

Teaching Civil Procedure: A Retrospective View

Paul D. Carrington

I have taught Civil Procedure in American law schools for forty years. The course I taught in 1999 bears only a very loose resemblance to the one I taught in 1960. My 1960 course bore scant resemblance to the one I took from Austin Scott in 1952-53, and virtually none to the course he took from James Barr Ames in 1907. Scott taught with a twinkle in his eye that enabled him to pillory students without their thinking his motive was other than to help them clear the cobwebs from their thinking. The content of his material mattered little. And apparently this was even more true for the teaching of Ames, of whom Scott said to me, "I did not need a course in legal ethics because I knew James Barr Ames."

A Short History of the Civil Procedure Course

Nevertheless, the two of our forebears in American law teaching who had the best opportunity to shape a curriculum in law omitted to teach Civil Procedure. They came to this common failure from opposing positions.

The first of the two was George Wythe, who had an open choice at the time of his appointment as professor of law and politics at William and Mary in 1779. Wythe understood his mission to be the nurturing of public virtue. Although a scholar of repute, he was not an academic person in the contemporary sense: he was a sitting judge while also a teacher. And it was not his purpose, nor did he seek to attract students, to prepare them to appear in court. He was preparing his students for public life in the Commonwealth of Virginia. He had his students for a single academic year, and he was their only law teacher.⁶

Wythe was constricted in his choices of content by the availability of reading materials. His lectures were in part a guide to Blackstone, the one generally

6. Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 *Wm. & Mary L. Rev.* 527 (1990) [hereinafter *Revolutionary Idea*]; Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 *Mercer L. Rev.* 673 (1990) [hereinafter *Teaching Virtue*]; Paul D. Carrington, *Teaching Law in the Antebellum Northwest*, 23 *U. Tol. L. Rev.* 3 (1991).
7. I have tried to develop this theme more fully in *Stewards of Democracy: Law as a Public Profession* (Boulder, 1999).
8. See Carrington, *Revolutionary Idea*, *supra* note 6, at 533-38.

available and readable law book. His students read not only those parts of Blackstone depicting the English law of contracts and property and the common law of crimes, but also the account of the English constitution, which Wythe apparently employed as an occasion to extol the greater virtues of the Virginia constitution he had helped write.⁹ He also lectured on Roman law, a subject on which he was acknowledged to be the most learned American.¹⁰ He introduced his students to the literature of political economy, notably the then recent works of Adam Smith and Baron Charles Montesquieu. He also conducted moot courts and fortnightly meetings of his students organized as a legislative body.¹¹

Wythe's successor, St. George Tucker, followed a similar pattern and at the conclusion of his teaching career, in 1803, published an Americanized edition of Blackstone, eliding Blackstone's royalisms and adding an extended treatment of American constitutional law based on Tucker's own lectures.¹² The Transylvania University Law Department, perhaps the most important in antebellum times because of the large number of its graduates who participated in our national public life, followed Wythe's leadership in emphasizing public law, comparative law, and political economy, while also affording access to Kent's *Commentaries on American Law*,¹³ a work, like Blackstone's, giving short shrift to adjective law.¹⁴

By the 1830s, there seems to have been a general understanding that an academic law program would occupy about five months of the year, and that students completing the program would be in residence two such years. Topics were often studied in alternating years. Transylvania may have been the first American university to conduct a final examination in law, given at the end of the program. Only those who passed received a degree. Most failed—which was OK, because the credential meant very little anyhow. Antebellum Harvard under Story and Greenleaf gave a degree to all who were present for the prescribed period.¹⁵ Thomas Cooley's Michigan and Theodore Dwight's Columbia did almost the same.¹⁶

To hear systematic lectures on common law pleading in the time of Wythe or Tucker, one would have had to enroll at the proprietary school in Litchfield,

9. Alonzo Thomas Dill, *George Wythe: Teacher of Liberty*, ed. Edward W. Riley, 42-43, 54-58 (Williamsburg, 1979).
10. William Wirt, *Sketches of the Life and Character of Patrick Henry*, 2d ed., 47-48 (Philadelphia, 1818).
11. Carrington, *Revolutionary Idea*, *supra* note 6, at 535-36.
12. Blackstone's *Commentaries on the Laws of England with Notes of Reference to the Constitution and the Laws of the Federal Government of the United States and of the Commonwealth of Virginia* (Philadelphia, 1803).
13. The first edition was published in Boston, 1826-30.
14. See generally Carrington, *Teaching Virtue*, *supra* note 6.
15. 2 Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America*, 2d ed., 88-92 (New York, 1970); Arthur E. Sutherland, *The Law at Harvard, A History of Ideas and Men, 1817-1967*, at 123-24 (Cambridge, Mass., 1967).
16. Elizabeth Gaspar Brown, *Legal Education at Michigan 1859-1959* at 740 (Ann Arbor, 1959); Julius Goebel, *A History of the School of Law, Columbia University* 50 (New York, 1955). Dwight was required to administer an examination before awarding a degree to his students.

where James Gould taught the subject with élan.¹⁷ Indeed, shortly before he retired, he published his lectures on pleading; they were an extended encomium to the intricacies of the forms of action.¹⁸ But Litchfield was not a university law school; its profit-seeking aim was to market Competence, not Virtue of the sort that Wythe, Tucker, and Cooley sought to nurture.

A reason that eighteenth-century pleading may have commended itself to Litchfield as a subject to teach was its arcane character. Only a lawyer could master the difference between trespass and trespass on the case; to know that distinction marked one as anointed because common law pleading was a task for which common sense was useless. A proprietary institution selling resaleable information could hardly afford to pass up the opportunity to celebrate such a subject. On the other hand, it was a subject having little interest to most university law teachers, for much the same reason.¹⁹ The system was only marginally more rational than trial by ordeal, or the Japanese alternative of sumo, both of which were religious ceremonies invoking the will of God to resolve disputes. It had no more political content, and far less intellectual content, than other complex games such as chess.

Gould's teaching of the subject was misguided, whatever his aim. Common law pleading was already in eclipse in England as well as America. Jeremy Bentham had likened aspects of common law pleading to a syphilis of government.²⁰ His view was widely shared, and in the early nineteenth century there was a movement afoot on both sides of the Atlantic to discard this barbaric sport. The forms of action Gould extolled in 1832 were abolished in England in 1836.²¹ Among those sharing Bentham's scorn of common law procedure were Jacksonians who regarded English procedure as just another burden the aristocracy imposed on honest folk as a means of preserving the wealth and status of lawyers.²²

New York University was founded by Benthamite utilitarians who admired the pragmatism of the new German universities and of the University of London.²³ One of its first achievements, in 1838, was to open a law school

17. Marian C. McKenna, *Tapping Reeve and the Litchfield Law School 81-106* (New York, 1985); see also Simeon Eben Baldwin, *James Gould, 1770-1838*, in *2 Great American Lawyers*, ed. William Draper Lewis, 455, 458 (Philadelphia, 1907).
18. *A Treatise on the Principles of Pleading in Civil Actions* (New York, 1936) (1892).
19. Asahel Stearns, the professor of law at Harvard from 1817 to 1829, may have been an exception. See Sutherland, *supra* note 15, at 72. Nathaniel Beverley Tucker, who was the professor of law and police at William and Mary from 1834 to 1851, may have been another. See Professor Beverley Tucker's Valedictory Address to His Class, 1 *S. Literary Messenger* 597, 597-602 (1835), *reprinted in Essays on Legal Education in Nineteenth Century Virginia*, ed. W. Hamilton Bryson, 103, 107 (New York, 1998).
20. *A Fragment on Government; or, A Comment on the Commentaries, Being an Examination of . . . Sir William Blackstone's Commentaries . . .*, 2d ed. (London, 1823), *reprinted in The Collected Works of Jeremy Bentham*, eds. J. H. Burns & H. L. A. Hart (London, 1977).
21. William S. Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, 1 *Cambridge L.J.* 261, 270-78 (1923).
22. Steven N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 *Law & Hist. Rev.* 311 (1988).
23. Theodore Francis Jones, *New York University 1832-1932 at 6* (New York, 1933); on the University of London, see Hugh Hale Bellot, *The University College, London, 1826-1926* (London, 1929).

under the leadership of Benjamin Butler, President Jackson's attorney general.²⁴ Butler proposed a three-year part-time curriculum of which the first year would be devoted to the "science" of pleading, with supplementary work on jurisprudence and constitutional law. Apparently he felt compelled to justify the attention to pleading:

Nor will the task of instructing in these branches be unworthy the efforts of an able and learned jurist. Our forms of proceeding, though generally prolix, and often encumbered with needless technicalities, are yet intimately connected with the principles of the Law. And as a general rule, he who best understands the nature and design of the instruments which the Law employs, will not only be most expert in the business of his profession, but be best qualified to look above the mere form, and to lay hold of, and appropriate to their true uses, the higher parts of his profession.²⁵

One of Butler's first steps was to employ David Graham, the author of an 1832 book on New York practice.²⁶ Graham was an associate of David Dudley Field in the effort to abolish common law procedure in New York, an effort that achieved success in 1848.²⁷ It was Graham who lectured on civil procedure that founding year. Alas, for reasons not fully known, the school closed after one year, to be reopened two decades later.²⁸

Max Weber explained the movement uniting Bentham, Field, and Graham as a response to the Enlightenment.²⁹ What they sought to do was to persuade those with the power to do so to delete dysfunctional formalities to assure, insofar as it is possible, that the judgments of law courts are based on the law and the facts, and are not the result of a misstep of counsel. One evident purpose in teaching pleading at New York University was to enlist support in the profession for the reforms that would be forthcoming a decade later. Timothy Walker, the founder of the Cincinnati Law School, was not a Jacksonian, but he shared the Jacksonians' interests in law reform, and he did some teaching of pleading in the 1840s to the same reformist end.³⁰ In the 1870s John Norton Pomeroy, another reformer, also gave attention to the subject at the Hastings College of Law of the University of California.³¹

Joseph Story may have been the first American law professor to teach the topics of jurisdiction and judgments. His lectures, presented in the 1830s,

24. The Law School Papers of Benjamin F. Butler: New York University School of Law in the 1830s, ed. Ronald L. Brown, 7-9 (New York, 1987) [hereinafter Law School Papers].
25. *Id.* at 124.
26. *Id.* at 8.
27. Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* 43-51 (New York, 1952); Subrin, *supra* note 22.
28. Law School Papers, *supra* note 24, at 9-11.
29. 1 *Economics and Society*, eds. Guenther Roth & Claus Wittich, 657 (New York, 1968); From Max Weber: *Essays in Sociology*, eds. H. H. Gerth & C. Wright Mills, 293 (New York, 1946).
30. Walter Theodore Hitchcock, *Timothy Walker: Antebellum Lawyer*, eds. Harold Hyman & William P. Hobby, 56, 79-81, 153-88 (New York, 1990).
31. Thomas Garden Barnes, *Hastings College of Law: The First Century 88-114* (San Francisco, 1978). See, e.g., John Norton Pomeroy, *The Code of Remedial Justice, Reviewed and Criticized* (Albany, 1877).

were part of a longer treatment of conflict of laws, a subject on which Story was the first American author.³² There was little national law on those topics until the Fourteenth Amendment was ratified in 1868.³³ Story's colleague Simon Greenleaf lectured on evidence and published the first work on that subject in 1852.³⁴ The law of evidence was largely the product of American judicial decisions accommodating the institution of the jury trial to the conditions of nineteenth-century America. Greenleaf's book would go through many editions before his subject was reworked by his former student, James Bradley Thayer,³⁵ and then by Thayer's student, John Henry Wigmore.³⁶

All of the works mentioned, and the teaching they expressed, were instruments of law reform. They were written in the spirit of the Jacksonian reforms of pleading and were a part of the tradition marked by Weber. The moral premise underlying the teaching of Graham, Walker, Story, Greenleaf, Thayer, Pomeroy, and Wigmore was that courts should seek in their procedures and administrative arrangements the means of providing judgments disinterestedly applying law made by a government of the people to facts, and thus to impose a resolution on disputes. Implicit in their teaching was the duty of the legal profession to support courts engaged in that enterprise. These teachers were, unlike Gould, children of the Enlightenment. They were also missionaries for a secular faith that law can be an effective instrument of popular self-government.

There is an additional reason for the stunted development of civil procedure teaching in university law schools in the nineteenth century. This was the local character of much of the applicable law. Butler's New York University was among the few schools deigning to teach the law of a state, because most schools were desperate to attract students from more than one state. This was especially true of Story's Harvard; Story had been summoned by the benefactor, Nathan Dane, to celebrate the national law, not the localisms that were dividing the Republic.

Civil procedure does not appear to have had a significant place in the curriculum of Simeon Eban Baldwin's Yale Law School or Theodore Dwight's Columbia.³⁷ Cooley's Michigan curriculum, however, included lectures on

32. 1 Warren, *supra* note 15, at 492-93; Sutherland, *supra* note 15, at 113-15; R. Kent Newmyer, *Supreme Court Justice Joseph Story: A Statesman of the Old Republic* 296-300 (Chapel Hill, 1985).
33. *Pennoy v. Neff*, 95 U.S. 714 (1877); *Harris v. Balk*, 198 U.S. 215 (1905); on the background of *Pennoy*, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoy Reconsidered*, 62 Wash. L. Rev. 479 (1987).
34. *A Treatise on the Law of Evidence* (Boston, 1852).
35. *A Preliminary Treatise on Evidence at Common Law* (Boston, 1898). On the relationship between these works, see William Twining, *Theories of Evidence: Bentham and Wigmore* 5-9 (London, 1985).
36. *A Treatise on the System of Evidence in Trials at Common Law Including the Statutes and Judicial Decision of All Jurisdictions in the United States*, 4 vols. (Boston, 1904-08).
37. Frederick C. Hicks, *Yale Law School: 1869-94 Including the County Court House Period* (New Haven, 1937); Goebel, *supra* note 16, at 44-68.

equity, evidence, and code pleading, and it even offered instruction in trial practice through a moot court.³⁸

The second important moment for the law curriculum was, of course, Langdell's. There was much that was fresh about his approach.³⁹ He appears to have known nothing about Wythe or those who followed him, or about any events or institutions west of the Hudson River. He did not, so far as we know, consider the possibility of teaching law to foster public virtue. He had no interest in social or political reform of any kind; a royalist at heart, he placed no value on the traditions of self-government. His charge, given him by President Eliot, was to elevate the status of the Harvard Law School by making it exclusive, apolitical, and academic.⁴⁰ Like many New Englanders more English than the English, he did not regard the Constitution of the United States or even the legislative enactments of Congress as law.⁴¹ Law, in his view, was what life-tenure judges made while unencumbered by any texts drafted by amateurs in legislative committees and constitutional conventions. Hence he preferred to consign constitutional law to the undergraduate curriculum so that professional law students might never have their minds sullied by the vulgarities of politics.

As a part of the scheme to make a Harvard legal education more valuable in the marketplace, Langdell proposed to extend the period of study from the usual two terms of about five months to three academic years of nine months each. This decision was in no way driven by a demand of Harvard students for more instruction, or of Harvard teachers for more time in which to cover material they deemed important. The purpose, and the only purpose, was to make Harvard Law more rigorous and hence more exclusive, as President Eliot had directed. Langdell needed to provide twenty-seven months' worth of curriculum in lieu of the traditional ten, while if possible diminishing the place in the curriculum of public law or other matters soiled by politics. This created a huge vacuum for private law courses, and thus a fresh canvas to which he was free to apply his crayon. His acolyte, James Barr Ames, was the author of no fewer than nine casebooks used to fill the time created by Langdell.⁴² It can be no surprise that, in Langdell's lifetime, the Harvard Law dropout rate was very high. A minority of those not excluded by the novel

38. Brown, *supra* note 16, at 226-49.

39. 2 Warren, *supra* note 15, at 359-78; Sutherland, *supra* note 15, at 166-84; Paul D. Carrington, *Hall Langdell* 20 *Law & Soc. Inquiry* 691, 707-16 (1995).

40. 2 Warren, *supra* note 15, at 396-97; 2 Henry James, *Charles W. Eliot: President of Harvard University, 1869-1909* at 61-63 (Boston, 1930); Charles W. Eliot, *Langdell and the Law School*, 33 *Harv. L. Rev.* 518 (1920).

41. See Christopher Columbus Langdell, *Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of It, During That Period*, 19 *Harv. L. Rev.* 151 (1906). Cf. Albert Venn Dicey, *Lecture on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (London, 1905).

42. *The Centennial History of the Harvard Law School, 1817-1917* at 175-89 (Cambridge, Mass., 1918).

examinations bothered to stay three years to imbibe such repetition, and many entered the profession with but a piece of a Harvard Law education.⁴³

Prominent among the new courses was Torts, a subject never before taught to law students anywhere. Indeed, the first book ever written about Torts had been published as recently as 1867.⁴⁴ Also added to the Harvard curriculum was formal instruction in civil procedure. Not; God save us, American procedure fashioned by such low-minded Jacksonians as David Dudley Field, but English civil procedure, the only kind worthy of study by good Anglophiles such as Langdell and Ames.

Ames, if it can be believed, taught his students at Harvard in 1880 the rigors of pleading under the Hilary Rules.⁴⁵ The Hilary Rules were the first English manifestation of Bentham's influence on procedural law reform. They were adopted by Parliament in 1836 as the result of the strenuous efforts of Henry Brougham, who challenged his legislative brethren:

It was the boast of Augustus, that he found Rome of brick and left it of marble. . . . But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it a patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.⁴⁶

Alas for Brougham, and even more for Ames, the Hilary Rules proved to be a disaster in practice and were repealed in 1852, a quarter-century before Ames began to teach them at Harvard.⁴⁷ Their fault lay in the unrealistic demands they imposed on counsel—a fault to which Ames, who never in his life appeared in court, was quite blind. It is as well that the pleading course was given only a minor place in the Langdell curriculum.

Because Langdell's Harvard was promoting university legal education as the route to Competence rather than Virtue, it sought to overcome the disadvantage of being a national institution and to solve the problem of filling out three full years of instruction by offering specialized third-year courses on local practice in the states to which the largest numbers of its students went. Generally these were taught by practitioners from the several states involved.⁴⁸

Civil Procedure and Judicial Law Reform

The teaching of civil procedure received a powerful impulse from the Progressive era. Roscoe Pound, then the dean at Nebraska, made a celebrated address to the American Bar Association in 1905 signaling the beginning of a

43. Sutherland, *supra* note 15, at 178-81; 2 Warren, *supra* note 15, at 521.

44. Francis Hilliard, *The Law of Remedies for Torts, or Private Wrongs* (Boston, 1867).

45. Millar, *supra* note 27, at 45-46.

46. 2 *Speeches of Henry Lord Brougham* 485 (London, 1838).

47. 15 Sir William Holdsworth, *A History of English Law*, eds. A. L. Goodhart & H. G. Hanbury, 7th ed., 108-11 (London, 1965).

48. 2 Warren, *supra* note 15, at 448, 452.

new era of reform.⁴⁹ Pound was joined in leading this endeavor by his sometime colleague at Northwestern, Wigmore.⁵⁰ By the time of Pound's address, the 1848 Field Code had been transmogrified by the New York legislature into the Throop Code, one of the most elaborate and least workable schemes ever devised for the resolution of disputes.⁵¹ Disenchanted by the propensity of American legislatures to ornament procedural systems with dissonant provisions favorable to the interests of whatever faction or interest group held their attention at the moment, the Progressive reformers favored court rule-making as the mechanism for reform.⁵² This was an English innovation of 1873 expressed for the first time in America in the Wyoming Constitution of 1890.⁵³ The Progressives also promoted enactment of the early precursors of long-arm legislation,⁵⁴ "merit selection" of judges,⁵⁵ more thorough merger of law and equity, and liberal joinder of parties and claims.⁵⁶ Among the most passionate advocates for procedural reform was William Howard Taft, a man not otherwise given to radical ideas.⁵⁷

This Progressive reform movement was taking shape at the same time that the academic legal profession was emerging as a group somewhat apart from the practicing bar. A whole generation of the newly minted career law teachers was imbued with an interest in civil procedure and a keen sense of the promise of reform to make civil law enforcement more effective. Among those who were active in reform efforts and who influenced the teaching of civil procedure in the era after World War I were Charles Clark at Yale,⁵⁸ Edson R. Sunderland at Michigan,⁵⁹ and Arthur Vanderbilt at New York University.⁶⁰

49. *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 *Am. L. Rev.* 729 (1906).
50. William R. Roalfe, John Henry Wigmore: Scholar and Reformer 111-13, 207 (Evanston, 1977); Paul D. Carrington, *The Missionary Diocese of Chicago*, 44 *J. Legal Educ.* 467, 502, 507-10 (1994).
51. Herbert Peterfreund & Joseph M. McLaughlin, *New York Practice: Cases and Other Materials 2* (Mineola, 1968); Harold R. Medina, *Important Features of Pleading and Practice Under the New York Civil Practice Act 2-3* (New York, 1922); Millar, *supra* note 27, at 55-56.
52. Steven B. Burbank, *The Rules Enabling Act of 1934*, 130 *U. Pa. L. Rev.* 1015, 1035-98 (1982).
53. *Wyo. Const.* art. 5, §2.
54. E.g., "doing business" legislation, upheld in *Commercial Mut. Accident Co. v. Davis*, 213 U.S. 245 (1909), and nonresident motorist legislation, upheld in *Kane v. New Jersey*, 242 U.S. 160 (1916) and *Hess v. Pawloski*, 274 U.S. 352 (1927).
55. The concept was proposed by Albert Kales of Northwestern University and was promptly adopted as the chief cause of the newly organized American Judicature Society. Michal R. Belknap, *To Improve the Administration of Justice: A History of the American Judicature Society 40-41* (Chicago, 1992).
56. Millar, *supra* note 27, at 98-142.
57. See, e.g., *The Selection and Tenure of Judges*, 38 *A.B.A. Rep.* 418 (1913).
58. See *Procedure: The Handmaid of Justice; Essays of Judge Charles E. Clark*, eds. Charles A. Wright & Harry M. Reasoner (St. Paul, 1965); Judge Charles Edward Clark, ed. Peninah R. Y. Petruck (New York, 1991).
59. See *The English Struggle for Procedural Reform*, 39 *Harv. L. Rev.* 725 (1926); *A Reply to Senator Walsh*, 6 *Or. L. Rev.* 73 (1926); *The Regulation of Legal Procedure*, 35 *W. Va. L.Q.* 131 (1927); *The Grant of Rule-making Power to the Supreme Court of the United States*, 32 *Mich. L. Rev.* 1116 (1934).
60. Eugene C. Gerhart, Arthur T. Vanderbilt: *The Compleat Counsellor 77-89, 140-83, 205-52* (Albany, 1980).

Also influential as teachers were Austin Scott of Harvard⁶¹ and Jerome Michael at Columbia.⁶² Casebooks prepared in that era integrated for the first time the teaching of pleading with the teaching of jurisdiction and the basic features of the civil jury trial.⁶³ Their presentations were uniformly historical in their orientation; students were taught to appreciate the difference between the forms of action and code pleading, and to prepare themselves for further reforms along the lines of those appearing in the Federal Rules promulgated in 1938. Much of the teaching of procedure in those decades was done in the upper-class years, although an introductory first-year one-semester course was not uncommon.

Many teachers of procedure became active reformers of legal institutions. The most important success was achieved by Clark and his associates, including Sunderland, who were responsible for the promulgation of the Federal Rules of Civil Procedure in 1938. Clark was the principal proponent of summary judgment and notice pleading; Sunderland can be said to have invented the pretrial conference. Vanderbilt also enjoyed dramatic success in leading radical reform of the legal institutions of New Jersey. But there were numerous others. Harold Medina of Columbia took up the cause of reforming the municipal courts of New York City.⁶⁴ Single-handedly he took on Mayor LaGuardia in legislative chambers at Albany. Thurman Arnold at the University of West Virginia began to gather empirical data to inform efforts to improve the administration of civil justice.⁶⁵

The 1938 rules were a hit.⁶⁶ Examined in a cold light today, they were no triumph of professional draftsmanship. In fairness, they were not presented at the time as a permanent solution to the problem posed by Rule 1 of achieving speedy, just, and efficient disposition of every civil case. Even the reformers of 1938 were aware of the iron law of unintended consequences, and they were mindful that vigorous advocates would exploit any weakness they might find in the structure created. But the new rules lent unaccustomed strength to the traditional purpose of discerning the truth with respect to disputed facts;

61. Scott joined the Harvard faculty in 1909 and is best known for his work in trusts. But he was a magnetic teacher, and his casebook, *A Selection of Cases and Other Authorities on Civil Procedure in Actions at Law* (Cambridge, Mass., 1919), was a creative work. See also Austin Wakeman Scott, *Fundamentals of Procedure in Actions at Law* (New York, 1922).
62. Michael's work was primarily devoted to evidence, which led him, like Wigmore, to a study of psychology and to a long association with Mortimer Adler. His tightly crafted casebook for a first-year introductory course was widely adopted and is worthy of examination today. *The Elements of Legal Controversy: An Introduction to the Study of Adjective Law* (Brooklyn, 1948).
63. See, e.g., Thurman Wesley Arnold & Fleming James, *Cases and Materials on Trials, Judgments and Appeals* (St. Paul, 1936); Edson R. Sunderland, *Cases and Materials on Judicial Administration* (Chicago, 1937); Arthur T. Vanderbilt, *Cases and Other Materials on Modern Procedure and Judicial Administration* (New York, 1952).
64. A brief account of Medina's career is Goebel, *supra* note 16, at 287-88.
65. Laura Kalman, *Legal Realism at Yale, 1927-1960* at 31-32 (Chapel Hill, 1986); *Voltaire and the Cowboy: The Letters of Thurman Arnold*, ed. Gene M. Gressley, 162-74 (Boulder, 1977).
66. Charles Alan Wright, *The Law of Federal Courts*, 5th ed., 429-30 (St. Paul, 1994); Geoffrey C. Hazard Jr., *Undemocratic Legislation*, 87 *Yale L.J.* 1284, 1287 (1978).

more than a few malefactors made generous settlement offers rather than face the horrors of a "deposition upon oral examination." The new rules also obliterated some arcane distinctions, such as the false dichotomy made in English law between law and equity, and thus made it harder for unjust litigants to take refuge in technicality. By liberalizing joinder, they fostered comprehensive resolution of disputes. And the rules were drafted with studied looseness of text to free judges from the duties to observe procedural niceties that impeded their efforts faithfully to apply the substantive law. Procedure became more a servant, albeit not a slave, to substance.

The broad acceptance with which the Federal Rules were received led to a further round of reform at midcentury. Many states adopted variations on the national rules, and some even adopted them in haec verba.⁶⁷ Among the major state reforms was a renovation of the New York Civil Practice Act in which Jack Weinstein, then of Columbia, was instrumental.⁶⁸ Characteristic of these reforms of state practice was the merger of law and equity, i.e., the abolition of the ancient traditions of the English Court of Chancery as a distinct feature of American law. The learning of equity scholars like John Norton Pomeroy became substantially obsolete, and teachers such as Zechariah Chafee retired, not to be replaced.⁶⁹ Much of the reform of state procedures was effected through the participation of teachers of civil procedure.

