CIVIL PROCEDURE

Chapter 1

The Study of Civil Procedure

§1.1 What This Course Is About: Civil Litigation and the Adversary System

Welcome to law school, and welcome to Civil Procedure. As you look through your list of courses, you encounter some familiar words, such as Property, Contracts, and Criminal Law. You also encounter at least one strange word — Torts. And then there is a class for which the words present no real problem, but as to which the words do not tell you much — that's our class, Civil Procedure. In this chapter, we discuss the course — what it addresses and why it is important — and some background topics that will set up our detailed study. Many students consider Civil Procedure the most difficult first-year class. If you are one of those students, take heart in the fact that you are not alone. More important, however, take steps to get a handle on the course. This book is intended to do just that.

Why does Civil Procedure give so many students trouble? There are two main reasons. First, Civil Procedure — unlike your other first-year courses — is foreign to your experience. Every person starting law school has had some exposure to Property, Contracts, Torts, and (perhaps) Criminal Law. For example, maybe you have entered a contract to rent an apartment or to buy a car. In fact, many of us have encountered issues relating to these core first-year classes in daily family life. When you were young,

maybe you received an allowance for doing certain chores; that was a contract. Or maybe you left your shoes on the stairs and someone tripped over them and fell; that was a tort. Or maybe you and a sibling disagreed about the ownership or right to possess a CD or an article of clothing; that was a property dispute. These are everyday occurrences. But before coming to law school it is extremely unlikely that you encountered problems relating to *in personam* jurisdiction or the subject matter jurisdiction of the federal courts or the right to a jury trial. Put simply, Civil Procedure is full of topics most of us have never seen before law school.

Second, Civil Procedure presents a remarkable mix of different kinds of material. Some of the topics, including pleadings and discovery, are intensely mechanical, and demand memorization of some fairly wooden rules, including temporal limits on when parties must accomplish certain tasks. In contrast, most of the material is intellectually rich, and occasionally vexing. For example, personal jurisdiction is a particularly amorphous area in which you are expected to use a series of Supreme Court opinions to distill an analytical approach to contemporary problems. At the outset, it is worth noting that the different types of materials — from the relatively mechanical to the relatively amorphous — lend themselves to different approaches in your study. With the mechanical topics, there is often a clear right answer. But as to the amorphous topics (particularly personal jurisdiction and some aspects of the *Erie* doctrine), there is rarely a single right answer. In these areas, you should realize that reasonable people might disagree as to the ultimate outcome, so your goal is not so much to get the right answer as it is to come to a conclusion that is within the realm of reasonable answers. We talk about these different types of materials and approaches to them in each chapter.

Litigation

Civil Procedure is about *litigation*, which is the basic model by which disputes are resolved in our society. Suppose someone does something that harms you — maybe by negligently driving her car, or punching you in the nose, or breaching a contract, or stealing your property. How do you resolve your grievance with that person? One possibility is to engage in "self-help," by which you redress the wrong personally; you might want to punch the perpetrator in the nose, or enter her property to seize what she stole. This is usually a disastrous choice, because you simply compound the wrong by perpetrating one yourself. Another possibility is to contact the person who harmed you and demand some compensation or other remedy. This often works, as people quite frequently work out their differences informally. If such efforts fail, however, what do you do? The classic course for dispute resolution is *litigation* — the process by which you sue the wrongdoer, by which you "take her to court." The dispute is

resolved by the judicial system through the litigation process. Litigation, then, is a socially acceptable method for resolving our disputes.

Indeed, litigation is *publicly funded* dispute resolution. The taxpayers provide the courtroom, the judge, and the bureaucratic instrumentalities by which the dispute (now usually called a *case* or *lawsuit*) is resolved. Obviously, not all disagreements in our society are determined by litigation. By far most disputes are resolved informally along the lines noted above — the parties work it out without filing a case. There is also a panoply of alternative dispute resolution (ADR) mechanisms by which parties can reach a resolution without going through the classic litigation process; we discuss the major ADR mechanisms (such as arbitration and mediation) in §1.3. But all these other methods for resolving disputes exist "in the shadow" of litigation. The fact that we call these other devices "alternatives" demonstrates that litigation is the norm. Again, that does not mean that *most* disputes are resolved by litigation. It simply means that litigation is the societally endorsed, publicly funded mechanism against which alternatives are measured.

Civil Litigation

Our course is about civil litigation. In this context, "civil" is juxtaposed to "criminal." For present purposes, it is helpful to think of litigation as falling into one or the other category. In a criminal case, a government (whether federal, state, or local) commences litigation against a defendant who has allegedly violated a law intended to keep the public peace. The goal of criminal litigation (called a *prosecution*) is to vindicate that public interest. If the criminal defendant is found guilty in the criminal litigation, the result can be some form of punishment — perhaps a fine, perhaps incarceration. Every day, in every newspaper, there are plenty of stories about criminal prosecutions. This course has nothing to do with them.

Instead, we deal with litigation aimed at vindicating *private* rights. Civil litigation is not brought by the government to punish someone for doing something against the public peace. Instead, it is brought by one who has been wronged by another.[1] That person is the *plaintiff* and the person who wronged her (whom she sues) is the *defendant*. In the civil suit the plaintiff seeks private remedies from the defendant for the harm done — often money[2] to compensate for damage done to the plaintiff's

[1] A government can be a party to civil litigation. For example, if the government concludes that one of its suppliers of goods has breached the contract between them, it can sue. The case would not be a criminal prosecution, but a civil case, by which the government seeks to vindicate its private rights.

[2] Money to compensate the plaintiff for harm done by the defendant is usually called *damages*. It is a common form of relief sought by plaintiffs, but is not the only one. In §1.2.3 we discuss damages and other commonly sought remedies.

automobile or to pay the medical bills incurred because of the defendant's actionable behavior. So in this course, we do not use the word *guilty*. That is a criminal law concept. Instead, we talk about a defendant's being *liable* to the plaintiff for some civil remedy, such as money to compensate for the wrong caused by the defendant's behavior.

Frequently, the same act or omission by the defendant will constitute both a crime and a civil wrong. The different goals of criminal and civil litigation can be demonstrated by looking at a simple example.

- While you are in class, suppose *D* breaks into your apartment and steals your television, DVD player, and stereo equipment; *D* then sells them to a third party. *D* has committed a burglary, and the government (probably the state) may prosecute *D* for that crime. If the state wins in that *criminal litigation*, *D* will be found guilty of burglary and will be punished, perhaps by a jail term.
- The criminal litigation vindicates the public's interest in dealing with one who violates basic rules by which we live in a decent society. But it does nothing *for you personally*. Putting *D* in jail does nothing to compensate you for the loss of your television, DVD player, and stereo equipment. To recover for those losses, you may file a *civil* case, seeking to recover money from *D* to permit you to replace the stolen items.[3] This is a civil case because it vindicates your personal rights against another. You would be the plaintiff and *D* would be the defendant. This course addresses *only* this latter type of litigation. Our society adopts the notion that this type of litigation is *adversarial*.

The Adversary System: Roles of the Parties, Lawyers, Jury, and the Judge

It is not enough for a government simply to provide a system for resolving disputes. The system must be perceived as legitimate. The government could decree that disputes between citizens will be resolved by a coin toss by a government official, with the result enforced by government officers. This would certainly resolve disputes (and more quickly than litigation), but it would not comport with any basic sense of justice. The civil justice system must strive to achieve the *fair* resolution of disputes.[4] To be legitimate, we insist that our system provide a fair method to determine the

[3] In many instances, your insurance company will have given you money representing the value of the stolen items (less whatever deductible you may have to pay under your insurance policy). Because of something called *subrogation*, the insurance company will then have the right to sue *D* to recover from *D* for the stolen items. Subrogation is discussed at §12.2. Don't worry about it now.

[4] Throughout the course, you will refer to the Federal Rules of Civil Procedure, which are included in a rules booklet that your professor undoubtedly asked you to purchase. These Rules apply in civil cases in federal (not state) courts, but most states have adopted rules modeled on them. Rule 1 provides that all the Rules "should be construed and

"truth" of what "really happened" and to apply the law to those facts. We can imagine different systems for determining the facts and the truth. For example, the government could investigate and determine when someone's rights have been breached by another and demand that the transgressor compensate the victim. Anglo-American civil justice has never embraced such a pervasive role for the government. Rather, we embrace the *adversary system* of litigation.

The adversary system is based upon self-interest. If an aggrieved person wishes to vindicate her civil claim by suing the person(s) who harmed her, she must take the initiative and sue. The government will not do it for her. And she must pursue the litigation vigorously. If she sues but then fails to keep the litigation going by appropriate action, the court may dismiss for "lack of prosecution." Once the parties are in the litigation process — which starts when the plaintiff sues the defendant — the adversary system requires each party to present her case and to attack the other's with partisan vigor. The adversary system is founded on the notion that the truth is best determined in the crucible of competition between adversaries. From this battle of self-interested combatants, an independent fact-finder (often a jury, but sometimes the judge) determines what likely happened. Thus, the system relies on partisan presentation by self-interested persons (not governmental investigation) to hone the evidence for presentation to a disinterested fact-finder. The purpose is to provide a fair, accurate, and efficient method of determining the likely facts and resolving disputes consistently, in accord with the law.

