of distributive justice depends on which specific goods we’re trying to facilitate access to. The unadorned concept of access to justice doesn’t have the fully determinate, unidirectional policy valence that many scholars assume it does.

* Assistant Professor of Law, Rutgers Law School. © 2021, Matthew A. Shapiro. For helpful comments and conversations, I thank Christian Buset, Brenner Fissell, Maria Glover, Olati Johnson, Alexi Lahav, Nancy Leong, John Oberdiek, Dave Pozen, Emily Stolzenberg, and Alec Walen, as well as Shaun Ossei-Owusu, Karen Tani, and the students in their Spring 2021 Law and Inequality Seminar at the University of Pennsylvania Carey Law School and participants in the Eleventh Annual Junior Faculty Federal Courts Workshop at the University of Arkansas School of Law and the Fifth Annual Civil Procedure Workshop at the University of Texas School of Law. I am also grateful to Rutgers Law School and the Maurice A. Deane School of Law at Hofstra University for financial support; to Palmer Sealy (Hofstra J.D. Class of 2021) for valuable research assistance; and to Will Baxley, Hannah Flesch, Lilith Klein-Evans, Adam Mitchell, Matthew Nussbaum, Lane Shadgett, and their fellow editors of *The Georgetown Law Journal* for their outstanding editorial work. This Article won the Association of American Law Schools 2021 Scholarly Papers Competition.

The problem, moreover, runs much deeper than just an ambiguity about the aims of civil justice. For the different goods associated with access to justice can be traced to different—and often conflicting—functions of the modern liberal state. Such conflicts are fundamental, going to the core of liberalism, and so are no more likely to be definitively resolved in civil procedure than they are in any other context. That being the case, we should expose and acknowledge the conflicts between different procedural (and political) goals and restructure procedural rulemaking institutions to better negotiate them, rather than imagine that blunt appeals to access to justice alone can determine civil procedure’s proper response to increasing economic inequality. We shouldn’t expect the task of determining the legal implications of economic inequality to be any more straightforward—or any less contentious—in civil procedure than it has been in public law. And public law, for its part, may end up having to make some of the same kinds of difficult trade-offs that civil procedure scholars have been loath to confront.

TABLE OF CONTENTS

INTRODUCTION	1475
I. ACCESS TO WHAT?	1482
A. COURT ACCESS	1485
B. PARTY RESOURCES	1487
C. JUDICIAL RESOURCES	1490
D. DISPUTE RESOLUTION: THIN AND THICK	1494
E. RIGHTS ENFORCEMENT: INDIVIDUAL AND AGGREGATE	1498
F. MAPPING ACCESS TO JUSTICE	1501
II. ACCESS-TO-JUSTICE TRADE-OFFS	1502
A. ARBITRATION	1503
B. LITIGATION FINANCE	1509
C. AGGREGATE LITIGATION	1512
D. SPILLOVER EFFECTS	1515
E. TRADE-OFFS AND SCARCITY	1517
III. ACCESS TO JUSTICE IN THE LIBERAL STATE	1519
A. CIVIL JUSTICE AND LIBERAL STATE FUNCTIONS	1519

1. Dispute Resolution	1521
2. Rights Enforcement	1524
3. Distributive Justice	1526
B. MEDIATING LIBERALISM'S CONFLICTS IN CIVIL JUSTICE	1533
1. Reconciliation Strategies	1534
2. Mediating Procedural Disagreements	1538
CONCLUSION	1541

INTRODUCTION

With growing economic inequality,¹ questions of distributive justice have become increasingly prominent in legal scholarship, particularly public law scholarship.² Civil procedure scholarship has been no exception. In particular, civil procedure scholars have long grappled with two distinct, though connected, sets of questions regarding the relationship between economic inequality and the civil justice system, questions that have only assumed added urgency in recent years. One set of questions concerns how various aspects of civil procedure can affect economic inequality—that is, the ways in which civil procedure can exacerbate or ameliorate economic inequality in society at large.³ Another set of

1. For the now-canonical citation for this observation, see generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Harvard Univ. Press 2014) (2013).

2. See generally, e.g., K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION 2* (2017) (identifying the concentration of economic power as “the fundamental problem of the modern economy”); GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* (2017) (arguing that the hollowing out of the middle class has undermined America’s constitutional structure); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015) (attributing government dysfunction to increasingly concentrated wealth); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014) (tracing the history of “anti-oligarchy” as a constitutional principle); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 198 (2014) (comparing “a new version of economic constitutional liberty” embodied in recent Supreme Court decisions to the *Lochner*-era doctrine of *laissez-faire*); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323 (2016) (arguing that the poor lack adequate political power and should therefore be treated as a protected class); Symposium, *The Constitution and Economic Equality*, 94 TEX. L. REV. 1287 (2016).

3. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076–78 (1984) (arguing that settlement compounds “distributional inequalities”); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 95 (1974) (considering “the possibilities of using the [legal] system as a means of redistributive (that is, systemically equalizing) change” and the question “under what conditions can litigation be redistributive” (footnote omitted)); Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929, 948 (1983) (criticizing “the complicity of rules of procedure in fostering inequality”); Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL’Y REV. 499, 499–502 (2017) (arguing that the Supreme Court’s arbitration jurisprudence has regressive distributive effects); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 463 (2017) (examining how recent developments in civil procedure “reflect and widen existing economic power imbalances” in

questions concerns the implications of economic inequality for civil procedure—that is, how the civil justice system and procedural rules and doctrines should be structured given background conditions of significant economic inequality.⁴ These latter questions conceive of the civil justice system as itself an object, rather than just an agent, of distributive justice,⁵ and in the civil procedure literature, they typically go under the heading of “access to justice.”⁶

And yet, despite the ubiquity of the phrase, discussions of access to justice⁷ have tended to focus almost exclusively on *how* (or according to what principles)

society); Helen Hershkoff, *Teaching Civil Procedure with Political Economy in Mind*, LAW & POL. ECON. (Dec. 5, 2018), <https://lpeblog.org/2018/12/05/teaching-civil-procedure-with-political-economy-in-mind/> [<https://perma.cc/BJM3-62MJ>] (deeming it “essential to forestall the dangerous trend of leveraging courts and law not only against those who are without power and wealth, but also in ways that make private power . . . ‘stronger than their democratic State itself’”).

As these citations suggest, scholars contemplating this first set of questions are preoccupied primarily with preventing civil procedure from augmenting and entrenching economic inequality—perhaps reflecting skepticism that the civil justice system can affirmatively promote economic equality. *See also infra* note 237 (citing sources that doubt whether increased access to justice can promote economic equality).

4. *See, e.g.*, Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 618 (2018) (considering the “challenges in making [adjudicatory] processes equally available across class lines”); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1881–84 (2002) (distinguishing between the effects of various procedural rules on economic inequality and the rules’ tendency to equalize power disparities within civil litigation); Hershkoff, *supra* note 3 (observing that “not all private parties have the same capacity to leverage the power of public courts in their favor”); *cf.* John Gardner, *What Is Tort Law For? Part 2. The Place of Distributive Justice*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 335, 335–36 (John Oberdiek ed., 2014) (distinguishing between tort law’s effects on economic inequality in society generally and “problems of distributive justice that come into being only because the law of torts exists”).

5. To distinguish the two sets of questions isn’t to deny that they’re connected. Indeed, one of the main reasons to attend to the civil justice system as an object of distributive justice may well be that it functions as a significant agent of distributive justice—that it plays an essential role in distributing the benefits and burdens of social cooperation and therefore partly constitutes the overall distributive (in)justice of the entire social scheme. For a recent argument along these lines, see FREDERICK WILMOT-SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* 4–5 (2019). Although I bracket the first set of questions in Parts I and II, I explore some of the connections between the two sets of questions in Part III. *See infra* notes 228–29 and accompanying text.

6. Indeed, for some scholars, issues of access to justice epitomize the problems of economic inequality that plague our society. *See, e.g.*, DEBORAH L. RHODE, *ACCESS TO JUSTICE* 19 (2004) (“No issue presents a more dispiriting distance between America’s core principles and actual practices than access to justice.”).

7. Given that the term “access to justice” is used across many different scholarly literatures to refer to many different normative ideals, I want to enter two caveats about this Article’s use of the term. First, my focus in this Article is on access to *civil* justice, and I accordingly bracket questions of *criminal* justice. Although some scholars have advocated a more “integrated” approach to reforming the civil and criminal justice systems, *see generally, e.g.*, Lauren Sudeall, *Integrating the Access to Justice Movement*, 87 FORDHAM L. REV. ONLINE 172 (2019), each system is governed by its own distinct set of legal doctrines and normative logics and, as such, continues to merit its own distinct theoretical treatment.

Second, even within the civil domain, some scholars espouse a capacious conception of access to justice that views the point of the civil justice system in terms of a “problem-solving” model, according to which the ultimate goal of civil justice is to solve social problems that are often the underlying causes of legal problems. *See, e.g.*, Sudeall, *supra*, at 173; *cf.* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW &

procedural resources and opportunities should be distributed and, accordingly, *who* should receive any given share of those resources and opportunities.⁸ Much less attention has been paid to *what*, exactly, is being distributed—which specific goods⁹ access to justice actually comprises. Instead, civil procedure scholars typically invoke the access-to-justice label as a byword for a more general stance on civil justice issues that supports the allocation of greater procedural resources and opportunities, generically defined, to economically disadvantaged individuals and opposes legislation, court rules, and judicial decisions that make it more difficult for such individuals to pursue their legal claims. Often left unspecified are precisely what objectives this more egalitarian distribution is supposed to realize. Perhaps because of this vagueness, proponents of access to justice have coalesced around a fairly stable set of policy positions on a wide range of procedural issues. On seemingly every question of civil justice, there appears to be broad agreement about which legal rules promote access to justice and which ones frustrate it.¹⁰

Soc’y REV. 631 (1980) (distinguishing “disputes” from “problems,” “grievances,” and “claims”). See generally Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 49, 49–50 (2019) (advocating a broader focus on “justice problems” rather than “legal needs”); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579 (2018) (advocating the application of problem-solving principles developed in drug courts to dispute resolution in ordinary civil courts); Katherine S. Wallat, *Reconceptualizing Access to Justice*, 103 MARQ. L. REV. 581 (2019) (arguing that access to justice requires lawyers to assume broader advocacy roles in the community, rather than focusing solely on improving individual access to the courts). The problem-solving model, however, doesn’t see anything normatively distinctive about the civil justice system, but rather views it as just one institution among many that can potentially solve social problems, perhaps better or perhaps worse than other institutions. By contrast, I’m focusing on what civil procedure scholars think is distinctive about the civil justice system—what goods courts and civil procedure can potentially realize but other social institutions can’t.

8. See, e.g., Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 930 (2009) (“How to allocate [legal] resources—who should allocate them and what principles should apply—will always be with us . . .”); I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 237 (2013) (“Given a set budget for legal services for the poor, coming both from the state and charitable organizations, how should those resources be distributed to rival claimants when one cannot fully help all of them?”); Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 989 (2012) (posing the question, “how to allocate, to ration, and to reconfigure [judicial] services”). Likewise, in his recent philosophical treatment of the subject, Frederick Wilmot-Smith equates the question what constitutes a “just justice system” with such questions as: “Which victims of injustice should get reparation, given that not all can? Who should suffer injustices . . . given that some will?” WILMOT-SMITH, *supra* note 5, at 2, 191, and he accordingly proposes principles for prioritizing the needs of certain classes of litigants over those of others when an equal distribution of resources and opportunities cannot be achieved, see *id.* at 191–98.

9. I elaborate on what I mean precisely by “goods” at the beginning of the next Part. See *infra* notes 25–27 and accompanying text.

10. For representative statements of the orthodox access-to-justice positions on various issues in civil procedure, see generally, for example, Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501 (2012) (arguing that recent procedural developments in areas such as pleading and summary judgment have had a disparate impact on female, minority, and economically disadvantaged plaintiffs); Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014) (criticizing recent Supreme Court decisions on pleading and summary judgment as “anti-plaintiff”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013) (criticizing recent procedural developments regarding summary judgment, expert testimony, class actions, arbitration,

In this Article, I argue that this apparent consensus is much less secure than scholars commonly assume. Only by abstracting from the specific goods associated with access to justice can scholars achieve such widespread agreement about which procedural rules accord with distributive justice. In fact, as this Article shows, scholars allude to multiple distinct goods when advocating broad access to justice. Though often treated as interchangeable or even synonymous, those goods, once distinguished, entail potentially conflicting implications for some of the doctrinal and policy issues that currently preoccupy civil procedure scholars, complicating the standard access-to-justice position on each one. Whether a particular policy promotes access to justice and satisfies the demands of distributive justice depends on which specific goods we're trying to facilitate access to. The unadorned concept of access to justice doesn't have the fully determinate, unidirectional policy valence that many scholars assume it does.

The problem, moreover, runs much deeper than just an ambiguity about the aims of civil justice. For the different goods associated with access to justice can be traced to different—and often conflicting—functions of the modern liberal state. Like debates about distributive justice in other domains, debates about distributive justice in civil procedure are ultimately debates about political theory. Such debates are fundamental, going to the core of liberalism, and so are no more likely to be definitively resolved in civil procedure than they are in any other context. That being the case, we should expose and acknowledge the conflicts between different procedural (and political) goals, rather than imagine that blunt appeals to access to justice alone can determine civil procedure's proper response to increasing economic inequality. Scholars have recently been struggling to determine the implications of economic inequality for public law; we shouldn't expect that task to be any more straightforward in civil procedure.

This Article makes three contributions—the first two of which concern only the first set of questions regarding the relationship between civil procedure and economic inequality outlined above, and the third of which concerns the second set as well.¹¹ One contribution is to disambiguate the concept of access to justice in civil procedure scholarship. Just as political philosophers who study distributive justice ask the “equality of what” question,¹² so we can ask the “access to

pleading, personal jurisdiction, and discovery for restricting plaintiffs' access to courts); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011) (criticizing recent Supreme Court decisions on arbitration and class actions); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010) (arguing that recent procedural developments in areas such as pleading and class actions reflect a “restrictive ethos”); and Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014) (elaborating criticisms of recent procedural developments as anti-plaintiff).

11. See *supra* notes 3–5 and accompanying text.

12. See Amartya Sen, *Equality of What?*, in 1 THE TANNER LECTURES ON HUMAN VALUES 195 (Sterling M. McMurrin ed., 1980). More precisely, in the philosophical literature on distributive justice, the “equality of what” question actually comprises two distinct issues: (1) the “currency” of egalitarian justice (that is, the metric—opportunity for welfare, resources, capabilities, and so on—for determining whether a given distribution is equal) and (2) the goods to be distributed (sometimes referred to in the

what” question of the numerous civil procedure scholars who advocate broad access to justice. And when we pose that question, we see that the (usually implicit) answer is far from uniform; scholars mention a host of goods that are ostensibly linked to access to justice but rarely acknowledge the differences between them. I identify, in particular, five distinct goods to which scholars urge more equal access: court access, party resources, judicial resources, dispute resolution, and rights enforcement. I then develop a typology of these goods, categorizing them as either ends in themselves or means to further goals and situating them along a spectrum spanning more formal and more substantive notions of access. This analytical framework makes clear that, in calling for broader access to justice, civil procedure scholars aren’t necessarily seeking to expand access to the same—or even the same kinds of—goods.¹³

A second contribution is to analyze the practical implications of this more fine-grained understanding of access to justice for current doctrinal and policy debates in civil procedure. Although the different goods associated with access to justice can perhaps coexist in theory, I show that they end up clashing repeatedly in practice. Seeking to promote access to one good often involves curtailing access to another. Such conflicts transect the typology of different goods associated with access to justice: formal and substantive notions of access conflict both with each other and among themselves, as do instrumental and intrinsic goods. These conflicts, moreover, play out (albeit in somewhat different ways) across many of the most significant contemporary controversies in civil procedure, from arbitration to third-party litigation funding to aggregate litigation. And not only do the conflicts arise within each of these doctrinal and policy domains; attempts to expand access (however conceived) in one domain can also have perverse, access-restricting spillover effects in others. The upshot is that bald invocations of “access to justice” are unlikely to resolve many of the debates about how civil procedure should respond to pronounced economic inequality. For depending on which specific goods one is advocating access to, considerations of access to

philosophical literature, but decidedly not in this Article, as *distribuenda*). See, e.g., Anca Gheaus, *Hikers in Flip-Flops: Luck Egalitarianism, Democratic Equality and the Distribuenda of Justice*, 35 J. APPLIED PHIL. 54, 55 (2016). The “access to what” question I pose in this Article corresponds to the second issue.

13. This Article’s analytical framework is partly inspired by, but nevertheless differs from, William Rubenstein’s typology of three “concepts” of equality in civil procedure. See Rubenstein, *supra* note 4, at 1867–68. Although Rubenstein expressly poses the “equality of what” question and distinguishes between three different notions of equality in civil procedure, only one of them—what he calls “equipage equality”—directly concerns access to justice. See *id.* This Article, by contrast, identifies five distinct goods, only one of which (“party resources”) arguably corresponds to “equipage equality,” but all of which are associated with access to justice. And whereas Rubenstein acknowledges only briefly, in passing, potential conflicts *within* the concept of equality, see *id.* at 1909–10, the prospect of conflicts between the different goods associated with access to justice is this Article’s main focus. One also finds similar typologies in the literature on legal aid—though again, focusing on different goods from those analyzed in this Article. See, e.g., Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 485–92 (1985) (identifying tensions between different goods associated with “legal aid,” but treating “access” as only one such good, rather than a complex of goods with its own set of conflicts).

justice will often weigh on *both* sides of each of those debates. In picking sides, we can't help but trade off some of the goods against others. Appreciating these trade-offs helps to reframe several perennial questions in civil procedure. Most notably, whereas civil procedure scholars tend to conceptualize many procedural issues as pitting access to justice against *other* values (particularly efficiency),¹⁴ this Article shows that they also present conflicts *within* the concept of access to justice itself.

A tempting response to such conflicts would be to simply privilege some of the goods associated with access to justice over others, or even to disavow some altogether. One sees hints of this response in civil procedure scholarship, which often portrays more formal notions of access as inadequate and focuses instead on the ulterior goals realized by greater access to justice (especially rights enforcement). As a third contribution, however, this Article contends that the conflicts between the different goods can't be so easily sidestepped. While civil procedure scholars do tend to emphasize more substantive notions of access and the intrinsic goods of civil litigation, they continue to attach importance to the more formal notions and the instrumental goods as well. And for good reason: *all* the goods associated with access to justice—the formal no less than the substantive, and the instrumental no less than the intrinsic—can be traced to essential functions of the modern liberal state. As political theorists have long recognized, these functions often pull in different directions. The conflicts between the different goods associated with access to justice thus replicate the inevitable conflicts between the state's different roles. Some of the most enduring debates in political philosophy concern how society should respond to these conflicts—which state functions should take priority and which should yield. We are as unlikely to resolve those fundamental disagreements in civil procedure as we are in other contexts.

There are, however, better and worse ways to negotiate such disagreements. Indeed, the best way forward may itself be procedural: rather than try in vain to establish a rigid, definitive hierarchy of goods to be promoted by greater access to justice, we could insist on more representative procedures for deliberating about the best course when conflicts between those goods inevitably arise. There may, in short, be no single, predetermined solution to the problems that economic inequality poses for civil procedure simply waiting to be discovered and implemented. Instead, given how inveterate the conflicts between the different goods

14. For one recent example of this tendency, see George Rutherglen, *The Problem with Procedure: Some Inconvenient Truths About Aspirational Goals*, 56 SAN DIEGO L. REV. 1, 3–4 (2019), which attributes many procedural controversies to inevitable conflicts between the different “aspirational goals” embodied in Federal Rule of Civil Procedure 1’s injunction “to secure the just, speedy, and inexpensive determination of every action and proceeding.” See also, e.g., 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, *FEDERAL PRACTICE AND PROCEDURE* § 1029 (4th ed. 2015) (identifying “trade-offs between and among” Rule 1’s three goals); Richard Marcus, ‘*American Exceptionalism*’ in *Goals for Civil Litigation*, in 34 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 123, 136 (Alan Uzelac ed., 2014) (positing trade-offs between “accuracy” and “efficiency”).

are, we may have to content ourselves with subjecting civil procedure's response to economic inequality to ongoing contestation.¹⁵

Although this Article is by no means the first piece of scholarship to attempt to analyze civil procedure in terms of more general theories of the state, it departs from prior work in significant respects. In particular, I seek to extend two strands of literature on the relationship between civil litigation and political theory. The first, most prominently associated with the work of Mirjan Damaška and Robert Kagan, attributes the United States' preference for an adversarial civil justice system to its more fundamental ideological commitment to limited government.¹⁶ But this work is quite blinkered in its conceptions of the purposes of both civil litigation and the state,¹⁷ whereas this Article seeks to limn a broader range of goods realized through civil litigation, as well as multiple state roles, and to link both to specific doctrinal and policy debates in civil procedure, not just to the general structure of the civil justice system.

The second line of scholarship, exemplified by the recent work of Sean Farhang and Stephen Burbank, examines civil litigation's role in facilitating the "private enforcement" of the government's regulatory "policy."¹⁸ This work, however, focuses almost exclusively on governmental policies embodied in specific federal statutes, again neglecting other state roles.¹⁹ It also fails to consider other objectives that might be furthered by greater access to justice besides policy implementation. In sum, while each body of scholarship also connects civil procedure to political theory, this Article offers a more comprehensive accounting of both the goods associated with access to justice and the roles of the state, and thus

15. Some scholars have posited civil litigation itself as a forum for negotiating political disagreements among the members of contemporary pluralistic liberal democracies. *See, e.g.*, ALEXANDRA LAHAV, IN PRAISE OF LITIGATION, at viii (2017) ("[L]itigation is a way of continually resolving conflicts arising from the deep divisions that inevitably arise in a heterogeneous society and avoiding one side or the other resorting to violence."); *see also id.* at 4–5 (describing litigation as a means of promoting "discussion of competing values"). But this Article suggests that questions of civil justice are themselves no more immune to such disagreements than any other political questions.

16. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 11 (1986) ("[D]ominant ideas about the role of government inform views on the purpose of justice, and the latter are relevant to the choice of many procedural arrangements."); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 99–125 (2001) (attributing the "adversarial" nature of the American civil justice system partly to the traditional American suspicion of centralized political power).

17. For example, Damaška considers only two functions of civil litigation ("conflict resolution" and "policy implementation") and connects them to only two very general, abstract archetypes of state governance ("reactive" and "activist") rather than to any more specific state purposes. DAMAŠKA, *supra* note 16, at 11, 72.

18. *See generally* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014); Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37 (2018) [hereinafter Burbank & Farhang, *Trump Era*].

19. *See, e.g.*, BURBANK & FARHANG, *supra* note 18, at xvii–xix.

a more nuanced understanding of the ways in which specific aspects of the civil justice system can be distorted by economic inequality.

This Article also intersects with the growing body of public law scholarship exploring the tensions between the “progressive” imperative to reduce economic inequality and traditionally “liberal” goals. First Amendment scholars, for example, have recently been debating the extent to which robust protections for free speech can coexist with a commitment to combatting economic inequality.²⁰ It turns out that such dilemmas are by no means unique to civil liberties law, but rather pervade most areas of the law, including civil procedure. At the same time, because civil procedure, more than any other area of the law, purports to be “transsubstantive,”²¹ it implicates a particularly wide array of the plurality of state objectives, and thus provides especially fertile ground for developing a more general theoretical account of the conceptual difficulties the state might face in responding to increasing economic inequality.

This Article begins, in Part I, by identifying five distinct goods that civil procedure scholars tend to associate (often implicitly) with access to justice and classifying those goods along several different dimensions. Part II then shows how these goods can end up conflicting with one another when applied to specific doctrinal and policy issues in civil justice. Finally, Part III traces these conflicts to even more fundamental tensions inherent in liberal conceptions of the state and suggests some ways to make limited progress on reconciling the pursuit of economic equality with other liberal goals in the civil justice context.