Discourse over the possible improvement of the Federal Rules was maintained by the presence of the Advisory Committee whose work was conducted out of the offices of James William Moore at Yale,⁷⁰ and then of Benjamin Kaplan⁷¹ and Albert Sacks⁷² at Harvard. Interest in empirical testing of procedural institutions was manifested in the career of Maurice Rosenberg at Columbia⁷³ and in the establishment in 1966 of the Federal Judicial Center.⁷⁴

Through the 1960s, much of the most respected scholarship in the field of civil procedure illuminated and criticized rules of court. Premier work was

67. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 *Wash. L. Rev.* 1367 (1986).
68. On the history of the act, see 1 Jack B. Weinstein et al., *The New York Civil Practice* (New York, 1963).
69. Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America, Adapted for All States and to the Union of Legal and Equitable Remedies Under the Reformed Procedure*, 5 vols. (San Francisco, 1941); Chafee, *Cases on Equity: Jurisdiction and Specific Performance* (Cambridge, Mass., 1934); Chafee, *Some Problems of Equity: Five Lectures Delivered at the University of Michigan, April 18, 19, 20, 21 and 22, 1949* (Ann Arbor, 1950).
70. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 *Yale L.J.* 718 (1975).
71. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (1), 81 *Harv. L. Rev.* 356 (1967).
72. Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Co. v. Tompkins and the Federal Rules*, 63 *Notre Dame L. Rev.* 671 (1988).
73. See Paul D. Carrington, *Maurice Rosenberg*, 95 *Colum. L. Rev.* 1901 (1995).
74. Joseph L. Ebersole, *The Federal Judicial Center: A Nontraditional Organization in the Federal Judiciary of the United States*, rev. ed. (Washington, 1979).

done by Moore⁷⁵ and by Charles Alan Wright at Texas,⁷⁶ but also significant were narrower and sometimes more penetrating treatments such as the thorough job done on requests for admissions by Ted Finman of the University of Wisconsin;⁷⁷ on directed verdicts by Edward H. Cooper, then at Minnesota;⁷⁸ on judicial notice of foreign law by Arthur Miller, then at Michigan;⁷⁹ or on summary judgment by Martin B. Louis of the University of North Carolina.⁸⁰

No sooner were the new rules promulgated in 1938 than the Supreme Court decided *Erie R.R. v. Tompkins*.⁸¹ For generations of teachers and students, this would prove to be a great moment in the life of the law. If given the full range of application favored by Justice Frankfurter,⁸² *Erie* would have killed the new rules and remanded the federal courts back to the ancient practice of conforming their procedure to that of local state courts. The line between substance and procedure, between what is properly a matter of state law and what is a matter of federal practice, or between what is properly a subject of a rule enacted by the Supreme Court rather than Congress, evoked a rich literature and a formidable line of Supreme Court decisions culminating in *Hanna v. Plumer* in 1955.⁸³ America was aboil in national procedural issues.

Also a continuing issue with high visibility was the federal constitutional limits on state court jurisdiction over persons and property. By the mid-1960s, most states had adopted extended long-arm legislation, often extending the reaches of their courts to the outer limit allowed by the Fourteenth Amendment.⁸⁴ Much scholarly writing was devoted to this subject, and many teachers introduced their course with a treatment of the due process limits of state court jurisdiction, beginning with *Pennoyer v. Neff*,⁸⁵ and proceeding through *International Shoe Co. v. Washington*,⁸⁶ to *Hanson v. Denckla*.⁸⁷

Another enlarged element of instruction centered on the text of the Seventh Amendment. The interface of the new rules of court, merging law and equity and allowing liberal joinder of parties and claims, with the ancient

75. James William Moore, *Moore's Federal Practice: A Treatise on the Federal Rules of Civil Procedure* (Albany, 1938). This work evolved into a 20-volume set.

76. In 1959 Wright became editor of William W. Barron & Alexander Holtzoff, *Federal Practice and Procedure*, 7 vols. (Albany, 1950).

77. *The Request for Admissions in Federal Civil Procedure*, 71 *Yale L.J.* 371 (1962).

78. *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 *Minn. L. Rev.* 903 (1971).

79. *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 *Mich. L. Rev.* 613 (1967).

80. *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 *Yale L.J.* 745 (1974).

81. 304 U.S. 64 (1938).

82. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

83. 380 U.S. 460 (1965). The literature is reviewed in Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 *Duke L.J.* 281.

84. 1 Robert C. Casad, *Jurisdiction in Civil Actions*, 2d ed., §§ 4-3 to 4-10 (Salem, 1991).

85. 95 U.S. 714 (1877).

86. 326 U.S. 310 (1945).

87. 357 U.S. 235 (1958).

distinction embedded in the 1791 text proved to be an intractable problem that still troubles the Supreme Court.⁸⁸ This has proved to be one area in which legal history has continuing and direct pertinence to the disposition of contemporary litigation.⁸⁹ State courts have struggled with similar issues arising under the texts of state constitutions, but the decisions of the Supreme Court have dominated discourse.⁹⁰

Numerous other procedural issues arising in state court litigation have been found in recent years to be subject to parameters established by the Fourteenth Amendment. Among these are adequacy of notice of proceedings,⁹¹ the right to notice before provisional remedies are granted,⁹² applicability of statutes of limitations,⁹³ *res judicata*,⁹⁴ the right to be represented by counsel,⁹⁵ the right to proceed in *forma pauperis* in some proceedings,⁹⁶ allocation of the burden of proof,⁹⁷ peremptory strikes of jurors,⁹⁸ and, most recently, the settlement of class actions.⁹⁹ Although all these topics have been constitutionalized by the Supreme Court, they have been left to the instruction of civil procedure teachers.

The literature and teaching of civil procedure in the decades following World War II reflected the maturation of the legal process as a means not merely of resolving disputes, but of enforcing rights and duties. Disenchantment with the administrative process of law enforcement led legislative bodies increasingly to rely upon private law enforcement by individual plaintiffs employing modern civil procedure to bring malefactors to account.¹⁰⁰ In this important respect, American civil litigation became unique in the world.

Localism as an impediment to teaching the national law diminished in its importance. The ascendant nationalization of the academic profession meant that law teachers absorbed in issues of local law would lose status within the

88. See *Feltner v. Columbia Pictures Television, Inc.*, 118 S.Ct. 1279 (1998); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).
89. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639 (1973).
90. See generally Randy J. Holland, *State Constitutions: Purpose and Function*, 69 *Temple L. Rev.* 989 (1996); Randall T. Shepard, *A New Generation: The Maturing Nature of State Constitution Jurisprudence*, 30 *Val. U. L. Rev.* 421 (1996).
91. See, e.g., *Greene v. Lindsey*, 456 U.S. 444 (1982).
92. See, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).
93. See, e.g., *Tulsa Prof'l Collection Serv. v. Pope*, 485 U.S. 478 (1988).
94. See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989).
95. See, e.g., *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).
96. *Boddie v. Connecticut*, 401 U.S. 371 (1971).
97. *Hicks Acting ex rel. Feiock v. Feiock*, 485 U.S. 624 (1988); *Santosky v. Kramer*, 455 U.S. 745 (1982).
98. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).
99. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).
100. Morton Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 213-46 (New York, 1993).

academic discipline, so that professional considerations were incentives to teachers to direct their attention to federal practice. And the increasing mobility of lawyers gave additional weight to the attractions to students of a study of the national law on the subject.

A PARTING REPRISÉ

LONNY SHEINKOPF HOFFMAN*

It is hard to imagine the semester is already at an end. Finals are just around the corner. Before long, you will be through your second and third years of law school and, thereafter, to lives as lawyers. Less than fifteen weeks ago our journey together began. We have covered much terrain since then, you and I; and yet, in perspective, what a short and fleeting span. Is it not presumptuous of me to think of having accomplished with you anything substantial, to say nothing of having made an indelible mark on your education and training? Still, in even less time, Lawrence managed to cross the Nefud desert and lead disparate tribal bands to successful revolt against the Turkish army in Aqaba. Our conquests have been less grandiose—less cinematic, to be sure—but still I say conquests we have made. After having come this far, we are entitled to sit back and reflect on the journey taken.

Between now and the time you enter the world as lawyers, there is twice as much schooling still before you to complete. Yet, in many respects, you have already taken the first and most difficult step. You have begun to lay a foundation for how to approach the law: intellectually, professionally and ethically. As your teacher, it is my hope that you will remember some of the lessons I intended to impart. What teacher does not wish it to be so! In the maddening rush through your first semester of law school, though, I fear you may have been distracted at times by what must have felt like a wild footrace to keep up with the course reading, by the demands of your other classes, and—dare I say—even of your own personal lives (yes, the world outside of school defiantly continued turning, unabated by your recent anointment as first-year law students). I want to take this opportunity, then, to spend a little time summarizing what I sought to accomplish in the course and what it is I would like you to take away from this experience. If I have done my job well,

* Assistant Professor of Law, University of Houston Law Center. For their thoughtful comments on earlier drafts of this essay, I thank Peter Linzer, John Mixon, Jennifer Rosato, Richard Saver, Michael Solimine and Leigh Van Horn. I am also indebted to several former students, Ed Barbarie, Damon Karam, Sharon Fast, Meghan Griffiths, Katherine Howard, Patrick Kemp, Kristin Lanoue, Lance Leisure and Jason Starks, for sharing their views about the course in Civil Procedure. Finally, I reserve special thanks to Laura Sheinkopf and Bobbi Samuels; their influences on my teaching are beyond measure. The University of Houston Foundation provided financial support for this project.

then much of what I am about to say will sound unnecessary and transparent, like I am clubbing you over the head with lessons already assimilated.

As I endeavored to stress from the outset, a single theme characterizes my pedagogic choices in organizing this course. That theme is that the most exciting, effective, and enriching way for me to teach the first-year class in Civil Procedure is to teach "by example." It is a concept with three different, but associated, meanings.

Teaching by example signifies that I place little emphasis on rote memorization of rules and doctrines, preferring instead to focus on how the law actually works. Acquiring knowledge of written law (that is, in the sense of the open-a-book-and-find-it variety) is a part of what is required of your legal studies, but it is only one part. Beyond knowledge, there is comprehension, application, analysis, synthesis and evaluation.¹ To encourage you toward more constructive and advanced learning, we worked with concrete exercises and hypothetical problems as a complement to our reading. By placing the law of procedure into a problem-oriented learning process, you were exposed to authentic examples of legal decision-making and asked, thereby, to respond to the material by thinking about law as lawyers must.

Teaching by example also means that I focus on a smaller number of subjects in procedure—that is, on a few *examples* of the law of procedure—rather than try to expose you to a smorgasbord of topics, not a single one of which you know in any detail or for which you have any appreciation of its true complexities. Through careful consideration and rigorous dissection of the material we do cover, my aim is for you to begin to acquire independent tools of legal reasoning that you may then apply on other occasions. Broadly stated, I seek to train and encourage you to think through and assess legal questions on your own and to help you construct a well deep with self-sustaining analytic abilities from which you will be able to draw for years and years to come.

The third, and last, respect in which I invoke teaching by example is as shorthand for saying that this course is concerned not only with the "law of procedure," but also with emphasizing and identifying the ethical boundaries and context in which legal problems and issues necessarily arise. The technical term for this is teaching ethical norms through the pervasive method.²

1. See TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK I, COGNITIVE DOMAIN (Benjamin S. Bloom et al. eds., 1956) (classifying different degrees or levels of intellectual tasks relevant in learning); see also DONALD H. JONASSEN ET AL., HANDBOOK OF TASK ANALYSIS PROCEDURES, ch. 12 (1989) (discussing "Bloom's Taxonomy of Educational Objectives").

2. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERSVASIVE METHOD, at xxix (1994) (observing that "[p]rofessional responsibility questions should be addressed in all substantive courses because they arise in all substantive fields, and because their resolution implicates values that are central to lawyers' personal and professional lives").

In plainer English, it means I do not believe it wise to teach a subject as powerful and as potent as Civil Procedure without trying to install some sense of the professional responsibilities that ought to flow from its embrace.

TEACHING BY EXAMPLE STRESSES ANALYSIS AND APPLICATION OVER
MEMORIZATION OF RULES AND DOCTRINES

The first sense in which I mean I teach by example is that I value studying cases and problems not because they are vehicles for memorizing legal rules and doctrine, but because they can be used to introduce you to the kind of rigorous cognitive exercises in which all good lawyers must engage. Rather than working exclusively from the cases, statutes and rules contained in our casebook, we wrestled with hypothetical problems and exercises throughout the semester as a supplement to and overall framework for our studies. The goal was to have you not just think abstractly and passively about a legal issue or a set of facts, but to push you to create something tangible: draft a pleading, frame a request for relief, lodge an objection, or make an argument. My objective, thus, was to encourage you toward active learning—toward the constitution of the tangible. The end product of your study became something you could pick up and hold in your hand and in your mind; something you could turn over and critique, analyze, assess and improve upon; something more than just a summary you read about what someone else had done.

I have found that students do not come to this style of learning easily or with much enthusiasm. Conventional teaching, as typified by the lecturing model, is based on the idea that teachers impart knowledge into empty, expectant vessels waiting passively to be filled. Having been conditioned to accept this traditional form of educational instruction, what Paulo Freire and bell hooks have called the “banking system of education,”³ most of the vessels find the traditional pedagogic approach unthreatening. In law school, the belief that course material can be imparted through straightforward recitation of the law comports jurisprudentially with a formalist view of our legal system. For formalists, rules and doctrines are assumed to be definite and ascertainable.⁴ As a result, the lecturing style of teaching fits comfortably with a formalist approach to teaching law that assumes there are answers to be gleaned and conveyed from careful study of the relevant authorities; and answers, especially for those who have just begun their studies in the field, are welcome indeed.⁵

3. BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 5, 14 (1994).

4. See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (discussing the rise of formalism in America in the latter part of the nineteenth century).

5. Note that the “Socratic” style of teaching, usually associated with law school teaching,

It must surely, then, have caused a great deal of anxiety for many of you that this course always seemed woefully short of answers. Although those early dog days of August may seem a distant memory now, think back to our earliest classes and you may recall the confusion and uncertainty you felt then. Consider, for instance, how we treated the subject of Rule 8's pleading requirements. After you had read some of the relevant cases, I asked you to draft a complaint, based on the results of an in-class mock client interview we had previously conducted. Your first reaction to all of the demands being made on you to create and think, not merely to read and regurgitate, naturally might have been: "I have no idea what should go into a complaint. I'm not a lawyer. I've only just begun law school. Why can't we see an example of what a lawsuit should look like so that we can use it as a model for drafting this one?"

I must confess these reactions were hardly unexpected. The question you may be asking, then, is why did I insist on this exercise if I thought that many or most of you would dislike it or be even further frustrated by it? My explanation is thus: drafting a lawsuit forced you to wrestle with the actual application of the case law you read to a particular fact pattern you had been given, rather than just debating how close or how far any particular case was from the standard promulgated by Rule 8 and as refined by common law precedents. If I had asked you how much factual information needs to go into a pleading to satisfy Rule 8, based on your reading of the Supreme Court's precedents in *Conley v. Gibson*,⁶ *Leatherman v. Tarrant County Narcotics & Coordination Unit*,⁷ or of particularly important lower court decisions like Judge Keeton's in *Cash Energy, Inc. v. Weiner*,⁸ what kind of answer would you have given? Indeed, is there an answer to this question in the abstract? By insisting that you take the doctrinal background and apply it to a particular fact pattern, you were forced to synthesize, as much as possible, the relevant authorities. In the language of educational theory, you were being asked to produce an authentic response to what you read about the law of procedure—

could just as easily as not be bottomed on a formalist view of law. One could prod students by asking a series of questions about the material covered and still maintain that the law is definite and ascertainable. Indeed, Christopher Columbus Langdell, the iconic image of formalism in the law school classroom, was also the popularizer of the Socratic style of teaching at Harvard Law School. See generally KRONMAN, *supra* note 4, at 170-74. Relating formalism to Socratic technique may be merely an entirely academic exercise anyway, insofar as the most reliable figures suggest that less than a third of professors teaching first-year courses rely primarily on the Socratic method, while nearly 95% of those teaching upper level classes lecture, at least some of the time, to their students. See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28-29 (1996).

6. 355 U.S. 41 (1957).

7. 507 U.S. 163 (1993).

8. 768 F. Supp. 892 (D. Mass. 1991).

that is, you were directed to act as lawyers must act when addressing legal issues as they arise.

At the end of the exercise, most of you may not have fully digested the lesson. Many, of course, still yearned for a definitive answer about pleading and still urged that we pinpoint precisely how much detail must be included in a complaint. But even as old habits and attitudes die hard, the process of working through problems and trying your hand at drafting exercises—rather than viewing the question only from the perspective of a dry appellate record—slowly, but surely, began to make some sense. As the semester wore on, more and more of you gradually became less and less uncomfortable with the idea that we were not going to provide answers in class. Having undertaken one exercise after another, the thought eventually began to percolate around the room that there might be more than one right way to put together the allegations of a lawsuit, or to draft discovery requests, or to respond to a summary judgment motion, and on and on. You began to see that there was no Answer, in the sense of some all-encompassing Truth, whether we were talking about the requirements of notice pleading or most of the other topics we addressed. There are boundaries to the law with which one must be familiar, to be sure, but the rules rarely come in one-size-fits-all packages.

My preference for active learning and for framing the in-class conversation around constructive understanding gained through application and analysis over recitation of formal rules is hardly revolutionary. Long before I began teaching, formalism's once firm hold on law school classrooms already had been thoroughly loosened.⁹ Today, it is surely right that most law professors favor more nuanced approaches to legal study than Christopher Columbus Langdell would have recognized or understood. Yet, if formalism's heyday has come and gone (as Jerome Frank¹⁰ and, more recently, Andrew Taslitz¹¹ remind us), the ghost of our Langdellian past still haunts the modern law classroom. How could it be otherwise? I have argued elsewhere that the assumptions about law embodied in formalist thinking are firmly rooted into our societal constructs about the rule of law in general and, to a large extent, may be inherent in the essential base of legitimacy upon which our American judicial system rests.¹²

In the context of the law school classroom, students certainly welcome the traditional approach to legal study. They instinctively feel less threatened by more straightforward recitation of the subject matter. From the instructor's

9. See generally KRONMAN, *supra* note 4 (discussing the demise of formalism, and the role of legal realism, law and economics, and critical legal studies).

10. See Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20, 21 (1951).

11. See Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143, 143 (1991) (book review).

12. See generally Lonny Sheinkopf Hoffman, *A Window Into the Courts: Legal Process and the 2000 Presidential Election*, 95 NW. U. L. REV. 1533 (2001) (book review).

vantage point, teaching is not only made easier by reciting that which is knowable and certain, but it also serves as a measure of academic validation. "I am *sir Oracle*—and when I ope my mouth let no dog bark."¹³ If I, as your professor, lack some superior body of finite and complete knowledge (something upon which I may *profess*), what claim do I have to the podium? Answers—definite answers in the form of black and white rules and clear doctrinal principles—are instant gratification to the newcomer and barometers of accomplishment for the teacher. Formalism is dead; long live formalism.

As with much else in life, I think the more sensible view is to recognize that the pedagogic debate about formalism and its place in legal pedagogy is a matter of emphasis and degree. With other like-minded souls,¹⁴ I believe I endeavor with greater fervor than most to move far away from a doctrinally-centered view of law. On the whole, I prefer application to answers; rigorous thinking to rote recitation of authorities. One of the perceived costs of this pedagogic orientation is that it engenders feelings among students of uncertainty and indeterminacy, at least in the short run. The law never seems settled with the rules pliable to the point of breaking. In practice, however, and over the long run, I think you will find that the kind of intellectual efforts we cultivated here will turn out to be the bread and butter of what you will be asked to do for your own clients. Our in-class efforts were meant, in some measure, to be a valuable practical experience and to provide a training ground of sorts for your future work. By insisting on placing legal questions in a concrete context, the main objective is to encourage students toward the kind of active, applicative learning I think ought to be an integral component of the legal education experience.

I have watched a handful of truly great lawyers represent their clients and, without exception, all of them share at least one remarkable skill: the sage ability to discern that in the hard cases it is usually the *facts*, and not the law, that matter most. The law is never irrelevant, of course, but where there is a legitimate dispute between two or more persons, the relevant rules serve only to frame the context of the debate; by themselves, they do not predetermine outcomes. Memorizing case holdings and legal doctrine will never lead you closer to becoming a great lawyer; and while a successful career surely is not defined solely by the ability to apply your knowledge of the facts of a particular case to the relevant law and then to analyze wisely, these are, nonetheless, essential traits that you must have if you are to be a valued counselor and advocate for others.

13. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 105 (1960).

14. See, e.g., Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the CaseFile Method*, 44 ST. LOUIS U. L.J. 1289 (2000) (discussing his CaseFile Method of study); see also EDWARD H. RABIN ET AL., *FUNDAMENTALS OF MODERN PROPERTY LAW* (4th ed. 2000) (applying problem-based approach to property law casebook).

TEACHING BY EXAMPLE EMPHASIZES CAREFUL ATTENTION TO DETAIL OVER
A BROAD SWEEP THROUGH AN ENTIRE FIELD

The second sense in which I have tried to teach this course by example is by focusing in detail on a smaller number of subjects in procedure rather than undertaking a broad sweeping coverage of the entire field. I have grand ambitions here: to produce students capable of thinking on their own and, thereafter, capable, thinking lawyers. The ambition is grand precisely because it is all too often the case that law students are not trained in a manner that encourages the development of independent reasoning ability. Students then matriculate to the profession without having worked on strengthening this essential skill set. Rigorous teaching can and does take place in law school but the forum, more often than not, is a smaller setting than the first year, large class experience (such as seminars, other small, intensively-focused classes and independent study projects with faculty members). By the time students take these courses, however, attitudes toward law and legal study largely have been set. Eventually, experience in the workplace may fill the holes left by formal legal education but the costs borne will have been substantial: for the lawyer, for her employer and, most of all, for the client. To my mind, as educators, we should strive in the very beginning of a student's studies to inspire good intellectual habits by sifting of the vast riches that can be mined from the development of keen analytic capabilities and from the cultivation of a temperament willing to endure the hard, lonely work that careful and rigorous study usually requires.

In consciously narrowing the number of procedure topics covered in the course, I recognize I am inviting controversy from both students and colleagues who may be concerned that an insufficient quantum of knowledge is being imparted. If I am going to make a convincing case for my pedagogic approach, then it is necessary to begin by recounting what was covered and what was left out from the class, though from having sat through the course you may already have some sense of the lacunas. Our syllabus provides a summary of the topics we examined, broken down into the eight main subject areas as they were addressed:

- (i) Pleadings and related issues (fair notice and special pleading requirements; sanctions; answers and affirmative defenses; amendments; counterclaims and cross claims);
- (ii) Personal jurisdiction and related issues (statutory and constitutional limits on the exercise of territorial jurisdiction; notice and service of process; venue and transfer; forum non conveniens);

- (iii) Subject matter jurisdiction (diversity jurisdiction; federal question jurisdiction; supplemental jurisdiction and removal);
- (iv) Choice of law (brief discussion of *Erie*);
- (v) Pretrial discovery (scope of discovery; written discovery; depositions; initial disclosures and other timing issues; responding/objecting to discovery; discovery disputes);
- (vi) Judgment as a matter of law;
- (vii) Additional parties/claims; and
- (viii) Preclusion law (brief discussion of general principles of res judicata and collateral estoppel).

Even this list is misleading insofar as we did not devote equal attention to all of these subject areas. Noticeably absent are several major topics that nearly all procedure casebooks and—I suspect—a good number of my procedure colleagues around the country do cover. Class actions and complex litigation were omitted entirely. We never addressed the subject of interpleader. The subject of prejudgment remedies was left out. We spent virtually no time either on trial practice and procedure or on appellate procedures, except as certain discrete subjects arose coincidentally with some other part of our conversation. I have no doubt that this list of topics not addressed surely could be expanded further and further. It is, quite clearly, then, an incomplete list. By extension, has not your exposure to the subject of Civil Procedure also been incomplete? Should you ask for your money back?

I have two answers to offer in defense of my pedagogic decision to focus on depth over coverage, although I hasten to add that I regard the former as less my reason for acting than is the latter.

I left off certain topics, not because I think they are unimportant, but rather for the more pedestrian reason that most of you, over the course of your entire careers, will either never come across these legal topics directly in practice, or you will address them very, very infrequently. For my own part, I find virtually the entire field of procedure fascinating. After this year is done, I would be delighted to work with you, through independent study or as a mentor on a law review note, regarding any of these or other topics. For those who know they will need more in-depth coverage of a subject, I encourage further exploration. If you are inclined toward banking law, then take our banking law offerings and immerse yourself in the mud of interpleader actions to your heart's content. My own, best pedagogic judgment, however, is that the topics we covered in class will arise most frequently in the practices of the

vast majority of students—and here I have tried to keep in mind that this room may be filled with as many future transactional lawyers as litigators—and that it is a better service to concentrate our efforts on the issues most of you are most likely to encounter.

There is a second answer I want to give to explain my pedagogic choice. It is, as I indicated before, the more compelling motivation for my adoption of this approach. Through my decision to focus on fewer topics in more detail, I endeavor to challenge you to truly learn something, to digest an issue fully and precisely so that you can draw upon your acquired skills in future study or work. I choose this path instead of seeking to expose you to “everything” related to procedure, as though that were even possible. I believe I have done my job well if I succeed in producing students who are able to think and reason through legal issues on their own, rather than merely attaining a passing familiarity with a topic but no real sense or understanding of it. In short, my guiding philosophy is that I care much more *that* you learn and *how* you learn than about *what* you learn.

Educational theorists would describe this approach as pushing students beyond the “zone of proximal development”; that is, beyond the level of learning they could otherwise obtain on their own.¹⁵ Put another way, rather than merely urging fluency in the vocabulary of the law, I believe that as a teacher I ought to be asking, “What can I do to help students gain a more lasting and deeper intellectual framework than they would otherwise possess if they had not taken this course?” By teaching a smaller number of subjects in greater detail, my firm pedagogic belief is that students will leave more capable of applying their acquired legal acumen to any problem, whether the particular issues were addressed specifically in one of their law school classes or not.

I believe it bolsters the case for teaching procedure by example to say that the subjects one could cover in this course, to a large degree, are fungible. I have created my own list of must-cover topics. Other syllabi may look somewhat, or even markedly, different than mine. Rather than regard these differences as indictments, I view them as confirmations that the subject of procedure is an excellent tool for teaching students how to think critically. Because procedure cuts across the entire legal landscape, I am able to address the entire class at once, without regard to whether you will become estate law lawyers or tax lawyers, environmental lawyers or lawyers who specialize in tort law. It also does not matter whether your career choice is litigation or transactional work. Procedure is relevant to everyone. As a result, I can employ any number of subjects falling under the general rubric of procedure to aid in the development of the skills that are important to all students in

15. L. S. VYGOTSKY, MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES 86-87 (Michael Cole et al. eds., 1978).

becoming successful lawyers and critical thinkers. I could not do the same if I were teaching an advanced course with a specific focus. It is precisely because the contexts in which you will encounter procedural issues are so vast and so innumerable, that I believe it makes little sense to try to pretend it is possible to cover all subjects in the field. Instead, my role is to help sharpen the intellectual tools that will serve you well in a number of different contexts.

There is time enough in later classes, and later in life, for you to become familiar in detail with particular questions and points of law. This course and law school, in general, are of most value if you are pushed to truly dissect a problem, to turn it upside down, to examine it from every side and then, finally, to carefully produce a thoughtful answer. This is a fundamental part of real teaching and learning. By contrast, I do not comprehend how students are served by wide, unfiltered sweeps through vast terrains. Even if the sole measure is how many right answers to legal doctrinal questions will students get after they have taken the final exam and moved on to other courses, conventional law school teaching, particularly as found throughout the first-year curriculum, usually disappoints.¹⁶

A Jewish fable recounts how a famous pianist once was asked how he managed to be so adept in playing the musical notes. To the question, he replied, "The notes I handle no better than many musicians, but the pauses between the notes—ah! That is where the art resides." In law, the pauses between the notes may be likened to the exacting skill of knowing when and how to slow down long enough to ponder a question more deeply than the next. The rules that may apply to any one particular case are readily ascertainable; any conscientious person ought to be able to find them, along with the pertinent case law. But it is the student who has not merely knowledge but a *command* of the law who is exceptional. Stand back! For when you hand her the same rule book, the words may fly off the page. Watch her wield the law, as a sharpened tool—no, better still, as a precisely tuned instrument—to reach the desired result for her client. Having mastered this rare ability, she is one of the few who is capable of recognizing and then invoking the enormous power that lies within the formal rules.

TEACHING BY EXAMPLE EMPHASIZES THE ETHICAL CHOICES AND RESPONSIBILITIES INVOLVED IN BEING A LAWYER

There is, finally, a third respect in which I have tried to teach Civil Procedure by example. I have stressed that there is much more to being a lawyer than merely knowing the law. There is also the challenge of recognizing and then acting on one's ethical obligations: to clients, to other lawyers and to the judicial system.

16. See, e.g., Leslie, *supra* note 14, at 1293 (discussing results following pop quiz given to students).

One irreducible component of a lawyer's professional responsibilities is to treat people with respect and to honor the views, opinions and arguments of others. In the classroom, I regard respect—both as a matter between teacher and student and among students—as an essential element that must be nurtured. In this regard, consider Leigh Van Horn's description of how vibrant educational environments are created and sustained at the secondary school level in her book, *Creating Literary Communities in the Middle School*:

There must be more to my role in developing and sustaining the community than my outward expressions of enthusiasm. The word "respect" is one that is frequently used by my students as they describe aspects of teacher behavior they consider important to their own growth. How is it that we show our students that we have respect for them? It occurs to me that respect is reflected in various ways—our willingness to participate in the learning experience as we work alongside our students, the emphasis we place on learning from one another, the way that we honor the products of our learning, and in the way that we care for one another.¹⁷

I have long felt that law academia has much to learn from the scholarship of teaching and education in other fields. Although we teach to different students, and for different purposes, what we do is fundamentally no different, in my estimation, than what any instructor must do to teach effectively. In my law school classroom, creating an environment of mutual respect is paramount. I never call on students to intimidate them. Rather, I do so to encourage students to wrestle outside of class with the ideas, arguments and issues about which they have read and to come prepared to defend a viewpoint (or, at least, be able to articulate various sides of a debate). I recognize that it is a tricky business at times, particularly since I want to encourage volunteers to answer as well, and not set up a culture that only the person who is "on" should be involved in the discussion. Moreover, it is obvious that some are not as keen on speaking out in class as others.

