

## ARTICLES

# The Paradox of Access Justice, and Its Application to Mandatory Arbitration

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*Access justice is one of the most appealing and least contentious regulatory techniques in law's repertoire. It aspires to give people equal opportunity to utilize certain primary goods, and it does so by assuring openness—that access to these goods is not allocated by markets and is not tilted in favor of wealth or privilege. But access justice often fails to meet its egalitarian aspirations, because groups that are not the intended targets of the intervention deploy access and its benefits disproportionately. Paradoxically, access justice often benefits various elites while paid for directly by taxpayers and indirectly by weaker groups. This Article brings to light this unintended and regressive cross-subsidy created by policies of access to information, compensation, insurance, accommodations, and more. It then examines in detail a specific contemporary access justice paradox—consumers' access to courts and the impact of mandatory arbitration agreements that limit such access. This Article demonstrates that access to courts is a franchise of the elite and of little value to weak consumers. Nevertheless, it considers whether contractual waivers of access to courts hurt weak consumers by foreclosing effective access through class-action representatives. This concern has theoretical merit, but it, too, is limited in ways that are often unappreciated.*

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INTRODUCTION

A. Access Justice

Equal access is one of the most appealing and least contentious regulatory techniques in law’s repertoire. Equal access aspires to give people even entitlement to certain primary goods or opportunities, and it does so by assuring openness—that access to these entitlements is not allocated by market prices and is not tilted in favor of wealth or privilege. Equal access is often secured by public expenditures that finance free entry for all, but it is also accomplished by mandates requiring providers to charge uniform affordable prices or offer uniform accommodations.

Some of the classic public goods are delivered via the equal access method: education, transportation, and parks. Public schools are open and free, guaranteeing baseline access to education to all citizens. Roads and commuter services stretch out to all communities and are also mostly free to use. And parks and waterfronts are held in the public trust, operated by the community and open to all. Funded by the taxpayers, bolstered occasionally by token usage fees, schools, roads, and parks are equally accessible.

Equal access is also a popular device in protective laws. Protective laws are legal regimes that seek to help weaker groups in society function better, enjoy more opportunity, and reach better outcomes. Laws requiring that people with disabilities be afforded equal access to buildings are a prominent example of this regulatory technique. So are policies and laws that require universal access to some forms of community banking and credit, personal health and property insurance, and necessity goods. Many other protective laws utilize the equal access technique, seeking to guarantee universal access to a variety of goods and services, including information, knowledge, the Internet, medicine, safety, compensation, and courts. These policies are often based on the highly plausible prediction that, in the absence of such mandates of open and equal access, weaker groups would fare worse.

There is a strong and alluring notion of equality underlying various access policies. If these goods and services were subject to market allocations, instead of being accessible to all through government mandates (and funding), the poor and the less sophisticated would be disproportionately priced out. Equal access enables those who could not otherwise afford to pay the true cost of these services to consume the subsidized good. It thus promotes a fundamental element of a liberal society—equal opportunity.

Equal access is alluring also because it is protective but not heavily paternalistic. True, it is more intrusive than some other regulation-lite techniques, such as mandated disclosure or the use of “choice architecture,”<sup>1</sup> because it mandates a baseline entitlement and limits opt-out, and thus interferes more aggressively with (and often replaces) private markets. But it is less intrusive than other command-and-control regulatory policies that go beyond the provision of access and mandate the quality or equality of *outcomes*.

Undoubtedly, some equal access policies have had important effects, helping disadvantaged groups. The days in which only the privileged could obtain education or have access to health care are gone. In fact, it would be difficult to imagine a liberal society without the guarantee of equal access to such core institutions. Many of the accomplishments of equal access are now taken for granted, regarded as the cornerstones of a just and fair society, and rightly so.

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<sup>1</sup> See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* 81–100 (Yale 2008).

But at the frontier of present-day protective law there hover various equal access policies with a more dubious foundation and a less encouraging success record. These are policies that secure free or subsidized access to all, but that some subgroups of people enjoy disproportionately. Paid for by all, but enjoyed by the few, these policies represent a *cross-subsidy*. This cross-subsidy may be desirable when the beneficiaries are a subgroup of the weak consumers who are the intended target of the redistributive concerns. This, for example, is the result of Medicaid and housing assistance programs. The poor are the primary recipients, and the programs redistribute wealth to reduce overall poverty. But the cross-subsidy is undesirable and unintended when the beneficiaries are the elite and when the benefits are paid for by the less privileged. It is the surprising prevalence of such unintended consequences that this Article exposes.

This question—the differential effect of protective laws among groups of consumers—is not often addressed by legal commentators. It is quite well understood that legal mandates intended to benefit consumers can impose costs that may be passed on to these consumers through higher prices, with adverse distributive consequences. Prior literature provided several criteria to predict the winners and losers from cost pass-ons of mandatory rules.<sup>2</sup>

But in the area of mandated access, the redistributive effect is rarely studied. Instead, it is often *assumed* that mandated access policies, even if they come at some cost, are mostly beneficial to the least privileged and most needy among consumers—those whose access might otherwise be denied. Thus, a common response to perceptions of disadvantage and deprivation in consumer and employment markets is to prop up the legal protections. Mandating important transactional rights for consumers or employees is thought to guarantee “access justice.” The weaker parties, who are otherwise “excluded from the market,” would be able to “participate in and reap the benefits of the [market].”<sup>3</sup> Similarly, another prominent access concern is “access to

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<sup>2</sup> See Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 *Stan L Rev* 361, 372–95 (1991).

<sup>3</sup> Hans-W. Micklitz, *Introduction*, in Hans-W. Micklitz, ed, *The Many Concepts of Social Justice in European Private Law* 3, 5, 36 (Elgar 2011).

knowledge”—shorthand for the right to use and participate in mediums of information and expression.<sup>4</sup> In intellectual property law, a “social movement” of access to knowledge views the limitations imposed on users by software vendors or patent holders as unfair, calling for lawmakers to guarantee open access.<sup>5</sup> Net neutrality—open access to the Internet—is another logical implication of access to knowledge.<sup>6</sup> These access-to-knowledge initiatives are founded on the empirical assumption that the beneficiaries of such protections are otherwise weaker than market participants who desire to restrict (and charge for) access.

I need a term for this paradigm, prevalent across all of law, that favors mandated equal access as a regulatory method. “Access justice” seems direct and descriptive.<sup>7</sup> It includes a variety of views across many regulatory areas, and it is therefore a generalization. But it is a useful generalization because so many lawmakers and commentators embrace some version of mandated equal access across a broad array of substantive issues.

It is so commonly assumed that access justice benefits the weak that the premise has escaped any significant scrutiny. Obviously, the belief that access justice is progressive is deeply held among liberals, who rely on it to advocate equal access reforms, such as access to banking for the poor.<sup>8</sup> But conservatives too accept the descriptive logic of access justice, even when opposing it on normative grounds. Professor Richard Epstein, for example, explains that strong consumer protections—proposed by the European Union and widely supported by access justice advocates—are likely to benefit weak consumers. Epstein is ready to “assume that the less-sophisticated half of . . . consumers stand to benefit from the [protective] regulation and the more-sophisticated half

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<sup>4</sup> See *Access to Knowledge* (Information Society Project, 2015), archived at <http://perma.cc/J9S4-Z8TG>.

<sup>5</sup> See, for example, Gaëlle Krikorian, *Access to Knowledge as a Field of Activism*, in Gaëlle Krikorian and Amy Kapczynski, eds, *Access to Knowledge in the Age of Intellectual Property* 57, 68–74 (Zone 2010).

<sup>6</sup> See, for example, *Charter for Innovation, Creativity and Access to Knowledge* (FCForum, 2010), archived at <http://perma.cc/GA5U-RRGS>; Angele A. Gilroy, *Access to Broadband Networks: The Net Neutrality Debate* \*1 (Congressional Research Service, July 1, 2015), archived at <http://perma.cc/SAY7-PUHX>.

<sup>7</sup> For an example of the use of the term “access justice” in the literature, see Micklitz, *Introduction* at 5 (cited in note 3) (using “access justice” to describe the European Union’s model of social justice).

<sup>8</sup> See generally, for example, Michael S. Barr, *Banking the Poor*, 21 Yale J Reg 121 (2004) (arguing for the progressive benefits of increasing low-income families’ access to banking services).

. . . are hurt by them, in equal degrees.”<sup>9</sup> He thus views such access policies as “an implicit cross-subsidy of weak consumers by their stronger counterparts.”<sup>10</sup> This is an intuitive assumption that no longer seems to require justification. Surely, mandatory consumer protections that secure access to markets and to core commercial rights greatly benefit *weaker* consumers who need them more direly. Sophisticated consumers are less reliant on access mandates because they can bargain for them more effectively or pay for access when necessary. Indeed, writing about equality of opportunity—the political ideal that is the foundation of access justice policies—Professor Robert Nozick conceded that such policies were either “directly worsening the situations of those more favored with opportunity” or “improving the situation of those less well-favored.”<sup>11</sup>

The view that mandated access justice helps the weak is therefore widely shared and rests on highly plausible logic. My goal in this Article is to challenge this view. I argue that in an important range of activity, it is false. It relies on superficial logic that can be debunked, and it is inconsistent with a large body of existing empirical evidence. Rather than helping the weak, access justice policies could be *regressive*, benefitting stronger consumers disproportionately, at times at the direct expense of the weak. This is the paradox of access justice.

The argument I present is simple. Access justice is merely an equality of opportunity, not of outcome. Some can draw on that opportunity better than others can. If those who take advantage of the open access and opportunity are disproportionately more sophisticated and affluent, the benefit of the program ceases to be progressive. And if the funding of such free programs burdens the poor, the result can be outright regressive.

Consider, for example, free and open access to a parking lot outside the city opera. Only people with cars, and mostly those attending the opera, would benefit from the opportunity. This rules out the poorest, who do not own cars in the first place, as well as anyone else other than opera lovers. When the mayor decides to start charging market prices for parking in the lot, she may be eliminating free and equal access, but she is hardly hurting the poor or working class community. She is merely ending a

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<sup>9</sup> Richard A. Epstein, *Harmonization, Heterogeneity and Regulation: CESL, the Lost Opportunity for Constructive Harmonization*, 50 *Common Mkt L Rev* 207, 213 (2013).

<sup>10</sup> *Id.* at 213–14.

<sup>11</sup> Robert Nozick, *Anarchy, State, and Utopia* 235 (Basic Books 1974).

subsidy that flows from all taxpayers to a small, highly educated, and relatively affluent elite group.<sup>12</sup>

I present in Part I of this Article a number of important social and legal policies that mirror the opera parking metaphor. I show, for example, that the long-standing federal scheme of subsidized flood insurance, which is commonly justified on grounds of access justice, is in fact a regressive policy, which provides subsidies to the more affluent homeowners at the expense of the generally less affluent taxpayers. The method I use to analyze this and other access justice policies is to identify who are the likely beneficiaries of the access program. Are there implicit “access handicaps”—structural bars to entry—that afflict some populations? Does the afflicted population that fails to realize the benefits of access consist primarily of the poor or other weak sectors? I also ask who pays for the programs that are selectively utilized. Are the costs spread widely on all taxpayers or all broadly defined *potential* users, thus creating a subsidy from low-value users to high-value users?

In presenting the paradox of access justice, I stop short of making a general claim that access justice policies are doomed to be unfair. As stated at the opening, numerous long-standing access mandates—like public education and public housing—help more and charge less those who can least afford such basic goods. The claim I develop is that access justice is a mixed bag. People often *assume* that it is enough to enact open access to achieve the desired redistribution. Recognizing the patterns of access handicaps corrects this misperception. I show that the cross-subsidy can go the wrong direction in systematic ways, and I trace this misalignment to various important access justice policies. By showing the recurrent failure of access justice, and the real possibility of a regressive bias, I hope to repudiate its mythic stature as a formula for consumer protection.

#### B. Access to Justice: Limits on Mandatory Arbitration Agreements

After introducing the potential general problem with access justice, the second Part of this Article (Part II) zooms in on one of the most contentious access justice debates of our time—access to courts. The problem of access to courts—sometimes referred to as

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<sup>12</sup> See Joni Maya Cherbo and Monnie Peters, *American Participation in Opera and Musical Theater—1992* 3–6 (Seven Locks 1995) (describing the demographic profile of the 3.3 percent of Americans who saw one or more operas during 1992).

access to justice<sup>13</sup>—addresses the legality of predispute arbitration agreements. These agreements are often included in consumer and employment contracts, stipulating that any dispute must be resolved through arbitration procedures, thus barring any access to courts. An important upshot of the denial of access to courts is the shutdown of class actions as a method for vindicating consumers' and employees' common complaints.

Here, as in other areas of access justice laws, it is commonly assumed that mandatory arbitration clauses indeed hurt potential plaintiffs. Accordingly, the first step in Part II, after describing the phenomenon of mandatory arbitration agreements, is to show that access to courts is yet another access justice policy that distributes benefits to some more than others. Surveying a large social science literature on access to courts, I present the possibility that access to courts is a privilege disproportionately deployed by sophisticated consumers, and almost never by the poor. In such cases, I argue, the denial of access to courts affects the sophisticated elite more than it affects others. Further, if the costs of lawsuits are spread evenly across all consumers who all pay higher prices, then in effect access to courts is a regressive access justice policy, benefitting the affluent at the expense of others.

Viewed in this light, contracts containing mandatory arbitration clauses eliminate the cross-subsidy. And, conversely, laws that prohibit or strike down such mandatory arbitration clauses restore access to courts but also restore the cross-subsidy. By reinstating the access-to-courts privilege, such laws force all consumers to pay for a benefit enjoyed only by the elite. If I am a poor consumer unlikely to go to court, I do not benefit from access to courts, and I might be worse off for it, by having to pay higher prices.

But there is more. The second step in evaluating access-to-courts laws is to reassess this conclusion in light of the effect of litigation through class actions. Even when initiated only by the sophisticated few, class actions can benefit all consumers, either by securing class-wide redress or by generating incentives for firms to provide safer and better products to all consumers (including nonlitigants). This possibility raises the specter of *vicarious access*—enjoying the value of access justice not in directly visiting the open forum but in piggybacking on the visitation by others. If

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<sup>13</sup> See, for example, *Office for Access to Justice Home* (DOJ), archived at <http://perma.cc/9JAJ-U4XU>.

this form of access is beneficial for all consumers, mandatory arbitration clauses that eliminate class actions hurt consumers as a group, not merely those with the propensity to sue.

The question whether class actions indeed create vicarious access is empirically open. The last Section of Part II lays out the contrasting conjectures regarding actual dissemination of the benefits of class litigation. It concludes that despite the class-wide effect of access to courts, subtle cross-subsidies may nevertheless afflict this institution. It shows that in a variety of contexts, access to courts—even vicariously—does not benefit large groups of less sophisticated, less affluent consumers.

## I. ACCESS JUSTICE AND REDISTRIBUTION

### A. The Regressive Possibility

Access justice is never equal. Some utilize the access more than others. They visit the open forum more often, enjoy the goods or services made accessible through the open forum more thoroughly, and use these accessible opportunities more effectively as a gateway to other advantages. When the price of entry is fixed (often at zero) and does not reflect such differential benefits, the program is redistributive.

Thus, the fundamental distributive question is—who are the beneficiaries of open access? Can they be identified systematically? And, of course, to evaluate the overall distributive footprint of the program, we also need to know who pays for it. Whose resources are taxed to pay for the subsidized access?

In some important cases, the cross-subsidy brought about by access justice is indeed progressive, favoring low-income people. This is largely the case with respect to primary school education in most big American cities, as well as access to emergency medical care or to city parks (although proximity to city parks affects housing prices<sup>14</sup> and might render the parks more accessible to the wealthy). In the public school context, two important sources of funding are property and income taxes, which are paid largely by higher-income property owners.<sup>15</sup> And public schools are more

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<sup>14</sup> John L. Crompton, *The Impact of Parks on Property Values: A Review of the Empirical Evidence*, 33 *J Leisure Rsrch* 1, 28 (2001).

<sup>15</sup> See Jennifer Von Pohlmann, *Property Tax Rates Highest for Homeowners Who Have Owned between Five and 15 Years, Own High-End or Low-End Homes* (RealtyTrac, Mar 2, 2015), archived at <http://perma.cc/9BP3-8NGU> (stating that those with the highest-value homes pay the highest percentage of their property value to property tax and that

likely to be attended by low-income people, because higher-income families are more likely to opt out for private education.<sup>16</sup> Likewise, emergency medical care (and access to urban trauma care centers in particular) benefits many low-income and underinsured groups, while largely funded by others.<sup>17</sup> And the same is true for city parks and beaches, more likely destinations of low-income residents who cannot afford remote and luxurious vacation destinations. These are funded not primarily by entry fees but instead by taxes and private donations.<sup>18</sup>

In another important class of cases, the direction of the cross-subsidy could systematically favor the middle class. Professor George Stigler called this “Director’s Law of Public Income Redistribution” (after Professor Aaron Director’s empirical conjecture), arguing that public expenditures are often made for the primary benefit of the middle class, funded by taxes borne disproportionately by the rich and the poor.<sup>19</sup> Stigler suggested that social security and tax exemptions for churches are examples of such pro-middle-class redistribution. Social security, for example, taxes most heavily, relative to the benefits they will receive, those who begin work early (instead of continuing in school) or those who die early, all favoring the middle class. Low-income taxpayers pay in a larger share of their income, and, Stigler argued, because they don’t live as long after retirement, they fail to reap the benefits of the payouts.<sup>20</sup>

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higher-end homes account for over half of the property tax nationwide). See also Jane Wells, *The Rich Do Not Pay the Most Taxes, They Pay All the Taxes* (CNBC, Dec 11, 2013), archived at <http://perma.cc/5GK2-EBWM>.

<sup>16</sup> The Chicago Public Schools website reports that 86 percent of students enrolled in the city’s public schools in 2014 came from low-income families. See *CPS Stats and Facts* (Chicago Public Schools, Jan 11, 2016), archived at <http://perma.cc/83WS-JEKY>.