I. ACCESS TO WHAT?

Access to justice is a resource, and a scarce one at that. It’s a resource because people seek access to the civil justice system to pursue their various objectives; it’s scarce because no legal system could realistically grant everyone who wishes to use it unlimited access to its institutions.²² Like many other scarce resources, then, the civil justice system exhibits what the political philosopher John Rawls, following David Hume, called the “circumstances of justice.”²³ And that means we must determine how to justly distribute access to the civil justice system among its potential users.²⁴

20. See, e.g., Symposium, *A First Amendment for All? Free Expression in an Age of Inequality*, 118 COLUM. L. REV. 1953 (2018).

21. See *infra* note 75 and accompanying text.

22. I revisit this assumption of scarcity in the next Part. See *infra* Section II.E.

23. See JOHN RAWLS, *A THEORY OF JUSTICE* 109–10 (rev. ed. 1999).

24. William Lucy advocates a “thin” conception of access to justice that purports to prescind from questions of distributive justice, largely on the ground that the “justice” part of access to justice is less tractable than the “access” part. See William Lucy, *Access to Justice and the Rule of Law*, 40 OXFORD J. LEGAL STUD. 377, 378–84 (2020). But this bracketing strategy strikes me as illusory. After all, access is itself an inherently distributive concept: one can have more or less access to a good, and, at least in conditions of scarcity, more access for some necessarily means less access for others; hence the question how access should be *distributed*. So I simply don’t see how we can extricate questions of access to justice from questions of distributive justice—though as I explain in Part III, access to justice undoubtedly implicates other values as well.

But what, exactly, is the state distributing when it distributes access to justice? If access to justice is a resource, what is the nature of that resource? Perhaps surprisingly, scholars rarely pause to specify what they're seeking to distribute more equally when they advocate greater access to justice. This Part shows that, in fact, scholars tend to associate the general ideal of access to justice with at least five more specific goods, each of which is a potential object of distribution: court access, party resources, judicial resources, dispute resolution, and rights enforcement. Although these goods are often conflated,²⁵ they're actually distinct, and they vary in important respects along the following dimensions: whether they're means to further ends or ends in themselves; whether they're merely formal or more substantive; and whether their distribution matters locally, at the level of an individual lawsuit, or globally, at the level of the civil justice system as a whole. Each good, moreover, is salient in conditions of economic inequality, for we tend to think that everyone is entitled to his or her fair share of each good regardless of his or her economic status.

I want to make three clarifications before proceeding. First, I use the term "goods" to refer to resources, opportunities (including procedural opportunities),

25. For example, in the very first paragraph of her foreword to a collection of essays on access to justice, Martha Minow subtly shifts between at least three of these goods. See Martha Minow, *Foreword to BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA*, at xv, xv (Samuel Estreicher & Joy Radice eds., 2016) (discussing under the single heading of "access to justice" what I refer to as court access, party resources, and rights enforcement). For an example of similar equivocation from the law-and-development literature, see Pascoe Pleasence & Nigel J. Balmer, *Justice & the Capability to Function in Society*, 148 *DÆDALUS* 140, 140 (2019), which defines "access to justice" as "the just and efficient resolution of civil legal problems in compliance with human rights standards and, when necessary, through impartial institutions of justice and with appropriate support." See also, e.g., Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 *FORDHAM L. REV.* 2319, 2325–26 (2020) (collecting prominent definitions of "access to justice" from the alternative dispute resolution (ADR) literature, all of which lump together multiple distinct goods). Other scholars have been more careful to distinguish at least some of the goods associated with access to justice—particularly dispute resolution and rights enforcement—but they have done so without recognizing the potential for those goods to conflict with one another, even in a single case or class of cases. See generally Carrie Menkel-Meadow, *What Is an Appropriate Measure of Litigation? Quantification, Qualification and Differentiation of Dispute Resolution* (Univ. of Cal., Irvine Sch. of Law Legal Studies Research Paper Series, Paper No. 2020-54), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3663304.

Wilmot-Smith posits "two objects of distribution" in the civil justice context: "legal resources and the benefits and burdens of legality." WILMOT-SMITH, *supra* note 5, at 26. Roughly, the term "legal resources" for Wilmot-Smith encompasses what I call "court access," "party resources," and "judicial resources," see *id.* at 13–14, while he includes what I call "rights enforcement" among the "benefits of legality," see *id.* at 16–19. But he doesn't systematically distinguish the different kinds of legal resources that I identify in this Part, and his category of the "benefits and burdens of legality" is both narrower and broader than my focus here. *Id.* at 26. It's narrower because it appears in the civil context to reduce to rights enforcement and doesn't explicitly include dispute resolution as a distinct good, see, e.g., *id.* at 66 & 224 n.48 (insisting that "the goal of a legal system" is "to do justice" and suggesting that "justice benefits are the salient consequences to consider when assessing the justice system," where "justice benefits" aren't defined to include dispute resolution (emphasis added)); it's broader because it does include various public benefits that can flow from adjudication (for example, nondomination and social equality among citizens, some of the benefits associated with the rule of law, and the production of legal norms) but that cannot, in fact, be distributed (precisely because they're public), see *id.* at 70–86, 165, 181–82.

outcomes, and so on that can be distributed more or less equally. The point of this Part is to get a better sense of exactly *what* proponents of access to justice seek to distribute more equally, and I don't intend to take a position on *how* any of the goods associated with access to justice should be distributed.²⁶ In particular, I don't mean to suggest that any of the goods are inherently alienable or, more generally, that they must continue to be distributed through market mechanisms, an arrangement that may well turn out to be unjust.²⁷

Second, I analyze goods associated with the *processes* for enforcing legal rights and other entitlements, as opposed to the rights and entitlements themselves. It's certainly possible to conceptualize the latter, too, as objects of distribution, and the creation and definition of substantive legal rights are critical dimensions of access to justice. But debates about access to justice tend to focus on the distribution of goods related to the effectuation of legal rights created by other bodies of law, and those are the kinds of goods I examine in this Part.²⁸

Third, I want to distinguish the typology of goods associated with access to justice that I develop in this Part from lists of procedural values proposed by other scholars. Many such lists enumerate various *desiderata* for a procedural system— aspirations or objectives the system should realize²⁹ or measures of its quality.³⁰ Other lists identify more generic social goals, such as efficient resource allocation and social justice, that can potentially be achieved through the civil justice system

26. See *supra* note 8 and accompanying text (distinguishing the issue of *what* is being distributed from the issue of *how* it's being distributed).

27. For an overview of market alienability in the civil justice context, see generally Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005). For an argument against using the market to distribute legal resources, see WILMOT-SMITH, *supra* note 5, at 51–69. *But see* Myriam Gilles & Gary Friedman, *Examining the Case for Socialized Law*, 129 YALE L.J. 2078, 2085 (2020) (reviewing WILMOT-SMITH, *supra* note 5, and arguing that legal resources can be distributed justly through a (heavily regulated) market).

28. Another good frequently mentioned in discussions of access to justice that I don't analyze separately is “legal advice” or “legal help”—terms that, though a bit vague, typically seem to refer to the ability to consult a lawyer but not necessarily file a lawsuit. This is often a focus of empirical scholarship on how people respond to “problems” with a potential legal dimension. See, e.g., Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, in BEYOND ELITE LAW, *supra* note 25, at 21, 30–39; Ian Weinstein, *Access to Civil Justice in America: What Do We Know?*, in BEYOND ELITE LAW, *supra* note 25, at 3–9; *cf. supra* text accompanying note 7 (citing scholars who advocate a “problem-solving” model of access to justice). While this is an important aspect of access to justice, my focus is on the use of the concept in civil procedure scholarship, where the concern is more about what resources are available to individuals after they decide to seek some kind of redress.

29. Frank Michelman provided one of the earliest such lists. 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, 1172–73. For a more recent list, see Victor D. Quintanilla & Michael A. Yontz, *Human-Centered Civil Justice Design: Procedural Justice and Process Value Pluralism*, 54 TULSA L. REV. 113, 117–21 (2018) (identifying “deterrence,” “effectuation,” “efficiency,” “participation and dignity,” and “equal treatment” as important objectives of civil justice).

30. See, e.g., Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335, 349–50 tbl.1 (1989) (enumerating six quality standards for assessing any dispute resolution process).

as well as other social institutions.³¹ But in general, the items on these other lists are regulative ideals rather than goods that can be distributed among potential users of the civil justice system.³² Many of the items, moreover, aren't even distinctive of civil justice, but apply equally to all important social institutions.³³ Civil procedure scholars who advocate broader access to justice, by contrast, tend to focus on goods that can be distributed more or less equally (hence their concern with economic inequality) and that are connected paradigmatically, if not exclusively, with the civil justice system. This Part adopts that same focus in developing its typology of goods associated with access to justice.

A. COURT ACCESS

When scholars invoke the ideal of access to justice, they often have in mind access to the courts.³⁴ To enjoy access to justice in this sense is to have the minimal ability to bring one's legal claims before a court by filing a lawsuit, and such access is distributed equally when everyone has the same opportunity to initiate the legal process. This understanding of access to justice has a venerable pedigree, embodied in the "day in court" ideal and the original "liberal ethos" of the

31. See, e.g., Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 908–21.

32. For that reason, I don't consider values seen as inherent in procedure, such as political legitimacy, see, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 189 (2004), or dignity, see, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 158–253 (1985). For a different account of the role of dignity in civil procedure, see Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501 (2020).

33. Baruch Bush, for example, includes efficiency ("resource allocation"), distributive justice ("social justice"), "public order," and "human relations" among the "goals of civil justice." See Bush, *supra* note 31, at 908. While these are all plausible candidate goals for any civil justice system to pursue, every social institution, not just the civil justice system, should be responsive to these values. The phrase "access to justice," by contrast, is commonly taken to refer to goods distinctive of the civil justice system. Bush contends that "the dispute handling system has a unique contribution to make to the furtherance of each goal, that cannot be duplicated by other social institutions, since they do not deal as directly with individual dispute situations." *Id.* at 923. But it's hard to see how goals such as efficiency and distributive justice have any particularly distinctive application in "individual dispute situations." Indeed, I argue that the pursuit of distributive justice in the civil justice context often ends up conflicting with the pursuit of other salient goals. See *infra* Section III.A.3.

34. See RHODE, *supra* note 6, at 5 ("In most discussions, 'equal justice' implies equal access to the justice system."); J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221, 223–24, 227 (2017) (identifying as one of three "goals" of procedural law "meaningful legal access for those who have claims for relief" and equating access to justice with civil procedure's "claim-facilitative function" (footnote omitted)); Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, 148 DÆDALUS 177, 178 (2019) ("Traditionally, access to justice has meant at minimum the effective capacity to bring claims to a court . . ."); Andrew Higgins, *The Costs of Civil Justice and Who Pays?*, 37 OXFORD J. LEGAL STUD. 687, 696 (2017) ("[A]ccess to justice consists of both an implied right of access to court and due process for litigants once they get there."); Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1417–34 (2018) (arguing that the Supreme Court's recent personal jurisdiction jurisprudence threatens to undermine access to justice by depriving certain categories of plaintiffs of any forum in which to bring their claims). The good of court access has also been recognized to have a physical, rather than purely legal, dimension. See *Tennessee v. Lane*, 541 U.S. 509, 523, 533–34 (2004) (holding that Congress had the power to abrogate the States' sovereign immunity and subject them to private lawsuits for failing to provide reasonable accommodations to disabled individuals seeking to access courthouses).

Federal Rules of Civil Procedure.³⁵ It also seems to motivate much of the scholarly criticism of recent Supreme Court decisions that arguably make it more difficult for plaintiffs to file their claims in court.³⁶

Defined in terms of court access, access to justice is a means to further ends, not an end in itself. Scholars do sometimes speak as though it were an end, neglecting to specify the further objectives court access is supposed to serve.³⁷ But those further objectives are never far below the surface. For example, the ability of individuals to bring their legal claims before a court, regardless of their social status, has long been considered an essential demand of the rule of law.³⁸ Other scholars have described courts as a government-provided “service” to which all must be afforded equal access, just as with roads.³⁹ Such attempts to explain the significance of court access assume that granting people access to courts is necessary for realizing other goals. If the rule of law requires equal access to the courts, that is presumably because such access promotes some value associated with the rule of law. And if courts provide a public “service,” then court access is a means of obtaining that service. Many discussions of access to justice, however, treat court access as its own good, distinct from the ends it serves—a good that can be distributed among the potential users of the civil justice system.

Court access is also a largely formal notion of access to justice. It’s concerned with one’s ability to get into court in the first place, rather than with what happens to one’s case once there. Even as you can readily present your claims to a court, you can still lack the ability to litigate those claims effectively. And yet, court access still has some modest substantive content. Most notably, scholars have invoked the notion of court access to criticize filing and other kinds of litigation fees for preventing economically disadvantaged parties from presenting their claims in court.⁴⁰ Such criticisms recognize that, even if one enjoys formal access

35. See, e.g., Miller, *supra* note 10, at 288 (associating the “ethos” of the Rules with “citizen access to the courts”); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1736–37 (2013) (similar).

36. See *supra* note 10.

37. Cf. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 872 (2009) (lamenting the “common tendency in bar discussions of access to justice . . . to treat the provision of services as an end in itself”).

38. See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 214, 217 (1979) (identifying as one corollary of the rule of law the principle that “[t]he courts should be easily accessible”); Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 691 (2006) (“A society based on the rule of law fails in one of its central premises if substantial parts of the population lack access to law enforcement institutions.”). For a recent critical examination of the various possible connections between access to justice and the rule of law, see generally Lucy, *supra* note 24.

39. Resnik, *supra* note 4, at 620–21; Resnik, *supra* note 8, at 921 (describing the status of “courts in the United States as a constitutionally-obliged substantive entitlement, a positive and regulated service that the government subsidizes”).

40. See, e.g., Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1504–05 (2019); Michelman, *supra* note 29, at 1165, 1172–77; Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part II*, 1974 DUKE L.J. 527, 530–31; Resnik, *supra* note 4, at 656–66 (providing empirical evidence that fees limit access); Resnik, *supra* note

to the courts, in the sense of not being legally prohibited from filing a lawsuit, one can still face various barriers that *effectively* prevent one from ever initiating the legal process. Truly equal access to courts requires eliminating such barriers. Although that won't necessarily improve anyone's ability to litigate his or her case, it will make it easier to at least get the case off the ground, a modest substantive achievement.⁴¹

Recognizing the (limited) substantive content of the good of court access makes the connection between court access and economic inequality relatively explicit: insofar as there's significant economic inequality, some people will be able to access the courts much less readily than others; court access, like many other social goods, will be distributed unequally.⁴² That will be true even apart from the existence of filing fees. As Nora Freeman Engstrom has explained, the very act of "claiming"—asserting a legal claim before a court—has a "distributive dimension," for "[s]ome studies suggest that low-income individuals have been traditionally less likely to seek redress following accidental injury, as compared [with] their wealthier counterparts."⁴³ Amid efforts to make civil procedure more cognizant of economic inequality, court access will figure among the goods to be distributed more equally.

B. PARTY RESOURCES

Although court access is perhaps the good most commonly associated with access to justice, few scholars believe that the ideal's demands are fully satisfied simply when everyone can present his or her legal claims to a court. Most also understand access to justice to be concerned with what happens to a case after it has been initiated.⁴⁴ In particular, many argue that the parties to a case should be able to command roughly equal resources so that they can litigate more or less on

8, at 941 ("The promises of access and remedies become illusory when courts charge fees that systematically exclude sets of claimants . . ."); *id.* at 961–67.

41. The substantive dimension of court access is also highlighted by the "informal justice" movement, which advocates simplified procedures as a way of promoting access to justice. *Cf.* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 954, 957 (2000) (arguing that legal complexity restricts access). *See generally* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE (Richard L. Abel ed., 1982). That proposal recognizes the complexities of court procedures as yet another obstacle to court access. Just like eliminating filing fees, simplifying the procedures of civil litigation can make it easier to present one's claims to a court.

42. The poor face the most significant impediments. *See, e.g.*, Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1420–21 (1995); Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1329–31 (2007); John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 589–90 (1984); Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 327–28 (2010).

43. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 830–31 (2011). *But see* Eric Helland, Daniel Klerman, Brendan Dowling & Alexander Kappner, *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1991–92 (2017) (presenting empirical evidence suggesting, but not proving, that low-income individuals may file personal-injury tort claims at *higher* rates than high-income individuals).

44. *See, e.g.*, LAHAV, *supra* note 15, at 115–17.

a par with each other.⁴⁵ William Rubenstein has dubbed this kind of equality “equipage equality,” a “measure of equality in the litigants’ capacities to produce their proofs and arguments.”⁴⁶ On this understanding, you lack access to justice if you lack the resources to litigate your case effectively, and you lack *equal* access to justice if you lack the resources to litigate your case more or less as effectively as your opponent.⁴⁷

Focusing on party resources, as with court access, treats access to justice as a means to further ends rather than an end in itself, with equality of party resources supposedly promoting accurate dispute resolution. As Rubenstein explains: “The concern of [equipage] equality [is] that socio-economic disparities brought to the adjudicative forum render[] the resulting adversarial dispute resolution process problematic.”⁴⁸ This concern is especially acute given the relative “passivity” of courts in our adversarial legal system, which puts a premium on the parties’ relative abilities to present their respective evidence and arguments.⁴⁹ And yet, notwithstanding their instrumental nature, party resources are a distinct good and thus a distinct object of distribution. It’s possible to seek to distribute party resources equally without considering the effect on the accuracy of the resolution of any given dispute, even if that’s the goal such a distribution is ultimately supposed to realize.

Although party resources share the instrumentality of court access, they lack the latter’s formality. Equality of party resources is a more substantive conception of access to justice, in that it aspires to render access *meaningful* or *effective*—hence scholars’ emphasis on resources that help parties to litigate their cases more effectively. One of the most significant resources in this regard is legal representation, which tends to be a main focus in discussions of access to justice.⁵⁰ For many scholars, achieving access to justice means ensuring that parties obtain legal representation, whether through free or subsidized counsel⁵¹ or one-way fee

45. See, e.g., Resnik, *supra* note 8, at 941 (“The promises of access and remedies become illusory . . . when the resources of the disputants are widely asymmetrical.”); *id.* at 967–72.

46. Rubenstein, *supra* note 4, at 1867–68; see *id.* at 1873–84. The term “equipage” was apparently coined by Michelman. *Id.* at 1868 n.9 (citing Michelman, *supra* note 29, at 1163).

47. For a prominent philosophical treatment, see generally Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303 (1988).

48. Rubenstein, *supra* note 4, at 1900–01; see also, e.g., LAHAV, *supra* note 15, at 117–18; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 517 (1986) (“When gross imbalances are commonplace and patent, a belief in adversarialism has a hollow ring.”).

49. See Galanter, *supra* note 3, at 119–21. For a more elaborate philosophical argument that, in an adversarial legal system, justice requires equal access to lawyers, see generally Shai Agmon, *Undercutting Justice – Why Legal Representation Should Not Be Allocated by the Market*, 20 POL., PHIL. & ECON. 99 (2021).

50. For example, the introduction to a special issue of the journal *Dædalus* on the American Academy of Arts and Sciences’ “Making Justice Accessible” project identified as one significant manifestation of the “justice gap” the fact that “the legal system does not ensure that all individuals with a civil legal problem get access to and secure either competent legal counsel or some other kind of help in addressing their problem.” John G. Levi & David M. Rubenstein, *Introduction*, 148 DÆDALUS 7, 7–8 (2019).

51. See, e.g., STEVEN P. CROLEY, CIVIL JUSTICE RECONSIDERED: TOWARD A LESS COSTLY, MORE ACCESSIBLE LITIGATION SYSTEM 124–30 (2017); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL

shifting in certain cases.⁵² That is a substantive, rather than merely formal, understanding of access to justice.

The substantive nature of party resources supports a capacious conception of what counts as a resource. If what matters is parties' ability to litigate their cases effectively, then parties' resources include *anything* that enhances their ability to litigate their cases. Resources are therefore a function not only of what one brings *to* court, but also of what court rules and procedures allow one to do *in* court. Party resources, in other words, also include the various opportunities afforded by court rules and procedures. For example, the tools of discovery count as a resource, even if a party requires additional (financial) resources to make full use of them. It follows that equality of party resources can be undermined not only when a poorer party must litigate against a wealthier one, but also when courts interpret or apply procedural rules in ways that restrict some parties' access to procedural opportunities—as is arguably true of the Supreme Court's pleading decisions and their effects on access to discovery⁵³ and the recently emphasized requirement that discovery be “proportional to the needs of the case.”⁵⁴

Party resources are a substantive good, but when it comes to seeking to distribute that good equally, the focus is local rather than global. Given that party resources matter insofar as they enable parties to litigate effectively against their opponents, equality of party resources must be judged at the level of the individual lawsuit, not the civil justice system as a whole. Courts can, to be sure, affect the broader distribution of resources for whole classes of potential litigants in distributing procedural opportunities between the parties directly before them—by, say, assigning the burden of production or proof to one party rather than the other.⁵⁵ The same is true of generally applicable rules of procedure. But the good

STUDY 306–16 (1988); Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865, 865 (2004) (“In most common usage, ‘access to justice’ means access to a lawyer, or what are generally regarded as next-best alternatives, such as assistance for self-represented litigants or demystifying court procedures.”); Cohen, *supra* note 8, at 222 (considering how legal service providers should “ration” “legal assistance”); Galanter, *supra* note 3, at 139 (arguing that the poor should be given free legal services in order to counteract the advantages enjoyed by repeat players); Carrie Menkel-Meadow & Robert G. Meadow, *Resource Allocation in Legal Services*, 5 *LAW & POL’Y Q.* 237, 238–40 (1983); Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 *FORDHAM L. REV.* 1899, 1921–23 (2017).

52. See, e.g., Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified as amended at 5 U.S.C. § 504 (2018) and 28 U.S.C. § 2412 (2018)). See generally Issachar Rosen-Zvi, *Just Fee Shifting*, 37 *FLA. ST. U. L. REV.* 717, 722 (2010) (proposing “a progressive one-way fee-shifting rule” favoring poor litigants).

53. See *Ashcroft v. Iqbal*, 556 U.S. 662, 683–86 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–59 (2007). For a critical overview of the extensive empirical debate about whether *Twombly* and *Iqbal* have in fact had such effects, see generally Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 *STAN. L. REV.* 369 (2016).

54. FED. R. CIV. P. 26(b)(1); see, e.g., Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 *DEPAUL L. REV.* 269, 281–88 (2020) (arguing that the proportionality requirement, at least as currently applied by many courts, disproportionately affects economically disadvantaged parties).

55. See John Gardner, *Legal Justice and Ludic Fairness*, 11 *JURISPRUDENCE* 468, 468 (2020) (“Often a court has to decide . . . how to assign which levers of procedural control, which argumentative

of party resources is, in the first instance, an object of local, rather than global or systemic, distribution.

In an era of significant economic inequality, party resources are an especially salient good because economic inequality is a significant source of disparities in party resources.⁵⁶ This isn't to deny the existence of other party asymmetries in civil litigation. Another asymmetry is that between what Marc Galanter famously called the "repeat player" and the "one-shooter"—between a party "which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests" and a party "whose claims are too large (relative to his size) or too small (relative to the cost of remedies) to be managed routinely and rationally."⁵⁷ But as this definition makes clear, the repeat-player phenomenon is itself partly a product of disparities in party resources, and thus of economic inequality.⁵⁸ Counteracting repeat players' advantages will thus often require blunting the effects of economic inequality on the parties' respective resources. That, in turn, can be achieved by either leveling up (that is, providing additional resources to economically disadvantaged parties) or levelling down (that is, restricting better-heeled parties from making full use of their resources).⁵⁹ Both strategies seek to limit the ability of economically advantaged parties to litigate their cases more effectively simply by virtue of their superior resources.