I regard it, therefore, as one of the most rewarding compliments I have received to be told that those who choose in other settings to be silent, out of fear, intimidation, or merely disinterest, choose instead to come to my class prepared and ready to engage in the daily classroom dialogue. This evidence of the blossoming of mutual respect—as it occurs between teacher and students, and among students—helps create the trust upon which a vibrant learning community depends. And make no mistake, the yield that is produced by the fostering of a healthy and dynamic learning environment truly should be valued at a price far above rubies. Students come prepared to converse, argue and debate, but also with a willingness to consider and listen to the viewpoints of others. Class discussions are made richer by having a greater and wider

17. LEIGH VAN HORN, *CREATING LITERACY COMMUNITIES IN THE MIDDLE SCHOOL* 18-19 (2001).

degree of student participation. Best of all, the dialogue often does not travel unilaterally merely from teacher to student and back again, but flows multilaterally. A chart of many of our discussions would trace a path from teacher to Student 1, then to Student 2, back to teacher, to Student 3, back to Student 1, and so forth. In this more complex web of dialogue and discussion, both individualized and collective learning experiences take root. As the professor, I cannot ask for more.

Building on our classroom experiences, I emphasized throughout the semester the importance of taking these lessons about respect and applying them to thinking about your soon-to-be future lives as lawyers. The responsibility of being a lawyer triggers professional obligations of decency, honesty, promptness, diligence, and general professional courtesy to other lawyers, to your clients, and to the judicial system. Some of these traits are naturally self-enforcing. In seven years of trial practice, I rarely saw a lawyer behave badly in court. Like the unruly child in grade school, unprofessionalism in lawyers tends to rear its ugly head only when the teacher is not looking. Acting professionally should not depend upon whether there is oversight, though. It should be instinctive and expected. Alas, we cannot depend entirely on people doing the right thing only for the sake of doing the right thing. As a result, there are punitive rules in place to deter malfeasance. The extent to which they do so, however, is a matter of some debate.

In addition to the exogenous rules the system imposes on all lawyers, I want to suggest there is another incentive that is particularly potent in encouraging lawyers to strive to take the highest ethical and professional road available. I am referring to the enormous power produced through the cultivation of an upright, honorable reputation. A personal story may help illustrate this point.

When I was in practice, I represented an investment brokerage house against one of its former clients. The client alleged that the company and her agent, in particular, had treated her very badly by churning the account. By this allegation it was meant that the agent (and through the agent, the company) encouraged her to make many small stock transactions that, on the whole, benefited the company and the agent more than the individual by generating commissions through investments that were not always client-appropriate and on which the returns were often sub-par.

One of my main client representatives was the compliance officer for the company. His job was to oversee all of the investments made by the brokerage agents on behalf of their clients, in order to ensure that these transactions were all proper and that everything done was in compliance with the existing securities laws, rules and regulations. During the pretrial phase of the case, I worked with this compliance officer to collect and then produce for the other side all of the documents that the company maintained that were relevant to the case. After I was satisfied I had done a thorough investigation to locate all

relevant records, I submitted all of the material that had been gathered to counsel for the claimant.

Opposing counsel and I disagreed on plenty of occasions throughout the case. Notwithstanding these differences, we managed to treat each other decently, courteously and respectfully. In effect, we amicably agreed to disagree. In this manner, each of us represented our respective clients' interests zealously, but still acted within the bounds of our professional obligations to each other.

The day of trial finally arrived. After opening statements, opposing counsel called their first witness to the stand. By mid-afternoon, several more witnesses had testified briefly and things appeared to be proceeding slowly, but surely, forward. Then, just before our afternoon break, opposing counsel called the company's compliance officer to the stand. The compliance officer had only been on the stand for about half an hour or so when the judges decided to take a brief fifteen-minute break. I never could have predicted what was to happen next.

Immediately upon the recess being called, the compliance officer approached me to ask if we could talk in private. For reasons that I do not think I will ever fully understand, for the first time ever in the case, the compliance officer confessed that he had withheld documents. As he now told me, about a month before this lawsuit had been filed, he had taken some files pertaining to the claimant and put them into his garage.

"Why are you telling me this only now?" I asked, stunned. Silence followed. "And why did you take them to your garage in the first place?" But he offered no explanation that made (or makes, even today) any sense.¹⁸ In retrospect, my best guess as to why he decided to come forward at all rather than remain silent is that this man suddenly found himself jolted into confession. It was as though his appearance on the stand as a sworn witness somehow ignited within him a profound sense of ethical torment. Possibly, this feeling had already been building inside of him for some time, and his sitting on the witness chair was a final straw, the necessary spark, to cause this eruption. I do not know for sure, and I suspect I will never know. I certainly did not know at the time. What I did know was that he was about to return to the witness stand to continue testifying and I had to do something about this new information I had just been given.

Returning to the proceedings, I began by explaining I had just been informed by the witness—literally out in the hallway—that there were additional documents relating to the claimant at the compliance officer's home.

18. What surely makes the story stranger still is that when the documents were finally produced, it turned out that none were particularly probative of the claims being made in this case, although we had little sense of this at the time he made his abrupt announcement in the middle of the hearing. What mattered then, of course, was the appearance of impropriety.

I explained that I had not been told of the existence of these documents before and that, to my knowledge, no other company official had known about them. I expressed my commitment to proceed in whatever fashion the court and the claimant's lawyer thought best, given the extraordinary circumstances.

I can still recall the silence that followed my short remarks. It was palpable and tense. After some time, the lawyer representing the claimant spoke. "I am deeply troubled by this announcement," he began,

and I beg the Court's indulgence to consider what is the best approach to take, under the circumstances. I suspect that an immediate suspension of the trial is in order so that we be given an opportunity to review these newly-discovered documents. After we have an opportunity to do so, I will be in a better position to advise the court on how I think we should proceed.

He then turned and looked directly at me.

I want to add, however, that I do not doubt for a minute that Mr. Hoffman was as taken aback by this announcement as I have been. Throughout my dealings with him, I can say without qualification that he has always acted professionally and with the highest degree of integrity. We have not always agreed about all things in this case, but I am certain that if he had known about these missing records beforehand, he would never have kept it secret. I am not as confident about the integrity of his client, but this should cast no black mark on his record.

As I reflect on the moral of the story, I am reminded of my childhood little league experience. I was never a very good baseball player. When I found myself at bat (which was rare, since that necessitated having me occupy right field, which I did far less adeptly than occupying the right side of the dugout bench), I would often shut my eyes just before the pitcher's release. At times, I liken the experience of being a lawyer to standing there in the batter's box, unprotected and blind. More often than not, we do not see the pitch coming. It whizzes by, and the hot wind trailing behind sends a surge of adrenaline through the body, but it is already too late. The collision either has happened or it has not. Even if we manage to keep our eyes open, unexpected occurrences in our work, as in life, are inevitable.

One of the lessons I take away from my experience in this case is that we ought to act honorably not solely because it is the honorable and right thing to do. We ought to act honorably, as well, precisely because it is not possible to foresee all difficulties we will face in the future. If this sounds pretextual, it is not intended in that way. I did not treat my opposing counsel with respect because I anticipated problems would arise later in the case, and I certainly did not work at building a reputation as a lawyer whose word could be relied upon because I thought I might need to cash in down the road. But knowing that reputation matters—that for a lawyer it is often all that matters—can serve as a powerful reminder that even if there is no way to insure against all unforeseen occurrences, it is still prudent to try, in the main, to fortify ourselves in

advance. We are still going to get hit, of course, though probably not as frequently, and the resulting damage may often be sustainable.

CONCLUSION

One of my intellectual heroes, Karl Llewellyn, once spoke to his own class of students at Columbia, exhorting them to rise to the challenges they would face in law school and beyond:

What I am trying to write in fire on the wall is that the task before you is immense, is overwhelming, and that the official courses of the school are not enough to compass it. "TEKEL: thou art weighed in the balance and found wanting." To do the work is not to do the classes. Rather must you immerse yourself for all your hours in the law. Eat law, talk law, think law, drink law, babble of law and judgments in your sleep. Pickle yourselves in the law—it is your only hope.¹⁹

The effort required of you is great, but there is no other way around it. This is how it must be with your education and training. I can provide a suitable and encouraging forum in which learning can take place. I can create an environment that is conducive to rigorous thinking and study; but I cannot do it for you. As Llewellyn put it, "[W]e do not teach—you learn."²⁰ At the end of the day, when this course is over, and you have graduated from this place and entered the world as lawyers, you will be on your own. Still, take comfort: the work you have done here and the habits you form as students *can* carry you a great way. The question is only whether we have provided a brilliant space in which you may thrive, and whether, then, you will make the commitment to do so.

19. LLEWELLYN, *supra* note 13, at 110.

20. *Id.* at 109.

WORLD-WIDE VOLKSWAGEN V. WOODSON --THE REST OF THE STORY

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By Charles Adams

I. THE ACCIDENT

Lloyd Hull knew he had a serious drinking problem. Ever since his retirement from the Navy two years before, it seemed as though he needed to get a little high, or better, every day. After getting off work on September 21, 1977, in Berryville, Arkansas, Lloyd was on his way to visit his older sister in Okarche, Oklahoma. Next to the bottle of Jim Beam on the front seat was a loaded .22 Magnum pistol for shooting jack rabbits on his sister's farm. Lloyd was driving a 1971 Ford Torino he had bought just the week before, paying \$500 down. It had a large V-8 engine, good tires and brakes, and was in perfect working condition.¹

As he drove along, Lloyd took shots from the bottle of bourbon. After passing through Tulsa around nightfall, he relaxed as he got on the Turner Turnpike that runs to Oklahoma City. He was not in any particular hurry to get to his sister's place, and he was not paying attention to his speed. Later he assumed he must have been driving too fast on account of the liquor. Lloyd did not notice the small car ahead of him until he was nearly on top of it. By the time he managed to hit *1123 his brakes, it was too late to avoid the car. His Torino slammed into the other car, a little off center on the driver's side. Lloyd saw the small car continue down the road for a few seconds after the collision, come to a stop, and then catch on fire. Lloyd pulled over and watched the small car burn, but he did not get out of his Torino. He noticed that the needle on his speedometer was jammed at seventy-five miles per hour.²

Harry Robinson suffered from arthritis. During the long winters in Massena, New York, a small town on the St. Lawrence Seaway next to Canada, his ankles and knees would swell up and bleed so badly that he had to stay in bed for two or three months at a time. His doctor had told him he needed a dry, warmer climate, and so he and his wife, Kay, had sold their restaurant and were moving to Tucson, Arizona with their three children. Kay was driving the 1976 Audi 100 LS that she and Harry had purchased new the year before from Seaway Volkswagen in Massena. Their daughter, Eva, age thirteen, and oldest son, Sam, sixteen, rode with her. Harry had rented a U-Haul truck for the furniture, and he and their other son, Sidney, age fifteen, were riding in the truck about fifty yards ahead of the Audi.³

Sam was in the front seat of the Audi, and he was the first to see the approaching headlights through the rear window. Sam yelled to his mother that the car behind was going to hit them, and as Kay looked in her rearview mirror, the Torino crashed into the back of the Audi.⁴

Sam saw the fire start in the area over the rear seat right after they were hit. Kay took her foot off the gas pedal and pulled the car off to the side of the road and put it in park. The fire covered the area above the rear seat and was spewing out gray sooty smoke. The blaze spread quickly over the rear seat, and the inside of the car got hot rapidly. Sam and Kay both tried to open their front doors but could not open either of them even though the doors were not locked. Somehow they had been jammed shut by the collision. Sam and Kay tried the rear doors, but they were jammed, too. Eva jumped from the back into the front seat. By that time flames were shooting out of the space where the seat back and the bottom cushion met in the rear seat. All the windows were rolled up, except for the side vent on Kay's side, and none of them would open either. Kay, Eva, and Sam were trapped.⁵

By the time they tried to open all the doors and windows, the fire *1124 had spread to the front of the car. Kay lay down on the front seat and tried to kick out the side window, but could not. The car was full of smoke and she could not see anything. Sam tried desperately to break the window with his fist. Kay heard people moving outside the car, but she could not see them. She heard Eva's hair catch on fire; it sounded like a torch.⁶

Harry Robinson noticed the Audi's headlights moving back and forth in the side mirrors of the U-Haul truck. His son, Sidney, looked out the right mirror and saw the flames ignite. He said "That's Mama's car," and Harry pulled over and got out of the cab. The Audi was moving toward them sliding sideways, and fire and smoke were coming out of the trunk. The Audi came to a stop and rolled backwards onto the grass by the side of the road. Due to his arthritis, Harry was only able to hobble toward the car and Sidney reached it first. Harry tried to open the doors on the driver's side, and then moved around the car to try the doors on the other side. When he reached the passenger side, the rear window blew out, and the fire seemed to erupt at the back of the car. Harry could see his family struggling inside. Sam appeared to be banging his head against the window, trying to break out. Meanwhile, Sidney was pounding on the outside of the windshield with his fist. Just when it seemed that Kay, Eva, and Sam would never get out of the car alive, a hero came to their rescue.⁷

Mike Miller first noticed the Ford Torino when he passed it on the right. As he looked over at the driver, Mike could tell he was drunk. At a curve further down the highway, the Torino nearly came to a stop and nearly went off the road, but it got back on the highway, practically running over some barrels beside the road. Then it picked up speed and passed Mike. A short time later Mike saw a ball of fire. He immediately stopped and ran over to the burning Audi, leaving his car door open and the engine running.⁸ As he ran, he thought perhaps he should have driven back to the tollgate at the entrance to the Turner Turnpike to report the accident instead of trying to help the people in the burning car himself.⁹

By the time Mike reached the Audi, the passenger compartment was engulfed in flames and filled with smoke. All he could see inside were two dark figures moving around, but he could hear people in the car screaming and banging on the windows. Sidney was not doing any good beating on the windshield with his fist, so Mike pushed him aside and kicked at the windshield. As it started to cave in, he gave it another *1125 push and knocked a big hole through the windshield on the passenger side.¹⁰

The fire was so intense by now that it looked as if there were a flame thrower in the back of the car with the blaze swirling around and concentrated on the driver's side. As flames curled around the hole that Mike had made in the windshield, two arms appeared. Mike reached down to grab Sam's arms above the elbows, but Mike's hands slipped off the burning flesh. He grabbed Sam again, this time by the wrists, and pulled his head and shoulders through the hole. While Mike dragged Sam off the hood of the car, another man on the scene, Etsel Warner, pulled Eva through the hole.¹¹

The fire continued to burn furiously, and Mike could not see anyone else through the thick black smoke in the car. Then he heard Harry yell, "Get my wife out of there." Mike looked through the hole and a hand suddenly appeared reaching through the smoke and flames. Kay had felt Sam and Eva go out of the car, and when nobody reached in for her, she figured that she must be on the wrong side. She moved over to the other side of the car and stuck her hand out. Mike grabbed her wrist and pulled as hard as he could. Luckily, Kay weighed only 98 pounds, and she practically flew through the hole and out of the

inferno.¹²

Mike helped the three victims move away from the burning car. After taking only a couple of steps, Mike heard a small explosion from inside the car. Mike did not look back, but kept walking, only faster, and he got the three victims to lie down. Kay and Eva had been wearing polyester blouses, which had melted and were stuck to their bodies.¹³

The highway patrol arrived on the scene, then the fire department, and finally an ambulance. Highway Patrol Trooper Spencer walked to the Ford Torino to question Lloyd Hull, who had a two inch gash on his lower lip, but was otherwise unhurt. Since Mr. Hull was obviously drunk, Trooper Spencer arrested him and took him to the hospital to have his lip sewn up, and then to jail, where he remained for fourteen days.¹⁴

Kay, Sam, and Eva Robinson all received severe burns. Sam suffered first and second degree burns on his face, neck, upper back, and arms. A nostril was burned, and he had a deep scar on his right cheek, *1126 and keloid scars on his chin, arms, and hands. Because she had been in the burning car longer, Eva's injuries were more serious. She suffered third degree burns on her neck, shoulders, and arms. Her vocal chords were burned, and she required skin grafts on her back, shoulders, and right hand. Fortunately, though, Eva had covered her face, and it had not been burned as badly as it otherwise might have been. Both Sam and Eva were hospitalized for six weeks in Tulsa, and spent many months undergoing physical therapy and reconstructive surgery.¹⁵

Since Kay Robinson had been trapped in the burning car the longest, her burns were the most horrible of all. She had burns on forty-eight percent of her body--thirty-five percent of which were third degree. Kay was in the intensive care unit for seventy-seven days and was hospitalized in Tulsa for another several months. She underwent thirty-four operations, all but two of which were under general anesthetic, for skin grafts and other reconstructive surgery. Most of her fingers were amputated, and she had severe scarring over the entire upper part of her body. Eva and Kay also suffered severe psychological trauma both from the ordeal and from their permanent disfigurement.¹⁶

With his wife and children hospitalized, Harry Robinson began the process of seeking redress for their injuries. The effort was to continue for more than fifteen years in state and federal trial courts in Oklahoma, a federal trial court in Arizona, the Oklahoma Supreme Court, the United States Court of Appeals for the Tenth Circuit, and the United States Supreme Court. Along the way the litigation would produce a landmark Supreme Court decision in the area of personal jurisdiction, *World-Wide Volkswagen Corporation v. Woodson*.¹⁷

II. FILING THE LAWSUIT

Harry Robinson first retained a Tulsa attorney named Charles Whitebook who brought in the Tulsa law firm of Greer and Greer, headed by two brothers who had specialized in personal injury litigation for many years. Jefferson Greer was the lead attorney, but his younger brother Frank devoted a significant amount of his time to the case as well. Mr. Greer was a prominent member of the personal injury plaintiffs' bar, having served as President of the Oklahoma Trial Lawyers Association in 1966 and as a Governor of The Association of Trial Lawyers of America in 1977. He had more than twenty years of experience trying personal injury cases and had handled some of the *1127 earliest products liability

cases in Oklahoma.¹⁸

Lloyd Hull was an obvious defendant, but he had no liability insurance, and consequently any judgment the Robinsons could obtain against him would be uncollectible. To obtain an enforceable judgment, the Robinsons would have to sue the manufacturer of the Audi on a products liability claim. To prevail, they would need to establish that the Audi was defective and that its defects had caused their injuries.

At the time of the Robinsons' accident, the law of products liability was undergoing fundamental change in Oklahoma. Prior to 1974, a manufacturer's liability under Oklahoma law for injuries caused by a defective product could be based upon one of only two theories: negligence, or breach of express or implied warranties of the manufacturer.¹⁹ In 1974, the Oklahoma Supreme Court adopted a rule of strict liability for manufacturers for defects in their products in *Kirkland v. General Motors Corporation*,²⁰ relying on section 402A of the Restatement (Second) of Torts. Thus, if the Robinsons could establish that the Audi was defective, its manufacturer would be strictly liable for their injuries, regardless of negligence.²¹

The dollar amounts of jury verdicts in personal injury cases had been increasing dramatically during the 1970s.²² In February 1978, a California jury returned a verdict for \$128.5 million in *Grimshaw v. Ford Motor Company*.²³ There were a number of similarities between the Grimshaw case and the Robinson's case against the manufacturer of the Audi. In Grimshaw, the gas tank of a 1972 Ford Pinto exploded when the Pinto was "rear-ended" while stalled on a freeway. The driver died as a result of the fire, and Richard Grimshaw, a thirteen year old passenger, suffered severe burns on his face and entire body.²⁴

It was evident that there was the potential for the Robinsons to *1128 recover a substantial, perhaps multi-million dollar verdict. The extent of their injuries, the pain and suffering, and the psychological trauma would surely win a jury's sympathy. On the other hand, the Oklahoma law of products liability was in its early stages of development, and there were a number of unsettled legal issues. The trial would be complicated by the need for testimony by experts in automotive engineering and safety, as well as the usual medical experts and experts on damages. Moreover, the German auto manufacturers had earned a reputation for being particularly aggressive defendants. While Mr. Greer realized at the outset that the case would be difficult to try, he could not have anticipated the extent of the obstacles he would encounter.

An aspect of the Robinsons' case that Mr. Greer immediately recognized as significant was the fact that the accident had occurred just a few miles outside of Tulsa County in Creek County,²⁵ Oklahoma, making venue proper in Creek County.²⁶ An oil boom had come to Creek County at the turn of the century, but had ended shortly after World War I, and it had been an especially depressed area during the 1930's.²⁷ By the 1970's, Creek County was a blue collar community that had become known to personal injury lawyers throughout the state as being particularly sympathetic to personal injury plaintiffs. The attractiveness of Creek County as a plaintiffs' venue was and is demonstrated by the numerous change of venue cases that have originated there.²⁸ Mr. Greer regarded Creek County as one of the best venues in which to try a personal injury lawsuit in the United States.²⁹ He rated it on a par with Dade County, Florida, or Cook County, Illinois,³⁰ both notoriously high-verdict jurisdictions, and he estimated that a case in Creek County was worth twice as much as it would be in Tulsa County.

Mr. Greer knew he needed to be prepared for the defendants' attempt to defeat venue in Creek County

through removal of the case to the United States District Court for the Northern District of Oklahoma in Tulsa, a standard defense strategy in cases involving *1129 nonresident defendants. Since the Robinsons had been citizens of New York, he would have to name defendants who were also citizens of New York to destroy diversity of citizenship and thereby block removal. After verifying that Seaway Volkswagen, Inc., the car dealer from whom the Robinsons had purchased the Audi, was incorporated in and had its principal place of business in New York, Mr. Greer named Seaway Volkswagen as one of the defendants in the case. He also named World-Wide Volkswagen, Inc., the distributor which supplied the Audi to Seaway Volkswagen, as another defendant. World-Wide Volkswagen was also a citizen of New York, since it was incorporated there. The other defendant originally named in the case was Volkswagen of America, Inc., which had imported the Audi from Germany and was a citizen of New Jersey.³¹

Mr. Greer filed separate petitions on behalf of each of the Robinsons in the Bristow Division of the District Court of Creek County on October 18, 1977. The Presiding Judge was Charles S. Woodson. Each of the petitions alleged a single cause of action for products liability based on defects in the design and location of the Audi's gas tank.³²

On May 23, 1978, Mr. Greer filed amended petitions in which he added Volkswagenwerk Aktiengesellschaft (Volkswagen of Germany) as a defendant. At the time Mr. Greer understood that Volkswagen of Germany had manufactured the Audi. He later was informed through a conversation with defense counsel and in responses to his interrogatories that the manufacturer of the Audi was Audi NSU Auto Union Aktiengesellschaft (Audi NSU). Accordingly, on June 14, 1978, he obtained an order substituting Audi NSU for Volkswagen of Germany as the defendant manufacturer. The correct identity of the Audi's manufacturer would later become a crucial issue in the case.³³

Volkswagen of Germany, Volkswagen of America, and Audi NSU were affiliated companies, and all were represented in the United States by the prestigious Wall Street law firm of Herzfeld and Rubin.³⁴ Rhodes, Hieronymus, Holloway and Wilson, a Tulsa law firm specializing in insurance defense, was retained as local counsel. Bert Jones, a senior partner at Rhodes, Hieronymus, took charge of the case in Tulsa. Separate counsel were needed for the other defendants, World-Wide and Seaway Volkswagen, and Mr. Jones recommended Tulsa lawyers, Mike Barkley and Dan Rogers, respectively, to represent *1130 them.³⁵

Mike Barkley was twenty-nine years old at the time, and he had recently set up his own office. Before that, he had been an associate for several years at Rogers, Rogers and Jones, an insurance defense firm in which Dan Rogers was a named partner. Having been on his own for only a short while, Mike was thrilled to get the call from Mr. Jones concerning the case, and he was eager to defend his new client, World-Wide Volkswagen.³⁶

Volkswagen of America, World-Wide and Seaway Volkswagen each filed special appearances to contest jurisdiction in Oklahoma and venue in Creek County, and after a hearing on December 21, 1977, Judge Woodson overruled their special appearances.³⁷ Harry Robinson's deposition was taken on December 30, and the defendants learned that prior to the accident he and Kay Robinson had sold their home and business in New York and had already purchased a new home in Arizona.³⁸ On January 5, 1978, the defendants joined in a petition for removal to the United States District Court for the Northern District of Oklahoma, claiming that the Robinsons were no longer citizens of New York, and consequently, federal subject matter jurisdiction existed based on diversity of citizenship.³⁹

Mr. Greer responded with a motion to remand in which he contended that although the Robinsons were in the process of changing their citizenship, they did not become citizens of Arizona until arriving there after their release from the hospital in Tulsa.⁴⁰ He argued that when their petition was filed in Creek County,⁴¹ the Robinsons were still citizens of New York,⁴² like World-Wide Volkswagen and Seaway, and thus there could be no federal subject matter jurisdiction based on diversity of citizenship.

Claire Eagan had been the law clerk for Allen E. Barrow, the chief federal judge in the Northern District of Oklahoma, since graduating *1131 in 1976 from Fordham University School of Law. One of her last assignments for Judge Barrow before entering private practice in 1978 was the Robinsons' motion to remand to Creek County. Ms. Eagan's research supported Mr. Greer's position, and she drafted Judge Barrow's order remanding the case to Creek County.⁴³

Ms. Eagan left her employment with Judge Barrow at the end of April, 1978, and on the following Monday began work at Hall, Estill, Hardwick, Gable, Collingsworth and Nelson, the largest law firm in Tulsa. By coincidence, Mike Barkley joined the Hall, Estill firm on the same day. On the first day in their new jobs, Mr. Barkley appeared in Ms. Eagan's office, dropped the World-Wide Volkswagen file on her desk, and told her that she was now assigned to assist him with getting World-Wide Volkswagen out of the state court action.⁴⁴

III. THE BATTLE OVER JURISDICTION

Since removal had not been successful, World-Wide Volkswagen's only way to avoid trial in Creek County was by establishing that Oklahoma lacked personal jurisdiction over the company. On January 5, 1978, the same day the defendants had filed the petition for removal, World-Wide Volkswagen and Seaway Volkswagen had filed separate motions for Judge Woodson to reconsider his order overruling their special appearances.⁴⁵ No action had been taken on the motions to reconsider while the case was in federal court, but once it was *1132 remanded to Creek County, Mike Barkley had the motions set for rehearing and sent Claire Eagan to handle the argument. It was the first motion she had ever argued.⁴⁶

In 1978, Oklahoma had two long-arm jurisdiction statutes that permitted its courts to exercise jurisdiction over nonresident defendants, sections 187 and 1701.03 of title 12 of the Oklahoma Statutes.⁴⁷ Section 187 had been adopted in 1963 and was based on the Illinois long arm statute.⁴⁸ Although section 187 authorized the assertion of personal jurisdiction over nonresidents with respect to causes of action arising from a variety of acts, none of these applied to World-Wide Volkswagen.⁴⁹ Section 1701.03 had been adopted in 1965 as a part of the Uniform Interstate and International Procedure Act. It was somewhat broader than section 187 and authorized the exercise of personal jurisdiction over a nonresident defendant as to causes of action arising from either of the following:

(3) causing tortious injury in this state by an act or omission in this state;

(4) causing tortious injury in this state by an act or omission outside this state if)the nonresident regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.⁵⁰ The Robinsons' injuries had occurred in Oklahoma, but the acts or omissions of World-Wide Volkswagen that were alleged to have caused the injuries would appear to have been in New York, rather than Oklahoma.