There are, of course, strict rules for this competition — including very important norms of professional responsibility for the lawyers. Thus, lying or destruction of evidence or other forms of cheating are not permitted. Lawyers who violate the norms can be sanctioned by the court and punished by the bar (including the ultimate sanction of disbarment). Parties who violate the norms can be sanctioned by the court. Within the rules, however, parties are expected to be self-interested, and their lawyers are required to represent them zealously. Within the rules, they may use every ploy, device, and creative effort to secure the best outcome for their client. They can be tough. They can be nasty. They can be sweet. They can be charming and engaging. They are to do what they think best to *win*. Litigation is competition. And it is usually a "zero-sum game" — which means that (usually) one side wins and one side loses.

In this adversary system, the judge's role — at least in theory — is rather limited. Classically, the judge is expected to be a passive umpire. She reacts to requests (called *motions*) by the parties for a variety of court orders (which we will study). At trial, she oversees the presentation of evidence

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administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

in accordance with the rules for admissibility (which you will study in an upper-division course on Evidence), but generally is not inquisitorial.[5] Again, our adversary system relies on the parties and their lawyers to determine what evidence to present and how to present it.

American judges are not completely passive. Judges — particularly in the federal courts (as opposed to state courts) — often ask questions of witnesses at trial, and raise various issues that the parties have failed to pursue. (When a judge raises an issue on her own — rather than in reaction to a motion by a party — she is said to act *sua sponte* — on her own motion.) If the adversary system were absolute, the judge would not take many (if any) *sua sponte* acts. But the adversarial ideal is not absolute. Let's face facts. Not all parties have equal skills or equal resources. Similarly, not all lawyers have equal skills or resources. Occasionally, a judge may inject herself into the questioning of a witness at trial to correct a mistake made by a lawyer. For example, if a lawyer failed to ask a witness about a particular issue that is relevant to the outcome, the judge might ask the question. After all, the goal is justice. The judge's limited intervention in such circumstances is probably a good thing. On the other hand, though, the judge is to remain impartial, and cannot allow herself to become so involved as to lose even the appearance of impartiality. Most judges are extremely good at drawing an appropriate line between avoiding undue involvement (on the one hand) and avoiding an unjust outcome based upon a technicality (on the other).

The role of judge as a largely neutral umpire has eroded significantly in the past generation, in response to increasingly complex litigation. As discussed in Chapters 12 and 13, civil litigation can become quite complex — with multiple claims and parties packaged into a single case. In some instances — especially in the class action (which we study in §13.3) — the court must become involved to ensure adequate representation of the interests of persons who, while not technically parties, may be affected by the outcome of the litigation. Lessons learned in complex litigation have permeated procedural rules generally, and it is now becoming routine to think of "managerial judges" — judicial officers whose job description has become increasingly bureaucratic. As we see in §§8.5 and 8.6, judges (especially in the federal courts) are required to take an active role in ensuring that the case keeps moving; to some judges, the job has become less judicial and more bureaucratic. In part, the emergence of managerial judges reflects the wide perception of a "litigation explosion" over the past few decades. There is much debate about the level of frivolous litigation filed in this country, and concern with abusive litigation has spurred some procedural innovations requiring greater oversight by judges. We see such provisions throughout the course.

[5] Judges in most continental European countries, in contrast, are inquisitorial, and take an active role in formulating the presentation of evidence at trial.

Litigation Is a (Potentially Lengthy) Process

Based on television shows and movies, most of us think of litigation as the trial itself — the nerve-wracking, dramatic moments in the courtroom, with the judge presiding, the jury listening and watching attentively, and a witness testifying on the stand in response to questions by razor-sharp lawyers. Of course, there are such moments in the real world. But most litigation moments — even in trial — are not riveting. More important, you should understand that the trial is just the tip of the iceberg. Litigation is a *process* that *may* lead to trial. In fact, the overwhelming majority of civil cases *never* go to trial. An empirical study of federal civil cases in 2002 found that only 1.8 percent of cases go to trial.[6] Why? Because in the vast majority of cases, the parties reach a settlement sometime during the process. In others, the court may terminate the case without trial, through motions to dismiss, for summary judgment, or other pretrial mechanisms for resolution.

It is important to understand that litigation is usually a lengthy process. Depending on the court system, litigation of a case that does go through trial will usually be measured in years, not in months. Why? Because there are many more parts to the process than the trial. Indeed, the plaintiff and her lawyer have a great deal to do even before filing the case. For one, they must decide *where* to file the case. As we will see, parties often spend a great deal of time and money litigating over *forum selection* — that is, whether the case is in a proper court. The decision implicates a variety of important doctrines, including personal jurisdiction, subject matter jurisdiction, and venue. In addition, there are questions of tactics and strategy: What location would be most convenient for the plaintiff and perhaps not ideal for the defendant? What court system (federal or state) might be most advantageous to the plaintiff (perhaps in terms of her lawyer's familiarity with the judges or the geographic area from which a jury will be drawn)? In what court is the litigation most likely to proceed more rapidly? In what court is the lawyer most comfortable? The question of forum selection is enormously important — and the course spends a good deal of time on it.

Further, before filing suit, the plaintiff and her lawyer must determine what to put in the complaint. More specifically, what *claims* (or *causes of action*) will the plaintiff assert, and what remedies will she seek? These are important questions, the answers to which are informed by the *substantive law*. Some substantive law is created by the legislative branch of government, for example, when Congress permits plaintiffs to sue to recover for deprivations of federal civil rights under 42 U.S.C. §1983. But

[6] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004) (the percentage given in text for 2002 is contrasted with data from 1962, when 11.5 percent of cases went to trial).

many claims are created by *common law* — that is, by court decision. Most of the claims treated in Contracts, Torts, and Property are common law claims.

Civil Procedure does not prescribe the elements of these various claims. Those elements — what one must allege and prove to win a case — are prescribed by the substantive law, covered in other courses (notably Contracts, Torts, and Property). Civil Procedure provides the mechanism — the process (litigation) — by which disputes over such substantive claims are resolved. Civil procedure is "trans-substantive" — it provides a theoretically content-neutral mechanism for resolving disagreements. In other words, Civil Procedure establishes the method by which someone would vindicate a right given her by the law you learn in courses such as Contracts, Torts, and Property.

Once the plaintiff files the case — once it is in what we can call the "litigation stream" — the law of Civil Procedure prescribes the rules by which the plaintiff and the defendant proceed. Though movies and television focus on the trial, the case must progress through various stages of litigation — including pleadings, motions, discovery, possible pretrial adjudication, conferences, and meetings — before getting anywhere near trial. That takes time. Again, outside small claims matters and some family law disputes, for which there are usually streamlined simplified procedures, the litigation stream in most cases takes years. In some especially congested courts, it is possible that the parties will not get to trial (if the case goes to trial) for five years after filing. During that time, the parties are engaged in pretrial litigation (and waiting in line for trial). Section 1.4 presents an overview of the litigation process, focusing on how the various subjects of Civil Procedure fit together.

Litigation Is an Expensive Process

We said above that litigation is publicly funded dispute resolution. That means that the public pays for the courthouse, the judge, and the bureaucracy necessary to support the system. But the public does not pay the costs and attorneys' fees incurred in the litigation. Each party bears her own costs and attorneys' fees, at least initially.

It is important to distinguish between these two categories of expense. Costs are the general expenses of litigation *other than* attorneys' fees. These include fees charged to file a case, fees incurred in notifying the defendant of the litigation, expenses of discovery, witness fees, and the like. Attorneys' fees, obviously, are the fees charged by the lawyer to represent the party. Generally, attorneys bill for their services by the hour. They keep detailed records of the hours spent on each matter, and often

bill monthly or quarterly. Instead of billing by the hour, the plaintiff's lawyer may take the case on a contingent fee, which means the lawyer recovers a fee only if the plaintiff recovers from the defendant. A contingent fee is set as a percentage of the recovery, and is agreed to in advance. It is important to consider how the requirement that each party bear her own costs and attorneys' fees affects the bottom line in litigation.

- *P* sues *D* for breach of contract. Let's assume that under the relevant substantive law of contracts, *P* is entitled to recover $300,000 from *D*. In other words, *D*'s breach of the contract with *P* caused *P* $300,000 worth of harm. *P* sues *D*. The case proceeds through the various stages of litigation and, after three years, goes to trial. After hearing all the evidence, the jury agrees with *P*'s version of the facts and returns a verdict of $300,000 for *P*. The court enters judgment in *P*'s favor for $300,000.
  - From all appearances, *P* has prevailed completely, and should be ecstatic. But is she? She has to pay her lawyer, who, let's say, took the case on a one-third contingent fee. So the lawyer gets $100,000 (one-third of *P*'s recovery). In addition, *P* has had to pay various costs — including filing fees and expert witness fees — of, say, $10,000.
  - The law provided that *P* was entitled to recover $300,000 — in other words, that $300,000 would compensate her for the harm caused by *D*. It is often said that the recovery was to "make her whole." But did it? Though the jury agreed that *P* should get $300,000, in fact she will pocket (in our hypothetical) $190,000. She had to pay $100,000 in attorneys' fees and $10,000 in costs.[7]
- Now let's see it from *D*'s viewpoint. Suppose *D* is convinced that she did not do any of the things *P* alleges. She litigates the case through trial and the jury returns a verdict in *D*'s favor. The court enters judgment for *D*. The judgment provides that *D* does not owe anything to *P*.
  - From all appearances, *D* has prevailed completely, and should be ecstatic. True, she does not have to write a check to *P*. But she has been writing checks to her lawyer all along. She may have paid $150,000 in attorneys' fees and $10,000 in costs.
  - According to the law, *D* did nothing wrong. Yet she has been sued and is out of pocket $160,000.

