December, 2014

Trans-Personal Procedures

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CONNECTICUT
LAW REVIEW

VOLUME 47 DECEMBER 2014 NUMBER 2

Article

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Recent court decisions have reignited a national debate about corporate personhood. This debate recognizes that the legal status of artificial persons is of great importance to the fabric of society, law, and politics. Questions about the status of artificial persons are typically raised in the context of substantive law, where corporate personhood has triggered strong reactions and important scholarship. But there is another, completely neglected side to this debate. The status of artificial entities is not solely negotiated in the context of substantive law. Procedure, similarly, must also choose whether to treat natural and artificial entities alike or not.

This Article is the first to examine when, how, and why procedure differentiates between different types of entities (natural persons, corporations, government agencies, labor unions, Native American Tribes, etc.). The default is trans-personal procedures that do not vary based on the personhood or entity-type of the litigating parties, yet deviations from the trans-personal norm span the procedural spectrum and systematically advantage and disadvantage some entities over others. I argue that the problem is not the trans-personal norm, or the many exceptions to it, but ad hoc departures from the norm, or blind adherence to the norm. Both are problematic and under-theorized. This Article demonstrates how different procedural values can be furthered or stifled by trans-personal rules and deviations from such rules. Before committing to trans-personal procedures or entity-specific treatment, we must understand how procedural values are affected by trans-personality. Procedural design neglects trans-personality at its own peril.

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I. INTRODUCTION

Recent court decisions have reignited a national debate about corporate personhood.[1] This debate recognizes that the legal status of artificial persons is of great importance to the fabric of society, law, and politics. Questions about the status of artificial persons are typically raised in the context of substantive law, where corporate personhood has triggered strong reactions and important scholarship.

But there is another, completely neglected side to this debate: The status of artificial entities is not solely negotiated in the context of substantive law, but procedure, similarly, must also choose whether to treat natural and artificial entities alike or not. This choice is of great practical importance to specific litigants. However, the importance of rules that apply or do not apply to all entities transcends any particular case. Legislators utilize entity-specific procedures to shape the flow of litigation and systematically favor or hinder certain entity types.

For example, federal entities enjoy special intervention rights,[2] greater time allowances to serve responsive pleadings,[3] unique protections from offensive issue preclusion,[4] and broader limitations on initial discovery than regular plaintiffs.[5] Elsewhere, venue rules are part of entity-specific

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[1] *See, e.g.*, Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1705 (2012) (holding that only natural persons are subject to liability under the Torture Victim Protection Act); Citizens United v. FEC, 558 U.S. 310, 365 (2010) (holding that bans on political speech based on the speaker's corporate identity are prima facie violations of the First Amendment).

[2] *E.g.*, 28 U.S.C. § 2403(a) (2012) (allowing federal entities to "intervene for presentation of evidence" when "the constitutionality of any Act of Congress affecting the public interest is drawn into question"); FED. R. CIV. P. 24(b)(2) (permitting the court to grant intervention rights to a federal agency "if the party's claim or defense is based on a statute or executive order").

[3] FED. R. CIV. P. 4(d), 12(a)(2)–(3).

[4] *See* United States v. Mendoza, 464 U.S. 154, 158, 162–63 (1984) ("[The] approval of nonmutual offensive collateral estoppel is not to be extended to the United States.").

[5] FED. R. CIV. P. 26(a)(1)(B)(i)–(viii).

regulatory schemes and provide special rules for corporations, banks, and power companies.[6] Foreign sovereigns receive protections from default judgments and punitive damages.[7] In many states, municipal corporations receive special procedural advantages, as do doctors.[8] Citizens can defeat forum non conveniens motions more easily than foreigners.[9] Native American Tribes may proceed pro se but other artificial entities may not.[10] In these and other contexts, procedure distinguishes between different types of natural and artificial persons, favoring some and hindering others. At times this offsets structural disadvantages; at other times it exacerbates them.

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[6] *See, e.g.*, 12 U.S.C. § 94 (2012) ("Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver . . . shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located . . . ."); 28 U.S.C § 1394 (2012) ("Any civil action by a national banking association to enjoin the Comptroller of the Currency . . . may be prosecuted in the judicial district where such association is located."); *infra* notes 83–85 and accompanying text.

[7] 28 U.S.C. § 1606 (2012) ("[A] foreign state . . . shall not be liable for punitive damages . . . ."); 28 U.S.C. § 1608(e) (2012) (requiring that a FSIA plaintiff must "establish[] his claim or right to relief by evidence satisfactory to the court" in order to obtain a default judgment); *see also* Hill v. Republic of Iraq, 328 F.3d 680, 681 (D.C. Cir. 2003) ("[W]e hold that under FSIA a plaintiff must prove that the projected consequences are 'reasonably certain' (i.e., more likely than not) to occur, and must prove the amount of damages by a 'reasonable estimate' consistent with this court's application of the American rule on damages."); *cf.* FED. R. CIV. P. 55(a) (containing no requirement for such evidence for non-FSIA plaintiffs).

[8] *E.g.*, CONN. GEN. STAT. § 52–190a (2007) (requiring reasonable inquiry and a certificate of good faith in negligence actions against health care providers); N.J. STAT. ANN. §§ 2A:53A–26–29 (West 2004) (requiring extra steps when filing an action against a "licensed person"); N.Y. C.P.L.R. 3012-a (McKinney 1987) ("In any action for medical, dental or podiatric malpractice, the complaint shall be accompanied by a certificate . . . declaring that: (1) the attorney has reviewed the facts of the case and has consulted with at least one physician in medical malpractice actions . . . and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action . . . ."); N.D. CENT. CODE § 28-01-46 (2006) (requiring a claim for professional negligence to be accompanied by an "affidavit containing an admissible expert opinion"); OKLA. STAT. tit. 12, § 19.1 (2013) (requiring that when a civil action for negligence requires expert testimony, the plaintiff must attach extra documents of proof to their petition); S.C. CODE ANN. § 15-36-100 (2012) ("[T]he plaintiff must file . . . an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit."); TENN. CODE ANN. § 29-26-122 (2012) (requiring certificates of good faith for health care liability actions); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2010) (requiring an expert report when filing a health care liability claim); VA. CODE ANN. § 8.01-20.1 (2007) (requiring a plaintiff to have secured an expert witness, for cases of medical malpractice, prior to service of process); W. VA. CODE § 55-7B-6 (2008) ("Prerequisites for filing an action against a health care provider"); OHIO CIV. R. 10(d)(2) (LexisNexis 2008) (requiring an affidavit of merit when a complaint contains a medical liability claim); PA. R. CIV. P. 1042.1–1042.8 (2008) (requiring extra steps when filing a professional liability action).

[9] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981) ("[A] foreign plaintiff's choice deserves less deference.").

[10] *See, e.g.*, Fraass Survival Sys., Inc. v. Absentee Shawnee Econ. Dev. Auth., 817 F. Supp. 7, 10 (S.D.N.Y. 1993) ("Indian tribal governments and their agencies do not fit well under the general rule against pro se representation by non-individuals . . . .").

Abstention is not an option here. Procedures that treat all kinds of entities alike are as much a choice as entity-specific procedures. Each choice creates different sets of winners and losers. This raises pressing questions. When must procedure treat humans and nonhumans alike? And to what extent should the law recognize, shun, or create differences between artificial entities and natural persons?

Procedural design has approached these questions on an ad hoc basis for too long, considering one procedure at a time, if even that, without reference to fundamental procedural values. It is time to recognize that these questions present design choices that can be handled well or poorly and that embed vital normative commitments deep within the procedural fabric.

This Article makes four important contributions to the rapidly expanding literature on corporate personhood and lays the groundwork for new research on procedural design. Part II explores the procedural default in this area that I call "trans-personality" or "trans-personal procedures."[11] Trans-personality is the principle that procedural rules should not vary based on the personhood or entity-type of the litigating parties. Under this principle, the same rules apply whether the litigating party is a natural or artificial person, a school board or an international corporation, a labor union or a Native American tribe.

This principle taps into deep-seated intuitions about procedures providing a level, non-discriminating playing field to all litigants. Despite this intuitive appeal, numerous political actors and litigants have challenged trans-personal procedures. As a result, the trans-personality norm, while strong, has never been universal. Instead, procedural rules present a complex patchwork of changing exceptions to trans-personality. Part III and IV contrast the assumed trans-personal uniformity against the

[11] This neologism is used to highlight differences and similarities with "trans-substantivity" which has been, so far, the main analytical tool to analyze and understand internal variation in procedural systems. Trans-substantivity is the principle that procedural rules should not vary based on the *substance* of the dispute. Trans-personality provides a complementary, but different lens to analyze procedures by focusing on the litigants, rather than the substance of the litigation. Procedures can treat all entities alike and all types of cases alike; conversely, procedures can single out types of cases for special treatment, or they can single out types of entities for special treatment, or do a combination of the two. *See* Stephen B. Burbank, *Pleading and the Dilemma of "General Rules"*, 2009 WIS. L. REV. 535, 536 ("[G]eneral rules should not only be transsubstantive but also, as it were, transprocedural, and accordingly that different rules should not (usually) be written for cases having different procedural needs . . . ."); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 375–76 nn. 25–26 (2010) (citing articles that discuss trans-substantivity); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1194 (2013) ("Trans-substantivity is one of the most fundamental principles of doctrinal design for modern civil procedure . . . ."); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 45–46 (1994) ("The price of trying to apply the same rules to all cases inevitably leads to general, vague, and flexible rules; such rules provide very little guidance for the bar or bench.").

discriminating reality. These Parts highlight instances where the trans-personal norm breaks down and explain why. Though seldom scrutinized by courts and commentators, deviations from the trans-personal norm span the procedural spectrum and systematically advantage and disadvantage identified entities.

This is important because procedures impose costs, redistribute bargaining leverage, and sometimes make suits unviable. Deviations from the trans-personal norm modify how likely different entities are to bring suit, how costly it is for them to litigate, their bargaining power during settlement discussions, and ultimately their likelihood of success. Trans-personal procedures and deviations from the trans-personal norm shape litigation patterns and ultimately the enforcement level of substantive regulatory regimes.

This ability gives rise to two potential pathologies. The first occurs when drafters of procedural law create entity-specific deviations from the trans-personal norm simply as an expression of pork-barrel spending, rather than with procedural values in mind. The flip-side pathology occurs when procedures blindly adhere to trans-personality without taking into account relevant differences between entity types. I argue that the problem is not the trans-personal norm, or the many exceptions to it, but ad hoc departures from the norm, or blind adherence to the norm. Both are problematic and under-theorized.

Examining trans-personality from this perspective of dangers and opportunities creates a novel analytical lens that allows me to upend conventional wisdom in key procedural areas. In Part V, I use this lens to highlight the problems created by taking the doctrine of *personal* jurisdiction, developed for persons, and applying it to non-persons like corporations. Personal jurisdiction is currently a unified trans-personal doctrine that applies to all types of entities. This approach has denied courts the flexibility to craft rules that are attentive to the essential differences between entities with and without a corporal existence. Currently the two halves of the doctrine are shackled together and that prevents a clear articulation of personal jurisdiction's goals and justifications. This is one example, among many, of how procedural design and legal scholarship can benefit from attention to the trans-personal norm and deviations from it.

II. THE TRANS-PERSONAL NORM

There is a strong, yet unexamined, norm embedded in federal and state procedural regimes to treat all entity types equally. Under this trans-personal norm, all procedural devices must be available to all types of entities. Similarly, all entities must by subject to the same procedural hurdles under the same standards as any other litigant. This norm is so strong that courts, statutes, legislators, and commentators rarely feel the

need to remark upon it. It is largely unspoken, and seemingly for good reason. Trans-personal procedures manifest and advance a variety of important normative and practical goals in everyday litigation.

Many entity types have the ability to sue and be sued.[12] But this tells us little about how they may be sued and the procedures that apply during litigation. Intuition might suggest that all procedures apply to all types of persons, and equally so. Recognizing the strength of this intuition is the foundation for understanding the exceptional import of the myriad deviation from the trans-personal norm explained in Part III and IV.

A. *Resolving Personhood Ambiguity*

The Federal Rules of Civil Procedure dictate who can do what, when, and how in the course of civil litigation. The Rules are thus necessarily chock-full with grammatical subjects and personal pronouns: "plaintiff," "defendant," "movant," "party," "nonparty," and "person."[13] Yet the Federal Rules never define who these entities might be.[14] They could refer to a natural person or a broad spectrum of artificial entities. Sometimes the context makes clear that the Rules designate only natural or artificial persons, but typically they do not.[15] Some procedural statutes mention

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[12] *See, e.g.*, Louis K. Liggett Co. v. Lee, 288 U.S. 517, 530 (1933) (discussing a chain store owner's suit to enjoin state tax officials for enforcing a state law).

[13] *See, e.g.*, FED. R. CIV. P. 1 (failing to define terms such as plaintiff, defendant, movant, party, nonparty, and person). Similarly, the Federal Rules of Appellate Procedure use the terms "appellant" and "appellee" without elaboration. FED. R. APP. P. 1.

[14] Arbitration conventions sometimes make explicit what is left implicit in the Federal Rules. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 1, June 10, 1958, 21 U.S.T. 2517, 2519 ("This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and *arising out of differences between persons, whether physical or legal.*") (emphasis added). Similarly, other areas of law are specific about their reach over identified natural and artificial persons. *See, e.g.*, Federal Food, Drug, and Cosmetic Act, 21 USC § 321(e) (2012) ("The term 'person' includes individual, partnership, corporation, and association."); CAL. HEALTH & SAFETY CODE § 11022 (West 2012) ("'Person' means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, or association, or any other legal entity."); Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1705 (2012) ("[T]he term 'individual' as used in the [Torture Victim Protection] Act encompasses only natural persons."); Pennsylvania R.R. Co. v. Canal Comm'rs, 21 Pa. 9, 20 (Pa. 1852) ("We do not think the word *individuals* is to be understood in a sense so narrow as that which the respondents would assign to it. It means something more than single persons. It would not exclude a partnership nor an incorporated company . . . .").

[15] *Compare* FED. R. CIV. P. 19(a)(1) ("A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party . . . ."), *with* FED. R. CIV. P. 45(b)(1) ("Any person who is at least 18 years old and not a party may serve a subpoena.").

entity types explicitly, but many do not.[16] Even where a procedure mentions entity types, such lists often leave out some entities without explanation. For example, Federal Rule 4(d) mandates that "[a]n individual, corporation, or association" has a duty to waive regular service of process but partnerships are not mentioned.[17]

In other areas of law, Congress provides guidance to resolve such ambiguity. The Dictionary Act instructs courts and agencies to interpret the words "person" and "whoever" to include a range of artificial entities, "as well as individuals," unless the context indicates otherwise.[18] For most areas of procedure, this clarification is of little use because the rules do not speak of "persons" but "plaintiffs," "defendants," and the like.[19] Application of the rules to all kinds of entities does, thus, not spring from statutory guidance or case law but from somewhere else.

Trans-personality furnishes the default interpretation. Where statutes and rules are silent about the reach of procedures to different types of entities, the trans-personal norm counsels for uniform treatment. The history and grammar of the Federal Rules also suggest a trans-personal background norm underlying the Rules. The framers of the Federal Rules of Civil Procedure desired to write simple and uniform rules.[20] Courts and commentators have interpreted the Rules in that spirit, applying them to entities not covered under a literal reading of the text.[21]

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[16] *See, e.g.*, 28 U.S.C. § 1335(a) (2012) ("The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society . . . .").

[17] FED. R. CIV. P. 4(d).

[18] 1 U.S.C. § 1 (2012) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . .").

[19] The most significant exception concerns the reach of civil action for the deprivation of rights. 42 U.S.C. § 1983 (2012) ("Every *person* who . . . subjects, or causes to be subjected, any citizen of the United States or *other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .") (emphasis added); *see also* Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 704 (2003) (holding that a Native American Tribe "does not qualify as a 'person' who may sue under § 1983"); Breard v. Greene, 523 U.S. 371, 378 (1998) ("[I]t is clear that Paraguay is not authorized to bring suit under § 1983. Paraguay is not a 'person' as that term is used in § 1983."); Ngiraingas v. Sanchez, 495 U.S. 182, 192 (1990) ("[N]either the Territory of Guam nor its officers acting in their official capacities are 'persons' under § 1983."); Will v. Mich. Dep't. of State Police, 491 U.S. 58, 64 (1989) ("[A] State is not a 'person' within the meaning of § 1983 . . . ."); Allee v. Medrano, 416 U.S. 802, 819 n.13 (1974) ("Unions may sue under 42 U.S.C. § 1983 as persons deprived of their rights secured by the Constitution and laws . . . .").

[20] *See, e.g.*, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 977 (1987) (noting the importance of "concepts of uniformity and simplicity" to the drafters of the Rules).

[21] *See* discussion *infra* Part II.A.1–3 (extending the text to government litigants, nonhuman entities, women, and non-gendered entities).

The trans-personal norm is strong and only a few have explicitly challenged it. These challenges are instructive, not because they succeeded or presented compelling arguments, but precisely because they did not. Their demise demonstrates the strength of the trans-personal norm and the strong intuitions for it that frequently overcome the entity-specific language of the Rules.

1. *Government Litigants*

One sustained attempt to exploit the broad terms of the Rules comes from government litigants. Since the inception of the Rules, government litigants have argued that some or all of the Rules do not apply to the government, or do not apply to the government in the same way as they do to other litigants.

Courts have routinely rejected such arguments. Indeed, the commitment of courts to trans-personality is deeply rooted in the procedural fabric of American civil litigation, predating even the advent of the Federal Rules.[22] Once the Federal Rules were in play, courts confirmed and entrenched trans-personality as the normative default. From early on, courts have scorned the government's arguments that the Federal Rules do not apply to the United States except where explicitly mentioned because this position "would lead to absurd results."[23] Similarly, courts rejected arguments that the government as a litigant is not subject to specific provisions in the Rules.[24] Government officials who sued in their official capacity were similarly unsuccessful in breaking the trans-personal mold of the Rules.[25]

The government's second line of argument was that even if the Rules apply, they should apply differently to government litigants than ordinary litigants. For example, government attorneys have argued for decades that pleading standards must favor the government both as plaintiff and as defendant. Federal courts rejected such arguments long before the inception of the Rules,[26] and they have continued to do so under both the old *Conley*[27] standard[28] and the new *Twombly/Iqbal*[29] standard.[30] Similarly,

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[22] *See, e.g.*, Maxwell v. United States, 3 F.2d 906, 911 (4th Cir. 1925) ("The form and sufficiency of pleadings do not depend upon whether the government is or is not a party to the litigation.").

[23] United States v. Gen. Motors Corp., 2 F.R.D. 528, 530 (N.D. Ill. 1942).

[24] *See, e.g.*, United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958) ("The Government as a litigant is, of course, subject to the rules of discovery.").

[25] *See, e.g.*, Durkin v. Pet Milk Co., 14 F.R.D. 385, 390 (W.D. Ark. 1953) ("[T]he plaintiff, while bringing the suit in his official capacity as the Secretary of Labor, nevertheless is 'in no different position than any ordinary litigant and is, therefore, bound by the Rules of Civil Procedure in the same respects as an ordinary litigant.'") (quoting Walling v. Richmond Screw Anchor, Co., 4 F.R.D. 265, 269 (E.D.N.Y. 1943)).

[26] *E.g.*, *Maxwell*, 3 F.2d at 911 ("The form and sufficiency of pleadings do not depend upon whether the government is or is not a party to the litigation.").

[27] Conley v. Gibson, 355 U.S. 41 (1957).

state courts refuse to apply special pleading rules to actions by or against state governments.[31] All of these courts insist that not only do the same procedures apply to the government, but that they also apply in the same way to the government as to any other type of litigant.[32]

Judges rarely justify such insistence on the uniform application of the Rules to all natural and artificial persons.[33] This commitment to apply procedure uniformly to all types of litigants is so pervasive that it extends beyond rules-based procedure to all types of procedure, including general principles of equity.[34]

2. *Nonhuman Entities*

Similarly, courts reject the notion that the Rules do not apply to nonhuman entities. Instead, courts routinely interpret the Rules to apply to all entities and to apply equally.

The broad nouns utilized in the Rules are entity-neutral. "Plaintiff" or

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[28] *E.g.*, Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 167–68 (1993) (rejecting the Fifth Circuit's adoption of a heightened pleading standard in civil rights cases alleging municipal liability under 42 U.S.C. § 1983); United States v. California, 655 F.2d 914, 919 (9th Cir. 1980) ("The federal government, like any other plaintiff, must meet all elements of any applicable cause of action—the bitter as well as the sweet.").

[29] Bell Atlantic Corp. v. Twombly, 550 U.S. 554 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[30] *E.g.*, United States v. Union Auto Sales, Inc., 490 Fed. Appx. 847, 851 (9th Cir. 2012) (Callahan, J., dissenting) ("Like any other plaintiff, the government must allege a claim for relief that rises above possible; it must be plausible.").

[31] *E.g.*, Davis v. City of San Antonio, 752 S.W.2d 518, 519 (Tex. 1988) ("We consider it established that governmental units litigate as any other party in Texas courts and must observe the same rules that bind all other litigants, which include the laws and rules governing pleadings and burden of proof."); Canutillo Indep. Sch. Dist. v. Olivares, 917 S.W.2d 494, 498 (Tex. Ct. App. 1996) ("[I]t is well established that governmental entities litigate as any other party in Texas courts and must observe the laws and rules governing pleadings and proof.").

[32] *E.g.*, Daitz Flying Corp. v. United States, 4 F.R.D. 372, 373 (E.D.N.Y. 1945) ("Rule 16 authorizes the court to direct the attorneys to appear for a pretrial conference 'in any action,' which refers to all civil actions, and no exception is made for an action in which the United States is a party. The United States Attorney must appear and his failure to do so would subject the government to the same sanctions which may be imposed against a private litigant. The United States is also bound by any agreements or admissions its counsel make at a pretrial conference to the same extent as a private litigant is bound by the statements made by his attorney. When the United States appears as a suitor, it places itself upon the same footing as other litigants and is not entitled to remedies which cannot be granted to other litigants."); Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265, 269 (E.D.N.Y. 1943) ("The United States Government is in no different position than any ordinary litigant and is, therefore, bound by the Rules of Civil Procedure in the same respects as an ordinary litigant.").

[33] *E.g.*, Mosseller v. United States, 158 F.2d 380, 382 (2d Cir. 1946) ("Congress has consented to suits against the United States by injured seamen. Having consented to suit, the United States should be held to have placed itself in the position of an ordinary litigant before the court, to whom the rules of civil procedure ordinarily apply."); Jackson Buff Corp. v. Marcelle, 20 F.R.D. 139, 140 (E.D.N.Y. 1957) ("That the Rules apply to actions in which the Government is a party either as plaintiff or defendant is established beyond doubt.").

[34] *E.g.*, United States v. Second Nat'l Bank of N. Miami, 502 F.2d 535, 548 (5th Cir. 1974) ("Certainly when seeking an equitable remedy the United States is no more immune to the general principles of equity than any other litigant.").

"defendant" could apply to all types of litigating entities. However, pronouns distinguish between natural persons and artificial entities.[35] "Who" refers to individuals, while "that" and "which" refer to groups and artificial entities.[36] A "party who is" thus indicates a natural litigant, while a "party that is" signifies an artificial entity. The current Rules use both sets of pronouns interchangeably.[37] Sometimes the Rules speak of a party "that is"[38] or "which is"[39] and sometimes the Rules refer to a party "who is."[40] Similarly, Federal Rule 18 uses the non-personal "it" to define litigants authorized to "join, as independent or alternative claims, as many claims as *it* has against an opposing party."[41]

Few would take this grammatical confusion to indicate that some rules are applicable only to natural persons while others are reserved for artificial entities. Instead, the courts apply the procedural rules and statutes to all entities, artificial and natural, independent of their literal, grammatically correct meaning.[42] Analogously, where applicable statutes make remedies available to "victims," courts have extended the term to cover "nonhuman entities such as the government and corporate institutions"[43] including the Indian Health Service,[44] banks,[45] and insurers.[46]

Courts are weary about applying different procedures for artificial and

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[35] "The chair who is made of wood" is incorrect, as is "the aunt that I cherish." However, because there is no possessive form of "that" in English, "whose" (the possessive form of "who") can refer to both people and things.

[36] THE CHICAGO MANUAL OF STYLE ¶ 5.54 (16th ed. 2010) ("*Who* . . . normally refers to a person. . . . *Which* normally refers to an animal or a thing.").

[37] This is particularly noteworthy given the grammatical precision evinced elsewhere in the rules. *E.g.*, FED. R. CIV. P. 28 ("Persons Before *Whom* Depositions May Be Taken") (emphasis added); FED. R. CIV. P. 45(b)(1) ("*By Whom* [a subpoena may be served] . . . .") (emphasis added).

[38] *E.g.*, FED. R. CIV. P. 4(d)(1), 4(h), 4(j)(2), 9(a)(1)(C), 11(c)(5)(B).

[39] *E.g.*, FED. R. CIV. P. 17(b)(2). *But cf.* FED. R. CIV. P. 30(b)(1).

