

**FINDING THE LIMITS OF EQUITABLE LIBERALITY:
RECONSIDERING THE LIBERAL CONSTRUCTION OF
PRO SE APPELLATE BRIEFS**

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ABSTRACT

The most basic function of the American state and federal judicial systems is clear: provide appropriate relief on the merits of valid claims. Given the procedural labyrinth and complexities of common law practice, securing such relief on such merits can prove to be quite a challenge for even the most adroit lawyer. Thus, widespread efforts to reduce or even remove often arbitrary obstacles from the path of pro se litigants—a class of court-users ill-equipped to handle many of the greatest difficulties of navigating the judicial forum—represents a logical and apparently equitable effort to further the fundamental drive towards merits resolutions. Still, these judicial efforts to assist pro se litigants operate in constant tension with the idea that all litigants are entitled to equal access to the courts and administration of judicial power. This Article examines a very specific example demonstrating this tension and raising troubling constitutional concerns: the United States Courts of Appeals’ practice of liberally construing pro se briefing to avoid waiver or reach unbriefed arguments while dismissing or denying relief on the similarly situated claims of represented litigants. As implemented in a majority of the circuits, this practice—decoupled from any statutory mandate or rule of general applicability—affords pro se litigants enhanced appellate review without regard to their individual circumstances, sophistication, or reasons for proceeding pro se. Drawing from this examination, this Article explores a variety of options designed to encourage judicial efforts to protect pro se litigants on a more principled basis thereby affording equal protection to all court-users while advancing the goal of producing appropriate resolutions on the merits of valid claims.

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INTRODUCTION

The task of the pro se litigant is daunting. Be he a civil plaintiff seeking recovery in tort or contract, a criminal defendant facing trial, or a convicted prisoner pursuing habeas corpus relief or vindication of civil rights from behind prison walls, the unrepresented party faces an unfamiliar environment with unfamiliar rules articulated in an unfamiliar language. Sometimes proceeding pro se is a choice. Sometimes it is not. Regardless, the pro se litigant will be held in varying degrees to a standard designed primarily for attorneys—licensed and extensively trained legal professionals often devoted to the intricacies of juridical arcana. Frequently, the pitfalls of going it alone are obscure and, ultimately, dispositive of what might otherwise be a meritorious claim for relief. Thus, judicial sympathy to the plight of the unrepresented looks to be a quite natural response to the appearance of inequity in a system dedicated to fairness. But, what if the judicial response to the limitations of pro se litigants, while certainly justifiable in the abstract, is not fair? More precisely, what if the decision to adopt an inquisitorial rather than adversarial¹ approach in cases involving a pro se litigant runs afoul of the constitutional rights of those litigants who opt to retain counsel? After all, the Constitution strives to preserve and, arguably, promote involvement of and reliance upon counsel. Faced with this constitutional question, one area in particular stands out for its application of unprincipled leniency towards pro se litigants and strict enforcement against those represented by even the least competent of counselors—waiver in the federal courts of appeals.

The idea that a litigant may waive a legal remedy by affirmative act or procedural omission derives chiefly from the maxim, “[q]uilibet potest renunciare juri pro se introducto.”² That centuries-old rule translates simply as, “every man can renounce a benefit which the law would have introduced for his own convenience.”³ More and more frequently, the federal courts of appeals have begun to rely upon a laundry list of error preservation mistakes to deem difficult issues waived and, often rightly, avoid reaching the merits. Yet simultaneously, those same courts have developed and entrenched a broad system of “liberal construction” excepting pro se litigants from many of the rigors of error preservation—affording them a special access to the courts and,

1. See Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 448 (2009) (suggesting that a more inquisitorial, active judicial role in the process of resolving certain types of cases would help unrepresented litigants more fully vindicate their rights in court).

2. *Dickinson v. United States*, 159 F. 801, 816 (1st Cir. 1908).

3. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 200 (1845).

arguably, a better standard of review than that enjoyed by their represented counterparts. Hence, while often disadvantaged by their lack of legal knowledge, pro se litigants have widely come to enjoy a unique preferred status conferred upon them by judicial fiat and without regard to their individual circumstances.

This Article addresses the possible constitutional violations created by the judicial willingness to suspend waiver rules on appeal for pro se litigants. It also explores the generic application of differing standards of review to such parties without regard to the sophistication of a given pro se individual or, for that matter, attorney. Part I will examine the demographics of pro se litigants across the state and federal courts, as well as the broader relationship between the courts and unrepresented parties, in an effort to ascertain to the extent possible who uses the courts without the assistance of counsel and what results they typically achieve. Part II will examine the history and use of the most troubling pro se preferential rule as applied across the federal courts of appeals: “liberal construction” of pro se briefs on appeal. Part III will examine one possible constitutional violation perpetrated by the differential treatment of pro se and represented litigants on appeal: whether dismissing a represented party’s claim as waived but excusing a similarly situated pro se litigant constitutes a denial of equal protection. Finally, Part IV will explore a range of possible solutions to develop a more principled approach to enforcing appellate waiver rules.

I. GOING IT ALONE: THE DATA ON PRO SE LITIGANTS AND THEIR SUCCESS IN COURT

Who are pro se litigants? Are they, as some suggest, crackpots airing outrageous conspiracy theories through the courts?⁴ Are they, as the media fervently reported in the mid-1990s, disgruntled prisoners suing over their peanut butter?⁵ Or, might they be lawyers, educated professionals, and other well-equipped members of society favorably suited to navigate the treacherous waters of legal procedure?⁶ The answer appears to be “all of the above.”

4. *E.g.*, Sean Munger, Comment, *Bill Clinton Bugged My Brain!: Delusional Claims in Federal Courts*, 72 TUL. L. REV. 1809 (1998) (discussing methods of handling delusional plaintiffs seeking vindication for real and imaginary harms through the federal courts).

5. *E.g.*, Katharine Q. Seelye, *Two Anti-Crime Bills Cleared by House by Large Margins*, N.Y. TIMES, Feb. 11, 1995, at A1 (discussing the “frivolous” prisoner suits motivating the passage of the Prison Litigation Reform Act); *see also* Statement of Senator Dole, 154 Cong. Rec. S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Robert Dole) (“These [prisoner] suits can involve such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.”).

6. *See, e.g.*, Huertas v. City of Camden, 245 F. App’x 168, 172 (3d Cir. 2007) (liberally construing

Though thin and subject to certain critical shortcomings as noted *infra*, the empirical data on pro se litigants and the outcomes of their cases reveals a broad spectrum of backgrounds and degrees of success in a variety of judicial forums. This Part sets out some of that data in an effort to create at least a marginally complete portrait of the American pro se litigant. It explores data gathered by scholars and court administrators studying a handful of state courts as well as the continuing efforts of the Administrative Office of the U.S. Courts to track pro se involvement in the federal courts. Additionally, this Part will address the serious lack of empirical data on important features of the pro se population in both the state and federal court systems—deficiencies highlighting the potential problems with an ad hoc pro se jurisprudence. Finally, the Part concludes with a brief discussion of the pro se experience in the face of an often-hostile bench and bar.

A. The Data

The data on pro se litigation in America's state and federal courts is sparse at best and often incomplete. The federal courts do the best job of systematically tracking pro se status in an aggregate form.⁷ Only a handful of state court systems have undertaken efforts, and then often sporadically, to tackle the admittedly Herculean task of identifying and following pro se cases for the purpose of gathering empirical data and improving the pro se experience.⁸ Among them, Utah,⁹ Iowa,¹⁰ New Hampshire,¹¹ California,¹²

the brief of lawyer representing himself in an appeal).

7. See ADMIN. OFFICE OF THE U.S. COURTS, OFFICE OF JUDGES PROGRAMS—STATISTICS DIVISION, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2009) [hereinafter JUDICIAL BUSINESS], available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2009.aspx>.

8. While only a handful of state courts have developed empirical data in this area, a great many more have dedicated significant resources to studying the pro se experience and the facilitation of legal assistance to pro se parties. A sampling of these sources has been compiled by the American Bar Association Standing Committee on the Delivery of Legal Services. See *Pro Se/Unbundling Resource Center*, AM. BAR ASS'N STANDING COMM. ON THE DELIVERY OF LEGAL SERVS. <http://apps.americanbar.org/legalservices/delivery/delunbundart.html> (last visited Mar. 19, 2011).

9. UTAH JUDICIAL COUNCIL, COMM. ON RES. FOR SELF-REPRESENTED PARTIES, STRATEGIC PLANNING INITIATIVE REPORT TO THE JUDICIAL COUNCIL (2006) [hereinafter UTAH REPORT], available at http://www.utcourts.gov/resources/reports/docs/ProSe_Strategic_Plan-2006.pdf.

10. REPORT OF THE JOINT IOWA JUDGES ASS'N AND IOWA STATE BAR ASS'N TASK FORCE ON PRO SE LITIGATION (2005), available at <http://www.ajs.org/prose/pdfs/ISBA%20Task%20Force%20Pro%20Se%20Report.pdf>.

11. N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, CHALLENGE TO JUSTICE: A REPORT ON SELF-REPRESENTED LITIGANTS IN NEW HAMPSHIRE COURTS (2004) [hereinafter N.H. REPORT], available at <http://www.ajs.org/prose/pdfs/NH%20report.pdf>.

12. JUDICIAL COUNCIL OF CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS (2004) [hereinafter CAL. REPORT], available at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf.

Montana,¹³ and New Mexico¹⁴ stand out for the greater depth of their studies. Though limited, this sampling of data from across the various judicial systems in the state and federal governments begins to develop a general picture of the sort of cases and litigants that proceed pro se.

1. The State Court Data

According to the National Center for State Courts, state courts around the nation have seen a surge in the number of self-represented parties.¹⁵ This spike in unassisted filings can be attributed to a range of factors including increases in the cost of legal services, decreased availability of legal aid programs, and a “greater public desire for understanding of and active involvement in their personal legal affairs.”¹⁶ As noted above, a handful of state courts have undertaken the challenge of tracking this increase in pro se participation. The resulting empirical data provides some insight into where pro se cases begin and how they progress. The bulk of the research commissioned in the states has focused on the trial courts, as evidenced by the reports from Utah and California, as well as less empirically driven studies from other states. A few states, such as New Mexico and Montana, have also tracked proceedings and results on appeal. Both data sets are addressed in turn.

The state courts of first instance are the logical and expected setting of most pro se litigation. In fact, narrower still, a great majority of pro se litigation takes place in state courts of limited jurisdiction such as landlord-tenant courts, small claims, and traffic courts.¹⁷ Consequently, the state trial courts represent a logical starting point for assessing who makes up the population of pro se litigants. While none of the sampled reports are comprehensive, they each provide a snapshot into the scope and depth of pro se involvement in courts of

13. CLERK OF THE MONT. SUPREME COURT, 2009 PRO SE CASELOAD REPORT (2009) [hereinafter MONT. REPORT], available at <http://courts.mt.gov/clerk/stats/default.mcp>.

14. N.M. COURT OF APPEALS, PRO SE PERCENTAGES 2009–2010 (2010) [hereinafter N.M. REPORT], available at <http://coa.nmcourts.gov/statistics/index.php>.

15. NAT’L CTR. FOR STATE COURTS, ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS 2 (2002), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=23>.

16. *Id.*

17. *Id.*; see also NAT’L CTR. FOR STATE COURTS, *Self-Representation Overview*, <http://www.ncsc.org/topics/access-and-fairness/self-representation/overview.aspx> (last visited Feb. 12, 2011). The concentration of a large number of pro se litigants in these categories of courts of first instance has led some court observers to claim that these courts have become a separate, somewhat insular collection of “poor people’s” [sic] courts.” Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 *FORDHAM L. REV.* 1573, 1582 (2002) (quoting Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1804 (2001)).

first instance. The most thorough available state court information comes from California and Utah, though in very different forms.

