

# THE PROCEDURAL FOUNDATION OF SUBSTANTIVE LAW

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## ABSTRACT

*The substance-procedure dichotomy is a popular target of scholarly criticism because procedural law is inherently substantive. This article argues that substantive law is also inherently procedural. I suggest that the construction of substantive law entails assumptions about the procedures that will apply when that substantive law is ultimately enforced. Those procedures are embedded in the substantive law and, if not applied, will lead to over- or under-enforcement of the substantive mandate. Yet the substance-procedure dichotomy encourages us to treat procedural systems as essentially fungible—leading to a problem of mismatches between substantive law and unanticipated procedures. I locate this argument about the procedural foundation of substantive law within a broader discussion of the origin and status of the substance-procedure dichotomy.*

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## INTRODUCTION

The substantive implications of procedural law are well understood. Procedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights. For example, there is no need to change the substantive contours of employment discrimination law when modifications to pleading rules and motion practice can bypass the more arduous substantive law-making process and deliver similar results. Yet even with knowledge of the capacity of procedure to achieve substantive ends, doctrinal reliance upon the dichotomy persists.

To complement the argument that procedure is inherently substantive, I suggest that the converse is also true. Specifically, the construction of substantive law necessarily entails making assumptions about how that law ultimately will be enforced. Many of those assumptions are rooted in the procedures pursuant to which a claim to vindicate that law would be litigated. The construction of substantive law, rather than occurring in a vacuum, is informed by expectations about pleading rules, the availability of a class action, the scope of discovery, case management techniques, rules of evidence, trial practice, and a constellation of other procedures. This contextualization of substantive law within a procedural framework will be subconscious when not deliberate.

Because substantive law is calibrated to achieve some outcome, fidelity to that law may require that it remain hinged to the corresponding procedural law that was presumed its adjunct. If the drafters of some substantive law require proof of defendant's *intent*, for example, that legislation may be predicated on affiliated procedures—say, that plaintiffs would have broad access to defendant's records through discovery, that plaintiffs would be able to introduce expert testimony at trial, and that defendants would be subject to cross-examination under oath. If this substantive law were enforced without these presumed procedures, there could be a mismatch between the desired and achieved levels of deterrence.

Once we see that procedure is embedded in substantive law, we can appreciate the additional strain that this places on the substance-procedure dichotomy and on doctrines that are premised upon the legitimacy of that dichotomy. Consider, in particular, the practice of applying forum procedural law no matter the applicable substantive law. When forum procedure is combined with foreign substantive law, the procedure that was embedded in the foreign substantive law is displaced. Applying forum procedural law to another system's substantive law necessarily distorts the latter.

My argument proceeds in five parts. In Part I, I present the origin of the substance-procedure dichotomy. The origin provides important context because understanding when and how the substance-procedure nomenclature emerged helps explain the fragility of the dichotomy. This dichotomy was neither time- nor battle-tested when it was codified as a foundational precept of our contemporary jurisprudence. Indeed, codification of a substance-procedure dichotomy is something of an accident of history. Appreciating these circumstances helps explain some of the incoherence of the doctrines constructed upon the dichotomy. I summarize that doctrinal incoherence in Part II.

In Part III, I relate the familiar narrative about how procedure is inherently substantive. The narrative presents in two basic forms. In one, procedure is substantive because procedure affects the outcome of cases; in the other, procedural reform is a disguise for the reform of substantive law. Both are demonstrably true.

In Part IV, I argue that procedure is embedded in substantive law. Using a stylized example of a state statute, I demonstrate that substantive law is neither *aprocedural* nor *trans-procedural*. Rather, substantive law has an associated procedure that must be applied by the enforcing court if the substantive law is to achieve the level of deterrence its drafters intended. To apply any other procedure leads to over- or under-enforcement of the substantive mandate.

The consequences of admitting that there is a false dichotomy at the core of our legal system may be substantial. But the magnitude of this problem should influence only the treatment of the condition, not the diagnosis. And in Part V, I consider various conceptual approaches, though all may appear radical to generations conditioned to accept a substance-procedure dichotomy.

One approach would abandon the notion that it is possible to apply some other jurisdiction's law. Instead, a strict *lex fori* regime would require the application of the forum's substantive and procedural law in all circumstances. In other words, there would be no choice of law doctrine. A second approach posits that, because we have misunderstood the nature of a substantive right, our choice of law doctrines are not robust enough, such that the application of another system's law would include *all* of that law, substance and procedure. A third approach would seek to harmonize all procedural systems and establish a universal procedure to ensure that forum procedure always matched the embedded procedure.

Ultimately, I advance a modest proposal that combines parts of all three approaches. First, choice of law doctrines should express greater humility and skepticism about the ability to apply another jurisdiction's

law. Second, when such application is appropriate and necessary, our choice of law doctrines should apply as much of that law as reasonably possible, without regard to the labels substance and procedure. And finally, procedural conformity efforts should be appreciated for their ability to enhance the integrity of substantive law.

In sum, this Article promotes *realization* of a fundamental rhetorical problem rather than *reformation* of a doctrine. This emphasis reflects both the advantages and the limitations of my Article. But inherent in my argument—in my analysis of the complex and problematic substance-procedure relationship—is the premise and aspiration that refined, meaningful doctrinal change is not possible without a comprehensive understanding of how rhetoric shapes reality. To analyze the rhetoric, then, is to commence the larger and better reform, which requires understanding before action.

### I. FROM ANTINOMY TO DICHOTOMY<sup>1</sup>

The history of Anglo-American law, which is typically dated from 1066, is approaching the end of its first millennium.<sup>2</sup> Interestingly, however, the categories of substance and procedure appear only in the last quarter of that historical narrative. One scholar has traced the development of a substance-procedure dichotomy to the waning years of the eighteenth century:

The dichotomy was fathered by Jeremy Bentham in a 1782 work entitled *Of Laws in General*, *sub nom* the distinction between substantive law and adjective law. Bentham there makes clear that he believes he is drawing a new distinction in the descriptive organization and analysis of the concept of law, and an examination of the leading pre-Bentham sources on English legal theory supports his claim.<sup>3</sup>

As Professor Risinger observes, Bentham located a substance-procedure dichotomy within “an extremely elaborate conceptual analysis of the

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1. For definitions, see *infra* note 43 and accompanying text.

2. A cite for the 1066 proposition is 1 Pollock & Maitland, *infra* note 15, at 79.

3. D. Michael Risinger, “Substance” and “Procedure” Revisited with Some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions,” 30 UCLA L. REV. 189, 191 (1982) (internal footnotes omitted).

phenomenon of law.”<sup>4</sup> And the originality of the dichotomy was “a major point of the entire structure of *Of Laws in General*.”<sup>5</sup>

In previous work I have credited (or blamed, as the case may be) Sir William Blackstone for introducing categories of substance and procedure.<sup>6</sup> In his famous *Commentaries on the Laws of England*, Blackstone, using what he called a “solid[,] scientific method,” restated the entire corpus of English law in the form of *substantive* rules.<sup>7</sup> In so doing, he appears to have differentiated substantive rights from the procedural mechanisms to prosecute the wrong, announcing in his *Commentaries*: “I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury: and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts.”<sup>8</sup>

Blackstone died in 1780, so we do not have the benefit of his response to the claims of originality that fill Bentham’s 1782 book.<sup>9</sup> But there is no doubt that Bentham was very familiar with his former professor’s work.<sup>10</sup> Bentham was a persistent and often savage critic of Blackstone, and may have been loath to share credit for introducing the substance-procedure paradigm.<sup>11</sup>

More important than attributing the paradigm to a single source is understanding the context of its emergence. Specifically, why would the categories of substance and procedure (or “adjective law”<sup>12</sup>) emerge in the

4. *Id.* at 191 n.11.

5. *Id.* at 191 nn.12–13 (“A partial list of sources where no [substance-procedure] distinction appears would include M. BACON, *A NEW ABRIDGEMENT OF THE LAW* (5th ed. 1798); W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765); E. COKE, *INSTITUTES OF THE LAW OF ENGLAND* (1628); and M. HALE, *PLEAS OF THE CROWN* (1682).”); see also Thomas C. Grey, *Accidental Torts*, 54 *VAND. L. REV.* 1225, 1231–32 n.10 (2001).

6. See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 *WASH. L. REV.* 429, 459 (2003).

7. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*34.

8. 3 BLACKSTONE, *supra* note 7, at \*115.

9. See generally WILFRID PREST, *WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY* 303 (2008). Even if Blackstone had been alive, he may well have declined to respond. See *id.* at 8 & n.31 (describing how Blackstone had four years to respond to Bentham’s *FRAGMENT ON GOVERNMENT*, a “scary attack” on the *COMMENTARIES*, yet chose not to answer in any public way).

10. See JEREMY BENTHAM, *A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND* (Charles W. Everett ed., 1928) (1776).

11. See generally Richard A. Posner, *Blackstone and Bentham*, 19 *J.L. & ECON.* 569, 570 (1976) (discussing Bentham’s hostility to Blackstone); PREST, *supra* note 9, at 8–9, 292–98, 306.

12. At that time, the word “adjective law” was more popular than “procedure.” Some have argued that procedure is “only a part, though the major part, of adjective law.” Risinger, *supra* note 3, at 191 n.11 (citing Bentham). But certainly by the turn of the twentieth century, the terms “procedural law” and “adjective law” were synonymous. See, e.g., *United States v. Cadarr*, 24 *App. D.C.* 143, 147

eighteenth century, rather than earlier in the many centuries of English jurisprudence? The answer is that, until then, substance and procedure were “inextricably intertwined” in both the Law courts and in the Equity courts.<sup>13</sup>

First, the Law courts had centuries of experience with writs, forms of action, and single-issue pleading.<sup>14</sup> That system boasted a network of highly technical pleading and practice rules that determined the course and outcome of litigation.<sup>15</sup> These rules earned Common Law the dubious distinction as “the most exact, if the most occult, of the sciences.”<sup>16</sup> Importantly, these procedural forms “were the terms in which the law existed and in which lawyers thought.”<sup>17</sup> Accordingly, what we might today refer to as “a substantive law of, say, torts, could only be explained through the actions of trespass, case and trover.”<sup>18</sup> “[O]ne could say next to nothing about actions in general, while one could discourse at great

(D.C. 1904) (“What is the legal significance of the word ‘procedure?’ The law ‘defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is ‘substantive law.’ So far as it provides a method of aiding and protecting, it is ‘adjective law’ or procedure.”); *Britton & Mayson v. Criswell*, 63 Miss. 394, 399 (Miss. 1885) (“How facts are, or are to be proven, is a matter of adjective, as contradistinguished from substantive, law, is a mere matter of legal procedure.”). The term adjective law still enjoys some attention. *See, e.g.*, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (referring to “adjective law” throughout).

13. Main, *Traditional Equity*, *supra* note 6, at 454.

14. *Id.* at 454.

15. *Id.* at 454–55; *see also* 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 190 (1895) (explaining that, within this system, “the whole fate of a lawsuit depends upon the exact words that the parties utter when they are before the tribunal”).

16. 2 POLLOCK & MAITLAND, *supra* note 15, at 609.

17. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 59 (2d ed. 1981) (“There was no substantive law to which pleading was adjective.”); *see also* JOSEPH H. KOFFLER & ALISON REPPY, *COMMON LAW PLEADING* 65 (1969) (“The Law was required to express itself through the Limited System of Writs and Forms of Action sanctioned by precedent . . . .”); ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 3 (1952) (“Procedure . . . belongs to the institutions of earliest development. At a time when substantive legal conceptions are visible only in the faintest of outline, procedure meets us as a figure already perfected and exact.”) (internal quotations omitted); R. ROSS PERRY, *COMMON-LAW PLEADING: ITS HISTORY AND PRINCIPLES* 3 (1897) (“It may be thought these are extravagant expressions of men who were educated to see excellence in anything that was technical and abstruse. When Littleton says that the law is proved by the pleading, and when Coke adds, approvingly, ‘as if pleading were the living voice of the law itself,’ they are not using mere figures of rhetoric.”); 2 POLLOCK & MAITLAND, *supra* note 15, at 559 (“Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law; they are—we say it without scruple—living things.”); Main, *supra* note 6, at 456 (“The principles of the common law had not been mapped out in the abstract, but instead grew around the forms by which justice was centralized and administered by the law courts.”).