C. JUDICIAL RESOURCES

Proponents of access to justice advocate more egalitarian distributions not only of *party* resources, but also of *judicial* resources. By "judicial resources" I mean judicial personnel (judges, court staff, and jurors), the time and attention of those personnel,⁶⁰ and the financial and other wherewithal of courts, as well as the ways in which procedural rules and doctrines allocate those other resources.⁶¹ The basic demand of access to justice with respect to judicial resources is that they be distributed more or less equally across different categories of cases and different groups of litigants. Conversely, access to justice is undermined when a larger

privileges, and which evidential or probative burdens, to which of the parties to the proceedings. And often, in doing these things and others, a court redistributes legal rights, duties, powers, permissions, justifications, excuses, presumptions, and so on, across a wider population of future law-users and law-violators.").

56. See Hershkoff, *supra* note 42, at 1329 ("Wealth clearly affects a litigant's ability to access the civil justice system . . .").

57. Galanter, *supra* note 3, at 97–98.

58. See *id.* at 125 fig.3. Though the phenomenon is not completely the product of such disparities. See *id.* at 103 (refusing to equate repeat players with "haves" and one-shooters with "have-nots").

59. See T. M. SCANLON, WHY DOES INEQUALITY MATTER? 18–19 (2018) (suggesting that levelling down can be appropriate in the legal context).

60. Cf. Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013) (evaluating how federal appellate courts allocate the scarce attention of judges).

61. For an in-depth study of how the substantive doctrines of constitutional law allocate judicial resources in this sense, see generally ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019).

share of judicial resources is devoted to certain, favored categories of cases than to other, disfavored ones.

Although rarely presented in such stark terms, the demand for a more egalitarian distribution of judicial resources is implicit in certain critiques of contemporary civil practice. Many of those critiques fault courts for focusing unduly on “big” or “complex” cases (often with larger financial stakes) at the expense of more routine cases, skewing the distribution of judicial resources in favor of the former.⁶² There are several different mechanisms through which such maldistribution of judicial resources can occur.

In the most direct mechanism, courts foreclose a particular cause of action, effectively withdrawing all judicial resources from that category of litigation so that they can be reserved for other, “more important” cases. This occurs, for instance, when courts embrace the “floodgates” argument, the idea that

certain sorts of law suits should not be allowed because to do so would ‘swamp’ the courts with litigation. The court supposes that if it were to allow that type of suit it would lack the time to consider promptly enough other law suits aiming to vindicate rights that are, taken together, more important than the rights it therefore proposes to bar.⁶³

The access-to-justice concern with the floodgates argument is that courts invoke it disproportionately to avoid having to deal with disfavored claims typically brought by disfavored groups of litigants, such as prisoners or discrimination plaintiffs.⁶⁴ When they do so, courts are effectively reallocating their resources away from those disfavored cases toward ones deemed more important.

Courts can also end up distributing judicial resources among different categories of cases somewhat more indirectly, simply by devoting more time and attention to some and thereby leaving less for others. This seems to be one potential concern with the practice that Judith Resnik has dubbed “managerial judging,” whereby judges focus on the “managerial” tasks associated with shepherding cases through the pretrial phase (usually resulting in settlement) at the expense of the more traditionally “adjudicatory” tasks associated with actually deciding cases on the merits.⁶⁵ Criticisms of managerial judging have tended to focus on

62. See generally, e.g., Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016) (criticizing courts’ focus on complex cases and attributing that focus partly to “one-percent” bias).

63. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 100 (1978).

64. See Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1037–53 (2013). See generally ERWIN CHEMERINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (2017) (criticizing recent procedural restrictions placed on constitutional litigation); LAHAV, *supra* note 15, at 124–26 (criticizing the severe restrictions placed on prisoner litigation by the Prison Litigation Reform Act (PLRA)). For a recent example of this tendency, see *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020), in which the Supreme Court unanimously held that the PLRA’s “three-strikes” provision, 28 U.S.C. § 1915(g) (2018), applies to all dismissals for failure to state a claim, whether with prejudice or without—a decision that could well significantly reduce the number of prisoner cases brought in federal court.

65. See Resnik, *supra* note 48, at 534–35. See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

the practice's costs for *managed* cases, particularly the risk that judges will abuse their power to prematurely terminate potentially meritorious lawsuits.⁶⁶ But managerial judging might also have more systemic implications for the distribution of judicial resources. In particular, insofar as more complex cases require more case management, judges who adopt a more managerial posture will end up spending more time and attention on complex cases than they otherwise would, necessarily reducing the time and attention they have to spend on more routine cases.⁶⁷ The prevalence of managerial judging can thereby end up slighting routine cases. Once again, from an access-to-justice perspective, the worry is that courts are giving certain categories of cases short shrift so that they can focus on the ones that, from many judges' perspectives, really matter.

One can understand these first two mechanisms for distributing judicial resources among different categories of cases as a form of disparate treatment: whether or not deliberately, relevant actors allocate fewer judicial resources to certain categories of cases out of a sense that those cases are less important. A third mechanism can be understood as a form of disparate impact: rather than choose to allocate their time or other resources to any particular category of cases, relevant actors can respond to the peculiar features of complex cases by adopting generally applicable rules, doctrines, and practices that have the effect of disproportionately burdening less complex cases. This is arguably what occurs when "litigation reform" measures are instituted to curb perceived abuses in "big" cases but end up stymying small cases as well.⁶⁸ Brooke Coleman has given a similar account of recent trends in the formal rulemaking process and in judicially developed procedural doctrine. Both processes, Coleman contends, are dominated by elite judges and lawyers focused on "litigation that involves highly resourced parties disputing complex issues."⁶⁹ This influence produces rules and practices developed with complex cases in mind that then "trickle down" to more routine cases, which they tend to unduly restrict.⁷⁰ According to Coleman, "[T]he entire

66. See, e.g., Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 63–65 (2019); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 39–42 (2003); Resnik, *supra* note 65, at 425–26; Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1311 (2010).

67. See Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 879 (2018) (arguing that ad hoc judicial practices, such as managerial judging, require significant time and attention).

68. See Thomas O. Main, *Procedural Constants: How Delay Aversion Shapes Reform*, 15 NEV. L.J. 1597, 1613 (2015) ("Although big cases constitute a small percentage of federal court litigation, the problems with big cases tend to dominate popular narratives about civil litigation and tend to fuel reforms that affect all cases, rather than only the big cases."). For more on the longstanding debate in the civil procedure literature about "big" cases and the disproportionate attention and resources they command, see Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1688–89 & nn.14–17 (1992) (collecting sources).

69. Coleman, *supra* note 62, at 1014; see *id.* at 1015–23; see also Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015) (reporting empirical findings that in recent decades the membership of federal civil rulemaking bodies has become increasingly pro-defendant, while their output has become increasingly anti-plaintiff).

70. Coleman, *supra* note 62, at 1041–46.

civil litigation system is captured by lawyers, judges, and parties that, while participating in the rarest litigation, inevitably bend the rules of the civil litigation system toward their best interests.”⁷¹ She accordingly advocates measures to “level the playing field among all litigants—large or small”⁷²—including structural reforms to incentivize courts and other actors to focus more on routine cases⁷³ and even separate litigation tracks for complex and routine cases.⁷⁴ The important point for the purposes of this Article is that such proposals amount to calls for greater equality in the distribution of judicial resources among different categories of cases.

Regardless of the precise mechanism by which judicial resources are distributed among cases, such resources are a means to further ends rather than ends in themselves. We care about the distribution of judicial resources primarily because of the goals they can be used to achieve, not just for their own sake. But whereas the goal of party resources is to enable parties to litigate their cases more effectively, the goal of judicial resources is to enable courts to resolve those cases more effectively. It’s still possible, though, to treat judicial resources as their own object of distribution distinct from those further goals.

Also as with party resources, a focus on the distribution of judicial resources reflects a substantive, rather than merely formal, understanding of access to justice. The point is to render access to justice meaningful or effective by ensuring that all cases receive the necessary amount of time, attention, and so on. It’s helpful to contrast, in this regard, the more familiar procedural ideal of “transsubstantivity,” according to which the same procedural rules should apply to all civil cases, regardless of subject matter.⁷⁵ That is a purely formal understanding of equality between different kinds of cases, as it concerns only the general

71. *Id.* at 1009; cf. Galanter, *supra* note 3, at 100–03 (describing the ability of repeat players to “play for [the] rules”); Resnik, *supra* note 4, at 607 (lamenting “the ability of ‘repeat players’ . . . to come out ‘ahead’ by using their resources and knowledge to structure procedures benefitting their interests rather than those of ‘one-shot’ players”).

72. Coleman, *supra* note 62, at 1012.

73. *See id.* at 1063–70.

74. *See id.* at 1070; *see also, e.g.*, Miller, *supra* note 10, at 370–71; Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 398–405 (2010). One might think that small claims courts, with their less onerous procedures, are supposed to serve precisely that function. *See, e.g.*, CROLEY, *supra* note 51, at 195–210 (making the access-to-justice case for small claims courts and advocating their extension to “medium claims”). Although that may have been their original purpose, *see, e.g.*, John Montague Steadman & Richard S. Rosenstein, “Small Claims” Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study, 121 U. PA. L. REV. 1309, 1309 n.2 (1973), in practice they’re primarily used by businesses to collect debts, *see* Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. REV. 269, 272 (1994). That’s partly because even small claims courts impose significant procedural hurdles. *See* James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 UDC L. REV. 177, 187–88 (2000).

75. On the general idea of transsubstantivity in civil procedure, *see* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975). For an account linking transsubstantivity to “rule equality,” *see* Rubenstein, *supra* note 4, at 1885–92.

applicability of the rules governing civil litigation.⁷⁶ The call to distribute judicial resources more equally goes further, attending to the effective priority the judicial system assigns any given category of cases relative to others.

But in contrast to party resources, the substance of judicial resources is defined globally or systemically rather than locally. Whereas the distribution of party resources matters at the level of an individual lawsuit, the distribution of judicial resources necessarily occurs across all the cases composing the judicial system's docket.

The connection between judicial resources and economic inequality is similarly global or systemic rather than local. As we've seen, the concern with judicial resources is not that economic inequality will infect any given case, but that the judicial system will tend to slight whole categories of cases that disproportionately involve economically disadvantaged parties.⁷⁷

D. DISPUTE RESOLUTION: THIN AND THICK

The goods commonly associated with access to justice that I've considered so far—court access, party resources, and judicial resources—are all means to further ends.⁷⁸ Although the ends to which they're means often remain implicit, it's possible to focus on the ends themselves as objects of distribution. Scholars concerned with access to justice often do exactly that, with the two most frequently cited ends being dispute resolution and rights enforcement. I consider the first in this Section and the second in the next.

Proponents of broader access to justice frequently mention dispute resolution as one good to be distributed more equally. Calls to make the civil justice system more accessible often focus on its dispute-resolution function,⁷⁹ while scholars advocating greater public funding for courts emphasize the state's role in authoritatively

76. Cf. Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1653–59 (2017) (associating transsubstantivity with formal equality).

77. Distributing judicial resources more equally is not the civil justice system's only possible response to economic inequality. Some scholars have expressly advocated an *unequal* distribution of judicial resources among cases, though with more resources going to suits likely to benefit economically disadvantaged parties. See, e.g., Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 45–46 (1979) (suggesting that structural suits “engage the judge in his most worthy and important function” and urging courts to “divert to other institutions the simpler, less complex cases”).

78. Cf. WILMOT-SMITH, *supra* note 5, at 15 (“Few people want legal resources for their own sake: people want a lawyer or to have access to courts in order to achieve an outcome.”). To classify these goods as instrumental is by no means to deny that legal procedures can have intrinsic value. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 72 (1985); Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1667–97 (2016) (identifying various “democratic” benefits of civil litigation, some of which are intrinsic to civil procedure); Shapiro, *supra* note 32 (analyzing dignitarian theories of procedure). Even if the value of procedure is partly intrinsic, court access, party resources, and judicial resources all remain instrumental to that value.

79. See, e.g., CROLEY, *supra* note 51, at 29 (“As a state-enforced mechanism for resolving disputes, civil litigation often is an attractive alternative to other forms of conflict resolution.”); RHODE, *supra* note 6, at 20 (seeking to promote access to justice by establishing “coordinate comprehensive systems for the resolution of disputes and the delivery of legal services”).

resolving disputes between private parties.⁸⁰ There's a longstanding debate in the civil procedure literature about the relative significance of dispute resolution among the various ends of civil litigation. Perhaps most famously, Owen Fiss has argued that civil litigation, properly understood, shouldn't concern itself *at all* with the resolution of disputes. "[C]ourts," Fiss declares, "exist to give meaning to our public values, *not* to resolve disputes."⁸¹ But that categorical statement is simply implausible as an account of the function of courts in the American civil justice system.⁸² Rather, as Robert Cover explained, "[a]djudication in the common law mold entails two simultaneously performed functions: dispute resolution and norm articulation."⁸³ The two functions are inextricably linked in our civil justice system, for "the norm articulation function [can]not be performed apart from dispute resolution," while resolving disputes according to law "will necessarily entail the articulation of general norms."⁸⁴ So whatever functions courts should be performing in civil cases, resolving disputes is among them. Proponents of access to justice accordingly portray courts and the civil justice system more generally as providers of dispute-resolution services, access to which can be more or less equal, and thereby treat dispute resolution itself as an object of distribution.

Implicit in discussions of access to justice, however, are two different notions of dispute resolution—one thin and one thick.⁸⁵ According to the thin notion,

80. See, e.g., Resnik, *supra* note 8, at 939 (emphasizing the importance of "accessible court services for ordinary disputants seeking state-based dispute resolution assistance"); see also, e.g., Judith Resnik, *Courts and Economic and Social Rights/Courts as Economic and Social Rights*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 259, 267 (Katharine G. Young ed., 2019) ("The ability to provide dispute resolution systems requires resources from governments for funding of courts' budgets and raises questions about subsidies for users."); *id.* at 286 (emphasizing the need for "accessible courts for ordinary disputants seeking state dispute resolution assistance").

81. Fiss, *supra* note 77, at 29 (emphasis added); see also *id.* at 30 ("[T]he function of the judge . . . is not to resolve disputes, but to give the proper meaning to our public values."). In the same article, Fiss likewise defines "[a]djudication" as "the social process by which judges give meaning to our public values." *Id.* at 2; cf. DAMAŠKA, *supra* note 16, at 88–90 (presenting dispute resolution and "policy implementation" as two distinct, and opposed, functions of a civil justice system). Adjudication does do that, but that is not *all* adjudication does.

82. Though it may be a more compelling statement of the function of the Supreme Court in particular. See Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668–69 (2012).

83. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 643 (1981).

84. *Id.*

85. The distinction I'm drawing between the thin and thick notions of dispute resolution is orthogonal to other distinctions prominent in the civil procedure literature. For example, scholars have distinguished between individualist and collectivist conceptions of legal claims. See, e.g., Glover, *supra* note 34, at 229–39 (discussing individualist and collectivist positions in debates about class actions). But the distinction between the thin and thick notions of dispute resolution concerns the point (or one of the points) of adjudication, not the nature of the claims being adjudicated. For the same reason, the distinction I'm drawing transects the distinction in economics between public and private goods. Dispute resolution, whether thick or thin, is a private good in that sense because it need not be made available to anyone beyond the immediate parties to the dispute (that is, it's excludable), though various public goods (such as those identified by Fiss) can indeed flow from the provision of that private good.

dispute resolution means resolving a dispute simply to achieve peace between the parties, irrespective of whether the resolution is “just” or even legally correct.⁸⁶ As we’ll see in the next Part, this is the notion of dispute resolution espoused by many proponents of alternative dispute resolution (ADR), particularly arbitration.⁸⁷ It also figures in discussions of class action settlements, whose goal (at least from the perspective of defendants) is to achieve “global peace”—the resolution of all claims against a particular defendant arising out of a particular event.⁸⁸

One might question whether the thin notion of dispute resolution represents a legitimate function of the civil justice system. After all, one might suppose, courts are legal institutions and, as such, must resolve disputes only *according to law*.⁸⁹ I’ll consider in Part III the normative question whether the state may legitimately aim to resolve disputes simply to achieve peace between the parties.⁹⁰ For now, I’ll just note that, as a descriptive matter, courts are routinely in the business of helping to resolve disputes in the thin sense.⁹¹ That’s because most cases now settle, and facilitating those settlements is one of courts’ main tasks.⁹² Although

See generally William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

86. *See, e.g.*, Jay Tidmarsh, *Resolving Cases “On the Merits,”* 87 DENV. U. L. REV. 407, 408–09, 431 (2010); *see also* Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan’s Celestial City*, 98 COLUM. L. REV. 1516, 1522 (1998) (“It is sometimes assumed that the business of courts is merely dispute resolution, by whatever means may be effective to bring repose”); Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 286–87 (2008) (arguing that the goal of federal civil litigation has evolved from “deciding cases on the merits to merely disposing of cases as expeditiously as possible”); *cf.* DAMAŠKA, *supra* note 16, at 102 (“Where the object of adjudication is to resolve disputes, . . . insistence on the substantive accuracy of verdicts loses much of its *raison d’être*.”) *id.* at 123, 135–36 (portraying dispute resolution as being at odds with truth seeking).

87. *See infra* notes 129–30 and accompanying text.

88. *See, e.g.*, Rhonda Wasserman, *Future Claimants and the Quest for Global Peace*, 64 EMORY L.J. 531, 536–39 (2014).

89. *See, e.g.*, Liam Murphy, *The Normative Force of Law: Individuals and States*, in 3 OXFORD STUDIES IN PHILOSOPHY OF LAW 87, 116 (John Gardner, Leslie Green & Brian Leiter eds., 2018) (“[T]hat the judicial branch should resolve disputes according to law, in all but the most extreme circumstances—such as would warrant an attempt to undermine a grossly unjust or illegitimate system from within—is not something that needs much argument. What else should it be doing?”); *cf.* Carrington, *supra* note 86, at 1522–23 (disparaging what I’m calling the thin notion of dispute resolution as a “pre-Enlightenment purpose” of the judicial system).

90. *See infra* notes 208–14 and accompanying text.

91. *See generally* James R. Maxeiner, *The Federal Rules at 75: Dispute Resolution, Private Enforcement or Decisions According to Law?*, 30 GA. ST. U. L. REV. 983 (2014) (arguing that civil litigation, as currently structured, primarily performs the function of dispute resolution in the thin sense, though lamenting that fact).

92. *See* FED. R. CIV. P. 16(a)(5) (listing “facilitating settlement” as one of the main purposes of the pretrial conference). Owen Fiss famously criticized the modern emphasis on settlement for slighting the “public” functions of civil litigation, particularly norm articulation. *See* Fiss, *supra* note 3, at 1085; *see also, e.g.*, Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 19–20 (1987); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676–77 (1986). But such criticisms have been overtaken by the ubiquity of settlements. Indeed, some scholars have argued that civil procedure should be restructured to account for this reality.

settlements may well be reached “in the shadow of the law,”⁹³ that doesn’t necessarily mean that settled cases are authoritatively resolved according to law.⁹⁴ Insofar as settlement remains a pervasive practice in our civil justice system, proponents of access to justice will continue to treat the thin notion of dispute resolution as a distinct good to be distributed more equally.

As this discussion suggests, in contrast to the thin notion of dispute resolution, the thick notion demands not just a resolution of the dispute for its own sake, on whatever terms, but rather a resolution “on the merits,” according to the applicable substantive law.⁹⁵ This notion of dispute resolution is most commonly associated with the framers of the original Federal Rules of Civil Procedure, who envisioned the Rules as a “handmaid of justice”⁹⁶ that would facilitate the “resolution of disputes on their merits.”⁹⁷ It also (arguably) underlies Lon Fuller’s prominent account of adjudication.⁹⁸ And it predominates in contemporary accounts of civil procedure, though it often travels along with the good of court access, the ability to present one’s legal claims to a court.⁹⁹ The point for present purposes is that the thin and thick notions of dispute resolution represent distinct goods and thus distinct objects of distribution: whereas equalizing access to dispute resolution in the thin sense means ensuring that everyone has an opportunity to get his or her disputes with others conclusively resolved, equalizing access to dispute resolution in the thick sense means ensuring that everyone has an

See generally, e.g., J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012).

93. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

94. This is by no means to gainsay the potentially significant public benefits, including benefits sounding in a kind of “justice,” that can flow from the thin form of dispute resolution achieved through settlements. *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1195–1202 (2009).

95. Perfect accuracy in dispute resolution is, of course, an elusive goal, and so the good of dispute resolution in the thick sense, as a practical matter, reduces to a purported resolution of one’s dispute on the merits, infected by no more than a “reasonable” risk of error in the outcome. *Cf.* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 302–05 (2010) (arguing that the “central purpose of procedure” is to “distribute the risk of outcome error fairly and efficiently”).

96. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 319 (1938).

97. Miller, *supra* note 10, at 288; *see, e.g.,* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1969–70 (2014); Maxeiner, *supra* note 91, at 994–1002; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 962 (1987); Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 527–28 (2006).

98. The hedge in the text is meant to acknowledge an ambiguity in Fuller’s account of adjudication. On the one hand, Fuller, echoing the thick conception of dispute resolution, identifies as “the distinguishing characteristic of adjudication . . . the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.” Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978). On the other hand, adjudication for Fuller need not involve an exercise of the authority of the state, which suggests that disputes need not be resolved according to law. *See id.* at 354.

99. *See, e.g.,* Glover, *supra* note 34, at 277 (linking “opportunity for claiming and merits-based resolution of claims,” though conceding that the two are “at times in tension”).

opportunity to get his or her disputes conclusively resolved according to the applicable substantive law.

We can compare the thin and thick notions of dispute resolution along the various dimensions I've used to classify the other goods associated with access to justice. Both notions regard dispute resolution as an end in itself, not merely a means to further ends. Even if both goods serve more general values (say, communal harmony in the case of the thin notion of dispute resolution and norm articulation in the case of the thick notion), both are considered worth pursuing in their own right. But in contrast to the formality of the thin notion of dispute resolution, the thick notion sees dispute resolution as a substantive good because it requires disputes to be resolved according to a particular standard; what matters according to the thick notion is *how* a dispute is resolved, not just *that* it be resolved. Finally, the substance of the good of dispute resolution in the thick sense is defined locally, in terms of how a given dispute should be resolved, rather than globally, in terms of the dispute's broader systemic implications.

Despite their conceptual differences, both notions of dispute resolution are salient in conditions of economic inequality. For economic disadvantage can make it more difficult for individuals to get their disputes resolved at all, let alone according to the applicable law. Hence the preoccupation of many proponents of access to justice with policies designed to provide less expensive dispute-resolution services to economically disadvantaged individuals.¹⁰⁰

E. RIGHTS ENFORCEMENT: INDIVIDUAL AND AGGREGATE

The last good associated with access to justice that I'll consider is also the most prominent, at least in recent civil procedure scholarship: rights enforcement.

As with dispute resolution, there are at least two distinct goods—and thus two distinct objects of distribution—that tend to fall under the heading of “rights enforcement.” One is the opportunity for individuals to enforce the rights that the substantive law confers on them. According to many proponents of access to justice, one's substantive legal rights remain purely formal, and aren't truly meaningful, unless one enjoys access to some avenue for effectively enforcing or vindicating them by holding rights violators accountable.¹⁰¹ This notion of rights enforcement overlaps with the thick notion of dispute resolution because most, if not all, private disputes involve substantive claims of right, and the two goods are

100. Consider, in this regard, the burgeoning practice of online dispute resolution (ODR). See generally, e.g., Amy J. Schmitz, *Expanding Access to Remedies Through E-Court Initiatives*, 67 *BUFF. L. REV.* 89 (2019) (examining ODR's potential to expand access to justice).