[40] *E.g.*, FED. R. CIV. P. 4(c)(2), 4(d)(3), 4(k)(1)(A)–(B), 14(a)(1), 14(a)(5), 14(a)(6), 14(c)(1), 17(b)(1), 19(a)(1), 20(a), 25(d), 26(a)(2)(B), 26(b)(4)(A), 28(c), 30(b)(1), 31(a)(3), 45(b)(1), 45(b)(3), 45(c)(2)(B)(ii), 45(c)(3)(A)(ii), 63, 65(d)(2)(C), 77(d)(1).

This seems to have been, and continues to be, a conscious decision. *See* Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure* (pts. 1 & 2), 4 MICH. B.J., Sept. 2005, at 56 (2005), 84 MICH. B.J., Oct. 2005, at 52 (2005) (noting the care taken by the drafters to make only stylistic rather than substantive changes).

[41] FED. R. CIV. P. 18(a) (emphasis added).

[42] *See, e.g.*, Minneapolis-St. Paul Mailers Union, Local #4 v. Nw. Publ'n, Inc., No. CIV.02-1101 ADM/AJB, 2003 WL 21672743, at *3 n.2 (D. Minn. July 15, 2003), *aff'd*, 379 F.3d 502 (8th Cir. 2004) ("Although the statute refers only to the possessive form of the masculine singular pronoun, the Court will assume our wise Congress intended for this rule of service also to apply to the Union, a nonhuman, non-gender-specific entity, and perhaps even to women!").

[43] United States v. Ruffen, 780 F.2d 1493, 1496 (9th Cir. 1986).

[44] United States v. Sunrhodes, 831 F.2d 1537, 1545–46 (10th Cir. 1987).

[45] United States v. Richard, 738 F.2d 1120, 1123 (10th Cir. 1984).

[46] *See* United States v. Florence, 741 F.2d 1066, 1067, 1069 (8th Cir. 1984) (upholding an order of full restitution to a bank and an insurer).

natural persons. As was the case with government litigants, courts have a parallel, longstanding devotion to trans-personality as the dominant procedural norm when interacting with artificial and natural persons. This commitment to trans-personality also pre-dates the enactment of the Federal Rules.[47] Similarly, state courts insist on applying the same procedures to artificial persons and natural persons.[48]

3. *Women and Non-Gendered Entities*

Predictably, the same rationale explains why the Rules have always applied to female litigants. This point might seem obvious, but it is only so because the trans-personal norm is strong.

Prior to 1987, the Federal Rules of Civil Procedure exclusively used the male versions for all personal pronouns, i.e., he, him, and his. The Rules and the notes of the advisory committee on the Rules thus seemed to have contemplated only male defendants,[49] male intervening parties,[50] male

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[47] *E.g.*, Ky. Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550–51 (1923) ("Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files, and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case.").

[48] *E.g.*, Sipe v. Local Union No. 191 United Bhd. of Carpenters and Joiners of Am., 393 F. Supp. 865, 873–74 (M.D. Pa. 1975) (holding that the term "individual" in a Pennsylvania service of process provision includes artificial entities like labor unions because the court simply "cannot conclude that by using 'individuals,' the legislature intended to immunize nonresident partnerships, joint ventures and trusts, as well as labor unions, from liability for injury to residents of the state"); Johnson v. Goodyear Mining Co., 59 P. 304, 306, 309 (Cal. 1899) (rejecting an attorney's fees provision that applied only to corporations but not to individuals and partnerships); Anderson v. Uncle Sam Oil Co., 186 P. 198, 199–200 (Kan. 1920) (rejecting a statute that provided that a judgment for wages may include reasonable attorney's fees but only from corporations and "does not apply to individuals nor to partnerships, although they may be engaged in the same kind of business as corporations, and have as much capital invested and as many persons employed as the corporations have").

[49] *E.g.*, FED. R. CIV. P. 13 advisory committee's note ("When a defendant, if *he* desires to defend *his* interest in property, is obliged to come in and litigate in a court to whose jurisdiction *he* could not ordinarily be subjected, fairness suggests that *he* should not be required to assert counterclaims, but should rather be permitted to do so at *his* election. If, however, *he* does elect to assert a counterclaim, it seems fair to require *him* to assert any other which is compulsory within the meaning of Rule 13(a).") (emphasis added); FED. R. CIV. P. 19 advisory committee's note ("If a person as described in subdivision (a)(1)(2) is amenable to service of process and *his* joinder would not deprive the court of jurisdiction in the sense of competence over the action, *he* should be joined as a party; and if *he* has not been joined, the court should order *him* to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, *he* will be dismissed from the action.") (emphasis added).

[50] *E.g.*, FED. R. CIV. P. 24 advisory committee's note ("The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if *he* could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if *he* can show that the trustee's representation of his interest probably is inadequate; similarly a member

attorneys,[51] male witnesses,[52] male class representative,[53] male magistrate judges,[54] male judges,[55] male Supreme Court Justices,[56] and males seeking and being subject to discovery.[57]

Despite this one-sided choice of pronouns, few would argue that the Rules did not apply to women or entities that cannot have a gender.[58] An understanding that the Rules apply to all genders and types of persons is thus deeply baked into the way we interpret the rules. Any other interpretation of the Rules is absurd. And that is precisely the point.

After 1987, the male pronouns were replaced with gender-neutralizing

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of a class should have the right to intervene in a class action if *he* can show the inadequacy of the representation of his interest by the representative parties before the court.") (emphasis added).

[51] *E.g.*, FED. R. CIV. P. 11 advisory committee's note ("Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether *he* had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether *he* depended on forwarding counsel or another member of the bar.") (emphasis added).

[52] FED. R. CIV. P. 26 advisory committee's note ("A second exception to the requirement of this subdivision permits a nonparty witness to obtain a copy of *his* own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain *his* statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of *his* statement and are modifying their regular practice accordingly.") (emphasis added).

[53] FED. R. CIV. P. 23 advisory committee's note ("[S]hall aver (1) that the plaintiff was a shareholder at the time of the transaction of which *he* complains or that *his* share thereafter devolved on him by operation of law . . . .") (emphasis added).

[54] FED. R. CIV. P. 73 advisory committee's note ("In order to exercise this jurisdiction, a magistrate must be specially designated under 28 U.S.C. § 636(c)(1) by the district court or courts *he* serves.") (emphasis added).

[55] FED. R. CIV. P. 16 advisory committee's note ("If the judge who tries the case did not conduct the conference, *he* could find it difficult to determine exactly what was agreed to at the conference.") (emphasis added).

[56] FED. R. CIV. P. 86 Effective Date of 1966 Amendment; Transmission to Congress; Rescission ("That the Chief Justice be, and *he* hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Civil Procedure in accordance with the provisions of Title 28, U.S.C., §§ 2072 and 2073.") (emphasis added) (citing Sections 2–4 of the Order of the Supreme Court, 383 U.S. 1031 (1966)).

[57] FED. R. CIV. P. 37 advisory committee's note ("The party seeking discovery may choose the court to which *he* will apply, but the court has power to remit the party to the other court as a more appropriate forum.") (emphasis added).

[58] *See generally* 1 U.S.C. § 1 (2012) ("[W]ords importing the masculine gender include the feminine as well . . . ."); 26 U.S.C. § 7701(p)(1)(3) (2012) (importing the definition of masculine as including feminine found in 1 U.S.C. § 1 into the Internal Revenue Code); Stearns v. Veterans of Foreign Wars, 500 F.2d 788, 789 (D.C. Cir. 1974) ("The use of the pronoun 'he' and the words 'enlisted man' cannot reasonably by construed to be anything more than grammatical imprecision in drafting the clause. Masculine pronouns are often used to refer to antecedents of indefinite or mixed gender without modifying the meaning of the antecedents."); Richardson v. Woodward, 104 F. 873, 876 (4th Cir. 1900) ("The personal pronoun 'him' has no bearing, as it may be construed 'her'; for section 5, subd. 13, Code Va., provides that 'a word importing the masculine gender only, may extend to and be applied to females as well as males.'").

general nouns (e.g. "the defendant").[59] Everybody understood that this was a mere stylistic change because the trans-personal norm clarifies the broad and imprecise articulation of the Rules.[60] The drafters of the Rules never had to spell out that the Rules apply to government litigants, or that nonhuman entities are covered by pronouns only applicable to humans, or that women were covered by the terms "he" and "his." They did not have to do so because the trans-personal norm furnished that vital interpretive standard. Contrary to the plain language of the Rules, many courts and commentators believe that the Rules simply must apply to all entities.[61] This belief speaks to the strength of the trans-personal norm.

As such, it is no surprise that the Rules rarely depart from trans-personality and actually go out of their way at times to facilitate adherence to the trans-personal norm. For example, the framers of the Rules explicitly chose trans-personal articulations of class action rules. As the history of class actions makes clear, the drafters of Rule 23(b)(2) were primarily concerned with school desegregation cases that pitted individuals (typically parents) against municipal organizations.[62] Despite this narrow focus on specific entity types, Rule 23(b)(2) is framed in trans-personal terms and can be invoked by any type of entity against any type of entity.[63] By writing the rule to conform to trans-personal expectations, the drafters were able to better insulate the provision from attacks of impartiality.

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[59] For example, Federal Rule of Civil Procedure 5 was thus modified: "Service upon the attorney or upon a party shall be made by delivering a copy to ~~him~~ the attorney or party or by mailing it to ~~him~~ the attorney or party at ~~his~~ the attorney's or party's last known address . . . ." CIVIL RULES COMMITTEE, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 97 (1987), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV03-1987.pdf; *see* REP. OF THE COMM. ON RULES OF PRACTICE AND PROCEDURE 1, 4 (1987), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1987.pdf (stating that the "gender neutralizing amendments" would go into effect on October 1, 1987). Some gender-specific pronouns have survived beyond the Rules. *See, e.g.*, 28 U.S.C. § 2284(b)(3) (2012) ("A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. *He* may grant a temporary restraining order . . . .") (emphasis added).

[60] None of this should obscure the fact that stylistic changes can be important. For example, style often signals inclusion, prioritization, and importance. A small shift in style can mark a seismic shift in substantive public and legal discourse.

[61] *See e.g.*, *Richardson*, 104 F. at 876 (stating that masculine pronouns can refer to antecedents of indefinite or mixed gender).

[62] *See* David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702 (2011) (noting that the rule's creators wrote Rule 23(b)(2) for school desegregation litigation).

[63] FED. R. CIV. P. 23(b)(2) (referring broadly to "the *party* opposing the class . . . .") (emphasis added); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2557–60 (2011) (discussing a Title VII-specific application of Rule 23(b)(2)); *see also* Sarah Dale, Note, *Reconsidering the Approach to 23(B)(2) Employment Discrimination Class Actions in Light of* Dukes v. Wal-Mart, 38 CONN. L. REV. 967, 967–68 (2006) (arguing that Rule 23(b)(2) treats female victims of discrimination differently).

B. *The Normative and Practical Appeal of the Trans-Personal Norm*

What makes the trans-personal norm so appealing and seemingly self-evident? Although courts and commentators seldom articulate explicit defenses for trans-personality, its appealing features are worth enumerating. Specifically, trans-personality supports core procedural values: clarity, uniformity, simplicity, judicial efficiency, impartiality, procedural equality, and adaptability to changing circumstances. These values are all served by a straightforward application of trans-personality.

Most notably, trans-personal procedures are simple. A single set of procedural rules can apply regardless of who the litigating entities are.[64] This makes for shorter rules that, potentially, are easier to apply. Procedural systems also struggle with internal coherence. All too often, different procedural provisions are in tension with one another and work at cross-purposes. Coherence is thus a prized feature of procedural systems. Yet building a "coherent structure"[65] becomes harder to do as one adds complexity. Adding provisions for multiple types of litigants not only adds unpredictability, but might also destabilize the existing coherence in the Rules.[66]

Simple and coherent procedural systems are also more likely to remain uniformly understood and applied. Courts and commentators have long prized uniformity because of the confusion and dangers inherent in myriad intra-circuit and inter-circuit splits.[67] Rules that cut against the trans-personal norm are also likely to contribute to a further drifting apart of the

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[64] *See* Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010) ("[W]e place primary weight [here] upon the need for judicial administration of a jurisdictional statute to remain as simple as possible."); Janice Toran, *'Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 371–72, 377, 386 (1990) (discussing the desire for simplification motivating the development of the Rules).

[65] *See generally* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) ("[Professor Moore's] treatise has kept before the profession a vision of the Federal Rules as a coherent structure . . . .").

[66] *See generally* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823–24, 826, 831, 841–42, 846–47 (2010) (discussing the possibilities for destabilization of the Rules after recent Supreme Court decisions); Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 13–14 (1995) (elaborating on the ability of the Federal Circuit's to articulate a coordinated and coherent approach to developing legal doctrines); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 26–30 (1989) (discussing the potential for bias that exists in specialized courts). *But cf.* David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Rules and Standards*, 46 CONN. L. REV. 415, 427 (2013) (arguing that the Federal Circuit's preference for rules over standards decreases bias).

[67] *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 463 (1965) ("Because of the threat to the goal of uniformity of federal procedure posed by the decision below, we granted certiorari . . . ."); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2007–08 (1989) (describing the Walsh-Hall critique of uniformity in the Federal Rules of Civil Procedure).

federal procedural regime from state regimes.[68] As such, the trans-personal norm supports procedural uniformity.

Next, trans-personal rules appear to support procedural equality and thus manifest a commitment to impartiality.[69] Our procedural regime is built on the baseline norm that different types of litigants must be treated equally.[70] In a common interpretation of this norm, such equality entails that all litigants have equal access to procedural devices. Litigants should not receive different procedural treatment because they are disliked or popular. Thus understood, trans-personal norms provide protections against the dangers of bias, discrimination, and exposure to political pressures.[71]

The authors of the Federal Rules of Civil Procedure in particular, and procedural rules in general, also worked hard to give procedure a non-substantive patina.[72] Under this framework, procedure is and should be secondary to substance.[73] In contrast, procedures tailored to different

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[68] *See generally* Roger Michalski, *Tremors of Things To Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 110–11, 117–20, 122–23 (2010), http://www.yalelawjournal.org/forum/tremors-of-things-to-come-the-great-split-between-federal-and-state-pleading-standards (detailing the evolving split between state and federal pleading standards).

[69] *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 52 (1976) ("Justice in a formal philosophical sense is often defined as equality of treatment. . . . [T]he degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated."); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1868 (2002) ("Our procedural systems rest upon the idea that adversarial litigants in a single case should be accorded equivalent procedural opportunities and upon the proposition that like cases should be processed according to like procedural rules. . . .").

[70] *See, e.g.*, Chi., St. Louis & New Orleans R.R. Co. v. Moss, 60 Miss. 641, 642–44 (1882) (rejecting on discrimination grounds a statute that allowed successful appellees to recover attorney's fees from corporations but not from other types of appellants).

[71] *See, e.g.*, Phipps v. Wis. Cent. Ry. Co., 113 N.W. 456, 458 (Wis. 1907) ("There is no substantial distinction between individuals pursuing their remedies in the courts of justice, and corporations. The one is entitled to the same rights, remedies, and privileges as the other. There is no ground for classification in this regard. The very object of the constitutional provisions, state and federal, are to place them upon an equality before the law in maintaining and defending their rights in the courts. There is no apparent natural reason suggested by necessity, no such difference in the situation and circumstances between the classes in the legislation in question as to suggest the propriety of the discrimination, and therefore the statute allowing examination of the former employé [sic] of a corporation, and denying such right in case of an individual [is improper] . . . .").

[72] 28 U.S.C. §§ 2072(a)–(b) (2012) ("[The Federal Rules of Civil Procedure] shall not abridge, enlarge or modify any substantive right.").

[73] *See, e.g.*, Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938) (commenting that procedure is a means to an end, not an end in itself; the "handmaid rather than mistress" of justice); *see also* Subrin, *How Equity Conquered Common Law*, *supra* note 20, at 962 ("Throughout his life, [Charles] Clark kept repeating that procedure should be subservient to substance . . . ."). Similar thinking permeates other areas of law. *See, e.g.*, Melissa Mortazavi, *The Cost of Avoidance: Pluralism, Neutrality, and the Foundations of Modern Legal Ethics*, 42 FLA. ST. U. L. REV. (forthcoming 2015).

personhoods smack of furthering substantive rights in a procedural guise. Such procedures would also increase the risk of inconsistent results. Cases with similar facts might reach different outcomes because different types of litigants would have access to different procedural tools. Trans-personal norms preserve an understanding of procedure that attempts to isolate procedure from political wrangling and confines substantive policy decisions to substantive statutes.[74]

Trans-personality also increases efficiency in actual or potential litigation. Courts and litigants can spend less time classifying parties and can devote more time and resources to resolving disputes.[75] Where procedure differentiates between different types of persons and where these differences matter, litigants have incentives to litigate such classifications fiercely.[76] Such battles detract from resolving the underlying dispute.

Rules that are identical across personhoods also provide broader access by limiting the power of specialists. General practitioners are on a more equal playing field with specialists in a procedural system that utilizes the same rules no matter the constellation of entity types. Where procedures violate trans-personal norms, attorneys who represent specific entity-types will have an advantage in utilizing personhood specific procedure.

Finally, the trans-personal norm also increases the flexibility of procedural regimes by easily absorbing new entity types. States frequently experiment with new corporate forms.[77] Trans-personal rules apply automatically to new entity types. Innovations in corporate forms do not impose the cost of also having to write or modify procedural rules on states. Such costs might stifle innovation within states. One could also argue that it is simply impracticable if we were to re-invent a new

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[74] *But cf. supra* footnote 66 (discussing the potential for bias in specialized courts).

[75] *Cf.* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1974, 1977 (1989) (arguing that the drafters of the federal rules "wanted to eliminate petty haggling over pointless distinctions among types of cases" and that "the drive for uniformity also embraced some effort to treat cases as at least presumptively alike rather than to encourage the parties to take up time fighting over what kind of case they were dealing with"); Subrin, *How Equity Conquered Common Law*, *supra* note 20, at 961–65 (noting the argument that non-transubstantive rules can cause needless disputes over distinctions and lines, and interfere with cases getting heard on the merits).

[76] Such classification battles are easily imaginable in the context of trans-substantivity but are less likely to occur in the context of trans-personality where the identity of the litigating parties is typically easily determinable by examining, for example, articles of incorporation. However, complex litigation with multiple defendants or plaintiffs that do not share an entity type is one area where such issues might come to the forefront.

[77] *See, e.g.*, Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55, 55 (2012) ("Over the past few years, jurisdictions across the country have enacted specialized organizational forms to house social enterprises. Social enterprises are entities dedicated to a blended mission of earning profits for owners and promoting social good. They are neither typical businesses . . . nor traditional charities.").

procedural system for every constellation of litigants.

These are good reasons to favor trans-personal procedures. However, despite these reasons, our procedural system is honeycombed with exceptions to the trans-personal norm. The next Section focuses on the questions that follow from this tension between the trans-personal norm and deviations from it: Why and how did these exceptions to trans-personality emerge? And how can we sort justified from unjustified deviations?

III. ENTITY-SPECIFIC PROCEDURES

The trans-personal norm, while strong, has never been universal. Instead, procedural rules present a complex patchwork of changing exceptions to trans-personality. This Part contrasts the assumed trans-personal uniformity against the discriminating reality. It highlights instances where the trans-personal norm breaks down and explains why.[78] Though seldom scrutinized by courts and commentators, deviations from the trans-personal norm span the procedural spectrum and systematically advantage and disadvantage certain entities.[79]

To make this argument, I start with a brief overview of deviations from the transpersonal norm. Next, I explain how framers of procedural law use deviations from the transpersonal norm to adjust regulatory regimes. Legislators, courts, and rule-makers have different regulatory levers available to tune regulatory regimes and affect primary conduct. They can modify enforcement levels by adjusting substantive law, provide for trans-substantive variation, or deviate from the trans-personal norm. These options represent possible approaches to governance challenges. Legislators can use any one of these approaches, or a combination of approaches. However, different rule-makers are differently situated to utilize trans-personal deviations. Procedural law is a combination of statutory and constitutional provisions, common law, federal rules, and local rules. Each presents unique challenges and opportunities to utilize trans-personal norms and deviations from it.

In the final Section, I explore two common pathologies. The first arises when drafters of procedural law succumb to bias and political pressures. They might create deviations from the trans-personal norm, not to further procedural values, but simply because of pork-barrel spending with a procedural twist. The mirror-image pathology arises when drafters of procedural law adhere to the trans-personal norm without reflecting on procedural values. The norm has much to recommend it, but departures

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[78] *See* discussion *infra* Part III.

[79] *See* Subrin, *How Equity Conquered Common Law*, *supra* note 20, at 911–12 (discussing the impacts of variations in procedural rules in civil suits).

from it are also necessary at times. Distinguishing between the two is a difficult task. All too often, departures from the norm are made on an ad hoc basis and adherence to the norm is due to blind inertia rather than principled reasoning. Both are problematic and under-studied.

A. *The Honeycombed Reality*

Federal and state statutes, rules, and cases are sprinkled with elaborate entity-specific provisions that span the procedural spectrum. For example, federal entities enjoy greater protections from punitive damages and offensive issue preclusion, special intervention rights, greater time allowances to serve responsive pleadings, greater protections from default judgments, and broader limitations on initial discovery than regular plaintiffs.[80] Some jurisdictional statutes create explicit exceptions for enumerated federal agencies and federal corporations like the Tennessee Valley Authority.[81] The Federal Arbitration Act does not apply to "seamen" and "railroad employees."[82] Elsewhere, venue rules are part of entity-specific regulatory schemes and provide special rules for corporations,[83] banks,[84] and power companies.[85] Native American Tribes

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[80] *See supra* notes 2–5 and accompanying text.

[81] *See, e.g.*, 28 USC § 1491(c) (2012) (creating an explicit exception prohibiting jurisdiction of the United States Court of Federal Claims over the Tennessee Valley Authority); Raygor v. Regents of Univ. of Minn., 534 U.S. 533, 536, 540–42, 544–46 (2002) (specifying exceptions to regular supplemental jurisdiction rules for states as litigants).

[82] 9 U.S.C. § 1 (2012).

[83] *See, e.g.*, Bain Peanut Co. of Tex. v. Pinson, 282 U.S. 499, 501 (1931) (rejecting an Equal Protection challenge to a Texas statute that permitted suits against private corporations to be brought in the county where the cause of action arose, while unincorporated individuals were not subject to similar suits except in their county of domicile, and noting that "we have to consider, not a geometrical equation between a corporation and a man, but whether the difference does injustice to the class generally, even though it bear hard in some particular case"); Plantation Legal Def. Servs., Inc. v. O'Brien, 401 A.2d 1277, 1278–79 (R.I. 1979) (upholding a statute that permits individual plaintiffs to bring small claims actions in the district where either plaintiff or defendant resides but requires that corporations commence such an action in the district where the defendant resides); Cook v. W.S. Ray Mfg. Co., 115 P. 318, 320 (Cal. 1911) (upholding a California venue provision that distinguished between corporations and individuals in actions arising in tort or contract); S. Union Life Ins. Co. v. Pesek, 22 S.W.2d 1090, 1091 (Tex. Civ. App. 1929) (upholding a Texas statute that provided that individuals may only be sued where they are domiciled but allows corporations to be sued anywhere).

[84] *See, e.g.*, 12 U.S.C. § 94 (2012) (providing for special venue provisions for "[a]ny action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association"); 28 U.S.C. § 1394 (2012) (broadening available forums for certain actions "by a national banking association"); Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc., 480 F.2d 798, 799–800 (5th Cir. 1973) (noting that the bank venue statute "confers on national banks immunity from suit outside the district, territory, county, and city where it is located").

[85] Miss. Power Co. v. Luter, 336 So. 2d 753, 754–55 (Miss. 1976) (upholding a Mississippi venue statute that "permits suits against power companies in any county in which a company may have a power line").

may proceed pro se but other artificial entities may not.[86] For other entities, statutes provide for different provisional remedies,[87] availability of injunctions,[88] declaratory judgments,[89] prohibitions against exemplary and punitive damages,[90] filing fee exemptions and special filing fee-shifting provisions,[91] securities for temporary restraining orders,[92] statute of limitations,[93] securities for expenses of opposing party,[94] disclosure requirements,[95] tolling provisions,[96] exemptions from securities for costs,[97]

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[86] *See, e.g.*, Fraass Survival Sys., Inc. v. Absentee Shawnee Econ. Dev. Auth., 817 F. Supp. 7, 10 (S.D.N.Y. 1993) ("Indian tribal governments and their agencies do not fit well under the general rule against pro se representation by non-individuals . . . .").

[87] *See, e.g.*, Household Fin. Corp. v. Johnson, 346 A.2d 177, 179–80 (Del. Super. Ct. 1975) (upholding a Delaware statute that allowed for banks and trust companies to utilize a wage attachment remedy that small loan companies were forbidden to pursue).

[88] *See, e.g.*, 28 U.S.C. §§ 3701–03 (authorizing and limiting the entities that may commence an action to enjoin unlawful sports gambling to "the Attorney General of the United States, [and] professional sports organization[s] or amateur sports organization[s]").

[89] *See, e.g.*, 28 U.S.C. § 2201 (2012) (prohibiting declaratory judgments against foreign governments in countervailing duty proceedings).

[90] 28 U.S.C. § 2674 (2012) (prohibiting punitive damages against the United States in tort claims).