<sup>17</sup> See Amy Knowlton, et al, *Patient Demographic and Health Factors Associated with Frequent Use of Emergency Medical Services in a Midsized City*, 20 *Academic Emergency Med* 1101, 1102 (2013) (noting that “persons with Medicaid or Medicare coverage are overrepresented among frequent [emergency department] users”); Tamyra Carroll Garcia, Amy B. Bernstein, and Mary Ann Bush, *Emergency Department Visitors and Visits: Who Used the Emergency Room in 2007?* \*1 (National Center for Health Statistics, May 2010), archived at <http://perma.cc/L2AD-6AJK>; January Angeles, *Insuring All Americans Is a Critical Component of an Efficient, High Quality Health Care System* \*2 (Center on Budget and Policy Priorities, Apr 21, 2009), archived at <http://perma.cc/C59Z-XATG>.

<sup>18</sup> See Margaret Walls, *Private Funding of Public Parks: Assessing the Role of Philanthropy* \*8 (Resources for the Future, Jan 2014), archived at <http://perma.cc/ABQ9-WW7C>.

<sup>19</sup> George J. Stigler, *Director’s Law of Public Income Redistribution*, 13 *J L & Econ* 1, 1–4 (1970).

<sup>20</sup> *Id.* at 3. See also Geoffrey T. Holtz, *Social Security Discrimination against African Americans: An Equal Protection Argument*, in Lawrence A. Frolik, ed, *Aging and the Law: An Interdisciplinary Reader* 111, 112–14 (Temple 1999).

But there is a third possibility that has not been systematically treated—and it is the most problematic one—whereby the cross-subsidy from access justice programs benefits the elite. It is this paradox that this Article explores. This arises whenever the benefits of programs that are at least partially paid for by taxpayers accrue disproportionately to the relatively wealthy. If everyone in society is asked to contribute equally to support a program, but the affluent utilize that program more frequently, it will effectively transfer wealth from the poor to the rich.

The regressive cross-subsidy is rarely an intended effect. Unlike progressive welfare programs that are intended to reduce poverty, regressive programs do not declare a goal to increase the well-being of the wealthy. Progressive policies like food stamps openly and unabashedly select their beneficiaries according to income. Regressive policies, by contrast, do not employ an explicit selection criterion to rule in solely the affluent and rule out others. Formally, these programs allow access to all, often accompanied by egalitarian rhetoric.<sup>21</sup> The pattern of selective utilization that develops is subtler and less salient. It is only when the benefits to the wealthy from the program turn out to exceed the tax and access fees they pay that a net regressive distribution occurs.

Accordingly, regressivity, as used here (and in the public finance literature), has two facets. The first measures how the *benefits* of the policy are distributed. Whenever poorer populations utilize these benefits at a less-than-proportional rate, the policy is regressive.<sup>22</sup> This is a weak sense of regressivity, because the funding for the policy might come from progressive taxes, suggesting that the overall redistribution does not hurt the poor. The affluent pay more for those benefits that they also happen to access more readily.

The second criterion of regressivity represents a stronger, and more troubling, form of inequality. It measures the effect of a

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<sup>21</sup> See Peter H. Schuck and Richard J. Zeckhauser, *Targeting in Social Programs: Avoiding Bad Bets, Removing Bad Apples* 42–43 (Brookings 2006). Professors Peter H. Schuck and Richard J. Zeckhauser consider poorly tailored social policies, including regressive policies. They point to a specific access justice policies—for example, subsidized student loans—as “bad polic[ies]” that redistribute wealth regressively. See *id.* at 41 n 60.

<sup>22</sup> See, for example, Inge Kaul, Isabelle Grunberg, and Marc A. Stern, *Introduction*, in Inge Kaul, Isabelle Grunberg, and Marc A. Stern, eds, *Global Public Goods: International Cooperation in the 21st Century* xix, xxix–xxxii (Oxford 1999). See also Tomás Serebrisky, et al, *Affordability and Subsidies in Public Urban Transport: What Do We Mean, What Can Be Done?*, 29 *Transport Revs* 715, 733–35 (2009) (concluding that supply-side transportation subsidies are “neutral or regressive” in their effects in part because the poor choose to walk more than the nonpoor).

particular public expenditures program on the overall inequality of income and welfare distribution.<sup>23</sup> Here, the assessment that expenditures are regressive is made not only on the basis of how the benefits are distributed, but also on the basis of who pays for them. The elite now pay *less* for the benefits that they access more readily. For example, tax revenues collected from middle- and low-income earners are used to fund, in part, the program for the wealthy.<sup>24</sup>

Before turning to examine actual regressive access justice policies, a fundamental theoretical question needs to be addressed. Why, it may be asked, is it troubling that *individual* programs are regressive? Is it useful or even wise to assess the distributional equity of each specific policy? Governments, after all, produce a large portfolio of public goods, some to benefit the poor and others to benefit the affluent. If these programs are welfare-enhancing overall, should they be abandoned when the benefits are allocated inequitably? In fact, identifying a few isolated regressive programs is misleading because redistribution should be measured by the overall effect of all programs. Some citizens benefit from program A, others from program B, and it is the combined effect of A and B that should be assessed.

Further, it may be argued, any regressive redistributive effect could be corrected by adequately designing the income tax burdens. Affluent suburbanites may not pay directly for their disproportionate use of highways or remote parks, but their higher income could be taxed more heavily.<sup>25</sup> Thus, if building suburban highways or marinas for yachts is welfare increasing, it ought to be done notwithstanding its correctable distributive effect.

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<sup>23</sup> See Udo Ebert and Georg Tillmann, *Distribution-Neutral Provision of Public Goods*, 29 Soc Choice & Welfare 107, 108 (2007) ("Distribution neutrality requires that the . . . original income distribution and [ ] the new one, which also takes into account the net benefits, are identical.").

<sup>24</sup> For an example of such a policy, see Part I.D.6 (discussing the Massachusetts Community Preservation Act, a program funded by lump sum fees on all deed registry transactions but benefitting only a few high-income communities that engage in land conservation).

<sup>25</sup> See Louis Kaplow and Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J Legal Stud 667, 668 (1994) ("[R]edistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient."). See also generally Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter given Optimal Income Taxation?*, 71 Am Econ Rev Papers & Proceedings 414 (1981) (arguing that it is preferable to redistribute wealth through taxation, rather than through legal rules, even if the system of income taxation is imperfect).

My purpose here is not to enter the normative debate over the proper scope and method for redistribution. Rather, my goal is descriptive: identify (in Parts I.D and II) the otherwise-unnoticed distributive effects of specific legal policies. Access justice policies are advocated, and their subsidies are enacted, with express distributive goals supported by progressive sentiments. Some policies are enacted to guarantee greater participation and equality within societal institutions—an effect that cannot be similarly advanced by a mere transfer of cash, or tax benefits, to the target groups. This justification relies critically on the relative rates of utilization of the access privileges. Unintended regressive effects should, therefore, inform the choice of such policies. Since my ultimate goal here is to evaluate the equity of specific regulatory regimes that mandate access as a form of protection for weaker consumers or employees, the direction of the distributive effect seems to be crucial.

Moreover, while regressive effects of access justice policies could in theory be offset by proper adjustments of income tax burdens, lawmaking does not regularly work this way. Some fiscal programs may be bundled politically with shifting tax burdens, but numerous laws and policies are enacted singly, unaccompanied by an income tax overhaul. If, as I suggest in the following Section, some important access justice laws turn out to be regressive, it would be difficult to imagine that lawmakers would respond by increasing income tax on the benefitting subgroup, to offset the cross-subsidy.

Finally, even if redistribution can be done more effectively and efficiently through direct fiscal means, and even if its overall goals are determined in the aggregate on the basis of some external principles of equity, one would still need to know how various legal rules and policies affect the different groups. Knowledge of their distributive effects is important so that the income tax system can be calibrated to achieve the desired level of redistribution and to correct for disproportionate benefits that some subgroups obtain elsewhere. Access justice is assumed to be egalitarian and even progressive, a substitute to direct fiscal redistribution, thus necessitating *less*, not more, corrective progressive taxation. But if the regressive effects were prevalent, the opposite would be true: redistributive taxes would be all the more necessary. In short, society cannot achieve its desired overall level of redistribution if it miscounts the effects of some access justice programs.

## B. Regressive Public Expenditures

Having established that regressive redistribution is a theoretical possibility, I now turn to demonstrate some examples of economic programs that illustrate this possibility. These examples will help develop, in Section C, a richer understanding of the mechanisms that cause selective utilization of access. Later, in Section D, with the understanding of such mechanisms, I examine some fundamental legal rules and policies that fit the regressive pattern. Here, at the outset, the illustrations come from fiscal and budgetary programs.

Consider public expenditures that supply open access to remote parks, libraries, or museums. To access a remote national park, people need to travel a distance, and those with cars, leisure time, appreciation for nature, and disposable income to pay the cost of travel and special gear are more likely to access the remote park. State and national parks are indeed open and free to all (with an occasional small entrance fee), but because they require transportation and travel gear, they are largely inaccessible to most lower-income residents of cities.<sup>26</sup> Access is subject to an implicit cost of approach, and the more remote the location is, the costlier to access. Public expenditure on maintaining free access to remote vacation spots is regressive, at least in the weak sense (in that the benefits accrue disproportionately to the better-off).

Roads and subsidized city parking lots may also be regressive in the weak sense. Usage rates of open roads and parking lots are higher among middle- and upper-income residents.<sup>27</sup> The poor are less likely to drive and park cars, and thus benefit less from highways and free lots. Many among the poor do not drive or commute (due to disability, poverty, or joblessness), and many who do commute work close to home.<sup>28</sup> Even public transportation could be

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<sup>26</sup> See Patricia A. Taylor, Burke D. Grandjean, and James H. Gramann, *National Park Service Comprehensive Survey of the American Public: 2008–2009; Racial and Ethnic Diversity of National Park System Visitors and Non-visitors* \*11 (National Park Service, Natural Resource Stewardship and Science, July 2011), archived at <http://perma.cc/Y7MF-PZHJ> (finding that the cost of hotels and food is the leading reason people do not visit national parks more frequently).

<sup>27</sup> See Lisa Schweitzer and Brian D. Taylor, *Just Pricing: The Distributional Effects of Congestion Pricing and Sales Taxes*, 35 *Transp* 797, 805, 808 (2008).

<sup>28</sup> See Paul Ong and Evelyn Blumenberg, *Job Access, Commute and Travel Burden among Welfare Recipients*, 35 *Urban Stud* 77, 82 (1998) (showing that Los Angeles welfare recipients' median commute was 7.5 miles, as opposed to an average of 16 miles for all workers). See also Brian McKenzie, *Who Drives to Work? Commuting by Automobile in the United States: 2013* \*18–19 (US Census Bureau, Aug 2015), archived at <http://perma.cc/Y3G7-86TA>.

regressive if not targeting struggling neighborhoods directly, for example, by improving a neighborhood's access to infrastructure (such as a new metro stop in a poor neighborhood).<sup>29</sup>

More generally, public programs that promote access to basic utilities in developing countries have had difficulty reaching the neediest populations. Access to energy is often promoted through price subsidies or unbilled consumption—the paradigmatic quantity-based subsidies (ones that are proportional to the amount of the service consumed)—but have been shown to be regressive. One World Bank study bemoaned the “perverse situation, in which higher-income consumers receive benefits they do not need . . . leaving few or no resources to expand access.”<sup>30</sup> Another World Bank study of utility subsidies found that, of the twenty-six subsidies considered, *none* were progressive. “The notion that [the studied price subsidies are] inherently pro-poor is clearly a misconception.”<sup>31</sup> Many nonpoor households receive the subsidy, and many poor households are excluded because they are not connected to the system from which access—and the subsidy—is drawn. In African countries, this is the pattern found for water and electricity subsidies: “poor households are less likely than the population as a whole to have [the] water and electricity connections” that are necessary to access and enjoy the program.<sup>32</sup> In developed countries, this is the pattern with other programs—like roads and transportation—that are accessed less by the poor, or from which the poor consume less than the wealthy. In these countries, road and transportation policies that eliminate free, open access—for example, collection of tolls—are often found to be progressive overall.<sup>33</sup> A California study estimated that road

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<sup>29</sup> For example, 73 percent of Metro rail passengers in Washington, DC, have annual household incomes of \$75,000 or more, whereas only 47 percent of bus passengers have similar incomes. See Steven Ginsberg and Laura Stanton, *Would Anyone Win If Metro Raised Fares?* (Wash Post, Sept 16, 2007), archived at <http://perma.cc/FA5Q-P4M8>.

<sup>30</sup> Enrique Croussilat, Richard Hamilton, and Pedro Antmann, *Addressing the Electricity Access Gap* \*12 (World Bank, June 2010), archived at <http://perma.cc/V4S5-3VAK>.

<sup>31</sup> Kristin Komives, et al, *Water, Electricity, and the Poor: Who Benefits from Utility Subsidies?* \*70–71 (World Bank, 2005), archived at <http://perma.cc/5TR5-UN3A>.

<sup>32</sup> Id at \*77. See also Kristin Komives, Dale Whittington, and Xun Wu, *Access to Utilities by the Poor: A Global Perspective* \*15–16 (World Institute for Development Economics Research Discussion Paper No 2001/15, June 2001), archived at <http://perma.cc/MS4S-EMSZ>.

<sup>33</sup> See David Banister, *Equity and Acceptability Questions in Internalising the Social Costs of Transport*, in *Internalising the Social Costs of Transport* 153, 158–60 (European Conference of Ministers of Transport 1994); Jonas Eliasson and Lars-Göran Mattsson, *Equity Effects of Congestion Pricing: Quantitative Methodology and a Case Study for Stockholm*,

tolls reduce the sales tax burden that the lowest income group would otherwise have to bear.<sup>34</sup> Free access to the highways is thus regressive in the strong sense.

Further, if people of middle income (and up) not only use transportation more, but also gain a disproportionate connection through it to income-producing opportunities, thereby crowding out the poor, then the open roads and transportation policies may be regressive in the stronger sense, of increasing the overall degree of inequality.<sup>35</sup> It is difficult to make this case empirically, and I suspect that the experience of different localities may vary.<sup>36</sup> Indeed, some American cities can be regarded as testaments to how a system of publicly maintained freeways facilitate urban flight to suburbs, harming the economic vitality of the central city and the well-being of its low-income residents.<sup>37</sup>

Similarly, to access a public library and even more so a museum, people have to appreciate literature and the fine arts, a trait that is correlated with income, and they have to be part of social networks that reward fluency in these media. Surely, some of the services offered by public libraries, like free computer and Internet access to local residents, are progressive—benefitting low-income people who may not have similar connectivity at home.<sup>38</sup> But other services, for example, the maintenance of expensive collections of rare works, benefit more the elites.<sup>39</sup> If they

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40 Transp Rsrch Pt A 602, 604 (2006). For a helpful review of the literature, see generally David Levinson, *Equity Effects of Road Pricing: A Review*, 30 *Transport Revs* 33 (2010).

<sup>34</sup> See Schweitzer and Taylor, 35 *Transp* at 806 (cited in note 27).

<sup>35</sup> Todd Litman and Marc Brenman, *A New Social Equity Agenda for Sustainable Transportation* \*6 (Victoria Transport Policy Institute, Mar 8, 2012), archived at <http://perma.cc/L2E7-7QWJ> (“[I]f roads and parking facilities are not financed by user fees (tolls, parking fees and increased fuel taxes) they must be financed by general taxes and building rents that everybody pays regardless of how much they drive, which is unfair and regressive.”).

<sup>36</sup> Kristin Komives and her coauthors argued that, although the utility subsidies in the states they studied were regressive, “they are less regressive than the distribution of income in the states. This finding indicates that the subsidies contribute to reducing inequality, even when the distribution of subsidy benefits is regressive.” Komives, et al, *Water, Electricity, and the Poor* at \*143 (cited in note 31).

<sup>37</sup> See Joe T. Darden, et al, *Detroit: Race and Uneven Development* xi (Temple 1987) (noting that “the economic decline of central cities and the economic rise of the suburbs [was] a redistribution facilitated by the massive construction of interstate highways”).

<sup>38</sup> See Thom File and Camille Ryan, *Computer and Internet Use in the United States: 2013* \*4–5 (US Census Bureau, Nov 2014), archived at <http://perma.cc/NN2K-3UDP> (showing that low-income families are less likely to have a computer or Internet access in their homes).

<sup>39</sup> See Paul J. DiMaggio, *The Museum and the Public*, in Martin Feldstein, ed, *The Economics of Art Museums* 39, 39–41 (Chicago 1991); Juan Prieto-Rodríguez and Víctor

are funded largely by wealthy philanthropists, museums may be regressive only in the weak sense—benefitting the affluent more, without increasing inequality. However, tax credits for the philanthropic class are a form of public expenditure, constituting a transfer from the general budget that funds all programs to the budget of cultural institutions that cater largely to the well-to-do, well-educated patrons.<sup>40</sup>

### C. Sources of Access Handicaps

The theoretical case laid out in Section A and the examples in Section B reveal a phenomenon that is sometimes called “access handicap”<sup>41</sup>—when some groups are *systematically* less likely to enter and utilize open sites. What are these access handicaps? What are the impediments that afflict some groups, stopping them from exercising their access rights? This Section explores the systematic access handicaps that prevent some groups from fully utilizing their access rights.

#### 1. Cost handicaps: Implicit nonprice fees.

A site may be free to enter but costly to reach. The example above of a remotely located but publicly funded national park involves an implicit screening fee—the cost of travel to reach the park.<sup>42</sup> Free higher education (in places where it is the norm) may require enormous private costs to qualify. Chinese elite universities, for example, are heavily subsidized. But the selection process is so demanding that Chinese families spend years and enormous

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Fernández-Blanco, *Optimal Pricing and Grant Policies for Museums*, 30 *J Cultural Econ* 169, 169–70 (2006).

