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Theseus in the Labyrinth: How State Constitutions Can Slay the Procedural Minotaur

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Abstract: Civil procedure is one of the biggest hurdles to access to justice. An array of rules and interpretations of those rules have turned lawsuits into meandering mazes with a procedural minotaur waiting to gobble up meritorious claims. The problem is especially acute for the many Americans without abundant resources or access to a lawyer. Fortunately, there is a ready remedy, albeit one access to justice advocates have ignored: state constitutions. Forty state constitutions, which protect hundreds of millions of Americans, generally guarantee "[t]hat all courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by the due course of the law." All litigants, no matter how much money or education they have, are entitled both to meaningful court access and to meaningful remedies when they suffer legally cognizable injuries. These provisions hold such special promise both because the vast majority of lawsuits take place in state court, and because the U.S. Constitution lacks a similar guarantee.

For too long, the conversations about how to achieve access to justice and how to interpret these state constitutional provisions have happened in isolation. This Article contributes to both of these conversations and then brings them together to generate a novel solution to America's access to justice problem. Countless scholars and judges have lamented that convoluted procedures lead to litigants losing on meritorious claims. They have also shown that those procedures increase the cost, length, and complexity of litigation, which makes hiring an attorney too expensive and deters some litigants from bringing deserving claims in the first place. This Article creates a new constitutional framework that legislatures should consider when writing civil procedure codes and that courts should use when deciding how to apply those codes. It then demonstrates how that framework will allow litigants to finally leap over the biggest procedural impediments facing them—pre-suit screening panels, strict time limits on claims, rigorous pleading standards, and stringent class action certification rules—by arguing that these impediments are frequently unconstitutional as applied in particular cases. This Article contends that there will be two principal benefits. The first will be that more litigants can win their claims on the merits instead of losing them on procedural technicalities. The second is that litigation will become cheaper and less time-consuming such that more litigants can vindicate their legal rights in court, regardless of whether they can afford counsel.

Finally, this Article situates its proposal in the context of current efforts to achieve access to justice such as advocacy for appointing counsel in all civil cases—civil Gideon— and letting litigants get an attorney's help on discrete tasks. This Article's proposal is much more feasible politically and financially for legislatures and courts to implement than civil Gideon, even as

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it decreases the need for an attorney's assistance, and more wide-reaching than attempts to unbundle legal services. Ultimately, though, access to justice advocates need not adopt this Article's proposal to the exclusion of all others. They will hopefully see, however, how the proposal can enable major progress in ending the access to justice crisis.

INTRODUCTION

The best near-term solution to the access to justice crisis has been

hiding in plain sight. To be specific, it has been hiding in forty state constitutional provisions that have no analog in the U.S. Constitution. Those provisions generally guarantee open courts and a right to a remedy, the very things access to justice advocates demand.[1] This Article proposes a novel framework for these provisions that will allow the many Americans who are pro se to scale currently insurmountable procedural barriers, lower the cost of litigation so that more Americans can afford to pursue their claims, and make it easier for litigants of modest means to meaningfully compete with wealthier litigants.

This Article simultaneously synthesizes and contributes to literature from two seemingly different areas to formulate one coherent solution. The first literature comes from access to justice advocates.[2] They have documented that at the same time millions of Americans face legal challenges, many of them simply cannot afford legal services.[3] Even when facing deleterious consequences, they are forced to navigate a complex legal system without legal counsel. Access to justice advocates have also documented how current solutions have been inadequate to make a meaningful difference.[4] Legal aid organizations have assisted only a smattering of Americans who need help. Access to justice commissions have produced reports,[5] but not lasting reforms. Cries for a right to counsel in civil cases have been met by silence from courts and legislatures. While access to justice advocates have identified what hasn't worked, and argued what would work in theory, they have yet to find a meaningful solution in practice.

The second literature comes from scholars and courts who have interpreted state constitutional provisions guaranteeing the right to open courts and the right to a remedy.[6] They have wrestled with how modern American courts should apply provisions originating from the Magna Carta in medieval England. Over the years, they have come up with a bewildering array of approaches to applying the provisions. Some courts hold that they protect remedies recognized at common law. Other courts have suggested that they should defer completely to legislative decisions

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1. For brevity's sake, this Article refers to these provisions simply as "the provision" or "the provisions." Courts sometimes refer to them as "open courts'" provisions or clauses, or "remedies'" provisions or clauses.

2. *See infra* Part I.

3. *See infra* Part I.

4. *See infra* Part I.

5. *E.g.*, DEL. ACCESS TO JUST. COMM'N, DELAWARE ACCESS TO JUSTICE COMMISSION REPORTS (2017), https://courts.delaware.gov/forms/download.aspx?id=98738 [https://perma.cc/LJ8P-A728].

6. *See infra* Part II.

about how to regulate court access and potential remedies.[7] This debate is particularly relevant to the discussion of how to facilitate access to justice given that state courts hear the overwhelming majority of cases in this country.[8] While courts and scholars have spilled considerable ink trying to understand the history behind these provisions,[9] they have yet to develop a practical framework that speaks to the modern access to justice crisis.

This Article brings these two literatures together to solve a critical aspect of the problem facing litigants: complicated procedures that keep them from getting remedies even when they are demonstrably entitled to those remedies. Perversely, at the same time that it has become harder for many Americans to afford a lawyer, procedures have become harder to follow. To name but a few examples, litigants now face heightened pleading standards, expensive but mandatory pre-trial procedures such as screening panels, and stringent class action rules. This state of affairs constitutes an expansive labyrinth in which unsuspecting litigants regularly sacrifice meritorious claims to a procedural minotaur. Luckily, Theseus is waiting in the wings, this time armed with a state constitution instead of a sword. This Article gives access to justice advocates an innovative framework they can use to make the forty provisions mentioned above help even the most resource-deprived litigants out of the maze. The framework can be used by both courts and legislatures to ensure civil procedure facilitates, rather than diminishes, access to justice.

This Article proceeds in four Parts. Part I explains that Americans now face a crisis when it comes to access to justice. Scholars, politicians, and courts have all recognized that "crisis" is an appropriate term to describe the lack of access to justice today.[10] It then examines how and why there is an access to justice crisis. It concludes that the primary culprits are procedural complexity, a lack of assistance from legal aid organizations, the cost of legal services, and substantive law. The framework this Article proposes meaningfully addresses the first three of these issues.

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7. *See, e.g.*, Crier v. Whitecloud, 496 So. 2d 305, 310 (La. 1986) (holding that the legislature had sole discretion to establish statutes of limitations).

8. Litigants filed fifteen million civil cases in state court in 2015. RICHARD Y. SCHAUFFLER, ROBERT C. LAFOUNTAIN, SHAUNA M. STRICKLAND, KATHRYN A. HOLT & KATHRYN J. GENTHON, NAT'L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 4 (2016). But in 2015, Americans filed only 281,608 civil cases in federal court. *Federal Judicial Caseload Statistics 2015*, U.S. CTS. (Mar. 31, 2015), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015 [https://perma.cc/8W8M-MBM2].

9. *E.g.*, Jonathan H. Hoffman, *By the Course of Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1307–11 (1995).

10. *See infra* section I.A.

Part II explains how the Magna Carta's promise all the way back in 1215 that, "[t]o no one will we sell, to no one deny or delay right or justice" made its way into forty state constitutions.[11] It then discusses the prominent interpretive approaches to these provisions and argues that they're unlikely to help most litigants. It concludes by suggesting that a new framework for these provisions could give the campaign for access to justice a major boost.

Part III develops a new framework for the provisions that recognizes the reality of today's legal system. It argues that legislatures should draft civil procedure codes and courts should interpret them through the lens of whether a procedure would deprive the reasonable litigant of a remedy to which they're entitled. This Part then proposes a definition of who the reasonable litigant is. In short, the reasonable litigant (1) is reasonably diligent, (2) is pursuing their claims pro se, (3) has only a high school education, and (4) has only a moderate income or less. These factors are not randomly chosen, but describe the average American.[12] Finally, this Part argues that the framework invalidates or circumscribes common procedural impediments hindering access to justice today. These impediments include statutes of repose, fee requirements, pre-litigation screening panels, heightened pleading standards, and stringent class action certification requirements. The cumulative effect of removing or narrowing these procedural impediments will be to give litigants a much greater chance of winning or losing their claims on the merits and of affording to pursue their claims all the way through the litigation cycle.

Part IV places this Article's proposed solution in the context of a larger discussion about how to achieve access to justice. It begins by defining what we mean when we use the term "access to justice" and illustrates how the proposed solution accomplishes several of the goals access to justice advocates care about. Part IV then explains why this Article's proposed solution is more likely to come into fruition than alternatives such as providing a government-funded lawyer to every civil litigant or unbundling legal services, i.e., letting litigants receive help from lawyers on discrete tasks throughout the litigation process.

I. THE ACCESS TO JUSTICE CRISIS

This Part documents the lack of access to justice most Americans face today and then explains what has caused the crisis.

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11. *English Translation of Magna Carta*, BRIT. LIBR. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/AK3G-SQSC].

12. *See infra* section III.A.

A. The Current Reality

Millions of Americans have legal issues at any given time.[13] This ranges from people with personal injury claims to people litigating child custody issues or fighting eviction. Racial minorities and the poor face even more problems than the average American.[14] Yet, at the same time that legal problems are widespread, access to legal services is available to only a narrow few. In fact, 86% of low-income Americans confront their legal problems with little or no help.[15] This is despite the fact that most poor Americans "reported that at least one of their [legal] problems affected them very much or severely."[16] Instead of seeking legal help, they attempt to navigate a byzantine legal system pro se.[17]

To call this state of affairs a crisis is to state a truth almost universally agreed upon. Scholars have done so.[18] So have judges[19] and politicians. In fact, one of President Biden's first acts in office was to sign a presidential memorandum to expand access to justice.[20] In some ways, he was late to

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13. *See generally* Emily S. Taylor, *Institutional Design for Access to Justice*, 11 U.C. IRVINE L. REV. 781 (2021).

14. *Id.* at 787.

15. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/QSH6-P5Y2].

16. *Id.* at 13.

17. Jessica Steinberg, *Demand Side Reform in Poor People's Court*, 47 U. CONN. L. REV. 741, 750 (2015) (documenting a trend where those with asymmetric power have asymmetric legal resources, such as unrepresented tenants litigating against landlords represented by counsel in landlord-tenant court).

18. *E.g.*, Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Access to Civil Justice and Justice Transformation*, 61 DRAKE L. REV. 845, 847 (2013) ("There is broad agreement that we face a critical access to civil justice crisis.").

19. King v. King, 162 Wash. 2d 378, 403, 174 P.3d 659, 672 (2007) (Madsen, J., dissenting) ("Ms. King's struggle to represent herself in this case demonstrates the legal hurdles that arise every day in courtrooms across Washington, showing the importance of counsel to a parent in a dissolution proceeding seeking to secure her fundamental right to parent her children."); *In re* Amends. to Rule Regulating Fla. Bar 1-7.3, 175 So. 3d 250, 255 (Fla. 2015) (Pariente, J., concurring) ("I urge that the Bar work with the Petitioners to devise some alternative, creative solutions to the immediate crisis while the Commission on Access to Civil Justice undertakes its analysis and recommends long-term solutions to address this issue [access to justice] in a comprehensive way.").

20. Press Release, White House, Fact Sheet: President Biden to Sign Presidential Memorandum to Expand Access to Legal Representation and the Courts (May 18, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/18/fact-sheet-president-biden-to-sign-presidential-memorandum-to-expand-access-to-legal-representation-and-the-courts/ [https://perma.cc/Q8PL-VCJW] ("As President Biden knows from his experience as a public defender, timely and affordable access to the legal system can make all the difference in a person's life—including by keeping an individual out of poverty, keeping an individual in his or her home, helping an unaccompanied child seek asylum, helping someone fight a consumer scam, or ensuring

the party. Over twenty-nine states have established formal access to justice commissions.[21] The popular press had already brought attention to the crisis.[22] Law professors have even suggested changes to legal education to improve the situation.[23]

B. What Caused the Crisis?

The access to justice crisis has four main causes: (1) the cost of legal services, (2) insufficient help from legal aid and lawyers, (3) the litigation process's procedural complexity, and (4) substantive law.[24]

The most obvious cause is how expensive legal services have become. Nationwide, the average law firm partner charged $536 an hour and the average associate charged $370 an hour in 2012.[25] Though the amount is surely higher or lower in certain areas, assuming the average as a baseline, it would be a prohibitive expense for the thirty-four million Americans living in poverty[26] and difficult to bear even for an American household earning a median income of $68,703.[27] Scholars have often explained the explosion in pro se litigants as resulting from the high cost of legal

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that an individual charged with a crime can mount a strong defense and receive a fair trial. But low-income people have long struggled to secure quality access to the legal system. Those challenges have only increased during the public health and economic crises caused by the COVID-19 pandemic. At the same time, civil legal aid providers and public defenders have been under-resourced, understaffed, and unable to reach some of the people in greatest need of their services.").

21. *See* Steinberg, *supra* note 17, at 760. To give but one example, North Carolina's commission works on a variety of strategies to increase access to justice in North Carolina: the development of materials and resources to support North Carolinians with civil legal needs who do not have access to attorneys in navigating the court system; the coordination of legislative strategy, education, and communications around funding for civil legal aid.

North Carolina Equal Access to Justice Commission, N.C. JUD. BRANCH, https://www.nccourts.gov/commissions/north-carolina-equal-access-to-justice-commission [https://perma.cc/F4H4-3N7V].

