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## Alternative Dispute Resolution: A Critical Reconsideration

Richard Delgado

*University of Alabama School of Law*, [rdelgado@law.ua.edu](mailto:rdelgado@law.ua.edu)

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# ALTERNATIVE DISPUTE RESOLUTION: A CRITICAL RECONSIDERATION

Richard Delgado\*

## INTRODUCTION: A MOVEMENT AND ITS CRITICS

IN 1985, in the pages of *Wisconsin Law Review*, four co-authors and I warned that alternative dispute resolution (ADR), then a relatively young movement undergoing explosive growth, was likely to disadvantage minorities, women, and members of other disempowered groups, particularly when their adversary was a corporation, a white person, or an authority figure of some kind.<sup>1</sup> Coming on the heels of a famous article by Owen Fiss,<sup>2</sup> the article attracted considerable attention, in part because it ran counter to the dominant ideology.

That ideology saw alternative dispute resolution as a welcome antidote to the expensive, anxiety-inducing, and time-consuming nature of formal, in-court adjudication that often left even the victor with mixed feelings about his or her experience.<sup>3</sup> Mediation and arbitration, by contrast, appeared to offer friendlier, more humane ways of resolving disputes in which the parties could sit around a comfortable table in a small room talking amicably.<sup>4</sup> No judge sat on high, scowling and issuing incomprehensible edicts (called “rulings”), with little if any accompanying explanation.<sup>5</sup>

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\* John J. Sparkman Chair of Law, University of Alabama School of Law. Thanks to Jean Stefancic, Lee Gilmer, and Miriam Garza for comments and suggestions, and to Michael Green for organizing the symposium in which this article appears.

1. Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

2. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing against pressured settlement on the ground that it removes consideration of fundamental values from dispute resolution). For more recent studies of prejudice in negotiation, see Charles B. Craver, *Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?*, 70 SMU L. REV. 891 (2017); Andrea Schneider, *Negotiating While Female*, 70 SMU L. REV. 695 (2017).

3. Delgado, *supra* note 1, at 1359, 1362, 1366–67 (noting some of these supposed advantages).

4. *Id.* But see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (noting that mediation presents process dangers for women and other disempowered disputants); Lela Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. DISPUTE RES. 123 (2016) (same).

5. See Richard Delgado, *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. 435, 448 (2015) (discussing “narricide”—the tendency of in-court disputing to interrupt the narrative flow of the story that the parties might prefer to tell).

The parties could tell their stories in ways that seemed natural to them, without constant interruption in the form of objections or whispered conferences between the lawyers at the judge's bench.<sup>6</sup> The mediator or arbitrator would try to help the parties understand each other's position and craft a solution that would give each at least a portion of what they wanted.<sup>7</sup> At the conclusion, everyone would leave satisfied that justice was done—or, if not, that at least they got to tell their story and have the others listen.<sup>8</sup> ADR was not only cheaper and faster than ordinary litigation,<sup>9</sup> it was likely to leave the parties on better terms than the ones they would have enjoyed following a winner-take-all judgment of a court.<sup>10</sup>

### I. FAIRNESS AND FORMALITY

How could one find fault with a system like that?

One could, we argued. Known as the “fairness and formality” critique, or confrontation theory for confining prejudice, our challenge began by harkening back to Gunnar Myrdal and other prominent social scientists who observed that many Americans behave as though they were ambivalent—of two minds—about race.<sup>11</sup> Our national ideals and founding documents hold that all persons are equal, cherished moral agents in the eyes of God.<sup>12</sup> But because of our history, most Americans also subscribe, if only unconsciously, to a second, lower set of values and practices that they exhibit during moments of intimacy such as with friends or at a pub.<sup>13</sup> On occasions like these, when no one else is looking, many Ameri-

6. *Id.*

7. See CARRIE J. MENKEL-MEADOW, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2011) (citing studies that support this among other advantages); ROGER FISHER & WILLIAM L. URY, *GETTING TO YES, NEGOTIATING WITHOUT GIVING IN* (1991) (same); Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 L. & SOC. INQ. 145,146 (1988) (same); Hopes and Fears, *supra* note 4, at 135 (touting its ability to “bridge differences” and “build unique solutions,” citing Stories Mediators Tell (Eric L. Galton & Lela P. Love eds, Am. Bar Ass'n 2013)). *But see* Lisa A. Rickard, *The Virtues of Arbitration*, N.Y. TIMES (Nov. 14, 2015), <https://www.nytimes.com/2015/11/14/opinion/the-virtues-of-arbitration.html> [<https://perma.cc/D9S4-8N37>]; Hopes and Fears, *supra* note 4, at 139–40 (citing a Rand Report that found that mediation was not significantly speedier than ordinary litigation).

8. *E.g.*, Fisher, *supra* note 7. For authors sympathetic to this supposed advantage, see, *e.g.*, Menkel-Meadow, *supra* note 7; William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) (touting the advantages of multiple approaches to dispute resolution); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990) (same).

9. *E.g.*, Love, *supra* note 4, at 125 (asserting that it is also less stressful and produces less “relational havoc” than does in-court disputing).

10. See Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 84 (1984); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 445 (1992) (positing that divorce mediation poses process problems for women, who are often financially and emotionally weaker than their male counterparts and hence more willing to accept the first offer); Love, *supra* note 4, at 125 (same).