Moreover, World-Wide Volkswagen's distribution franchise was limited to Connecticut, New York, and New Jersey, and it neither conducted business in Oklahoma nor derived any revenue from the state. Thus, there seemed to be a strong basis for arguing that World-Wide Volkswagen was not subject to personal jurisdiction under Oklahoma's long-arm statutes. On the other hand, only two years before, the Oklahoma Supreme Court had held that section 1701.03 authorized the assertion of jurisdiction over Volkswagen of America and a Volkswagen distributor in Texas in another products liability case.⁵¹

*1133 Ms. Eagan argued to Judge Woodson that Oklahoma did not have personal jurisdiction over her client under section 1701.03, because World-Wide Volkswagen did not sell any automobiles in Oklahoma. In addition, she maintained that construing section 1701.03 to extend personal jurisdiction over World-Wide Volkswagen would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Judge Woodson advised the inexperienced lawyer that the Fourteenth Amendment did not carry much weight in Creek County, and the motion to reconsider was denied.⁵²

Ms. Eagan was ready to abandon her effort, but Mike Barkley was convinced that Creek County had no jurisdiction over his client. He told her to prepare an application to assume original jurisdiction and a petition for a writ of prohibition and file it with the Oklahoma Supreme Court. Although Volkswagen of America and Audi NSU had also objected to jurisdiction at the trial court level, they did not join in World-Wide Volkswagen's petition to the Oklahoma Supreme Court. However, Seaway Volkswagen, the auto dealer, did join in the petition. Seaway Volkswagen's liability was based on its having sold a defective product that World-Wide Volkswagen had supplied, and therefore, it was entitled to indemnity from World-Wide Volkswagen.⁵³ Moreover, as long as Seaway Volkswagen did not take a position that was adverse to World-Wide Volkswagen, it would be entitled to indemnification for its attorney's fees.⁵⁴ Consequently, World-Wide Volkswagen assumed primary responsibility for defending the case against Seaway Volkswagen and itself, and Seaway Volkswagen took a passive role throughout the litigation, joining in all of World-Wide Volkswagen's actions.

The Oklahoma Supreme Court granted the application to assume original jurisdiction, but it denied the writ of prohibition.⁵⁵ Mr. Greer maintained before the Oklahoma Supreme Court that jurisdiction existed under both paragraphs (3) and (4) of section 1701.03, citing the Illinois Supreme Court's holding in *Gray v. American Radiator & *1134 Standard Sanitary Corporation*.⁵⁶ The Gray case involved an interpretation of the provision in the Illinois long-arm statute that authorized the assertion of jurisdiction arising from the "commission of a single tort within this State."⁵⁷ Reasoning that a tort was not complete until a plaintiff sustained an injury, the Illinois Supreme Court decided that a defendant that had manufactured and sold a defective product in another state committed a tort in Illinois and was therefore subject to jurisdiction there, because the plaintiff's injury resulting from the defect was sustained in Illinois.⁵⁸

The Oklahoma Supreme Court ruled that a similar interpretation of paragraph (3) would render paragraph (4) nugatory, because it would make it impossible to have a tortious injury in the state caused by an act or omission outside the state.⁵⁹ Nevertheless, it held that paragraph (4) conferred jurisdiction over World-Wide Volkswagen, because given the retail value of the Audi, World-Wide Volkswagen had derived substantial revenue from the Robinsons' use of the Audi in Oklahoma as well as from the sale of other automobiles that from time to time would foreseeably be used in Oklahoma. The Oklahoma Supreme Court explained its holding as follows:

The product being sold and distributed by World-Wide and Seaway Volkswagen is by its very design and purpose so mobile that World-Wide and Seaway Volkswagen can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by World-Wide and Seaway Volkswagen were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that World-Wide and Seaway Volkswagen derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding that World-Wide and Seaway Volkswagen derive substantial revenue from goods used or consumed in this State.⁶⁰

As soon as the Oklahoma Supreme Court's decision came down, Mr. Barkley told Ms. Eagan to pack her bags because they were going to New York.⁶¹ Mr. Barkley was still not ready to give up, and he wanted to obtain authorization from his client to petition the United States Supreme Court for certiorari. When Mr. Barkley and Ms. *1135 Eagan met with World-Wide Volkswagen's corporate counsel and its insurer in New York, both refused to authorize them to incur any additional legal expenses contesting the jurisdictional issue. Their justification was that World-Wide Volkswagen was entitled to indemnification against Volkswagen of America and Audi NSU for the same reason that Seaway Volkswagen was entitled to be indemnified by World-Wide Volkswagen.⁶² Since World-Wide Volkswagen was not willing to pay to take the case to the United States Supreme Court, Ms. Eagan thought the battle over jurisdiction was finally at an end.

But Mr. Barkley took Ms. Eagan across the street to the offices of Herzfeld and Rubin, the law firm representing Volkswagen of America and Audi NSU. Mr. Barkley explained to the lawyers at Herzfeld and Rubin that if World-Wide and Seaway Volkswagen were dismissed for lack of personal jurisdiction, Volkswagen of America and Audi NSU could remove the case to federal court and avoid a trial before a "plaintiff's jury" in Creek County. He managed to convince them that it was in their clients' interests to underwrite the legal expenses of taking the case to the United States Supreme Court, particularly since their clients were already obligated to indemnify World-Wide and Seaway Volkswagen's legal expenses. As a result of Mike Barkley's meeting with Herzfeld and Rubin, Volkswagen of America and Audi NSU agreed to pay for World-Wide Volkswagen's petition for certiorari.⁶³ In addition, Herzfeld and Rubin would participate in the preparation of the briefs, and a senior partner of Herzfeld and Rubin, Herbert Rubin, would argue World-Wide Volkswagen's cause before the Supreme Court instead of Mike Barkley.⁶⁴ Had the "upstream" defendants not paid World-Wide Volkswagen's legal expenses, there would have been no World-Wide Volkswagen Corp. v. Woodson decision by the United States Supreme Court.

The work began on the petition for certiorari. The weakest link in the Oklahoma Supreme Court's opinion was its conclusion that World-Wide and Seaway Volkswagen derived substantial revenue from the use of automobiles in Oklahoma, since it was likely that no *1136 automobiles they had ever sold, aside from the Robinsons' Audi, had been used in Oklahoma. However, the Oklahoma Supreme Court is the final authority on matters of Oklahoma law,⁶⁵ such as the meaning of the phrase "derives substantial revenue from goods used . . . in this state" in section 1701.03(4). The only issue the United States Supreme Court could address was whether Oklahoma's exercise of jurisdiction over World-Wide and Seaway Volkswagen violated their rights to due process of law under the Fourteenth Amendment to the United States Constitution.⁶⁶

Although it had long been a fundamental topic in every law school civil procedure course, at the time the petition for certiorari was being prepared, the constitutionality of a state court's exercise of personal jurisdiction over nonresident defendants had been addressed in only a relatively small number of Supreme Court cases. One hundred years before, the Supreme Court had ruled in the landmark case of *Pennoyer v. Neff*⁶⁷ that the Fourteenth Amendment's Due Process Clause places limits on a state court's exercise of jurisdiction over nonresident defendants.⁶⁸ The *Pennoyer* scheme of personal jurisdiction was based on the physical presence of defendants: in general, the courts of a forum state could exercise jurisdiction over any persons and property within its borders but could not exercise jurisdiction over persons and property outside its borders.⁶⁹ Serious problems ultimately developed in applying this jurisdictional scheme to nonresident motorists, who might cause an accident in a state and depart before the victims could serve them with summons. Similar difficulties were presented by modern corporations that conduct business nationwide but lack a physical presence in many states. These problems led the Supreme Court to scrap the *Pennoyer* scheme in 1945 and replace it with a fairness standard based on minimum contacts and "traditional notions of fair play and substantial justice"⁷⁰ in *International Shoe Co. v. Washington*.⁷¹

During the early 1950s, the Supreme Court applied the new *International Shoe* standard flexibly in several cases,⁷² each time upholding the exercise of personal jurisdiction. But in 1958, it ruled that a Florida *1137 state court's exercise of jurisdiction was unconstitutional in *Hanson v. Denckla*.⁷³ After *Hanson*, the Supreme Court seemed to lose interest in the area, and during the next two decades, it did not take any cases involving personal jurisdiction. Then in 1977 and 1978, the Supreme Court handed down *Shaffer v. Heitner*⁷⁴ and *Kulko v. Superior Court*,⁷⁵ two decisions in which it reversed assertions of personal jurisdiction over nonresident defendants by state courts.

The brief accompanying *World-Wide and Seaway Volkswagen's* petition for certiorari emphasized the Supreme Court's three most recent cases in which it had ruled in favor of defendants contesting personal jurisdiction.⁷⁶ In *Hanson v. Denckla*, the Supreme Court first articulated the rule that for a defendant to be subject to a state court's jurisdiction, there must "be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."⁷⁷ The Supreme Court again employed this "purposeful availment" requirement to strike down state courts' assertion of jurisdiction over nonresident defendants in *Shaffer v. Heitner*⁷⁸ and *Kulko v. Superior Court*,⁷⁹ and *World-Wide and Seaway Volkswagen* urged its application in their own case.⁸⁰ They pointed out that the Robinsons were responsible for the Audi's entering Oklahoma, and argued that they should not be subject to jurisdiction in Oklahoma because of "a fortuitous event precipitated by the unilateral, voluntary act of the Robinsons in driving through that state."⁸¹ *World-Wide and Seaway Volkswagen* further argued the mere fact it may have been foreseeable that the Robinsons might drive to Oklahoma should not be enough to permit its courts to exercise jurisdiction over the companies; *1138 otherwise, any local seller would become subject to suit in every state where a purchaser might take a product.⁸² They contended that to provide a sufficient basis for jurisdiction, foreseeability had to be coupled with the "affiliating circumstances" that the seller purposefully availed itself of the benefits of the forum state.⁸³

Mr. Greer responded that *World-Wide and Seaway Volkswagen* were parts of a national network of Audi dealers, including one located in Tulsa on Route 66.⁸⁴ Consequently, both *World-Wide* and *Seaway Volkswagen* could reasonably anticipate that purchasers of their automobiles would travel to

Oklahoma and require servicing there. He also cited a number of cases upholding jurisdiction where torts committed in another state resulted in injuries in the forum state.⁸⁵ The Robinsons' brief in opposition to the petition for certiorari concluded with an appeal to the Supreme Court that it not return to the restrictive jurisdictional doctrine of *Pennoyer v. Neff*, which the Supreme Court had rejected twenty years before.⁸⁶

The Supreme Court grants fewer than five percent of the thousands of petitions for certiorari that are filed with it each year.⁸⁷ The chances of having one's case heard by the High Court are therefore ordinarily slim, but the likelihood that the Court would grant World-Wide Volkswagen's petition seemed especially remote. Not only had the Supreme Court heard few cases involving personal jurisdiction over the preceding two decades, but it had denied numerous petitions for certiorari presenting issues similar to those raised by World-Wide Volkswagen.⁸⁸

*1139 One aspect of World-Wide Volkswagen's case, however, distinguished it from the others: it was the first petition for certiorari in a products liability case where the allegedly defective product had been brought into the forum state by a consumer, rather than by the manufacturer or a distributor.⁸⁹ This would prove to be crucial to the Supreme Court's decision that Oklahoma lacked jurisdiction over World-Wide Volkswagen and Seaway.⁹⁰ Another factor that may have influenced the Supreme Court was the coincidental filing of an appeal in *Rush v. Savchuk*,⁹¹ a case from Minnesota involving an issue of quasi in rem jurisdiction.⁹² The Supreme Court noted probable jurisdiction in *Rush v. Savchuk* on the same day that it granted World-Wide and Seaway Volkswagen's petition for certiorari, and ordered the two cases set for argument together.

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World-Wide and Seaway Volkswagen's battle over jurisdiction *1143 ended with the Supreme Court's decision, which has become a staple of civil procedure courses and casebooks since 1980. But the battle over jurisdiction was only a preliminary skirmish in the many years of litigation that lay ahead for the parties who remained in the case.

Note about subsequent history of the case

On remand, the case went to trial. The federal jury rendered a verdict for the defendants. That was appealed and there was a second trial but ultimately, after 20 years of litigation, the Robinsons received no compensation at all for their injuries.

The U.S. Legal System: A Short Description

Federal Judicial Center

BACKGROUND

The U.S. Constitution establishes a federal system of government. The constitution gives specific powers to the federal (national) government. All power not delegated to the federal government remains with the states. Each of the 50 states has its own state constitution, governmental structure, legal codes, and judiciary.

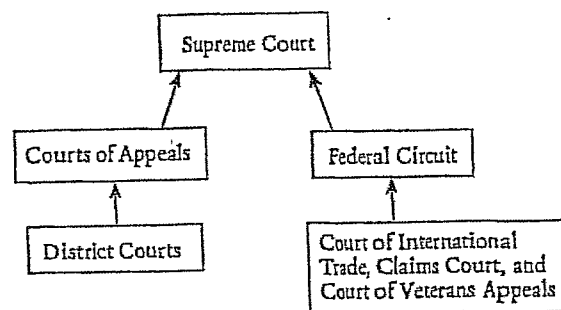
The U.S. Constitution establishes the judicial branch of the federal government and specifies the authority of the federal courts. Federal courts have exclusive jurisdiction only over certain types of cases, such as cases involving federal laws, controversies between states, and cases involving foreign governments. In certain other areas federal courts share jurisdiction with state courts. For example, both federal and state courts may decide cases involving parties who live in different states. State courts have exclusive jurisdiction over the vast majority of cases.

Parties have a right to trial by jury in all criminal and most civil cases. A jury usually consists of a panel of 12 citizens who hear the evidence and apply the law stated by the judge to reach a decision based on the facts as the jury has determined them from the evidence at trial. However, most legal disputes in the United States are resolved before a case reaches a jury. They are resolved by legal motion or settlement, not by trial.

STRUCTURE OF THE FEDERAL COURT SYSTEM

The U.S. Constitution establishes the U.S. Supreme Court and gives Congress the authority to establish the lower federal courts. Congress has established two levels of federal courts below the Supreme Court: the U.S. district courts and the U.S. circuit courts of appeals.

U.S. district courts are the courts of first instance in the federal system. There are 94 such district courts throughout the nation. At least one district court is located in each state. District judges sit individually to hear cases. In addition to district judges, bankruptcy judges (who hear only bankruptcy cases) and magistrate judges (who perform many judicial duties under the general supervision of district judges) are located within the district courts. U.S. circuit courts of appeals are on the next level. There are 12 of these regional intermediate appellate courts located in different parts of the



THE U.S. LEGAL SYSTEM: A SHORT DESCRIPTION

country. Panels of three judges hear appeals from the district courts. A party to a case may appeal as a matter of right to the circuit court of appeals (except that the government has no right of appeal in a criminal case if the verdict is "not guilty.") These regional circuit courts also hear appeals from decisions of federal administrative agencies. One non-regional circuit court (the Federal Circuit) hears appeals in specialized cases such as cases involving patent laws and claims against the federal government.

At the top of the federal court system is the U.S. Supreme Court, made up of nine justices who sit together to hear cases. At its discretion, the U.S. Supreme Court may hear appeals from the federal circuit courts of appeals as well as the highest state courts if the appeal involves the U.S. Constitution or federal law.

STRUCTURE OF STATE COURT SYSTEMS

The structure of state court systems varies from state to state. Each state court system has unique features; however, some generalizations can be made. Most states have courts of limited jurisdiction presided over by a single judge who hears minor civil and criminal cases. States also have general jurisdiction trial courts that are presided over by a single judge. These trial courts are usually called circuit courts or superior courts and hear major civil and criminal cases. Some states have specialized courts that hear only certain kinds of cases such as traffic or family law cases.

All states have a highest court, usually called a state supreme court, that serves as an appellate court. Many states also have an intermediate appellate court called a court of appeals that hears appeals from the trial court. A party in a case generally has one right of appeal.

COURT ADMINISTRATION

The judicial branches of the federal and state governments are separate from the legislative and executive branches. To insure judicial independence, the judicial branches of the federal and state governments control the administration of the courts. Court administration includes managing court budgets, prescribing rules of trial and appellate procedure, reviewing judicial discipline matters, offering continuing educational programs for judges, and studying court performance.

In the federal judiciary, the Judicial Conference of the United States, made up of 27 members (the Chief Justice of the United States and 26 judges from each geographic region of the United States) has overall administrative responsibility for the courts and has primary authority to make policy regarding the operation of the judicial branch of the government. The Judicial Conference is assisted by a large number of committees made up of federal judges (and sometimes also state court judges and attorneys) who study different parts of the federal court system and make recommendations. An important re-

sponsibility of the Judicial Conference is to recommend changes in the rules of procedure used by all federal courts.

Congress has created three administrative agencies within the judicial branch. The Administrative Office of the U.S. Courts manages the day-to-day operations of the courts, including such matters as payroll, equipment, and supplies. The Federal Judicial Center conducts educational and training programs for judges and court personnel and does research in the fields of court operations and administration. The U.S. Sentencing Commission develops advisory guidelines for federal judges in imposing criminal sentences.

In most state court systems, the state supreme court has overall administrative authority over the court system. It is assisted by an administrative office. The chief justice of the state supreme court usually appoints the director of the state court administrative office.

JUDGES

Justices of the U.S. Supreme Court and circuit and district judges are appointed by the President of the United States if approved by a majority vote of the U.S. Senate. These justices and judges serve "during good behavior"—in effect, a life term. Presidents usually nominate persons to be judges who are members of their own political party. Persons appointed are usually distinguished lawyers, law professors, or lower federal court or state court judges. Once these judges are appointed their salaries cannot be reduced. Federal judges may only be removed from office through an impeachment process in which charges are made by the House of Representatives and a trial is conducted by the Senate. In the entire history of the United States, only a few judges have been impeached and those removed were found to have committed serious misconduct. These protections allow federal judges to exercise independent judgment without political or outside interference or influence.

The methods of selecting state judges vary from state to state and are often different within a state, depending on the type of court. The most common selection systems are by commission nomination and by popular election. In the commission nomination system, judges are appointed by the governor (the state's chief executive) who must choose from a list of candidates selected by an independent commission made up of lawyers, legislators, lay citizens, and sometimes judges. In many states judges are selected by popular election. These elections may be partisan or non-partisan. Candidates for judicial appointment or election must meet certain qualifications, such as being a practicing lawyer for a certain number of years. With very few exceptions, state judges serve specified, renewable terms. All states have procedures governing judicial conduct, discipline, and removal.

In both the federal and state systems, judicial candidates are almost always lawyers with many years of experience. There is no specific course of training for judges and no examination. Some states require judges to attend continuing education programs to learn about developments in the law. Both the federal and state court systems offer beginning and continuing education programs for judges.

PROSECUTORS

Prosecutors in the federal system are part of the U.S. Department of Justice in the executive branch. The Attorney General of the United States, who heads the Department of Justice, is appointed by the President with Senate confirmation. The chief prosecutors in the federal court districts are called U.S. attorneys and are also appointed by the President with Senate confirmation. Within the Department of Justice is the Federal Bureau of Investigation, which investigates crimes against the United States.

Each state also has an attorney general in the state executive branch who is usually elected by the citizens of that state. There are also prosecutors in different regions of the state, called state's attorneys or district attorneys. These prosecutors are also usually elected.

LAWYERS

The U.S. legal system uses the adversarial process. Lawyers are essential to this process. Lawyers are responsible for presenting their clients' evidence and legal arguments to the court. Based on the lawyers' presentations, a trial judge or jury determines the facts and applies the law to reach a decision before judgment is entered.

Individuals are free to represent themselves in American courts, but lawyers are often necessary to present cases effectively. An individual who cannot afford to hire a lawyer may attempt to obtain one through a local legal aid society. Persons accused of crimes who cannot afford a lawyer are represented by a court-appointed attorney or by federal or state public defender offices.

American lawyers are licensed by the individual states in which they practice law. There is no national authority that licenses lawyers. Most states require applicants to hold a law degree (Juris Doctor) from an accredited law school. An American law degree is a post-graduate degree awarded at the end of a three-year course of study. (Normally individuals complete four years of college/university before attending law school). Also, most states require that applicants for a license to practice law pass a written bar examination and meet certain standards of character. Some states allow lawyers to become bar members based on membership in another state's bar. All states provide for out-of-state lawyers to practice in the state in a particular case under certain conditions. Lawyers can engage in any kind of practice. Although there is no formal distinction among types of legal practice, there is much informal specialization.

ESSAYS

A TALE OF TWO CIVIL PROCEDURES

Pamela K. Bookman & Colleen F. Shanahan***

I. LAWYERED AND LAWYERLESS COURTS

A. *Types of Cases*

When federal civil procedure scholars think of state courts, they may think of a less structured, more chaotic, more plaintiff-friendly, elected-judge-ruled courtroom where plaintiff-lawyer-led litigation vaguely resembles what takes place in federal court but takes longer and yields higher jury awards. This image has been carefully cultivated and promoted by the Chamber of Commerce and other like-minded organizations, who rank state court systems as “judicial hellholes” when they are conducive to class actions and other kinds of suits against business defendants.²¹ In this telling, plaintiff’s lawyers are opportunistic “bad guys.”²² The image is

20. See *supra* notes 3–9 and accompanying text.

21. See, e.g., Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. Va. L. Rev. 1097, 1098 (2008) [hereinafter *Thornburg, Judicial Hellholes*]; *Florida Surpasses California to Become Worst ‘Judicial Hellhole’*, Fla. Chamber of Com. (Dec. 5, 2017), <https://www.flchamber.com/florida-surpasses-california-to-become-worst-judicial-hellhole/> [https://perma.cc/HPX6-KTG8]; *The U.S. Chamber Institute for Legal Reform Commends Judicial Hellholes for Highlighting Nation’s Worst Civil Justice Jurisdictions*, U.S. Chamber Inst. for Legal Reform (Dec. 5, 2018), <https://instituteforlegalreform.com/the-u-s-chamber-institute-for-legal-reform-commends-judicial-hellholes-for-highlighting-nations-worst-civil-justice-jurisdictions/> [https://perma.cc/CA68-3MKA]; 2020–2021 *Judicial Hellhole Report*, Everlasting Judicial Hellholes 2020/2021, ATR Found., <https://www.judicialhellholes.org/reports/2020-2021-executive-summary/> [https://perma.cc/K7B8-CBKP] (last visited Mar. 20, 2022); cf. Megan M. La Belle, *Influencing Juries in Litigation “Hot Spots”*, 94 Ind. L.J. 901, 930 (2019).

22. See, e.g., Thornburg, *Judicial Hellholes*, *supra* note 21, at 1100 (explaining the campaign to scapegoat plaintiffs’ lawyers and paint them “as greedy parasites trying to make an easy buck by scaring companies into settling frivolous claims”).

federal-court-centric, depicting state courts as a wild west version of what happens in federal court.

Even if one rejects the negativity of this imagery, one may still imagine state courts as a rough corollary to federal court—at least in terms of many of the kinds of cases heard, if not the amount of money at stake. Federal courts have exclusive jurisdiction over few cases. Most federal court cases could be heard in state court, and there are some state courts that do resemble federal courts along these metrics. Discussion of state courts in civil procedure scholarship and curricula tends to focus on these state courts, often while considering how state courts relate to federal courts.²³ For example, in studying the law of removal, one learns that state courts of general jurisdiction provide an alternative forum for federal claims. In these state courts, parties file suits that could plausibly be removed to federal court. Such litigation would likely involve questions of federal law or high monetary stakes (and thus potentially satisfy the federal amount-in-controversy requirement) and parties from different states—cases similar to the ones that federal courts handle.²⁴

Thinking of state litigation in terms of whether it could proceed in federal court focuses one's attention on certain kinds of cases. Those cases—business or insurance disputes, for example—exist in state courts. Indeed, many states have established separate commercial divisions.²⁵ These cases tend to involve higher monetary stakes, the parties are likely to be able to afford zealous lawyers, and the courts in which these cases unfold often do follow procedures that roughly resemble the Federal Rules.

23. See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 295–303 (7th ed. 2015) (discussing the relationship between federal and state courts); Zachary D. Clopton, *Making State Civil Procedure*, 104 *Cornell L. Rev.* 1, 4–5 (2019) [hereinafter Clopton, *Making State Civil Procedure*] (providing a comprehensive study of state court procedure-making, in part to understand the relationship between state court procedure and federal procedural retrenchment); cf. Weinstein-Tull, *supra* note 1, at 1034–35 (analyzing lawyerless state courts to draw conclusions about federalism).

24. Other federal civil procedure and federal court topics that involve state courts include abstention doctrines, exclusive jurisdiction, and state courts' obligation to enforce federal law. See Fallon et al., *supra* note 23, at 1101–71 (abstention doctrines); *id.* at 418–22 (exclusion of state court jurisdiction); *id.* at 440–60 (obligation to enforce federal law).

25. Pamela K. Bookman, *New York's International Commercial Courts*, in *New Specialised Commercial Courts and Their Role in Cross-Border Litigation* (forthcoming 2022–2023) (manuscript at 6) (on file with the *Columbia Law Review*); John F. Coyle, *Business Courts and Interstate Competition*, 53 *Wm. & Mary L. Rev.* 1915, 1918 (2012) (listing nineteen states that have established dedicated business courts). Part of the impetus is to attract the business of business litigation into the state by creating a court that commercial parties want to choose in their forum selection clauses. For an overview of these trends in the United States and around the world, see Pamela K. Bookman, *The Adjudication Business*, 45 *Yale J. Int'l L.* 227, 233–39 (2020) (discussing the rise of specialized commercial courts in London and New York).

But the vast majority of state court cases raise issues of state law and could not be filed in federal court.²⁶ “The state courts are flooded with cases related to consumer debt, divorce, child custody and support, paternity, wage and hour, landlord–tenant, abuse and neglect, probate, and domestic violence.”²⁷ Relatedly, the litigants do not have the funds and do not stand to benefit financially from the litigation to support legal fees—especially if the claims cannot be aggregated.²⁸ Indeed, the courts we describe as lawyerless are often known as “poor people’s courts.”²⁹

The result is often a bifurcated justice system within state courts: between resourced parties or parties with claims large enough to support paying an attorney, and the rest of the people with legal problems.³⁰ In some states, like New York, these courts are literally different places and different divisions (e.g., Commercial Court and Family Court).³¹ In other

26. See, e.g., Hannaford-Agor et al., *supra* note 1, at 8 (reporting that, of civil cases in seventeen states’ courts of general jurisdiction, 61% were contract cases, 11% probate, and 11% small claims); Shanahan et al., *Institutional Mismatch*, *supra* note 1, at app. tbl.2.

27. Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case”* *Civil Justice*, 2016 *BYU L. Rev.* 899, 919 [hereinafter Steinberg, *Adversary Breakdown*].

28. Significant reductions in the availability of class actions have also reduced low-income litigants’ access to federal *and* state courts (and to lawyers) through aggregation of small-value claims. See Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 *Emory L.J.* 1531, 1536 (2016) [hereinafter Gilles, *Low-Income Litigants*] (“[I]n recent decades, access to class-wide relief for low-income groups has declined precipitously.”). Gilles describes how class action restrictions especially limit low-income litigants’ class actions, and the title of her essay presumably applies to the disappearance of low-income litigants from the civil dockets of federal courts, or perhaps lawyered courts. See *id.* at 1535–37. The inability to aggregate small-value claims, of course, often effectively deters bringing such claims individually. Moreover, as discussed below, federal legislation granting federal courts jurisdiction over class actions that otherwise might be brought in state courts has resulted in the application of the stricter federal court standards that have effectively eliminated many of these class actions altogether. See *infra* notes 185–192 and accompanying text (discussing the Class Action Fairness Act of 2005).

29. See Vicki Lens, *Poor Justice: How the Poor Fare in the Courts* x–xi (2016) (describing “how the lives of poor people are disrupted or helped by the judicial system”); Tonya L. Brito, *Producing Justice in Poor People’s Courts: Four Models of State Legal Actors*, 25 *Lewis & Clark L. Rev.* 145, 147 (2020) (using the term “poor people’s courts” to refer to “state courts hearing family, housing, administrative, and consumer cases”); Elizabeth L. MacDowell, *Reimagining Access to Justice in Poor People’s Courts*, 22 *Geo. J. on Poverty L. & Pol’y* 473, 475 (2015) (“[T]his article uses the term ‘poor people’s courts’ to refer to state civil courts serving large numbers of low-income, unrepresented litigants . . .”).

30. This dynamic exists to a lesser extent, and in different ways, in federal courts. See Hammond, *Pro Se Procedure*, *supra* note 4, at 2695 (discussing the “shadow system of civil procedure” that applies to federal pro se litigants); Roger Michalski & Andrew Hammond, *Mapping the Civil Justice Gap in Federal Court*, 57 *Wake Forest L. Rev.* (forthcoming 2022) (manuscript at 5), <https://ssrn.com/abstract=3931568> [<https://perma.cc/8FQU-NNYC>].