22. Bryce Covert, *Poor People Don't Stand a Chance in Court*, THINKPROGRESS (May 11, 2016, 12:00 PM), https://archive.thinkprogress.org/poor-people-dont-stand-a-chance-in-court-7e46bd4e5719/ [https://perma.cc/485X-BJYS].

23. *See* Kathryne M. Young, *What the Access to Justice Crisis Means for Legal Education*, 11 U.C. IRVINE L. REV. 811, 816 (2021).

24. As substantive law issues are beyond the scope of this Article, I do not address them here.

25. Debra Cassens Weiss, *Average Hourly Billing Rate for Partners Last Year Was $727 in Largest Law Firms*, ABA J. (July 15, 2013, 6:33 PM), https://www.abajournal.com/news/article/average_hourly_billing_rate_for_partners_last_year_was_727_in_largest_law_f [https://perma.cc/HK5Q-BYFH].

26. Jessica Semega, Melissa Kollar, Emily A. Shrider & John Creamer, *Income and Poverty in the United States: 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/publications/2020/demo/p60-270.html [https://perma.cc/QT4R-EANF].

27. *Id.*

services.[28]

Second, at the same time that legal costs have exploded, legal aid efforts have not kept up. For example, Congress and President Richard Nixon created the Legal Services Corporation (LSC) to provide poor people legal services in the 1970s.[29] The LSC did not receive adequate funding in the beginning, but it received steadily less money even as the need for its help increased.[30] Today, the LSC only serves Americans who are at 125% of the federal poverty guidelines, which is $30,750 per year for a family of four or $16,988 for an individual.[31] Even if it provided robust assistance to all who met those income guidelines, it would still fail to help many Americans who make too much to qualify for assistance, but cannot reasonably afford today's legal fees. As it happens, it provides insufficient assistance even to those whose income qualifies for help. Only 59% of litigants eligible for LSC help receive any.[32] Only between 28% and 38% of eligible litigants will receive enough LSC help to fully resolve their problems.[33] Lack of resources accounts for the gap in coverage.[34]

Pro bono service has been no solution either. 20% of lawyers have admitted to never doing pro bono work in their careers.[35] In fact, only 20% of lawyers met the ABA's 50-hour aspirational goal for pro bono service in 2018.[36] The Am Law top 200 firms decreased their pro bono hours by 12% during the great recession.[37]

A third cause of the crisis is the legal process's complexity. I can attest that first-year civil procedure students often struggle with all the rules and doctrines they must abide by to litigate a claim. The same must be true of

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28. Steinberg, *supra* note 17, at 752–53 ("The reasons for the spike in pro se litigation are only partially understood, but most studies that have examined the characteristics of unrepresented litigants conclude that poverty is the primary force driving individuals to represent themselves in court. Even those not technically 'poor' under federal guidelines often lack the financial means to hire an attorney.").

29. Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 527 (2006).

30. *Id.* ("When the current federal appropriation for LSC is adjusted for inflation, it constitutes only forty-nine percent of the amount Congress appropriated for LSC in 1981, even though the number of people eligible for legal services increased by fourteen percent during this period.").

31. LEGAL SERVS. CORP., *supra* note 15, at 16; *Federal Poverty Level (FPL)*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/federal-poverty-level-fpl/ [https://perma.cc/39DW-VNUY].

32. LEGAL SERVS. CORP., *supra* note 15, at 13.

33. *Id.*

34. *Id.*

35. Daniel M. Taubman, *Has the Time Come to Revise Our Pro Bono Rules?*, 97 DENV. L. REV. 395, 429–30 (2020).

36. *Id.*

37. *Id.*

the many Americans who litigate with limited or no legal help. A plaintiff must ensure that they sue in a court that has subject matter jurisdiction, personal jurisdiction, and can lay venue, write a cogent complaint, propound and respond to interrogatories and requests for admission, take and defend depositions, and engage in motion practice. They can lose cases at any of these stages before they ever make their case to a jury. Then they must abide by a myriad of evidentiary rules, examine and cross-examine witnesses, and if they prevail after all of those obstacles, successfully enforce a judgment. A 2010 survey of one thousand state court judges confirms how big of a role procedural problems play in thwarting access to justice.[38] Eighty-nine percent found that pro se litigants suffered from procedural errors.[39] Without legal training, how could they not? Unsurprisingly, pro se litigants face disproportionately adverse outcomes.[40]

In short, the landscape for most litigants is bleak. They must navigate a procedural minefield with little or no legal assistance. As I will explore in Part IV, the prospect of meaningful legal representation is remote for most litigants.

II. THE PROVISIONS

This Part explores the history behind the provisions, examines the primary schools of thought for how to interpret them, explains how those approaches are currently unlikely to help most litigants achieve access to justice, and then argues that the provisions can serve as an opportunity for access to justice advocates.

A. The Magna Carta

The right to court access and a remedy for every injury guaranteed in forty state constitutions descends from the Magna Carta. In 1215, English barons extracted famous concessions from King John to address their grievances.[41] One of those grievances was that the legal system had been corrupted by bribery and become prone to excessive delay.[42] Litigants had to purchase writs, with more expensive ones needed to expedite

38. Steinberg, *supra* note 17, at 755–56.

39. *Id.*

40. *Id.* at 756–57 (describing how unrepresented parties fared far worse than represented parties in family law and in landlord-tenant court).

41. R.H. Helmholz, *Magna Carta and* Ius Commune, 66 U. CHI. L. REV. 297, 298 (1999).

42. Vincent R. Johnson, *The Magna Carta and the Beginning of Modern Legal Thought*, 85 MISS. L.J. 621, 628 (2016).

proceedings or procure a favorable outcome.[43] In other words, courts in medieval England were "pay to play." To address this concern, the Magna Carta promised: "[t]o no one will we sell, to no one deny or delay right or justice."[44]

Prominent English commentators and jurists refined this principle before it became embedded in state constitutions. In the 1600s, Lord Coke added an explicit right to a remedy—"by the course of law"—for every injury.[45] Some have argued that this stemmed from a desire to protect an independent judiciary.[46] For example, Coke argued that the king could not halt or delay proceedings in common law courts; eventually King James removed him from his position as chief justice after repeated clashes.[47]

In *Commentaries on the Laws of England*, an influential treatise in eighteenth century America,[48] William Blackstone asserted that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[49]

B. State Constitutions

Coke's and Blackstone's formulations of the Magna Carta's right to court access and a remedy entered state constitutions while the American colonies were still revolting against Great Britain. Delaware's 1776 constitution,[50] for example, promised

> [t]hat every freeman for every injury done him in his goods, lands or person, by any other person, ought to have remedy by the course of the law of the land, and ought to have justice and right for the injury done to him freely without sale, fully without any

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43. David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199 (1992).

44. BRIT. LIBR., *supra* note 11.

45. SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES 55–56 (4th ed. 1671) ("Every subject of the Realme, for injury done to him in bonis, terries, vel perfona, by any other Subject, be he Ecclesiasticall, or Temporall, Free, or Bond, Man, or Woman, Old, or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.").

46. *See* Daniel W. Halston, *The Meaning of the Massachusetts Open Courts' Clause and Its Relevance to the Current Court Crisis*, 88 MASS. L. REV. 122, 124 (2004).

47. *Id.*

48. Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 786 (2004).

49. WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 23 (1765).

50. Maryland's 1776 constitution contained a similar provision:

> That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

MD. CONST. art. XVII.

> denial, and speedily without delay, according to the law of the land.[51]

There is some evidence that the drafters of early guarantees adopted them in part because they resented English interference with colonial courts.[52]

Other states followed suit. The exact origins of the provision in most of those states remain mysterious in part because "explicit statements explaining why they incorporated the open courts clause into their constitutions are absent."[53] Indeed, "[t]here is little indication that it was the subject of debate when newer states copied it into their own constitutions."[54]

Regardless of how the provisions came about, today, some formulation of a right to court access and a remedy appears in forty state constitutions.[55] There are two primary versions:

> #1: "That every person for every injury done him in his goods, land or person, ought to have remedy by the course of the law of the land and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land."
>
> #2: "That all courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by the due course of the law."[56]

C. Interpretive Approaches

Throughout American history, courts have developed several often-inconsistent approaches to the provisions. None of these approaches have furthered access to justice, which necessitates a new framework for the provisions.

1. Provisions Freeze Common Law Remedies

Some courts have found that legislatures cannot unreasonably interfere

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51. DEL. CONST. of 1776, Declaration of Rights § 12. The current version reads

> All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. Suits may be brought against the State, according to such regulations as shall be made by law.

DEL. CONST. art. 1, § 9.

52. Hoffman, *supra* note 9, at 1307–11.

53. *Id.* at 1284.

54. *Id.* at 1285.

55. Thomas R. Phillips, *The Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003).

56. *Id.* at 1311.

with remedies that were available to litigants at common law. For example, the Minnesota Supreme Court found that the state's provision "enjoins the legislature from eliminating those remedies that have *vested at common law* without a legitimate legislative purpose."[57] Any remedies that vested after common law under such an interpretation are not constitutionally protected.[58] Courts have spent decades, if not centuries, trying to figure out when it is reasonable for a legislature to interfere with a common law remedy.[59] In terms of procedure, that would mean that courts and legislatures could only impose barriers between a litigant and a remedy that existed at common law.[60] For example, one scholar proposed that "procedural impediments [between a litigant and a remedy] that were well-established at the time the remedy clause became part of the state's constitutional law, as well as their modern counterparts, are permissible."[61] The point of allowing such procedural impediments is to keep litigation from spinning out of control and give courts and legislatures clarity about what procedural limitations they can impose on a substantive right.[62] There are two primary problems with this approach.

First, there is a level of generalities problem, which undermines the clarity freezing the common law is supposed to achieve. As one scholar acknowledges, "some may see a products liability statute of repose that forecloses suits after a specified period—regardless of whether the damage provoking the suit was or should have been discovered within that period—as different in kind, not merely degree, from a conventional and traditional statute of limitations."[63] Freezing the common law is supposed to remove some of the guesswork from adjudicating challenges under the provisions. Instead of having to decide what is fair, just, or wise, judges can simply look at a history book and know how to rule on a case. But that task is likely to be difficult in the case of the provisions because,

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57. Olson v. Ford Motor Corp., 558 N.W.2d 491, 497 (Minn. 1997) (emphasis in original).

58. *See id.*

59. *E.g.*, Lemuz By and Through Lemuz v. Fieser, 993 P.2d 134, 149–50 (Kan. 1997) (allowing the Kansas legislature to abolish a common law corporate negligence cause of action because it substituted a statutory remedy as a quid pro quo because the statutory remedy benefited society as a whole); Estabrook v. Am. Hoist & Derrick, Inc., 498 A.2d 741, 750–51 (N.H. 1985), *overruled by* Young v. Prevue Prods., Inc., 534 A.2d 714 (N.H. 1987), *and* Thompson v. Forest, 614 A.2d 1064 (N.H. 1992) (focusing on whether a substitute remedy preserved an individual litigant's rights instead of whether it was better for society as a whole).

60. Schuman, *supra* note 43, at 1220 ("Although the state may decide what events constitute legally cognizable injuries, the state may not deny any person the opportunity to seek a legal remedy for such injuries, unless the denial is a well-settled and traditional constraint or a contemporary version of one.").

61. *Id.* at 1224.

62. *See id.*

63. *Id.* at 1226.

unlike with many federal constitutional clauses where scholars and judges can consult the federalist papers, Madison's notes on the convention, or nineteenth century treatises, there are precious few resources providing insight into the original understanding of the provisions in many states. In many state constitutional conventions, there is no record of discussion of the provisions at all.[64] My primary purpose here is not to wade into the debate about originalism's virtues and vices as a general matter. It is instead to point out that in this specific context, history gives us little information to work with.

Second, an originalist approach to the provisions will, in some cases, allow rigid procedural impediments that undermine access to justice. In Massachusetts, for example, which adopted a provision in its 1780 constitution,[65] the legal system tolerated procedural and technical rules flatly inconsistent with access to justice. Common law writs could be abated if the plaintiff failed to state the defendant's occupation or social rank.[66] Writs could also be abated if a plaintiff sued a defendant whose father had the same name if the plaintiff failed to refer to the defendant as "junior" and the father and son lived in the same town.[67] In one paternity suit—where the mother already had to accuse the defendant of being the father while pregnant—the court dismissed her suit because she had failed to refer to the defendant as junior,[68] which meant she failed to secure the financial support needed to raise her child. As a result of these technical rules, many Massachusetts citizens felt justice was "unobtainable."[69] They complained that judicial proceedings were so "intricate" that their typical result was only to "'throw an honest man out of three quarters of his property' if he put his case to law."[70] No access to justice advocate can

64. *See* Hoffman, *supra* note 9. Schuman has suggested that history might explain different interpretations of open courts' and remedies' clauses. "Thus, the command to provide a remedy for injuries means one thing if the words occur in the charter of a people noted for distrust of renegade legislatures and something quite different in the charter of a populist community with an historical anti-judicial bias." Schuman, *supra* note 43, at 1220. While this assertion is plausible on its face, it becomes tougher to entertain when there is no historical record of what the drafters of the guarantee thought.

65. MASS. CONST. pt. 1, art. XI ("Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which [they] may receive in [their] person, property, or character. [They] ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws.").

66. WILLIAM NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830 76 (1975).

67. *Id.*

68. *Id.*

69. *Id.* at 69.

70. *Id.*

find that an acceptable outcome.