11. See Delgado, *supra* note 1, at 1382–84.

12. See *id.* at 1375–85, 1388; GUNNAR MYRDAL, *AN AMERICAN DILEMMA* LXX (1944).

13. Delgado, *supra* note 1, at 1382–86.

cans are much more likely to tell a racist story or sexist joke or take action that will hurt the chances of a minority or a woman.<sup>14</sup>

On official occasions, such as a Fourth of July parade, with the bands playing and flags flying, most Americans will act according to their higher, official values.<sup>15</sup> If they find themselves standing next to an African American or a person whom they know to be gay, they are apt to smile, put an arm around the person's shoulder, and say, "Isn't the parade grand?" Afterward, they may invite him or her to a barbecue in their back yard.<sup>16</sup> This observation dates back to Myrdal's *An American Dilemma*, if not further.<sup>17</sup>

By the same token, the theory holds, jurors and other participants in a courtroom drama are apt to behave with scrupulous fairness, following the judge's instructions to the letter. The physical arrangements of the courtroom, with the robed judge sitting on high, the state or national flag on prominent display, the blindfolded lady of justice in full view, and the uniformed bailiff standing at the ready, remind everyone that this is an occasion on which they are expected to act in accord with the American Creed.<sup>18</sup> Studies of jury behavior show that even prejudiced jurors often find it within themselves to do so.<sup>19</sup>

Alternative dispute resolution offers few such cues. The comfortable setting and informal atmosphere instead provide an ideal situation for a more empowered actor to behave in his usual confident fashion and to expect the mediator to enact his wishes as well.<sup>20</sup> He will speak forthrightly as though his account of the matter is the only possible one.<sup>21</sup> His body language and manner will suggest that he expects to win. A female or minority adversary is apt to sense the prevailing atmosphere and its familiar expectations and not put their case forward as confidently as they might otherwise.<sup>22</sup>

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14. *Id.* at 1385, 1387–89.

15. *Id.* (noting that situational features like these can remind everyone present, if only subconsciously, that they are expected to hold prejudicial attitudes and habits in abeyance).

16. *Id.*

17. See Myrdal, *supra* note 12; JUAN PEREA ET AL., RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA 100–02, 131–33, 200–02 (3d ed., 2015) (reprinting passages by George Washington, Thomas Jefferson, and Abraham Lincoln exhibiting ambivalence or outright disdain toward Indians or African Americans).

18. Delgado, *supra* note 1, at 1375, 1383–84, 1388.

19. See HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 497–98 (1966).

20. Delgado, *supra* note 1, at 1386–88, 1394–95, 1402.

21. *Id.* at 1371–73, 1384–85, 1390–91.

22. *Id.* See also Richard Delgado, *Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997) (noting that litigation's contentious nature repels many women); Ian Ayres, *Fair Driving*, 104 HARV. L. REV. 817, 818–19 (1991) (noting that automobile salesmen quoted women higher prices than they did men because they believed the women would not expect better deals); Menkel-Meadow, *supra* note 7, at 129 (noting that some women do not set high goals in mediation or settlement conferences). See also Amanda Lee Meyers, *Honda Settles Auto-Lending Discrimination Claims*, DESERET NEWS (July 14, 2015), <http://www.deseretnews.com/article/765677419/Honda-settles-discrimination-claims-with-Justice-Department.html> [<https://perma.cc/D6L5-GXVF>].

For social scientists, this “confrontation” or fairness-and-formality hypothesis explains why desegregation came about with so little resistance in the United States military following President Truman’s executive order.<sup>23</sup> It also explains why minorities often find government jobs and sports, where civil service rules and athletic conventions dictate what can be done and how success is measured, attractive.<sup>24</sup> And, it explains why they often do comparatively poorly in alternative dispute resolution.<sup>25</sup>

Accordingly, we theorized that divorcing women who opted for mediated rather than litigated divorce would obtain lower alimony and child support awards than those they would have received had they proceeded in court.<sup>26</sup> We also posited that the same would hold true for consumers or employees who agreed to submit claims to arbitration as well as persons charged with crime who opted for restorative justice instead of judicial disposition of the charges against them.<sup>27</sup>

## II. CRITICISM GROWS: EMPIRICAL STUDIES

Empirical support was not long in coming. Two large, scientifically controlled investigations, one from Bernalillo County, New Mexico,<sup>28</sup> and

23. The formality of the military and its system of hierarchical control and written rules for promotion made this transition relatively easy. See Exec. Order No. 9981 (1948) (desegregating the armed forces); CHARLES MOSKOS, *ALL THAT WE CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION THE ARMY WAY* (1997).

24. Delgado, *supra* note 1, at 1386–89 (explaining the confrontation theory); Richard Delgado, *Rodrigo’s Roadmap*, 93 NW. U. L. REV. 215, 241 (1997) (applying it to sports).

25. See text and notes 26–45 *infra*. It goes without saying that in-court adjudication is far from perfect, especially for the poor and those who are unfamiliar with the courtroom setting (not repeat players). See *infra* note 57 (explaining reasons for skepticism); Marc Galanter, *Why the Haves Come Out Ahead, Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95 (1974).

26. Delgado, *supra* note 1, at 1363, 1395 & n.274; Menkel-Meadow, *supra* note 7, at 352–53 (citing scholars who attribute women’s reluctance to assert themselves forcefully in such settings to their more “relational” personalities and conditioning).

27. Delgado, *supra* note 1, at 1360, 1395 & n.274. See also Pat K. Chew, *Contextual Analysis in Arbitration*, 70 SMU L. REV. 837 (2017) (noting that employees seeking recompense for job-related mistreatment through arbitration do poorly compared to ones who seek recovery in court); Theresa M. Beiner, *The Many Lanes Out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837 (2014) (same); Michael Green, *Tackling Employment Discrimination with ADR*, 26 BERKELEY J. EMP. & LAB. L. 321 (2005). See also Richard Delgado, *Goodbye to Hammurabi, Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751 (2000) (noting that this movement, which took start in the mid-1970s in response to the perceived excesses of harsh retribution and excessive incarceration, provides for an active role for the victims of crime. It also requires community service or some other form of restitution from offenders in addition to face-to-face mediation in which victims and offenders confront each other in hopes of recognizing each other’s common humanity.).

