DEFINING AND BALANCING EQUITY

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Equity has become a significant goal of every major institution in the United States. Yet equity is often vaguely defined and comprises multifaceted goals. The concept of equity, as a foil to treating everyone identically under formal equality, can both foster and undermine an institution's primary mission or other values. This paper will reckon with how institutions, especially legal academia, can balance equity against other institutional values. The proper balancing of equity with other institutional values is impeded by the difficulties of defining equity and the chilling effects institutional actors face in discussing these issues.

This Article will first trace the concept of equity from its historical roots in Aristotle and the courts of equity, to modern anti-discrimination law, to critical theory scholarship. The paper will then define what I term procedural equity, which is focused on fairness of access and opportunities, and substantive equity, which is focused on fairness of results. These concepts of equity exist in some tension with an institution's other goals, such as efficiency, freedom of speech and inquiry, and classical liberal individual rights or other moral systems of justice. Critical to performing this balancing is an ability to discuss these issues openly, and institutions, especially academia, are not leaving sufficient spaces open for members to have diverging views on the different conceptions of equity.

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INTRODUCTION

Equity is an important part of the current mission of essentially all of the institutions in the United States. Relatively recently, educational institutions,[1] the government,[2] and organizations within the corporate world,[3] the health care sector,[4] and the nonprofit sector,[5] have begun to reflect on how they can better facilitate and achieve equity. These institutions, regardless of their primary functions, have affirmed their commitment to equity and begun to create and implement policies to achieve this goal. In some cases, equity may be necessary to achieving an institution's mission, may harmonize well with the mission, or be a separate but significant aspect of the institution's objectives.[6] However, in certain instances, the goal of equity may be at odds with an institution's primary mission.[7]

Despite this overwhelming commitment to equity, the concept of equity is often ill-defined and under-theorized.[8] In one articulation, "[e]quity is

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[1] *See, e.g.*, *Policy on Institutional Equity*, NW. UNIV. (Sept. 1, 2022), https://www.northwestern.edu/civil-rights-office/policies-procedures/policies/policy-on-institutional-equity-2022-2023-draft-6.21.pdf [https://perma.cc/F7AP-NHXZ]; Steven Mintz, *How to Stand up for Equity in Higher Education*, INSIDE HIGHER ED: HIGHER ED GAMMA (Apr. 20, 2021), https://www.insidehighered.com/blogs/higher-ed-gamma/how-stand-equity-higher-education?v2 ("Equity is higher ed's word of the hour -- and rightly so.").

[2] *See* Exec. Order No. 13985, 86 Fed. Reg. 7009, 7009 (Jan. 20, 2021) ("It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."); *see also* Ill. Exec. Order No. 2021-16 (July 30, 2021), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-16.2021.html [https://perma.cc/H8Y7-9MDX] ("The Office of Equity is hereby created within the Office of the Governor. The Governor shall hire a Chief Equity Officer to lead the Office of Equity.").

[3] *See* Melisande Schifter, *7 Ways Companies Are Advancing Racial Justice in Business*, WORLD ECON. F.: SYSTEMIC RACISM (June 18, 2021), https://www.weforum.org/agenda/2021/06/7-ways-companies-are-advancing-racial-justice-in-business/ [https://perma.cc/YJC2-HSZ7].

[4] *See* Kulleni Gebreyes et al., *Mobilizing Toward Health Equity: Action Steps for Health Care Organizations*, DELOITTE INSIGHTS (May 26, 2021), https://www2.deloitte.com/us/en/insights/industry/health-care/health-care-equity-steps. [https://perma.cc/ZG6S-7U7B].

[5] *See Why Diversity, Equity, and Inclusion Matter for Nonprofits*, NAT'L COUNCIL OF NONPROFITS, https://www.councilofnonprofits.org/tools-resources/why-diversity-equity-and-inclusion-matter-nonprofits [https://perma.cc/LW84-WQK5].

[6] *See infra* Part II.

[7] *See infra* Part II.

[8] *See* Lua Kamál Yuille, *Inequity as a Legal Principle*, 66 KAN. L. REV. 859, 867 (2018) ("Despite its ubiquity, it is not easy to think about inequity. Defining the contextually amorphous concept has proven both difficult and controversial.").

promoting justice, impartiality and fairness within the procedures, processes, and distribution of resources by institutions or systems."[9] President Biden's Executive Order on *Advancing Racial Equity and Support for Undeserved Communities Throughout the Federal Government* defines equity as:

> the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.[10]

Thus, equity can refer to equalizing opportunities, equalizing results, or equalizing some combination of both of these dimensions. Understandings of equity can also pertain to individuals or groups.[11] There are various definitions across institutions and within institutions.[12] Often, equity is contrasted with equality, but how these two concepts differ, and what it means to treat people or groups fairly or justly, has not been solidly fleshed out or agreed upon.[13]

A decade ago, a widely circulated meme influenced the current conception of equity,[14] and the responses to that meme further demonstrated how many ways there are to approach this concept.[15] In a graphic, three children of different heights stand behind a fence attempting to see a baseball game. In an illustration of *equality*, each child is given one box to stand on, so that the tallest child can see the game well; the middle child can catch a glimpse of the game; and the smallest child cannot see the game. In an illustration of *equity*, each child is given the number of boxes needed to see the game, so the smallest child is given the most boxes. The graphic spawned various critiques, and even prompted some to draw their own memes arguing that true justice required no fence at all.[16]

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[9] *Diversity, Equity, and Inclusion*, EXTENSION FOUND. IMPACT COLLABORATIVE, https://web.archive.org/web/20230114232648/https://dei.extension.org/ [https://perma.cc/KL9J-SGQN].

[10] Exec. Order No. 13985, *supra* note 2.

[11] *See infra* Section II.C.

[12] *See infra* Section I.C.

[13] *See infra* Part I.

[14] *See* Craig Froehle, *Evolution of an Accidental Meme*, MEDIUM (Apr. 14, 2016), https://medium.com/@CRA1G/the-evolution-of-an-accidental-meme-ddc4e139e0e4 [https://perma.cc/47LE-SMLF].

[15] *See* Nancy E. Dowd, *Equality, Equity, and Dignity*, 37 L. & INEQ. 5, 9–10 (2019) (arguing that equality, equity, and dignity are all important and overlooked in the state's obligation to children).

[16] *See* Paul Kuttner, *The Problem with That Equity vs. Equality Graphic You're Using*, CULTURAL ORG., https://www.socialventurepartners.org/wp-content/uploads/2018/01/Pro

Memes are not a rigorous way to explore a concept, but they can dramatically affect social consciousness and opinions on an issue.[17] When legal scholars have addressed issues related to equity, they generally assume it to be a laudable goal and largely devote their efforts to operationalizing the goal or discussing how society has fallen short of achieving that goal.[18] Without a solid framework for questioning, understanding, and evaluating equity as a distinct concept and goal, however, it is difficult to assess whether equity has been—or can ever be—achieved. The lack of scholarly engagement with the first principles of the definition of equity also means few are academically evaluating whether its achievement in certain spheres, or with respect to certain policies, undermines other important institutional goals.

Currently, many institutions have dramatically elevated equity as a value or goal without properly accounting for how a focus on equity may create other injustices or detract from the institution's mission. Because of the necessarily amorphous way in which equity functions as a concept, institutions run the risk of undermining or abandoning other important goals, some of which may be more critical to their missions, in attempting to become more equitable.[19] Balancing equity with an institution's other goals requires a more precise assessment of what equity is, when it is justified, how resources should be allocated to it, and how it intersects with other important goals, such as the search for truth, free expression, efficiency, or the primary objective of an institution.

As an example, consider the primary goal of indigent defense at a public defender's office. A public defender's office may spend some percentage of its budget on diversity, equity, and inclusion policies, training, and programming, so that its employees can better serve their clients with diverse needs and backgrounds and so their employees feel better included in the world

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blem-with-Equity-vs-Equality-Graphic.pdf [https://perma.cc/L79Z-QVVR] (Nov. 1, 2016).

[17] *See* Liam McLoughlin & Rosalynd Southern, *By Any Memes Necessary? Small Political Acts, Incidental Exposure and Memes During the 2017 UK General Election*, 23 BRIT. J. POL. & INT'L RELS. 60, 61, 78 (2020).

[18] *See, e.g.*, Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 553 (2020) (discussing measures to combat the "[p]ay inequity [that] continues to plague the United States"); Deborah N. Archer, "*White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1269–70 (2020) ("As communities engage in the project of highway redevelopment, racial equity—focusing on repairing racialized harm and advancing racial justice in both process and outcome—must be a central calculus at each stage."); Felix Mormann, *Clean Energy Equity*, 2019 UTAH L. REV. 335, 340 (2019) ("To be clear, this Article was motivated by the author's normative concerns over equity deficiencies in today's clean energy policy landscape. And these concerns over the uneven distribution of economic opportunities and costs form the basis of proposed pathways for policy reform.").

[19] *See infra* Part II.

environment.[20] In many ways, this equity focus will help public defenders better perform their roles. However, this expense and priority change removes money from the budget that could be used to pay for expert witnesses or to hire more attorneys to represent indigent clients, the organization's primary mission. The expense might also potentially compromise attorneys' time, productivity, and qualifications in favor of an increased focus on equity—thus potentially harming the diverse array of clients and their needs.

Additionally, without sufficient scrutiny of equity as a concept, educators, policymakers, and laypeople cannot assess whether equity maintains coherence as a value. Equity, as an essential goal of an institution, may be philosophically justified for a variety of reasons: it can have inherent value or it can help achieve other values, like a better integrated, well-rounded, and educated population. Alternatively, upon examination, certain approaches to equity may have significant moral, philosophical, or practical problems, or the achievement of equity may compromise too much of an organization's ability to promote other values or progress towards its primary mission.