Although largely focused on family law, California has undertaken several efforts to evaluate its population of pro se litigants with varying degrees of depth and breadth. Most notably, California conducted a limited analysis of civil pro se filings as part of a 2006 assessment of programs designed to assist self-represented litigants. In that study, the data revealed that upwards of 4.3 million litigants appeared pro se in a California court during the previous year.¹⁸ The data further indicated that most pro se plaintiffs seek relief in the expected areas: unlawful detainer (largely landlords),¹⁹ family law, and probate. Approximately 16% of general civil suits falling outside these three categories involved a pro se plaintiff at the time of filing.²⁰ Thus, the California statistics—representative of one of the largest and most active state court systems in the country—demonstrate that pro se litigants are appearing before courts in larger and larger numbers. They bring suits of varying degrees of complexity and in varying areas of law. Most importantly, while some areas involved greater numbers of unrepresented parties, the general picture of civil practice in California reveals a diverse “pro se practice” not easily reduced to a single stereotypical case or litigant.

Unlike California, Utah has not published aggregate figures of pro se participation. Rather, the Utah courts stand out as the only system to develop a demographic picture of pro se litigants. According to a 2006 report of the Utah Committee on Resources for Self-Represented Parties, 52% of pro se litigants appearing at trial were between the ages of 25 and 44.²¹ Approximately 65% of pro se litigants reported having one or no children at home.²² Financially, Utah’s pro se litigants skewed noticeably, but not overwhelmingly, towards lower income brackets when measured against socioeconomic averages nationally.²³ The Committee found that pro se litigants fell into three noteworthy brackets: 47% of litigants earned less than \$24,000 per year, 60% earned less than \$36,000 per year, and a surprising 15% earned more than

18. CAL. REPORT, *supra* note 12, at 2.

19. *Id.* at 11. Interestingly, the court personnel report that an even larger percentage—upwards of 90%—of unlawful detainer defendants proceed without the assistance of counsel. *Id.* at 2.

20. *Id.* at 2.

21. UTAH REPORT, *supra* note 9, at 2.

22. *Id.* at 3.

23. Based on contemporary Census Bureau calculations, the distribution of income brackets at the time of the Utah study was as follows: 28% of households earned less than \$25,000 per year, 55% of households earned less than \$50,000 per year, and, to mirror the Utah brackets studied, roughly 15% of households earned more than \$100,000 per year. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2007 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT (2007), available at http://pubdb3.census.gov/macro/032007/hhinc/new06_000.htm.

\$96,000 per year.²⁴ A quarter of pro se litigants in Utah identified themselves as minorities.²⁵ Nearly all pro se litigants identified English as their primary language.²⁶ Finally, only 75% of pro se litigants described themselves as “very infrequent” court users.²⁷ Importantly, these figures illustrate an often-overlooked facet of pro se litigation in American courts—lack of demographic uniformity. No single group makes up an overwhelming majority of the pro se population in Utah and, as a consequence, uniform treatment on the basis of pro se status likely would be inappropriate. These figures suggest pro se litigants operate with varying degrees of sophistication—a fact belied by the generic stereotypes of pro se litigants at the most basic levels of judicial access.

As noted above, other states have also explored the scope of pro se involvement, even if only superficially. In a 2004 study, a New Hampshire Supreme Court Task Force discovered that upwards of 85% of all civil cases in state district courts and 48% of all civil cases in state superior courts²⁸ involved at least one pro se litigant.²⁹ An Arizona study covering the period between 1980 and 1990 found that unrepresented appearances in the narrow category of divorce cases increased from 24% to 88% in a ten-year period.³⁰ A survey of Idaho court users in 1999 indicated that as many as 31% of pro se litigants in that state had consulted counsel before opting to “go it alone.”³¹ All of these trial court studies reinforce two points made clear by the California and Utah data: pro se participation is increasing and it has involved a wider, less uniform group of individuals than previously thought.

Two appellate courts have also addressed the area of pro se empirical research. First, the New Mexico Court of Appeals provides complete data on pro se involvement and results on an annual basis. In its most recent annual summary, the court reported that 18.97% of parties appeared pro se.³² The most notable statistic derived from New Mexico data may be the fact that only 4.5% of pro se cases were resolved by formal opinion of the court while the

24. UTAH REPORT, *supra* note 9, at 3.

25. *Id.*

26. *Id.*

27. *Id.*

28. Under the New Hampshire system, district courts are “community” courts operating with limited jurisdiction to handle misdemeanor criminal matters, small claims, and other low-level legal proceedings. The superior courts represent the primary court of first instance for all other cases. See *Frequently Asked Questions: Courts*, N.H. JUDICIAL BRANCH, <http://www.courts.state.nh.us/sitewidelinks/faqindex.htm#COURTS> (last visited Feb. 19, 2011).

29. N.H. REPORT, *supra* note 11, at 2.

30. Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 441 (2009).

31. Frances H. Thompson, *Access to Justice in Idaho*, 29 FORDHAM URB. L.J. 1313, 1316 (2002).

32. N.M. REPORT, *supra* note 14, at 1.

remaining 95.5% were disposed of in memorandum opinions.³³ Compare that to the roughly 16% of represented cases afforded formal opinions by the court.³⁴ Additionally, the court affirmed 86% of pro se appeals while affirming only 75% of appeals by represented parties.³⁵ Thus, the type of process and results for pro se litigants appear to differ from those of represented parties based on the available data. The Montana Supreme Court³⁶ has also produced annual data on its pro se caseload. In 2009, the court reported that pro se filings made up 26.44% of cases before the court.³⁷ Approximately 79% of appeals were in civil cases.³⁸ Inmates made up 51.4% of pro se filers, but 81% of civil appeals were filed by non-inmates.³⁹ In short, the prisoner stereotype so often affixed to all pro se litigation simply lacks statistical support in the state court system. In the aggregate, these appellate statistics, due in no small part to the more modest docket of appellate courts, provide far broader coverage than trial courts could hope to achieve. Yet these studies reveal similar results and reinforce the notion that the archetypal conception of the pro se litigant is of little value and a faulty foundation for jurisprudential doctrine.

In sum, the state court data is woefully incomplete, rarely longitudinal, often anecdotal, and sporadic at best. That said, the available data demonstrates a robust and growing pro se litigant population with diverse backgrounds and differing capacities for navigating their way through the state court systems.

2. The Federal Courts

Unlike most of the state systems, the federal courts maintain a comprehensive system for tracking the number and nature of pro se suits. Through the Administrative Office of the U.S. Courts, the federal judiciary tracks a wide range of pro se statistics and groups them into three major categories: (1) civil pro se filings in the district courts; (2) sources of civil pro se appeals; and (3) general caseload statistics on pro se versus non-pro se filings. Each category bears at least brief review.

First, the federal district courts provide the largest data set of any of the courts tracking pro se participation. In the twelve-month period ending September 30, 2009, 71,543 pro se civil suits were filed in the federal district

33. *Id.*

34. *Id.*

35. *Id.*

36. Notably, the Montana Supreme Court is the primary appellate court in Montana and most appeals come to the court as appeals by right. MONT. CODE ANN. § 25-21-4 (2010). Thus, the court's data on pro se involvement represents a generally complete view of pro se appellate activity in that state.

37. MONT. REPORT, *supra* note 13, at 1.

38. *Id.*

39. *Id.*

courts.⁴⁰ That figure made up approximately 26% of the federal trial court docket. Among pro se litigants, prisoners filed approximately 48,722 of those suits.⁴¹ That translates to 68% of pro se filings and 18% of all civil suits initiated in the district courts. Thus, non-prisoner litigants make up a significant portion of the pro se civil litigant population in the federal district courts—debunking the myth that all (or nearly all) of pro se litigants are disgruntled prisoners at the federal level as well.

Second, following these district court statistics, the appellate data reinforces the idea that pro se litigants make up a meaningful portion of the court-user population. Combined, the United States Courts of Appeals commenced 57,740 cases in the twelve-month period ending September 30, 2009.⁴² Of these, 27,905 cases—a surprising 48%—were pro se at the time of filing.⁴³ That 48% breaks out into the eight major categories used by the Administrative Office as follows:

<i>Table 1: Federal Appellate Pro Se Filing Statistics⁴⁴</i>	
Category	Pro Se Filings (Percentage of Total Caseload / Percentage of Pro Se Caseload)
Criminal	4% / 8.5%
Prisoner Petitions vs. United States	8.5% / 18%
Other Civil vs. United States	2% / 4.5%
Private Prisoner Petitions	17% / 34.5%
Other Private Civil	6% / 13%
Bankruptcy ⁴⁵	0.5% / 1%
Administrative Appeals	4% / 8.5%
Original Proceedings	6% / 12%

40. JUDICIAL BUSINESS, *supra* note 7, at 75.

41. *Id.*

42. *Id.* at 127.

43. *Id.*

44. *Id.*

45. Of note, the Administrative Office also reports a 29.2% increase in pro se bankruptcy filings between 2008 and 2009. *Id.* at 43.

This data both confirms and refutes much of the speculation about the identity of federal pro se litigants. As many individuals assume, a large portion of federal pro se litigants are prisoners. In fact, as Table 1 demonstrates, just over half of all federal pro se litigants bring suit from prison. That said, 47.5% of federal pro se litigants are not prisoners. Consequently, 13,207 cases fell outside the “pro se as prisoner” paradigm in a single year of court business.

Unfortunately, the Administrative Office does not provide data like that gathered by the Utah study regarding federal pro se litigants in any forum. Nonetheless, the data that is available again reinforces the emerging picture of the unrepresented American litigant—complete inconsistency. Pro se litigants in the federal courts, like their counterparts in state courts, bring large numbers of suits in a wide variety of areas of law. Most importantly, they do not fall neatly into a given category. In short, the empirical data on pro se litigants comes down to a single conclusion: pro se litigants lack uniformity.

B. Why the Lack of Demographic and Qualitative Results Data Matters

Though various courts gather a variety of data on pro se filings, none appear to consistently track the demographics of pro se litigants and the results of pro se efforts to secure judicial relief.⁴⁶ Are they educated? Do they have the resources to acquire counsel? How often do they win their cases? When they lose, why do they lose? These questions are critically important to developing an effective and principled pro se jurisprudence. Yet the sporadically gathered, incomplete data detailed *supra* leaves the court without a rational, empirical foundation upon which to proceed. In fact, the lack of data on these points and other empirical measures is often mentioned as a major action item in those jurisdictions seeking new ways to address the recent increase in pro se participation.⁴⁷ Additionally, scholars evaluating the efficacy of pro se litigants often call for increased empirical research into the correlation between results and pro se assistance

46. See Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 989–90 (2007) (citing BETH LYNCH MURPHY, RESULTS OF A NATIONAL SURVEY OF PRO SE ASSISTANCE PROGRAMS: A PRELIMINARY REPORT n.2 (2000), available at http://www.ajs.org/prose/pro_murphy.asp).

47. See, e.g., WIS. PRO SE WORKING GROUP, PRO SE LITIGATION: MEETING THE CHALLENGE OF SELF-REPRESENTED LITIGANTS IN WISCONSIN 40 (2000) (“The Working Group recommends . . . district court administrators, clerks of court, judges, and others [should be provided reports] indicat[ing] the percentage of self-represented litigants in specific types of cases. . .”).

programs.⁴⁸ So why does this lack of data have a meaningful impact on the institution of pro se-specific rules such as the appellate courts' stance on pro se waiver? A look at each of the questions articulated above provides an answer.