28. See Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC. REV. 767, 776–89 (1996) (noting that small-stakes litigants who opted for mediation received lower awards—especially if they were minorities or women—than ones who opted for an ordinary trial); Christine Rack, *Negotiated Justice: Gender and Ethnic Minority Bargaining Patterns in the Metrocourt Study*, 20 HAMLINE L. PUB. L. & POL’Y 211, 222, 248–90 (noting that white disputants made higher initial demands than minority ones did); Menkel-Meadow, *supra* note 7, at 134, 154 (citing studies). See also Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Con-*

another from small-claims court in Israel<sup>29</sup> found that women, minorities, and other relatively disempowered litigants achieved better results when they took their cases to court rather than to a mediator, arbitrator, or other non-formal dispute resolution forum.<sup>30</sup> Pat Chew showed that employees seeking redress for workplace wrongs did better when they litigated their claims rather than submitting them to arbitration.<sup>31</sup> She also showed that this holds true when American businesses submit their claims to mediation in China.<sup>32</sup> Meta-studies by Deborah R. Hensler<sup>33</sup> and Lisa Blomgren<sup>34</sup> yielded much the same results.<sup>35</sup>

### III. THE SPECIAL CASE OF SMALL-PRINT ARBITRATION CLAUSES

This news, however, did little to slow the rush to alternative dispute resolution. Large corporations, in particular, found mandatory arbitration particularly attractive in limiting their liability for defective products, dangerous drugs, or services that did not deliver as promised.<sup>36</sup> A series

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*nected Mediation*, 70 SMU L. REV. 721 (2017); Carol A. Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681 (2017) (discussing mediation and its many drawbacks).

29. Oren Gazal-Ayal & Ronen Perry, *Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method in Case Outcomes*, 39 L. & SOC. INQ. 791 (2014).

30. See Menkel-Meadow, *supra* note 7, at 653–54 (praising this study as “rigorously successful”).

31. See Chew, *supra* note 27; Pat Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?* 46 WAKE FOREST L. REV. 185 (2011).

32. Chew, *supra* note 27.

33. Gilat J. Bachar & Deborah R. Hensler, *Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don’t Know*, 70 SMU L. REV. 817 (2017) (reviewing the results of studies of all types of ADR).

34. Lisa Blomgren Amsler, Alexander B. Avtgis & M. Scott Jackman, *Dispute System Design and Bias in Dispute Resolution*, 70 SMU L. REV. 913 (2017) (reviewing studies of many types of alternative dispute resolution).

35. A meta-study is a study of all the studies, i.e., a review of the literature.

36. See, e.g., Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1, <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/63N6-SHXD>] (noting that, “Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration” and observing that, “By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies . . . devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices”) and noting the technique’s spread to new areas practically every month, such as funeral homes and car loans. Even small companies are beginning to adopt the practice. See Jessica Silver-Greenberg and Michael Corkery, *Start-Ups Embrace Arbitration to Settle Workplace Disputes*, N.Y. TIMES, May 15, 2016, at A1, <https://www.nytimes.com/2016/05/15/business/dealbook/start-ups-embrace-arbitration-to-settle-workplace-disputes.html> [<https://perma.cc/5LHQ-JUVR>]. See also Gretchen Morgenson, *Student Victims Seek to Become Creditors in ITT Bankruptcy*, N.Y. TIMES, Jan. 8, 2017, at 1, <https://www.nytimes.com/2017/01/06/business/student-victims-seek-to-become-creditors-in-itt-bankruptcy.html> [<https://perma.cc/F8R7-JVBP>]; Terese M. Schireson, *The Ethical Lawyer-Client Arbitration Clause*, 87 TEMPLE L. REV. 547, 548 (2015) (noting that “Arbitration clauses have become a standard feature in form contracts including . . . credit card agreements, . . . cell phone bills, home mortgages, and . . . other service and sales agreements.”). See also *Don’t Force Students to Sign Away Their Rights* (editorial), N.Y. TIMES, June 10, 2016, at

in the *New York Times* showed how, by inserting agreement-to-arbitrate clauses in a host of settings, ranging from auto sales, student loans, and marketing of various products and services, corporations sharply reduced their exposure and practically eliminated class actions.<sup>37</sup> The series also showed how the practice began at a meeting of high-powered defense attorneys from several large corporations at which they came up with the strategy.<sup>38</sup> Beginning around 2010, the practice of incorporating agreement-to-arbitrate clauses in agreements setting up a relationship spread like wildfire to literally dozens of areas so that no citizen is likely to go through a single day without using a product, app, or service that, if it backfires and causes an injury or disappointment, will require the purchaser to submit the claim to arbitration, not a court.<sup>39</sup>

#### IV. VULNERABILITY—A DOUBLE-EDGED SWORD

How did corporations hit upon this strategy? A few commentators posited that small-stakes cases such as divorce mediation may have supplied a natural experiment that gave big-firm lawyers a hint of what might be possible.<sup>40</sup> Our warning in the *Wisconsin Law Review* may have put them on notice, as well. When we suggested that the disadvantage that ADR imposed on weaker disputants was structural in nature and unlikely to go away even with better mediator training, the light bulb went on. Corporations realized that arbitration would enable them to win big.<sup>41</sup>

If so, this feature offers a lesson for minority disputants and their defenders, namely that they pay close attention to the work of scholars such as Martha Fineman who draw attention to *vulnerability* as a touchstone

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A26, <https://www.nytimes.com/2016/06/10/opinion/dont-force-students-to-sign-away-their-rights.html> [<https://perma.cc/Q6HP-Y9ZL>] (noting the common practice of including arbitration clauses in documents setting up student loans).