31. *N.Y. Comp. Codes R. & Regs.* tit. 22, § 202.70 (2021) (Uniform Rules of the Commercial Division of the Supreme Court); *id.* at § 205 (Uniform Rules of the Family Court); see also Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 *Law & Soc. Inquiry* 1058, 1060–61 (2017)

states, like California, there is a unified court system, although parties with different kinds of cases are directed to different courthouses.³²

But while some states' commercial divisions are busier than others, all states have some courts or courtrooms that have far more cases than they can reasonably handle and that suffer from chronic funding shortages, "with budget cuts sparked by recessions and many state legislatures declining to restore funding in times of economic growth."³³ They have become the government of last resort for a host of social problems, from consumer debt to housing issues to domestic violence.³⁴ Indeed, although lawyerless state courts are overflowing with more cases than they can handle, a proportionally small number of legal problems become legal cases.³⁵ As discussed below, in these courts, procedures differ starkly from those in federal court.³⁶

B. *Variation in Written Procedure*

It is commonly assumed, as a rough generalization, that civil courts in the United States, whether federal or state, have similar written procedures.³⁷ Specifically, there is first the "assumption of equivalence"—the assumption that state codes of procedure either copy or effectively parallel

(noting that District of Columbia housing court's "inquisitorial regime . . . departs sharply from traditional adversarial procedure").

32. See Nat'l Ctr. for State Cts. Data Visualizations, Courts of Limited Jurisdiction, Tableau Pub. (July 8, 2019), <https://public.tableau.com/app/profile/ncscviz/viz/CourtsOfLimitedJurisdiction/Story1> (on file with the *Columbia Law Review*).

33. Wilf-Townsend, *supra* note 12, at 1713–14; see also Kathryn A. Sabbeth, Market-Based Law Development, LPE Project (July 21, 2021), <https://lpeproject.org/blog/market-based-law-development/> [<https://perma.cc/VM94-VVFA>] [hereinafter Sabbeth, Market-Based Law Development]; Zambrano, Federal Expansion, *supra* note 9, at 2103 (discussing the budget struggles of many state judicial systems).

34. Colleen F. Shanahan & Anna E. Carpenter, Simplified Courts Can't Solve Inequality, 148 *Daedalus* 128, 130, 133 (2019).

35. The leading scholar on access to justice, Rebecca Sandefur, uses the iceberg metaphor to describe the scope of civil justice problems in the United States: The percentage of cases that end up in court represent only the tip of the iceberg of civil legal problems. See Sandefur, *Access to What?*, *supra* note 14, at 50. For a visualization, where the vast number of civil justice problems are represented by the bulk of an iceberg beneath the water's surface, see William D. Henderson, Rule Makers vs. Risk Takers, Univ. of Denver Inst. for the Advancement of the Am. Legal Sys. (Mar. 25, 2020), <https://iaals.du.edu/blog/rule-makers-vs-risk-takers> [<https://perma.cc/9EAL-PHSH>] (providing a visualization of Sandefur's *Access to What?*).

36. There is a related, but distinct, phenomenon in administrative agency proceedings. While agency adjudications are typically lawyerless, they are also by definition executive branch processes designed to implement government action, and their procedural rules and norms follow from this structural difference. See Shanahan et al., *Lawyers, Power, and Strategic Expertise*, *supra* note 1, at 476–81 (describing the hearing procedures of a District of Columbia administrative tribunal).

37. See, e.g., Scott Dodson, The Gravitational Force of Federal Law, 164 *U. Pa. L. Rev.* 703, 705 (2016) (arguing that states "routinely follow[] federal law even when adherence is not compelled").

the Federal Rules.³⁸ This rough assumption³⁹ has some purchase in some state courts—often those that hear business trial cases or class actions, for example.⁴⁰ But equivalence can be difficult to measure on a formal basis (even when a state has copied the Federal Rules of Civil Procedure)⁴¹ and may change over time—especially as the Supreme Court’s interpretations of the Federal Rules evolve and states choose whether to follow course.⁴² More important for our purposes is the fact that, however true this assumption of equivalence might be for lawyered state courts, it is less true, if not decidedly false, when it comes to lawyerless ones.

The assumption of equivalence fails both because lawyerless courts are sometimes separate court divisions with their own written rules of procedure and also because of informal and unwritten rules of procedure. First, written procedure does not only vary from state to state; it also varies *within* state court systems.⁴³ As noted, many states have subject-matter-specific courts dedicated to addressing certain kinds of social problems,

38. See, e.g., Coleman, *One Percent Procedure*, supra note 10, at 1049 (noting that “[a]bout half of the states have adopted the Federal Rules of Civil Procedure verbatim,” and in those that have not, “at least one study has determined that procedural practice in those state courts often lines up with federal court practice”); *id.* (arguing that elite litigation by elite lawyers in federal court has an outsized influence on procedural rules and development in state and federal court). But see Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 *Case W. Resv. L. Rev.* 501, 512–16 (2016) (describing studies in 1986 and 2003 showing an absence of intra-state procedural uniformity, even among so-called “replica states”).

39. There is a longstanding debate on the “parity” of state and federal courts—a debate that tends to assume or rebut the argument that federal courts provide a superior kind of procedure that state courts should emulate. But this debate, again, focuses on the comparison between federal courts and those state trial courts that perform a similar function and entertain somewhat comparable kinds of cases litigated predominantly by represented litigants. See, e.g., Burt Neuborne, *Myth of Parity*, 90 *Harv. L. Rev.* 1105, 1115–30 (1977). Erwin Chemerinsky has concluded, “[U]ltimately the issue of parity is an empirical question for which no empirical measure is possible.” Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 *UCLA L. Rev.* 233, 256 (1988).

40. See, e.g., Spaulding, supra note 3, at 265 (“For a few decades in the twentieth century there may have been parallels between federal procedural law and the procedural law of the states, but there are arguably more divergences than similarities now in some of the most consequential areas of pretrial litigation.”).

41. Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 *Calif. L. Rev.* 411, 424 n.108 (2018) [hereinafter Clopton, *Retrenchment*] (“There is considerable difficulty in measuring the degree of overlap between federal and state systems of procedure. The prevailing view seems to be that the Federal Rules had a marked impact on the form of state procedure . . . [and] on content, though that trend has slowed, if not reversed.”); see also *id.* (showing that states have deviated from federal procedural rules and recommending that they do so more in response to federal procedural retrenchment).

42. See, e.g., *id.* at 465 (documenting a “hodgepodge of state procedural choices”); Hannaford-Agor, supra note 1, at 11 (charting the organization of state court jurisdiction over general civil cases); Subrin & Main, supra note 38, at 516 (cautioning against evaluating intra-state uniformity based solely on textual uniformity).

43. See Nat’l Ctr. for State Cts. Data Visualizations, supra note 32.

like housing court, family court, or domestic violence court.⁴⁴ These courts often have their own procedural codes, with important differences from the Federal Rules of Civil Procedure. For example, as compared to the federal system, New York has fewer constraints on discovery, more liberal appeals, and more flexibility with regard to jury trials.⁴⁵ Within New York, a general civil matter heard in the Supreme Court is subject to more formal filing requirements and procedural rules as well as the rules of evidence. A matter heard in Family Court has more litigant-friendly filing requirements and procedures, as well as statutory exceptions to the rules of evidence.⁴⁶

Second, not all procedure is encapsulated in a set of written rules.⁴⁷ Related to the equivalence assumption is another underlying assumption: that the development and interpretation of written procedure in state civil courts resembles development and interpretation in federal court.⁴⁸ To the extent that federal-state procedural equivalence is judged by reading state court judicial opinions about procedural issues,⁴⁹ the very conversation assumes the existence of lawyers arguing these points and judges writing opinions about them. This assumption does not hold in lawyerless courts where the absence of lawyers on both sides and of written opinions, especially about procedure, make it nearly impossible to test the assumption using common tools. Practitioners and clinical professors, however, provide extensive data and testimonies demonstrating that procedure on

44. In New York, for example, the trial-level Supreme Court only hears those cases which fall outside the jurisdiction of more specialized courts such as the Family Court, the Surrogate's Court, and the Court of Claims. See Janet DiFiore & Lawrence K. Marks, *New York State Unified Court System, New York State Courts: An Introductory Guide* 2-3 (2016), <http://ww2.nycourts.gov/sites/default/files/document/files/2019-06/NYCourts-IntroGuide.pdf> [<https://perma.cc/453X-J226>].

45. See N.Y. Comp. Codes R. & Regs. tit. 22, §§ 205.1-205.86 (2021).

46. *Id.* §§ 202.1-202.72 (Supreme Court Rules); *id.* § 205.1-205.86 (Family Court Rules).

47. In Georgia, for example, the state law governing eviction proceedings "leaves interstitial gaps that local jurisdictions must fill out of necessity," such that localized courts use "local norms, demographics, and court culture . . . to adapt their own process in ways that shape outcomes and the experience of those using the system." Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 *Vand. L. Rev.* 1365, 1379 (2021).

48. Compare Dodson, *supra* note 37, at 706 (arguing that states "follow federal law" even when "state actors have authority to craft regimes and render interpretations different from—even contrary to—federal law"), with Clopton, *Making State Civil Procedure*, *supra* note 23, at 3 ("Unnoticed by virtually all procedure scholars, the states are pursuing a different course [from the federal rulemaking process].").

49. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 *Vill. L. Rev.* 311, 470-79 (2001) (discussing pleading); *id.* at 363 (discussing discovery).

the ground in lawyerless courts varies considerably from procedure in federal court or even in lawyered state trial courts.⁵⁰ Indeed, some clinical professors have described lawyerless courts as unrecognizable to students who have studied only federal courts.⁵¹

To study civil procedure in federal courts, scholars look at the Federal Rules of Civil Procedure, local rules, statutes, judicial opinions, and sometimes interviews with lawyers, judges, and even parties. The Rules receive significant scholarly attention.⁵² But scholars also acknowledge that there is more to procedure than the Rules alone.⁵³ By contrast, in lawyerless

50. See Carpenter et al., "New" Civil Judges, *supra* note 3, at 261–65 ("[S]tudies have found differences in how judges apply substantive and procedural law, with some judges refusing to follow existing law at all. Our own research has shown that some judges routinely depart from adversary procedures when dealing with pro se litigants, while others hew to the passive norm."); Steinberg, Adversary Breakdown, *supra* note 27, at 938 ("[I]t has become routine for judges to employ a range of unsanctioned adversary departures."); Sabbeth, Market-Based Law Development, *supra* note 33 ("When arguments are raised (and certainly when they are not), judges routinely disregard the plain letter of the law.").

51. See, e.g., Andrea M. Scielstad, Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education, 6 *Clinical L. Rev.* 127, 128–29 (1999) ("[M]any students are genuinely shocked by the extent to which unwritten rules and local customs—including relationships, power dynamics, and shared understanding between certain participants in the legal process—play a role in American judicial systems.").

52. See, e.g., Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and the Procedural Efficacy, 87 *Geo. L.J.* 887, 890 (1999) (arguing that Congress should step back from statutory rulemaking and allow courts to form "a model of principled deliberation akin to common law reasoning" because "congressional intervention can easily distort the principled coherence of the rule system as a whole"); Stephen B. Burbank, The Rules Enabling Act of 1934, 130 *U. Pa. L. Rev.* 1015, 1132 (1982) (examining how the Advisory Committee on Rules for Civil Procedure interpreted the Rules Enabling Act); Brooke D. Coleman, The Efficiency Norm, 56 *B.C. L. Rev.* 1777, 1778 (2015) [hereinafter Coleman, Efficiency Norm] (arguing that a "faulty conception of efficiency is not producing high-value procedure, but is instead resulting in cut-rate procedural rules and doctrines"); Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 *U. Chi. L. Rev.* 494, 498 (1986) (examining "the Rules and the litigation context in which they have operated over the past fifty years" since their enactment); A. Benjamin Spencer, Substance, Procedure, and the Rules Enabling Act, 66 *UCLA L. Rev.* 654, 656 (2019) ("Many scholars have wrestled with the [Rules Enabling Act's] language in an attempt to understand the precise contours of its constraints. Of particular concern has been how we should understand the nature of its directive that the rules may not alter substantive rights . . .").

53. See, e.g., Pamela K. Bookman & David L. Noll, Ad Hoc Procedure, 92 *N.Y.U. L. Rev.* 767, 774 (2017) [hereinafter Bookman & Noll, Ad Hoc Procedure] (noting that civil procedure "can also be established while litigation is pending, in response to problems that arise in specific disputes, resulting in ad hoc procedure"); Erwin Chemerinsky & Barry Friedman, The Fragmentation of Federal Rules, 46 *Mercer L. Rev.* 757, 763 (1995) (noting that "substantial areas of procedure are covered by local rules, and these rules differ enormously across the country"); David Freeman Engstrom & Jonah B. Gelbach, Legal Tech, Civil Procedure, and the Future of Adversarialism, 169 *U. Pa. L. Rev.* 1001, 1005 (2021) (arguing that "it is not a stretch to say that legal tech will, in time, remake the adversarial system, not by replacing lawyers and judges with robots, but rather by unsettling, and even resetting, several of its procedural cornerstones"); Laurens Walker, The Other Federal

courts, the nature of proceedings, the number of proceedings, the absence of lawyers, and the changing role of judges all make it challenging even to *observe* procedure.

C. *The Presence and Roles of Lawyers and Judges*

A third common assumption is that lawyers and judges play roughly equivalent roles in state and federal civil procedure. This may be true to some extent in state courts populated by lawyers on both sides of the “v,” but the assumption does not hold where lawyers are largely absent.

Federal courts are heavily lawyered spaces, with 70% of filed cases involving representation on both sides.⁵⁴ A few prototype cases break this mold: prisoner cases, employment discrimination cases, and social security appeals.⁵⁵ In 75% of cases in state civil courts, at least one party does not have a lawyer.⁵⁶ And the state judicial institutions that hear these cases are often separated from the lawyered courts and divisions that hear the quarter of symmetrically lawyered cases (such as business-to-business disputes, state court class actions, and MDLs).⁵⁷

In lawyered courts, lawyers facilitate their client’s use of the adversarial system by identifying legal problems, presenting them in the context of the law, navigating the court system, and directly advocating for their client. Lawyers zealously bring claims for plaintiffs and protect defendants from these cases. Rules of civil procedure harness and enable this role for lawyers and keep lawyers in check by structuring the adversarial posture.

In federal courts, pro se litigants tend to be plaintiffs; the greater-resourced parties in federal litigation are often defendants, though they are also regularly plaintiffs in business-to-business disputes.⁵⁸ In lawyerless state courts, however, the greater-resourced and represented parties (like a landlord, a debt collector, or the government) often appear as plaintiffs, rather than the beleaguered defendants that they paint themselves as in federal litigation.⁵⁹ Because they are plaintiff’s counsel and because they

Rules of Civil Procedure, 25 Rev. Litig. 79, 80 (2006) (describing the development of common law procedural rules that “interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules”).

54. See Hammond, *Pro Se Procedure*, *supra* note 4, at 2691.

55. *Id.* at 2691, 2697–98.

56. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 511–17.

57. See Nat’l Ctr. for State Cts. Data Visualizations, *supra* note 32.

58. Cf. Russell M. Gold, *Power Over Procedure*, 57 Wake Forest L. Rev. (forthcoming 2022) (manuscript at 1–4), <https://ssrn.com/abstract=3799298> [<https://perma.cc/7ZN3-S98B>] (characterizing federal civil procedure as governing a world “where wealthy White defendants are disproportionately powerful”).

59. See, e.g., Nicole Summers, *Civil Probation*, 75 Stan. L. Rev. (forthcoming 2023) (manuscript at 51–52), https://ssrn.com/abstract_id=3897493 [<https://perma.cc/PSD5-UBSJ>] [hereinafter Summers, *Civil Probation*] (describing litigation and settlement dynamics between landlords and unrepresented tenants); Wilf-Townsend, *supra* note 12, at 1711 (“[I]n state courts, these roles are reversed: the most common cases pit a better-resourced

are unopposed, those lawyers who do appear in lawyerless courts play a different role than they would in fully lawyered contexts. There is no defense lawyer to keep an aggressively represented plaintiff in check or to advocate to the judge, nor are there incentives to press the court to document, develop, or constrain procedure—whether “pro-plaintiff” or “pro-defendant.”⁶⁰

One might expect the judges in lawyerless courts to serve as replacements for lawyers in helping self-represented litigants navigate the adversarial system. This can happen. But judges play a variety of roles in state courts, some more politicized than others.⁶¹ And in some instances, judges are not even lawyers.⁶² Moreover, state civil courts, unlike administrative agencies, remain rooted in adversarial dispute resolution as their fundamental structural design. As a result, “[m]illions of low- to middle-income people without counsel or legal training must protect and defend their rights and interests in courts designed by lawyers and for lawyers.”⁶³ These parties often prepare for, navigate, and sometimes resolve their cases in the hallways, drawing on guidance from informal and formal sources of assistance, and facing either represented, more powerful opponents or just an inscrutable system.⁶⁴

plaintiff, often a corporation with lawyers, against an unrepresented individual defendant.”).

60. Cf. Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 *Harv. J.L. & Gender* 55, 110–11 (2018) [hereinafter Sabbeth, *Housing Defense*] (describing the inherent structural disadvantages of litigating from a defensive position).

61. Clopton, *Making State Civil Procedure*, *supra* note 23, at 19 n.102 (“One area where states differ markedly from the federal system, and from each other, is in their method of selecting judges.” (citing Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 *Vand. L. Rev.* 1729, 1733 (2017) (discussing judicial selection methods and partisanship))); see also Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* 4 (2012) (“[J]udicial elections reduce state judges’ willingness to apply the law or protect rights in the face of public opposition or special interests.”).

62. See, e.g., Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 *Colum. L. Rev.* 1287, 1290 (2022); Nolan Anderson, Randy Kreider & Kristen Schnell, *Injustice in the Lowest Courts: How Municipal Courts Rob America’s Youth*, *Colum. L. Sch. Juv. L. Ctr.* 9 (2021), https://jlc.org/sites/default/files/attachments/2021-02/Municipal%20Fines_Final.pdf [<https://perma.cc/B6GN-JV74>] (“[Some] states do not require municipal judges to be lawyers, sometimes requiring just a high school degree.”).

63. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 512.

64. See Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer’s Monopoly*, 89 *Fordham L. Rev.* 1315, 1317 (2021) [hereinafter Steinberg et al., *Judges and Deregulation*] (“Nonlawyer advocates often meet with litigants in courthouse hallways or in private court-based interviews—underscoring their formalized institutional role—and yet they rarely appear during court proceedings and their role is not . . . delineated by local rule.”); Summers, *Civil Probation*, *supra* note 59 (manuscript at 13) (“Landlords and their attorneys leverage these profound [power] disparities to pressure tenants into signing settlement agreements. These settlements are typically signed in the court hallways Hallway negotiations are entirely unmonitored . . .”).

Indeed, these courts are so overburdened with massive numbers of filings that cases may receive just a few minutes of a judge's attention at most.⁶⁵ When they do conduct proceedings, judges sometimes adhere to the adversarial archetype of a "neutral arbitrator," but increasingly, and as directed by some ethical rules, they intervene to assist self-represented parties in developing their cases and navigating procedures that may seem labyrinthine even if designed with the hope of being simple.⁶⁶ These interventions range from explaining legal concepts (which often maintains or exacerbates complexity) to eliciting information and otherwise controlling the presentation of evidence from litigants.⁶⁷ This kind of "active judging" may encourage settlement, as "managerial judges" in federal court do,⁶⁸ but they may also abandon their traditional neutrality and help guide the self-represented litigant, or favor the represented. As discussed below in section II.A.2, these interventions tend to be ad hoc, inconsistent, and potentially fleeting. These courts rarely produce written judicial opinions that might develop these procedures—nor are there lawyers asking them to do so.

Legal scholarship's poor systemic understanding of lawyerless courts is sometimes explained by the difficulty of studying these courts.⁶⁹ Over the past few decades, boots-on-the-ground scholars, often social scientists and clinical law professors who practice in these courts, have overcome these obstacles and produced empirical and theoretical scholarship about state civil courts, enriching our understanding. But the point is that the absence of lawyers itself alters both the procedures and our ability to observe and understand them.

65. See, e.g., Steinberg et al., *Judges and Deregulation*, *supra* note 64, at 1337 (calculating seven minutes per case in some jurisdictions but indicating that "most hearings are much shorter").

66. Anna E. Carpenter, *Active Judging and Access to Justice*, 93 *Notre Dame L. Rev.* 647, 667–72 (2017) [hereinafter *Carpenter, Active Judging*] (discussing arguments for active judging); Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 521–24 (discussing the judicial canons for supporting pro se litigants); Steinberg, *Adversary Breakdown*, *supra* note 27, at 903 ("[A]ctive judging has become routine in many small, two-party cases . . .").

67. See, e.g., Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 551 (describing research findings in which "judges exerted tight control over evidence presentation by asking leading questions—including questions based on the petition—and constricting parties' opportunity to present testimony, particularly narrative testimony").

68. See Judith Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 374, 376–77 (1982).

69. See, e.g., Spaulding, *supra* note 3, at 270 ("Meaningful empirical studies of state courts can be conducted, but this work is far more time and resource intensive than studying federal court litigation."); Stephen Campbell Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 *Daedalus* 129, 134 (2014) (noting the deep political reasons for "[o]ur ignorance" of state courts).

D. *Merits and Efficiency*

Traditionally, scholars understand courts—or rather, lawyered, federal courts—as sites of dispute resolution and law development.⁷⁰ As just noted, lawyerless courts engage in vanishingly little law development, whether substantive or procedural, in part because of the absence of lawyers prompting them to do so (by requiring written explanations or by filing motions or appeals challenging their decisions, for example).⁷¹

But another set of assumptions underlies this discussion of lawyered and lawyerless courts as sites of dispute resolution: that they similarly balance the sometimes competing values of, on the one hand, reaching (and deliberating) the merits of a case and, on the other, promoting efficiency. One goal of the Federal Rules was to make the resolution of federal court litigation less about lawyers' manipulation of procedural "technicalities" and more about getting to the merits of the case.⁷² Civil procedure reforms have also long chased "efficiency."⁷³ Much civil procedure scholarship laments the fading away of the "ideal" of using trials to engage the merits of a dispute, through the rise of pleading standards, easier access to summary judgment, less discovery, increased managerial judging leading to settlement, rising class action certification requirements, and arbitration.⁷⁴

70. E.g., Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum. L. Rev. 665, 671–72 (2012) (discussing dispute resolution and law declaration models of adjudication). Litigation also serves other purposes in a democratic society. See Alexandra Lahav, *In Praise of Litigation 1–2* (2017) ("Litigation helps democracy function in a number of ways: it helps to enforce the law; it fosters transparency . . . ; it promotes participation in self-government; and it offers a form of social equality by giving litigants equal opportunities to speak and be heard.").

71. See Lizzie Green, *Wage Theft in Lawless Courts*, 107 Calif. L. Rev. 1303, 1330 (2019) (noting that the "absence of nuanced legal doctrine in small claims court" is the result of the small financial value of those cases); Sabbath, *Market-Based Law Development*, supra note 33 ("Investment in courts and lawyers in rough proportion to economic power results in the self-perpetuating underdevelopment of law for poor people.").

72. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, Duke L.J. 1, 4–5 (2010) ("[R]ather than eliminating claims based on technicalities, the Federal Rules created a system that relied on plain language and minimized procedural traps, with trial by jury as the gold standard for determining a case's merits." (footnotes omitted)).

73. See generally Coleman, *Efficiency Norm*, supra note 52 (discussing and critiquing the pursuit of efficiency in federal civil procedure).

74. See id. at 1778 (criticizing a view of efficiency that defines costs narrowly as the amount litigants must pay at each litigation moment, without taking into account the costs of, for example, "mistakenly filtering out meritorious claims"); see also Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 Vand. L. Rev. 1119, 1142–50 (2019) ("In cases involving issues ranging from personal jurisdiction and pleading standards to class certification, discovery, and trials, the [Roberts] Court has turned litigation into an obstacle course for civil plaintiffs." (footnotes omitted)); Maureen Carroll, *Class Action Myopia*, 65 Duke L.J. 843, 880 (2016) ("Heightened evidentiary burdens increase the transaction costs associated with class treatment"); Brooke Coleman, *The Vanishing Plaintiff*, 42 Seton Hall L. Rev. 501, 512 (2012) (noting that pressure from "organizational defendants" has resulted

This lament typically focuses on federal litigation's failure to allow cases to get to the merits, not the other failure: the requirement of quality representation to have any hope that reaching the merits is equivalent to obtaining justice.⁷⁵ At the same time, procedure reforms, including those that make merits-based determinations more elusive, are often justified as promoting efficiency. Mr. Twombly will never "get to the merits" of whether Bell Atlantic colluded with other telecommunications companies to stifle competition, in part because allowing his lawyers to investigate the merits was deemed an inefficient use of judicial resources.⁷⁶

While these dynamics exist in varying degrees in lawyered state courts, "getting to the merits" and the notion of efficiency have a different salience in these courts. In many cases, there is no dispute to resolve as defined by the relevant law—for example, it may be uncontested that rent or another debt is owed.⁷⁷ Those cases are routinely resolved summarily or as default judgments, which are technically merits decisions but involve no deliberation—and no law development. It can be true that efficient default procedures have the benefit of sparing the debtor the additional expense of hiring a lawyer.⁷⁸ This cost-saving may also motivate the absence of discovery in many lawyerless courts, but it has downsides that Diego

in the move toward "a restrictive procedural regime"); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 375 (2005) ("[C]lass actions will soon be virtually extinct."); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119, 161–66 (2011) (discussing the consequences of *Iqbal's* heightened pleading standard); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 Tex. L. Rev. 1097, 1108 (2006) (describing the Rehnquist Court's "hostility towards the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice"); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 Geo. Wash. L. Rev. 353, 368 (2010) (describing the Supreme Court's "capitulation to defendant requests for more restrictive pleading standards" as "the clearest evidence of procedure's tilt towards restrictiveness"); Suja Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 142 (2007) (arguing that summary judgment is unconstitutional under the Seventh Amendment); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 Wash. U. L. Rev. 1027, 1030 (2013) ("Judges are regularly called upon to exercise their discretion to shape the boundaries of litigation within the open-textured provisions of the Federal Rules.");

75. See Sabbeth, *Simplicity as Justice*, supra note 18, at 296 ("[F]or parties disadvantaged by the surrounding economic system and the underlying substantive law, procedural protections are the most that the disadvantaged can expect from the system.");

76. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (cautioning that antitrust discovery imposes significant costs on both the courts and the parties).

77. As one of us describes elsewhere with Anna Carpenter, Alyx Mark, and Jessica Steinberg, a meaningful proportion of state civil cases are ones involving children or relationships. In these cases, there may be a dispute as to facts or underlying law, but the foundational framing of people's problems as a dispute—rather than a social need—is flawed. Shanahan et al., *Institutional Mismatch*, supra note 1, at 1477–79, 1492.

78. See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in the Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah*, 1 J. Empirical Legal Stud. 591, 602 (2004) (discussing Charles E. Clark's similar views, reflected in the Federal Rules of Civil

Zambrano discusses elsewhere in this symposium.⁷⁹ Indeed, many of these courts are not even trying to discover the truth as between litigants' competing accounts of facts.

Recent state civil procedure scholarship, however, explores how procedural rules designed with these efficiency benefits in mind lead to courts doling out speedy injustice. This scholarship focuses on the massive numbers of default judgments and the rules that facilitate them, the dysfunction of notice, and "assembly-line litigation" where "courts transfer assets from unsophisticated, often-indigent persons to major corporations without seriously evaluating the merits of the case."⁸⁰ Default judgments can skip important due process guarantees, like making sure the debtor is even aware that she has been accused of owing a debt.⁸¹ Moreover, a growing scholarship challenges the injustice of certain debts, even if owed.⁸² Lawyerless state civil courts are a locus for collecting on such debts without evaluating whether they are owed or the injustice behind them. This role provides another example of how lawyerless courts serve as a government of last resort when other parts of government have failed citizens.⁸³

Procedure); Kellen Richard Funk, *The Lawyer's Code: The Transformation of American Legal Practice, 1828–1938*, at 268–72 (Nov. 2018) (Ph.D. dissertation, Princeton University) (on file with the *Columbia Law Review*) (discussing New York State's Field Code).

79. Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 *Colum. L. Rev.* 1423, 1451–53 (2022) [hereinafter Zambrano, *Missing Discovery*].