Are pro se litigants educated and do they have the resources to acquire counsel? Nobody knows. The intuitive conclusion that pro se litigants tend to come from lower income brackets is likely true as evidenced by the limited available data from the Utah study and other similar efforts. By extension, the correlation between household income and education levels likely applies as well. But how significantly do these factors skew the pro se demographics? Again, nobody knows. The Utah study found that 15% of pro se litigants came from households earning more than roughly \$100,000 per year—a rate consistent with the average percentage of households falling into that category nationally. Thus, a significant portion of the pro se population, in Utah at least, does not come from lower income households. Other studies shore up Utah's data. While expense is often an issue, only 57% of pro se litigants in another study asserted that they could not afford a lawyer.⁴⁹ A 1993 study by the American Bar Association found that 20% of pro se family law litigants stated they could afford counsel but opted to represent themselves.⁵⁰ Similarly, as others have noted, education levels of pro se litigants span the spectrum.⁵¹ The ABA's 1993 study found that most pro se litigants in the courts it examined tended to have at least some college education.⁵² Numerous other studies support or dispute that conclusion.⁵³ The number of attorneys proceeding pro se in their own matters—likely a sizeable group—has never been assessed. These widely spaced data points on the pro se scatter-plot simply do not allow for any sort of coherent, informed conclusion. In short, pro se litigants, while often conceived of in terms of averages or modes, cannot be uniformly or, for that matter, even generally classified as wealthy or poor, educated or illiterate, capable or incapable using the available data.

Similarly, the lack of available data canvassing pro se results undermines confidence in any judicially created rule of general applicability

48. See Cantrell, *supra* note 17, at 1582–84.

49. AYN H. CRAWLEY, MD, LEGAL ASSISTANCE NETWORK, HELPING PRO SE LITIGANTS TO HELP THEMSELVES 2 (2002), available at <http://www.courts.ca.gov/xbc/partners/HelpThemselves.pdf>.

50. JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION 9 (1998) (citing SALES, BECK, & HAAN, SELF-REPRESENTATION IN DIVORCE CASES (1993)).

51. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1576 (2005).

52. SALES, *supra* note 50, at 9.

53. Swank, *supra* note 51, at 1576 (cataloguing the differing and inconsistent results offered by an array of studies exploring pro se demographics including education).

favoring or disfavoring pro se litigants. Results research is spottier than any of the aforementioned categories of information. What is available covers only those areas susceptible to the standard pro se stereotypes: habeas petitions,⁵⁴ grants of certiorari,⁵⁵ and prisoner suits.⁵⁶ Thus, one cannot ascertain the overall “winning percentage” of pro se litigants either as plaintiffs or defendants in the larger part of pro se filings. Moreover, without this basic data, absolutely no empirical evidence covers how pro se litigants typically lose—be it on the merits, through some procedural failing such as untimeliness, or, as is relevant here, through the operation of a waiver rule. Consequently, the development of preferential procedural rules to assist pro se parties that may or may not be losing their cases and (assuming they lose more often than not) may or may not be losing on procedural grounds seems problematic at best.

C. *The Pro Se Experience*

Understanding to the extent possible, then, who goes it alone in the courts and what they can expect in terms of results, the nature of a pro se litigant’s interface with the judicial system bears at least a brief discussion. The bench and bar appear to persist in an incomplete and arguably inaccurate view of pro se litigants premised upon assumptions not born out by the empirical evidence. As one leading scholar in the field of pro se litigation research explains, unrepresented parties “typically receive a hostile reception from overworked court staff,” face judges and lawyers who “resist suggestions to reform their traditional adversarial roles or . . . complex rules,” and a system that defies the expectations of a litigant oftentimes having only experienced trial courts through daytime television programs.⁵⁷ Moreover, attorneys are often encouraged to aggressively invoke waiver rules as a matter of course in an effort to cabin their pro se counterparts and limit judicial review by way of a dizzying array of judicially created restrictions.⁵⁸ Thus, the enticing equity of affording special treatment to pro se litigants—however rarely the courts decide to do

54. Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 80 (1990).

55. Kevin H. Smith, *Justice for All?: The Supreme Court’s Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381, 382 (1999).

56. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 509–10 (2002) (examining the limited studies of pro se prisoner success).

57. Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 37–38 (2002).

58. Scott L. Garland, *Avoiding Goliath’s Fate: Defeating a Pro Se Litigant*, LITIG., Winter 1998, at 45, 47.

so—is apparent and understandable. Such an inclination to dispense with the rules is perhaps justifiable in areas that, while significant, are not outcome dispositive.⁵⁹

These harsh realities of proceeding without counsel add an important facet to broader understanding of who proceeds pro se and how they fare in the system. Hostility from the courts and their regular cast of characters likely affects more than just the satisfaction of unrepresented court users. Still, even if this experience was universal, the question remains as to whether such obstacles can or should confer new and unique substantive rights unavailable to those who can and do secure their own counsel.

II. THE LIBERAL CONSTRUCTION OF PRO SE BRIEFS ON APPEAL

A complicated array of pro se rules, exceptions to rules, and carefully articulated refusals to make exceptions pepper the federal case law. The most frequently cited and discussed of these is the liberal construction of pro se pleadings mandated by the “just construction” provision of Federal Rule of Civil Procedure 8(e). The local rules of some federal courts excuse pro se litigants from certain technical requirements.⁶⁰ The local rules of others limit certain pro se privileges.⁶¹ Even the very means of accessing appellate review—the all-important notice of appeal—is regulated by a special regime of pro se exceptions.⁶² Yet one special judicial invention reserved for pro se litigants stands out as unique: the liberal construction of pro se briefs on appeal. Unsupported by an express procedural mandate like the rules for trial court pleadings, never promulgated through a judicial rule-making process like the local rules, and never expanded to reach represented parties like the jurisdiction-conferring notice requirements, the appellate liberal construction rule lacks the pedigree and flexibility of its peers.

59. As discussed in a recent article by Jona Goldschmidt, one area particularly ripe for such preferential treatment is the often arbitrary and embarrassing realm of courtroom decorum. Jona Goldschmidt, “*Order In The Court!*”: *Constitutional Issues in the Law of Courtroom Decorum*, 31 *HAMLIN L. REV.* 1, 25 (2008) (exploring the intricacies and problems of courtroom decorum and linking some violations to pro se status).

60. 1ST CIR. R. 30.0 (excusing pro se litigants from electronic filing requirements); 3D CIR. R. 25.1(c) (same); 6TH CIR. R. 30(m) (requiring the state to assemble the record on appeal on behalf of certain types of pro se litigants); 11TH CIR. R. 31-6(a)-(b) (requiring or permitting the filing of replacement briefs upon retention of counsel in certain pro se matters).

61. 4TH CIR. R. 34(b) (limiting review to issues raised in initial pro se briefing even where supplemental briefing is later filed by counsel); 2D CIR. R. 34 (limiting oral time allotted for oral argument to shorter period than in cases where both parties are represented by counsel).

62. *Smith v. Barry*, 502 U.S. 244, 248 (1992) (requiring liberal construction of notices of appeal, particularly in pro se cases).

This Part examines two aspects of the federal courts' liberal construction rule. First, it defines and describes the operation of the liberal construction rule as developed in all twelve⁶³ geographic circuits. In this context, it addresses the most important question attendant to any judicial rule: Does it make a practical difference in the outcome of actual cases? Second, it explores the history of the rule, how it relates to the more widely applied liberal construction of pro se pleadings, and its deviation from those roots. Taken together, these two components converge to reveal a judicially mandated rule without statutory or jurisprudential support, inconsistently applied to sometimes subtly and other times dramatically change the analysis of federal courts of appeal.

A. Defining the Pro Se Liberal Construction Rule

Though applied in virtually all twelve geographic circuits, the pro se liberal construction rule is not susceptible to a single definition. Rather, it has developed along twelve sometimes parallel, sometimes divergent paths depending on the particular caseloads peculiar to each region. These unique variations on a common theme serve to illustrate many of the shortcomings of what purports to be a rule of general applicability. That said, all versions of the liberal construction rule bear certain hallmarks demonstrating the common origins of this equitable judicial doctrine. Together, the various circuit approaches can be grouped into four major categories: (1) Limited or No Application Jurisdictions; (2) Strong-Application Jurisdictions; (3) Factored-Approach Jurisdictions; and (4) Ad Hoc/Inconsistent Jurisdictions. Many of the circuits straddle these categories, but all can be predominantly categorized into at least one approach. The following sub-parts illustrate how each approach works in contrast to the alternative practices found around the country.

1. Limited or No Application Jurisdictions

Not all federal jurisdictions embrace the liberal construction of pro se briefs on appeal. In at least a third of federal appellate courts, pro se litigants are held to the same, or at least very similar, briefing standards as their represented counterparts. Specifically, the First, Fourth, Eighth, and D.C. Circuits all maintain the weakest forms of pro se liberal construction found in the federal courts. These four circuits and their various degrees of

63. The Federal Circuit is omitted from this analysis as it rarely entertains pro se litigants and lacks any sort of developed pro se construction jurisprudence due to the unique circumstances of its jurisdiction.

non-participation bear a brief but close examination. The discussion of pro se status in these jurisdictions helps to demonstrate not only a particular approach to handling pro se briefings but, more importantly, illustrates some of the pitfalls of completely ignoring the equities that give rise to liberal construction rules in the first instance.

The D.C. Circuit represents the least active player in the realm of pro se liberal construction. The circuit's case law reveals virtually no instances in which the court has liberally construed pro se arguments to overcome standard waiver rules or otherwise assist an unrepresented litigant. Like all of the other circuits surveyed, the D.C. Circuit has a robust "liberal construction" jurisprudence as it relates to complaints dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).⁶⁴ It has also adopted some unique pro se rules found nowhere else in the federal courts.⁶⁵ Ultimately, however, the D.C. Circuit has never adopted an express policy of liberally construing pro se briefs on appeal other than to occasionally note that a pro se litigant loses even assuming better arguments had been raised.⁶⁶ Whether due to the D.C. Circuit's unusual docket or some other factor, the issue of pro se liberal construction on appeal simply does not appear to have been a major issue at any point in that court's case law. As a result, the circuit maintains the least favorable appellate rules for pro se litigants and has the least developed case materials on this topic.

The Fourth Circuit's attempts to address the problem of inadequate pro se briefing very much mirrors those of the D.C. Circuit with a few notable exceptions. The nature of the Fourth Circuit's approach to pro se litigants is perhaps best crystallized in *Flint v. Haynes*.⁶⁷ In *Flint*, the court explained:

We are not unmindful of our duty to provide equal access to the courts for all persons. We have established procedures to assist the uncounselled, the legally unsophisticated, and the impoverished litigant who seeks relief in our courts. Yet we must

64. See *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005) (discussing the practice of liberally construing both pro se and represented complaints at the FRCP 12(b)(6) stage of litigation but affording pro se litigants certain extra assistance including inferring unnamed defendants); but see *Warren v. District of Columbia*, 353 F.3d 36, 37 (D.C. Cir. 2004) (explaining that liberal construction applies to all complaints and questioning any special liberalities afforded pro se litigants).

65. E.g., *Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997) (finding that equitable statute of limitations tolling doctrines may be more readily applied to pro se litigants); see also *Shankar v. ACS-GSI*, 258 F. App'x 344, 345 (D.C. Cir. 2007) (refusing to grant any pro se benefits to litigant who previously had the assistance of counsel).

66. See *United States v. Kearney*, 682 F.2d 214, 223 (D.C. Cir. 1982) (liberally construing a pro se argument to explain that, even if it had been properly raised, the litigant still would not prevail (citing *Giglio v. United States*, 405 U.S. 150 (1972))).

