

PROCEDURALISM, CIVIL JUSTICE, AND AMERICAN LEGAL THOUGHT

PAUL MACMAHON*

ABSTRACT

American legal scholars spend a large proportion of their time debating and theorizing procedure. This Article focuses on American proceduralism in the particular field of civil justice and undertakes a detailed comparison with England, where procedural questions receive little academic attention. It finds that procedure is more prominent in America partly because Americans have been more willing than others to use private litigation as a tool for regulation. More significantly, procedural questions necessarily occupy more space in American debates because authority over civil justice is unusually dispersed among different actors; procedural rules allocate power among these actors. But American proceduralism runs deeper than these surface explanations allow, and a full account requires an examination of the history of American legal thought. I trace contemporary American proceduralism to a counter-intuitive source – the emergence of Legal Realism in the 1920s and 1930s.

* Climenko Fellow and Lecturer on Law, Harvard Law School. For exceptionally helpful comments on previous drafts, thanks to Joseph Blocher, Josh Chafetz, Michael Coenen, Bert Huang, Deirdre Mask, Masayuki Tamaruya, and Jay Tidmarsh. This paper descends from one I presented to the Twentieth British Legal History Conference at the University of Cambridge in July 2011. I am grateful to Neil Jones for organizing the conference, and also to Geoff Lindsay, Mike Macnair, James Oldham, and David Seipp, who provided helpful comments on my presentation.

TABLE OF CONTENTS

1.	Introduction.....	546
2.	Proceduralism	551
	2.1. <i>Procedure and Substantive Law</i>	554
	2.2. <i>Proceduralism as Belief in the Centrality of Procedural Questions</i>	559
3.	American Proceduralism in Civil Justice	561
	3.1. <i>The Centrality of Procedure in American Civil Justice</i>	563
	3.2. <i>A Comparative Example: Civil Procedure at the Periphery in England</i>	568
4.	Proceduralism-Promoting Features of American Civil Litigation.....	574
	4.1. <i>American Faith in Private Litigation</i>	574
	4.2. <i>Fragmentation of Power in American Civil Justice</i>	578
5.	Procedure and the History of American Legal Thought.....	584
	5.1. <i>The Dominance of Procedural Categories Until the Late-Eighteenth Century</i>	585
	5.2. <i>The Nineteenth-Century Rise of Substance</i>	587
	5.2.1. <i>English Procedural Reform and the Rise of Substantive Legal Categories</i>	588
	5.2.2. <i>American Procedural Reform and the Rise of Substantive Legal Categories</i>	590
	5.2.3. <i>The Transatlantic Triumph of Substantive Law</i>	594
	5.3. <i>Procedure's Revival in Twentieth-Century America</i>	594
	5.4. <i>The Continued Dominance of Substantive Law in England</i>	604
6.	Conclusion.....	610

1. INTRODUCTION

In law, procedure matters. From the very start of law school, students learn that many of the most important questions about law and justice are procedural. In first-year civil procedure courses, students consider questions such as: which court has the power to hear the plaintiff's claim? What does a plaintiff have to plead to survive a motion to dismiss? Will a jury or judge decide the case? Criminal law courses often include a large criminal procedure component; regardless, everyone knows how important procedural issues are in criminal justice. American law students quickly understand, if they don't know already, that procedural

rules are often just as important as the substantive law governing the plaintiff's claim or the prosecution's case.

Procedural questions are important in any legal system, but they often dominate legal debates in the United States to a puzzling extent. As Robert Kagan says, "[c]ompared to other economically advanced democracies, American civil life is more deeply pervaded by conflict and by controversy about legal processes."¹ Regardless of the *content* of their views on procedure, Americans consider procedural issues to be centrally important. In the depth of their absorption with procedural questions, American lawyers and legal scholars appear to diverge from many of their foreign counterparts. The aim of this Article is to figure out why.

Post-9/11 litigation by alleged enemy combatants detained in Guantanamo and elsewhere provides a vivid example of proceduralism in action. The plaintiffs in these cases asserted dramatic violations of their substantive rights to be free from illegal detention and torture. The central questions raised by war-on-terror litigation surely concern the factual and legal validity of these claims. But, writing more than six years after the September 11, 2001 attacks, Jenny Martinez demonstrated that most of the U.S. court decisions in detainee litigation were fixated on questions of process: whether the federal courts had the power to hear the dispute, which federal district was the proper venue, whether the correct branch of the federal government had taken the necessary decision, whether particular plaintiffs had standing, whether evidence was protected from discovery by the state secrets privilege, and so on.² (Not much has changed since then.)³

¹ ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2001).

² See Jenny S. Martinez, *Process and Substance in the "War On Terror,"* 108 COLUM. L. REV. 1013 (2008).

³ The Supreme Court has continued to focus on procedural issues in war-on-terror cases since Martinez's article. See Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 391 (2010) (examining the "noteworthy disparity" between the Supreme Court's "assertiveness in upholding judicial jurisdiction" and "its reticence regarding substantive rights"); Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 125 (2011) ("Although the Justices have repeatedly acted to assert and preserve the institutional role of the federal courts more generally, they have been decidedly unwilling to engage the substance of counterterrorism policies, especially in cases in which those policies relate to alleged abuses of individual civil liberties.").

Martinez contrasted the greater propensity of British⁴ and Israeli courts to reach the merits in war-on-terror cases and suggested that “there is something *particular* about American legal culture at this moment in time” that provides at least part of the explanation for that concentration on procedural issues.⁵

This “something particular” about American legal culture is the focus of this Article. I aim to make two main contributions to the limited literature on the distinctively proceduralist tilt of American legal education and scholarship.⁶ First, I establish and explain this form of American exceptionalism in the particular field of civil justice.⁷ In America, civil procedure is at the core of the first-year curriculum and plays host to a wide array of sophisticated scholarly approaches; American scholars intellectualize legal procedure to an unusual degree. Here, as elsewhere in the Article, I sharpen our understanding of America by comparing it to its close cousin: England.⁸ In marked contrast to the American position, few scholars in England focus their work on civil procedure, and most students pass through their law degrees

⁴ For more on the British judicial response, see John Ip, *The Supreme Court and House of Lords in the War on Terror*, 19 MICH. ST. J. INT'L L. 1 (2011) (considering the implications for individual liberties of decisions by the United States Supreme Court and the United Kingdom's House of Lords in war-on-terror litigation).

⁵ Martinez, *supra* note 2, at 1016; *see also id.* at 1078 (“[J]urists in many other nations simply do not share the American academic fascination with process and skepticism of rights-based arguments.”).

⁶ Aside from Martinez, *supra* note 2, surprisingly few scholars have written generally on the reasons for the proceduralist bent of American legal culture. As discussed in Section 3.2, *infra*, previous work on Anglo-American comparative civil procedure by Benjamin Kaplan and Masayuki Tamaruya has noticed that procedural questions seem to inspire more debate in American civil justice than in its English equivalent. *See* Benjamin Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 MICH. L. REV. 821, 844 (1971) (noting that “strife” over reforms of court procedure was “far less intense in England than in the United States”); Masayuki Tamaruya, *The Anglo-American Perspective on Freezing Injunctions*, 29 CIV. JUST. Q. 350, 363 (2010) (noting that “politics does not appear to play a significant role” in English civil procedure, whereas American civil procedure is “overtly political”).

⁷ By “civil justice,” I mean simply civil litigation (in public law and private law). *See* Jason M. Solomon, *What Is Civil Justice?*, 44 LOY. L.A. L. REV. 317, 321–24 (2010) (distinguishing among different uses of the phrase “civil justice” in academic and popular discourse).

⁸ Martinez conjectures that the legal systems of other nations are less proceduralist than the United States, but says that a comparative study of the relationship between substantive and procedural law is beyond the scope of her article. *See* Martinez, *supra* note 2, at 1078.

without giving it much thought. Proceduralism in civil justice, therefore, is not synonymous with the common-law tradition. Given their shared substantive and procedural heritage, the divergence between England and the United States is remarkable, and cries out for explanation.

Second, I provide a two-level account of the origins and circumstances of contemporary American proceduralism. At one level, I tie the high degree of salience that procedural questions have in American civil justice to distinctive features of civil litigation: Americans simply do more with civil litigation, and authority over civil justice is divided among varied actors. More fundamentally, I contend that American proceduralism is closely related to the history of American legal thought, in general, and to the rise of Legal Realism, in particular. The more obvious place to seek the origins of American proceduralism is the Legal Process movement that flourished in the 1940s and 1950s.⁹ But we gain a deeper understanding of the character of American proceduralism by looking back further, to the Legal Realists. I show that, as part of their embrace of an instrumental approach to legal justification, and their skepticism about the determinacy of substantive law, the Realists *themselves* called attention to the significance of procedure. Their work then provoked a proceduralist response in the shape of Legal Process thought. Through the intellectual descendants of the Realists and Legal Process theorists, the strongly proceduralist element in American legal thought lives on today.

The Article proceeds as follows. I begin in Section 2 with some analytical work, explaining precisely what I mean by proceduralism. In so doing, I canvass much of the existing scholarship on the substance-procedure relationship. In Section 3, I survey contemporary legal education and scholarship and show the centrality of procedure to American legal culture in the field of civil justice, contrasting it with English legal culture. In Section 4, I explore a partial explanation for the difference: American lawyers consider procedure more consequential in civil justice because procedure simply *is* more consequential in American civil justice. I give two sets of reasons. First, procedure is more important in

⁹ See Martinez, *supra* note 2, at 1064 (“Despite years of criticism of the limitations and shortcomings of Legal Process methodology, there is enduring (and not entirely unwarranted) appeal in the promise that if we can just figure out a good process for making decisions, the hard policy questions of the time will be resolved correctly.”).