2. *Lockstepped with the U.S. Constitution*

Several state courts have found that their provisions mean the same thing as the federal Due Process Clause.[71] In understanding the constitutional right to court access, they have turned to United States Supreme Court decisions, the most notable of which is *Boddie v. Connecticut*.[72] There, welfare recipients challenged Connecticut's refusal to hear their divorce actions until they paid a fee; they unsuccessfully asked the clerk of court to waive the fee.[73] The Supreme Court found Connecticut could not, consistent with the Due Process Clause, condition access to the courts to seek divorce on payment of a fee.[74]

Subsequent Supreme Court decisions clarified that the Due Process Clause's right to court access was narrow. In *United States v. Kras*,[75] for instance, the petitioner sought to declare bankruptcy, but could not afford the filing fee to do so, and argued that refusing to let him file a bankruptcy petition without paying the fee infringed on his right to court access.[76] The Court distinguished *Boddie* on the grounds that it involved the fundamental right to marriage, whereas there was no fundamental right to declare bankruptcy.[77] Further, the Court asserted, while only courts could confer divorces, indebted litigants had other options to lower their debts besides getting a court to discharge them.[78] *Kras* and its progeny hold that there is "a constitutional interest in not having to pay court filing fees only in narrow circumstances where courts are the only avenue for redress of a fundamental right."[79]

State courts have imported this narrow view of the Due Process Clause into their provisions. After *Boddie* and *Kras*, the Montana Supreme Court considered a Montana law which required plaintiffs to submit medical malpractice claims to a panel including three lawyers and three healthcare providers before filing a claim in court.[80] Of the challenge to the law under

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71. When I use "Due Process Clause," I refer both to the Fourteenth and Fifth Amendments to the United States Constitution.

72. 401 U.S. 371 (1971).

73. *Id.* at 373.

74. *Id.* at 375–81.

75. 409 U.S. 434 (1973).

76. *Id.* at 438–42.

77. *Id.* at 444–45.

78. *Id.* at 445.

79. Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1481 (2008).

80. Linder v. Smith, 629 P.2d 1187, 1188 (Mont. 1981).

Montana's provision, the court observed "that access to the courts is not an independent fundamental right; access is only given such a status when another fundamental right—such as the right to dissolve the marital relationship—is at issue, and no alternative forum exists in which to enforce that right."[81] The court drew heavily on federal precedents like *Boddie* and explicitly declared that its provision applied to the same extent as the Due Process Clause.[82]

There is a textual problem and a philosophical problem with this approach. As for the textual, the right to court access under the Due Process Clause applies only to "fundamental right[s]," but the texts of the provisions do not condition the right to court access on the right in question being fundamental.[83] In several cases, state constitutions simply require that courts "shall be open."[84] To add a requirement that the provisions only apply in the context of fundamental rights is to add a crucial term to the constitutional provisions that state residents never voted on. What may be going on here at the federal level is a federalism discount. Judge Sutton has observed that "[i]n some settings, the challenge of imposing a constitutional solution on the whole country at once will increase the likelihood that a 'federalism discount' will be applied to the right."[85] In practice, this means that when the United States Supreme Court creates a right, it simultaneously adopts a lenient standard to enforce the right against the states. When the Supreme Court announced a right to court access in *Boddie*, it may have been leery of imposing too much on state court systems. This might come both from a desire to respect the role of states in our constitutional system, or a fear of what it will mean to aggressively police a new constitutional standard. Regardless of the reason for the federalism discount, the Supreme Court has applied one when it comes to the right of court access. Indeed, *Boddie* warned that "[w]e do not decide that access for all individuals to the courts is a right

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81. *Id.* at 1190.

82. *Id.* at 1190–92; *see also* Mo. All. for Retired Ams. v. Dep't of Lab. & Indus. Rels., 277 S.W.3d 670, 675 (Mo. 2009) ("The analysis employed to determine the constitutional validity of a statute on open courts grounds, then, is the same as the analysis used for procedural due process claims, as article I, section 14 is 'a second due process clause to the state constitution.'" (quoting Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 10 (Mo. 1992))).

83. *Linder*, 629 P.2d at 1190.

84. *See, e.g.*, N.C. CONST. art. 1 § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."); IND. CONST. art. 1 § 12 ("All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.").

85. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17 (2018).

that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual."[86]

So, when state courts apply federal Due Process Clause precedents regarding the right to court access, they are also applying a federalism discount. But that makes no sense. "No state supreme court . . . has any reason to apply a 'federalism discount' to its decisions, making it odd for state courts to lean so heavily on the meaning of the Federal constitution in construing their own."[87] The Florida Supreme Court need not worry about enforcing an aggressive standard in Vermont, or infringing on Vermont's role in our constitutional system. Whatever negative practical consequences there would be at the federal level from embracing an expansive view of the right to court access, those consequences would be lower at the state level.

Rejecting reliance on the federal Due Process Clause allows access to justice advocates to make common cause with textualists, those who highly value federalism, and those who believe the Supreme Court has become too powerful. Textualists should be willing to question how state courts have restricted their provisions by adding terms not present in the text. Those who value federalism believe states should have substantial leeway to depart from federal policy, so long as they do not violate the U.S. Constitution. Rejecting restrictive federal precedents would give states the opportunity to chart a new jurisprudential direction. It would also enhance the role of state courts. Many Americans today look upon the Supreme Court as the foremost guardian of individual rights.[88] Reinvigorating the provisions allows state courts to take their rightful place alongside the Supreme Court in safeguarding important rights such as the right to court access and a remedy.

It is common in certain quarters to lament how powerful the Supreme Court has become.[89] One way to impose real limits on its power is for state courts not to follow Supreme Court rulings when they do not have to. In other words, when state courts march in lockstep behind federal courts, they effectively give the Supreme Court the power not just to decide federal constitutional issues, but state constitutional issues as well. Finding opportunities when state courts can reject federal constitutional decisions on a principled basis is a way of increasing the power of state courts, and implicitly, of decreasing the Supreme Court's power.

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86. Boddie v. Connecticut, 401 U.S. 371, 382 (1971).

87. SUTTON, *supra* note 85, at 175.

88. *See id.* at 4.

89. Brian Christopher Jones, *Disparaging the Supreme Court, Part II: Questioning Institutional Legitimacy*, 2016 WIS. L. REV. 239, 249 (2016).

3. *Committed to the Legislature's Sole Discretion*

Some state courts have found that their provisions are judicially unenforceable. The Louisiana Supreme Court, for example, has found that "[t]he legislature has the sole discretion in fixing statutes of limitation" because the provision is "a mandate to the judiciary of this state rather than a limitation on the legislature."[90]

There are at least three problems with this line of thinking. First, it begs the question of what the legislature should do. In other words, even if the provisions are only "mandates" to the judiciary and not the legislature, the question remains what exactly the provisions require. Both legislators and judges take oaths to uphold their state constitutions. Any civil procedure code they draft should be consistent with that state constitution. Importantly, unlike at the federal level, where the Supreme Court prescribes the rules of civil procedure,[91] legislatures do so in several states.[92]

That is why the framework this Article proposes below gives as much guidance to legislators as it does to judges. Second, this line of thinking presupposes that the legislative branch inherently has more legitimacy to restrict or widen access to remedies based on civil procedure. This might be true when we think about unelected judges and elected legislators; we might want to be cautious before having the former overrule the latter, and by extension, the people. However, it is unclear that judges lack legitimacy compared to legislators. Thirty-nine states elect either their trial or appellate court judges, and several use partisan direct election for state supreme court justices.[93] Does a directly elected supreme court justice really have less legitimacy to police court access and access to remedies than a representative elected to serve one district? In fact, unlike legislators, elected supreme court justices are some of the only officials who can say they speak for "the people" as a whole. Given this reality, you might say that in many states, judges have a unique responsibility to vigorously enforce these provisions. Third, it involves abdicating the

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90. Crier v. Whitecloud, 496 So. 2d 305, 310 (La. 1986); *see also* Klutschowski v. PeaceHealth, 311 P.3d 461, 485 (Or. 2013) (Landau, J., concurring) ("My own view is that it is unlikely that the framers intended the remedy clause to serve as a limitation on legislative authority, certainly not one that essentially freezes the guarantee to preserve mid-nineteenth-century tort law.").

91. Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1040 (1993).

92. Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 10 (2018) (stating that California, Connecticut, Georgia, Illinois, Kansas, Louisiana, New York, North Carolina, and Oklahoma are "code states").

93. Michael S. Kang & Johanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 932 (2016).

traditional judicial role. Ever since *Marbury v. Madison*,[94] "[i]t [has] emphatically [been] the province and duty of the judicial department to say what the law is."[95] True, there have been exceptions to this general rule such as the political question doctrine. But the justifications for the political question doctrine seem inapplicable to the provisions. In *Baker v. Carr*,[96] the U.S. Supreme Court found that the political question doctrine applied when there was

> [a] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[97]

Nothing in the provisions' text commits the provision exclusively to the legislature. Courts have not explained why it is impossible to formulate judicially manageable standards to interpret these provisions or how deciding provision challenges would infringe on the separation of powers.

Finally, this argument ignores important history. The ancestor for every provision is the Magna Carta, so its history should be relevant, at least for those who purport to support a historical approach to understanding the provisions. In 1215, the English barons who pressured King John to sign the charter believed he was interfering with courts by selling writs to the highest bidder.[98] That is, they believed parties external to courts could trample on the right to court access and the right to a remedy. Similarly, today, the legislature could interfere with court access through the civil procedure code it adopts.

4. The Provisions Only Protect Courts from Outside Interference

At least one commentator has suggested the true purpose of the

94. 5 U.S. 137 (1803).

95. *Id.* at 177.

96. 369 U.S. 186 (1962).

97. *Id.* at 217.

98. David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 37 (1986).

provisions is to protect courts from outside influence, not guarantee a certain level of court access or a right for every remedy.[99] Although a desire to protect judicial independence helped lead to the Magna Carta, there are three problems with assuming that judicial independence is the sole reason for the provisions. First it ignores the text and assumes that we should follow some original purpose. The text of these provisions, with extraordinary consistency, simply demands that courts "be open" and that someone injured "shall have remedy by due course of law." Second, it is strange to believe that these provisions are implicitly designed to protect the judiciary's independence when there are other provisions explicitly doing that. For example, Minnesota's constitution declares, "[t]he powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution."[100] Treating the provisions only as protecting the judiciary's independence would render clauses like that just described superfluous.

Finally, in several states, courts themselves have the primary responsibility of promulgating the rules of civil procedure.[101] An approach that says the provisions mean to protect court independence fails to keep courts from making or interpreting rules that deny access to justice.

D. The Opportunity

The provisions promise that courts will be open to all trying to redress an injury and that someone who has been injured will actually get a remedy. This promise is especially relevant in light of a legal system where procedure condemns so many litigants to failure, even when they should prevail on the merits. It is also important because the vast majority of state constitutions, but not the U.S. Constitution, have a provision at the same time that state courts hear the vast majority of cases in the country. In 2015, for example, Americans filed fifteen million civil cases in state court.[102] By contrast, in 2015, Americans filed only 281,608 civil

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99. Hoffman, *supra* note 9, at 1311 ("The historical setting in which Coke added his gloss to Magna Carta, as well as the circumstances under which the colonists revived his teachings, strongly suggest that the language of the open courts clause was intended to promote and protect an independent judiciary, not to guarantee a remedy for every right.").

100. MINN. CONST. art. III; *see also* IOWA CONST. art. III.

101. Clopton, *supra* note 92, at 9 (noting that forty-one states authorize courts to make the rules of civil procedure in their states, and that "of the forty-one rules states, all but three empower the highest court to make the rules of civil procedure, occasionally with legislative involvement").

102. SCHAUFFLER ET AL., *supra* note 8, at 4.

cases in federal court.[103] Current interpretative approaches to the provisions are unlikely to ensure true procedural fairness, but the right one could help the vast majority of litigants. In sum, the provisions give access to justice advocates a weapon of immense power to fight procedural injustice if only they will wield it.

III. A NEW FRAMEWORK FOR THE PROVISIONS

This Part lays out a framework for how access to justice advocates should prod legislatures to design civil procedure codes and how they should use that framework to bring challenges to aspects of civil procedure that prevent meaningful court access or deprive litigants of a remedy.

A. The Reasonable Litigant Framework

This Article advocates what is effectively a reasonable litigant framework. It then considers how legislatures and courts should make civil procedure promote meaningful court access and allow plaintiffs to obtain remedies to which they're entitled. With any reasonable person framework, the devil is in the details.[104] So who is the "reasonable litigant" here? I believe the reasonable litigant has four characteristics: (1) they are diligent, (2) pro se, (3) have just a high school education, and (4) are not wealthy. These characteristics are not randomly chosen, but reflect the background of most litigants today.[105] Any interpretation of the provisions that seeks to move beyond the unhelpful current approaches should seek to address actual conditions on the ground.

1. Diligent

There must be some rules in litigation, otherwise the process will become unmanageable. There must be page limitations to court filings. Courts must impose deadlines. There must be minimum standards for complaints so that defendants know why they're being sued. Discovery needs to follow an orderly process. Court hearings cannot devolve into screaming matches or fist fights. Therefore, a starting assumption should be that anyone who wishes to litigate a civil lawsuit will research claims to the best of their ability, read up on procedures they have to follow, and

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103. *Federal Judicial Caseload Statistics 2015*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015 [https://perma.cc/8W8M-MBM2].

104. For a humorous attempt to define the reasonable person, see Lydia J. Carlsgaard, *Reasonable Person and I*, 27 HASTINGS WOMEN'S L.J. 165 (2016).