This Article explores the concept of equity from philosophical and legal lenses in order to more coherently and deliberately approach how to balance equity with other institutional goals. Currently, institutions are not balancing equity against other goals because of both definitional problems—defining both equity and its competing interests—and because of the chilling effects institutions establish when discussing the proper balance of equity against competing goals.

Most understandings of equity combine notions of fair process/fair access—what I term *procedural equity*—with notions of ensuring fair outcomes or fair distributions of outcomes—what I term *substantive equity*.[21] These values may exist in tension—especially in academia—with an institution's other goals, such as efficiency, free speech, free inquiry, classical liberalism, or other systems of fairness or moral dessert.[22] The best way to resolve these

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[20] *See, e.g.*, *Racial Equity Action Plan*, S.F. PUB. DEF.'S OFF., https://sfpublicdefender.org/wp-content/uploads/sites/2/2021/02/PDR-Racial-Equity-Action-Plan-Phase-I-updated-2-5-2021.pdf [https://perma.cc/5X73-JQR6] (Feb. 5, 2021). The San Francisco Public Defender's Office is changing its policy from almost exclusively focusing on its attorneys' work product to also ensuring that its employees are treated more equitably. *Id.*

> Historically, Public Defenders offices, similar to other legal offices, have focused on the achievements, professional development and work product of the attorneys in the office. This has sometimes left other employees, many of whom are people of color, at times feeling disconnected from the core work and resulting praise that comes from success in the courtroom. I am committed to changing these patterns and ensuring that all of our employees feel equally appreciated and valued in the office. *Id.*

[21] *See infra* Section I.C. Equity is often used as a foil to more "[f]ormal equality." As a result, procedural equity does not focus on giving individuals equal resources, but giving them the resources they need to thrive, as individuals and sometimes as members of groups. *Id.*

[22] *See infra* Part II.

tensions is through explicit, open discussions, and legal academia must take certain steps to ensure that these discussions occur.

The goal of the Article is to establish a typology for understanding equity to determine when attempts to achieve equity bolster, and when they undercut, other important institutional goals, especially in legal education. Ultimately, equity is not incoherent as a concept and can be justified, to some extent, legally and intellectually. However, institutions must fully take stock of how they are conceptualizing equity, how their devotion of resources to this goal may undermine other values, and how equity can both serve and detract from their primary mission.[23]

This Article will proceed in three parts. Part I begins with the philosophical and legal origins of our modern conceptions of equity, from Aristotle to Rawls to critical legal studies, and concludes by offering various, precise versions of the current understanding of equity in modern institutions. Part II examines goals that, variously, exist in harmony and in tension with equity, such as efficiency, uniformity of standards, free expression, and devotion of resources more directly to the primary aim of an institution. This Part also attempts to propose solutions for optimizing how to balance equity with these other goals. Part III then concludes by specifically examining the context of legal education, in which efforts to facilitate equity have altered, for good and for ill, admissions, the classroom environment, and the ways in which legal scholars approach the law. Part III discusses how various approaches to equity may facilitate, or hinder, the primary mission of a law school under competing understandings of a law school's primary mission.

I. MODERN UNDERSTANDINGS OF EQUITY, FROM ITS ORIGINS

Equity, even to modern proponents, has so many potential definitions that the concept is in the eye of the beholder. In order to flesh out this concept, this Section examines equity's origins, from ancient philosophy to contemporary anti-discrimination law. It will then categorize several modern conceptions of equity that inform policy in our major institutions.

[23] *See infra* Part III.

A. Philosophical Origins of Equity, From Aristotle to Rawls

Although modern understandings of equity generally distinguish equity from more formal notions of equality,[24] equity's philosophical origins, and even fairly modern instantiations,[25] often do not make this distinction.

Most scholars trace the concept of equity to Aristotle,[26] although "[t]he tradition of *epieikeia*, the word now translated as 'equity,' begins in Homer, where *epieikeia* and its cognates means what is appropriate."[27] Perhaps borrowing from Homer, and also from the rhetorician Gorgias,[28] Artistotle's Nicomachean Ethics described the concept of equity and the equitable, or epiekes, both in terms of individual morality and in terms of how legislative bodies, and eventually courts,[29] should act.[30]

According to Aristotle, equity and justice share a complex relationship. What is equitable and what is just are neither exactly the same nor "generically different."[31] Equity may sometimes be superior to legal justice, or a

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[24] *See, e.g.*, Kimberly Amadeo, *What Is Educational Equity, and Why Does It Matter?: Why Equity Is Better than Equality for the Economy*, BALANCE MONEY, https://www.thebalancemoney.com/equity-in-education-4164737 [https://perma.cc/D7G4-4W8Y] (May 9, 2021) (contrasting equity, which removes "personal and social" barriers and giving students sufficient education to "perform at an acceptable level" with equality, which gives students the same amount of resources); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 169 (2002) (explaining that, in mediations, "[e]quity, as distinct from equality, can support distributions other than an even split.").

[25] *See*, *e.g.*, Augustus F. Hawkins, *Equity in Education*, 28 HARV. J. LEGIS. 565, 567 (1991) ("The philosophy of equity was represented by the Civil Rights Act of 1964. It sought to instill equality into education.").

[26] *See* Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 843 & n.396 (2013) ("In our legal culture, the dominant understanding of equity derives from Aristotle.") (citing Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFS. 83, 92–95 (1993)); *see also* Darien Shanske, *Four Theses: Preliminary to an Appeal to Equity*, 57 STAN. L. REV. 2053, 2056 (2005) ("There is general agreement that the equity tradition begins with Aristotle."); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1067 (2021) (tracing equity's "deep roots within the Western intellectual tradition" from Aristotle to the Middle Ages to the modern era).

[27] Shanske, *supra* note 26, at 2056 & n.11–13 (citing HOMER, ILIAD *23.537, 464 (Richmond Lattimore trans, Univ. of Chi. Press 1951)).

[28] Shanske, *supra* note 26, at 2056 & n.15 (citing 2 HERMAN DIELS & WALTHER KRANZ, DIE FRAGMENTE DER VORSOKRATIKER (1959)). For other sources on ancient thinkers who shaped Aristotle's view of equity, *see* Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFS. 83, 97 (1993).

[29] Although Aristotle permits equity as a corrective to lawmaker oversights in his "Nicomachean Ethics," in the "Rhetoric," Aristotle "makes it explicit that *epieikeia* can be appealed to (indeed ought to be) in the context of a trial and not only in a debate in the assembly." Shanske, *supra* note 26, at 2058 & n.28 (citing ARISTOTLE, RHETORIC *I.15, 7 (Ingram Bywater trans, Mod. Libr. 1954)).

[30] *See* ARISTOTLE, NICOMACHEAN ETHICS *V.10 (W.D. Ross trans, Oxford Univ. Press 1980), http://classics.mit.edu/Aristotle/nicomachaen.html [https://perma.cc/UMW6-5MDL].

[31] *Id.*

"correction of legal justice," due to the fact that the law must be articulated universally, leading to cases where applying a universal statement does not lead to correct results.[32] "Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement."[33] A person who is equitable, instead of being a "stickler for his rights in a bad sense," will take less than what he is legally owed, in order to be equitable.[34] Analogously, there are cases where the law and rules cannot be rigid, but must adapt to an unexpected set of facts, where adhering exactly to the law is unjust.[35]

Scholars have summarized Aristotle's understanding of equity as "an invocation of justice where law fails on account of its generality."[36] Aristotle explicitly connected morality, justice, and the law in ways that allow our behavior to adapt to circumstances where rigid applications of principles may yield improper, unforeseen results.[37]

Aristotle thus connected moral notions of equity—where we behave as equitable individuals without rigidly demanding what is owed if that would be inappropriate—to legal notions of equity—where judges and lawmakers may depart from rules written in absolute terms as a corrective to oversights in specific situations.[38] Aristotle believed equity to be a form of justice that is sometimes superior to the absolute rule-following, when we can make allowances for exceptional circumstances.[39] This is strongly echoed in modern institutional notions of equity.[40]

Aristotle's views about equity are evident in an updated instantiation in John Rawls, another philosopher whose thinking has profoundly influenced modern notions of equity, and who has had profound impacts on "contemporary legal thinking" in general.[41] "[R]esponsible for the resurgence of political liberalism,"[42] Rawls posited a morality based on a type of fairness that is most solicitous towards the least fortunate among us.

Rawls's most seminal work, *A Theory of Justice*,[43] formulates a theory of "justice as fairness."[44] The only time *A Theory of Justice* uses the word

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *See* Smith, *supra* note 26, at 1081.
[37] *See* NICOMACHEAN ETHICS, *supra* note 30, at *V.10.
[38] *See id.* at *V.4.
[39] *See id.*
[40] *See infra* Section I.C.
[41] *See* Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549, 550 (1994).
[42] Aldir Guedes Soriano, *Liberal Democracy and the Right to Religious Freedom*, 2013 BYU L. REV. 581, 582 (2014).
[43] JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).
[44] *Id.* at 3.

"equity" is when Rawls discusses courts of equity, which, like courts of law, must decide like cases alike in order to facilitate the predictability and impartiality necessary for the rule of law.[45] However, Rawls's conception of fairness as justice requires "equal basic liberties,"[46] "fair equality of opportunity,"[47] and "the difference principle."[48] Rawls's difference principle is a precursor to many current conceptions of equity valued by our institutions. According to the difference principle, inequalities in life prospects, or unequal distributions of resources, are justifiable only if this inequality works to the advantage of the most disadvantaged members of society.[49]

Various interpretations of the difference principle correspond to the various current conceptions of equity described in the next Section. Some believe the difference principle is quite radical, requiring major re-distributions of resources, while others believe it demands only the provision of equal opportunities.[50] Consistent with Rawls's theories of justice and fairness could be the view that large disparities of wealth and outcome are acceptable, so long as the rules are set up so that these disparities also redound to benefit the least socially favored. Alternatively, proponents of Rawls might believe that any system with large wealth disparities indicates that the rules were not formulated fairly, from behind, the "veil of ignorance."[51] Using the metaphor of a veil of ignorance, Rawls argued that those making the rules of society should do so as if they were unaware of the segment of society they inhabit, or their level of wealth, education, or talent.[52] In this way, the rules will be fair and not chosen because they specifically advantage the rule-maker. In such a situation, people would choose social rules and laws that help maximize the position of the least fortunate, who could be any of us.[53]

Rawls did not precisely outline what is owed to the least fortunate, and his later works may have modified his earlier, more robust views.[54] However, this indeterminacy of what fairness requires maps closely onto the vagueness within current understandings of equity, which contain some elements of

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[45] *See id.* at 51, 206–09.