In both situations — whether *P* won or *D* won — we have a nagging sense that the result is not fair. When *P* won, she was supposed to get $300,000 but really only got $190,000. When *D* won, she was faultless, but ended up $160,000 in the hole. Some commentators have argued that the

[7] Not only that, but it took a long time to vindicate the claim. The harm of $300,000 was caused, say, three years before *P* wins her case. If she had had that $300,000 over the three years, she would have been making interest on the money. So one might expect the law to require *D* to pay interest on the claim. Generally, however, interest begins to accrue only when the judgment is entered. So *P* has lost three years' worth of interest on that money.

law should permit "shifting" of costs and attorneys' fees. Put bluntly, the argument goes, the loser should be required to pay the winner's costs and attorneys' fees. This "loser pays" system is followed in many other countries, including Great Britain. The American system has adopted something of a middle course — known, not surprisingly, as the "American Rule."

In litigation in the United States, each party pays her own costs and attorneys' fees as the case progresses. Once the case is resolved, however, the American Rule provides for some shifting of the ultimate liability — generally the prevailing party may recover her costs — *but not her attorneys' fees* — from the losing party. In the federal system, this rule is reflected in Federal Rule 54(d)(1), which creates a presumption that the winner is entitled to recover her costs from the loser.[8] Detailed coverage of this point is beyond our scope, but it is worth noting that not every litigation expense qualifies as a cost under Rule 54(d)(1).[9] Instead, that Rule permits shifting of only certain litigation expenses set forth in 28 U.S.C. §1920. In addition, statutory caps limit the amount that can be recovered for certain costs. Quite frequently, the limited amount recovered does not come close to the expense actually incurred. Thus, though it is generally said that the prevailing party recovers her costs from the loser, in fact the recovery will not reimburse that party for her out-of-pocket expenses.

More significantly, the American Rule creates a presumption that each side bears her own attorneys' fees — by far the most significant expense incurred in litigation. Persons are free to contract around the American Rule — and frequently do. It is commonplace for parties entering a contract to provide that — in the event of litigation — the prevailing party will recover attorneys' fees from the loser. (In fact, you are probably a party to such a contract — check your contracts with credit card and insurance companies.)

Occasionally, courts recognize a common law exception to the American Rule, and order a party to pay the other party's attorneys' fees. For example, in *Chambers v. NASCO, Inc.*,[10] the Supreme Court upheld a general power to make such an order against a party who engages in bad faith, vexatious litigation. For the most part, though, courts are reluctant to create exceptions to the general rule. This attitude reflects a general sense

[8] This presumption is subject to some exceptions. For our purposes, the important exception will be discussed in §4.5.3, which addresses 28 U.S.C. §1332(b). That statute permits the court to force a prevailing plaintiff to pay her own costs and the defendant's costs if the plaintiff recovered less than a certain amount. Don't worry about it now.

[9] Costs recoverable under Rule 54(d)(1) are usually called *taxable* costs. The word has nothing to do with whether one pays income tax. Taxable simply refers to the types of costs recoverable. We discuss this topic in more detail in §9.3. *See generally* 10 Moore's Federal Practice §54.101.

[10] 501 U.S. 32, 43-51 (1991).

that fee-shifting provisions should come from the legislative branch.[11] Congress has passed many statutes addressing the award of attorneys' fees, some of which permit the prevailing party to recover her fees from the losing party. The broadest fee-shifting provisions permit recovery by successful parties claiming discrimination in violation of various federal laws.[12]

Outside such piecemeal efforts, however, federal and state legislatures have continued to embrace the American Rule. While there is a facial appeal to the "loser pays" system, as seen above, proponents of the status quo fear that broad shifting of attorneys' fees would make plaintiffs too timid to attempt to vindicate their rights. A plaintiff — particularly one of limited means — might eschew the right to sue if losing meant that she would have to pay the defendant's attorneys' fees. Indeed, there may be something particularly American about the American Rule — it seems consistent with our sense of individual justice and paying one's own way. There are strong arguments (and feelings) on both sides of the debate. Suffice to say that every effort to abandon the American Rule has failed. The result is simply that litigation — even for the winner — is an expensive proposition.

§1.2 Background and Recurring Themes

§1.2.1 Federalism

Throughout your career as a law student and lawyer, you will encounter issues relating to the relationship between the federal and state governments. In your first-year studies, you address such issues in Constitutional Law as well as in Civil Procedure. In this section, we discuss basic background materials that play a role in Civil Procedure.

Each person in the United States is subject to the authority of at least two governments — the federal government and that of a state.[13] The federal government (or national government) is one of limited powers. The

[11] *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 263 (1975) (rejecting the notion that the judiciary can "jettison the traditional rule against nonstatutory allowances to the prevailing party . . .").

[12] *See, e.g.*, 42 U.S.C. §1973l(e) (Voting Rights Act); 42 U.S.C. §3613(c)(2) (Fair Housing Act).

[13] Some people in the United States don't live in states, but in federal enclaves such as the District of Columbia or territories such as Guam or the Commonwealth of Puerto Rico. For such persons, the federal government plays two roles — that of the national sovereign and also that of the local sovereign. For instance, Congress (in its role as legislature for the federal government) passes laws of national application and also passes local laws to govern the District of Columbia.

Constitution of the United States (which is included in your Federal Rules booklet and which you should read at your leisure early in your studies) does several things. For starters, the Constitution *creates* the federal government. Without it, there would be no national government. There would be instead 50 separate sovereigns, un-united. After the War of Independence there were 13 colonies. The leaders of that generation understood that certain functions were best performed centrally. For example, it made no sense to have each colony coin separate money, or to impose barriers to travel or trade among the colonies, or for each colony to raise its own army. The Founders concluded that things like coinage and commerce and defense should be handled centrally.

The first experiment at centralization — the Articles of Confederation — did not work well. Finally, the Framers met in Philadelphia to work out a Constitution, forging a national government to perform certain tasks, and leaving the independent state governments in charge of the rest. Thus, in the Constitution, the independent states forming the United States actually *cede* power to form the new national government. This process emphasizes that the federal government is one of limited powers. As the Tenth Amendment makes clear, powers not ceded to the federal government in the Constitution remain vested in the states or in the people. So the federal government is not an oppressive omnipresence — it exists solely because the states and the people decided to centralize certain functions in a national power.

The Constitution spells out the powers of each of the three branches of the federal government. Article I concerns the legislative branch, and establishes that all federal legislative power is vested in the Senate and House of Representatives. It also establishes rules for when those bodies shall meet, how membership is allocated, and age and residency requirements. It expressly lists the powers to be exercised by the national legislature and restricts the states from various acts, including imposing duties and entering treaties. Article II addresses the executive branch, and provides that the national executive power is vested in the President of the United States. It details the requirements for office and the powers of the presidency, including the authority to appoint (with the advice and consent of the Senate) various federal officers, including federal judges. You will study Articles I and II in considerable detail in your course on Constitutional Law.

In Civil Procedure, we focus on Article III of the Constitution, which establishes the judicial branch of the federal government. It requires the existence of only one federal court — the Supreme Court of the United States — but permits Congress to establish lower federal courts, as discussed in §4.3. Consistent with the limited nature of federal power, it establishes that the federal judicial power extends only to certain types of cases (listed in Article III, §2, paragraph 1). This is an extremely important point

in Civil Procedure — federal courts *can only hear certain kinds of disputes*. If a case does not fall within this federal "subject matter jurisdiction," it can only be heard in a *state* court.

Thus, from the outset, keep in mind that there are two completely separate sets of courts — federal courts and state courts. State courts, essentially, can decide *any* type of dispute. But federal courts can only hear a limited range of disputes. We discuss these points in detail in Chapter 4. For now, it is enough to note two of the types of cases that can be heard in federal courts — those between citizens of different states (called *diversity of citizenship* cases) and those arising under federal law (called *federal question* cases).

- *P*, a citizen of New York, enters a contract with *D*, a citizen of California. *D* breaches the contract by failing to perform as required by the agreement. *P* may sue *D* in a federal court, because the dispute is between citizens of different states.[14] The Founders thought it important to permit the federal courts to entertain such interstate disputes, as we see in §4.5.2.[15]
- *P* claims that *D* terminated her employment in violation of federal law prohibiting discrimination on the basis of national origin. *P* may sue *D* in federal court, because her claim arises under federal law. The Founders thought it important to permit the federal courts to entertain disputes involving federal law, as we see in §4.6.1.[16]

Let's not get distracted by detail. For now, focus on the big picture — the federal judicial system has limited subject matter jurisdiction. Courts in that system can only decide cases falling within the judicial power of Article III, §2, paragraph 1 of the Constitution; the two main examples are cases between citizens of different states and cases arising under federal law.

In addition, Article III, §1, provides extraordinary protection to federal judges. They are appointed by the President, with approval required by the Senate. Federal judges appointed under Article III never face an election, cannot be removed by the voters, and have lifetime tenure, during which their pay cannot be reduced. They can only be removed by impeachment (which has happened only a handful of times in our nation's history). In §4.4, we discuss this remarkable job security accorded federal judges.