105. *See infra* section III.A.

attempt to follow them as best they can. This part of the reasonable litigant framework will keep from throwing unnecessary parts of civil procedure codes into doubt, such as the ability of a defendant to move for a more definite statement if a complaint is too vague to allow them to prepare a defense after reading it.

2. *Pro Se*

The image most Americans have long held of litigation from television is of two lawyers putting on a theatrical performance in the courtroom.[106] Reality is far different. For starters, many Americans would probably be surprised to learn that lawyers do not go to trial the same day they receive a case,[107] or that much of an attorney's time is spent reviewing documents, researching case law, or getting clients to pay their legal bills. But perhaps the biggest surprise is that, in a majority of cases, there is no lawyer at all. By some estimates, around two-thirds of American litigants represent themselves pro se in civil cases.[108] In California, the number is 80%.[109] The number of pro se litigants is especially high in family law, small claims court, and landlord-tenant disputes.[110] Notably, this number has increased significantly over time. As recently as the 1970s, only between ten and twenty percent of civil cases had a pro se litigant.[111] Lest there be any doubt, the primary reason so many litigants are pro se today is because of poverty or lack of money.[112]

The overwhelming majority of pro se litigants struggle to comply with required procedures.[113] Frequently, pro se litigants lose meritorious claims because of technical failures.[114] This should be particularly troubling in state court systems, which claim to favor resolution of disputes on the merits.[115] Courts are not open in a meaningful sense if pro se litigants

106. Kimberlianne Podlas, *Guilty on All Accounts: Law and Order's Impact on Public Perception of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 19 (2008).

107. *See id.*

108. Steinberg, *supra* note 17, at 750.

109. *Id.* at 751.

110. *Id.* at 750.

111. *Id.* at 751.

112. *Id.* at 752.

113. *Id.* at 755.

114. *See id.*

115. *E.g.*, Bernice's Educ. Sch. Age Ctr., Inc. v. Cooper, C.A., No. CPU4-12-003634, 2013 WL 601097, at *4 (Del. Com. Pl. Feb. 18, 2013) (observing that Delaware had a "policy favoring adjudication of cases on the merits as opposed to on procedural grounds"); Robles v. Grace Episcopal Church, 595 N.Y.S.2d 824, 824 (N.Y. App. Div. 1993) (granting motion to vacate judgement because of "the public policy in favor of resolving cases on the merits"); Dlouhy v. Dlouhy, 55 Wash. 2d 718,

cannot get a decision on the merits because they cannot grapple with particular procedures. If the provisions are to matter, they must protect pro se litigants.

3. *High School Education*

The average American has only a high school diploma and did not attend college, let alone law school. In fact, only about 32% of Americans have a college degree.[116] Only about 0.004% of Americans are licensed attorneys, and yet we have written civil procedure codes that only they can successfully use in many cases.[117]

And even that takes a while. In my civil procedure class, students often struggle initially with concepts like subject matter jurisdiction, preclusion, or making heads or tails of Supreme Court decisions on pleading standards. Although most eventually become comfortable with the material, it is only after a semester of study, and even then, they will require years of practice experience before they completely master the rules. If that is true of law students, we should expect it to be true of people who have never had a chance to study law. It is untenable to treat going into hundreds of thousands of dollars in debt and investing three years into law school as a prerequisite to getting meaningful court access or a decision on the merits when you have a meritorious claim. But that is the consequence of not taking into account how much education the typical American really has.

4. *Not Wealthy*

The average worker earned $41,537 in 2019,[118] too much to secure representation from the Legal Services Corporation (LSC).[119] This figure makes it easy to understand why many Americans choose to be pro se

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721, 349 P.2d 1073, 1075 (1960) ("It is the policy of the law that controversies be determined on the merits rather than by default.").

116. KEVIN MCELRATH & MICHAEL MARTIN, BACHELOR'S DEGREE ATTAINMENT IN THE UNITED STATES: 2005 TO 2019, U.S. CENSUS BUREAU (2021), https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-009.pdf [https://perma.cc/GMW4-43X2].

117. *New ABA Data Reveals Rise in Number of U.S. Lawyers, 15 Percent Increase Since 2008*, AM. BAR. ASS'N (May 11, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/ [https://perma.cc/358B-ALJ4]; *U.S. Population Up 5.96% Since 2010*, U.S. CENSUS BUREAU (Dec. 20, 2018), https://www.census.gov/library/visualizations/interactive/population-increase-2018.html [https://perma.cc/LPY3-LP3D].

118. Semega et al., *supra* note 26, at tbl.A-6.

119. LEGAL SERVS. CORP., *supra* note 15, at 15–16.

rather than pay a lawyer hundreds of dollars an hour or a retainer of thousands of dollars, as they must often do even in family law cases.[120] It also means that even if they can afford to pay a lawyer, the costs could affect whether they can pursue meritorious claims, or whether they feel forced to settle or voluntarily dismiss cases.

There is precedent for considering a litigant's socioeconomic status in deciding what provides meaningful court access. In his dissent in *Kras*, Justice Marshall criticized the majority's holding that there was no fundamental right to discharge debts in bankruptcy and to have filing fees waived.[121] He took particular issue with the majority's attitude towards the petitioner's financial concerns.[122] The majority observed that in weekly installments, the filing fee to obtain bankruptcy was less than the price of a movie or a pack of cigarettes.[123] In response, Justice Marshall stated, "I cannot agree with the majority that it is so easy for the desperately poor to save $1.92 each week over the course of six months."[124] He then took his colleagues to task because, "no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are." While the majority implicitly assumed that movie outings and cigarette purchases were common, Justice Marshall asserted that they were "not a routine purchase but a luxury indulged in only rarely."[125] Justice Marshall then invited judges to consider "how people live" in understanding what the Constitution requires.[126]

Justice Marshall's views did not carry the day in *Kras*, but other courts have accepted his invitation. In *Whiteside v. Smith*,[127] for example, the Colorado Supreme Court found that a requirement that an indigent litigant spend a month's worth of income on a medical evaluation before being allowed to challenge an unemployment benefits reduction violated due process.[128] In so doing, the Colorado Supreme Court drew on Justice Marshall's dissent in *Kras*.[129]

Having laid out the reasonable litigant framework, I wish to consider how legislatures and courts should each apply it to ensure states comply

120. Steinberg, *supra* note 17, at 753.

121. United States v. Kras, 409 U.S. 434, 458 (1973) (Marshall, J., dissenting).

122. *Id.* at 458–60.

123. *Id.* at 449.

124. *Id.* at 460.

125. *Id.*

126. *Id.*

127. 67 P.3d 1240 (Colo. 2003).

128. *Id.* at 1245.

129. *Id.* at 1249.

with their provisions.

B. Legislative Framework

We are used to leaving legislatures to make policy and courts to enforce the constitution.[130] But legislators, no less than judges, take oaths to uphold their state constitutions.[131] Just as we might think about how both state courts and federal courts protect individual rights, we might consider how both legislatures and courts could independently protect rights and combine to offer more constitutional protection than each branch could individually. Perhaps the most important way access to justice advocates can hold civil procedure codes to the standards of the provisions is to ensure the legislature considers those standards when formulating civil procedure codes in the first place. This is for two reasons. First, as already described, legislatures themselves draft civil procedure codes in many states.[132] Second, also as already described, courts often give extensive deference to legislatures when evaluating challenges based on the provisions.[133]

The framework legislatures should adopt involves a simple question: would the rule or statute in question prevent a reasonable litigant from getting (1) meaningful court access or (2) a remedy to which they are entitled? I wish here to avoid the question of whether the legislature can abolish or amend certain remedies, such as by providing a workers' compensation scheme to handle what would have previously been tort claims. Nor do I wish to focus on whether someone has a cognizable legal injury.[134] Instead, I assume here that the legislature has not abolished a

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130. *See* TRACY BATEMAN, RACHEL M. KANE & MICHAEL ROSENHOUSE, 5 IND. L. ENCYC. CONST. L. § 27 (Sept. 2022) ("Judges must enforce the Constitution as written and intended. The judiciary has final authority in determining whether or not the Legislature has enacted a statute that is constitutional. In a proper case, it is not only the right of the courts, but also their duty, to declare invalid an unconstitutional statute.").

131. Opinion of the Justices No. 380, 892 So. 2d 332, 333 (Ala. 2004) ("We note that legislators take the same oath to uphold the constitution of this State as do the members of this Court; therefore, legislators must make their own independent decisions as to the constitutionality of proposed legislation.").

132. *See supra* section II.A.

133. *E.g.*, Crier v. Whitecloud, 496 So. 2d 305, 310 (La. 1986); Hawley v. Green, 788 P.2d 1321 (Idaho 1990).

134. Courts have spilled considerable ink on the idea of "damnum absque injuria," that is, a harm without a legally recognized injury. *E.g.*, Masich v. U.S. Smelting, Refin. & Mining Co., 191 P.2d 612, 626 (Utah 1948) (Wolfe, J., concurring) ("I do not understand that Article I, Sec. 11, of the Constitution of Utah, prohibits the modification or even the entire removal or destruction of a common law right by legislative enactment. There is still such a thing as damnum absque injuria. I need express no opinion as to those injuries based on rights respecting person, property or reputation which under

remedy, and that a given plaintiff has a cognizable injury. A legislature might ask something like, "assuming an individual plaintiff had been victimized by an antitrust violation and antitrust law in our state gives them a cause of action, would civil procedure provisions keep them from getting a real day in court or stop them from prevailing on a meritorious claim?"

C. Court Review

Courts will still have to consider how the provisions interact with civil procedure. There will likely be few facial challenges to particular components of the civil procedure code itself, i.e., an argument that discovery rules or summary judgment rules violate the provisions under every circumstance. There likely will, however, be challenges to rules or statutes regulating court access under certain circumstances. In these instances, I would advocate a version of the reasonable litigant framework described above. Courts should ask, assuming a litigant has a meritorious claim and an unambiguously legally cognizable injury, "would a given procedure close off court access for the reasonable litigant as a practical matter, or prevent the reasonable litigant from recovering even if they have a meritorious claim?" Examples of how courts can apply the framework are below.

D. Applying the Framework

Here, I consider how the provisions interact with particular aspects of civil procedure and how access to justice advocates can use my framework to make civil procedure more friendly to the reasonable litigant.

1. Statutes of Repose

Statutes of repose are similar to statutes of limitations in that both impose time limits on when litigants can bring claims. But they differ in when the clock begins running. A statute of limitations begins running when the plaintiff is injured. By contrast, a statute of repose begins running from the date of the defendant's tortious act.[135]

Statutes of repose often govern claims against lawyers, doctors,

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the pressure of the growth of the enlightened conscience of mankind have become a part of the common law.").

135. *See* Brandon Djonlich, *Attorney Malpractice Statute of Repose: Applies to Non-Clients and Clients*, 29-AUG CBA REC. 49 (2015).

architects, and engineers.[136] They're often justified by the need to protect defendants from indefinite liability. With architects and builders, for example, buildings they design can stand for decades.[137] In addition, as the years pass, memories will fade and records that might establish a defense will inevitably be lost or discarded.[138] It is fair to say that few defendants keep thirty years' worth of records. To be sure, however, there is also a danger in giving certain industries the benefit of statutes of repose. As the Kentucky Supreme Court once noted, "There is hardly a commercial segment in our society that does not now approach the General Assembly with the argument that it confers some significant benefit on 'the state's economy' . . . which deserves [a statute of repose]."[139]

Courts have usually upheld statutes of repose.[140] Often, they have read their state's provision to apply to the same extent as the federal Due Process Clause in rejecting challenges.[141] For example, the Indiana Court of Appeals claimed that its provision is really "analogous to the due process clause of the Fourteenth Amendment" when it held that a ten-year statute of repose was consistent with its provision.[142] Other courts have found that statutes of repose simply abolish a cause of action such that there is no longer a legally cognizable injury.[143]

This Article's framework is flatly inconsistent with rigid statutes of repose. Suppose a lawyer failed to ensure that a deed was properly recorded, meaning that a client was left without proper title to the land, and that the state in question has a four-year statute of repose governing legal malpractice claims as Ohio does.[144] Suppose that the client was then sued five years later and lost the land to someone with a superior claim.

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136. Mark M. Mikhaiel & M. Elizabeth Monihan, *Ohio Enacts a Legal Malpractice Statute of Repose*, 31 OHIO PROB. L.J. 191, 193 (2021).

137. Edward H. Tricker, Erin L. Ebeler & Christopher R. Kortum, *Applicability of Statutes of Repose to Indemnity and Contribution Claims and 50 State Survey*, 7 J. OF THE AM. COLL. OF CONSTR. LAWS. 341, 345 (2013).

138. *Id.*

139. *E.g.*, Perkins v. Ne. Log Homes, 808 S.W.2d 809, 817 (Ky. 1991).

140. Josephine H. Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 645 (1985) ("[M]ost courts have found that statutes of repose do not violate open courts provisions.").

141. *Id.* at 645.

142. Scalf v. Berkel, Inc., 448 N.E.2d 1201, 1203 (Ind. Ct. App. 1983).

143. *E.g.*, Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 833 (Mo. 1991). I believe that defending statutes of repose this way is problematic. If the answer to any objection to a procedural impediment preventing even the most diligent litigants from getting meaningful court access is that legislatures can abolish causes of action, then those legislatures have carte blanche to practically abolish substantive rights through procedural limitations. That prospect is unacceptable.