101. See, e.g., LAHAV, *supra* note 15, at 54–55; DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 38 (2015) (“In principle, America is deeply committed to individual rights. In practice, few Americans can afford to enforce them.”); Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Businesses*, 46 *U. MICH. J.L. REFORM* 537, 538 (2013) (describing civil procedure's “progressive aim” of facilitating “enforcement of . . . private rights”); Higgins, *supra* note 34, at 691 (“A liberal democratic society governed by the rule of law must provide an effective and accessible system for enforcing private rights.”); Rhode, *supra* note 37, at 890 (“Making legal rights meaningful fosters values central to the rule of law and social justice.”).

often mentioned in the same breath.¹⁰² But there is nevertheless some conceptual space between the two goods, in that the thick notion of dispute resolution focuses on the declaration of the parties' legal relationships, whereas the individual notion of rights enforcement focuses on individuals' practical enjoyment of their legal rights. To appreciate this gap, consider settlements, which, depending on their terms, can vindicate rights that have been violated even though they're reached not according to the law, but only in its shadow.

A second notion of rights enforcement has a more aggregate focus. Rather than being concerned with any one individual's ability to enforce his or her own rights, this notion aims to secure rights broadly held by the members of large social groups against widespread violations.¹⁰³ This is the notion of rights enforcement underlying the related concepts of "private enforcement"¹⁰⁴ and the "private attorney general."¹⁰⁵ In our legal system, private parties, rather than governmental agencies, often have primary responsibility for enforcing statutorily enacted policies, including policies broadly conferring individual rights, and in seeking to enforce their own statutorily conferred rights, private parties often end up vindicating the rights of others similarly situated to them as well. The main procedural vehicle for the aggregate notion of rights enforcement, therefore, is not the individual bipolar lawsuit but the class action, in which a representative plaintiff stands in for a group of rights holders, each of whom experienced a similar rights violation.¹⁰⁶ As this connection to the class action demonstrates, when it comes to the aggregate notion of rights enforcement, access to justice demands that groups of rights holders be adequately protected against rights violations through the availability of lawsuits (including class actions) that will deter violations and compensate rights holders when violations do occur. The good that must be distributed more equally, in other words, is protection against widescale violations of a given category of rights.

Both the individual and the aggregate notions of rights enforcement are vulnerable to being undermined through either disparate treatment or disparate impact. With regard to disparate treatment, laws can expressly impose special procedural

102. See, e.g., Higgins, *supra* note 34, at 693 ("The civil justice system comprises the legal process for determining disputes and upholding rights, and the rules on accessing this procedure."); Maxeiner, *supra* note 91, at 1015 ("The essential goal of every modern system of civil justice is the application of law to facts to determine rights and resolve disputes according to law and justice.").

103. See, e.g., Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 601–10 (2010); Miller, *supra* note 10, at 291–92.

104. See generally Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013) (describing and assessing private enforcement regimes in the United States); Marcus, *supra* note 14, at 129–33 (noting the American emphasis on private enforcement).

105. Civil procedure scholars use the term "private attorney general" in many different ways. The use that best corresponds to the aggregate notion of rights enforcement is what William Rubenstein has called "the private attorney general as supplemental law enforcer," which denotes "private attorneys whose work for private clients contributes to the public interest by supplementing the government's enforcement of laws and public policies." William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2146 (2004) (capitalization omitted).

106. See, e.g., Resnik, *supra* note 10, at 83–84.

requirements on a given category of rights that make it more difficult to enforce those rights, at either the individual or aggregate level. Securities class actions, for example, are subject to heightened pleading requirements and limits on discovery, both of which arguably impede the enforcement of the rights granted by the securities laws.¹⁰⁷ As for disparate impact, even facially neutral procedural requirements can disproportionately burden certain categories of rights and, again, hinder the enforcement of those rights,¹⁰⁸ as is arguably true of the effect of the Supreme Court's recent pleading decisions on civil rights lawsuits.¹⁰⁹ Access to justice, understood in terms of the good of rights enforcement, demands that such barriers to enforcement be removed, so that individuals can vindicate their rights (the individual notion of rights enforcement) and rights can be safeguarded against widespread violations (the aggregate notion).¹¹⁰

Scholars often link both notions of rights enforcement to other goods associated with access to justice, and understandably so. For example, the individual notion is often mentioned alongside court access,¹¹¹ which makes sense given that the good of court access is the ability to present one's legal claims to a court and that many legal claims are rights claims. The aggregate notion of rights enforcement, meanwhile, seems to be closely connected to the thick notion of dispute resolution, inasmuch as the precedents set by merits-based resolutions of disputes involving rights violations can spur further rights litigation, encourage settlements of similar disputes, and thereby deter future rights violations, thus better securing rights holders' enjoyment of their rights.

But rights enforcement is still a distinct good, and we can appreciate the distinctions by again considering the various dimensions along which I've classified the other goods associated with access to justice. Both notions of rights enforcement—individual and aggregate—are ends in themselves rather than merely means to other ends, for both are recognized as goals of the civil justice system, even if their achievement also realizes other, further goods. Both notions, moreover, treat rights enforcement as a substantive rather than formal good; in contrast to court access,

107. See Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4 (2018); Rubenstein, *supra* note 4, at 1888–92 (discussing how heightened procedural requirements for certain kinds of disfavored litigation, such as securities class actions and prisoner litigation, can undermine equality).

108. See, e.g., Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 465–518 (2014); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 344–45 (1990).

109. See, e.g., Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 225–27.

110. Alleged rights violators have rights, too, perhaps including a right not to be held liable for meritless claims. But such rights are a competing value to be balanced against the imperatives of access to justice, not a good internal to access to justice itself.

111. See Marcus, *supra* note 14, at 137 (equating “access to court” with “private enforcement”); Steinman, *supra* note 34, at 1407 (considering how “personal jurisdiction doctrine can undermine access to justice and the enforcement of substantive rights and obligations”). Compare Glover, *supra* note 34, at 240 (associating access to justice with “facilitat[ing] claiming” (emphasis omitted)), with *id.* at 275–83 (developing “a theory of procedure in reducing transaction cost barriers to the effectuation of substantive rights” (capitalization omitted)).

rights enforcement means the successful or effective vindication of rights, not just the opportunity to present rights (and other) claims before a court. The two notions of rights enforcement, however, define the substance of that good at different levels: whereas the individual notion focuses on the ability of a person to enforce his or her rights through an individual lawsuit, the aggregate notion focuses on the extent to which rights are either protected or violated across society.¹¹²

Both notions of rights enforcement are salient in conditions of economic inequality. Because of their greater vulnerability, economically disadvantaged individuals tend to suffer more rights violations than more powerful parties, yet their economic disadvantage can also prevent them from effectively enforcing their rights. As Myriam Gilles has explained, “lower-income groups are more regularly and perilously exposed to abusive practices by private business interests,” particularly in the consumer and employment contexts, even as they enjoy fewer avenues for redressing those injuries.¹¹³ This means that measures that hinder rights enforcement will tend to disproportionately harm economically disadvantaged individuals. For that reason, discussions of access to justice will continue to focus on rights enforcement in an era of significant economic inequality.¹¹⁴

F. MAPPING ACCESS TO JUSTICE

The previous Sections together yield a conceptual map of the various goods that scholars tend to associate with access to justice and that they seek to distribute more equally in an era of economic inequality. I have identified five such goods and distinguished them along three main dimensions:

- whether the good treats access to justice only as a means to further ends or also as an end in itself;

112. Cf. WILMOT-SMITH, *supra* note 5, at 31 & 213 n.16 (distinguishing the ideal “that the little man succeeds even against the rich and powerful,” which “deals with equality in an individual suit,” from the ideal “that the powerless and powerful have no better prospects of securing what is theirs as of right,” which “deals with equality across the legal system”). In this respect, the aggregate notion of rights enforcement treats the effectuation and nonviolation of rights as themselves social “goals” to be achieved. See Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3, 15 (1982); Amartya Sen, *Rights as Goals*, in EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE 11, 12 (Stephen Guest & Alan Milne eds., 1985) [hereinafter Sen, *Rights as Goals*]; cf. JOHN GARDNER, *Public Interest and Public Policy in Private Law*, in TORTS AND OTHER WRONGS 304, 305–06, 326–27 (2019) (positing “seeing to it that justice is done according to law” as a “freestanding policy goal”).

113. Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1540 (2016); see *id.* at 1540–50.

114. Rights enforcement also bears on the first set of questions concerning the connection between civil procedure and economic inequality that I identified at the outset of this Article and that I’ve bracketed so far—namely, civil procedure’s tendency to compound or ameliorate economic inequality in society at large. In particular, constraining rights enforcement can exacerbate economic inequality because stronger parties’ power is likely to be only further entrenched when weaker parties can’t effectively enforce their rights. See *supra* note 3 and accompanying text; see also *infra* note 234 and accompanying text (discussing Owen Fiss’s account of civil procedure as facilitating “countervailing” power); cf. WILMOT-SMITH, *supra* note 5, at 41–43 (arguing that “equal justice . . . is a precondition for justice in the distribution of welfare over time”).

- whether the good is merely formal or instead more substantive, promising effective or meaningful access; and
- for the substantive goods, whether their substance is defined locally, in terms of an individual lawsuit, or globally, in terms of the civil justice system as a whole.¹¹⁵

So distinguished, the various goods can be represented in the following matrix:

	Formal	Substantive (local)	Substantive (global)
Means	Court Access	Party Resources	Judicial Resources
Ends	Dispute Resolution (thin)	Dispute Resolution (thick)/Rights Enforcement (individual)	Rights Enforcement (aggregate)

We can now see that, in urging broader access to justice, scholars are advocating a more egalitarian distribution of not just a single good, but rather a complex bundle of distinct (if related) goods—goods that differ from one another in several significant respects.

II. ACCESS-TO-JUSTICE TRADE-OFFS

While it's worth unbundling the concept of access to justice into its constituent goods simply for the sake of conceptual clarity, the prior Part's analysis also has practical implications. For the various goods associated with access to justice don't always travel together. The more distinct values or interests a particular concept comprehends, the more likely the concept is to contain mutually conflicting elements.¹¹⁶ And that turns out to be the case with access to justice: the goods considered in Part I may well be compatible in theory, but they end up clashing repeatedly in practice, requiring trade-offs *within* the ideal of access to justice itself.

This Part explores the conflicts between the different goods associated with access to justice in the context of three prominent doctrinal and policy issues on which civil procedure scholars have recently focused: arbitration, litigation

115. I thus think the choice between an individualistic and a systemic approach to access to justice is a false one. Some of the goods we care about distributing more equally are constituted, and thus have meaning, at the level of the individual lawsuit, while other goods become relevant only in the context of the broader civil justice system. *But cf.* Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate: Individual vs System-Level Justification and the Rule of Law*, 52 U.C. DAVIS L. REV. 1371, 1416–23 (2019) (demanding a “[systemic] explanation” for changes in the plaintiff win rate over time).

116. *Cf.* David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 227 (2016) (“The more sorts of privacy claims that there are, the greater the risk that there will be conflicts among them.”).

finance (or third-party litigation funding), and aggregate litigation. For each issue, civil procedure scholars have settled on a set of policy positions presumed to best promote access to justice, and thus to best accord with the demands of distributive justice in conditions of significant economic inequality.¹¹⁷ But when we disaggregate the different goods associated with access to justice, we discover that the same policy can either promote or curb access to justice, depending on which specific good we focus on. Each of the three policy issues pits the different goods against one another.¹¹⁸ Such conflicts can arise directly, as when promoting one good entails sacrificing another, or more indirectly, as when promoting one good prompts relevant actors to adapt their behavior in ways that compromise another.¹¹⁹ Whatever the precise mechanism, however, this Part suggests that we can't always equalize the distribution of all the goods associated with access to justice simultaneously; seeking to distribute one good more equally often comes at the cost of skewing the distribution of another in a less egalitarian direction. What's more, the trade-offs between the different goods arise not just within any given doctrinal or policy domain, but also across domains, as efforts to promote access to justice in one area can have perverse, access-restricting spillover effects in another.

To be clear, I don't mean to endorse any particular position on the policy issues considered in this Part, much less to identify any position as the "true" access-to-justice position on those issues. Indeed, in Part III, I'll argue that *all* the goods associated with access to justice correspond to essential state functions, such that we can't simply focus on any one good to the exclusion of the others. My aim in this Part is instead to understand how the ideal of access to justice can plausibly appear on both sides of some prominent contemporary debates in civil procedure and thus why simply invoking that general ideal is, without more, unlikely to resolve any of those debates.

A. ARBITRATION

The potential for the various goods associated with access to justice to conflict with one another is perhaps most apparent in the context of the debate over arbitration. Even as arbitration's proponents defend the practice as a way of promoting access to justice, arbitration's critics condemn it for curbing access to justice. How can the ideal of access to justice intelligibly be invoked by both sides of the arbitration debate? The answer, I suggest, is that proponents and critics of arbitration are implicitly appealing to different goods associated with access to justice and, in so doing, unwittingly exposing some of the trade-offs between those goods. Admittedly, the trade-offs remain more theoretical than real for the time

117. *See supra* note 10.

118. The trade-offs I focus on in this Part are thus what David Pozen has called "dimensional" or "domain" trade-offs, Pozen, *supra* note 116, at 230–31 (emphasis omitted), in that they involve conflicts between the different goods associated with access to justice, rather than, say, conflicts between the members of different groups with respect to the same good.

119. *Cf. id.* at 232 (distinguishing between direct and indirect "triggers" to trade-offs between different aspects of privacy).

being, given the current arbitration regime's overwhelming hostility to individual claimants.¹²⁰ But advocates of access to justice will ultimately have to confront those trade-offs in deciding whether to seek to reform (rather than eliminate) arbitration as part of their broader policy program, a choice that depends on which of the goods associated with access to justice they're attempting to distribute more equally.

The modern practice of arbitration was originally, and continues to be, defended as an imperative of access to justice. According to the framers of the Federal Arbitration Act (FAA) of 1925,¹²¹ arbitration would serve as a cheaper and simpler alternative to civil litigation, which at the time had grown so costly and cumbersome as to effectively foreclose the civil justice system as a viable avenue of recourse for many litigants.¹²² Proponents of arbitration in the 1970s justified the practice in similar terms,¹²³ as do their contemporary counterparts (mostly scholars of ADR rather than civil procedure), who argue that arbitration's supposedly streamlined procedures enable would-be litigants to pursue claims that otherwise wouldn't warrant the costs of litigation.¹²⁴

Although these proponents rarely pause to explain exactly what they mean by "access to justice," one can understand their arguments to be touting arbitration's potential to promote greater access to three of the distinct goods considered in Part I. First, by providing a less expensive alternative to litigation, arbitration arguably reduces the significance of preexisting inequalities in the distribution of party resources. Arbitration does not formally allocate additional resources to any party; on the contrary, as a private institution, arbitration charges the parties for the services it provides.¹²⁵ But if the streamlined procedures of arbitration are cheaper to navigate than civil litigation, then a party's ability to command

120. See *infra* notes 132–36 and accompanying text.

121. Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–16 (2018)).

122. See Aragaki, *supra* note 97, at 1969–77. See generally Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115 (2010) (identifying connections between the early access-to-justice and ADR movements).

123. See Andrew B. Mamo, *Three Ways of Looking at Dispute Resolution*, 54 WAKE FOREST L. REV. 1399, 1411–19 (2019). Mamo goes on to consider two other "strands" of 1970s dispute-resolution theory, see *id.* at 1419–41, but they are less relevant to debates about access to justice, at least as those debates have unfolded in contemporary civil procedure scholarship.

124. See, e.g., Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 44–45; Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001); James W. Meeker & John Dombink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2227 (1993). See generally, e.g., Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1805 (2016) (arguing that "mandatory arbitration clauses that deny access to courts eliminate a privilege that weaker consumers rarely enjoy anyway"); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843 (2010) (analyzing arbitration costs to consumers in proceedings administered by the American Arbitration Association); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1 (discussing potential misunderstandings about arbitration clauses in consumer contracts).

125. See Drahozal & Zyontz, *supra* note 124, at 845.

resources (at least above a certain threshold) matters less practically, thus counteracting some of the advantages enjoyed by deeper-pocketed parties. A dispute-resolution system can achieve greater “equipment equality”¹²⁶ not just by directly subsidizing the under-resourced party, but also by structuring its procedures in ways that obviate some of the financial advantages of the better-heeled party.

This picture, however, is incomplete. Recall that party resources include not just financial wherewithal and access to legal representation, but also the opportunities afforded by a dispute resolution process to develop and present one’s claims.¹²⁷ And on that broad conception, arbitration’s effects on the distribution of party resources are more ambiguous than the proponents’ arguments imply. Insofar as arbitration is the cheaper, more streamlined alternative it purports to be, that’s precisely because it offers more limited mechanisms for claim development than civil litigation. Money matters less in arbitration (if it does indeed matter less) because there’s less in arbitration to spend money on. That’s particularly true when it comes to discovery, even though, given information asymmetries, (would-be) plaintiffs often have greater need for discovery than (would-be) defendants.¹²⁸ So we must weigh any gain in effective financial litigating capacity against the concomitant loss of procedural opportunities before we can determine arbitration’s overall effect on the distribution of party resources in any given case. All that said, at least in cases involving claims that can be substantiated without much discovery, arbitration can distribute party resources more equally than litigation.

Second, arbitration can provide broader access to the good of dispute resolution, understood in the thin sense.¹²⁹ Arbitration, of course, promises a private resolution of the parties’ dispute according to their contract and not according to the relevant (statutory or common) law; it thus doesn’t seem capable of promoting access to the thick notion of dispute resolution, which requires a resolution of the dispute by a public official according to the relevant substantive law.¹³⁰ But

126. See *supra* note 46 and accompanying text.

127. See *supra* Section I.B.

128. This is a standard point in criticisms of the Supreme Court’s pleading decisions in *Twombly* and *Iqbal*. See *supra* note 10.

129. Cf. RHODE, *supra* note 6, at 20–21 (advocating “expanded opportunities for informal dispute resolution” and “alternative dispute resolution” on access-to-justice grounds, though not specifically mentioning arbitration).

130. See HAZEL GENN, JUDGING CIVIL JUSTICE 116–19 (2010); Hazel Genn, *What Is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397, 411 (2012); Higgins, *supra* note 34, at 693–94 (“Whereas the legitimacy of some dispute resolution services depends on parties’ consent to the outcome (eg mediation) or consent to the process (eg arbitration), the legitimacy of legal process derives from the court’s role in protecting rights and upholding the law.”); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 223 (1995) (“While an arbitrator might, at some level, be governed by law, the arbitration itself [is] not a process obliged to enforce federal law.”). But see *infra* note 206 and accompanying text (suggesting that arbitration may sometimes be able to provide decisions according to the law and thus dispute resolution in the thick sense); see also AKC Koo, *The Role of the English Courts in Alternative Dispute Resolution*, 38 LEGAL STUD. 666, 668–73 (2018) (conceding that ADR cannot provide what I’m calling dispute resolution in the thick sense but touting this as one of its virtues).

insofar as a cheaper process is more likely to culminate in *some* binding resolution of a dispute, arbitration can plausibly claim to offer greater access to dispute resolution in the thin sense.

Third, for similar reasons, arbitration can potentially promote access to the individual notion of rights enforcement. Arbitration will fail to deliver on that promise insofar as individual rights enforcement simply reduces to the thick notion of dispute resolution, because, once again, arbitration need not result in a decision according to the substantive law, whether the applicable substantive law confers rights or otherwise.¹³¹ But if one can vindicate one's rights without having to obtain formal recognition from the law, then arbitration, by offering a streamlined process for obtaining some compensation for rights violations, will often constitute a more accessible avenue for enforcing one's rights and thus distribute the good of individual rights enforcement more equally.

In sum, the access-to-justice defense of arbitration turns out to rest on three distinct goods to which arbitration purportedly promotes broader access.

The main problem with this defense is that it bears little relationship to the current practice of arbitration, at least in cases involving individual claimants such as consumers and employees. As critics of arbitration have noted, the overwhelming weight of the available empirical evidence shows that very few individuals whose claims are subject to arbitration actually initiate arbitration proceedings; the vast majority forgo any redress and simply "lump" their legal injuries, perhaps deterred by arbitration's often high filing fees and surprisingly strict rules.¹³² The dearth of claims being filed in arbitration suggests that arbitration isn't actually the cheaper, more accessible alternative to litigation it claims to be, but is instead skewed in favor of "repeat-player" parties who count on arbitration's inaccessibility to evade responsibility for their wrongdoing.¹³³ And without its purported advantages over litigation, it's hard to see how arbitration can realize a more egalitarian distribution of party resources, dispute resolution in the thin sense, or individual rights enforcement. Arbitration's promise of greater access to those goods is, at least in current circumstances, all but illusory.¹³⁴

131. See *supra* note 130.

132. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808, 2879 (2015) [hereinafter Resnik, *Diffusing Disputes*]; Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 660–79 (2020).

133. See, e.g., David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1309–27 (2009); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648–61 (2005). Some recent empirical evidence, on the other hand, appears to support the access-to-justice arguments for arbitration against these kinds of criticisms. See generally Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 1–2 (2019) (finding that arbitration is "surprisingly affordable for consumers, employees, and medical patients" and that "enterprising plaintiffs' lawyers . . . have taken advantage of arbitration's open doors").

134. The qualifier is meant to reflect the fact that some current forms of arbitration, even in cases involving individuals, employ procedures that do facilitate access to some of these goods. See Gross, *supra* note 25, at 2326–36.

In addition to denying that arbitration promotes access to justice, critics also argue that the current arbitration regime affirmatively frustrates the ideal. The primary culprit, according to these critics, are arbitration clauses in consumer and employment contracts of adhesion that contain class-arbitration bans, which effectively force individuals into arbitration but forbid them to aggregate their claims with those of similarly situated parties once there. By simultaneously compelling arbitration and barring aggregation, class-arbitration bans thwart so-called negative-value claims, claims for which the costs of recourse exceed any potential recovery, such that they're not worth prosecuting on an individual basis but would be viable when aggregated with other parties' claims.¹³⁵ One of the main effects of the current arbitration regime, critics contend, is to suppress entire categories of legal claims, a blatant denial of access to justice.¹³⁶

Rather than disputing arbitration's potential to promote access to justice *tout court*, such criticisms are better understood to be focusing on different goods associated with access to justice from those emphasized by arbitration's proponents. The critiques of adhesive arbitration clauses and class-arbitration bans, in contrast to the empirical arguments noted earlier, don't deny that arbitration can, in theory, counteract disparities in party resources, offer broader access to dispute resolution in the thin sense, or even facilitate individual rights enforcement. Those critiques instead fault the current arbitration regime for curbing access to at least three of the other distinct goods considered in Part I. First, insofar as adhesive arbitration clauses aren't truly voluntary, they effectively force the individual consumers and employees whom they bind into arbitration and thereby deprive those individuals of even the option of accessing the courts to present their claims to a public official.¹³⁷ This amounts to a regressive distribution of the good of court access.¹³⁸ Second, not only does arbitration fail to achieve dispute resolution in the thick sense, but the more prevalent the practice becomes, the more it curbs access to that good, by stymying the development of the substantive law—and thus foreclosing the very prospect of decisions according to the law—in whole categories of cases.¹³⁹ Among arbitration's many opportunity costs, in

135. See, e.g., Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T v. Concepcion*, 88 NOTRE DAME L. REV. 825, 830 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 720–24 (2012).

136. See generally, e.g., David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012) (developing this criticism at length).

137. See, e.g., MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19–32 (2013); Resnik, *Diffusing Disputes*, *supra* note 132, at 2808, 2839–40; Schwartz, *supra* note 133, at 1249; Sternlight, *supra* note 133, at 1648–53.

138. For similar reasons, adhesive arbitration clauses also threaten to skew the distribution of *judicial* resources, draining courts of "smaller" cases involving individual consumers and employees and thus allowing judges to devote a greater share of their time, attention, and other resources to the more "complex" cases remaining on their dockets. But judicial resources don't figure nearly as prominently as the other goods in debates about access to justice and arbitration, so I don't focus on them here.