[46] *Id.* at 53.

[47] *Id.* at 65.

[48] *Id.* For an excellent analysis of A THEORY OF JUSTICE and its influence on the Supreme Court under Chief Justice Earl Warren, *see* Michael Anthony Lawrence, *Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court*, 81 BROOK. L. REV. 673, 677–78 (2016).

[49] RAWLS, *supra* note 43, at 68 ("What, then, can possibly justify this kind of initial inequality in life prospects? According to the difference principle, it is justifiable only if the difference in expectation is to the advantage of the representative man who is worse off, in this case the representative unskilled worker.").

[50] Lawrence, *supra* note 48, at 679 (describing various interpretations of the "controversial" difference principle).

[51] *See* RAWLS, *supra* note 43, at 11.

[52] *Id.*

[53] *Id.*

[54] *See* Lawrence, *supra* note 48, at 679 & n.41.

"equal opportunity"[55] with a sense that those least advantaged may require more resources, to improve the status of those least privileged.[56]

Various other philosophers and thinkers have also contributed to our current understanding of equity. John Paul Sartre, other existentialists, and the postmodernists, provided further examples of philosophical approaches that have undermined the formalistic and more "objective" thinking of formal equality, where everyone is treated the same on some axis.[57] The next Section will discuss the work within disciplines of the law and legal theory that have been performed to establish the foundations of our modern notions of equity.

B. Legal Understandings of Equity, From Courts of Equity to Anti-Discrimination Law

Equity's current treatment in our institutions, from education, to government, to the health sector, and to private industry, derive not only from the great philosophers, like Aristotle and Rawls, but from legal thinking. As examples, courts of equity, anti-discrimination law, and disciplines within legal scholarship, like critical race theory, demonstrate that our current interpretation of equity as a value is connected to our sense of the role of courts, our substantive law, and the intellectual contributions of legal scholars.

The modern conception of equity, as distinct from the concept of formal equality, is analogous to the legal conception of courts of equity as distinct entities from courts of law. The analogy between equitable moral principles and equitable legal principles, and the view that general principles may need correctives, began with Aristotle, whose work *Rhetoric* discussed permitting appeals to equity during trials.[58] These concepts eventually became incorporated into the English courts, which administered courts of equity as a

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[55] Equality of opportunity is akin to giving people equal capacity to compete against each other but not interfering with the results or ultimate distributions of outcomes. *See* Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 623 (2011) ("Most Americans believe in something called 'equal opportunity,' generally meaning that we should minimize the extent to which arbitrary characteristics unrelated to talent (such as one's race) determine one's success in life, in order to allow one's abilities to do so. If that condition is met, most seem to tolerate divergent outcomes so long as they are the product of individual choices and not the circumstances of one's birth.").

[56] *See infra* Section I.C. Modern conceptions of equity will be more thoroughly explored.

[57] Robert Fogel, *Toward a Postmodern Egalitarian Agenda*, AM. ENTER. INST. (Apr. 12, 1999), https://www.aei.org/research-products/speech/toward-a-postmodern-egalitarian-agenda/ [https://perma.cc/LT5M-A84H]; Storm Heter, *Sartre's Political Philosophy*, INTERNET ENCYCLOPEDIA PHIL., https://iep.utm.edu/sartre-p/ [https://perma.cc/P29P-TWWV]; Christian J. Onof, *Jean Paul Sartre: Existentialism*, INTERNET ENCYCLOPEDIA PHIL., https://iep.utm.edu/sartre-ex/#SH2c [https://perma.cc/U9NY-NU5C]; THOMAS FLYNN, EXISTENTIALISM: A VERY SHORT INTRODUCTION 124–125 (2006).

[58] *See* Shanske, *supra* note 26, at 2058 (citing ARISTOTLE, RHETORIC *1.15, 83 (W. Rhys Roberts trans, Mod. Libr. 1954)).

separate system from the courts of common law until the Judicature Acts of the 1870s.[59]

The English Courts of Chancery borrowed heavily from Aristotle's concepts of equity; these courts allowed the Chancellor to exercise discretion to deviate from the harsh common law precedents when strict adherence to legal rules or legally available remedies would not yield justice between the parties.[60] In turn, the American courts, which merged law and equity into a single court system in most jurisdictions,[61] borrowed from the English system.

Just as courts of equity can transcend the rigid constraints of the written law to produce the most just outcome, proponents of the modern value of equity assert that fairness and justice in creating policies or distributing resources require more than formal equality—or treating everyone identically—due to various differences between individuals, based on factors ranging from systemic inequities to differences in styles of learning and learning ability.[62] Therefore, the courts of equity are an important predecessor to modern notions of equity in our institutions.

With that being said, the establishment of courts of equity and equitable remedies,[63] although they use the same terms and share many of the same values as our modern conception of equity, are fairly attenuated from what members of our institutions mean when they say they are trying to improve equity within their institutions. As demonstrated below, more direct predecessors to current conceptions of equity, especially conceptions of equity for members of an identity group—such as racial equity or gender equity—are located in anti-discrimination law, critical race theory, and critical feminist theory.

Like the courts of equity being a foil to courts of law, anti-discrimination law has also evolved in ways that mirrors the distinction between formal equality and equity. The Fourteenth Amendment's guarantee of equal protection is the analog to formal equality in that the government violates equal protection guarantees only if there is a law or policy that is facially invalid, or if the government has applied the law with discriminatory intent.[64] These

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[59] Madeline M. Plasencia, *No Right to Lie, Cheat, or Steal: Public Good v. Private Order*, 68 U. MIAMI L. REV. 677, 702–03 (2014).

[60] *Id.* at 702.

[61] *Id.* at 703. The Delaware Chancery Court is a notable exception to this.

[62] *See infra* Section I.C.

[63] Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 477–478 (2003). Courts have the power, in addition to awarding damages, to "exercise their broad discretion to award various equitable remedies" including injunctions, disgorgement, and restitution.

[64] Washington v. Davis, 426 U.S. 229, 248 (1976) (upholding qualification test for police officers for the District of Columbia even though the tests had a racially disproportionate impact in excluding Black prospective officers).

policies exhibit "disparate treatment," or treating a protected class differently than others, which is constitutionally forbidden.[65]

By contrast, "disparate impact,"[66] which is closer to equity principles, is not a violation of the Equal Protection clause.[67] A facially neutral law or policy, like a written or verbal test administered to prospective police officers, may not violate the Constitution, even if the policy results in racial disparities.[68] According to the Supreme Court in *Washington v. Davis*, racially disproportionate impact, standing alone, may not trigger a constitutional violation, unless that impact is so stark that "an invidious discriminatory purpose may . . . be inferred from the totality of the relevant facts."[69] Therefore, a disproportionate impact is not "irrelevant," but it is not in itself a constitutional violation.[70]

However, the Supreme Court in *Davis* allowed for the possibility that civil rights law, apart from the Constitution, could use a "disparate impact" standard instead, prohibiting policies that resulted in racial disparities even without discriminatory purpose or intent.[71] Thus, under many federal and state civil rights or anti-discrimination laws, disparate treatment is not necessary to prove unlawful discrimination.[72] For example,[73] under Title VII, an

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[65] *See* Noah Kane, Note, *Treat Thy Neighbors as Thyself? Equal Protection and the Scope of RLUIPA's Equal Terms Clause*, 43 CARDOZO L. REV. 823, 826 (2021) (noting that the equal protection clause "prohibits disparate treatment, unless that disparate treatment is fairly justified by a nondiscriminatory governmental interest"); *see also* Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1629–32 (2021) (discussing the theoretical crisis in anti-discrimination law where disparate treatment—or treating someone differently because of some protected characteristic—may not actually involve conscious discriminatory intent).

[66] Disparate impact is when a policy that does not facially discriminate ultimately affects members of different protected classes differently. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1130 (1997) ("Equal protection doctrine currently constrains explicitly race-based forms of state action; but, as the Court has repeatedly held, the state may enforce 'facially neutral' policies and practices with a disparate impact on minorities or women so long as such policies or practices are not enacted for discriminatory purposes.").

[67] *See id.*

[68] *Davis*, 426 U.S. at 229.

[69] *Id.* at 242 (discussing the total exclusion of Black people from juries, where there is no plausible explanation besides invidious discrimination).

[70] *See id.*

[71] Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1343 (2010) ("The Court rejected that idea [of disparate impact violating the Constitution] in *Washington v. Davis*, but in doing so it also opined that Congress could create disparate impact standards at the statutory level.") (citing Washington v. Davis, 426 U.S. 229, 248 (1976)).

[72] Of course, "[s]tate and local anti-discrimination statutes vary in whether they cover disparate impact discrimination." Nan D. Hunter, *Sexuality and Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 N.Y.L. SCH. J. HUM. RTS. 565, 578–80 (2000) (charting cases involving laws covering discrimination of same-sex couples).

[73] As an example, Congress codified disparate impact in employment discrimination claims under the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(k) (2006).

employer's practice that adversely affects a group on the basis of race, gender, religion, or national origin, must be justified as a "business necessity."[74] This means that a disparity in results, such as far fewer women hired than men, or a disparity in salaries between women and men holding the same position, may be unlawful under anti-discrimination statutes, even in the absence of any sort of disparate treatment, if these policies are not integral to the need of the business.[75] Employers must now demonstrate that their policies do not arbitrarily harm certain groups of people.