[91] *See, e.g.*, 28 U.S.C. § 1916 (2012) (stating that seamen may institute certain suits "without prepaying fees or costs or furnishing security therefor"); TEX. CIV. PRAC. & REM. CODE ANN. §§ 8.01–8.02 (West 2002) ("The state is exempt from the payment of the filing fee. . . . If the state prevails in a lawsuit, the opposing party shall pay the entire amount of any filing fee attributable to the state, including any amount exempted . . . .").

[92] *See, e.g.*, FED. R. CIV. P. 65(c) ("The United States, its officers, and its agencies are not required to give security" for preliminary injunctions or temporary restraining orders).

[93] Daniel v. Amicalola Elec. Membership Corp., 711 S.E.2d 709, 715 (Ga. 2011) ("[We uphold] [t]he short statute of limitation[s] [for electric membership corporations because it] reflects the fact that [electric membership corporations] are statutorily required to provide service to all those in their coverage area who desire service, and they may incur high capital costs to fulfill this duty. In addition, unlike for-profit utilities, these non-profit, consumer-owned entities have no profit margin to cushion the financial blow of damages payments or re-routing of distribution facilities as a result of lawsuits filed long after alleged causes of action arise. In light of these differences from other utilities and other businesses, we cannot say that it was irrational for the General Assembly to require that landowners seeking to enforce property rights bring claims against [electric membership corporations] (and telephone cooperatives) more expeditiously.").

[94] *See, e.g.*, Beyerbach v. Juno Oil Co., 265 P.2d 1, 6 (Cal. 1954) (upholding a statute that "requires [a stockholder] plaintiff to furnish security for [corporate] defendants' expenses if the trial court finds that there is no reasonable probability that the corporation will benefit from the derivative action, but does not contain a comparable provision requiring the corporation to post security for plaintiff's expenses if the trial court finds a probability that the corporation will benefit").

[95] *See, e.g.*, FED. R. CIV. P. 7.1 (providing for special disclosure statements for nongovernmental corporations); SUP. CT. R. 29.6 (stating the requirement of a disclosure statement for nongovernmental corporations).

[96] *See, e.g.*, 29 U.S.C. § 1854(f) (2012) (tolling the statute of limitations in actions for bodily injury or death to a migrant farmworker); 50 U.S.C. § 526 (2012) (tolling the statute of limitations during military service); Raygor v. Regents of Univ. of Minn., 534 U.S. 533, 536 (2002) ("[T]he tolling provision [of 28 USC § 1367(d)] does not apply to claims filed in federal court against nonconsenting States.").

[97] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 6.004 (West 2012) ("A school district may institute and prosecute suits without giving security for cost and may appeal from judgment without

non-removability,[98] and special intervention rights.[99] In times past, statutes provided for special costs and fees rules (typically recovery of attorney fees) for actions against railroad companies[100] and insurance companies.[101]

The Federal Rules also provide for special requirements in derivative class actions (including special pleading requirements) that, by definition, could not be brought against a natural person.[102] Similarly, the Rules include special provisions for suits related to unincorporated associations. In these cases, litigants can utilize class action procedures to give "entity treatment" to the association when it could not be sued otherwise.[103] Other statutes and rules can apply only, in practice, to specific entities.[104]

In these and other contexts, procedure is entity-specific and it systematically favors and hinders identified entities. At times, these deviations are but minor departures with little practical effect. However, at

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giving supersedeas or cost bond"); TEX. CIV. PRAC. & REM. CODE ANN. § 6.002(a) (West 2002) ("Security for costs may not be required of an incorporated city or town of this state in an action, suit, or proceeding.").

[98] 28 U.S.C. § 1445 (2012) (rendering certain actions involving railroads, carriers, employees, and women un-removable to federal court).

[99] *See, e.g.*, 28 U.S.C. § 2323 (2012) ("The Surface Transportation Board and any party or parties in interest to the proceeding before the Board, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party. Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Board, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.").

[100] *See, e.g.*, Hindman v. Or. Short Line R.R. Co., 178 P. 837, 839 (Idaho 1918) (allowing the recovery of attorney's fees where damages are recovered against a railroad which has failed to maintain right of way fences as furthering a proper regulatory regime), *aff'd on reh'g*, 178 P. 839 (Idaho 1919); Ill. Cent. R.R. Co. v. Crider, 19 S.W. 618, 620–21 (Tenn. 1892) (upholding a statute that awarded reasonable attorney's fees to a successful plaintiff against a defendant railroad company in actions for damages to the plaintiff's property). *But cf.* Gulf, Colo. & Santa Fé. Ry. Co. v. Ellis, 165 U.S. 150, 166 (1897) (rejecting an attorney fee statute that only applied to railroads); Dewell v. N. Pac. Ry. Co., 170 P. 753, 754 (Mont. 1918) (rejecting a statute that "allows an attorney fee to the property owner if he is successful in the litigation, but does not allow it to the railway company if it is successful").

[101] *See, e.g.*, Cont'l Cas. Co. v. Gold, 194 So. 2d 272, 274 (Fla. 1967) (upholding a statute that assessed attorney's fees against insurance companies but not other entities); Spicer v. Benefit Ass'n of Ry. Emps., 21 P.2d 187, 188–89 (Or. 1933) (upholding a statute that imposed attorney's fees, including fees for appellate actions, on insurance companies but not other entities).

[102] FED. R. CIV. P. 23.1; *see also* FED. R. CIV. P. 23.1 advisory committee's note ("A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule.").

[103] FED. R. CIV. P. 23.2; *see also* FED. R. CIV. P. 23.2 advisory committee's note ("Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give 'entity treatment' to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b).").

[104] *See, e.g.*, 28 U.S.C. § 1712 (2012) (providing for coupon settlements in class actions); FED. R. CIV. P. 66 (providing for receivers that are, in practice, always individuals and not corporations or partnerships).

other times, they re-balance entire procedural regimes in new directions.[105]

B. *Entity-Specific Deviations as Regulatory Levers*

Legislators can utilize different regulatory levers to adjust regulatory regimes and achieve desired enforcement levels. They can modify enforcement levels by adjusting substantive law or procedural law. On the procedural side, Congress has multiple options. For example, it can adjust procedures that apply to all cases. This is a blunt tool because it affects broad swaths of dissimilar cases. A more targeted approach focuses on specific types of cases. Deviations from the trans-substantive norm work this way. This mechanism is well understood by the existing literature.

Less prominent is an understanding that deviations from the trans-personal norm can also target specific subclasses of legal actors and achieve regulatory aims. Entity-specific procedures modify the cost of bringing suit, the likely success of a case, and the bargaining leverage of those entities.[106] By making suits more or less likely, Congress can thus adjust enforcement levels in yet another way.

These options represent alternative approaches to governance challenges. Legislators can use any one of these approaches, or a combination of approaches. As the following example on pleading in medical malpractice cases demonstrates, these levers might have overlapping targets and consequences. But at other times they represent fundamentally different ways to conceive of the governance challenge at hand and means to tackle it. As the second example on pre-suit discovery will show, Congress also uses entity-specific procedures to distribute enforcement potential between private attorney generals and public agencies. In these and other contexts, entity-specific procedures are a regulatory lever with unique and under-studied characteristics.

1. *Medical Malpractice Pleading*

Legislators can modulate enforcement levels by targeting types of suits or protecting types of defendants. For example, numerous states are concerned with rising healthcare costs and increasing liability insurance rates for healthcare providers. Many commentators attribute part of these

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[105] *See, e.g.*, Stewart v. U.S. Postal Serv., 649 F. Supp. 1531, 1534–35 (S.D.N.Y. 1986) ("There are other manifestations of the interest in justice rather than in technicalities when the government is a litigant. For instance Federal Rule of Civil Procedure 55(e) prohibits a default judgment against the government, 'unless the claimant establishes his claim or right to relief by evidence satisfactory to the court,' a requirement not imposed on entering default judgments against private parties. These indicia and others stand for the proposition that when the government is a party to litigation, substance should trump procedure.").

[106] *See* discussion *infra* Part IV.D.

costs to excessive medical malpractice actions.[107] In response, state legislatures have sought to protect healthcare professionals by altering substantive tort law and modifying procedures. These modifications affect a broad range of procedural settings. For example, states cap damages, provide for alternative dispute resolution mechanisms, limit the admissibility of certain evidence, and provide for special pleading requirements.[108]

These reforms illustrate that the legislature has multiple tools at its disposal to effectuate its goals. The most obvious and often least politically viable is to change substantive tort law. Alternatively, legislatures can create exceptions to the trans-substantive norm by targeting specific types of lawsuits (e.g., medical malpractice suits or wrongful death cases). However, there is a third way, an alternative that has been neglected in scholarly discourse: the legislature can craft procedures that specifically protect health care professionals as a group of litigants.

Pleading standards are one illustration of the difference between deviations from the trans-substantive and trans-personal norm. Legislators in numerous states have addressed perceived excesses in medical malpractice litigation by introducing additional pleading requirements.[109]

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[107] *See, e.g.*, ALA. CODE § 6-5-540 (2005) ("This Legislature finds and declares that the increasing threat of legal actions for alleged medical injury causes and contributes to an increase in health care costs . . . and that the spiraling costs and decreasing availability of essential medical services caused by the threat of such litigation constitutes a danger to the health and safety of the citizens of this state . . . ."); Richard E. Anderson, *Billions for Defense: The Pervasive Nature of Defensive Medicine*, 159 ARCHIVES OF INTERNAL MED. 2399, 2401 (1999) (suggesting that physicians order tests or procedures in excess of their actual need to protect themselves from the risk of lawsuits); Tara F. Bishop et al., *Physicians' Views on Defensive Medicine: A National Survey*, 170 ARCHIVES OF INTERNAL MED. 1081, 1081 (2010) (reporting survey results suggesting that a "majority of physicians also agreed that protections against unwarranted malpractice suits are needed to decrease the unnecessary use of diagnostic tests"); Newt Gingrich, Op-Ed., *How the G.O.P. Can Fix Health Care*, N.Y. TIMES, Feb. 22, 2010, at A19 (noting that doctors order unnecessary care "to protect against frivolous suits filed by trial lawyers seeking an easy payout, particularly after a doctor makes a simple mistake"); *see also* David Leonhardt, *A System Breeding More Waste*, N.Y. TIMES, Sept. 23, 2009, at B1 ("The debate over medical malpractice can often seem theological. On one side are those conservatives and doctors who have no doubt that frivolous lawsuits and Democratic politicians beholden to trial lawyers are the reasons American health care is so expensive. On the other side are those liberals who see malpractice reform as another Republican conspiracy to shift attention from the real problem.").

[108] *See, e.g.*, DEL. CODE ANN. tit. 18, § 6854 (1999) (limiting who qualifies to give expert medical testimony); FLA. STAT. ANN. § 766.207 (West 2011) (providing litigants in medical malpractice actions the option to voluntarily submit to binding arbitration); N.H. REV. STAT. ANN. § 507-E:2 (LexisNexis 2009) (stating the burden of proof in medical malpractice actions); VA. CODE ANN. § 8.01-581.15 (2013) (limiting the amount recoverable in a medical malpractice action).

[109] *E.g.*, N.J. STAT. ANN. §§ 2A:53A-26–29 (West 2004); N.Y. C.P.L.R. 3012-a (McKinney 1987); N.D. CENT. CODE § 28-01-46 (2006); OHIO CIV. R. 10(d)(2) (LexisNexis 2008); OKLA. STAT. tit. 12, § 19.1 (2013); S.C. CODE ANN. § 15-36-100 (2012); TENN. CODE ANN. § 29-26-122 (2012); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2010); VA. CODE ANN. § 8.01-20.1 (2007); W. VA. CODE § 55-7B-6 (2008); PA. R. CIV. P. 1042.1-1042.8 (2008).

Legislatures who have followed this approach typically focus on medical malpractice complaints,[110] personal injury claims,[111] or healthcare negligence.[112] This approach focuses on substance-specific procedural variation that departs from the trans-substantive norm.

Other states focus on trans-personality instead and use entity-specific pleading standards. For example, Arizona imposes special requirements on plaintiffs who sue healthcare professionals.[113] Such plaintiffs must state in their complaint whether they will require an expert opinion to establish the defendant's liability.[114] Notice that this deviation from uniform pleading standards is not abandoning trans-substantive norms. Many suits against health care professionals might be related to medical malpractice, but they need not be. The statute does not mention medical malpractice and might be invoked in other substantive areas that often involve health care professionals (e.g., breach of contract, data mismanagement, infringement of privacy, mismanagement of hospital funds, etc.). The Arizona pleading regime designates unique requirements based on the type of defendant, rather than the type of case.[115]

In practice, this pleading regime is typically invoked in medical malpractice cases.[116] But the Arizona example highlights that there are important differences between acting on a type of litigant rather than a type of case. This law sweeps different types of cases into its ambit. Legislative choices that target the trans-personal norm protect health care professionals more broadly from all types of potential suits. In contrast, a law that deviates from the trans-substantive norm protects all parties subject to wrongful death or malpractice actions, including non-health care professionals, but would leave healthcare professionals vulnerable to suits grounded in other areas of law.

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[110] *See, e.g.*, FLA. STAT. § 766.203(2)(b) (2004) (requiring that a claimant's initiation of a lawsuit be accompanied by "a verified written medical expert opinion"); GA. CODE ANN. § 9-11-9.1(a) (2002) (requiring expert affidavits for "any action for damages alleging professional malpractice").

[111] *See, e.g.*, CONN. GEN. STAT. § 52-184c (2007) (establishing specific requirements for expert witnesses).

[112] *See, e.g.*, DEL. CODE ANN. tit. 18, § 6853 (2004) (requiring expert affidavits for "healthcare negligence lawsuit[s]").

[113] ARIZ. REV. STAT. ANN. § 12-2603 (2011) (West); *cf.* OKLA. STAT. tit. 12, § 19(A) (2011) (demonstrating a hybrid approach that mixes deviation from trans-substantivity and trans-personality norms).

[114] *See, e.g.*, statutes cited *supra* note 110.

[115] *See, e.g.*, statutes cited *supra* note 113.

[116] Typically, but not exclusively. For example, the statute has been applied in endangerment by neglect cases. *See, e.g.*, Estate of Cook *ex rel.* Weniger v. Scottsdale Residential Care Investors, No. 1 CA-CV 07-0847, 2008 WL 4667316, at *1 (Ariz. Ct. App. Oct. 16, 2008) (suing for failing to protect a patient in a nursing home from another patient). Such cases are seemingly not considered part of medical malpractice doctrine in Arizona. *See, e.g.*, Estate of Adolfo Chavez v. Arizona, No. C20050715, 2006 WL 4078641, at *2 (Ariz. Super. Ct. Dec. 20, 2006) (holding that claims under the Vulnerable Adult Statutes are not for medical malpractice).

Substance-specific and entity-specific pleading regimes represent two separate approaches to achieve overlapping, but different, regulatory goals. Pleading regimes that are specific to medical malpractice claims typically address concerns related to highly technical negligence claims that also trigger strong emotions. Pleading regimes specific to health care providers address concerns related to the special character of these defendants, no matter the type of lawsuit at hand (say, an extreme concern with reputation costs even for successfully defended suits).

Of course, states can also mix and match substance-specific and entity-specific legislation.[117] In these situations, trans-substantivity is an important part of the story, but only a part. The interaction of substance-specific and entity-specific provisions creates the enforcement level.

2. *Pre-Suit Discovery*

As we saw in the medical malpractice context, the legislature can utilize entity-specific procedures to give advantages to defendants. The legislature can also invoke entity-specific procedures to benefit plaintiffs. For example, Congress granted the Federal Trade Commission the power to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."[118] This allows the Commission to conduct a significant amount of discovery before bringing suit.[119] Pre-suit discovery puts the Commission in a better position to evaluate the desirability of instigating a lawsuit. It also increases the Commission's settlement leverage and opens up litigation tactics unavailable to regular plaintiffs. Equally important, pre-lawsuit discovery puts the Federal Trade Commission in a stronger

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[117] *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-02 (LexisNexis 2003) (specifying pleading standards that apply to "[a]ll claims, suits, and actions . . . by a person against a health care provider for medical injury"); MINN. STAT. § 544.42, subdiv. 1–2 (2003) (requiring expert affidavits and specifying pleading standards for "an action against a professional alleging negligence or malpractice in rendering a professional service"); MISS. CODE ANN. § 11-1-58 (2002) (establishing a unique pleading standard applicable in "any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services"); MO. REV. STAT. § 538.225 (2005) (establishing a special pleading standard in "any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services").

[118] 15 U.S.C. § 49 (2012); *see* FTC OPERATING MANUAL § 3.6.7.5.2, *available at* http://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf ("Investigational subpoenas may be used to require testimony and production of documents (duces tecum) or to require testimony without the production of documents (ad testificandum) in [a broad range of] investigations . . . ."). The FTC may also informally request information and interviews. *See id.* § 3.3.6.6.1 ("Request for Access Letters"); § 3.3.6.6.4 ("Interviews").

[119] This power is tempered by internal safeguards. *See id.* § 3.6.7.3 (providing for Clearance and Approval procedures by a Bureau Director prior to issuing compulsory process); *id.* § 3.6.7.5.7 (setting forth guidelines for Petitions to Quash or Limit).

position to survive motions to dismiss after *Iqbal*[120] and *Twombly*.[121]

Unlike the Federal Trade Commission, regular plaintiffs do not have access to privately held information, making it more difficult for them to allege enough factual detail to make a claim "plausible."[122] The pre-suit discovery powers granted to the Commission are typically justified on two primary grounds. First, pre-suit discovery can limit the amount of required regular discovery.[123] Second, the Federal Trade Commission has the power to refer a case for possible criminal prosecution.[124] Congress granted the Securities Exchange Commission similar pre-suit powers.[125]

Predictably, these entity-specific procedures make it easier and cheaper for the Federal Trade Commission and the Securities Exchange Commission to bring suits. They also make it more likely that such suits will succeed and that the parties will settle early. The net effect of these provisions is thus increased enforcement of the underlying substantive regulatory regime. Notice that Congress cabined such increased enforcement to specific federal agencies. Congress could have crafted substance-specific procedures that grant all litigants in these types of suits broader discovery powers to ensure a vibrant enforcement climate. It did not do so. Instead, Congress utilized entity-specific procedures to fine-tune the level and source of enforcement.[126] In this context, entity-specific

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[120] Ashcroft v. Iqbal, 556 U.S. 662, 689 (2009) ("Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.").

[121] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

[122] *See* William H. Page, *The FTC's Procedural Advantage in Discovering Concerted Action*, THE ANTITRUST SOURCE (Feb. 2009), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_SourceFull2_26f.authcheckdam.pdf ("[T]o avoid dismissal for failure to state a claim, a private plaintiff must plead . . . enough factual detail about the defendants' conduct to make it 'plausible' to believe that they conspired.").

[123] *See* FTC OPERATING MANUAL, *supra* note 118, at § 4.2.2 ("Failure to develop the facts as fully as possible prior to issuance of the complaint may lead to protracted post-complaint discovery and, as a result, prolonged delay in adjudication.").

[124] *See id.* § 3.6.9 ("If the staff develops information during the course of a competition investigation indicating possible criminal violations of the Sherman Act, the Commision's liaison officer with the Antitrust Division of the Department of Justice should be consulted for guidance as to applicable policies and procedures.").

[125] *See, e.g.*, 15 U.S.C. § 77s(c) (2012) ("[A]ny member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry."); *id.* § 77t(a) ("Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.").

[126] *See, e.g.*, 15 U.S.C. § 49 (2012) ("[T]he Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating

procedures manifest a privileging of public enforcement over private attorney generals.[127]

3. *Service of Process*

Similarly, legislatures can use procedure to make all suits against certain entity types cheaper and easier. Many states use service of process provisions in this manner. These provisions single out specific types of organizations to fine-tune how quickly, cheaply, and conveniently plaintiffs can initiate suits against various defendants. For example, a California statute provides for easy service of process on banks.[128] Banks may be served with process by delivering a copy of the summons and the complaint to any "cashier or assistant cashier" in addition to the regular service of process options available when serving any other corporation.[129]

Such singling out of specific entity types has a long history. States have long utilized entity-specific service of process provisions to facilitate regulation of sensitive economic activities. Typically, states did so by broadening the scope of permissible service of process on insurance[130] and railroad companies,[131] but providing for more restrictive service of process provisions for other types of organizations, like labor unions.[132] States also

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to any matter under investigation."); 15 U.S.C. § 77t(a) ("Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.").

[127] *See* 15 U.S.C. § 78u–4 (2012) (targeting "private action[s]" in the securities litigation context).

[128] CAL. CIV. PROC. CODE § 416.10(c) (West 2004).

[129] *Id.* ("A summons may be served on a corporation by delivering a copy of the summons and the complaint . . . [i]f the corporation is a bank, to a cashier or assistant cashier . . . .").

[130] *See, e.g.*, Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 253–54 (1909) (upholding a Missouri statute that authorizes service of process on an insurance company by delivering a copy of the summons and complaint on "any person within the State who shall solicit insurance on behalf of any insurance company, or make any contract of insurance, or who collects or receives any premium for insurance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either"); Lafayette Ins. Co. v. French, 59 U.S. 404, 408 (1855) (upholding an Ohio statute that allowed for service of process on any insurance agent "with authority to make contracts of insurance" in Ohio); Dixon v. Order of Ry. Conductors of Am., 49 F. 910, 911 (C.C.E.D. Wis. 1892) ("[A]ny person doing for such company any of the acts specified in section 1977 is an agent of the company . . . .").

[131] *See, e.g.*, Kunz v. Lowden, 124 F.2d 911, 914 (10th Cir. 1942) (holding that service of process on a railroad is proper under state statute when the complaint and summons were served on a person that sold the railroad's tickets on behalf of a third party); Dinzy v. Illinois Cent. R.R. Co., 61 F. 49, 52 (C.C.N.D. Iowa 1894) (upholding an Iowa statute that allows railway companies to be served on any station master even though "the station agent is not a general officer of the company . . . he acts for the company only at the particular station to which he is assigned, and . . . his powers are of the most limited character").

[132] Christian v. Int'l Ass'n of Machinists, 7 F.2d 481, 482 (E.D. Ky. 1925) (holding that service of process on a local chairman and member of international union was insufficient because there is

used service of process provisions to target non-economic entities of interests, like fraternal societies.[133]

The current trend is in the opposite direction and increases the burdens on plaintiffs who desire to provide service of process on business entities. In many jurisdictions, service of process on a corporation, partnership, or association[134] is currently more burdensome than service on a natural person. Under the Federal Rules, business entities must be served either by delivering a copy of the summons and complaint to "an officer, a managing or general agent or any other agent authorized by appointment or law"[135] or under parallel notice procedures authorized by state law.[136] State laws typically enumerate the corporate officers that may receive service of process.[137] Some states allow the summons and the complaint to be left at corporate offices, but many do not.[138] By not providing for a provision that parallels the service of process provisions for individuals, the Federal

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"nothing . . . that justifies the position that any individual member of any of these unions, if there be such, or of a local union, or an officer or agent of a local union, represents the International Union to the extent that service of process on him will bring it before the court"). *See generally* 29 USC § 185(d) (2012) ("The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.").

[133] *See, e.g.*, Travelers' Protective Ass'n v. Gilbert, 101 F. 46, 49–50 (8th Cir. 1900) (upholding a state statute that allows for service of process on fraternal societies by serving the chief officer or secretaries of subordinate lodges or societies).

[134] "Association" covers a wide spectrum of entities. *See, e.g.*, Estate of Klieman v. Palestinian Auth., 467 F. Supp. 2d 107, 114 (D.D.C. 2009) (covering groups classified as terrorist organizations); Modica v. Paper Allied Indus., Chem. & Energy Workers Int'l Union, No. 05-CV-1087, 2006 U.S. Dist. LEXIS 65111, at *5 (W.D. Ark. Aug. 29, 2006) (covering labor unions); Estates of Ungar v. Palestinian Auth., 325 F. Supp. 2d 15, 55–56 (D.R.I. 2004) (covering groups classified as terrorist organizations); Georgia v. Nat'l Democratic Party, 447 F.2d 1271, 1273 n.2 (D.C. Cir. 1971) (covering political associations and parties); American Commercial Co. v. U.S. Officers & Non-Commissioned Officers Club, European Theater, 187 F.2d 91, 91 (D.C. Cir. 1951) (covering officers clubs); Stuart v. Al Johnson Constr. Co., 236 F. Supp. 126, 128 (W.D. Pa. 1964) (covering joint ventures); Allain v. Nat'l R.R. Adjustment Bd., Third Div., 120 F. Supp. 453, 455, 457–58 (N.D. Ill. 1953) (covering unincorporated labor unions).

[135] FED. R. CIV. P. 4(h)(1)(B) (2012).

[136] FED. R. CIV. P. 4(h)(1)(A) (incorporating FED. R. CIV. P. 4(e)(1) for corporations, partnerships, and associations).

[137] *See, e.g.*, CAL. CIV. PRO. CODE § 416.10 (West 2004) ("A summons may be served on a corporation by delivering a copy of the summons and the complaint . . . [t]o the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process"); MONT. R. CIV. P. 4(i)(3)(A) ("A business or nonprofit entity must be served by . . . delivering a copy of the summons and complaint to: (i) an officer; (ii) a director; (iii) a manager; (iv) a member of a member-managed limited liability company; (v) a superintendent; (vi) a managing agent; (vii) a general agent; or (viii) a partner . . . .").