18. Main, *Traditional Equity*, *supra* note 6, at 457 (citing KOFFLER & REPPY, *supra* note 17); *see also* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 21 n.42 (1989).

length about the mode in which an action of this or that sort was to be pursued and defended.”<sup>19</sup> The *substantive* law was subsumed within the *procedural* form.<sup>20</sup> Hence the familiar words of Sir Henry Maine that English “substantive law has at first the look of being gradually secreted in the interstices of procedure.”<sup>21</sup>

Meanwhile, in the traditional courts of Equity, there were no procedural rules and, instead, an all-encompassing substantive mandate.<sup>22</sup> There were no writs, “forms of action nor emphasis upon the formation of a single issue.”<sup>23</sup> “Indeed, animated by the juristic principles of discretion, natural justice, fairness and good conscience, the essence of a jurisprudence of equity [was] somewhat inconsistent with the establishment of formal [procedural] rules.”<sup>24</sup> Hence the characterization of Equity as “loose and liberal, large and vague.”<sup>25</sup> A broad *substantive* mandate dominated the jurisprudence of Equity in much the same way that *procedure* captured the jurisprudence applied in the Law courts. But in neither Law nor Equity was there meaningful appreciation of the separability of substance and procedure.

For centuries in England the separate systems of Law and Equity had been both rivals and partners.<sup>26</sup> But by the middle of the eighteenth century, a profound transformation was underway: among other changes,

19. MILLAR, *supra* note 17, at 3–4 (quoting 2 POLLOCK & MAITLAND, *supra* note 15, at 562); *see also* Bone, *supra* note 18, at 20–21.

20. *See* George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 30, 30–31 (1924–1925) (suggesting that the common law “became so interested in forms that they allowed the substance to escape”).

21. HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (author’s ed., Henry Holt 1886).

22. *See* Main, *Traditional Equity*, *supra* note 6, at 454. The word “traditional” is an important qualifier in this discussion. As I have chronicled elsewhere, “Equity began to experience a process of systematization in the early seventeenth century.” Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 383 (2005).

23. Main, *Traditional Equity*, *supra* note 6, at 457; *see also* EDWIN B. MEADE, LILE’S EQUITY PLEADING AND PRACTICE § 94, at 59 (3d ed. 1952):

In the equity procedure one encounters no bewildering rules as to the name or classification of the particular suit, or according to the nomenclature at law, “forms of action.” When from an investigation of the law and facts, counsel has determined that the client has a good cause for equitable relief, he is saved the problem of wasting brain-sweat in deciding whether he shall sue in debt, *assumpsit*, or covenant, in trover or repleven, in trespass *vi et armis* or trespass on the case. He simply decides to file a “bill in equity.”

24. *See* Main, *Traditional Equity*, *supra* note 6, at 458.

25. W.S. Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 295 (1915) (internal quotations omitted).

26. Main, *ADR: The New Equity*, *supra* note 22, at 375.

both systems were incorporating key components of the other.<sup>27</sup> Law was absorbing “many of the best practices of Equity.”<sup>28</sup> Meanwhile, Equity was becoming systematized by rules and processes.<sup>29</sup>

Very importantly, the words substance and procedure offered a vocabulary for explaining this phenomenon. With each system looking increasingly like the other, “[d]ifferences between the systems were viewed as merely procedural.”<sup>30</sup> Blackstone wrote:

Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief.<sup>31</sup>

“The perception that parallel court systems were applying substantially similar substantive rules of law under different procedural schemata led inevitably to the [ultimate] merger [of Law and Equity].”<sup>32</sup> The merger of Law and Equity, on one hand, and the emergence of a substance-procedure duality, on the other, thus presented interlocking narratives: a purely *procedural* merger of Law and Equity purported to leave the grand *substantive* jurisprudence of both systems intact.<sup>33</sup> Put another way: the

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27. *Id.* at 375–89; Bryant Smith, *Legal Relief Against the Inadequacies of Equity*, 12 TEX. L. REV. 109, 110–13 (1934) (tracing key elements of reforms in both systems to the middle of the eighteenth century).

28. Main, *ADR: The New Equity*, *supra* note 22, at 386.

29. *Id.* at 384–85.

30. *Id.* at 386.

31. 3 BLACKSTONE, *supra* note 7, at \*436.

32. Main, *ADR: The New Equity*, *supra* note 6, at 464.

33. A central theme of the merger of law and equity—in state courts in the mid-nineteenth century and in federal courts in 1938—was this notion of a purely *procedural* merger.

For the rhetoric of reform in the state courts, see, for example, FIRST REPORT OF THE COMMISSION ON PRACTICE AND PLEADINGS 74 (1878) (“The legislative mandate of the Commissioners was reform in procedure—not alteration of the substantive rules of equity or the common law.”); PHILEMON BLISS, A TREATISE UPON THE LAW OF PLEADING 15 (3d ed. 1894) (codes “affect modes of procedure.”).

For the rhetoric of reform in the federal courts, see, for example, *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 & n.26 (1949) (“Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.”); Percy Bordwell, *The Resurgence of Equity*, 1 U. CHI. L. REV. 741, 750 (1934) (“The abolition of the common-law forms of action was not intended to change the substantive law.”); Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CAL. L. REV. 127 (1943) (observing that the new rules abolished the procedural distinctions between law and equity while leaving intact the systems’ different rights, remedies, and substantive rules); Ralph A. Newman, *What Light is Cast by History on the Nature of Equity in Modern Law?*, 17 HASTINGS L.J. 677, 679 n.14 (1966) (“Only procedural distinctions have been abolished.”) (quoting WILLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE § 141 (1950)).



words substance and procedure helped explain how the merger of Law and Equity could be an ambitious yet also safe reform.<sup>34</sup>

It is no coincidence that the categories of substance and procedure surfaced during the Enlightenment, when scientists and philosophers sought to understand all of the world around them by categorizing it. The capacity to distinguish between and among things became an integral part of intelligibility.<sup>35</sup> And the Enlightenment epistemology produced particularly binarist thinking such as subject/object, culture/nature, mind/matter, and rational/irrational.<sup>36</sup> A substance/procedure antinomy likewise resonated, especially for Blackstone, a law professor at Oxford who wrote his *Commentaries* for instructional purposes (as opposed to law reform).<sup>37</sup>

But rather than remaining in the ivory tower for maturation and refinement, the categories of substance and procedure were put to immediate use as foundational legal infrastructure. Quite unfortunately, consciousness of the substance-procedure antinomy happened to coincide with the formation of new systems and courts and methodologies in the nascent United States of America.<sup>38</sup> This apparent distinction between matters substantive and procedural offered a tempting and accessible conceptual structure for a system of jurisprudence that was being built from scratch.<sup>39</sup> The First Congress, for example, passed a statute providing that the new federal courts would, in cases at law, generally follow the

For discussion of how the merger of law and equity was not, in fact, purely procedural after all, see Main, *Traditional Equity*, *supra* note 6, at 476–95.

34. See Main, *Traditional Equity*, *supra* note 6, at 466 n.221.

35. See generally ISAIAH BERLIN, *THE AGE OF ENLIGHTENMENT: THE 18TH CENTURY PHILOSOPHERS* (1984); TOM D. CAMPBELL, *LAW AND ENLIGHTENMENT IN BRITAIN* (1990).

36. *Id.*

37. See PREST, *supra* note 9, at 308–09 (associating Blackstone with other contemporary political philosophers); see also Main, *Traditional Equity*, *supra* note 6, at 461 (citing Alan Watson, Comment, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 810 (1988)).

In stark contrast to Blackstone, Bentham was a reformer. See ELIE HALÉVY, *THE GROWTH OF PHILOSOPHIC RADICALISM* 35 (2d ed. 1948); see generally JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT*, ii–iii (1776) (criticizing Blackstone's anti-reformist views).

38. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 926 (1986–1987).

For background on the popularity of Blackstone's *Commentaries* in the United States, see DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 221 (1963) (“It was said that the *Commentaries* were selling nearly as well in America as in England . . .”).

39. The early courts were unable and unwilling to replicate the English system in full. On the Law side, there were not enough sophisticated lawyers, clerks, and libraries to sustain such a system; and Equity's association with the royal prerogative invited some resistance. See Subrin, *supra* note 38, at 927–28; see also Millar, *supra* note 17, at 39–42; Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 *SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 367, 369–70, 410–12 (1907).

“modes of process” of the state in which the court sat.<sup>40</sup> The Second Congress prescribed a distinctive court procedure for equity cases.<sup>41</sup> Other statutes recognizing a substance-procedure distinction soon followed.<sup>42</sup>

This process of codification converted a substance-procedure antinomy into a substance-procedure dichotomy. Before this conversion, substance and procedure represented conceptual opposites—substantive laws detailed the rights and responsibilities of the parties, and procedures prescribed the vindication of those rights and the fulfillment of those responsibilities. That antinomy revealed the diverse purposes and functions that for centuries had been seamlessly integrated (in concept as well as nomenclature) in a corpus of laws. Antinomy is an especially apt descriptor of the relationship between substance and procedure because these concepts are not only counter-terms or antonyms, but are also paradoxically yoked:<sup>43</sup> each is extraordinarily difficult to define without also defining the other.<sup>44</sup> Yet the substance-procedure antinomy invited a more nuanced and sophisticated appreciation for laws’ multiple intentions and meanings.

But the law did not codify this new consciousness; it codified a dichotomy. As a dichotomy, substance and procedure were still conceptual opposites, but dichotomies are characterized by mutually exclusive and mutually exhaustive categories. The exclusive disjunction had severe

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40. Act of September 29, 1789, ch. XXI, § 2, 1 Stat. 93, 93.

41. Act of May 8, 1792, ch. XXXVI, § 2, 1 Stat. 275, 276.

42. See generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 56–58 (2d ed. 1985) (chronicling early American civil procedure); 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 509–51 (1971) (discussing the process acts of the 1780s and 1790s); HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17–18, 581–88 (1953) (discussing the repeated pattern of state law governing unless superseded by federal law in the process and conformity acts of the 1700s and 1800s); JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES (7th ed. 1930) (reprinting and discussing the 1822, 1842, 1866, and 1912 equity rules).

43. To be clear, while antinomy and antonym share an etymological root, they have slightly different meanings. While antonyms are opposites, antinomy captures the more complex idea that the two terms have some relationship that constitutes a paradox or some unresolvable contradiction between two opposing but equally valid conclusions.

44. See, e.g., JOHN SALMOND, JURISPRUDENCE § 172 (9th ed. 1937):

Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law regulates the conduct of affairs in the course of judicial proceedings; substantive law regulates the affairs controlled by such proceedings.

See also *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941) (defining rules of procedure as “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”).

consequences: lost was the conceptual possibility for laws that belonged in both categories or in neither category. As antinomy, the counter-terms substance and procedure were more localized, open-ended, and did not contain this sense of closure; laws could be both substantive and procedural, or could be neither substantive nor procedural.<sup>45</sup> But with codification as a dichotomy, this heterogeneity was lost.

Further, a dichotomy is not simply a neutral division of an otherwise all-encompassing descriptive field. “Dichotomous thinking necessarily hierarchizes and ranks the two polarized terms so that one becomes the privileged term and the other its suppressed, subordinated, negative counterpart.”<sup>46</sup> Indeed, the inferiority of procedure to substance is a familiar refrain. In the eighteenth century, Bentham “degrade[d] procedure”—suggesting even the term “‘adjective law’ implied too much influence for procedure.”<sup>47</sup> Then, in the nineteenth century, David Dudley Field undertook to refine the machinery of procedure.<sup>48</sup> At the turn of the twentieth century, Thomas Shelton analogized procedure to “a clean pipe, an unclogged artery, a clear viaduct, or a bridge.”<sup>49</sup> Decades later, Charles Clark drafted rules to be a “handmaid rather than [a] mistress.”<sup>50</sup> And as a contemporary example, one of my colleagues, a property professor, teaches his students that procedure is like the player piano to substantive law’s musical compositions.<sup>51</sup> That substance and procedure are frequently defined with metaphors may be some evidence that the terms lack innate definition.<sup>52</sup>

45. See generally RAIA PROKHOVNIK, *RATIONAL WOMAN: A FEMINIST CRITIQUE OF DICHOTOMY* 24–25 (Manchester Univ. Pr. 2002).

46. ELIZABETH GROSZ, *VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM* 3 (Allen & Unwin 1994).

47. Kenneth W. Graham, Jr., Book Review, “*There’ll Always Be an England*”: *The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204, 1213 (1987) (reviewing WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985)).

48. See Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988).

49. Janice Toran, *‘Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 374–75 (1990).

50. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938) (quoting *In re Coles*, 1 K.B. 1, 4 (1907)); Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542 (1925) (same).