80. Wilf-Townsend, *supra* note 12, at 1709. See also Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 *Ala. L. Rev.* 893, 922–23 (2020) (noting the increasing "reliance on informal, flexible processes . . . and managerial judging practices in the name of judicial efficiency," and explaining "that many, if not most, judges—especially in state courts—face incessant pressure to streamline their case processing in the face of an ever-growing docket").

81. See Robin J. Effron, *The Invisible Circumstances of Notice*, 99 *N.C. L. Rev.* 1521, 1522 (2021) [hereinafter Effron, *Invisible Circumstances*] ("The due process right of notice is among the most neglected and understudied of constitutional rights.").

82. See, e.g., Abbye Atkinson, *Borrowing Equality*, 120 *Colum. L. Rev.* 1403, 1410 (2020) ("Because debt affects marginalized groups disproportionately and more severely, its invocation as a source of equality and mobility may simply further entrench the very inequality it is offered to ameliorate."); Dalié Jiménez, *Decreasing Supply to the Assembly Line of Debt Collection Litigation*, 135 *Harv. L. Rev. Forum* 374, 376 (2022) (proposing "a federal law that would 'kill' the ability of debt collectors to pursue a debt (in a lawsuit or outside of it) after a statutory period"); Jessica K. Steinberg, Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 *Harv. L. Rev. Forum* 359, 370–73 (2022) (using an invest/divest framework to propose transformation of debt collection courts). For advocacy work on this issue, see generally *The Debt Collective*, <https://debtcollective.org/> [<https://perma.cc/G7HN-TYEJ>] (last visited Feb. 3, 2021) (discussing various factors that have collectively led to debt).

83. See Shanahan et al., *Institutional Mismatch*, *supra* note 1, at 1523–26 ("Where courts shift their role to provide resources to meet litigants' needs, the courts are squarely assuming the roles of the executive and legislative branches in social provision."). Tonya Brito argues that there are multiple ways of interpreting justice unrelated to the merits of a case. For example, in cases obligating low- and no-income fathers to pay child support, justice is not about determining whether the fathers are really in arrears. Brito, *supra* note

Lawyerless state courts thus hear cases, follow procedures, involve judges and lawyers, and weigh values in ways that are quite different from the state courts discussed in Hart and Wechsler's Federal Courts casebook, or those that are depicted by Chambers of Commerce as "judicial hellholes."⁸⁴ Yet the vast majority of cases in the United States are filed in state civil courts. Some of these cases roughly parallel those brought in federal court. But most are even more different from federal courts than what civil procedure scholarship typically assumes.

HOW EQUITY CONQUERED COMMON LAW: THE FEDERAL RULES OF CIVIL PROCEDURE IN HISTORICAL PERSPECTIVE

STEPHEN N. SUBRINT†

I. COMMON LAW, EQUITY, AND THE FEDERAL RULES OF CIVIL PROCEDURE

Much of the formal litigation in England historically took place in a two-court system: "common law" or "law" courts, and "Chancery" or "equity" courts.²³ Although they were complementary, law and equity courts each had a distinct procedural system, jurisprudence, and outlook. The development of contemporary American civil procedure cannot be understood without acknowledging these differences. The more formalized common law procedure has been so ridiculed that we tend to ignore its development to meet important needs, some of which still endure, and that many of its underlying purposes still make sense. Conversely, especially during this century, equity has been touted in ways that obscure the underlying drawbacks to its use as the procedural model.

A. *Common Law Procedure*

The law courts had three identifying characteristics: the writ or formulary system, the jury, and single issue pleading.²⁴ Each matured in England between the thirteenth and sixteenth centuries and later influenced legal development in America. Each represented a means of confining and focusing disputes, rationalizing and organizing law, and of applying rules in an orderly, consistent, and predictable manner.

²³ A rich variety of other courts also existed. See 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1047-89 (W. Lewis ed. 1898).

²⁴ See S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 26-46 (1969). The three Central law courts were King's Bench, Exchequer, and Common Pleas. For a description of the courts, see *id.* at 20-22; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 139-56 (5th ed. 1956).

Subjects of the king, desirous of royal aid, would bring grievances to the Chancellor, who served as the king's secretary, adviser, and agent. The Chancellor's staff, the Chancery, sold writs, "royal order(s) which authorized a court to hear a case and instructed a sheriff to secure the attendance of the defendant."²⁵ Clerks organized complaints into categories, and particular writs came to be used for particular types of oft-repeated complaints.²⁶ Over time, "plaintiffs could not get to the court without a chancery writ, and the formulae of the writs, mostly composed in the thirteenth century to describe the claims then commonly accepted, slowly became precedents which could not easily be altered or added to."²⁷

The writs gradually began to carry with them notions of what events would permit what result or remedy. Ultimately, an organized body of what is now commonly called substantive law evolved from the writs.²⁸ Distinct procedural characteristics developed for different writs. Each writ implied a wide range of procedural, remedial, and evidentiary incidents, such as subject matter and personal jurisdiction, burden of proof, and methods of execution.²⁹ The writ of novel disseisin, for instance, was designed to provide for the rapid ejection of one who was wrongfully on the plaintiff's land. It was accompanied by more expeditious procedures than the writ of right, which decided the ultimate issue of ownership.³⁰ The writ system also confined adjudication. The

²⁵ S. MILSOM, *supra* note 24, at 22.

²⁶ See T. PLUCKNETT, *supra* note 24, at 353-54.

²⁷ S. MILSOM, *supra* note 24, at 25.

²⁸ See H. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1886) ("So great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure . . .").

²⁹ See F. MAITLAND, *EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW, TWO COURSES OF LECTURES* 296-98 (A. Chaytor & W. Whittaker eds. 1920).

³⁰ See *id.* at 318-23. "Seisin" has a meaning similar to, but different from, possession. Feudalism renders dysfunctional our concepts of "possession," "right," or "title." See S. MILSOM, *supra* note 24, at 103-05. Other examples of the common law attempt to integrate substantive rights and methods for their enforcement can be seen in the writs of covenant and replevin. In covenant, the requirement of a seal for proof probably improved the likelihood that only honest claims were pursued. See *id.* at 213. In replevin, the distrainee (the plaintiff who says that his goods were wrongfully taken) is entitled to immediate possession of the goods upon giving a "bond for the value of the chattels, conditioned on his loss of the suit and failure to return the chattels to the defendant." S. COHN, *THE COMMON-LAW FOUNDATION OF CIVIL PROCEDURE* 19 (1971); see F. MAITLAND, *supra* note 29, at 355. This, too, should discourage frivolous suits, as well as self-help. For contemporary suggestions to integrate different areas of substantive law with different procedures, see Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 900 (1974); Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE*, *supra* note 6, at 65.

obligation to choose only one writ at a time limited the scope of law suits, as did rules severely restricting the joinder of plaintiffs and defendants.³¹

Like the evolution of the writ, the development of the jury trial represented movement toward confinement, focus, rationality, and a legal system of defined rules to regulate human conduct. Before the development of the jury, parties at common law were tested before God through ordeal, battle, or the swearing of "compurgators."³² With the inception of juries, disputants began telling their respective stories to their peers, who determined which version was correct. Because human beings (rather than God) were to hear and decide the case, an individual might have found it favorable to present facts that might have changed the minds of the now-human dispute resolvers. Once the idea emerged that a special set of circumstances could necessitate a different verdict, the seed of substantive law had been planted: specific facts would trigger specific legal consequences. The jury concept brought with it, therefore, the idea of consistent and predictable law application by human beings, rather than divine justice by mysterious means. It now became logical for a trial to focus on proof relevant to those specific facts at issue that carry with them a legal consequence.³³

Common law also evolved as a technical pleading system designed to resolve a single issue. When it became apparent that specific facts should bring about specific legal results, it made sense to determine whether the plaintiff's story, if true, would permit recovery and, if so, what facts were in dispute. Assuming the defendant did not contest that he was properly brought before the correct court, but still disputed the case, the common law procedure permitted first a demurrer, and then confession and avoidance, or traverse.³⁴ Under single issue pleading, the parties pleaded back and forth until one side either demurred, resulting in a legal issue, or traversed, resulting in a factual issue.³⁵

³¹ See F. JAMES, JR. & G. HAZARD, JR., *CIVIL PROCEDURE* 462 (3d ed. 1985) [hereinafter F. JAMES & G. HAZARD (3d)]; F. MAITLAND, *supra* note 29, at 298-99.

³² See H. LEA, *SUPERSTITION AND FORCE* 252, 279 (3d ed. 1878); T. PLUCKNETT, *supra* note 24, at 114-18; G. REMBAR, *THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM* 186-87 (1980).

³³ See S. MILSOM, *supra* note 24, at 30-32; T. PLUCKNETT, *supra* note 24, at 124-30.

³⁴ See S. COHN, *supra* note 30, at 47; T. PLUCKNETT, *supra* note 24, at 409-10, 413-14.

³⁵ See 1 J. CHITTY, *TREATISE ON PLEADING* 261-63 (1879); S. COHN, *supra* note 30, at 46-48; T. PLUCKNETT, *supra* note 24, at 405-15; G. REMBAR, *supra* note 32, at 224-28. See generally H. STEPHEN, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS: COMPRISING A SUMMARY VIEW OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW* (1824) (discussing the "science" of pleading under the common law system).

Lawyers well into the nineteenth century on both sides of the Atlantic viewed the "common law" procedural system as comprising the writ or form of action, the jury, and the technical pleading requirements that attempted to reduce cases to a single issue. This system became rigid and rarefied.³⁶ Due to the countless pleading rules, a party could easily lose on technical grounds.³⁷ Lawyers had to analogize to known writs and use "fictions" because of the rigidity of some forms of action.³⁸ Lawyers also found other ways around the common law rigidities, such as asserting the common count and general denials, which made a mockery of the common law's attempt to define, classify, and clarify.³⁹

The common law procedural system, nonetheless, had its virtues. The formality and confining nature of the writs and pleading rules permitted judges, who were centralized in London, to attempt (and often to succeed) in forging a consistent, rational body of law, which provided lawyers with analytical cubbyholes.⁴⁰ The common law system, furthermore, permitted increased participation by the lay community. If the pleading resulted in the need for a factual determination, it could be sent to the county where the parties resided. A judge from the Central Court could easily carry the papers, reduced to a single issue, in his satchel, and convene a jury at an "assize."

The focusing of cases to a single issue also aided both judges and lawyers in their effort to understand and apply the law, as well as assisting lay jurors in resolving factual disputes. The use of known writs, each with their own process, substance, and remedy, allowed the integration of the ends sought and means used. The system presumably achieved—or at least tried to achieve—some degree of predictability about what legal consequences citizens could expect to flow from their conduct. Comparing the traditional common law system to that of his own day, Maitland (1850-1906) commented on the common law's attempt to control discretion: "Now-a-days all is regulated by general

³⁶ See T. PLUCKNETT, *supra* note 24, at 410.

³⁷ See J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 331; G. REMBAR, *supra* note 32, at 225-31. On the number and subtlety of writs, see 1 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 564-67 (2d ed., reissued 1968).

³⁸ See, e.g., G. REMBAR, *supra* note 32, at 224.

³⁹ See J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 338-39; F. MAITLAND, *supra* note 29, at 300-01; S. MILSOM, *supra* note 24, at 247-52; G. REMBAR, *supra* note 32, at 207-12; Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 516, 520-21 (1907).

⁴⁰ For an example of the relationship of writs and common law pleading to the development of the legal profession, see S. MILSOM, *supra* note 24, at 28-42; T. PLUCKNETT, *supra* note 24, at 216-17.

rules with a wide discretion left in the Court. In the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules."⁴¹

B. *Equity Procedure*

By the early sixteenth century it was apparent that the common law system was accompanied by a substantially different one called equity. Equity was administered by the Chancellor, as distinguished from the three central common law courts with their common law judges.⁴² The contemporary English historian, Milsom, explains that one cannot find the precise beginning of the Equity Court, for, in a sense, it had been there all along.⁴³ As previously noted, although the writs had started as individualized commands from the Chancellor, by the fourteenth century several of the writs had become routinized.⁴⁴ Grievants, however, continued to petition the Chancellor for assistance in unusual circumstances, such as where the petitioner was aged or ill, or his adversary particularly influential.⁴⁵ Whereas the writ and single issue common law system forced disputes into narrow cubbyholes, these petitions to the Chancellor tended to tell more of the story behind a dispute. Bills in equity were written to persuade the Chancellor to relieve the petitioner from an alleged injustice that would result from rigorous application of the common law.⁴⁶ The bill in equity became the procedural vehicle for the exceptional case. The main staples of Chancery jurisdiction became the broader and deeper reality behind appearances, and the subtleties forbidden by the formalized writ, such as fraud, mistake, and fiduciary relationships.⁴⁷

The Equity Court became known as the Court of Conscience. Like ecclesiastical courts, it operated directly on the defendant's con-

⁴¹ F. MAITLAND, *supra* note 29, at 298.

⁴² Around 1523, Christopher St. Germain explored the relationship of equity to the common law system in *Dialogues Between a Doctor of Divinity and a Student of the Common Law*. For a discussion of this work and its impact, see S. MILSOM, *supra* note 24, at 79-83; T. PLUCKNETT, *supra* note 24, at 279-80.

⁴³ See S. MILSOM, *supra* note 24, at 74-87.

⁴⁴ See *supra* notes 25-27 and accompanying text.

⁴⁵ See F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-75, 77.

⁴⁶ See F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-79; T. PLUCKNETT, *supra* note 24, at 688-89.

⁴⁷ See F. MAITLAND, *supra* note 29, at 7-8. Maitland illustrates equity jurisdiction with "an old rhyme": "These three give place in court of conscience/Fraud, accident, and breach of confidence." *Id.* at 7. The idea that more formal legal rules should be accompanied by a more discretionary approach in order to prevent injustice was not new. On the Jewish notion of justice and mercy, see 10 ENCYCLOPEDIA JUDAICA 476, 476-77 (1977). On the Greek notion of *epiikeia*, connoting "clemency, leniency, indulgence, or forgiveness," see G. MCDOWELL, *supra* note 9, at 15.

science.⁴⁸ This had far-reaching repercussions. In a common law suit, the self-interest of the parties was thought too great to permit them to testify.⁴⁹ The Chancellor, however, compelled the defendant personally to come before him to answer under oath each sentence of the petitioner's bill. There were also questions attached. This was a precursor to modern pretrial discovery.⁵⁰ Equity did not take testimony in open court, but relied on documents, such as the defendant's answers to questions.⁵¹

As the defendant was before the Chancellor to have his conscience searched, the Chancellor could order him personally to perform or not perform a specific act.⁵² Such authority was necessary to enforce a trust. If the defendant was found to be holding land in trust for another, he could be compelled to give the use and profit of the property to the beneficiary.⁵³ The ability to fashion specific relief, both to undo past wrongs and to regulate future conduct, also distinguished equity from the law courts, which in most instances awarded only money damages.⁵⁴

The Chancellors were usually bishops, and so the term "conscience" again became associated with equity.⁵⁵ Notwithstanding the writs and the common law that developed around the writs, the Chancellor was expected to consider all of the circumstances and interests of all affected parties. He consequently was also to consider the larger moral issues and questions of fairness.⁵⁶ The equity system did not revolve around the search for a single issue. Multiple parties could, and often had to, be joined.⁵⁷ There was now a considerably larger litiga-

⁴⁸ See 5 W. HOLDSWORTH, A HISTORY OF THE COMMON LAW 216 (2nd ed. 1937); S. MILSOM, *supra* note 24, at 81-82.

⁴⁹ See T. PLUCKNETT, *supra* note 24, at 689.

⁵⁰ See F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE 171-72 (2d ed. 1977) [hereinafter F. JAMES & G. HAZARD (2d)].

⁵¹ See *id.*; C. REMBAR, *supra* note 32, at 298; Bowen, *supra* note 39, at 524-25.

⁵² See S. MILSOM, *supra* note 24, at 81-82; T. PLUCKNETT, *supra* note 24, at 689. It is appropriate to use "he" for defendants because during this period women were usually treated as incompetent to be parties to a suit. See F. JAMES & G. HAZARD (2d), *supra* note 50, at 415.

⁵³ See C. REMBAR, *supra* note 32, at 296.

⁵⁴ See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 22 (1973); F. MAITLAND, *supra* note 29, at 254-67; S. MILSOM, *supra* note 24, at 81-82; Bowen, *supra* note 39, at 517-18.

⁵⁵ See T. PLUCKNETT, *supra* note 24, at 685-86, who wrote: "[T]he ecclesiastical chancellors were certainly not common lawyers, and it must have been a perfectly natural instinct, then as now, for a bishop when faced by a conflict between law and morals, to decide upon lines of morality rather than technical law."

⁵⁶ See S. MILSOM, *supra* note 24, at 79-81. Sixteenth century theorists recognized "the appeal to the chancellor [as being] for the single [divine] justice, in circumstances in which the human [common law] machinery was going to fail." *Id.* at 80.

⁵⁷ See Bowen, *supra* note 39, at 516, 523-31 ("[I]t was a necessary maxim of the

tion package. This less individualized justice demanded and resulted in more discretionary power lodged in a single Chancellor, who resolved—often in a most leisurely manner—issues both of law and fact.⁵⁸ The lay jury was normally excluded.⁵⁹

By the sixteenth century, the development of common law jurisprudence thus reflected a very different legal consciousness from equity. Common law was the more confining, rigid, and predictable system; equity was more flexible, discretionary, and individualized. Just as the common law procedural rules and the growth of common law rights were related, so too were the wide-open equity procedures related to the scope of the Chancellor's discretion and his ability to create new legal principles. In equity, the Chancellor was required to look at more parties, issues, documents, and potential remedies, but he was less bound by precedent and was permitted to determine both questions of facts and law.⁶⁰ The equity approach distinctly differed from the writ-dominated system. Judges were given more power by being released from confinement to a single writ, a single form of action, and a single issue, nor by being as bound by precedent; and they did not share power with lay juries.⁶¹

In assessing the place of equity practice in the overall legal system, it is critical to realize the extent to which the common law system operated as a brake. One could not turn to equity if there was an adequate remedy at law.⁶² Equity grew interstitially, to fill in the gaps of substantive common law (such as the absence of law relating to trusts) and to provide a broader array of remedies—specific performance, injunctions, and accountings. Equity thus provided a "gloss" or "appendix" to the more structured common law.⁶³ An expansive equity practice developed as a necessary companion to common law.⁶⁴

Court of Chancery that all parties interested in the result must be parties to the suit.").

⁵⁸ See S. MILSOM, *supra* note 24, at 82-83 ("It is a regular institution, but not applying rules; rather it is using its discretion to disturb their effect.").

The length of equitable proceedings was notorious. This aspect of equitable proceedings has been attributed to the court's desire to effect complete rather than merely substantial justice, as well as the self-interest of Chancery officials who profited from lengthy suits. See 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 373-74 (3rd ed. 1944).

⁵⁹ See S. COHN, *supra* note 30, at 1.

⁶⁰ See C. REMBAR, *supra* note 32, at 275.

⁶¹ For summaries of the different approaches of law and equity, see L. FRIEDMAN, *supra* note 54, at 21-23; F. JAMES & G. HAZARD (3rd), *supra* note 31, at 11-14; S. MILSOM, *supra* note 24, at 74-83.

⁶² See R. HUGHES, *HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS* 418-20 (2d ed. 1913).

⁶³ See F. MATTLAND, *supra* note 29, at 18-19.

⁶⁴ On occasion, a new equity rule would become part of the law applied in the common law courts. See F. JAMES & G. HAZARD (3d), *supra* note 31, at 16; T.

The disparities between law and equity were not always stark. Not all common law declarations were incisive, and common law pleading did not always isolate tidy issues; sometimes there was joinder of parties or issues. Conversely, equity often developed its own formal rules of both substance and process.⁶⁵ It is true, however, that when looked at as a whole, the common law writ/single issue system took seriously the importance of defining the case; integrating forms of action with procedure and remedy; confining the size of disputes; and articulating the legal and factual issues. In short, a goal of the common law was predictability by identifying fact patterns that would have clearly articulated consequences.

This Article will explore flaws in equity and law when we examine the evolution of procedure in America. It is important to note here, however, that from the beginning, equity's expansiveness led to larger cases—and, consequently, more parties, issues, and documents, more costs, and longer delays—than were customary with common law practice.⁶⁶ This is not to minimize the problems associated with common law practice, or the need for a more flexible counterpart to the common law. The point is that a less structured multiparty, multi-issue practice has always had significant burdens.⁶⁷

PLUCKNETT, *supra* note 24, at 689.

⁶⁵ For examples of permissible joinder of parties and forms of action at common law, see F. JAMES & G. HAZARD (2d), *supra* note 50, at 452-54, 463-64. Much of the writing of the legal realists emphasized the discretion inherent in all judging and dispute resolution. See, e.g., the Chapters on "Rule-Skepticism," "Fact-Skepticism," and "The Prediction of Decisions" in W. RUMBLE, *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS* 48-182 (1968) (examining the realist movement's revolt against classical jurisprudence). See *infra* note 131 (on how equity practice became complicated).

⁶⁶ See, e.g., 1 W. HOLDSWORTH, *supra* note 58, at 425-28; C. REMBAR, *supra* note 32, at 298-303; R. WALKER AND M. WALKER, *THE ENGLISH LEGAL SYSTEM* 31 (3rd ed. 1972); Bowen, *supra* note 39, at 524-27. One commentator has noted that some of the problem in equity

no doubt, was due to a defect which equity never cured—the theory that Chancery was a one-man court, which soon came to mean that a single Chancellor was unable to keep up with the business of the court. Not until 1913 do we find the appointment of a Vice-Chancellor.

T. PLUCKNETT, *supra* note 24, at 689 (footnote omitted). For complaints about equity in America, see *infra* notes 90-106 and accompanying text.

⁶⁷ Equity also became associated with monarchy and nondemocratic principles, because of its inherent discretion, rejection of the lay jury, and clashes with Parliament and the law courts. See F. JAMES & G. HAZARD (3d), *supra* note 31, at 14-16. See generally Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 *ILL. L. REV.* 127 (1941) (exploring the power struggle between the courts of common law and equity in the 17th century).

C. *The Equity-Dominated Federal Rules of Civil Procedure*

In the twentieth century, Federal Rules proponents emphasized that they were not suggesting new procedures. They rather insisted that they were just combining the best and most enlightened rules adopted elsewhere.⁶⁸ For the most part the proponents were right, but their argument ignores the implications of their choices regarding what the "best" rules were. The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.⁶⁹ The expansive and flexible aspects of equity are all implicit in the Federal Rules. Before the Rules, equity procedure and jurisprudence historically had applied to only a small percentage of the totality of litigation.⁷⁰ Thus the drafters made an enormous change: in effect the tail of historic adjudication was now wagging the dog. Moreover, the Federal Rules went beyond equity's flexibility and permissiveness in pleading, joinder, and discovery.⁷¹

⁶⁸ See, e.g., AMERICAN BAR ASSOCIATION, *FEDERAL RULES OF CIVIL PROCEDURE* (E. Hammond ed. 1939) (proceedings of the Institute on the Federal Rules of Civil Procedure and the Symposium on the Federal Rules of Civil Procedure). For a description of the sources of various rules, see *Hearings on the Rules of Civil Procedure for the District Courts of the United States: Hearings Before the House Comm. on the Judiciary, 75th Cong., 3d Sess. 4* (1938) [hereinafter *1938 House Hearings*] (statement of Homer Cummings, U.S. Attorney General); AMERICAN BAR ASSOCIATION, *supra*, at 28, 32 (statement of Edgar B. Tolman, member of the drafting committees); *id.* at 45, 51, 54-55, 57, 59, 66 (statement of Charles E. Clark, Dean of Yale Law School).

⁶⁹ See *1938 House Hearings, supra* note 68, at 73 (statement of Edgar B. Tolman); P. CARRINGTON & B. BABCOCK, *CIVIL PROCEDURE* 19, 20 (2d ed. 1977); 4 C. WRIGHT & A. MILLER, *supra* note 1, § 1008; Clark & Moore, *A New Federal Civil Procedure I: The Background*, 44 *YALE L.J.* 387, 434-35 (1935) [hereinafter Clark & Moore I]; Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 *N.Y.U. L. REV.* 1057, 1058 (1955).

⁷⁰ See Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 *U. PA. L. REV.* 829, 832-38 (1982).

⁷¹ Compare Rule 25 (Bill of Complaint—Contents) of the Federal Equity Rules of 1912 in J. HOPKINS, *THE NEW FEDERAL EQUITY RULES* (1913) [hereinafter *FED. EQ. R.*] (requiring, inter alia, "ultimate facts") with *FED. R. CIV. P. 8(a)(2)* (General Rules of Pleading: Claims for Relief); compare *FED. EQ. R. 26* (Joinder of Causes of Action) (requiring that joined causes of action be "cognizable in equity," and that "when there is more than one plaintiff, the causes of action joined must be joint . . .") with *FED. R. CIV. P. 18(a)* (Joinder of Claims and Remedies: Joinder of Claims) and 20(a) (Permissive Joinder of Parties: Permissive Joinder); compare *FED. EQ. R. 47* (Depositions—To Be Taken in Exceptional Instances) (permitting oral depositions only "upon application of either party, when allowed by statute, or for good and exceptional cause . . .") with *FED. R. CIV. P. 30(a)* (Depositions Upon Oral Examination: When Depositions May be Taken); and compare *FED. EQ. R. 58* (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (limiting interrogatories to "facts and documents material to the support or defense of the cause") with *FED. R. CIV. P. 26(b)(1)* (General Provisions Governing Discovery: Discovery Scope and Limits in General).

The purpose of this Article is not to show the derivation of each Federal Rule. The drafters of the Rules, treatises, and articles have already done this.⁷² This Article, however, will establish how different people and various historical currents ultimately joined together in a historic surge in the direction of an equity mentality. The result is played out in the Federal Rules in a number of different but interrelated ways: ease of pleading;⁷³ broad joinder;⁷⁴ expansive discovery;⁷⁵ greater judicial power and discretion;⁷⁶ flexible remedies;⁷⁷ latitude for

⁷² They show the extensive borrowings from equity, particularly from the Federal Equity Rules of 1912, *supra* note 71. *See, e.g.*, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES app. at 83, 84 table 1 (March 1938) (showing "Equity Rules to which references are made in the notes to the Federal Rules of Civil Procedure"); G. WRIGHT & A. MILLER, *supra* note 1 (providing a rule by rule discussion); Holtzoff, *supra* note 69, at 1058.

⁷³ *See, e.g.*, FED. R. CIV. P. 2 (One Form of Action), 8(a), (c), (e) (General Rules of Pleading: Claims for Relief, Affirmative Defenses, Pleading to be Concise and Direct; Consistency), 11 (Signing of Pleadings, Motions, and Other Papers; Sanctions), 15 (Amended and Supplemental Pleadings). For a comparison to previous American procedure, see *infra* text accompanying notes 93-97, 143-49. For a criticism of the leniency in pleading, see McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 124-25 (1952) [hereinafter McCaskill, *Philosophy of Pleading*].

⁷⁴ *See, e.g.*, FED. R. CIV. P. 13 (Counterclaim and Cross-Claim), 14 (Third-Party Practice), 15 (Amended and Supplemental Pleadings), 18 (Joinder of Claims and Remedies), 19 (Joinder of Persons Needed for Just Adjudication), 20 (Permissive Joinder of Parties), 22 (Interpleader), 23 (Class Actions), 24 (Intervention), 25 (Substitution of Parties), 42 (Consolidation; Separate Trials). For comparative code provisions, see *infra* text accompanying notes 150-51.

⁷⁵ *See* FED. R. CIV. P. 26-37 (Depositions and Discovery). For contemporary discovery problems, see *supra* note 7. For comparative code provisions, see *infra* text accompanying notes 152-57.

⁷⁶ One lawyer complains: "It has become increasingly clear that if one can but find him, there is a federal judge anywhere who will order nearly anything." Publius, *Let's Kill All the Lawyers*, WASHINGTONIAN, Mar. 1981, at 67. For comments on the enlarged, amorphous, and multi-issued nature of lawsuits and the vast amount of law available to lawyers and judges, see discussions in THE POUND CONFERENCE, *supra* note 6. Examples of Federal Rules of Civil Procedure that lend themselves to, or specifically provide for, judicial discretion include: 1, 8(a), (c), 11, 12(c), 13, 14, 15, 16, 19(b), 20, 23, 26(b)(1), (c), (d), 35(a), 37(a)(4), (b)(2), 39(b), 41(a)(2), 42(a), (b), 49, 50(a), (b), 53(b), 54(b), 54(c), 55(c), 56(c), 59(a)(1), 50(b)(1), 60(b)(6), 61, 62(b), 65(c). I have used current numbers, but for the most part, they are identical or similar to the 1938 rules. The case law rarely has provided more predictability or better defined standards than the rules, as is demonstrated by looking up the aforementioned rules in J. MOORE, MOORE'S FEDERAL PRACTICE (2nd ed. 1984), or G. WRIGHT & A. MILLER, *supra* note 1. One usually finds in these treatises a wide range of cases offering a baffling array of interpretations that usually provide no more certainty than the vague rule itself. On case management, see *supra* note 17.