American civil justice because Americans place more faith in civil litigation, relying on private parties as agents of regulation, where other legal systems choose a government-led solution or leave the social problem to market or social pressure.¹⁰ So the stakes in American civil justice are higher than elsewhere, and the peculiarly American reliance on litigation has spawned procedural innovations like class actions and large punitive damages. These developments give American procedure scholars more to write about and American students more to learn. Second, adjudicative power over civil justice in America is distinctively fragmented among different actors—between federal courts and state courts and between judge and jury.¹¹ Procedural law is so significant in America partly because it polices the boundaries between these various actors. I support these contentions by again focusing on the American-English contrast. In England, power over civil justice is reposed mainly in a single, relatively homogeneous, set of judges. The English legal system's essentially unitary character and the near-extinction of its civil jury are crucial factors in the continued dominance of substance over procedure in England.

While these distinguishing features of American civil justice are a vital part of the story, I believe they do not alone explain the full extent of American proceduralism. Accordingly, Section 5 explores deeper reasons, reasons that lie in the history of legal thought. Looking to the intellectual history of American law, I find the roots of contemporary proceduralism in the emergence of Legal Realism in the 1920s and 1930s. The Legal Realists fomented skepticism about substantive law, gaining near-universal acceptance for Llewellyn's dictum that "law in the books" (in essence, substantive law) often differs fundamentally from "law in action" (affected by procedure). The more one sees law as a means of achieving economic or political goals, as American lawyers and legal theorists typically do, the more important procedure becomes in assessing the law's actual contribution to those goals. The Realists did not just talk about procedure (though they certainly did that); one of their number, Charles E. Clark, was the principal architect of the Federal Rules of Civil Procedure. Thereafter, the response of Legal Process theorists to the Realist attack on the

¹⁰ See Section 4.1, *infra*.

¹¹ See Section 4.2, *infra* (discussing the fragmentation of power in the civil justice system).

coherence of substantive law was to seek agreement on procedural solutions, thus assuring the special significance of procedure in the way Americans think about law. An understanding of the importance of procedure is now almost unanimous among American lawyers.

Again, I reinforce my argument by focusing on the English comparison. At the end of the nineteenth century, Anglo-American lawyers shared a belief in the primacy of substantive law. The English, however, retained this belief, while procedure grew in importance for the American legal academy. Unlike the United States, England never had a Realist revolution, and the English still place less weight on procedural questions in civil justice. This, I suggest, is no coincidence. My comparative law case for the connection between Realism and proceduralism is strengthened by analysis of a 1932 article by a leading Realist, Thurman Arnold.¹² As Arnold and his colleagues attacked previous understandings of the substance-procedure distinction, Arnold looked across the Atlantic to find that substantive law retained its privileged position. Arnold was describing a transatlantic divergence that remains eighty years later.

In short, the Article links two intuitions that commonly strike people who, like me, have come to the American legal system from another: (i) that American legal culture is deeply affected by Legal Realism, and (ii) that Americans are exceptionally interested in procedure. The argument is not a simplistic one that Legal Realism “caused” American proceduralism; I suggest the possibility of mutual causation between these two crucial aspects of American legal life.

2. PROCEDURALISM

Legal scholars frequently use the word “proceduralism,” and the corresponding word “proceduralist.”¹³ Proceduralism, whatever it may be, has received plenty of attention in criminal

¹² See Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 643 (1932).

¹³ The word “proceduralist” is used mainly as a noun (usually to denote a person who espouses proceduralism), but also sometimes as an adjective (to describe an institution or argument that partakes of proceduralism). “Proceduralistic” also makes an occasional appearance in the law reviews.

law,¹⁴ constitutional theory,¹⁵ the legislative process,¹⁶ political philosophy,¹⁷ legal theory,¹⁸ bankruptcy law,¹⁹ corporate law,²⁰

¹⁴ As I discuss further in note 60, *infra*, Bill Stuntz provides a detailed description and critique of proceduralism in criminal justice. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 196-242* (2011); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006) (arguing that “constitutional proceduralism” during the 1960s and 1970s backfired and led to a harsher criminal justice system); William J. Stuntz, *Substance, Procedure, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1 (1996) (examining the intersection of two lines in constitutional law: “the line that separates criminal from civil, and the line between substance and process”); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 74-76 (1997) (arguing for a doctrine-by-doctrine examination of the law of criminal procedure to determine whether the costs of procedures are worthwhile). For further criticisms of “proceduralism” in criminal law, see *Developments in the Law: The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1158-63 (2008) (criticizing the Supreme Court’s “proceduralism” in cases involving mental capacity determinations); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case Of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003) (challenging “the proceduralist approach to criminal procedure”).

¹⁵ Most theoretical attempts to justify the American practice of judicial review of legislation may be characterized as proceduralist. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (providing a “representation-reinforcing” account by leading exemplar John Hart Ely, which has been described by both critics and allies as involving proceduralism); see also Michael C. Dorf, *The Coherency of Democracy and Distrust*, 114 YALE L.J. 1237, 1268 (2005) (stating that Ely “espouses proceduralism” and “goes so far as to suggest that it is in the very nature of a constitution to create a procedural framework rather than to resolve substantive issues”); Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (criticizing Ely on the ground that “[t]he process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values”). Cf. Frank I. Michelman, *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, 42 TULSA L. REV. 891, 891 (2007) (describing the “proceduralistic turn” in liberal thought about how to justify judicial review of legislative action).

¹⁶ See Jeremy Waldron, *Principles of Legislation, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 15, 31 (Richard W. Bauman & Tsvi Kahana eds., 2006) (defending scholarship that focuses on the rules governing the legislative process against charges of “mindless proceduralism”).

¹⁷ For example, the work of John Rawls has been characterized as “proceduralist,” partly because of Rawls’s assertion that the subject-matter for a theory of justice is the basic structure of society, and partly because Rawls uses the procedural device of agreement behind a veil of ignorance as a justificatory strategy. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999). See also Michelman, *supra* note 15, at 102; cf. Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI.-KENT. L. REV. 589, 616-18 (1994)

administrative law,²¹ employment law,²² the law of public schools,²³ and election law.²⁴ Whether they simply identify proceduralism, consider themselves proceduralists, or diagnose proceduralism as a malady, scholars rarely attempt to define these terms. Clarifying, or at least stipulating, the meaning of

(examining the relationship between procedure and substance in political philosophy and arguing that Rawls has a substantive conception of justice).

¹⁸ Debates over the concept of “rule of law” often center on the contrast between proceduralist views and substantive views. See, e.g., Daniel B. Rodriguez, Mathew D. McCubbins & Barry R. Weingast, *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1469–71 (2010) (contrasting the “substantive” conceptions of the rule of law held by Hayek, Rawls, and Dworkin with Raz’s “proceduralist” account).

¹⁹ See Douglas G. Baird, *Bankruptcy’s Uncontested Axioms*, 108 YALE L.J. 573, 576–77 (1998) (dividing bankruptcy law scholars into “traditionalists” and “proceduralists”); Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 931 (2004) (defending “proceduralism” as an account of U.S. bankruptcy law).

²⁰ Park McGinty, *The Twilight of Fiduciary Duties: On the Need for Shareholder Self-Help in an Age of Formalistic Proceduralism*, 46 EMORY L.J. 163, 172 (1997) (arguing that procedural protections for shareholders against director self-interest are inadequate).

²¹ See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1341 (2006) (referring to the “proceduralism that dominates post-APA legal thinking in administrative law”); David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 230 (criticizing the “simple promotion of proceduralism” by the U.S. Supreme Court in *United States v. Mead*); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 233 (1992) (contending that “[t]he APA is a prominent example of the dialectical relationship between expertise theory and proceduralism” and that “[a] declining faith in the ability of experts” led to “a re-emergence of proceduralism.”).

²² See Paul M. Secunda, *Labor and Employment Law*, 64 INDUS. & LAB. REL. REV. 203, 204 (2010) (reviewing CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010)) (defining as “proceduralist” an “approach that emphasizes the existence of procedural devices to mitigate employer unfairness in the workplace” and describing Estlund’s argument as proceduralist).

²³ See Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415 (2011) (examining proceduralism in the Individuals with Disabilities Education Act); David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976) (considering the power and pitfalls of procedural protections as a means of curbing arbitrary behavior by public school officials).

²⁴ See, e.g., Edward B. Foley, *Electoral Dispute Resolution: The Need for a New Sub-Specialty*, 27 OHIO ST. J. ON DISP. RESOL. 281, 286 (2012) (proposing a new scholarly field named “Democratic Proceduralism” that “ambitiously attempts to develop new and better procedures for operating a democratic society”).

proceduralism is a crucial preliminary step in my argument that proceduralism is a defining feature of American civil justice. I ask first: what is procedure? Then, I ask: what kind of orientation towards procedure counts as proceduralism?

2.1. Procedure and Substantive Law

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

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

²⁵ John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974). See also Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 192 (2004) (describing the procedure-substance distinction as “a tough nut to crack”). A recent remark by Joseph Blocher is representative of the prevailing academic attitude toward the procedure-substance distinction. Blocher employs the terms “substantive” and “procedural,” while “knowing that the distinction between substantive and procedural rights is blurry at best.” Joseph Blocher, *Rights To and Not To*, 100 CAL. L. REV. 761, 765 n.20 (2012).

²⁶ See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995) (“Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle. They do not offer larger or more abstract explanations than are necessary to decide the case.”) (citations omitted).

²⁷ See Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 810 (2010) (“[S]ubstance and procedure . . . are not only counter-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2. Proceduralism as Belief in the Centrality of Procedural Questions

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

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

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

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

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

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

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

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

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

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

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

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

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

3. AMERICAN PROCEDURALISM IN CIVIL JUSTICE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶³ 95 U.S. 714 (1877).

⁶⁴ 326 U.S. 310 (1945).

⁶⁵ 495 U.S. 604 (1990).

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

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

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

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

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

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

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

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

⁷¹ See Section 2.1, *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸¹ Eskridge, *supra* note 53, at 947.