51. I don’t remember sufficient details of this exchange to satisfy the demands of *The Bluebook*. But I remember the event, and my response: “Shut up!” I carefully explained to this colleague as I ran from our faculty club in tears. This heavily embellished anecdote is inspired by Ring Lardner’s humorous novel *THE YOUNG IMMIGRANTS*.

52. See Leslie M. Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 105 (1998) (“[I]f commentators and the courts can agree on nothing else, they can agree that the terms ‘substance’ and ‘procedure’ have no plain meaning.”).

## II. DICHOTOMY IN DISARRAY

What started as the germ of an idea about different intentions and meanings for laws—substantive mandates, on one hand, and the procedural mechanics of enforcement, on the other—spread like a virus. And the legitimacy of a substance-procedure dichotomy is now largely presumed. Today, for example, a Federal Rule of Civil Procedure is not a valid procedural rule under the Rules Enabling Act if it abridges, enlarges or modifies a substantive right.<sup>53</sup> In diversity cases, the *Erie* doctrine requires federal courts to apply state substantive law and federal procedural law.<sup>54</sup> Closely related to the vertical choice of law context in *Erie* is the horizontal choice of law; a court usually applies the procedural law of the forum even when it applies the substantive law of another jurisdiction.<sup>55</sup> The retroactivity of a congressional statute, administrative regulation, or court ruling can also turn on the substance-procedure classification.<sup>56</sup> And different lines of authority prescribe the process for substantive and procedural lawmaking.<sup>57</sup> Whether fundamental or artificial, the distinction that separates substance from procedure is consequential.

Now, more than two hundred years after it was introduced, the dichotomy is entrenched, if not also reified. But is it—and was it ever—really understood? Because the stakes of litigation are high, and because lawyers are rewarded handsomely for their creativity, there is often much

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53. See 28 U.S.C. § 2072 (2006); see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018 (1982); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 26 (2008).

54. See *Eric R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see generally Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79 (1993); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974).

55. See, e.g., *Midwest Grain Products of Illinois, Inc. v. Productization, Inc.*, 228 F.3d 784, 791–92 (7th Cir. 2000); *Morris v. LTV Corp.* 725 F.2d 1024, 1027 (5th Cir. 1984); *Jones v. Prince George's County*, 835 A.2d 632, 640 (Md. 2003); see generally Walter W. Cook, “Characterization” in the Conflict of Laws, 51 YALE L.J. 191 (1941); Joseph M. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflicts-of-Laws Principle*, 14 S. CAL. L. REV. 221 (1941); Ernest G. Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws*, 50 YALE L.J. 743 (1941).

56. See Hans W. Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319, 323 (1995); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2104–05 (2008).

57. See generally Burbank, *supra* note 53.

debate about whether something is substantive or procedural. Is a law requiring plaintiffs to disclose their names in a complaint substantive or procedural?<sup>58</sup> Is a law requiring certain types of claims to be submitted to non-binding mediation substantive or procedural?<sup>59</sup> (What about compulsory arbitration?<sup>60</sup>) Is prejudgment interest a matter of substance or procedure?<sup>61</sup> (And is it necessarily the same answer for post-judgment interest?<sup>62</sup>) Many doctrines have long been difficult to classify as either substantive or procedural: statutes of limitation,<sup>63</sup> testimonial privileges,<sup>64</sup> fee-shifting statutes,<sup>65</sup> burdens of proof,<sup>66</sup> the availability of equitable

58. See *Doe v. Provident Life & Accident Ins. Co.*, 176 F.R.D. 464 (E.D. Pa. 1997); *Doe v. Blue Cross & Blue Shield of Rhode Island*, 794 F. Supp. 72 (D.R.I. 1992); Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195 (2004); see generally Jed Greer, *Plaintiff Pseudonymity and the Alien Tort Claims Act: Questions and Challenges*, 32 COLUM. HUM. RTS. L. REV. 517 (2001); Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1 (1985).

59. See Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 297–98 (2002); see, e.g., *Johnson v. Fruit Belt Elec.*, Nos. 93-1932, 93-2442, 1995 WL 6227 at \*6 (6th Cir. Jan. 5, 1995); *Vest v. St. Albans Psychiatric Hosp. Inc.*, 387 S.E.2d 282, 283–85 (1989); see also Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 80–81 (2001).

60. Compare, *Hum v. Dericks*, 162 F.R.D. 628, 635–37 (D. Haw. 1995), and *Adkins v. Commonwealth of Va. ex rel. Univ. of Va. Med. Ctr.*, 154 F.R.D. 139, 140–41 (W.D. Va. 1994), with *Feinstein v. Mass. Gen. Hosp.*, 643 F.2d 880, 885–87 (1st Cir. 1981), and *Edelson v. Soricelli*, 610 F.2d 131, 133–35 (3d Cir. 1979).

61. See Dustin K. Palmer, Comment, *Should Prejudgment Interest Be a Matter of Procedural or Substantive Law in Choice-of-Law Disputes?*, 69 U. CHI. L. REV. 705 (2002) (recounting how this is a debated question).

62. See Brian P. Miller, Comment, *Statutory Post-Judgment Interest: The Effect of Legislative Changes After Judgment and Suggestions for Construction*, 1994 BYU L. REV. 601 (1994).

63. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722–29 (1988); Ernest G. Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492 (1919); James A. Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 WASHBURN L.J. 405 (1980); Richard Henry Seamon, *An Erie Obstacle to State Tort Reform*, 43 IDAHO L. REV. 37, 91 (2006) (explaining that statutes of limitations may be substantive for purposes of an *Erie* analysis yet procedural for conflicts analysis); Louise Weinberg, *Choosing Law: The Limitations Debate*, 1991 U. ILL. L. REV. 683 (1991).

64. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971); Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909 (1991); Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 244–46 (2006); Stewart E. Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 MINN. L. REV. 461 (1977); Robert J. Tepper, *New Mexico's Accountant-Client Privilege*, 37 N.M. L. REV. 387 (2007); Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 795–98 (1999).

65. See Jeffrey A. Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere*, 49 U. PITT. L. REV. 393 (1988).

66. See, e.g., Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 848–49 (1985); Paul A. Freund, *Federal-State Relations in the Opinions of Judge Magruder*, 72 HARV. L. REV. 1204, 1205–13 (1959); Seamon, *supra* note 63, at 91–92 (explaining that

relief, and other remedial matters.<sup>67</sup> Judges forced to characterize these issues as either substantive or procedural are confronted with a choice that is not only vexing, but also consequential. Indeed, the fate of cases can turn on the resolution of each of these. And, for better or worse, the answers to these questions in any one case can be so contextualized that they have little or no precedential effect on subsequent cases.

Two centuries of jurisprudence exploring the substance-procedure dichotomy can be summarized as efforts either to *divine* or to *define* the line of separation. With the former approach, popular in the nineteenth century, the exercise assumed that there was some pre-existing line separating substance from procedure—and that that line could, through careful analysis, be revealed.<sup>68</sup> This was the “brooding omnipresence” theory of law at work.<sup>69</sup> “In its purest manifestation, formalism denied that economics, culture, or psychology played any role in the judicial process of discovering the applicable law and applying it to individual cases. The law, like science, developed and improved as judges made new discoveries and got progressively closer to legal ‘truth.’”<sup>70</sup> This approach supplied certainty and formalism for what it lacked in nuance and reason.

burdens of proof may be substantive for purposes of an *Erie* analysis yet procedural for conflicts analysis).

67. See, e.g., Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 16–20 (2004); Russell J. Weintraub, *The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?*, 43 TEX. INT’L L.J. 401 (2008); Russell J. Weintraub, *Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse*, 42 TEX. INT’L L.J. 311 (2007).

68. See, e.g., HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS 160 (1927) (discussing the task of discerning “on which side of the [substance-procedure] line a set of facts falls”); see generally EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 79, 181–82 (2000).

69. The term was made famous when quoted by Justice Frankfurter in *Guaranty Trust Co. v. York*:

[*Erie*] overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. . . . Law was conceived as a “brooding omnipresence” of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law. . . .

326 U.S. 99, 101–02 (1945) (internal citations omitted). In *Southern Pacific Co. v. Jensen*, Justice Holmes wrote: “The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some State. . . .” 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). See generally PURCELL, *supra* note 68, at 181–82.

70. John M. Conley & William M. O’Barr, *A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology*, 29 LAW & SOC. INQUIRY 179, 184 (2004).

Beginning shortly after the turn of the twentieth century, the early legal realist movement suggested that there was no pre-existing line, but rather merely a decision that needed to be made about where the line would be drawn.<sup>71</sup> This realization, in turn, prompted acceptance of the notion that the line could be drawn in different places, depending upon the purpose for drawing it in any given instance.<sup>72</sup> After all, in the language of the 1920s, a word like “substance” or “procedure” is (to borrow from Justice Holmes) but the “skin of a living thought.”<sup>73</sup> A functional approach purported to offer sufficient flexibility to consider all of the variables implicated in any particular application of the substance-procedure distinction. But, of course, flexibility cannot be achieved without severely compromising the values of predictability and uniformity.<sup>74</sup>

As Professor John Hart Ely observed, “[w]e were all brought up on sophisticated talk about the fluidity of the line between substance and procedure.”<sup>75</sup> Some other characterizations of the state of the doctrine are less forgiving. Professor Risinger has suggested that “organized confusion is the official doctrine.”<sup>76</sup> My personal favorite is counsel offered by Professor Herbert Goodrich in his 1927 *Handbook on the Conflict of Laws*: “[T]he distinction is made by courts, and the lawyer must figure it out as best he can.”<sup>77</sup> The line between substance and procedure is often described with unflattering adjectives such as “vague,” “unpredictable,” “imprecise,” “amorphous,” “unresolvable,” “unclear,” “chameleon-like,” “murky,” “blurry,” “hazy,” and “superbly fuzzy.”<sup>78</sup>

71. See generally Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 668 (1993) (“Legal Realism revolutionized the [legal] profession’s thinking about law, making it virtually impossible for thoughtful lawyers to regard litigation procedure and policy as completely divorced from the politics of substantive outcomes.”).

72. See Walter Wheeler Cook, “Substance” and “Procedure” in the *Conflict of Laws*, 42 YALE L.J. 333, 335–37 (1933) (arguing that the line between substance and procedure could only be drawn with knowledge of the purpose of the line-drawing); see also *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (“The line between ‘substance’ and ‘procedure’ shifts as the legal context changes.”).

73. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”).

74. Risinger, *supra* note 3, at 190, 201 (suggesting that one commentator’s “linguistic relativism” or “an abdication of analysis” is another’s “abdication of analysis” or “linguistic relativism” functional definition.”).

75. Ely, *supra* note 54, at 724.

76. Risinger, *supra* note 3, at 202.

77. GOODRICH, *supra* note 68, at 158–59 n.2.

78. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1703–04 (1992) (stating that the distinction between substance and procedure is “vague and unpredictable”); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 (1997)

The cause of this instability is no mystery. The assumption that categories of substance and procedure are mutually exclusive and exhaustive simply seems to defy reality. It is quite obvious that certain procedural rules, such as burdens of proof and the class action device, also have a substantive orientation.<sup>79</sup> Likewise, certain substantive statutes, such as the statute of frauds and strict liability, also have something procedural at their core.<sup>80</sup> Even at the macro level, problems are manifest: some laws (e.g., statutes of limitations) are routinely classified as substantive for *Erie* purposes yet are procedural for conflict of laws analyses.<sup>81</sup> “The result can be a federal court deferring to the court of the state in which it sits (because [a doctrine] is substantive) but not then deferring to the state which created the cause of action (because [the same doctrine] is procedural and forum law governs).”<sup>82</sup>

This jurisprudence is largely ad hoc because the categories of substance and procedure were not fully formed when codified and have not

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(line between substance and procedure “is inherently unresolvable”); Brooke D. Coleman, *The Celotex Initial Burden Standard and an Opportunity to “Revivify” Rule 56*, 32 S. ILL. U. L.J. 295, 319 (2008) (“[M]ost scholars accept that the line between procedure and substance is superbly fuzzy.”); Bradford R. Clark, *Erie’s Constitutional Source*, 95 CAL. L. REV. 1289, 1310 (2007) (“The line between substance and procedure is murky at best.”); Michael M. O’Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 357, 378 (2004) (“[T]he precise boundaries between substance and procedure are admittedly imprecise.”); Kurt M. Saunders, *Plying the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals*, 21 GA. L. REV. 653, 692 (1987) (discussing “amorphous” concepts of substance and procedure); Exxon Corp. v. Burglin, 42 F.3d 948, 951 (5th Cir. 1995) (referring to the “blurry line between substance and procedure”); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring) (“The line between procedural and substantive law is hazy.”); GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 19 (1998) (referring to “the chameleon-like distinction” between substance and procedure); In re Richards, 213 F.3d 773, 784 (3d Cir. 2000) (“[T]he line separating procedure from substance is often unclear.”).