37. See text and notes 36 *supra*, 38–39 *infra*; Beiner, *supra* note 27 (discussing companies who refer employment discrimination claims to ADR).

38. See Silver-Greenberg, *supra* note 36 (discussing this meeting, which included representatives from Bank of America, Chase, Citigroup, Sicoover, Sears, Toyota, and General Electric). See also Jessica Silver-Greenberg and Michael Corkery, *Efforts to Rein in Arbitration Come Under Well-Financed Attack*, N.Y. TIMES, Nov. 16, 2016, [www.nytimes.com/2015/11/16/business/dealbook/efforts-to-rein-in-arbitration-come-under-well-financed-attack.html](http://www.nytimes.com/2015/11/16/business/dealbook/efforts-to-rein-in-arbitration-come-under-well-financed-attack.html) [<https://perma.cc/4QM6-XX4D>] (Int'l Edition) (noting that the home mortgage and finance industries strongly embrace the tactic).

39. Silver-Greenberg, *supra* note 36. Even when not of the coerced, small-print variety, arbitration offers traps for the unwary. See, e.g., Pat K. Chew, *Contextual Analysis in Arbitration*, 70 SMU L. REV. 837 (2017); Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639 (2017).

40. E.g., Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Fairness and Formality—A Thirty-Year Retrospective* (forthcoming, 2017); Silver-Greenberg, *supra* note 36 (noting that the shift to arbitration was “more than a decade in the making” and amounted to “a legal coup” that began when a lawyer named Kaplinsky remembered a small case from his youth and realized that “[b]anks could take it a step further”).

41. Delgado, *supra* note 40. See also Chew, *supra* note 27 (noting that arbitration is little fairer when the arbitrator is a woman).

for social analysis.<sup>42</sup> These scholars highlight how focusing on this quality can avoid some of the shoals of traditional analysis, for example under the equal protection clause, with its many tiers of review and requirements of state action, intent, and straight-line causation.<sup>43</sup> If a group, such as African Americans or undocumented immigrants, requires heightened judicial scrutiny, these scholars ask, why not protect them using the very feature—their vulnerability—that calls for judicial solicitude?<sup>44</sup>

This approach avoids line-drawing problems<sup>45</sup> as well as the charges of reverse racism that often follow the decision to distribute a coveted good, such as a seat in a famous university, to a minority at the expense of an equally deserving white.<sup>46</sup> Administrators adopting vulnerability as a criterion would protect all those who are in need of special consideration at this point in their lives.<sup>47</sup> Line-drawing problems would recede since most types of vulnerability are readily recognizable.<sup>48</sup> One is either weak—ill, young, disabled, or of minority race and lacking in resilience—or not.<sup>49</sup> And, as mentioned, few people are likely to envy the vulnerable, believe that they are getting away with something, and deem themselves virtuous when they organize to deprive them of an undeserved handout.<sup>50</sup>

As impressive as those arguments are, bringing vulnerability to broad attention can backfire. That feature can elicit two responses, not just one. Pointing out that Jones is susceptible can motivate sympathetic onlookers imbued with empathic impulses (social worker types) to rush to his or her aid.<sup>51</sup> A child teeters on a precipice; everyone rushes to guide it to safety.<sup>52</sup>

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42. See Martha Fineman, *Anchoring the Vulnerable Subject in the Human Condition*, 20 *YALE J. L. & FEM.* 1 (2008); *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 252–53 (2010); *Beyond Identities: The Limits of An Antidiscrimination Approach to Equality*, 92 *B.U. L. REV.* 1713, 1720, 172–54, 1769 (2012). See also *Vulnerability and the Human Condition Initiative*, EMORY UNIVERSITY, <http://web.gs.emory.edu/vulnerability> (describing a university-wide project to publicize Professor Fineman’s scholarship about this concept). See also *Fineman on Vulnerability and Law* (Nov. 30, 2015), <https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law> [<https://perma.cc/PS2T-5DEL>].

43. See Fineman, *supra* note 42; Delgado, *supra* note 40, discussing these supposed advantages.

44. Anchoring, *supra* note 42 (noting that vulnerability—the absence of resilience—does not reside in fixed groups such as the disabled or immigrant children. Instead, it arises from an interaction between individuals and the surroundings in which they find themselves at a particular moment in their life cycle.).

45. Who is a minority, anyway? What about mixed-race people? The transgendered?

46. Responsive State, *supra* note 42, at 275.

47. *Id.* at 253, 267–68.

48. Responsive State, *supra* note 42, at 253.

49. *Id.* at 253–55.

50. *I.e.*, reverse-racism charges. See text and note 46 *supra*; *Ricci v. DeStefano*, 557 U.S. 557 (2009) (discussing a challenge to a fire department’s promotion procedures that made special concessions to minorities).

51. See *Wagner v. International Railway*, 232 N.Y. 176, 133 N.E. 437 (1921) (“*Danger invites rescue. The cry of distress is the summons to relief*”) (emphasis added); Henry Prosser, Prosser on Torts sec. 51 (2d ed. 1955) (same).