⁸² *Id.*

⁸³ *Id.*

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

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

contrast the very different position in England.⁸⁶ England is a close legal cousin to the United States in many ways, making comparison a fruitful exercise, because it reduces the number of variables.⁸⁷ Moreover, focusing on the English contrast is particularly useful because it cuts off the argument that an American-style degree of proceduralism is an inherent feature of the common-law tradition.⁸⁸ Given the practical importance of procedural questions to the lives of lawyers and to the outcome of cases, the minor role that civil procedure plays in contemporary English legal education and scholarship is extraordinary.

English legal academics have almost entirely ceded the territory of civil procedure to the legal profession.⁸⁹ The most obvious symptom of civil procedure's neglect is its marginal place in legal education. The standard path to a legal career as a solicitor

⁸⁶ "England" here is shorthand for "England and Wales." What I say about England and Wales appears to be true throughout the United Kingdom, but Scotland's legal system and culture remain distinct from England's; Northern Ireland, too, may present special features that would unduly complicate the analysis.

⁸⁷ P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1004-05 ("England is still thought to share much of American legal culture and legal ideals, even if, to paraphrase George Bernard Shaw, England and America sometimes appear to be two countries divided by a common legal heritage.") (footnote omitted).

⁸⁸ I have not sought to gauge the level of proceduralism in civil-law systems. But there are some suggestions in the literature that, in the twentieth century, at least, procedure had an even lower scholarly and curricular profile in continental Europe than in England. See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1211 (2005) ("In sharp contrast to American law schools, which treat the study of procedure as a fundamental component of legal education, continental European law faculties deem procedure to be of negligible interest and focus instead on conveying abstract principles of substantive law."); Mirjan Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363, 1368 (1968) (stating that an American lawyer would be surprised that he would "almost never . . . find discussion of the influence of procedural considerations on substantive issues' in a Continental law faculty").

⁸⁹ Hence, Atiyah and Summers wrote in 1987 that "English academics have abandoned certain subjects entirely to the professions. Thus there is very little (if any) law school teaching of such subjects as legal ethics and civil procedure." P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 407 (1987). See also P.S. ATIYAH, *PRAGMATISM AND THEORY IN ENGLISH LAW* 133 (1987) ("What the academics need to bear in mind is that it is not their task to ape the practitioners.").

or barrister in England is a three-stage process: (1) a three-year undergraduate degree in law at a university (the “academic stage”); (2) a year of classroom instruction in the more mundane knowledge needed to practice law (the “vocational stage”); and (3) a one-year or two-year period of apprenticeship.⁹⁰ At the academic stage, English legal scholars and the students they teach divide law into the substantive law categories at the core of a law degree: contract law, tort law, land law, trusts law, constitutional law, administrative law, and European law.⁹¹ The vast majority of English law students pass through their degrees without ever thinking seriously about civil procedure. Indeed, it was *impossible* in the academic year 2011-12 for an undergraduate law student to take a civil procedure course at four of the law schools ranked in the top five by *The Times*.⁹² For the most part, anything a student might learn about civil procedure in the academic stage of legal education comes accidentally when learning substantive law.⁹³ John Langbein, who studied law in England and in the United States, has said: “If I were given the power to make one change in

⁹⁰ Lawyers in England and Wales are either solicitors or barristers. Budding solicitors spend two years as “trainees” before qualifying. Young barristers spend one year as “pupils” before being called to the Bar. See Nigel Duncan, *Gatekeepers Training Hurdles: The Training and Accreditation of Lawyers in England and Wales*, 20 GA. ST. U. L. REV. 911, 913 (2004).

⁹¹ As a condition of recognizing a law degree, the legal professions require universities to offer the following compulsory subjects: “(1) Public Law, including Constitutional Law, Administrative Law, and Human Rights; (2) Law of the European Union; (3) Criminal Law; (4) Obligations, including Contract, Restitution, and Tort; (5) Property Law; and, (6) Equity and the Law of Trusts.” Duncan, *supra* note 90, at 913 n.6.

⁹² The top five English law schools in *The Times*’s “Good University Guide 2011” were as follows: Oxford; Cambridge; the London School of Economics; University College, London; and Durham. Even at Cambridge, the only one of the five to offer civil procedure to undergraduates, it could only be taken as a “half-subject” in the student’s final year. Some of the other schools do offer civil procedure as an option for post-graduate students taking master’s degrees in law.

⁹³ Some students will learn something about civil procedure when they take administrative law; many English texts and courses cover the special procedures governing judicial review of government action. See, e.g., WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* ch. 18 (10th ed. 2010). And some students may learn about pre-judgment remedies in courses on Equity. See, e.g., JILL E. MARTIN, HANBURY & MARTIN: *MODERN EQUITY* chs. 23 & 24 (18th ed. 2009). But the point remains: the vast majority of students never study civil procedure as a subject in its own right during a law degree.

English legal education, it would be to have civil procedure taken seriously."⁹⁴

It is not that English civil procedure is devoid of significant problems to study. Far from it: the past fifteen years have seen the English legal system in a fairly constant state of procedural turbulence. The late 1990s brought the Woolf Reforms, named after the judge whose report on *Access to Justice* contended that the civil justice system was too slow, too unequal, too costly, too uncertain, too fragmented, too adversarial, and too complex. The *Access to Justice* report formed the basis for wholesale changes in the civil litigation system and a whole new set of Civil Procedure Rules.⁹⁵ The Woolf Reforms ushered in a new interventionist approach to case management and aimed to promote the use of alternative dispute resolution.⁹⁶ The new rules expand the availability of summary judgment, a remedy previously unavailable in large classes of cases.⁹⁷ Moreover, England has altered its litigation-funding rules to allow "no win, no fee" agreements in some cases, prompting radical innovations in the

⁹⁴ John H. Langbein, *Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons*, in 2 *PRESSING PROBLEMS IN THE LAW: WHAT ARE LAW SCHOOLS FOR?* 1, 1 (P.B.H. Birks ed., 1996). See also JACK I.H. JACOB, *THE FABRIC OF ENGLISH CIVIL JUSTICE* 252 (The Hamlyn Lectures, Thirty-Eighth Series, 1986) (noting the "deplorable fact" that civil procedure is generally not a required subject for obtaining a law degree).

⁹⁵ The Woolf Reforms also imposed a large-scale reform of terminology in the hopes of making legal language more accessible to the general public. Thus England no longer has "plaintiffs," but instead has "claimants." Writs of certiorari, prohibition, and mandamus have been renamed "quashing order," "prohibiting order," and "mandatory order," respectively. A civil action was previously started by "writ" or by "summons"; now the originating document is a "claim form." The pleadings in an action are called the "statements of case." See Civil Procedure Rules, 1998, S.I. 1998/3132 (L. 17) (Eng. & Wales) (laying down the rules of civil procedure in the High Court, county courts, and Court of Appeal (Civil Division)).

⁹⁶ See NEIL ANDREWS, *THE MODERN CIVIL PROCESS: JUDICIAL AND ALTERNATIVE FORMS OF DISPUTE RESOLUTION IN ENGLAND* pt. III (2008) (discussing alternative civil justice including settlement, mediation, and the framework of English arbitration); LORD WOOLF M.R., HM'S STATIONERY OFFICE, LORD CHANCELLORS DEP'T, *ACCESS TO JUSTICE: FINAL REPORT* (1996) (U.K.) (aiming to "simplify and harmonize" procedures for High Court and county court cases).

⁹⁷ Civil Procedure Rules, 1998, S.I. 1998/3132 (L. 17) (Eng. & Wales) pt. 24 (touching upon summary judgment, "a procedure by which the court may decide a claim or a particular issue without a trial").

legal profession in the personal injury field,⁹⁸ and a rearguard action by insurance companies. Remarkably, a generally favorable court decision⁹⁹ has created a fledgling industry devoted to third-party funding of litigation.¹⁰⁰ And England is experimenting with the “group action,” a diluted form of the American class action.¹⁰¹ Taken together, these reforms amount to major changes in the administration of civil justice.

But despite the abundance of procedural tumult, “[c]ivil procedure scholars are a rare breed.”¹⁰² One writer justly notes the “paucity of rigorous analytical or theoretical literature dealing with civil justice matters” in common-law countries other than the United States.¹⁰³ It is common to lament that writers on English

⁹⁸ See Herbert M. Kritzer, *Fee Regimes and the Cost of Civil Justice*, 28 CIV. JUST. Q. 344 (2009) (analyzing reforms of fee systems for lawyers).

⁹⁹ *Arkin v. Borchard Lines Ltd.*, [2005] EWCA (Civ) 655, [2005] 1 W.L.R. 3055 (Eng.) (permitting the practice of professional third-party litigation funding and limiting a third-party funder’s liability for costs to the extent of the funding it provided).

¹⁰⁰ See Rachael Mulheron & Peter Cashman, *Third-Party Funding of Litigation: A Changing Landscape*, 27 CIV. JUST. Q. 312, 312–13 (2008) (“There has been an increasing number of litigation funders and brokers entering into the market; hedge fund interest in backing commercial litigation has expanded; . . . a consultation by the Office of Fair Trading has endorsed third-party funding in private actions for breaches of competition law; and Sir Anthony Clarke M.R. has extra-judicially expressed ‘in principle’ approval for regulated litigation funding.”) (citing *Private Actions in Competition Law: Effective Redress for Consumers and Business* 27–28 (Office of Fair Trading Discussion Paper, OFT916, Apr. 2007), available at http://www.offt.gov.uk/shared_offt/reports/comp_policy/of916.pdf; Neil Rose, *Drive for Transparency on Third-Party Funding*, LAW SOC’Y GAZETTE, Feb. 14, 2008, <http://www.lawgazette.co.uk/news/drive-transparency-third-party-funding> (“I am in principle a supporter of third-party funding, provided that appropriate regulation is put in place.”)).

¹⁰¹ See generally Rachael Mulheron, *Recent Milestones in Class Actions Reform in England: A Critique and Proposal*, 127 LAW Q. REV. 288 (2011) (discussing the preference for sectoral reform which English governmental policy-makers have shown to date).

