THE CLASH OF PROCEDURAL VALUES

by

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Should civil litigation be fast, inexpensive, or accurate? When these goals clash, which one should prevail? These questions are the subject of countless court opinions, policy arguments, academic debates, and civil procedure exams. Yet discussion of procedural values to date has taken place in the dark, lacking vital information about which procedural values matter to actual litigants.

This Article fills that void with empirical analysis. It analyzes an original dataset based on 1,200 surveys mailed to a broad range of litigants and judges asking for their views on procedural values. It interprets survey responses by introducing to legal scholarship a novel combination of methodological tools: multidimensional scaling and circular regressions.

The analysis reveals a consensus among surveyed groups for not *valuing highly speed, cost, and privacy. This consensus cuts against the prevailing wisdom in policy-making circles, court opinions, and academic literature.*

Beyond this consensus, this Article also reveals significant conflict between groups over which of the remaining procedural values are most important. Federal judges prioritize fairness and participation. Large corporations value accuracy and finality. Pro se litigants stress the importance of accessibility and simplicity. These findings raise pressing concerns: whenever we favor one procedural value over another, we favor some litigants over others. Conflict over prioritizing procedural values is, ultimately, conflict about prioritizing litigants themselves.

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* Associate Professor at the University of Oklahoma College of Law. Many thanks to Melissa Mortazavi and Maryellen Fullerton for helpful comments and suggestions on the design and execution of the survey. Many thanks for comments and suggestions on earlier drafts to Professors Robert Bone, Norman Spaulding, Steven Gensler, Alexandra Lahav, Howard Wasserman, Andrew Bradt, Alexander Reinert, Nicholas Stephanopoulos, Monika Ehrman, Kit Johnson, Joshua Sellers, Sarah Burstein, and reviewers and participants for the Law & Society Annual Meeting, the SEALS Annual Conference, the University of Arkansas School of Law Faculty Workshop, the Oklahoma Junior Scholars Conference, and the Civil Procedure Workshop. But the most thanks go to the many survey participants who took the time and care to fill out the survey. Thank you.

INTRODUCTION

Should civil litigation be fast, inexpensive, or accurate? When these values clash, which one prevails? These questions lie at the core of American procedural law. They are the subject of countless court opinions, policy arguments, academic debates, and civil procedure exams. What is most important in civil litigation?

Recent revisions of the Federal Rules of Civil Procedure (Rules) have put these questions back into the spotlight.[1] The new amendments focus on Rule 1, the "Master Rule," and discovery tools with the aim to temper the "over-use, misuse, and abuse of procedural tools that increase cost and result in delay."[2] The amendments reflect a broad trend to increas-

[1] *See, e.g.*, Revisions of FED. R. CIV. P. 1, 4, 16, 26, 34, and 37 (effective December 1, 2015).

[2] FED. R. CIV. P. 1 advisory committee's note to 2015 amendment, available at http://www.uscourts.gov/file/18022/download; *see also* Chief Justice Roberts, *2015 Year-End Report on the Federal Judiciary*, U.S. SUPREME COURT 5–6 (Dec. 31, 2015), http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf ("Rule 1 of the Federal Rules of Civil Procedure has been expanded by a mere eight words, but those are words that judges and practitioners must take to heart.").

ingly emphasize speedy, private, and inexpensive adjudication.[3] This emphasis frequently comes at the expense of other procedural values like participation, fairness, and accessibility. Tradeoffs between these procedural values are often inevitable.[4] For example, restrictive pleading and powerful summary judgment standards might reduce cost and delay—but at the risk of accuracy.

Such tradeoffs might be unavoidable, but they need not be made in the dark. Judges, academics, and lawmakers often justify procedures in terms of protecting certain values on behalf of litigants. However, little is known about what actual users of the civil justice system care about or want. This Article makes those preferences known and heard. Using an original dataset based on 1,200 physically mailed surveys to a broad range of litigants and judges, this Article challenges doctrinal assumptions and received wisdom by being the first to document preferences over procedural values empirically. It makes methodological, empirical, and normative contributions to the existing literature.

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[3] *See, e.g.*, Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 858 (2015) [hereinafter Tidmarsh, *Litigation Budget*] ("The central theme in the past thirty years of American procedural reform—with its rise of case management and its emphasis on proportional discovery—has been the effort to keep litigation costs under control."); Jay Tidmarsh, *Resolving Cases "On The Merits,"* 87 U. DENV. L. REV. 407, 408 (2010) [hereinafter Tidmarsh, *Resolving Cases*] ("[Recent reform] efforts can loosely be associated with a law-and-economics perspective (in the sense that they are all attempts to rein in perceived excess costs in the present litigation system) . . . ."); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1813 (2014) (noting that recent Supreme Court decisions on procedural questions are "laced with discussion of the burdens of adjudication"); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1786 (2015) ("Rather than considering a range of costs and benefits, the U.S. Supreme Court, Congress, and rulemakers view a particular kind of litigation costs as the near-exclusive concern. This singular focus has given rise to the current efficiency norm."); *see also* FED. R. CIV. P. 1 advisory committee's note to 1993 amendment (emphasizing "the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay").

[4] *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("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."); *cf.* Tidmarsh, *Resolving Cases*, *supra* note 3, at 413 ("It is the guarantee of a full opportunity—unfettered by concerns for expense, delay, or advancing certain political interests—that defines the 'on the merits' principle."); Kevin M. Clermont, *Res Judicata as Requisite for Justice*, 58 RUTGERS U. L. REV. 1067, 1080 (2016) ("no realistic conception of justice would call for pursuing truth or any other aim without concern for cost"); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424–25 (1982) [hereinafter Resnik, *Managerial Judges*] ("Judicial management has its own techniques, goals, and values, which appear to elevate speed over deliberation, impartiality, and fairness.").

The first contribution is methodological in nature. The Article introduces a new dataset on complex preferences litigants and judges have over a range of competing procedural values. The Article then combines two methods to analyze and present such data: multidimensional scaling and circular regressions. The Article is the first in legal scholarship to utilize circular regressions.

The data, paired with this new method of analyzing preference rankings, leads to empirical contributions. The Article finds a broad consensus among the surveyed groups for *not* valuing highly speed, cost, and privacy. This finding cuts against numerous Supreme Court opinions and commentaries that lament the perceived high costs of litigation, the slow pace of litigation, and the danger to private information posed by broad discovery tools.[5] Beyond consensus on not valuing speed, privacy, and cost highly, the survey also reveals significant conflict between groups over which of the remaining procedural values are most important. Federal judges prioritize fairness and participation above all else. Large corporations emphasize the values of accuracy and finality. Pro se litigants stress the importance of accessibility and simplicity. Different kinds of litigants desire very different things.

This empirical contribution raises a vital, but overlooked, normative point: procedure is not neutral. Whenever we favor one procedural value over another (as we often must), we also favor some litigants over others. Conflict over procedural values is conflict over which litigants to support and which to hinder. However, this choice need not be made blindly. Armed with the right data and methodological tools,[6] courts, legislators, and commentators can now tailor their choices to reflect fundamental normative commitments. Conversely, they can no longer hide behind broad hopes of helping all litigants uniformly when the data indicate otherwise.

This Article focuses on procedural values in the context of civil litigation. However, its approach and methodology is applicable in any area of law where there is conflict over ends and values—that is to say, everywhere. As such, the following sections present an initial survey of a vast new field of legal study.

I. DOCTRINAL AMBIGUITIES: OMISSIONS AND LIMITATIONS

Procedural values shape the design and interpretation of procedural rules. Because of this vital role, many procedural systems explicitly mention procedural values and utilize procedural values to animate the development of case law. This Section introduces the uses of procedural values in civil procedure rules, scholarship, and case law. It finds im-

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[5] *See infra* Section IV.A.

[6] *See infra* Section II.B.

portant omissions and limitations in the doctrinal literature that empirical scholarship can help to clarify.

A. The Ambiguous Master Rule

Federal Rule of Civil Procedure 1 is the "Master Rule" that "affects how all the other Rules are interpreted and applied."[7] It instructs that the rules "should be construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[8] Other federal procedural systems share the same or similar articulations of procedural values.[9] Statutes[10] and lo-

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[7] Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 288 (2010); *see also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1011, at 55–59 (4th ed. 2002); *In re* Paris Air Crash of Mar. 3, 1974, 69 F.R.D. 310, 318 (C.D. Cal. 1975) (Rule 1 is "the most important rule of all.").

[8] FED. R. CIV. P. 1. Other procedural systems similarly provide guiding procedural values. *See, e.g.*, G.A. Res. 68/109, UNCITRAL Arbitration Rules, at 15 (Dec. 16 2013) ("The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."); LCIA ARB. R. 14.4(i)–(ii) (2014) (The arbitration tribunal has "a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute."); Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 63 (emphasizing the need to "[ensure] access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes"); U.K. Civ. P. R. 1.1 ("These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost" which entails "ensuring that the parties are on an equal footing," "saving expense," and "ensuring that [a case] is dealt with expeditiously and fairly . . . ."); Kenya Civil Procedure Act of 2010, Chapter 21, § 1A(1) ("The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.").

[9] *See, e.g.*, FED. R. BANKR. P. 1001 ("[The Federal Rules of Bankruptcy Procedure] shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."); FED. R. CRIM. P. 2 ("These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."); FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

[10] *See, e.g.*, 28 U.S.C. § 471 (2012) ("The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."); 29 C.F.R. § 18.10 (2016) ("These rules govern the procedure in proceedings

cal rules[11] echo Rule 1. Many states also incorporate identical[12] or similar provisions into their procedural rules.[13] The Supreme Court frequently explains and justifies interpretations of procedural rules with reference to Rule 1.[14] For example, one of the most cited passages of the Supreme

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before the United States Department of Labor, Office of Administrative Law Judges. They should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding."); 33 C.F.R. § 20.103 (2016) ("Each person with a duty to construe the rules in this part in an administrative proceeding shall construe them so as to secure a just, speedy, and inexpensive determination."); 50 C.F.R. § 228.3 (2016) ("The regulations shall be construed to secure the just, speedy and inexpensive determination of all issues raised with respect to any waiver or regulation . . . .").

[11] *See, e.g.*, U.S. DIST. CT. R. N.D. CAL. 1-2(b); U.S. DIST. CT. RULES C.D. ILL., GENERAL AND CIVIL CDIL- LR 5.5(B)(4); W.D. MICH. LCR 1.6; U.S. BANKR. CT. R. W.D. LA.

[12] *See, e.g.*, ARK. R. CIV. P. 1; FLA. R. CIV. P. 1.010; IDAHO R. CIV. P. 1; MINN. R. CIV. P. 1; WIS. STAT. ANN. § 801.01 (2017).

[13] *See, e.g.*, MICH. CT. R. 1.105 ("These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties."); N.Y. C.P.L.R. 104 (McKinney 2017) ("The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding."); KAN. STAT. ANN. § 60-102 (2017) ("The provisions of this act shall be liberally construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.").