79. See *supra* note 66; see also Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 216 (2004) (“The parol evidence rule has the form of a rule of evidence, but it functions as a substantive rule of law.”).

80. See *Emery v. Burbank*, 39 N.E. 1026, 1027 (Mass. 1895) (deeming statute of frauds procedure); 5 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS §§ 28.12–28.15 (2d ed. 1986) (a rule of strict liability may be adopted to avoid the complexities of proving fault); William A. Reppy, Jr., *Choice of Law Problems Arising when Unmarried Cohabitants Change Domicile*, 55 SMU L. REV. 273, 284 (2002) (discussing the substantive and procedural nature of statutes of fraud).

81. See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516–17 (1953) (recognizing that a state could apply its own statute of limitations to a foreign substantive right, implicitly labeling the statute of limitations as procedural); *Guaranty Trust Co. v. York*, 326 U.S. 99, 108–09 (1945) (applying state statute of limitations in *Erie* context); see also Seamon, *supra* note 63, at 91–92.

82. *Brilamy & Lee*, *supra* note 66, at 848–49 & n.90 (citing *Sampson v. Channell*, 110 F.2d 754 (1st Cir.) (burden of proof a matter of state substantive law under *Erie*), *cert. denied*, 310 U.S. 650 (1940); *Levy v. Steiger*, 124 N.E. 477 (Mass. 1919) (burden of proof a matter of procedural law for conflict of laws analysis); *cf.* *Cent. Vt. Ry v. White*, 238 U.S. 507 (1915)).



crystallized since.<sup>83</sup> Of course, some laws are both substantive and procedural, and some laws may be neither. The situation approximates that which might result if, after a couple of decades of appreciating the tension between efficiency and fairness,<sup>84</sup> all laws were to be classified as promoting one or the other. Consideration of such a duality (like consideration of a substance-procedure antinomy) could be constructive, stimulating, and revealing. But codifying a dichotomy and forcing one label or the other on all laws—and attaching consequences to that label—would be rash, if not also preposterous and dangerous. Yet that is essentially what occurred with the substance-procedure dichotomy.

Importantly, at the time of its codification, the substance-procedure dichotomy might have appeared more mature and developed than it was. The substance-procedure dichotomy has frequently been confused with the “right-remedy distinction,” which has much deeper historical roots.<sup>85</sup> “Perhaps as early as the thirteenth century, the right-remedy distinction was ‘developed by continental theorists chiefly in the context of international law.’”<sup>86</sup> The right-remedy distinction separates the underlying substantive right from the range of available remedies to rectify it.<sup>87</sup> In the vernacular of the substance-procedure dichotomy, both the substantive right and the range of remedies typically would be labeled

83. See Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937, 940–41 (1988); see also MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 176–77 (1980) (lower courts exhibit “confusion and inconsistency”).

84. See generally JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 67–132 (1988); ROBIN PAUL MALLOY, LAW AND THE MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS 108 (2000); ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 88–120 (1975); Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 175–79 (2000); Richard Craswell, *Kaplow and Shavell on the Substance of Fairness*, 32 J. LEGAL STUD. 245 (2003); Michael B. Dorff, *Why Welfare Depends On Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847, 847–50 (2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 967–70 (2001); Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103 (2002).

85. Risinger, *supra* note 3, at 191–92.

The difference between the traditional right-remedy distinction and the procedure-substance dichotomy may strike some as subtle, but it is very important. Bentham interpreted the definition of the possible range of remedies that might be accorded for a violation of a right as being part of the substantive law, whereas under traditional right-remedy theory such a determination was clearly part of the remedial law, as were those things Bentham would have called adjective or procedural.

*Id.*

86. *Id.* at 190–91.

87. On the difference between right-remedy and substance-procedure distinctions generally, see Bone, *supra* note 18, at 14–17.

substantive.<sup>88</sup> And what Blackstone or Bentham labeled adjective or procedural would have been part of the remedy so far as the right-remedy distinction was concerned.<sup>89</sup> The right-remedy distinction had defined “right” so narrowly that there was very little subtlety or nuance to that traditional test.<sup>90</sup> For this reason, a substance-procedure dichotomy may have appeared as a meaningful and obvious, perhaps even timeless, construct when it was codified.<sup>91</sup> But that was a mirage.

Unfortunately, the substance-procedure dichotomy was allocated a heavy jurisprudential load even though it could not bear that structural weight. It should come as no surprise, then, that the contours of the substance-procedure dichotomy remain undefined, if not in outright disarray.

### III. PROCEDURE AS SUBSTANCE

This Part could be neatly summarized with the simple declaration: “procedure is power.”<sup>92</sup> “[A]ll informed observers of the litigation process” should already understand the substantive capacity of procedure.<sup>93</sup> “Procedure is an instrument of power and social control. Procedures alter the conduct of groups and individuals, and thus can prefer some over others. And procedure can, in a very practical sense, negate, resuscitate, or generate substantive rights.”<sup>94</sup>

The argument that procedure is substantive presents in two basic forms. The classic version is that procedure has substantive qualities because it affects the outcome of cases.<sup>95</sup> A more contemporary version is that procedural reformers have a substantive agenda.<sup>96</sup> Both versions are verifiable.

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88. Risinger, *supra* note 3, at 190–92; *see also* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 166–69 (2008).

89. Risinger, *supra* note 3, at 191–92.

90. *Id.* at 192–94.

91. *Id.* at 198.

92. *See generally* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1442 (2008).

93. *Id.*

94. THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE* 1 (Thomson/West 2006).

95. *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325 (1986) (“Ultimately, procedure and substance cannot be divorced . . .”); Solum, *supra* note 79, at 196–202.

96. *See* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 846 (1993) (“We . . . know the difference between the inevitable non-neutrality of procedure and the notion that the rulemakers are or might as well be animated by an overtly political agenda.”); Solum, *supra* note 79, at 196–202.

“[N]o procedural decision can be completely neutral in the sense that it does not affect substance.”<sup>97</sup> If procedures are to serve any purpose at all, they will affect litigation behavior and create new winners and new losers. When the discovery rules were adopted in 1938, they were expected to make a trial less about sport and ambush, and more about truth and evidence.<sup>98</sup> “This presupposed that [those rules] would change the results in many cases.”<sup>99</sup> In this vein, procedure is *substantive* in that it is *not unimportant*, as the subordinate role assigned to it by the substance-procedure dichotomy would suggest.

Procedural rules can also change how certain substantive laws are (or are not) enforced. To this end, scholars have analyzed the substantive capacity of numerous procedural devices and doctrines including, among many others, pleadings,<sup>100</sup> sanctions,<sup>101</sup> summary judgment,<sup>102</sup> joinder,<sup>103</sup>

97. Elliott, *supra* note 95, at 325; see Solum, *supra* note 79, at 196–202.

98. See Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 865 (1933).

99. Charles Allen Wright, *Procedural Reform: Its Limitations and its Future*, 1 GA. L. REV. 563, 570 (1967).

100. See, e.g., Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 961–74 (1990); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010), draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1467799](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467799); Joseph Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. (forthcoming 2010), draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1477519](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1477519); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009); Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 107–12 (2008); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 688–90 (1984); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 371–73 (1990).

101. See, e.g., STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (1989); Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219, 241 (1995) (noting that civil rights plaintiffs and/or their lawyers were sanctioned “at a rate . . . that is considerably higher than the rate for plaintiffs in non-civil rights cases.”); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 172–73 (1994); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200–01 (1988).

102. See, e.g., Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206–09 (1993); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1073–74 (2003); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–11 (2007); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 165 (1988); Weinstein, *supra* note 100, at 112–13.

103. Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C.

evidence (e.g., *Daubert*),<sup>104</sup> discovery,<sup>105</sup> case management,<sup>106</sup> bifurcation,<sup>107</sup> and class actions.<sup>108</sup> The bulk of this literature has documented how so-called procedural reforms have intentionally, relentlessly, and quite successfully weakened civil rights and discrimination laws.<sup>109</sup> Other substantive areas that have been examined in

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L. REV. 211, 252–53 (1992); Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. APPLIED PSYCHOL. 909, 914 (2000); Pamela J. Stephens, *Manipulation of Procedural Rules in Pursuit of Substantive Goals: A Reconsideration of the Impermissible Collateral Attack Doctrine*, 24 ARIZ. ST. L.J. 1109, 1128–34 (1992); Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 533–34 (2006).

104. See, e.g., Margaret A. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy On Expert Testimony in Toxic Tort Litigation*, 64 LAW & CONTEMP. PROBS. 289, 308–24 (2001); Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 347–76 (1999); Edward J. Imwinkelried, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 6–7 (2000); John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 BAYLOR L. REV. 267, 310–17 (1988); Frank M. McClellan, *Bendectin Revisited: Is There a Right to a Jury Trial in an Age of Judicial Gatekeeping?*, 37 WASHBURN L.J. 261, 264, 279–80 (1998); Weinstein, *supra* note 100, at 112–16; Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. (forthcoming 2010) (on file with author).

105. See, e.g., Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1988–96 (2007); Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1210–16 (2005) (discussing “discovery regimes” and how “state procedure has fragmented in an area where procedural differences can have major substantive effects”); Redish & Murashko, *supra* note 53, at 39.

106. See, e.g., Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269, 271 (1990); Tidmarsh, *supra* note 103, at 533–34; see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (expressing concern over potential for judges to abuse their discretionary power).

107. See Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (2000) (suggesting bifurcation affects outcomes); Horowitz & Bordens, *supra* note 106 (reporting empirics on consequences of bifurcation); Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1612 (1963) (suggesting bifurcation can increase likelihood of defense verdicts); see also Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 536 (1993).

108. See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1305 (2002); Burbank, *supra* note 93; Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1928 (2006) (arguing that it is “difficult to conclude” that “the advent of the small claims (negative value) class action did not ‘alter substantive law.’”) (quoting Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1877 (2006)); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003).

109. See, e.g., Baumann et al., *supra* note 103, at 296; Schneider, *supra* note 104, at 140–43.

some depth include antitrust,<sup>110</sup> corporate law and securities regulation,<sup>111</sup> racketeering,<sup>112</sup> and environmental protection.<sup>113</sup>

The perception that procedure is relatively insignificant can be exploited. Indeed, “[s]ubstantive decisions can be ‘disguised as process’ and process decisions can operate as a proxy for substantive impacts.”<sup>114</sup> This subterfuge is dangerous because procedural reforms can have the effect of denying substantive rights without the transparency, safeguards and accountability that attend public and legislative decision-making.<sup>115</sup> And procedural laws can be applied retroactively.<sup>116</sup> All this literature is aptly, if crudely, captured in a nutshell by Representative John Dingell, who said in a Congressional hearing: “I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time.”<sup>117</sup> I do not mean to suggest that procedure is the tool only of scoundrels. Indeed, the Federal Rules of the Civil Procedure themselves were the product of New Deal legislation that promised access to courts for immigrants, women, labor and others who would be able to take advantage of its liberal measures.<sup>118</sup> And, of course, not all procedural changes with substantive consequences are part of some broader political agenda.<sup>119</sup>

110. Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627 (2008); Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 674 (1993).

111. Franklin A. Gevurtz, *Who Represents the Corporation? In Search of a Better Method for Determining the Corporate Interest in Derivative Suits*, 46 U. PITT. L. REV. 265, 280–81 (1985); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 447–49 (1986); Miller, *supra* note 102, at 1052, 1065–66, 1125–26; Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537, 550–53 (1998); Weinstein, *supra* note 100, at 26.

112. Lisa A. Huestis, *RICO: The Meaning of “Pattern” Since Sedima*, 54 BROOK. L. REV. 621, 623 & n.9 (1988); Robins, *supra* note 110, at 677.

113. Robins, *supra* note 110, at 679.

114. Schneider, *supra* note 104, at 141 (citing Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1017 (2008)).

115. See generally Jack B. Weinstein, *After Fifty Years of Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989).

116. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994).

117. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (testimony of Rep. John Dingell).

118. See Subrin, *supra* note 38, at 944–48, 973–74 (documenting the Federal Rules’ reliance on New Deal principles, including access to the legal system); Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1649–51 (1981) (arguing that the creation of uniform federal rules with liberal pleading requirements and discovery provisions expanded the role of the federal government and facilitated public litigation); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272–80 (1997).