If disparate treatment maps onto the formal notion of equality—everyone must be treated neutrally and the same—disparate impact maps onto several variations of modern notions of equity discussed in the next Section. In one understanding of the reason for countenancing disparate impact claims, a demonstrable disparate impact must mean that there is some underlying disparate treatment; the disparate treatment simply cannot be proven, so courts allow disparate impact as an evidentiary substitute.[76] This resembles some modern visions of equity. Equalizing outcomes is another way of demonstrating that the rules are actually equal and fair instead of an arbitrary burden on certain classes of people. Equity of outcome is thus necessary to ensuring that people are actually being treated equally and neutrally.

In another, more robust version of equity, disparate impact is a problem in and of itself. Equity of outcome is not simply a way of proving a more formal equality, or nonarbitrary treatment, but is necessary to achieve fairness. In a Rawlsian sense, equity of outcome ensures a minimal standard for the least advantaged,[77] which, in modern conceptions of equity, may encompass not just individuals, but various identity groups like women or racial and ethnic minorities.[78]

In addition to evolving anti-discrimination laws, critical legal studies, and its successors of critical race theory and critical feminist theory, have done much of the hard work in connecting legal theory and anti-discrimination norms to produce our current understanding of equity.[79] Critical legal

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[74] *See* Henry L. Chambers, Jr., *The Supreme Court Chipping Away at the Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1172–73 (2014) (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

[75] *See id.* at 1174 (citing Connecticut v. Teal, 457 U.S. 440 (1982)) (forbidding a facially neutral written test that affected eligibility for promotion even though the employer took other factors into account to undo any disparate impact the test had on racial minorities).

[76] *See Yick Wo V. Hopkins*, 118 U.S. 356, 374 (1886) (the Supreme Court of the United States invalidating a facially neutral statute because it had been administered so disproportionately against laundries owned by Chinese immigrants that the Court concluded there must have been a discriminatory purpose).

[77] *See supra* Section I.A.

[78] *See infra* Section I.C.

[79] *See* Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 744 (1993) ("Critical legal studies heavily influenced a number of later movements, including radical feminism and Critical Race Theory. Both borrowed from CLS its

scholars have examined how rules that appear facially neutral actually derive from discriminatory practices or discriminatory exclusions of groups from certain spheres of power and how these rules may arbitrarily disadvantage members of certain groups.[80] For example, proponents of critical race theory, which developed in the late 1980s as a critique of critical legal studies, argue that a "colorblind" legal system masks the way the law influences race relations to support white supremacy.[81] Ignoring the historical and present injustices caused by racism furthers the oppression of disadvantaged groups.[82]

These insights have led to an evolution in thinking on whether formal equality is sufficient to ensure justice, and whether rules that appear equal may nevertheless be unjust. This thinking has contributed to a push for greater equity in our institutions. Critical race theory has also had its detractors, and these insights spawned much criticism and controversy over the divisiveness of focusing one's view of the law and American society so thoroughly through the prism of identity groups.[83] Critiques of critical legal studies and its successors argue that these movements favor narrative over neutral principles and eschew more classical liberal values of individualism and formal equality for each person.[84] These critiques also apply to the current increased attention to equity. The current definitions of equity that institutions have employed have both benefitted from, and inherited the problems of, the approach of critical race theory. The final section in Part I will detail the various ways individuals and institutions currently conceptualize the value of equity.

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skepticism of law as science, its questioning whether text contains one right meaning, and its distrust of law's neutral and objective facade.").

[80] *See, e.g.*, Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333–34 (2006).

[81] *Id.* at 333–35 (describing how critical race theorists believe that colorblindness "maintains the oppressive conditions and lack of opportunities for subordinated groups that continue to be structured by the historical and modern use of race in law and throughout the society").

[82] *See* LESLIE G. CARR, "COLOR-BLIND" RACISM 107–170 (1997).

[83] *See* Kimberlé Williams Crenshaw, *This Is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV 1702, 1713–14, 1714 nn.21–22 (2022).

[84] *See, e.g.*, Jeffrey J. Pyle, Note, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 794 (1999) ("By discarding the processes of objectivity and rational empiricism, race-crits clear the ground for their idea that a person's position on the racial totem pole controls his or her fate to the exclusion of all else."); Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC (Dec. 8, 1996), https://newrepublic.com/article/74070/the-bloods-and-the-crits [https://perma.cc/FC9J-NL27] (book review) (arguing that critical race theory, which "has gained increasing currency in the legal academy," stands in stark opposition to liberal values and the rule of law). *See generally* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 140–43 (1997) (criticizing critical race theory, among other theories, for abandoning objectivity and methodologies based primarily on rigorous reason).

C. Modern Conceptions of Equity

Equity is an elusive concept for a variety of reasons. First, for many, equity is largely about achieving fairness, which itself means different things to different people.[85] Further, equity combines notions of giving people equal (or, alternatively, fair)[86] opportunities or processes with notions of equalizing results or outcomes. Therefore, equity is some amalgamation of equal access (or, to some, fair access, or receiving resources that meet a minimum threshold to ensure fair access) with equalizing outcomes, or achieving results that clear a threshold level of acceptability.[87] However, neither a perfectly fair process nor perfectly equal outcomes can ever be achieved in a way that is either practically or conceptually satisfying. This final Section will discuss the numerous conceptions of equity, attempting to precisely outline its components and sources of disagreement among those who place a high priority on the value of equity.

As a concept, equity is sometimes used interchangeably with—and often directly contrasted with—equality, which is easier to define and, in many ways, more philosophically coherent.[88] Formal equality requires an identity among whatever axis is being equalized.[89] Rule of law requires that we be treated equal before the law—meaning that similarly situated cases should be decided similarly. Equal treatment requires that everyone be given the same opportunities. Equal pay means that individuals are rewarded identically, so long as their efforts or talent, or the value of their output, is commensurate.

Equity presumes that formal equality is unfair or incomplete for a variety of reasons.[90] Because individuals, or groups, are differently situated on a variety of axes, formal equality may, as discussed in the previous Section, perpetuate inequalities or injustices.[91] Ultimately, views about equity attempt to

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[85] *See* Kris Putnam-Walkerly & Elizabeth Russell, *What the Heck Does 'Equity' Mean?*, STAN. SOC. INNOVATION REV. (Sept. 15, 2016), https://ssir.org/articles/entry/what_the_heck_does_equity_mean# [https://perma.cc/PDU8-ZJ74] (explaining that equity is defined in the dictionary as fairness or justice, which are "shaped by each individual's worldviews and experiences, [so] the definition may be a perpetually moving target").

[86] *Id.* (defining equity as giving everyone what they need to reach their "full potential").

[87] *See, e.g.*, Olatunde C.A. Johnson, *The Equity E.O.: Building A Regulatory Infrastructure of Inclusion*, 46 ADMIN. & REG. L. NEWS 5, 5 (2021) (describing how although President Biden's executive order on racial equity "offers a narrow definition of 'equity' (deploying terms such as 'fair' and 'impartial' that sound in procedural fairness), it also articulates the robust goal of 'full participation'-- a more capacious norm of social inclusion and citizenship.").

[88] *See* Yuille, *supra* note 8, at 867 ("Often, [inequity] appears to be used interchangeably with inequality, a related but distinct concept. Inequality is nothing more than a quantitative measure of sameness or equivalence.").

[89] *See Equality*, STAN. ENCYC. OF PHIL., https://plato.stanford.edu/entries/equality/ [https://perma.cc/3AU3-R52E] (Apr. 26, 2021).

[90] *See supra* Section I.B.

[91] *See supra* Section I.B.

create a fairer world than equity proponents believe can be achieved by following equality principles alone. This fairness is achieved through several components.

For one, many scholars and advocates who discuss equity describe equity as having what I will term a strong *procedural* component. Procedural equity would not require that individuals be given *the same* resources (that would constitute equality), but that they be given, according to many, the resources that they *need*.[92] A student with certain learning disabilities, they argue, cannot thrive if given only the resources of a student who can easily assimilate and make meaning of written language, especially if the latter student has other familial or economic advantages.[93]

Part of what creates some intellectual incoherence in understanding and operationalizing the concept of equity is determining what someone "needs." In addition, unfairness is also created by giving people what they need instead of, for example, what they "deserve,"[94] based on effort or contribution. A system could easily be created where, for example, the neediest students in an educational system take up the most resources, depriving many students of what might be considered their fair share. What is a fair process, or fair access or opportunity, in the absence of equality or some sense of moral desert, is quite difficult to determine.

Perhaps to clarify some of this confusion or ambiguity, many seekers of equity also incorporate what could be called a *substantive* component.[95] The substantive component of equity would attempt to create some fairness around, not just opportunities, access, or resources, but actual results. Thus, equity would require giving each student sufficient resources to achieve an acceptable level of educational competence or giving each person sufficient health care resources to allow for a threshold level of life outcomes. An even

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[92] *See* Putnam-Walkerly & Russell, *supra* note 85 (describing equity as "about each of us getting what we need to survive or succeed—access to opportunity, networks, resources, and supports—based on where we are and where we want to go.").

[93] *See* Nancy E. Dowd, *Children's Equality Rights: Every Child's Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1375–76 (2020) (arguing that society must dismantle hierarchies that are created based on race, gender, and "physical and mental disabilities [which] often steer children toward the bottom, especially if they are already there because of race, gender, and class identities.").

[94] There may be a strain of equity reasoning that is based on notions of moral desert. As Rawls would argue, individuals do not deserve their talents and did not earn their intelligence, so giving them more because of their greater contributions based on special talents or characteristics is unfair. *See* JOHN RAWLS, A THEORY OF JUSTICE 89 (Harvard Univ. Press rev. ed. 1999). There are many reasons, both from a utilitarian and a deontological perspective, to dispute the notion that individuals have not cultivated their talents, or their intelligence. However, those who wish for notions of equity to eclipse values like equality may subscribe to this Rawlsian approach.