144. Mikhaiel & Monihan, *supra* note 136, at 193.

The client would lose the ability to bring their malpractice claim at all. They would be foreclosed from a remedy against the lawyer despite the fact that they would have no reason to think they were injured within the four-year statute of repose. At a minimum, courts applying the framework should therefore strike down statutes of repose that don't have discovery exceptions,[145] and legislatures should avoid writing such statutes.

As the Kentucky Supreme Court has explained, supporters of statutes of repose will argue that striking them down will cause economic hardship.[146] However, some courts have found statutes of repose violate the provisions.[147] There is little evidence such decisions have caused economic hardship. In *Jackson v. Mannesmann Demag Corp.*,[148] for example, the Alabama Supreme Court considered a statute of repose that barred claims against defendants who had participated in constructing a building more than seven years after the building was complete.[149] The court struck the statute down after finding that there was no substantial relationship between it and "the eradication of any social evil."[150] The court did not worry that builders would face grave injustice merely for having to answer for defects they created. When confronted with predictions about how invalidating statutes of repose will cause economic catastrophe, access to justice advocates can respond that dreadful consequences haven't materialized in states whose courts have found the statutes unconstitutional. There is little to no evidence that builders became less likely to take on construction projects in Kentucky, Alabama, Utah, Wyoming, North Dakota, and Florida after their state courts struck down statutes of repose.

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145. Some statutes of repose apply a discovery rule. For example, Illinois's statute of repose governing construction claims provides, "any person who discovers such act or omission prior to expiration of 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action." 735 ILL. COMP. STAT. 5/13-214(b) (2017).

146. *E.g.*, Perkins v. Ne. Log Homes, 808 S.W.2d 809, 817 (Ky. 1991).

147. *E.g.*, *id.* at 809 (citing Kentucky's open courts' provision to invalidate five year statute of repose governing claims against builders); Berry By and Through Berry v. Beech Aircraft Corp., 717 P.2d 670, 683 (Utah 1985) (invalidating a ten-year statute of repose for products liability claims under open courts' provision); Hanson v. Williams Cnty., 389 N.W.2d 319, 319 (N.D. 1986) (invalidating a ten-year statute of repose after applying something like intermediate scrutiny); Daugard v. Baltic Coop. Bldg. Supply Ass'n, 349 S.W.2d 419, 425 (S.D. 1986) (invalidating six-year statute of repose governing claims against builders and observing that it was "a locked deadbolt and shackle on our courtroom doors"); Phillips v. ABC Builders, Inc., 611 P.2d 821, 821 (Wyo. 1980) (invalidating ten-year statute of repose governing claims against builders); Overland Constr. Co., Inc. v. Sirmons, 369 So. 2d 572, 574 (1979) (invalidating twelve-year statute of repose governing claims against builders).

148. 435 So. 2d 725 (Ala. 1983).

149. *Id.* at 728–29.

150. *Id.*

2. *Pre-suit Requirements*

Before filing suit, it is common practice for state courts to impose requirements such as paying a fee, or presenting claims to a panel. Even though they usually do not appear in civil procedure codes and instead appear as separate statutory enactments, they do regulate the manner in which litigants vindicate their rights, so I consider these pre-suit requirements alongside other civil procedure code provisions.

a. Fees

Both state and federal courts impose fees on litigants. Federal courts waive only the prepayment of fees and only after they have preliminarily assessed the claim's merits.[151] The U.S. Constitution only requires states to allow lawsuits without payment of fees when "the state monopolizes the dispute resolution process."[152] That means states have considerable leeway to require or not require poor litigants to pay court fees. But many states have adopted the federal approach to filing fees, which means they will only waive fees after preliminarily assessing a claim's merits.[153]

And many states have upheld the constitutionality of such filing fees. For example, in *Hughes v. Tennessee Board of Probation & Parole*,[154] the Tennessee Supreme Court considered a statute that required prisoners to pay all outstanding court fees before filing another lawsuit.[155] The prisoner wanted to challenge denial of his parole, but owed $258.58 in court fees from prior lawsuits, including a divorce case.[156] The court rejected due process and equal protection challenges to the statute and ordered the prisoner's appeal dismissed.[157] The court reasoned that whether inmates could challenge a denial of parole did not implicate a fundamental right and that it was rational to require indigent inmates to pay outstanding court fees.[158] The court didn't consider whether the fee requirement was consistent with Tennessee's provision.

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151. 28 U.S.C. § 1915.

152. 1 STEPHEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE AND FEDERAL COURTS § 8:3 (2022).

153. *Id.*; *see also* Johnson v. Lynaugh, 796 S.W.2d 705, 706–07 (Tex. 1990) (applying federal standards for whether a claim was frivolous and refusing to consider an open courts' challenge raised for the first time on appeal); Merola v. Adams, 790 S.W.2d 488, 489–90 (Mo. Ct. App. 1990) (applying federal standards to assess when to waive filing fees).

154. 514 S.W.3d 707 (Tenn. 2017).

155. *Id.*

156. *Id.* at 711 & n.4.

157. *Id.* at 724.

158. *Id.* at 718, 722.

Similarly, the Florida Supreme Court rejected indigent litigants' request to have administrative hearing transcripts provided at no cost so they could pursue appeals.[159] The litigants argued that requiring them to pay for the transcripts, which might well have been a severe hardship given their poverty, violated Florida's provision.[160] The Florida Supreme Court quickly rejected the argument because it found requiring litigants to pay for transcripts was not unreasonable, suggesting a sort of rational basis approach to the provision.[161] It then interpreted Florida's due process clause consistently with the federal Due Process Clause and found no due process violation.[162]

These filing fees can completely preclude court access and deprive a plaintiff with a meritorious claim of a remedy. If someone is in poverty, it is foreseeable that they would not be able to pay court debts or for transcripts necessary to pursue an appeal. That means as a practical matter, they lack access to courts and that even if they're eligible to remediate a cognizable injury, they can't. The reasonable litigant framework described above applies to those of modest means. That means wherever possible, legislatures should allow fee waivers or repeal statutes conditioning court access on payment of fees. Judges should find that at a minimum, requiring such fees out of indigent litigants violates the provisions. In this regard, state constitutions may confer greater protections on poor litigants than the U.S. Constitution does.

In some ways, this requires a different conception of the legal system. Today, the legal system is best described as "pay to play." We typically ask plaintiffs who have been wronged to pay for their own court fees, their own lawyers, and their own investigations. We put the burden of achieving justice on the individual. But what if we thought of the court system as a societal good instead? That is, what if we think of ensuring that every citizen can meaningfully access the court system in the same way we think of it as a societal good to provide every elderly person with social security or every child with an education? These are exactly the questions access to justice advocates should present to legislatures as they write their civil procedure codes and rules.

b. Pre-suit Clearance

Many states require litigants to complete extensive pre-suit procedures

159. Smith v. Dep't of Health & Rehab. Servs., 573 So. 2d 320 (Fla. 1991).

160. *Id.* at 322.

161. *Id.* at 323.

162. *Id.* at 324.

before filing suit.[163] This often involves presenting their cases to a pre-suit screening panel before they can file their claims in courts. In some cases, the panels can merely make a recommendation about how the trial court should rule,[164] while in others, they can impose onerous conditions on litigants such as requiring them to pay a bond if the panel views the claims as too weak.[165] In still others, a plaintiff's complaint will be dismissed if they did not secure a suitable expert opinion validating their claims.[166] Pre-suit clearance requirements are especially common in medical malpractice lawsuits, driven by a perception that there are too many frivolous malpractice claims.[167] Courts have typically upheld these panels against constitutional challenge.[168] They have found that the panels do not infringe on the provisions.[169]

Under my framework, the reasonable litigant is pro se, and has limited financial resources. Screening panels prolong the litigation process for plaintiffs and could increase the costs they bear from having to present evidence twice. A broad judgment is difficult here. Whether the screening panels would deter the reasonable litigant from pursuing a claim depends on how long the panel takes to conduct a hearing and render a decision. Undoubtedly, some litigants consider pre-suit requirements a mere nuisance.[170] But requirements that substantially prolong the litigation process could cause litigants with meritorious claims to give up as they

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163. *See* Jean Macchiaroli Eggen, *Medical Malpractice Screening Panels: An Update and Assessment*, 6 J. HEALTH & LIFE SCIS. L. 1, 8 (2013).

164. *See, e.g.*, Comiskey v. Arlen, 55 A.D.2d 304 (N.Y. App. Div. 1976) (finding a panel consisting of a judge, lawyer, and physician could recommend how a jury should rule, but the recommendation was nonbinding).

165. *See, e.g.*, Paro v. Longwood Hosp., 369 N.E.2d 985 (Mass. 1977) (finding the plaintiff's evidence of medical malpractice insufficient to prove liability and imposing a $2,000 bond on the plaintiff as a condition of filing suit).

166. Paley v. Maraj, 910 So. 2d 282, 283 (Fla. Dist. Ct. App. 2005) (finding dismissal appropriate pursuant to Florida's medical malpractice pre-suit requirements because in a malpractice action against an emergency room physician, the plaintiffs "did not provide an affidavit of an emergency room physician, but rather an affidavit of an obstetrician-gynecologist" even though the gynecologist "had been called to emergency rooms to deal with emergency medical situations involving obstetrical patients and on those occasions had worked in conjunction with emergency room doctors").

167. Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181, 186–87 (1990).

168. *E.g.*, *Comiskey*, 55 A.D.2d 304 (finding the screening panel did not infringe on the right to jury trial or the right to due process).

169. Linder v. Smith, 629 P.2d 1187 (Mont. 1981) (rejecting argument that requiring plaintiffs to present claims to panel of lawyers and medical professionals before filing suit violated the provision after concluding that the analysis for the federal due process clause and the provision was the same); *Paro*, 369 N.E.2d at 990–91 (upholding a screening panel against the provision after concluding that the analysis for the due process clause and the provision was the same).

170. Edward J. Carbone, *Presuit Nuts 'N' Bolts*, 26 TRIAL ADVOC. Q. 27, 27 (2007) ("Presuit is a joke anyway—it's just a hurdle they make us jump through before we can file suit.").

realize they cannot afford the expense of going through the screening panel in addition to all the other costs they must bear. As such, access to justice advocates should press courts and legislatures to regard screening panels with suspicion. At a minimum, the procedures should be expedited and relatively easy to comply with. At best, many will be honest about the fact that certain pre-suit requirements are likely less about filtering out unmeritorious claims and more about raising the time and financial cost of a lawsuit high enough that many litigants, regardless of how meritorious their claims are, will be deterred from suing at all.[171]

Statutes that allow panels to condition court access on paying a bond because the panel has decided it thinks the claim is weak would definitively shut the door on the reasonable litigant if the bond is too high. For example, the Massachusetts Supreme Court has upheld a requirement that a plaintiff pay a $2,000 bond before pursuing litigation after an adverse panel finding.[172] That would be too expensive for the reasonable litigant to pay. As such, it violates the provisions under my framework.

3. *Class Actions*

Another reality of modern litigation is that plaintiffs often stand to recover small amounts of money. But the right of court access and to a remedy applies to citizens with both large and small claims. Small claims court can help. But in some cases, the potential recovery is too small even for that. A plaintiff who has been cheated out of $30 will probably not find it worthwhile to take time off work, pay any court fees, and go to small claims court. Little wonder that the Seventh Circuit has dryly observed, "only a lunatic or a fanatic sues for $30."[173]

Class actions step into the gap. An individual will likely not sue to recover $30. But, if ten million other citizens had suffered a $30 injury from a corporation and joined together in a class action, they could recover $300 million, enough to hire competent counsel, conduct an investigation,

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171. To be sure, this might be done with benign objectives, such as decreasing health insurance costs. Felicia Scroggins, *Differentiating Medical Malpractice and Personal Injury Claims in the Context of Statutory Protections:* Lacoste v. Pendleton Methodist Hosp., L.L.C., 3 J. HEALTH & BIOMEDICAL L. 367, 372 ("The Louisiana legislature passed the Act in 1975 to regulate medical malpractice claims in an attempt to reduce insurance rates."). It is open to question whether pre-suit requirements actually make healthcare cheaper. If pre-suit requirements prolong cases and make them costlier, then medical malpractice cases on net might be more expensive with onerous pre-suit requirements than they were without, even accounting for the possibility that some number of plaintiffs will choose not to bring claims.

172. *Paro*, 369 N.E.2d 985.

173. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

and pursue the class's claims.[174] As the U.S. Supreme Court has said:

> 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 [their] rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[175]

That means courts and legislatures need to be careful about class action rules. They cannot engage in the hostility that has arguably characterized federal jurisprudence on class actions.[176] In fact, three different ways federal courts have undermined class actions would likely violate the provisions if state courts engaged in the behavior.

First, some courts have required classes to demonstrate a substantial likelihood of success.[177] In *Dolgow v. Anderson*,[178] the court held that, in part to deter nuisance suits, a putative class "must make a preliminary showing that there is good ground to believe that there is a substantial possibility of success"[179] at a preliminary evidentiary hearing. State courts have applied a preliminary success requirement under their own class action rules.[180]

Second, courts have added extratextual requirements to Rule 23,[181]

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174. To be sure, scholars have questioned whether class actions are an effective way of redressing individual harms. For example, Myriam Gilles argues that "[t]he plain reality is that small-claims consumer class actions are poor vehicles for getting compensation into the hands of injured parties." Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 316 (2010). Instead of viewing the most important function of class action as being to compensate injured plaintiffs, she has argued for viewing class actions as an important vehicle to deter corporate misconduct. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 162 (2006). If the primary purpose behind class actions is in fact to deter corporate misbehavior, we might think of the provisions as providing society as a whole a right to access the courts and a societal right to a remedy. In any case, how best to conceptualize the class action is beyond this Article's scope.

175. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

176. *See* Andrew D. Brandt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1252 (2018) (describing federal courts as "already hostile to class actions").

177. Milberg v. W. Pac. R.R. Co., 51 F.R.D. 280, 282 (S.D.N.Y. 1970). This does seem to be against the weight of authority. 7A MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1759 (4th ed. 2021).

178. 43 F.R.D. 472 (E.D.N.Y. 1968).

179. *Id.* at 488.

180. *E.g.*, Boehne v. Camelot Vill. Apartments, 288 N.E.2d 771, 779 (Ind. Ct. App. 1972) (citing *Dolgow* to require the plaintiff "to show preliminarily proof to establish that a class action may successfully be maintained before the class action motion is decided").

181. FED. R. CIV. P. 23.

which governs the certification of class actions. These requirements have undermined Rule 23's efficacy. One example is an "ascertainability" requirement, which comes in two flavors. The first "requires only 'that a class must be defined clearly and that membership be defined by objective criteria, rather than by, for example, a class member's state of mind.'"[182] A strict approach requires there to be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[183] As a practical matter, this has meant:

> (1) they require the plaintiff to offer evidence to prove that the proposed method of identifying class members will be successful; (2) they require such proof at the outset of the case, as a certification prerequisite, rather than later in the case, when devising the claims administration process; (3) they require proof of administrative feasibility as an independent certification prerequisite, rather than as part of the Rule 23(b)(3) superiority and manageability analysis; and (4) they reject class members' affidavits, standing alone, as proof of class membership.[184]

Courts have declined to certify consumer class actions because consumers didn't have what they deemed to be good enough records demonstrating purchase.[185] As Myriam Gilles observed, "[t]his proof requirement presents daunting problems in most small-claims consumer class actions. Who, after all, has proof that they purchased peanut butter, pineapples, or aspirin?"[186]

Another example of an extratextual addition to Rule 23 is the requirement that those seeking recognition as a Rule 23(b)(2)[187] class share an inherent characteristic like race or gender. The Eighth Circuit, for example, has held that since Rule 23(b)(2) requires a class seeking an injunction to be cohesive, that is to be "bound together through preexisting or continuing legal relationships or by some significant common trait such

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182. Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 CONN. L. REV. 695, 705 (2018) (quoting Mullins v. Direct Digit., L.L.C., 795 F.3d 654, 657 (7th Cir. 2015)).

183. *Id.* at 713 (quoting City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc., 867 F.3d 434, 442 (3d Cir. 2017)).

184. *Id.* at 713.

185. *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 619 (W.D. Wash. 2003) (rejecting the use of sworn affidavits to establish that class members had purchased the medication in question and suggesting that even many receipts would be inadequate to meet the ascertainability requirement).

186. Gilles, *supra* note 174, at 312.

187. FED. R. CIV. P. 23(b)(2) ("[T]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.").

as race or gender."[188]

Finally, federal courts have tightened the commonality requirement. In *Wal-Mart Stores, Inc. v. Dukes*,[189] 1.5 million current and former female employees sued Wal-Mart for gender discrimination by denying them equal pay or promotions.[190] They alleged not that Wal-Mart "has any express corporate policy against the advancement of women" but that "their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees."[191] The Court found that Rule 23(a)'s commonality requirement was unsatisfied because any common question, "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[192] The dissent criticized the majority for conflating Rule 23(a)'s commonality requirement with Rule 23(b)(3)'s requirement[193] that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[194]

The different strands of hostility to class actions at the federal level threaten to keep class actions from being a being a viable vehicle for plaintiffs. The reasonable litigant is pro se and lacks substantial resources. When a judge decides that there is insufficient likelihood of prevailing on the merits in the class action at a preliminary stage, they end a class member's chance to get a remedy. This is particularly problematic depending on what constitutes a "substantial probability." If the judge thinks the percentage is something like 70% that the class will win, then they are imposing a higher standard of proof than the one plaintiffs would have to satisfy at trial.[195] Assume that the plaintiff really was illegally deprived of $50 and has an indisputable right to recover. Rejecting a class

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188. *In re* Teflon Prods. Liab. Litig., 254 F.R.D. 354, 369 (S.D. Iowa 2008) (quoting *In re* St. Jude Medical, Inc., 425 F.3d 1116, 1121 (8th Cir. 2005)) (suggesting that class certification under Rule 23(b)(2) was inappropriate in part because "this is not a case in which members of the same racial minority or gender have bound together to fight against perceived discrimination").

189. 564 U.S. 338 (2011).

190. *Id.* at 343–45.

191. *Id.* at 344.

192. *Id.* at 350.

193. *Id.* at 376 (Ginsburg, J., concurring in part and dissenting in part).

194. *Id.* at 362 (quoting FED. R. CIV. P. 23(b)(3)). My purpose here is not to take a position on whether the Supreme Court properly applied Rule 23. Instead, I wish to consider how the Court's approach conflicts with the mandate to keep courts "open" and to provide a right to a remedy.

195. Frederick Schauer, *Slightly Guilty*, 1993 U. CHI. LEGAL F. 83, 88 (1993).

action because it was not substantially likely to prevail at an early stage would deprive him of a remedy. And given that few lawyers will take a $50 case and that the costs of prosecuting a small claims action would eliminate the benefit of any recovery, denying class certification denies a remedy.

Requiring punctilious proof that a class is ascertainable closes off court access. It is unreasonable to expect plaintiffs to keep thorough records of over-the-counter medication or consumer products purchased for years on end before they find out they were legally injured. If a class cannot be certified for lack of such unlikely proof, then the class action is not a viable way to seek a remedy in many consumer class actions. Given the constraints on pursuing individual actions, that means there is no meaningful court access.

The same is true of the way courts have tightened the commonality requirement. Any large consumer class action will invariably have factual differences—especially when there are 1.5 million class members—so requiring that one factual or legal question resolve all issues in one fell swoop is unrealistic and threatens the viability of large class actions. Importantly, these very large class actions are likely the ones that involve enough money to attract the quality legal representation that makes class actions potentially successful.

Alarmingly, state courts have tightened their own class action rules, inspired in part by federal decisions.[196] This Article's framework should lead state courts to reject this development because robust class actions are necessary to make a remedy practical in many cases.

4. Pleading Standards

Every case begins with a complaint. Many cases end with a motion to dismiss. Some litigants will experience discovery disputes. Some will face summary judgment motions. And some—though a small minority now[197]—will go through a jury trial. But every single one will either draft, seek to dismiss, or answer a complaint. Given that the complaint might be the single biggest pressure point in modern litigation, access to justice advocates can use my framework to encourage courts and legislatures to

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196. *E.g.*, Wilmington Pain & Rehab. Ctr., P.A. v. USAA Gen. Indem. Ins. Co., No. N15C-06-218 JRJ CCLD, 2017 WL 8788707, at *3 (Del. Super. Ct. Oct. 17, 2017) (adopting *Wal-Mart's* approach to Rule 23's commonality requirement in refusing to certify a class); Georgia-Pacific Consumer Prods., LP v. Ratner, 762 S.E.2d 419, 423 (Ga. 2014) (same); Price v. Martin, 79 So. 3d 960, 975 (La. 2011) (same).

197. Renee Lettow Lerner, *The Resilience of Substantive Rights and the False Hope of Procedural Rights: The Case of the Second Amendment and the Seventh Amendment*, 116 NW. U. L. REV. 275, 290 (2021).

formulate pleading standards consistent with the provisions.

When it comes to pleading standards, states fall in a few categories: fact/code pleading, notice pleading, and plausibility pleading.[198] Code pleading began in New York in 1848 with the Field Code.[199] Built on disenchantment with common law pleading, which was widely perceived to be unsuited to changing economic conditions in the nineteenth century,[200] the Field Code abolished common law forms of action.[201] It famously required complaints to contain "[a] statement of facts constituting the cause of action, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."[202] At its high-water mark, a version of the Field Code spread to at least twenty-seven states.[203] Pleaders needed to provide facts on which their complaints were based. Courts in code-pleading states distinguished between material, evidentiary, "dry naked actual," and ultimate facts.[204] They often dismissed complaints for failing to expressly allege facts corresponding to each element of the substantive law on which their claim was based.[205] As code pleading became bogged down by fights over whether complaints had provided enough facts and enough of the right kinds of facts, the legal profession clamored for reform.[206]

Reformers won a significant victory with the Federal Rules of Civil Procedure, which instituted notice pleading. Rule 8 to this day requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[207] Complaints no longer needed to plead facts supporting each element of a claim.[208] For a long time, the prevalent

198. Clopton, *supra* note 92, at 12–13.

199. James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on* Iqbal, *a Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1273 (2010).

200. *Id.* at 1271–73.

201. *Id.* at 1273.

202. *Id.* (quoting Field Code, ch. 379, 1848 N.Y. Laws 479, § 120(2)).

203. CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 15 (1897). There are still several code-pleading jurisdictions left. For example, Oregon still requires pleadings to be "the written statements by the parties of the facts constituting their respective claims and defenses." OR. R. CIV. P. 13(a). About eleven states are still code-pleading jurisdictions. Clopton, *supra* note 92, at 12 n.53.

204. Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 261–63 (1926).

205. *See, e.g.*, Chi. & E.R. Co. v. Lain, 83 N.E. 632, 633 (Ind. 1908) ("The absence [from the complaint] of any one of these elements [of a negligence cause of action] renders a complaint bad . . . ." (quoting Muncie Pulp Co. v. Davis, 70 N.E. 875, 877 (Ind. 1904))).

206. Maxeiner, *supra* note 199, at 1276.

207. FED. R. CIV. P. 8(a)(2).

208. Maxeiner, *supra* note 199, at 1278.

interpretation of Rule 8 was the Supreme Court's decision in *Conley v. Gibson*.[209] *Conley* applied the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[210] Under the most liberal interpretation of Rule 8, "[p]laintiffs need not plead facts; they need not plead law; they plead claims for relief. Usually they need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of."[211] Most states adopted notice pleading by the end of the twentieth century.[212]

However, the beginning of the twenty-first century saw the rise of plausibility pleading. In *Bell Atlantic Corp. v. Twombly*,[213] amid disenchantment over discovery costs, the Supreme Court claimed that Rule 8 required complaints to plead enough facts to make their claims plausible.[214] To determine whether the claim was plausible, the Court considered whether there was a benign "obvious alternative explanation" that accounted for the defendant's conduct.[215] The Supreme Court adhered to its new plausibility standard in *Ashcroft v. Iqbal*.[216] Courts in Colorado, Massachusetts, Nebraska, South Dakota, and Wisconsin have adopted plausibility pleading by judicial decision.[217]

In many instances, asking plaintiffs to provide concrete facts in support of their claims will not pose a constitutional difficulty. It is hard to imagine the reasonable litigant deciding that they cannot pursue their litigation based on a car accident because they have to describe their claims in detail. Asking for factual detail in many cases will help defendants prepare a defense and help the court better understand the claim's basis. And in many cases, such as negligence torts, this information should be easily available to plaintiffs.

This calculation changes when the elements of a claim require proof about the defendant's state of mind. Some courts applying the plausibility standard have dismissed complaints because they didn't allege details about the defendant's intent or state of mind that they would have needed

209. 355 U.S. 41 (1957).

210. *Id.* at 45–46.

211. Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005).

212. Clopton, *supra* note 92, at 12.

213. 550 U.S. 544 (2007).

214. *Id.* at 569.

215. *Id.* at 567.

216. 556 U.S. 662 (2009).

217. Clopton, *supra* note 92, at 14.

discovery to uncover.[218] In how many cases do we expect a defendant to write a memo or arrange to have a recording made where they document their intent to violate the law in a way that harms a plaintiff? Dismissing complaints for failure to allege facts that are impossible to obtain without discovery violates the provisions because it shuts the courthouse door on litigants before they can even get their cases started. The reasonable litigant who has a right to a remedy for an injury could be deprived of that remedy because they could not plead facts they couldn't uncover prior to bringing suit.[219]

Similarly, policing the source material complaints can draw from will often violate the provisions. At the federal level, courts have cracked down on stolen plausibility.[220] To be specific, they have prohibited plaintiffs from drawing on third-party litigation materials such as previous complaints, government or regulatory letters, or settlement agreements. A common scenario is when a plaintiff seeks to quote or borrow from a Securities and Exchange Commission (SEC) complaint in their own complaint.[221] To prevent plaintiffs from doing so, courts will often grant motions to strike under Rule 12(f) or issue Rule 11 sanctions. I have previously made a normative case against federal courts applying the doctrine of stolen plausibility.[222]

That normative case is a constitutional one in states[223] with the provisions and with requirements to provide substantial factual support in their complaints. In a particular case, allowing a litigant to borrow from third-party materials may be the difference between a meritorious complaint and an unmeritorious complaint.[224] In a complex case, the reasonable person—no matter how diligent—cannot replicate the investigation that an entity like the SEC or Equal Employment

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218. United States *ex rel.* Harper v. Muskingum Watershed Conservancy Dist., 842 F.3d 430, 437–38 (6th Cir. 2016) (wanting facts in complaint showing that a defendant knew fracking leases violated deed restrictions); Tanedo v. E. Baton Rouge Par. Sch. Bd., No. SA CV10-01172, 2012 WL 5447959, at *9 (C.D. Cal. Oct. 4, 2012) (dismissing counterclaims because no facts pled in support of allegation that plaintiff had no intention of paying).