¹⁰² Susan M.C. Gibbons, Book Review, 122 LAW Q. REV. 336, 336 (2006) (reviewing RACHAEL P. MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* (2004)); see also JACOB, *supra* note 94, at 252–53 (“[T]here is hardly any research taking place in the subject at Universities . . . [C]ivil procedural law remains the Cinderella of the legal academic world.”). The problem is longstanding. In 1926, an English legal scholar remarked that “very little has been written upon Civil Procedure of a critical or analytical character since the days of Bentham.” See Maurice Amos, *A Day in Court at Home and Abroad*, 2 CAMBRIDGE L.J. 340, 340 (1926).

¹⁰³ See Susan M.C. Gibbons, *AAS Zuckerman Civil Procedure*, 4 OXFORD U. COMMONWEALTH L.J. 129, 130 (2004) (book review) (noting that civil procedure has

civil procedure focus too much on the “nuts and bolts,” and that scholars should “give more attention to the purposes [civil [procedure] serves.”¹⁰⁴ There are some recent signs of change.¹⁰⁵ The implementation of the Woolf Reforms inspired two outstanding treatises—one emanating from Oxford,¹⁰⁶ the other from Cambridge.¹⁰⁷ But these books are bright stars in an otherwise dark sky, and given their cost, their level of detail, and the absence of civil procedure on the curriculums of most law schools, they are mostly read by practitioners and judges.¹⁰⁸ One scholar, reviewing the two treatises in 2005, said that “[t]he arguments in favour of civil procedure’s forming an important part of English legal studies have long been overwhelming; yet the resources have been lacking.”¹⁰⁹ Though hopeful for the future, the reviewer aptly summed up civil procedure’s current position in England: “many students and academics working on English law

not attracted a high level of academic attention or sustained critical examination as compared with other areas of law).

¹⁰⁴ J.A. JOLOWICZ, *ON CIVIL PROCEDURE*, at ix (2000) (claiming that English legal scholars “have concentrated almost exclusively and for far too long on the ‘nuts and bolts’ of litigation and, in particular, on its costs and its delays”).

¹⁰⁵ In addition to doctrinal work, there has also been some serious empirical work on English civil justice by socio-legal scholars. See, e.g., HAZEL GENN, *JUDGING CIVIL JUSTICE* (2010); Hazel Genn, *Understanding Civil Justice*, 50 *CURRENT LEGAL PROBS.* 155 (1997).

¹⁰⁶ ADRIAN ZUCKERMAN, *ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE* (2006). Cf. Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 *AM. J. COMP. L.* 709 (2005) (reviewing, *inter alia*, ZUCKERMAN, *supra*). Zuckerman’s treatise combines an unusual degree of theoretical rigor with doctrinal discussions. In a recent court decision, the book was described as a “valuable pioneering exposition of the principles of procedural law.” *Emerald Supplies Ltd. v. British Airways plc*, [2010] *EWCA (Civ)* 1284, [2011] 2 *W.L.R.* 203, 205 (Eng.). Unsurprisingly, given the state of English scholarship on civil procedure, Zuckerman often draws on American materials for theoretical background.

¹⁰⁷ NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM* (2003). Cf. Geoffrey C. Hazard, Jr., *Two Valuable Treatises on Civil Procedure*, 37 *N.Y.U. J. INT’L L. & POL.* 611 (2005) (reviewing, *inter alia*, ANDREWS, *supra*); Marcus, *supra* note 106 (reviewing, *inter alia*, ANDREWS, *supra*).

¹⁰⁸ See Hazard, *supra* note 107, at 612 (stating that Andrews’s book is “written primarily for barristers and solicitors engaged in litigation in England”); Dyson L.J., *Book Review*, 26 *CIV. JUST. Q.* 389, 392 (2007) (reviewing ZUCKERMAN, *supra* note 106) (stating that Zuckerman’s book “should be in the library of anyone who is a serious civil litigation practitioner”).

¹⁰⁹ Ben McFarlane, *Book Review*, 121 *LAW Q. REV.* 343, 343 (2005) (reviewing ZUCKERMAN, *supra* note 106, and ANDREWS, *supra* note 107) (“[I]t has always been a struggle to find general treatments which can both inform and inspire.”).

have not been disabused of the mistaken but tenacious impression that civil procedure consists of an arbitrary set of technical rules, to be endured in the real world but ignored in university."¹¹⁰ There are a few notable exceptions to this general rule, but the small number of dedicated English civil procedure scholars must feel isolated among, and underappreciated by, their colleagues.¹¹¹

4. PROCEDURALISM-PROMOTING FEATURES OF AMERICAN CIVIL LITIGATION

One obvious form of explanation for the American exceptionalism identified in Section 3 is to say that procedure simply matters more to American civil justice. Americans have shown greater faith in civil litigation than their counterparts elsewhere, and more willingness to harness the power of "private Attorneys-General."¹¹² And procedural questions justifiably loom larger in a system, like the American, where power over civil litigation is divided among several different actors—state courts and federal courts, judges and juries. Based on these relatively distinctive features of American litigation, one might argue that questions of procedure rightly demand a larger share of American attention. I believe these reasons do not fully account for American proceduralism, but they are a significant part of the story. Again, I draw on the comparative example of England for support.

4.1. American Faith in Private Litigation

For several decades, American courts and legislatures were considerably more likely than their equivalents in other nations to respond to a social problem by conferring a private cause of action. Where other nations have relied on social pressure or regulatory actions by government agencies to check undesirable behaviour, Americans have often chosen instead to confer power on

¹¹⁰ *Id.*

¹¹¹ See ANDREWS, *supra* note 107, at 23 (civil procedure is "barely on the curricular map except in a handful of universities").

¹¹² See Hazard, *supra* note 107, at 623 ("In both England and Germany, redress of injuries is regarded as a social responsibility to be managed through state regulatory systems, such as health care in the case of personal injury. In the United States, on the other hand, injuries primarily have been addressed in terms of private initiative and allocation of responsibility among private actors through adjudication.").

individual plaintiffs and their lawyers to bring lawsuits and hold defendants in check. This observation is commonplace in comparative-law studies of American legal system.¹¹³ Americans have been willing to depart from traditional conceptions of civil litigation to make it easier for plaintiffs to hold defendants accountable. Again, the English counter-example is instructive. Benjamin Kaplan—a Harvard proceduralist and previously the Reporter to the Advisory Committee on the Federal Rules of Civil Procedure—observed in 1971 that “in England social problems have not framed themselves so readily as cases for the courts; the courts by reason of long disengagement have not been looked to as dynamic instruments of public betterment.”¹¹⁴ Social problems, we might add, do not really “frame themselves”; people frame them in certain ways.¹¹⁵

One symptom of American enthusiasm for pursuing regulatory goals via private litigation is the ability of juries applying state tort law to award large amounts of punitive damages in personal injury cases—notwithstanding the Supreme Court’s attempts to cabin their ability to do so.¹¹⁶ Multiple damages are also available in many areas of American law by legislative choice. Congressional authorization of treble damages in federal antitrust cases even led to diplomatic friction between the United Kingdom and the United States during the the 1970s and 1980s.¹¹⁷ Another

¹¹³ See, e.g., John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 291–92 (2010) (noting that many Europeans remain skeptical of the forms of “entrepreneurial litigation” developed in the United States); Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 288–301 (2002) (outlining exceptional features of American procedure: the civil jury, the party-driven discovery process, the passive judge, and the role of warring experts).

¹¹⁴ Kaplan, *supra* note 6, at 845 (arguing that “much more is involved [in questions of procedural reform] than judgments about narrow procedural devices”).

¹¹⁵ See ERVING GOFFMANN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 453 (1981) (“The psychological principles that govern the perception of decision problems and the evaluation of probabilities and outcomes produce predictable shifts of preference when the same problem is framed in different ways.”).

¹¹⁶ See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (holding that an award of \$2,000,000 in punitive damages was grossly excessive).

¹¹⁷ See, e.g., W.C. Beckett, *United Kingdom*, in *Symposium, Transnational Litigation – Part II: Perspectives from the U.S. and Abroad*, 18 INT’L LAW. 773 (1984) (discussing the significance of United Kingdom’s Protection of Trading Interests

obvious result of greater American enthusiasm for “plaintiff power” is the class action. Even as Congress and state legislatures have sought to curtail the class action, the political machinations and interest-group politics behind class action reform provide yet more grist for the American proceduralists’ mills.

Even after many years of conservative backlash,¹¹⁸ various features of the American civil justice system remain more favorable to plaintiffs than those of equivalent economically advanced nations. Parallel developments in the English law of supra-compensatory damages, for example, have been considerably more cautious, with the courts hewing closely to the notion that the purpose of tort law is to award compensation.¹¹⁹ The longstanding ability of American plaintiffs’ lawyers to aggregate and control many small claims constitutes—to English eyes—a remarkable departure from the traditional bipolar conception of litigation, giving rise to new kinds of lawsuit and a whole host of legal and ethical issues. Even after curtailments of the American class action, the English equivalent—the “group action”—remains in the early stages of its development and is exceedingly tame by comparison.¹²⁰

Act 1980 as a legislative response to what it saw as excessive claims to jurisdiction).

¹¹⁸ See, e.g., Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002) (discussing decades of criticism of trends in tort law and calls for “tort reform”).

¹¹⁹ See *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.) (Eng.) (holding that exemplary damages were only available in three situations: “(i) oppressive, arbitrary or unconstitutional actions by government servants; (ii) where the defendant’s conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; (iii) where expressly authorized by statute . . .”). In recent years, however, English courts have loosened this restrictive approach in modest ways. See, e.g., *Kuddus v. Chief Constable of Leicestershire Constabulary*, [2001] UKHL 29, [2002] 2 A.C. 122 (H.L.) (appeal taken from Eng.) (“[T]here is no basis in *Rookes v Barnard* [1964] AC 1129 for the view that the power to award exemplary damages exists only in torts which had been decided to have that character prior to 1964.”).