139. See, e.g., Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409–13. Such criticisms echo Owen Fiss's prominent critique of settlement. See Fiss, *supra* note 3.

other words, is the forgone chance to develop the law that makes dispute resolution in the thick sense even possible. Third, class-arbitration bans undermine aggregate rights enforcement: by short-circuiting the main vehicle for private enforcement, class-arbitration bans effectively insulate potential rights-violators (especially large corporations) from liability for their wrongdoing, and when violations of a given category of rights are inadequately deterred, those rights will be disproportionately vulnerable to violation.¹⁴⁰ And class-arbitration bans further dampen the deterrent effects of rights litigation by forestalling the development of the legal precedents contemplated by the thick notion of dispute resolution, precedents that would otherwise induce settlements of rights claims.

The upshot is that arbitration purports to promote access to several of the goods associated with access to justice but, as currently structured, fails to achieve that promise, while undermining access to several of the other goods. The question then arises for proponents of access to justice: should they prioritize reforming arbitration to make it more accessible, or should they instead prioritize increasing access only to courts? That choice, in turn, entails a trade-off between the various goods associated with access to justice. We could reform arbitration to make it the cheaper, streamlined alternative to litigation it claims to be, so that it does in fact broaden access to party resources, dispute resolution in the thin sense, and individual rights enforcement. We could also restructure the practice (by, say, prohibiting adhesive arbitration agreements and class-arbitration bans) so that it no longer frustrates access to courts, dispute resolution in the thick sense, and aggregate rights enforcement.¹⁴¹ But while such reforms would go a long way toward addressing the most objectionable aspects of the current arbitration regime, arbitration would still necessarily fail to promote court access and dispute resolution in the thick sense, because a private dispute resolution process by definition can't broaden access to those goods. Parties would thus face a newly accentuated trade-off between the greater parity in party resources offered by a (reformed) arbitration system and the thick form of dispute resolution uniquely provided by civil litigation. Enlisting arbitration to promote access to justice, in short, requires forgoing some of the goods associated with that ideal, while repudiating the practice requires forgoing others. Some trade-offs are ineliminable insofar as access to justice continues to be simultaneously associated with goods that can be

140. See, e.g., LAHAV, *supra* note 15, at 126–28; RADIN, *supra* note 137, at 33–46; Glover, *supra* note 34, at 293–99; J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3075–76 (2015); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 807–08 (2009); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 110–22; Sternlight, *supra* note 133, at 1634–38.

141. Insofar as such reforms resulted in more cases being brought in court rather than arbitration, that would effectively reduce the amount of judicial resources available for each case, even as it could potentially smooth the *distribution* of judicial resources across different kinds of cases, by requiring judges to devote a greater share of resources to cases that had previously been relegated to arbitration (or thwarted altogether) and a smaller percentage to “complex” cases. See *supra* note 138.

realized outside the public civil justice system and goods that can be realized only within it.

Appreciating these trade-offs complicates the place of arbitration in any program designed to promote access to justice in an age of economic inequality. We can encourage arbitration to help economically disadvantaged parties to get their disputes resolved more readily. Or we can curtail arbitration to ensure that such individuals have access specifically to courts and decisions according to law. The relative desirability of these options depends on which of the goods associated with access to justice we emphasize. Nor is the question primarily an empirical one, about the most effective policies for promoting access to justice; it is instead a normative question, about which specific goods we should be trying to facilitate access to.

B. LITIGATION FINANCE

Where arbitration purports to promote access to justice by providing an alternative forum to the civil justice system, litigation finance (or third-party litigation funding) promises to do so by rendering the civil justice system itself more accessible. Litigation finance is the practice in which private third-party entities, usually hedge funds or dedicated litigation-funding companies, agree to cover a plaintiff's up-front litigation costs in exchange for a specified share of any damages award or settlement payment he or she ultimately receives.¹⁴² One can already begin to see from this description how litigation finance might promote access to justice, and that is how it is often portrayed. But as with arbitration, the access-to-justice valence of litigation finance becomes more ambiguous once we evaluate the practice in terms of the distinct goods associated with that ideal.

Civil procedure scholars increasingly tout litigation finance's potential to promote access to justice by allowing resource-strapped plaintiffs to bring claims they otherwise couldn't afford to prosecute.¹⁴³ And the practice does indeed promise to distribute several of the goods identified in Part I more equally. At the outset, litigation finance broadens court access by helping plaintiffs to surmount the various financial hurdles that can prevent them from presenting their legal claims to a court in the first place. It also mitigates disparities in party resources once the lawsuits are underway, enabling plaintiffs to litigate their claims more effectively against their opponents. For these reasons, litigation finance can increase the chances that plaintiffs will obtain at least some resolution of their disputes and some recompense for any violations of their rights, and perhaps even a

142. See Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275–77 (2011).

143. See Higgins, *supra* note 34, at 697–98, 707–09; Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 103 (2010); Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833, 894 (2015); Steinitz, *supra* note 142, at 1305–06. *But see generally* Victoria Shannon Sahani, *Rethinking the Impact of Third-Party Funding on Access to Civil Justice*, 69 DEPAUL L. REV. 611 (2020) (suggesting that third-party litigation funding fails to promote access to justice for certain discrete categories of litigants).

full resolution “on the merits”—thus facilitating broader access to dispute resolution (in both the thin and thick senses) and individual rights enforcement.

Whereas the various arguments for litigation finance explicitly invoke the ideal of access to justice, criticisms of the practice tend to be framed in terms of other, competing values. Even some of those criticisms, however, can be understood as bearing on the various goods associated with access to justice. Certain criticisms essentially deny litigation finance’s pretension to promote access to any of those goods. For example, given the prevalence of contingency-fee arrangements in personal-injury cases, some scholars have questioned the extent to which economically disadvantaged tort plaintiffs actually resort to litigation finance to fund their lawsuits, speculating that many plaintiffs may instead be using the money to meet their daily needs while their litigation is pending—a kind of payday loan.¹⁴⁴ If that’s right, then litigation finance may have only a limited marginal benefit, beyond other kinds of financing arrangements, in terms of facilitating court access, equalizing party resources, and broadening access to dispute resolution and rights enforcement.¹⁴⁵

Litigation finance has also provoked a backlash among certain decisionmakers, a reaction that threatens to undermine its ability to broaden access to any of the goods associated with access to justice. The practice remains controversial, and in light of the controversy, federal courts have promulgated local rules and issued standing orders requiring disclosure of the existence (if not the terms) of third-party litigation funding agreements in any given case,¹⁴⁶ individual judges have compelled discovery regarding such agreements (in rare cases),¹⁴⁷ and Congress and state legislatures have considered legislation that would subject all such agreements to greater transparency.¹⁴⁸ Insofar as such disclosure requirements impose significant compliance costs on parties who enter into third-party litigation funding agreements, they can amount to a “tax” on litigation finance that can undo, or at least significantly curtail, the access-promoting effects of the practice.

144. See Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1167–68 (2019); Ronen Avraham, Lynn A. Baker & Anthony Sebok, *The Anatomy of Consumer Legal Funding* 7 (Aug. 10, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3670825.

145. That result would be especially disconcerting given evidence that the terms of litigation finance agreements can be even more exploitative than those for other forms of consumer debt. See, e.g., Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, 23 WIDENER L.J. 229, 231–32 (2013) (noting exploitative terms, such as high interest rates); Bert I. Huang, *Litigation Finance: What Do Judges Need to Know?*, 45 COLUM. J.L. & SOC. PROBS. 525, 527, 531 & n.23 (2012) (similar); Steinitz, *supra* note 142, at 1277, 1322 (similar).

146. E.g., N.D. CAL. CIV. R. 3-15; see Memorandum from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper, Dan Coquillette, Rick Marcus & Cathie Struve 3 (Feb. 7, 2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/04/Panel-5-Survey-of-Federal-and-State-Disclosure-Rules-Regarding-Litigation-Funding-Feb.-2018.pdf> [<https://perma.cc/52WH-HAFU>].

147. See J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911, 922–26, 924 nn.50, 52 (2016).

148. See, e.g., Litigation Funding Transparency Act of 2019, S. 471, 116th Cong. (2019); WIS. STAT. ANN. § 804.01 (West 2019).

Even apart from such restrictions on litigation finance, the practice is hardly an unalloyed boon from an access-to-justice perspective. For the restrictions appear to be motivated by at least two sets of concerns about litigation finance, each of which, if valid, points to a dynamic process that can create trade-offs between the different goods associated with access to justice. One set of concerns relates to the motives of third-party litigation funders. At best, funders invest in those cases they expect to yield the highest rate of return on their investment.¹⁴⁹ Such incentives can potentially distort the distribution of some of the goods in less egalitarian directions. In particular, funders' (perfectly rational) preference for lucrative cases can skew court dockets in favor of those cases likely to result in the biggest awards or settlements, as opposed to those that might be more "deserving" according to some other criterion. That, in turn, could subtly shift the allocation of judicial resources in favor of lucrative cases, to the potential detriment of "smaller" cases.¹⁵⁰ And if smaller cases tend to disproportionately involve economically disadvantaged plaintiffs, then litigation finance could foster a less egalitarian distribution of judicial resources.¹⁵¹

Another set of concerns regarding litigation finance relates to potential conflicts of interest between funders and plaintiffs. Some scholars, for example, worry that funders, eager for a sure and quick return on their investments, will pressure reluctant plaintiffs to prematurely accept inadequate settlement offers.¹⁵² That could potentially undermine the good of dispute resolution in the thick sense: while plaintiffs would achieve some resolution of their dispute, and thus enjoy greater access to the good of dispute resolution in the thin sense, they might be less likely to secure anything like the resolution to which they're entitled under the applicable law. Litigation finance may, in other words, tend to produce more settlements falling toward the outer edges of the "shadow of the law." It's true that more traditional financial arrangements, such as the contingency fee, can similarly distort settlements. But rules of professional ethics as well as limits on the amount a lawyer can accept on contingency somewhat constrain lawyers' ability to sell out their clients, so litigation finance may produce greater distortions. Such distortions can also have broader systemic effects. In particular, more inadequate settlements might mean less deterrence of rights violations,

149. At worst, they select cases for more objectionable reasons, financing litigation to, say, harass or retaliate against an enemy. See Glover, *supra* note 34, at 246–51 (discussing litigation finance's relationship to the traditional common law prohibitions against champerty and maintenance).

150. Cf. David L. Noll, *The Effect of Contingent Fees and Statutory Fee-Shifting*, in BEYOND ELITE LAW, *supra* note 25, at 170, 171 (showing how the contingent fee and other alternative funding arrangements shift the distribution of legal representation to different categories of claims and claimants).

151. For empirical evidence of a similarly regressive effect from an increase in the jurisdictional limit for small claims courts, see generally Anthony Niblett & Albert H. Yoon, *Unintended Consequences: The Regressive Effects of Increased Access to Courts*, 14 J. EMPIRICAL LEGAL STUD. 5 (2017).

152. See, e.g., Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 401 (2016) (identifying potential conflicts of interest in litigation finance); Steinitz, *supra* note 142, at 1324 (demonstrating how funders can influence, and distort, settlement decisions).

undermining the good of aggregate rights enforcement for certain categories of litigants. Reforms designed to address the foregoing concerns and safeguard the goods of thick dispute resolution and aggregate rights enforcement, on the other hand, might discourage third-party investment in lawsuits, undermining litigation finance's capacity to broaden court access and augment party resources.

This discussion of the potential ramifications of litigation finance for access to justice is admittedly somewhat speculative, and the practice merits further empirical study. But in evaluating the empirics, we first need a firm grasp of the specific goods to which litigation finance might promote greater access. Depending on how various actors respond to the incentives created by litigation finance, those goods may end up conflicting in this context rather than cohering.

C. AGGREGATE LITIGATION

If any procedural mechanism is thought to promote access to justice, it is aggregate litigation, and particularly the class action. Civil procedure scholars have long debated the merits and demerits of class actions, and the terms of that debate are well-established.¹⁵³ According to those terms, class actions potentially pit access to justice against other values, such as social welfare; the debate has primarily concerned whether those conflicts are real or illusory. I'm not joining that debate here. Rather, I aim to show that access-to-justice arguments for class actions are best understood as resting on a subset of the goods associated with that ideal, while some of the criticisms of class actions implicitly advert to other of those goods. Aggregate litigation, in short, potentially entails trade-offs not just between access to justice and other values, but also between the various goods to which many civil procedure scholars seek to promote broader access.

According to the standard access-to-justice justification for the class action, the device promotes access to justice by enabling victims of wrongdoing to pursue claims that can't feasibly be prosecuted individually and so would otherwise go unremedied.¹⁵⁴ Class actions, on this account, broaden access to several of the goods considered in Part I, which scholars refer to more or less explicitly. First, class actions promote broader court access, allowing plaintiffs to present claims that would otherwise never get off the ground.¹⁵⁵ Second, aggregation helps to offset power asymmetries between the parties within the litigation and thus achieves greater equality of party resources than would be possible in an individual lawsuit against a big defendant.¹⁵⁶ Third, although class-action lawsuits often end in a settlement, that can still promote dispute resolution in the thin sense

153. For general discussion of some of the longstanding controversies surrounding class actions, see Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699 (2013).

154. For the locus classicus for this justification, see generally Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

155. See JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 53 (2015); Gilles, *supra* note 113, at 1535–36; Resnik, *supra* note 10, at 134; A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 449 (2013).

156. See LAHAV, *supra* note 15, at 121–22; Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1496–97 (2013); Resnik, *supra* note 8, at 968.

because class members achieve at least some resolution of their dispute with the defendant. Fourth (and most significant for proponents of class actions), aggregate litigation helps to distribute the goods of both individual and aggregate rights enforcement more equally—individual because, again, victims can obtain at least some recompense for violations of their rights, and aggregate because class actions impose consequences for widespread, diffuse rights violations, which aren't adequately deterred by individual lawsuits.¹⁵⁷ It's precisely for this reason that many scholars worry that restrictions on class actions will disproportionately harm economically disadvantaged individuals, who tend to be disproportionately vulnerable to widespread, diffuse rights violations.¹⁵⁸

The access-to-justice case for aggregate litigation is thus quite compelling. At the same time, however, certain prominent criticisms of class actions—both recent and perennial—highlight ways in which aggregate litigation can actually yield less egalitarian distributions of some of the other goods associated with access to justice. For one thing, some scholars have recently worried that class actions, because of their complexity and attendant pathologies, garner an excessive share of the attention of judges (and procedural rulemakers), at the expense of smaller, but still viable, cases brought by economically disadvantaged individuals.¹⁵⁹ One can understand this concern in terms of the good of judicial resources: by diverting judges' finite time and attention away from smaller cases, class actions can effectively redistribute judicial resources in ways that are more ambiguous for the economically disadvantaged individuals class actions have traditionally been thought to benefit most.

For another, skeptics of class actions have long argued that class counsel exploit agency costs to aggrandize themselves by agreeing to settlements that promise generous attorney's fees but little benefit for class members.¹⁶⁰ A related

157. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1074–87 (2012); Carrington, *supra* note 101, at 540; Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 22, 24 (1996); Galanter, *supra* note 3, at 143; Gilles, *supra* note 113, at 1550–53; Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058 (2002); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294–95, 312–13 (2014); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 832 (2002); Rubenstein, *supra* note 4, at 1881.

158. See Gilles, *supra* note 113, at 1537–38, 1553–57.

159. See Coleman, *supra* note 62, at 1044–46.

160. See, e.g., COFFEE, JR., *supra* note 155, at 6, 133–53; David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 GEO. WASH. L. REV. 542, 570 (2011); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 418–25 (2000); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–83 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991). But see Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104–05

concern is that the “*in terrorem*” effect of class certification will induce defendants to settle class claims irrespective of their merits.¹⁶¹ While both concerns are typically portrayed as extrinsic to, and even pitted against, access to justice, they also implicate that ideal. Both, in particular, can be understood as questioning how class actions distribute the good of dispute resolution in the thick sense, which (to repeat) requires a decision according to the applicable substantive law. Insofar as judges respond to such concerns by scrutinizing class-certification requests and class settlements more closely for conformity with the substantive law, they may end up distributing the good of dispute resolution in the thick sense more broadly. On the other hand, that same scrutiny can end up restricting access to some of the other goods associated with access to justice, particularly court access (insofar as the prospect of increased scrutiny dissuades victims of widespread rights violations from filing class actions in the first place) and dispute resolution in the thin sense (insofar as the increased scrutiny results in the approval of fewer class settlements).¹⁶²

Two current debates about aggregate-litigation practice illustrate the potential trade-offs between the various goods associated with access to justice. One issue is how rigorously courts should review proposed class settlements, and, in particular, the extent to which they should assess the merits in deciding whether to certify a settlement class.¹⁶³ Federal Rule of Civil Procedure 23 was recently amended to specify criteria for courts to consider in evaluating proposed class settlements, some of which arguably invite courts to contemplate the merits of the class claims.¹⁶⁴ Such blending of the merits and settlement-class inquiries is problematic insofar as we’re looking to class actions to distribute court access, dispute resolution in the thin sense, and rights enforcement more broadly, at least assuming that fewer class actions will be filed and fewer class settlements approved. But the practice might provide greater opportunity to ensure that class settlements conform more closely to the substantive law and therefore might distribute the good of dispute resolution in the thick sense more broadly.

Another example of the potential trade-offs can be found in the debate about the desirability of repeat-player plaintiffs’ lawyers in mass-tort cases consolidated under the multidistrict litigation (MDL) statute, a form of nonclass aggregate

(2006) (arguing that concerns about agency problems between class counsel and class members have been overstated).

161. See, e.g., Glover, *supra* note 34, at 305. Both sets of concerns are most acute in, and may even be limited to, damages class actions certified under Federal Rule of Civil Procedure 23(b)(3), as opposed to class actions seeking only declaratory or injunctive relief certified under Rule 23(b)(2). See generally Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843 (2016).

162. *But cf.* Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 938, 940–45 (1975) (suggesting that a “conflict resolution model” of civil litigation would *disfavor* the use of class actions to aggregate negative-value claims, which is tantamount to “stirring up” a legal dispute that otherwise wouldn’t exist).

163. On the place of merits considerations in the class-certification decision, see generally Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009).

164. See FED. R. CIV. P. 23(e)(2).

litigation.¹⁶⁵ While some scholars worry that repeat plaintiffs' lawyers sell out individual plaintiffs with significant claims in order to achieve a quick (and, from their perspective, lucrative) global settlement,¹⁶⁶ others have emphasized their superior ability to achieve any aggregate settlement at all and thus to secure some kind of compensation for all victims.¹⁶⁷ Each view presupposes a different good associated with access to justice: repeat-player plaintiffs' lawyers in MDLs seem to fill a significant role in helping to promote court access and access to dispute resolution in the thin sense, while arguably compromising at least some individuals' access to dispute resolution in the thick sense.¹⁶⁸ For similar reasons, reforms designed to either restrict or facilitate the role of repeat-player plaintiffs' lawyers in MDLs are likely to promote some of the goods at the expense of the others.

As with arbitration and litigation finance, then, aggregate litigation doesn't necessarily broaden access to all the goods associated with access to justice at all times, but rather can end up trading off some of those goods against others. No one policy appears to achieve a more egalitarian distribution of all the goods that proponents of access to justice seek to distribute more equally.

D. SPILLOVER EFFECTS

So far in this Part, I've examined some of the ways in which the various goods associated with access to justice can conflict with one another within a given doctrinal or policy area in civil procedure. But such conflicts can also occur *across* areas. That is, attempts to use one procedural doctrine or policy to promote access to a good or set of goods can spill over into other corners of civil procedure or even other bodies of law, where they can end up curtailing access to those same goods.

Consider, for example, the increasingly "restrictive" nature of pretrial procedure, the tendency of the Supreme Court and federal rulemakers to impose procedural requirements that make it more difficult for plaintiffs to initiate and substantiate their claims.¹⁶⁹ Some scholars have attributed this trend partly to the increased complexity of much federal civil litigation. One source of that complexity is aggregate litigation, and particularly class actions. Even as class actions promote access to several of the goods associated with access to justice,¹⁷⁰ they also make litigation more complicated and costly. In a dynamic process outlined

165. See generally Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393 (2019) (situating MDLs on a continuum of aggregation along with class actions and arguing that the two aggregative devices raise many of the same normative issues).

166. See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1447–52 (2017).

167. See, e.g., Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 88–101 (2019).

168. For extensive empirical evidence demonstrating that recent MDLs headed by repeat-player plaintiffs' lawyers frequently result in settlements but rarely give plaintiffs a significant portion of the relief they're entitled to under the applicable substantive law, see generally ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* (2019).

169. See *supra* note 10.

170. See *supra* notes 155–58 and accompanying text.

by Brooke Coleman, judges and rulemakers become preoccupied with that increased complexity and cost and seek to curb both by limiting pretrial motions practice and discovery not just in complex cases, but in all civil cases.¹⁷¹ Although most of the costs of civil litigation are attributable to only a small fraction of the overall civil docket,¹⁷² decisionmakers impute the particular pathologies of complex litigation to civil litigation writ large and adopt measures that curtail more and less complex litigation indiscriminately. Such measures, including heightened pleading requirements and limits on discovery, have been widely criticized for restricting access to justice,¹⁷³ and they can indeed be understood as threatening several of the goods associated with that ideal.

Margaret Lemos has identified a similar spillover effect created by statutory incentives to sue, such as fee-shifting provisions, damages multipliers, and punitive damages.¹⁷⁴ By enacting such incentives, Congress seeks to encourage private litigation to enforce the substantive rights it recognizes. The incentives can accordingly broaden access to several of the goods associated with access to justice, particularly court access, party resources, and rights enforcement (both individual and aggregate). But as Lemos notes, insofar as incentives to sue succeed in increasing litigation rates, they can have the unintended consequence of fomenting hostility among judges to the rights being enforced (and even the litigants seeking to enforce them), prompting “judicial backlash” that can take the form of either more stringent procedural requirements or less generous interpretations of substantive law.¹⁷⁵ Such reactions can undercut the same goods that litigation incentives purport to promote: if judges respond to increased litigation rates by erecting additional procedural hurdles for plaintiffs, that can curb court access and party resources not only in disfavored cases, but in all civil cases; and if they react by construing rights-conferring statutes more narrowly, that can make it more difficult for plaintiffs asserting those rights to prevail on their claims, undermining rights enforcement.

These examples illustrate how efforts to promote access to justice in one sphere (say, class actions or litigation incentives) can induce relevant actors to

171. See Coleman, *supra* note 62, at 1041–45, 1052–54 (attributing the plausibility requirement for pleading and discovery’s proportionality requirement to “one percent” bias as well as to some of the pathologies associated with class actions).

172. See *id.* at 1047–49 (collecting statistics).

173. See *supra* note 10.

174. See Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 785–95 (2011).

175. See *id.* at 823–40; cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873–89 (1999) (exploring how judges redefine substantive constitutional rights in light of the available remedies for their violation). I don’t necessarily mean to endorse Lemos’s account as a compelling historical explanation for the judicial backlash to all the specific substantive rights she considers. Much of that backlash likely stemmed from outright ideological opposition among judges to the rights being enforced, rather than from more technical concerns about rising litigation rates. See generally BURBANK & FARHANG, *supra* note 18. But Lemos’s model nevertheless seems to have at least some explanatory power. Note as well that, in contrast to the kind of spillover effect identified by Coleman, the one identified by Lemos doesn’t necessarily depend on the transsubstantivity of the Federal Rules of Civil Procedure because the forms of judicial backlash she describes can be targeted at specific categories of cases.

reshape civil procedure or other bodies of law in ways that end up restricting access to justice in other spheres (say, noncomplex cases or substantive rights). Once we appreciate the plurality of potentially conflicting goods comprised by the ideal of access to justice, it becomes difficult to confine the access-to-justice analysis to any single doctrinal or policy domain, without considering the broader ramifications for the civil justice system as a whole.