67. *Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981).

also take steps to make certain that meaningful access to the courts remains available and equal.⁶⁸

The court gave examples including the appointment of counsel and the liberal construction of complaints as the sorts of judicial assistance that avoid the creation of an unequal standard for represented parties.⁶⁹ This understanding is reflected in three decades of admittedly sparse case law that followed. When holding pro se arguments waived in that period, the court repeatedly cited the same general waiver propositions used to disqualify arguments in ordinary cases.⁷⁰ The court regularly indulges in the practice of considering waived pro se positions for the sake of argument, but it has never ruled for a pro se litigant under those circumstances.⁷¹ This sentiment is only reinforced by the Fourth Circuit's apparent efforts to reinforce its ability to hold arguments waived through its local rules. For example, Local Rule 34(b) requires pro se litigants to file informal briefs to serve as a sort of screening tool of the court.⁷² Local Rule 46(f) gives significant secondary effects to that requirement by limiting appellate review to the contents of the required informal brief—even when the litigant later retains counsel and files a formal replacement brief.⁷³ Thus, both in case law and the local rules, the Fourth Circuit has largely rejected any effort to afford liberal construction to pro se briefs on appeal and, moreover, appears to be the only jurisdiction to actually codify local rules that increase the potential for pro se waiver.

Finally, the First and Eighth Circuits, though occasionally inconsistent in their respective positions, round out the group of courts rejecting liberal construction. In perhaps the clearest repudiation of liberal judicial treatment of pro se appeals, the First Circuit in *Eagle Eye Fishing Corp. v. United States Department of Commerce* rejected a pro se appellant's attempts to rely on his lack of representation to avoid the application of the administrative waiver rule.⁷⁴ The First Circuit explained that “[t]he Constitution does not require judges . . . to take up the slack when a party elects to represent himself.”⁷⁵ Similarly, in *Andrews v. Bechtel Power*

68. *Id.* at 974 (citations omitted).

69. *Id.*

70. *United States v. Coster*, 26 F. App'x 366, 367 (4th Cir. 2002); *see also United States v. Davis*, 23 F. App'x 149, 150 (4th Cir. 2001).

71. *See, e.g., United States v. Brightman*, 246 F. App'x 822, 825 (4th Cir. 2007); *Kennedy v. Richard-Flagship Servs., Inc.*, 3 F. App'x 15, 17 n.* (4th Cir. 2001).

72. 4TH CIR. R. 34(b).

73. 4TH CIR. R. 46(f).

74. *Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce*, 20 F.3d 503, 506 (1st Cir. 1994).

75. *Id.* (holding that courts need not “take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course” (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 183–

Corp., the court rejected the pro se litigant's improperly preserved error on the grounds that "[t]he right of self-representation is not a license not to comply with relevant rules of procedural and substantive law."⁷⁶ The same understanding underpinned the Eighth Circuit's rejection of similar procedural failings in a prisoner civil rights action.⁷⁷ Though these circuits have occasionally vacillated in their resolve,⁷⁸ the greater weight of authority in both jurisdictions shows a tendency to enforce waiver provisions against pro se litigants in the same way they are enforced against represented parties.⁷⁹

Taken together, these four jurisdictions outline one end of the pro se appellate spectrum—often unsympathetic, unwilling to craft an alternative rule structure, and ready to permit pro se errors to carry dispositive weight.

2. Strong-Application Jurisdictions

At the opposite end of the spectrum, four circuits have strongly and clearly embraced the idea that pro se litigants should be afforded the same leeway in their appellate briefs that they are afforded with their complaints in the district court. In a rather unusual grouping, the Second, Fifth, Ninth, and Eleventh Circuits stand at the vanguard of liberal pro se construction in the federal system. These four jurisdictions have unapologetically given dispositive effect to the liberal construction rules. Moreover, in so doing, they have re-envisioned the role of the appellate court as a creature in search of the right outcome either through the traditional adversarial process or a more Napoleonic inquisitorial approach.

84 (1984))).

76. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 140 (1st Cir. 1985) (quoting *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975)).

77. *Burgs v. Sissel*, 745 F.2d 526, 527–28 (8th Cir. 1984).

78. *See Johnson v. Thyng*, 369 F. App'x 144, 149 n.3 (1st Cir. 2010) (noting that where a litigant proceeds pro se the court "may grant him some leeway" as to whether his claim on appeal is adequately presented for waiver purposes); *United States v. Bates*, 561 F.3d 754, 758 (8th Cir. 2009) (liberally construing appellant's briefing); *United States v. Gray*, 581 F.3d 749, 753 (8th Cir. 2009) (liberally construing appellant's arguments below); *Wyman v. United States*, 62 F. App'x 364, 366 (1st Cir. 2003) (liberally construing pro se litigant's appellate filings); *Celikoski v. United States*, 21 F. App'x 19, 22 n.6 (1st Cir. 2001) (liberally construing appellate motion); *Webb v. Black*, 826 F.2d 769, 770 (8th Cir. 1987) (declining to apply waiver due to pro se status).

79. *See United States v. Vasco*, 564 F.3d 12, 24 n.11 (1st Cir. 2009) (acknowledging pro se status but applying normal standard); *United States v. Carrasco*, 540 F.3d 43, 48 (1st Cir. 2008) (same); *United States v. Bucci*, 525 F.3d 116, 129 (1st Cir. 2008) (same); *United States v. Liles*, 373 F. App'x 652, 654 (8th Cir. 2010) (citing *United States v. McFarland*, 116 F.3d 316, 318 (8th Cir. 1997)) (applying normal waiver rules); *United States v. Cooper*, 368 F. App'x 696, 697 (8th Cir. 2010) (citing *United States v. Turner*, 898 F.2d 705, 714 (9th Cir. 1990)) (same).

Largely by virtue of their intertwined jurisprudential histories, the Fifth and Eleventh Circuits take similar positions on the issue of liberal construction of pro se appellate briefs. As a result, these circuits represent the strongest adherents of the liberal construction approach. The Fifth Circuit case law affording liberal constructions to appellate briefing reaches back to 1983. In *Abdul-Alim Amin v. Universal Life Insurance Co.*, the court explained for the first time that “[s]ince the plaintiff [was] pro se, and since his brief, liberally construed” articulated a reversible error, it would not dismiss the appeal as it would under ordinary circumstances and ultimately reversed the trial court.⁸⁰ That decision, through more than twenty years of subsequent jurisprudence, has led to the development of the clearest articulation of pro se liberal construction: “[P]ro se litigants’ briefs are liberally construed so as to avoid waiver of issues[;] the indulgence for parties represented by counsel is necessarily narrower.”⁸¹ Similarly, the Eleventh Circuit explained in *Laurent v. Select Portfolio Servicing, Inc.*, that it maintains an express judicial “policy of construing *pro se* briefs liberally.”⁸²

These two strong articulations overtly permitting liberal construction stand out among the remaining circuits for two reasons. First, the Fifth Circuit specifically excludes all represented parties from the benefits of liberal construction.⁸³ Second, the application of the liberal construction rule to pro se briefs in both circuits has had a dispositive effect in favor of pro se litigants—not only saving unpreserved error but, more importantly, permitting the court to rule in favor of the pro se party asserting that error.⁸⁴ Thus, although pro se litigants quite frequently lose even under a liberal construction,⁸⁵ the uniquely strong application of pro se exemptions from

80. *Abdul-Alim Amin v. Universal Life Ins. Co.*, 706 F.2d 638, 640 n.1 (5th Cir. 1983).

81. *Audler v. CBC Innovis, Inc.*, 519 F.3d 239, 255 (5th Cir. 2008) (citing *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993)).

82. *Laurent v. Select Portfolio Serv., Inc.*, 193 F. App’x 831, 833 (11th Cir. 2006).

83. *Audler*, 519 F.3d at 255; *see also* *United States v. Gonzalez*, 592 F.3d 675, 680 n.3 (5th Cir. 2009) (“Although we liberally construe the briefs of *pro se* litigants to avoid waiver, Gonzalez is currently represented by counsel.” (citing *Audler*, 519 F.3d at 255)).

84. *See* *Drayton v. Sec’y for Dep’t of Corr.*, 249 F. App’x 813, 815 (11th Cir. 2007) (rejecting waiver on the basis of pro se status alone); *Secs. & Exch. Comm’n v. Simmons*, 241 F. App’x 660, 663 n.1 (11th Cir. 2007) (same); *Johnson v. Quarterman*, 479 F.3d 358, 359 (5th Cir. 2007) (applying liberal construction to save pro se litigant and granting relief to the same); *Smith v. Leonard*, 244 F. App’x 583, 584 (5th Cir. 2007) (same).

85. *See* *Parker v. United States*, 372 F. App’x 984, 985 (11th Cir. 2010) (applying normal waiver rules to pro se litigant); *Pollinger v. IRS Oversight Bd.*, 362 F. App’x 6, 10 (11th Cir. 2010) (applying liberal construction, but denying pro se litigant relief); *Martinez v. Bus Driver*, 344 F. App’x 46, 48 (5th Cir. 2009) (applying liberal construction, but refusing to read in arguments not briefed by pro se appellant); *Estiverne v. JPMorgan Chase Bank, N.A.*, 303 F. App’x 224, 224 (5th Cir. 2008) (applying liberal construction, but denying pro se litigant relief); *Bustamante v. Mukasey*, 286 F. App’x 239, 240 (5th Cir.

waiver in these circuits has given liberal construction teeth as more than just a device for mere *arguendo* rejections.

Though not the leader of the strong-application group, the Second Circuit stands out for its forthright articulation of the justifications behind liberal construction of appellate briefs. Nowhere is this more evident than the court's recent discussion of the judicial role in pro se cases in *Moran v. Astrue*.⁸⁶ *Moran* involved the court's review of an administrative law judge's (ALJ) handling of a pro se social security matter.⁸⁷ The court explained that pro se litigants enjoy a special status in the Second Circuit. In particular, the mere presence of a pro se litigant imposes "heightened" duties on the ALJ.⁸⁸ The court even went so far as to explain that "[t]he ALJ must adequately protect a *pro se* claimant's rights by ensuring that all of the relevant facts are sufficiently developed and considered."⁸⁹ Though limited to "non-adversarial"⁹⁰ benefits proceedings in *Moran*, this judicially centric approach to pro se litigation has readily flowed into other areas as well. For example, in *Weixel v. Board of Education of New York*, the court held in the course of a normal civil litigation matter that "the [pro se litigants'] allegations in this case must be read so as to raise the strongest arguments that they suggest."⁹¹ That pronouncement has been subsequently applied to directly rebut attempts by represented parties to assert waiver as a defense on appeal.⁹² The strength of the Second Circuit's position is best exemplified by the results of this doctrine. Though pro se litigants frequently lose even under "the strongest arguments that [their briefs] suggest," the court has also repeatedly declined to enforce otherwise valid waivers exclusively on the basis of a litigant's pro se status.⁹³ Notably, in

2008) (applying liberal construction, but denying jurisdiction to issues in which pro se litigant failed to exhaust administrative remedies); *First Fed. Bank for Savs. v. Fortenberry*, 176 F. App'x 630, 630 n.1 (5th Cir. 2006) (applying normal waiver rules to pro se litigant).

86. *Moran v. Astrue*, 569 F.3d 108 (2d Cir. 2009).

87. *Id.* at 112–13.

88. *Id.* at 113 (quoting *Cruz v. Sullivan*, 912 F.2d 8, 11 (2d Cir. 1990)).

89. *Id.* (quoting *Cruz*, 912 F.2d at 11 (internal quotation marks omitted)).

90. *Id.* at 112.