[14] *See, e.g.*, Dietz v. Bouldin, 136 S. Ct. 1885, 1891 (2016) (noting that federal district courts "around the country use every day" many standard procedural devices that are not explicitly provided in Rules or statutes "in service of Rule 1's paramount command: the just, speedy, and inexpensive resolution of disputes"); Nelson v. Adams USA, Inc., 529 U.S. 460, 465 (2000) (interpreting rules to amend and supplement pleadings with reference to the aim of securing the just, speedy, and inexpensive determination of every action); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617–18 (1997) (explaining the historic expansion of class actions "as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one"); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 409 (1990) (Stevens, J., concurring in part and dissenting in part) ("Rule 11 and Rule 41(a)(1) are both designed to facilitate the just, speedy, and inexpensive determination of cases in federal court."); Torres v. Oakland Scavenger Co., 487 U.S. 312, 319 (1988) (Scalia, J., concurring in the judgment) (arguing for an interpretation of Appellate Rules "according to their apparent intent" because the "Rules of Civil Procedure do[] not prescribe that they are to be 'liberally construed,' but rather that they are to be 'construed to secure the just, speedy, and inexpensive determination of every action'"); Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 543 (1987) (interpreting the interaction between discovery provision under the Federal Rules and treaty obligations under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters with reference to "the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts"); Foman v. Davis, 371 U.S. 178, 181 (1962) (interpreting amended pleadings with reference to Rule 1 and stating that "[i]t is . . . entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities"); Brown Shoe Co. v. United States, 370 U.S. 294,

Court's interpretation of the requirements for summary judgment turns on the meaning of Rule 1.[15] This reliance on Rule 1 and similar provisions reflects the vital role procedural values play in civil procedure.[16]

But these rules and statutes are silent on whether speedy is more important than inexpensive.[17] Similarly, the rules do not tell us what to do when these procedural values are in conflict with each other. Often they are, and courts have to prioritize one over the other.[18] For example, many summary judgment motions increase speed and reduce expense but might come at the cost of accuracy. A trial might come closer to an accurate finding of liability, but only at the cost of great expense and time.

The picture becomes murkier still once we consider that Rule 1 mentions only a small subset of procedural values. Some procedural values are not explicitly mentioned in the Rules but are baked deep into the fabric of the Rules.[19] For example, accuracy in adjudication (holding liable parties liable, non-liable parties non-liable) is not clearly mentioned in Rule 1. This absence stands in sharp contrast to articulations of adjudicative goals elsewhere that emphasize the value of accuracy.[20] Still, scholars and judges routinely take it as a given that the Rules value accurate adjudications.[21]

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306 (1962) (noting that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure").

[15] Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'").

[16] *See, e.g.*, *In re* Paris Air Crash of Mar. 3, 1974, 69 F.R.D. 310, 318 (C.D. Cal. 1975) ("The most important rule of all is the last sentence of F.R.Civ.P. 1 . . . . It is this command that gives all the other rules life and meaning and timbre in the realist world of the trial court.").

[17] *See, e.g.*, Bone, *supra* note 7, at 288 (Rule 1 is "at best hopelessly vague and at worst downright misleading."); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 158 (2015) ("Rule 1 sends murky, distinctly mixed, signals.").

[18] Bone, *supra* note 7, at 288 (arguing against the "assumption [] that the three values embodied in the phrase 'just, speedy, and inexpensive' can be applied without tradeoffs or conflicts and without sacrificing substantive justice for speedier resolution or lower costs"); *see also* Resnik, *Managerial Judges*, *supra* note 4, at 424–25 ("Judicial management has its own techniques, goals, and values, which appear to elevate speed over deliberation, impartiality, and fairness.").

[19] *See, e.g.*, Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1943) (emphasizing the value of simplicity); Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517 (1925) (same).

[20] *See, e.g.*, FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, *to the end of ascertaining the truth* and securing a just determination." (emphasis added)).

[21] *See generally* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 244–45 n.157–69 (2004) (citing cases and remarking that "[o]n the surface, it seems obvious

Other important values are similarly embedded in procedural law beyond the Federal Rules. For example, the Supreme Court frequently resolves ambiguity in jurisdictional statutes,[22] and even the preclusion doctrine,[23] by emphasizing the importance of simplicity. Elsewhere, courts and commentators emphasize the importance of participation,[24] privacy, fairness,[25] and accessibility.

Beyond highlighting the importance of single procedural values, courts and commentators also underscore how some doctrines contain two or more conflicting procedural values.[26]

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that the system strives for correct outcomes"); *see also* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994).

[22] *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 80, 96 (2010) ("[W]e place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible" and this entails "[a]ccepting occasionally counterintuitive results [as] the price the legal system must pay to avoid overly complex jurisdictional administration . . . ."); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1225 (2004) ("One ought not make a fetish of bright line rules, but they have their place, and one place in particular is the law of jurisdiction."). *Cf.* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011) (arguing that simplicity in the context of subject matter jurisdiction is overvalued). *See generally* Janice Toran, *'Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990).

[23] *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 901 (2008) ("In [the context of preclusion doctrine] crisp rules with sharp corners are preferable to a round-about doctrine of opaque standards.").

[24] *See, e.g.*, Richards v. Jefferson County., 517 U.S. 793, 798 (1996) (emphasizing the "deep-rooted historic tradition that everyone should have his own day in court") (citations omitted); Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (internal quotations and citations omitted)). *See generally* Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 401 (1910) ("With respect to . . . rules of procedure, we should make nothing depend upon them beyond securing to each party his substantive rights—a fair chance to meet his adversary's case and a full opportunity to present his own."); s*ee also* Solum, *supra* note 21, at 274 ("Procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate," and "participation has a value that cannot be reduced to accuracy, because a core right of participation is essential for the legitimacy of adjudication.").

[25] *See generally* Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 165 (1997) ("[B]eing treated fairly by authorities, even while being sanctioned by them, influences both a person's view of the legitimacy of group authority and ultimately that person's obedience to group norms.").

[26] *See generally* Clermont, *supra* note 4, at 1076, 1081 (Res judicata showcases "the eternal tension between validity and finality" because "[t]here is an obvious tradeoff between getting things right and getting them finished.").

B. How to Prioritize Among Conflicting Procedural Values

Drafting, amending, and interpreting procedural rules requires prioritizing some of these procedural values over others. This is true in all procedural settings, from joinder, to *res judicata*,[27] to pleading, to jurisdiction. In all these settings, tradeoffs between accuracy, speed, and expense are inevitable.[28] But when courts have to choose among them, how do they choose? This question is tied up with another: who benefits from their choices? Different litigants might desire very different things from the civil justice system. Some might lament the cost and expense of litigation, while others might lament the decline of adjudications on the merits[29] or an overly weighty emphasis on finality.[30]

Commentators have long recognized the importance and centrality of these procedural values.[31] How procedural values are ranked shapes the functioning of procedural systems and the structure of litigation.[32] A system with a singular focus on participation will be more expensive and time-consuming than one whose primary concern is to minimize litiga-

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[27] *See generally id.* at 1075–76 (noting that "the U.S. Supreme Court in a sizable series of cases has embraced res judicata with an especially fervent ardor" that "demonstrated a rather remarkable acceptance of simplistic notions of efficiency and disregard of real costs in fairness").

[28] *See, e.g.*, Solum, *supra* note 21, at 185–86 ("Procedural perfection is unattainable. No conceivable system of procedure can guarantee perfect accuracy. Approaching procedural perfection is unaffordable because a system that achieved the highest possible degree of accuracy would be intolerably costly.").

[29] *See, e.g.*, Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) ("[O]ur adversary system rates truth too low . . . .").

[30] *See generally* Frederic M. Bloom, *Information Lost and Found*, 100 CALIF. L. REV. 635, 650 (2012) (noting that some litigation rules might "subordinate[] truth to privacy, full access to adversarialism, and cooperation to competition"); Clermont, *supra* note 4, at 1068.

[31] *See, e.g.*, Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 300 ("[Rule 1] was and is the expression of an ideal; certainly no one would claim that the Federal Rules of Civil Procedure have achieved such a purpose."); Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 853 (1989) (describing Rule 1 as encapsulating the "central objective of rules of procedure in the judicial system"); Richard L. Marcus, *Myth & Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 1 (1983) (emphasizing the "central goal of the Federal Rules of Civil Procedure articulated in [R]ule 1"); Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 847 ("Identifying the major ends we seek to achieve through civil dispute processing is, of course, fundamental to thinking about possible reforms.").

[32] *See, e.g.*, Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 842 (1984) [hereinafter Resnik, *Tiers*] ("The relative weights assigned to these features determine the makeup of procedural models and of the structure for court decisionmaking.").

tion costs.[33] Procedures striving for accuracy above all else will not protect privacy concerns.[34] Robust claim and issue preclusion rules that protect finality are rarely simple.

The mix of procedural values at play, and the relative importance assigned to values in that mix, determine the shape of the civil justice system. Because of this, commentators and courts continually argue for a rebalancing of procedural values. Traditionally, courts emphasized the significance of accuracy in adjudication.[35] Litigation was focused on finding liable parties liable and blameless parties blameless. Over time, this focus has shifted.[36] Courts and commentators have pointed out that accurate adjudications are expensive, time-consuming, and often rely on discovery that invades the privacy of litigants.[37] They argue that we should forgo the ideal of accurate adjudication in favor of saving litigants time and mon-

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[33] *Cf.* James A. Henderson, Jr., *A Process Perspective on Judicial Review: The Rights of Party-Litigants to Meaningful Participation*, 2014 MICH. ST. L. REV. 979, 981 ("[R]obust judicial review threatens not only to tip the political balance of power too far in favor of courts over the other governmental branches, but also to tip the balance of power within judicial decision making too far in favor of judges over party-litigants. Thus, even as greater numbers of controversies reach the courthouse under a more expansive regime of justiciable review, the meaningfulness of the party-litigants' participation, once there, may be significantly diminished.").

[34] Perhaps the most famous articulation of the inverse notion is found here: United States v. Nixon, 418 U.S. 683, 710 (1974) (common law testimonial privileges are inherently "in derogation of the search for truth").

[35] *See, e.g.*, 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1182, at 17 (3d ed. 2004) (noting that the foundational belief underlying the Federal Rules is the goal to facilitate the "determination of litigation on the merits"); Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 190 (1958) (arguing that the original drafters of the Federal Rules aimed to put "truth ahead of cleverness and tactics"); James William Moore, *The New Federal Rules of Civil Procedure*, 6 I.C.C. PRAC. J. 41, 42 (1938) ("The Federal rules . . . epitomize the new objective of all procedure . . . that litigation ought to be settled on the merits and not upon some procedural ground."); David W. Peck, *The Complement of Court and Counsel*, 9 REC. ASS'N B. CITY N.Y. 272, 274 (1954) ("The object of a lawsuit is to get at the truth and arrive at the right result."); Tidmarsh, *Resolving* Cases, *supra* note 3, at 408 ("Most of the efforts at procedural reform in the past thirty years have been attempts to walk away from, or tamp down the consequences of, Pound's belief in a simple, uniform, discretionary, 'decide each case on its merits' approach to legal procedure.").

[36] *See generally* Bone, *supra* note 7, at 294–300 (providing a history of Rule 1 with turning points and recent developments); Tidmarsh, *Litigation Budget*, *supra* note 3, at 858 ("The central theme in the past thirty years of American procedural reform—with its rise of case management and its emphasis on proportional discovery—has been the effort to keep litigation costs under control.").

[37] *See generally* Tidmarsh, *Resolving Cases*, *supra* note 3, at 408 ("[Recent reform] efforts can loosely be associated with a law-and-economics perspective (in the sense that they are all attempts to rein in perceived excess costs in the present litigation system) . . . .").

ey.[38] This shift in procedural values drives important doctrinal developments in such diverse areas as summary judgment standards, discovery sanctions, and pleading standards.[39] Shifting from an emphasis on some procedural values to another radically alters the nature, feel, and mechanics of litigation.