¹²⁰ One major difference is that English courts have so far taken a strict view of the “representativeness” requirement for an American-style “opt-out” class action. A representative party must have the “same interest” as those she represents. In a striking recent example, the English Court of Appeal refused to allow a collective litigation of an antitrust claim by direct and indirect purchasers of freight services. *Emerald Supplies Ltd. v. British Airways plc*, [2010] EWCA (Civ) 1284, [2011] 2 W.L.R. 203, 218 (Eng.). By way of contrast, a similar putative class action is proceeding in the United States District Court for the Eastern District of New York, and has already yielded several multi-million-dollar

Relatedly, the phenomenon of “public law litigation”¹²¹ — which allows judges to assume ongoing supervisory powers over schools, hospitals, prisons, police departments — “has no counterpart in England.”¹²² For reasons political and practical, public law litigation has fallen out of favor to some extent since its 1970s heyday, but the recent Supreme Court decision requiring California to reduce its prison population is a compelling reminder of the potential power of American civil litigation to force wholesale institutional changes.¹²³

No comparative sketch of the English and American civil justice systems would be complete without considering the allocation of responsibility for attorney’s fees. Under the “English rule,” the loser pays the winner’s costs and lawyers’ fees, while under the “American rule,” each side bears its own costs and fees.¹²⁴ To the extent that America departs from the American rule, it does so mainly to provide one-way fee-shifting in favor of victorious plaintiffs in civil rights and consumer law cases as a means of encouraging these classes of plaintiff to bring suit. Meanwhile, before deciding to file an action, the English claimant must consider the risk that she will both lose her case and be obligated to pay the defendant’s legal bills. Predictably, fewer English claimants are willing to stick their heads above the parapet to test the law’s outer limits. In turn, American lawyers must expend more of their energies on devices that allow courts, before trial, to dispose with the greater volume of meritless cases that results from the more plaintiff-friendly rules.

In sum, the American litigation system is a rough-and-tumble world, ripe with political controversy. By comparison, the more

settlements. See *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG)(VVP), 2011 WL 2909162 (E.D.N.Y. July 15, 2011) (involving antitrust claims brought by indirect and direct purchasers against airlines engaging in price fixing in the air cargo industry).

¹²¹ See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (discussing public law litigation and how it might redefine the place of law and courts in American politics).

¹²² ATIYAH & SUMMERS, *supra* note 89, at 152.

¹²³ See *Brown v. Plata*, 131 S. Ct. 1910, 1929 (2011) (“[W]hen necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population.”).

¹²⁴ E.g., David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 IND. INT’L & COMP. L. REV. 583 (2005).

stable English procedural regime seems to lack the capacity to provoke such impassioned debate.

4.2. Fragmentation of Power in American Civil Justice

American enthusiasm for private litigation, however, is not enough to explain America's exceptional proceduralism. True, the greater availability and potency of American lawsuits generates a great deal of procedural interest, but it also throws up many issues of substantive law. To continue our comparative reference point, English legal scholars seem to allocate just as great a proportion of their scholarly efforts to civil litigation. The difference is that English scholars are overwhelmingly drawn to writing about judges' rulings on substantive law, rather than in the procedural questions the judges resolve along the way. We find a somewhat more satisfying explanation for the greater American interest in procedure, however, when we add to our analysis the differing structures of the contrasting legal systems.

In short, civil procedure matters more in America because authority over civil cases is divided among a greater number of different entities.¹²⁵ Most procedural doctrine is concerned with delineating the boundaries between these entities. In England, decision-making power is concentrated with a single, relatively homogeneous, group of judges. Accordingly, there is often no real English equivalent to the procedural questions that provoke the most spirited debate in America; these concern the divisions of power among federal courts and the various state courts, and between judge and jury. Benjamin Kaplan noticed this striking difference between English and American litigation after spending a few days in London's Royal Courts of Justice.¹²⁶ Kaplan

¹²⁵ See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 223 (photo. reprint 1991) (1986); Tamaruya, *supra* note 6, at 364 (unlike in England, "[t]he American procedure is overtly political not only in the sense that the politicians are actively involved but also in the sense that the debates on procedures concern the distribution of power among different decision-makers or different groups of people in the society."). Relatedly, Atiyah and Summers note that "[b]y comparison with the English position, the United States has a veritable profusion of formal sources of law." ATIYAH & SUMMERS, *supra* note 89, at 55.

¹²⁶ Kaplan, *supra* note 6, at 821. Kaplan noticed that procedural matters were largely resolved by masters rather than judges, and commented that "[o]ne connects the masters' work with the fact that procedure in England has been put in the adjective or subordinate place where it seems to belong." *Id.* at 828.

suggested that civil procedure had a lesser place in England because “England is a legal unit without the complications of competency, jurisdiction, and venue that can bedevil an action in a federal system.”¹²⁷

For example, the horizontal allocation of sovereign power among the several states, along with geographic scale, largely accounts for the importance of personal jurisdiction questions in America. For the most part, these issues arise when a plaintiff sues a defendant from one state in a court located in another state.¹²⁸ As well as the sheer inconvenience of litigating in a far-flung place—America is a big country—the defendant may be concerned that the plaintiff’s chosen forum will be less favorable to her than another. For obvious reasons, these questions arise less often in England, where a greater proportion of litigation is conducted solely by parties from the single, unitary jurisdiction of England and Wales.¹²⁹

In the United States federal courts, the scope of federal jurisdiction is crucial in part because parties and observers rightly discern significant differences between federal judges (appointed by the President and confirmed by the Senate) and state-court judges (many of whom are elected or are at least subject to retention elections.)¹³⁰ To take another example, the *Erie* doctrine is so important to American lawyers because it represents the federal courts’ attempt to define the area where they must defer to the

¹²⁷ *Id.*

¹²⁸ Of course, some American personal jurisdiction cases involve defendants from outside the United States. *See supra* note 67 (discussing *McIntyre*, an action brought in New Jersey against a defendant incorporated in England, and *Asahi*, a case brought in California against Japanese manufacturer).

¹²⁹ Procedural questions do loom large in the small, but important, field of transnational commercial litigation in England. *See, e.g.,* LAWRENCE COLLINS ET AL., DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS (14th ed. 2008). More broadly, in recent years, two rival court systems—the European Court of Human Rights and the courts of the European Union—have begun to chip away at the English courts system’s near-monopoly on adjudicative authority over English disputes. But the contrast with the United States remains stark, especially because there are no European equivalents (yet) to the federal district courts. The recent agreement for a unified European patent court is an important indication of likely future moves towards more intrusive European Union authority over adjudication. *See* Owen Bowcott, *Unified Patent Court Split Between Paris, London and Munich*, GUARDIAN, July 3, 2012, <http://www.guardian.co.uk/law/2012/jul/03/unified-patent-court-london>.

¹³⁰ *See* JED SHUGERMAN, THE PEOPLE’S COURTS: THE RISE OF JUDICIAL ELECTIONS AND JUDICIAL POWER IN AMERICA (2012).

law-making authority of the several States. Many other key topics in American civil procedure also draw their significance from the fact of judicial federalism, including the scope of federal court jurisdiction, the rules governing removal from state court to federal court in cases of jurisdiction, and the rules governing interjurisdictional preclusion. That these questions have *constitutional* significance reinforces the prestige of the field.

The importance of federalism to the American procedural system is even more obvious when one turns to the subject matter of the Federal Courts course. The shifting extent of State sovereign immunity and Congress's power to abrogate it are bound up with the tussle between national authority and the prerogatives of the States. Studying the scope the United States Supreme Court's power to review state court decisions similarly entails consideration of questions of federalism. And much of the topic of abstention arises from the possibility of concurrent litigation in state and federal courts.¹³¹ Again, the subject of federal habeas corpus review of state-court criminal judgments exists because of the divided authority between state courts and federal courts. There is no equivalent form of review in England's unitary legal system, where the only kind of judicial post-conviction relief is a new appeal within the same system.¹³² Indeed, two acute observers of the differences between England and America noted in 1987 that "[t]he whole concept of collateral attack is utterly alien to English lawyers, and indeed seems to them to be subversive of the authority of judicial decisions."¹³³

¹³¹ See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 588 (1985) (discussing the various doctrines under which federal courts abstain from exercising their jurisdiction, and noting the need for federal courts to avoid "undue interference" with the states).

¹³² See Criminal Justice Act, 1995, (A.S.P. 46) 51 & 52, c. 44 (Eng.) (indicating that under the current system for review of previously adjudicated criminal cases, the Criminal Cases Review Commission considers applications for post-conviction review and refers cases to the Court of Appeal of England and Wales—the same court to which an initial appeal goes in a serious criminal case).

¹³³ ATIYAH & SUMMERS, *supra* note 89, at 217. This statement is no longer true without qualification; collateral attack has gained ground in England since several miscarriages of justice came to light in the late 1980s and early 1990s. See David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1042 (2010) ("A number of high-profile exonerations in the 1980s and 1990s raised concerns in the U.K. about the prevalence of wrongful convictions and the paucity of mechanisms to correct them. In particular, the case of the "Birmingham Six"—six Irish men falsely convicted of bombing a pub in

Even once jurisdictional issues are settled, a major division of power remains in most American civil cases¹³⁴ between judge and jury.¹³⁵ This divide explains the relentless American scholarly focus on the standards for summary judgment. Though American and English judges alike have the power to grant summary judgment rather than allowing the case to proceed to trial, the stakes are very different. In England, the right to jury trial in civil cases has largely been abolished,¹³⁶ so denying a motion for summary judgment means that the case goes to trial before a judge, usually the same judge who ruled on the summary judgment motion. In the United States, the decision to deny summary judgment generally means that the case will be tried (if at all) to a jury. Accordingly, the effect of the Supreme Court's concerted

Birmingham—galvanized public opinion when their convictions were overturned in 1991. In response, the British Home Secretary created a blue-ribbon panel, the Royal Commission on Criminal Justice, and charged it with the task of examining the causes of wrongful convictions and recommending better procedures for dealing with such miscarriages of justice.”); *IN THE NAME OF THE FATHER* (Universal Pictures 1993) (depicting a case similar to the Birmingham Six, that of the “Guildford Four”).