E. TRADE-OFFS AND SCARCITY

The specific trade-offs I've explored in this Part are in one sense contingent, in that they depend partly on the reactions of institutional actors to procedural rules and practices, reactions that are hardly ineluctable. But I've also suggested that at least *some* trade-offs between the various goods associated with access to justice are in another sense inevitable, in that no policy will simultaneously broaden access to all the goods. That's both because some of the goods can directly compete with one another (as in the case of the thin and thick notions of dispute resolution, inasmuch as it's possible to achieve some resolution of a dispute without resolving it "on the merits") and because any policy will produce dynamic effects that will, in turn, alter relevant actors' incentives, with mixed, if unpredictable, distributive consequences for the different goods. And yet, one might reject this impression of necessity as a false one. One might, in particular, think that any trade-offs are a result of scarce resources, such that they could be eliminated, or at least mitigated, by devoting more resources to civil justice issues than the paltry sums the state currently allocates.

It's certainly true that the trade-offs I've considered obtain only in conditions of scarcity. If we had unlimited resources to spend on civil justice issues, then we wouldn't have to sacrifice any of the goods associated with access to justice, but rather could simply apportion additional funds to offset any access-restricting side effects of purportedly access-promoting policies. But neither in that case would access to justice strictly present any problem of distributive justice, for the "circumstances of justice"—the preconditions for questions of distributive justice to arise in the first place—include (moderate) scarcity.¹⁷⁶ Absent scarcity, one person's consumption of a resource doesn't affect any other person's consumption of that resource, raising no issue of how to distribute the resource. Scholars have correctly conceptualized problems of access to justice as problems of distributive justice precisely because the resources available for civil justice issues are scarce, requiring us to decide how to distribute those resources among the potential users of the civil justice system. And with that scarcity comes the need to make trade-offs between the different goods.

It's also true that devoting more resources to civil justice issues would significantly ameliorate the perceived necessity of those trade-offs. With additional resources, judges could, for instance, decide more cases on their merits without compounding case backlogs. That might, in turn, weaken the demand for private

176. See *supra* note 23 and accompanying text.

forms of dispute resolution such as arbitration, thereby easing the tension between the thin and thick notions of dispute resolution. It might also reduce incentives for judges to slight some cases for others, thereby smoothing the distribution of judicial resources across the docket.¹⁷⁷ These kinds of dynamics suggest that the trade-offs I've considered are a matter of degree: the more abundant the resources available for civil justice issues, the less acute the trade-offs between the different goods associated with access to justice.¹⁷⁸

It's important to recognize, moreover, that purportedly access-promoting policies and doctrines can affect not only the distribution of particular goods, but also the total amount of resources available for civil justice issues, potentially reducing scarcity and thus easing any trade-offs between the goods. For example, while greater restrictions on arbitration might initially channel more cases into the judicial system and thereby effectively diminish the amount of resources available for resolving any particular case, policymakers might respond to that influx by allocating additional resources to civil justice issues, ultimately reducing scarcity. Such a mechanism is admittedly speculative, but it suggests that the overall level of funding for civil justice issues is at least partly endogenous to particular policy choices, rather than being a purely exogenous constraint on the pursuit of greater access to justice.¹⁷⁹ And if that's so, then we shouldn't assume that scarcity, or the concomitant trade-offs between the various goods, will inevitably persist in their current form.

All that said, however, those trade-offs are bound to persist in some form, at least in a political and legal system even remotely resembling our current one. Even with significantly more resources, the civil justice system still wouldn't be able to devote equal attention to every case but would instead have to prioritize some cases and tasks over others. And it's hard to see how we could set those priorities without trading off some of the goods associated with access to justice against others—whether court access against dispute resolution and rights enforcement, the thin notion of dispute resolution against the thick, party resources against judicial resources, and so on. The civil justice system is thus likely to

177. For suggestive empirical evidence, see Christoph Engel & Keren Weinshall, *Manna from Heaven for Judges – Judges' Reaction to a Quasi-Random Reduction in Caseload* 3 (Max Planck Inst. for Research on Collective Goods, Discussion Paper No. 2020/1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521220, which found that judges in one court system responded to a reduction in their caseloads by devoting more resources to deciding the remaining cases on their merits.

178. The trade-offs are thus likely to be much more acute in state civil justice systems than in the federal system, given the extreme resource constraints and overwhelming caseloads faced by the former. See Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 252, 282. Indeed, state civil justice systems may not even exhibit the "circumstances of justice"—not because they're free from scarcity, but because, on the contrary, they're plagued by a scarcity so severe that they can't even begin to realize any of the goods associated with access to justice, much less distribute those goods more equally. See *supra* note 23 and accompanying text.

179. Cf. Adrian Vermeule, *Judicial Capacities: Some Second-Order Problems*, BALKINIZATION (Sept. 14, 2019, 9:00 AM), <https://balkin.blogspot.com/2019/09/judicial-capacities-some-second-order.html> [<https://perma.cc/YP3Q-WV8G>] (making an analogous point about the effects of judicial decisions on "judicial capacity").

confront the kinds of conflicts considered in this Part so long as it continues to be characterized by even moderate scarcity and, as such, to operate amid the circumstances of justice.

III. ACCESS TO JUSTICE IN THE LIBERAL STATE

If, as I argued in the previous Part, the various goods associated with access to justice can indeed conflict with one another, then the most pressing questions for proponents of access to justice aren't simply empirical, about which policies best promote access to justice;¹⁸⁰ they're also normative, about which goods we *should* be seeking to distribute more equally when trade-offs between those goods arise. How should we answer these normative questions? If we can't simultaneously equalize the distribution of all the goods in all circumstances, then which goods should we prioritize in our efforts to promote broader access to justice?

In this Part, I contend that there is no straightforward answer to such questions because there is no straightforward hierarchy of the goods associated with access to justice. And that's because the various goods all reflect essential functions of the modern liberal state, functions that can themselves come into conflict. To rank the goods, we would first have to resolve persistent disagreements within liberal thought about how those more fundamental conflicts should be adjudicated. Rather than attempt that quixotic task, I suggest that we more candidly acknowledge the inevitable trade-offs between the different goods associated with access to justice and structure procedural rulemaking institutions to better reflect the diversity of views about which goods should take precedence in efforts to make the civil justice system more accessible in an age of economic inequality.

A. CIVIL JUSTICE AND LIBERAL STATE FUNCTIONS

This Section connects the various goods that proponents of access to justice seek to distribute more equally with three of the most prominent functions assigned to the state in the broadly "liberal" tradition in political theory. Two of those goods correspond directly to two traditional functions of the liberal state: dispute resolution and rights enforcement. Although the other goods—court access, party resources, and judicial resources—are mere means to further ends and thus cannot themselves constitute state functions, they become salient in light of a third state function that has been emphasized in contemporary liberal thought: distributive justice.

What's more, the three state functions I identify, no less than the goods associated with access to justice, can conflict with one another in practice. That's for

180. Contra the suggestions in, for example, James Gamble & Amy Widman, *The Role of Data in Organizing an Access to Justice Movement*, 87 *FORDHAM L. REV. ONLINE* 196, 196–98 (2019), which calls for a "complete picture" of access-to-justice issues, but presents that "picture" as a purely empirical one; and D. James Greiner, *The New Legal Empiricism and Its Application to Access-to-Justice Inquiries*, 148 *DÆDALUS* 64, 67 (2019), which laments the lack of "rigorous empiricism" in access-to-justice debates without acknowledging those debates' significant, ineliminable normative dimension. This is by no means to deny the importance of empirics to improving access to justice.

three interrelated reasons.¹⁸¹ First, the functions tend to be cast at a fairly high level of abstraction, rather than in terms of particular policies, which renders their policy implications less determinate. Second, partly because of their abstraction, the functions are beset by “empirical uncertainty about the[ir] real-world effects”¹⁸²—about what consequences will ensue when the state endeavors to discharge them in practice. And third, the dispute-resolution and rights-enforcement functions can be specified more or less independently of concerns about economic equality; the more autonomous those functions are, the more they’ll tolerate background conditions of significant economic inequality, and the more likely they’ll be to conflict with the egalitarian mission of the state’s distributive-justice function.

To acknowledge the potential for conflicts between the three state functions, however, isn’t to condemn either the ideal of access to justice or liberal theories of the state as hopelessly incoherent or radically indeterminate. Adherents of the Critical Legal Studies movement famously drew exactly that conclusion—about specific areas of legal doctrine,¹⁸³ access to justice and the related concept of “legal aid,”¹⁸⁴ and liberal conceptions of the state itself.¹⁸⁵ But a political theory can comprehend conflicting components without collapsing into incoherence or indeterminacy. Any theory that recognizes a plurality of irreducible social goals to be achieved and state functions to be performed will inevitably have to make trade-offs between those goals and functions.¹⁸⁶ This Section highlights several such trade-offs that liberal theories of the state confront in the civil justice context, trade-offs that are particularly pertinent to efforts to promote broader access to justice.

181. These reasons parallel the three reasons that Jeremy Kessler and David Pozen offer to explain why “none of the leading theories of free speech has been able to generate clear or consistent guidance about how [economic] inequalities ought to bear on constitutional analysis.” Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1979 (2018); see *id.* at 1979–81. But whereas Kessler and Pozen seem to regard these features as shortcomings that, in principle, could be remedied by making the theories more “politicized” (by which they appear to mean more attentive to the distribution of material goods), I view them as inevitable features of any theory of politics (including “politicized” or materialist ones)—at least insofar as a theory recognizes an irreducible plurality of goods for the state to promote, as it must if it is to be plausible in a modern liberal society. See *id.* at 1983–84.

182. *Id.* at 1980.

183. See, e.g., ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 65 (1996); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

184. See Abel, *supra* note 13, at 607 (“[Legal aid] itself, like the welfare state of which it is a part, is internally contradictory.”).

185. See, e.g., Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349–50 (1982).

186. Cf. ADRIAN VERMEULE, THE CONSTITUTION OF RISK 2 (2014) (“[T]he tensions between and among the values of constitutionalism are best understood not as contradictions, but as competing risks and tradeoffs.”).

1. Dispute Resolution

Liberal political theories have traditionally emphasized the state's role of authoritatively resolving private disputes between its citizens.¹⁸⁷ The justifications for that emphasis vary. Some sound in *realpolitik*, particularly the notion that resolving private disputes is an important way for the state to extend its authority and enhance its legitimacy so that it can more effectively discharge its other responsibilities.¹⁸⁸ Other justifications are more principled, such as the idea that the state's role as the final, authoritative dispute resolver is either one aspect of the state's supreme, universal authority—its claim to bind all the members of the political community through its directives, irrespective of any contrary claims made by other social institutions¹⁸⁹—or a corollary of its duty to recognize individuals' natural rights to an avenue of recourse for the wrongs committed against them.¹⁹⁰ But whatever its precise grounding, the dispute-resolution function is one that liberalism has traditionally assigned to the state.

Some self-avowed liberals reject this account, with Owen Fiss once again starkly articulating the dissenting view. Just as Fiss seeks to divorce the dispute-resolution function from the judicial role,¹⁹¹ so he suggests that dispute resolution is no proper concern of the liberal state. At most, he contends, the state has a generic interest in “the peaceful resolution of disputes,” not an interest in “resolving [any particular] dispute itself.”¹⁹² Dispute resolution, on this view, is a mere byproduct of the state's true function in the civil justice context, which is “to give the proper meaning to our public values.”¹⁹³ Indeed, Fiss deems it “an extravagant

187. See, e.g., STEPHEN HOLMES, *THE ANATOMY OF ANTI-LIBERALISM* 201–10 (1993); Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law?*, in *PRIVATE LAW AND THE RULE OF LAW* 288, 295–97 (Lisa M. Austin & Dennis Klimchuk eds., 2014); Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 *VA. L. REV.* 1391, 1415–29 (2006).

188. This has been a theme in much of Judith Resnik's recent work. See Resnik, *supra* note 4, at 620–21; Resnik, *supra* note 8, at 920, 930, 938, 941; Resnik, *supra* note 80, at 260–61 (arguing that courts are “statist,” in that “governments *depend* on courts to implement their norms, to develop and to protect their economies, and to prove their capacity to provide ‘peace and security’”); *id.* at 283 (“States *need* their members and residents to participate in adjudicatory processes, both to maintain peace and security as well as to generate and reinforce their own authority to do so.”); cf. JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011) (depicting courthouses as physical symbols of state authority). But cf. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1986) (revealing how legalism—a commitment to the rule of law—can *impede* other political objectives).

One can disparage such justifications as defending merely rule *by* law, with the state using law to advance its own interests. See Jeremy Waldron, *Rule by Law: A Much Maligned Proposition* 2–3 (N.Y. U. L. Sch., Pub. L. & Legal Theory Working Paper No.19-19, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378167. But even a weak commitment to rule *by* law can have important disciplining effects on the state, and thus important benefits for the rule *of* law. See *id.* (manuscript at 14–21).

189. For more on the nature of this claim, see LESLIE GREEN, *THE AUTHORITY OF THE STATE* 82–86 (1988).

190. See, e.g., JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 111–46 (2020) (deriving such a duty from the political theory of John Locke).

191. See *supra* note 81 and accompanying text.

192. Fiss, *supra* note 77, at 30 n.66.

193. *Id.* at 30.

use of public resources” for public courts to resolve “purely private disputes”—disputes in which the parties do not contest the meaning of “public values”¹⁹⁴—and he would instead relegate such disputes to private arbitration, perhaps backed by state enforcement.¹⁹⁵ As with his account of the judicial role, however, Fiss’s account of the state’s interest in civil justice presumes a false dichotomy between dispute resolution and norm declaration; courts have no roving authority to declare public values, but rather may do so only in the context of resolving concrete disputes between the parties before them.¹⁹⁶ More to the point, in categorically rejecting any essential role for the state in dispute resolution, Fiss departs markedly from traditional liberal theories of the state.

Some scholars have also associated the dispute-resolution function with a libertarian or “minimalist,” as opposed to genuinely liberal, conception of the state. According to Mirjan Damaška, for instance, the “reactive” or laissez-faire state conceptualizes the civil justice system in terms of dispute resolution, whereas the activist state views it as another tool for “policy implementation.”¹⁹⁷ But this contrast, too, is overdrawn. As many scholars have noted, in providing courts for the resolution of private disputes, the state necessarily develops a robust institutional apparatus and affords private parties significant financial subsidies—features associated with the activist state.¹⁹⁸ And the state has historically used the resolution of private disputes as a means of implementing its policies and augmenting its capacities.¹⁹⁹ The dispute-resolution function thus accords with more expansive, as well as more limited conceptions, of the liberal state.

The dispute-resolution function emphasized in liberal theories of the state comprehends both the thin and thick notions of dispute resolution outlined in Part I. With regard to the thick notion, the paradigmatic form of dispute resolution on liberal accounts is a resolution “on the merits,” according to the applicable law. That’s for at least two reasons. First, liberalism entails a commitment to the rule of law, and the rule of law is commonly understood to require courts, in the course of resolving private disputes, to “do[] justice between the parties

194. *Id.*; see also *id.* at 43 (disparaging adjudication of such cases as “a high-class (but subsidized) form of arbitration”).

195. *Id.* at 30.

196. See *supra* notes 83–84 and accompanying text.

197. DAMAŠKA, *supra* note 16, at 11, 72. Indeed, Damaška contends that the reactive state conceives of all state functions on the dispute resolution model. See *id.* at 73, 77–78; cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288 (1976) (“The conception of litigation as a private contest between private parties with only minimal judicial intrusion confirmed the general view of government powers as stringently limited.”).

198. See Resnik, *supra* note 8, at 942–47, 961–72; see also STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 45, 219 (1999); Brendan S. Maher, *The Civil Judicial Subsidy*, 85 IND. L.J. 1527, 1529 (2010). Indeed, this is one of the main reasons that Fiss seeks to extricate courts from private disputes lacking any “public” dimension. See Fiss, *supra* note 77, at 31, 43.

199. See, e.g., William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 768 (2008). See generally FARHANG, *supra* note 18 (arguing that Congress authorizes enforcement of federal statutes through private lawsuits to achieve its regulatory goals over opposition from the Executive Branch).

according to law.”²⁰⁰ Second, in the liberal social-contract tradition, all political institutions, including courts, are supposed to speak authoritatively on behalf of the entire political community, a function that requires decisions to be made according to law rather than by arbitrary diktat.²⁰¹

Given the centrality of the thick notion of dispute resolution in liberal theories of the state, arbitration enjoys an ambivalent relationship with liberalism.²⁰² On the one hand, insofar as arbitrators aren’t (contractually) obligated to do justice according to law²⁰³ and lack authority to speak on behalf of the political community,²⁰⁴ arbitration can’t perform the function of dispute resolution in the thick sense.²⁰⁵ On the other hand, arbitration may not be intrinsically incapable of performing that function. For “[a]lthough arbitrators lack the status and full panoply of responsibilities of judges, in theory, arbitrators nevertheless attempt to act in their stead and to assess and express a public, impartial reaction to legal wrongs after their occurrence.”²⁰⁶ Arbitration might therefore be able, at least in principle, to resolve disputes according to the law, especially inasmuch as arbitrators’ decisions are subject to review by public courts.²⁰⁷

But regardless of whether arbitration accords with the thick notion of dispute resolution, liberalism contemplates that the state’s courts will also perform the arbitration-like function of dispute resolution in the thin sense, resolving at least some disputes simply for the sake of achieving peace between the parties and not necessarily according to any substantive law.²⁰⁸ For one thing, even if the rule of

200. John Gardner, *The Twilight of Legality*, 43 AUSTRALASIAN J. LEGAL PHIL. 1, 19 (2018).

201. See ARTHUR RIPSTEIN, PRIVATE WRONGS 13, 272–75 (2016); Ripstein, *supra* note 187, at 1428; Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 420 (2016).

202. Even more confounding for liberalism are international commercial courts, which blend features of traditional courts and arbitration. See generally Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT’L L. 227 (2020).

203. See Gardner, *supra* note 200, at 12.

204. See RIPSTEIN, *supra* note 201, at 14, 288–89; Seana Shiffrin, *Speaking Amongst Ourselves: Democracy and Law*, in 37 THE TANNER LECTURES ON HUMAN VALUES 145, 207 (Mark Matheson ed., 2018) (noting that “private arbiters do not represent us or generate public principles”).

205. See GARDNER, *supra* note 112, at 307 (contending that arbitration resolves individual disputes ad hoc, rather than according to generally applicable rules, and so necessarily doesn’t involve decisions according to law).

206. Shiffrin, *supra* note 201, at 441; see also *id.* (describing arbitrators as theoretically “neutral third parties” who even often “aim to interpret and implement the substantive law . . . and to follow judicial precedents”).

207. In questioning whether arbitration can perform the function of dispute resolution in the thick sense, I’m questioning its capacity to deliver final, authoritative resolutions of private disputes according to the applicable law. See *supra* notes 95–99 and accompanying text. Regardless of whether it can do so, arbitration may well constitute a “thick” form of dispute resolution in the different sense of resolving disputes according to a community’s shared norms or values, as is arguably true of religious arbitration. See, e.g., Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 2997–99 (2015); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1240–41 (2011). The compatibility of religious arbitration with a liberal legal order is a difficult issue that I can’t address here.

208. More precisely, liberalism contemplates that even courts will occasionally perform tasks akin to what Daniel Markovits has called “first-party arbitration” or “arbitration as gap-filling,” where

law demands that the law be capable of authoritatively guiding the conduct of its subjects,²⁰⁹ the law will regularly fail in that task, whether because it contains gaps, because it employs vague standards such as “reasonable care” or “best interests of the child,” or for other reasons. Many disputes will thus be only partly “regulated” or even wholly “unregulated” by the law,²¹⁰ yet will still come before the courts for an authoritative resolution. In resolving such disputes, judges have little choice but to exercise their best judgment—that is, to engage in the kind of thin dispute resolution characteristic of arbitration. For another, insofar as dispute resolution is grounded in the state’s ultimate authority,²¹¹ it entails resolutions of private disputes that are final and binding as between the parties.²¹² The whole point of law, after all, is to authoritatively displace individuals’ own private moral judgments in the domains it regulates, a function that, somewhat paradoxically, can further important liberal values, including individual autonomy.²¹³ Yet a commitment to finality and bindingness can at times diverge from a commitment to substantive justice, and thus from the thick notion of dispute resolution. Such a divergence is more or less expressly contemplated by the various preclusion doctrines, which grant most judicial decisions conclusive, binding effect irrespective of their correctness.²¹⁴ When the state insists that private parties abide even patently erroneous resolutions of their disputes, it assumes the function of dispute resolution in the thin sense. Liberalism thus involves courts in both the thin and thick notions of dispute resolution that are prominent in discussions of access to justice.

2. Rights Enforcement

Rights enforcement is another essential function that liberalism assigns to the state. Although liberal theories vary in terms of the precise rights they recognize, they all vest individuals with certain rights, both against the state itself and against one another.²¹⁵ And the liberal state must not only recognize individuals’ rights, but also render those rights meaningful by providing some effective way

“arbitration replaces party-provided processes of dispute resolution . . . and in particular supplants the bargaining that precedes contracting,” as opposed to “third-party arbitration” or “arbitration as judging,” where arbitration “stand[s] in for court-provided processes of dispute resolution, including adjudication.” Daniel Markovits, *Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 433 (2010).

209. See Gardner, *supra* note 200, at 13.

210. See RAZ, *supra* note 38, at 172–75, 193–94.

211. See *supra* note 189 and accompanying text.

212. See *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) (recognizing “the State’s monopoly over techniques for binding conflict resolution” and “final dispute settlement”); RAZ, *supra* note 38, at 216–17 (“It is of the essence of municipal legal systems that they institute judicial bodies charged, among other things, with the duty of applying the law to cases brought before them and whose judgments and conclusions as to the legal merits of those cases are final.”).

213. More than any other philosopher, Joseph Raz has explicated law’s claim to authority and grounded that claim in liberal political theory. See generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

214. See generally RESTATEMENT (SECOND) OF JUDGMENTS §§ 27–29 (AM. LAW INST. 1982) (summarizing preclusion principles).

215. See generally, e.g., DWORKIN, *supra* note 63; JEREMY WALDRON, *LIBERAL RIGHTS* (1993).

of enforcing or vindicating them. More specifically, the traditional liberal commitment to individual rights requires including both the individual and aggregate notions of rights enforcement among the state's core roles. With regard to individual rights enforcement, the state might not always endeavor to enforce individuals' rights itself, but it must at least afford individuals a means of vindicating their rights when violated.²¹⁶ And once the state recognizes or confers certain categories of individual rights, the nonviolation of those rights becomes one of the state's goals,²¹⁷ a goal that requires the state to adopt policies and procedures aimed at deterring and rectifying rights violations at the systemic level as well—what I've described as the aggregate notion of rights enforcement.

Both notions of rights enforcement can potentially conflict with the liberal state's other roles, though the severity of the conflicts will depend on the precise nature of the recognized rights, which will differ from one version of liberalism to another. At one extreme, Martin Redish has interpreted the liberal tradition to grant individuals secondary, procedural rights to a significant degree of autonomy in determining whether and how they will seek to enforce their primary, substantive rights.²¹⁸ That understanding sets up potential conflicts between individual rights enforcement, on the one hand, and, on the other, both aggregate rights enforcement (insofar as litigant autonomy constrains procedural devices, such as class actions, designed to remedy and deter widespread rights violations) and at least the thick notion of dispute resolution (insofar as individuals exercise their autonomy to resolve their disputes beyond the state's purview). Whereas Redish espouses a particularly austere "classical" (bordering on libertarian) version of liberalism,²¹⁹ more egalitarian versions such as Fiss's attach greater priority to collective goals,²²⁰ and thus will confront basically the converse of the conflicts faced by Redish's. Still other versions will afford the state somewhat more

216. See, e.g., LAHAV, *supra* note 15, at 4 ("[T]he existence of a right to enforce rights is the backdrop of all social interactions."); see also, e.g., GOLDBERG & ZIPURSKY, *supra* note 190, at 30–51 (analyzing the importance of the *ubi jus ibi remedium* principle in American law).