While emphasizing this important role of procedural values, scholars have also long recognized that procedural values are difficult to study.[40] Some judges might stress the importance of inexpensive litigation in court opinions while some commentators might point out the value of accurate determinations. Doctrinal work on procedural value has demonstrated the rich variety of procedural values at work in civil litigation.[41] However, such work alone cannot be a complete guide to policymaking because it does not systematically measure what actually matters to the users of the civil justice system.[42]

Because the literature on procedural values has not asked litigants and judges about procedural values, it has largely overlooked that different types of litigants might care about different things. When commentators considered this point, they have been left with guesswork and anec-

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[38] *See, e.g.*, E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 321 (1986) ("Nourishing the fiction that justice is a pearl beyond price has its own price."); Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303, 1305 (2015) ("[I]t is dangerous to be attached to the alluring view that adjudication is primarily about generating results most in accord with the truth of the matter at hand. . . . Nontrivial system costs must usually be incurred to obtain even an approximation of the truth. Attempting to move closer is increasingly costly, and perfect truth is unobtainable."); Tidmarsh, *Litigation Budget*, *supra* note 3, at 857 ("The perceived problem is that obtaining information can be expensive, so that, in the eyes of some, the value of the information discovered is not always worth its cost.").

[39] *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("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."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (encouraging courts to remember "that proceeding to [] discovery can be expensive"). *See generally* Tidmarsh, *Litigation Budget*, *supra* note 3, at 857 ("This impulse—to prevent excessive expenditure on litigation—also underlies recent judicial efforts to raise the pleading bar.").

[40] *See, e.g.*, Resnik, *Tiers*, *supra* note 32, at 841 ("While it is relatively easy to discern procedure's legitimating functions . . . , it is more difficult to examine procedure's value-expressive functions."); Rowe, Jr., *supra* note 31, at 847 ("Whereas it may be easy to enumerate several values, difficulties lie in trying to classify them, to reckon how much they are likely to come into conflict, and to say how to deal with the tradeoffs among them when they do.").

[41] *See generally* Patrick J. Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325 (1995).

[42] Their preferences are of course not the sole guide to how one should design procedural rules. But it would be strange to design a procedural system that is willfully ignorant of the desires and vulnerabilities of the people who actually use it.

dotes. Judges might care about speed (moving the docket along).[43] Companies might care about protecting sensitive information from public discovery. Government litigants might care about accuracy above all else. But is that actually the case? Do empirical findings confirm or confound these well-established expectations? Doctrinal work cannot answer this question. Instead, we must ask different types of litigants and judges directly.

II. DATA: MEASURING PROCEDURAL VALUES

The limitations of doctrinal scholarship point towards the need for empirical work on the question of procedural values. We simply do not know who cares about which procedural values. Are there some procedural values that predominate over others? Are there some that are consistently neglected? Only empirical work can answer these questions. More specifically, we have to ask the users of the civil justice system about which procedural values matter more to them than others. If two are in conflict, which one should prevail? Which is more important in their view?

A. Survey Who

The only way to know which procedural values are more important to litigants and judges than others is to ask them.[44] This raises an important methodological question: who is "them"? This study focuses on different stakeholders that might have very different, well, stakes.[45] I surveyed discrete groups of users of the civil justice system, including law firm partners and associates,[46] in-house counsel at large corporations,[47]

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[43] *See, e.g.*, The Federal Courts Study Committee, *Report of the Federal Courts Study Committee*, 22 CONN. L. REV. 733, 744–48 (1990) (noting that many judges claim extreme docket pressures lead them to prioritize speedy dispositions).

[44] Revealed preferences might be another way but is very difficult to do in this context because of the complexity of litigation and the difficulty of holding confounding variables constant. Similarly, experimental work is conceivable but it would be difficult to approximate the stakes and complexity of litigation in a controlled environment. *Cf.* John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1275 (1974) (reporting results based on a laboratory experiment involving "[e]ighty-four male, undergraduate subjects" and "asking an individual to choose a particular system before he becomes a disputant on either side of a legal dispute").

[45] *Cf.* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1277 (2005) ("The existing empirical literature on the legal system—thin as it is—[] devotes next to no attention to distinctions between litigant types.").

[46] Drawn from the litigation departments of the largest law firms in the U.S. The survey excluded designated discovery attorneys because of their unique focus on only one aspect of litigation.

pro se litigants,[48] charities,[49] Native American Tribes,[50] labor unions, state and federal government litigants,[51] and federal judges.[52]

This research design provides answers to some questions, but not others. The main benefit of this approach is to increase the likelihood that I can make meaningful claims about the litigation preferences of different types of litigants and judges. However, I cannot say what the "typical" litigant wants. To answer that question, the survey would have to focus on a random sample of federal litigants.[53] I did not structure the research design of this Article to answer what a "typical" litigant desires for two reasons: First, I wanted to include federal judges in the analysis. Judges are active participants in the civil justice system and the extent to which their preference over procedural values mirror or diverge from other types of litigants is of extreme normative and practical importance.[54] Second, I could not specify a sampling strategy that did not make troublesome assumptions. For example, many corporations are frequent litigants. If the random sample draws them repeatedly, should

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[47] Drawn from the Fortune 500 list of 2015. *See Fortune 500 list of 2015*, FORTUNE, http://fortune.com/fortune500/2015/list.

[48] The category of pro se litigants is based on a random sample of recent pro se litigants in the federal docket. They were all drawn from cases that terminated in a six-month window in 2014–2015, just prior to sending out the survey. This timing was chosen to maximize response rates because many pro se litigants might not be reachable at the addresses indicated in the dockets in the future (alas, even with the recent time window, numerous envelopes to pro se litigants were returned because they no longer lived at the indicated address). The category of pro se litigants excludes all prisoner rights and habeas cases because of their unique procedural postures. It also excludes actions against attorneys (proceeding pro se) in proceedings related to disbarment (that typically recognize orders of state courts to suspend attorneys from practicing).

[49] Drawn from lists about the largest charities in the U.S. This was likely a mistake as many of the largest charities (as measured by, say expenditures) focus on charitable work abroad and virtually have no domestic litigation activities. Not surprisingly, charities had the lowest response rate to the survey. A better approach might have been to randomly sample charities that litigated in a given time window.

[50] Drawn from the list of all federally recognized Native American Tribes.

[51] Both sets were random samples of recent litigants in federal courts. The state government litigants tend to be from Attorney General offices. The federal government litigants include attorneys in the civil division of the Justice Department, AUSAs throughout the nation, and attorneys for specific government agencies (e.g., the FTC, EPA, FEC, SEC, and the CFPB).

[52] The random sample included mostly district court judges, a few appellate judges, and no Supreme Court Justices.

[53] Or just "litigants" that would include both state and federal litigants. However, state docket sheets are difficult or even impossible to obtain from all jurisdictions, rendering such a sampling approach vulnerable to damaging selection bias concerns.

[54] Similarly, a random sampling approach might have excluded some groups (like Native American Tribes) that have few, but often very important, cases and whose views were important to include.

their answers count for more than a one-shot litigant? Similarly, many litigants (especially pro se litigants) are in the federal system for mere days with one-claim cases against a singular defendant while government litigants often pursue cases that go on for years and years, include many claims, pass through all stages of litigation, and include complex constellations of defendants, third-party defendants, counter-claims, etc. Should the sampling method weigh both equally? I have no principled way to answer these questions. Perhaps other researchers will find ways to structure a sampling method that avoids some of these potential pitfalls.

To sidestep these pitfalls, the Article utilizes a sampling strategy that proceeds group-by-group. This research design allows me to answer some questions (for example how federal judges compare to other groups) but not others (what the "average" litigant wants).

B. Survey What

The previous Section explained who was surveyed and why. This Section explains what the survey asked and how it was administered.

The survey consisted of a cover page, a response page with instructions, and a stamped return envelope.[55] It was mailed to 1200 attorneys and judges ("survey subjects" or "subjects"). The survey used physical mail rather than email requests to increase response rates and to provide assurances of anonymity.[56] Subjects could mail back response pages without including their names or addresses. This increases the likelihood that they respond truthfully to the questionnaire.

Each response page asked survey subjects to rank procedural values from most important to least important.[57] The survey instructions did not allow for ties or weighting.[58] The survey provided a list of nine procedural values and brief definitions of each as explained in Table 1.[59] The defini-

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[55] A randomly selected survey is included in Appendix A.

[56] Also, numerous pro se litigants might not have regular access to the internet or email accounts; numerous docket sheets for cases involving pro se litigants did not include email addresses.

[57] "Important" in this context could mean important to the surveyed person or to the surveyed person's client. The questionnaire did not specify which of the two was in play because of the importance of keeping the instructions identical across all surveyed parties; more specific instructions would make little sense for some groups and could needlessly confuse them (e.g., pro se litigants are always their own client and judges do not have clients). Similarly, the survey asked about importance in the overall context of litigation rather than in specific settings (e.g., pleading, discovery, trial, etc.).

[58] This was done to keep the complexity of the survey within manageable bounds and increase response rates.

[59] The aim of the survey was to focus on concrete procedural values that would likely have salience to litigants and judges, rather than broad and abstract concepts (e.g., adversarial, inquisitorial, legitimate, authoritative, etc.). *Cf.* E. Allan Lind et al.,

tions were provided to ensure uniform understandings of the meaning of each procedural value across subjects. Clearly, each of these procedural values is tremendously complex and multifaceted. Similarly, scholars might quibble with the brief encapsulations the survey provided. The survey aimed to provide a balance between providing too much interpretation (that would also be lengthy and might have discouraged survey participation), and too little information (that would lead to undetectable variability in the responses).

For each subject, the order of the procedural values was randomized so that, for example, accuracy did not always top the list.

Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest, 39 J. PERSONALITY & SOC. PSYCHOL. 643, 643 (1980) ("Recent research and theory on the factor affecting perceptions of fairness and justice have followed two discrete paths; 'distributive justice' work . . . and 'procedural justice' work . . . ."); Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCHOL. REV. 349, 350–52 (2003) (examining the main procedural justice theories). Similarly, some prior research focused on preferences between completely different dispute-resolution mechanisms. *See, e.g.*, E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES VII–IX (1989) (examining preferences between settlement conferences, trials, or arbitration); Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167, 1170 (1993) (examining preferences between mediation and arbitration); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 211 (2004) (summarizing prior research and reporting on "3 experiments that elaborate on previous research regarding preferences for alternative dispute resolution procedures for the resolution of legal disputes").

TABLE 1.

Procedural Values and Definitions as provided in survey to law firm associates and partners; in-house counsel at firms, labor unions, federally recognized Native American Tribes, and charities; state and federal government attorneys; pro se litigants; and federal judges. In the Survey, the order of the values was randomized across respondents.

ACCURACY: Making sure that parties at fault are held accountable; blameless parties held blameless.
SPEED: Ensuring the fast determination of lawsuits.
INEXPENSIVE: Litigation, once initiated, is as cheap as possible for litigants, courts, and non-litigants.
PARTICIPATION: Litigants have an opportunity to be heard and are treated with respect.
SIMPLICITY: Litigation rules are simple and easy to understand.
FAIRNESS: Litigants are treated equally by the court.
PRIVACY: Litigation rules protect confidential information.
ACCESSIBILITY: Access to courts is clear and initiating a lawsuit is affordable.
FINALITY: Litigants have assurances that the outcomes of lawsuits will not be re-visited in the future.

Notice that the list of procedural values does not include the item "justice" (as Rule 1 does). The reason for this omission is that "justice" is an abstract and broad term that can mean many things to many individuals. Frequently, "justice" connotes a combination of procedural values (say, just the right combination of fairness and finality).[60] Including "justice" in the survey might thus make other procedural values redundant. The ambiguity inherent in the term would also make it difficult to interpret results across individuals. To avoid these traps, the survey splits the broad concept of "justice" into more concrete items.

[60] *See, e.g.*, Rowe, Jr., *supra* note 31, at 847 ("'Justice,' in [the context of Rule 1], presumably includes fairness in treatment of the litigants, accuracy in fact finding, and decision in accord with applicable norms.").