[95] People may disagree about which benefits or entitlements fall within the category of procedural equity and which fall within the category of substantive equity. Establishing these categories gives people discussing these issues a common framework to improve these discussions.

more robust understanding of substantive equity would require all students to get to the same educational level, although this clearly presents both practical and moral problems, considering there are a variety of reasons students' educational outcomes diverge, besides just a failure to provide them with adequate resources.

The substantive and procedural components of equity also merge because, presumably, if a system were procedurally fair/equitable, we would see more equality of outcomes. Thus, ensuring some amount of convergence of outcomes is a way of testing whether there is sufficiently fair opportunity for all.

Equity may have both procedural and substantive components and may also focus on either individuals or groups. Based on robust approaches to equity, institutions looking to advance equity often seek to create more equitable environments based not on fair/equal/similar treatment of individuals as the locus of equity (say, using non-discriminatory hiring criteria or even ensuring that each individual is given what they need to thrive), but on fair treatment of *groups* (by measuring equity at the group level instead of the individual level).[96] Group-based equity, which has a strong association with anti-racism philosophy and measures, attempts to ensure that historically disadvantaged groups are given fair treatment, either in access or in results, or both.

Procedural equity for groups would ensure that these groups are given good or fair access by perhaps providing certain groups with more resources, like providing extra money for certain communities to improve schools or access to health care, or facilitating tutoring opportunities for those with disabilities, so they can compete fairly with members of majority groups. Substantive equity for groups would establish ways of ensuring fair representation of groups as a result, say through affirmative action programs. Policies that equalize results among groups suffer from the same potential unfairness as policies that seek to equalize results among individuals. These policies may penalize others unfairly in the process of equalizing access or outcomes, due to a variety of reasons besides systemic injustice, that different groups may be different in a particular institution. These policies, because they often target and assign benefits and burdens to groups instead of individuals, also may create some of the divisive aspects of critical race theory by focusing a sense of justice not on individuals but on aggregates, or members of groups.

Despite its complexities and problems, equity has important intellectual content. Equity acknowledges the deficiencies of using formal equality as the sole touchstone of fairness and justice. Proponents of equity, like Aristotle before them, believe that the rigidity of treating everything alike may often

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[96] *See*, *e.g.*, Dowd, *supra* note 93, at 1409–10 ("Because hierarchies among children are not only economic hierarchies, but are strongly racialized and gendered, a critical component of equity is 'fairness' defined in racial and gender terms . . . .").

result in substantial unfairness, due to unforeseen circumstances and unaccounted for contexts that necessarily arise when formulating universal principles.[97]

In this Part, I explored the origins of our modern understanding of equity and analyzed its component parts, examining what I call procedural and substantive equity. I also offered reasons why the concept of equity is so intractably nebulous, and perhaps sometimes unfair, despite its focus on fairness, and why it is nonetheless an important philosophical and practical lens through which to achieve justice. The next Part will examine how equity can act in harmony with, but can also undermine, other important institutional values.

II. EQUITY AS A FOIL TO OTHER VALUES

Whether defined purely procedurally, or with its weightier substantive components, equity as an institutional goal can clash or harmonize with an institution's primary mission. The more demanding a standard for equity is—for example ensuring equity in results instead of simply in access—the more likely a focus on equity may conflict with an institution's other missions or values. When institutions focus on equity, this may divert resources from the institution's essential goals or alter an institution's prior standards for achieving those goals.[98] Additionally, advancing equity may undermine other values of an institution, although there are ways in which equity may bolster the advancement of these values. This Part details the other values that may conflict with equity in different institutions, especially in education.

A. Equity Versus Efficiency/Uniform Standards

In many arenas, notions of equality, or concerns related to distributional effects, create tension with notions of efficiency, or the desire to optimally perform some function. Efficiency is generally more concerned with generating resources or wealth for the whole, or producing particular goods and services, not distributing them. For example, in economics, policies aimed at redistributing wealth more equitably may create market inefficiencies and shrink the "pie" of how much wealth is created for everyone.[99] However,

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[97] *See supra* Part I.

[98] *See infra* Part III.

[99] A classic debate in law and economics is whether legal rules should be implemented to remedy economic inequality or if legal rules should maximize efficiency and allow the tax system to redistribute wealth. Louis Kaplow and Steven Shavell wrote an influential article about how allowing legal rules to correct inequalities would create a double distortion, whereby both the legal regime and the tax system would have distorting effects on efficient social outcomes, such as incentives to work or take care to reduce hazards. *See* Matthew Dimick, *Should the Law Do Anything About Economic Inequality*, 26 CORNELL J. L. & PUB. POL'Y 1, 2–6 (2016) (exploring and responding to Louis Kaplow & Steven Shavell,

there are many situations where reducing inequalities can foster growth, so the trade-off between efficiency and equality/equity is "mythological."[100] The key is to figure out how to reduce any dramatic inefficiencies produced when fostering equity. Many institutions do not appear to be self-consciously considering this optimization problem in their zeal to advance equity.[101]

Equity, in its robust and often outcome-oriented form, may have a deleterious impact on an institution's output or advancement of its primary, non-distributional goals. Most obviously, resources devoted to equity are removed from an institution's main functions, as in a public defender's office, who spends a large sum of money that could be used for direct client services, expert witnesses, or hiring lawyers on equity workshops and programming.[102] Additionally, equity debates among employees and the strife surrounding disputes over equity concerns have led to disharmony and difficultly advancing an organization's mission, and this has particularly affected left-leaning organizations with progressive social justice missions.[103] Perhaps most importantly, hiring and promotion decisions aimed at correcting larger systemic and societal problems that create inequities in the workforce, may mean that the best-suited employee, based on the standard qualifications, is not hired or promoted. Or, a large number of resources may need to be diverted to training the employee or overcoming systemic inequities that led the employee to have less prestigious or advantageous qualifications. Instead of focusing solely on optimizing resources, including human resources, institutions are balancing that goal with correcting what they perceive as the effects of societal wrongs, and this may undermine aspects of an organization's optimal functioning.

Indeed, instead of grappling with this trade-off directly and acknowledging that equity—an important goal—may undermine other aspects of an institution's primary mission, many institutions are attempting to undermine the concept of uniform standards. Casting doubt on concepts like aptitude that can be measured, and the need for unform, assessable standards to qualify people and ensure optimal achievement, elides the conflict of values between efficiency and equity, but at great cost, both in terms of maintaining and

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Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income, 23 J. LEGAL STUD. 667 (1994).

100 Steven A. Ramirez, *Bearing the Costs of Racial Inequality: Brown and the Myth of the Equality/Efficiency Trade-Off*, 44 WASHBURN L.J. 87, 89 (2004).

101 *See infra* Section II.B. This is due, in part, to the difficulty of speaking openly and explicitly about these sensitive issues. If one fears losing their career or social status by speaking out about an overzealous commitment to equity, or about tradeoffs inherent in devoting resources to achieving equity, an institution cannot make rational decisions about how to balance competing values.

102 *See supra* Introduction.

103 *See* Ryan Grim, *Elephant in the Zoom*, INTERCEPT (June 13, 2022, 6:07 PM), https://theintercept.com/2022/06/13/progressive-organizing-infighting-callout-culture/ [https://perma.cc/PD2V-2GLP].

evaluating rigorous standards and potentially at great cost to the groups purportedly disadvantaged by the system that assesses and maintains those standards. For example, in Part III, this Article will discuss efforts to reduce reliance on standardized testing in law schools, including the current use of the LSAT.[104]

Of course, there are ways in which a focus on equity may also advance the efficiency or productivity of an institution. Ensuring that a diversity of backgrounds and perspectives are represented may also serve an organization's mission and improve efficiency because people from different backgrounds may generate different types of ideas. A variety of studies have demonstrated that having a diverse workforce, both in terms of employees and managers, may improve productivity,[105] although these studies may be conflating correlation with causation,[106] especially given how popular and mainstream advancing equity currently is. Further, because of background social issues that may create inequities, institutions may become more efficient by focusing on diversifying their hires and managers, and having a diverse group of managers may be optimal for efficiency. In addition, organizations ensuring diversity will better understand their diverse clients or patrons. For example, public defenders will better serve their clients if they attend to their clients' individual needs, approach their clients from a place of empathy, and understand the systemic inequities that may have led their clients to behave in particular ways. Some amount of diversity, equity, and inclusion programming is necessary for members of an organization to relate better to each other and ensure that all employees are treated fairly and even equally, as in similarly, which is necessary to comply with anti-discrimination laws. There will thus be efficiency costs and benefits, and an organization must openly acknowledge these costs and benefits and thoughtfully balance the competing interests to best serve its mission.

In some cases, an organization's mission may include enhancing diversity or rectifying systemic injustices and inequities. In those cases, even if a focus on equity produces significant institutional difficulties in advancing its mission, an institution may deem these inefficiencies worth their cost, especially an institution devoted to social justice. However, some organizations, again,

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104 *See infra* Part III.

105 *See* Lisa H. Nicholson, *Making In-Roads to Corporate General Counsel Positions: It's Only a Matter of Time?*, 65 MD. L. REV. 625, 643 (2006) (describing two studies demonstrating the benefits of a diverse workforce).

106 For example, "[o]ne study conducted by the American Management Association . . . found that firms having diverse senior management teams achieved better financial performance than firms that responded negatively to the survey regarding the presence of diversity." *Id.* This result may be due to a causal relationship between diversity and performance or due to a confounding factor that the type of firms that have not embraced diversity are not attuned to social movements relating to the popularity of diversity initiatives, and are thus, also unlikely to grow and evolve well in other areas. *See id.* at 648 n.99.

to avoid the efficiency/equity conflict, have begun to redefine their missions to include equity or social justice as an important part of the mission.[107] This can create major tensions with an organization's primary goals. Social justice is a highly politicized concept, with different people having differing views on what justice requires.[108] When an organization begins to incorporate rectifying systemic injustices that it did not itself create, distortions to the organization's other, more fundamental, or essential missions, may occur, especially in organizations where members should be permitted to have different views on how to define social justice and what it requires. In that sense, equity considerations often exist in tension with allowing members of an institution wide latitude to engage in free speech or open inquiry that may contradict an institution's stated equitable mission. The next Section addresses this issue.