119. See generally Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993).

All this is a familiar story. And only the broadest summary of this literature is necessary to remind that procedural means can achieve substantive ends, whether or not intended. As the substance-procedure metaphors mentioned above imply: adjectives can pervert the meaning of sentences, pipes can leak or pollute, handmaids can become mistresses, and player pianos can be so out of tune that the music is unrecognizable.

#### IV. PROCEDURE IN SUBSTANCE

In this Part, I expose more fissures in the substance-procedure dichotomy. I demonstrate that substantive law is neither *aprocedural* nor *trans-procedural*, but rather is constructed with a specific procedural apparatus in mind to vindicate the rights created or the responsibilities assigned by that substantive law. Whether consciously or subconsciously, the drafters of substantive law embed an associated procedure.

Substantive law relies on procedure to effectuate the substantive mandate. Substantive law without any procedure at all would be a “vain and hollow thing.”<sup>120</sup> Although some substantive laws may be merely aspirational or symbolic,<sup>121</sup> it is surely true that generally speaking “[t]he best laws in the world are meaningless unless they can be meaningfully enforced.”<sup>122</sup> To borrow a useful phrase often invoked in another procedural context, substantive law without procedural law would be a “castle in the air.”<sup>123</sup> As castles in the air are seldom built, substantive law would seldom be constructed without some procedure to vindicate that law.<sup>124</sup> Because substantive law requires procedure, it is not *aprocedural*.

Nor is substantive law *trans-procedural*. Substantive law would be *trans-procedural* only if the rights established and responsibilities assigned in the substantive law could be fulfilled and realized in any procedural

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120. Edgard H. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 404 (1941) (referring to a right without a remedy).

121. See generally LON L. FULLER, *THE MORALITY OF LAW* 5–7 (rev. ed. 1969); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990); James N. Henderson, Jr. & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978); see also Bone, *supra* note 18, at 14–15.

122. Jean R. Sternlight, *Dispute Resolution and the Quest for Justice*, 14:4 DISP. RESOL. MAG. 12, 12 (2008).

123. FREDERIC WILLIAM MAITLAND, *EQUITY AND THE FORMS OF ACTION* 19 (A.H. Chaytor ed. 1909) (referring to a system of Equity without a complementary system of Law).

124. See Mauro Cappelletti & Bryant G. Garth, *Policies, Trends and Ideas in Civil Procedure*, in XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 14 (Mauro Cappelletti & Bryant G. Garth eds., 1987) (“Procedural law therefore is necessarily interdependent with substantive law, and neither is of much value without the other.”).

system. Consideration of a simple, stylized example will illustrate how substantive law cannot be trans-procedural.

Assume that the legislature of the State of Maine has promulgated a statute to protect vulnerable franchisees from abuse by franchisors. This is a simple statute, nicknamed the FPA (Franchisee Protection Act), with four elements constituting a new private cause of action. Imagine that the FPA is unequivocally “substantive” as that term is ordinarily used—the FPA does not prescribe any special pleading, joinder, discovery, or other procedural rules within its text.

When drafting legislation like the FPA, legislators must balance a number of competing priorities. Of course, more protections for franchisees can discourage franchisors from investing in Maine businesses. The legislation would reflect these compromises and the desired level of deterrence.<sup>125</sup> The substantive core of that legislation would be embodied in the four elements of the cause of action, and those elements could be more or less exacting in their terms. By exacting, I mean that the wording of each substantive element of a cause of action can be calibrated—dialed up or dialed down—to require more or less of a showing in order for the plaintiff ultimately to prevail. For example, under the FPA, franchisee plaintiffs might have to demonstrate an injury that is (“dialing” from high to low): severe, significant, substantial, or actual; or the statute could presume injury and require no showing whatsoever.

Each substantive element of the cause of action under the FPA constitutes another “dial.” An element of scienter, for example, could impose liability when the defendant franchisor acts intentionally, wrongfully, in bad faith, negligently, or not in good faith. A third element could enumerate the prohibited acts in more or less detail. And fourth, an element of causation could be more or less demanding.

The calibration of all four of these substantive elements would reflect the desired level of deterrence. But the level of deterrence, in fact, achieved will be influenced by the procedural system that hosts litigation filed under that statute. To identify just a few examples:

- Onerous filing fees, complex pre-filing requirements, and heightened pleading standards can discourage the filing of even meritorious claims.<sup>126</sup>

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125. My assumption is only that the legislation has some objective. Whether the goal is ambitious or mere window-dressing doesn't change the analysis at all; either way, there is some desired outcome.

126. See *supra* note 100.

- Class actions will facilitate the filing of claims that would not otherwise be pursued.<sup>127</sup>
- The availability vel non of discovery will determine the evidence available to the parties, and thus potentially influence the outcome of the suit.<sup>128</sup>
- Rules of evidence will determine what factfinders consider when evaluating the merits of the substantive claim.<sup>129</sup>

Procedural systems can vary in important ways, including the amount of time between filing and trial, a judge's authority to enforce court orders (through contempt or otherwise), and the availability of appeals. These and countless other procedures associated with enforcement will affect the level of deterrence, in fact, achieved.

If the FPA is *drafted* in contemplation of a procedural system with onerous filing fees, complex pre-filing requirements, and heightened pleading standards, the elements of the cause of action will incorporate that assumption. And if that law is *enforced* instead in a procedural system with easy access, simple filing requirements, and a liberal pleading standard, there will be over-enforcement of the intended mandate.

If the FPA is drafted in contemplation of a procedural system that does not have a class action device, the elements of the cause of action will incorporate that assumption. For example, to ensure the desired amount of litigation, the statute might provide for presumed or punitive damages. But if that law is enforced instead in a procedural system with a class action device, then again, there would be over-enforcement of the intended mandate.

If the FPA is drafted in contemplation of a procedural system that facilitates broad discovery, the elements of the cause of action will incorporate that assumption. If plaintiff must prove the defendant's *intent*, for example, the assumption that plaintiff would have access to the defendant's employees for questioning and defendant's documents for inspection would be essential. If the same proof were required in a procedural system with no discovery, then of course the substantive mandate would be under-enforced.

To compensate for these procedural differentials and to achieve the desired enforcement, the elements of the cause of action would be

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127. See *supra* note 108.

128. See *supra* note 105.

129. See *supra* note 104.



calibrated differently. “Substance and process are intimately related. The procedures one uses determine how much substance is achieved . . . .”<sup>130</sup> And because there are procedures (or combinations of procedures) that would require different substantive law to achieve the same net result, substantive law is not trans-procedural.

Because substantive law is neither a procedural nor trans-procedural, exactly which procedural system(s), then, is the Maine legislature presuming when it drafts the FPA? One possible answer would be Maine’s state court procedure; a second would be Maine’s federal court procedure; a third answer could be some composite of these (and/or other familiar, perhaps even anticipated, procedures). We would not know the answer, and of course that answer could vary not only from legislature to legislature and legislation to legislation, but even from legislator to legislator. Moreover, the answer is further obscured because the contextualization of substantive law within a procedural framework would often be subconscious.

Whichever of these assumptions informs the legislative drafting, the substantive law is not drafted in a vacuum. Whatever this built-in procedural expectation, it would be some parochial assumption. And parochial it should be; the situs of most of the litigation under the FPA would be Maine state and federal courts.

In most cases, a parochial assumption will be either correct or “close enough.” Often, a Maine state court would be both the presumed and the actual forum for litigation under the FPA. If instead the parochial assumption was some composite of Maine federal and state procedures, there will be some mismatch between the presumed and the actual because no forum with such procedures exists; however, if the actual forum was a Maine federal court, then presumably any mismatch under these circumstances would be modest. Substantial differences between state and federal procedures of course would exacerbate the consequences of a mismatch.<sup>131</sup>

130. Frank H. Easterbrook, *Substantive Due Process*, 1982 SUP. CT. REV. 85, 112–13 (1982).

131. For a discussion of efforts that would encourage states to deviate more dramatically from the federal model, see Koppel, *supra* note 105; Symposium Journal on State Civil Procedure, 35 W. ST. U. L. REV. 1, 1–304 (2007). For broader context on this phenomenon, see EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* 177–99 (Oxford 1992) (discussing the history of forum shopping).

*But see* 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, 329–33 (2001) (proving substantial conformity between federal and state practice in fact even when the textual rules are substantially different).

Occasionally, the parochial assumption will be spectacularly wrong: when the substantive law is litigated in a forum with procedures dramatically different than those contemplated by the drafters of the substantive law. The FPA could be applied by a French court, for example, in litigation involving The Body Shop, a franchise of L’Oreal, a French company.<sup>132</sup> Or the FPA could be applied by a Japanese court in litigation involving the Japanese franchisor Kumon Math & Reading Centers.<sup>133</sup> Importantly, differences in procedural law from country to country are “much greater” even than differences in substantive law.<sup>134</sup> And these procedural differences can dramatically affect the enforcement calculus.<sup>135</sup>

Critical mismatches are not limited to cases involving the application of foreign substantive law by domestic courts. Procedural variation even among American state courts could be—and historically has, at times, been<sup>136</sup>—significant. “Procedural diversity is built into the federal structure of fifty state judicial systems, which are natural laboratories for . . . experimentation.”<sup>137</sup> For example, “most states have charted their own paths toward civil discovery reform, paths that diverge from each other and from the federal rules.”<sup>138</sup> Different discovery rules alone can affect the outcome of a case.<sup>139</sup> But state procedures can also vary as to

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132. For an overview of the French legal system generally and civil procedure in particular, see CHRISTIAN DODD, *THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH* (Oxford 2006); Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9 (1996).

133. For an overview of the Japanese legal system generally and civil procedure in particular, see CARL F. GOODMAN, *JUSTICE AND CIVIL PROCEDURE IN JAPAN* 189–249 (2004); Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687, 697 (1998).

134. Andreas F. Lowenfeld, *Introduction: The Elements of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 652 (1997).

135. See *supra* notes 126–29 and accompanying text.

136. One of the most significant procedural reforms in American procedural history started in the state courts. See MILLAR, *supra* note 17, at 52 (“The first quarter of the nineteenth century had not long passed before a pronounced movement for reform on a wide scale had made its appearance. . . . Its principal theater was the State of New York.”); see also Subrin, *supra* note 38, at 931–43; Subrin, *supra* note 48, at 316–19.

137. Koppel, *supra* note 105, at 1175.

138. *Id.* at 1173; see also Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 613 (2002): “Justice Brandeis praised the ability of states to be ‘laboratories’ in which experiments in the law might be conducted. Procedural rules illustrate this. Analysis of the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years reveals a very complex situation.”

139. See Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 TUL. J. TECH. & INTEL. PROP. 167, 202 (2005) (“One of the important ways in which the process can affect the outcome is through discovery.”). This is not to suggest that more discovery necessarily helps plaintiffs. See Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 796 (1998) (discussing empirical studies finding that “the more days plaintiff spent in discovery, the lower their recovery relative to expectations[, and

pleadings,<sup>140</sup> class actions,<sup>141</sup> juries,<sup>142</sup> summary judgments,<sup>143</sup> alternative dispute resolution,<sup>144</sup> early incentives for settlement,<sup>145</sup> case management,<sup>146</sup> and every other conceivable device.<sup>147</sup> Because procedure matters, these mismatches, which lurk in all situations where the procedure that is applied varies from that which was contemplated by the drafters of the substantive law, matter too.<sup>148</sup> Procedural systems are not fungible.<sup>149</sup>

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[f]or defendants the number of days spent in discovery was independent of the amount they were ultimately liable to pay”); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 110–16 (1983) (finding that increased lawyer time spent on discovery was associated with decreased measures of success for plaintiffs).

140. See John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 315 n.172 (2001) (citing state cases); Main, *supra* note 131, at 329–59; 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, 1377–79 (1986); 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, 282, 293–94 (2008); Christine L. Childers, Note, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 701 n.146 (2002) (citing state rules of procedure).

141. See Sue-Yun Ahn, *CAFA, Choice-of-Law, and the Problem of Legal Maturity in Nationwide Class Actions*, 76 U. CIN. L. REV. 105, 113–15 (2007); Burbank, *supra* note 93, at 1523; Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1528 (2005); Steinman, *supra* note 140, at 279–80, 295–97.

142. See, e.g., Neal P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003) (discussing the history of jury reform in U.S. and, specifically, efforts in Tennessee); Valerie P. Hans, *Inside the Black Box: Comment on Diamond and Vidmar*, 87 VA. L. REV. 1917, 1920–21 (2001) (discussing the Arizona Jury Project).