⁷⁷ *See* Chayes, *supra* note 20, at 1292-96; Oakes, "A Plague of Lawyers?": Law and the Public Interest, 2 VT. L. REV. 7, 12-15 (1977).

lawyers;⁷⁸ control over juries;⁷⁹ reliance on professional experts;⁸⁰ reliance on documentation;⁸¹ and disengagement of substance, procedure, and remedy.⁸² This combination of procedural factors contributes to a procedural system and view of the law that markedly differs from ei-

⁷⁸ "Americans increasingly define as legal problems many forms of hurts and distresses they once would have accepted as endemic to an imperfect world or at all events as the responsibility of institutions other than courts." Goldstein, *A Dramatic Rise in Lawsuits and Costs Concerns Bar*, N.Y. Times, May 18, 1977, at A1, col. 3, B9, col. 1 (quoting Professor Maurice Rosenberg, a Columbia University law professor); see also J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 18 (1981) (noting the role of attorneys in fostering litigation); Carpenter, *The Pampered Poodle and Other Trivia*, 6 LITIGATION 3 (Summer 1980) (discussing the enormous magnitude of trivial litigation); Taylor, *supra* note 12 (stating that lawyers find ways to keep each other busy based on their training to find potential conflicts in the simplest of relationships). At least one commentator, however, has cautioned about claims of litigiousness. See Galanter, *supra* note 12, at 36-69.

⁷⁹ Litigants must now claim the right to a jury trial at an earlier stage of the litigation than had been the norm. See FED. R. CIV. P. 38(b) (Jury Trial of Right; Demand). For the more jury-protective provision of the Field Code, see 1848 N.Y. Laws, ch. 379, § 221 [hereinafter 1848 CODE]; see also FED. R. CIV. P. 50(a), (b) (Motion for a Direct Verdict and Judgment Notwithstanding the Verdict), 56 (Summary Judgment). On previous constitutional doubts as to directed verdict and judgment n.o.v., see *Galloway v. United States*, 319 U.S. 372, 396-411 (1943) (Black, J., dissenting); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 376-400 (1913). Cases such as *Galloway*, which stated that the practice of granting a directed verdict was approved explicitly in the Federal Rules of Civil Procedure, see 319 U.S. at 389, were considered by some as making inroads on the quality of the right to a jury trial, notwithstanding the language in the Enabling Act (currently codified at 28 U.S.C. § 2072 (1982)) that the rules should not "abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

It is true that some cases under the Federal Rules are jury-protective. See, e.g., *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). These cases do not alter the essential point, however, that the major thrust of the Federal rules is pro-judge rather than anti-jury. See *infra* text accompanying notes 512-13.

⁸⁰ For example, under the Enabling Act of 1934, the Supreme Court and the Advisory Committee, rather than Congress or state legislatures, formulated the procedural rules. Those rules empowered judges at the expense of juries. The rules facilitated the role of courts to deal with larger societal problems, perhaps making it easier for other branches to refrain from resolving those issues. See, e.g., Chayes, *supra* note 20, at 1288-1302; Oakes, *supra* note 77, at 8-10. Public policy cases, as well as personal injury and commercial cases, in turn increasingly relied on experts to aid the court, both because lawyers prepared and presented the cases, and because experts were widely utilized as witnesses.

⁸¹ See Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION 28, 28-29 (Spring 1981); Sherman & Kinnard, *supra* note 7, at 246; *Those #*X!!! Lawyers*, TIME, April 10, 1978, at 58-59. Again borrowing from equity, there has been a decrease on the importance of oral testimony in open court and of the trial itself, with profound influence on the quality and meaning of dispute resolution, and on the nature of trial advocacy. See Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A. J. 860 (July 1980); Stanley, *President's Page*, 62 A.B.A. J. 1375, 1375 (1976); *infra* text accompanying notes 445-48.

⁸² See *infra* text accompanying notes 110-21, 214-15, 381-82.

ther a combined common law and equity system or the nineteenth century procedural code system.⁸³ The norms and attitudes borrowed from equity define our current legal landscape: expansion of legal theories, law suits, and, consequently, litigation departments; enormous litigation costs; enlarged judicial discretion; and decreased jury power.

Before discussing how the shift to an equity-type jurisprudence came about, it is important to issue four warnings. First, I am not arguing that before the Federal Rules there had been no movement toward equity. To the contrary, the Field Code of 1848 took some steps in that direction, and there were subsequent experiments in liberalized pleading, joinder and discovery.⁸⁴ What I *am* saying is that the Federal Rules were revolutionary in their approach and impact because they borrowed so much from equity and rejected so many of the restraining and narrowing features of historic common law procedure. It was the synergistic effect of consistently and repeatedly choosing the most wide-open solutions that was so critical for the evolution to what exists today.

Second, I am not saying that the Federal Rules are solely responsible for shaping the contours of modern civil litigation. Factors such as citizen awareness of rights, size and scope of government, and individual and societal expectations for the good and protected life should also be considered.⁸⁵ Causes and effects here, as with other historical questions, are virtually impossible to disentangle. So far as I can determine, the Federal Rules and the Enabling Act are simultaneously an effect, cause, reflection, and symbol of our legal system, which is in turn an effect, cause, reflection, and symbol of the country's social-economic-political structure. It cannot be denied, however, that the Federal Rules facilitated other factors that pushed in the same expansive, unbounded direction.⁸⁶

Third, to criticize a system in which equity procedure has swallowed the law is not to criticize historic equity or those attributes of modern practice that utilize equity procedure. This is not an attack on

⁸³ See Schaefer, *Is the Adversary System Working in Optimal Fashion?*, in THE POUND CONFERENCE, *supra* note 6, at 171, 186 ("The 1906 lawyer would not recognize civil procedure as it exists today, with relaxed pleading standards, liberal joinder of parties and causes of action, alternative pleadings, discovery, and summary and declaratory judgments.").

⁸⁴ See G. RAGLAND, JR., DISCOVERY BEFORE TRIAL 17-18 (1932); *infra* text accompanying notes 132-38.

⁸⁵ One should also consider the growth in legislation and regulation, transactions and their complexity, photocopying and data processing, nontangible property, and the size of law firms. See *supra* text accompanying note 18.

⁸⁶ See *infra* notes 355-58 and accompanying text (describing the impact of the New Deal on the development of the Federal Rules).

those aspects of *Brown v. Board of Education*⁸⁷ or other structural cases that attempt to re-interpret constitutional rights in light of experience and evolving norms of what is humanitarian. I *do* criticize, however, the availability of equity practice for all cases, the failure to integrate substance and process, and the failure to define, categorize, and make rules after new rights are created. In other words, I question the view of equity as the dominant or sole mode instead of as a companion to a more defined system.

Fourth, I am not suggesting that we should return to common law pleading or to the Field Code. Nonetheless, there are aspects of common law thought, pre-Federal Rules procedure, and legal formalism that may continue to make sense and should inform our debate about appropriate American civil procedure.⁸⁸

TRADITIONAL EQUITY AND CONTEMPORARY PROCEDURE

(WASH. L. REV., Vol. 78)
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Thomas O. Main

III. THE PROCEDURAL MERGER OF LAW AND EQUITY

Beginning in the middle of the nineteenth century, a reform effort to simplify legal procedure originated in the State of New York.²¹¹ The reformers were frustrated with the practical and theoretical complexities of parallel systems of law and equity.²¹⁴ Enticed by the rhetoric of uniformity,²¹² these reformers sought to unify law and equity into a single system of codes.²¹³ Such codes offered a simple set of uniform rules better suited for the practical task of procedure to efficiently process the more important issues of substantive law.²¹⁷ One commentator described the technicalities of common law pleading as "needless distinctions, scholastic subtleties and dead forms which have disfigured and encumbered our jurisprudence."²¹⁹ The reform effort was successful, as Section 62 of the new New York Code of Civil Procedure declared for New York state courts:

The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.²¹⁸

The Field Code abolished the common law forms and merged law and equity in a greatly simplified procedure.²²⁰ Code reformers took great pains to emphasize that the new codes reorganized only the procedure of law and equity.²²¹ Accepting Blackstone's view that substance and procedure were conceptually distinct,²²² the Field Code took the additional step of recognizing the divisibility in fact of substance and procedure: "The legislative mandate of the Commissioners was reform in procedure—not alteration of the substantive rules of equity or the common law."²²³

The merged procedure of the codes borrowed heavily from equity practice.²²⁴ Much like the old bills in equity, the Field Code provided that the pleadings should state the facts;²²⁵ thus the codes, like equity, de-emphasized the importance of framing an issue.²²⁶ The Code adopted for all actions numerous equity practices and processes, including latitude in the joinder of claims and parties.²²⁷ Further, echoing King James I's

resolution of the dispute between Bacon and Coke three centuries prior,²²⁸ any conflict between the substantive doctrines of law and equity was to be resolved in favor of equity.²²⁹

The innovative codes proved popular elsewhere and were adopted in most states. The system inaugurated by the New York Code of 1848 was adopted promptly by Missouri and Massachusetts in 1849 and 1850, respectively.²³⁰ In 1851, California adopted a version of the Field Code, and prior to the outbreak of the Civil War, Iowa, Minnesota, Indiana, Ohio, the Washington Territory, Nebraska, Wisconsin and Kansas likewise enacted similar procedural codes.²³¹ Within twenty-five years, procedural codes had been adopted in a majority of the states and territories.²³² Additionally, the Field Code had at least some influence in all states, as all states departed somewhat from the common law system of pleading in response to the proliferation of the codes.²³³ For example, some of the states that did not model the codes nevertheless modified their pleading rules by statutes, allowing the assertion of equitable defenses in actions at law.²³⁴

Nevertheless, the reform effort that was remarkably successful in the state courts initially drew only skepticism from the federal courts. Although law and equity were administered on different "sides" of the same federal courts,²³⁵ a commitment to the formal separation of law and equity was venerated and, arguably, constitutionally grounded. Justice Grier emphasized the significance of the separation in an 1858 opinion of the Court:

This [dual] system, matured by the wisdom of ages, founded upon principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sociologists, who invest new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common law courts.²³⁶

Bolstered by constitutional references to systems of law and of equity,²³⁷ commentators long sustained the argument that "the Federal courts cannot adopt the blended system, nor can Congress change the present Federal system, because it is fixed by the Constitution of the United States."²³⁸

However, the resolve for separate systems weakened as popular confusion and dissent mushroomed. A primary source of the confusion and dissent was federal procedure, which, both prior and subsequent to state adoption of the procedural codes, followed state procedure in law

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cases and a uniform federal procedure in equity cases.²³⁹ Thus, there was a uniform simplified procedure in equity for the federal courts throughout the country. Yet in law cases the various federal courts were applying the procedure of the corresponding state court.

Federal equity practice was a model of simplicity and uniformity. Somewhat paradoxically, federal procedure in equity cases was actually a product of a certain hostility toward equity among the early colonists.²⁴⁰ Conformity to state practice seems to have been demanded, but it became necessary to follow the English equity procedure because a number of the states adopted no equity procedure to which conformity could be had.²⁴¹ The first set of Federal Equity Rules, promulgated by the Supreme Court in 1822, contained thirty-three very concise rules of practice and procedure.²⁴² A few of the rules were mandatory,²⁴³ but most generously accorded federal judges with broad discretionary authority.²⁴⁴ Moreover, after the extension of the doctrine of *Swift v. Tyson*,²⁴⁵ to equity cases in 1851, the federal courts enunciated their own views of the principles of equity jurisprudence, without restriction by the decisions of state courts.²⁴⁶ The Federal Equity Rules proved quite durable and were substantially revised only twice in the succeeding century—in 1842 and in 1912.²⁴⁷ The latter revision was a comprehensive reform that modeled many of the provisions of the Field Code, especially those dealing with the joinder of parties.²⁴⁸

Meanwhile, the procedure in law cases was controlled by congressional legislation requiring the federal courts to follow state procedure "as near as may be."²⁴⁹ The Conformity Act was unpopular and true conformity seemed largely unobtainable.²⁵⁰ Noting the success of equity procedure,²⁵¹ the American Bar Association blamed legislative control of federal practice for the problem and proposed that the power to promulgate federal rules of procedure for law cases be turned over to the United States Supreme Court.²⁵² After years of debate and struggle,²⁵³ Congress passed a bill providing:

[T]hat the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.²⁵⁴

The legislation further provided that "[t]he court may at any time unite the general rules prescribed by it for cases in equity with more in actions at law as to secure one form of civil action and procedure for both . . ."²⁵⁵ However, the Court did not rush to the task; an advisory

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committee was appointed the following year.²⁵⁶ Two years thereafter, a set of uniform rules was promulgated, eliminating the distinction between procedures for cases in equity and in law.²⁵⁷ "Under the new rules the hideous Conformity Act [was] relegated to the limbo of 'old unhappy, far off things.'"²⁵⁸ In his address to the American Law Institute Chief Justice Hughes stated the objective of the new rules:

It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances. It is also apparent that in seeking that end we should not be fettered by being compelled to maintain the historic separation of the procedural systems of law and equity.²⁵⁹

Carrying the torch lit by Blackstone 150 years earlier, the reformers argued that procedure had a tendency to be obtrusive, and that it should be restricted to its proper and subordinate role.²⁶⁰ The Chief Justice transmitted the Rules to Congress over the dissent of Justice Brandeis, and in 1938 the new uniform Federal Rules of Civil Procedure went into effect.²⁶¹

The philosophy and procedures of equity heavily influenced the tenor of the new Federal Rules.²⁶² One general and generous sentence

applicable to all types of cases established a fluid standard of pleading.²⁶³ Parties could plead alternative theories.²⁶⁴ Plaintiffs were able to pursue novel theories of relief.²⁶⁵ Related and unrelated claims could be joined in a single action.²⁶⁶ Judges could hear the counterclaims and cross-claims of parties already joined in the filed action.²⁶⁷ As in equity, there were numerous specialized devices through which judges could allow the lawsuit to expand further in order to develop a more efficient litigation unit—e.g., impleaders,²⁶⁸ interpleaders,²⁶⁹ interventions,²⁷⁰ and class

actions.²⁷¹ Complementing the new pleading regime were new liberal rules of discovery,²⁷² and judges were vested with the authority to "manage" the case through pretrial conferences²⁷³ and special masters.²⁷⁴

The Federal Rules reflected a philosophy that the discretion of individual judges, rather than mandatory and prohibitory rules of procedure, could manage the scope and breadth and complexity of federal lawsuits better than rigid rules.²⁷⁵ Indeed, Rule 1 articulated this

very purpose: "[The Federal Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."²⁷² Commenting generally on the philosophy and durability of discretionary rules, Professor Carrington mellifluously recites: "Tight will tear. Wide will wear."²⁷³

Like the Field Code, the reforms were directed exclusively to the procedural problem: the 1934 enabling legislation provided that "said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."²⁷⁴ The Supreme Court later confirmed that "[t]he Rules have not abrogated the distinction between equitable and legal remedies. Only the procedural distinctions have been abolished."²⁷⁵ The fundamental substantive characteristics that distinguished the regimes of law and equity remained intact.²⁸⁰ Again, in the event of any substantive conflict between law and equity, the latter was to prevail.²⁸¹

Many states, in turn, modeled the federal rules for their state court procedures. In 1960, in the first comprehensive survey of state adoption of the Federal Rules, Professor Charles Alan Wright concluded that, after twenty years of operating under the Federal Rules, state procedural systems were approximately evenly divided among procedural systems modeled on the Federal Rules, the common law and the Field Code.²⁸² Decades later, Professor John Oakley detailed "the pervasive influence of the Federal Rules on at least some part of every state's civil procedure."²⁸³

The Supreme Court's Regulation of Civil Procedure: Lessons From Administrative Law

Lumen N. Mulligan
Glen Staszewski

UCLA L. Rev. v. 59 (2012)

The rulemaking era began when Congress empowered the Court to promulgate the Rules of Civil Procedure in 1934 with the passage of the Rules Enabling Act.⁴¹ Although the 1934 Act did not specify the use of committees, in 1935 the Court appointed a fourteen-person Advisory Committee—which did not adhere to the notice-and-comment procedures currently required of the Advisory Committee⁴²—to do the research and drafting work for the creation of the original Federal Rules of Civil Procedure.⁴³ Under this first incarnation of the rulemaking process, the Court directly reviewed the work of the Advisory Committee and, if satisfied, reported the promulgated Rules to Congress,⁴⁴ which could overrule any of the rules by exercising the legislative veto built into the 1934 Act during the specified “report-and-wait period.”⁴⁵ Although the Court often deferred to the Advisory Committee’s proposals during this early period,⁴⁶ it did on occasion exercise its authority to revise Advisory Committee proposals prior to submission to Congress.⁴⁷ At least once, the Court exercised its rulemaking authority directly in amending a Rule of Criminal Procedure, bypassing the Advisory Committee entirely.⁴⁸

The rulemaking process became more reticulated in 1958 when Congress created the Judicial Conference of the United States, which took over the direct supervision of the Advisory Committee from the Court.⁴⁹ This new structure resulted in decreased input into the rulemaking process by the Justices.⁵⁰ Indeed, during this period, the Court unfailingly promulgated Rules recommended to it by the Judicial Conference, leading Justices and commentators to describe the Court’s role in rulemaking as one of being a “mere conduit” for the work of others.⁵¹

By the late 1970s, observers of the rulemaking process, including Chief Justice Burger,⁵² leveled charges at every step in the process. They argued that Congress’s review of the Rules was flawed.⁵³ They similarly argued that the Court was not an appropriate entity to promulgate Rules.⁵⁴ Commentators chastised the committee structure as acting beyond the bounds of the Rules Enabling Act⁵⁵ and for being unrepresentative and closed to public input.⁵⁶ The judiciary sought to correct many of these faults without new legislation by commissioning a Federal Judicial Center study, which, upon completion, suggested several amendments to the rulemaking process.⁵⁷

These changes, however, did not satisfy Congress, which passed significant rulemaking reforms in 1988.⁵⁸ While retaining the Judicial Conference’s role in the rulemaking process, the 1988 Act codified the role of the rulemaking committees for the first time. It mandated the existence of the Standing Committee on Rules of Practice and Procedure, which the Judicial Conference had previously established at its discretion, and charged the Standing Committee with reviewing the proposals of other duly appointed committees and making recommendations to the Judicial Conference.⁵⁹ The 1988 Act also formalized the Judicial Conference’s practice of deploying area-specific advisory committees.⁶⁰ Hence, the Court can only promulgate Rules that have been vetted by the area-specific advisory committees, the Standing Committee, and the Judicial Conference.

The 1988 Act also increased representation and public participation in the rulemaking process. The Act mandates that the various advisory committees include practitioners, trial judges, and appellate judges.⁶¹ Congress also mandated greater transparency and public input. The Act thus requires the Judicial Conference to publish its procedures for amendment and adoption of rules.⁶² It further re-

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quires that the Advisory and Standing Committees conduct open and publicly noticed meetings, record the minutes, and make those minutes publicly available.⁶⁵ Additionally, the 1988 Act codified the longstanding practice of the Advisory Committee to attach official drafters' notes to Rule proposals.⁶⁶ Finally, the 1988 Act increased the length of the report-and-wait period to Congress. The period now stands at a minimum of seven months.⁶⁷

Thus, the current rulemaking process comprises seven steps.⁶⁸ First, the Administrative Office of the United States Courts collects recommendations for new Rules or amendments from the public, practitioners, and judges.⁶⁹ These suggestions are forwarded to the appropriate Advisory Committee's reporter⁷⁰ (a law professor assigned to each advisory committee to set the agenda and do the initial drafting of rule revisions and explanatory notes⁷¹), who makes an initial recommendation for action to the Advisory Committee. Second, to go forward with a Rules revision, the Advisory Committee must submit the proposed revision and explanatory note, and any dissenting views, to the Standing Committee in order to obtain permission to advance to the publication and comment period.⁷² Third, the Advisory Committee publishes the proposed revision widely, receives public comment, and holds public hearings.⁷³ At the conclusion of the notice-and-comment period, the Advisory Committee's reporter summarizes the results of the public input and presents them to the Advisory Committee.⁷⁴ If the Advisory Committee finds that no substantial changes to the revision are called for, it transmits the revision and accompanying notes and reports to the Standing Committee.⁷⁵ If the Advisory Committee makes substantial changes to the proposed revision, it must go through another public notice-and-comment period.⁷⁶ Fourth, the Standing Committee reviews the proposed revision.⁷⁷ If it makes substantial changes to the proposed revision, the Standing Committee returns the proposed revision to the Advisory Committee.⁷⁸ If the Standing Committee does not make substantial changes, it sends the proposed revision to the Judicial Conference.⁷⁹ Fifth, the Judicial Conference considers proposed revisions each September, sending approved revisions to the Court or rejected proposals back to the Standing Committee.⁸⁰ Sixth, the Court takes the proposed revisions under advisement from September to May 1 of the following year, at which time it must transmit to Congress those Rules it seeks to promulgate.⁸¹ Seventh, under the current law, Congress's report-and-wait period runs another seven months from May 1 to December 1, at which time unaltered revisions to the Rules become law.⁸²

PROCEDURALISM, CIVIL JUSTICE, AND AMERICAN LEGAL THOUGHT

PAUL MACMAHON*

2. PROCEDURALISM

Legal scholars frequently use the word "proceduralism," and the corresponding word "proceduralist."¹³ Proceduralism, it may be, has received plenty of attention in criminal law,¹⁴ constitutional theory,¹⁵ the legislative process,¹⁶ political philosophy,¹⁷ legal theory,¹⁸ bankruptcy law,¹⁹ corporate law,²⁰

administrative law,²¹ employment law,²² the law of public schools,²³ and election law.²⁴ Whether they simply identify proceduralism, consider themselves proceduralists, or diagnose proceduralism as a malady, scholars rarely attempt to define these terms. Clarifying, or at least stipulating, the meaning of proceduralism is a crucial preliminary step in my argument that proceduralism is a defining feature of American civil justice. I ask first: what is procedure? Then, I ask: what kind of orientation towards procedure counts as proceduralism?

2.1. Procedure and Substantive Law

American lawyers are "brought up on sophisticated talk about the fluidity of the line between substance and procedure."²⁵ Yet there is rough agreement on what counts as procedure and what counts as substantive law, however poorly theorized that agreement may be.²⁶ While it may be difficult to tell whether a particular rule is procedural or substantive, the existence of troublesome borderline cases does not make the distinction meaningless. Mostly, the difference is intuitively obvious. In criminal law, for example, the definition of an offense is a matter of substantive law. In the tort of negligence, the elements of the plaintiff's cause of action—duty, breach, causation, and damage—are matters of substantive law. But the rule that the prosecution must prove the elements of a criminal offense beyond a reasonable doubt is a rule of procedure, and so is the (general) civil rule that the plaintiff must establish the elements of a cause of action by a preponderance of the evidence. Rules about the proper forum for litigation are procedural, and so are rules about jury selection. Also procedural are the rules about the kinds of evidence the parties may offer to the court.

A procedure is a way of doing something. In law, procedure is a way of "doing" substantive law.²⁷ Substantive law is the body of

rules that purports to guide people's conduct outside litigation and the lawmaking process.²⁸ In litigation, we need answers to two questions: *what* is the law that governs the parties' relations outside of litigation? And *how* do courts resolve disputes about what that law means for the parties in particular cases? Substantive law is an answer to the "what" question; procedure is an answer to the "how" question. This "what-how" distinction tallies with the difference in constitutional law between "procedural due process" and "substantive due process."²⁹ Substantive due process³⁰—an oxymoron, perhaps³¹—prevents government actors from depriving persons of certain interests, no matter how they do it. Procedural due process doctrine regulates only *how* government may deprive a person of life, liberty, or property. Similarly, in administrative law, when exercising "procedural review," a court may review *how* the agency reached its decision; review of the merits of the decision itself is "substantive review."³²

terms or antonyms, but are also paradoxically yoked: each is extraordinarily difficult to define without also defining the other.") (citations omitted).

²⁸ This view of substantive law reflects Justice Harlan's concurrence in *Hanna v. Plumer*, 380 U.S. 460, 474–77 (1965). For similar views, see Martinez, *supra* note 2, at 1020–21; Solum, *supra* note 25, at 192–225; Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46 n.200 (1985). See also S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995) (Posner, J.) (the aim of a legal rule is "substantive" when it is "designed to shape conduct outside the courtroom and not just improve the accuracy or lower the cost of the judicial process").

²⁹ See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 417–19 (2011) ("[T]he distinction between adjudication-related conduct and non-adjudication-related conduct is sufficiently distinct to serve as a useful dividing line for distinguishing between substantive and procedural rights.") (citation omitted).

³⁰ See *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) ("The Due Process Clause guarantees more than fair process . . .").

³¹ See *Mays v. City of East St. Louis*, 123 F.3d 999, 1001 (7th Cir. 1997) (Easterbrook, J.) (remarking that "'substantive due process' is an oxymoron"). Critics of substantive due process delight in pointing out the difficulties of squaring this body of doctrine with the text of the Clauses. See, e.g., John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 493 (1997) (likening a "reader of the Supreme Court's substantive due process cases" to a "moviegoer who arrived late and missed a crucial bit of exposition"); ELY, *supra* note 15, at 18 ("[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green, pastel redness.'").

³² Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2012).

Much of the agony over the substance-procedure distinction flows from the *Erie* case.³³ The *Erie* doctrine is not only “the most studied principle in American law,”³⁴ but also the central platform for discussing the procedure/substance distinction.³⁵ Before *Erie*, when federal district courts exercising their diversity-of-citizenship jurisdiction adjudicated a common-law cause of action, such as a claim in contract or tort, they usually applied their own brand of common law, “federal common law.”³⁶ But after *Erie*, “there is no general federal common law” because, as the Supreme Court decided, the federal courts lack constitutional authority to declare

³³ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The literature on *Erie* and subsequent cases is enormous and inconclusive. See, e.g., Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987 (2011); Robert J. Condlin, “A Formstone of Our Federalism”: *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 525 (2005); Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What’s Wrong with the Recent Erie Decisions*, 92 VA. L. REV. 707 (2006); Ely, *supra* note 25; Henry J. Friendly, *In Praise of Erie – and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963 (1998); Solum, *supra* note 25, at 192–225; Adam N. Steinman, *What Is the Erie Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245 (2008); Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877 (2011).

³⁴ Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980) (attesting to the importance of the *Erie* doctrine as the keystone to American civil procedure).

³⁵ As Lawrence Solum says, “[a]ny discussion of substance and procedure that does not start with *Erie* will nonetheless be interpreted by American judges, lawyers, and legal academics with *Erie*’s legacy in mind. In a sense, the question ‘What is procedure?’ begins with *Erie* – whether we like it or not.” Solum, *supra* note 25, at 193.

³⁶ See *Swift v. Tyson*, 41 U.S. 1 (1842). The decision in *Swift* rested on the Supreme Court’s interpretation of the Rules of Decision Act, which provides that “[t]he laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.” In *Swift*, the court adopted a restrictive interpretation of the “laws of the several states” that included statutory law and “local” common law, but excluded “general” state common law. In *Erie*, the Supreme Court interpreted “laws of the several States” to include general state common law, citing “the work of a competent scholar” as to the original intent behind in the Rules of Decision Act. *Erie*, 304 U.S. at 73 n.5 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923)).

substantive rules of common law.³⁷ By the same token, no one doubted federal authority to develop rules of *procedure* for the federal courts to apply in diversity actions.³⁸ Indeed, four years before the Court's *Erie* decision, Congress had passed the Rules Enabling Act, asserting federal power to promulgate for the federal courts "rules of practice and procedure."³⁹ In a nutshell, the conventional understanding of *Erie* is that "federal courts sitting in diversity apply state substantive law and federal procedural law."⁴⁰

In *Erie* itself, Justice Reed foresaw future problems, pointing out that "[t]he line between procedural and substantive law is hazy."⁴¹ Sure enough, a series of Supreme Court decisions has followed, and the Court has sometimes struggled to apply the distinction consistently.⁴² Is a state statute of limitations

³⁷ *Erie*, 304 U.S. at 78 (stating that the Constitution does not confer on federal courts the power to make substantive federal law).