<sup>40</sup> See Alan L. Feld, Michael O’Hare, and J. Mark Davidson Schuster, *Patrons despite Themselves: Taxpayers and Arts Policy* 75 (NYU 1983); Alan L. Feld, *Revisiting Tax Subsidies for Cultural Institutions*, 32 *J Cultural Econ* 275, 276 (2008); Michael Rushton, *Who Pays? Who Benefits? Who Decides?*, 32 *J Cultural Econ* 293, 295 (2008).

<sup>41</sup> Komives, et al, *Water, Electricity, and the Poor* at \*60–61 (cited in note 31).

<sup>42</sup> See David Scott and Wayne Munson, *Perceived Constraints to Park Usage among Individuals with Low Incomes*, 12 *J Park & Recreation Administration* 79, 84, 91 (Winter 1994); Jin-Hyung Lee, David Scott, and Myron F. Floyd, *Structural Inequalities in Outdoor Recreation Participation: A Multiple Hierarchy Stratification Perspective*, 33 *J Leisure Rsrch* 427, 443 (2001). For discussions of the sensitivity of lower-income people to usage fees, see Thomas More and Thomas Stevens, *Do User Fees Exclude Low-Income People from Resource-Based Recreation?*, 32 *J Leisure Rsrch* 341, 351–52 (2000); Stephen D. Reiling, Hsiang-Tai Cheng, and Cheryl Trott, *Measuring the Discriminatory Impact Associated with Higher Recreational Fees*, 14 *Leisure Sci* 121, 137 (1992); J. Bishop Grewell, *The Ethics of Recreation Fees: Slamming the Door on Low-Income People?*, 22 *PERC Rep* 7, 8 (Mar 2004), archived at <http://perma.cc/FA6V-RG7E>.

resources to pass the entry tests.<sup>43</sup> Those unable to afford the implicit eligibility fee are disproportionately handicapped.

Here, the “open” and “free” attributes are technically correct (there is no ticket office at the gate of the park, nor a full tuition bill at the Chinese elite university). But it is functionally false. In deciding whether to pursue the freely accessed good, people face nonzero costs of arrival at the open gates or of qualifying for free entry, and these costs may vary across different groups both in magnitude and affordability. Sometimes these costs favor the poor. For example, the additional costs may be measured by time: how long the entrant is willing to stand in the queue. In such cases, free access is deployed more by those with low alternative cost of time, namely, the relatively poor.<sup>44</sup> But other times these costs are stacked against the poor, especially when they require expenditure of disposable income.

To be sure, part of an effective access justice policy may be the subsidization of the implicit nonprice fees. If, in order to enjoy open access to higher education, people have to spend years on costly preparation, prep schools can be subsidized. Ironically, this logic can also be turned on its head: implicit nonprice fees can be strategically mounted on some populations (primarily weak populations) to reduce their access to the otherwise-free and open forum. Voter ID laws, which require a registration process that is relatively costless for the upper- and middle-class but costly for the poor, are a strategic impediment because of their particular effect on poor populations.<sup>45</sup>

## 2. Network handicaps: Connectedness to a grid.

Another form of pre-access impediment is membership in a network. To enjoy some forms of open access, people have to be

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<sup>43</sup> Keith Bradsher, *In China, Families Bet It All on College for Their Children* (NY Times, Feb 16, 2013), online at <http://www.nytimes.com/2013/02/17/business/in-china-families-bet-it-all-on-a-child-in-college.html> (visited Feb 12, 2016) (Perma archive unavailable).

<sup>44</sup> See Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* 73–76 (Russell Sage 1992).

<sup>45</sup> See *Crawford v Marion County Election Board*, 472 F3d 949, 955 (7th Cir 2007) (Evans dissenting) (arguing that the voter ID law in question would impact the ability of the poor and elderly to vote); *Frank v Walker*, 773 F3d 783, 785 (7th Cir 2014) (Posner dissenting from denial of rehearing en banc), quoting *Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* \*2–3 (Brennan Center for Justice at NYU School of Law, Nov 2006), archived at <http://perma.cc/7NSF-5X4U> (noting that the poor, the elderly, and minorities are less likely to have documents allowing them to comply with voter ID laws).

connected to the network through which the benefits are distributed. For example, to enjoy the many benefits from open services on the Internet one needs to be connected to the Internet. To enjoy “access to knowledge” one has to join a community of users that gain the access. At an even more basic level, immigrants may be deprived of access because they are not part of the language “network.”

A painful reminder of the connectedness-to-a-network handicap comes from an important access justice policy—projects providing people with subsidized utilities (like water and electricity). In developing countries, utility subsidies benefitted least those who need them most—poor people in remote areas—because of the low rates of network connectedness among the very poor.<sup>46</sup> If the electricity grid does not reach your village, cheap subsidized electricity is not going to benefit you. Likewise, the benefits of public roads and public transportation flow to communities connected by the commuter network, not to remote and unconnected areas.

When connectedness to a network is the access handicap, access justice would be better served by expanding the network, rather than subsidizing the goods and services that flow through it. Expenditures in expanding a network directly benefit new entrants who are brought in, who could be selected based on need. (Benefits also flow indirectly to incumbents in the network, due to “network externalities.”)<sup>47</sup> By contrast, subsidies of the services flowing through the network benefit only the incumbents.

### 3. Information handicap: Understanding the access privilege.

Access may be deployed differentially because of information costs. People may be able to gain access without any implicit fee and without having to join a formal network or grid, but free access may nevertheless be worthless to them if they don’t know about it or if they don’t understand why it might benefit them.

The information about open access has to be disseminated to all potential beneficiaries. But people have different exposures to such information and different abilities to process it. I will show below examples of mandated health insurance benefits that are

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<sup>46</sup> See text accompanying notes 31–32. Another area in which connectedness to a network is key to access justice is Internet connection. See text accompanying notes 6 and 38.

<sup>47</sup> For a brief description of network externalities, see David Bardey, Helmuth Cremer, and Jean-Marie Lozachmeur, *Competition in Two-Sided Markets with Common Network Externalities*, 44 *Rev Indust Org* 327, 328 (2014).

available, and potentially beneficial, to all policyholders, but that are not utilized by some. To understand the ins and outs of a health insurance plan, the beneficiary needs to read lengthy and complex documents with numerous instructions about how to utilize the different benefits. Lawmakers may make heroic efforts to simplify such guides and manuals, but the complex is often hard to simplify.<sup>48</sup> And so some benefits may go unused, despite the access justice policy that brought them into the plans in the first place.

Even educated people may succumb to information handicaps. Who can master every detail in her health and dental plan? Do you—sophisticated legal readers—know how often your vision plan entitles you to a new pair of glasses, and under what terms?<sup>49</sup> Later (in Part II), I will discuss in detail the mechanics of access to courts, an access justice policy that depends in part on people reading and responding to information and disclosures. For consumers, access to courts is practiced through class actions, but joining the class litigation and receiving redress through it is conditional on reading and understanding technical information notices that most people tend to overlook.<sup>50</sup>

While the complexity of access justice rules affects everybody, it is no surprise that it affects less educated and less sophisticated consumers more severely. Even if the structure of an access justice program is simplified, literacy, numeracy, and experience operate as sorting devices, filtering out the less sophisticated.<sup>51</sup> True, access to education (through subsidized schooling) could potentially help close the gaps in the information handicap between the rich and the poor. But, as I will illustrate below, some of the

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<sup>48</sup> See Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 121–37 (Princeton 2014).

<sup>49</sup> See, for example, *Benefits: Vision Plans* (The University of Chicago Human Resources, Jan 27, 2016), archived at <http://perma.cc/T8CF-BEF8>.

<sup>50</sup> The information available suggests that the response rate is quite low. See *Do Class Actions Benefit Class Members: An Empirical Analysis of Class Actions* \*2 (Mayer Brown LLP), archived at <http://perma.cc/V5UX-KCM7> (stating that settlements delivered funds to between 0.000006 percent and 12 percent of class members). See also Debra Lyn Bassett, *Class Action Silence*, 94 *BU L Rev* 1781, 1796 (2014).

<sup>51</sup> See Sean F. Reardon, Rachel A. Valentino, and Kenneth A. Shores, *Patterns of Literacy among U.S. Students*, 22 *Future Children* 17, 26 (Fall 2012), archived at <http://perma.cc/2LLU-ZJV7> (describing a large discrepancy in literacy rates based on income and noting that, for students born in 2000, those from families in the ninetieth percentile of income had literacy rates 1.25 standard deviations higher than those from families in the tenth percentile); Irwin S. Kirsch, et al, *Adult Literacy in America: A First Look at the Findings of the National Adult Literacy Survey* \*60–61 (National Center for Education Statistics, Apr 2002), archived at <http://perma.cc/6TR7-5W3N>.

programs that intend to provide better access to information and education, and which are intended to reduce the information handicap, are themselves bootstrapped by this and other access handicaps—namely, by the fact that one needs to know about the availability of the access program, and be able to overcome other impediments to access.<sup>52</sup> Worse still, some of these programs that purport to provide information equally and openly to all backfire and increase, rather than reduce, the inequality in access utilization. If the information is more legible and useful to the educated, handing out such information may exacerbate the regressivity. For example, providing good disclosures about quality of hospitals may help sophisticated patients make better hospital choices, crowding out the less sophisticated and relegating them to lower-quality medical care.<sup>53</sup>

Closely related to the information problem is the *cognitive function* handicap. It is no secret that people sometimes make poor decisions because of cognitive biases and judgment error. Here, too, there is evidence that poor people perform worse and “behave in less capable ways.”<sup>54</sup> People who experience ongoing material strain are more cognitively taxed and thus exhibit more mental scarcity, leading to decision errors.<sup>55</sup> Access opportunities that require some measure of decisional sophistication to realize thus fall prey to the cognitive function handicap.

#### 4. Benefit handicaps: The differential value of access.

Even if free or subsidized access is truly accessible to all, unobstructed by the cost, network, or information handicap, not everyone will exercise it equally. Some people may derive more benefit

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<sup>52</sup> See notes 104–09 and accompanying text.

<sup>53</sup> See Lawrence P. Casalino, et al, *Will Pay-for-Performance and Quality Reporting Affect Health Care Disparities?*, 26 *Health Aff* w405, w409 (2007), online at <http://content.healthaffairs.org/content/26/3/w405.full.pdf> (visited Aug 24, 2016) (Perma archive unavailable); Dana B. Mukamel, et al, *Quality Report Cards, Selection of Cardiac Surgeons, and Racial Disparities: A Study of the Publication of the New York State Cardiac Surgery Reports*, 41 *Inquiry* 435, 443–45 (2004); David Dranove, et al, *Is More Information Better? The Effects of “Report Cards” on Health Care Providers*, 111 *J Polit Econ* 555, 581–83 (2003).

<sup>54</sup> Anandi Mani, et al, *Poverty Impedes Cognitive Function*, 341 *Sci* 976, 976 (2013). See also generally Anuj K. Shah, Sendhil Mullainathan, and Eldar Shafir, *Some Consequences of Having Too Little*, 338 *Sci* 682 (2012); Sendhil Mullainathan and Eldar Shafir, *Scarcity: Why Having Too Little Means So Much* (Times Books 2013).

<sup>55</sup> See Justin S. White and William H. Dow, *Intertemporal Choices for Health*, in Christina A. Roberto and Ichiro Kawachi, eds, *Behavioral Economics and Public Health* 27, 62 (Oxford 2016).

from the access justice program because they need it more. And conversely, others may need it less.

Policies intended to improve physical access to facilities for people with disabilities are intended to have such differential benefit and are rightly celebrated for these selective effects. In fact, they sometimes deliberately exclude others from deploying the access program and even punish them if they do—for example, in the case of handicap parking spaces.<sup>56</sup>

Many other facially neutral access justice policies suffer from varying utilization rates due to differential benefits across users. City parks with playgrounds are worth more to families with kids; open and subsidized higher education is worth more to people who graduate from high school; and accessible insurance is worth more to people with high losses. For example, programs of access to disaster relief (or to subsidized disaster insurance) benefit everyone who succumbs to an otherwise-uncompensated disaster, and in the abstract they appear neutral. But in effect these programs are more valuable to people who live in disaster-prone areas. All victims of severe weather disasters may qualify for some form of free government relief or subsidized flood insurance, but people living in the predicted paths of storms benefit more.<sup>57</sup>

##### 5. Affordability handicaps: The effect of small fees.

Access justice is sometimes implemented through free-of-charge entry. But problems of moral hazard may lead to inefficient deployment that would make the program too costly. When, for example, access to medicine is implemented by distribution of drugs free of any charge, people may hoard medications unnecessarily, at great cost to the providers and to taxpayers.<sup>58</sup> Similarly, when people receive ambulance or emergency care services for

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<sup>56</sup> See, for example, 625 ILCS 5/11-1301.3 (mandating fines for those who, without authorization, park in spots reserved for persons with disabilities); *Disabled Parking FAQ's for Law Enforcement* (Massachusetts Registry of Motor Vehicles, 2016), archived at <http://perma.cc/JJ4A-N98W> (stating that individual jurisdictions can issue tickets of \$100 to \$300 for parking in a handicap space without a placard).

<sup>57</sup> See Part I.D.3.a. See also generally Omri Ben-Shahar and Kyle D. Logue, *The Perverse Effects of Subsidized Weather Insurance*, 68 *Stan L Rev* 571 (2016).

<sup>58</sup> Consider Merrill Goozner, *New Medicare Rule Aims to Curb Waste and Fraud in Medical Equipment Business* (Wash Post, Mar 24, 2012), archived at <http://perma.cc/Z3V4-J3KL>.

free, the services may be deployed excessively.<sup>59</sup> This moral hazard may occur in other areas as well. If, for example, enrollment in public universities is free of any tuition charge, people may enroll in programs of study even when they generate little probability of private success and low social value.<sup>60</sup>

The inefficiency and waste arising from such free-of-charge access justice programs often lead to the implementation of some cost sharing or co-payments—small fees that purport to shift a tolerable burden to those who make the decision to access the program. The fees have to be large enough to reduce the moral hazard, but not too large to make the program unaffordable.

But even token prices may filter out many users, especially the poorest, for whom any minor cash price may be burdensome. This result has been abundantly documented in health care and prescription drug policy.<sup>61</sup> The same result, of shutting down the very poor from gaining access, has also been suggested in the context of rent control—a prominent access justice policy that seeks to improve access to housing among low-income renters and to promote mixed-income communities. Most rent control policies decrease but do not eliminate rent payments. Thus, the poorest renters may still be unable to afford the reduced rent payments. This prevents the program from having the desired effect on the target population. Although the distributive effects of rent control are debated and may vary across cities, a substantial literature has documented a disturbing distributive effect of rent control: the beneficiaries are often more sophisticated and economically stronger than the intended population.<sup>62</sup> The regressive effects of

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<sup>59</sup> See Aaron L. Schwartz, et al, *Measuring Low-Value Care in Medicare*, 174 JAMA Internal Med 1067, 1073 (2014) (finding that one-quarter of Medicare patients have received unnecessary treatment that was likely to provide little benefit).

<sup>60</sup> See *Efficiency and Effectiveness of Public Expenditure on Tertiary Education in the EU* \*17–23 (European Commission), archived at <http://perma.cc/MZ4N-W6Q9>.

<sup>61</sup> See Michael Chernew, et al, *Effects of Increased Patient Cost Sharing on Socioeconomic Disparities in Health Care*, 23 J Gen Internal Med 1131, 1134–35 (2008); Sujha Subramanian, *Impact of Medicaid Copayments on Patients with Cancer: Lessons for Medicaid Expansion under Health Reform*, 49 Med Care 842, 844 (2011); *Report to the Congress: Medicare Payment Policy* \*338–66 (Medicare Payment Advisory Commission, Mar 2012), archived at <http://perma.cc/3QKS-Y9YY>.

<sup>62</sup> See Richard Arnott, *Time for Revisionism on Rent Control?*, 9 J Econ Persp 99, 108 (Winter 1995); Edward L. Glaeser, *Does Rent Control Reduce Segregation?* \*9 (Harvard Institute of Economic Research Discussion Paper No 1985, Nov 1, 2002), archived at <http://perma.cc/7RJW-6SJJ>. See also Joseph Gyourko and Peter Linneman, *Equity and Efficiency Aspects of Rent Control: An Empirical Study of New York City*, 26 J Urban Econ 54, 64 (1989) (finding that lower-income residents benefitted at slightly higher levels, but that “poor benefit targeting” reduced this benefit).

some rent control policies may be due to more than the affordability handicap. They may be due to the information handicap—some people are less competent at understanding how to jump the queue and secure the coveted scarce benefit. Or, even more cynically, they may be due to a variant of a network handicap—being outside a social or political network that helps secure the benefit.<sup>63</sup> But affordability may nevertheless explain some of the selection pattern.

The affordability handicap can be found elsewhere. For example, it may be a concern in consumer-protection law.<sup>64</sup> Laws mandating consumer rights—whether these are access rights or other universal nondisclaimable protections—can have price effects that are negligible for some but meaningful for others. If people have different price-quality tradeoffs, the higher quality obtained by mandated rights may price out the bargain basement shoppers who prefer low-quality, low-price bundles.

These patterns explain the access handicap. While providing some order to the universe of access justice policies and generating some testable predictions regarding the prevalence of the regressive effect, my account above falls short of a “theory” of differential access. The argument that access policies may be regressive follows inductive reasoning, rather than first-principles logic. Its force depends on the prevalence of evidence supporting it. For example, access to government disaster relief may be progressive if it goes to low-income victims (as is often the case with tornados destroying mobile homes in Tornado Alley or in low-lying areas along the Mississippi River), but it may be regressive if it goes to higher-income victims (as is often the case with hurricanes damaging high-end waterfront property). There is nothing inherent in the type of relief that determines its regressive consequences. Its redistributive bottom line depends on the relative incidence of storms in poor and rich areas. In general, then, the various access justice policies create different sets of winners and losers. As the

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<sup>63</sup> See, for example, Jim Edwards, *No, Rent Control Does Not Work—It Actually Benefits the Rich and Hurts the Poor* (Business Insider, Sept 3, 2015), archived at <http://perma.cc/6T4C-AFXZ> (describing how personal connections can be crucial to a buyer seeking a rent-controlled apartment); Scott James, *How Rent Control Subsidizes San Francisco's Super-Rich* (Bay Citizen, Feb 16, 2012), archived at <http://perma.cc/37YB-XTNV> (describing how tenants' political clout helps to cement San Francisco's rent control policies).