143. See Michael P. Allen, *A Survey and Some Commentary on Federal “Tort Reform,”* 39 AKRON L. REV. 909, 926 & 926–27 n.70 (2006); JoEllen Lind, *“Procedural Swift”: Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 769–71 (2004); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 418–19 (1992); Steinman, *supra* note 140, at 278–79, 288–93.

144. Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1570–83 (1994).

145. See *id.* at 1583–87.

146. See *id.* at 1555–56, 1562–70.

147. See Paul D. Carrington, *Teaching Civil Procedure: A Retrospective View*, 49 J. LEGAL EDUC. 311, 329–30 (1999) (urging law teachers and lawyers to take advantage of states as laboratories for procedural experimentation).

148. See *supra* notes 92–119 and accompanying text. The dependent relationship between substantive rights and anticipated procedures is reflected also in administrative law where it is oft mentioned that plaintiffs “must take the bitter with the sweet.” *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974).

149. International efforts to harmonize various substantive laws could suggest otherwise. After all, these model acts purport to work with the procedures of civil law, common law, or even radically different legal systems. The Convention on the International Sale of Goods (CISG)—one of the most successful harmonization initiatives—is in force in more than 70 very different countries, including Argentina, China, France, Israel, Syria, the U.S., Uzbekistan, and Zambia. United Nations Comm. on

Mismatch scenarios are commonplace. In virtually every instance of alternative dispute resolution, for example, there is a mismatch because the substantive law is applied in a setting with different procedural accoutrements. For example, there would be no jury, discovery may be restricted, written testimony may substitute for oral, and the joinder of additional parties may be infeasible.<sup>150</sup>

Moreover, there is a mismatch with every diversity case in federal court (where federal procedure is applied to state substantive law),<sup>151</sup> every federal law action that proceeds in state court (where, typically, state procedure is applied to federal substantive law),<sup>152</sup> and with every application by one court of any other jurisdiction's substantive law.<sup>153</sup> Even when litigation takes place in the very forum anticipated by the

Int'l Trade Law, Status: 1980—United Nations Convention on Contracts for the International Sale of Goods, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Jan. 11, 2010) [hereinafter "UNCITRAL"]; see Peter Huber, *Some Introductory Remarks on the CISG*, 6 *INTERNATIONALES HANDELSRECHT* 228, 228 (2006) ("It is therefore fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law.").

Importantly, however, these model laws tend to focus exclusively on transnational relationships. The CISG, for example, alters only the domestic law governing transnational contracts. See United Nations Convention on Contracts for the Sale of Goods art. 1, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter "CISG"]. The narrow focus is significant because the forum for the resolution of a transnational dispute is most likely an international arbitral forum. Thus the anticipated procedural forum, while not parochial, is no less predictable. See Avery W. Katz, *Remedies for Breach of Contract Under the CISG*, 25 *INT'L REV. L. & ECON.* 378, 384 (2006) ("Most CISG disputes . . . are heard by private arbitral tribunals . . ."); Joseph M. Lookofsky, *Consequential Damages in CISG Context*, 19 *PACE INT'L L. REV.* 63, 86–87 (2007) ("[M]ost CISG cases are decided by arbitrators . . .").

Further, many unification initiatives have modest substantive consequences in practice. First, the text of the CISG, for example, allows nations to make reservations, and about thirty percent of the signatories have opted out of certain provisions. See CISG, *supra*, art. 92 et seq.; see also UNCITRAL, *supra* (status table documenting reservations). Second, because "the CISG uses general standards rather than precise rules," there is much variation in how subsequent interpreters apply its terms. Paul B. Stephan, *Does the CISG Fill a Much-Needed Gap?*, 101 *AM. SOC'Y INT'L L. PROC.* 414, 415 (2007); see also Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 *NW. J. INT'L L. & BUS.* 299 (2004); Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 *AM. J. COMP. L.* 379 (2005). And finally, the CISG expressly allows contracting parties to opt out of its specific provisions. CISG, art. 6. Accordingly, the entire domain of the CISG is contracts voluntarily entered into by parties with alternatives. See also *infra* note 190.

150. See Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 *TUL. L. REV.* 1, 31–33 (1987); Alan S. Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 *SMU L. REV.* 2005, 2027–28 (1993).

151. See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see also *supra* note 54 and accompanying text.

152. See, e.g., *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217–21 (1916).

153. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); see also *supra* note 55 and accompanying text.

drafters of the substantive law, there would be a chronologic mismatch if the procedure has changed since the substantive law was promulgated.<sup>154</sup>

This argument echoes many of the themes introduced by the scholars whose “procedure-as-substance” work is summarized in Part III *supra*. Like them, I am illustrating the power of procedure. But it is also important to see how my point differs from theirs. Those scholars focus on how procedure is *introduced* at the enforcement stage to undermine substantive rights. I am emphasizing that an anticipated procedure may *not be introduced* at the enforcement stage, and that its absence could affect substantive rights.<sup>155</sup> The associated procedure should remain hinged to the substantive law.

To a very limited extent, my argument is something of a rejoinder to theirs. After all, in circumstances where the procedure applied by the enforcing court *matches* the procedure anticipated by the drafters of the substantive law, then the substantive mandate would not be undermined by it—even when those procedures appear to dilute the substantive mandate. For example, a heightened pleading standard for civil rights cases does not undermine substantive law that was drafted in anticipation of a heightened pleading standard. Indeed, to apply a liberal pleading standard to that law instead could lead to over-enforcement of the substantive mandate.

But this rejoinder is of little consequence because (1) most of their procedure-as-substance criticism, in fact, targets genuine mismatches (with new procedures applied to older substantive laws); and (2) even if the enforcement procedure in fact matches what was anticipated, there is still a manipulation of “procedure” to achieve a substantive goal. So long as there is some sense that procedure is less significant than substance (again, a byproduct of the substance-procedure dichotomy), procedural reforms can be implemented without the scrutiny and attention that are an integral part of substantive law-making.<sup>156</sup> Accordingly, rather than allaying any of the concerns identified in the preceding part, the arguments

154. For a similar argument recognizing the evolving nature of language, see generally Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635 (2008).

155. Professor Adam Steinman has made a similar argument in suggesting that federal courts respect state summary judgment, class certification, and pleading standards. See Steinman, *supra* note 140, at 282–301.

156. Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 647 (1994) (“Because procedural rules are so important to substantive rights, and because non-specialists usually pay little attention to procedural rules . . . it is important to be alert to the possibility that the people who ‘write the procedure’ may be acting in their own self-interest . . .”) (citing Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1993)).

asserted in this part complement and feed the basic critique: the substance-procedure dichotomy is fundamentally flawed.

A return to the player piano metaphor may be helpful here. The musical compositions that are substantive law are not written for *all* player pianos. A paper music roll prepared for the pneumatically-operated Pianola cannot be read by a Yamaha, which reads only magnetic tape. Other contemporary player pianos read computer disks. Your mother's player piano is almost certainly not your son's player piano. While one could always try to convert one format into another, we also know that even the most earnest translation will introduce variation.<sup>157</sup> Substantive law is likewise being applied on unfamiliar platforms, but without even the effort to translate.

## V. CONCEPTUAL POSSIBILITIES

### A. *Apply Only Forum Law*

The first conceptual possibility is for us to admit that, because we have misunderstood the nature of a substantive right, it is impossible to faithfully apply some other jurisdiction's substantive law. Accordingly, we would abandon all of our choice of law doctrines. A strict *lex fori* regime, instead, would require the application of forum substantive and procedural law in all circumstances. Doing so would prevent the sort of geographic mismatch that can result when one court undertakes to apply the substantive law of some other state or country.

It is a tall order to expect a Maine court meaningfully to apply French law—or even Florida law. Perhaps “courts should not presume to speak for other jurisdictions in this manner” nor ignore the “express will” of their own legislature by applying some other law.<sup>158</sup> Of course judges are also more familiar with forum law, making its application easier, less time-consuming, and much more efficient.<sup>159</sup> Although a *lex fori* approach may seem radical, it has long been among the approaches in the conflict of laws canon,<sup>160</sup> and it was the law in diversity cases in federal court for

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157. This metaphor also evokes appreciation for the orchestral use of period instruments. See Academy of Ancient Music, <http://www.aam.co.uk/> (last visited Dec. 1, 2008).

158. See *Sutherland v. Kennington Truck Serv., Ltd.*, 562 N.W.2d 466, 474 (Mich. 1997) (Brickley, J., concurring in part and dissenting in part).

159. See Amos Shapira, “*Grasp All, Lose All*”: *On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 257–58 (1977).

160. See CRAMTON, CURRIE & KAY, *CONFLICT OF LAWS* 303–05 (2d ed. 1975); STEPHEN C. MCCAFFREY & THOMAS O. MAIN, *TRANSNATIONAL LITIGATION IN COMPARATIVE PERSPECTIVE* 482–89 (Oxford Univ. Press 2010). *But see* EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS &

nearly a century before *Erie Railroad Co. v. Tompkins*.<sup>161</sup> Even today, the administration of criminal law largely avoids conflict of laws analyses and substance-procedure mismatches.<sup>162</sup>

Yet several doctrinal obstacles would thwart a strict *lex fori* approach. For example, this approach could not (without major reform) address the mismatches that occur when state-law cases are in federal court,<sup>163</sup> nor when federal-law cases are in state court.<sup>164</sup> Moreover, this approach provides no solution for the mismatches that occur in ADR, where there is

SYMEON C. SYMEONIDES, CONFLICT OF LAWS 42 (3d ed. 2000) (“Ehrenzweig’s dream of *lex propria in foro proprio* is as remote today as it was during Ehrenzweig’s time.”). The most passionate advocate of a *lex fori* approach in conflicts doctrines was Albert Ehrenzweig. See generally Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A “Restatement” of the “Lex Fori Approach,”* 18 OKLA. L. REV. 340 (1965); Albert A. Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960); Shapira, *supra* note 159.

161. Compare *Swift v. Tyson*, 41 U.S. 1 (1842), with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Nevertheless, there were mismatches under *Swift* because federal procedure was controlled by the Conformity Acts, which required federal court procedure to conform to state court procedures. See Thomas O. Main, Symposium, *Reconsidering Procedural Conformity Statutes*, 35 W. ST. U. L. REV. 75, 85–87 (2007). Accordingly, even with a uniform substantive law for diversity cases, federal procedure varied from state to state.

162. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. c (1971) (clarifying that criminal law not addressed in the Restatement). It would be an overstatement to say that there are no conflicts issues in criminal law or that courts apply only forum law. Many of the problems of *international* criminal law are essentially matters of conflicts. See LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (Oxford 2006) (2003). State courts would also need to apply controlling federal law. Also, there are some secondary and collateral issues in criminal law, such as the construction of a defendant’s criminal history and evidentiary privileges, that involve conflicts analyses. Compare Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 260 (2005) (discussing relevance of out-of-state sanctions on sentencing determinations), with Dan Markel, *Connectedness and its Discontents: The Difficulties of Federalism and Criminal Law*, 4 OHIO ST. J. CRIM. L. 573 (2007) (discussing Logan’s approach). See also *Gonzalez v. State*, 45 S.W.3d 101 (Tx. Crim. App. 2001).

163. State cases are filed in federal court under the federal court’s diversity jurisdiction. Section 1332 of Title 28 provides federal jurisdiction over non-federal-law claims when there is diversity between the parties. See 28 U.S.C. § 1332 (2000). And *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) reads (an unspecified provision of) the U.S. Constitution to require courts to apply state substantive law in diversity cases. If one were committed to a comprehensive *lex fori* model the possible revisions to address this hurdle would include (1) eliminating diversity jurisdiction (which could be accomplished by legislative enactment alone); or (2) reversing *Erie* and reinstating the pre-*Erie* jurisprudence that allowed the application of federal (common) law in diversity cases. See *Swift v. Tyson*, 41 U.S. 1 (1842).

164. Except when there is exclusive federal subject matter jurisdiction, federal causes of action can be filed in state court. See Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1505 n.10 (2006). In cases with federal causes of action filed in state court, the Supremacy Clause prevents a state from applying state law. U.S. Const. art. VI, cl. 2. If one were committed to a comprehensive *lex fori* model, the possible revision to address this hurdle (absent constitutional amendment) would be to give exclusive jurisdiction over all federal causes of action to federal courts.

no forum substantive law for neutrals to apply.<sup>165</sup> Nor would it address the sort of chronologic mismatches that can occur when new procedure is applied retroactively to vintage substantive law.