[138] *Compare* MONT. R. CIV. P. 4(i)(3)(B) (2011) ("A business or nonprofit entity [can] be served by . . . leaving copies of the summons and complaint at the office or place of business . . . ."), *with* CAL. CIV. PRO. CODE 416.10 (West 2004) (proscribing methods of service that do not include leaving the summons and complaint at corporate offices).

Rules leave it up to the states to either make it harder or make it easier to serve a corporation, partnership, or association.

Another limitation is more fundamental: corporations, partnerships, and associations may not be served personally.[139] Because they lack a physical body, they are—strictly speaking—not persons and can thus not be served personally as a matter of raw metaphysics.[140]

The provisions in Federal Rule of Civil Procedure 4(h) concerning "agents authorized by statute" also obscure a finely-tuned regulatory system that utilizes restrictions on the service of process to protect and further the interests of specific organizations.[141] For example, to facilitate public work projects, Congress paired substantive surety bond provisions with permissive service of process provisions. Under the Miller Act of 1935,[142] subcontractors and suppliers of governmental building and public work projects are protected by sureties since they are unable to protect themselves from non-payment with a traditional lien.[143] Such sureties are provided by surety corporations that are subject to specific service of process provisions.[144]

Not only are the surety corporations required to appoint resident agents for service of process where they provide surety bonds,[145] but they must also "file a certified copy of the power of attorney with the clerk of the district court for [that] district."[146] Where the surety corporation's agent has not yet been appointed or is dead, absent, or otherwise unavailable, "service of process may be made on the clerk of the court."[147] The statute makes explicit that service of process in this manner "is as valid as if the corporation were served in the judicial district of the court."[148] The original

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[139] FED. R. CIV. P. 4(h), in contrast to 4(e), does not provide for delivery "to the individual personally" domestically. FED. R. CIV. P. 4(e)(2)(A). International delivery of service of process for corporations, partnerships, and associations parallels provisions "for serving an individual, except personal delivery." FED. R. CIV. P. 4(h)(2).

[140] *See* Smetal Corp. v. W. Lake Inv. Co., 172 So. 58, 71 (Fla. 1936) ("Strictly speaking, there is no such thing as personal service upon a corporation. Considered apart from the individual human beings who compose its stockholders, officers, and agents, and by and through whom it acts, a corporation is a mere incorporeal legal entity created by government. So when we speak of personal service upon a corporation, we mean personal service upon its officers or agents.").

[141] FED. R. CIV. P. 4(h).

[142] 40 U.S.C. §§ 3131–3134 (2012). Originally enacted as the Heard Act in 1894. The Heard Act of 1894, ch. 280, 28 Stat. 278 (codified as amended at 40 U.S.C. § 270 (1934).

[143] *See* 40 U.S.C. § 3133 (2012) ("Every person that has furnished labor or material in carrying out work provided for in a contract . . . that has not been paid in full within 90 days . . . may bring a civil action on the payment bond . . . .").

[144] 31 U.S.C. §§ 9304–08 (2012).

[145] *Id.* § 9306(a).

[146] *Id.* § 9306(b).

[147] *Id.* § 9306(c). The statute also requires that a copy of the process be mailed "immediately" to the surety corporation. *Id.* § 9306(c)(2)(A).

[148] *Id.* § 9306(c)(3).

title of the Act illuminates the justification for these unusual provisions: "An Act for the protection of persons furnishing materials and labor for the construction of public works."[149] Courts interpreting this provision have highlighted that Congress's policy objectives concerning public works are intertwined with the unusually broad service of process provisions.[150]

Deviations from the trans-personal norm can thus assist or hinder litigants, encourage or hamper litigation, and fine-tune substantive policy goals. Given such regulatory potential, we should not be surprised that legislators and courts frequently deviate from the trans-personal norm to target specific entities for specialized treatment.

C. *Pork-Barrel Procedures*

Different drafters of procedural law are subject to various political pressures and institutional blind spots.[151] Each can use deviations from the trans-personal norm wisely or recklessly. Here, I explore two common pathologies.

The first occurs when drafters of procedural law fall prey to bias and singular political pressures. They might create entity-specific deviations from the trans-personal norm simply as an expression of pork-barrel spending, rather than with procedural values in mind. This option is particularly attractive because the cost of such procedural variation is obscured from the general public. Additionally, such costs do not fall on the public purse but rather are distributed among all litigants that face adverse procedures. Entity-specific favoritism is also a seductive option because it allows the legislature to micro-target specific entities without destabilizing procedural regimes.[152]

Entity-specific procedures can be a convenient device for legislatures to subtly protect key interest groups. Accordingly, procedures that target or benefit identifiable entities can become focal points for interest group lobbying. For example, it is tempting to understand the Private Securities Litigation Reform Act of 1995 (PSLRA) in these terms.[153] The Act details

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[149] Act of February 24, 1905, ch. 778, 33 Stat. 811 (amending the Act of August 13, 1894, ch. 280, 28 Stat. 278). The original act is substantively the same to the current, modernized version.

[150] *See, e.g.*, United States v. S. Dredging Co., 251 F. 400, 402 (D. Del. 1918) ("Congress in providing for the giving of bond under the act with 'the additional obligation,' and for the rights to be enjoyed thereunder by persons furnishing materials and labor for the construction or repair of public works, and for the manner in which those rights should be enforced, created a new statutory cause of action and a new statutory remedy for its enforcement.").

[151] *See* Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 457 (1935) (noting the risk of "indifference and political manipulation" when the legislature articulates procedure).

[152] *See generally* Clermont & Yeazell, *supra* note 66, at 831 (arguing that the switch to the *Twombly/Iqbal* standard "destabilized the [legal] system").

[153] *See, e.g.*, Ind. State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc., 719 F.3d 498, 510 (6th Cir. 2013) (Gwin, J., concurring), *cert. granted*, 134 S. Ct. 1490

elaborate pleading requirements for suits alleging fraud under federal securities statutes that predominantly implicate politically well-connected corporate players.[154]

Just as entity-specific procedures can be used to protect favored entities, they can also be used to harm disfavored types of natural or artificial persons. The Prison Litigation Reform Act (PLRA), which imposes special procedural requirements on suits brought by incarcerated individuals, can be interpreted in these terms. For example, the PLRA grants courts the power to dismiss prisoner complaints sua sponte,[155] places special limits and conditions on attorney fees,[156] provides for limitations on recovery,[157] limits access to *in forma pauperis* status,[158] and sets remedy limitations.[159] Where applicable, prisoners must also exhaust all available administrative remedies before filing a lawsuit,[160] which is often virtually

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(2014) (noting "considerable lobbying by corporate and investment interests" surrounding the PSLRA); Arnlund v. Deloitte & Touche LLP, 199 F. Supp. 2d 461, 471 n.3 (E.D. Va. 2002) ("The [PSLRA] was the result of heavy lobbying by corporate America, the accounting profession and the securities industry (*e.g.* brokerage houses, investment bankers and accounting firms)."); Stephen J. Choi et al., *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869, 873 (2005) ("The PSLRA was enacted over President Clinton's veto following an extensive lobbying campaign by accounting firms, corporate leaders and members of the securities industry."); Lisa Girion, *Crisis In Corporate America; 1995 Tort Reform Act Said to Provide Safe Harbor for Fraud; Legislation: Critics Say Curbs on Shareholder Suits Have Contributed to the Rash of Scandals, But Some Lawmakers Still Stand Behind the Law*, L.A. TIMES, July 21, 2002, at Business 1 ("'[The PSLRA] was passed in a frenzy of ideological zeal with Silicon Valley throwing gasoline on. Arthur Andersen was aggressively lobbying for this bill. Andersen was way out front.'"); Stephen Labaton, *Earnings Restated? Don't Blame a Lawsuit For It*, N.Y. TIMES, Feb 3, 2006, at C7 (describing a "crusade by business groups and many lawmakers over the last decade" to enact the PSLRA); Dean Starkman, *Pension Fund Seeks to Control Suit Under Securities Reform Act*, WALL ST. J., Aug. 8, 1996, at B7 ("The securities reform act was enacted last year in the face of strenuous lobbying by the plaintiffs' bar . . . ."); Jeffrey Taylor, *Accountants' Campaign Contributions Are About To Pay Off in Legislation on Lawsuit Protection*, WALL ST. J., Mar. 8, 1995, at A22 ("The Big Six accounting firms, weary of securities-fraud lawsuits against them and their corporate clients, last fall put their money where their frustrations were. They flooded sympathetic lawmakers with 11th-hour campaign contributions after it became apparent that Republicans might win control of Congress.").

[154] *See* 15 U.S.C. § 78u-4(b)(1)(B) (2012) ("[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed."); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321 (2007) ("[I]n . . . the PSLRA, Congress 'impose[d] heightened pleading requirements in actions brought pursuant to § 10(b)' [of the Act].") (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006)).

[155] 42 U.S.C. § 1997e(c)(1) (2012).

[156] *Id.* § 1997e(d).

[157] *Id.* § 1997e(e).

[158] 28 U.S.C. § 1915(g) (2012); *see also* Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997) (rejecting an equal protection challenge to personhood-specific evaluations of *in forma pauperis* filings by incarcerated and non-incarcerated litigants).

[159] 18 U.S.C. § 3626(b)(2) (2012).

[160] 42 U.S.C. § 1997e(a); *see also* Jones v. Bock, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA . . . ."); Woodford v. Ngo, 548 U.S. 81, 85 (2006) (noting

impossible to achieve.[161] Similarly, states also attempt to disadvantage inmate litigants by drafting person-specific deviations from the trans-personal norm.[162] The Federal Rules of Appellate Procedure and the Rules of the Supreme Court also carve out unique submission procedures for inmates.[163]

The PLRA is often interpreted in substance-specific terms as applying only to suits related to prisoners' rights cases. However, suits regarding prison conditions filed by ex-prisoners fall beyond the scope of the PLRA.[164] Additionally, many of the PLRA's provisions apply in any type of suit brought by prisoners, not only those related to prison conditions.[165]

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that under the PLRA "[e]xhaustion is no longer left to the discretion of the district court, but is mandatory").

[161] *See, e.g.*, Amador v. Andrews, 655 F.3d 89, 95–99 (2d Cir. 2011) (detailing byzantine procedures that prisoners must satisfy in New York to exhaust administrative remedies); *see also Woodford*, 548 U.S. at 83–84, 90 (noting that the PLRA requires "proper exhaustion" and that "untimely or otherwise procedurally defective administrative grievance[s] or appeal[s]" will not satisfy the exhaustion requirement).

[162] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a) (West 2002) (granting courts the power to dismiss claims sua sponte even before service of process); *id.* § 14.003(e) (granting courts the power to "advise the [Texas Department of Criminal Justice] that a mental health evaluation of the inmate may be appropriate"); *id.* § 14.005 (outlining administrative exhaustion requirements).

[163] *See* FED. R. APP. P. 25(C) ("A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule."); SUP. CT. R. 29.2 ("If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid.").

[164] *See, e.g.*, Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam) (noting that the ex-prisoner plaintiff was no longer "subject to the PLRA's exhaustion requirement because he was not a prisoner or otherwise incarcerated when he filed his complaint"); Ahmed v. Dragovich, 297 F.3d 201, 210 n.10 (3d Cir. 2002) ("[E]very court of appeals to have considered the issue has held that the PLRA does not apply to actions filed by former prisoners."). This approach raises conceptual and practical difficulties, as courts have to decide whether a prisoner that dies remains a prisoner and whether the PLRA applies to an amended complaint filed by a now ex-prisoner where the suit was initiated while the plaintiff was still incarcerated. *See, e.g.*, Rivera-Quiñones v. Rivera-Gonzalez, 397 F. Supp. 2d 334, 340 (D.P.R. 2005) ("'[L]itigants . . . who file prison condition actions after release from confinement are no longer "prisoners" for purposes of § 1997e(a) and, therefore, need not satisfy the exhaustion requirements of this provision.'") (quoting Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999) (per curiam)); Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000) (en banc) ("[W]hether the [PLRA] applies to lawsuits that are filed while the plaintiff is a confined prisoner but which are not decided until after he is released from confinement.").

[165] *See, e.g.*, Robbins v. Chronister, 435 F.3d 1238, 1244 (10th Cir. 2006) (holding that parts of the PLRA are applicable to pre-incarceration civil rights actions by now incarcerated individuals); United States v. Jones, 215 F.3d 467, 469 (4th Cir. 2000) ("[T]he text of the [PLRA] is not limited to [specific] actions. Instead, Congress chose to make this filing fee provision applicable to all 'civil action[s].'"); Lefkowitz v. Citi-Equity Grp., Inc., 146 F.3d 609, 612 (8th Cir. 1998) ("[U]nder the plain language of the statute, the phrase 'civil action or appeal' is not limited to challenges to conditions of confinement . . . ."); Reyes v. Keane, 90 F.3d 676, 678 n.1 (2d Cir. 1996) ("We do not suggest that the only civil actions to which the PLRA applies are prisoners' suits seeking relief from prison officials because of prison conditions. The PLRA covers the general run of civil actions, regardless of the claim and regardless of the identity of the defendants."). *But cf.* Hall v. Galie, No. Civil Action 05-975, 2009

Courts have applied provisions of the PLRA in a broad spectrum of cases involving prisoners.[166] In all of these cases, procedures target a type of litigant, not a type of lawsuit.

These procedures can be justified as ways to address an avalanche of frivolous lawsuits by people with too much time on their hands.[167] However, there is some doubt that prisoner litigation clogged up court dockets as much as supporters of the PLRA suggested and whether courts were unable to deal with such suits.[168] More likely, Congress used the PLRA to respond to state attorneys general who sought relief from the burdens of prisoner litigation defense.[169]

Whatever the merits might be of reducing frivolous lawsuits by

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WL 722278, at *7 (E.D. Pa. Mar. 17, 2009) ("PLRA limitations on attorney's fees do not apply to actions based exclusively upon pre-incarceration civil rights violations.").

[166] *See, e.g.*, Kucera v. Black, No. 4:12-CV-15218, 2012 WL 6200332, at *1 (E.D. Mich. Dec. 12, 2012) (applying the PLRA to visitation rights); Hopper v. Rinaldi, Civil Action No. 07-5323, 2008 WL 558049, at *1 (D.N.J. Feb. 29, 2008) (applying the PLRA to wrongful arrest); *In re* Blumeyer, No. 4:06CV1681 CDP, 2007 WL 209917, at *1–2 (E.D. Mo. Jan. 24, 2007) (applying the PLRA to bankruptcy); Grant v. New Jersey, No. Civ. 04-1748(DMC), 2005 WL 1528920, at *1 (D.N.J. June 28, 2005) (applying the PLRA to child support and alimony).

[167] *See, e.g.*, Jones v. Bock, 549 U.S. 199, 202 (2007) ("In an effort to address the large number of prisoner complaints filed in federal court, Congress enacted the [PLRA].") (citation omitted); Woodford v. Ngo, 548 U.S. 81, 84 (2006) ("Congress enacted the [PLRA] in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts. The PLRA contains a variety of provisions designed to bring this litigation under control.") (citations omitted); Porter v. Nussle, 534 U.S. 516, 524 (2002) ("Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits . . . ."); Inmates of Suffolk Cnty. Jail v. Rouse, 129 F.3d 649, 661 (1st Cir. 1997) ("In sum, an objective reading of the legislative history demonstrates that the plaintiffs' inability to obtain prospective relief does not spring from Congress's wish to do them harm, but from its desire to minimize the occasion for federal courts to administer state prisons.").

[168] *See, e.g.*, Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1776–77 (2003) (noting that the rate of prisoner filings declined considerably in the fifteen years before the PLRA's enactment); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 21 (1997) ("The fact that the courts had already done most of what the Republican legislation sought to accomplish was largely irrelevant from a politician's point of view . . . . [I]t made political sense to enact the PLRA even if it accomplished little as a matter of law. Legislators' comments on the PLRA rarely adverted to the judicial developments over the prior decade and a half.").

[169] *See, e.g.*, David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 405 (2010) ("In all likelihood, entreaties from state attorneys general for relief from the expense and burden of prisoner litigation defense—a policy goal different from the efficient resolution of cases on their merits—played a larger role in motivating Congress to restrict prisoner access to courts."); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1566 (2003) ("The PLRA was put on the agenda of the 104th Congress . . . by the potent alliance of the National Association of Attorneys General (NAAG) and the National District Attorneys Association (NDAA)."); Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 300 (2007) ("[T]he PLRA represented a moment when state attorneys general were able to take advantage of anti-prisoner and anti-activist court sentiment—as well as a Republican-controlled Congress—to curtail access to courts.").

incarcerated individuals, there is reason to believe that the interests of prisoners are not well-represented in Congress.[170] Inmates are a disfavored, disenfranchised, poor, and stigmatized group. The politicians who voted for the PLRA did not need to fear adverse reelection consequences or diminished campaign contributions. The PLRA and PSLRA thus present very different political calculations. That is not proof that they are different manifestations of pork-barrel procedures. But it might make us wonder to what extent their enactment was motivated by a professed concern with procedural values and to what extent simple politics shaped congressional behavior.

Unprincipled use of entity-specific procedures to protect favored entities and to hurt disfavored ones represents one potential pathology of deviating from the trans-personal norm. The second pathology occurs when drafters of procedural law adhere to the trans-personal norm without reflecting on procedural values.[171]

IV. DEVIATIONS FROM THE TRANS-PERSONAL NORM AND PROCEDURAL VALUES

What should we make of the gap between the all-encompassing trans-personal norm and the honeycombed reality? How can we distinguish justified and unjustified deviations from the trans-personal norm?[172]

Strict formalism is a tempting standard. If the rule or statute mentions specific entities, then it is surely suspect. Procedural equality, one might argue, is best furthered by insisting on general terms like "plaintiff" or "litigant." But such strict entity-blindness is often nonsensical and would undermine equal treatment. Different entities present different procedural challenges and opportunities. Despite the broad language of the rules, litigants simply cannot orally depose a corporation or conduct a mental examination of a labor union.[173] No amount of metaphor twisting can give

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[170] *See* Jean Chung, *The Sentencing Project, Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT 1 (2014), http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf (reporting on the ubiquity of state laws disenfranchising felons both while in prison and after); *cf.* Walker v. Bain, 257 F.3d 660, 670 (6th Cir. 2001) ("We admit to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual, albeit 'technical,' civil rights violations.").

[171] *See infra* notes 368–402 and accompanying text.

[172] I will leave aside here which procedures can survive constitutional scrutiny. Since most of the exceptions to trans-personality do not touch on suspect classes, few constitutional challenges have a high likelihood of success.

[173] *See* FED. R. CIV. P. 30(a)(1) ("A party may, by oral questions, depose *any person*, including *a party*, without leave of court except as provided in Rule 30(a)(2).") (emphases added); FED. R. CIV. P. 35(a)(1) ("The court where the action is pending may order *a party* whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner.") (emphasis added).

an artificial person a body or a voice.

Strict formalism also conflicts with intuitions that there might be good reasons to extend special protections to vulnerable persons and entities. Forcing the same procedures on multinational corporations with experienced legal teams and on poorly represented incompetents would not make for an even fight.[174] Denying courts and drafters of policy regimes the ability to utilize entity-specific variation could thus destroy much-needed flexibility. Sometimes procedure must bend to accommodate differences between entities.

But when? Courts, legislatures, and commentators currently lack the basic conceptual vocabulary to distinguish principled from unprincipled invocations of trans-personality. As a result, procedural law is a patchwork of ad hoc exceptions from the trans-personal norm and unexplained adherence to the norm.

This Section argues that departures from the trans-personal norm, as well as adherence to it, must be justified with reference to fundamental procedural values. Before committing to trans-personal procedures or entity-specific treatment, we must reflect on the procedural values embedded in the trans-personal norm and deviations from it. This approach allows us to isolate the dangers inherent in entity-specific procedures and to simultaneously recognize the great promise of utilizing deviations from the trans-personal norm wisely. Procedural design neglects trans-personality at its own peril.

A. *Equal Access*

Deviations from the trans-personal norm can exacerbate or correct litigation resource imbalances among parties. Many entities, especially large institutional actors, have significant resource advantages over individual litigants that they can leverage in the course of litigation. Equal procedural rules, thus, cannot guarantee an equal playing field in the adversarial system.[175] But adroit entity-specific manipulation of the trans-personal norm can provide a leg up for otherwise poor, naïve, one-time litigants without institutional support. Such interventions keep a thumb on

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[174] *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 517–20 (1986) ("Adversarialism is a plausible mechanism for generating information leading to acceptable outcomes and for validating individual dignity only when the adversaries are roughly comparable—when each side has similar resources.").

[175] *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981) ("[O]ur adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests . . . ."); ROBERT A. KAGAN, ADVERSARIAL LEGALISM 121–25 (2001) (discussing well-financed litigants' advantages and poor litigants' disadvantages in American civil proceedings); Mashaw, *supra* note 69, at 52 ("[I]nsofar as adjudicatory procedure is perceived to be adversarial and dispute resolving, the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated.").

the otherwise unbalanced scales of justice.

For example, statutes in the past provided for unique cost and fee-shifting rules for actions against railroad companies[176] and insurance companies.[177] These procedural provisions aimed to make lawsuits against railroad and insurance companies economically viable. Predictably, doing so increased the chances of otherwise outgunned individuals' bringing successful suits against well-funded entities with significant institutional resources. Optimal private enforcement of a substantive regulatory regime depends here on entity-specific deviations from the trans-personal norm. Without them, pre-suit resource disparities will predictably distort litigation behavior. A plaintiff might settle a meritorious case early simply because she is running out of money.

In some places, procedures explicitly authorize a court to weigh litigation resources. For example, the Federal Rules instruct courts to weigh "the parties' resources" when determining whether restrictions on the scope of discovery are appropriate.[178] Predictably, corporations are often found or deemed to have significant litigation resources beyond the means available to individual litigants that must be taken into account.[179]

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[176] *See, e.g.*, Hindman v. Or. Short Line R.R. Co., 178 P. 837, 838–39 (Idaho 1918) (upholding a statute allowing for the recovery of attorney's fees where damages are recovered against a railroad that has failed to maintain right of way fences), *aff'd on reh'g*, 178 P. 839 (1919); Ill. Cent. R.R. Co. v. Crider, 19 S.W. 618, 619, 622 (Tenn. 1892) (awarding attorney's fees under a state statute placing liability on railroads for "all damages" resulting from the death or injury of livestock by train). *But see* Gulf, Colo. & Santa Fé Ry. Co. v. Ellis, 165 U.S. 150, 152–53, 166 (1897) (rejecting an attorney fee statute that applied only to railroads); Dewell v. N. Pac. Ry. Co., 170 P. 753, 754 (Mont. 1918) (rejecting a statute that awarded attorney's fees to a litigant prevailing in a suit against a railroad but not to a prevailing railroad).

[177] *See, e.g.*, Cont'l Cas. Co. v. Gold, 194 So. 2d 272, 273–74 (Fla. 1967) (upholding a statute that assessed attorney's fees against insurance companies but not other entities); Spicer v. Benefit Ass'n of Ry. Emps., 21 P.2d 187, 188, 193 (Or. 1933) (upholding a statute that assessed attorney's fees against insurance companies but not other entities).

[178] FED. R. CIV. P. 26(b)(2)(C)(iii); *see also* Moore v. Cnty. of Del., 586 F.3d 219, 221 (2d Cir. 2009) ("[D]enial of costs may be appropriate where a losing party can demonstrate misconduct by a prevailing party, the public importance of the case, the difficulty of the issues presented, or its own *limited financial resources*.") (emphasis added); Cross v. Gen. Motors Corp., 721 F.2d 1152, 1157 (8th Cir. 1983) ("The district court's order indicates that the trial judge considered Cross's limited financial resources . . . . In so doing, the district court did not abuse its discretion."); Poe v. John Deere Co., 695 F.2d 1103, 1108 (8th Cir. 1982) ("It is of course within a court's discretion to deny costs because a plaintiff is poor or for other good reason . . . .").

[179] *See, e.g.*, Tedder v. Am. Railcar Indus., 739 F.3d 1104, 1111 (8th Cir. 2014) ("[The plaintiff] is not a corporation with perpetual life and an army of in-house litigators; he is an aging, disabled man who has spent the last four years of his life in litigation."); Kirschenman v. Auto-Owners Ins., 280 F.R.D. 474, 488 (D.S.D. 2012) ("Auto–Owners can be presumed to have vastly more resources than two elderly people living lives of modest means in rural South Dakota."); Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 576 (N.D. Ill. 2004) ("CBRE had net revenues of 1.6 billion dollars for fiscal year 2003. Plaintiffs, who include former employees of CBRE, are clearly at a serious financial disadvantage."); FDIC v. La Antillana, S.A., No. 88 Civ. 2670 (JFK), 1990 WL 155727, at *3 (S.D.N.Y. Oct. 5, 1990) ("Defendants are being sued in their individual capacity, and two of the four defendants have indicated meaningful financial difficulties in pursuing this matter, while plaintiff is a

Procedures that equalize litigation opportunities, explicitly or implicitly, protect fundamental procedural values.