¹³⁴ Some American civil cases are tried to a judge alone, but in most, the parties have a constitutional right to a jury and the plaintiff asserts that right. In the federal district courts, the Seventh Amendment to the U.S. Constitution protects the right to trial by jury in cases “at common law.” The federal right does not apply in state court, but most states have similar constitutional protections for jury trial rights. In this context and others, the constitutional element adds a certain element of glamour to American civil procedure.

¹³⁵ Though actual jury trials are rare, parties reach settlement agreements in the shadow of the jury. See Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 13 (2006) (“The promise of full-blown adjudication in a public forum, a ‘day in court’ is increasingly redeemed by ‘bargaining in the shadow of the law.’”).

¹³⁶ See Supreme Court Act, 1981, c. 54, § 69 (Eng.) (indicating that the right to trial by jury remains for defamation, false imprisonment, and malicious prosecution actions; however, even within the category of cases where a general right remains, a bench trial may be held where “the court is of the opinion that the trial requires any prolonged examination of documents or any scientific or local investigation which cannot be conveniently made with a jury”). Though London is the “libel capital of the world,” and the parties in libel cases presumptively have a right to trial by jury, libel trials with juries are now rare. Under proposed reforms, English civil juries may soon be a thing of the past. See Josh Halliday, *Removing Libel Juries Would Be Dangerous, Warns Newspaper Industry*, *GUARDIAN*, May 11, 2011, <http://www.guardian.co.uk/media/2011/may/11/libel-law-defamation-reform> (“The government’s draft bill, unveiled in March, signalled an end to the use of juries in all but exceptional circumstances. The bill removes the presumption in favour of a jury trial as part of measures to cut costs and speed up court cases.”).

effort in the 1980s to make summary judgment more freely available to defendants in the federal courts¹³⁷ was to reduce democratic participation in the civil justice system.¹³⁸ One scholar has even asserted that the increased use of summary judgment in the federal courts violates plaintiffs' constitutional rights to trial by jury.¹³⁹ Summary judgment could not provoke such excitement in England.

A distinctive feature of American litigation, its all-inclusive party-driven approach to discovery, is another instance of fragmentation of power within the litigation process. And the pleading rules are so important in America because, once a plaintiff gets over the initial hurdle of a motion to dismiss for failure to state a claim,¹⁴⁰ she is entitled to demand from the

¹³⁷ See FED. R. CIV. P. 56 (providing that a party is entitled to summary judgment where there is "no genuine issue as to any material fact"). See also *Celotex Corp. v. Catrett*, 477 U.S. 316 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 572 (1986) (the trilogy of cases in 1986 where the United States Supreme Court broadened access to summary judgment).

¹³⁸ See Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79, 93 (2003) ("Citizen participation in the disposition of civil cases has been an important, indeed central, and perhaps critical, element in the development of the American legal system.").

¹³⁹ See Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 142 (2007) ("I conclude that summary judgment should be eliminated altogether because it is unconstitutional under the Seventh Amendment."). Typically, given the vibrant scholarly debate on civil procedure in America, Professor Thomas's provocative article produced a flurry of responses. See, e.g., Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625, 1627 (2008) ("[T]he argument that summary judgment is unconstitutional depends on a rigid, erroneous interpretation of the Seventh Amendment."); William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653 (2008) (arguing against an originalist interpretation of the Seventh Amendment). For Professor Thomas's reply, see Suja A. Thomas, *Why Summary Judgment Is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA L. REV. 1667 (2008).

¹⁴⁰ In an American federal court, though the filing of a motion to dismiss generally does not automatically stay the defendant's discovery obligations, a successful motion to dismiss by the defendant will often intervene before the plaintiff has obtained substantial discovery. See Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 69 (2010) ("The rules say nothing specifically about the availability of discovery pending a motion to dismiss. As an original matter, at least, the drafters probably did not contemplate the need for such discovery, for under the liberalized pleading standard of Rule 8, the assumption was that discovery would not be needed to survive a Rule 12(b)(6) motion to dismiss. *Twombly* and *Iqbal* may change this dynamic, but it [is] not clear in what direction.")

defendant, without judicial approval, any evidence that might be relevant to the case, and to conduct depositions of the defendant and of third-party witnesses.¹⁴¹ In England, with its more restrained approach to discovery, the stakes on a motion to strike out a claim are lower because, even if the defendant's motion fails, the court still has the power to rein in unnecessary discovery demands. It is easy to see why English scholars spend little time thinking about pleading, while, for Americans, it is often all-important.

Similar observations emerge from the comparative work of Masayuki Tamaruya on the very specific topic of "freezing injunctions"—pre-trial orders that restrain a defendant from dealing with assets in such a way as to avoid future execution of a later money judgment.¹⁴² Freezing injunctions are widely available in England,¹⁴³ but the U.S. Supreme Court has ruled that federal district courts lack the power to issue an equivalent form of relief—partly because freezing injunctions were not traditionally available in English chancery practice at the time of American independence.¹⁴⁴ While English practice evolved, the U.S. Supreme Court seemed to cling to an outmoded position in this fairly technical area of procedural doctrine. Seeking an explanation for the contrasting approaches, Tamaruya finds the answer partly in the politicization of American civil procedure reform, which hinders the ability of judges to undertake explicit,

¹⁴¹ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (referring expressly to the "burdens of discovery" that would otherwise be imposed on the defendants when justifying the dismissal of the plaintiff's claim). See also *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 (2007) ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

¹⁴² See Masayuki Tamaruya, *The Anglo-American Perspective on Freezing Injunctions*, 29 CIV. JUST. Q. 350, 350 (2010) ("Freezing injunctions have been adopted in most common law jurisdictions as an effective civil remedy to combat attempts by recalcitrant debtors or fraudsters to frustrate potential money judgments by use of ever faster methods of fund transfer. The United States, however, provided a conspicuous exception.").

¹⁴³ See *Mareva Compania Naviera S.A. v International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (A.C.) (establishing the English courts' ability to grant freezing injunctions).

¹⁴⁴ See *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("We must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity.").

unilateral reform of civil procedure.¹⁴⁵ In England, judges are able to go quietly and informally about the business of procedural reform, because “a few core members of the judiciary and the bar keep a firm grip on the reform of civil procedure.”¹⁴⁶ American procedure, on the other hand, is “overtly political[,] not only in the sense that the politicians are actively involved but also in the sense that the debates on procedures concern the distribution of power among different decision-makers or different groups of people in the society.”¹⁴⁷

5. PROCEDURE AND THE HISTORY OF AMERICAN LEGAL THOUGHT

Still, even these differences do not fully explain American exceptionalism in the focus on procedure. Certainly, it makes sense that procedural questions should occupy a somewhat greater proportion of the energies of American legal scholars. But these explanations fail to account for (what must seem to English eyes) the scale of American obsession with procedure or (what must seem to American eyes) an extraordinary degree of apathy about procedural law in the English legal academy. Civil procedure remains marginal in England even though large-scale reforms in the last fifteen years must surely have had profound effects on the outcomes of cases, the structure of the legal professions, and the behavior of citizens subject to the substantive law that legal scholars continue to focus on. Moreover, that America “does more” with litigation and disperses power among different actors may, in part, be symptoms rather than just causes of American legal culture’s fascination with procedure. Consequently, I propose that we seek deeper reasons for the divergence, embedded in the history of law and legal thought in the two countries. When one takes a historical turn in procedure, the comparison between American law and English law is particularly apt, and, I think, especially revealing.

I show in this Section that there is a strong connection between the rise of Legal Realism and the prominence of legal procedure in America. I do not mean to say simply that Legal Realism “caused”

¹⁴⁵ In reality, as the *Iqbal* and *Twombly* cases show, the Supreme Court has been willing to make new procedural law under cover of “interpreting” the Federal Rules of Civil Procedure.

¹⁴⁶ Tamaruya, *supra* note 142, at 363.

¹⁴⁷ *Id.*

American proceduralism, though that appears to be partly true. To the extent that there is a causal relationship, it may well be mutual—proceduralism may encourage realism and vice versa. I tell the comparative story in the following way. First, I explain that legal theorists in both England and America embraced substantive law more and more as the nineteenth century progressed, relegating procedure to a minor place in the burgeoning legal academies of both countries. Indeed, the period around the turn of the twentieth century can fairly be described as a period of intellectual unity between the legal elites of England and America,¹⁴⁸ a unity that included a shared belief in “legal science” and the primacy of substantive law. However, when Legal Realism swept through the American law schools, the common-law consensus broke down. As part of the rupture between England and America, American scholars and the lawyers whose minds they shaped attached a greater degree of importance to the realities of law-application, at the expense of their erstwhile concentration on the conceptual coherence of substantive law. England did not have a Realist revolution, and also has never fully embraced civil procedure as a worthy field of academic study. In the ensuing decades, the structure of English legal education has helped to entrench the substantive-law focus of English legal academia, holding back the encroachment of procedural ideas into the domain of substance.

5.1. The Dominance of Procedural Categories Until the Late-Eighteenth Century

Though it is possible to look back and classify centuries of common-law practice in substantive law terms,¹⁴⁹ that way of thinking came surprisingly late in the history of common-law thought. Looking back on the previous centuries from a nineteenth-century perspective, Maine stated that “substantive law has at first the look of being gradually secreted in the interstices of

¹⁴⁸ See RICHARD A. COSGROVE, *OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870–1930*, at 66 (1987) (noting that, by the 1880s “the interpretation of the United States as a worthy offspring of England had gained respectability among Victorian intellectuals.”).