219. One possible solution to this is have robust pre-discovery provisions available to plaintiffs. *See, e.g.*, N.C. R. CIV. P. 27 (providing a mechanism to receive some information prior to a lawsuit beginning).

220. Marcus Alexander Gadson, *Stolen Plausibility*, 110 GEO. L.J. 291, 293 (2021).

221. *In re* Connetics Corp. Sec. Litig., 542 F. Supp. 2d 996 (N.D. Cal. 2008) (granting a motion to strike a portion of a complaint relying exclusively on a previous SEC complaint after finding that such exclusive reliance violated Rule 11).

222. Gadson, *supra* note 220.

223. Some state courts have suggested they would apply something like the doctrine of stolen plausibility. *See* Frederick v. Smith, No. A-2902-11T1, 2012 WL 5512400, at *2 (N.J. Super. Ct. App. Div. Nov. 15, 2012).

224. *See* Fraker v. Bayer Corp., No. CV F 08–1564, 2009 WL 5865687 (E.D. Cal. Oct. 6, 2009).

Opportunity Commission can conduct to produce a complaint. The reasonable litigant lacks the money and manpower at their disposal to do so. Adopting the doctrine of stolen plausibility (or something like it) would prevent the reasonable litigant from getting meaningful court access as they could not progress past the motion to dismiss stage and cannot secure a remedy even if they have a meritorious claim.

Scholars[225] and the occasional court[226] have objected to plausibility pleading insofar as it permits judges to make factual determinations on a motion to dismiss. The idea is that juries are supposed to make factual determinations, and *Iqbal's* and *Twombly's* willingness to weigh the plaintiff's allegations against obvious alternatives constituted a factual determination and invaded the jury's role. I am sympathetic to these arguments, but they do not show a violation of the provisions. The provisions promise meaningful court access and a remedy, but not that a jury will provide them.

IV. WHY THE PROVISIONS BELONG IN THE ACCESS TO JUSTICE CONVERSATION

This Part discusses some of the most prominent strategies access to justice advocates have proposed and then demonstrates why reinvigorating the provisions is more likely to pay dividends in the short term and more likely to facilitate deeper reforms in the long term.

A. Theoretical Underpinnings

The phrase "access to justice" can refer to several related, but distinct, concepts. It can mean (1) the ability to get into court, (2) equalizing party resources so that poor litigants can meaningfully compete with wealthy ones, (3) allocating judicial resources fairly across different kinds of cases, i.e., not giving disproportionate attention to cases involving large amounts of money, (4) ensuring that societal disputes are fairly resolved, and (5) ensuring that parties can enforce rights the substantive law gives them.[227]

It is important to acknowledge inevitable tensions between those five concepts when claiming to improve access to justice as I do here. Making it easier to get into court for more litigants could decrease the resources available to adjudicate truly meritorious claims. Suppose that without the

225. Suja Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008); Marcus Gadson, *Federal Pleading Standards in State Court*, 121 MICH. L. REV. 409 (2022).

226. Webb v. Nashville Area Habitat for Human., Inc., 346 S.W.3d 422, 430 (Tenn. 2011).

227. *See generally* Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473 (2021).

procedural reforms I outline here, a judge would have five cases that proceed past a motion to dismiss for failure to state a claim, but that after those procedural reforms, ten cases do. Now that the judge's attention is divided in half, the cases might take much longer to resolve, leading some of the plaintiffs who had meritorious claims to accept unfavorable settlements or give up altogether. If that happens, we might worry that societal disputes are not being fairly resolved and that citizens do not have a sufficient ability to enforce substantive rights. We might also worry that judicial resources are not being fairly distributed if more unmeritorious claims surmount procedural hurdles. If we accept that the procedures discussed above effectively filter out unmeritorious claims so that those with meritorious claims have an easier time getting judicial attention, tempering those procedures might distribute resources from meritorious litigants to unmeritorious litigants.

It is also important to acknowledge the limitations of what this Article's proposal can accomplish. Diminishing procedural hurdles may decrease how much a party's resources matter by making litigation less costly to the parties, but inequalities in party resources will always exist. A corporation which can hire several lawyers and conduct expensive preparations will have an advantage over a pro se plaintiff.

Having said that, the legal system will have limited resources for the foreseeable future. Given that reality, I will argue that this Article's proposal is either more likely to accomplish access to justice goals, or as likely as alternatives.

B. Civil Gideon

Perhaps the most discussed solution to the access to justice crisis is "civil Gideon." The idea is that, just as the Supreme Court has guaranteed indigent criminal defendants facing felony charges a right to a defense attorney,[228] courts should require that in some or all cases, poor civil litigants receive an attorney as well.[229]

Gideon was decades in the making. In *Powell v. Alabama*,[230] thirty-one years earlier, the Supreme Court considered an appeal from the Scottsboro Boys.[231] Although Alabama provided for appointed counsel in capital cases,[232] the court found that they "were not accorded the right of counsel

228. Gideon v. Wainwright, 372 U.S. 335 (1963).

229. Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1227–29 (2010).

230. 287 U.S. 45 (1932).

231. *Id.* at 68–69.

232. Barton, *supra* note 229, at 1235.

in any substantial sense."[233] Instead, counsel had not been appointed until the morning of trial,[234] which meant they could not have thoroughly investigated any potential defenses.[235] *Powell* stood for the proposition that defendants were entitled to reasonably competent counsel when facing serious charges, and that a pro forma appointment did not pass constitutional muster. *Gideon v. Wainwright*[236] extended the principle by reversing the conviction of a Florida defendant in a felony case who could not afford a lawyer and yet did not have one appointed.[237] The Court held that indigent defendants in criminal cases had the right to have a lawyer appointed for them.[238]

For a time, it looked like the Supreme Court might eventually extend *Gideon* to civil cases. For example, in *In re Gault*,[239] the Supreme Court held that a juvenile defendant was entitled to appointed counsel before a judge sent him to a state reformatory.[240] Although the defendant was not charged with a felony, the Court found that, "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[241] As a result, the "[t]he juvenile needs the assistance of counsel to cope with problems of law."[242] Furthermore, in *Vitek v. Jones*,[243] a Supreme Court plurality held that a Nebraska prisoner was entitled to have counsel appointed in a hearing determining whether the state could transfer him to a mental institution.[244] The Court emphasized that "commitment to a mental hospital produces 'a massive curtailment of liberty'"[245] and even claimed that "loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."[246]

However, the Supreme Court definitively closed the door on civil

233. *Powell*, 287 U.S. at 58.

234. *Id.* at 56.

235. *See id.* at 58.

236. 372 U.S. 335 (1963).

237. *Id.* at 337.

238. *Id.* at 344.

239. 387 U.S. 1 (1967).

240. *Id.*

241. *Id.* at 36.

242. *Id.*

243. 445 U.S. 480 (1980).

244. *Id.*

245. *Id.* at 491 (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)).

246. *Id.* at 492.

Gideon in *Lassiter v. Department of Social Services of Durham County*.[247] There, the Department of Social Services terminated a mother's parental rights after a hearing in which the mother was not represented by counsel and did not have counsel appointed for her.[248] The Court held that indigent litigants only have a right to appointed counsel when facing deprivation of physical liberty, i.e., prison time.[249]

Some of *Gideon's* rationale surely applies in the civil context. The Court noted that,

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[250]

Even the American Bar Association has advocated appointment of counsel to indigent litigants in cases involving "shelter, sustenance, safety, health or child custody."[251] For their part, some scholars have argued for extending *Gideon* into the civil context. Some have argued that indigent litigants should have appointed counsel when seeking welfare benefits.[252] Others have contemplated giving indigent litigants appointed

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247. 452 U.S. 18 (1981).

248. *Id.* at 20–21.

249. *Id.* at 26–27.

250. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (internal quotations omitted) (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

251. AM. BAR ASS'N, ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 1 (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf [https://perma.cc/V737-YE93].

252. *E.g.*, Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 280 (2009) ("[T]his Article sets forth a more detailed argument for a right to representation in welfare fair hearings in New York State. In tune with the approach reflected in the ABA Report, this Article proposes a targeted right to representation that would address the current system's most serious due process deficits, yet be tailored in a way that reflects political and budgetary realities."). As the article's title suggests, the

counsel when navigating the eviction process.[253] Some intrepid scholars have attempted to argue that their state constitutions require some version of civil Gideon.[254] "If victory was measured in paper, civil Gideon could claim it in hand."[255]

Scholarly support for civil Gideon is, of course, not absolute. Some have noted that *Gideon* has not worked especially well in the criminal context. There is a huge asymmetry between the resources criminal defendants and criminal prosecutors receive; of the over $100 billion allocated annually to the criminal justice system, half goes to police while only 2–3% goes to indigent defendants.[256] The problem is acute in a wide range of states of various political traditions, regional locations, and racial and ethnic makeup. In a seminal study of indigent defense, Mary Sue Backus and Paul Marcus cited data from Georgia, Virginia, Louisiana, Pennsylvania, North Dakota, Kentucky, Ohio, Minnesota, Missouri, California, Mississippi, Arizona, and Massachusetts to show that there was a "crisis of the American criminal justice system in terms of providing lawyers for poor people."[257] There is no shortage of anecdotes with which to paint a horrifying picture. For example, Roberto Miranda confronted murder charges with court-appointed counsel who had just graduated from law school and had never tried a murder case.[258] Of forty witnesses who could have been helpful, the lawyer only interviewed three.[259] Little surprise, then, that Miranda received a death sentence and spent fourteen years in prison.[260] At least his story has a happy ending: he was eventually exonerated.[261]

Benjamin Barton has argued that courts have generally been unwilling to police poor lawyer performance.[262] Instead, "courts want to presume

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authors did not advocate for an unlimited right to appointed counsel in welfare cases. Instead, they suggested limiting the right to appointed counsel to "priority" cases they deemed the most serious in order to accommodate political and budgetary realities.

253. Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187 (2009).

254. Mary Helen McNeal, *Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point*, 66 MONT. L. REV. 81 (2005) (arguing that the Montana Constitution required appointment of counsel to indigent litigants in at least some cases, including parental rights).

255. Steinberg, *supra* note 17, at 763.

256. Barton, *supra* note 229, at 1251.

257. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1130 (2006).

258. *Id.* at 1034.

259. *Id.*

260. *Id.*

261. *Id.*

262. Barton, *supra* note 229, at 1255.

lawyers effective and move on."[263] Under the Supreme Court's standard for ineffective assistance of counsel from *Strickland v. Washington*,[264] defendants must show both that the lawyer's performance was objectively deficient and that the deficiency prejudiced them.[265] According to Barton, "[t]he combination of these two prongs and the Court's invitation to skip the performance prong to jump right to the prejudice prong means that, while the farce and mockery standard [that courts had used to assess lawyer performance prior to *Strickland*] is technically dead, its spirit lives on."[266] The worry here is that the same concerns that led courts not to vigorously enforce the right to counsel in the criminal context will manifest in the civil context. Barton believes it would be better to focus on making courts friendlier to pro se litigants.[267] Other scholars have echoed the call.[268]

Still, the implementation problems of criminal Gideon aside, civil Gideon maintains appeal to scholars.[269] In terms of the five goals of access

263. *Id.*

264. 466 U.S. 668, 687 (1984) ("A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

265. *Id.*

266. Barton, *supra* note 229, at 1256.

267. *Id.* at 1272 ("A main conceptual problem with civil *Gideon* is that it is a deeply conservative and backward looking solution: it starts with the assumption that nothing in the current structure or process of the court should change and that the only way to address the disadvantages the poor face is to appoint more free lawyers. By contrast, pro se court reform starts with a fundamental change in court attitude (from passive neutrality to assistance and notice of the unrepresented).").

268. *E.g.*, Steinberg, *supra* note 17, at 746 ("This Article submits that a supply side approach operating alone will not radically alter the experiences or case outcomes of pro se litigants. As a complement, 'demand side' reform is necessary in the courts. Demand side reform refers to an overhaul of the processes and rules that govern litigation so that they best serve the interests of the overwhelming majority of customers in the lower state courts—the unrepresented. Effective demand side reform would revise the procedural and evidentiary rules that commonly cause pro se litigants to stumble and require judges to develop facts that support established claims and defenses, thus enabling meaningful participation in the court system by those who appear without counsel. Fundamental changes to the way disputes are processed and decided in the poor people's courts are needed to bring the operation of the legal system into alignment with the capabilities of the litigants who use it.").

269. It would seem that even access to justice advocates don't necessarily agree on appointing counsel to indigent litigants in every last case. *Id.* at 762–63 ("There is no singular conception of civil Gideon, but there is broad consensus on what it is not. Civil Gideon does not contemplate appointment of counsel for all indigent litigants in all civil cases. Instead, supporters seek a guarantee of counsel where the deprivation of critical rights is at stake."). What counts as "critical" is of course up for debate. *See also* Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social*

to justice listed above, it primarily addresses three of them. The first is ensuring that parties have equitable resources. Assuming that every litigant has a competent lawyer with adequate time to dedicate to the lawsuit, every party will have sufficient resources to litigate the case effectively. Even the poorest litigant will have a base level of resources in a fight with a wealthier party. Second, civil Gideon aims to make fair resolution of disputes more likely. With a lawyer to help litigants navigate procedural and evidentiary obstacles, they are more likely to achieve a resolution that reflects their cases' actual merits. Finally, and on a related note, civil Gideon could cause lawyers to ensure that parties are more likely to enforce their substantive rights by helping them overcome procedural hurdles and present their cases effectively once in court.