[14] By statute, the amount in controversy in a diversity of citizenship case must exceed $75,000. We discuss this in §4.5.3.

[15] Interestingly, *P* is not *required* to file this case in federal court. If she prefers, she can litigate in state court.

[16] Here, too, *P* generally is not *required* to file the case in federal court. If she prefers, she can litigate the federal claim in state court. There are some (very few) federal question claims that must go only to federal court — over which federal courts have "exclusive federal question" jurisdiction. There are very few of these, though. See §4.6.1.

The point is simple: The Founders thought it important to give federal judges freedom to make decisions without fear of reprisal. A federal judge can rule against local interests without fear of being voted out of office. Likewise, she can rule against Congress without fear that that body will reduce her salary. State court judges, in contrast, do not have these protections; generally, they face an electorate at some point to get or to keep their jobs.

In addition to forming the national government and vesting its three branches with power, the Constitution also guarantees individual rights and liberties. Thus, for instance, neither the federal nor state government may abridge an individual's freedom of speech,[17] or impose cruel and unusual punishment on anyone, or deprive someone of life, liberty, or property without due process of law. It is helpful to think of such rights this way: By joining the Union, the states surrendered absolute power. By becoming a member of the United States, each state essentially agreed that it would not abridge free speech, would not impose cruel and unusual punishment, and would not deprive persons of life, liberty, or property without due process. (There are, of course, other individual liberties; we mention these three for simplicity.) One of the major topics in Civil Procedure — personal jurisdiction — concerns one of these federal constitutional limitations on state power. Specifically, due process requires that a state cannot enter a binding judicial order against someone unless that person has sufficient contacts with the state. We study this in detail in Chapter 2.

So for our purposes, it is important at this stage to focus on three things. First, the relationship between the federal and state governments is complex and evolving, and will be studied in Constitutional Law and Civil Procedure (and other courses in the upper division of law school). Second, federal courts have authority to adjudicate only certain types of cases, while state courts can entertain virtually any type of dispute. Third, the Constitution imposes limits on the power of states (including the state courts). One of these is that a state court cannot enter a valid judicial order without affording the defendant due process. We now turn to the structure of judicial systems. One of the important issues we consider is the interaction of the federal and state court systems.

[17] The First Amendment to the Constitution provides that the federal legislature may not abridge freedom of speech. As you will study in Constitutional Law, the Fourteenth Amendment is interpreted as incorporating several of the protections of the Bill of Rights — including free speech — and providing that they are also not subject to encroachment by *state* governments.

§1.2.2 Roles of Trial and Appellate Courts (and the Interaction Between the State and Federal Courts)

The federal government and each state has a judicial *system* — a group of courts that serve different functions in the resolution of disputes. These systems can differ markedly from state to state, but some characteristics are common to all. An important common characteristic is the bifurcation between *trial* courts and *appellate* courts. Each system must have a trial court. Indeed, most of our course on Civil Procedure addresses activities in the trial court. The basic litigation stream discussed in §1.1 — involving pleadings, discovery, motions, and adjudication, including trial — takes place in the trial court. The process may take years or it may be over very quickly (as when the defendant defaults or the court dismisses the case early in the proceedings).

In the trial court, a single judge presides over the case at a time. In most systems (including the federal system), the same judge oversees the case at every stage of the trial court litigation. In some states, such as California, different judges may rule on different aspects of the case; for example, one judge might rule on motions and another may oversee the trial. But even in such a system, only one judge is involved in making determinations at a time. (If the case goes to trial, a jury might be empaneled to decide the facts, but the judge presides over the trial.) The trial court is called a court of *original* jurisdiction, which signifies that the case is instituted there and the outcome of the dispute is determined there. The trial court provides the mechanisms for processing the case, including discovery, and for determining the facts, applying the law to the facts, and thus determining who wins and who loses. Unless the parties settle the case, the trial court eventually enters a judgment, declaring who wins and what, if any remedy, is to be awarded. Movies and television shows about lawyers focus on events in the trial court. Here — at least at trial — we have the courtroom drama — the witnesses breaking down on the stand, the jury swayed by the articulate lawyer.

In appellate courts, there is no jury, there are no witnesses, there is no presentation of evidence. Instead, lawyers for each party present oral argument (often 30 minutes per side) to a panel, usually of three judges. The appellate court does not determine what happened and apply the law to those facts — that is the role of the trial court. The role of an appellate court is to determine whether the trial court did its job properly. If so, the appellate court can affirm the judgment of the trial court. If not, the appellate court can reverse or vacate the judgment and remand to the trial court for further proceedings. The party instituting the appeal is the *appellant*. The other party is the *appellee*. Interestingly, there is no federal constitutional right to appeal the result in a civil case. Thus, in federal courts the right to appeal from the federal district court to the United States Court

of Appeals is created only by statute; it is a matter of legislative grace. The same is true in many, but not all, state courts. In general, one may appeal only from a final judgment — that is, the trial court's ultimate decision on the merits of the entire dispute. The numerous interlocutory (or non-final) decisions of the trial court generally cannot be appealed as they are made, but must await entry of the final judgment.

On appeal, the appellate court does not second-guess everything the trial judge did. Generally, it reviews only those things to which a party made a timely objection at the trial court and which that party then raised on appeal. Because the appellate court does not entertain the presentation of evidence — does not, for instance, see witnesses testify — it is not in a position to second-guess the trial court's determination of the facts. Instead, it defers to the trial court on such issues, and will reverse only if the trial court's findings are "clearly erroneous." The appellate court makes this determination by reviewing the trial court record — reading the transcript of the trial, reviewing the documents and other evidence adduced at trial, etc. On questions of law, however, the appellate court does not defer to the trial court. Rather, it determines the law *de novo* — afresh, on its own. So if the trial court made an error of law — for example, by putting the burden of proof on the wrong party, or misstating the law, or allowing the introduction of improper evidence — the appellate court may reverse the judgment and remand for further proceedings, including, if necessary, a new trial. We discuss standards of appellate review in detail in §14.7.

Not every trial court error will result in reversal, however. The error must be "prejudicial," as opposed to "harmless." That is, sometimes a trial judge will make a mistake, but the mistake did not likely affect the outcome of the case. Such an error is harmless, and will not result in a reversal. But some errors do affect or at least taint the outcome. Such errors are prejudicial, and will result in reversal.

From this brief discussion, it is clear that our system of justice values *finality*. There is one trial court and, generally, one chance to litigate issues. If a party does not like the outcome, she can appeal, but the appellate court will reverse only if there was a clearly erroneous factual finding or a prejudicial error of law. *But, unless the judgment is set aside or a new trial ordered, or unless it is reversed on appeal, the disgruntled party does not get another chance to litigate the issues.* So if one does not like the result of her case at trial court, there is no opportunity to "do over" or to take a Mulligan.[18] Indeed, in Chapter 11, we study doctrines that limit the party's ability to relitigate issues *even in a different case.*

In most judicial systems, including the federal system, there are actually two levels of appellate courts. The first, known in many states (and

[18] *Mulligan* is a golf term. When you hit a lousy tee shot, taking a Mulligan means you hit a new tee shot and do not count the lousy one. Mulligans are wonderful if you play like I do.

the federal system[19]) as the Court of Appeals,[20] performs the function we just discussed. It is there to ensure that the trial court reached plausible factual findings, and applied the right law and applied it correctly. It is an "intermediate" court, because it is perched above the trial court but below the jurisdiction's supreme court. That supreme court is also an appellate court.

Before discussing the role played by supreme courts, however, we should note that not all judicial systems have an intermediate court. In Nevada, for instance, there is no court between the trial court and the supreme court. In Virginia, there is a Court of Appeals, but it has very limited jurisdiction, and does not hear appeals in general civil cases. Where the intermediate court does exist — as in the federal system and in most states — appeal to that court is usually "of right." That means that a party who loses at the trial court has a right to have the appellate court review the case (assuming, of course, that the party taking the appeal satisfies the procedural requirements for doing so). Again, in the federal system, this right is not secured by the Constitution, but is granted by statute.

Generally, there is no right to appeal, however, to the jurisdiction's supreme court.[21] In most civil cases, review by the supreme court is discretionary. Thus, the court is not required to hear any particular civil case,[22] and does so only if convinced by the party seeking review that the case is sufficiently important to warrant its attention. So though the supreme court is an appellate court, and serves the appellate function described above, it does so in a very selective way. Because it hears such a small number of cases, it looks for those in which a pronouncement by the ultimate court is needed to bring clarity and certainty to the law. For example, the Supreme Court of the United States may agree to hear a case that raises an issue on which the various Courts of Appeals have reached different conclusions. Thus, supreme courts generally act only when a case raises an important issue on which there is some uncertainty or other need for definitive guidance. Supreme courts rarely agree to review a case

[19] In the federal system, the Court of Appeals is divided geographically into circuits, most of which have a numerical name. For instance, the United States Court of Appeals for the Eleventh Circuit (which lawyers simply call "the Eleventh Circuit") hears appeals from federal trial courts in Florida, Georgia, and Alabama. Congress sets the geographic boundaries by statute. In addition, Congress sets the geographic boundaries of the federal trial courts — the United States District Courts.

[20] Not all states follow suit. In California, this court is known as the Court of Appeal (singular). In New York, it is called the Appellate Division.