217. Cf. GARDNER, *supra* note 112, at 305–06, 326–27 (positing "seeing to it that justice is done according to law" as a "freestanding policy goal"). See generally Sen, *Rights as Goals*, *supra* note 112 (analyzing the nonviolation of rights as a policy goal).

218. See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 4, 89, 95–99 (2009) (arguing that liberal democracy entails a strong form of "process-based" autonomy—the freedom to participate on one's own terms in the lawmaking process, including adjudication). Redish further contends that this understanding of litigant autonomy is also a requirement of constitutional procedural due process. See *id.* at 140–47.

219. Cf. DAMAŠKA, *supra* note 16, at 104–09 (arguing that the "reactive state" recognizes a robust form of litigant autonomy). But see generally BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* (2019) (propounding a libertarian defense of class actions and the restrictions on litigant autonomy they entail). Insofar as Redish embraces libertarianism, one can question whether his political theory is genuinely liberal at all. See generally Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 PHIL. & PUB. AFF. 105, 107 (2001) (arguing that libertarianism "reject[s] essential liberal institutions").

220. For Fiss's elaboration of the egalitarian commitments undergirding his brand of liberalism, see generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

leeway in reconciling its various functions.²²¹ But even those more moderate liberal theories will spawn conflicts between the state's different functions inasmuch as they countenance any significant role for individuals, rather than just the state itself, in enforcing rights.

The liberal state will likely confront similar conflicts between its aggregate rights-enforcement and dispute-resolution functions. It will be difficult, for example, for the state to promote aggregate rights enforcement without curbing dispute resolution in the thin sense, lest individual disputes be resolved on terms that do not adequately deter widespread rights violations; hence some of the concern with class-arbitration bans in arbitration agreements, which have been criticized for privileging the thin form of dispute resolution realized through arbitration at the expense of the aggregate rights enforcement realized through class actions.²²² And sometimes rights will be best protected in the aggregate through resolutions of disputes that sweep in as many affected parties as possible but without giving any particular party precisely what he or she is entitled to under the applicable substantive law, thus compromising dispute resolution in the thick sense—as is arguably true of many nonclass aggregate settlements.²²³ In both kinds of cases, the state will have to decide whether to prioritize its aggregate rights-enforcement or dispute-resolution function.

Both rights enforcement and dispute resolution, in short, are fundamental state functions according to virtually any liberal theory of the state, yet those functions can sometimes pull the state in different directions in the civil justice context.

3. Distributive Justice

Dispute resolution and rights enforcement are important state functions even according to “classical” understandings of liberalism. Seeking to give expression to the value of equality as well as liberty, theories in the “high liberal” tradition—most prominently, John Rawls's influential theory of “justice as fairness”—assign the state a third significant function: securing distributive justice.²²⁴ While this egalitarian amendment renders liberalism more compelling normatively, it also makes liberal theories of the state more complex conceptually, engendering significant conflicts between the state's multiple roles. And those conflicts are particularly acute in the civil justice context.

In speaking of distributive justice as a state function, I mean to refer to the task of arranging society's rules and institutions so as to fairly distribute the benefits and burdens of social cooperation among society's members.²²⁵ The state, in

221. For a self-avowedly liberal-democratic account of procedure that attempts to chart a middle course between libertarian procedural theories such as Redish's and more egalitarian ones such as Fiss's, see generally LAHAV, *supra* note 15.

222. See *supra* notes 135–36 and accompanying text.

223. See *supra* notes 165–67 and accompanying text.

224. On the distinction between “classical” and “high” liberalism, see generally Freeman, *supra* note 219.

225. See Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL. (Sept. 26, 2017), <https://plato.stanford.edu/entries/justice-distributive/> [<https://perma.cc/5UQE-WM4U>] (focusing

discharging this function, seeks to directly combat (unfair) economic inequality in society at large. Although liberalism's distributive-justice function, unlike the dispute-resolution and rights-enforcement functions, doesn't correspond directly to any of the goods considered in the previous Parts, it nonetheless implicates all those goods—and the various conflicts between them.

It does so for at least two reasons. First, a state that takes its distributive justice mission seriously will seek to distribute a range of goods more equally—not just material goods such as wealth, but also rights, public offices, and access to important social institutions.²²⁶ These latter kinds of goods comprehend all the goods associated with access to justice, each of which represents either an important incident of citizenship or a necessary means of fully enjoying those incidents.²²⁷ Second, the distribution of the various goods associated with access to justice can, in turn, affect the distribution of other goods that are also objects of distributive justice, such as material benefits, freedom, and political rights. It's true that I began by distinguishing the issue of how civil procedure might exacerbate or ameliorate economic inequality in society at large from the issue of how civil procedure should be structured so as to best insulate it from the effects of economic inequality and to ensure that the various goods provided by the civil justice system are distributed fairly, and I focused exclusively on the latter issue in the previous two Parts.²²⁸ But the former issue can no longer be bracketed once liberalism tasks the state with securing distributive justice, for the achievement of distributive justice partly depends on the distribution of the goods associated with access to justice. So, by including distributive justice among the state's functions, contemporary versions of liberalism require the state to attend to the distribution of the goods associated with access to justice both for their own sake as well as for their broader impact on the overall distribution of benefits and burdens in society. A more libertarian state that disclaims any redistributive mission, by contrast, will be less concerned (or perhaps completely unconcerned) with the distribution of the goods provided by the civil justice system.²²⁹

on "principles designed to cover the distribution of benefits and burdens of economic activity among individuals in a society," which "have been the dominant source of Anglo-American debate about distributive justice over the last six decades").

226. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 181 (rev. ed. 1996) (including among the "primary goods" to be distributed according to his two principles of justice not only "income and wealth," but also, for example, "basic rights and liberties," "powers and prerogatives of offices," and "the social bases of self-respect").

227. See generally LAHAV, *supra* note 15, at 112–41 (arguing that broad access to courts promotes social equality); WILMOT-SMITH, *supra* note 5, at 34–41 (arguing that liberal-democratic commitments to "equal rights" and "equal concern" for all citizens demand that all citizens have relatively equal abilities to vindicate their rights).

228. See *supra* notes 3–5 and accompanying text; cf. Gardner, *supra* note 4, at 341 (considering the "question whether the [tort] system justly distributes access to the corrective justice it dispenses"); *id.* at 346 (considering "the ever-present question of how to distribute, among imaginable classes of potential parties, tort law's special apparatus for doing or helping to do justice between them").

229. See DAMAŠKA, *supra* note 16, at 106–07 (arguing that a laissez-faire state will be unconcerned with inequalities in the litigation process).

The liberal-egalitarian state's distributive-justice function can potentially conflict with both its dispute-resolution function and its rights-enforcement function. The main reason for such conflicts is that dispute resolution and rights enforcement, insofar as they answer to any notion of justice at all, are commonly understood to be responsive to *corrective* justice rather than distributive justice. In other words, while dispute resolution and rights enforcement are goods that can be distributed, and can therefore be objects of distributive justice, those goods are constituted according to the distinct ideal of corrective justice—the justice that consists in correcting wrongs committed by individuals against one another.²³⁰ And seeking to do corrective justice can sometimes impede or even subvert the achievement of distributive justice, and vice versa.²³¹

With regard to dispute resolution, the conflict with distributive justice can be triggered by at least two mechanisms. First, from the perspective of distributive justice, dispute resolution is a derivative, rather than fundamental, function: a focus on distributive justice requires that disputes be resolved so as to promote the fairest overall distribution of benefits and burdens in society,²³² or at the very

230. See, e.g., RIPSTEIN, *supra* note 201, at 289–94 (sharply distinguishing corrective justice as a form of “foreground justice” that concerns horizontal relations between private parties from distributive justice as a form of “background justice” that concerns vertical relations between private parties and the state); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in 4 OXFORD ESSAYS IN JURISPRUDENCE 237 (Jeremy Horder ed., 2000). For an egalitarian critique of such a strict separation between corrective and distributive justice, see generally Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 LEGAL THEORY 181 (2006).

The conflicts still arise even if we substitute “redressive justice,” “civil recourse,” or “relational justice” for corrective justice. For just like corrective justice, those alternative principles focus on local justice between the parties, as opposed to the global distribution of benefits and burdens in society. See ANDREW S. GOLD, *THE RIGHT OF REDRESS* (2020) (arguing that private law aims to achieve redressive justice between the parties); GOLDBERG & ZIPURSKY, *supra* note 190, at 238–39 (arguing that tort adjudication, on a civil recourse account, is “direct” in that it focuses on resolving the dispute between the parties rather than advancing broader social goals); Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 112, 131 (Hanoch Dagan & Benjamin Zipursky eds., 2020) (defending the “freestanding significance of relational justice” in contract law). So, any understanding of dispute resolution and rights enforcement grounded in those principles will likewise lack the systemic focus of distributive justice and thus risk conflicting with that ideal.

231. The contrast I’m drawing between corrective justice and distributive justice shouldn’t be taken to deny the existence of certain “localized” questions of distributive justice that can arise solely between the parties, such that doing justice between the parties will sometimes involve doing distributive justice as well as corrective justice. See Gardner, *supra* note 4, at 346–50. Although such local distributive justice may also conflict with corrective justice in particular cases, I’m focusing on conflicts between corrective justice (understood to implicate both dispute resolution and rights enforcement) and global distributive justice—the distribution of the benefits and burdens of social cooperation across society. See *supra* note 225 and accompanying text.

232. Some law-and-economics scholars have famously denied that private law adjudication can effectively pursue this goal. For the classic argument, see Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–68 (1994). For a recent overview of the debate, see generally Matthew Dimick, *The Law and Economics of Redistribution*, 15 ANN. REV. L. & SOC. SCI. 559 (2019). For a recent argument challenging the law-and-economics orthodoxy in light of contemporary political realities, see generally Zachary Liscow, *Redistribution for Realists* (Feb. 24, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792122.

least to avoid compounding systemic injustice in that distribution, rather than simply to achieve peace between the parties (as contemplated by the thin notion of dispute resolution) or even to do corrective justice according to the law (as contemplated by the thick notion). Dispute resolution, we've seen, is itself one of the goods that distributive justice requires to be distributed more equally, but there's no reason to think that a more egalitarian distribution of that good will necessarily produce a more egalitarian distribution of the other benefits of social cooperation. And when we can choose between a resolution of a dispute that either achieves peace between the parties or does corrective justice according to the law, on the one hand, and, on the other, a resolution that does neither but promotes a fairer overall distribution of the benefits and burdens of social cooperation, distributive justice demands that we choose the latter. A thoroughgoing commitment to distributive justice thus subordinates or even subsumes the dispute-resolution function.²³³

Second, some scholars have worried that understanding civil justice in terms of dispute resolution unduly narrows the scope and ambition of civil procedure, preventing economically disadvantaged individuals from banding together to use civil litigation as a form of “countervailing power” against the “large aggregations of power,” such as corporations, that often obstruct efforts to achieve distributive justice.²³⁴ That is arguably the result when a dispute between a weaker party and a more powerful one is settled, sent to arbitration, or even adjudicated without regard for its broader, systemic implications. The liberal state's dispute-resolution function can, in these ways, hinder efforts to promote a fairer distribution of the benefits and burdens of social cooperation.

The liberal state confronts a similar conflict between its distributive-justice and rights-enforcement functions. That conflict underlies the longstanding division within liberal thought between “vigorous government” liberals, who tend to prioritize the aggressive use of state power for redistributive ends, and civil-libertarian or “legal” liberals, who tend to prioritize the judicial enforcement of individual rights, including against the state itself.²³⁵ Members of the former

233. Cf. DAMAŠKA, *supra* note 16, at 87 (noting that, in the “activist,” or redistributivist, state, adjudication is “independent” of the dispute-resolution function and instead seeks to promote other goals); Hanoch Dagan & Avihay Dorfman, Justice for Contracts 16 (Nov. 20, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435781 (“[P]ursuing a framework of distributive justice in private law eliminates the relational structure of private law.”).

234. Fiss, *supra* note 77, at 43–44; *see also* Norris, *supra* note 3, at 544 (arguing that recent procedural developments have undermined the “countervailing power” function of civil litigation). Some scholars have argued that any tendency of a focus on dispute resolution to undermine distributive justice is the result of a so-called neoliberal ideology, though the precise meaning of the epithet and its relationship to liberalism more generally remain somewhat obscure. *See, e.g.*, Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 *FORDHAM L. REV.* 1143, 1162 (2009); Mamo, *supra* note 123, at 1419–26, 1440; *see also* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 *FLA. L. REV.* 575, 581 (2020) (criticizing the Supreme Court's arbitration jurisprudence for embodying a “neoliberal” hostility to collective action).

235. Cf. Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 *MICH. L. REV.* 893, 910–11 (2016) (distinguishing between “New Deal Liberal[s]” and “Rights

camp worry that legal liberalism's emphasis on judicially enforceable rights undermines distributive justice, both by constraining the government's ability to undertake systemic egalitarian reforms and by defusing and quieting public pressure for such reforms in the first place.²³⁶ In a similar vein, progressive scholars have long criticized the very idea of access to justice for unduly emphasizing the enforcement of individual rights through civil litigation—which, they contend, is ill-suited to achieving egalitarian objectives—and thereby diverting attention from other, more promising avenues for redistributing the benefits and burdens of social cooperation.²³⁷ Rights enforcement, on this view, is a mere distraction from distributive justice.²³⁸

At first blush, prominent liberal theories of the state purport to reconcile distributive justice with the state's other roles, but they do so only by privileging one of the roles over the others. Consider, for example, Rawls's theory of justice. Rawls famously articulated two principles of justice requiring a generally egalitarian distribution of the benefits and burdens of social cooperation.²³⁹ Those principles govern the "basic structure" of society, "its main political and social institutions and how they fit together into one unified system of cooperation."²⁴⁰ The purpose of the basic structure is to secure "background justice"—to prevent putatively fair individual market transactions from undermining the just overall distribution of benefits and burdens over time—and Rawls's two principles require that the institutions of the basic structure be arranged to perform that function.²⁴¹ While there is some ambiguity as to whether the basic structure includes

Revolution Liberal[s]" and arguing that the former are more willing to curb access to courts); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1085 & n.4 (2014) (summarizing historical scholarship on how some Progressive-era and New Deal liberals conceptualized civil liberties to augment, rather than restrict, the state's capacities).

236. See generally, e.g., Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016) (recounting how many progressives during the early twentieth century worried that judicial enforcement of civil liberties thwarted democratic regulation of private economic power).

237. See, e.g., Richard L. Abel, *Redirecting Social Studies of Law*, 14 LAW & SOC'Y REV. 805, 827 (1980) (suggesting that the main effect of law is "social stasis" rather than "social change"). See generally, e.g., Abel, *supra* note 13 (interrogating legal aid's role in undermining more systemic egalitarian reforms); Galanter, *supra* note 3 (examining various ways in which legal institutions can advantage the "haves" and thus entrench inequality).

238. Cf. Elizabeth L. MacDowell, *Vulnerability, Access to Justice, and the Fragmented State*, 23 MICH. J. RACE & L. 51, 81 (2018) (arguing that the "fragmentation" of state institutions, which is typically justified in terms of protecting individual rights, frustrates the pursuit of distributive justice). Compare Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 387–98 (2018) (suggesting that judicially enforced constitutional rights provisions are a less effective means of achieving economic equality than are structural reforms), with Mila Versteeg, *Can Rights Combat Economic Inequality?*, 133 HARV. L. REV. 2017, 2058–60 (2020) (reviewing SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018), and noting examples where judicial enforcement of socioeconomic rights has achieved greater material equality).

239. See RAWLS, *supra* note 23, at 266.

240. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 39–40 (Erin Kelly ed., 2001).

241. RAWLS, *supra* note 226, at 265–69.

the substantive rules of private law,²⁴² it undoubtedly comprehends the civil justice system and its *procedural* rules.²⁴³ The various goods associated with the civil justice system must therefore be distributed according to Rawls's two principles of justice, including his "difference principle," which permits inequalities in the distribution of the benefits and burdens of social cooperation only insofar as such inequalities benefit the members of the worst-off group in society.²⁴⁴ The upshot is that, even in the civil justice context, the state will have to directly pursue—or at least pay significant heed to—distributive justice, and particularly background justice, to the potential detriment of its other aims, including the kind of local justice achieved through dispute resolution and (individual) rights enforcement.²⁴⁵ Like Fiss,²⁴⁶ for instance, a Rawlsian perspective would seem to countenance compromising on the resolution of individual-rights claims and other disputes for the sake of a fuller realization of "public values," including a more egalitarian distribution of the benefits and burdens of social cooperation.²⁴⁷

Rawls's theory might initially seem to contain the conceptual resources for accommodating distributive justice to the state's other functions. As Samuel Scheffler explains, Rawls officially eschews "strong distributivism" for "weak distributivism," subjecting the institutions of the basic structure not just to the difference principle, but also to two other requirements (equal basic liberties and fair equality of opportunity), which he assigns lexical priority over the difference

242. Compare, e.g., *id.* at 267–69 (suggesting that contract law isn't part of the basic structure), with, e.g., SAMUEL FREEMAN, *LIBERALISM AND DISTRIBUTIVE JUSTICE* 167–94 (2018) (arguing that the premises of Rawls's theory commit him to including private law within the basic structure); and Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 *GEO. WASH. L. REV.* 598, 600 (2005) (making a similar argument specifically about contract law).

243. See RAWLS, *supra* note 240, at 10 (including "[t]he political constitution with an independent judiciary" in the basic structure, though not further specifying the nature of the "judiciary"); RAWLS, *supra* note 226, at 301 (including "the legal order" within the basic structure); see also SAMUEL FREEMAN, RAWLS 464 (2007) (stating that the basic structure includes, among other institutions, "the legal system of trials"); WILMOT-SMITH, *supra* note 5, at 43.

244. See RAWLS, *supra* note 23, at 65–73.

245. Some private law theorists embrace this implication. See, e.g., Aditi Bagchi, *Distributive Justice and Contract*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 193, 193–94 (Gregory Klass, George Letsas & Prince Saprai eds., 2014) (arguing that the rules of contract law should account for both preexisting inequalities and the likely distributive effects of the rules' application); Aditi Bagchi, *Distributive Injustice and Private Law*, 60 *HASTINGS L.J.* 105, 135 (2008) (similar); Gregory C. Keating, *Is Tort Law "Private"?*, in *CIVIL WRONGS AND JUSTICE IN PRIVATE LAW* 351, 352–53, 359–60, 364–65 (Paul B. Miller & John Oberdiek eds., 2020) (arguing that, because tort law's rights and duties are partly constitutive of "basic" or "background" justice, corrective justice must remain subordinate to distributive justice).

246. See *supra* note 81 and accompanying text.

247. One might insist that I've misunderstood the nature of the Rawlsian project. Because Rawls's principles of justice are formulated in the idealized hypothetical choice situation known as the "original position," the argument goes, it's simply a mistake to speak of real-world institutional practices such as rights enforcement as "undermining" the pursuit of distributive justice; rather, insofar as the judicial enforcement of individual rights ends up curtailing certain egalitarian goals, those goals simply aren't requirements of distributive justice, properly understood. But rather than refute the existence of a tension or trade-off between distributive justice and rights enforcement in Rawls's theory, this response seems merely to push that trade-off back to the level of the institutional choices faced by the parties to the original position. I'm grateful to Alec Walen for pressing me on this point.

principle.²⁴⁸ This hierarchy might seem to constrain the state's pursuit of distributive justice in ways that would permit other considerations, including those related to dispute resolution and rights enforcement, to shape the legal system.²⁴⁹ But on closer inspection, Scheffler reveals, Rawls's ostensibly "weak distributivist" theory of justice collapses back into "strong distributivism" in practice, for the other requirements impose few limits on the state's pursuit of distributive justice as specified by the difference principle.²⁵⁰ Rawls's theory thus does not defuse the conflicts between distributive justice and the liberal state's other roles so much as deny them, by assigning distributive justice effective, if not formal, priority over other imperatives.²⁵¹

Other liberal theories likewise deny the conflicts between distributive justice and the state's other functions, albeit in favor of the other functions rather than distributive justice. Arthur Ripstein, for instance, espouses a Kantian account of adjudication that privileges the dispute-resolution and rights-enforcement functions over the pursuit of economic equality. Indeed, Ripstein affords virtually *no* role for considerations of distributive justice in the resolution of private law disputes,²⁵² and so, in contrast to a Rawlsian approach, would presumably require that every individual dispute be resolved according to the applicable law, irrespective of its broader systemic implications, including for the overall distribution of the benefits and burdens of social cooperation. Now, it's true that the centerpiece of Ripstein's theory is a thick notion of dispute resolution according to which a court can authoritatively resolve private disputes only if it can speak on behalf of all the members of the political community.²⁵³ And "[t]o be entitled to act on behalf of everyone, [the state] must stand in the right relation to each citizen over whom it exercises power," which requires, among other things, "seeing to it that everyone has enough to avoid falling into extreme dependence on

248. See Samuel Scheffler, *Distributive Justice, the Basic Structure, and the Place of Private Law*, 35 OXFORD J. LEGAL STUD. 213, 222 (2015).

249. *Cf. id.* at 223–24 (raising the possibility that weak distributivism might leave room for contract law to be shaped not just by distributive concerns, but also by principles of promissory morality and the "bipolar" structure of private law litigation generally).

250. *See id.* at 224–25.

251. For another intriguing attempt to at least partly reconcile Rawlsian distributive justice and corrective justice in contract law, see Zhong Xing Tan, *Where the Action Is: Macro and Micro Justice in Contract Law*, 83 MOD. L. REV. 725 (2020). Zhong purports to effect such a reconciliation by identifying a set of "micro" distributive concerns that can ostensibly be addressed within the "bilateral" confines of an individual lawsuit. *See id.* at 726–28. But that still leaves a potential conflict between corrective justice and the "macro" distributive concerns embodied in Rawls's principles of justice. Nor is it clear that Zhong's notion of "micro justice" represents a distinct *form* of justice, as opposed to an expanded *conception* of corrective justice gerrymandered to encompass certain distributive concerns. In that regard, it seems to resemble some of the "reconciliation strategies" I consider in the next Section—and to suffer from some of the same pitfalls.

252. *See* RIPSTEIN, *supra* note 201, at 23 ("I will unashamedly maintain that the point of tort litigation is to resolve the specific dispute between the parties currently before the court, based entirely on what transpired between them."); *cf.* Dagan & Heller, *supra* note 230 ("Only the most urgent distributive concerns may legitimately override the demands of relational justice within private law.").

253. *See supra* note 201 and accompanying text.

others.”²⁵⁴ The state may claim to speak for all its citizens and legitimately resolve their disputes and determine their rights only insofar as it avoids extreme economic inequality. On Ripstein’s theory, then, a proper understanding of the dispute-resolution function itself requires a degree of distributive justice. But this understanding of distributive justice is relatively minimal and sees that function as incidental to the state’s other, more fundamental functions.²⁵⁵ Only by diluting the requirements of distributive justice does Ripstein manage to harmonize them with dispute resolution and rights enforcement.²⁵⁶

I don’t mean to endorse either Rawls’s or Ripstein’s purported reconciliation of distributive justice with the liberal state’s other functions of dispute resolution and rights enforcement; in fact, I’m skeptical of both attempts. The point, rather, is that, insofar as a liberal theory fully recognizes all three functions, the state won’t be able to pursue them all simultaneously without qualification, but will instead end up having to trade off some functions against others.²⁵⁷

B. MEDIATING LIBERALISM’S CONFLICTS IN CIVIL JUSTICE

There are two main sets of potential responses to the conflicts between the liberal state’s various functions in the civil justice context. One kind of response seeks to dissolve the conflicts by purporting to reconcile the different functions, though in practice this means emphasizing one function to the exclusion of the others. Another kind of response squarely confronts the conflicts and then seeks to develop strategies to mediate them. After first considering several possible reconciliation strategies, this Section goes on to argue that we should prefer the case-by-case mediating strategies, given persistent disagreement about the relative importance of the liberal state’s various functions. We can best respect the existence of such disagreement by structuring procedural decisionmaking institutions to be more responsive to the full range of views on how to navigate the kinds of conflicts canvassed in the previous Section when they inevitably arise.