¹⁴⁹ David Ibbeston’s book on the history of the common law of contract, tort, and unjust enrichment is a self-conscious attempt to find substantive principles of law in the practices of more procedurally minded lawyers. DAVID J. IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* (1999).

procedure.”¹⁵⁰ And procedural categories dominated legal thought for intensely practical reasons. One grand procedural divide was the distinction between courts of law and courts of equity. Within the common-law courts, eighteenth-century lawyers still organized their thinking around the forms of action. In essence, a form of action was a verbal formula the courts would recognize as an appropriate means of starting a particular kind of case.¹⁵¹ In real property cases, for example, the plaintiff had to choose between a writ of right, an assize of novel disseisin, and an action in ejectment. In the contractual setting, an action of assumpsit would usually do the trick, but the actions of debt or covenant remained a possibility. And so on.

The forms of action, bogged down by steady accretion of technical learning, provided the prism through which common lawyers saw the law. The result of choosing the wrong form of action could be severe: if the court found that the plaintiff’s case did not fall within the requirement of the chosen form, the case might be dismissed with prejudice to bringing the action in another form. In addition, the particular form of action sometimes dictated the proper court where the action could be brought. Moreover, different forms of action entailed different ways of serving process on the defendant, different potential prejudgment remedies, and differing availability of default judgment. The chosen form of action also affected the defendant’s pleading obligations, the mode of trial (Jury or judge? If a jury, what form of jury?), and the kind of post-judgment remedies available.

The courts sometimes allowed the law to develop by indulging legal fictions: once the court accepted the fiction, a plaintiff could use a form of action to bring his suit even though he could not really establish one of its elements.¹⁵² Common-law lawyers in the late-eighteenth century spent vast amounts of energy deploying

¹⁵⁰ HENRY SUMNER MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (Arno Press 1975) (1883).

¹⁵¹ In 1829, the Common Law Commissioners identified seventeen different ways of commencing an action in the common-law courts in England. ROYAL COMM’N ON THE COMMON LAW, *FIRST REPORT OF THE COMMISSIONERS ON THE PRACTICE AND PROCEEDINGS OF THE SUPERIOR COURTS OF COMMON LAW* (1829), reprinted in 9 IRISH UNIVERSITY PRESS SERIES OF BRITISH PARLIAMENTARY PAPERS 72–4 (P. Ford & G. Ford eds., 1970).

¹⁵² Bentham detected “the pestilential breath of fiction” everywhere in English law. JEREMY BENTHAM, *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 411 (J.H. Burns & H.L.A. Hart eds., 1977).

and debating the applicability of arbitrary rules, rather than on the substance of the parties' dispute or the justice of their cases. Procedural wrangling is perhaps an inherent part of any system of laws and courts—a price we pay for subjecting human behavior in a complex society to rules detailed enough to usefully guide conduct and fetter official discretion. By the late-eighteenth century, however, the common law had plainly lost its bearings.

5.2. *The Nineteenth-Century Rise of Substance*

The substance-procedure distinction began to emerge from late-eighteenth-century rationalizations of the common law through the works of two great adversaries, William Blackstone and Jeremy Bentham. If nothing else, Blackstone and Bentham shared a desire to impose some kind of analytical rigor on the common law. Blackstone, drawing on the civil law tradition, aimed to uncover the rights and wrongs recognized by English law, as distinct from the methods for enforcing them.¹⁵³ Accordingly, his *Commentaries* were partly responsible for developing a division between substance and procedure.¹⁵⁴ But it was Bentham who made the substance-procedure distinction explicit.¹⁵⁵ “Laws prescribing the course of procedure,” Bentham said, “have . . . been characterized by the term *adjective* laws, in contradistinction to those other laws . . . [that] have been

¹⁵³ See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 35 (1765–69) (explaining that the common law should be viewed as setting forth “a general map of the law”); see also WILLIAM BLACKSTONE, *AN ANALYSIS OF THE LAWS OF ENGLAND* (1756) (providing a critical analysis of English laws and their basis).

¹⁵⁴ See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 458–60 (2003) (exploring Blackstone’s introduction of substance and procedure as fundamentally different concepts); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 929–30 (1987) (“Blackstone atomized the study of law by separating not only rights from wrongs, but also the methods of enforcement from both.”).

¹⁵⁵ See D. Michael Risinger, “Substance” and “Procedure” Revisited with Some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions,” 30 UCLA L. REV. 189, 191 (1982) (“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.”). *Of Laws in General* was substantially completed in 1782 but was not discovered until 1939. See JEREMY BENTHAM, *OF LAWS IN GENERAL*, at xxxi (H.L.A. Hart ed., 1970) (noting that the work was unknown until 1939 when it was discovered by Professor Charles Warren Everett at University College London).

characterized by the correspondent opposite term, *substantive laws*.”¹⁵⁶

Bentham did not wish merely to draw an analytic distinction between substance and procedure. Indeed, his very terminology suggested that procedure should be merely adjectival. Bentham sought to “degrade procedure from its prior position of equality in the legal enterprise to a position subordinate to the substantive law.”¹⁵⁷ The substance-procedure distinction took hold both in his own country and in the newly-independent United States. So, too, did Bentham’s desire to sweep away anachronistic procedural technicalities, and his belief in the central importance of substantive law, rather than procedure.

5.2.1. *English Procedural Reform and the Rise of Substantive Legal Categories*

In the early-nineteenth century, the life of English law was still governed by the forms of action, and the jurisdictional divide between law and equity remained intact. But as the nineteenth century progressed, dissatisfaction with the writ system and other pleading technicalities grew. Bentham’s relentless critiques of the common law, though extreme, struck a chord in Victorian England. Reform-minded lawyers chafed at a system of writs whose boundaries owed more to accidents of history than any rational scheme of organization. More and more, those who sought to rationalize the law—the treatise-writers—organized their works around “scientific” substantive categories rather than the discredited forms of action.¹⁵⁸

¹⁵⁶ JEREMY BENTHAM, *PRINCIPLES OF JUDICIAL PROCEDURE, WITH THE OUTLINES OF A PROCEDURE CODE*, reprinted in 2 *THE WORKS OF JEREMY BENTHAM* 5 (John Bowring ed., 1843); see also Thomas C. Grey, *Accidental Torts*, 54 *VAND. L. REV.* 1225, 1231 n.10, 1240 (2001) (“It was Jeremy Bentham who made the distinction between substantive law and procedure . . . prominent . . . This new conceptual distinction helped Bentham . . . make the case that English law remained intellectually and practically incoherent because *substantive* legal rights and duties were learned and classified for practice under the jumbled array of *procedural* forms that had grown up over the centuries to enforce them.”).

¹⁵⁷ Kenneth W. Graham, Jr., “*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)).

¹⁵⁸ See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 *U. CHI. L. REV.* 632 (1981) (exploring the predominance of the view that law was a science amongst treatise writers).

In England, Parliament abolished the forms of action over a forty-year period in the nineteenth century in a series of legislative acts aimed at simplifying common-law procedure. It was not until the Judicature Acts of 1873 and 1875 that the forms of action were finally buried and common-law procedure was reduced, in essence, to a single form of action. The Judicature Acts also lessened the effect of another major procedural divide—the distinction between the courts of common law and the courts of equity. Though courts took pains to make clear that only the *administration* of law and equity were fused, rather than the bodies of substantive law that were previously administered in the separate courts, administrative fusion obviously lessened the importance of what was once a grand jurisdictional divide.¹⁵⁹

The abolition of the forms of action was partly a result of the rise of substantive legal thought, and once the forms were out of the way, substantive categories rose to the fore. These categories were preeminently based on legal theory (contract, tort, property), but there were also some contextual categories (commercial paper, marine insurance). The Judicature Acts aided the process by bringing about “the ultimate separation of substantive law from procedure,” which “made possible the belief . . . that legal rights and obligations are one thing, the machinery and procedures for their recognition and enforcement another.”¹⁶⁰

The dramatic lessening of importance in procedure in the life of English lawyers coincided with the emergence of the university legal scholar in England. The great “rationalization” of the legal system loosened procedure’s grip on the common-law legal mind, but civil procedure was still of great moment to practicing lawyers, as always. What was different was that those who taught and produced scholarship about English law began to neglect civil procedure as a field of study. For the most part, those with positions on the newly-emerging English law faculties had little or no practical experience. Their ideas were inspired by Roman and

¹⁵⁹ Though the *administration* of law and equity is fused, English lawyers continue to observe a more rigorous separation between common-law and equitable ideas than American courts. The process of fusion continues today, to the impatience of some scholars. See Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 OXFORD J. LEGAL STUD. 1 (2002) (arguing that lawyers should do more to bring together common law and equity).

¹⁶⁰ J.A. Jolowicz, *‘General Ideas’ and the Reform of Civil Procedure*, 3 J. LEGAL STUD. 295, 300 (1983).

German legal theorists, and many appear to have considered procedure beneath them. Substance was king.

Speaking to law students at the University of Cambridge on the forms of action at the end of the nineteenth century, F.W. Maitland recognized that he was swimming against the tide in asking students of English law to focus on procedure rather than substance:

It may—I am well aware of it—be objected that procedure is not a good theme for academic discussion. Substantive law should come first—adjective law, procedural law, afterwards. The former may perhaps be studied in a University, the latter must be studied in chambers.¹⁶¹

Though Maitland disagreed profoundly with this way of thinking—claiming famously that the forms of action “still rule us from their graves”—he recognized that it represented the dominant way of thinking among England’s still-embryonic university law faculties.

5.2.2. American Procedural Reform and the Rise of Substantive Legal Categories

Like their English counterparts, American lawyers—to the extent they imported the complex body of procedural learning developed in the King’s courts—grew discontented with the forms of action as the nineteenth century progressed.¹⁶²

The most significant nineteenth-century procedural reform to result from this dissatisfaction was the Field Code of 1848, some form of which was adopted in more than half the States.¹⁶³ The Code, devised by David Dudley Field and the New York Commission on Practice and Pleading, was inspired by the

¹⁶¹ F.W. MAITLAND, *EQUITY: ALSO, THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES* 294 (A.H. Chaytor & W.J. Whittaker eds., 1913).