[21] Again, there are some exceptions. In Nevada, there is a right to appeal trial results to the Nevada Supreme Court. Such appeal of right of a civil case to the supreme court is extremely rare.

[22] Remember, we deal in this course with civil cases. In many states, the supreme court is required to review criminal convictions in which the death sentence is imposed.

simply to correct some mistake on an established matter — that is something the intermediate court of appeals ought to do.

The chart below shows the typical tripartite court system, with the trial court at the bottom, the intermediate appellate court in the middle, and the supreme court at the apex. On the left side are the names of those courts in the federal system. The trial court is the United States District Court, which is always followed with a geographic description. For example, in California there are four federal trial districts: The Southern District sits in San Diego, the Central District in Los Angeles, the Northern District in San Francisco, and the Eastern District in Sacramento. In some states, there is only one district, such as the United States District Court for New Jersey. As noted above, the intermediate court in the federal system is the United States Court of Appeals (for whatever circuit is involved). The federal supreme court is the Supreme Court of the United States, which, as you know, consists of nine Justices and sits in Washington, D.C.

On the right side of the chart is the model for most state judicial systems. Trial courts have various names in the different states[23] (and sometimes even within a state). Remember that in some states there is no intermediate court of appeals. The high court in most states is known simply as the supreme court.[24] That court is often called the *court of last resort* because it is the highest court in that judicial system. Courts below it are sometimes called *inferior courts*. This is not a pejorative statement; it does not mean that such courts are not as competent as others. It simply means they are below another court in the judicial system. Thus, a trial court is inferior to an intermediate appellate court. The trial court and intermediate appellate court are both inferior to the supreme court.

Federal System		*State System*
U.S. Supreme Court	HIGH COURT	State Supreme Court
U.S. Court of Appeals	INTERMEDIATE	Court of Appeals (typically)
U.S. District Court	TRIAL COURT	Various names, e.g., District, Circuit, Superior

It is important to understand that the supreme court of each state is the final arbiter on the meaning of state law. No federal court — not even the Supreme Court of the United States — has any authority to tell the Iowa Supreme Court what Iowa law is or should be. Most of us have a sense

[23] In New York, the trial court is called the supreme court.

[24] Here, too, there is some state variation. In New York, the high court is the Court of Appeals. In Massachusetts, it is the Supreme Judicial Court.

that somehow almost any issue can be decided by the Supreme Court of the United States. On television news, we often hear people say, "I'm going to fight this to the highest court in the land — all the way to the Supreme Court." Well, fine. Just realize that the highest court in the land on matters of state law is not the Supreme Court in Washington, D.C. The highest court in the land on issues of Arizona law is in Phoenix. The highest court in the land on issues of New York law is in Albany.

It is also important to understand that a case filed on one side or the other — either in the federal trial court or a state trial court — is appealed *through that system.* In other words, a case filed in the state trial court in California is appealed to the California Court of Appeal and ultimately to the California Supreme Court (if that court agrees to hear the case). A case cannot be appealed from a state trial court to a federal appellate court; neither can a case filed in a federal trial court be appealed to a state appellate court.

For our purposes, there is one very important exception to the model we just laid out: The Supreme Court of the United States may exercise appellate review over state court decisions, *but only if two things are true.* First, the case must have been appealed all the way through the state system. That means that review at the United States Supreme Court is precluded until a party has sought review by the highest court of the state system that could hear the case (usually, that is the state supreme court).

- *P* sues *D*. The case is fully litigated and the trial court enters judgment for *P*. *D* appeals to the intermediate court of appeals, which affirms the judgment. *D* cannot seek review by the United States Supreme Court because the intermediate court of appeals is not the state's highest court. *D* must seek review at the state supreme court. If that court agrees to hear the case, the party who loses there can seek review by the United States Supreme Court.
  - What if the state supreme court refuses to hear the case? After all, the state supreme court's review is usually discretionary. Then the party who lost at the intermediate court of appeals can seek review by the United States Supreme Court, because review was sought at the highest state court. The requirement, then, is not that the state's highest court actually render a decision. Rather, a party must have "exhausted" all options in the state system before seeking review at the United States Supreme Court.[25]

Second, the United States Supreme Court can review *only* matters of federal law.[26]

[25] *See* Costarelli v. Massachusetts, 421 U.S. 193 (1975).
[26] This is the upshot of 28 U.S.C. §1257.

- The Iowa Supreme Court holds that the state law on abortion prohibits abortions in the third trimester of pregnancy. The United States Supreme Court has no authority to review this holding, because it concerns state law, on which the state supreme court is the authoritative body.
- The Iowa Supreme Court holds that the state law on abortion does (or does not) violate federal constitutional principles concerning personal privacy. The United States Supreme Court may review this issue, because it is one of federal law — the meaning of the federal Constitution.

Thus, the Supreme Court of the United States exercises its appellate jurisdiction in two types of cases. First, it has discretion to review decisions of the United States Courts of Appeals.[27] These are cases that have been litigated through the federal system — from the United States District Court to the United States Court of Appeals and, now, to the court of last resort in the federal system. Second, it has discretion to review rulings from state courts if (1) a litigant has sought review at the highest state court that could entertain the matter and (2) the issue presented is one of federal law.

As seen above, Supreme Court review in either instance — over judgments by the United States Court of Appeals or over judgments from the highest state court on matters of federal law — is discretionary. A party seeking review by the Supreme Court files a petition for writ of *certiorari*. The writ is granted, and the case reviewed by the Supreme Court, only if at least four of the nine Justices agree that the case should be heard. Such action is extremely rare. In an average year, litigants will seek *certiorari* in more than 7,000 cases; it will be granted in about 100. So the odds of Supreme Court review of any case are exceptionally long. If the Court agrees to hear the case, the party who sought review is called the *petitioner* and the other party is called the *respondent*.[28]

Again, note that lower federal courts — the United States District Court and the United States Court of Appeals — do not have appellate jurisdiction over cases decided in the state courts. Many students seem to have the idea that federal courts are somehow superior to state courts — that a federal court somehow can review what state courts do. As we have just seen, though, federal appellate review of state judgments is quite rare — it can be done only by the Supreme Court, only over matters of federal law, and only in the extraordinary situation in which the Supreme Court grants a writ of *certiorari*.[29]

[27] This is established in 28 U.S.C. §1254(1).

[28] So in a Supreme Court opinion, the party whose name is listed first was not necessarily the plaintiff (who filed the case in trial court). Rather, it is the party who lost in the court immediately below, and who (successfully) sought Supreme Court review.

[29] The United States Supreme Court has *original* (as opposed to appellate) jurisdiction in certain limited situations. Original jurisdiction, as we saw above, means that it sits as a trial court. Under Article III, §2, paragraph 2 of the Constitution, the Supreme Court has

Finally, we need to understand the doctrine of *precedent*, or *stare decisis*. The Latin phrase means "to stand by things decided." When an appellate court makes a holding on a question of law, that holding is *precedential*. That means that it binds all lower courts within that judicial system on that question of law; no inferior court in that judicial system can take a different approach on that question of law. Of course, precedent can be overturned — either by the appellate court that set the precedent or by a higher court.

- Suppose the Georgia Court of Appeals (an intermediate appellate court in that state's judicial system) holds that state law recognizes a particular claim — that it allows someone who has suffered a particular harm to sue the perpetrator of the harm. Lower courts in that judicial system — that is, trial courts in Georgia — must follow that rule on that question of law. The holding of the Court of Appeals establishes precedent for the lower courts in Georgia.
- Suppose the Georgia Supreme Court decides to review the question and concludes that state law does *not* recognize that claim. The state supreme court's holding on this question overturns the Georgia Court of Appeals' holding.[30] All courts in the Georgia judicial system (trial courts and the intermediate appellate court) must follow the precedent set by the state supreme court.

Obviously, decisions by the United States Supreme Court bind all courts in the United States, federal and state, *on matters of federal law*. Thus, the Supreme Court is the ultimate arbiter on the meaning of federal statutes and the Constitution. As suggested above, *stare decisis* is not immutable. A court may determine that relevant changes in law and society lead to the conclusion that precedent be overturned. In 1896, the Supreme Court held that separate but equal facilities for different races did not violate constitutional norms.[31] In 1954, in the landmark decision of *Brown v. Board of Education*,[32] the Court overturned the 1896 holding. In 1842, the Supreme Court held that federal courts could fashion their own common

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trial jurisdiction in cases affecting ambassadors and other public ministers and consuls, and in cases in which a state is a party. Such cases are rare, and usually not discussed in Civil Procedure.

[30] If the supreme court were reviewing the same case in which the court of appeals had made its pronouncement, we would say that the supreme court reversed the lower court's judgment. The term *reverse* connotes that a higher court disagreed with a lower court in the context of the same case. The term *overrule*, in contrast, refers to a subsequent ruling *in a different case* that rejects the holding of an earlier case. Examples of such "overturning" of precedent are given in the next paragraph of the text, with *Brown* and *Erie*.

[31] Plessy v. Ferguson, 163 U.S. 537 (1896).

[32] 349 U.S. 294 (1954).

law for the resolution of disputes between citizens of different states.[33] In 1938, in the famous decision of *Erie Railroad Co. v. Tompkins*,[34] addressed in Chapter 10, the Court overturned the 1842 holding as having usurped state power in violation of the Tenth Amendment to the Constitution. The circumstances that justify a departure from the doctrine of precedent are subject to debate and can be the source of considerable controversy. Your professor may discuss them in Civil Procedure or, more likely, in Constitutional Law or a course on Legal Methods.