91. *Weixel v. Bd. of Educ. of N.Y.*, 287 F.3d 138, 146 (2d Cir. 2002) (quoting *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (internal quotation marks omitted)).

92. *See, e.g., Qing Yun Sun v. U.S. Dep't of Justice*, 301 F. App'x 87, 89 n.1 (2d Cir. 2008) (citing *Weixel*, 287 F.3d at 145–46) (agreeing that petitioner's pro se argument that she feared torture upon deportation "preserved her challenge to the denial of that relief").

93. *See Cold Stone Creamery, Inc. v. Gorman*, 361 F. App'x 282, 286 (2d Cir. 2010) (quoting *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006) (internal quotation marks omitted)) (deciding pro se litigant avoids appellate dismissal by virtue of liberal construction); *Yueqing Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005) (citing *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998)) (applying normal waiver rules notwithstanding pro se status); *Lawson v. Kirschner*, No. 97-7834, 1998 U.S. App. LEXIS 14776, at *5 n.2 (2d Cir. May 20, 1998) (determining that an expressly waived argument was

all of these cases, the court has never explored the specific circumstances or sophistication of a given pro se litigant but, rather, has adopted a blanket rule triggered exclusively by the absence of counsel.⁹⁴

The final member of the strong-application jurisdictions stands out from its peers for still another slightly different reason. Like the Second, Fifth, and Eleventh Circuits, the Ninth Circuit has a long,⁹⁵ if occasionally waffling,⁹⁶ history of liberal construction of pro se briefs on appeal. Unlike other jurisdictions, which make the jump from liberal construction of complaints to liberal construction of briefs without explanation, the Ninth Circuit grounds itself in the same principles that allow extraordinary leeway in the appellate review of Rule 12(b)(6) dismissals. In *Balistreri v. Pacifica Police Department*, the Ninth Circuit held that there is “no reason to treat pro se appellate briefs any less liberally than pro se pleadings.”⁹⁷ That simple pronouncement has given special force to the Ninth Circuit’s policy of allowing pro se litigants to proceed where represented parties would normally be dismissed on waiver grounds.⁹⁸ Though analyzed in greater

subject to appellate review by virtue of pro se status); see also *Xi Li v. Holder*, 356 F. App’x 455, 457 (2d Cir. 2009) (citing *Marmolejo v. United States*, 196 F.3d 377, 378 (2d Cir. 1999)) (explaining that the court was “construing broadly [the petitioner’s] pro se brief” before denying his petition); *Heller v. Comm’r of Soc. Sec.*, 328 F. App’x 74, 75 (2d Cir. 2009) (citing *LoSacco v. City of Middletown*, 71 F.3d 88, 92–93 (2d Cir. 1995)) (applying liberal construction, yet ultimately deeming a pro se litigant’s argument waived); *Alam v. Mukasey*, 261 F. App’x 328, 329 (2d Cir. 2008) (“[W]e liberally construe the papers filed by pro se litigants. . . . [but] we ‘need not manufacture claims of error for an appellant proceeding pro se.’” (quoting *LoSacco*, 71 F.3d at 93)).

94. Similarly, the Second Circuit also has developed a number of local rules governing all pro se cases regardless of the sophistication of a given litigant. Most notably, Local Rule 27(j) erects additional barriers to entry by requiring a precise statement of issues for appeal as an initial filing requirement, and Local Rule 34 reduces pro se oral arguments to just five minutes—well less than the standard ten to fifteen minutes afforded to represented parties. 2D CIR. R. 27(j); 2D CIR. R. 34.

95. Like the Fifth Circuit, the Ninth Circuit appears to have maintained nearly twenty-five years of liberal construction jurisprudence. The most notable case introducing liberal construction in the circuit occurred in 1985. Sitting en banc, the Ninth Circuit expressly applied the liberal construction rules to salvage a pro se claim. *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc) (citing *Jones v. Cmty. Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984)) (“[W]e have an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.”).

96. See, e.g., *Balser v. Dep’t of Justice*, 327 F.3d 903, 911 (9th Cir. 2003) (declining to apply the “liberality generally afforded pro se litigants”); see also *Levi v. State Bar of Cal.*, 391 F. App’x 633, 633 (9th Cir. 2010) (citing *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992)) (applying normal waiver principles); *United States v. Vuksinich-Almada*, 279 F. App’x 502, 503 (9th Cir. 2008) (applying normal waiver principles).

97. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

98. See *In re Koncicky v. Peterson*, 341 F. App’x 316, 318 (9th Cir. 2009) (citing *Balistreri*, 901 F.2d at 699 for liberal brief construction); *Rodriguez v. Mukasey*, 294 F. App’x 345, 346 (9th Cir. 2008) (same in Board of Immigration Appeals proceeding); *Dajin Liu v. Gonzales*, 223 F. App’x 572, 572–73 (9th Cir. 2007) (same); *Jacobo v. Ashcroft*, 114 F. App’x 928, 929 (9th Cir. 2004) (same); *Corr v. City & Cnty. of Honolulu*, No. 94-16918, 1995 U.S. App. LEXIS 24584, at *2 (9th Cir. Aug. 22, 1995) (same); see

detail *infra* for its arguable flaws, the idea that briefs on appeal are equivalent to pleadings under the Federal Rules of Civil Procedure represents the only approach extending special benefits to pro se litigants that is grounded in an alternative rationale other than the straight equities attendant to pro se status.

Taken together, these four jurisdictions illustrate four divergent routes arriving at the same destination. Whether through the equity-driven approach of the Fifth and Eleventh Circuits, the shift towards inquisitorial control in the Second Circuit, or the extension of Federal Rule of Civil Procedure 8(e) into the realm of appellate practice by the Ninth Circuit, these courts have all arrived at the conclusion that pro se litigants need assistance, and these courts have exhibited a willingness to render that assistance in, if nothing else, a moderately predictable manner governed by discoverable precedent.

3. Factored-Approach Jurisdiction

The Third Circuit stands alone as the only one of the twelve geographic circuits to occupy the middle ground between potentially a harsh rejection through enforcement of ordinary waiver rules and an unprincipled strong application of liberal construction of pro se briefs. The Third Circuit's theory appears to be grounded in an effort to balance two competing concerns. As early as 1974, the court explained that it was hesitant to adopt uniform, per se rules of liberal construction advantaging pro se litigants.⁹⁹ It noted that appellate decisions taking a lenient stance towards pro se litigants make it difficult for trial courts to make the right call in the first instance when faced with what would ordinarily constitute a clear and dispositive waiver.¹⁰⁰ Yet, the court has also sought to maintain its discretion to reach otherwise waived issues to address those exceptional cases that truly require appellate review notwithstanding a pro se litigant's technical failures.¹⁰¹ The result of this effort is perhaps best exemplified by the court's decision in *United States v. Contents of Two Shipping Containers Seized at Elizabeth*.¹⁰² Addressing a pro se seizure defendant, the court explained that

also *Conrad v. McCormick*, No. 93-35382, 1994 U.S. App. LEXIS 766, at *1 n.1 (9th Cir. Jan. 7, 1994) (aggressively applying *Balistreri*, 901 F.2d at 699 to avoid apparent waiver of all appealable issues).

99. *United States v. Proffitt*, 498 F.2d 1124, 1126 n.2 (3d Cir. 1974).

100. *Id.*

101. *Tabron v. Grace*, 6 F.3d 147, 154 n.2 (3d Cir. 1993) (citing *Riley v. Jeffes*, 777 F.2d 143, 147-48 (3d Cir. 1985)); see also *Goldwire v. Folino*, 274 F. App'x 143, 146 n.3 (3d Cir. 2008) (citing *Bronshtein v. Horn*, 404 F.3d 700, 728 (3d Cir. 2005)) (explaining that waiver rules are not jurisdictional, and, hence, the court retains discretion to review waived errors).

102. *United States v. Contents of Two Shipping Containers Seized at Elizabeth*, 113 F. App'x

“[p]ro se status by no means creates an automatic exception to the waiver rule, but we have relied on this factor to relax the waiver rule in the past.”¹⁰³ Thus, unlike the non-application jurisdictions, the Third Circuit views pro se liberality as a discretionary tool available to judges. At the same time, unlike the strong-application jurisdictions, pro se status remains but a single factor in waiver analysis. In total, this balanced, but not unbounded,¹⁰⁴ approach appears to give the court the best ability to afford fair review to represented and unrepresented parties in light of the equities of each individual approach.

4. Ad Hoc/Inconsistent Jurisdictions

While nine of the geographic circuits can be easily categorized, three circuits appear to remain undecided. The Sixth, Seventh, and Tenth Circuits have all addressed the special circumstances of pro se litigation but have yet to develop a consistent jurisprudence governing brief construction. In the Sixth Circuit, the court has repeatedly permitted liberal construction of pro se briefs (though often to no avail) while also stating a rule that pro se litigants are held to the same procedural standards as represented parties.¹⁰⁵ The Seventh Circuit’s jurisprudence is even less consistent. On the one hand, the court has developed strong precedent for the idea that the same waiver rules that govern represented parties will apply to pro se parties.¹⁰⁶ At the same time, the court has regularly disregarded that precedent to liberally construe pro se briefs in avoidance of those rules.¹⁰⁷ This case law

460, 462 n.2 (3d Cir. 2004).

103. *Id.* (citations omitted).

104. *See, e.g.,* United States v. Garth, 188 F.3d 99, 105 n.7 (3d Cir. 1999) (acknowledging “wide latitude” afforded pro se litigants but declining to consider issues not raised before the district court).

105. *Compare* Wright-Hines v. Comm’r of Soc. Sec., 597 F.3d 392, 394 (6th Cir. 2010) (applying liberal construction to non-criminal, non-habeas pro se brief without explanation or citation), *and* Miller v. Cason, 49 F. App’x 495, 496 (6th Cir. 2002) (applying liberal construction to pro se habeas brief without explanation or citation), *and* Davis v. Daughtrey, 36 F. App’x 178, 179 (6th Cir. 2002) (same), *with* Fitts v. Sicker, 232 F. App’x 436, 441–42 (6th Cir. 2007) (citing *McNeil v. United States*, 508 U.S. 106, 113 (1993)) (“Although a *pro se* litigant’s filings are to be construed liberally, he must still comply with the basic rules of the Court.”).

106. *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 699–700 (7th Cir. 1995) (citations omitted) (“Although pro se litigants are entitled to some procedural protections, they are in general subject to the same waiver rules that apply to parties who are represented by counsel.”); *see also* *Thomas v. Knight*, 196 F. App’x 424, 426–27 (7th Cir. 2006) (applying *Provident* to enforce waiver against a pro se litigant); *Pavey v. Conley*, 170 F. App’x 4, 7 n.2 (7th Cir. 2006) (same); *Dodd v. Corbett*, 154 F. App’x 497, 500 (7th Cir. 2005) (same).

107. *See, e.g.,* *Snyder v. Nolen*, 380 F.3d 279, 284–85 (7th Cir. 2004) (expressly declining to apply the rule announced in *Provident*); *but see* *United States v. Stabile*, 122 F. App’x 856, 858 (7th Cir. 2005) (citing *United States v. Atkinson*, 259 F.3d 648, 654 (7th Cir. 2001)) (“We, of course, construe the briefs of pro se defendants liberally . . .”).

not only sets out inconsistent standards but, quite strikingly, it does so in conflicting binding authority. The Tenth Circuit presents the same predicament. That court has explained that, “although [it] make[s] some allowances” for pro se litigants’ inability to craft an artful brief, “the court cannot take on the responsibility of serving as the litigant’s attorney in constructing arguments and searching the record.”¹⁰⁸ Nonetheless, the court has done exactly that on several occasions.¹⁰⁹ All three jurisdictions appear to re-craft their rule depending on the equities of a given case. More strikingly, all three jurisdictions maintain contradictory authority that strips away any possible pretense of predictability. Ultimately, this ad hoc approach represents the least equitable of the four categories as it inherently creates a system where pro se litigants cannot know what is actually expected of them until a dispositive opinion informs them whether they have satisfied applicable procedural norms.