52. See Prosser, *supra* note 51.



But not always. As with barnyard chickens with a speck of blood that end up pecked to death by their yard-mates, the sight of vulnerability can elicit an aggressive response.<sup>53</sup> We all know how schoolyard bullies can pick on a slightly built child or one with crossed eyes or a funny name or accent.<sup>54</sup> Large nations can attack small, weak ones, unless, like Switzerland, they are bristling with underground artillery and citizens who keep military rifles at home in case of an invasion.<sup>55</sup> Corporate raiders look for slim pickings for their next hostile takeover.<sup>56</sup> Gimlet-eyed defense lawyers, some of whose high-salaried male friends have gone through mediated divorce and done well at it, apply the lessons learned in that setting to their defense planning at work.<sup>57</sup>

## V. MANDATORY ARBITRATION: EXPLAINING THE INCREASE

In short, something like the following sequence of events occurred. Mediation, especially the divorce kind, turned out to be enjoyable, especially for the mediator class, enabling them to believe they were doing good work.<sup>58</sup> Even their clients claimed to like it, especially the women: It allowed them to tell their stories.<sup>59</sup> Satisfaction ran high, even though the results were, as they say, sub-optimal. Men noticed all this and passed the word on to others, including corporate defense counsel. Consent-to-arbitration clauses took off, saving corporate America billions over the next two decades<sup>60</sup> and leaving consumers with little recourse when they were cheated or injured by defective products. The Supreme Court

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53. See Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate-Speech Regulation*, 82 CALIF. L. REV. 871, 877–78 & n.56 (1994). Naturalists and poultry farmers believe that this is an evolutionary response that enables the flock to rid itself of the unfit. *Id.* at 878 & n.56.

54. See Southern Poverty Law Center, SPLC Survey: *Presidential Campaign Leading to Widespread Fear, Bullying in Schools* (April 13, 2016), <https://www.splcenter.org/news/2016/04/13/splc-survey-presidential-campaign-leading-widespread-fear-bullying-schools> [<https://perma.cc/397S-FP98>].

55. See Clare Nullis, *Long-Secret Forts Coming to Light in Switzerland*, WASH. POST, Oct. 20, 2002, [https://www.washingtonpost.com/archive/politics/2002/10/20/long-secret-forts-coming-to-light-in-switzerland/e43cc165-f485-4593-909b-cc84489c447f/?utm\\_term=.8ca048fa0459](https://www.washingtonpost.com/archive/politics/2002/10/20/long-secret-forts-coming-to-light-in-switzerland/e43cc165-f485-4593-909b-cc84489c447f/?utm_term=.8ca048fa0459) [<https://perma.cc/9VWH-XY9Y>].

56. See Carl C. Icahn, Investor, BIOGRAPHY.COM, <http://www.biography.com/people/carl-c-icahn-9348875> [<https://perma.cc/Z2LK-7YVV>] (describing the career of a prominent corporate raider).

57. See text and note 38 *supra* (describing how this happened at a meeting of high-powered corporate defense lawyers).

58. See, e.g., Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?* 21 HARV. NEGOTIATION L. REV. 1 (2015) (positing that training in mediation teaches one to consider all sides of an issue in an unbiased fashion).

59. Delgado, *supra* note 22, at 1405; Menkel-Meadow, *supra* note 7, at 653, 1548–49 (discussing studies showing satisfaction with divorce mediation); Joshua Rosenberg & Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1488–89 (1994) (same); Mary Beth Howe & Robert Fialla, *Process Matters: Disputant Satisfaction in Mediated Civil Cases*, 29 JUST. SYSTEM J. 25 (2008) (noting that many disputants bonded with and grew to like their mediator).

60. See Silver-Greenberg & Corkery, *supra* note 38 (noting that “considerable sums of money are at stake”).

blessed arbitration in a series of decisions.<sup>61</sup> Inequality increased.

Since then, the relationship between formality and fairness has become less clear-cut than it was when we first wrote, with formality no longer so clearly superior for weaker parties.<sup>62</sup> Still, well-heeled actors, particularly large corporations, have continued to flock to ADR, just as couples flocked to divorce mediation in the early days despite warnings of the process dangers it harbored for women.

Elsewhere, I expand on the connection between vulnerability and reform, employing a prize-winning film, *The Unbearable Lightness of Being*, starring Daniel-Day Lewis and Juliette Binoche,<sup>63</sup> as a vehicle to show how issuing a warning can alert bystanders to come to the aid of an endangered group. But it can also notify predators of easy prey, as happened with Binoche's character, Tereza, an amateur photographer.<sup>64</sup>

Instead, I offer here a few remarks aimed at framing the debate about deformalized disputing in light of social currents, including growing inequality. As will be seen, if large forces are inexorably pressing society in that direction, efforts on behalf of procedural reform will stand little chance of success without conscious efforts to counteract them.<sup>65</sup> Otherwise, procedural reformers could easily find themselves playing minor parts in a second natural experiment carried out by the strong.<sup>66</sup>

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61. See *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (upholding a fine-print contract that obliged consumers to arbitrate cases one by one); *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (same).

62. In particular, procedural formality may no longer be the sure guarantor of fairness of outcome that it once was. The reason is that not all national creeds include racial fairness. For example, in South Africa during Apartheid, the official values were overtly racist. The national regime oppressed blacks and treated them as second-class citizens. There, a black with a broken-down car could hope for kindly treatment from a passing motorist or pedestrian more readily than from a representative of the official regime. The same was true in the American South during slavery and Jim Crow. An occasional white southerner might extend blacks a helping hand in situations where the authorities were unlikely to do so. The relationship between fairness and formality, in short, is contingent and varies over time and from place to place. What is the situation in the U.S. today? Our society now embraces official neglect ("colorblindness") and worries more about reverse racism and quotas than relieving historical injustice. We deport Latinos, bar Muslims from entry, and tell Blacks that affirmative action's days are numbered. In short, we may well be approaching a point where, as in South Africa, a disempowered minority citizen may hope for better treatment from an informal source than from an official one—a magistrate or judge enforcing brutally cool, uncaring laws.

63. *THE UNBEARABLE LIGHTNESS OF BEING* (Saul Zaents Productions 1988).