But entity-specific procedures need not equalize litigation resources. They can also do just the opposite. Or do both simultaneously vis-à-vis different pairings of plaintiffs and defendants. This insight is best demonstrated by examining deviations from the trans-personal norm that affect government litigants.

Currently, many of the most significant deviations from the trans-personal norm are structured around government litigants.[180] Several Federal Rules explicitly provide for differential treatment in cases in which the United States is a party.[181] Together, these deviations add up to a significant litigation advantage. For the government as defendant, these advantages act as "sovereign immunity light" because they shield the government from the typical burdens of litigation.[182] Remedy limitations further protect government interests.

Cases involving the federal government are significant, in part, for reasons of sheer numerosity. In the twelve-month period ending March 31, 2013, the United States was a party in approximately eighteen percent of all civil actions commenced in federal district courts.[183] During that period, 271,950 civil actions were commenced in district courts.[184] The United States was a litigant in 47,726 of them.[185] Beyond sheer numbers, cases involving the United States are also frequently important because of their far-reaching subject matter.

The authors of the Federal Rules were aware of the importance of litigation involving the United States. Government attorneys pressed the original Advisory Committee to the Federal Rules to create special provisions and exceptions in the Rules for cases in which the United States

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corporation of significant size and resources. The Court finds, therefore, that the cost factor weighs in defendants' favor.").

[180] This was not the case with prior procedural regimes, for example the Federal Equity Rules.

[181] *See, e.g.*, FED. R. CIV. P. 12(a)(2) (giving the United States a sixty-day time frame to submit a responsive pleading where, unless service is waived, another defendant would have twenty-one days); FED. R. CIV. P. 13(d) (stating that the rules concerning counterclaims "do not expand the right to assert a counterclaim . . . against the United States"); FED. R. CIV. P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law."); FED. R. CIV. P. 55(d) (limiting the circumstances in which a court may enter a default judgment against the United States).

[182] The term might be apt for a second reason: legislators potentially waived sovereign immunity for some of these entities knowing that procedures could or already did provide special litigation advantages and protections for government defendants.

[183] ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIARY CASELOAD STATISTICS tbl C-2 (2013), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C02Mar13.pdf.

[184] *Id.*

[185] *Id.*

is a party.[186] Mindful of these pressures, Congress and the Advisory Committee drafted rules and statutes that provide significant procedural advantages to the United States as a litigating party in violation of the trans-personal norm.[187]

These advantages cover a broad range of procedural devices: from granting special intervention rights,[188] prohibiting the use of nonmutual offensive issue preclusion against the government,[189] imposing shorter statutes of limitations in actions against the government,[190] absolving the

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[186] William D. Mitchell, *Some of the Problems Confronting the Advisory Committee in Recent Months—Commencement of Actions—Effect of Findings of Fact in Cases Tried by Court Instead of Jury, Etc.*, 23 A.B.A. J. 966, 968 (1937) ("The Advisory Committee have been pressed by the legal staffs of many of the bureaus and agencies of the federal government to make special provisions in these rules applicable to cases in which the United States is a party.").

[187] For a parallel example of such advantages in the criminal context, see Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2224 (1989) ("The political content of the Criminal Rules is reflected in the Criminal Rules drafting process. It is widely recognized that the United States Department of Justice is the critical 'repeat player' . . . . I have often been told that, if 'Justice' is unhappy about a rule change, the change doesn't go forward.").

[188] *See* 28 U.S.C. § 2403(a) (2012) ("In any action . . . in a court of the United States to which the United States . . . is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court . . . shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality."); FED. R. CIV. P. 24(b)(2) ("[T]he court may permit a federal . . . governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.").

[189] *See* United States v. Mendoza, 464 U.S. 154, 162–63 (1984) ("We hold . . . that nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues such as those involved in this case."); *see also* Standefer v. United States, 447 U.S. 10, 13, 25 (1980) (holding that the doctrine of nonmutual collateral estoppel does not preclude a conviction of aiding and abetting a crime when the principal was acquitted of the charges); Lunday-Thagard Co. v. U.S. Dep't of the Interior, 773 F.2d 322, 325 (Temp. Emer. Ct. App. 1985) ("The Supreme Court has recently made it clear that the nonmutual offensive use of collateral estoppel . . . is not applicable in suits against the United States."). *But cf.* NLRB v. Donna-Lee Sportswear Co., 836 F.2d 31, 37–38 (1st Cir. 1987) ("[W]here the [NLRB] has sought to determine the existence or non-existence of what is essentially a private agreement, blind adherence to the doctrine that the Government is generally exempted from issue preclusion is not compelled."); Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin., 666 F. Supp. 1475, 1478 (D. Colo. 1987) ("*Mendoza* does not posit an absolute rule excluding the use of nonmutual offensive collateral estoppel against the government.").

[190] *See, e.g.*, 46 U.S.C. § 30905 (2012) (limiting the time in which parties can bring suits in admiralty against the United States); Day v. Mem'l Hosp. of Guymon, 844 F.2d 728, 732 (10th Cir. 1988) ("The requirement that claimants give notice of their claim [to the state within 120 days] is a reasonable restriction . . . . and may bar the plaintiff's claim against Memorial Hospital."); Wilson & Co. v. City of Jacksonville, 170 F.2d 876, 877, 879 (5th Cir. 1948) (upholding the statute of limitations for tort claims against municipalities); Goings v. Chickasaw Cnty., 523 F. Supp. 2d 892, 916, 920 (N.D. Iowa 2007) (upholding a statute of limitation against a municipality in a tort claim); Celli v. Metro-North Commuter R.R., 891 F. Supp. 124, 126, 127 (S.D.N.Y. 1995) (upholding New York's statute of limitations in cases where the defendant is a "public authority" entity); O'Halloran v. United States, 817 F. Supp. 829, 831 (N.D. Cal. 1993), *aff'd*, 45 F.3d 436 (9th Cir. 1994) (holding that service seventy-seven days after the complaint was filed was not forthwith service under the "forthwith service" requirement of the Suits in Admiralty Act); Harris v. City of Chattanooga, 507 F. Supp. 374,

United States and its agencies from having to provide securities for damages or costs,[191] providing securities for preliminary injunctions or temporary restraining orders,[192] absolving governments from attorney fee awards[193] and costs or expenses,[194] providing for special notice of hearing or trial provisions,[195] administrative exhaustion requirements,[196] unique cost and fee shifting provisions,[197] limitations on jurisdiction in cases against the United States,[198] special proposed class settlement notification rights,[199] limitations on punitive damages,[200] to special removal rights for members of the armed forces,[201] the United States, its agencies, its officials, officers of federal courts, and officers of the Senate and House of Representatives.[202]

These exceptions typically present only minor hurdles for well-funded

375, 378 (N.D. Ga. 1981) (upholding a Georgia notice requirement as applied to a sister states' municipal corporations); Shoemaker v. Aldmor Mgmt., 291 S.E.2d 549, 550 (Ga. 1982) ("[S]ufficient differences exist between governmental and private tortfeasors to justify the legislature in requiring that ante litem notice be given to one but not the other . . . ."); Black v. Ball Janitorial Serv., 730 P.2d 510, 514, 515 (Okla. 1986) (upholding a statute of limitation distinguishing between public and private entities).

[191] 28 U.S.C. § 2408 (2012) ("Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding.").

[192] FED. R. CIV. P. 65(c) ("The United States, its officers, and its agencies are not required to give security.").

[193] *See, e.g.*, Lake LBJ Mun. Util. Dist. v. Coulson, 839 S.W.2d 880, 890–91, 895 (Tex. Civ. App. 1992) (upholding a statute that prevents the recovery of attorney fees from government entities but permits "persons, corporations, partnerships, or other legal entities" to recover attorney fees) (internal quotation marks omitted).

[194] *See, e.g.*, 40 U.S.C. § 3133(b)(5) (2012) ("The Government is not liable for the payment of any costs or expenses of any civil action brought under this subsection.").

[195] *See, e.g.*, Ga. Dep't of Med. Assistance v. Columbia Convalescent Ctr., 458 S.E.2d 635, 637–38 (Ga. 1995) (upholding a state notice statute that provides "benefit to state litigants that is not provided to other litigants" even though the "rationales for the statute might [also] apply in some circumstances to private citizens involved in litigation").

[196] *See, e.g.*, 42 U.S.C. § 1997e(a) (2012) ("No action shall be brought . . . until such administrative remedies as are available are exhausted.").

[197] 28 U.S.C. § 2412 (2012).

[198] 28 U.S.C. § 1500 (2012) ("The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States . . . .").

[199] 28 U.S.C. § 1715 (2012).

[200] *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259–60 (1981) ("By the time Congress enacted what is now § 1983, the immunity of a municipal corporation from punitive damages at common law was not open to serious question. It was generally understood by 1871 that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity, but this understanding did not extend to the award of punitive or exemplary damages."); *accord* Jefferson v. City of Tarrant, Ala., 522 U.S. 75, 86 (1997) (Stevens, J., dissenting) ("As a matter of federal law we have already decided that compensatory damages may be recovered [against a municipality], and that punitive damages may not.") (internal citations omitted).

[201] 28 U.S.C. § 1442a (2012).

[202] 28 U.S.C. § 1442(a) (2012).

and experienced litigants that spar with government litigants. But for poor, inexperienced, pro se litigants, they widen already significant pre-suit resource gaps.

1. *Increased Time Allowances*

Federal Rule of Civil Procedure 12(a) requires that defendants serve a plaintiff with responsive pleadings within twenty-one days after service of the summons and complaint.[203] The United States, its agencies, officers, and employees have sixty days after service to respond.[204] This gives federal defendants a significant tactical advantage.[205] Non-federal defendants who wish to have sixty days to answer the complaint must take advantage of the waiver provision.[206] However, they only can do so if the plaintiff offered that option.[207]

These time differences grant the federal government almost three times as many days as other defendants to do factual and legal research. Predictably, this allows government attorneys to draft stronger legal arguments supported by greater factual detail. In the age of plausibility pleading, increased factual detail and stronger legal support can make a significant difference. Due to the increased breathing space, government attorneys are also less likely to make factual contentions without evidentiary support—a sanctionable action.[208]

2. *Burdensome Notice Requirements*

Providing service of process on a government defendant is also more burdensome than serving any other kind of defendant. For knowledgeable and well-funded plaintiffs, providing notice to the government is merely a nuisance. However, for inexperienced or poor plaintiffs, these burdensome notice requirements discourage or prevent suits altogether.

The requirements of service of process on government organizations vary depending on the type of government organization to be served.[209]

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[203] FED. R. CIV. P. 12(a)(1)(A)(i).

[204] FED. R. CIV. P. 12(a)(2)–(3); *see also* Acron Invs., Inc. v. Fed. Savings & Loan Ins. Corp., 363 F.2d 236, 239–40 (9th Cir. 1966) (holding that the Federal Savings and Loan Insurance Corporation is an "agency" within the meaning of Federal Rule of Civil Procedure 12(a)); FDIC v. Daughan, 144 F.R.D. 597, 598 (D. Me. 1992) (holding that the FDIC is an "agency" within the meaning of Federal Rule of Civil Procedure 12(a)).

[205] *But cf.* FED. R. APP. P. 4(a)(1)(A)–(B) (granting sixty days for filing a notice of appeal, rather than the usual thirty days, by any party in cases where one of the parties is the United States, or one of its agencies, officers or employees).

[206] FED. R. CIV. P. 4(d).

[207] *Id.*

[208] FED. R. CIV. P. 11(b)–(c).

[209] FED. R. CIV. P. 4(i)–(j); *see also* Canini v. U.S. Dep't. of Justice Fed. Bureau of Prisons, No. 04 Civ. 0949(CSH), 2008 WL 818696, at *3 (S.D.N.Y. Mar. 26, 2008) (finding service improper where the United States, not the Federal Bureau of Prisons, was the proper defendant for this action, and

Serving the United States may be accomplished by registered mail or personal delivery on the United States attorney for the district in which the action is brought, a designated assistant U.S. attorney or clerical employee, or the civil-process clerk at the United States attorney's office.[210] In addition, plaintiffs must send a copy of the summons and complaint to the Attorney General.[211] Where the action challenges an order of a nonparty agency or officer, Rule 4 requires that the plaintiff send an additional copy of the summons and complaint to the agency or officer.[212]

Service of process on a United States agency, corporation, or an employee sued in an official capacity requires that the plaintiff also send a copy of the summons and of the complaint by registered or certified mail to that party.[213] As such, service on federal corporations parallels service on United States agencies rather than other kinds of corporations—a switch from prior practice that reflects the prevailing emphasis on the public benefit aspect of incorporated federal agencies.[214]

Congress periodically makes such adjustments to the service of process provisions to reflect current policy priorities. For example, prior versions of Rule 4 probed whether a federal entity was more like a corporation or an agency.[215] The Tennessee Valley Authority was treated as an agency for service of process purposes despite substantial economic activities.[216] Courts previously struggled with federal agencies that have not been formally incorporated, debating whether to treat them as federal corporations or federal agencies.[217] Similarly, prior to 1983, Rule 4

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service upon an agency of the United States does not constitute service upon the United States itself); Cunningham v. United States, 199 F. Supp. 541, 541–42 (W.D. Mo. 1958) (holding an action against the United States improper when it should have been brought against a federal officer, agency, or corporation).

[210] FED. R. CIV. P. 4(i)(1)(A); *see also* De Luca v. Chertoff, No. 06-61465-CIV-COHN/SNOW, 2007 WL 1050864, at *2 (S.D. Fla. Apr. 4, 2007) (construing Rule 4 strictly by holding that a security guard is not authorized to receive service of process for the United States Attorney).

[211] FED. R. CIV. P. 4(i)(1)(B).

[212] FED. R. CIV. P. 4(i)(1)(C).

[213] FED. R. CIV. P. 4(i)(2).

[214] *See* FED. R. CIV. P. 4(d)(3) (indicating that service on U.S. corporations had different requirements than service on federal agencies in 1988 and years prior); *see also* Federal Crop Insurance Act, 7 U.S.C. § 1502 (2012) (indicating that the purpose of the Federal Crop Insurance Corporation is to "promote the national welfare"); Federal Home Loan Bank Act, 12 U.S.C. §§ 1430(g), (i)-(j) (2012) (noting the community support requirements for Federal Home Loan Banks).

[215] FED. R. CIV. P. 4(d)(5) ("If the U.S. agency is a corporation the copy [of the summons] shall be delivered as provided in paragraph (3) of the subdivision of this rule.").

[216] *See* Nat'l Res. Def. Council, Inc. v. Tenn. Valley Auth., 340 F. Supp. 400, 403 (S.D.N.Y. 1971) ("It is not disputed that the TVA is an agency of the United States."), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972); Ramsey v. United Mine Workers of Am., 27 F.R.D. 423, 424 (E.D. Tenn. 1961) ("There can be no doubt that TVA is an agency of the United States.").

[217] *See, e.g.*, Gart v. Cole, 166 F. Supp. 129, 133 (S.D.N.Y. 1958) ("For purposes of service of process the Federal Housing Administration is considered to be a corporation and may be sued in a district where it maintains an office and does business.").

required personal delivery of the complaint and summons to the officer or agency or United States corporation sued.[218] Congress has since amended Rule 4 to ease the burden on plaintiffs that sue agencies, federal corporations, and employees sued in an official capacity.[219]

Congress recognized that it imposed numerous procedural hurdles on plaintiffs who sue federal agencies, corporations, and officials sued in their official capacity. In response, Congress provided for greater leniency to cure defects when serving these entities.[220] This does not eliminate the burdens imposed on plaintiffs but attempts to dull the sharp consequences of ineffectual service.

Despite its complexity and fine-grained provisions, the current version of Rule 4 is actually simpler and more unified than past regimes. It replaced many prior statutes that provided for alternative service of process provisions on specific government agencies.[221] For example, Congress used to require service of process on the Secretary of Agriculture.[222]

Nonetheless, service of process on government entities remains bewilderingly complex. Serving process on states, local governments, and municipal corporations entails different requirements than serving process on the United States, its agencies, corporations, or employees.[223] The Federal Rules provides two methods for serving process on a state, local government, or municipal corporation. The first method requires personal delivery of the summons and complaint to the "chief executive officer" of the sub-federal government unit.[224] Plaintiffs frequently struggle to ascertain the chief executive officer of a local government entity.[225] The

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[218] *See, e.g.*, Robert Hawthorne, Inc. v. U.S. Dep't of Interior, 160 F. Supp. 417, 420 (E.D. Pa. 1958) (noting that service was inadequate because the Secretary of the Interior was not served personally in accordance with prior Rule 4 in a suit concerning the development of a national historical shrine); Frost v. Ewing, 13 F.R.D. 432, 433 (W.D. Pa. 1953) (holding that Rule 4(d)(5) required personal service on the Federal Security Administrator); Olin Indus., Inc. v. NLRB, 72 F. Supp. 225, 227–28 (D. Mass. 1947) (holding that service on the Regional Director of the National Labor Relations Board was insufficient to confer jurisdiction over the Board or its members).

[219] *See* 128 CONG. REC. H9848, 9851 (daily ed. Dec. 15, 1982) (statement by Rep. Edwards).

[220] FED. R. CIV. P. 4(i)(4) (requiring courts to allow parties reasonable time to cure certain defects).

[221] FED. R. CIV. P. 4 advisory committee's note ("[Rule 4] provide[s] a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. . . . [Other statutes] are modified insofar as they prescribe a different method of service or dispense with the service of a summons.").

[222] *See* 7 U.S.C. § 608c(15)(B) (2012) ("Service of process [for petitions] may be had upon the Secretary by delivering to him a copy of the bill of the complaint."); C.J. Wieland & Son Dairy Prods. Co. v. Wickard, 4 F.R.D. 250, 252 (E.D. Wis. 1945) (holding that the service of process requirements of the Federal Rules of Civil Procedure supersede any conflicting statutes).

[223] FED. R. CIV. P. 4(i)–(j).

[224] FED. R. CIV. P. 4(j)(2)(A).

[225] *E.g.*, Lundquist v. S.D. Bd. of Regents, No. CIV 11–4098–RAL, 2011 WL 5325621, at *2 (D.S.D. Nov. 4, 2011) (holding service of process invalid because the plaintiff delivered the summons and complaint to the executive secretary rather than the CEO); Miljkovic v. Univ. of Haw., Civ. No.

alternative method requires following the rule "prescribed by that state's law for serving a summons or like process on such a defendant."[226] In practice, these two methods can amount to the same result since state law frequently also requires personal delivery on the chief executive officer. In such situations, if it is difficult to ascertain the identity of the CEO, and if the CEO avoids service of process, a plaintiff might be unable to initiate a suit against the state or local government unit.[227]

Municipal corporations doing business beyond the borders of the chartering state present another set of problems to plaintiffs who must decide whether to serve them as corporations or as local government units. Courts have reluctantly admitted that service of process upon a municipal corporation located in one state but doing business in another might simply be impossible in an action brought in a federal court in another state.[228]

Service on a foreign government or its agencies is governed by yet another set of provisions that establish different burdens for plaintiffs due to the complex international relations issues raised by suits against foreign governments.[229]

Congress also detailed specific service of process provisions for some patriotic organizations, including the Future Farmers of America,[230] American Veterans (AMVETS),[231] and the United States Olympic Committee.[232] Nevertheless, Congress explicated that federal law does not

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09–00064 ACK–KSC, 2011 WL 237028, at *4 (D. Haw. Jan. 21, 2011) (holding service upon the Education Department invalid because the plaintiff served process upon the Education Department's former chief executive officer); Coleman v. State Supreme Court, 633 F. Supp. 2d 106, 107 (S.D.N.Y. 2009) (holding service upon a legal clerk in the New York Attorney General's office invalid where the plaintiff had sued the New York State Supreme Court's Mental Health Hygiene Part); Clinton v. Berkeley Cnty., Civil Action No. 3:08–CV–10, 2009 WL 35331, at *6 (N.D.W. Va. Jan. 6, 2009) (holding service upon the mayor of a municipality instead of the CEO of the county invalid); Taher v. Wichita State Univ., Civil Action No. 06–2132–KHV, 2007 WL 852364, at *3–4 (D. Kan. Mar. 19, 2007) (holding service upon a vice president and the general counsel of a university instead of the CEO invalid).

[226] FED. R. CIV. P. 4(j)(2)(B).

[227] *E.g.*, Amy v. Watertown, 130 U.S. 301, 306, 308, 311, 313–18 (1889) (upholding dismissal of service where plaintiff was required under state law to serve process on the mayor and where plaintiff attempted to serve the former mayor, the city clerk, the city attorney, and the last presiding officer of the Board of Street Commissioners).

[228] *E.g.*, Clark Cnty., Nev. v. City of Los Angeles, 92 F. Supp. 28, 32 (D. Nev. 1950) ("[W]e find no provision [in the Federal Rules of Civil Procedure] whereby a municipal corporation may be brought within the jurisdiction of a federal court sitting in a state other than the state of which the municipal corporation is a creature. If the omission was intentional, the facts and circumstances disclosed by the pleadings here raise a question as to the wisdom of such omission.").

[229] *See* 28 U.S.C. § 1608(a) (2012) (requiring service upon a foreign government "in accordance with any special arrangement for service" or by other methods if such arrangement does not exist).

[230] 36 U.S.C. § 70912 (2012).

[231] 36 U.S.C. § 22710 (2012).

[232] *See* 36 U.S.C. § 220510 (2012) (specifying that the organization must have a designated agent in the State of Colorado to receive service of process for the corporation).

provide for specific service of process provisions for numerous other organizations.[233]

3. *Exemption from the Waiver Duty*

Under the Federal Rules, individuals, corporations, and associations that may be served process have "a duty to avoid unnecessary expenses of serving the summons."[234] When requested by the plaintiff, these entities must waive the usual service of process protections and settle for process by mail.[235] The aims of these waiver provisions are "to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel."[236] Yet local and federal government units are exempt from this duty.[237] Plaintiffs may not request waiver of service from the United States, its agencies, corporations, officers,[238] or the states,[239] local governments,[240] municipal organizations,[241] and foreign nations.

The Notes of the Advisory Committee on the Federal Rules justifies

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[233] *E.g.*, 36 U.S.C. § 20210 (2012) ("The [Air Force Sergeants Association] shall comply with the law on service of process of each State in which it is incorporated and each State in which it carries on activities."); 36 U.S.C. § 21110 (2012) ("The [American Gold Star Mothers, Incorporated] shall comply with the law on service of process of each State in which it is incorporated and each State in which it carries on activities."); 36 U.S.C. § 50110 (2012) ("The [Daughters of Union Veterans of the Civil War 1861–1865] shall comply with the law on service of process of each State in which it is incorporated and each State in which it carries on activities."); 36 U.S.C. § 60110 (2012) ("The [82nd Airborne Division Association, Incorporated] shall comply with the law on service of process of each State in which it is incorporated and each State in which it carries on activities.").

[234] FED. R. CIV. P. 4(d)(1).

[235] FED. R. CIV. P. 4(d)(1)(G). Such individuals, corporations, and associations may not be so required if they are able to show good cause to do otherwise. FED. R. CIV. P. 4(d)(2).

[236] FED. R. CIV. P. 4(d) advisory committee's note on 1993 amendment.

[237] Courts sometimes make this point in the negative, noting that "[t]he government cannot waive service of process." Constien v. United States, 628 F.3d 1207, 1213 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2884 (2011). However, there is no upside to waiving service for the United States and its agencies, officers, and employees, since another provision of the Rules already affords them the only "carrot" of the waiver provision (more time to serve an answer to the complaint). *Compare* FED. R. CIV. P. 4(d)(3) ("A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent."), *with* FED. R. CIV. P. 12(a)(2) ("The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.").

[238] *See, e.g.*, Tuke v. United States, 76 F.3d 155, 156 (7th Cir. 1996) ("[T]he comprehensive 1993 revision of Rule 4 waiver of service does not play a role in litigation against the national government."); Vargas v. Potter, 792 F. Supp. 2d 214, 217 (D.P.R. 2011) (holding, *inter alia*, that service against the U.S. Postmaster General was invalid where the plaintiff mailed a request for waiver of summons).

[239] *E.g.*, McGann v. New York, 77 F.3d 672, 674 (2d Cir. 1996) (per curiam) ("Rule 4(d)(6) required that a state be served by personal service or according to the laws of that state.").

[240] *E.g.*, Red Elk v. Stotts, 111 F.R.D. 87, 89 (D. Mont. 1986) (holding, *inter alia*, that service by mail upon a county is not proper until the defendant acknowledges service).

[241] *E.g.*, Norlock v. City of Garland, 768 F.2d 654, 656 (5th Cir. 1985) ("Rule 4 does not authorize service by mail on municipal corporations . . . .").

this entity-specific deviation from the norm based on "policy reasons," arguing that "governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail."[242] However, the waiver provisions apply to other defendants, whether they ultimately prevail or not.[243]

The Advisory Committee provides a second reason why government units should be exempt from the waiver provisions: it argues that United States "mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice."[244] According to the Advisory Committee, the "same principle is applied to agencies, corporations, and officers of the United States" and to state and local government units.[245] This raises a host of questions. The first is plainly empirical: are government mailing facilities actually inadequate? This in turn implicates an epistemological and institutional question: how does the Advisory Committee know this? Even if the mailing facilities were inadequate at the time of the rule change, do they continue to be so? One might also wonder whether this policy actually facilitates and encourages poor mailing facilitates and whether it might make more sense to upgrade mail processing facilities. Lastly, what about other institutional actors with chronically and notoriously poor mailing facilities? Are they also deserving of procedural protections? These questions cast doubt on the provided justification for the deviation from the trans-personal norm.