B. Process-Based Values Like Free Speech and Free Inquiry

A focus on equity can be significantly beneficial to the process of free speech and free inquiry and can guarantee that many voices from diverse perspectives are heard. However, an increased focus on equity as a value exists in tension with free speech and free inquiry in two fundamental ways. Proponents of equity, which is often an outcome-based value, may have less tolerance for free speech, a process-based value, and have implemented measures that would chill speech concerning whether a focus on equity is the fairest approach, especially contexts like academia. Further, in the name of equity, some seek to censor or restrict speech that devalues individuals or undermines the dignity of members of groups that are given special solicitude.

The decision to favor equity as a value often eschews other conceptions of social justice and fairness.[109] As an example, notions of equity that are based on giving people resources that they require to thrive, exist in tension with a concept of fairness that is based on giving people what they have earned or what they "deserve." For example, a maternity leave policy may be well justified based on equity considerations (or highly justified based on utilitarian

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[107] *See e.g.*, *supra* notes 1–4 & accompanying text; *infra* Part III.

[108] *See, e.g.*, William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 GEO. MASON INDEP. L. REV. 97, 116 (1993) (describing "vague[,] subjective concepts such as 'social justice' or 'humanitarianism,'" which are often used in conjunction with the exercise of political power). There are many different theories regarding what social justice requires. *See* Emmanuel Frimpong Boamah & Craig Anthony Arnold, *Assemblages of Inequalities and Resilience Ideologies in Urban Planning*, *in* RACIAL JUSTICE IN AMERICAN LAND USE (Arnold et al. eds., forthcoming 2023) ("According to anti-domination theory, justice is not achieved through individual rights (remedial justice), the politics of pluralism (procedural justice), or (re)distribution of goods and resources (distributive justice), but in reform of institutions and social structures that create and perpetuate structural inequality and domination.").

[109] *See infra* Section II.C (discussing how equity-based moral systems conflict with classical liberalism).

considerations regarding what is good for society), but giving some employees leave with pay, which is not based on their contributions to the company, exists in tension with a moral system of deservedness. Equity as a moral system may also conflict with moral systems based on treating individuals equally or the same.[110] A hyper-fixation on equity tends to crowd out other moral systems because equity as a value often conflicts with other conceptions of rights and fairness.[111]

Because aspiring to equity, especially robust conceptions of equity, conflicts with other viable and reasonable moral systems, many members of an institution may disagree with decisions to emphatically favor a particular approach to equity,[112] or to devote resources to achieving this ideal. When this happens, and when individuals question the policies or outcomes of an institution, they may be silenced by that organization or by members of that organization, either in explicit or implicit ways.[113] Both theoretical and demonstrable examples of a commitment to equity clashing with a robust commitment to free speech or free inquiry exists across institutions.

A theoretical clash between equity and free speech exists because equity is often an *outcome-driven* value, which involves examining whether the policies' outcomes yield equitable distributions. A commitment to a robust understanding of equity requires evaluating facially neutral policies and uniform standards in light of concerns about distributional *outcomes*.[114] By contrast, free speech, in its best and purest conception, is a *process-based* value;[115] a culture of free exchange involves the clashing of views and ideals to get close to the "truth," either the factual truth or some moral or political truth.[116] This means that no opinion can be considered wholly unacceptable and no particular outcome or answer can be favored. Throughout history, people

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[110] *See supra* Part I.

[111] *See infra* Section II.C (discussing this tension, notably, equity conceptions, often exist in tension with classical liberalism).

[112] *See supra* Section I.C (discussing exploration of the various approaches to equity an organization may take).

[113] *See* Grim, *supra* note 103. An alarming number of progressive organizations are having trouble functioning or advancing their missions because "a dogmatism descends sometimes," where those focused on equity have less tolerance for free speech and often chill the speech of others questioning certain actions taken by the organization. *Id.*

[114] *See supra* Part I.

[115] *See* Jay Schiffman, *Tolerance as Understanding*, 3 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 68 (2003) (describing political process theory, where interests are balanced using a "purportedly neutral [political] process," where classically liberal values such as free speech and due process exemplify process-based values).

[116] For a complicating and nuanced explanation, *see* Christoph Bezemek, *The Epistemic Neutrality of the "Marketplace of Ideas": Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159, 174–76, 180 (2015) (comparing the views of Milton, John Stuart Mill, Justice Louis Brandeis, and Justice Oliver Wendell Holmes and concluding that only Justice Holmes believes that the government must be "epistemically neutral" and not even interfere in the marketplace of ideas to favor true facts over false facts).

have tried to suppress objectionable ideas that turned out to be true, so the best way to secure good outcomes is to guard a neutral process and ensure that the government cannot remove any individual notion from the marketplace of ideas.[117]

Those devoted to achieving certain outcomes as a way of measuring justice or fairness often dismiss process-based philosophies of achieving a good society, like modern free speech doctrine.[118] This is in part because free speech, to many proponents of equity, is not truly neutral, in the same way formal equality is not neutral. The ability to exercise one's First Amendment rights is somewhat related to what sort of resources one has to enter into the marketplace of ideas.[119] Property rights, to some degree, form a baseline starting place to determine when the government can and cannot intervene.[120] For example, I can censor someone in my own apartment, and the government will protect my property from vandals or trespassers. The First Amendment's commitment to viewpoint-neutrality, and the inability of the government to determine which ideas are good or bad, also means the government generally cannot distinguish between the rights of the powerful and powerless in order to help those with relatively less power.[121] Thus, there is a philosophical clash between free speech and equity that may serve as a justification—in the minds of proponents of robust conceptions of equity—to ensure unanimity of opinion or close off certain avenues of debate, especially if those avenues undermine an institution's commitment to equity.[122]

Practically, there are myriad demonstrable examples of the clash between robust free speech values and robust equity principles. This clash happens both in chilling the speech of those who disagree with an organization's approach to equity and in chilling speech that offends or undermines the dignity of those who belong to groups for whom equity as a value is especially focused—for example, when an art history lecturer's contract was not renewed

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[117] *See* Abrams v. United States, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

[118] *See* David Gillborn, *Risk-Free Racism: Whiteness and So-Called "Free Speech"*, 44 WAKE FOREST L. REV. 535, 543–44 (2009).

[119] Erica Goldberg, *Common Law Baselines and Current Free Speech Doctrine*, 66 VILL. L. REV. 311, 322 (2021) ("When the government protects property rights, the argument goes, the wealthy and privileged have more opportunities for speaking, and thus the government is acting to influence speech opportunities.").

[120] *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 914–15 (1987).

[121] *Id.*

[122] *See infra* Part III.

because she showed a painting depicting the Prophet Muhammad, which some students believed was offensive and "Islamophobic."[123]

Pressure to conform to the outcome-based ideology of equity has sometimes led to a stifling of debate or discourse among members of the organization about what is fair, what is reasonable, and what is best for the organization.[124] In certain cases, even the government may attempt to compel speech to serve equity goals.[125] This is not inevitable, but those who have most strongly incorporated equity into their worldview, even in academia, often believe that their value-laden views are necessary and irrefutable, and require other members of the organization to share them, even at the expense of academic freedom or freedom to pursue one's chosen intellectual path in academic scholarship.[126]

Some scholars have persuasively argued that institutions must often devote themselves *either* to the pursuit of truth *or* to the pursuit of an ideological ideal, like a particular conception of justice.[127] Institutions that should be devoting themselves to open inquiry have sacrificed some of this important value to balance it against equity considerations.[128] Codes of conduct or speech codes that include censoring opinions that others find offensive may chose equity considerations over speech considerations quite crassly, but this rebalancing of priorities happens in more subtle ways as well. Journalists, especially on the right side of the political spectrum—who may be most in favor of free speech concerns over equity concerns—have written about the stifling of criticism and dissent on important topics in medicine and the law in order to serve equity goals.[129] Newspapers and magazines have fired journalists,

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[123] *See* ASSOCIATED PRESS, *Art Professor Sues After Firing Over Showing Prophet Muhammad Images*, NBC NEWS (Jan. 18, 2023, 4:42 AM), https://www.nbcnews.com/news/us-news/art-professor-sues-firing-showing-prophet-muhammad-images-rcna66250 [https://perma.cc/U3SY-G8V4].

[124] *See* Grim, *supra* note 103.

[125] *See* Erica Goldberg, "*Good Orthodoxy*" *and the Legacy of* Barnette, 13 FIU L. REV. 639, 643–44 (2019) (providing examples of potentially unconstitutional efforts to establish an orthodoxy of opinion around values such as inclusion and tolerance).

[126] *See* Brian Soucek, *Diversity Statements*, 55 U.C. DAVIS L. REV. 1989, 1991 (2022) ("University faculty increasingly can't get hired, tenured, or promoted without submitting a statement describing their 'contributions to diversity, equity, and inclusion.'") (quoting Robert Maranto & James D. Paul, *Other Than Merit: The Prevalence of Diversity, Equity, and Inclusion Statements in University Hiring*, AM. ENTER. INST. (Nov. 8, 2021), https://www.aei.org/research-products/report/other-than-merit-the-prevalence-of-diversity-equity-and-inclusion-statements-in-university-hiring/ [https://perma.cc/KJF7-7C7C]).

[127] *See, e.g.*, Jonathan Haidt, *Why Universities Must Choose One Telos: Truth or Social Justice*, HETERODOX ACAD. (Oct. 21, 2016), https://heterodoxacademy.org/blog/one-telos-truth-or-social-justice-2/ [https://perma.cc/QPE4-B7LK].