<sup>64</sup> Oren Bar-Gill and Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, 50 *Common Mkt L Rev* 109, 113–15 (2013).

factors just described in this Section come into play, the winners are less likely to be drawn from the poor.

#### D. Regressive Legal Institutions

We have seen that access justice programs may be regressive when their benefits accrue disproportionately to sophisticated or affluent groups. The examples drawn out thus far focused on fiscal and budgetary allocations, whereby the government uses its funding powers to allocate benefits. This Section moves on to examine a different type of access justice intervention—accomplished through legal institutions and mandates. These are policies in which the government does not directly produce a public good (as, say, in the examples of parks and education). Instead, the distributive effects of the policies discussed below occur indirectly, through the costs and benefits arising from legal rules.

##### 1. Mandated disclosure.

Mandated disclosure is a regulatory technique requiring one party to the transaction to provide information to the other party so that the other party can make a better decision. It does not regulate the decisions or the choices that people make; it regulates only the distribution of information. Mandated disclosure is an access-to-information policy that requires truthful, often comprehensive, information to be served out in equal portions. All consumers get the same warnings, the same disclosure forms, and the same data to fuel their informed consent.<sup>65</sup>

Mandated disclosure is broadly intended to protect weaker populations. Disclosures are routinely enacted in response to trouble stories in which ordinary citizens suffered misfortune. Lawmakers often brandish the specific travails of a working class or low-income person to punctuate the utility of the proposed disclosure mandate for similar folks who are not sophisticated or fortunate enough to obtain the necessary information absent a mandate.<sup>66</sup>

But free and equal access to information does not mean equal utilization of it. Building on the conceptual framework developed above, it is the *information handicap* that limits the use of mandated disclosures. Anatole France remarked bitingly about “the

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<sup>65</sup> See Ben-Shahar and Schneider, *More Than You Wanted to Know* at 3–6 (cited in note 48).

<sup>66</sup> See *id.* at 138–43.

majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”<sup>67</sup> The majestic equality of disclosure fades when filtered through the information handicap. The information being disclosed has to be sought, noticed, read, understood, processed, and then used in a way that improves decisions and outcomes. In each one of these steps, the poor and poorly educated benefit less than the wealthy and the educated. The very people whose troubles led to the enactment of disclosure mandates are least likely to benefit from them.

Medical informed consent forms—one of the crown jewels of the mandated disclosure paradigm—illustrate this pattern. Consent forms are required by law to be fully detailed, so that all risks posed to patients or to human research subjects will be transparent. Even if drafted in lay language, these forms are complex, mostly written at a literacy level exceeding that of poor and unsophisticated patients.<sup>68</sup>

Similarly, consumer financial disclosures require some financial education and savvy to be useful. “Evidence from studies of consumer credit disclosure rules suggests that it is better-off consumers who tend to make use of information.”<sup>69</sup> “The poor may rationally decide not to make use of information, if they feel no alternatives will be available to them.”<sup>70</sup> Better-educated (and wealthier) consumers know better how to search for information, understand it, ask questions about it, comparison shop, and receive better advice with it.<sup>71</sup>

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<sup>67</sup> Anatole France, *The Red Lily* 95 (John Lane 5th ed 1916) (Winifred Stephens, trans) (Frederic Chapman, ed).

<sup>68</sup> See S. Michael Sharp, *Consent Documents for Oncology Trials: Does Anybody Read These Things?*, 27 *Am J Clinical Oncology* 570, 570 (2004) (“[S]tudies have found that consent documents are long and complicated to the point that the average person in the United States is likely to find them difficult to read.”); Angela Fagerlin, et al, *Patient Education Materials about the Treatment of Early-Stage Prostate Cancer: A Critical Review*, 140 *Annals Internal Med* 721, 726–27 (2004); Stuart A. Grossman, Steven Piantadosi, and Charles Covahey, *Are Informed Consent Forms That Describe Clinical Oncology Research Protocols Readable by Most Patients and Their Families?*, 12 *J Clinical Oncology* 2211, 2212 (1994).

<sup>69</sup> Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information*, 32 *J L & Society* 349, 357 (2005).

<sup>70</sup> *Id.* at 358. See also William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 *Wis L Rev* 400, 443–44 (“[I]f too much information is put on the label, it will look like the fine print in a contract and undoubtedly be ignored by most consumers.”).

<sup>71</sup> See Barbara O’Neill, Barbara Bristow, and Patricia Q. Brennan, *MONEY 2000 Participants: Who Are They?*, 37 *J Extension* (Feb 1999), archived at <http://perma.cc/28D4-UWLF>; Howells, 32 *J L & Society* at 357–58 (cited in note 69).

Mandated disclosures not only benefit the more educated and more sophisticated recipients, but, in an unintended way, can worsen the relative situation of weaker groups.<sup>72</sup> There are some disturbing instances in which this phenomenon has been empirically documented. For example, hospitals must disclose report cards—scores that measure the quality of treatment they provide, most often mortality rates. There is some evidence that these mandates led hospitals to improve the reported dimensions, but there are also discouraging findings that the disclosure hurt the sicker and poorer patients. Healthier and more sophisticated patients found their way to higher-rated hospitals and to better overall medical care, while sicker and poorer patients were treated in hospitals with worse grades. This results in “marginal health benefits for healthy patients, and major adverse health consequences for sicker patients.”<sup>73</sup> The potential harm to poorer, sicker patients is due to their relative disadvantage in the “arms race” to obtain the benefits of superior medicine that disclosures reveal. If the best hospitals have limited capacity, those with handicapped access to the information about hospital quality will suffer a systematic disadvantage in medical outcomes.

Mandated disclosure can be harmful to the poor in another, subtler way. In consumer credit markets, the poor face shadier lending practices, have less financial savvy, and are more vulnerable to marketing traps. The main protection they have is the network of antifraud regulations disciplining the conduct of subprime lenders.<sup>74</sup> These are state and federal laws that identify particular patterns of deception and abuse and provide remedies for the abused parties. Disclosures, however, *undermine* these protections. Why? Because compliance with disclosure mandates creates a veneer of legality, a presumption against fraud. Almost by definition, there cannot be fraud or deception when the lender made all the information accessible and carefully lavished on the

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<sup>72</sup> See Kenneth McNeil, et al, *Market Discrimination against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry*, 13 L & Society Rev 695, 699 (1979); Ben-Shahar and Schneider, *More Than You Wanted to Know* at 176–80 (cited in note 48).

<sup>73</sup> Dranove, et al, 111 J Polit Econ at 577 (cited in note 53).

<sup>74</sup> Paul M. Schwartz, Note, *Where Do We Go from Here? The Battle against Predatory Subprime Lending*, 3 Brooklyn J Corp, Fin & Comm L 213, 231 (2008) (discussing the state and federal remedies for victims of predatory lending).

debtor all the mandated disclosures required by the Truth in Lending Act<sup>75</sup> and its satellites.<sup>76</sup>

And so, access justice—here, the alluring ideal of equal access to information—replaces and substitutes for the fraud claim a ruffled consumer would otherwise have. The protection that would otherwise be accorded through antifraud legislation is thus diminished. Sophisticated consumers are less troubled by this substitution effect because they are not confronted with the same predatory lending schemes. They are better educated and better advised, they can sniff the aroma of deception, and they can safeguard against questionable solicitations by asking better questions or taking their patronage elsewhere. They can fall back on more robust informal networks of advice and reputation. It is therefore the poor who suffer disproportionately from the crippling of antifraud and antideception laws.

## 2. Mandated compensation.

Tort and products liability, and other remedial rules in private law, guarantee people's access to remedy—an equal right to all victims to be made “whole” according to the same formula. This is a crucial ingredient in some conceptions of access justice because meaningful redress of injuries protects either those who are “excluded from the market or [ ] those who face difficulties in making use of the market freedoms.”<sup>77</sup> But, like many minimum-quality terms, mandated compensation can have differential effects across consumers, which can lead to cross-subsidies whereby poor consumers subsidize the compensation of wealthier consumers.<sup>78</sup>

Mandated compensation can fail to generate protective benefits to weak consumers because of the *utility handicap* and the *affordability handicap*. Consider first the utility handicap. Tort

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<sup>75</sup> Pub L No 90-321, 82 Stat 146 (1968), codified as amended at 15 USC § 1601 et seq.

<sup>76</sup> See Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, in Omri Ben-Shahar, ed, *Boilerplate: The Foundation of Market Contracts* 83, 92–93 (Cambridge 2007); *Riensch v Cingular Wireless LLC*, 2006 WL 3827477, \*6–9 (WD Wash); *Williams v First Government Mortgage and Investors Corp*, 225 F3d 738, 751–52 (DC Cir 2000) (affirming the denial of the plaintiff's Truth in Lending Act claim given the lender's adequate disclosure of the agreement's terms).

<sup>77</sup> Hans-W. Micklitz, *Social Justice and Access Justice in Private Law* \*2 (European University Institute Working Paper No LAW 2011/02, 2011), archived at <http://perma.cc/M4TD-MAZU>.

<sup>78</sup> Charles Fried and David Rosenberg, *Making Tort Law: What Should Be Done and Who Should Do It* 71 (AEI 2003).

compensation for injuries arising from defective products requires manufacturers to pay for the losses suffered by victims. The cost of this liability regime is spread to all consumers through the increased price of products. How much each victim gets in compensation depends on how large her losses are, and—not surprisingly—the measurable losses to the poor tend to be smaller than those that accrue to the wealthy. Property-rich and high-income consumers receive greater awards, because damages in tort law are correlated with lost income and with consequential harm to property.<sup>79</sup>

If, hypothetically, these property-rich and high-income consumers had to buy private insurance for their idiosyncratic losses, they would be charged premiums commensurate with their higher expected losses, and the cross-subsidy would be avoided. This is the most basic feature of private insurance markets: if you insure against larger losses—for example, when the insured asset is a more valuable home or a larger earning capacity—you pay more for the coverage. But products liability law bundles the insurance component with the product purchase and the product price, preventing differentiation of the premiums. In most retail circumstances, sellers lack the ability to discriminate *ex ante* in price between different groups of consumers according to characteristics such as wealth or propensity toward getting into accidents (although for some products, like high- or low-end automobiles, some separation occurs because these products are targeting different income niches). As a result, all customers end up paying an equal implicit premium for the right to get the bundled insurance coverage—in the form of a higher product price. Poorer consumers with smaller expected losses thus cross-subsidize the broader *de facto* coverage of wealthier consumers engaging in the same activity or consuming the same product.<sup>80</sup>

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<sup>79</sup> This point has been made previously by many writers. See, for example, Richard L. Abel, *A Critique of American Tort Law*, 8 *Brit J L & Society* 199, 202–03 (1981) (noting that “the quantum of damages preserves, and indeed amplifies, the present unequal distribution of wealth and income”); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 *Yale L J* 1297, 1350–51 (1981); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *Yale L J* 1521, 1546, 1559–60 (1987); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 *Yale L J* 353, 405–06 (1988); Walter Y. Oi, *The Economics of Product Safety: A Rejoinder*, 5 *Bell J Econ & Mgmt Sci* 689, 690 (1974); James R. Garven, *Moral Hazard, Adverse Selection, and Tort Liability*, 28 *J Insurance Issues* 1, 6 (2005).

<sup>80</sup> See Priest, 96 *Yale L J* at 1546, 1559–60 (cited in note 79); James Henderson, *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 *Touro L Rev* 107, 119 (1993) (emphasizing that tort liability “is a miserable flop as a social insurance system”).

Despite my optimism regarding unbundled insurance markets, a similar pattern of cross-subsidization can occur when mandated compensation schemes are infused into insurance law. For example, auto insurance is widely viewed as a scheme intended to guarantee a cushion of compensation to victims of auto accidents.<sup>81</sup> Higher policy limits cost more, but provide more recovery for all victims. Drivers may not wish to purchase high liability limits, but the law requires them to do so in order to accord access to compensation to their victims. But who, among the potential victims, benefits more from drivers' generous insurance? Interestingly, advocates for low-income minority groups argued *against* mandatory make-whole auto insurance policies.<sup>82</sup> They realized that when the injured plaintiffs are poor, their recoveries are smaller. This is because their lost wages are lower, lawyers are harder for them to find, and jurors are less likely to return high awards. Thus, in the grand scheme, poorer populations benefit less from high-limit auto insurance, but nevertheless pay the same premiums to drive. Accordingly, their advocates even went as far as aligning with insurers in proposing low-cost, no-frills auto insurance policy options designed for low-income drivers. Those choices would have allowed people to opt out of the general pool and establish a separate insurance pool, with lower premiums. Partitioned from the general pool (and its associated higher coverage benefits), they would cease to cross-subsidize their more affluent fellow drivers and victims. Ironically, consumer activists like Ralph Nader successfully campaigned against the partitioned two-tier choice, invoking the logic and the rhetoric of access justice. Nader alleged that the low-coverage option "would unfairly deprive the poor of their right to be fully compensated for pain and suffering" and that it "dehumanized the poor and deprived them of their equal rights."<sup>83</sup>

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<sup>81</sup> See, for example, Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* 70–72 (Harvard 2008); Shaubin Talesh, *Insurance Law as Public Interest Law*, 2 UC Irvine L Rev 985, 996–97 (2012) ("[M]andatory automobile insurance laws serve the public interest by making drivers financially responsible to others they injure in an accident and are now treated as a necessary cost of living in the United States.").

<sup>82</sup> James M. Anderson, Paul Heaton, and Stephen J. Carroll, *The U.S. Experience with No-Fault Automobile Insurance: A Retrospective* 52–53 (RAND 2010) (recounting the efforts of these advocates).

<sup>83</sup> Id at 53–54. See also Kenneth Reich, *Nader Draws Criticism by Consumers for No-Fault View* (LA Times, May 28, 1989), archived at <http://perma.cc/7PC5-7CXM>.

These examples point to the utility handicap as the source of the regressive distribution effect of mandated compensation policies—different groups gaining different value from the benefit. But the affordability handicap may also account for the differential value. For some low-income consumers, the price increase of the product that now contains a more generous remedy or insurance component might make the entire activity—the purchase of the product or the driving of a car—prohibitively costly. They exit the market and no longer cross-subsidize their more affluent fellow consumers. But the adverse effect on them is no less troubling. It is the denial of an even more important access—the equal access to product markets and the participation in the primary activity.<sup>84</sup>

### 3. Mandated insurance.

The auto accidents and products liability examples above illustrate a more general phenomenon of mandatory equal access to insurance: elites benefit more from indemnity, even though it is equally available to all. A similar pattern can be traced in other insurance schemes, in which the social policy of access justice is driven by egalitarian concerns but in fact embodies a regressive redistribution. Let me demonstrate it through two examples: property insurance and health insurance.

*a) Property insurance.* Consider the widely prevalent public programs providing access to affordable homeowner's insurance in areas exposed to severe weather. The high risk of storms and of catastrophic loss means high, sometimes unaffordable, premiums. Political pressure thus builds for government intervention that would make insurance and home ownership accessible to middle- and lower-income people. Subsidized insurance is viewed as an important ingredient in access justice because insurance is required to obtain a mortgage loan, and its affordability can determine the path to home ownership. This is why flood insurance, for example, is provided with significant subsidies by the federal government

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<sup>84</sup> For similar arguments on compensation in contract law and the redistributive effect of consequential damages, see Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S Cal L Rev 629, 659–60 (1988) (discussing how, when a single price is charged, “buyers who had inherently low risks would be paying a premium to cover the potential liability to buyers who had inherently high risks”); Gwyn D. Quillen, Note, *Contract Damages and Cross-Subsidization*, 61 S Cal L Rev 1125, 1129–32 (1988).

through the National Flood Insurance Program.<sup>85</sup> This is also why many states that experience severe weather, like Florida, set regulatory caps on premiums for homeowner's insurance, and why some have state-funded insurance companies whose public purpose is to "provide property insurance protection . . . to those who are, in good faith, entitled to obtain coverage through the private market but are unable to do so."<sup>86</sup>

This is the rhetoric of access justice. When establishing such programs and voting to fund them, the ideal of access justice engenders bipartisan support, justified by "our moral duty to the poorest people and working people and lower middle income people."<sup>87</sup> Billions of dollars of subsidies are justified, according to one lawmaker, to prevent working families, who are "doing everything they can to put food on the table," from losing their homes.<sup>88</sup> But the reality, despite this progressive rhetoric, is disappointingly regressive, and largely due to the problem that I classified as the *utility handicap*. The government subsidies for insurance accrue foremost to homeowners in the highest-risk areas—in coastal communities. These are also the higher-value properties, owned by the affluent who desire and who can afford the luxury of proximity to the beach.<sup>89</sup> Because the deficit between premiums and payouts has to be paid by all taxpayers (or all policyholders, including those located inland in lower-risk, lower-value, lower-income areas), the subsidized insurance benefits the wealthier households at the expense of others.

In a separate coauthored study, I estimated the regressive effect of Florida's state-subsidized property insurance program. The study found a strong positive correlation between wealth and

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<sup>85</sup> See, for example, *Flood Insurance: FEMA's Rate-Setting Process Warrants Attention* \*6–7 (GAO, Oct 2008), archived at <http://perma.cc/GT46-PLGV> ("Congress mandated the use of subsidized premiums to encourage communities to join the program and mitigate concerns that charging rates that fully and accurately reflected flood risk would be a burden to some property owners.").

<sup>86</sup> *Who We Are* (Citizens Property Insurance Corporation), archived at <http://perma.cc/F7QH-74H2>.

<sup>87</sup> National Flood Insurance Program Enhanced Borrowing Authority Act of 2005, HR 3669, 109th Cong, 1st Sess, in 151 Cong Rec 19751 (Sept 8, 2005) (statement of Rep Frank). See also Rick Lazio, *Flood Fund Aids Working-Class Homeowners* (NY Times, Nov 18, 1993), online at <http://www.nytimes.com/1993/11/18/opinion/1-flood-fund-aids-working-class-homeowners-535993.html> (visited Aug 24, 2016) (Perma archive unavailable).