B. The History of the Pro Se Liberal Construction Rule

Addressing the history of the rule after exploring its application may, at first, appear to invert the order of things. In this case, however, understanding where the various geographic jurisdictions fall provides the foundation for understanding the tangled and unusual history of this particular judicial creation. Specifically, all twelve jurisdictions embrace the liberal construction of pro se complaints notwithstanding the fact that only a handful extend that doctrine to pro se appellate briefs.¹¹⁰ Ultimately, all of the geographic circuits cite back to the Supreme Court’s decision in *Haines v. Kerner*¹¹¹ for the former proposition.¹¹² Where the jurisdictions diverge,

108. Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005).

109. Brown v. Cooke, 362 F. App’x 897, 899 (10th Cir. 2010) (enforcing waiver only after liberally construing litigant’s appellate briefs); Weaver v. Astrue, 353 F. App’x 151, 154 (10th Cir. 2009) (citing Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)) (liberally construing all pro se “materials” including appellate briefs); Law v. Pugh, No.99-1578, 2000 U.S. App. LEXIS 23835, at *3 (10th Cir. Colo. 2000) (citing Haines v. Kerner, 404 U.S. 519, 520–21 (1972)) (“Because plaintiff proceeds pro se, we are obliged to construe his pleadings liberally.”).

110. Whitson v. Stone Cnty. Jail, 602 F.3d 920, 922 n.1 (8th Cir. 2010); Alba v. Montford, 517 F.3d 1249, 1252 (11th Cir. 2008); Andrews v. Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007); Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006); Settles v. U.S. Parole Comm’n, 429 F.3d 1098, 1106 (D.C. Cir. 2005); Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003); Perez v. United States, 312 F.3d 191, 194–95 (5th Cir. 2002); Weixel v. Bd. of Educ. of N.Y., 287 F.3d 138, 145–46 (2d Cir. 2002); Boswell v. Mayer, 169 F.3d 384, 387 (6th Cir. 1999); Hunt v. Uphoff, 199 F.3d 1220, 1223 (10th Cir. 1999); Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997); Flint v. Haynes, 651 F.2d 970, 974 n.12 (4th Cir. 1981) (citing Gordon v. Leeke, 574 F.2d 1147 (4th Cir.1978)).

111. Haines v. Kerner, 404 U.S. 519 (1972).

112. Roberts v. Wainwright, 666 F.2d 517, 519 (11th Cir. 1982); Loe v. Armistead, 582 F.2d 1291, 1295 (4th Cir. 1978); Alley v. Dodge Hotel, 501 F.2d 880, 883 (D.C. Cir. 1974); Guerro v. Mulhearn, 498

however, is in how they make the leap from complaint to brief, often relying exclusively on *Haines*.

The discussion of liberal construction in *Haines* derived from the now defunct Federal Rule of Civil Procedure 12(b)(6) dismissal standard announced in *Conley v. Gibson*.¹¹³ In large part, *Haines* merely reiterated *Conley*'s long held rule that a motion to dismiss would only be granted where it appeared "beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."¹¹⁴ *Haines*'s only substantive addition to *Conley* was to suggest that a court should liberally construe pro se documents in applying this broad and permissive standard.¹¹⁵ Still, *Haines* did make one major contribution to the "liberal construction" jurisprudence that explains its role as the origin of the liberal rules governing pro se appeals—it decoupled permissive review from the Federal Rules of Civil Procedure.

More precisely, *Haines*'s often cited determination that the court "hold[s] [pro se pleadings] to less stringent standards than formal pleadings drafted by lawyers" makes no reference to the Federal Rules.¹¹⁶ Previously, *Conley*'s broad and accepting approach to initial complaints was tied directly to the Federal Rules. As *Conley* explained, then Federal Rule of Civil Procedure 8(f), notably a rule of general applicability that encompassed all litigants, required courts to construe "pleadings" so "as to do substantial justice."¹¹⁷ The Rules also provided a definition of what constituted a pleading: complaints; answers; answers to counterclaims; answers to crossclaims; third-party complaints; answers to third-party complaints; and any reply ordered by the district court.¹¹⁸ Thus, *Haines*

F.2d 1249, 1256 (1st Cir. 1974); *Cruz v. Cardwell*, 486 F.2d 550, 552 (8th Cir. 1973); *Bryant v. Harris*, 465 F.2d 365, 366 (7th Cir. 1972); *Corby v. Conboy*, 457 F.2d 251, 253 (2d Cir. 1972); *Hoggro v. Pontesso*, 456 F.2d 917, 918 (10th Cir. 1972); *McElroy v. Swan*, 457 F.2d 1303, 1304 (6th Cir. 1972); *Neal v. Georgia*, 469 F.2d 446, 448 (5th Cir. 1972); *Turack v. Guido*, 464 F.2d 535, 536 (3d Cir. 1972); *Villarreal v. United States*, 461 F.2d 765, 768 (9th Cir. 1972).

113. *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

114. *Haines*, 404 U.S. at 521 (quoting *Conley*, 355 U.S. at 45–46).

115. It is hard to conceive of how a court could more liberally apply such a lenient pleading standard. In reality, *Haines* appears to have been focused on special limitations imposed on prisoner litigation. *Id.* at 521. Nonetheless, nearly 40 years of jurisprudence independently developed around the country has adopted *Haines* as the origin of liberal construction of pro se complaints.

116. *Haines*, 404 U.S. at 520.

117. *Conley*, 355 U.S. at 48 (quoting FED. R. CIV. P. 8(f)). Notably, the appellate courts are not always unmindful of the origins of liberal construction as a product of the Federal Rules of Civil Procedure. In one particularly noteworthy (though arguably erroneous) example, the Seventh Circuit held that Federal Rule of Civil Procedure 8 requires appellate briefs to be liberally construed. *Saladino v. Redisi Family P'ship*, 120 F. App'x 645, 646 (7th Cir. 2005).

118. FED. R. CIV. P. 7(a).

paved the way for pro se liberal construction in the courts of appeals notwithstanding the fact that briefs do not appear in the Rule 7 list of pleadings or the fact that Rule 8(e)¹¹⁹ has no force in the appellate courts by freeing liberal construction—however unintentionally—from the original constraints imposed by *Conley*.

In application, few courts have given pause when relying upon *Haines* while making the leap from liberally construing pleadings to liberally construing briefs. A very small number have squarely addressed the issue by explaining they see no distinction between a complaint in the district court and appellate briefing for the purposes of construction.¹²⁰ In other circuits, the use of imprecise terms like “papers” extrapolated from “pleadings” has led to appellate application of the liberal construction doctrine.¹²¹ Still, the even greater majority merely applies liberal construction to pro se briefing without any explanation and with, at most, a citation to *Haines*.¹²² The import of these varying approaches is that none of the courts surveyed based the special favor granted to pro se litigants on any identifiable rule of general applicability. Whereas the liberal construction of pleadings to do substantial justice extends to all complaints and other Rule 7(a) filings, only pro se litigants enjoy liberal construction of their appellate briefs. In short, what began as a general rule derived from the basic tenets of notice pleading has transformed through four decades of applying *Haines* and its loosely written discussion of pro se status in all twelve geographic circuits to produce a far narrower rule on appeal affording additional appellate rights to a discrete subclass of litigants.

119. Rule 8(f) was superseded by the nearly identical Rule 8(e) in 2007. FED. R. CIV. P. 8 advisory committee’s note.

120. *E.g.*, *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990) (“Defendants suggest no reason to treat pro se appellate briefs any less liberally than pro se pleadings.”).

121. *E.g.*, *United States v. Bates*, 561 F.3d 754, 758 n.3 (8th Cir. 2009) (extending the term “pleading” to encompass briefs); *Van Doan v. Ashcroft*, 125 F. App’x 664, 668–69 (6th Cir. 2005) (expanding the term “filing” to add appellate briefs); *Marmolejo v. United States*, 196 F.3d 377, 378 (2d Cir. 1999); *see also* *Chriceol v. Phillips*, 169 F.3d 313, 315 n.2 (5th Cir. 1999) (broadening the meaning of “claims” to include appellate arguments).

122. *See, e.g.*, *Wright-Hines v. Comm’r of Soc. Sec.*, 597 F.3d 392, 394 (6th Cir. 2010) (no explanation given); *United States v. Gray*, 581 F.3d 749, 753 (8th Cir. 2009) (providing no explanation after citing *Haines* for liberal construction of “objections”); *Johnson v. Quarterman*, 479 F.3d 358, 359 (5th Cir. 2007) (citing *Haines* to justify liberal construction of briefs without explanation); *Williams v. Ballard*, 466 F.3d 330, 335 (5th Cir. 2006) (giving no explanation); *Miller v. Cason*, 49 F. App’x 495, 496 (6th Cir. 2002) (same); *Kennedy v. Richard-Flagship Servs. Inc.*, 3 F. App’x 15, 17 (4th Cir. 2001) (same); *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) (same after referring to appellate briefs as “filings”); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (providing no explanation or citation).

III. THE CONSTITUTIONAL PROBLEM WITH UNPRINCIPLED LIBERAL CONSTRUCTION

Pro se litigants, an increasingly large portion of the federal appellate docket, often enjoy a heightened degree of appellate review. Whether they receive that benefit depends largely on their geographic location. In other words, pro se litigants, in some jurisdictions at least, enjoy a more vigorously protected right to access the courts than their represented counterparts. So what? At first blush, it appears the panoply of procedural pitfalls pro se litigants often fail to avoid offsets the special privileges conferred on them. Taking a more critical view of this deeply ingrained practice, however, raises an important question: Should equal access to the courts be enhanced exclusively based on pro se status without regard to individual sophistication? The Equal Protection Clause with its special coverage for the fundamental right of access to the courts would seem to influence the outcome to this inquiry. Under existing case law, the answer, at least at present, is only normative; one would overreach to conclusively assert that the liberal construction of pro se appellate briefs clearly violates the Constitution. Nonetheless, the fact that this question even arises begins to suggest that something is amiss. This Part briefly explores the potential constitutional problems raised by the liberal construction doctrine in the appellate context to the extent that it impedes the right to access the courts in violation of the Equal Protection Clause.¹²³

Early recognition of the fundamental right to access the courts dates back to the beginning of American jurisprudence.¹²⁴ Yet most of the case law addressing access to the courts as an equal protection right arises in the context of incarcerated or indigent litigants. In fact, the heavy focus on indigence and incarceration might lead one to believe that the access right only extends to members of these two limited classes of litigants.¹²⁵ This situation is further complicated by the fact that the right to access the courts and its connection to indigence are born of a confluence of the Due Process

123. Though this Article focuses on equal protection concerns, the same analysis contained herein raises several serious questions regarding the Seventh Amendment right to retain counsel in civil suits. The right to retain counsel at one's own expense has been universally recognized in the federal courts. Yet granting special benefits to those who choose to represent themselves would seem to present a possibility that special pro se jurisprudence might chill the exercise of that right. Obviously, the benefits of proceeding pro se may not be offset by the benefits of retaining counsel. Nonetheless, this concern presents another issue of pro se liberal construction, albeit an issue for another day.

124. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C. E.D. Pa. 1823).