All in all, plaintiffs have fewer options to serve process on government organizations as compared to service of process on regular individuals. The government is "clearly exempted" from many of the service of process options available to individuals.[246] The effect of restricting options for plaintiffs who sue government units is that such lawsuits are harder and costlier to instigate. This makes suits against the government less attractive, provides a first line of defense, and increases the government's

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[242] FED. R. CIV. P. 4 advisory committee's note on 1993 amendment.

[243] *See* FED. R. CIV. P. 4(d)(2) (providing that the court may impose service of process expenses on defendants, irrespective of whether they ultimately prevail in the litigation).

[244] FED. R. CIV. P. 4 advisory committee's note on 1993 amendment; *see* Constien v. United States, 628 F.3d 1207, 1213 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2884 (2011) (noting that the United States cannot waive service of process in part because of the nature of its mail-receiving facilities); Mitchell, *supra* note 186, at 968 ("Everyone familiar with government operations knows that, because of the size of its operations, it requires more time for an action to be brought to the attention of the government and reach the proper department . . . than private litigants require.").

[245] FED. R. CIV. P. 4 advisory committee's note on 1993 amendment; *cf.* Ecret v. Diamond, No. C07-171RSL, 2007 WL 2743432, at *2 (W.D. Wash. Sept. 17, 2007) (holding that notice was effective where plaintiff had mistakenly requested and mistakenly received waiver of service from city government defendant).

[246] *See* Hodge v. Rostker, 501 F. Supp. 332, 333 (D.D.C. 1980) ("Paragraph (7) of rule 4(d), which allows for service in a manner prescribed by state or local law, specifically liberalizes service only upon an individual or a corporation; the United States is clearly exempted.").

pre-suit settlement leverage.

Courts have contributed to this discrepancy by strictly interpreting the service of process provisions on federal[247] and local[248] government units. For example, when serving the civil-process clerk, the plaintiff must take care to clearly label the civil-process clerk as the recipient.[249] Failure to do so constitutes insufficient service of process and will lead to dismissal. Rule 4 does not make this requirement explicit and it is buried deeply in the Advisory Committee Notes.[250]

Thus, entity-specific procedural deviations from the trans-personal norm increase a plaintiff's burden of providing service of process on government organizations as compared to service on individuals or corporations. Congress has not explained the reason for many of these exceptions. Where Congress has justified departures from the trans-personal norm, such justifications are brief and typically gesture toward either federalism concerns[251] or the broadly articulated goal of providing "for the protection of the United States."[252]

4. *Fighting on Two Fronts*

Many of these procedures are only minor inconveniences for well-funded institutional actors. However, inexperienced plaintiffs with limited resources may find these procedural hurdles insurmountable. A legal team comprised of a corporation's in-house counsel and an experienced law firm is unlikely to struggle with the requirements of providing proper notice to government entities. Individual plaintiffs frequently do.

It is in this context that we should understand pro se and *in forma pauperis* provisions. Both are typically understood as a response to problems beyond procedure (e.g., poverty). However, attention to the

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[247] *Cf.* Peters v. United States, 9 F.3d 344, 346 (5th Cir. 1993) (arguing that Rule 4 "is easily understandable"); Guthery v. United States, 507 F. Supp. 2d 111, 115 (D.D.C. 2007) ("The Court will not pick and choose which service requirements to enforce as to which parties. All parties have notice as to the service requirements because such requirements are detailed in the Federal Rules of Civil Procedure.").

[248] *See, e.g.*, English v. Murphy, No. 1:09-CV-00866, 2010 WL 1416763, at *3 (M.D.N.C. Apr. 5, 2010) (invalidating plaintiff's service when mail was addressed to the governmental agency rather than officer, director, agent, or member thereof in contravention of North Carolina state law that requires strict compliance with service-by-mail provisions).

[249] *See, e.g.*, Vargas v. Potter, 792 F. Supp. 2d 214, 217 (D.P.R. 2011) ("Although the documents were submitted by certified mail, plaintiff failed to name the civil-process clerk as the recipient, as [Rule 4(i)(1)(A)] requires.").

[250] FED. R. CIV. P. 4 advisory committee's note on 1993 amendment ("To assure proper handling of mail in the United States attorney's office, the authorized mail service must be specifically addressed to the civil process clerk of the office of the United States attorney.").

[251] *See, e.g.*, 28 U.S.C. § 1442(a) (2012) (granting special removal rights for federal entities and their officers).

[252] *See* 28 U.S.C. § 2410(b) (2012) (detailing service requirements in actions affecting property on which the United States has a lien).

mechanisms whereby entity-specific procedures can exacerbate litigation resource disparities reveals that pro se and *in forma pauperis* provisions are, in part, a procedural response to a procedural problem. Procedures that advantage the government often disadvantage individual litigants and thereby tilt the playing field in favor of comparatively well-resourced litigants. Pro se and *in forma pauperis* provisions counteract this tilt and help to level the playing field. Looking at pro se and *in forma pauperis* provisions through the lens of trans-personality provides a new justification for such provisions. This approach also helps to explain why corporations are typically not allowed to proceed pro se or *in forma pauperis*.[253]

Entity-specific procedures that benefit the government frequently disadvantage individual litigants. They do so by exacerbating litigation inequality vis-à-vis individuals. Yet it is important to keep in mind that the same entity-specific procedures might also *equalize* litigation resources. Poorly paid and often overworked government attorneys (no matter how capable and driven) are frequently at a disadvantage when faced with more well-resourced corporate adversaries. In these situations, the playing field is tilted against the government. The same deviations from the trans-personal norm that tilt the playing field against individuals help here to level the playing field in suits between government litigants and well-funded corporate litigants. Entity-specific procedures can thus simultaneously equalize and exacerbate litigation advantages. A nuanced approach to procedural design must take both of these effects into account.[254]

B. *Accuracy*

Accuracy is another deeply ingrained and central procedural value.[255] Properly articulated departures from trans-personality further litigation

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[253] *See, e.g.*, United States v. Twenty Miljam-350 IED Jammers, 669 F.3d 78, 91 (2d Cir. 2011) ("[A] corporation is not allowed to appear in federal court except by a licensed attorney . . . ."); Two Old Hippies, LLC v. Catch the Bus, LLC, 784 F. Supp. 2d 1221, 1224 (D.N.M. 2011) ("[I]t has also been a long standing legal principle that a corporation must be represented by an attorney to appear in federal court."); *see also* FED. CIR. R. 47.3(a) ("An individual (not a corporation, partnership, organization, or other legal entity) may choose to be represented by counsel or to represent himself or herself pro se, but may not be represented by a nonattorney."); D.N.M. L.R.-CIV. R. 83.7 ("A corporation, partnership or business entity other than a natural person must be represented by an attorney authorized to practice before this Court."); E.D. CAL. L.R. 183(a) ("A corporation or other entity may appear only by an attorney.").

[254] Notice also that this is a probabilistic endeavor that must work by proxy because just as there are rich individuals, there are also poor corporations.

[255] *See* JOHN RAWLS, A THEORY OF JUSTICE 239 (1972) ("[T]he rule of law requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances.").

accuracy in a number of ways. For example, procedures can protect the natural and artificial entities most likely to get excusable default judgments imposed against them. Such exceptions from the trans-personal norm necessarily entail normative judgments. Many suits routinely trigger default judgments but do not warrant specialized treatment (e.g., suits to collect debts). The question is whether the natural or artificial person's failure to appear is excusable or not. Typically, such excuses are narrowly construed and hard to obtain ex post. But Congress provided ex ante that the United States, soldiers, minors, and incompetents receive more protection from default judgments than regular defendants. This Section examines these deviations from trans-personality and their justifications grounded in accuracy concerns.

1. *Protections from Default Judgments for Government Litigants*

The federal government receives significant protections from default judgments. Under Federal Rule 55, a default may be entered against a party who "has failed to plead or otherwise defend."[256] However, the United States is exempt from this requirement. Default judgments against the United States, its officers, and its agencies may only be entered if the claimant meets an additional hurdle: the claimant must "establish[] a claim or right to relief by evidence that satisfies the court."[257] While a default judgment against a regular defendant may be entered by the clerk as an administrative matter, the presiding judge must review evidence before entering a default judgment against a federal defendant.[258]

In effect, these provisions allow federal defendants to avoid or dull many of the burdens imposed on regular litigants. For example, while a failure to answer a complaint within the provided time frame exposes regular defendants to defaults, federal defendants can effectively extend the already expanded time allotment to respond to a complaint without fearing default judgments.[259] Similarly, failure to comply with court orders

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[256] FED. R. CIV. P. 55(a).

[257] FED. R. CIV. P. 55(d); *see also* 28 U.S.C. § 763 (1946) (superseded by the Federal Rules) ("Should the district attorney neglect or refuse to file the answer or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.").

[258] *Compare* FED. R. CIV. P. 55(a) ("[T]he clerk must enter the party's default."), *with* FED. R. CIV. P. 55(d) ("[J]udgment may be entered against the United States . . . only if the claimant establishes a claim or right to relief by evidence that satisfies the court.").

[259] *See, e.g.*, Mason v. Lister, 562 F.2d 343, 345 (5th Cir. 1977) (holding that the refusal to enter the default was not an abuse of discretion where "[a]fter defendant's motion to dismiss was denied, the defendant filed no further pleadings for over five weeks, despite Federal Rule of Civil Procedure 12(a)(1), requiring a response within ten days after the denial of a pre-answer motion"); Ross v. United States, 574 F. Supp. 536, 538 (S.D.N.Y. 1983) ("*Mere* failure to respond to the complaint within sixty days does not justify entry of default judgment.") (emphasis added).

carries the risk of default judgments for regular plaintiffs.[260] In contrast, federal defendants need not fear such sanctions to the same extent.[261] For example, in one action the district court ordered the Secretary of Health and Human Services to produce documents on a given date.[262] The Secretary "had failed to file the transcript approximately ten weeks after the date set" and in response, the district court entered a default judgment.[263] The appellate court appreciated the district court's "feeling of frustration" and noted that the Secretary had a history of unresponsiveness to litigation.[264] Yet the court noted that district courts are constrained by Federal Rule 55 from disciplining federal defendants in ways that it could and would with all other defendants.[265]

Deviation from trans-personality serves here to minimize adversarial norms and immunize federal litigants against overworked or incompetent representation. For example, one court explained that Federal Rule 55 "rests on the rationale that the taxpayers at large should not be subjected to the cost of a judgment entered as a penalty against a government official which comes as a windfall to the individual litigant."[266] As such, Rule 55(d) functions as a tool to protect the general public from government attorneys who misunderstand or misapply the Federal Rules even if it imposes additional costs on plaintiffs.[267] Courts have broadly applied this rationale to cases not explicitly governed by Rule 55, citing general equity and policy considerations that are unavailable to non-federal defendants.[268]

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[260] FED. R. CIV. P. 37(b)(2)(A)(vi) (authorizing the court to "render[] a default judgment against a disobedient party").

[261] However, federal *plaintiffs* do. *See, e.g.*, United States v. Cotton Valley Operators Comm., 9 F.R.D. 719, 720–21 (W.D. La. 1949) (dismissing the government's complaint for failure to comply with court orders and noting that to do otherwise "would in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General"), *aff'd per curiam*, 339 U.S. 940, *reh'g denied*, 339 U.S. 972 (1950).

[262] Poe v. Mathews, 572 F.2d 137, 137 (6th Cir. 1978) (per curiam). Notice that the old title for this position was "Secretary of Health, Education and Welfare." *Id.*

[263] *Id.*

[264] *Id.* at 137–38.

[265] *Id.* at 138; *cf.* Jackson Buff Corp. v. Marcelle, 20 F.R.D. 139, 140 (E.D.N.Y. 1957) (rejecting the government's position that a judgment may not be entered against the defendants for their default in answering the discovery requests under Rule 55 because this "contention, if it were carried to its logical conclusion the Government could *never* be required to comply with requests for admissions, and could, with impunity, ignore them").

[266] Campbell v. Eastland, 307 F.2d 478, 491 (5th Cir. 1962).

[267] *See id.* at 492 ("It is incumbent on a court under the spirit, if not the letter, of Rule 55(e) to extend this measure of protection to the public on whom will fall the ultimate burden of an adverse judgment.").

[268] *See, e.g.*, Williams v. Gen. Servs. Admin., 582 F. Supp. 442, 443 (E.D. Pa. 1984) ("I do not perceive any possible way in which a ten-day delay (if there even was a delay) could have prejudiced the plaintiffs."); O'Neill v. United States, 79 F. Supp. 827, 830–31 (E.D. Pa. 1948) ("Although Rule 55(e) of the Rules of Civil Procedure . . . does not apply to admiralty proceedings, I think the policy of the Rule is generally sound and is particularly applicable to a case like the present.").

2. *Members of the Armed Forces*

Soldiers and Sailors receive similar special procedural protections that violate the trans-personal norm. Since the Civil War, Congress has exempted servicemembers from numerous procedural burdens during specified war times.[269] Since World War II, these protections are now constantly in effect under the Servicemembers Civil Relief Act.[270]

The purpose of the Act is to protect the rights of servicemembers during their military service.[271] Congress intends to enable servicemembers "to devote their entire energy to the defense needs of the Nation" rather than worry about lawsuits back home.[272] This, in turn, "strengthen[s], and expedite[s] the national defense."[273] To do so, the Act intertwines procedural protections with substantive provisions related to mortgages, rents, liens, motor vehicle leases, and telephone service contracts.[274]

The procedural provisions provide that servicemembers may reopen default judgments entered against them under certain circumstances.[275] Non-compliance with the act renders judgments against servicemembers voidable in ways that are not available to non-servicemember defendants.[276]

The burden to determine military status falls, at least to a significant part, on the plaintiff, who must file an affidavit stating whether the defendant is engaged in military service or stating that the plaintiff is unable to determine whether the defendant is engaged in military service.[277] Plaintiffs who knowingly make false affidavits about the

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[269] *See* 55 CONG. REC. 7791 (1917) (statement of Rep. Webb) (discussing some states' enactment of stay laws during the Civil War, which essentially stayed all legal proceedings brought against servicemembers during time of war).

[270] 50 U.S.C. app. §§ 501–96 (2006); 50 U.S.C. §§ 597a–97b (1990). Previously, the Act was known as the "Soldiers' and Sailors' Civil Relief Act." 50 U.S.C. app. § 501 (2002).

[271] 50 U.S.C. app. § 502(2) (2006); *see also* Boone v. Lightner, 319 U.S. 561, 565–67 n.2 (1943) (quoting 55 CONG. REC. 7789 (1917) (statement of Rep. Webb) ("The country is asking 2,000,000 of its young men to risk their lives and, if need be, to give up their lives for their country. Before long even more will be asked to make the same sacrifice. Is it more than naked justice to give to the savings of these same men such just measure of protection as is possible?")).

[272] 50 U.S.C. app. § 502(1) (2006).

[273] *Id.*

[274] *See, e.g.*, 50 U.S.C. app. § 535 (2006) (providing special procedure for servicemembers in terminating motor vehicle and residential leases).

[275] *See* 50 U.S.C. app. § 521 (2006) (providing procedures for protections against default judgments for servicemembers); *see also, e.g.*, United States v. Kaufman, 453 F.2d 306, 308–09 (2d Cir. 1971) ("The purpose of the Soldiers' and Sailors' Civil Relief Act is to prevent default judgments from being entered against members of the armed services in circumstances where they might be unable to appear and defend themselves . . . .").

[276] *See* 50 U.S.C. app. § 521(g)(1) (2006) (authorizing courts to vacate or set aside default judgments entered in an action covered by this section against a servicemember under specified circumstances); *cf.* FED. R. CIV. P. 60(b) (authorizing the court to relieve a party from a final judgment, order, or proceeding for a limited set of reasons).

[277] 50 U.S.C. app. § 521(b)(1) (2006).

defendant's servicemember status are subject to fines and criminal sanctions.[278] Where the defendant's servicemember status cannot be determined by the affidavit, courts may require the plaintiff to file a bond before entering judgment "to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part."[279]

The Act also provides for the appointment of an attorney to represent the defendant in military service.[280] The statute prohibits courts from entering a judgment until the servicemember defendant is represented by an attorney.[281] If this attorney cannot make contact with the servicemember, her actions in the case do not waive the servicemember's defenses or otherwise bind the servicemember.[282] In effect, this means that appointed attorneys can do little more than move for a stay of proceedings, given that Congress conferred upon the courts broad authorization to stay such proceedings.[283] Congress also granted courts the power to stay or vacate the execution of judgments, attachments, and garnishments if they determine that a defendant "is materially affected by reason of military service in complying with a court judgment or order."[284]

As one state supreme court explicitly acknowledged, all of these procedural provisions advantage servicemember defendants over regular defendants.[285] Apart from shifting the adversarial balance, the Act also carves out a greater role for courts to look out for the interests of servicemembers beyond anything other non-servicemember defendants can expect.[286] Courts are thus called upon to treat soldiers procedurally

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[278] *Id.* § 521(c); *see, e.g.*, *Kaufman*, 453 F.2d at 308, 312 (affirming a conviction for filing a false affidavit).

[279] 50 U.S.C. app. § 521(b)(3) (2006); *see, e.g.*, Syracuse Sav. Bank v. Brown, 42 N.Y.S.2d 156, 158–59 (N.Y. Sup. Ct. 1943) (noting that the court had the right and duty to protect the interests of any defendants who might be servicemembers and consider utilization of the bond provision).

[280] 50 U.S.C. app. § 521(b)(2) (2006); *see* United States v. Hampshire, 892 F. Supp. 1327, 1332 (D. Kan. 1995) (explaining that the plaintiff argued that the Act required the court to appoint an attorney for a person in the military and that he was not provided an attorney in violation of his rights).

[281] *Id.*

[282] 50 U.S.C. app. § 521(b)(2) (2006); *see In re* Custody of Nugent, 955 P.2d 584, 588 (Colo. App. 1997) (explaining the requirements which must be met to not violate the Act's provisions).

[283] *See* 50 U.S.C. app. § 521(d) (2006) (mandating that courts shall grant a stay of proceedings "upon application of counsel" if the court finds that certain conditions are met).

[284] 50 U.S.C. app. § 524(a) (2006).

[285] *See, e.g.*, Haller v. Walczak, 79 N.W.2d 622, 624 (Mich. 1956) ("The provisions of the [Servicemembers Civil Relief Act] were obviously designed to protect those in military service. It does not appear that in the enactment of the measure Congress sought to protect others.").

[286] *See, e.g.*, Boone v. Lightner, 319 U.S. 561, 569 (1943) (noting the discretion given to trial judges "in pursuance no doubt of [Congress'] policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee"); Syracuse Sav. Bank v. Brown, 42 N.Y.S.2d 156, 157–58 (N.Y. Sup. Ct. 1943) ("In my judgment, the purpose of [the Soldiers' and Sailors' Civil Relief Act of 1940] is to protect the interests of persons in the military service and to

different than other defendants, even defendants, like many State Department employees, who are also sent abroad (often to remote and dangerous locations).

3. *Minors and Incompetents*

Legislators and judges recognize that minors and incompetents typically have less capacity and experience than regular litigants and might be unable to protect their own interests. To take account of these tendencies, the old Federal Equity Rules, which preceded the Federal Rules of Civil Procedure, provided special rules for responsive pleadings from minors or incompetents.[287] The Federal Equity Rules also authorized courts to issue orders broadly to protect minors and incompetents.[288] Various deviations from the trans-personal norm currently continue this effort to protect minors and incompetents procedurally. For example, the Federal Rules aim to ensure that minors and incompetents are properly represented.[289] Relatedly, plaintiffs cannot obtain default judgments against minors and incompetents from the clerk of the court.[290] Instead, such default judgments require court action and may only be entered if the minor is represented.[291] Even where the rules are silent, courts emphasize that they have a special responsibility to protect minors and

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relieve them from the mental distress occasioned by the handicap of their response to the call of their country. To meet this situation and to give such persons in military service protection and a degree of mental repose, the courts are authorized and directed to intervene to the end that their rights and remedies shall not be impaired or jeopardized in consequence of such military service.").

[287] *See* FED. EQ. R. 30, *in* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 154–55 (7th ed. 1930) ("Averments other than those of value or amount of damage, when not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship . . . .").

[288] *See* FED. EQ. R. 70, *in* HOPKINS, *supra* note 287, at 203 (stating that suits by or against incompetents are subject "to such orders as the court or judge may direct for the protection of infants and other persons").

[289] *See* FED. R. CIV. P. 17(c)(2) (stating that the court may assign a guardian ad litem to protect a minor or incompetent who is unrepresented); FED. R. BANKR. P. 1004.1 ("The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor."); E.D. CAL. L.R. 4.39(1) (providing for additional procedural protections); *cf.* Cornett v. Donovan, 51 F.3d 894, 899 (9th Cir. 1995) (concluding that the government is required to provide incompetent persons with the right to access); Sara Jeruss, *Empty Promises? How State Procedural Rules Block LGBT Minors from Vindicating Their Substantive Rights*, 43 U.S.F. L. REV. 853, 873–74 (2009) (discussing how the Federal Rule 17(c) provides protections for minors but the advisory notes do address situations where minors are in conflict with their parents).

[290] *See* FED. R. CIV. P. 55(b)(1) ("[T]he clerk—on the plaintiff's request . . . must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.").

[291] *See* FED. R. CIV. P. 55(b)(2) ("A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared.").

incompetents.[292]

The flip-side of these protective layers founded on diminished agency is that procedures afford minors and incompetents less autonomy and control over the course of litigation than they do for regular litigants. For example, representatives of minors may not proceed pro se on behalf of a minor, even if the minor approves.[293] Similarly, Federal Local Rules of Court[294] and state statutes[295] mandate that courts must approve settlements involving minors and incompetents.[296] Judges may overrule the express wishes of the minor or incompetent to protect his or her real interests and further litigation accuracy.[297] This oversight includes the power to reduce

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[292] *See, e.g.*, Dacanay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978) ("Indeed, from the time of the early courts of chancery a guardian ad litem has been unable to bind a minor litigant to a settlement agreement absent an independent investigation by the court and a concurring decision that the compromise fairly promotes the interests of the minor, who, as we repeat, is a ward of the court.") (citations omitted); Nice v. Centennial Area Sch. Dist., 98 F. Supp. 2d 665, 667 (E.D. Pa. 2000) ("The court has an inherent duty to protect the interests of minors and incompetents who appear before it.") (citations omitted); Keith *ex rel.* Eagan v. Jackson, 855 F. Supp. 765, 775 (E.D. Pa. 1994) (observing that a court has an "inherent duty to protect the interests of minors and incompetents that come before it"); Kuykendall v. Zachary, 16 S.W.2d 590, 591 (Ark. 1929) ("It is the duty of the court to protect the interests of the infants, and see to it that their rights are not bargained away by those who represent them.") (internal quotation marks omitted); Leonard v. Rose, 422 P.2d 604, 608 (Cal. 1967) ("The guardian had no authority to make such an agreement without approval of the court that appointed him.").

[293] *See, e.g.*, Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990) ("The choice to appear *pro se* is not a true choice for minors who under state law cannot determine their own legal actions.") (citation omitted); Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986) ("[A] minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney.").

[294] *See, e.g.*, E.D. CAL. L.R. 202(b) ("No claim by or against a minor or incompetent person may be settled or compromised absent an order by the Court approving the settlement or compromise."); D. HAW. L.R. 17.1 ("Except as otherwise permitted by statute or federal rule, no action by or on behalf of a minor or incompetent shall be dismissed, discontinued, or terminated without the approval of the court. When required by state law, court approval shall also be obtained from the appropriate state court having jurisdiction over such matters for any settlement or other disposition of litigation involving a minor or incompetent.").

[295] *See, e.g.*, CAL. CIV. PROC. CODE § 372(a) (West 2004) (stating that settlements require "the approval of the court"); TENN. CODE ANN. § 34-1-121(b) (2007) ("[T]he court . . . has the power to approve and confirm a compromise of the matters in controversy on behalf of the minor or disabled person."); MICH. CT. R. 2.420(B) (1985) ("In actions covered by this rule, a . . . settlement, or dismissal pursuant to settlement must be brought before the judge to whom the action is assigned and the judge shall pass on the fairness of the proposal."); PA. R. CIV. P. 2039(a) (West 2002) ("No action to which a minor is a party shall be compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor.").

[296] Some courts conceptualize this in terms of capacity to contract. *See, e.g.*, *Dacanay*, 573 F.2d at 1080 ("Without concurring court approval, a guardian ad litem lacks contractual capacity to settle litigation just as surely as the minor himself lacks capacity."); RESTATEMENT (SECOND) OF CONTRACTS § 12(2) (1981) ("A natural person . . . has full legal capacity to incur contractual duties . . . unless he is . . . an infant, or . . . mentally ill or defective . . . .").