<sup>88</sup> Homeowner Flood Insurance Affordability Act of 2014, S 1926, 113th Cong, 2d Sess, in 160 Cong Rec S 581 (daily ed Jan 29, 2014) (statement of Sen Heitkamp).

<sup>89</sup> See *Value of Properties in the National Flood Insurance Program* \*2 (Congressional Budget Office, June 2007), archived at <http://perma.cc/AVG4-5XDP> (noting the extremely high values of subsidized coastal properties).

insurance subsidy. It turns out that a 1 percent increase in a household's value is associated with roughly a 1 percent increase in the subsidy. Simply put, if Eve's home is worth twice as much as Adam's, Eve enjoys on average twice the absolute subsidy—\$2 for every \$1 that Adam gets.<sup>90</sup>

While my main concern in discussing this example of subsidized property insurance is to show the unintended *redistributive* effect of access justice, this is the moment in the Article when I digress and make a comment on social waste. The cross-subsidy that government-provided insurance creates not only redistributes resources in favor of the affluent coastal residents and at the expense of others, but also energizes the rapid development along the riskiest, most erosion-prone, coastal areas.<sup>91</sup> In a little less than two generations, the population living in coastal Florida increased fourfold, by ten million people. Coastal exposure now represents 79 percent of all property exposure in the state, with an insured value of \$2.9 trillion.<sup>92</sup> You'd think that frequent hurricanes would chill the rate of development, right? Not in the slightest (why should they, if insurance is filthy cheap?). The path that Hurricane Andrew blazed along the Florida coast in 1992, at the time leaving \$25 billion in losses, has been so lushly redeveloped that the same storm would now cause more than double the losses, estimated by a congressional report at \$55 billion in 2005 (holding constant the value of building material and real estate, as well as other societal changes).<sup>93</sup> Access justice, in this case, was in large part an invitation to more affluent Americans to move to the land of subsidy.

*b) Health insurance.* In the homeowner's insurance example (and previously in the discussion of auto insurance), the elite had larger losses and thus received more de facto coverage for the same subsidized price. But the access handicap of insurance can accrue for a different reason: the lower propensity to invoke the benefits. This effect could occur in the area of health insurance. Poor people are more sensitive to co-payments (affordability handicap) and to other nonprice fees (cost handicap) and thus can less easily access the treatment benefits that the wealthy more

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<sup>90</sup> See Ben-Shahar and Logue, 68 *Stan L Rev* at 606–07 (cited in note 57).

<sup>91</sup> *Id.* at 613.

<sup>92</sup> *Florida Hurricane Insurance: Fact File* (Insurance Information Institute, Oct 2015), archived at <http://perma.cc/WVB9-XAUP>.

<sup>93</sup> *Climate Change: Financial Risks to Federal and Private Insurers in Coming Decades Are Potentially Significant* \*25 (GAO, Mar 2007), archived at <http://perma.cc/ZA9N-MM5V>.

readily secure.<sup>94</sup> Further, as health plans and medical bureaucracies become more complex, it is the sophisticates that can better understand and utilize the labyrinth of insurance benefits (information handicap).<sup>95</sup> Indeed, much regulatory effort has been focused on “health insurance literacy” and on simplifying the “Summary of Coverage” forms that enrollees receive, to afford greater accessibility to the less educated. But the results are disappointing. People have difficulty ascertaining what is covered, what it costs, and which plans to choose.<sup>96</sup> As a result, rates of health care utilization vary, and insurance benefits realization falls short of plan treatment eligibility. If there are disproportionate rates of utilization of benefits among people with different wealth and sophistication, health insurance can quickly become regressive in the strong sense, as long as the disproportionate utilization outweighs the higher premiums that the high earners pay.

This regressive effect—a wealth transfer from those with less means to the more affluent—has been documented, for example, in the area of mental health insurance. One of the access justice trends promoted by the Patient Protection and Affordable Care Act<sup>97</sup> is to mandate mental health benefits as part of all health plans.<sup>98</sup> But studies found that, when mental health benefits are covered, whites and high-income individuals consume more services than nonwhites and low-income individuals.<sup>99</sup> Nonwhites and low-income individuals do not take advantage of these benefits at the same rates as their white and more affluent coworkers, and to the degree that nonwhites and low-income individuals seek care for mental illnesses, they are more likely to turn to general

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<sup>94</sup> See Joseph Newhouse, et al, *Free for All? Lessons from the RAND Health Insurance Experiment* 57–58 (Harvard 1993) (discussing whether cost sharing had a larger effect among the poor).

<sup>95</sup> See M. Gregg Bloche, *Race and Discretion in American Medicine*, 1 *Yale J Health Pol, L & Ethics* 95, 108 (2001).

<sup>96</sup> See Lynn Quincy, *Making Health Insurance Cost-Sharing Clear to Consumers: Challenges in Implementing Health Reform’s Insurance Disclosure Requirements* \*4–6 (Commonwealth Fund, Feb 2011), archived at <http://perma.cc/G7TU-6P4J>.

<sup>97</sup> Pub L No 111-148, 124 Stat 119 (2010), codified in various sections of Title 42.

<sup>98</sup> See *Health Benefits & Coverage: Mental Health & Substance Abuse Coverage* (US Centers for Medicare & Medicaid Services), archived at <http://perma.cc/MA9E-MTSW>.

<sup>99</sup> See, for example, Barak D. Richman, *Insurance Expansions: Do They Hurt Those They Are Designed to Help?*, 26 *Health Aff* 1345, 1351 (2007).

practitioners rather than to mental health professionals. For example, it was found that whites take advantage of outpatient mental health benefits about four times more often than blacks.<sup>100</sup>

If these findings can be generalized—if mental health insurance benefits are deployed by the elites more—these benefits constitute transfers from nonwhites to whites and from low-income to high-income workers. The mandates provide access to mental health care to all, and they are commonly supported by the rhetoric of access for the weaker, otherwise-undertreated, groups. But because insurance premiums under group health plans can only imperfectly separate the pool, and thus cannot reflect the utilization by heavy users, everyone pays for services that are disproportionately consumed by the elite.

Again, it is worth refreshing a point made earlier.<sup>101</sup> It might not be troubling or even surprising that some individual components in a large multifaceted scheme are favoring the affluent. Surely, some other components can more than offset this effect by redistributing in favor of other groups. It is the net effect of the program overall that matters, not its individual benefits. The regressive impact of specific features is troubling only to the extent that it is both unintended and not accounted for in the overall calculus. If a feature of the insurance program is thought to be progressive, and if political capital is spent in passing it to favor the poor, it might then be more problematic to discover that its effects run counter to establishment wisdom.

#### 4. Mandated accommodations.

In general, laws mandating access for people with disabilities have an important effect that goes beyond income redistribution. Enabling disabled people to access public areas, buildings, and transportation allows them fuller participation in society, and serves the goal of “equal access to societal opportunities.”<sup>102</sup> For

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<sup>100</sup> See *id.* at 1349. In a further study, Professor Barak Richman and his coauthors demonstrated that the greater use of mental health treatments among whites and high-income patients is not explained by greater incidence of mental illness. Strikingly, there is no significant evidence that higher incidence of outpatient mental health care reduces the likelihood of adverse mental health (measured by the probability of hospitalization for mental illness). See Barak Richman, et al, *Mental Health Care Consumption and Outcomes: Considering Preventative Strategies across Race and Class* \*8, archived at <http://perma.cc/ED36-F5NL>.

<sup>101</sup> See text accompanying note 25.

<sup>102</sup> Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 Va L Rev 825, 860 (2003). See also Samuel R. Bagenstos,

example, § 504 of the Rehabilitation Act of 1973<sup>103</sup> forbids organizations and employers from excluding individuals with disabilities or denying them an equal opportunity to receive program benefits and services. It is aimed to “guarantee [ ] equal opportunity” and “equal access” for people with disabilities.<sup>104</sup>

But, in a subtle manner, disability accommodations could be regressive within the eligible class, when they disproportionately benefit the elite among those entitled to the accommodation. Consider the following example. Under the above-mentioned § 504, public school students with disabilities are entitled to accommodations such as additional time on exams and assignments. There is now growing evidence that in reality students from affluent areas are far more likely to enjoy these accommodations than are students from poor areas. A survey by the US Department of Education’s Civil Rights Data Collection shows that students in wealthy districts have nearly *five times more* utilization of the accommodations, relative to the state average. In Illinois, only about 1 percent of public school students statewide had § 504 accommodations, compared to 5 percent in Chicago’s wealthy suburbs. The twenty districts with the highest percentages of accommodations had 76 percent white enrollments and all had lower percentages of poverty than the state average, while the twenty districts with the lowest accommodation rate were only 19 percent white and had far higher poverty rates than the state average.<sup>105</sup>

Section 504 was designed to level the playing field for people with disabilities, and in a broad range of areas does so effectively. But some of its privileges are not simple or cheap to invoke, thus setting off an unintended sorting dynamic, resulting in selective access. First, the information handicap: some measure of sophistication is necessary to know about the available accommodations, how to apply for them, how to be tested, and who pays for

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*Subordination, Stigma, and “Disability”*, 86 Va L Rev 397, 426–30 (2000); *US Airways, Inc v Barnett*, 535 US 391, 397 (2002) (noting that “basic equal opportunity” was the goal of the Americans with Disabilities Act).

<sup>103</sup> Pub L No 93-112, 87 Stat 355, codified at 29 USC § 701 et seq.

<sup>104</sup> 29 USC § 701(b)(1)(F), (c)(2).

<sup>105</sup> Diane Rado, *Special Help Starts as Early as Grade School—but Only for Select Students* (Chicago Tribune, June 6, 2012), archived at <http://perma.cc/4BGQ-N4LP>. For the full data, see *New Data from U.S. Department of Education Highlights Educational Inequities around Teacher Experience, Discipline and High School Rigor* (US Department of Education, Mar 6, 2012), archived at <http://perma.cc/A7US-PSLC>.

the tests.<sup>106</sup> Second, the cost handicap: exam accommodations require the qualifying student to be diagnosed as having a learning disability.<sup>107</sup> These diagnostics are expensive and require both financial investment and motivation. And so, like the remote vacation parks that are difficult to reach, equal access is an illusion. Finally, there is the network handicap: pragmatically, families in social networks that know about and discuss the practice of children's exam preparations and accommodation diagnostics are more likely to seek the accommodation.<sup>108</sup>

The same problem has been documented, for example, with college admissions. Texas's "Top 10 Percent Plan," an access justice program that provides automatic admission to all state universities for students in the top 10 percent of their high school classes, has been shown to benefit poor communities less than expected: "Where there isn't a strong college-going culture . . . we don't find evidence that eligibility for the top 10 percent has an impact on students going to the flagship [university]."<sup>109</sup> With differential propensities to invoke the accommodation, the gap between the sophisticated and the poor reemerges, and the accommodations end up being deployed by high-income and elite groups.

Neither exam accommodations nor selective enrollment to colleges are transfers from the poor to the wealthy. Exam accommodations granted to disabled students in wealthy suburbs do not come at the expense of disabled students in poor districts, because all can qualify. Instead, the advantages of exam accommodations

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<sup>106</sup> See *Office of Diverse Learner Supports and Services* (Chicago Public Schools, Nov 18, 2014), archived at <http://perma.cc/HWJ2-WQ79> (discussing the process of applying for accommodations); *Special Education* (Davis Joint Unified School District), online at <http://www.djUSD.k12.ca.us/speced> (visited Mar 20, 2016) (Perma archive unavailable) (stating that anyone can request an evaluation in writing).

<sup>107</sup> See Mark Kelman and Gillian Lester, *Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities* 47–48 (Harvard 1997) (discussing the complex process of identifying a learning disorder).

<sup>108</sup> See Jake Tapper, Dan Morris, and Lara Setrakian, *Does Loophole Give Rich Kids More Time on SAT?* (ABC News, Mar 30, 2006), online at <http://abcnews.go.com/Nightline/loophole-give-rich-kids-time-sat/story?id=1787712> (visited Mar 20, 2016) (Perma archive unavailable) (describing how some wealthy students employ money and social connections to get diagnoses that grant them extra time on standardized tests).

<sup>109</sup> Laura Isensee, *New Research Finds Top 10 Percent Plan Impacts Students Differently* (Houston Public Media, Apr 22, 2014), archived at <http://perma.cc/PU94-J588>. See also Lindsay Daugherty, Paco Martorell, and Isaac McFarlin Jr, *Percent Plans, Automatic Admissions, and College Outcomes* \*27 (IZA Journal of Labor Economics, 2014), archived at <http://perma.cc/8EXB-93FV>.

come largely at the expense of nondisabled students (and disproportionately those from wealthy suburbs). Similarly, automatic acceptance to colleges for the top 10 percent comes again at the expense of those who would otherwise be admitted, mostly strong students. But as long as the access policies serve affluent populations and not the poor, the relative opportunities of the affluent increase. The difficulties attributed to learning disabilities or to lack of elite college education then continue to be concentrated more among the poor who do not deploy the opportunities for improvement, contributing to their relative deprivation.

##### 5. Preservation of open space.

In recent decades, numerous states and local communities enacted land preservation acts, authorizing special taxes and budgetary allocations to purchase and convert private land for public purposes. As access justice policies, their purpose is to protect “open space,” “affordable housing,” and historical preservation, and to counteract private forces of commercial development, selective access, and excessive growth.<sup>110</sup> “Equitable access to open, green spaces is vital to the environmental, social, and economic life of a community. . . . [C]hildren are better able to learn and people are happier and healthier when they have access to natural settings.”<sup>111</sup> The Trust for Public Land champions such efforts as “protect[ing] land for people” and ensuring “easy access to a safe place to play in nature.”<sup>112</sup>

For example, the Massachusetts Community Preservation Act<sup>113</sup> (CPA) was passed in 2000, allowing cities and towns to adopt a CPA program by imposing property tax surcharges of up to 3 percent, thus becoming eligible for matching funds from the state, bankrolled by fees imposed on all deed registry transactions.<sup>114</sup> Who benefits from this program? Who pays for it?

Not surprisingly, affluent towns are the biggest winners. It was estimated that “communities in the highest quintile for property values received \$127 per capita in CPA matching funds,

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<sup>110</sup> Christopher Hawkins, *Electoral Support for Community Growth Management Policy*, 92 Soc Sci Q 268, 282 (2011). For an example of one such act, see Community Preservation Act § 2, 2000 Mass Acts 1234, codified as amended at Mass Ann Laws ch 44B, § 2.

<sup>111</sup> Veda Truesdale, *Open Space Access: Passive Recreation, Pocket Parks, Greenways/Blueways* (New Jersey Department of Environmental Protection, Sept 2007), archived at <http://perma.cc/65TT-BE36>.

<sup>112</sup> *Our Work* (Trust for Public Land), archived at <http://perma.cc/9V74-PWQV>.

<sup>113</sup> 2000 Mass Act 1234, codified as amended at Mass Ann Laws ch 44B, § 1 et seq.

<sup>114</sup> Mass Ann Laws ch 44B, §§ 3(b), 9.

while . . . [those] in the lowest three quintiles received \$10, \$5, and \$3 per capita respectively.”<sup>115</sup> “A large share of the state funds is going to a few communities with high property values.”<sup>116</sup> The median income among the top ten winners—communities that received the largest state-funded subsidy—was about \$87,000, while the median income within the top losers—those who pay to fund the subsidy but do not enjoy it—was only about \$38,000.<sup>117</sup> Even in the winning communities, the bulk of the state funding is spent not on affordable housing (which would have been progressive), but on open space protection.<sup>118</sup>

Why do affluent municipalities receive the bulk of the benefit? In short: due to the affordability handicap. Adoption of the 3 percent property tax surcharge, which is required to qualify for the state subsidy, is correlated with high property value.<sup>119</sup> Low-income communities are reluctant to vote for tax increases, and stay out.

Even more disturbingly, while lower-income cities refrain from tapping into the CPA subsidy spigot, they nevertheless pay *more than their share* to fund its costs. Under the Massachusetts law, the subsidy is paid for through lump sum fees imposed on all real estate transactions, statewide.<sup>120</sup> This means that larger cities, where most of the transactions occur, are the big contributors. But larger cities are also concentrations of low-income residents and low property values, where CPA referenda rarely pass. Thus, “the residents of poor communities that could not afford a land bank would end up subsidizing, through their state taxes, wealthy communities that might have afforded a land bank on their own.”<sup>121</sup> When all is said and done, in the name of access justice, resources are transferred from residents of the poorer cities to the wealthy communities. Weston, Newton, and Nantucket win. Worcester loses.

Open space preservation policies are regressive in another indirect way. Reducing the supply of land for development increases

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<sup>115</sup> Robin Sherman and David Luberoff, *The Massachusetts Community Preservation Act: Who Benefits, Who Pays?* \*11 (Rappaport Institute for Greater Boston, July 2007), archived at <http://perma.cc/D6AH-7T5C>.

<sup>116</sup> *Id.* at \*13.

<sup>117</sup> *Id.* at \*16.

<sup>118</sup> *Id.* at \*17.

<sup>119</sup> Sherman and Luberoff, *The Massachusetts Community Preservation Act* at \*20 (cited in note 115).

<sup>120</sup> See Mass Ann Laws ch 44B, §§ 8–9.

<sup>121</sup> *Community Preservation*, Boston Globe A22 (Nov 3, 1999).

housing prices, crowding out the poor.<sup>122</sup> Labeled by one report as “the new segregation,” restricted growth policies “deter African-American and other minorities from the housing market [at] disproportionate rates.”<sup>123</sup> The city of Portland, Oregon, with its aggressive land preservation and urban growth boundary rules and rapidly climbing housing costs,<sup>124</sup> is a testament to this causal effect.<sup>125</sup>

## II. ACCESS TO COURTS

Part I introduced a general, transsubstantive pattern. Access justice works only in a superficial sense. When the rubber hits the road and we start counting who utilizes (and how often) the publicly provided open access programs, differential access rates may correlate with income and sophistication. Access justice policies that are not specifically targeted to needy recipients but are instead “universal” or “neutral” or “open” can be a perk to sophisticated recipients who are comparatively competent at collecting the benefits, particularly if they do not bear a commensurate share of the cost.