[128] *See id.*

[129] *See* Aaron Sibarium, *The Hijacking of Pediatric Medicine*, FREE PRESS (Dec. 7, 2022), https://www.thefp.com/p/the-hijacking-of-pediatric-medicine [https://perma.cc/5VRP-DPD6].

who, for example, expressed the view that COVID-19 may not have arisen organically but in a laboratory (this view was deemed "racist"), or criticized some of the more violent types of protests that erupted after the killing of unarmed George Floyd by the police.[130] Scientific research grants from the government must now outline their equity plans.[131] Additionally, many universities are now requiring professors, historically those who should have the widest latitude to transgress prevailing norms and values (of which equity is certainly one that has taken hold in higher education), to demonstrate how their teaching, and sometimes even how their scholarship,[132] serves the value of equity.

In this environment, sometimes the only people emboldened enough to speak out against a perceived overemphasis on equity are not the best representatives of a nuanced view of how to balance interests. In order to argue against the widespread culture of providing group-based preferences or advantages in the name of equity, employees of organizations may sometimes marshal group-based arguments as explanations of why these group-based preferences are either unjust or an inappropriate remedy.[133] These arguments often include pernicious stereotypes, but silencing them means that their ideological opponents may make claims about reasons certain groups are underrepresented in their organizations that are not permitted to be tested or countered.

In some cases, those with reasonable alternative approaches are silenced within organizations because the organization is no longer amenable to serious questioning of its agenda or values as they relate to equity, especially

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[130] *See* Jonathan Chait, *Progressive America Needs a Glasnost*, N.Y. MAG: INTELLIGENCER (Nov. 1, 2022), https://nymag.com/intelligencer/2022/11/james-bennets-firing-was-just-one-of-many-illiberal-errors.html [https://perma.cc/UP3F-82NQ].

[131] Lawrence Krauss, *Now Even Science Grants Must Bow to 'Equity and Inclusion'*, WALL ST. J. (Oct. 12, 2022, 12:56 PM), https://www.wsj.com/articles/science-grants-equity-and-inclusion-energy-department-dei-proposals-hiring-pier-plan-woke-11665153295 [https://perma.cc/S6E3-7ZME].

[132] *See generally* Soucek, *supra* note 126, at 1991. The University of Dayton, where I teach at the law school, recently passed an internal resolution requiring professors to demonstrate how their service, scholarship, or teaching advances "inclusive excellence." (document on file with author). The School of Engineering at the University of Dayton, for example, requires professors to demonstrate this for all three areas. *See Faculty Policies and Guidelines and Criteria for the Evaluation and Promotion of Faculty, Faculty of Practice, and Lectures and Tenure of Family*, UNIV. OF DAYTON SCH. OF ENG'G, https://udayton.edu/engineering/_resources/pdfs/dean/p-and-t-criteria-v12-margie-updyke.pdf [https://perma.cc/F95Q-SMJ8] (May 2022). This means professors whose scholarship might somehow undermine this goal, yet be based on an objective, process-based method of scientific inquiry, will be running afoul of the dictates of the university by following the scientific method.

[133] *See* Aja Romano, *Google Has Fired the Engineer Whose Anti-Diversity Memo Reflects a Divided Tech Culture*, VOX (Aug. 8, 2017, 8:50 AM), https://www.vox.com/identities/2017/8/8/16106728/google-fired-engineer-anti-diversity-memo [https://perma.cc/98AF-452P].

where any exploration carries some risk of harm to the sense of belonging of members of certain identity groups.[134] This is a poor way to balance interests, and if institutions wish to achieve the proper balance between equity and other important values, that balancing must happen in a culture of openness. Homogeneity of opinion is often highly problematic, even within institutions that must share similar values, but certain institutions, like the academic environment, the media, or the sciences, require more open debate and free inquiry to serve their primary missions. In these institutions, a strong emphasis on the most robust forms of serving equity has been the most problematic for free speech and free inquiry values. This Article will discuss how to balance a commitment to equity on free speech and academic freedom in its final Part.

C. Individual Rights and Classical Liberalism

Notions of equity as an essential part of a just system conflict with other moral and political approaches, including classical liberalism, with its sense of *individual* rights and entitlements.[135] Classical liberalism, which embodies the ideas of John Locke, John Stuart Mill, and Immanuel Kant, draws a sharp line between the government and the private citizen, forbidding the government to play ideological favorites so that individuals can exercise their autonomy and maximally pursue their preferred interests.[136] By contrast to the focus on the individual of classical liberalism, equity often measures whether certain *groups* are affected, or seeks to equalize the distributions of benefits and burdens among people based on particular characteristics. In that sense, how an individual is treated depends upon membership in a particular group. Facially neutral policies that ensure everyone is treated with formal equality (a version of fairness for the individual) may be abandoned in favor of policies that seek to ensure less disparity among group outcomes. In this way, certain individuals—especially if they qualify for status in particular groups—are given preferential treatment to achieve more equitable outcomes instead of providing everyone with a process that focuses on fairness to the individual. Individuals are judged based on many metrics outside of their control.

As an example of the clash between equity principles and classical liberalism, consider the case of *Students for Fair Admissions v. University of North Carolina*. The Supreme Court considered whether the University of North Carolina's race-conscious admissions program violated the Equal Protection clause of the Fourteenth Amendment, because it accounts for race when determining if an individual should be admitted in an attempt to produce a

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[134] *See id.*

[135] *See* Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 130 n.36 (2008) (defining classical liberalism as "emphasizing individual rights, equal opportunity in the public sphere, toleration, neutrality toward private conceptions of the good, and, arguably, individual autonomy").

[136] L. Scott Smith, *Constitutional Meanings of 'Religion' Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89, 118 & n.215 (2004).

student body with more underrepresented minorities.[137] Prior to the case, proponents of classical liberalism argued that "the 14th Amendment protects individuals, not groups. It can be no other way. A person's unalienable rights cannot depend on the fortunes of other individuals or the whims of the political majority."[138] Each individual should be treated as an individual, without making assumptions about what the person needs or deserves based on group status.

Proponents of more equity-based thinking, which would favor some consideration of race in a university's admissions policies, argued that universities like the University of North Carolina, "with long histories of excluding and marginalizing Black students, [should] be permitted to consider race as one factor in a holistic review in order to ensure that their incoming classes are racially diverse and Black students can feel safe and welcome."[139] This reasoning, in the same way equity-based arguments complicate our understanding of formal equality, is predicated on the view that individuals were never treated as individuals, and universities must acknowledge and rectify their past group-based thinking that has had an effect on current students' performance. Implicitly, this reasoning also ties whether an individual student feels welcome to whether that student sees a sufficient number of students that also belong to their group. This reasoning also, to some degree, presumes that every Black student of today has been affected by the University's long history of race-based discrimination, as a group, instead of considering—as a classical liberal might—whether a particular student has been disadvantaged in a way that is reflected in their academic performance and thus deserves a particular solicitude in admissions decisions.

There is surely merit to both approaches, but they exist in philosophical contrast to one another. Although *Students for Fair Admissions v. University of North Carolina ultimately* held that both private universities that receive federal funding and public universities, which are subject to the Equal Protection Clause, may not use race as a factor in college admissions if the

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[137] *See* Students for Fair Admissions v. Univ. of N.C., 143 S. Ct. 2141, 2161–62 (2023); *see also* Students for Fair Admissions v. Univ. of N.C., No. 14CV954, 2019 WL 4773908, at *6–*8 (M.D. N.C. Sept. 30, 2019). The parties dispute the extent to which being a member of an underrepresented minority provides an advantage in gaining admissions to the University of North Carolina, but both parties admit that the University considers race in its holistic process.

[138] Wen Fa, *In Higher Education and Beyond, Race-Based Policies Stifle Individualism and Ultimately Harm Everyone*, SCOTUSBLOG (Oct. 27, 2022, 12:05 PM), https://www.scotusblog.com/2022/10/in-higher-education-and-beyond-race-based-policies-stifle-individualism-and-ultimately-harm-everyone/ [https://perma.cc/Y4GU-43XP].

[139] Danielle R. Holley, *The History of Anti-Black Discrimination in Higher Education and the Myth of a Color-Blind Constitution*, SCOTUSBLOG (Oct. 26, 2022, 6:05 PM), https://www.scotusblog.com/2022/10/the-history-of-anti-black-discrimination-in-higher-education-and-the-myth-of-a-color-blind-constitution/ [https://perma.cc/88EZ-PJLU].

affirmative action program involves racial stereotyping and has no end-point,[140] the indefiniteness of the scope of this holding—and whether it applies outside admissions decisions[141] means universities and other institutions must still grapple with how they advance racial equity goals, in admissions and in other areas, and still must grapple with equity goals along axes other than race. As a result, the Supreme Court's decision may define some parameters about how institutions may balance equity values against other interests, but it largely leaves the question unanswered.

The clash of individual rights versus notions of equity need not mean that institutions cannot advance both approaches. A balance must be struck. Institutions must recognize the primacy of the individual and the need to not make gross generalizations or provide overwhelming benefits to individuals based on group membership while ensuring that policies are truly neutral and that outcomes are not so disparate as to cast doubt on the fairness of the entire system. In addition, institutions that compel its members to believe in one philosophical notion of fairness and justice over another must also recognize that they have elevated the ideology and values of the institution over freedom of conscience or freedom of inquiry for the individual. This may be a particularly pernicious approach in academic institutions, like law schools, which is the subject of the final Part of this Article. The next section will discuss how law schools can balance paramount educational values, like academic freedom, with their diversity initiatives.

III. EQUITY AND LEGAL EDUCATION

Academia, in an effort to maintain its distinct institutional credibility, should primarily concern itself with free inquiry and the search for truth, not with promoting particular ideologies in the way advocacy organizations or political actors do. These truths that are the essential byproduct of education and careful study at academic institutions can be descriptive—like whether a particular bacteria causes a particular disease—or normative—like whether a particular political philosophy is the most just, reasonable, or intellectually coherent. Indeed, public universities beholden to the First Amendment have very little leeway to discriminate on the basis of viewpoint.[142] Although it

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[140] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 143 S. Ct. 2141, 2175 (2023) (holding that "[b]oth programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points").