[297] *See, e.g.*, Donnarumma v. Barracuda Tanker Corp., 79 F.R.D. 455, 459 (C.D. Cal. 1978) ("The Court is mindful of its obligations to protect the interests of minors and in so doing to scrutinize the terms of any proposed settlement of their lawful claims . . . ."); Rafferty v. Rainey, 292 F. Supp. 152,

attorney fees.[298]

Service of process provisions also illustrate some of the ways that procedural rules stray from the trans-personal norm and are utilized to protect minors and incompetents from inaccurate judgments. The current service of process provisions are organized around the personhood of the defendant.[299] This was not always the case. The old Federal Equity Rules did not distinguish between different types of entities when regulating service of process.[300] Instead, the Federal Equity Rules treated all types of artificial and natural entities the same even though the Rules explicitly contemplated suits against corporations elsewhere.[301] The rules on service of process were short and uniform.[302]

In contrast, the current service of process provisions are long, complicated, and draw sharp distinctions between different entity types.[303] Courts remain skeptical of service of process provisions that differentiate between different types of lawsuits,[304] but they readily accommodate different rules for different types of defendants.[305]

154–55 (E.D. Tenn. 1968) ("[I]t is clear that an onerous burden devolves upon this Court in considering proposed settlements involving minors and other persons under disability.").

[298] *See, e.g.*, S. & E.D.N.Y. L. CIV. R. 83.2(a)(2) (McKinney 2014) ("The Court shall authorize payment to counsel for the infant or incompetent of a reasonable attorney's fee and proper disbursements from the amount recovered in such an action, whether realized by settlement, execution or otherwise and shall determine the said fee and disbursements, after due inquiry as to all charges against the fund."); Doe v. Mattingly, No. 06 CV 5761(JBW), 2007 WL 2362888, at *1, *3–4 (E.D.N.Y. Aug. 14, 2007) (finding that attorney's fees in a proposed settlement were proportionately too high and awarding a portion of those fees to the minor).

[299] *See* FED. R. CIV. P. 4(e)–(j) (providing the procedural requirements for serving process on different types of defendants).

[300] *See* FED. EQ. R. 13, *in* HOPKINS, *supra* note 287, at 154–55 ("The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.").

[301] *See, e.g.*, FED. EQ. R. 27, *in* HOPKINS, *supra* note 287, at 187 ("Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath."); FED. EQ. R. 58, *in* HOPKINS, *supra* note 287, at 258 ("If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any office of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall see fit.").

[302] *See* FED. EQ. R. 13–14, *in* HOPKINS, *supra* note 287, at 154–55 (providing service of process rules for the defendant, irrespective of their personhood characteristics).

[303] *See* FED. R. CIV. P. 4(e)–(j) (providing specific service of process requirements for numerous types of defendants).

[304] *See, e.g.*, Carson v. Maurer, 424 A.2d 825, 838 (N.H. 1980) (finding an equal protection violation where special notice provisions were applicable only in medical malpractice cases).

[305] *See, e.g.*, O'Halloran v. United States, 817 F. Supp. 829, 832–33 (N.D. Cal. 1993) (rejecting an equal protection challenge to an admiralty rule that required "forthwith service" rather than regular service on a private party); Owens v. I.F.P. Corp., 374 F. Supp. 1032, 1035–36 (W.D. Ky. 1974) (rejecting an equal protection challenge where a service-of-process provision treated in-state defendants differently from out-of-state defendants); Kreft v. Fisher Aviation, 264 N.W.2d 297, 304 (Iowa 1978)

Given the centrality of notice to every lawsuit, it seems like an unlikely place for trans-personality to fracture. After all, one could think that the service of process is accomplished simply when the plaintiff serves the summons and complaint on the defendant. Any plaintiff, any defendant. There seems to be little need to distinguish between different types of entities when it comes to notice.[306]

And yet, Federal Rule of Civil Procedure 4 explicitly distinguishes between different categories of entities, including different types of individuals.[307] Specifically, the Rule provides for different service of process requirements for each of these categories.[308] These differences amount to a finely and continuously tuned system to support and achieve specific normative ends that recognize the unique situation of different entities.

Indeed, within natural persons alone, Rule 4 distinguishes between three types of natural persons: individuals, minors, and incompetent persons.[309] Individuals are usually served by in-hand delivery of the summons and the complaint[310] or by leaving copies of the process at the individual's "dwelling or usual place of abode with someone of suitable age and discretion who resides there."[311] Sometimes, plaintiffs have the option to deliver process to an agent authorized by appointment or by law to receive service of process.[312] Finally, plaintiffs can deliver process on defendants pursuant to parallel notice procedures authorized by the state "where the district court is located or where service is made."[313]

Plaintiffs have fewer available choices when serving a minor or incompetent person.[314] Such persons must be served as prescribed by the law of the state in which service is made, not the law of the state in which the district court is located.[315] This limitation increases the chance that

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(rejecting an equal protection challenge to default judgment procedures that distinguished between different types of defendants).

[306] *See, e.g.*, FED. R. APP. P. 25(c)(1) (providing numerous means by which a party can be served). *But see* FLA. STAT. ANN. § 48 (West 1967) (providing for detailed service of process provisions by entity type); FLA. R. CIV. P. 1.070(e) ("At the time of personal service of process a copy of the initial pleading shall be delivered to the party upon whom service is made.").

[307] FED. R. CIV. P. 4(e)–(j).

[308] *Id.*

[309] FED. R. CIV. P. 4(e)–(g).

[310] FED. R. CIV. P. 4(e)(2)(A).

[311] FED. R. CIV. P. 4(e)(2)(B).

[312] FED. R. CIV. P. 4(e)(2)(C).

[313] FED. R. CIV. P. 4(e)(1); *see also* Hanna v. Plumer, 380 U.S. 460, 473–74 (1965) ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.").

[314] This is true when serving minors and incompetent persons domestically or internationally. FED. R. CIV. P. 4(g).

[315] FED. R. CIV. P. 4(g).

notice provisions are compatible with the state's overall scheme to protect minors.[316] State notice provisions frequently provide for delivery of the summons and complaint on the parent, guardian, or conservator of the minor or incompetent person and the defendant herself.[317] Such double-delivery increases the opportunity of presenting objections by or on behalf of the minor or incompetent person.[318] While limiting the available means of service and requiring double-delivery increases the burdens on the plaintiff, courts justify these provisions as means to protect the defendant's interests given the likely inability of the minor or incompetent to do so herself.[319]

Like government entities, minors and incompetents are also exempt from a duty to waive process.[320] The justification for this entity-specific deviation from the trans-personal norm rests on a "presumed inability to understand the request and its consequences."[321] These provisions protect litigation accuracy. They do so by providing for procedural protections against judgments unrelated to the merits.[322] As these procedures

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[316] *See* 42 AM. JUR. 2D *Infants* § 194 (2010) ("In several jurisdictions, it is provided by statute or rule of court that process against a minor must be served on his or her parent or guardian or on some other designated person. The purpose of such provision is to bring to the attention of someone presumed to be interested in the protection of the minor's rights the fact of the institution and pendency of the action against the minor."); *see also* Collins v. Collins, 250 S.E.2d 870, 872 (Ga. Ct. App. 1978) ("We reject the notion that a minor can waive the multiple service requirements of Code Ann. § 81A-104(d)(3). Counsel has cited and we have found no cases reported in Georgia on this issue, but we hold that to permit such a waiver would be utterly inconsistent with the obvious intent of the statute to protect minors.").

[317] *See, e.g.*, CAL. CIV. PROC. CODE § 416.60 (West 2004) ("A summons may be served on a minor by delivering a copy of the summons and of the complaint to his parent, guardian, conservator, or similar fiduciary, or, if no such person can be found with reasonable diligence, to any person having the care or control of such minor or with whom he resides or by whom he is employed, and to the minor if he is at least 12 years of age."); CAL. CIV. PROC. CODE § 416.70 (West 2004) ("A summons may be served on a person (other than a minor) for whom a guardian, conservator, or similar fiduciary has been appointed by delivering a copy of the summons and of the complaint to his guardian, conservator, or similar fiduciary and to such person, but, for good cause shown, the court in which the action is pending may dispense with delivery to such person.").

[318] *See* 42 AM. JUR. 2D *Infants* § 194 (2010) ("When service on both the infant and parent is required, service upon the parent alone is not sufficient, and a notice is required to be served on the minor as well. Stated otherwise, statutory multiple-service requirements may not be waived.") (footnote omitted).

[319] *See* Miller v. Super. Ct. of L.A. Cnty., 362 P.2d 497, 499 (Cal. 1961) ("The requirement of service upon the father or mother (here both were served) is obviously to give the parent notice of the service on the minor so that he may take the proper steps to protect the minor's interests.").

[320] *See* Waters v. Farmers Tex. Cnty. Mut. Ins. Co., 9 F.3d 397, 401 (5th Cir. 1993) (reversing the lower court's grant of summary judgment in favor of the government where the government had failed to serve its motion properly on the minor appellant, in contravention of procedural rules).

[321] FED. R. CIV. P. 4 advisory committee's note on 1993 amendment.

[322] *See id.* ("The general purpose of this revision is to facilitate the service of the summons and complaint. The revised rule explicitly authorizes a means for service of the summons and complaint on any defendant. While the methods of service so authorized always provide appropriate notice to

recognize, different natural and artificial entities are more or less capable of asserting their rights and partaking in litigation.[323] Without entity-specific procedural protections, our confidence in the accuracy of resulting judgments would be much diminished.

All of these deviations from the trans-personal norm raise important issues ripe for further research. First, one might wonder whether these entities are worthy of special procedural treatment at the expense and to the exclusion of everybody else. Why does Congress protect soldiers from default judgments but not diplomats or Peace Corps volunteers?[324] Second, are these deviations empirically warranted? Are there institutional features that prevent a federal agency from responding to pleadings and motions in a timely manner but do not affect other large institutions (say, Walmart)? Third, does specialized procedural treatment encourage precisely the problems that it was meant to address? For example, some federal litigants might fail to file timely responsive pleadings not because of inherent institutional weaknesses, but because they can delay proceedings without fear of default judgments.[325] Similarly, budgets might systematically short-change federal litigants because they receive procedural subsidies not available to other litigants. In these situations, deviations from the trans-personal norm impose systemic costs but leave overall litigation accuracy unaffected.

C. *Participatory and Expressive Values*

Independent of litigation accuracy, procedures can also further important participatory and expressive rights by giving parties their "day in court."[326] This principle has long been a cornerstone of procedural

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persons against whom claims are made, effective service under this rule does not assure that personal jurisdiction has been established over the defendant served.").

[323] *See id.* ("Infants or incompetent persons likewise are not called upon to waive service because, due to their presumed inability to understand the request and its consequences, they must generally be served through fiduciaries.").

[324] *See* 50 U.S.C. app. § 521 (2006) (providing protections against default judgments for members of the armed forces).

[325] *See In re* Burrell, 230 B.R. 309, 313 (Bankr. E.D. Tex. 1999) ("Thus, the question of the applicability of the Act is properly focused upon [50 U.S.C. app.] § 521 and whether this Court believes that it should exercise its discretion under the Act to stay a hearing to determine whether relief from the automatic stay should be granted when the debtor fails to appear in his own defense at such hearing, ostensibly because of his military commitments overseas. Such discretion should not be exercised lightly. Since it was the serviceman-debtor who invoked this Court's jurisdiction and the protections provided by the automatic stay by the filing of a voluntary petition under Chapter 13, the Court is immediately faced with the undesirable prospect that the exercise of its discretion on behalf of this debtor under these circumstances would be tantamount to authorizing his use of the Act as a sword against creditors rather than as a shield.").

[326] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or

design.[327] Besides the inherent good of acknowledging the dignity of all participants, litigants are also more likely to accept adverse outcomes as legitimate when they had a fair opportunity to be heard.

Entity-specific procedures modify the probability that parties have an opportunity to participate in judicial proceedings. For example, removal from state to federal courts can make it more difficult for plaintiffs to litigate and attend judicial proceedings in a distant federal court house. Particularly in a time before the widespread availability of cars, many plaintiffs in large states understandably dreaded removal of their cases to a distant federal court. Mindful of this danger, Congress created entity-specific exceptions to the general removal statute.[328] One of these exceptions provides that certain actions against a railroad cannot be removed to federal court.[329] According to the congressional record, this was the "invariable custom"[330] and hurt local plaintiffs who had to incur the cost of traveling to a distant federal district court and face unsympathetic juries.[331] Similarly, other statutes sought to make certain actions involving carriers, employees, and women non-removable to federal court.[332]

Another example of entity-specific procedures furthering participatory values is embedded in venue statutes that provide unique rules for corporations,[333] banks,[334] and power companies.[335] These rules tend to

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property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

[327] *See, e.g.*, *id.* at 314 (citing Milliken v. Meyer, 311 U.S. 457 (1940)) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 402 (1910) (stating that procedural rules must serve "to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case").

[328] *See* 28 U.S.C. §§ 1445(a)–(d) (2012) (indicating the types of civil actions that cannot be removed to federal court).

[329] *See id.* § 1445(b) ("A civil action in any State court against a carrier or its receivers or trustees . . . may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interests and costs."); *see also* Kansas City S. Ry. Co. v. Leslie, 238 U.S. 599, 602 (1915) ("The language of both amendment and Judicial Code, we think, clearly inhibits removal of a cause arising under the Act from a state court upon the sole ground of diversity of citizenship.").

[330] 45 CONG. REC. 4092 (1910) (statement of Sen. Joseph Dixon).

[331] *E.g.*, *id.*

[332] *See, e.g.*, 28 U.S.C. §§ 1445(c)–(d) (2012) (providing that civil actions under workmen's compensation laws and under the Violence Against Women Act of 1994 are not removable).

[333] *See, e.g.*, Bain Peanut Co. v. Pinson, 282 U.S. 499, 500–02 (1931) (rejecting an equal protection challenge to a Texas statute that permitted suits against private corporations to be brought in the county wherein the cause of action arose while unincorporated individuals were not subject to similar suits except in their county of domicile); Plantation Legal Def. Servs., Inc. v. O'Brien, 401 A.2d 1277, 1278–79 (R.I. 1979) (upholding a statute permitting individual plaintiffs to bring small claims action in the district where either the plaintiff or the defendant resides but requiring that corporations

make it easier for individual plaintiffs to sue locally and participate in proceedings.

Other entity-specific provisions do not restrict removal but authorize it. For example, Congress created special removal rights for the United States, its agencies, officials, officers of federal courts, and officers of the Senate and House of Representatives.[336] These provisions do not implicate participatory rights but safeguard federalism concerns. This example reminds us that entity-specific provisions, even within the same procedural setting, might function very differently and further different values.

D. *Efficiency*

The previous Sections explored entity-specific procedures that protect important procedural values but often make litigation costlier. However, deviations from the trans-personal norm can also have the inverse effect by selectively minimizing litigation burdens on parties and witnesses. This Section explores litigation efficiency in two procedural settings: discovery and pleading. In the first, entity-specific procedures minimize discovery burdens, which is one of the most widespread and maligned litigation costs.[337] The second procedural setting is federal pleading standards. In that Section, I argue that the Supreme Court missed an opportunity to realize significant litigation efficiency because of its inattention to potential deviation from the trans-personal norm. Courts and commentators have mischaracterized recent changes in pleading standards as animated by trans-substantive concerns. I reframe this debate by arguing that courts tried to protect one type of entity (government actors) but were shackled by the trans-personal norm to craft pleading standards that apply to all types

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commence such actions in the district where the defendant resides); Cook v. W.S. Ray Mfg. Co., 115 P. 318, 319–20 (Cal. 1911) (upholding a California venue provision distinguishing between corporations and individuals in actions arising in tort or contract); S. Union Life Ins. Co. v. Pesek, 22 S.W.2d 1090, 1090–91 (Tex. Civ. App. 1929) (reluctantly upholding a Texas statute providing that individuals may only be sued where domiciled but corporations may be sued anywhere).

[334] *See, e.g.*, 12 U.S.C. § 94 (2012) (providing for special venue provisions for "[a]ny action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association "); 28 U.S.C. § 1394 (2012) (broadening available forums for certain actions "by a national banking association"); Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc., 480 F.2d 798, 800 (5th Cir. 1973) (noting that the national banking association venue statute "confers on national banks immunity from suit outside the district, territory, county, and city where it is located").

[335] *See, e.g.*, Miss. Power Co. v. Luter, 336 So. 2d 753, 754–55 (Miss. 1976) (rejecting the defendant's due process and equal protection claims and upholding a Mississippi venue statute that "permits suits against power companies in any county in which a company may have a power line").

[336] 28 U.S.C. § 1442(a) (2012).

[337] *See* Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 269–70 (1982) (discussing the problems associated with discovery and the effort on behalf of the Advisory Committee to confer more power on federal judges to monitor discovery practices).

of entities. This lack of personhood-specific flexibility imposes unnecessary costs.

1. *Limitations on Initial Discovery*

The Supreme Court has been eager to point out that "[t]he Government as a litigant is, of course, subject to the rules of discovery."[338] However, this obscures the fact that the Rules themselves make numerous exceptions in favor of the government. For example, Federal Rule of Civil Procedure 26 protects the federal government by limiting the costs associated with discovery in many cases involving the United States.

Amendments to Rule 26, passed in 2000, exempt eight categories of proceedings from initial disclosure requirements.[339] When establishing this exception, the Advisory Committee estimated "that, nationwide, these categories total approximately one-third of all civil filings."[340] Initial disclosures are important because they impose automatic costs on the litigating parties and open the door for more targeted discovery tools.

Most of these eight categories involve situations in which the United States is a litigant.[341] Some do so explicitly, mentioning actions "by the United States to recover benefit payments"[342] and actions "by the United States to collect on a student loan guaranteed by the United States."[343] Others do so implicitly in actions that predictably will predominantly involve federal or local government entities.[344] While Rule 26 is framed in reciprocal terms (exempting both parties from initial discovery), federal and local governments benefit the most from removing initial discovery burdens. For example, in an action to review an administrative record, the plaintiff typically would benefit from initial discovery but the administrative agency would not.

The Advisory Committee justifies these exemptions in subject-specific terms. The Committee argues that the exemptions "identify cases in which there is likely to be little or no discovery."[345] However, other types of cases

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[338] United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958).

[339] FED. R. CIV. P. 26(a)(1)(B)(i)–(viii).

[340] FED. R. CIV. P. 26 advisory committee's note on 2000 amendment.

[341] The only two that do not directly involve the government relate to "proceedings ancillary to a proceeding in another court" and actions "to enforce an arbitration award." FED. R. CIV. P. 26(a)(1)(B)(viii)–(ix).

[342] FED. R. CIV. P. 26(a)(1)(B)(vi).

[343] FED. R. CIV. P. 26(a)(1)(B)(vii).

[344] *See* FED. R. CIV. P. 26(a)(1)(B)(i) ("[A]n action for review of an administrative record . . . ."); FED. R. CIV. P. 26(a)(1)(B)(ii) ("[A] forefeiture action in rem arising from a federal statute . . . ."); FED. R. CIV. P. 26(a)(1)(B)(iii) ("[A] petition for habeas corpus . . . ."); FED. R. CIV. P. 26(a)(1)(B)(iv) ("[A]n action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision . . . ."); FED. R. CIV. P. 26(a)(1)(B)(v) ("[A]n action to enforce or quash an administrative summons or subpoena . . . .").

[345] FED. R. CIV. P. 26 advisory committee's note on 2000 amendment.

that also require little or no discovery receive no special treatment. For example, Rule 26(a)(1)(B)(vii) exempts actions by the United States to collect on a student loan but not actions by a private party to do the very same thing. Debt collection cases by private parties in general require little or no discovery, yet they are not exempt from initial discovery requirements. Thus, alleviating discovery obligations speaks more to entity-specific treatment than subject-specific treatment. Uniformity yields here to reducing litigation costs for federal and local government entities.

2. *Federal Entity-Specific Pleading*

Recent changes to federal pleading standards represent a missed opportunity to gain significant litigation efficiency because of inattention to potential deviation from the trans-personal norm. This lack of personhood-specific flexibility imposes unnecessary costs on many types of litigants.

Courts and commentators have mischaracterized recent changes in federal[346] and state[347] pleading standards as animated by trans-substantive rather than trans-personal concerns. This confusion is lamentable, if understandable. Recent changes in the federal pleading standard originated in *Bell Atlantic Corporation v. Twombly*. There, the Court re-calibrated pleading standards in the context of an antitrust suit. It announced a departure from long-established pleading practice,[348] partially in response to the idiosyncratic problems raised by antitrust complaints. Predictably, courts and commentators speculated whether the new pleading standard would apply only in antitrust cases or also apply in a broader domain of cases.[349] This debate in the literature and courts was exclusively concerned

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[346] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009) (applying *Twombly* in the civil rights context); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (stating that in the antitrust context, a complaint must allege "enough facts to state a claim to relief that is plausible on its face").

[347] *See, e.g.*, Potomac Dev. Corp. v. District of Columbia, 28 A.3d 531, 544 (D.C. 2011) (adopting *Iqbal*'s pleading standard); Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008) ("[W]e take the opportunity to adopt the refinement of that standard that was recently articulated by the United States Supreme Court in [*Twombly*]."); Sisney v. Best Inc., 754 N.W.2d 804, 809 (S.D. 2008) ("[W]e adopt the Supreme Court's new standards."). *But see* McCurry v. Chevy Chase Bank, 233 P.3d 861, 863–64 (Wash. 2010) (rejecting the highly persuasive but non-binding *Iqbal* decision).

[348] *Compare* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) ("In appraising the sufficiency of a complaint we follow, of course, 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."), *with Twombly*, 550 U.S. at 562–63 ("*Conley's* 'no set of facts' language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement.").

[349] *See, e.g.*, Colloquium, Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. 117, 117 (2007) ("[I]t is a misreading of *Twombly* to extend 'plausibility' beyond that [antitrust law] context."); Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 138, 142 (2007) ("*Bell Atlantic* could be read as imposing a new notice-plus-grounds fact pleading standard across-the-board . . . .").

with the types of cases that might fall under the *Twombly* reasoning.

The Supreme Court took up this question two years after *Twombly* in *Ashcroft v. Iqbal*. Here, unlike in *Twombly*, the Court faced a case that raised concerns not typically present in most cases; *Iqbal*'s concerns were not tied to a specific type of case. Instead, they arose because the plaintiff pursued a particular type of defendant: high-ranking government officials.[350]

As the Supreme Court highlighted in its opinion, it granted certiorari because the lower courts "urged this Court to address the appropriate pleading standard" in cases that would "subject[] high-ranking Government officials" to the burdens of litigation.[351] The courts were mindful of the unique status of high-ranking government defendants who might be charged with responding to a "national and international security emergency."[352] The Supreme Court noted that "high-level officials . . . must be neither deterred nor detracted from the vigorous performance of their duties."[353] As such, "the sufficiency of respondent's pleadings is both inextricably intertwined with, . . . and directly implicated by, . . . the qualified immunity defense[]" potentially available to the high-ranking government officials but not others.[354] In short, these defendants raise unique issues.

The Court had the opportunity to craft pleading rules uniquely suitable for these types of defendants. It did not do so because it misconceived the issue in *Iqbal*. The Court asked whether the new pleading standard of *Twombly* should apply in all types of cases. The notion of trans-substantivity constrained the Court to frame the question as whether "*Twombly* should be limited to pleadings made in the context of an antitrust dispute."[355] Predictably, it held that *Twombly* "applies to antitrust and discrimination suits alike."[356]

The Court did not ask whether the standard should apply to all types of defendants. It analyzed the notion of trans-substantivity but failed to question whether pleading rules should apply to all entities equally. The Court tried to protect one type of entity (government officials) but was shackled by the trans-personal norm to craft pleading standards that now

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[350] Including the Director of the FBI and former Attorney General. *Iqbal*, 556 U.S. at 662.

[351] *Id.* at 670.

[352] *Id.* (quotation marks omitted).

[353] *Id.* at 686.

[354] *Id.* at 673 (citations and quotation marks omitted).

[355] *Id.* at 684. The focus on the substance of a case, rather than the litigating entities, is not new. *See* Jones v. Bock, 549 U.S. 199, 224 (2007) ("We once again reiterate, however—as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*—that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.").

[356] *Iqbal*, 556 U.S. at 684 (citation omitted).

apply to all types of entities.[357]

For many of these entities, the concerns that animated the departure from settled pleading standards either do not apply or apply very differently. A store manager, no matter how busy, just does not have the same portfolio of responsibilities as the Attorney General or the Director of the FBI does. Similarly, whatever responsibilities she might have, they are not tied to the public interest and public purse in the same manner.[358] The distractions of litigation and the risk of disclosing vital information during litigation are radically different between regular defendants and high-ranking government defendants.

These differences warrant a procedural response attuned to the unique procedural problem raised by high-ranking government officials. *Iqbal* presented an opportunity to differentiate pleading standards and break from the trans-personal norm. The Supreme Court could have protected government officials without affecting countless cases that do not raise the concerns that a suit against such defendants raises. The lack of such a differentiated response imposes costs in many of these cases. These costs come in many forms; some cases are dismissed prematurely, before gaining access to vital discovery, while other cases are never brought in the first place.