254. RIPSTEIN, *supra* note 201, at 289.

255. *See, e.g., id.* at 290 (“Beyond the entitlement to make laws and adjudicate and impose binding resolution on private disputes, the state must also have the power to tax, that is, to compel citizens to contribute to the costs of maintaining its essential programs.”).

256. Indeed, in contrast to many other contemporary liberal theorists, Ripstein seems to deny that a liberal state has any roving license to pursue material equality as a freestanding ideal. *See id.* at 291–92 (suggesting that the state’s pursuit of “background justice” should aim not to achieve any egalitarian distributive pattern, but only to “enable [citizens] both to pursue their own purposes and to participate as they see fit in the public sphere”).

257. I’m loath to characterize these trade-offs between distributive justice and the other state functions as either strictly principled or strictly contingent. Rather, they strike me as both: contingent insofar as they result from current institutional arrangements, but principled insofar as those institutional arrangements reflect particular normative conceptions of the state functions. *But cf.* Felipe Jiménez, *Contracts, Markets, and Justice*, 71 U. TORONTO L.J. 144, 163 (2021) (reviewing PETER BENSON, *JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW* (2019), and insisting that there is no “principled incompatibility between distributive justice and contract law”).

1. Reconciliation Strategies

One could deny the inevitability of the conflicts between the liberal state's various functions and instead seek to dissolve those conflicts by reconciling the functions.²⁵⁸ There are at least three possible strategies for doing so.

First, one could simply redefine liberalism more narrowly to reduce to just one of the functions identified in the previous Section, so that any conflict between the functions would amount not to a conflict within liberalism, but rather to a conflict between liberalism and values external to it. That is the approach taken by "classical" versions of liberalism such as Redish's, which exclude the distributive-justice function from the state's remit.²⁵⁹ Such a move, however, is contentious, for as we saw, all three functions are prominent in contemporary liberal thought.

Second, and more subtly, one could define liberalism to comprehend all three state functions but attach strict priority to only one, so that the prioritized function would always prevail over the others in any conflict between them. Such a priority could be either normative or practical. As an example of normative priority, Owen Fiss deems what he considers the "public" functions of adjudication (that is, the norm-articulation and redistributive functions) to be categorically more important than the dispute-resolution function and insists that the former should never be compromised for the sake of the latter.²⁶⁰ Rawls's theory, we've seen, establishes a similar hierarchy of functions, while Ripstein's effectively reverses the priority. This strategy, however, ends up reducing, more or less, to the redefinition strategy noted above: even as it nominally recognizes all three state functions, it gives practical effect in cases of conflict to only one, the one to which it assigns priority.

Frederick Wilmot-Smith, by contrast, offers an argument that might be understood to imply a practical priority of distributive justice over the other liberal state functions in the civil justice context.²⁶¹ Wilmot-Smith contends that the accurate adjudication of rights claims requires a relatively equal distribution of legal resources, lest wealthier parties leverage their superior resources to induce courts

258. Cf. Frederick Schauer, *Official Obedience and the Politics of Defining "Law,"* 86 S. CAL. L. REV. 1165, 1183–84 (2013) (considering various "strategies of reconciliation" to eliminate apparent conflicts between law and morality (capitalization omitted)).

259. See, e.g., Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1575–78 (2007) (defining "liberal political theory" narrowly in terms of respect for individual autonomy and arguing that this commitment precludes the state from limiting individuals' enforcement of their legal rights for the sake of other values, such as distributive justice).

260. Fiss, *supra* note 77, at 29–32; cf. Bone, *supra* note 95, at 302 (identifying only one "central purpose" of procedure and three subsidiary "qualifications" of that purpose).

261. Wilmot-Smith explicitly defends a *normative* priority of certain principles of distributive justice over others in the civil justice context when circumstances preclude their joint fulfillment. See WILMOT-SMITH, *supra* note 5, at 191–92. But because I'm concerned here with the relationship between distributive justice and *other* state functions, I focus on the *practical* argument for prioritizing distributive justice over other state functions that his account of distributive justice implies. See *id.* at 192.

to rule unjustly in their favor.²⁶² Given this potential for resource inequalities to distort adjudication, distributive justice, although perhaps not categorically more important than dispute resolution or rights enforcement, conditions the successful performance of those other functions and therefore, one might think, must be accorded priority over them as a practical matter.

Whether Wilmot-Smith's argument actually entails such a priority depends on the precise demands distributive justice makes in the civil justice context. Wilmot-Smith explicitly considers the demands of justice with regard to the distribution only of *legal* resources, not all the other benefits and burdens of social cooperation.²⁶³ So limited, his argument shows at most only that the dispute-resolution and rights-enforcement functions presuppose a roughly equal distribution of legal resources, not that those functions must yield to the goal of achieving a just overall distribution of the benefits and burdens of social cooperation. His argument, in other words, supports not a complete priority of distributive justice over the other state functions, but only a partial priority of justice in the distribution of one class of goods—legal resources—over those other functions.

That said, it seems difficult to cabin Wilmot-Smith's argument—and thus the scope of any practical priority of distributive justice over the other state functions—to the distribution of legal resources alone. That's because the distribution of the other benefits and burdens of social cooperation, as much as the distribution of legal resources, will affect dispute resolution and rights enforcement. After all, one's ability to successfully file and prosecute a lawsuit depends not only on whether one can afford to hire a lawyer and pay any filing fees, but also on such factors as whether one can afford to take time off from work for depositions, court dates, and so on. And that, in turn, will depend on one's relative share of the benefits and burdens of social cooperation. So, if we accept the argument that distributive justice enjoys a practical priority over other state functions insofar as distributive *injustice* compromises the integrity of those other functions, then it seems we must extend that priority beyond the distribution of legal resources to the distribution of all the benefits and burdens of social cooperation—to distributive justice *tout court*.²⁶⁴ The problem with this implication, however, is that such a comprehensive priority of distributive justice threatens to eliminate the independent status of the dispute-resolution and rights-enforcement functions, ostensibly in the name of preserving them: if dispute resolution and rights enforcement require a just distribution of all the benefits and burdens of social cooperation, then the former must be performed so as to achieve and maintain the latter. The values that constitute dispute resolution

262. See *id.* at 26–27, 59–65, 74–75, 82–86. For a precursor of this argument, see Wertheimer, *supra* note 47.

263. See, e.g., WILMOT-SMITH, *supra* note 5, at 91 (“A proposal that legal resources be [equalized] across a legal system can . . . be understood to be a proposal that the level of legal resources any individual has should not be a function of (among other things) their antecedent wealth.”).

264. And indeed, Wilmot-Smith ultimately argues that the costs of providing legal resources should be distributed according to general principles of just taxation—though he distinguishes *costs* from *resources*, with the distribution of the latter supposedly being a separate question from distributive justice generally. See *id.* at 170–84.

and rights enforcement are no longer expressed in their own right, but are instead coopted by the imperatives of distributive justice.

A similar problem arises if we seek to reconcile the different state functions by attaching priority not to any of the functions themselves, but rather to the different goods with which they're associated. The most intuitive proposal along these lines would be to prioritize those goods that are ends in themselves (that is, dispute resolution and rights enforcement) over those that are mere means (that is, court access, legal resources, and judicial resources).²⁶⁵ On this view, because the ends are more important than the means, and because the distribution of the means can affect the distribution of the ends, we should prioritize ensuring a just distribution of the ends, even at the expense of a less egalitarian distribution of the means. If, for example, arbitration actually provided greater access to (thin) dispute resolution and (individual) rights enforcement, that might justify promoting the practice even when doing so requires curbing court access and withholding legal resources. Such a priority makes sense as far as it goes, but it doesn't go as far as one might think. In particular, it doesn't even purport to address conflicts *between* the different ends: the various notions of dispute resolution and rights enforcement.²⁶⁶ And we're no more likely to settle on an incontrovertible hierarchy of those ends than we are to settle on an incontrovertible hierarchy of the state functions with which they're associated.

Third, rather than redefine liberalism itself, one could redefine its component state functions so that they no longer conflict with one another. Public law scholars have recently pursued this kind of strategy in the First Amendment context by seeking to redefine free speech rights to better accommodate considerations of distributive justice. On the one hand, some scholars define free speech narrowly so that it doesn't prevent the state from pursuing egalitarian goals.²⁶⁷ On the other hand, some scholars define free speech broadly to encompass some of the egalitarian goals with which it purportedly conflicts.²⁶⁸ One could envision making

265. Cf. *id.* at 26–27 (presenting the “benefits and burdens of legality” as more fundamental than “legal resources” because the latter are mere means to the former). Conversely, the means could be prioritized over the ends, an approach that would confront conflicts similar to those I go on to describe.

266. Wilmot-Smith seems to unwittingly court such conflicts by including both distributive justice (“justice in allocation”) and corrective justice (“the reparation of injustice”) among the “benefits of legality” that he seeks to distribute more equally. *See id.* at 32–33, 36. One of his defenses of his “equal justice” principle poses a similar problem. In arguing that justice in the distribution of the benefits and burdens of legality can be partly constitutive of justice in the distribution of other goods beyond the legal system, Wilmot-Smith offers no practical guidance for situations in which that relationship doesn't necessarily obtain and corrective justice diverges from distributive justice. *See id.* at 43, 57–58.

267. *See* Kessler & Pozen, *supra* note 181, at 1987–89 (outlining a strategy of “First Amendment minimalism” that seeks to limit the scope of the First Amendment's “coverage” and the strength of its “protection” so that it stands as less of an impediment to efforts to reduce economic inequality).

268. *See, e.g.,* Leslie Kendrick, *Another First Amendment*, 118 COLUM. L. REV. 2095, 2102 (2018) (contemplating a progressive strategy that would “redefine the scope of the [free speech] right by redefining the values served by it” to include economic equality); Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2222 (2018) (“[O]ne might define freedom of speech to include a commitment to economic redistribution.”); Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 961 (2020) (“[C]onsiderations of

analogous definitional moves in the civil justice context. For example, by redefining dispute resolution and rights enforcement more narrowly, we could ensure that those functions never prevent the state from adjudicating a dispute so as to best promote the fairest overall distribution of the benefits and burdens of social cooperation. Or, if we defined distributive justice more broadly to encompass dispute resolution and rights enforcement, then those latter two functions would necessarily have to be discharged so as to best serve the former. A similar result would be achieved if we redefined dispute resolution and rights enforcement more broadly to encompass some of the concerns traditionally associated with distributive justice, such that performing the former functions would necessarily entail at least a partial fulfillment of the latter.²⁶⁹ Redefined in such ways, though, the three state functions would no longer enjoy the roughly equal prominence they've traditionally been accorded in liberal political theory; rather, the one favored function would subsume the others.

The foregoing three strategies seek to harmonize the liberal state's various functions in somewhat different ways, but they all share a reluctance to accept the full breadth and independent status of each of those functions and the ensuing conflicts between them. Without purporting to have refuted any of the reconciliation strategies, I want to suggest that such reluctance is likely to render them all unstable, insofar as they end up emphasizing one of the state functions to the exclusion of the others. That's because all the functions have a strong claim on the liberal state's attention, yet there is little agreement—within liberal thought, much less between liberal and nonliberal theories of the state—about which functions should take precedence in cases of conflict. In ranking the various state functions, the various reconciliation strategies seek to transcend such disagreements, but at the cost of giving some of the functions short shrift.

The members of modern, pluralistic liberal democracies reasonably disagree not just about which policies the state should pursue, but also about such fundamental matters as which rights we enjoy and even what justice itself requires.²⁷⁰ Some of our most basic disagreements, in other words, concern what the state

distributive justice do properly affect interpretation of free speech . . ."). Kessler and Pozen dub this strategy First Amendment "maximalis[m]," the extension of First Amendment protection to efforts to combat economic inequality. Kessler & Pozen, *supra* note 181, at 1989–94; cf. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 121 (2000) (reconceptualizing liberty as "an aspect of equality rather than, as it is often thought to be, an independent political ideal potentially in conflict with it").

269. Cf., e.g., Hanoch Dagan & Avihay Dorfman, Poverty and Private Law: Beyond Distributive Justice 3 (Jan. 2, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637034 (presenting "poverty" as a concern not only of distributive justice, but also of the "relational justice" realized by private law). For Dagan and Dorfman's more general account of relational justice, see Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016).

270. See JEREMY WALDRON, LAW AND DISAGREEMENT 12–15, 149–63 (1999) (considering the normative significance of fundamental disagreements about rights and justice); see also STUART HAMPSHIRE, JUSTICE IS CONFLICT (1999) (arguing that matters of substantive justice will always be contested); Jamal Greene, *A Private Law Court in a Public Law System*, 12 LAW & ETHICS HUM. RTS. 37, 40 (2018) ("It is in the nature of [a mature constitutional] democracy that rights are respected in general terms but that their specification prompts reasonable disagreement.").

may legitimately do. There's little reason to think that such disagreements don't extend to the civil justice context, where, as we've seen, several different functions compete with one another and several corresponding goods stand to be distributed. Indeed, given the kinds of conflicts within the ideal of access to justice considered in Part II, civil procedure seems to be a particularly prominent site for our disagreements about the state's proper role.

And yet, in the civil justice context as much as any other, we must still make collective decisions about policy even in the face of reasonable disagreements of principle. The reconciliation strategies promise to allow us to make those decisions by arranging the liberal state's various functions so that they ostensibly cohere rather than conflict. The problem with that approach is that it involves taking a controversial position on how to *respond* to conflicts between the different functions under the guise of avoiding the conflicts altogether. In fact, to purportedly reconcile the state's different functions, the reconciliation strategies end up having to downplay some functions, essentially denying them their full force in conflicts with the others.²⁷¹ But that move assumes broad agreement about which of the conflicting functions should be diluted and which should be preserved undiminished—agreement that remains elusive.

2. Mediating Procedural Disagreements

The alternative is to acknowledge the conflicts between the liberal state's various functions and our disagreements about how to resolve them.²⁷² Faced with such intractable disagreements, the best we may be able to hope for are fair procedures for negotiating conflicts between the different state functions in specific contexts. One might criticize such a procedural response as its own kind of ill-fated attempt to elide those conflicts. As both public law scholars²⁷³ and political theorists²⁷⁴ have argued, any decisionmaking procedure entails its own substantive commitments and so cannot promise a "neutral" resolution of substantive disagreements but rather threatens to obfuscate them. It thus might seem as though I'm succumbing to the "basic tendency within American legal culture, if not within law itself, to seek nominal reconciliation of competing views about the content of public policy" by "perpetually redescribing . . . first-order political conflicts as—and rerouting them into—comparatively esoteric debates about the allocation of institutional authority and the rationality of decisionmaking

271. See *supra* Section III.B.1; cf. SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018) (criticizing attempts to frame considerations of economic equality in terms of human rights for diluting the demands of distributive justice).

272. This response is analogous to the strategy Daniel Markovits and Alan Schwartz dub "[e]mbracing [v]alue [p]luralism." Daniel Markovits & Alan Schwartz, *Plural Values in Contract Law: Theory and Implementation*, 20 THEORETICAL INQUIRIES L. 571, 583 (2019).

273. See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067–72 (1980).

274. See, e.g., RONALD DWORKIN, *Ronald Dworkin Replies*, in DWORKIN AND HIS CRITICS 339, 387 (Justine Burley ed., 2004) ("I take questions of proper legal procedure to be themselves questions of political morality that themselves have right answers."); RAWLS, *supra* note 226, at 422 & n.168 (acknowledging that "procedural justice depends on substantive justice").

methods.²⁷⁵ But I'm not claiming to "reconcile" differing views about which state functions to prioritize when they conflict; in fact, I doubt such reconciliation is possible. Rather, insofar as we accept the persistence of reasonable disagreements of political principle, we can't avoid institutional questions about how to proceed in the face of those disagreements.²⁷⁶ And that means we must settle on some kind of procedure for deciding which political objectives to pursue in cases of conflict.²⁷⁷

In the civil justice context, there are several different institutional forms such a decisionmaking procedure could potentially take—though choosing among the different arrangements (or others I haven't considered) would require a more complete normative assessment than I can offer here. One option might be to allow courts to decide which state functions to prioritize in specific cases. The main difficulty with that approach, however, is that legitimately making trade-offs between the different state functions requires a significant amount of information and a broad range of input about the potential ramifications of any particular trade-off, information and input that American courts generally aren't structured to elicit.²⁷⁸ And although courts could conceivably be restructured to do so, that kind of reform would itself implicate contested issues regarding the relative importance of the different state functions.

There is, of course, an institution that is already designed to make collective decisions based on large amounts of information and taking account of a broad range of views regarding the proper role of the state: Congress. If the conflicts between the various goods associated with access to justice implicate more fundamental disagreements of political principle, that would seem to counsel in favor of vesting Congress with greater authority over questions of civil procedure—a suggestion that echoes criticisms of the federal civil rulemaking process as an excessively broad delegation of Congress's legislative powers.²⁷⁹ I don't necessarily mean to endorse those criticisms, but a more politically accountable institution might seem to be the natural venue for debating the relative importance of the different state functions in the civil justice context.

275. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1827 (2016).

276. Cf. WALDRON, *supra* note 270, at 160–61 (insisting on the need for "procedural principles" of political decisionmaking given persistent disagreement about substantive issues of justice).

277. Cf. Dana Shocair Reda, *What Does It Mean to Say That Procedure Is Political?*, 85 FORDHAM L. REV. 2203, 2222–25 (2017) (also arguing that civil procedure is "political," though in the narrower sense that it involves conflicts over material resources).

278. Cf. Bone, *supra* note 95, at 300–01 (arguing that procedural issues entail "value tradeoffs" that individual judges aren't well placed to make); Jamal Greene, *The Supreme Court 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 115–19 (2018) (arguing that U.S. courts would have to be significantly restructured to effectively perform proportionality analysis in constitutional rights cases).

279. See generally, e.g., Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303 (2006) (elaborating such a critique).

Yet Congress has in recent decades been loath to undertake widescale procedural reforms.²⁸⁰ So, barring a radical reassertion of authority over civil justice issues by Congress, a third option might be to rely primarily on the federal civil rulemaking process to negotiate the conflicts between the different state functions in the civil justice context, while reforming that process to make it more representative of the multiplicity of views on how to resolve those conflicts. Admittedly, the rulemaking process cannot completely supplant Congress as a forum for mediating procedural disagreements. Only Congress can, for example, determine the place of arbitration in the civil justice system, which is governed by the FAA,²⁸¹ or calibrate the effect of incentives to sue on substantive rights, both of which are also creatures of statute.²⁸² But the Federal Rules of Civil Procedure equally affect the balance of competing values in the civil justice context. And the rulemaking process, in contrast to ordinary adjudication, is structured to gather information and solicit input from affected parties, albeit not to the same extent as the legislative process.²⁸³ The problem, as numerous scholars have noted, is that the actual decisionmakers—particularly the members of the Advisory Committee on the Rules of Civil Procedure—generally hail from similar professional backgrounds,²⁸⁴ which suggests that they will tend to share similar perspectives on the different state functions and how they should be prioritized in cases of conflict. Appreciating the pervasive disagreements on those questions thus provides further support for proposals to make the rulemaking process more representative. With a broader membership, the rulemaking process would be more likely to comprehend not only a wider range of views regarding specific procedural issues, but also, as a likely byproduct of that increased diversity, a wider range of views regarding the role of civil procedure in discharging the state’s various functions.²⁸⁵

280. See generally Briana Lynn Rosenbaum, *The Legislative Role in Procedural Rulemaking Through Incremental Reform*, 97 NEB. L. REV. 762 (2019) (arguing that Congress’s recent efforts at procedural rulemaking have taken the form of incremental reform that is opaque and “unmoored from adjudication and practice-based normative values”).

281. 9 U.S.C. §§ 1–14 (2018).

282. See *supra* notes 174–75 and accompanying text.

283. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 918–50 (1999). *But see id.* at 923–24 (criticizing legislative models of procedural rulemaking); see also Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 849–50 (1993) (arguing that the rulemaking process should not emulate the legislative process); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 801 (1991) (criticizing attempts to “politicize” the rulemaking process).

284. See, e.g., BURBANK & FARHANG, *supra* note 18, at 65–129; Coleman, *supra* note 62, at 1017–19. *But see* Burbank & Farhang, *Trump Era*, *supra* note 18, at 50–51 (suggesting that reforms of the rulemaking process have mitigated this problem); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 666–67 (1993).

285. Cf. BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019) (defending the democratic legitimacy of the administrative state and advocating reforms to make it more representative); RAHMAN, *supra* note 2 (similar).

Although pursuing any of the foregoing mediating strategies might make it more difficult to achieve consensus on any particular procedural issue, we may have to accept a greater degree of contention if we are to adequately respect the fact of reasonable disagreement on fundamental political questions. Fairness may require subjecting the trade-offs between the different goods associated with access to justice—and, by extension, the trade-offs between the state's different functions—to continuous contestation by decisionmakers who represent all segments of the political community.

CONCLUSION

Given the concept's rhetorical power, it's hardly surprising that scholars invoke "access to justice" as the standard response to the problems that increasing economic inequality poses for civil procedure. And yet, the concept's normative allure outstrips its capacity to generate practical guidance. For it turns out that access to justice demands a more egalitarian distribution of not just a single good associated with the civil justice system, but a multiplicity of goods, not all of which can be simultaneously distributed more equally through any particular policy. We thus face a choice in civil procedure about which goods to focus on broadening access to. And in making that choice, we inevitably confront questions about which functions the state should be performing in the civil justice context, questions that implicate some of the most fundamental disagreements in liberal political theory about the state's proper role. Public law, particularly constitutional law, has long been recognized as being inextricably bound up with those questions; civil procedure turns out to be no different.

This Article's analysis suggests two more general lessons, one for civil procedure and one for public law. First, normative debates in civil procedure, including debates about access to justice, often proceed as if they were governed solely by values *internal* to civil procedure doctrine and theory—the most commonly invoked values being procedural due process (or "procedural justice") and the ideals enumerated in Federal Rule of Civil Procedure 1.²⁸⁶ But that turns out to be an illusion: we can no more escape fundamental questions of political theory in civil procedure than we can in any other area of the law.

Second, calls for greater economic equality in other areas of the law will likely be plagued by the same kinds of ambiguity that we've seen in discussions of access to justice until scholars specify precisely which goods they're seeking to distribute more equally. And in providing that greater specificity, they may well find that they're actually attempting to equalize the distribution of an irreducible plurality of state-provided goods, which can't be so easily ranked or commensurated. Consider the recent focus on "political economy" in public law scholarship. As elaborated by four prominent scholars working under that banner, a political-

286. See FED. R. CIV. P. 1 (admonishing that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding").

economy approach to law seeks to “investigate[] the relation of politics to the economy,” with the ultimate goal of achieving a more egalitarian distribution of at least three goods: economic power, material and social wellbeing, and political participation.²⁸⁷ But these goods, just like the goods associated with access to justice, are distinct, and there’s little reason to think that they’re any less likely to conflict with one another. Public law, like civil procedure, may thus not be able to address the problem of economic inequality through a greater emphasis on the idea of distributive justice alone, but may instead end up having to make difficult trade-offs between goods that are commonly supposed to be cohesive, if not unitary. While the prospect of such trade-offs is hardly a reason to abandon the project of promoting economic equality, it is a reason to take greater care in reflecting on what, exactly, that project entails. The main lesson that civil procedure has to offer public law on this front is that how we resolve conflicts between different state-provided goods will depend on our conceptions of the state’s proper roles. Just as in civil procedure, so, too, in public law: our views about what distributive justice requires will reflect our views about why we have the state in the first place.

287. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1792 (2020); see *id.* at 1818–32 (articulating a political program around the concepts of “power,” “equality,” and “democracy”). For yet more goods that many public law scholars seek to distribute more equally, see generally sources cited *supra* note 2.