I will now examine this paradox in the context of what is perhaps the most important and controversial access justice debate of recent times: access to courts. This is a debate over a distinct institutional issue: Should the law enforce mass-market arbitration agreements that require aggrieved individuals to file their complaints in an arbitration forum chosen by the commercial party with whom they dealt? These predispute agreements over mandatory arbitration effectively bar the plaintiffs’ access to courts of law and replace it with what many regard as inferior, stingier arbitration justice, stripped of the threat of class action.

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<sup>122</sup> See Randall J. Pozdena, *Smart Growth and Its Effects on Housing Markets: The New Segregation* \*33 (National Center for Public Policy Research, Nov 2002), archived at <http://perma.cc/NC9A-UA6A> (“[T]he burden of site-supply restrictions will fall disproportionately on poor and minority families.”).

<sup>123</sup> *Id.* at \*v.

<sup>124</sup> Portland is ranked among the top ten least affordable cities in America. See Erik Gunther, *Start Saving Now! These Are the 10 Least Affordable Cities in America* (National Association of Realtors, Jan 28, 2015), archived at <http://perma.cc/G9EC-CSFQ>.

<sup>125</sup> See Samuel R. Staley, Jefferson G. Edgens, and Gerard C.S. Mildner, *A Line in the Land: Urban-Growth Boundaries, Smart Growth, and Housing Affordability* \*23–24 (Reason Public Policy Institute Policy Study No 263), archived at <http://perma.cc/KAK6-DUGR>; Joe Streckert, *How We Got Here* (Portland Mercury, Aug 5, 2015), archived at <http://perma.cc/L8G6-FUCM>.

### A. The Debate over Mandatory Arbitration

Despite heroic efforts by various courts to strike them as unconscionable, mandatory arbitration clauses are enforceable.<sup>126</sup> Commentators, however, are bluntly critical of this jurisprudence, which they argue limits people's access to judicial forums, and potentially to any kind of remedy. "[A]n arbitration clause causes our right to jury trial to vanish."<sup>127</sup> "Large areas of American life and commerce have silently been insulated from the lawsuit culture."<sup>128</sup> Critics of arbitration clauses challenge the superficial notion that such contractual provisions represent the joint interests of both businesses and consumers.<sup>129</sup> These arrangements are not negotiated, and are often not even noticed at the time of contracting. The fine print authorizing them is merely "paperwork," not informed consent, and the choice whether to agree to mandatory arbitration is not much of a choice when all vendors who compete in some product space require an agreement to arbitrate.<sup>130</sup> Of course, it is possible that waivers of access to courts are rational. As Judge Frank Easterbrook has said, "People are free to opt for bargain-basement adjudication" because "[i]n competition, prices adjust and both sides gain. 'Nothing but the best' may be the motto of a particular consumer but is not something the legal system foists on all consumers."<sup>131</sup> Arbitration clauses are like other features of the deal—they "[a]ll stand or fall together."<sup>132</sup>

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<sup>126</sup> See *AT&T Mobility LLC v Concepcion*, 563 US 333, 337–38 (2011) (describing such holdings by the California Supreme Court, the Ninth Circuit, and a California district court); *American Express Co v Italian Colors Restaurant*, 133 S Ct 2304, 2312 (2013).

<sup>127</sup> Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* 108 (Princeton 2013).

<sup>128</sup> Patti Waldmeir, *How America Is Privatising Justice by the Back Door*, *Fin Times* 12 (June 30, 2003).

<sup>129</sup> See, for example, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 *Wash U L Q* 637, 642–43 (1996) ("[I]t is critical to distinguish between commercial arbitration voluntarily agreed to by parties of approximately equal bargaining power, and commercial arbitration forced upon unknowing consumers, franchisees, employees or others through the use of form contracts.").

<sup>130</sup> Radin, *Boilerplate* at 7–9 (cited in note 127).

<sup>131</sup> *Carbajal v H & R Block Tax Services, Inc*, 372 F3d 903, 906 (7th Cir 2004) (Easterbrook).

<sup>132</sup> *Oblix, Inc v Winiecki*, 374 F3d 488, 491 (7th Cir 2004) (Easterbrook).

Nevertheless, the overwhelming conclusion among critics is that arbitration has the “capacity to reduce, if not altogether eliminate, access to the courts and to the law.”<sup>133</sup> This concern of limited access to law has two primary aspects, one relating to compensation and the other to deterrence.<sup>134</sup> The compensatory concern is based on the thought that litigation provides superior recovery because it is cheaper to file and to pursue, granting more effective procedural weapons (like discovery). It is also public and thus has precedential value, and it allows for more substantial remedies. The deterrence concern is based on the limited incentive of consumers to enforce small claims. One artifact of arbitration clauses is the class action waiver.<sup>135</sup> Critics believe that “such clauses should not be enforced at all because any gains from aggregate litigation in terms of better incentives to take care *ex ante* would be lost.”<sup>136</sup> As a result, consumers as a group are disfavored, whereas the more powerful businesses benefit.<sup>137</sup>

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<sup>133</sup> Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L Rev 819, 822 (2003).

<sup>134</sup> See Heather Bromfield, Comment, *The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements*, 43 UC Davis L Rev 315, 341–46 (2009); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum L Rev 1872, 1904–09 (2006). See also Jean R. Sternlight, *Tsunami: AT&T Mobile LLC v. Concepcion Impedes Access to Justice*, 90 Or L Rev 703, 704–05 (2012) (noting that after *Concepcion* the lack of an ability to arbitrate on behalf of a class of plaintiffs was likely to reduce access to any sort of remedy for those who had been harmed); Jean R. Sternlight, *Mandatory Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 Sw L Rev 87, 89 (2012) (stating that *Concepcion* “has greatly reduced the likelihood that consumers can enforce certain of their legal rights in any forum”); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis L Rev 33, 37 (noting that compelled arbitration takes the ability to access courts away from plaintiffs).

<sup>135</sup> See Christopher R. Drahozal and Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 Ohio St J Disp Res 433, 444 (2010) (finding that “all of the arbitration clauses in consumer contracts [in the study] contained a class arbitration waiver”). See also Kimberly L. Intagliata, Comment, *Improving the Quality of Care in Nursing Homes: Class Action Impact Litigation*, 73 U Colo L Rev 1013, 1031–32 (2002) (discussing how class actions give access to plaintiffs who would otherwise have claims that were too small to bring, and therefore deter potential defendants from harming patients in nursing homes); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 Va L Rev 1871, 1874 (2002) (stating that “[e]lass action is indispensable to achieving the social objective of minimizing the sum of accident costs through tort deterrence”).

<sup>136</sup> Gerhard Wagner, *Dispute Resolution as a Product: Competition between Civil Justice Systems*, in Horst Eidenmüller, ed, *Regulatory Competition in Contract Law and Dispute Resolution* 347, 394 (Verlag C.H. Beck 2013).

<sup>137</sup> See Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 Harv J Legis 281, 284 (2002) (arguing that the Federal Arbitration Act has been used to make

My goal is to explore the validity of the access-to-courts distributive concerns. It turns out, however, that the question whether arbitration renders justice less accessible to consumers *as a group* is difficult to untangle empirically (more on this later). Thus, as a first step, I want to ask a subtler question: Assuming that arbitration limits the incidence of lawsuits and the magnitude of recovery, who among consumers are affected more? What are the characteristics of the consumers who, in the absence of arbitration clauses, would have litigated their claims? Are there consumers that perhaps lose nothing, or even benefit from the arbitration mandate? If consumers vary in their sophistication, education, psyche, wealth, vulnerability, type and size of injuries, litigiousness, or other traits, does the denial of access to courts hurt weaker consumers disproportionately more? Or does it hurt the more sophisticated consumers? Rather than looking at consumers as a homogeneous group—as most of the literature explicitly or implicitly does—my goal is to unpack the rank of “consumers” and identify the adversely affected subgroups.

The concerns over access justice would be all the more powerful and urgent if the denial of litigation is disproportionately affecting weak consumers. Indeed, this is a plausible conjecture: those who have fewer resources and less sophistication are less likely to be able to pay the upfront fees of filing for arbitration, and thus will be denied any kind of redress.<sup>138</sup> On the other hand, the concerns over access to courts would be weakened if it turns out that only elite groups of litigious consumers are adversely affected by the limited access to courts, and that—in an unappreciated way, by reducing firms’ costs of litigation and the prices of products—weak consumers benefit.

There are two steps to the remaining argument. The first, in Part II.B, applies the framework developed above and examines the direction of the cross-subsidy. If equal access to courts is deployed differentially by people, who benefits and who loses? Is it a regressive policy? The second step, developed in Part II.B, is to examine the possibility of a different channel of access—“vicarious access.” This is a unique feature of access to courts, not present in

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arbitration “a tool for the powerful to exert authority over the less powerful”); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv Negotiation L Rev 171, 193 (2003).

<sup>138</sup> See Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 L & Contemp Probs 133, 135 (Winter/Spring 2004) (“For substantial claims, the services’ fees alone likely make access to arbitration infeasible, and actual costs are often made even greater by the terms of the arbitration agreement.”).

other equal access policies, whereby the value of open access is enjoyed not directly but through representatives. Access to courts allows vicarious access through class actions. Because class actions are a method to distribute the benefits of litigation to those who otherwise fail to utilize it, is there still a regressive cross-subsidy?

## B. The Litigation Cross-Subsidy

The working hypothesis in much of the commentary on litigation versus arbitration is that consumers would fare better in litigation in securing remedies vis-à-vis their business rivals.<sup>139</sup> I will take this premise—that arbitration is effective in reducing firms' liability—as a starting point. Some empirical work has contested it, suggesting that consumers and employees actually fare well in arbitration, relative to litigation. Indeed, labor unions often negotiate for arbitration in collective agreements, and surely they wouldn't do so to *reduce* their potential recovery.<sup>140</sup> But the empirical question remains open and widely controversial.<sup>141</sup>

My argument, instead, is that if arbitration indeed reduces consumers' access to redress, this effect is potentially favorable not only to firms, but also to the weakest subgroups of consumers. This is a direct application of the strong form of the regressive cross-subsidy idea. Access to courts is an access justice policy that, although available to all, is disproportionately utilized by the sophisticated elite, and these benefits are partially paid for by all consumers, including the less sophisticated consumers, through higher prices. Accordingly, if indeed arbitration restricts access to

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<sup>139</sup> See, for example, David Horton and Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 Georgetown L J 57, 99–116 (2015) (investigating empirically whether consumers are disadvantaged in arbitration and concluding that “consumers facing high-level and super repeat-playing defendants are strongly disadvantaged in the arbitral forum relative to consumers facing one-shot defendants”).

<sup>140</sup> See Peter Florey, *Labor & Employment Arbitration: Questions for the Late '90s*, 52 Disp Res J 66, 70 (Spring 1997) (quoting multiple scholars giving unions credit for the success of arbitration in the context of collective bargaining); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 74 Denver U L Rev 1017, 1020 (1996) (stating that it is usually assumed that collective bargaining agreements will contain arbitration clauses); Kenneth M. Casebeer, *Supreme Court without a Clue: 14 Penn Plaza LLC v. Pyett and the System of Collective Action and Collective Bargaining Established by the National Labor Relations Act*, 65 U Miami L Rev 1063, 1072 (2011) (stating that labor arbitration is often viewed by parties “as an extension of the collective-bargaining process” and is therefore favored) (emphasis omitted).

<sup>141</sup> This question was the topic of a symposium at the University of Michigan entitled *Empirical Studies of Mandatory Arbitration*. See generally Omri Ben-Shahar, *How Bad Are Mandatory Arbitration Terms?*, 41 U Mich J L Ref 777 (2008).

lawsuits and to recovery, it removes the regressive cross-subsidy. A nonsuing consumer who wants to pay low prices should thus root for a contract that maximally *restricts* access to courts.

1. Who benefits from access to courts?

When access to courts and to litigation is free and unrestricted, who takes advantage of it? In order to pursue any kind of litigation strategy, the aggrieved claimant has to understand that her rights were violated (and that a court can be similarly persuaded). She must also have enough of a litigious nature to undertake the ordeal of an adversary proceeding. She then has to find an attorney that will take the case. And, importantly, the claimant has to have the patience to await a remedy that sometimes takes years to secure. True, a settlement might be reached early, but without a credible threat to litigate the case all the way to judgment, the settlement amount would not reflect the merits.

These are characteristics that are more likely to be found in wealthier, more educated, and more sophisticated consumers.<sup>142</sup> Take the first link in this chain—the ability to recognize that a violation occurred. The consumer has to know her rights, meaning she has to be educated enough to read, understand, and exploit the information written (sometimes in legal language) in the consumer contract, the employment handbook, or other lengthy disclosures. For example, if the consumer was hit with a large unexpected fee, or received an inferior product, or discovered that her personal information is being harvested from her account, the consumer needs to verify that the fee, the product, or the data collection was a violation of the fine print terms to which the consumer agreed sometime in the past (or during one of the numerous updates since). Few, even among the very literate, know how to find these documents, and fewer still know what they really say.

But while the agony of reading fine print is a shared experience among all, it is well documented that poor, less educated consumers are less likely to successfully read and understand the terms of contracts, which are complex legal texts. To recognize a violation and articulate a complaint, consumers have to be competent in performing nontrivial numeracy skills, including some

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<sup>142</sup> See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L & Society Rev 95 (1974).

understanding of risk and probabilities—which they often lack.<sup>143</sup> One study suggests that only 3 to 4 percent of the population can understand the language in which contracts are drafted.<sup>144</sup> And it is no secret that low levels of literacy are concentrated among low-income people and minorities.<sup>145</sup> Maybe things can be improved by financial literacy campaigns and “heightened” disclosures, but as we saw already,<sup>146</sup> mandated disclosures are the gods sending nuts to those who have no teeth. Disclosure operates to exacerbate the regressivity. The more disclosure-trained and cautious are the recipients of financial literacy training (who are disproportionately the well-educated), the greater their relative advantage.<sup>147</sup>

But weak consumers are less likely to seek remedies in court for reasons beyond their poor ability to read boilerplate and understand their rights. The poor and the disadvantaged endure more abuse and exploitation by dealing with lower-quality vendors. For them, legal problems are not discrete extraordinary events but rather the course of everyday life.<sup>148</sup> As a result, their expectations for decent treatment—and for remedies in the event that it is not rendered—may be comparatively depressed, and their propensity to turn to the court for resolution may be lower.<sup>149</sup>

Further, when they are defrauded, the magnitudes of their claims are smaller. True, some violations of rights lead to fixed,

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<sup>143</sup> See Annamaria Lusardi and Olivia S. Mitchell, *Financial Literacy: Evidence and Implications for Financial Education* \*2 (TIAA-CREF Institute, May 2009), archived at <http://perma.cc/7S65-K4CU>.

<sup>144</sup> See Alan M. White and Cathy Lesser Mansfield, *Literacy and Contract*, 13 *Stan L & Pol Rev* 233, 237, 239 (2002) (“The degree of literacy required to comprehend the average disclosure form and key contract terms simply is not within the reach of the majority of American adults.”).

<sup>145</sup> See Mark Kutner, et al, *Literacy in Everyday Life: Results from the 2003 National Assessment of Adult Literacy* \*15, 31 (National Center for Education Statistics, Apr 2007), archived at <http://perma.cc/2YVG-UUV7>.

<sup>146</sup> See Part I.D.1.

<sup>147</sup> See, for example, Daniel Fernandes, John G. Lynch Jr, and Richard G. Netemeyer, *Financial Literacy, Financial Education, and Downstream Financial Behaviors*, 60 *Mgmt Sci* 1861, 1874 (2014) (finding “that financial literacy has less effect in low-income samples”).

<sup>148</sup> See Stephen Wexler, *Practicing Law for Poor People*, 79 *Yale L J* 1049, 1050 (1970) (“Poor people do not lead settled lives into which the law seldom intrudes; they are constantly involved with the law in its most intrusive forms.”).

<sup>149</sup> For example, low-income parents are more “fatalistic” about children’s exposure to hazards and less influenced by safety warnings, even though their children are disproportionately exposed to these hazards. David Klein, *Societal Influences on Childhood Accidents*, 12 *Accident Analysis & Prevention* 275, 275 (1980). See also Marcel E. Conrad, Patricia Brown, and Marcia G. Conrad, *Fatalism and Breast Cancer in Black Women*, 125 *Annals Internal Med* 941, 942 (1996) (finding that even when breast cancer screening was provided at no cost, few minority patients availed themselves of the resources).

lump sum recovery (for example, statutory damages), or to recovery that is in theory independent of wealth (for example, medical expenses). But many violations lead to losses that do depend on income.<sup>150</sup> Wealthier people buy more products and pay higher prices, which account for larger nominal losses when fraud or violation occurs. And wealthier people may suffer larger losses when recovery is measured by earning capacity, lost income, lost property value, lost opportunity, or other consequential harms.

If the poor have lower nominal claims, they also become less attractive clients for attorneys. As it is, there is evidence that only a small fraction of individuals with claims who seek private representation are able to obtain counsel.<sup>151</sup> The great majority of low-income claimants cannot afford legal counsel and cannot find their way into the court system.<sup>152</sup> Small claims leave less recovery once litigation costs are netted, and there is plenty of evidence that litigation indeed takes longer than arbitration<sup>153</sup> (and, although the possibility of settlements blurs the empirical comparison, settlements in the shadow of costly litigation are likely to be stingier). And among people who go to court and self-represent, the poor and less educated are also less effective in advocating their claims.<sup>154</sup> There is convincing evidence that litigation is a cost-effective dispute resolution strategy only for high-stakes claims. Most poor consumers don't have such claims.