64. Tereza and her husband, Tomas, a neurosurgeon, took part in a demonstration against Russian invaders who were occupying the town square of Prague. In hopes of alerting the world to their country's predicament, Tereza took photographs of the protesters and the Russian soldiers and tanks. She entrusted the photos to a countryman fleeing for the safety of Geneva. Days later, to her horror, she learned that the Soviets had obtained copies of her photos, published in foreign newspapers, and were using them to identify and interrogate the Czech citizens they could identify from them.

65. See text and notes 66–102 *infra*.

66. See text and notes 39–40 *supra* (describing how corporate lawyers seized upon the results of divorce mediation to craft a strategy that saved their clients billions).

## A. PROCEDURE FOR THE ONE PERCENT

Four current trends, two of a legal nature, and two societal, reinforce the movement toward alternative dispute resolution and away from the judicial kind.

1. First is *increasing inequality*. Thomas Piketty and others have been calling attention to the growing gap between the top one percent in society and all the rest.<sup>67</sup> Piketty and, before him, Marx, believed this tendency inherent in corporate capitalism, at least unless a society makes strenuous efforts to counter it, as some European countries have done.<sup>68</sup> But in the U.S., we have, wittingly or not, accelerated the growing gap by changes in the tax code,<sup>69</sup> deregulation of all kinds,<sup>70</sup> federalism,<sup>71</sup> and weakening of unions<sup>72</sup>—all moves toward reduced protection for relatively disempowered groups.

2. By the same token, our society *offers less upward mobility* than other developed countries do.<sup>73</sup> We have a weaker public safety net,<sup>74</sup> a more regressive tax code,<sup>75</sup> and poorer quality public schools.<sup>76</sup> Despite our self-image as a nation of Horatio Algiers, the chances for a child born into the bottom quintile of ending life anywhere near the top are miniscule.<sup>77</sup> Both features—increasing inequality and little upward mobility—mean that a concerted effort to replace deformed dispute resolution with the traditional, in-court kind would confront a tide running in the oppo-

67. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2013).

68. See KARL MARX, vol. 1, *A CRITIQUE OF POLITICAL ECONOMY* (Penguin Classics, paper ed. 1991).

69. See Dylan Matthews, *U.S. Tax Code Isn't as Progressive as You Think*, WASH. POST (Apr. 4, 2013), [https://www.washingtonpost.com/news/wonk/wp/2013/04/04/u-s-tax-code-isnt-as-progressive-as-you-think/?utm\\_term=.d3c8e89e9fbc](https://www.washingtonpost.com/news/wonk/wp/2013/04/04/u-s-tax-code-isnt-as-progressive-as-you-think/?utm_term=.d3c8e89e9fbc) [<https://perma.cc/UF7N-LQEL>].

70. See Gregory Kort, *Trump Orders Two-for-One Repeal for All New Regulations*, USA TODAY (Jan. 30, 2017), <http://www.usatoday.com/story/news/politics/2017/01/30/trump-orders-two-one-repeal-all-new-regulations/97237870/> [<https://perma.cc/AU36-CQP2>] (noting the administration's effort to reduce the amount of regulation).

71. See Ken Blackwell, *Principle, Federalism, and Passion: How the GOP Needs All Three to Win and Govern* (Apr. 1, 2016), <http://dailycaller.com/2016/04/01/principle-federalism-and-passion-gop-needs-all-three-to-win-and-govern/> [<https://perma.cc/2L2X-RQK4>] (explaining how advancing federalism is a key strategy for the Republican establishment).

72. See Josh Levs, *Why America's Unions Are Losing Power*, CNN (Dec. 11, 2012), <http://www.cnn.com/2012/12/11/us/union-power-analysis/> [<https://perma.cc/WR3R-CT49>] (discussing the steady weakening of union power). See also Walter Scheidel, *What Tames Inequality? Violence and Mayhem*, CHRON. (Feb. 2, 2017), [www.chronicle.com/article/what-tames-inequality-/239074](http://www.chronicle.com/article/what-tames-inequality-/239074) [<https://perma.cc/A3X7-QLJ7>] (noting the trend toward a social structure dominated by a small number of mega-rich and positing that only a violent revolution will alter it).

73. See Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879 (2007) (discussing how the U.S. offers less upward mobility than is commonly thought).

74. *Id.* at 883, 913.

75. See text and note 69 *supra*.

76. Editorial Board, *Why Other Countries Teach Better: Three Reasons Students Do Better Overseas*, N.Y. TIMES (Dec. 18, 2013), [http://www.nytimes.com/2013/12/18/opinion/why-students-do-better-overseas.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/12/18/opinion/why-students-do-better-overseas.html?pagewanted=all&_r=0) [<https://perma.cc/5D9Q-C65C>] (observing that compared to those of many other advanced societies, the U.S. educational system lags in many respects).

77. Myth, *supra* note 73, at 901 (putting the probability at about two percent).

site direction.<sup>78</sup> Formal, in-court proceedings are expensive, a social welfare benefit that we provide and subsidize in order to enable the poor to secure their rights.<sup>79</sup> And the outcomes it provides are apt to be more favorable than those a weaker disputant is apt to achieve in a mediated or arbitrated proceeding.<sup>80</sup>

3. *Changes in substantive law* give further evidence of that tide. Our society has recently imposed tort caps,<sup>81</sup> proposed eliminating fiduciary rules for financial advisors,<sup>82</sup> and imposed barriers to recovery for medical malpractice.<sup>83</sup> Each of these measures likewise contributes to a climate in which reform is difficult to achieve—or even imagine—because it runs against the tide. With liability capped, for example, why not relegate an injured consumer to an informal setting, where she and her opponent can haggle over a comparatively small sum?