There are, of course, other ways to divide the world of procedural values into constitutive parts.[61] One way to do so would be to cluster some of the provided procedural values together. For example, both privacy and cost describe expenditures associated with litigation (though very different kinds of expenditures). Similarly, accessibility and cost capture closely related concepts since filing fees is an expenditure, and so is hiring a lawyer. However, for many institutional litigants, the costs of initiating a lawsuit pale compared to the costs of pursuing years of discovery and motion work. Conversely, for many pro se litigants, procedural hurdles associated with initiating a lawsuit might be the main roadblock to successful litigation.[62] As such, accessibility and cost both capture expenditures, but expenditures that likely have different consequences for different litigants. Because of that, they remained disaggregated.[63]

Beyond clustering procedural values there are also arguments for declustering procedural values. For example, many litigants and courts lament the costs associated with broad discovery provisions.[64] This cost is

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[61] *See, e.g.*, Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 916 (1979) (listing finality, obedience, guidance, efficiency, availability, neutrality, conflict reduction, and fairness); Resnik, *Tiers*, *supra* note 32, at 842, 945–58 (describing "twelve valued features of procedure in this country" including litigants' autonomy, litigants' persuasion opportunities, finality, impartiality, and economy); Rowe, Jr., *supra* note 31, at 847–50; Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 482–91 (1986) (participation, transparency, revelation, equality, predictability, rationality, privacy-dignity, appearance of fairness); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 20–27 (1974) (privacy, consensualism, fairness, legality, participatory governance, process legitimacy, peacefulness, humaneness and respect for individual dignity, rationality, timeliness, finality); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172–77 (deterrence, dignity, effectuation, and participation); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1856 (2014) ("[T]he core values of the Federal Rules [are] simplicity, uniformity, access to courts, decisions on the merits, and attorney latitude.").

[62] Such hurdles include straight-up financial costs like filing fees but also more complicated hurdles like understanding jurisdictional limitations, joinder rules, pleading requirements, and simple filing mechanics. Pro se litigants might not understand these requirements, might not even know about them, or might not know how to learn about them.

[63] Similarly, "finality" incorporates concerns with inexpense, speed, fairness, but also unique concerns that justify labeling it as a separate procedural value. *See generally* Clermont, *supra* note 4, at 1078 (noting that "res judicata plays a key role in procedure, judicial operation, courts' structure, separation of powers, and international law").

[64] Rowe, Jr., *supra* note 31, at 852 ("American discovery practice often adds significantly to cost and delay.").

monetary (and thus captured by "inexpensive" on the survey).[65] But it can also be burdensome in a non-monetary manner (say, by distracting companies from their core business function). The survey left these two costs aggregated to keep the number of procedural values on the survey down to a manageable number.[66] Otherwise survey respondents would likely struggle to keep track of an excessive number of items on the questionnaire.

Finally, there are procedural values that the literature on procedural values considers but that were excluded from the survey.[67] Here as elsewhere I stuck to the list of procedural values in Table 1 to keep things understandable and meaningful for survey subjects while covering the range of procedural concerns commonly raised in court opinions and legal scholarship.[68]

C. Survey Response Rates

Respondents returned completed surveys in the mail. The response rate was 22 percent. This is significantly higher than anticipated (randomized legal and social science surveys frequently struggle with response rates).[69] Higher response rates would of course have been wel-

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[65] *See also* FED. R. CIV. P. 1 (which uses the term "inexpensive" and the survey tries to mirror this formulation).

[66] Similarly, "privacy" could be decomposed into privacy vis-à-vis opposing litigants and vis-à-vis the public at large. Another example is "simplicity" that might be thought of as "separate notions of simplicity, clarity, and accessibility." *See* Lumen N. Mulligan, *Clear Rules - Not Necessarily Simple or Accessible Ones*, 97 VIRGINIA L. REV. IN BRIEF 13, 13–15 (2011).

[67] For example: "efficiency" and "proportionality" (because both relate to the cost of the suit in relation to another metric, a concept captured in part by "expense" and other procedural values); legitimacy (a complex concept that is also ambiguous because some respondents might think that legitimacy is either endogenous as created by the other procedural values, or completely exogenous as originating from the larger political order beyond court procedures). Other procedural values that future researchers might want to consider are uniformity, predictability, openness/transparency of decision-making, education (explaining law and legal institutions to litigants and juries and third-parties), democracy (procedures reflecting, utilizing, and re-enforcing democratic and/or community values in court settings and choices), customizability/responsiveness (allowing parties to contract around procedures), and authoritative (expressing and strengthening the might of the law).

[68] Another consideration is survey response rates. Long and detailed surveys might yield more fine-grained answers, but might also scare survey respondents away from the survey or lead them to abandon the survey without finishing it.

[69] *See, e.g.*, Conor Clarke & Edward Fox, *Perceptions of Taxing and Spending: A Survey Experiment*, 124 YALE L.J. 1252, 1271 (2015) ("[I]n our surveys, an average of 18% to 24% of Internet users who saw each question responded."); Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 571 (2015) (reporting "an overall response rate of 12.7%"); Donna Shestowsky, *How Litigants Evaluate the Characteristics of*

comed, but the response rate is sufficiently high to draw statistically significant and substantively meaningful conclusions.[70] Equally important, there is no reason to believe that the response rate incorporates a selection bias into the findings.[71]

Finally, the zip codes of survey respondents suggest that they were fairly evenly distributed around the country.

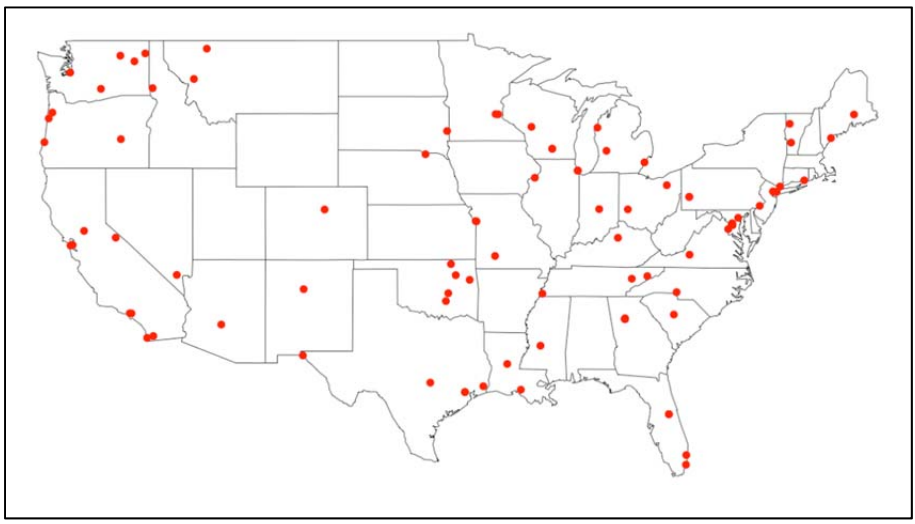

Figure 1. Geographic Distribution of Survey Respondents by Zip Code.

That being said, some zip codes predictably prompted more survey responses than others (most notably those in big cities like Washington D.C., midtown Manhattan, and Chicago).

Legal Procedures: A Multi-Court Empirical Study, 49 U.C. DAVIS L. REV. 793, 807 n.55 (2016) (reporting a "10% response rate" and noting that 10% "is much higher than what was reported for other ex ante field studies on litigants' procedural preferences"); Lamont E. Stallworth & Linda K. Stroh, *Who Is Seeking to Use ADR and Why Do They Choose to Do So?*, DISP. RESOL. J., Jan.–Mar. 1996, at 30, 33–36 (reporting a response rate of 7 percent); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1004 (2015) (reporting a response rate of 31 percent among targeted federal agency decision-makers).

[70] Except for charities as a category because their response rate was too low. *See infra* Section III.E.

[71] This could have been the case if, say, attorneys too busy to answer surveys systematically favor fairness over finality. There is no indication in the data that this is the case. If anything, categories of people typically considered unlikely to answer surveys (like federal judges and law firm partners) responded at higher rates than any other category (perhaps because of their long and sustained engagement with procedural questions).

D. Survey Notables

Most survey respondents returned only the survey page. However, some survey respondents chose to waive anonymity and included their name or other identification material (I did not record such information to preserve the anonymity of the submitted data). Some respondents also included comments on procedural values and the survey itself.[72]

One important observation from three respondents focused on the fact that the survey instructions asked them to rank all procedural values in order from most important to least important. One survey respondent simply refused, marking "1"s in all slots and adding that "[a]ll [procedural values] are equally important to me." This is understandable. After all, every procedural value *is* important. And attorneys and judges might refuse to rank them.[73] But one might wonder what such a person would do when a case forces a choice: say, an interpretation of pleading standards that either leads to more accuracy or less costs, or a reading of notice provisions that is either furthering simplicity or participation. Sometimes the Federal Rules of Civil Procedure, a statute, or case law makes the choice for us.[74] But often there is ambiguity in the procedures, and such ambiguity is resolved with reference to procedural values.[75] Sometimes we have to choose. Such moments tend to reveal which procedural value we hold dearer than others.

Other survey respondents (typically those who had litigated pro se) included accounts of their litigation history. One wrote simply that "I feel

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[72] This Article is quantitative in nature. For a qualitative approach see, for example, Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 580 (2004) (reporting "qualitative data from in-depth interviews with parents and school officials who participated in special education mediation sessions").

[73] Commentators in other fields have similarly expressed concerns that forcing respondents to rank among values might force them to choose between items they consider equally important. *See, e.g.*, Gregory R. Maio et al., *Rankings, Ratings, and the Measurement of Values: Evidence for the Superior Validity of Ratings*, 18 BASIC & APPLIED SOC. PSYCHOL. 171, 179 (1996); Duane F. Alwin & Jon A. Krosnick, *The Measurement of Values in Surveys: A Comparison of Ratings and Rankings*, 49 PUB. OPINION Q. 535, 549 (1985).

[74] For example, the final judgment rule emphasizes speed over accuracy. *See* 28 U.S.C. § 1291 (2012).

[75] Another survey respondent disagreed, arguing that "[a]ll of these values are important, generally complementary and achievable. By insisting on a ranking, I am concerned the response creates, at least implicitly, a false dichotomy. For example, my #1 and #9 ranked "values" should be equally important, but 9 is subsumed in 1, as are 2 through 8. *See* Fed. R. Civ. P. 1." *Cf.* Tidmarsh, *Resolving Cases*, *supra* note 3, at 413 ("It is the guarantee of a full opportunity—unfettered by concerns for expense, delay, or advancing certain political interests—that defines the 'on the merits' principle.").

my voice was never heard" (not surprisingly, this respondent valued "participation" highly). Some respondents also included more colorful language, describing various procedural values with a broad range of expletives.[76]

Together, these survey responses are the first portrait of which procedural values are of importance to which litigants.

III. ANALYTICAL APPROACH & EMPIRICAL FINDINGS

The survey yields detailed answers to how different litigants and judges rank procedural values. Having executed the survey, the next step is to represent these survey findings in a manner that is comprehensible and that allows us to test intuitions against the data.

This is a non-trivial task because ranking nine procedural values allows survey respondents to pick, in effect, from 362,880 possible rank-orders.[77] It is thus unlikely that survey respondents pick identical rank-orders. Instead, we are looking for the presence or absence of clusters.

A. Initial Descriptive Information of Survey Responses

To check for such clusters we have to reduce the complexity of survey responses from among 362,880 choices down to a manageable size. Table 2 presents an initial summary of all valid survey responses.[78] Fairness is the most popular procedural value. Roughly 46 percent of respondents indicate that it is their most important value. Accuracy is the second most popular procedural value (28 percent). All other values pale in comparison. Speed and inexpense, two of the procedural values explicitly mentioned in Rule 1 and frequently invoked by courts, are only rarely ranked in the first position. Most survey respondents rank them somewhere in the lower half. In contrast, "participation" is rarely ranked in the top position, but more than half of all survey respondents rank it among their top three choices. Simplicity, finality, and privacy are the least popular procedural values. Only a few outliers ranked privacy as within their three most important values. In fact, roughly half of all survey respondents ranked privacy either in the last or penultimate position.