§1.2.3 The English Influence and the Bifurcation of Law and Equity

The United States evolved, of course, from British colonies. Not surprisingly, then, much of our procedure and much of our law finds root in England. One pivotal event in English history was the Norman Conquest, which was ensured when William the Conqueror defeated the Britons in the Battle of Hastings in 1066. William revolutionized many things in Britain, including the administration of justice. Before William, the justice system consisted of local courts, run by feudal lords and barons. The local control of these courts reflected the scattered, feudal nature of life in England at the time. William did much to pull the feudal fiefdoms into a more unified whole that mirrored a single country.

William established three sets of royal courts, which did not replace the feudal courts, but existed alongside them. The courts were the King's Bench, the Court of the Exchequer, and the Court of Common Pleas. Each court entertained only certain types of disputes, each of which was denominated by a particular *writ*. For instance, to sue for an intentional tort, the plaintiff would seek a "writ of trespass *vi et armis*," while to sue for negligence the plaintiff would seek a writ of "trespass *on the case*."[35] Over time, the royal courts gradually expanded the types of cases they could hear — by expanding the number of writs they would grant. The local barons were not happy about this, because the expansion of the royal courts' jurisdiction resulted in a contraction of the jurisdiction of the local feudal courts. Ultimately, though, there was little they could do about it, and over time the feudal courts waned in importance.

[33] Swift v. Tyson, 41 U.S. 1 (1848).

[34] 304 U.S. 64 (1938).

[35] It's important to keep in mind that in law school you encounter familiar words in unfamiliar contexts. The word *trespass* is widely used in common parlance to mean the unlawful entry onto another's land. As used here, the word has a broader meaning — a wrong committed against another's property or her person. The English common law courts recognized a dizzying array of writs for various forms of trespass. For example, if someone stole your personal property, you would sue in trespass *de bonis asportatis*.

While expanding their jurisdiction, the royal courts, over the centuries, did two other things, both of which made them less desirable as tribunals of justice. First, they became increasingly rigid; the courts emphasized form over substance. Many plaintiffs with legitimate claims and solid proof lost because of some arcane procedural slip-up.[36] Second, the royal courts were not creative when it came to awarding relief to those plaintiffs who did win. Basically, they recognized one remedy: *damages*, which is a monetary payment. Damages are to this day an important remedy, but there are many cases in which damages cannot make the plaintiff whole.

- *D* trespasses across *P*'s real property[37] every day. *P* sues and wins. The royal courts would permit *P* to recover money to compensate her for the damage by *D*'s trespass. Note how this remedy is aimed only at past behavior — it makes *D* pay for the trespassing she has already done. But it does nothing to prevent future trespassing. If *D* wants to keep trespassing, she may do so, and the only sanction will be payment of damages. In all likelihood, the damages will not be prohibitive, and *D* may find it worth her while simply to pay to trespass daily. Because of the limited remedy of damages, *D* can essentially force *P* to grant her a license to travel across *P*'s land.
  - What *P* wants is a court order telling *D* that she cannot trespass, punishable by holding *D* in contempt of court (which may result in a fine or imprisonment of *D*). Stated in terms lawyers use, *P* wants an *injunction* — an order prohibiting *D* from taking some act in the future. But the royal courts simply did not grant injunctions.
- *D* steals a diamond ring from *P*. *P* sues and wins. The royal courts would require *D* to pay *P* money sufficient to purchase a new diamond ring. But *P* doesn't want a new ring — she wants the one that was stolen, because it had great sentimental value. She wants what lawyers call *specific relief* — a remedy that relates to this particular piece of property. The royal courts, however, would not grant such relief. It was basically damages or nothing.

These two factors — the elevation of form over substance and the limited remedy available — led plaintiffs to seek relief outside the royal courts. Specifically, they started going to the King's Council, which was a

[36] As we see in §7.2, the common law rules of pleading a case were quite unforgiving. If the plaintiff chose the wrong writ (which she had to choose at the outset of the case, when she might not have been clear on the facts), she would lose, even if at trial she showed that she had a right to recover on a different writ.

[37] Real property, or "realty," is land. Many students equate the word "real" with "tangible," and thus conclude that a car is real property, because they can touch it, so it is in some sense real. Don't make that mistake. Real property is land. Period. If you own something that is not land, it is personal property, sometimes called *chattels*. Personal property can be tangible (like a car) or intangible (like an ownership interest in a corporation, usually represented by a stock certificate).

group of officers serving the King. These suitors would ask the King's Council to intervene and to "do justice" in their case. Gradually, the Chancellor, who was a member of the King's Council, began to issue orders in individual cases. These orders were issued on behalf of the King's Council and were aimed at achieving "equity." By about the middle of the fourteenth century, this practice had developed into a separate court, called Chancery (named, obviously, after the Chancellor).

Thus, nearly seven centuries ago in England, there were two completely separate sets of courts: the law courts (which consisted of the royal courts) and the equity (or Chancery) courts. Today, in the twenty-first century, on this side of the Atlantic, this bifurcation of law and equity is still important (as you will see throughout your legal career). But let's complete the story in old England. Over the centuries, equity practice expanded, and the equity court developed a series of useful remedies that were unavailable in the law courts. Equity upheld the assignment of claims (which law courts would not do) and enforced trusts (which law courts also would not do). The equity court even became so brazen that it would issue an order forbidding the enforcement of a judgment from a royal court if the judgment were obtained through fraud. Such an order seemed so invasive of royal court jurisdiction that King James I commissioned a group, headed by Francis Bacon, to resolve the debate. The commission concluded that the equity court indeed had the power to issue an injunction to stop a party from enforcing a fraudulent judgment from a law court. Importantly, because the injunction was issued against the party, and not against the court or judge, it was not an impermissible encroachment of the royal courts' power.

Afterward, the law and equity courts continued to develop independently. They adopted different procedures and terminology. Law courts employed a jury to determine the facts of a case, while equity courts did not. Trials in law courts featured live testimony by witnesses, while equity favored presentation of evidence through sworn written statements, or *affidavits*. At law, a case was known as a "legal action," while equity adjudicated a "suit at equity." At law, the court's adjudication resulted in a "judgment," while at equity the court entered a "decree." At law, the judicial officer was the "judge," while at equity the judicial officer was the "chancellor." Law courts enforced their judgments *in rem*, which (as we discuss in Chapter 2) means "against the property." Equity courts, in contrast, enforced decrees *in personam*, or "against the person."

- A law court enters a judgment against *D* for $50,000. If *D* does not pay the money to *P*, the court will enforce the judgment by issuing an order to the sheriff to seize *D*'s property (her house, her car, her bank account, whatever the sheriff can get) and have it sold at a public auction. The first $50,000 raised at the auction would go to *P* (with the rest going to *D*). If the auction failed to fetch $50,000, *P* is just out of luck. The judgment at

law is enforced against the property — and if the property is insufficient to cover the judgment, tough.

- An equity court enters a decree requiring *D* to return a stolen diamond ring to *P*. *D* refuses to do so. The sheriff can arrest *D* and put her in jail until she agrees to return the ring. The equity decree is enforced against the person, so the court can coerce *D* to do as she was ordered. As my dear late friend Donald Fyr used to say, "equity is into behavior modification."[38]

Most important, law and equity courts differed in the remedies available. Again, law courts were largely limited to awarding damages. There are different types of damages, as you will see, particularly in your courses on Contracts and Torts. Compensatory damages, as the name makes clear, compensate the plaintiff for the harm occasioned by the defendant's act. Punitive damages, as the name also implies, are aimed at punishing a defendant for particularly egregious behavior. It is important to understand, though, that not all awards of money constitute damages. For instance, restitution of unjust enrichment is not damages, and historically was pursued in equity.

- *D* performs services for *P*, for which the bill is $120. *P* gives *D* a $100 bill and a $50 bill, mistakenly thinking that the latter was a $20 bill. *D* has been unjustly enriched by $30. *P*'s claim is not for damages, but for restitution, to disgorge the amount overpaid.

Equity courts, as noted, developed a broad range of remedies. These include the injunction (which is an order commanding that the defendant either do or refrain from doing something), specific performance (which commands a party to perform in accordance with its agreement in a contract), rescission (which "undoes" a document, such as a contract, thus allowing both sides to be free of obligations under the document), and reformation (under which the court essentially redrafts a document to accord with the parties' true intentions). Equity also developed the "clean-up" doctrine, which allowed it to award damages, so long as they were incidental to the principal equitable relief sought. To this degree, then, equity could award a remedy usually available only at law (damages). The converse was not true, however; thus, the law courts did not grant equitable relief.

- *P*, the owner of real property, sues in equity for a decree ordering *D* to move out of the premises after *D*'s lease had expired. The equity court can grant the injunction ordering *D* to move and, as incidental to the

[38] Don Fyr was my mentor in law teaching, and was my daughter's Godfather. He died in 1994. He was a wonderful guy, who cared greatly about teaching.

decree, order *D* to pay damages to cover the lost rent for the period during which she overstayed.