4. *Changes in procedural law* show the same trend. Plausibility pleading,<sup>84</sup> cutbacks in class actions and summary judgment,<sup>85</sup> and heightened standing rules<sup>86</sup> all make civil courts a less promising avenue for the injured citizen or consumer than they were formerly. And *Citizens United*<sup>87</sup> and *Shelby County v. Holder*<sup>88</sup> make it harder for citizens to achieve reform through the political process. All these changes contribute to a climate that makes “second class treatment for second class litigants” seem fitting and natural.

All these developments enable the haves to strengthen and consolidate their position vis-à-vis the have-nots. They also enable them to put in

78. As both Carrie Menkel-Meadow and Judith Resnik are reported to have said, “The train (meaning ADR) has already left the station” (meaning is unstoppable). See Eric K. Yamamoto, *ADR: Where Have All the Critics Gone?* 36 S. CLARA L. REV. 356 n.10 (1996); Carrie Menkel-Meadow, personal communication, ca. 1998 (same).

79. See, e.g., text and notes 2–3, 8–9 *supra*.

80. See text and notes 28–39 *supra*.

81. See Michael I. Kraus, “Pain and Suffering” and the Rule of Law: Why Caps Are Needed, *FORBES* (April 17, 2014), <http://www.forbes.com/sites/michaelkraus/2014/04/17/pain-and-suffering-and-the-rule-of-law-why-caps-are-needed/#3d869db93577> [https://perma.cc/8538-5HQA].

82. See Ron Lieber, *Fiduciary Rule Is Now in Question: What's Next for Investors*, *N.Y. TIMES* (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/your-money/estate-planning/fiduciary-rule-is-now-in-question-whats-next-for-investors.html> [https://perma.cc/W4FG-HGJQ] (noting that establishment figures appear poised to eliminate this rule).

83. See Thomas Kaplan, *Lessons for Albany on Malpractice Limits*, *N.Y. TIMES* (Mar. 25, 2011), <http://www.nytimes.com/2011/03/25/nyregion/25malpractice.html> [https://perma.cc/WV93-VJGB].

84. See *Iqbal v. Ashcroft*, 556 U.S. 662 (2009).

85. E.g., Class Action Fairness Act of 2005, 28 U.S.C. 1332(d), 1453, 1711-15.

86. See, e.g., *Leading Case, Spokeo v. Robins*, 130 HARV. L. REV. 437 (2016) (discussing the trend toward more stringent standing requirements). See also Brooke Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016) (noting that “federal civil procedure is [now] a one percent regime . . . [that] creates suboptimal results”). Moreover, “The entire civil litigation system is captured by lawyers, judges, and parties that, while participating in the rarest litigation inevitably bend the rules . . . toward their best interests.” *Id.* at 1009. Accordingly, “the result is a system . . . that is of the one percent, by the one percent, and for the one percent.” *Id.* at 1014.

87. *Citizens United v. FEC*, 558 U.S. 310 (2010).

88. 133 S.Ct. 2612.

place further practices and rules favoring themselves, each of which, at the time, seems natural and just.<sup>89</sup>

## B. EXPLAINING HEGEMONIC PROCEDURE

What explains this cycle, and why is it happening in each of these sectors—politics, procedure, substantive law—at roughly the same time? Consider three underlying forces that contribute to it:

1) *Global warming*. In two books and an essay in the *New York Times*,<sup>90</sup> Naomi Klein warns that global climate change will raise water levels in all the oceans, flooding many coastal regions.<sup>91</sup> At the same time, it will produce famines and prompt hordes of desperate immigrants to seek shelter in wealthier countries.<sup>92</sup> The rich see these shifts coming and are beginning to take measures to assure safety in the times ahead. The author of a book on conservative money and influence<sup>93</sup> notes that a dystopian novel, *Camp of the Saints*,<sup>94</sup> is beginning to make new rounds in alt-right and white supremacist circles.<sup>95</sup> In the novel, Europe is threatened by a rising tide of desperate, dark-skinned people seeking refuge from war and famine.<sup>96</sup> It recounts the struggle of white civilization (France) to save itself from the threat of engulfment by dark hordes from backward countries.<sup>97</sup> In our day, mainstream newspapers are raising the

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89. See the “many doors” critique of ADR, which made disputant choice the decisive factor for determining whether a formal or informal dispute procedure was in order. *E.g.*, Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RESOL. 211 (1995); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. DISP. RESOL. 297 (1996).

90. Naomi Klein, *This Changes Everything: Capitalism vs. the Climate* (2014); Naomi Klein, *The Shock Doctrine: the Rise of Disaster Capitalism* (2008); Naomi Klein, *Labor Leaders’ Cheap Deal with Trump*, N.Y. TIMES (Feb. 7, 2017), at A21, [www.nytimes.com/2017/02/07/opinion/labor-leaders-cheap-deal-with-trump.html](http://www.nytimes.com/2017/02/07/opinion/labor-leaders-cheap-deal-with-trump.html) [https://perma.cc/4T2F-TLVF].

91. See, e.g., Cheap Deal, *supra* note 90 (noting that the wealthy are best positioned to avoid the consequences of global warming).

92. *Id.*; Abdi Guled, *Drought, Hunger Push Somalis to Flee Amid Fears of Famine*, ASSOC. PRESS (Feb. 27, 2017), <https://apnews.com/6c3e1580d3e04cd88a7939c1f2700d96/drought-hunger-push-somalis-flee-amid-fears-famine> [https://perma.cc/F7DR-H4SJ]; Elaine Gordts, *Crippling Drought Kills 110 Somalis in Just Two Days*, HUFFINGTON POST (WORLD) (Mar. 5, 2017), <http://www.huffingtonpost.com/> [https://perma.cc/VE5E-ZYUB].

93. Jean Stefancic and Richard Delgado, *No Mercy: How Conservative Think Tanks and Foundations Changed America’s Social Agenda* (1996), interviewed by this author on February 2, 2017, in Tuscaloosa, Alabama.