This all sounds nice in theory. But in fact, civil Gideon is unlikely to come to fruition. No court has adopted anything like it.[270] Maryland's Court of Appeals has come the closest. In *Frase v. Barnhardt*,[271] three of the court's seven justices argued for taking "the first step onto the path of civil *Gideon*"[272] in the context of a parental rights termination appeal, and argued that Maryland's constitution required a different outcome than *Lassiter*.[273] But a controlling majority refused to embrace the argument.

The prospect of legislatures enacting civil Gideon is grim. They have not embraced civil Gideon before.[274] They are unlikely to do so for several reasons. The first is the price tag. In the criminal context, states were spending almost $2.3 billion on indigent defense in 2012.[275] In reality, if

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Change, 15 TEMP. POL. & C.R. L. REV. 697, 711 (2006) ("A narrowing of the categories [of cases in which civil Gideon applies] should focus on power imbalances, with one important power imbalance involving cases that pit an unrepresented party against a represented one. These cases represent the ultimate breakdown of an adversary system that depends upon a rough equality between the parties in the quest for justice. Instead of thinking in terms of represented and unrepresented parties, we should consider three categories: cases in which both sides are represented, cases in which both sides are unrepresented, and cases in which a represented party is pitted against an unrepresented one. Cases in which both parties are represented by counsel are not part of the Civil Gideon analysis. Cases in which both sides are without counsel more easily lend themselves to other options, since courts are more willing to provide significant help if they are doing so equally to both sides.").

270. Barton, *supra* note 229, at 1249 ("[N]o state court has found any sort of broad civil *Gideon* right.").

271. 840 A.2d 114 (Md. 2003).

272. *Id.* at 138 (Cathell, J., concurring).

273. *Id.* at 134–35.

274. *E.g.*, Steinberg, *supra* note 17, at 768–69 ("Legislatures have not been more hospitable towards a civil right to counsel than courts. In the past ten years, there have been several well-publicized attempts to secure counsel in a narrow subcategory of cases for a narrow subset of the affected population and, still, most of those efforts have failed.").

275. ERINN HEBERMAN & TRACY KYCKELHAHN, U.S. DEP'T OF JUST., NCJ 246684, STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008–2012 – UPDATED 1 (2015), https://bjs.ojp.gov/content/pub/pdf/sgide0812.pdf [https://perma.cc/7NJT-NXRQ].

they wanted to make workloads manageable for the attorneys trying to balance 194 clients at any time,[276] they would likely have to spend billions of dollars more. Yet they would have to do so with serious financial limitations. From the Great Recession to the COVID-19 pandemic,[277] states have been strapped for cash for a long time now even as they have been primarily responsible for infrastructure and education spending.[278] Simply put, even sympathetic legislatures might perceive that they lack the financial wherewithal to fund a civil Gideon guarantee.

Even if adequate funding were available, it would take a major educational effort to help the public understand how vital of a problem lack of access to legal assistance is. Indeed, "[a]lmost four-fifths of Americans incorrectly believe that the poor are now entitled to legal aid in civil cases, and only a third think that they would have a very difficult time obtaining assistance."[279] Without being more informed about the actual state of play in the legal system, many Americans might not support their legislatures enacting civil Gideon because they might not see the need for it.

Then, legislatures must be concerned about optics since their members are concerned about winning reelection. Although most Americans support legal assistance for the poor, they would prefer the assistance come from volunteer attorneys—even though pro bono legal assistance has not put a meaningful dent in the access to justice crisis—and not government funding.[280] Voters are especially likely to be skeptical of legislators who fund attorneys for people seeking welfare benefits or unpopular groups like prisoners seeking help with civil litigation.[281] To accommodate this reality, legislators might be tempted to limit civil

276. Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html (last visited Jan. 20, 2023).

277. Anshu Siripurapu & Jonathan Masters, *How COVID-19 Is Harming State and City Budgets*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/how-covid-19-harming-state-and-city-budgets [https://perma.cc/4NU3-ATEK] (last updated Mar. 19, 2021, 11:47 AM) ("Many U.S. state and local governments, on the front lines of the response to the coronavirus pandemic, are facing severe budget shortfalls. A distressing combination of dwindling tax revenues, record unemployment, and rising health costs have pushed them to cut back on spending for infrastructure and education—of which states and cities are by far the primary funders. Some still bear the scars of the 2008 financial crisis, which forced painful spending cuts to public services.").

278. *Id.*

279. Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. UNIV. J.L. & POL'Y 47, 53 (2003).

280. *Id.*

281. *Id.* ("For many claims, such as those involving challenges to welfare legislation or prison conditions, one Denver legal aid attorney aptly noted that '[t]he only thing less popular than a poor person is a poor person with a lawyer.'").

Gideon to politically palatable circumstances like litigants who work full time but are facing eviction. But any such limits will necessarily render civil Gideon less of a silver bullet because they will prevent civil Gideon from helping as many needy litigants. That result would undermine the rationale for civil Gideon in the first place, which is to ensure a more equitable playing field for precisely the sorts of vulnerable litigants who might not receive help due to the above political considerations.

Access to justice advocates must acknowledge that civil Gideon is a difficult political lift. But this Article's framework is far more politically feasible. When was the last time a citizen became so outraged by changes to a civil procedure code that they voted against the legislator who proposed them? When was the last time they were so enraged by a state court judge's interpretation of the civil procedure code that they voted against that judge at reelection? As a civil procedure scholar, I, of course, would welcome more Americans paying attention to the important subject. But it is not likely to happen. In this context, civil procedure's relative dullness—to most voters at least—is not a vice, but a virtue. Legislators and judges can use my framework to help make the civil procedure code facilitate access to justice without risking as much political blowback as civil Gideon would threaten.

Cost-conscious public officials will not have to spend any money to adopt my framework and apply it when formulating civil procedure codes. To the extent my framework enables more litigants to surmount procedural hurdles, and make it further into the litigation process than they would have previously, my framework might eventually require more judicial personnel such as judges and law clerks. However, this increase would be spread out over time and not require a large upfront commitment.

As it stands, civil Gideon will not serve any of the access to justice goals I identified for the foreseeable future as a practical matter. To be clear, this doesn't mean that civil Gideon is a bad idea, or that access to justice advocates shouldn't push for it. Indeed, it is possible to argue for civil Gideon as the optimal long-term solution while simultaneously arguing for my approach as a near-term solution. At the very least, though, my approach is the one likeliest to come to fruition in the foreseeable future.

C. Unbundling Legal Services

Another solution access to justice advocates have supported is unbundling legal services. The idea is that instead of appointing legal counsel for the entirety of a lawsuit, poor litigants can receive help on

discrete tasks such as drafting a complaint or answering interrogatories.[282] One benefit is that unbundled services are less costly for the legal system to provide while still providing needed help. Another is that litigants have often been satisfied with unbundled services.[283] In terms of the access to justice goals discussed above, unbundled services aim to serve the same ones as civil Gideon does, albeit at lower cost. First, it seeks to indirectly equalize resources between parties. During the times that matter most in the litigation cycle, both parties can access lawyers, which means that the wealthier party should not be unduly advantaged. Second, it seeks to ensure lawyers can help clients achieve fair case resolutions at times, such as when drafting a complaint or opposing a motion for summary judgment, that matter most. Finally, clients with lawyers who help with important tasks should have an easier time enforcing substantive rights.

Again, this sounds fine in theory. However, the efficacy of unbundling services is unclear. Professor Jessica Steinberg conducted a study of how ghostwriting and one-time negotiating assistance affected case outcomes for tenants facing eviction in a California county.[284] For ghostwriting assistance, the Legal Aid Society of San Mateo County arranged for a lawyer to meet with a tenant, solicit answers to several questions, and then write a responsive pleading to the landlord's complaint.[285] The lawyer also instructed the tenant on how to properly file the responsive pleading.[286] For negotiation assistance, Legal Aid Society lawyers negotiated with as many landlords as possible a week before jury trials were to commence.[287] Worryingly, Professor Steinberg found that providing unbundled assistance generally yielded the same outcomes as providing none at all.[288] Instead, "[t]hey lost their homes just as often, faced just as few days to move out, and made payments to their landlords with the same frequency, and in similar amounts."[289] By contrast, tenants who received full legal assistance performed much better than pro se tenants or tenants who

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282. *See* Steinberg, *supra* note 17, at 774.

283. Michael Millemann, Nathalie Gilfrich & Richard Granat, *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. J. POVERTY L. 1178, 1186 (1997).

284. Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 474 (2011).

285. *Id.* at 477.

286. *Id.*

287. *Id.* at 478.

288. Professor Steinberg did find that "the provision of unbundled legal services did advance procedural justice. Tenants who received unbundled aid significantly outperformed unassisted tenants in both evading default judgment and in asserting valid, doctrinally cognizable defenses to their eviction actions." *Id.* at 482.

289. *Id.*

received some unbundled assistance.[290] A UCLA study has found similar results.[291] Other researchers, however, have found more promising outcomes.[292]

Rather than wade into this empirical debate, I wish to argue why my approach is likely to yield more far-reaching benefits. First, it is more comprehensive. My framework would lead to civil procedure codes as a whole becoming more friendly to all litigants. Pro se litigants would have an easier time surmounting procedural hurdles. But they would not be the only beneficiaries. Litigants of modest means could well face lower legal costs. For example, if states limit arduous pre-suit litigation panels, litigants of modest means will have more money to pay their lawyer throughout the litigation cycle and might therefore choose not to go pro se. In addition, even if we think that unbundled legal services are part of the solution, similar and cheaper procedures to navigate may mean that unbundled service providers are able to help more litigants than they could before. Second, my framework requires no upfront financial investment, as noted before. For unbundled legal services to truly reach all those who need it most, there needs to be much more funding. At that point, it faces the same issue that civil Gideon does, namely getting a large financial commitment at the same time the states are either not positioned or inclined to provide it.

To be sure, it is not either/or. Access to justice advocates can support both unbundled legal services and my framework, but for reasons stated above, I believe my approach is likelier to yield real benefits.

D. "Demand-Side" Reform

Recognizing the problems with civil Gideon and unbundled legal services, some scholars have emphasized the need for what I'll call

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290. *Id.*

291. EMPIRICAL RSCH. GRP., UCLA SCH. OF L., EVALUATION OF THE VAN NUYS LEGAL SELF-HELP CENTER: FINAL REPORT 3 (2001) (finding that recipients of unbundled services from a Self-Help Legal Access Center did not achieve meaningfully different results than those who did not receive such services).

292. D. JAMES GREINER, CASSANDRA WOLOS PATTANAYAK & JONATHAN HENNESY, ABDUL LATIF JAMEEL POVERTY ACTION LAB, HOW EFFECTIVE ARE LIMITED LEGAL ASSISTANCE PROGRAMS? A RANDOMIZED EXPERIMENT IN A MASSACHUSETTS HOUSING COURT 1–2 (2012), https://www.povertyactionlab.org/sites/default/files/research-paper/3826_Legal%20assistance%20programs%20Mar2012.pdf [https://perma.cc/Y69U-58JZ]. The study, carried out in Massachusetts Housing Court, randomized which litigants received unbundled legal assistance and which litigants received a full attorney-client relationship. The study found little evidence that the recipients of unbundled legal assistance fared worse than those who received comprehensive attorney assistance. *Id.*

"demand side reform."[293] The goal is to "improve[] fairness and due process for the unrepresented without an increase in the presence of attorneys."[294] Demand side reform accomplishes this by "restructur[ing] the rules of court and the roles of judges to support pro se participation in the legal system."[295] Professor Steinberg acknowledged that this approach would likely make access to justice efforts more politically palatable, just as I have argued here.[296] One of my goals is to complement existing demand side efforts. In some ways, the calls for demand side reform to date are insufficiently comprehensive. Making filing a complaint simpler is well and good, but ultimately accomplishes little if heightened pleading standards lead to dismissal. To use a track analogy, the current demand side conversation might open the stadium doors wider and enable more runners to participate in the race; my approach actually makes the hurdles easier to jump over.

In addition, what has been missing from calls for demand side reform is how and why wide-ranging demand side reform will actually come into fruition. The constitutional hook for my advocacy of procedural reform may lend such efforts more urgency than they would otherwise have. And my more specific guidance on which procedures are acceptable in a world where so many litigants are pro se will provide legislatures and judges grappling with these issues tangible help.

CONCLUSION

Access to justice efforts have been at an impasse for decades. Almost everyone acknowledges that too many Americans cannot get a meaningful day in court and that too many Americans are unable to get meaningful remedies even when they have an undeniable right to such remedies. While a variety of solutions—civil Gideon foremost among them—have been discussed, few have been adopted, and none has produced lasting change.

It is time to try something different. My focus on state courts and my constitutional framework offers a way to break the deadlock. While reinvigorating forty state constitutional provisions and making a new

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293. *E.g.*, Steinberg, *supra* note 17, at 787. Professor Steinberg used this term as part of a title for a Connecticut Law Review Article. *Id.* But I mean for it to encompass the arguments other scholars have made about the necessity of focusing on reforming procedures for pro se litigants. *E.g.*, Barton, *supra* note 229, at 1270.

294. Steinberg, *supra* note 17, at 787.

295. *Id.*

296. *Id.* at 805 ("Legislatures and courts will find a right to counsel more politically and economically palatable if demand side reform drives many or most cases into the exempt-from-representation column.").

contribution to a centuries-old debate about how to interpret them, the framework promises to dramatically simplify litigation, make it cheaper, and enable litigants who can't afford a lawyer to get justice. I do not argue that it is a silver bullet, and indeed, there likely is no such thing. But it is a new weapon for the access to justice advocate's arsenal. And, as I outline above, it can be a powerful one.