Rigid adherence to uniformity creates these costs. However, abandoning trans-substantive pleading standards is an ineffectual response in this scenario. Though *Iqbal* was a discrimination suit, most discrimination suits do not involve high-ranking government officials. As such, it would have been clumsy to craft an inherently overbroad exception to the pleading rule based on distinctions between different types of cases. Predictably, the Supreme Court rejected this possibility out of hand. Abandoning trans-personal pleading standards is the more nuanced response that addresses the concerns of the Court without affecting broad swaths of cases needlessly. Federal pleading standards need not be trans-

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[357] Of course there might still be a difference between the rule and the application of the rule. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1038–39 (2003) (discussing Rule 8 of the Federal Rules of Civil Procedure and the application of Rule 8); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 14, 91 (2010) (noting the possibility that plausibility will become "transsubstantive in name only").

[358] *See Iqbal*, 556 U.S. at 685 ("If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, 'a national and international security emergency unprecedented in the history of the American Republic.'") (quoting Iqbal v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007)).

personal.[359]

The Supreme Court did not entertain the possibility of abandoning the trans-personal norm. Instead, it focused exclusively on the trans-substantive character of pleading rules. Scholars and commentators followed the Supreme Court's lead. This omission has deprived doctrinal and empirical scholarship of an important perspective on the possibilities and dangers of the emerging federal pleading regime. Neither courts nor commentators recognized that a deviation from the trans-personal norm could have effectuated the concerns that animated a needlessly broad departure from well-established pleading practice. Attentiveness to trans-personality would have avoided much conceptual confusion and the unnecessary costs imposed on many plaintiffs who are not suing high-ranking government officials.

V. ENTITY COMPATIBILITY

Part IV identified procedural values implicated by deviations from the trans-personal norm: equality, accuracy, participatory and expressive values, and efficiency.[360] These values are frequently discussed by courts and commentators. Together, they constitute the basic vocabulary of procedural design.

This Section introduces a new procedural value. Procedures are more coherent, function more efficiently, and are more legitimate when they recognize fundamental and inherent differences between different entity types. I call this procedural value "entity compatibility." It measures to what degree procedures recognize procedurally relevant differences between entities. The existing literature has not yet identified this procedural value because until now we lacked the necessary theoretical vocabulary grounded in trans-personality. Now that this ground-work has been laid, entity compatibility is ripe for exploration.

This Section will first highlight fundamental differences between different types of natural and artificial persons. Next, I demonstrate that personal jurisdiction doctrine must take account of these fundamental differences. Doing so will make the doctrine more entity-compatible and thereby clarify the doctrine and its justification.

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[359] Just as federal pleading standards do not apply equally in different types of cases. *See, e.g.*, FED. R. CIV. P. 9(b) (providing that a litigant alleging fraud or mistake "must state with particularity the circumstances constituting fraud or mistake"). *But cf.* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 167–68 (1993) (rejecting the use of a heightened pleading standard in the Fifth Circuit in civil rights cases alleging municipal liability under §1983).

[360] *See supra* Part III (discussing entity-specific procedures).

A. *Fundamental Differences*

Entity types are different, both ontologically and by law. Corporations, labor unions, municipalities, states, and actual persons—to name only a few entity types—share few inherent characteristics: some can live forever, some expire; some can be and act in multiple places simultaneously, others are bound to one locale; some have a singular purposes while others have shifting and diverse purposes;[361] some have a physical manifestation, others do not; some must be owned, others cannot be owned; some can be jailed, others cannot;[362] some can have physical and mental disabilities, others cannot;[363] some have dignitary rights,[364] others do not; some have religious[365] and racial identities,[366] others do not. These differences between entity types can be relevant in different

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[361] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 18 (1768) ("[T]here is a great variety [of corporations], for the advancement of religion, of learning, and of commerce . . . .").

[362] *See, e.g.*, Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 205 (1993) ("Natural persons can be imprisoned for perjury, but artificial entities can only be fined."); Lipman v. Goebel, 192 N.E. 203, 205 (Ill. 1934) (citation omitted) ("While it is true that natural persons may be subject to the rigors of section 5 of the statute by seizure of their bodies and imprisonment for torts committed where malice is the gist of the action, and that a corporation cannot be imprisoned because of torts committed by its officers, yet it does not follow that such situation violates the equal protection provisions of either the State or Federal Constitution or that due process of law is not afforded thereby to natural persons . . . ."); BLACKSTONE, *supra* note 361, at 18 ("[A corporation] cannot be committed to prison; for its existence being ideal, no man can apprehend or arrest it.").

[363] *See generally* S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 587, 589–91 (8th Cir., 2003) (noting that corporations cannot exhibit physical disabilities as individuals can for purposes of a South Dakota farming statute).

[364] *See, e.g.*, Jerry L. Mashaw, *supra* note 69, at 46–57 (lamenting the limitations of cost-benefit analysis and discussing additional values of procedure: utilitarianism, individual dignity, equality, and tradition); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1173–75 (discussing "dignity values" in relation to access to courts); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 20–27 (1974) (discussing various values, including "[*h*]*umaneness* and [r]espect for [i]ndividual [d]ignity") (emphasis added).

[365] Religious identities are not limited to natural persons under the law. *See, e.g.*, CAL. CORP. CODE § 10002 (West 2014) ("A corporation sole may be formed under this part by the bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church, for the purpose of administering and managing the affairs, property, and temporalities thereof."). *But cf.* Zachary J. Phillipps, Note, *Non-Prophets: Why For-Profit, Secular Corporations Cannot Exercise Religion Within the Meaning of the First Amendment*, 46 CONN. L. REV. ONLINE 39, 59 (2014) (arguing that corporations cannot assert free exercise rights because, inter alia, corporations are not merely "alter egos" of their shareholders).

[366] *See, e.g.*, *Rowland*, 506 U.S. at 209 ("[A] wholly legal creature has no color, and belongs to no race . . . ."); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263 (1977) ("[A] corporation . . . has no racial identity and cannot be the direct target of . . . discrimination."). *But cf.* Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 16 (1st Cir. 1979) (citations omitted) ("Corporations are persons whose rights are protected by the [Civil Rights Act].").

procedural contexts.[367] One of these contexts is personal jurisdiction. I focus on personal jurisdiction here because the doctrine is in flux and has prompted significant debate among scholars in recent years.

B. *Personal Jurisdiction and Entity Jurisdiction*

As the name makes clear, *person*al jurisdiction traditionally concerns a court's power over a person. With the rise of corporations and other organizations, courts began to apply the same doctrine to non-persons.[368] However, there are four fundamental differences between natural and artificial persons that render this union suspect: individuals have bodies and artificial persons do not; individuals can act and exist only in one place at a given time while corporations can act and exist in numerous places simultaneously; corporations can live forever; and to be created and exist, corporations require governments while individuals do not.

These differences are relevant in this procedural context because personal jurisdiction is traditionally founded on a court's actual physical power over the defendant.[369] Physical presence unrelated to the suit at hand is sufficient to sustain personal jurisdiction.[370] For individuals, physical presence is easy enough to determine. The court simply asks where the defendant's feet touched the ground when she was served with process.[371]

For corporations, this simple question quickly turns into metaphysical

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[367] *See* Power Mfg. Co. v. Saunders, 274 U.S. 490, 493–94 (1927) ("No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible; the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.").

[368] For reasons of time and space, I will focus in this section on corporations and leave aside other business organizations and entities. Similar, though non-identical, arguments could be made for those entity types in the context of personal jurisdiction.

[369] *See* Burnham v. Super. Ct. Cal., Marin Cnty., 495 U.S. 604, 610–12 (1990) (reciting antecedents in English and American common-law practice); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("Historically the jurisdiction of courts to render judgments in personam is grounded on their de facto power over the defendant's person."); McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power."); *see also* United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 35 (1st Cir. 1999) ("It is common ground that, for a court to render a binding decision consonant with due process, it must have personal jurisdiction over the parties, that is, the power to require the parties to obey its decrees."); Doctor's Assocs., Inc. v. Reinert & Duree, P.C., 191 F.3d 297, 302 (2d Cir. 1999) ("Subject to exceptions, a court's in personam order can bind only persons who have placed themselves or been brought within the court's power.").

[370] *See Burnham*, 495 U.S. at 619–20 (discussing the history and application of transient jurisdiction).

[371] *Cf.* Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (holding that the defendant was amenable to service while flying above the forum in an aircraft and thus within the "territorial limits" of the state) (quotation marks omitted).

quicksand.[372] Corporations have no feet. They also do not think, act, or exist; only individuals working on behalf of the corporation do. Insofar as the corporation exists, such existence must be attributed to the acts and existence of individuals.[373] All corporate action is vicarious. To determine where a corporation exists, we must examine the acts and existence of individuals related to the corporation.[374] But these individuals also think, act, and exist when not working for or on behalf of the corporation. We simply cannot equate the individuals with the corporation. Showing corporate presence thus requires "an act of judgment which selects and attributes to the corporation, from the mass of activity done or purporting to be done on its behalf, those acts of individuals which are relevant for the particular statutory purposes and policies in hand."[375]

This metaphysical difference between natural and artificial entities has generated some of the enduring personal jurisdiction puzzles that continue to confuse and frustrate courts, commentators, and students of personal jurisdiction.[376] What activities of corporate agents make the corporation present in the forum so that it can be served? Can any corporate agent make the corporation present? Does one isolated instance of presence suffice as it does for individuals?[377] In a world where corporations have far reaching operations that span many jurisdictions, these abstract questions about ascribing presence to an entity that has no body become pressing.[378]

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[372] *See* Philip B. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts: From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 577–86 (1958) (discussing the particular difficulties of "consent," "presence," and "doing business" with regards to personal jurisdiction over corporations).

[373] *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (describing a corporation as "an artificial being, invisible, [and] intangible").

[374] *See, e.g.*, *Int'l Shoe Co.*, 326 U.S. at 316 ("Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.") (citation omitted).

[375] United States v. Scophony Corp. of Am., 333 U.S. 795, 804 (1948).

[376] *See id.* at 802 ("The source of trouble lies in the use of verbs descriptive of the behavior of human beings to describe that of entities characterized by Chief Justice Marshall as 'artificial . . . , invisible, intangible, and existing only in contemplation of law.'") (quoting *Trs. Of Dartmouth Coll.*, 17 U.S. at 636).

[377] *Compare* James-Dickinson Farm Mortg. Co. v. Harry, 273 U.S. 119, 122 (1927) ("Jurisdiction over a corporation of one State cannot be acquired in another State or district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the company."), *with* Pa. Fire Ins. Co. v. Gold Issue Mining Co., 243 U.S. 93, 94 (1917) ("[S]ervice of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the State."), *and* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir. 1990) (concluding that state courts had personal jurisdiction over foreign corporations and their agents where actions on behalf of corporation manifested their consent to being amenable to suit in the states).

[378] *See, e.g.*, Travelers Health Ass'n v. Virginia. *ex rel.* State Corp. Comm'n, 339 U.S. 643, 648–49 (1950) ("[I]f Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska.

Courts tackled these questions by examining when and where agents represent corporations through actions, rather than their own individual presence.[379] Examining vicarious corporate activity has spanned various tests, from the doing-business test[380] to the current minimum contacts test.[381] Despite their various problems, these tests are vital in determining when a corporation can be sued in a forum.[382] But these tests are of little interest in most suits against individuals.[383] Even where they are, the elements of these tests mean very different things for individuals and corporations. Individuals have very different "continuous and systematic" contacts with a forum than corporations. They do not target[384] or "purposefully avail[]"[385] themselves of a forum as corporations do. Most individuals do not have the institutional capacity to foresee the

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Health benefit claims are seldom so large that Virginia policy holders could afford the expense and trouble of a Nebraska law suit."); R.R. Co. v. Harris, 79 U.S. (8 Wall.) 65, 83–84 (1870) (noting that if a corporation from one state doing business in another is not "present" in that state then "there could be no legal redress short of the seat of the company in another State . . . . In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility.").

[379] Represent is the act of making something present again. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 247 (1967); *cf.* Goldey v. Morning News, 156 U.S. 518, 522 (1895) (noting that there is no personal jurisdiction where service of process was accomplished within the jurisdiction upon corporate president, temporarily within the jurisdiction, and "not charged with any business of the corporation"); Pope v. Terre Haute Car & Mfg. Co., 87 N.Y. 137, 141 (N.Y. 1881) ("It has never been supposed that a service upon one of the [corporate officers] is required to be made while the officer is acting officially or engaged in the business of the corporation.").

[380] *See, e.g.*, Phila. & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265 (1917) ("A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there.").

[381] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (concluding that a defendant must have certain "minimum contacts" to the area to be subjected to in personam jurisdiction).

[382] *See* Gross v. Chevrolet Country, Inc., 655 So. 2d 873, 878 (Miss. 1995) (depicting the importance of the "doing business" test by deciding that Chevrolet could not be sued in Mississippi where it did not purposefully perform any business in the forum); Kenny v. Alexson Equipment Co., 432 A.2d 974, 980, 984 (Pa. 1981) (emphasizing the importance of the minimum contacts test, and deciding that an isolated transaction does not meet the requirements of the test).

[383] Predictably, the brunt of the personal jurisdiction doctrine develops these days with reference to corporations, as the names of the most famous cases in this area show. *See* J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851–52 (2011); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 586, 595 (1991); Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., Solano Cnty., 480 U.S. 102, 113–14 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 463–68 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415–16 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980); *Int'l Shoe Co.*, 326 U.S. at 317.

[384] *See, e.g.*, Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1081 (9th Cir. 2003) ("Businesses who structure their activities to take full advantage of the opportunities that virtual commerce offers can reasonably anticipate that these same activities will potentially subject them to suit in the locales that they have targeted.").

[385] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

jurisdictional consequences of their actions.[386] Considerations of fairness and burdens also play out very differently for individuals and corporations.[387] This problem is compounded by the fact that corporations can be and act in multiple places simultaneously, while individuals are bound to one place and one time.[388] Similarly, legal persons can own and control other legal persons.[389] Finally, corporations can exist forever and are thus capable of accumulating more contacts with a forum over a longer time-span.[390]

The metaphor of domicile is another way that courts and commentators have tried to overcome the non-corporal aspect of corporations in an area of law founded on corporal existence. Individuals are typically at home somewhere and have a special relationship with that place. Corporations, similarly, have a unique relationship with their state of incorporation. Courts and commentators have analogized the relationship of individuals to their home with the relationship of corporations to their place of incorporation.[391]

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[386] *See Burger King Corp.*, 471 U.S. at 474 (noting that it would be unfair to subject an individual to litigation in a foreign jurisdiction if he or she could not reasonably anticipate that his or her actions would create personal jurisdiction there); *World-Wide Volkswagen Corp.*, 444 U.S. at 297 (stating that it is difficult for a defendant to determine whether his or her conduct would allow him or her to reasonably anticipate being connected with the state's jurisdiction).

[387] *See Asahi Metal Indus. Co.*, 480 U.S. at 113 ("A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief.").

[388] *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (restricting extra-territorial application of federal statutes by concluding that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices").

[389] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (involving North Carolina's exercising personal jurisdiction over a foreign subsidiary of a legal person, a corporation); *see also* Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 1–2 (1986) (explaining how the United States could have jurisdiction over a foreign subsidiary if that subsidiary's parent is incorporated in the United States).

[390] *See* Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 107 (2010) ("As corporations increasingly began to do major amounts of business outside of their states of incorporation, states tried to extend their own courts' jurisdiction over claims arising out of corporate activity within the state. The Supreme Court expanded the scope of personal jurisdiction over corporations by ruling that if a corporation was doing business within the forum state, it was present for the purposes of the territorial rule of personal jurisdiction.") (footnotes omitted); *see also generally* BLACKSTONE, *supra* note 361, at 18 ("[Corporations] may maintain a perpetual succession, and enjoy a kind of legal immortality.").

[391] *See, e.g.*, *Goodyear Dunlop*, 131 S. Ct. at 2853–54 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) ("Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporations—also indicate general submission to a State's powers."); *see also* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 735 (1988) ("A corporation usually has one state of incorporation and one principal place of business, and individuals have a single domicile."); Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623, 675 (2012) ("Both Europeans and Americans allow general jurisdiction in

But these two relationships are inherently different. For corporations, the state of incorporation grants the corporation existence. States can deny corporations existence and dissolve them without raising the same moral concerns that arise when denying individuals existence or dissolving them.[392] Also, since corporations are created by the laws of the state where they are incorporated, states can condition the right to incorporation. States frequently extract consent to be sued in their courts and appoint a local agent for local service as a condition of incorporation and doing business in the state.[393] This bargain is premised on the notion that the state could prevent the corporation from doing business altogether.[394] However, individuals do not depend on the state for their existence in the same way as corporations and can conduct business outside of their home state without having to agree to the conditions of a foreign forum.[395] Corporations can be asked to consent to jurisdiction in ways that

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the place where the defendant, individual or corporation, is 'at home.'"); Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 45–46 (2012) (discussing a corporation's residence as determined by the corporation's reasonable ability to avoid contacts with a forum); E. Hilton Young, *The Nationality of a Juristic Person*, 22 HARV. L. REV. 1, 3 (1908) ("A juristic person is domestic in the state by which it was created (or by which it was expressly authorized).").

[392] For some time, many jurisdictions required special legislative acts for each act of incorporation. *See* BLACKSTONE, *supra* note 361, at 18 ("[W]ith us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given."); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 188–91 (2d ed. 1985) (explaining that for part of the 19th century legislatures granted charters "by statute, one by one").

[393] *See, e.g.*, Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1855) (acknowledging that a corporation could be subject to a lawsuit vis-à-vis its attorney acting in the subject state); *see also* Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 9–16 (1990) (providing a summary of the corporate consent doctrine). Notice also that courts have struggled to infer the scope of this consent. *See, e.g.*, Sondergard v. Miles, Inc., 985 F.2d 1389, 1393, 1396 (8th Cir. 1993) (holding that the appointment of an agent implies consent to general jurisdiction); Pittock v. Otis Elevator Co., 8 F.3d 325, 328–29 (6th Cir. 1993) (allowing consent for specific jurisdiction only if jurisdiction has been established under minimum contacts analysis); Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183–84 (5th Cir. 1992) (holding that a corporation's statutory registration in the forum state of Texas must ultimately pass constitutional muster if personal jurisdiction over the corporation is to be deemed proper).

[394] *See* Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction and Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 157 (2013) (recognizing a state could get consent from a corporation if it were able to prevent other corporations from conducting business within the forum).

[395] U.S. CONST. art. IV, § 2, cl. 1 (amended 1924) (protecting the fundamental rights of all citizens as they travel from state to state); Flexner v. Farson, 248 U.S. 289, 293 (1919) ("[I]t is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed . . . .") (citations omitted).

individuals cannot.[396]

The fundamental differences between individuals and corporations are thus procedurally significant in the context of personal jurisdiction. Courts must resort to different arguments when exercising personal jurisdiction over natural persons rather than artificial persons. However, personal jurisdiction doctrine is nominally a unified trans-personal doctrine that applies to all entities.[397] This approach has denied courts the flexibility to craft rules that are attentive to the fundamental differences between entities with and without a corporal existence.[398] Predictably, the result has been conceptual confusion.[399] The doctrine tries to craft a unified standard for fundamentally different entities. Concepts like "home" that make sense for natural persons are applied to artificial persons. Limitations appropriate for artificial entities are stretched to accommodate individuals. Currently, the two halves of the doctrine are shackled together. This prevents a clear articulation of personal jurisdiction's goals and justifications.[400]

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[396] *See, e.g.*, Flexner v. Farson, 109 N.E. 327, 329 (Ill. 1915), ("A nonresident person, unlike a corporation, does business in any state of the Union, not by virtue of the consent of that state but under the federal Constitution. His property which he sends into the state he submits to the jurisdiction of its courts, but not his person. We do not see how it can be presumed that his right to do business in that state would be waived because of a statute like the one in question, where there was no necessity or consideration for his so doing."), *aff'd*, 248 U.S. 289 (1919); *see also* Pennoyer v. Neff, 95 U.S. 714, 735–36 (1877) ("Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law."), *overruled by* Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

[397] *See Shaffer*, 433 U.S. at 212 ("We therefore conclude that *all assertions* of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.") (emphasis added).

[398] *See* United States v. Scophony Corp. of Am., 333 U.S. 795, 803 (1948) ("The process of translating group or institutional relations in terms of individual ones, and so keeping them distinct from the nongroup relations of the people whose group rights are thus integrated, is perennial, not only because the law's norm is so much the individual man, but also because the continuing evolution of institutions more and more compels fitting them into individualistically conceived legal patterns. Perhaps in no other field have the vagaries of this process been exemplified more or more often than in the determination of matters of jurisdiction, venue and liability to service of process in our federal system.").

[399] *See, e.g.*, Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 564 (1995) ("[J]urisdiction in the United States is a mess."); Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 572 n.17 (1991) (describing the Supreme Court's "uncertainty and confusion" with the personal jurisdiction doctrine); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 102 (1988) (stating that the personal jurisdiction doctrine is a "body of rules without reasons").

[400] *See, e.g.*, Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1589 (1992) ("[The Supreme Court has] not given us a coherent philosophical foundation for the constitutional restrictions they recognize."); Jay Conison, *What Does Due Process Have To Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) ("[Personal jurisdiction doctrine] is a body of

A natural conclusion of this argument is to bifurcate the doctrine into two parts: personal jurisdiction and entity jurisdiction. This would allow courts to recognize the fundamental differences between natural and artificial persons and craft rules uniquely suited for each.[401] Splitting the doctrine asunder would free each branch to develop without the conflicting demands and limitations of the other branch. Courts could avoid broad abstractions and finally provide specific accounts of what contacts between a specific entity and the forum are jurisdictionally significant.[402]

Persons and entities are different. The personal jurisdiction doctrine will never be coherent until we recognize the fundamental differences between natural and artificial persons, as well as the procedural implications of these differences.

VI. CONCLUSION

A vibrant literature in procedural commentary debates the practical and normative appeal of uniform rules.[403] This literature has focused on types

law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined.").

[401] *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 486 (1985) (internal quotation marks omitted) (arguing that corporations may not utilize jurisdictional rules against small consumers so as to "crippl[e] their defense") (citing Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 329 (1964) (Black, J., dissenting)); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 422 (1984) (Brennan, J., dissenting) ("[O]ur economy has increased the frequency with which foreign *corporations* actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident *corporations* within the scope of their respective jurisdictions.") (emphasis added).

[402] *See* Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 871, 885 (2012) (arguing that nationwide contacts that are inclusive of a forum state is the best way to create a consistent jurisdictional doctrine); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 418 (2004) (contending that the "purposeful availment" requirement is an empty analysis because the contacts might not bear any relationship with the forum and the significance put on some contacts over others is arbitrary).

[403] *See, e.g.*, Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 698, 710, 715 (1988) (describing the Supreme Court's efforts to achieve uniformity but with little success); Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 722, 727 (2013) (questioning specialized procedural or remedial treatment for cases involving constitutional status of a legal claim); Fairman, *supra* note 357, at 1137–38, 1042, 1064 (recognizing the lack of uniformity with the usage of Rule 8 and with the rules in general); Arthur R. Miller, *supra* note 357, at 90–94 (stating that transsubstantivity within the Federal Rules has been abandoned); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 600 (2005) (explaining that a trans-substantive role for judges remains while it has ended for the Federal Rules); Resnik, *Failing Faith*, *supra* note 174, at 526 (deciding that the rules have been slightly undermined); Subrin, *Federal Rules, Local Rules, and State Rules*, *supra* note 67, at 2048–51 (1988) (considering the reasons why non-trans-substantive civil procedure exists); Subrin, *Fudge Points*, *supra* note 11, at 45–46 (suggesting that creating uniformity would force lawyers to be more ethical to their clients). For notable defenses of the trans-substantive norm, see Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2087–89 (1989) (explaining the invalidity of many

of cases, but has neglected variation based on the types of litigants. While trans-substantively has triggered vigorous debate among scholars and courts, trans-personality has not yet been identified as a contested principle underlying civil procedure.[404]

This omission blinds scholars, legislators, and courts to the important differences among dissimilar types of natural and artificial persons. Without a theoretically grounded understanding of personhood as applied to procedure, scholars and courts have been unable to articulate when procedures should apply to all kinds of persons and when procedures may legitimately splinter into different regimes based on personhood-specific traits.

Treating different types of natural and artificial persons alike has important consequence to specific litigants and shapes the flow of litigation. In doing so, procedure can affect the enforcement levels of substantive legal regimes by targeting specific entity types for special treatment. Perhaps even more importantly, equal procedural treatment signals social standing and thereby encourages equal substantive treatment. Given these stakes, the choice between entity-specific procedures and trans-personal procedures should be the result of careful deliberation instead of institutional inertia.

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defenses for the trans-substantive norm); Geoffrey C. Hazard, Jr., *Discover Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246 (1989) (offering a defense that the rules afford better access to courts); *see also* Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 421–22 (2010) (exploring the "fundamental principle" that "procedural rules applied in a federal case should not be sensitive to location"); Rubenstein, *supra* note 69, at 1885 ("[W]e have generally selected procedural rules that are 'trans-venue' in nature, meaning that civil cases in Chicago will be processed in the same manner as civil cases in Peoria.") (footnote omitted).

[404] *See* Cover, *supra* note 65, at 718 (abstracting the need for particular substantive objectives outside the "trans-substantive values").