One abiding tenet of equity jurisprudence has been that one cannot obtain an equitable remedy if the legal remedy (of damages) is adequate to make her whole. If the harm done to the plaintiff can be vindicated by an award of damages, she must sue at law, and cannot invoke equity jurisdiction. Thus, the first order of business for a plaintiff in equity is to allege that her legal remedy of damages is inadequate. We saw examples above: the plaintiff for whom the diamond ring had sentimental value and the plaintiff who did not want the defendant trespassing across her property.

This dual set of courts — law and equity — with their different procedures, terminology, methods of enforcement, and remedies, were imported to the American colonies. Throughout most of its history as an independent nation, the United States followed the practice of maintaining separate courts of law and equity. In 1938, though, Congress abolished separate law and equity dockets in the federal courts. It provided instead for a single type of civil case, known as a "civil action." Under the Federal Rules of Civil Procedure, adopted in that year, there is uniform procedure in all cases in the federal courts, regardless of whether they would have been law or equity in bygone days. Most states did the same, and abolished separate law and equity courts. But not all have done so. Every state is free to do as it pleases. In Delaware, for example, there are still separate law and equity courts. In Virginia, until 2006, the main trial court (the Circuit Court) was divided into law and equity sides, in which the historical terminological and remedial differences persisted. In that year, Virginia finally abolished the distinctions and now uses a unified procedure in all cases.

The fact that the federal system and those of most states have merged law and equity into a single trial court, though, does not mean that the distinction between law and equity is not important. It is. To this day, all jurisdictions differentiate between legal and equitable remedies, and a plaintiff cannot obtain an equitable remedy without demonstrating that her legal remedy (of damages) is inadequate. Moreover, in federal court the Seventh Amendment preserves a right to jury trial in civil cases "at law" but not at equity. As discussed in §9.2.2, determining whether a litigant has a right to jury trial can be difficult, and involves the historic lines of demarcation between law and equity.

§1.3 Alternatives to Litigation

We know that litigation is the basic model for dispute resolution in our society. We also know that it is usually an expensive and time-consuming

process. Some critics note not only the expense and delay, but also question the underlying premise of the adversary system; some feel that the polarizing effects of that system may obscure rather than reveal the truth. Further, some commentators criticize the fact that most litigation is a zero-sum game: One side wins and the other side loses. Many disputes, they argue, are sufficiently subtle that there should be some "give" on both sides of the case. Moreover, litigation forces the parties to focus on the past, rather than on building a harmonious future relationship.[39] For these and other reasons, recent decades have seen increasing interest in alternatives to litigation. Most Civil Procedure casebooks have at least some materials on alternative dispute resolution (ADR). And most law schools offer upper-level courses on ADR and on specific forms of litigation alternatives.

It is worth noting that American society has long embraced ADR in specific settings. For instance, in the workplace, it has long been commonplace that the litigation model has been supplanted by statutes concerning workers' compensation. These statutes provide that a worker injured on the job cannot sue her employer. Instead, the employer is required to pay a certain benefit — set by statute or regulation — for specific types of injuries. Under workers' compensation programs, then, workers waive their right to sue their employers in return for an absolute right to recover a specific dollar sum immediately. The award is made without need of showing that the employer was at fault. Workers' compensation programs are a common alternative to tort litigation.

The commonest form of ADR, of course, is settlement. People with disputes work them out all the time, often obviating the need even to file a case. But, as we saw above, a settlement is usually struck with litigation in the background — that is, if the parties do not settle the dispute, one of them will sue. Settlement is really a form of *negotiation* — the parties may structure the outcome in a way that makes most sense for them. They can avoid the "winner takes all" mentality of litigation and structure an outcome in which each side gives and each side receives. In a dispute between businesses that foresee an ongoing relationship, perhaps the settlement will involve future conduct toward each other. In the upper division of law school, you may take a course on negotiations; such classes are frequently taught by adjunct professors, who are "real-world" lawyers with a wealth of valuable experience to be shared.

Often, serious settlement negotiations do not commence until after a case has been filed and the parties have engaged in some stages of litigation. In the discovery phase of the case, for instance, each side may get a

[39] Of course, many disputes are between people who would prefer never to deal with each other again, such as in the typical automobile crash case. But many disputes are between people who envision an ongoing relationship, such as businesses or family members. In such situations, the parties may wish to resolve the dispute as quickly as possible, to allow an agreeable future.

"reality check" about what the evidence actually shows. Maybe an event that seemed clear-cut at the time has more nuance when witnesses give testimony. Also, as each side spends increasing amounts in lawyers' fees, the incentive to negotiate a settlement often increases. Many disputes will not settle early — the parties have their heels dug in. But with the passage of time and expenditure of money, the parties may become more willing to approach the bargaining table.

When most people invoke the phrase "ADR" they are referring to two dispute-resolution mechanisms: arbitration and mediation. It is important to understand the differences between them. It is also important to understand that while each traditionally has been voluntary, an increasing number of judicial systems are requiring disputants to try one or the other; in other words, after filing litigation, some parties find themselves engaged in mediation or arbitration because the judge ordered them to do so. This "mandatory ADR" is a relatively new phenomenon. Traditionally, ADR has been voluntary; parties to litigation may choose to submit to mediation or arbitration, or parties to a contract may have waived the right to sue in favor of some form of ADR. Indeed, you may be surprised to learn (when you look at the fine print of some contracts you have signed) how often you have done just that.

Arbitration is quite similar to litigation; the parties submit their dispute to a decision by a third party. The third party, however, is not a judge paid by the taxpayers. She is a civilian, chosen and paid by the parties; in some cases, there is a panel of multiple (usually three) arbitrators. And the hearing does not take place in a courthouse built with taxpayer funds. It takes place in somebody's office. The American Arbitration Association (AAA), a private entity, has offices throughout the country, and provides training for arbitrators as well as a venue for arbitration hearings. Many contracts provide that disputes between the parties must be arbitrated under the auspices of the AAA. The collective bargaining agreement between Major League Baseball and the players' union provides for arbitration of some salary disputes.

An arbitration hearing looks like a trial, at which each side presents evidence. But the hearing is far less formal than a trial. The rules governing admissibility of evidence at trial do not apply, and the arbitrator(s) often allow the introduction of hearsay. Evidence is frequently proffered in written form instead of oral testimony. In arbitration, there is no formal discovery, but the arbitrator often facilitates the parties' exchange of relevant information. Like litigation, arbitration usually results in a winner and a loser. The advantages over litigation are usually simple: Arbitration is cheaper and less time-consuming than formal litigation.

Parties to arbitration often waive significant rights. There is no right to a jury trial in arbitration, and there is usually little, if any, appellate review.

The victorious party may ask a court to confirm and enforce the arbitration award. The losing party can petition a court to vacate the arbitration award, but on very limited grounds. Usually, the arbitrator's misapplication of the law is not a basis for setting aside an arbitration award. Critics assert that arbitration thus can become essentially a "lawless" dispute resolution.

Mediation is quite different from litigation. Here, the parties ask a third party to help them reach a settlement. The mediator is less interested in who is right than in getting the parties to find common ground. The mediator is often creative in suggesting ways for the parties to get the dispute behind them and get on with their lives. Often, mediators realize that parties need a chance to tell their story, and structure hearings to allow each side to do so. In addition to being cheaper and less time-consuming than formal litigation, mediation usually avoids the zero-sum game: The object is to reach accord, rather than to declare a winner and a loser.

In recent years, feminist scholars have debated whether the mediation model, with its emphasis on cooperation and communication, is more hospitable to women than the adversary system of litigation.[40] In addition, some commentators criticize ADR as forcing compromise upon persons who have a right to vindication and remedy. At a broader level, the use of ADR forces us to consider a very basic question: What is the purpose of litigation? It might be seen as essentially private — litigation is intended to resolve disputes peacefully, and thus to prevent disputants from resorting to self-help. It might also be seen, however, as serving a public function — as private citizens using governmental power to force other citizens to abide by the norms we have set for appropriate behavior.[41] Under such a view, the adversary system of litigation is not seen as excessively combative, but as necessary to vindicate the rules of civil society. As one leading commentator concluded: "We train our students in the tougher arts [of litigation] so that they may help secure all that the law promises, not because we want them to become gladiators or because we take special pleasure in combat."[42]

At this point you may not — indeed, perhaps you *should* not — have an overarching view of the role of litigation in our society. As you study Civil Procedure, you will occasionally become inundated with detail, enmeshed in specifics. This is as it should be. The details are important. But from

[40] *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1607 (1991) ("To the extent that women are more likely than men to believe in communication as a mode of conflict resolution and to appreciate the importance of an adversary's interests, [the adversary system of litigation] does not always suit their needs."). Professor Grillo concludes, however, that mediation often does not serve women well.

[41] Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1089 (1984) (describing litigation as "an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals").

[42] *Id.* at 1090.

time to time you will also find yourself taking a view from higher altitude — pondering the big questions of the role of litigation and the administration of justice. As we said in §1.1, Civil Procedure presents students with a stunning array of material — from the nuts and bolts to the big picture. In the next section, we put the various topics together to survey the entire course.

§1.4 The Big Picture in Civil Procedure

Many students struggle for a sense of how the various topics in Civil Procedure relate to one another. Some get a good grasp of the various pieces of the course — they understand individual topics in isolation — but do not see how those pieces fit together. In fact, the topics covered in our course do fit into a cohesive whole. This section describes that whole and provides a framework of the course. It does so in a largely chronological way, by reflecting how litigation unfolds in the usual case. It is imperative to understand, however, that there is no single right order in which to cover the topics in this course. Your professor may cover them in a different order from the way they are addressed in this book. There is nothing wrong with that. No matter what order, however, it will facilitate understanding to see how the pieces fit together.