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[76] *E.g.*, "Finality: Bullshit" (on file with author).

[77] 9! = 362,880.

[78] "Valid survey responses" are those that followed the instructions and rated all procedural values from most important to least important. I excluded from all subsequent analysis survey responses that did not follow the instructions (for example, those that assigned "most important" to all procedural values). However, I also re-ran the analysis with invalid survey responses included and doing so leaves untouched the main substantive findings of the Article.

TABLE 2. Distribution of Importance Rankings of the Procedural Values for All Survey Respondents.

Rank Score	Accuracy	Speed	Inexpesive	Participation	Fairness	Accessibility	Finality	Simplicity	Privacy
1	28.44	1.78	3.56	7.56	46.22	8.44	1.33	1.78	0.89
2	19.56	6.22	4.44	20.89	28.00	10.22	3.56	5.33	1.78
3	13.78	5.78	9.78	29.78	10.67	12.00	8.44	6.22	3.56
4	10.67	10.22	12.44	12.00	5.33	17.78	10.67	12.00	8.89
5	5.33	16.89	14.67	11.56	3.11	12.44	12.00	14.22	9.78
6	6.67	19.56	16.00	4.00	4.44	11.11	12.44	15.56	10.22
7	7.56	16.89	14.67	7.11	0.44	11.11	14.22	12.89	15.11
8	6.22	14.22	13.33	4.89	0.44	9.33	16.89	15.56	19.11
9	1.78	8.44	11.11	2.22	1.33	7.56	20.44	16.44	30.67

Note: "1" indicates most important, "9" indicates least important. Each cell entry indicates the percentage of survey respondents who ranked a value in a given rank.

Table 2 provides a first overview of how litigants and judges rank procedural values. While a useful first overview of the survey responses, these numbers also hide important variation. For example, government attorneys were twice as likely to rank accuracy in first place than federal judges. Similarly, virtually no corporate counselors put accessibility in first place while a fourth of pro se litigants did.

To push the analysis further in a more nuanced direction that takes account of the differences between groups we would have to provide tables of importance rankings for each category of surveyed litigant or judge.[79] This would lead to eight tables[80] of 9x9 numbers (or 648 numbers in all). This approach would be difficult to work with and interpret.[81]

B. A Multidimensional Scaling Model

To address this difficulty and evaluate substantive and statistical significance, I turn to two methodological tools: multidimensional scaling and circular regressions. Combining the two is a method novel to legal scholarship.[82]

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[79] *See supra* Section II.A.

[80] Or many more if we split the analysis further: for example, divide the category of federal judges into district and appellate judges, law firms into partners and associates, government attorneys into federal and state, etc.

[81] It would also not give us confidence intervals. *Cf.* Section III.E.

[82] Multidimensional scaling has been used to great effect in other disciplines and in legal scholarship. *See generally*, *e.g.*, INGWER BORG & PATRICK J.F. GROENEN, MODERN MULTIDIMENSIONAL SCALING: THEORY AND APPLICATIONS (2d ed. 2005); TREVOR F. COX & MICHAEL A. A. COX, MULTIDIMENSIONAL SCALING (2d ed. 2001); Stephen LaTour et. al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258 (1976) (using multidimensional scaling without circular regressions to evaluate study participants' views on twelve model procedures). However, circular regressions have not yet made their way to legal scholarship.

I begin by treating each survey response that ranks procedural values from one to nine as a vector pointing in nine-dimensional space.[83] Of course, nine-dimensional space is difficult to visualize or analyze. We have to reduce the complexity of nine-dimensional space to a more manageable scale without losing vital information. Multidimensional scaling algorithms do precisely that. They aim to place responses in lower dimensional spaces while preserving goodness-of-fit. To do so, the algorithm moves survey responses around in lower dimensional space and checks how well the underlying distances between higher dimensional survey responses can be preserved. This approach allows me to show procedural values and individual survey responses within a common and comprehensible space.[84] It does so without any *a priori* assumptions about how procedural values relate to each other (e.g., that speed and inexpense are closely related, while accuracy and privacy are not). Instead, the relation of procedural values is determined endogenously. As such, it is not dependent on any preconceived expectations of the secondary literature or that I might have.

The multidimensional scaling process can reduce the complexity of nine-dimensional to any lower dimension. Higher dimensional representations are more faithful to the complex structure of procedural values among litigants and courts. However, they are difficult to interpret. Meanwhile, lower dimensional representations trade accuracy for more workable models. As a practical matter, researchers typically use multidimensional scaling to reduce complexity to one or two-dimensional space, and in rare instances to three-dimensional space.[85]

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[83] One dimension for each procedural value.

[84] One way to capture the intuition behind multidimensional scaling is to consider representations of our solar system. Out there in space, the solar system is a complex four-dimensional structure. However, it can also be represented in three-dimensional space (with some orbits deviating from a plane) or two-dimensional space (a picture with all orbits on a single plane) or even one-dimensional space (a line that captures the order and average distance of planet orbits around the sun). Which representation we use depends on our aims. Somebody who wants to send a probe to Pluto on a multi-year trip will require a model that is absurdly precise and therefore will use the most faithful model, even though it is difficult to handle. Somebody who wants to provide an account of the circumstellar habitable zone in our solar system will predictably pick a one–dimensional or two–dimensional account to keep things manageable, even though this comes at the cost of accuracy. *See, e.g.*, David Koch & William Borucki, *A Search for Earth-Sized Planets in Habitable Zones Using Photometry* 229, 231–36 (1996), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.20.5104&rep=rep1&type=pdf.

[85] Provided in Appendix B and C, respectively. They are only provided for illustrative purposes and to underscore the value of a two-dimensional model. An interactive three-dimensional model is available. *See* Roger Michalski, *The Clash of Procedural Values*, http://www.michalski.ch/3d/.

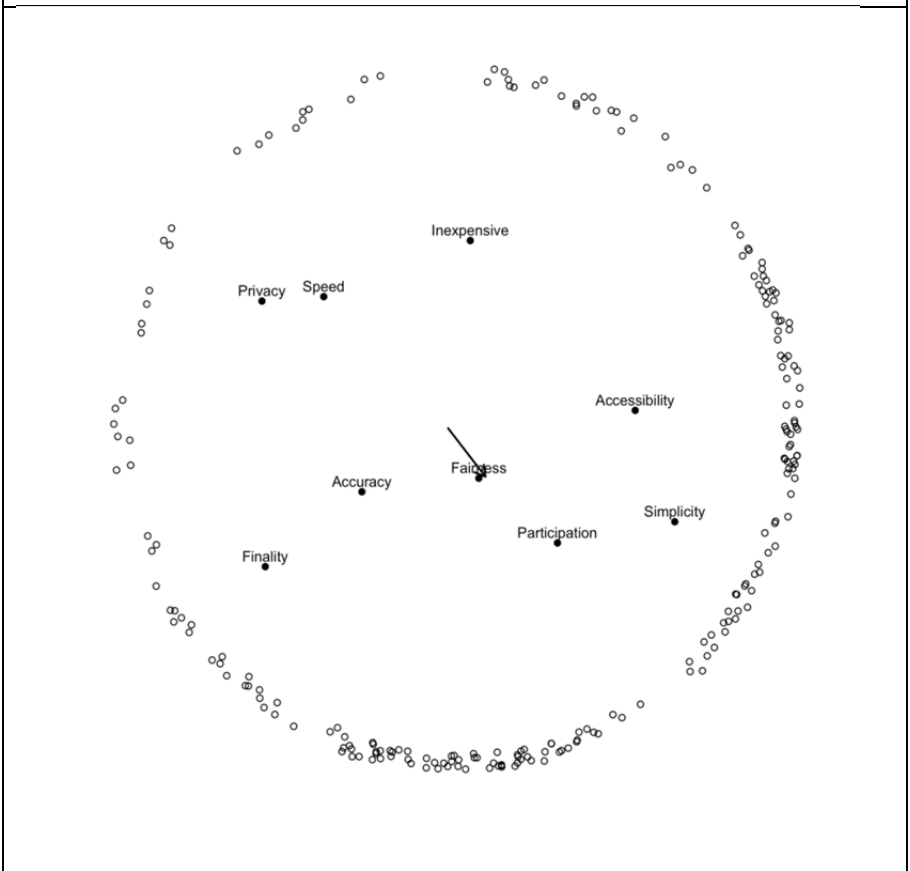
Figure 2 presents the main analytical model in two dimensions.[86] It incorporates and makes visible the procedural values rankings of all survey respondents.[87] As such, it provides a unitary visual depiction of all individual value rankings. When aggregated with all survey responses, these value rankings reveal patterns and clusters. Figure 2 shows, for the first time, the structure of procedural values among a wide range of litigants.[88]

[86] This figure, its mode of presentation, and indeed, this entire Article owes a tremendous amount to the work of William Jacoby. *See, e.g.*, William G. Jacoby, *Is There a Culture War? Conflicting Value Structures in American Public Opinion*, 108 AM. POL. SCI. REV. 754 (2014).

[87] Survey responses are not weighted. This means that each individual survey response had the same impact on the layout in Figure 2. One implication of this equal treatment is that groups with higher survey responses had collectively more of an impact on the overall distribution of procedural values. Alternative approaches are imaginable that normalize survey responses group-by-group to equalize their impact (so that, for example, a handful of responses from charities count as much as the large number of responses from federal judges). The downside of a normalized approach is that it makes assumptions about group homogeneity that might be true for some groups and not for others. Notice also that later parts of the analysis and later figures split the analysis group-by-group or even sub-group by sub-group and thus side–step these questions.

[88] I will first turn to findings of substantive significance before turning to questions of statistical significance (discussed in Section III.E.).

Figure 2. Two-Dimensional Scaling of Procedural Value Rankings.



Notes: The procedural values are shown as labeled, solid circles. The open circles at the periphery are scaled responses from individual survey respondents. They have been normalized and jittered to de-clutter the figure and aid in the interpretation. This changes the length of the individual vectors but not the orientation. As such it has no substantive effect on the interpretation. The arrow is the mean direction vector for all survey responses (140.14 degrees from the top, pointing toward the lower right quadrant).

The estimated model depicts the relation of procedural values toward the center (with labeled, solid circles), and shows individual respondent's answers towards the periphery (with open circles). The intuition behind the arrangement of the points is that procedural values that are ranked close together by respondents are also close together in this figure. For example, many respondents ranked speed and privacy close together (not necessarily, and not typically in first and second place, but rather *both* towards the middle of their ranking sheets).

The procedural values span a wide spectrum in Figure 2 in keeping with their conceptual diversity. This provides assurance that the proce-

dural values utilized in the survey capture a broad range of procedural concerns.

Despite this overall spread, the procedural values form two loose clusters. At the top half, privacy, speed, and inexpense form a group. This confirms the notion that efficient litigation (in various forms) is a cohesive concern to litigants. At the bottom, the remaining procedural values group together. The core of this group is fairness and participation, and together these values build on the concept of even-handed adjudication (in various forms).[89]

Recognizing these two groups is important, but should not overshadow other relations. After all, accessibility is closer to inexpensive (spanning across the two groups) than to finality (located within the same group). This is understandable, given the important roles inexpensive litigation and accessibility play in the lives of less experienced and poorly funded litigants.