Moreover, courts operate slowly and court-awarded remedies take time to secure. The higher the consumer-plaintiff's discount rate and the more liquidity-constrained she is, the less valuable the delayed recovery is (even if it is compounded by interest), and

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<sup>150</sup> See Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-framing the Empirical Study of Employment Arbitration*, 41 U Mich J L Ref 843, 855 (2008) (noting that "employee salary is likely to correlate positively with award size").

<sup>151</sup> See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum Hum Rts L Rev 29, 58 (1998) ("The result of these formidable hurdles is that most people with claims against their employer are unable to obtain counsel, and thus never receive justice."); William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 Disp Res J 40, 45 (Oct–Dec 1995). For more data on low- and moderate-income households' access to attorneys, see generally Rebecca L. Sandefur, *Lawyers' Pro Bono Services and American-Style Civil Legal Assistance*, 41 L & Society Rev 79 (2007) (finding that indigent clients have become increasingly dependent on pro bono programs).

<sup>152</sup> See Nourit Zimmerman and Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 Fordham Urban L J 473, 478 (2009).

<sup>153</sup> See Weidemaier, 41 U Mich J L Ref at 846 (cited in note 150).

<sup>154</sup> See Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U Mich J L Ref 813, 831 (2008) (noting that, for resolving small claims, arbitration may be the cheapest option).

the more amenable the consumer is to accepting a small settlement rather than “vindicating” her legal rights through a full-blown judgment.<sup>155</sup>

Finally, litigation is risky business. The greater the uncertainty about the outcome of litigation, the less beneficial it is for risk-averse plaintiffs, who would prefer lower settlements to the uncertainty of litigating the case fully.<sup>156</sup> It is widely accepted that poorer individuals exhibit higher degrees of risk aversion,<sup>157</sup> and thus value the prospect of the litigation “damages lottery” less.

All these findings suggest that the litigation right would be more valuable, and more commonly realized, with better returns and larger settlements, by stronger consumers—those who know their rights and can effectively pursue them against a sophisticated business opponent or its experienced insurer. There are some data to support this, although they are mostly anecdotal and not systematic. Some evidence comes from the area of employee claims—in which, even when litigation is permitted, there are almost no cases of recovery by low-paid waged workers. Professors Theodore Eisenberg and Elizabeth Hill concluded that “the absence of cases of this type is likely explained by the fact that lower-paid employees seem to lack ready access to court, as other researchers have reported.”<sup>158</sup> Hill showed that, unlike arbitration, litigation is unrealistic for employees with incomes below \$60,000.<sup>159</sup> And Professor Ted St. Antoine posits that defendants “wait out most smaller claims, assuming employees will not be able to pursue them in court.”<sup>160</sup>

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<sup>155</sup> See Emily C. Lawrance, *Poverty and the Rate of Time Preference: Evidence from Panel Data*, 99 J Polit Econ 54, 72 (1991) (finding that “[p]oor households are likely to possess relatively high rates of time preference”).

<sup>156</sup> See Uri Weiss, *The Regressive Effect of Legal Uncertainty* \*2–3 (Tel Aviv University Law Faculty Paper 30, 2005), archived at <http://perma.cc/X9PX-HS3L>.

<sup>157</sup> See Nancy Ammon Jianakoplos and Alexandra Bernasek, *Are Women More Risk Averse?*, 36 Econ Inquiry 620, 629 (1998) (confirming findings that “relative risk aversion decreases as household wealth increases”).

<sup>158</sup> Theodore Eisenberg and Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp Res J 44, 45 (Nov 2003–Jan 2004). See also Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 Ohio St J Disp Res 777, 782 (2003) (“Studies to date indicate that only highly-compensated employees are able to gain access to the court systems for their employment-related claims.”).

<sup>159</sup> See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp Res J 8, 10–11 (May–July 2003).

<sup>160</sup> See Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U Mich J L Ref 783, 790 (2008).

Additional hints that courts are accessed disproportionately by the elite come from litigation of health benefits. Some legal systems recognize a constitutional claim for a “right to health,” which allows individuals to seek court protection of their right to various medical treatments. A study in Brazil (where a right to health is recognized) showed that the litigation that ensued under this access-to-medicine paradigm was largely to the benefit of elites, as it was used to secure high-tech and experimental treatments.<sup>161</sup> The vast majority of the cases litigated were brought by a privileged minority seeking access to “high-cost medicines, such as new types of insulin for diabetes and new cancer drugs,” that were otherwise excluded by health administrators because of low effectiveness.<sup>162</sup> It was shown that the right-to-health litigation was largely concentrated in the richest regions, where a small minority “is able to use the court system to its advantage.”<sup>163</sup> Access to courts is otherwise “beyond the means and reach of most poor Brazilians.”<sup>164</sup> Further, the cost of these augmented treatments is borne by others. As state resources devoted to health and provision of medications are fixed, such litigation reallocates general health expenditures, which would otherwise benefit broader populations, in favor of the litigating minority.

Finally, more evidence about disproportionate utilization of access to courts comes from India’s experience with “Public Interest Litigation.” This is a judicial procedure “for enhancing the social and economic rights of disadvantaged and marginalized groups in India.”<sup>165</sup> But a World Bank study found that what began as “an effort on the part of the courts to speak to [ ] poverty, social exclusion, and powerlessness” has increasingly grown to be a forum for middle-class lifestyle grievances.<sup>166</sup> The report found some evidence that “judicial attitudes are less favorably inclined to the claims of the poor than they used to be” and that the win rate for marginalized groups is lower, and increasingly so, relative to that of advantaged individuals.<sup>167</sup> As the examples provided above

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<sup>161</sup> Octavio Luiz Motta Ferraz, *Harming the Poor through Social Rights Litigation: Lessons from Brazil*, 89 *Tex L Rev* 1643, 1660–62 (2011).

<sup>162</sup> *Id.* at 1661.

<sup>163</sup> *Id.* at 1662.

<sup>164</sup> *Id.*

<sup>165</sup> Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?* \*i (World Bank Policy Research Working Paper 5109, Nov 2009), archived at <http://perma.cc/9GG3-LKST>.

<sup>166</sup> *Id.* at \*8.

<sup>167</sup> *Id.* at \*13.

show, it is unsurprising that peasants do not do as well as lawyers and teachers in court.

## 2. Who pays for access to courts?

As shown above, litigation is regressive in the weak sense, as sophisticated and higher-income people disproportionately enjoy its benefits. This Section shows that it is also regressive in the strong sense by answering the following questions: Do weaker consumers who do not enjoy its benefits nevertheless pay for its cost? Is the added recovery that litigation affords the high-income group of consumers financed, at least in part, by the poor and unsophisticated consumers?

Here, I can point only to indirect effects. First, let us return to the assumption mentioned at the outset of this Section—that arbitration is cheaper for firms than litigation is (an assumption regularly made by many commentators, in suggesting that vendors draft arbitration terms to reduce their legal exposure and save money). The most compelling reason for this assumption is the cost of liability. Arbitration that effectively inhibits lawsuits reduces the liability exposures of firms, and likely also the cost of liability insurance.<sup>168</sup> Like any other cost, it affects the price of the service. In highly competitive industries, most if not all of this cost would be rolled into higher prices to consumers, whereas in concentrated industries, only part of this cost would be borne by consumers, and the rest by the vendors, depending on the elasticity of demand.<sup>169</sup>

One might object to this pass-through argument. A firm cannot pass along its litigation costs in the form of higher prices without losing its market share. The cost of litigation and liability, so goes the argument, would either lower firms' profits (without pass-through to consumers) or induce firms to avoid malfeasance in the first place. Either way, there would be no added cost borne by the nonsuing customers.<sup>170</sup> The latter argument (deterrence) will be discussed in the next Section. For now, it suffices to recognize that even firms that offer excellent products and enjoy growth of their market share face an endless trickle of potential suits. It would be naïve to think that the litigation risk—and the

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<sup>168</sup> See Maltby, 30 Colum Hum Rts L Rev at 31–32 (cited in note 151) (finding that mandatory arbitration clauses were used to reduce potential litigation costs).

<sup>169</sup> Craswell, 43 Stan L Rev at 367–68 (cited in note 2).

<sup>170</sup> See Adam Levitin, *The Access-to-Justice Myth* (Credit Slips, Aug 1, 2013), archived at <http://perma.cc/8JEP-7H6Q>.

cost of resolving it—could be fully petered out by “good behavior.” In competitive industries, it is also less likely that firms would absorb the added cost of litigation without any pass-through. And if other firms in the industry face a similar magnitude of litigation risk, the effect on market share would be a wash: all firms would exhibit some increase in prices.

Thus, as long as some price effect exists, it tends to be shared equally by all consumers. Unless vendors find ways to unbundle the legal terms and sell incremental litigation rights for add-on prices, people pay for features regardless of their propensity to utilize them. A nondisclaimable right to litigate is merely a type of mandatory quality improvement, and like any other such feature, it effectuates a cross-subsidy in favor of the group that enjoys it more. This is true whether the quality feature is part of the product (like the size of a hard disk) or part of the contract. Mandatory warranties, rights to withdraw, or remedies make products more expensive and might well reflect the preferences of some consumers. But for lower-income consumers, these protections are harder to invoke and to afford. If your budget permits only the discounted items on the menu, a mandate to serve only the high-end, high-price offering is bad news.

And so, if consumers have to pay for access to courts, many of them would prefer low prices over free access. As Professor James White bluntly put it, “For a nickel or a dime, almost all of us would . . . agree to arbitrate.”<sup>171</sup> Especially those for whom “a nickel or a dime” matters.

### 3. Corrective versus distributive justice.

I have argued that access to courts fits the template of regressive access justice because elites are more likely to utilize it, incidentally imposing the costs of their utilization (through higher product prices) on others. In this light, mandatory arbitration clauses that deny access to courts eliminate a privilege that weaker consumers rarely enjoy anyway and save them the cost of cross-subsidizing their more affluent fellow consumers.

This Section continues the discussion by probing such questions as: Could the regressivity argument truly have such far-reaching implications? Must the private right to seek redress for wrongs—a fundamental building block of private law and private

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<sup>171</sup> James J. White, *Contracting under Amended 2-207*, 2004 Wis L Rev 723, 742.

ordering—come with such troubling redistributive effects? Is corrective justice in private law inimical to distributive justice?

Upon some reflection, the gist of this claim, that equal and open access to courts is regressive, may not be so surprising. It is well recognized that reparatory commands of corrective justice, even if applied universally, may not serve the goals of distributive justice. Rights to sue and seek redress are corrective treatments in the same way that drugs and health care are, working to remedy harms and ills. Notwithstanding its corrective effects, health care is notoriously vulnerable to unfair allocation.<sup>172</sup>

For one, litigation remedies seek to reinstate a preinjury state of affairs that was itself distributively unfair.<sup>173</sup> Some are returned to their preinjury high state, and others to their low state. In addition, it would be a striking coincidence if the resources allocated to correct past wrongs were distributed in an egalitarian fashion. Even priorities in criminal law and law enforcement, which are determined centrally and democratically, allocate corrective and protective measures without much concern for any distributive criteria.<sup>174</sup> This is all the more true in private law, which lacks a central headquarters and affords its corrective mechanism to anyone sophisticated enough to demand it. In general, the distribution of corrective measures may conflict with notions of distributive fairness, even if each measure itself is working perfectly well as a corrective device.<sup>175</sup>

If private law remedies were cheap to secure, the access problem and its resulting redistributive imbalance would be trivially solved. But the ideal of access to courts is implemented through a

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<sup>172</sup> See M. Makinen, et al, *Inequalities in Health Care Use and Expenditures: Empirical Data from Eight Developing Countries and Countries in Transition*, 78 Bull World Health Org 55, 56 (2000) (analyzing the unequal distribution of health care in a variety of countries and finding, for example, that, in Indonesia in 1990 only 12 percent of health care funding went to the poorest 20 percent of households whereas 29 percent went to the wealthiest 20 percent).

<sup>173</sup> See Ernest J. Weinrib, *The Idea of Private Law* 80 (Harvard 1995) (“[C]orrective justice operates on entitlements without addressing the justice of the underlying distribution.”).

<sup>174</sup> See generally Alon Harel and Gideon Parchomovsky, *On Hate and Equality*, 109 Yale L J 507, 538–39 (1999).

<sup>175</sup> See John Gardner, *What Is Tort Law for? Part 2. The Place of Distributive Justice* \*7 (Oxford Legal Research Paper No 62/2013, May 2013), archived at <http://perma.cc/G9E4-HPXQ>. See also generally Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2007); Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S Cal L Rev 193 (2000).

cumbersome and expensive legal process. That such a process effectively denies practical access to the weaker sectors of the population is a feature already discussed.

There are cases in which the luxury of selective access to courts imposes no cost on the poor. The affluent might be enjoying—and paying for—their exclusive access justice. There are markets for goods and services that are already segregated, serving either the affluent or the poor but not both sectors, with no intersector cross-subsidy. When five-star cruise ships, cosmetic surgeons, or golf resorts are sued by aggrieved patrons, patients, or players, any effect such suits might have on the prices of these services does not matter to the poor. It might be weakly objectionable that the institution of public courts is serving only the affluent—that justice is a luxury good. But there is no redistribution away from the poor.

Thus, the conflict with distributive fairness is more acute when the access to courts enjoyed by the elites comes at a real cost to the poor, through higher prices or limited choice. There are many markets for goods and services—for example, telecommunications—that integrate a large cross-section of the population, the poor and the affluent, who pay similar prices for similar products. In these markets, the cross-subsidy is a real concern.

Finally, the tradeoff between corrective and distributive fairness that I highlighted is a descriptive observation. It is an unintended consequence of selective access to courts. Nothing in the analysis here responds to the question how to balance the two justice concerns—correct private wrongs and redistribute fairly. The analysis merely informs such discussion. It debunks the myth that access to courts and to private law remedies is a slam-dunk victory for justice concerns. Rather, consumers are not a monolithic battalion equally eager to conquer the lawsuit battlefield. Victory for the alert few comes at a cost to the sluggish many.

#### 4. “Vicarious access”: The class action externality.

I now want to consider an important objection to the claim that litigation is regressive. A crucial feature of existing arbitration clauses is the removal of class representation procedures. Arbitration clauses not only turn plaintiffs away from litigation,

they also bar aggregation of suits.<sup>176</sup> And class actions—even if filed solely by the alert and the sophisticated—provide a positive externality, which benefits all. Class action litigation produces this positive externality in two ways. First, class actions enable poorer class members to piggyback on the litigation efforts of others and collect the same recovery without any deliberate effort. Second, if the threat of class actions changes the behavior of potential defendants, this deterrent effect is a public good enjoyed by all consumers equally. As long as defendants are forced to pay for their wrongdoing, it doesn't matter who sues and collects—the entire class, the class representative alone, or the class's attorneys. The significant awards resulting from class actions serve the interests of potential (nonsuing) victims.

This is an important qualification that, if true, diminishes the regressive concern developed above. It would make access to courts a *sui generis* species of access justice policy, one that provides neither direct benefit to the poor nor a disproportionate benefit to the wealthy. Rather, it is a mechanism that builds on vicarious access—*access by representatives*—relying on the competence of these representatives to secure an equal benefit to all.

As in any representative model, the main concern is the alignment of interests between the principals and the agent-representative. To determine if the representative model reduces the regressivity concerns associated with free and open access to courts, the following Section asks: Do active litigants promote the compensatory and deterrence concerns that matter to nonlitigants? The discussion below examines the two potential class-wide benefits of class actions—recovery to all and common deterrence. In a nutshell, the class-wide recovery effect is a phantom. Even successful class actions have very low recovery rates. The deterrence effect, however, is potentially more meaningful and could be a game changer, but only if the version of deterrence it produces is equally beneficial to all consumers. There are fundamental reasons to worry that it is not.

*a) Recovery to all?* Consider, first, the proposition that low-income consumers benefit from class-wide recovery: at no cost to them, the poor recover at least part of their loss. There is plenty of sobering evidence showing that only a tiny, negligible fraction

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<sup>176</sup> See *Concepcion*, 563 US at 351 (holding that a state-law prohibition on class action waivers conflicts with the Federal Arbitration Act's objectives). See also *Italian Colors*, 133 S Ct at 2312.

of class members actually redeem their share of the class recovery.<sup>177</sup> For example, many class actions end with the attorneys representing the class being paid in cash, but the consumer-members receiving coupons (although this practice is being cut back by law).<sup>178</sup> The average redemption rate of various coupons has been measured to be somewhere between 1 percent and 6 percent, mirroring the typical corporate-issued promotional coupon redemption rate.<sup>179</sup> When Ford, for example, agreed to a settlement in a class action over the Explorer SUV rollover problem, it was estimated to have a potential cost of up to \$500 million. But in the end, far less than 1 percent of the eligible consumers (seventy-five, out of a class of over one million) signed up to redeem their price-cut coupons.<sup>180</sup> In another consumer class action alleging deceptive business practices, members were entitled to total potential compensation of \$64 million, but redemption was less than \$1.8 million.<sup>181</sup>

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<sup>177</sup> See *Do Class Actions Benefit Class Members* at \*2 (cited in note 50) (stating that settlements delivered funds to between 0.000006 percent and 12 percent of class members); *Redman v RadioShack Corp.*, 768 F3d 622, 628 (7th Cir 2014) (noting that “a little more than one half of one percent of the entire class . . . submitted claims for the coupon in response”); Christopher S. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla L Rev 71, 119–20 (2007) (stating that it is not uncommon for a small percentage of class members to file claims); William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 FRD 375, 379 (1973) (“Even after a settlement, where class members are notified that they can share in the recovery merely by filing a simple proof of claim, only 10% to 15% bother to do so.”); *Petruzzi’s, Inc v Darling- Delaware Co.*, 983 F Supp 595, 605 (MD Pa 1996) (stating that when class members must file proof of their claim “response rates are often very small, and rarely exceed 50%”).

<sup>178</sup> See Class Action Fairness Act of 2005 (CAFA), Pub L No 109-2, 119 Stat 4, codified in various sections of Title 28; *Tanoh v Dow Chemical Co.*, 561 F3d 945, 952 (9th Cir 2009) (discussing the ways in which CAFA was intended to ensure fair recoveries for class members).