125. See generally Russell J. Davis, *Annotation: What, in View of the Supreme Court, Constitutes the Constitutional Right of Access to the Courts*, 52 L. Ed. 2d 779 (2008) (discussing access to the courts and the disparity between indigent and non-indigent prisoners).

and Equal Protection Clauses that is not always easily pulled apart.¹²⁶ Thus, the suggestion that affording pro se litigants certain benefits on appeal violates the Equal Protection Clause, by interfering with the fundamental rights of represented litigants, arguably turns the conventional understanding of this issue on its head. That said, the troubling dual system of appellate review—occasioned by unprincipled liberal construction rules—dovetails with the exact same sorts of concerns that led the Supreme Court to aggressively embrace the access right more than half a century ago.

A. The Supreme Court on Access to the Courts

The Supreme Court's thorough efforts to develop "access to the courts" jurisprudence provides both a necessary backdrop and logical starting point for evaluating the constitutional issues created by liberal construction of pro se briefing. Beginning with issues of criminal prosecution and running more recently into the realm of civil litigation, the Court's treatment of access to the courts under the Equal Protection Clause has developed along a winding and often convoluted path. Nonetheless, a core demand for reasoned distinction in access limitations permeates the Court's various analyses as well as those of the circuit courts attempting to follow the Court's lead.

Most scholars herald the Supreme Court's decision in *Griffin v. Illinois*¹²⁷ as the birthplace of the present-day understanding of the fundamental right of access to the courts.¹²⁸ In *Griffin*, the Court deemed unconstitutional an Illinois statute that required criminal defendants to pay for transcripts as a prerequisite to appeal.¹²⁹ The Court explained that "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."¹³⁰ Thus, while state courts were not required by the Constitution to offer appellate review, an election to provide such review must conform to the requirements of Due

126. See Eric K. Weingarten, Comment, *An Indeterminate Mix of Due Process and Equal Protection: The Undertow of In Forma Pauperis*, 75 DENV. U. L. REV. 631, 636–40 (1998) (exploring access to the courts as a major example of the overlap between the Due Process and Equal Protection Clauses).

127. *Griffin v. Illinois*, 351 U.S. 12 (1956).

128. See, e.g., Stephen I. Valdeck, *Federal Courts, Practice & Procedure: Boumediene's Quiet Theory: Access to Courts and the Separation of Power*, 84 NOTRE DAME L. REV. 2107, 2117–18 (2009) (describing *Griffin* as the beginning of a line of cases re-grounding access to the courts in the Due Process and Equal Protection Clauses following the early development of the "denial-of-access" case law exemplified by *Ex parte Hull*, 312 U.S. 546, 547–49 (1941)).

129. *Griffin*, 351 U.S. at 19–20.

130. *Id.* at 18.

Process and Equal Protection.¹³¹ Consequently, the Illinois statute's effect of discriminating against poor litigants seeking to exercise their fundamental right to access the courts was unconstitutional.¹³²

Ten years later, the Court again expanded upon the access right in an often overlooked and underappreciated case. In *Rinaldi v. Yeager*, the Court addressed a statute requiring unsuccessful prisoner-litigants to reimburse the state for the costs of appellate transcripts.¹³³ The Court found that the New Jersey statute at issue invidiously discriminated and lacked any independent justification.¹³⁴ In reaching this conclusion, the Court explained that "once established, [appellate] avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."¹³⁵ Thus, while *Griffin* may have begun the equal protection line of cases, *Rinaldi* provided the critical first principles through the "unreasoned distinctions" paradigm that persisted as the key test in the cases that followed.

Finally, the Supreme Court has gradually expanded the access right to stretch beyond the realm of criminal prosecutions and collateral litigation. First, in *M.L.B. v. S.L.J.*, the Court found that appellate fee rules similar to those at issue in *Griffin* violated the Equal Protection Clause in the context of proceedings to terminate parental rights.¹³⁶ The Court explained that the same invidious discrimination on the basis of poverty that afflicts limitations on criminal appeals also affects other important rights.¹³⁷ Thus, the Court held that parental rights terminations constituted one of "a narrow category of civil cases in which the State must provide access to its judicial process without regard to a party's ability to pay court fees."¹³⁸ That "narrow category" was again expanded and reevaluated most recently in 2004 when, in *Tennessee v. Lane*, the Court held that the "right of access to the courts . . . call[s] for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications."¹³⁹ Applying that rule to the Americans with Disabilities Act, the Court went on to hold that states were required to afford disabled individuals with reasonable access to the courts.¹⁴⁰

131. *Id.*

132. *Id.* at 19.

133. *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

134. *Id.* at 309.

135. *Id.* at 310 (citations omitted).

136. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

137. *Id.* at 112.

138. *Id.* at 113.

139. *Tennessee v. Lane*, 541 U.S. 509, 529 (2004).

140. *Id.*

Importantly, the Court did not limit reasonable access based on the subject matter of individual suits.¹⁴¹ Viewed together, these two cases show an increasing movement towards affording broader constitutional protections against those “unreasoned distinctions” motivating the Court in *Rinaldi*.

B. Articulating a New, Expansive View of Rinaldi

The glacial development of access to the courts jurisprudence has led to two competing views of the reach of the Equal Protection Clause in guarding this fundamental right. On the one hand, a significant group of courts and scholars treat the access right as something designed to protect against invidious discrimination on the basis of the quasi-suspect classifications of incarceration and poverty.¹⁴² On the other hand, a very small group of commentators take a more expansive approach to the access right based on the “unreasoned distinctions” test announced in *Rinaldi*.¹⁴³ This second view forms the foundation of the potential constitutional violation perpetrated by the well-meaning courts of appeals as they seek to afford greater appellate access to pro se litigants.

Seventh Circuit Judge Kenneth Ripple best articulated the broad view approach to *Rinaldi* in a dissenting opinion. Well before the civil expansion of the access right, Judge Ripple vigorously opposed the dismissal of three pro se civil cases on the basis that the litigants had failed to file necessary jurisdictional statements mandated by the circuit’s local rules.¹⁴⁴ Citing *Rinaldi*, Judge Ripple explained that represented parties are only subject to a fine for failure to comply—not outright dismissal.¹⁴⁵ Drawing on the “unreasoned distinctions” rule, Judge Ripple went on to write, “Distinctions between represented and *pro se* appellants must have ‘some relevance to the purpose for which the classification is made.’”¹⁴⁶ Of equal importance, Judge Ripple divided the access right from the right to self-representation.¹⁴⁷ In so doing, he clarified that the *Rinaldi* test should apply

141. *Id.*

142. *See, e.g.,* Mitchell v. Farcass, 112 F.3d 1483, 1489 (11th Cir. 1997) (narrowly construing *Rinaldi* to merely require “any justification” for distinctions); *see also* Joshua D. Franklin, Comment, *Three Strikes and You’re Out of Constitutional Rights? The Prison Litigation Reform Act’s “Three Strikes” Provision and its Effect on Indigents*, 71 U. COLO. L. REV. 191, 195–201 (2000) (cataloguing the development of the access right through the *M.L.B. v. S.L.J.* decision and concluding that the access right is narrowly tailored to a specific four-factored analysis).

143. *See* Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900–01 (9th Cir. 1988) (articulating a broad view of access protections along with examples of their application).

144. *Despenza v. O’Leary*, 889 F.2d 113, 114 (7th Cir. 1989) (Ripple, J., dissenting).

145. *Id.*

146. *Id.* (quoting *Rinaldi*, 384 U.S. at 309 (citation and internal quotation marks omitted)).

147. *Id.* at 114–15.

on the basis of the pro se-versus-represented classification without regard to the very different test governing infringements of the right to represent oneself.¹⁴⁸

Applying *Rinaldi* in this way produces an interesting result. Courts regularly afford liberal construction to pro se appellants without a searching analysis, detailed review, or explication of why such a benefit is necessary. In one particularly egregious case, the Third Circuit found that a pro se plaintiff it described as “an experienced litigator” was nonetheless entitled to the full protections conferred on other pro se litigants.¹⁴⁹ Other jurisdictions have similarly granted pro se benefits where it would seem no reasonable justification would support relying upon the pro se distinction.¹⁵⁰ As discussed at length *supra*, pro se litigants are coming to the courts in increasing numbers. They come with varied means and degrees of sophistication. In short, the pro se population simply does not conform to the stereotype of the indigent prisoner that provided the “reasoned distinction” underpinning the liberal construction jurisprudence of previous courts of appeals. Thus, *Rinaldi* can be read to suggest that the uniform extension of any benefit on the basis of pro se status violates the principles of equal protection much in the same way that Judge Ripple argues uniquely pro se penalties should be deemed unconstitutional.

Moreover, even if this restriction of the access rights of represented parties is not constitutionally actionable, it illustrates a serious flaw in the way courts interpret briefing. No rational distinction supports giving a dispensation to an attorney who poorly briefs his own case while penalizing that lawyer’s client when the same lawyer poorly briefs that case as well. Conversely, when an unrepresented litigant has the financial ability to retain counsel and opts to go it alone, the equities supporting liberal construction fall away. The same rationale that allows parties to suffer waivers due to their counsel’s failings would require voluntary pro se litigants to face the same rules—a party must live with its representational choices. In the end, whether constitutional or not, the liberal construction of pro se briefs as

148. *Id.* at 114.

149. *Huertas v. City of Camden*, 245 F. App’x 168, 172 (3d Cir. 2007).

150. *See Corbin v. Supreme Court of Fla.*, 233 F. App’x 917, 917–18 (11th Cir. 2007) (granting pro se benefits to attorney representing himself); *Smith v. N.Y. Presbyterian Hosp.*, 254 F. App’x 68, 70 (2d Cir. 2007) (granting pro se benefits to attorney representing herself because she had been out of practice for a number of years); *Torres v. Cnty. of Webb*, 150 F. App’x 286, 294 (5th Cir. 2005) (liberally construing pro se lawyer’s appellate brief). *But see Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001) (declining to give liberal construction to pro se lawyer’s papers); *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 82 n.4 (2d Cir. 2001) (same); *Harbulak v. Cnty. of Suffolk*, 654 F.2d 194, 198 (2d Cir. 1981) (stating that an attorney appearing pro se “cannot claim the same special consideration which the courts customarily grant to pro se parties”).

applied in virtually all of the geographic circuits reflects precisely the sort of “unreasoned distinction” between pro se and represented litigants that should not be permitted to have a dispositive effect on individual claims.

IV. REMEDIES: PRESERVING EQUITY WHILE PROTECTING EQUALITY IN FEDERAL APPEALS

Pro se litigants do not succumb to a single stereotype and neither do the rules governing pro se appellants as evidenced by the many and varied schemes enacted around the country. The distinction between pro se litigants and represented parties hints at serious equal protection concerns that, even if not per se unlawful, raise troubling questions as to the rationale and equity driving pro se waiver rules on appeal. In short, there is a problem. But what is to be done about it? The disparity in the approaches of the various circuits provides the answer. Obviously, the ad hoc developments of twelve geographic circuits have proven inadequate. A pro se litigant in the District of Columbia has substantially different appellate rights than an identical pro se litigant in New York. The same can be said by viewing the inverse of the circuit’s rules with respect to represented parties. Yet the circuit survey set forth in Part II *supra* suggests three possible means of resolution. First, like the non-participating jurisdictions, the circuits could abolish liberal construction of appellate arguments in all cases. Second, building on the approach of the strong-application jurisdictions, the circuits could extend the benefit of broad liberal construction to all litigants regardless of whether they are represented by counsel. Finally, drawing on the Third Circuit’s approach, the circuits could treat pro se status as one factor among many in deciding whether to exercise discretion to enforce various waiver rules. This Part explores the strengths and weaknesses of all three options before settling upon and describing the necessary steps to enact a revised, uniform approach across the geographic circuits.