Figure 2 also depicts points (with open circles) for each individual survey respondent. These points are arranged in the same space as the value circles (but normalized and jittered to de-clutter the figure). Most of the survey respondents are located toward the bottom half of the circle. This reflects the fact that most survey respondents placed fairness, participation, and accuracy in their top three choices. There is some variability in the rankings of respondents, but the majority of respondents agree on the centrality of these procedural values over all others. This suggests a core consensus on basic procedural values. This overall consensus is at odds with the predominant trend in court opinions and rulemaking to stress speed and inexpense. Few litigants seem to rank those values as highly as participation, fairness, and accuracy.

This observation is reflected in the mean direction vector, depicted in Figure 2 as an arrow. It averages all survey respondents to provide a quick way to encapsulate the typical ranking of procedural values among all respondents.[90]

C. Heterogeneity Across Groups

The account so far has stressed consensus. However, the prior figures and tables have not split the analysis for different groups of litigants

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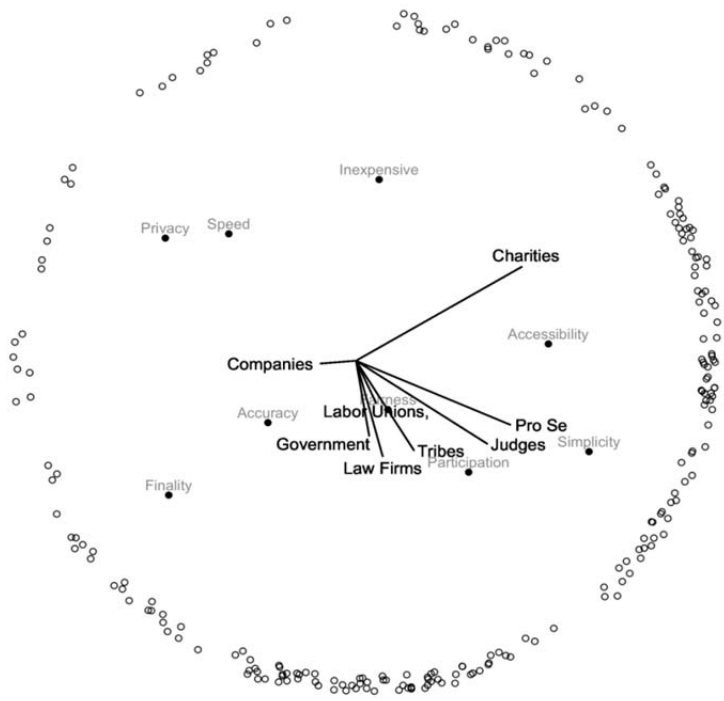
[89] *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) ("[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.").

[90] Again, because the sampling strategy did not randomly sample among all federal litigants, the arrow cannot be interpreted as the preference ranking over procedural values of the "typical" or "average" federal litigant. *See supra* Section II.A. Instead, the arrow encapsulates the typical response within the diverse groups that received the survey.

and judges. Do all groups place the same emphasis on the same procedural values, or is there diversity across the groups?

Figure 3 provides an initial answer. It replaces the mean direction vector (that captures the average survey response) with vectors for each group that was surveyed (arrowheads were removed to avoid clutter). The length of the arrows/lines indicates homogeneity within each group: longer arrows mean more agreement within a group, shorter arrows less agreement, and a zero-length arrow would indicate no agreement at all in any direction.

Figure 3. Two-Dimensional Scaling of Procedural Value Rankings with Mean Vectors for Litigants and Judges.



Notes: This figure reproduces much of the information of Figure 2. However, it removed the mean direction vector and replaced it with mean vectors for each group of survey respondents (the arrowheads of the vectors have been removed and the opacity of the procedural value labels lowered to avoid clutter).

This figure again underscores the point of significant consensus. None of the mean vectors of any group point toward the upper left quad-

rant of the figure.[91] Most point away from efficiency concerns and towards equal treatment concerns.

However, this figure is the first to demonstrate variation within this basic preference. Most notably, companies are far more inclined towards accuracy and finality than other groups. Charities and pro se litigants stress accessibility and simplicity. Most of the other groups manifest a strong preference for participation and fairness. Labor unions, law firms, government attorneys, and Native American Tribes are almost indistinguishable from each other. The preferences over procedural values of federal judges lie in the middle of all of these groups.[92] One noticeable feature of judges is the length of their mean arrow. The length indicates that the preferences of judges are significantly in agreement with each other. One indication of this agreement is that an astonishing 52 percent of judges ranked participation within their top two most important procedural values (compared to 22 percent of all other responses). Another 33 percent of judges ranked participation in third place, a few outliers below that, and not a single judge ranked participation last.

D. Homogeneity Within Groups

Beyond examining inter-group variation, we can also examine intra-group variation with the same method. Some might argue that lumping a wide range of individuals into broad categories like "federal judges" or "law firm attorneys" could obscure significant findings. Perhaps these are not meaningful categories in this context. That might be the case if the preferences of members of these groups on procedural values point in radically different directions. Of course any group will have some variation within it, but this Section inquires into the degree of variation and whether the variation tracks normatively significant concepts.

1. Judges

The first place to look for such variation is within the broad category of "federal judges." After all, federal judges are appointed by different

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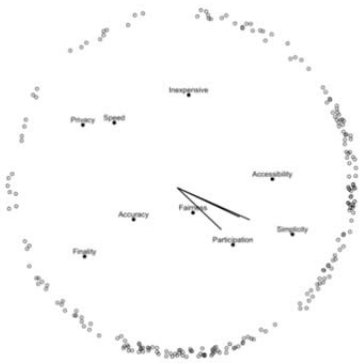
[91] The two that come closest are the mean vectors for charities and companies. The response rate for charities was low and we should be cautious about placing too much emphasis on findings related to charities. *See infra* Section III.E. The mean vector for companies comes closest to point toward the upper half towards privacy and speed. The relatively short length of the mean vector indicates that companies do not have as homogenous responses as other groups. This suggests future avenues for research that might focus on different industries, litigation histories, and ownership.

[92] This finding complicates some anecdotal evidence. *See, e.g.*, Frankel, *supra* note 29, at 1034 ("Many things look different from the bench. Being a judge is a different profession from being a lawyer. In the strictest sense I can speak only for myself, but I believe many other trial judges would affirm that the different perspective helps to arouse doubts about a process that there had been neither time nor impetus to question in the years at the bar. It becomes evident that the search for truth fails too much of the time." (citations and quotations omitted)).

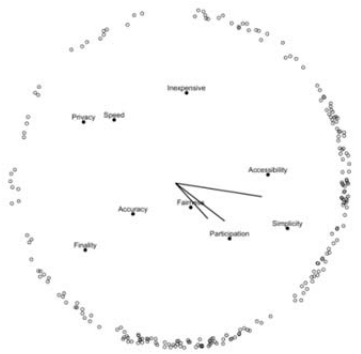
Presidents, serve in different places, and have different characteristics. Do these differences map onto different opinions when it comes to procedural values? Figure 4 breaks down the category of judges into subgroups according to appointing President (Panel A, on the left) and the race of the judge (Panel B, on the right).

Figure 4. Two-Dimensional Scaling of Procedural Value Rankings of Judges with Mean Vectors for Appointing Presidents and Judge's Race.

A. Mean vectors for sub-groups defined by Appointing President



B. Mean vectors for sub-groups defined by Race of Judge



Notes: This figure reproduces much of the information of Figure 2. However, it removed the mean direction vector and replaced it with mean vectors for subgroups of survey respondents (the arrowheads of the vectors have been removed and the opacity of the procedural value labels lowered to avoid clutter).

Panel A shows mean vectors for the judges appointed by the last three Presidents. The mean vector for judges appointed by President Obama is on the left, those for President George W. Bush are in the middle, and those for judges appointed by President Clinton are slightly further on the right.[93] While there is some variation between the views of these three sub-groups, it is not as significant as expected given the diverse ideological stances of these three Presidents.[94] Also, since the order of the mean vectors tracks the order of appointments (clockwise in time), the minimal variation observed might capture time on the bench, rather than ideological commitments.

[93] The random sampling of federal judges selected few that were appointed by prior Presidents (e.g., President Reagan). Because of their low number in the dataset, they were excluded from the analysis here.

[94] This complicates traditional notions of judicial preferences as contained in the attitudinal theory. *See generally* Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 4 (2008) ("Attitudinal theory proffers that judges are political actors who make decisions that will maximize their policy preferences.").

Panel B repeats this analysis for the race of the judges as identified by the Biographical Directory of Federal Judges maintained by the Federal Judicial Center.[95] The mean vector on the right is for judges identified as African-American, the mean vector in the middle for those identified as White, and the mean vector on the left is for judges that the Fed-Federal Judicial Center categorized as neither White nor African-American.[96] Again, we observe some variation between these groups, but less than expected.

Race and Appointing President were chosen here because they seemed the most likely to showcase variation. But they did not. Similarly, distinctions based on gender, ABA ratings, appointment as district or appellate judge, etc. all failed to produce large variations. This suggests that federal judges as a group largely share the same views on procedural values. Of course there are some outliers, but most federal judges emphasize participation and fairness as the core procedural values. This finding of uniformity lessens fears about political bias and the like, at least when it comes to fundamental procedural value judgments.

2. Government Attorneys and Law Firm Attorneys

Other categories within the dataset are similarly comprised of diverse sub-groups, thus raising the same question as to the presence or absence of in-group heterogeneity. For example, the group "government attorneys" contains both federal and state government attorneys. The state attorneys typically work for the Attorney General of a given state while the federal attorneys comprise both Justice Department attorneys and attorneys for individual federal agencies (e.g., the Federal Trade Commission). Do state and federal attorneys value the same things in litigation?

The same question can be asked about big law firm attorneys. This group is comprised of associates and partners. Do these two sub-groups take the same approach to procedural values? Figure 5 examines these questions.

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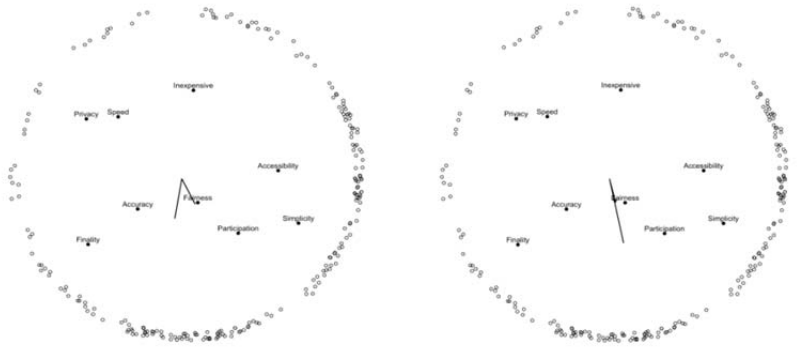
[95] *History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/export.html (follow "Biographical Directory of Federal Judges" hyperlink, then "Database Export" hyperlink).

[96] Unfortunately, there were not enough respondents in the "Other" category (as defined by the Federal Judicial Center) to make more fine-grained distinctions.

Figure 5. Two-Dimensional Scaling of Procedural Value Rankings of Government Attorneys and Law Firm Attorneys.

A. Government Attorneys: Mean vectors sub-groups defined by employment for federal or state agency

B. Law Firm Attorneys: Mean vectors for sub-groups defined by partner or associate status



Notes: This figure reproduces much of the information of Figure 2. However, I removed the mean direction vector and replaced it with mean vectors for sub-groups of survey respondents.

Panel A (on the left) provides mean directional vectors for government attorneys. The vector on the left represents answers for all state attorneys; the arrow on the right for all federal attorneys in the dataset. As before, the analysis reveals similar approaches to procedural values within these two sub-groups. This finding is of normative interest, in part, because state and federal attorneys at times litigate side-by-side and sometimes against each other. Figure 5.A suggests compatible approaches on fundamental procedural questions and concerns.