<sup>179</sup> See James Tharin and Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Georgetown J Legal Ethics 1443, 1445 (2005); Thomas A. Dickerson and Brenda V. Mechmann, *Consumer Class Actions and Coupon Settlements: Are Consumers Being Shortchanged?*, 12 Advancing Consumer Interest 6, 7 (Fall/Winter 2000) (finding redemption rates of between 2 and 6 percent).

<sup>180</sup> Jef Feeley and Myron Levin, *Ford Accord Garners Less Than 1 Percent Participation*, Bloomberg News (July 7, 2009).

<sup>181</sup> *Strong v Bellsouth Telecommunications, Inc.*, 173 FRD 167, 172 (WD La 1997). See also *Roundtable Discussion on Private Remedies: Class Action/Collective Action; Interface between Private and Public Enforcement* \*4 (Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee Working Party No 3 on Co-operation and Enforcement, May 31, 2006), archived at <http://perma.cc/Z4LZ-DE5K>. In another case, the proposed class settlement was not approved by the court, citing actual redemption rates that ranged from 0.002 percent to 0.11 percent for similar coupons. See *Buchet v ITT Consumer Financial Corp.*, 858 F Supp 944, 944–95 (D Minn 1994).

There are, to be sure, ways to increase participation rates by providing cash payments rather than coupons, autoenrollment with sticky opt-outs, and other tweaks. But in many cases any meaningful consumer recovery would require some active steps by the class members, triggering again the disproportionately low participation rate by those who do not read the boilerplate notices about the settlements. In fact, it is possible that various methods to make recovery more accessible would bump against the information handicap or network handicap, and thus would exacerbate the disproportionate exclusion of the poor.

Furthermore, because many of the compensation schedules are set in settlement negotiations by the plaintiff's attorneys and the defendants—both of whom have little interest in maximizing the payouts to the anonymous class members who are underrepresented in these settlement negotiations—the mechanism is inherently likely to shortchange the poorest among the class members. In fact, there is reason to expect that settlements involving less-educated class members would tend to be especially abusive and self-dealing because class members in such settlements rarely object to the settlement.<sup>182</sup>

It is possible that the value of class litigation would accrue to all if the remedy granted is a forward-looking injunction or corrective advertising. Attorneys will still get their lodestar fees for their success, and firms will happily comply by tweaking the language of the product label or other negotiated disclosures. It is questionable, however, how much benefit, if any, these settlements generate for the public. In the absence of compensation, the main remaining benefit is prevention though deterrence, to which I now turn.

*b) Deterrence.* What about the deterrence effect? Do class members—rich and poor alike—enjoy the compliance incentives that the threat of class action litigation creates?

A deterrence effect would arise if class actions led to substantial judgments and settlements that were paid out. Disgorgement of ill-gotten gains would be a powerful deterrent of misconduct. The deterrence effect would diminish if these judgments and settlements were only partially cashed out by consumers. The above Section demonstrated that redemption rates are low, but businesses do worry about the cost of settling class action litigation,

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<sup>182</sup> See Leslie, 59 Fla L Rev at 109–10 (cited in note 177) (discussing the futility of class members' objections to proposed settlements).

or else they would not draft class action waivers. And so, it is plausible that costly litigation is generated even with feeble redemption rates, forcing businesses to account for this cost in planning their primary conduct and to take extra care, thus delivering better goods and services to all.

Ideally, class actions would target the firms that commit the worst offenses and deliver the worst bargains. They would target producers who deceive consumers (for example, by falsely labeling products and charging higher prices); or manufacturers of defective and injurious products; or businesses that fraudulently bill consumers for more than the businesses are entitled. But since class actions are often driven by the financial incentives of the attorneys launching them, they are selected according to a different criterion: the ability and willingness of the defendant to settle. If the set of firms that are willing to settle is different from the set of those that commit the worst offenses, class actions may “underdeter, overdeter or deter the wrong parties.”<sup>183</sup>

Is there such divergence between the worst offenders and the most-likely-to-settle defendants? Class actions are likely to target the firms that have deep pockets and strong reputations to defend. Reputation and wealth are usually signs of success—badges that only firms that developed desirable brands can wear. If a feature of the product malfunctions, or if the firm promoted a feature that caused disappointment to consumers, the firm with the strong brand reputation and large cash reserves would have more incentive and capacity to redress the problem to avoid the negative reviews, the reputation penalty, and the resulting drop in sales—all arising without litigation.<sup>184</sup> If instead such firms stonewall and refuse to redress a complaint, it may likely be the type of complaint that invokes a technical or frivolous violation, one that does not hurt the firm’s market share.

To be sure, there are many meritorious claims against shady businesses specializing, for example, in the gray areas of subprime lending (for example, usury cap violators, credit-repair organizations, and questionable debt collection practices),<sup>185</sup> and

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<sup>183</sup> Thomas B. Leary, *The FTC and Class Actions: Remarks before the Class Action Litigation Summit* (FTC, June 26, 2003), archived at <http://perma.cc/S9HX-JEJZ>.

<sup>184</sup> See generally Omri Ben-Shahar, *One-Way Contracts: Consumer Protection without Law*, 6 *Eur Rev Contract L* 221 (2010) (emphasizing that, absent legal protections, consumers would be even more reliant on brand reputation and would develop more sophisticated methods of measuring brand performance).

<sup>185</sup> See Cathy Lesser Mansfield, *The Road to Subprime “HEL” Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51

pursuing them through class actions would be particularly advantageous to the poor, who are disproportionately victimized by such defendants. Class actions in these areas could at times provide an important supplement to public enforcement. Indeed, many consumer-credit protection statutes specifically envision class actions as an effective way of deterring patterns of creditor misbehavior, and the right to recover statutory damages makes the award of damages in class action litigation easy to administer.<sup>186</sup> Arbitration clauses effectively shut down this avenue of enforcement in areas that might directly benefit from increased deterrence. Viewed in this light, the Supreme Court's approval of arbitration clauses in credit-repair organizations' contracts, which are mostly sold to the poor by nonreputable firms, is more harmful than the Court's similar approval of a cellphone contract's arbitration clause. The irony is that the Court's liberal bloc seemed more energized in opposing arbitration clauses in the latter case (four dissenting justices) than in the former (only one dissent).<sup>187</sup>

Still, it is questionable whether businesses that specialize in deliberate advantage taking of less educated and poorer borrowers, like credit-repair organizations,<sup>188</sup> would be effectively deterred by the threat of private attorney general suits. In such cases, a coordinated agency-based enforcement campaign might be superior as a regulatory technique. The worst wrongdoers may not be the ones with the deepest pockets that attract private actions.

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SC L Rev 473, 556 (2000) (discussing abusive terms and practices associated with subprime loans, including balloon payments and prepayment penalties); Leah A. Plunkett and Ana Lucia Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 *Suffolk U L Rev* 31, 36 (2011) (discussing the criminal punishments for violating the usury cap).

<sup>186</sup> See, for example, Credit Repair Organizations Act § 409, Pub L No 104-208, 110 Stat 3009-455, 3009-459 (1996), codified at 15 USC § 1679g (providing for statutory damages and attorney's fees if a credit-repair organization harms a consumer); Consumer Credit Reporting Reform Act of 1996 § 2412, Pub L No 104-208, 110 Stat 3009-426, 3009-446, codified as amended at 15 USC § 1681n (establishing damages for willing or knowing non-compliance); Fair Debt Collection Practices Act § 813, Pub L No 95-109, 91 Stat 874, 881 (1977), codified at 15 USC § 1692k (establishing civil liability for debt collectors who fail to comply with the provisions of this statute); Truth in Lending Act § 130, 82 Stat at 157 (1968), codified as amended at 15 USC § 1640 (establishing civil liability and the ability to bring suit as a class for violations of the act).

<sup>187</sup> Compare *Concepcion*, 563 US at 357-67 (Breyer dissenting, joined by Ginsburg, Sotomayor, and Kagan), with *CompuCredit Corp v Greenwood*, 132 S Ct 665, 676-80 (2012) (Ginsburg dissenting).

<sup>188</sup> See *Credit Repair Scams* (FTC, Aug 2012), archived at <http://perma.cc/R3FG-FVAH>; Emily Patterson, *Don't Fall for Credit Repair Scams* (Better Business Bureau, June 8, 2015), archived at <http://perma.cc/FLS4-UPYW>.

And an effective enforcement campaign might require investigative resources aimed against a network of disperse fly-by-night defendants,<sup>189</sup> with forward-looking as well as criminal remedies, rather than anecdotal suits that end up with meek settlements, that compensate the lawyers more effectively than the victims, and that do little to shut down the systematic abuse.

It is also important to imagine different ways in which firms would be affected by class actions. In general, increased liability could have several effects. First, it could lead firms to shut down an entire activity as unprofitable, and, as a result, some consumers would be hurt. Some forms of high-risk, high-cost lending not prohibited by statute, or FDA-approved drugs with harmful side effects, have both substantial benefits and substantial costs. Shutting down their distribution because of high liability costs, instead of through fundamental regulatory cost-benefit analysis, may hurt consumers.

Second, increased liability could lead firms to continue the activity but make sure they comply with the technical legal standards. Manufacturers of products would have an incentive to reduce liability risks, but many of the precautions that accomplish this goal would be ones designed by lawyers, not product engineers. It might not be necessary to reduce the actual hazard of the product if liability could be curbed by drafting longer warning labels or disseminating new disclosures—avoiding claims of negligent failure to warn or deception. For example, if AT&T Mobility wants to advertise “free phones” yet charges sales tax on the hypothetical retail value, its fear that the ads might lead to liability for deceptive false advertising could have the sole effect of longer fine print disclaimers. The *AT&T Mobility LLC v Concepcion*<sup>190</sup> case—in which a class action plaintiff alleged fraud on behalf of all customers who received free phones but were charged sales tax—ended up with the landmark Supreme Court decision to validate the arbitration clause and to effectively diminish consumers’ access to class action litigation.<sup>191</sup> But an opposite result, securing access to class action litigation, could merely put firms’ lawyers on greater guard. AT&T would still advertise free phones and still charge sales tax on the retail value, but would lawyer up prior to

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<sup>189</sup> See Marc Weber Tobias, *Credit Repair Companies: How to Avoid Being Scammed* (Forbes, May 6, 2015), archived at <http://perma.cc/S6VQ-8LXN> (discussing credit-repair organizations, scams, and the “fly-by-night” nature of many of these organizations).

<sup>190</sup> 563 US 333 (2011).

<sup>191</sup> See *id.* at 352.

any public communication as a precaution against litigation and would add an “asterisk” to its pamphlets—“taxes and other charges may apply.” Access to litigation morphs into access to information, but disclosure—as discussed above<sup>192</sup>—triggers the information handicap and is often a regressive policy, serving the sophisticates who read it.

Third, there is the price effect. Could it be that class actions improve products and behavior but render them too costly for the poor? Surely, products are improved when they are more closely scrutinized by courts or asked to meet higher regulatory standards. But one does not need to subscribe to the “Chicago School” economic approach to recognize that better products are more closely scrutinized by courts and cost more in competitive and noncompetitive markets alike. People make different price-quality tradeoffs, and some consumers would prefer the higher quality even at a higher price. But not all consumers would benefit. Other consumers, particularly those with more constrained budgets, prefer low prices over high quality. They shop at bargain basements and search for marked-down products even if they have some defects. If class actions increase the price of products, it is quite possible that the poor may come out as net losers.

To be sure, even a sharp price effect that liability may elicit could be universally desirable. For example, when the business is sued for deceptively hiding some service fees, the effect might be higher upfront prices, but here the higher prices are offset by lower overall latent fees.<sup>193</sup> The higher price is a more salient index for the true cost of the purchase. Higher prices might also be desirable when consumers underestimate the risks and losses that might be associated with some products and fail to insure against loss or discount their value. And it is more than possible that these benefits associated with salient and informative upfront prices would accrue disproportionately to the poor, who might otherwise be easier targets for the false allure of teaser prices and other cognitive traps.<sup>194</sup>

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<sup>192</sup> See Part I.C.3.

<sup>193</sup> See Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* 159 (Oxford 2012) (discussing how complexity helps lenders hide the true price of goods by hiding costs in less salient provisions).

<sup>194</sup> In credit card markets, nonsalient prices and fees are incurred primarily by low-income users and fund the perks enjoyed by more affluent users. See *id.* at 100. It should be noted, however, that even a reduction and elimination of nonsalient prices may not remove the cross-subsidy inherent in credit card markets, because the loyalty perks enjoyed by the affluent would be funded by interchange revenue, which in turn leads to

##### 5. Access to courts: Conclusion.

There is a seductive logic to the access-to-courts argument. Consumers *should* be entitled to vindicate their rights in forums that allow them full procedural rights and effective remedies and charge low filing fees. Boilerplate surrenders of these rights in favor of mandatory arbitration are therefore widely regarded as benefitting businesses at the expense of consumers.

But this logic threatens to unravel when consumers are viewed not as a homogenous army of competent private litigators eager to burst out of the no-litigation chains, but rather as a heterogeneous class that includes a potentially large subgroup of less sophisticated and unlikely-to-sue people. Access to litigation might not help these folks; rather, it helps the stronger, more informed, more litigious consumers. It becomes an access justice policy with regressive effects.

What makes access to courts potentially unique in the more general access justice landscape is the litigation externality produced by class actions—the mechanism of vicarious access. Not all consumers have to sue for all consumers to benefit from the right to sue. Thus, the strongest case for access to courts and against mandatory arbitration might very well rest on this deterrence externality. It is possible that various types of socially harmful conduct are insufficiently deterred by public enforcement and that private class actions create better compliance, eliminate harmful conduct, and result in more accurate prices, to the benefit of all. True, class actions may also lead to unintended and unwelcome burdens on some consumers, but it cannot be categorically said that such a distributive impact trumps the deterrence benefit to all consumers.

It is nevertheless noteworthy that the problem of access to justice that predispute mandatory arbitration agreements create is falsely branded as the right of weaker victims to receive proper corrective redress. The benefit to weaker consumers comes neither from equal access nor from equal redress. Rather, it arises from the opposite: the fact that very few *strong* consumers actually sue and receive redress and that their actions force bad actors to pay for their misdeeds. Ironically, deterrence might work best

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higher retail prices charged to all. But see Steven Semeraro, *The Reverse-Robin-Hood-Cross-Subsidy Hypothesis: Do Credit Card Systems Effectively Tax the Poor and Reward the Rich?*, 40 Rutgers L J 419, 421 (2009) (offering “reasons to doubt that credit card use actually increases retail prices in a substantial and systematic way”).

if access were selective and if the payments of large judgments went to the pockets of rich plaintiffs' attorneys, and almost never to compensate the truly poor and the worst-off among consumers. The more attorneys benefit from such suits, the more motivated they would be to produce this form of deterrence. But, I argue, all this requires great faith in the ability of the class action device to successfully target only the meritorious claims. It also requires even greater faith in the motivation of class action lawyers and the diligence of supervising judges to produce class remedies that engender valuable deterrence, rather than token gestures (like improved disclosures) that are themselves regressive.

### CONCLUSION

This Article offers a framework to evaluate access justice programs. Such programs open their doors to a large class of people, but the basic insight of this Article is that not all qualified beneficiaries walk through these doors. Programs that are primarily utilized by weaker and poorer populations and funded by public expenditures succeed in their goal to redistribute progressively. But other programs achieve the opposite. Their open access feature is exploited more by sophisticated elites, enjoying benefits subsidized by the less well off. They embody the paradox of access justice.

The first half of this Article surveyed various access justice policies that are likely associated with a regressive pattern. One could, of course, perform the opposite exercise and line up various access programs that have a progressive bias. But because access justice commentary is inundated with progressive sentiment, the purpose of the cross-substantive survey here was to ring a caution bell. Good protective intentions can be gutted by unintended redistributive patterns. The very reasons that make some people more in need of protection make them also less likely to utilize open access opportunities.

There is a demoralizing spirit to this argument. It suggests that the implementation of a protective agenda is more difficult to achieve than currently thought. Within the regulatory repertoire, policies can be arranged along the scale of their intrusive or paternalistic quality. At one end, there are the minimally intervening regulatory techniques that leave extensive space for people to make their own decisions (policies like mandated disclosure and statutory default rules). These devices are notoriously unhelpful to the poor and to those less trained in the acumen of consumer

choice. At the other end of the spectrum, there are regulatory policies that leave little or no room for personal choice, relying instead on mandated outcomes, in-kind allocations, and strict government supervision. Properly designed, such devices can surely improve the well-being of the weak, but they too are notorious for their costs and trade-offs. In the interstices lies the regulatory device of access justice. It goes beyond choice architecture by designing, mandating, and paying for specific programs and requiring that they be open to all. But it stops short of picking out the beneficiaries or mandating the outcomes, instead allowing people to vary their levels of utilization. Unfortunately, it is the continued reliance of this device on individuals' affirmative decisions to seek out and to deploy the accessible program that paradoxically undermines the redistributive goals of the policy, exposing it to troubling and inequitable patterns.

The second Part of the Article examined a specific open access policy—access to courts of law. It began by presenting the possibility that this, too, is a policy benefitting elites while costing the public at large. The concern is that equal access is not enough, that it takes unique sophistication to vindicate one's interest through public courts. Worse, the enhanced liability due to selective access could be rolled into the prices that everyone pays.

But the cross-subsidy concern was only the beginning, not the conclusion, of the access-to-courts analysis. It is compounded by another factor: the benefits of litigation could extend to parties not actively accessing it. This is the deterrence externality due to class action procedures, what I called *vicarious access*. Thus, contractual agreements that bar claim aggregation threaten to undermine this proliferation of the otherwise-selective benefit of litigation. We thus learn that the interest of consumers is *not* open access to courts for all. Individual suits are a useless privilege to most. Instead, their interest is consistent with highly restrictive access, channeled through class actions into a deterrent device. This interest is served if and only if the representatives select the right cases for litigation. If plaintiffs choose cases based on anything other than the gravity of the underlying offense to the underrepresented group, the litigation mechanism remains regressive.