94. JEAN RASPAIL, *THE CAMP OF THE SAINTS* (1994) (discussing how a swarm of desperate refugees from underdeveloped countries seek to take over France). See also Ryan Lenz, *Attorney for Aryans*, *Intell. Rep.* (So. Poverty Law Center), Spring 2017, at 18, 20 (describing recent alt-right fiction in a similar vein).

95. Interview with Professor Jean Stefancic, University of Alabama School of Law, in Tuscaloosa, AL, Feb. 8, 2017. On the rise of the alt-right, see *The Year in Hate and Extremism: After Half a Century, The Radical Right Enters the Mainstream* (cover story), *Intell. Rep.* (Southern Poverty Law Center), Spring, 2007.

96. *Camp of the Saints*, *supra* note 94.

97. *Id.*

prospect of similar scenarios in the not too distant future,<sup>98</sup> and at least one prominent official in the Trump administration warns ominously that history runs in cycles, that “winter is coming,” and that Western culture is under threat.<sup>99</sup>

2) A second source of anxiety in elite circles is *fear of an upcoming demographic shift* as the population of the United States approaches a tipping point, around year 2042, when the number of minorities will exceed that of whites, and the nation will cease to be a majority-white state.<sup>100</sup> California, whose numbers are now close to that point, recently underwent a series of shocks and adjustments as the dominant group fought to preserve its position in the face of the upcoming shift.<sup>101</sup> A number of highly placed academics, White House spokesmen, and political operatives believe that this is true of the country at large and that we are in the early stages of a cultural showdown.<sup>102</sup>

3) A third force is *reaction to the Sixties* and its counterculture of drugs, freedom, and anti-authoritarian attitudes.<sup>103</sup> Many senior leaders today were young during this formative period and, unlike their more experimentally-minded counterparts, reacted against the currents that were roiling American society, studied hard, and bade their time. Some of the unrest spreading across the country today in the form of immigration marches, anti-Trump protests, and Black Lives Matter may remind them of the horrors of their youth. Now, however, having risen to high levels in

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98. See, e.g., Michael Kimmelman, *A Parched and Sinking Capital: Mexico City's Water Crisis Pushes It to the Brink*, N.Y. TIMES (Feb. 19, 2017), at A1, <https://www.nytimes.com/interactive/2017/02/17/world/americas/mexico-city-sinking.html> [<https://perma.cc/ZS7T-TC5X>] (noting that climate change is causing the city to sink into its porous soil, and warning that, “if climate change wreaks havoc on the social and economic fabric of global linchpins like Mexico City . . . no amount of walls, guns, barbed wire, armed aerial drones or permanently deployed mercenaries will be able to save one half of the planet from the other.”).

99. See Christopher Caldwell, *What Does Steve Bannon Want?*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/opinion/what-does-steve-bannon-want.html> [<https://perma.cc/YG5K-EXNK>]; Emily Bazelon, *Department of Justification*, N.Y. TIMES (Mar. 5, 2017), at 38, <https://www.nytimes.com/2017/02/28/jeff-sessions-stephen-bannon-justice-department.html> [<https://perma.cc/LP27-UGD6>] (noting that, according to presidential advisor Stephen Bannon, America is at a point comparable to “the early 20th century, when waves of immigrants flooded the country”). He and many of his colleagues also believe that the West has a distinctive, impressive culture and that immigration threatens to dilute it, *Justification*, *supra*; SAMUEL HUNTINGTON, *CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (paper ed. 2016) (same). See also Attorney, *supra* note 94, at 20 (noting the upsurge in current conservative and alt-right circles of this sort of thinking and preoccupation with history, war, cycles, race conflict, white cultural superiority, threat, and impending doom).

100. See Richard Delgado, *Rodrigo's Portent: California and the Coming Neocolonial Order*, 87 WASH. U. L. REV. 1293 (2010) (discussing California's reaction upon approaching this tipping point).

101. *Id.* See also HUNTINGTON, *supra* note 99 (positing that large numbers of Hispanic immigrants are threatening America's culture and identity).

102. See Department of Justification, *supra* note 99, at 38; HUNTINGTON, *supra* note 99.

103. See, e.g., TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (paper ed. 1993).

think tanks and government, they are in a position to do something about them.<sup>104</sup>

#### CONCLUSION: WHY PROCEDURE IS BECOMING LESS OPEN

Could these currents explain deformalization and some of the other legal changes mentioned above? Perhaps not directly, but large issues have a way of filtering down to actors like the judges on the Ninth Circuit who ruled against Donald Trump's first immigration ban<sup>105</sup>—as well, I suggest, to procedure specialists who might ignore those currents at their peril. As recently as February 2017, the nation received a lesson in how ignoring the big picture was a new president's error in the Ninth Circuit. He thought he could set the country right by enacting a ban on Muslim immigration. But a three-panel court of appeal instead saw his action in light of constitutional doctrine and history.<sup>106</sup>

Creating procedural rules that are both equitable and accessible is a vital task. But if our system of civil procedure is to offer a fair and just forum for the resolution of disputes, we will need to pay attention to the rise of deformalization among many shifts that favor well-heeled actors at the expense of the less powerful. This, in turn, will require attention to resurging inequality and the many measures that its defenders are putting into place, not merely in procedural law but across the board.

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104. See Department of Justification, *supra* note 99, at 38 (noting that Nigel Farage, the British politician who was behind the movement known as Brexit, sees the world in similar terms and that the prominent news organization, Breitbart, takes the same general position, as does President Trump himself).

105. See Adam Liptak, *Court Refuses to Reinstate Travel Ban, Dealing Trump Another Legal Loss*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/politics/appeals-court-trump-travel-ban.html> [<https://perma.cc/N2LV-V57B>].

106. *Id.*