Panel B (on the right) shows the mean directional vectors for associates and partners that work at big law firms. The two vectors point in the same direction (the arrow-heads for associates has been preserved in this figure for visual clarity). This suggests an almost identical approach to procedural values. Notice however that the mean vector for associates is shorter than for partners. This indicates less agreement within the group as to procedural values. On *average*, the two groups agree. But Figure 5.B suggests that associates as a sub-group are more split on these questions.[97]

Together, these figures on judges, government attorneys, and law firm attorneys (as well as others that could have been provided) provide assurances that the surveyed groups are cohesive and share fundamental

[97] A longitudinal study might be able to reveal whether associates as a group become more homogenous (perhaps because outliers change careers?) or whether the diversity of views is preserved in this generation of associates as they become partners down the road.

attitudes towards litigation.[98] These groups are surprisingly homogenous on the question of ranking procedural values.

E. Circular Regression

The analysis so far focused on substantive significance. This Section turns to the question of statistical significance[99] and examines how much confidence we can put into the findings presented in earlier sections. The most fundamental question here is whether we can reject the null hypothesis that the various groups questioned by the survey share the same stance on procedural values.[100]

To do so, I turn to a specialized regression model called a circular regression.[101] It functions largely like a regular regression, but unlike a regular regression, it incorporates the fact that in our situation we are focused on the angular separation of the dependent variables around a circle.[102] In other words, we need a model that takes into account that the survey responses are arranged in a circular space. A linear regression would have difficulties accounting for the fact that a point at the eleven o'clock position is closer to the noon position than a point at the three o'clock position. However, circular regressions are designed precisely to deal with these situations.[103]

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[98] This raises the fascinating question of causality: did career choices and experiences shape attitudes towards procedural values, or did the attitudes towards procedural values shape career choices? *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 235 (MELVIN J. LERNER ed., 1988) ("Like other such attitudes . . . procedural preferences might be acquired during the childhood socialization process and come to acquire their own affective base.").

[99] Statistical significance is unrelated to questions of normative, practical, and or conceptual importance. A finding might be statistically significant but not of any relevance to anybody alive.

[100] Ideally, we would also use regression models to tease out simultaneous effects. However, we cannot test for them here because of the lack of control variables (e.g., years since graduation from law school, income, ideological score, etc.—it was simply not feasible to collect reliable data on such control variables).

[101] The model specifications of a circular regression are built on a generalized linear model: $\mu_i = \mu + g^{-1}(x_i)$.

[102] *See generally* N.I. FISHER, STATISTICAL ANALYSIS OF CIRCULAR DATA (1993); N.I. Fisher & A. J. Lee, *Regression Models for an Angular Response*, 48 BIOMETRICS 665 (1992); Jeff Gill & Dominik Hangartner, *Circular Data in Political Science and How to Handle It*, 18 POL. ANALYSIS 316 (2010). *See also* Maria Oliveira et al., *Nonparametric Circular Methods for Exploring Environmental Data,* 20 ENVTL. & ECOLOGICAL STAT. 1 (2013); Charles C. Taylor, *Automatic Bandwidth Selection for Circular Density Estimation*, 52 COMPUTATIONAL STAT. & DATA ANALYSIS 3493 (2008).

[103] Other places where they have been utilized to great effect include studying the time of day when suicides occur and battlefield casualties.

Table 3 reproduces the circular regression results for a model that predicts the orientations of individual survey respondents with dummy explanatory variables for all surveyed groups.

TABLE 3. Circular Regression Results.

	MLE Coefficient	Standard Error	Observed Probability
Companies	2.3289	0.4125	0.000637 ***
Tribes	1.0321	0.3869	0.003823 **
Charities	-0.6762	0.8652	0.217248
Law Firms	1.1608	0.2985	7.88e-07 ***
Labor Unions	1.0317	0.5833	0.038467 *
Federal Judges	0.6500	0.2633	0.008874 **
Government	1.4333	0.2736	0.000011 ***
Pro Se Litigants	0.6242	0.4692	0.082984

Notes: Statistical significance codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

The reported regression results are similar to the results of a standard regression. The MLE coefficients indicate the estimated angle for each group. They are measured in radians going clockwise from the three o'clock position. Positive values indicate clockwise movement while negative values would indicate counterclockwise movement.

As in Figure 2, there are no groups that favor procedural values in the upper left hand quadrant of the circle (where privacy, speed, and inexpense are located). Charities and pro se litigants are closest to the three o'clock position, pointing toward simplicity and accessibility. On the other extreme, companies point much closer toward the nine o'clock position, with labor unions, government attorneys, and tribes in the middle. Beyond this group, we have judges slightly set off on their own but surprisingly close to pro se litigants. The circular regression model, in short, reproduces much of the substantive findings of Figure 3.

The main contribution of the circular regression results lies in the ability to calculate p-values. Here, the observed probabilities are generally strong. This indicates that we can have confidence in the results. We can have confidence that the various groups take different approaches to procedural values.[104] That is true for most categories except charities and pro se litigants. The measurement of charities' preferences on procedur-

[104] Though measurably different, those differences are sometimes substantively large and important and sometimes small and of limited normative interest.

al values is uncertain because of the low response rates of charities.[105] Pro se litigants present another problem. Here, in addition to low response rate, non-systematic responses muddle the analysis. Perhaps pro se litigants are too diverse a group to make reliable claims about their overall preferences on procedural values. The data included single-shot pro se litigants and serial pro se litigants (often under instructions with the court not to file new actions). Likely, these two sub-groups take different approaches to litigation and receive different treatments from courts and opposing counsel.

IV. NORMATIVE IMPLICATIONS: OVERLAP AND CONFLICT

The empirical findings of this Article can be split into two categories: consensus and conflict. Both are normatively important and I will discuss them separately.

A. Beyond Speed, Cost, and Privacy

The previous Sections showed a broad consensus among the surveyed groups for *not* valuing highly privacy, speed, cost, and simplicity. This finding contrasts with many Supreme Court opinions,[106] commentaries,[107] and recent procedural reforms[108] that justify procedural choices

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[105] Which is due, in turn, to my poor survey strategy in relation to charities.

[106] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011) (justifying enforcing waivers of class actions in either arbitration or the courts because of the "costliness and delays of litigation"); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360–61 (2011) (limiting the availability of class actions because of the costs to defendants post class certification); Ashcroft v. Iqbal, 556 U.S. 662, 684–85 (2009) (justifying a heightened pleading standard with reference to the importance of avoiding costly and disruptive discovery); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) ("[A]ntitrust discovery can be expensive"); *see also* Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably *costly* and *protracted* discovery phase." (emphasis added)). *See generally* Resnik, *supra* note 3, at 1813 (noting that recent Supreme Court decisions on procedural questions are "laced with discussion of the burdens of adjudication").

[107] *See, e.g.*, *Costs and Burdens of Civil Discovery: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011); Bone, *supra* note 7, at 287 ("Over the past three decades, many courts and commentators have expressed concern about federal civil litigation. One hears frequent complaints about the high costs of discovery, strategic abuse of the litigation process, huge case backlogs, litigation delays, and frivolous suits."); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400–01 (1973). *See generally* William G. Childs, *When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation*, 27 REV. LITIG. 565, 566 (2008); Elliot, *supra* note 38, at 321 ("[W]e need to find procedural techniques for narrowing issues that take into account the essential truth that information is a scarce and costly good that must inevi-

in terms of minimizing the perceived high costs of litigation, increasing the slow pace of litigation, and reducing the danger to private information posed by broad discovery tools. For example, recent revisions of the Federal Rules that focused on Rule 1 and discovery tools aim to temper the "over-use, misuse, and abuse of procedural tools that increase cost and result in delay."[109] Revisions in the past emphasized "the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay."[110]

Such reforms require justification because they might impose collateral burdens on other procedural values.[111] Yet such justification cannot derive from the interests of litigants and judges because they rank privacy, speed, and cost as less important than other values. Of course, lowly ranked procedural values are not unimportant. But the diverse surveyed

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tably be rationed."); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 669 (2010) ("For thirty years, the Federal Rules of Civil Procedure have relied on active judicial case management to combat undue cost and delay."); Harold Hongju Koh, *"The Just, Speedy, and Inexpensive Determination of Every Action?"*, 162 U. PA. L. REV. 1525, 1527 (2014) ("Is today's civil process just? Sometimes no. Is it speedy? Relatively. Inexpensive? Not really."); Resnik, *Managerial Judges*, *supra* note 4, at 379 ("[J]udges have begun to experiment with schemes for speeding the resolution of cases and for persuading litigants to settle rather than try cases whenever possible . . . .").

[108] *See, e.g.*, Revisions of FED. R. CIV. P. 1, 4, 16, 26, 34, and 37 (effective December 1, 2015). *See generally* Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1652 (2013) ("Over the past thirty years, the U.S. Supreme Court and the Judicial Conference have modified the Federal Rules of Civil Procedure to address concerns that litigation costs too much, takes too long, and leads to unjust results."); Subrin & Main, *supra* note 61, at 1850 ("Since 1980, the Federal Rules have been amended numerous times: the scope of discovery was narrowed; numerical limits restricted the amount of discovery; and new discovery conferences, pretrial conferences, mandatory disclosures, and sanction rules encouraged closer judicial supervision of discovery.").

[109] FED. R. CIV. P. 1 advisory committee's note to 2015 amendment.

[110] FED. R. CIV. P. 1 advisory committee's note to 1993 amendment.

[111] Of course, one could hope that a reform has only beneficial or neutral consequences for all procedural values. For example, cheaper and faster discovery might *also* increase accuracy by making it less likely that defendants are blackmailed into settlements that do not reflect the merits of a case. Though possible, more likely and perhaps more common are situations where gains for one procedural value (e.g.. great cost savings) are bought at the cost of smaller impacts on other procedural values (e.g., slightly less accurate resolutions). This raises the important normative question whether procedural reforms should strive for Pareto efficiency. Similarly, future research could inquire into which various groups are willing to trade one unit of one procedural value for a unit of another (e.g., one unit of fairness for eight units of finality). The great difficulty of such research would be defining "units" in a way that creates a common space to meaningfully compare different procedural values to each other.

groups indicated that among a range of procedural values, these are currently least important.[112]

This suggests that the movement to make litigation cheaper, faster, and less invasive has been successful. Litigants and judges currently are not primarily concerned with these procedural values (though one might suspect that they were in the past).[113] The numerous procedural reforms over the last years of the Federal Rules themselves and interpretations of these rules by lower and higher courts seem to have alleviated to some extent the need to focus on cost, speed, and privacy. Currently, litigants and judges place more emphasis on other procedural values. Perhaps reform proposals should focus more on the procedural values that currently matter the most to litigants and judges. This could help to give full expression to the procedural values litigants and judges evaluate highly at this point in time.

There are a number of ways to question this conclusion. Perhaps most obviously, a skeptic could argue that survey respondents simply lied about their preferences. However, given the anonymity of the survey responses it would be surprising if, for example, federal judges felt compelled to lie about their true stances on procedural values.[114]

A related concern is that survey respondents answered what they thought was expected from them, rather than their "true" preferences. Again, one might wonder why they would bother misrepresenting their preferences. Additionally, given the uniformity of responses within groups, such misrepresentation would have to be motivated by systematic factors that act uniformly on isolated individuals within each group.[115]

Another skeptical approach might question whether litigants assess their own litigation needs accurately. That is not a given. However, it strikes me as likely that, on the whole, litigants know their own litigation needs and vulnerabilities better than other people do.