Most Civil Procedure professors spend a great deal of time on topics concerning the selection of the forum in which litigation will proceed. For reasons we discuss in the various chapters, litigants and lawyers care a great deal about where litigation takes place. For now, suffice to say that we will see cases in which parties paid millions of dollars in attorneys' fees and expenses to vindicate their choice of forum. It is a very important issue.

Four topics in the course relate directly to forum selection. First (here, but not necessarily in your course) is *personal jurisdiction,* which governs the geographic question of whether the plaintiff may sue the defendant in a particular *state.* As we see in Chapter 2, this is a far more complex question than may meet the eye, and is affected both by state statutes and the Due Process Clauses of the Constitution. The statutory and constitutional analyses are aimed at determining whether a particular state has sufficient "power" over the defendant to enable it to enter a judgment that will bind the defendant. Second, and closely related, is the topic of *notice.* It is not enough simply to show that a state has personal jurisdiction over the defendant. In addition, due process requires that the defendant be given notice of the proceedings against her and an opportunity to defend. We address these topics in Chapter 3.

Thus, together, personal jurisdiction and notice ensure that the plaintiff can sue the defendant *in a particular state.* The next question is what court *in that state* hears the case. This question raises the topic of *subject matter jurisdiction,* treated in Chapter 4.[43] Specifically, the choice is between litigating in the state court system or the federal court system. As noted in §1.2.1, the federal courts have limited subject matter jurisdiction, which means that they can entertain only specific types of disputes. The topic raises constitutional and statutory considerations as to the allocation of judicial business between the federal and state governments. Keen awareness of the requirements for invoking federal subject matter jurisdiction — and an understanding of the policy reasons for the various forms of federal subject matter jurisdiction — is part of the arsenal of any litigation lawyer.

The last topic addressing forum selection is *venue,* addressed in Chapter 5. Venue is concerned with the geographic question of *where* the litigation will proceed *within the chosen judicial system.* Subject matter jurisdiction informs us that a particular case can go to a federal district court, but it does not tell us *which* federal district court. The nation is divided into federal districts, and federal statutes prescribe proper venues for various types of cases in the federal system. So if the plaintiff wants to sue in federal court in California, the venue question would determine where the case goes — to the Southern District of California (in San Diego), the Central District of California (in Los Angeles), the Northern District of California (in San Francisco), or the Eastern District of California (in Sacramento).

In Chapter 6, we study the avenues available to the defendant for challenging the plaintiff's choice of forum. The timing and method for raising an objection may vary depending on whether the objection is to personal jurisdiction, notice, subject matter jurisdiction, or to venue. The rules here are fairly mechanical and can be harsh. Failure to abide by them may result in waiver of an otherwise valid defense. So, in sum, Chapters 2 through 6 all deal broadly with the topic of forum selection.

From there, we assume that the case is in a proper forum, and walk through the litigation in a typical case. Chapter 7 addresses *pleadings,* which are the documents in which parties set forth their claims and defenses, such as the complaint and the answer. This is a fairly mechanical topic, in which historical perspective is helpful. In this area, we will see that a case may be ended without trial. Specifically, for instance, the

[43] Many professors start with subject matter jurisdiction before addressing personal jurisdiction. Again, there is no single right way to approach these topics. In my view, personal jurisdiction should go first because it is the broader question. It asks whether the plaintiff can sue the defendant in Texas (or any other particular state). If the answer is yes, the next task (it seems to me) is to determine the proper court in Texas (or whatever state). But there is nothing wrong with starting with subject matter jurisdiction.

defendant may successfully move to dismiss for any of a variety of grounds, or the plaintiff may win a judgment based on the defendant's failure to respond to the complaint properly. The pleadings, at best, basically put the parties on notice of the general claims by the plaintiff and defenses raised by the defendant. They are based upon the parties' best understanding of the facts. Modern procedure recognizes, however, that that understanding of the facts is largely uninformed. In the *discovery* phase of litigation, discussed in Chapter 8, we see that each party has very broad (perhaps surprisingly broad) rights to gain access to evidence held by the other party, and to force that party to clarify its position on relevant matters.

Thus, together, pleadings and discovery constitute an education process in which each party finds out about the other side's position and evidence. In a fundamental way, the judicial system's desire for free exchange of information and evidence seems at odds with the adversary system discussed in §1.1. After all, if the point is to win, why should a party have to cough up information that hurts her case? Yes, the goal of each party is to win. But the goal of the process is to do justice — to achieve the just and fair resolution of the dispute. So litigation is not unfettered warfare. The search for the truth is fostered by disclosure within the rules. Sometimes the discovery process demonstrates that there is no claim there, and leads to dismissal. Sometimes it convinces the defendant that she really did do something wrong and caused harm to the plaintiff, which may lead to settlement. In all events, the American system is based in part on a very broad duty to cooperate in ascertaining the truth by allowing the adversary to have access to information.

In Chapter 9, we address actual adjudication of the dispute. Many cases disappear before getting to this point — perhaps because the court dismissed the case, perhaps because the defendant defaulted, perhaps because the parties settled. Cases that do survive to this stage will not necessarily be tried. It may be that there is no dispute on a material issue of fact, in which case the dispute is simply over the interpretation of a legal issue. In such a case, the court can rule through a procedure known as summary judgment. If, on the other hand, the parties dispute material issues of fact, the case will be tried. Here, we consider the important and sometimes vexing issue of whether the parties are entitled to a jury trial. And in cases involving a jury, it is important to allocate authority between the jury and the judge. One way or another, whether by summary judgment or trial, the dispute is adjudicated and the case ended with the court's entry of judgment.

At this point, the losing party may seek appellate review, which we address in Chapter 14. Before going there, however, the intervening chapters address other topics. One is the *Erie* doctrine, which many people consider the most difficult topic in Civil Procedure. *Erie* is a subject of

surpassing importance, because it goes to the heart of the relationship between the state and federal governments. It is important to note, though, that *Erie* raises its troubling specter in rather limited circumstances. It is only an issue when the case is in federal (not state) court. And, even there, it generally arises only when the federal court is exercising diversity of citizenship jurisdiction — that is, the case is in federal court because of the citizenship of the parties. The question addressed by *Erie* is whether the federal judge in such a case must apply state law (or, on the other hand, is free to ignore state law and fashion her own approach). *Erie* is something of a freestanding issue. It can be raised almost anytime in the course.

Remember that Chapter 9 ended with the court's entering a judgment in the case. In Chapter 11, we assess whether that judgment precludes anyone from litigating anything in a different case. The preclusion doctrines of claim and issue preclusion (also known as res judicata and collateral estoppel) emphasize the importance of finality. In general, our system is committed to the notion that a litigant has one opportunity to litigate a matter. She does not get to litigate the same claim or the same issues serially in different cases. So the preclusion doctrines demonstrate how broadly a judgment operates. They may prohibit a plaintiff from asserting the same claim again. They may prohibit someone from litigating a particular issue again.

In Chapters 12 and 13 we complicate the litigation. Through Chapter 9, with its entry of judgment, we presumed a fairly simple case — the typical case of one plaintiff suing one defendant. In real life, there are many such cases. But many cases, on the other hand, involve multiple claims and multiple parties. The rules of joinder, addressed in Chapter 12, define the scope of a single civil case. Specifically, they define how many claims and how many parties may be packed into a single case. In this area, we dip back to topics covered in Chapter 4, about the subject matter jurisdiction of the federal courts. Why? Because each claim asserted in federal court — not just the original claim by the plaintiff against the defendant — must be supported by a basis of federal subject matter jurisdiction. Thus, this area is a rich one for professors. They can test the mechanical joinder provisions of the Federal Rules of Civil Procedure and topics of federal subject matter jurisdiction in a single fact pattern.

Chapter 13 continues themes established in Chapter 12, by addressing special multiparty litigation. Specifically, we discuss interpleader and the class action. Interpleader is a very specific type of litigation in which claimants are vying for ownership of money or some tangible property. In the class action, a representative sues on behalf of a group. Because the result of the litigation binds the class members, we encounter important issues of due process. Beyond this, the class action is controversial because it creates potentially devastating liability for a defendant by aggregating

potentially thousands of claims in a single case. The device has always been at the center of a tug-of-war between the plaintiff's bar and business interests.

In 2005, however, large business interests succeeded in urging Congress to pass the Class Action Fairness Act, which funnels many class actions from state to federal court. This funneling is, at least in theory, substance-neutral, which means that it does not affect the substantive law to be applied in the case. On the other hand, there is a general sense that federal courts are less hospitable to class actions than state courts. Thus, critics charge, the Class Action Fairness Act is actually a version of tort reform sold to the public as a mere procedural provision. That is, the Act forces tort class actions from state to federal court, where they are likely to be thwarted not on the basis of the substantive law, but on procedural grounds. This recent issue, then, raises in microcosm profound topics of federalism and the efficacy of our procedural system for the administration of justice.

So again, welcome to law school and welcome to Civil Procedure. Throughout the course, you will see a wide range of subjects — some easy, some hard, some mechanical, some amorphous. Most of them are foreign to your experience; unlike issues presented in your other first-year courses, you probably have not seen them before. This book is intended to make you comfortable with those issues.