Even in that small subset of cases where it would be doctrinally feasible to undertake a strict *lex fori* approach,<sup>166</sup> the new litigation dynamic could be problematic. Defendants would be particularly vulnerable to plaintiffs' forum-shopping for favorable law.<sup>167</sup> And while a court could dismiss the case in circumstances where it was unwilling to apply its own law to the facts presented, a dismissal, in turn, could result in unfairness to plaintiffs who may be unable to file suit in the more appropriate forum.<sup>168</sup> Indeed, forum non conveniens dismissals are "outcome-determinative in a high percentage of . . . cases."<sup>169</sup>

### B. Apply All of Foreign Law

A second conceptual possibility prescribes essentially the opposite of the first. Again we would admit that we have misunderstood the nature of a substantive right. But rather than retreat from our choice of law doctrines, we would expand them so that when courts apply another

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165. *Lex mercatoria* could be an exception. See generally Michael Douglas, *The Lex Mercatoria and the Culture of Transnational Industry*, 13 U. MIAMI INT'L & COMP. L. REV. 367 (2006). For a description of the uneasy relationship between ADR and substantive law generally, see Main, *supra* note 22, at 366–72.

166. This would include only the basic conflict of laws cases and, even among those, only those filed in state court. With a reversal of the Court's holding in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941) (requiring federal courts to apply state conflicts principles), the scope could include basic conflict of laws cases in federal and state courts.

167. For a discussion of the supposed evils of forum shopping, see AMOS SHAPIRA, *THE INTEREST APPROACH TO CHOICE OF LAW WITH SPECIAL REFERENCE TO TORT PROBLEMS* 45–46 (1970); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evils of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995); James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355 (2008). For cases invoking this theme, see *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972); *Chaplin v. Boys* [1969] 2 All E.R. 1085 (H.L.).

168. Presumably, the grounds for such a dismissal would be forum non conveniens. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 356–58 (1963) (discussing the invocation of forum non conveniens to avoid the application of unfamiliar foreign law). Many plaintiffs whose claims are dismissed on grounds of forum non conveniens never file another suit. See David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 418–20 (1987). "[O]nly an outright dismissal with prejudice could be more 'outcome determinative' than a [forum non conveniens] dismissal to a distant forum in a foreign land." In re Air Crash Disaster near New Orleans, La., 821 F.2d 1147, 1156 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom.* Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989). See generally Kevin M. Clermont, *The Story of Piper*, in *CIVIL PROCEDURE STORIES* 222–23 (2d ed. Foundation Press ed., 2008).

169. Robertson, *supra* note 168, at 409.



system's law, the courts would apply *all* of that other law—substance and procedure. This would prevent the sort of geographic mismatch that can result when a court combines the substantive law of some other state or country with its own procedural law.<sup>170</sup>

This approach has fewer doctrinal complications than the first,<sup>171</sup> but even greater practical obstacles. Applying foreign substantive and procedural law with limited judicial resources, partial comprehension, and the vagaries of translation could lead to extreme inefficiencies, delays, and errors.<sup>172</sup> There could be tremendous complexity in trying to distill another procedural system's requirements about commencing an action, service, joinder, pre-trial dispositions, interim remedies, the scope of discovery, experts, evidence, sanctions, burdens of production, and fee-shifting.<sup>173</sup> Imagine the task of replicating another system's modes of case assignment, court management, trial with specialized courts and judges, and so forth. Given the complexity, we would expect many courts to exercise their discretion to dismiss these cases on grounds of *forum non conveniens*.<sup>174</sup> And as already explained, such dismissals, in turn, could result in unfairness to plaintiffs who may be unable to file suit in the other forum.<sup>175</sup>

A more modest version of this second approach could find inspiration in the forms of action of the ancient Law courts. In a contemporary version

170. And the approach would prevent chronologic mismatches, provided courts applied the procedural schemata that corresponds with the applicable substantive law.

171. Some "procedural" law from another system could exceed the judicial authority of the forum court. That aside, the principal doctrinal hurdle regards the authority over court procedures. While most state constitutions give that authority to the courts, some include a role for the legislative branch. Compare ARIZ. CONST. art. VI, § 5(5) ("The supreme court shall have . . . Power to make rules relative to all procedural matters in any court."), with VT. CONST., ch. II, § 37 ("The Supreme Court shall make and promulgate rules. . . . Any rule adopted by the Supreme Court may be revised by the General Assembly."). Authority over procedural rulemaking in federal court is likely an inherent judicial power under Article III of the U.S. Constitution, even though Congress has also purported to confer authority over procedural rulemaking to the courts. 28 U.S.C. § 2072 (2006); see Burbank, *supra* note 93, at 1452–53. If one were truly to pursue this line of reform, another issue to investigate would be whether a rule or statute directing the application of foreign procedural law would be an impermissible delegation. See generally Main, *supra* note 161, at 85–87. For a discussion of state sovereignty over procedure, see Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 976–83 (2001).

172. See generally RICHARD FENTIMAN, *FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF AND CHOICE OF LAW* (1998) (discussing the difficulty of applying foreign law); Richard Fentiman, *Foreign Law and the Forum Conveniens*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* 275–76 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) (discussing the difficulty of applying foreign law as a factor in identifying the *forum conveniens*).

173. Shapira, *supra* note 159, at 257.

174. See *supra* note 168 and accompanying text.

175. *Id.*

of the forms of action, legislation could integrate the substantive mandate with procedures tailored for that claim.<sup>176</sup> For example, when the Maine legislature drafts the FPA it could include within the statutory text a prescription for a heightened pleading standard, no class actions, limited and accelerated discovery, and any other “procedural” mandates. Other statutes would prescribe different tailored procedures. To avoid mismatches, courts would apply all of a statute without regard to the labels “substance” and “procedure.”

To a limited extent, this sort of integrated law-making is already happening.<sup>177</sup> For example, many state statutes require plaintiffs asserting malpractice claims to submit, at a very early stage in the case, an admissible expert opinion to support the allegation of negligence.<sup>178</sup> Other statutes require certain plaintiffs to go through methods of ADR or to submit to review boards before filing suit.<sup>179</sup> Through legislation, the U.S. Congress has modified pleading standards and imposed exhaustion requirements for plaintiffs asserting certain types of claims.<sup>180</sup> And many legislatures have enacted statutes to override or restore certain procedures.<sup>181</sup> But most of these are examples of “statutory procedural

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176. For example, when the Maine legislature drafted the FPA it could have included within the text a prescription for a heightened pleading standard, no class actions, limited and accelerated discovery, and other “procedural” mandates.

177. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2040 (1989) (detailing various efforts by states “to better mesh process and substance”).

178. See, e.g., ARIZ. REV. STAT. ANN. § 12-2602 (2009); MINN. STAT. ANN. § 544.42 (West 2009); N.J. STAT. ANN. § 2A:53A-27 (West 2007); PA. R. CIV. P. 1042.3 (2008); TEX. CIV-PRAC & REM. CODE ANN. § 150.002 (Vernon Supp. 2008). Compare *Chamberlain v. Giampapa*, 210 F.3d 154, 156 (3d Cir. 2000) (applying New Jersey affidavit of merit statute), with *Serocki v. Meritcare Health System*, 312 F. Supp. 2d 1201, 1205–11 (2004) (refusing to apply North Dakota’s expert affidavit statute).

179. See, e.g., IDAHO CODE ANN. §§ 6-1001 (2006); LA. REV. STAT. ANN. § 40:1299.47 (2001 & Supp. 2007); WIS. STAT. ANN. §§ 655.42 (West 2004); *Bledsoe v. Crowley*, 849 F.2d 639 (D.C. Cir. 1988); *Seoane v. Ortho Pharm., Inc.*, 660 F.2d 146 (5th Cir. 1981).

180. The Y2K Act, for example, imposed strict pleading requirements. 15 U.S.C. § 6607 (2006). The Prison Litigation Reform Act of 1995 imposed exhaustion requirements. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 11, 18, and 28 U.S.C.). The Private Securities Litigation Reform Act of 1995 also contained a number of procedural components. Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

181. See generally JEB BARNES, *OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* (2004); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). For two recent examples, see Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, Jan. 29, 2009, 123 Stat. 5 (codified in scattered sections of 29 and 42 U.S.C.); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009) (unenacted); see also Civil Rights Restoration Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

law”<sup>182</sup> that do not *integrate* substance and procedure. Contemporary forms of action would require statutes that integrate procedure within legislation establishing or acknowledging the substantive right of action. Maitland warned (promised?) that the forms of action would “rule us from their graves.”<sup>183</sup>

However, neither contemporary forms of action, nor the most earnest effort to apply another jurisdiction’s procedural law could fully resolve the mismatch problem. Indeed, the more accurate the basic contention of this Article—that substantive law incorporates parochial assumptions—the more complicated and incomplete this particular approach. After all, legislative drafting incorporates assumptions not only about formal, stated procedures, but also non-formal procedures,<sup>184</sup> and many other litigation realities—access (to courts and administrative agencies), cost (both the time and expense), the availability of legal representation (including legal aid, the contingency fee, and legal insurance), the quality of the decision-maker (the independence of the judiciary and elected judges), even the culture (social, political, and economic circumstances; history; language).<sup>185</sup> Undertaking to apply another’s “procedural” law could never replicate the actual experience.

### C. Normalize Procedure

The third conceptual possibility involves a different approach: procedure would be converted into a universal constant. If all procedural systems were identical, there would be no geographic mismatch when legislation drafted in one jurisdiction was enforced elsewhere—the embedded procedure would be a shared platform. Realizing these benefits would require a long horizon, however, as adoption of the universal approach would introduce widespread chronologic mismatches in the short term.

The obvious obstacle to this approach is that “procedural systems [may be] too different and too deeply embedded in local political history and

182. See Burbank, *supra* note 92, at 1699–03.

183. Maitland, *supra* note 123, at 296 (“The forms of action we have buried, but they still rule us from their graves.”).

184. For discussion of the relationship between formal and non-formal procedure, see Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981 (2004).

185. See generally OSCAR G. CHASE, *LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT* (2005); Andrew J. Cappel, *Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389, 389–90 nn.1–2 (2003) (collecting scholarship).

cultural tradition” to expect anything resembling harmonization.<sup>186</sup> As stated above, differences in procedural law from country to country are “much greater” even than differences in substantive law.<sup>187</sup> That point deserves emphasis because it resonates with the themes presented here about the power of procedure.<sup>188</sup> Remarkably, societies may be more likely to consider abandoning their own substantive regimes of commercial law or intellectual property,<sup>189</sup> for example, than they would surrender their own procedure.<sup>190</sup>

That said, there is evidence of progressive procedural convergence.<sup>191</sup> Outside the United States we have seen some countries broaden discovery,<sup>192</sup> adopt class actions,<sup>193</sup> and more vigorously promote

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186. Geoffrey C. Hazard, Jr., *From Whom No Secrets are Hid*, 76 TEX. L. REV. 1665, 1666–1669 (1998); see also Kevin Clermont, *Why Comparative Civil Procedure?*, Foreword to KUO-CHANG HUANG, INTRODUCING CIVIL DISCOVERY INTO CIVIL LAW, at ix, xvi (2003) (“Procedure is surprisingly culture-bound, reflecting the fundamental values, sensibilities, and beliefs of the society.”); Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002) (“[C]ourt procedures reflect the fundamental values, sensibilities and beliefs (the ‘culture’) of the collectivity that employs them.”); Hein Kotz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT’L L. 61, 71 (2003) (“[R]ules organizing constitutional, legislative, administrative, or judicial procedures are deeply rooted in a country’s peculiar features of history, social structure, and political consensus . . . .”); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 710 (2005) (“[P]rocedure is peculiarly parochial. Procedural characteristics and development may be singularly tied to ‘cultural’ or governmental characteristics of a given nation . . . .”); Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 211–12 (2007).

187. Lowenfeld, *supra* note 134, at 652.

188. See *supra* note 92 and accompanying text.

189. See *supra* note 149; see also World Trade Organization, Trade Related Aspects of Intellectual Property Rights Agreement, [http://www.wto.org/english/tratop\\_e/TRIPS\\_e/TRIPS\\_e.htm](http://www.wto.org/english/tratop_e/TRIPS_e/TRIPS_e.htm) (last visited December 1, 2008). TRIPS “has achieved impressive accomplishments in harmonizing and setting minimum rights around the world.” Roberto Garza Barbosa, *International Copyright Law and Litigation: A Mechanism for Improvement*, 11 MARQ. INTELL. PROP. L. REV. 77, 79 (2007) (internal footnote omitted).