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[112] "Finality" is a good example of this insight. Clearly, finality is essential to the functioning of our legal system. Without a well-functioning *res judicata* doctrine, judgments would lack force. Without a well-defined *res judicata* doctrine, parties could not ascertain the scope of a judgment. Despite this conceptual importance, many survey respondents ranked finality lowly compared to other procedural values. This suggests that finality as currently implemented does not raise pressing concerns. For many litigants and judges, it seems, the current finality doctrine is reasonably acceptable and in less need of attention than other procedural values.

[113] I suspect that studies suggesting that litigants worry about costs arrive at this result because they do not ask about costs in relation to other concerns. After all, any litigant worries about costs. But only when we ask about the importance of cost concerns in relation to other concerns can we discern the relative importance of one concern over all others.

[114] Even if the surveys were not anonymous, it would be surprising if survey respondents (like judges) would lie about their true preferences.

[115] Coordination among survey respondents is extremely unlikely given the utilized sampling strategy. *See infra* Section II.A.

Beyond questioning the accuracy of the survey responses, a different approach could justify a continued focus on speed, cost, and privacy by emphasizing benefits to non-litigants. After all, the findings of this Article draw on survey responses from litigants and judges. While they seemingly do not prize efficiency arguments highly, other stakeholders might. This is a viable line of argumentation. However, traditionally, reform proposals that emphasized speed, cost, and privacy have been justified with reference to the need of litigants and courts, not taxpayers or third parties. That is not to say that this kind of work could not be done. But it would require a careful account of why the people most directly impacted by litigation rules, who have the most incentives to evaluate procedural values, and who have the most experience with litigation are the wrong group to ask. For example, one might say that we are really interested in protecting taxpayers (whether they be litigants or not). However, such a focus would generate different reform proposals than those traditionally and currently in circulation. To take but one example, reforms of discovery procedures as currently implemented focus on the costs to litigants and will likely not unburden the wallets of taxpayers (if anything, more judicial involvement in discovery might lead to more work for tax-funded judges and clerks).

The findings of this Article thus limit the domain of available justifications: those focused on litigants and judges must contend with the expressed preferences of these groups. However, this leaves open for the future normative, doctrinal, and empirical research justifications that relate to non-litigants.

B. Inter-Group Conflict

Beyond a consensus on not valuing speed, privacy, and inexpense highly, the survey also reveals significant conflict between groups over which of the remaining procedural values are most important.[116] Companies lean toward accuracy and finality; judges towards participation and fairness; pro se and charities towards accessibility and simplicity. These values are often in conflict with each other. When we choose, say, accuracy over accessibility, we thus make a choice that favors one group of litigants (companies) over another (pro se litigants). Procedural values cannot be judged abstractly. They are tied to the litigation needs and vulnerabilities of actual litigants. This Article has made that connection explicit. It is a charged choice to prioritize some procedural values over

[116] *See also* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1277 (2005) ("[T]he legal services retained by organizations differ fundamentally from those retained by individuals, as we would predict from the economics of the market for lawyers . . . .").

others. As such, policymakers and courts must justify in clear terms why some litigants are hindered and others helped.

It is easier to see this point when procedures draw explicit distinctions between different entities.[117] However, the survey responses suggest that even facially neutral procedures (that do not mention different types of entities) might affect different entities differently. Predictably, procedures that strengthen the finality of adjudications will be prized by corporations but not pro se litigants even if the rules apply equally to all litigants. Conversely, facially neutral procedures that increase accessibility to courts will be hailed by pro se litigants and bemoaned by corporations.

The challenge in all of this is to align our procedural system with our normative commitments.[118] Should we favor government litigants over pro se litigants? Companies over Native American Tribes? These are difficult normative questions that can now be discussed against a concrete empirical backdrop.

Part of the difficulty in answering these normative questions is that any answer involves important monetary and non-monetary costs. Emphasizing some procedural values over others shifts these costs from one group to another. One of these costs is a group's view of the court's legitimacy. Insofar as procedures reflect what litigants value, they are worthy of trust, investment, and respect (even by people who receive negative outcomes in their individual cases). However, where procedure fails to reflect common values, it will likely foster discontent and undermine the rule of law. This suggests, as a general rule, that procedural systems should be careful not to stray too far from shared and currently prized procedural values.

CONCLUSION

This Article has used surveys paired with multidimensional scaling and circular regressions to shed light on procedural values. This approach can be applied fruitfully in many legal fields, from administrative, criminal, and state court adjudications, to core substantive fields at home and abroad. Similarly, this study could be extended longitudinally to study how values shift over time. This could help to identify trends, peaks and nadirs, turning points, and correlations with doctrinal developments

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[117] *See, e.g.*, United States v. Mendoza, 464 U.S. 154, 158 (1984) ("[The] approval of nonmutual offensive collateral estoppel is not to be extended to the United States."); 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 . . . ."). *See generally* Roger Michalski, *Trans-Personal Procedures*, 47 CONN. L. REV. 321 (2014).

[118] *See generally* Koh, *supra* note 107, at 1529 ("Do we really want our system of procedure to privilege instrumental, Benthamite notions of due process based on cost-benefit analysis over intrinsic Kantian notions of dignitary fairness?").

and docket pressures. With such information at hand, judges and policymakers will be in a better position to make fundamental choices about which normative values to embed in our legal system and which to shun.

Ultimately, law is conflict over means and ends. Significant litigation and scholarship debate proper means, but ends often lurk out of sight, perhaps because they are hard to measure and study. This has been true in procedural scholarship, where it is easy to debate the normative desirability of doctrinal changes without specifying which types of litigants would be harmed or hindered by emphasizing one procedural value over another. In the procedural world, courts and scholars sometimes embrace such ambiguity and use vague aims to stand in for concrete values. However, this Article has shown that such a convention is illusory; there is no divorcing procedural values from parties, no way for theory to stand apart from the people the law touches on the ground.

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APPENDIX

A. *A Sample Survey*

Please note that in the mailed survey the instructions and the survey were on separate pages and the formatting will likely be slightly different here. Also, the order of the procedural values was randomized for each survey respondent (thus, this is only one *sample* survey).

Instructions:

This survey asks you to rank what is the most important and least important to you in litigation. For this study to be accurate, all items on the list need to be ranked, 1 for what you think is most important all the way through to 9 for the least important item. Each item must have a unique number (in other words, please use all numbers 1-9, even if two items are close).

For example, if the survey was about ice cream and you liked Chocolate best, Vanilla second best, and Strawberry the least, you would fill out the survey like this:

Ranking	Item
2	Vanilla
1	Chocolate
3	Strawberry

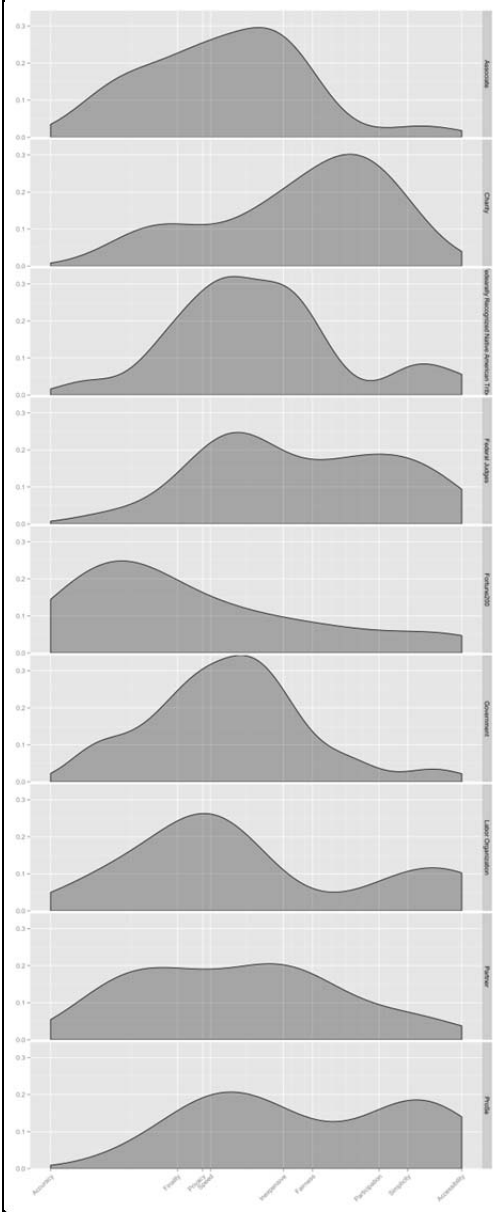
Thank you again.

Survey:

Ranking (1 is most important, 9 is least important)	Value	Explanation
	Accuracy	Making sure that parties at fault are held accountable; blameless parties held blameless.
	Speed	Ensuring the fast determination of lawsuits.
	Inexpensive	Litigation, once initiated, is as cheap as possible for litigants, courts, and non-litigants.
	Participation	Litigants have an opportunity to be heard and are treated with respect.
	Fairness	Litigants are treated equally by the court.
	Accessibility	Access to courts is clear and initiating a lawsuit is affordable.
	Finality	Litigants have assurances that the outcomes of lawsuits will not be re-visited in the future.
	Simplicity	Litigation rules are simple and easy to understand.
	Privacy	Litigation rules protect confidential information.

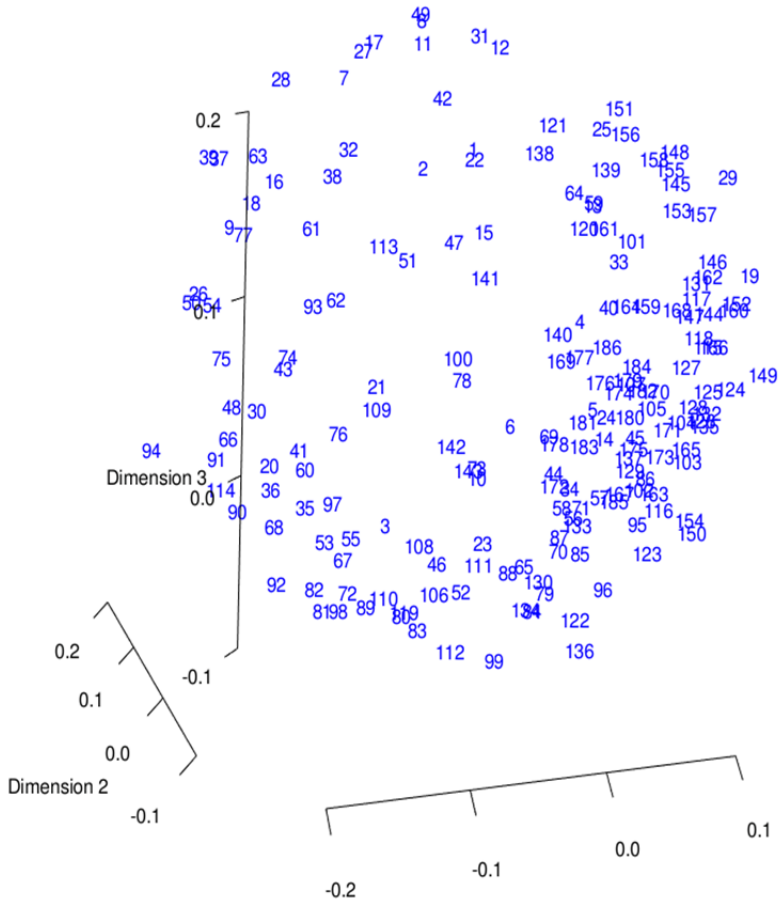
B. One-Dimensional Model

Figure 6. One-Dimensional Scaling of Procedural Value Rankings.



C. Three-Dimensional Model

Figure 7. Three-Dimensional Scaling of Procedural Value Rankings.



Notes: Three dimensions are inherently unsuitable for printing on two-dimensional paper. An interactive version of this figure is available online at: www.michalski.ch/3d/.