[141] *Id.* at 2176 (holding that the University of North Carolina and Harvard's programs violated the law, but that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise").

[142] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995) ("For the University . . . to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

may be true that "universities need to be agnostic about whether the Earth is round or less than 10,000 years old,"[143] that is because universities should be able to discriminate on whether professors and students use rigorous academic *processes*, not on the ultimate *conclusions* (or viewpoints) they produce. Public and private universities, if they profess a commitment to academic freedom, must ensure that their focus on diversity initiatives do not undermine this paramount educational value. Academic freedom should belong to institutions that act in an academic way—favoring processes of reasoning over conclusions—not in an ideological way.[144]

Legal academia is somewhat distinct from academia in general because the law is unavoidably normative. Law professors and the law in general usually share certain philosophical commitments, including an appreciation of the value of rule of law, of the idea that "justice" should prevail, and of our democratic system. However, the more abstractly these commitments are defined, the more room law schools can leave for students and professors to have varying and controversial views on, for example, whether the Constitution should be scrapped entirely,[145] or what "justice" or "public interest," two often used but highly subjective and debatable terms, actually should mean. A commitment to "legal reasoning" is fairly values neutral, as it embodies a process of inductive and deductive thinking and analogical use of cases that can lead to a variety of results and can be tested based on its process-based properties (how sound is the reasoning), not on the ultimate result reached.

Many law schools do incorporate into their missions less abstract or academic commitments and more substantive commitments to certain ideals, like social justice, serving the less fortunate, or working for the public interest. But even these values can be stated abstractly without requiring students or professors to have a particular political view about what is most in the public interest. Further, even if law schools base their teaching and signaling on inculcating professional or philosophical values into students, professors must be free to think and write about the idea that legal methodologies are flawed, and that perhaps rule of law is an illusory or unsatisfying concept. That freedom is what distinguishes and elevates the status of academia.

Equity, as a substantive value, has influenced the culture of law schools, affecting everything from admissions decisions to statements produced on law schools' websites to how classrooms are run and how students are treated. As a result, law schools should openly acknowledge the ways their policies on equity affect the other academic values of their institutions. Often, this grappling happens privately because these conversations are sensitive and because

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[143] Soucek, *supra* note 126, at 2021.

[144] Erica Goldberg & Kelly Sarabyn, *Measuring a "Degree of Deference": Institutional Academic Freedom in a Post-*Grutter *World*, 51 SANTA CLARA L. REV. 217, 234–35 (2011).

[145] *See, e.g.*, Louis Michael Seidman, *Let's Give Up on the Constitution*, N.Y. TIMES (Dec. 30, 2012), https://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html [https://perma.cc/KZE6-WFS5].

professors fear alienating students or losing their jobs.[146] However, to achieve a sensible balance between important but competing values, these calculations must be performed openly and honestly. Instead of getting rid of diagnostic information, like the LSAT,[147] and trying to obscure these debates, law schools—to respect their place in academia and the role of an academic institution—should truly grapple with this information, and explain how they are balancing the idea that the test is decently predictive of reasoning and reading comprehension skills,[148] with the idea that members of certain groups may be disadvantaged by the test. While the LSAT is not without flaws, dismissing a test that assesses reading comprehension and logical reasoning, to avoid the conflict between promoting equity and upholding rigorous standards that measure aptitude, is unwise for society as a whole and even potentially for the groups who have been disadvantaged by widespread use of standardized testing. Other factors, like undergraduate GPA and recommendations, may be even more "infused with bias."

As another example, in part based on a commitment to procedural and substantive equity,[149] in order to not exclude students with disabilities from the practice of law, universities give accommodations for students with a range of psychological and intellectual disabilities, even going beyond what federal law requires.[150] For example, students at many institutions who claim and demonstrate—through whatever process the law school requires—that they have test anxiety, may be given more time to complete tests, at times fostering resentment among other students.[151] Because of this resentment,

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[146] *See* Ryan Quinn, *Faculty Fear Backlash for Free Speech*, INSIDE HIGHER ED. (Feb. 27, 2023), https://www.insidehighered.com/news/2023/02/28/advocacy-group-survey-faculty-fear-backlash-free-speech [https://perma.cc/3PL3-2NUP] (describing a recent survey that suggests that while faculty do not generally support punishing professors for speech, there is a "soft authoritarianism" that causes faculty to be afraid to speak out).

[147] *See* Alfred Grieg, *ABA Removes LSAT Requirement for Law Schools*, OBSERVER (Dec. 13, 2022), https://fordhamobserver.com/71413/recent/news/aba-removes-lsat-requirement-for-law-schools/ [https://perma.cc/GL3E-LU2P] (describing that many have argued that the LSAT is inequitable, or leads to inequitable results, and the American Bar Association recently voted to make the LSAT optional for law school admissions).

[148] *See Council Pauses Move to Make Pre-Admissions Test Optional*, AM. BAR ASS'N (May 22, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/05/council-pauses-pre-admissions-test-optional/ [https://perma.cc/L5AW-CMRU].

[149] *See supra* Part I.

[150] For example, the Americans with Disabilities Act may not require universities to accommodate students with test anxiety, but many institutions do so anyway. Buhendwa v. Univ. of Colo. at Boulder, 214 Fed. Appx. 823, 825 (10th Cir. 2007).

[151] *See* Ali A. Aalaei, *The Americans With Disabilities Act and Law School Accommodations: Test Modifications Despite Anonymity*, 40 SUFFOLK UNIV. L. REV. 419, 431, 435 (2007) Citing sources for this claim is difficult, because certain information is confidential and because people are afraid to have these conversations in ways that may run afoul of disability law. Some of these claims about law school culture stem from my own experience and from varied conversations with law professors who span the political/ideological spectrum.

students often prefer to keep their accommodations status private, unfortunately stigmatizing students seeking accommodations and preventing candid conversations from happening around the optimal level of accommodating versus incentivizing conforming to standards, especially for impediments that can be improved or ameliorated entirely through effort, attention, and treatment if law schools continue to expand their accommodations, and the number of students seeking accommodations increases, both at universities and in the workforce.[152] Yet many schools do not openly acknowledge the diminution in efficiency in advancing their primary missions (in running tests efficiently and uniformly and in training students to work within time constraints), or the moral and philosophical unfairness created that disadvantages students who cannot demonstrate that they fit into particular groups deserving of special accommodations and treatment. Perverse incentives may be created, where students may prefer to be classified as needing disability accommodations to give them certain advantages, that can potentially undermine academic standards and valid academic metrics.

These social forces are acknowledged by many, but often remain unspoken—at least in large groups or formal settings—because professors are afraid of alienating students or speaking out against current trends or because they fear administrative fiat.[153] And as a result, balancing competing goals sensibly becomes more difficult. Of course, law schools must comply with federal and state disability law and may also have their own philosophical commitments to making sure that test constraints do not prevent otherwise excellent lawyers from being denied access to the profession. However, these goals must be balanced against efficiency, rigor, and fairness goals *explicitly*, or the balance will—as it currently likely is—favor the side that can advance its views openly and without fear.

The best way to ensure that conversations can happen explicitly, even if professors must ultimately adhere to university policy on the university's own balance of equity and other goals, is to place fewer penalties on law professors for expressing views that are not elevated by the current zeitgeist around equity. Policies mandating that professors have certain views about equity versus, for example, classical liberalism, interfere with the constant search for moral and political truth about what is fair and how to run institutions. Mandatory statements on these contested issues should be disfavored, but any diversity statements required for hiring or promotion should focus on ensuring that professors are attuned to their diverse student body and treat students fairly, instead of compelling professors to have particular viewpoints or to

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[152] *See generally* Bradley A. Areheart & Michael Ashley Stein, *The Disability-Employability Divide: Bottlenecks to Equal Opportunity*, 113 MICH. L. REV. 877, 878, 893, 896 (2015).

[153] *See* Quinn *supra* note 146. It is difficult to support this proposition quantitatively, because of the chilling effect and the fear of discussing it, but professors afraid to speak out seem to be growing in number.

care about particular causes in their scholarship.[154] Faculty should be surveyed anonymously about their views on how to strike these balances, and universities should stress their commitment to free inquiry and academic freedom, teaching students how to think and not what to think.

Although law schools are not values-neutral (and indeed, no institution is values-neutral), there are ways for law schools to ensure that professors uphold certain values with respect to educating students that do not ultimately interfere with a professor's ability to argue against those policies in research or scholarship. In addition, law schools earn and deserve the title of "academic" institutions when they act academically, teaching and favoring process-based values, like reasoning, intellectual rigor, reading comprehension, and production of written and oral legal arguments (regardless of result), instead of on inculcating their students and professors with more substantive, results-oriented, non-process-based values regarding conclusions about what is fair, what is just, and how to run a society.

CONCLUSION

Equity is a way of ensuring that the dictates of formal equality do not create injustice or unfairness. The concept of equity has rightly been increasingly appreciated by our major institutions, including academia. However, due to the nebulous nature of the right, and the sensitivities involved in discussing this philosophical and political concept, meaningful, rigorous efforts to explicitly balance equity against other values have not been sufficiently undertaken. Equity may conflict with other important institutional goals, such as efficiency, other notions of fairness, free inquiry, and individual rights.

This Article endeavors to establish comprehensive understandings of equity, both substantive and procedural equity, and to openly acknowledge conflicting values and determine how to optimize balancing between equity and other, equally significant values. The current environment makes these conversations difficult, if not impossible, but academia is likely the best place to discuss this balancing in the most abstract, respectful, and charitable ways. These conversations are had most sensibly if academia would remove cultural and professional barriers to professors and students engaging on these topics.

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[154] *See* Soucek, *supra* note 126, at 2021–24 (discussing which types of mandatory diversity statements discriminate against professors or applicants on the basis of viewpoint).