190. See *supra* notes 134 and 186. To be clear, there are Principles of Transnational Civil Procedure that are the product of an effort for a universal set of procedures. See ALI/UNIDROIT Principles of Transnational Civil Procedure, 4 UNIFORM L. REV. 758 (2004). To my knowledge, no nation has adopted them. Importantly, however, even if adopted, these principles and rules would apply only to *transnational* commercial disputes. For the significance of such a narrow focus, see *supra* note 149. Cornelis D. van Boeschoten, *Hague Conference Conventions and the United States: A European View*, 57:3 LAW & CONTEMP. PROBS. 47, 47 (1994) (explaining isolationist point of view).

191. See ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 3 (Cambridge 2006) (expressing confidence in harmonization of procedures regarding formulation of claims, development of evidence and decision procedure); Rowe, *supra* note 186, at 204–05; see generally CHASE, *supra* note 186; Scott Dodson, Book Review, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133 (2008) (reviewing OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT (West 2007)); Hazard, *supra* note 186, at 1666–68.

192. See Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT’L & COMP. L. 153, 164–97 (1999); see also Peter F. Schlosser,

settlements.<sup>194</sup> Meanwhile, American procedure's evolution moves toward heightened pleading standards,<sup>195</sup> more limited discovery,<sup>196</sup> more judicial involvement,<sup>197</sup> and fewer jury trials<sup>198</sup>—evocative of traditional civil law systems. Indeed, differences between the civil law and common law systems are often caricatured and exaggerated.<sup>199</sup> Yet procedural exceptionalism generally, and American exceptionalism in particular, will surely endure.<sup>200</sup> Nevertheless, this conceptual possibility reminds us that the elimination of idiosyncratic and exceptional procedures can reduce the number and consequences of mismatches that can distort substantive law at the enforcement stage.<sup>201</sup>

*Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 17 (1996).

193. See WARD K. BRANCH, *CLASS ACTIONS IN CANADA* (1996); Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301 (2007); S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289 (2001); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003); Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn from Each Other?*, 11 DUKE J. COMP. & INT'L L. 157 (2001); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 402–03 (2002); Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201 (1999); Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 411–14 (2001).

194. See Marcus, *supra* note 186, at 729–31; Rowe, *supra* note 186, at 209–10.

195. See Dodson, *supra* note 191, at 144–45; Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1021–59 (2003).

196. See Marcus, *supra* note 192, at 164–97; Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301 (2002).

197. See Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity With Our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1, 20 (1992); Dodson, *supra* note 191, at 148–50; Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 13 (2001) (“[P]articularly in the realm of complex litigation, the American managerial judge has undertaken roles that are indeed converging with the civil law inquisitorial judge.”); Rowe, *supra* note 186, at 195–96; Tidmarsh, *supra* note 103, at 568–69; see generally Resnik, *supra* note 106.

198. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 506–15 (2004) (indicating a drop in civil jury trials from 1.8 percent to 0.6 percent of all case dispositions between 1976 and 2002); Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004).

199. See Marcus, *supra* note 186, at 712 (suggesting that the “effigies” of the common law and civil law systems “have always been overdrawn”); Edward F. Sherman, *Transnational Perspectives Regarding the Federal Rules of Civil Procedure*, 56 J. LEGAL EDUC. 510 (2006) (describing an evolution of convergence); see generally HERBERT JACOB ET AL., *COURTS, LAW & POLITICS IN COMPARATIVE PERSPECTIVE* 3–6 (1996); Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 TEX. INT'L L.J. 625 (2007).

200. See generally Chase, *supra* note 186.

201. For an argument in favor of procedural conformity between federal and state courts, see Main, *supra* note 171 and accompanying text.

#### D. A Hybrid Solution

None of the three conceptual possibilities is immediately practicable nor even, as it turns out, a complete solution to the mismatch problem. The only realistic solution may be some combination of the three. And to that end, I offer three overlapping suggestions.

First, we should express much greater humility and skepticism about our ability to apply another jurisdiction's substantive law. Substantive law has an embedded procedure that informed its construction. To unhinge that substantive law from its associated procedure risks mismatch.

To be sure, one person's humility and skepticism will be another's "chauvinism"<sup>202</sup> or "provincialism"<sup>203</sup> when thoughtful restraint leads to the application of forum law rather than foreign law.<sup>204</sup> The suggestion here is only that when exercising the broad discretion to apply domestic or instead some other law,<sup>205</sup> judges should consider whether the foreign law could be faithfully applied.<sup>206</sup> The greater the number of differences between the foreign and forum systems, the less confidence courts should have about their ability to apply another's law with fidelity to its mandate.

Second, in circumstances where the application of foreign law is appropriate and necessary, we should incorporate as much of that law as reasonably possible, regardless of whether that law is "substantive" or "procedural." We must be mindful that our doctrines have misunderstood the nature of a substantive right. The rights created or responsibilities

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202. Hans Wolfgang Baade, *Foreword to Symposium, New Trends in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 673, 677 (1963).

203. Robert D. Childres, *Toward the Proper Law of the Tort*, 40 TEX. L. REV. 336, 338 (1962).

204. "Foreign" refers only to law that is not a product of the court's jurisdiction. Thus "foreign" law could be federal law in a state court, state law in a federal court, any law in an ADR proceeding, and so forth.

205. See generally Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1844–51 (2006) (describing wide discretion of the court under the "most significant relationship" standard used in the Restatement (Second) of Conflict of Laws).

Of course in many instances of mismatch there is no discretionary choice, whether because there is no forum law (as in ADR) or because the foreign law must be applied (as when state cases are in federal court in diversity, under *Erie*). See *supra* notes 163–65 and accompanying text.

206. The *Restatement (Second) of Conflict of Laws* includes as one of the general factors relevant to the choice of the applicable rule of law the "ease in the determination and application of the law to be applied." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(g) (1971). Fidelity to the full substantive mandate is not a primary concern of the Restatement, however. See *id.* § 6 cmt. j.

Ease in the determination and application of the law to be applied. Ideally, choice-of-law rules should be simple and easy to apply. This policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results. The policy does, however, provide a goal for which to strive.

*Id.*

assigned by substantive law must be enforced in the context of their affiliated procedures. Procedures that can easily be replicated should enjoy a presumption of applicability if a court is timely informed of their existence. That presumption could be rebutted in situations where the procedure is trivial or could not influence the substantive mandate.

Importantly, this suggestion would change the rhetoric of cases more than the results of cases. After all, much of the clutter in the substance-procedure doctrines is caused by intuition to classify things that matter as substantive, and things that do not as procedural.<sup>207</sup> Even under current doctrine, procedures can be enforced when they are “bound up” with a state-created right.<sup>208</sup> Similarly, when a state “has taken a rule of practice and substantially intertwined that rule with the basic right of recovery,” it will be applied.<sup>209</sup> Procedures are recognized in this jurisprudence provided they are considered a *condition* of the substantive right.<sup>210</sup> And creativity is welcome, even encouraged.<sup>211</sup> My point here is simply that, in many U.S. courts the doctrine is—or at least very nearly is—in place to

207. See generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 59 (5th ed. 2006) (“If . . . the foreign rule in issue is not especially difficult to find and apply and if there is any probability that the rule may affect the outcome, the rule should be considered as ‘substantive’ . . .”); 3 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1600 (1935).

If the practical convenience to the court in adopting the local rule of law is great, and the effect of so doing upon the rights of the parties is negligible, the law of the forum will be held to be controlling. If the situation is reversed the rule of the foreign law will be adopted.

*Id.* The RESTATEMENT (SECOND) OF CONFLICT OF LAWS does not even “attempt to classify issues as ‘procedural’ or ‘substantive’ . . . Instead [the rules] face directly the question whether the forum’s rule should be applied.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122, cmt. b (1971).

208. See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535 (1958) (citing *Cities Servs. Oil Co. v. Dunlap*, 308 U.S. 208 (1939)), *overruled on other grounds*, *Hanna v. Plumer*, 380 U.S. 525 (1958); see, e.g., *Hines v. Elkhart Gen. Hosp.*, 603 F.2d 646, 648 (7th Cir. 1979) (explaining that state’s requirement that “submission of a claim to the medical review panel for its opinion prior to the institution of a judicial action is an integral part of the rights and obligations established by the Act”).

209. *Prashar v. Volkswagen of America, Inc.*, 480 F.2d 947, 953–54 n.14 (8th Cir. 1973).

210. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 544–45 (1949), a state statute required any plaintiff filing a derivative suit to post an indemnity bond. The Court held, “[w]e do not think a statute which so *conditions* the stockholder’s action can be disregarded by the federal court as a mere procedural device.” *Id.* at 556 (emphasis added).

211. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996) (recognizing a state statute that called on appellate and trial courts to strike damage awards that materially deviated from what would be reasonable compensation); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750–52 (1980) (disregarding FED. R. CIV. P. 3 because there was no indication that that Rule was intended for the situation presented); see also FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 2.37 at 172–73 (5th ed. 2001) (“[A]pplying *Erie* remains an exercise of judgment rather than the application of mechanical tests, calling for the comparison and in appropriate cases the accommodation of state and federal policies.”).

facilitate the application of procedure that either accompanies or informs a substantive mandate.<sup>212</sup>

The third suggestion charts a different track. With regard to efforts to harmonize or approximate procedural systems, I would contribute an additional value to be considered in those discussions. Typically these efforts are championed with promises of efficiency, simplicity, and uniformity.<sup>213</sup> But the thrust of this Article suggests that such efforts are not only about procedure *qua* procedure, but are also about the integrity of substantive law. From a long-term perspective, harmonization efforts would help courts avoid geographic mismatches because substantive law would be constructed upon a shared procedural platform. From a short-term perspective, however, harmonization efforts would, if applied retroactively, introduce chronologic mismatches because they would displace procedures embedded in vintage substantive law in favor of new procedures. This consideration should be included in the contemporary discourse about the merits and demerits of procedural harmonization and model laws.

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212. To be sure there could be a problem under current doctrine when, in a diversity case, there is a direct and unavoidable conflict between a protocol and a Federal Rule of Civil Procedure. When there is a direct and unavoidable conflict with a Federal Rule of Civil Procedure, the Federal Rule ordinarily trumps. See *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965); see generally John C. McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965). However, direct and unavoidable conflicts can often be explained away with creativity. See *supra* note 211. Further, courts have been instructed to balance the policies behind a state statute against the policies that inhere in the Federal Rule. See *Byrd*, 356 U.S. at 536–39; see also Steinman, *supra* note 140, at 267–68 (discussing viability of “Byrd-balancing”). And “Gasperini indicates that, even after *Hanna*, state law with procedural aspects will sometimes prevail in federal court.” FLEMING ET AL., *supra* note 211, at 172; see *Gasperini*, 518 U.S. 415. Further still, a protocol would present a much stronger case for enforcement because the protocol would be part of the legislation establishing or acknowledging a particular state substantive right rather than a stand-alone or generally-applicable state statute. In *Gasperini*, for example, the state statute applied by the Court was a stand-alone “tort reform” statute of a rather generalized applicability. 518 U.S. at 418.

Every application of the reverse- or inverse-*Erie* doctrine reflects this basic methodology. The Supreme Court has held, for example, that a strict pleading standard in state court “cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.” *Brown v. Western Railway of Ala.*, 338 U.S. 294, 298 (1949); see generally Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006); Steinman, *supra* note 140, at 294.

213. See, e.g., ALI/UNIDROIT, *supra* note 191, at 11 (adoption of model rules would “reduce . . . uncertainty”). This argument includes (and actually began with) efforts to harmonize substantive law. See generally Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law and Software Sales*, 8 GEO. MASON L. REV. 261 (1999); Perry E. Wallace, *The Globalization of Corporate Governance: Shareholder Protection, Hostile Takeovers and the Evolving Corporate Environment in France*, 18 CONN. J. INT’L L. 1, 32 (2002).



## CONCLUSION

Although we have known that procedure is inherently substantive, we should now also appreciate that substance is inherently procedural. The construction of substantive law entails assumptions about the procedures that will apply when that substantive law is ultimately enforced. Those procedures are embedded in the substantive law and, if not applied, can lead to over- or under-enforcement of the substantive mandate.

Understanding that procedure is substantive, and that substance is procedural debunks two myths: first, that there is a substance-procedure dichotomy, and second, that procedure is the inferior partner. A substance-procedure antinomy that was introduced for teaching purposes was impulsively codified as a rigid substance-procedure dichotomy. Doctrines founded upon this false dichotomy are flawed and vulnerable.