A. Abolition

The easiest method of resolving the problem with pro se liberal construction is also the most obviously unworkable. The simplest route to avoiding the equal protection issues discussed *supra* would be to refuse all liberal construction of pro se briefs. Such an approach would certainly find strong footing because, unlike the rule with complaints, pro se liberal construction on appeal lacks a foundation in a rule of general applicability. Moreover, it would greatly enhance predictability by transforming today’s

discretionary waiver rules into bright line standards governing every argument in every brief in every case regardless of the type of claim or type of party involved. Still, the abolitionist approach is flawed on its face for three significant reasons: (1) abolition would only exacerbate the very inequities that gave rise to special pro se rules in the first instance; (2) abolition would, in short, produce bad case law and precedent; and (3) abolition would permit courts to abdicate their duty to decide.

From the outset, this Article acknowledges and seeks to demonstrate a firm appreciation of the difficult reality faced by pro se litigants. Without belaboring the equities further, proceeding through the complex American judicial system without the assistance of counsel is extraordinarily difficult and treacherous.¹⁵¹ As Part I makes clear, pro se litigants make up a significant population of court users, and a significant portion of pro se litigants are unsophisticated and of limited means. Thus, while pro se litigants cannot be reduced to the traditional stereotype, a large number of such parties will simply lose access to justice by virtue of their lack of legal training and inability to hire counsel.

Moreover, as Justice Stephens aptly noted, “[t]he maxim that ‘hard cases make bad law’ may also apply to easy cases.”¹⁵² The ill-developed positions presented by untrained pro se litigants often take on the appearance of easy cases once they are assailed by a competent attorney. The adversarial system, in its purest form, assumes equal rivals with differing information. In the end, the truth—not the parties—is supposed to win out. Yet in the lopsided battle of pro se-versus-attorney, that basic tenet at the heart of the American system of justice and dispute resolution lacks force. A court that willingly submits to the wiles of every skilled attorney opposing an outmatched pro se litigant risks not only reaching the “wrong” result but, worse still, developing precedential rules based on an incomplete and ill-considered case decision. In such a situation, it seems only natural that the court should assume the responsibility of insuring that the “truth will win out.”

Finally, in a more philosophical sense, a complete abolition of any sort of concession to pro se litigants would seem to work an abdication of judicial responsibility. As one commentator has explained, “[t]he very existence of justiciability doctrines, which excuse courts from deciding cases in certain circumstances, implies that where those circumstances are not present, courts do not enjoy the freedom to abstain from adjudication.”¹⁵³ Such a refusal to act can bring about injustices as great as

151. See, e.g., Goldschmidt, *supra* note 59.

152. *Hudson v. United States*, 522 U.S. 93, 106 (1997) (Stephens, J., concurring).

153. Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to*

or greater than those perpetrated by giving preference to a class of litigants like pro se parties.¹⁵⁴

Thus, the courts simply cannot ignore the plight of the unrepresented. The long history of experience giving rise to liberal rules in so many jurisdictions more than adequately demonstrates the need for judicial discretion to reach beyond poorly briefed arguments to settle upon the correct conclusion under the law. Failure to do so risks the integrity of the judicial system itself, both in the litigants cheated out of fair and complete adjudication and their common law descendants that will follow in reliance upon the poorly conceived precedent these cases would produce.

B. Expanded Application

Though more difficult than abandoning all equitable considerations, the circuits could also opt to expand the current pro se doctrines to apply to all parties regardless of whether they are represented by counsel. Put another way, the circuits could adopt a strongly inquisitorial stance in assessing the arguments presented to them once the adversaries in a given case were first afforded their opportunity to battle it out. Such an approach would avoid the harsh results and potential bad precedential developments that would likely arise were the courts to take an abolitionist path. Still, radically lowering the bar for what constitutes a majority of court users and repositioning the court as a quasi-investigative body carries with it a number of noteworthy concerns.

What one commentator has described as “involved appellate judging” could very well eliminate all of the concerns presented by the current system of pro se liberalities.¹⁵⁵ An “involved appellate judge” is defined as one who “us[es] their discretion to improve the law by implementing the most correct reasoning.”¹⁵⁶ To be able to accomplish that task, “involved appellate judges” reach beyond traditional areas of *sua sponte* analysis to aggressively use their discretion by “follow[ing] their instincts about unargued points that they believe may be important to resolution of a particular case.”¹⁵⁷ This shift towards “inquisitorial judging,” defined broadly in the literature as a relaxing of procedural rules to permit more

Decide, 94 GEO. L.J. 121, 127 (2005).

154. *Id.* at 123 (noting the serious consequences of judicial inaction); *id.* at 123 n.3 (“[O]ne of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.” (quoting *Heckler v. Chaney*, 470 U.S. 821, 851 (1985) (Marshall, J., concurring))).

155. Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 251 (2004).

156. *Id.* at 252.

157. *Id.* at 294.

involved participation by the judge or neutral arbiter,¹⁵⁸ is not without its adherents.¹⁵⁹

Still, the problems with an expanded application of pro se liberality following this logic are manifest. Though proponents suggest it would “be no great new burden” on judges,¹⁶⁰ that conclusion seems dubious at best given the fact that such an approach very well might give rise to freestanding due process rights to essentially have judges develop a party’s legal arguments. Moreover, it would likely undermine the ability of lower courts to efficiently dispose of matters as an “involved” appellate court likely could not rest upon a party’s failures and the plain error standard to jettison those claims not properly presented or preserved. Hence, the already overburdened geographic circuits would likely be overwhelmed by the added responsibility of not only deciding the myriad cases presented to them each year but also developing the underlying arguments from the record itself.

That same potential for universal de novo review on appeal also raises a serious specter of hidden unfairness. How are litigants to defend against arguments they have never heard presented, and, more to the point, who is to say that inquisitorial judges can better ferret out the best understanding and presentation of those arguments? After all, the adversarial system is premised on the belief that having a stake in the outcome of a case presents the best possible motivation to insure all arguments are presented to the best extent possible. The counter argument, of course, is that financial means improve judicial access and the ability to be an adversarial participant. But such an argument illustrates the greatest flaw in the involved appellate model—it directly encourages judges to take the side of one party. In particular, an involved appellate judge would likely be required to most often take the side of the less financially sound party and assume the role of advocate behind the cloistered walls of judicial chambers. The most troubling part of this scenario is not just the loss of judicial impartiality but, more importantly, the further diminishment of transparency. While judicial decision-making rightly proceeds under a certain cloak of secrecy, extending that protection to advocacy itself would certainly undermine the legitimacy of judicial outcomes.

In short, broadly expanding liberal appellate review is incompatible with the adversarial approach. An attempt to reform in this way would

158. Finegan, *supra* note 1, at 448.

159. See Oldfather, *supra* note 153, at 137–60 (2005) (exploring various forms of judicial restraint and discussing the problems those refusals to decide bring upon litigants and the case law); see also Finegan, *supra* note 1, at 448 (arguing for more aggressive judicial participation in all pro se criminal matters).

160. Cravens, *supra* note 155, at 285.

require radical structural change while further stressing the increasingly taxed federal courts.

C. Factored Analysis

If the appellate courts cannot abolish liberal construction rules or, alternatively, expand them to encompass all parties in all cases, how can they satisfy the equitable demands at hand while still preserving the fundamental adversarial bedrock of the American system? The answer to this question is already extant in the case law, albeit not thoroughly developed. The Third Circuit system of treating pro se status as a single factor in deciding whether to exercise discretionary waiver rules presents an ideal middle ground.¹⁶¹ Moreover, though not a widely held view, the Third Circuit approach has, on occasion, already sprung up in other circuits.¹⁶² Treating pro se status as one of many concerns in deciding whether to reach beyond properly presented briefs would allow courts to consider the equities where appropriate and strictly maintain briefing standards in all other cases.

As Part I attempts to illustrate, “pro se” is a virtually meaningless classification. In this era of increased participation by uncounseled litigants, a party’s lack of representation can no longer serve as a proxy for sophistication, socioeconomic status, or—as often seen in the prisoner context—likelihood of presenting a meritorious claim. Does it work sometimes? Yes, but not always or even consistently. Hence, “pro se” status ought to be treated as a flag triggering closer appellate scrutiny of the circumstances of the individual litigant at issue. Rather than affording that designated proxy status, courts should consider, among other things: material in the record regarding a pro se litigant’s education, reasons for proceeding without counsel, and success in presenting his arguments up to that point. These factors, taken in conjunction with pro se status, would allow the courts to reach necessary issues to the greatest extent possible without usurping the role of the parties as advocates and adversaries.

In fact, this factored approach to waiver analysis could solve another major problem in appellate adjudication—poor briefing by counsel. Many of the same equities that support conducting a more searching review of the

161. *United States v. Contents of Two Shipping Containers Seized at Elizabeth*, 113 F. App’x 460, 462 n.2 (3d Cir. 2004) (“Pro se status by no means creates an automatic exception to the waiver rule, but we have relied on this factor to relax the waiver rule in the past.” (citation omitted)).

162. *See, e.g., Confere v. Astrue*, 235 F. App’x 701, 702 (10th Cir. 2007) (treating pro se status, along with education and circumstances, to decide whether “compelling reasons” justify excusing a party from a particular waiver rule).

briefs of unsophisticated and impoverished pro se litigants apply with equal force to similar litigants trusting their matters to incompetent counsel. Where no prejudice will result to an adverse party (such as where a party briefs both a waiver and merits argument in response), a court using the factored approach could look past counsel to the sophistication of his or her client and the importance of the interests at stake to equitably apply waiver rules. Just as a pro se litigant who cannot afford counsel ought not be deprived access to justice, an unsophisticated party that trusts the wrong lawyer calls out for a certain degree of judicial protection not afforded under the current ethics rules.

The question then becomes how such a change could be wrought. The answer here is quite simple in light of the resounding success of the liberal construction rules applied to complaints. Federal Rule of Civil Procedure 8(e), as noted *supra*, provides that “[p]leadings must be construed so as to do substantial justice.” As detailed in Part II, many of the courts granting pro se litigants the benefits of liberal construction on appeal do so in reliance on this rule as well as Supreme Court decisions validating its application to complaints and other pleadings. As a result, it is only a small leap to see the procedural process by which the factored solution to the pro se liberal construction problem could be brought about—the Federal Rules of Appellate Procedure. Neither the Federal Rules of Appellate Procedure nor the local rules of any geographic circuit contain an appellate counterpart to Rule 8(e). Adopting such an appellate rule, however, would provide a generally applicable standard bolstering the circuits’ use of judicial discretion when employing waiver while avoiding the problems presented by reliance on a freestanding pro se/represented classification scheme. Importantly, Rule 8(e) does not discriminate. It requires all pleadings to be construed to do justice and leaves the courts with authority to decide how to accomplish that end on a case-by-case basis. Thus, a rule of appellate procedure requiring all briefing to be construed so as to do justice would empower the court to grant exceptions where equity demands it for both pro se and represented parties and stay its hand where strict enforcement is appropriate.

CONCLUSION

Pro se litigation is an increasingly significant part of the federal docket and, in particular, the dockets of the twelve geographic circuits. Pro se litigants still face daunting challenges when they approach the courthouse alone, but they no longer submit to a single stereotype justifying sweeping pronouncements and per se rules. While liberal construction of appellate

briefs is not in itself a bad thing, it has a tendency to create differing degrees of judicial access on the basis of an increasingly irrational distinction. By acknowledging pro se status for what it is—a warning rather than a conclusive trigger—and adopting a reasoned, principled approach to granting waiver exceptions through a rule of general applicability, the federal courts of appeals will not only improve access to justice for pro se litigants but also better protect the needs and interests of all litigants while making the most of the adversarial process.