³⁸ In *Erie*, Justice Reed stated in concurrence that "no one doubts federal power over procedure." *Erie*, 304 U.S. at 92 (Reed, J., concurring).

³⁹ 28 U.S.C. § 2072(a). The grant of rule-making authority further helped to enshrine the procedure-substance distinction by providing that the Federal Rules could "not abridge, enlarge or modify any substantive right." *Id.* § 2072(b). For the history behind the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

⁴⁰ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (explaining *Erie*'s reading of the Rules of Decision Act). For a challenge to this conventional understanding, see Steinman, *supra* note 33 (arguing that the *Erie* doctrine requires federal courts to follow state law on many procedural issues, including summary judgment and class certification, because the application of federal procedural rules would interfere unduly with substantive state-law rights).

⁴¹ *Erie*, 304 U.S. at 92 (Reed, J., concurring) (surmising that it may be difficult to differentiate between substantive and procedural law as the majority opinion posits).

⁴² See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (holding that a New York law prohibiting class actions for a certain cause of action did not preclude a federal court sitting in diversity from hearing a class action under Federal Rule 23); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (holding that the claim-preclusive effect of a decision by a federal district court sitting in diversity is governed by the laws of the state where the deciding court is located); *Gasperini*, 518 U.S. 415 (allowing New York's more invasive standard for judicial review of jury awards to apply in a federal court sitting in diversity); *Hanna v. Plumer*, 380 U.S. 460 (1965) (ruling that federal courts should apply the federal rule regarding service of process); *Byrd v. Blue Ridge Rural Elec. Coop.* 356 U.S. 525 (1958) (holding that federal courts sitting in diversity should follow federal practice of having the issue of eligibility for workers' compensation determined by a jury, despite state law rule favoring judicial determination); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (allowing

procedural or substantive? (Answer: perhaps surprisingly, substantive.)⁴³ Is a rule providing a valid method of service of process procedural or substantive? (Answer: procedural.)⁴⁴ In the most recent *Erie* doctrine case, *Shady Grove*, Justice Scalia used quotations from previous cases to reiterate the Court's longstanding definition of procedure.⁴⁵ Procedure, he wrote, is "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."⁴⁶ "If [a procedural rule] governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."⁴⁷

As well as court procedure, lawyers and scholars must attend to law-making procedure. How is (and should) law-making power (be) allocated among different branches of government, and between the federal government and state government? Some procedural questions straddle the law-making/adjudication boundary. Procedural questions include general questions of legal method: questions about the methodology for interpreting statutes, questions about whether and when to follow or disregard precedent, and questions about how much power courts should have to review the decisions of administrative agencies. These, too, are procedural questions for the purposes of my description of proceduralism.

federal court to apply federal rules if the outcome would be substantially the same as applying state rules).

⁴³ See *Guaranty Trust*, 326 U.S. at 110, 112 (holding that state statute of limitations applies since applying the corresponding federal rule would substantially alter the outcome of the case).

⁴⁴ See *Hanna*, 380 U.S. at 463-64, 473-74 (enforcing the federal rule regarding service of process as a procedural rule).

⁴⁵ See *Shady Grove*, 130 S. Ct. at 1442 (quoting *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941); *Hanna*, 380 U.S. at 464; *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 8 (1987); *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)).

⁴⁶ *Shady Grove*, 130 S. Ct. at 1442 (quoting *Sibbach*, 312 U.S. at 14) (internal quotations omitted).

⁴⁷ *Id.* (quoting *Murphree*, 326 U.S. at 446). Cf. *Guaranty Trust*, 326 U.S. at 109 ("[Procedure is] the manner and the means by which a [substantive-law] right to recover, as recognized by the State, is enforced.").

2.2. Proceduralism as Belief in the Centrality of Procedural Questions

Now that we know what procedure is, what is proceduralism?⁴⁸ As I define it, proceduralism is simply the tendency to believe that procedure is centrally important.⁴⁹ Arguments premised on the importance of procedure are proceduralist (or proceduralistic); people who generally tend to believe procedure is important are proceduralists. We can also diagnose proceduralism on a larger scale: participants in and observers of a proceduralist legal culture allocate relatively larger proportions of their interests, energies, and attentions to questions of procedure rather than to questions of substantive law.

My definition is purposefully broad, and, though usage has been far from consistent, my version at least has the advantage of covering most things that have been called "proceduralism" or "proceduralist" in the legal literature.⁵⁰ First, it includes someone who thinks that *only* procedure matters. In the context of legal debates, it is hard to find anyone who *really* believes that only procedure matters. Legal writers do sometimes use this narrow definition of proceduralism either as an ideal-type⁵¹ or to caricature

⁴⁸ On the varieties of meanings of words ending in "-ist" and "-ism", see, for example, Adrienne Lehrer, *A Note on the Semantics of -Ist and -Ism*, 63 AM. SPEECH 181 (1988) (noting the emergence of "racism," "ageism," and "speciesism"); Michael R. Dressman, *The Suffix -Ist*, 60 AM. SPEECH 238 (1985) (discussing the divergence of and differences between -ist, -ism, and -ize); cf. MORRISSEY, *You Know I Couldn't Last, on YOU ARE THE QUARRY* (ATTACK Records 2004) ("[E]very -ist and every -ism thrown my way to stay.").

⁴⁹ See Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn From American Experience*, 11 COLUM. J. EUR. L. 1, 47 (2004) (cautioning against "'proceduralism,' whereby a disproportionate amount of time and energy is devoted to procedural issues"). Geradin's definition of proceduralism is similar to mine except that he adds a pejorative connotation.

⁵⁰ My definition, however, does not seem to fit Edward Janger's theory of "Universal Proceduralism" for resolving choice-of-law questions in cross-border insolvency law. See Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L L. 819 (2007) (proposing universal but minimally harmonized rules of transnational bankruptcy procedure, and non-uniform substantive law). Cf. Jay Lawrence Westbrook, *A Comment on Universal Proceduralism*, 48 COLUM. J. TRANSNAT'L L. 503 (2010) (criticizing Janger's theory of universal proceduralism).

⁵¹ See Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 321 (1997) (defining "proceduralism" as the kind of justificatory theory of democracy that is "indifferent to the substantive decisions produced by a particular governmental arrangement, caring only that, according to some particular substantive moral theory, the procedures used to produce those decisions either are inherently good or promote good effects").

the arguments of opponents.⁵² The definition also includes a more commonly held view about procedure: "the notion that good procedures are presumptive evidence of good results."⁵³ Third, my definition includes those who believe that *more formal* procedures (for example, a formal notice-and-comment procedure before administrative rule-making) will lead to better outcomes.⁵⁴ Finally, it also includes the family of views that stresses the intrinsic value of procedures as opposed to, or in addition to, their instrumental effects.⁵⁵ Note, however, that within my definition, one need not subscribe to any particular theory to be a proceduralist. Procedure may matter to a proceduralist because of its instrumental effects, or because procedure is valuable in its own right.

Moreover, to be a proceduralist, one need not adhere to any particular beliefs about what counts as a good or a fair procedure. My argument that American legal culture is particularly proceduralist, therefore, is distinct from Robert Kagan's critique of American overreliance on "adversarial legalism"—the excessive use of costly and adversarial legal processes—to implement social

⁵² See David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 19 n.2 and accompanying text (describing as "myopic" the proceduralist approach "that ignores deterrence and compensation objectives and related individual welfare effects of the substantive law in evaluating the operation and potential redesign of the civil liability system").

⁵³ William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 964 (1989) (reviewing ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, *PROCEDURE* (1988)). See also Cass R. Sunstein, In Memoriam, *Bernard D. Meltzer (1914-2007)*, 74 U. CHI. L. REV. 443, 444 (2007) (noting "Bernie was a craftsman because he was a proceduralist—one who believed, with Justice Frankfurter, that 'the history of liberty has largely been the history of the observance of procedural safeguards'").

⁵⁴ This appears to be the meaning of "proceduralism" criticized in Barron & Kagan, *supra* note 21, at 229-32.

⁵⁵ See Solum, *supra* note 25, at 183 ("While procedural justice is concerned with the benefits of accuracy and the costs of adjudication, it is *not solely* concerned with those costs and benefits. Rather, procedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms."); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976) (exploring individual dignity as a value when evaluating procedures).

policies.⁵⁶ According to my definition, Kagan himself is a proceduralist because he stresses the importance of examining and reforming the particular procedural solutions that Americans have chosen. Regardless of the sources of their proceduralism, or their own views about what counts as good procedure, proceduralists stand out for their belief that procedure is at least as important as matters of “substance.”⁵⁷ Where proceduralist ideas prevail, procedural questions have a higher degree of salience.⁵⁸

3. AMERICAN PROCEDURALISM IN CIVIL JUSTICE

My focus in this Article is on proceduralism in civil justice.⁵⁹ It is not that proceduralism is especially pronounced in civil justice; in fact, proceduralism is perhaps a more widely accepted feature in

⁵⁶ As I explain in Section 4.1, *infra*, however, there is surely a link between the American focus on procedural questions and the particular procedural solutions American legal institutions have chosen.

⁵⁷ In this way, my analysis of proceduralism is structurally similar to a comparative-law analytic distinction drawn by James Whitman between “consumerism” and “producerism.” See James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340 (2007). Whitman’s purpose is to undertake a comparative-law analysis of the supposed encroachment of American consumerism in continental Europe; along the way, he contrasts consumerism with its opposite, producerism. The point, according to Whitman, is not that European law simply favors consumers, or that European law simply favors producers. Rather, the point is that Americans tend to consider the debate between competing perceptions of consumer interest to be important, while Europeans tend to lend greater importance to questions about producers’ interests. On Whitman’s exposition, what is distinctive about a consumerist legal order is that participants see the rights and interests on the demand side of the market as significant. A producerist legal order focuses on the supply side, with the rights and interests of different classes of producer—workers vs. employers, small businesses vs. large businesses, and so forth—dominating debates.

⁵⁸ On the concept of salience, see Frederick Schauer, *Foreword: The Court’s Agenda—And the Nation’s, The Supreme Court, 2005 Term*, 120 HARV. L. REV. 4, 18 n.40 (2006) (describing salience as “weighty prominence” and distinguishing it from “mere importance, mere knowledge, or even mere prominence”).

⁵⁹ For an attempt to approach civil and criminal procedure from a single perspective, see Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 85–86 (2008) (“There are (almost) no general proceduralists, only criminal proceduralists and civil proceduralists who, like the blind men in John Godfrey Saxe’s *The Blind Men and the Elephant*, ‘see’ only part of the picture.”). I will mostly leave the specific field of administrative law to one side. But there, perhaps more than anywhere else, proceduralism reigns. See Mashaw, *supra* note 21; Barron & Kagan, *supra* note 21; HORWITZ, *supra* note 21.

the criminal field.⁶⁰ My first aim, then, is to establish the significance of procedure in the intellectual life of American civil justice. I reinforce the point by contrasting the peripheral position that procedure plays in the academic legal education and scholarship in England.

⁶⁰ As Bill Stuntz has shown, the Warren Court attempted to rein in the excesses of police and prosecutors mainly by conferring new procedural rights on defendants, rather than by regulating the substantive law of crimes. See generally Stuntz, *The Political Constitution of Criminal Justice*, *supra* note 14. See also STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE*, *supra* note 14, at 216–242. Stuntz argued that this focus on criminal procedure backfired, partly because the Supreme Court essentially left legislatures a free hand as they expanded the scope of substantive criminal law. On Stuntz's account, "[t]he Supreme Court decided to regulate policing and procedure, and the politicians responded with a forty-year backlash of overcriminalization and overpunishment." Stuntz, *The Political Constitution of Criminal Justice*, *supra* note 14, at 849–50. Whether or not Stuntz is right to consider this procedural strategy an error, it is plain that the Warren Court largely disregarded substantive criminal law and looked for procedural solutions. Justice Stevens finds Stuntz's critique of "Earl Warren's errors" "surprisingly unpersuasive," but accepts the premise of "our system's focus upon criminal procedure rather than substance." John Paul Stevens, *Our 'Broken System' of Criminal Justice*, N.Y. REV. BOOKS, November 10, 2011 (reviewing STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE*, *supra* note 14).

In response to Warren Court reforms, law-and-order forces in the Burger and Rehnquist Courts and in the Congress fought procedure with procedure, making it more difficult to assert procedural rights by erecting more and more procedural barriers to post-conviction relief in the federal courts. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-32, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.) [parenthetical according to rule 12.2.2, p. 113]. The result of the AEDPA and judicially created procedural obstacles to federal-court review of state-court convictions is that "[f]ederal judges expend enormous amounts of time reviewing habeas petitions from state prisoners, but much of that time is spent finding ways to dismiss the petitions on procedural grounds without ever addressing their merits." Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 1–2 (2010); see also Larry Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 542 (2006) ("The failure of federal habeas to help correct problems in state criminal justice systems is particularly regrettable given evidence that states systematically violate criminal defendants' rights."). Cf. Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 320–69 (1993) (noting the Supreme Court's evasion of jurisdictional barriers to habeas review in pursuit of equitable results). Both conservative and pro-defendant voices decry excessive proceduralism in American criminal justice. See Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised By State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 315–17 (noting that the law-and-order "overproceduralism" critique laments the overprotection of criminal defendants and the devolution of criminal trials into procedural morass, while defense lawyers and civil rights activists lament the numerous procedural bars to post-conviction relief).

3.1. *The Centrality of Procedure in American Civil Justice*

The obvious place to start is civil procedure. Civil procedure is at the heart of American legal curriculum. By “civil procedure,” of course, I mean the rules and principles governing how a legal system enforces the rights and duties created by substantive law: in which court an action may be brought, the standards for pleading and summary judgment, the scope of pre-trial discovery, the allocation of responsibility for lawyers’ fees, and so on. In the first-year curriculum, these procedural questions stand on a similar footing to questions of substantive law. This insight may seem either surprising or obvious to American readers, but I hope to establish that it is both true and significant.

American law schools aspire to be professional schools, so it is unsurprising that the rules governing litigation appear somewhere on the curriculum. However, students don’t just learn civil procedure as preparation for the bar exam. Rather, it is an integral component of the standard first-year curriculum. Every American law student takes civil procedure, and the professors who teach the subject engage in vigorous scholarly debates and discuss a steady stream of major Supreme Court decisions.⁶¹ The cultural prominence of civil procedure is impressed on the American law student from day one.⁶² Law students are taught to approach procedural questions not simply as technical rules they need to learn if they are to argue about substantive questions. Rather, procedural questions are *themselves* the site of intellectually challenging arguments about justice, rights, efficiency, and sovereignty. This is true even in more doctrinally focused civil procedure courses that focus on the Federal Rules.

Often, American civil procedure courses begin with the topic of personal jurisdiction. What might otherwise seem a technical issue becomes, in the hands of any reasonably competent American law professor, a vehicle for exploring questions of state sovereignty,

⁶¹ Cf. Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314–15 (2012) (welcoming the Supreme Court’s recent re-engagement with civil procedure, and noting that the Court has decided more than twenty civil procedure cases in the last six terms).

⁶² See Elizabeth M. Schneider, *Structuring Complexity, Disciplining Reality: The Challenge of Teaching Civil Procedure in a Time of Change*, 59 BROOK. L. REV. 1191, 1191 (1993) (“[S]tudents find procedure enormously complex and challenging, and it has the reputation for being the hardest course in the first-year curriculum.”).

individual fairness, and legal method. Students become familiar with the formalistic territorial approach exemplified by *Pennoyer v. Neff*,⁶³ the “minimum contacts” revolution of *International Shoe Company v. Washington*,⁶⁴ and the more recent reassertion of formal reasoning in cases like *Burnham v. Superior Court of California*.⁶⁵ The Supreme Court produced two major fresh personal jurisdiction decisions in 2011.⁶⁶ Immediately, the American student sees civil procedure as vital—worthy of strident debate by Supreme Court Justices⁶⁷—rather than as a dry set of rules subservient to substantive law.

Another important topic for the first-year law student is pleading: what must the plaintiff include in the complaint to survive a pre-answer motion to dismiss for failure to state a claim? Again, this might sound at first like a minor question, but in America it raises basic questions about citizens’ rights of access to the courts. Formally, the Federal Rules of Civil Procedure require only “notice pleading,” but two recent Supreme Court decisions hold that, in fairness to defendants, plaintiffs ought to put more flesh on the bones of their complaints.⁶⁸ A federal-court plaintiff is now required to state a claim for relief that is facially plausible,⁶⁹ a

⁶³ 95 U.S. 714 (1877).

⁶⁴ 326 U.S. 310 (1945).

⁶⁵ 495 U.S. 604 (1990).

⁶⁶ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

⁶⁷ The Supreme Court has issued several fractured and sharply divided rulings in cases concerning personal jurisdiction over a non-forum defendant whose goods cause harm after being taken to the forum jurisdiction. See *McIntyre*, 131 S. Ct. at 2786–91 (plurality opinion) (concluding that a court cannot exercise personal jurisdiction over a defendant who did not purposely avail herself of the privilege of doing business in the forum State); *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 112 (1987) (plurality opinion) (concluding that a mere awareness that a product may reach a jurisdiction when placed in the stream of commerce is not enough to satisfy the minimum contacts requirement); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (holding that a non-resident must purposely avail himself of the state’s privileges and protections for that state to have personal jurisdiction over him).

⁶⁸ For an argument that these cases bring United States pleading standards closer to those in England and elsewhere, see Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT’L & COMP. L. REV. 1, 3–8 (2011).

⁶⁹ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (establishing a “facial plausibility” standard for pleadings); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556

development that has inspired a predictably vast amount of scholarly commentary.⁷⁰

For the moment, allow me one more example from the Civil Procedure curriculum, already mentioned above:⁷¹ choice of law in the federal courts—the *Erie* doctrine, a “key part of the rite of passage” for American law students.⁷² Three things about the *Erie* doctrine are particularly relevant here. First, students (their professor hopes) understand that, beneath the Supreme Court’s lawyerly discussions of precedent and doctrine, lurk larger questions of sovereignty and law-making power. Second, American law students are presented with powerful evidence of how important procedural rules are. A significant post-*Erie* lesson is that plaintiffs, with their penchant for forum-shopping, obviously think that the identity of the court that hears a lawsuit may make a big difference to the case’s outcome. Third, the *Erie* doctrine teaches students that the line between procedural rules and substantive rules is highly problematic and difficult to draw. Debates over procedural rules, just as much as substantive rules, raise crucial questions of justice and efficiency.

(2007) (ruling that a complaint requires “enough factual matter (taken as true)” to suggest that the claim is meritorious).

⁷⁰ Any attempt at an exhaustive list of law review articles on *Iqbal* and *Twombly* would be doomed to failure, but here are some examples: Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773 (2011); Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413 (2011); Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215; Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61 (2007).

⁷¹ See Section 2.1, *supra*.

⁷² Rowe, *supra* note 33, at 1015 (“[T]his area combines inherent complexity and interest while being a key part of the rite of passage through which most of us went and continue to put our students.”).

The focus on procedure does not end with the first year of law school. Students often have a variety of procedural options to choose from in their second and third years. Indeed, the elective course often considered the most rigorous and demanding in American law schools—named “Federal Courts,” “Federal Courts and the Federal System,” “Federal Jurisdiction,” or some variation thereon—includes a healthy dose of civil procedure, integrated with grand constitutional themes of federalism and separation of powers.⁷³ “Fed Courts” is a kind of finishing school for the elite law student interested in litigation. The class is most often anchored by a famous casebook penned in the 1950s by Hart and Wechsler,⁷⁴ though there are alternative texts.⁷⁵ The subject-matter of Federal Courts includes the following topics: the extent of federal-court jurisdiction; the States’ sovereign immunity from suits and Congress’ power to abrogate that immunity; Supreme Court review of state-court decisions; choice of law in the federal courts (including another helping of *Erie* doctrine); remedies for violations of constitutional rights; justiciability (ripeness, mootness, and the “political question” doctrine); and the power of federal district courts to abstain from exercising their jurisdiction. The course requires an understanding of the relations between, on the one hand, states and their court systems and, on the other, the federal government and its courts system. These relations are inseparable from ideological and political conflicts in American history, from the founding of the Republic, through the era of Jacksonian Democracy, the Civil War, the Reconstruction Period, the New Deal, the Civil Rights Era, and so on.

To take but one example, a key topic in Federal Courts is habeas corpus review of state court judgments of criminal convictions. The topic straddles civil and criminal procedure.⁷⁶

⁷³ See Steve Vladeck, *Things You Oughta Know if You Teach Federal Courts*, PRAWFSBLAWG (Mar. 21, 2012, 6:48 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/03/things-you-oughta-know-if-you-teach-federal-courts.html> (stating that there are three “classical views” of the Federal Courts course: 1. “as an advanced civil procedure course”; 2. “as an advanced constitutional law course”; 3. “as a federal remedies course”) (emphasis omitted).

⁷⁴ The book is now in its sixth edition: RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009).

⁷⁵ See, e.g., PETER W. LOW, JOHN C. JEFFRIES, JR. & CURTIS A. BRADLEY, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* (7th ed. 2011).

⁷⁶ A petition for habeas corpus is a civil action against the jailer. See Donald A. Dripps, *On Reach and Grasp in Criminal Procedure: Crawford in California*, 37

The boundaries of this form of relief have waxed and waned along with broader shifts in the politics of American federalism and law-and-order politics. In the 1960s, while simultaneously expanding the procedural rights of criminal defendants, the Supreme Court opened the doors of the federal district courts to those claiming that their state court convictions were procured by violations of those rights. Since then, after a series of decisions by the Burger and Rehnquist Courts cutting back on this form of relief, a Republican Congress further restricted the availability of a federal forum for state prisoners in the Antiterrorism and Effective Death Penalty Act of 1996, mandating a host of jurisdictional obstacles for prisoners and highly deferential standards of review.

Again, reviewing this body of doctrine and its history impresses upon the student the importance of procedure.⁷⁷ Students also come into contact with the gargantuan academic literature that attends Federal Courts questions.⁷⁸ Only a minority of students take a Federal Courts class, but those who do go on to exert a disproportionate influence on the legal system. To a large extent, these are the students who win fancy clerkships with federal judges, work as litigators at the most lucrative firms, and, more importantly, attain influential jobs in government, become law professors, and later become judges in the higher courts.⁷⁹

As a further illustration of the richness of American procedural scholarship, consider the school of thought originating at Yale Law School in the 1970s and identified as "metaprocedure" by William Eskridge.⁸⁰ In a review article of a set of teaching materials by

N.C. J. INT'L L. & COM. REG. 349, 355 (2011) (discussing some of the complexities that arise when federal courts intervene in state criminal procedure).

⁷⁷ See Richard H. Fallon, Jr., *Why and How to Teach Federal Courts Today*, 53 ST. LOUIS U. L.J. 693, 693 (2009) (noting the prevalent idea that "a sophisticated Federal Courts course should yield insights more profound than those that emerge from any other public law offering," but calling it a "myth").

⁷⁸ See Thomas E. Baker, *Federal Court Practice and Procedure: A Third Branch Bibliography*, 30 TEX. TECH L. REV. 909 (1999) (a two hundred-page long "comprehensive bibliography of books and articles dealing with the various aspects of the federal courts and federal court procedures").

⁷⁹ See Michael J. Gerhardt, *Teaching Federal Courts: Federal Judges as Problem Solvers*, 53 ST. LOUIS U. L.J. 729, 734 (2009) ("[Federal Courts] is a course that is almost always appealing to the students who are on law review or are planning to do clerkships.").

⁸⁰ See generally, Eskridge, *supra* note 53; see also ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE*, at vi (1979) (explaining that the assembled essays in the book "might be seen as giving preliminary shape to a field of inquiry

Robert Cover, Owen Fiss, and Judith Resnik, Eskridge felt able to describe the casebook as “an intellectual Mardi Gras—a joyous, outrageous, intense feast of ideas that seeks to revolutionize the subject.”⁸¹ By “[e]mphasizing the intellectual and socio-political structures of procedure rather than its nuts and bolts, Cover, Fiss and Resnik propound[ed] a radically new way of teaching procedure to students.”⁸² The point was to get students to think fundamentally about the value of procedure, and, for the authors of the casebook, litigation was “a public event rather than simply a means of resolving private disputes.”⁸³ Partly because Yale Law School has produced so many law professors from the ranks of its former students, the metaprocedure approach spread far beyond its New Haven home. By the late 1980s, “a significant number of teachers . . . call[ed] themselves ‘proceduralists.’”⁸⁴

Nevertheless, many contemporary American proceduralists apparently consider their field an “academic backwater,”⁸⁵ when compared to other legal fields. At the very least, I want to console American proceduralists with the thought that things could be much, much worse. As I will suggest in the next section, the view from outside the United States looks very different indeed.

3.2. *A Comparative Example: Civil Procedure at the Periphery in England*

The vibrancy and intensity of American debates about civil procedure is best understood in comparative relief. Here, I

very much in flux”). For a more skeptical review, see Mark V. Tushnet, *Metaprocedure?*, 63 S. CAL. L. REV. 161 (1989) (criticizing the primary arguments made in Cover, Fiss, and Resnik’s casebook, *PROCEDURE*, *supra* note 53). See also Linda S. Mullenix, *God, Metaprocedure, and Metarealism at Yale*, 87 MICH. L. REV. 1139, 1142 (1989) (reflecting on the influence that *PROCEDURE*, *supra* note 53, has had on the procedural debate).

⁸¹ Eskridge, *supra* note 53, at 947.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Mullenix, *supra* note 80, at 1142.

⁸⁵ See *id.* at 1141 (referring to civil procedure as “a legal specialization normally lacking in intellectual excitement”); Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 516 (2006) (“[M]y claim that procedure has become an academic backwater is singing to the choir; those interested enough to read this Article know what I mean.”)

58 S.Ct. 817
Supreme Court of the United States.
ERIE R. CO.

v.
TOMPKINS.*

No. 367

|
Argued Jan. 31, 1938.

|
Decided April 25, 1938.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson*¹ shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that state. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for Southern New York, which had jurisdiction because the company is a corporation of that state. It denied liability; and the case was tried by a jury.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is, a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the state on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of \$30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held (2 Cir., 90 F.2d 603, 604), that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law, and that 'upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. * * * Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. * * * It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train.'

The Erie had contended that application of the Pennsylvania rule was required, among other things, by section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C. s 725, 28 U.S.C.A. s 725, which provides: 'The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari. 302 U.S. 671, 58 S.Ct. 50, 82 L.Ed. 518.

First. *Swift v. Tyson*, 16 Pet. 1, 18, 10 L.Ed. 865, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be; and that, as there stated by Mr. Justice Story, 'the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the

true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.'

The Court in applying the rule of section 34 to equity cases, in *Mason v. United States*, 260 U.S. 545, 559, 43 S.Ct. 200, 204, 67 L.Ed. 396, said: 'The statute, however, is merely declarative of the rule which would exist in the absence of the statute.'² The federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given section 34,³ and as to the soundness of the rule which it introduced.⁴ But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, *73 the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.⁵

Criticism of the doctrine became widespread after the decision of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426.⁶ There, *Brown & Yellow*, a Kentucky corporation owned by Kentuckians, and the *Louisville & Nashville Railroad*, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Ky., Railroad station; and that the *Black & White*, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the *Brown & Yellow* reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for Western Kentucky to enjoin competition by the *Black & White*; an injunction issued by the District Court *74 was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift & Tyson* had been applied, affirmed the decree.

Second. Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity;⁷ and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.⁸

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended

discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen.⁹ Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment.¹⁰ In addition to questions of purely commercial law, 'general law' was held to include the obligations under contracts entered into and to be performed within the state,¹¹ the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee;¹² the liability for torts committed within the state upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the state;¹³ and the right to exemplary or punitive damages.¹⁴ Furthermore, state decisions construing local deeds,¹⁵ mineral conveyances,¹⁶ and even devises of real estate,¹⁷ were disregarded.¹⁸

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule.¹⁹ And, without even change of residence, a corporate citizen of the state could avail itself of the federal rule by reincorporating under the laws of another state, as was done in the *Taxicab Case*.

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.²⁰ Other legislative relief has been proposed.²¹ If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.²² But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.

Third. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be

local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed. 772, against ignoring the Ohio common law of fellow-servant liability: I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.'

The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes.²³ The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law':

'But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *

'The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional

assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti v. Pennsylvania R. Co.*, 307 Pa. 203, 160 A. 859, the only duty owed to the plaintiff was to refrain from willful or wanton injury. The plaintiff denied that such is the Pennsylvania law.²⁴ In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the state. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.