¹⁶² See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975); Paul D. Carrington, *Teaching Civil Procedure: A Retrospective View*, 49 J. LEGAL EDUC. 311, 317 (1999) (“Among those sharing Bentham’s scorn of common law procedure were Jacksonians, who regarded English procedure as just another burden the aristocracy imposed on honest folk as a means of preserving the wealth and status of lawyers.”).

¹⁶³ See Subrin, *supra* note 154, at 931-39 (describing the Field Code’s attempt to merge common law and equity).

Benthamite tradition of legal reform, which prized legislative arrangement over common-law development. Most significantly, the Field Code merged the administration of law and equity, and it rejected the forms of action. Plaintiffs and defendants would now be required to plead relevant facts satisfying the elements of a substantive law cause of action, rather than recite the apposite procedural verbal formula. Field, of course, was a proceduralist, but, like Bentham, his ultimate aim was to demote procedure from its previously privileged place. In keeping with the growing focus on substance, Field viewed procedure as a kind of tool in the service of the substantive law; he aimed to remove obstacles to the “swift, economic, and predictable enforcement of discrete, carefully articulated rights.”¹⁶⁴ (Field also helped to devise a Code of substantive law, which was never enacted.)

The process of procedural reform in America was more complex than in England because each system of civil justice, state and federal, proceeded at its own pace. But as American reformers left the forms of action and the law-equity split behind, they cleared the way for scholars in the law schools to focus their energies on substantive law. In this respect, American scholars were similar to their English counterparts, with whom they regarded as forming a joint enterprise. Many American law professors even regarded themselves as teachers of English law, which they often referred to as “our law”—that “*common law*” being the newly rationalized substantive law of contracts, torts, and property. Langdell’s first casebook, *A Selection of Cases on the Law of Contracts*, is dominated by English cases—310 of 336 cases were from the English courts.¹⁶⁵ Langdell was less concerned with teaching students how courts work than with helping them to derive and apply the small number of fundamental principles underpinning private law subjects.¹⁶⁶

¹⁶⁴ *Id.* at 935.

¹⁶⁵ C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871). I take the numbers from E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1439–40 (1987) (suggesting that cultural Anglophilia and the desire to present a unified body of doctrine motivated Langdell’s selection of cases).

¹⁶⁶ See Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983) (“Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts . . .”).

It would be a mistake to caricature the formalism of the late-nineteenth-century Anglo-American elite legal community. Legal scholars of the period still sometimes relied on policy arguments at the margins. But taking “formalism” as an ideal type rather than as a description of any particular scholar, the conclusion remains sound: the period was a high-point for the idea that legal reasoning was autonomous from instrumental concerns. Langdell is—perhaps unfairly¹⁶⁷—characterized as an extreme exponent of the “formalism” of the era, but, in any event, his view of civil procedure was representative of the growing focus on substantive law. In fact, in one sense, Langdell viewed civil procedure instrumentally. As Thomas Grey says, “[a]s a classical legal scientist [Langdell] regarded procedure as instrumental to the enforcement of substantive, scientifically ascertained rights; procedure was thus a kind of technology in the service of legal science.”¹⁶⁸ Thus, procedural rules and doctrines were instrumental, not to broader social goals, but to substantive legal rights that were ends in themselves.

As Holmes famously said in a review of Langdell’s contracts casebook, Langdell elevated “logic” over “experience.”¹⁶⁹ But Holmes, too, was a product of his time, and he exhibited a certain disdain for procedure, particularly in his earlier work. At the very beginning of his lectures on the common law, he distinguished between substance and procedure, identifying the latter with history and anachronism: “The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the

¹⁶⁷ Bruce Kimball’s work challenges much of the received wisdom about Langdell. See, e.g., BRUCE KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826–1906* (2009); Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 *LAW & HIST. REV.* 345 (2007). The picture that emerges from Kimball’s extensive scholarship is more nuanced than the picture of Langdell painted by Holmes, Frank, and Gilmore. According to Kimball, Langdell’s mode of legal reasoning was “three dimensional, exhibiting a comprehensive yet contradictory integration of induction from authority, deduction from principle, and analysis of acceptability, including justice and policy.” *Id.* at 390. Still, Langdell should plainly be distinguished from the Legal Realists, for whom “justice and policy” came first and last.

¹⁶⁸ Grey, *supra* note 166, at 14 n.50.

¹⁶⁹ Oliver Wendell Holmes, Jr., Book Review, 14. *AM. L. REV.* 233, 234 (1880) (reviewing C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES* (2d ed. 1879)).

degree to which it is able to work out desired results, depend very much upon its past."¹⁷⁰ Holmes's aim in *The Common Law* was to bypass procedure, and to find the substantive principles of torts, contracts, property, and crimes lurking below the procedural surface.

Though Langdell followed the general mood in relegating procedural doctrines to a secondary role, his curriculum did have a place for civil procedure.¹⁷¹ In this respect, the American law schools diverged from the English universities. Despite Langdell's non-instrumental vision of substantive law, his Harvard Law School purported to be a professional school training lawyers for practice. Fittingly, then, the required courses for Harvard law students, along with the core substantive courses of Contract, Tort, Property, Equity, and Criminal Law, included a course in Civil Procedure.¹⁷² Langdell, who had substantial practical experience with the Field Code as a New York lawyer, taught three procedure courses himself: the required course in "Civil Procedure at Common Law,"¹⁷³ and two electives, one in "Civil Procedure under the New York Code" and the other in "Process, Arrest, and Bail." However, perhaps reflecting the general mood, few students took the elective procedural courses, and the courses were

¹⁷⁰ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-2 (1881); see also *id.* at 253 ("[W]henever we trace a leading doctrine of substantive law far enough back, we are very likely to find some forgotten circumstance of procedure at its source.").

¹⁷¹ See Bruce A. Kimball, *Students' Choices and Experience During the Transition to Competitive Academic Achievement at Harvard Law School, 1876-1882*, 55 J. LEGAL EDUC. 163, 172 (2005) (displaying a student's first-year schedule in 1876, which included a course in civil procedure taught by Langdell). See also Bruce Kimball & Pedro Reyes, *The "First Modern Civil Procedure Course," as Taught by C.C. Langdell, 1870-78*, 47 AM. J. LEGAL HIST. 257, 258 (2005) (noting that the "principles and characteristics of the 'modern civil procedure course' . . . include . . . [a] focus on the procedural rather than substantive issues of cases").

¹⁷² Langdell seems to have renamed the course "Civil Procedure." See Kimball & Reyes, *supra* note 171, at 268. Previous courses at Harvard were entitled "Pleading." *Id.*

¹⁷³ The required class—taught first by Langdell and continued by James Barr Ames until 1905—was a course in common-law pleading in England under the forms of action before 1830. This curricular choice is not quite as bizarre as it might seem. See Kimball & Reyes, *supra* note 171, at 259 (noting, among other reasons, that common-law pleading persisted in many American jurisdictions when Langdell taught).

discontinued in 1878. More generally, the pleading course was given "only a minor place in the Langdell curriculum."¹⁷⁴

5.2.3. *The Transatlantic Triumph of Substantive Law*

To sum up: the nineteenth century witnessed a remarkable intellectual shift in the way that lawyers in the common-law tradition organized the law. At the beginning of the nineteenth century, substance and procedure were almost inseparable. Scholars and leading lawyers, however, disengaged substantive law from procedure, and relegated procedure to a subservient role. The need for procedural reform was an important element of legal debates in both America and England; to that extent, the nineteenth century was a century of proceduralism. But the dominant aim of reformers was to make procedure unimportant, to approach a utopian state of affairs where procedure no longer hindered substantive law. American lawyer Thomas Shelton used various metaphors to explain the subservient role that procedure ought to play, contending that legal procedure should be "a clean pipe," "an unclogged artery, a clear viaduct," or "a bridge."¹⁷⁵ That sentiment was widely shared by legal scholars throughout the Anglo-American legal community.

5.3. *Procedure's Revival in Twentieth-Century America*

In one respect, however, Langdell provided a foundation for the later rise of civil procedure. When American law schools replicated the Harvard curricular model of legal education—which, in many ways, remains dominant—they also adopted the course in Pleading or Civil Procedure. Langdell's curriculum, then, provided a beachhead for a different kind of American intellectual interest in the subject. Much like the case method of

¹⁷⁴ Carrington, *supra* note 162, at 321 (stating that "[i]t is as well" Langdell gave the pleading course "only a minor place in the curriculum" because, at the time, Ames taught "the rigors" of England's Hillary Rules, which "proved to be disastrous in practice and were repealed in 1852").

¹⁷⁵ THOMAS WALL SHELTON, *SPIRIT OF THE COURTS* 17, 32, 72 (1918), *quoted in* Janice Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 374–75 (1990) ("Thomas Shelton, who admired Pound, came to share Pound's view of procedure. Shelton envisioned a procedure separate from, but facilitative of, substantive law. He likened procedure to a clean pipe, an unclogged artery, a clear viaduct, or a bridge.").

instruction, the civil procedure course was later used for decidedly non-Langdellian purposes.

The rising early-twentieth-century Legal Realist mood prompted civil procedure's move back from an adjectival position to a central one in American legal thought. As a multifaceted movement, Legal Realism was many things, but the Realists shared at least two positions—one negative, the other constructive. First, Realists denied a major premise of Langdellian legal science—that judges could deduce answers from a small number of principles of substantive law. Second, Realists agreed that law is an instrument to be used in the service of social ends.¹⁷⁶ This functionalism led the Realists—in their attempts at reconstructive projects—to think systematically about the consequences of legal rules and practices. Procedures could not, for the Realists, be simply an instrument toward the enforcement of substantive law because substantive law rules were not ends in themselves; to the extent that one could distinguish between both procedural and substantive law rules, both kinds should advance social goals. In the end, the Realists made little progress toward a satisfying account of what those social goals might be. But in seeking to uncover law's instrumental functions, and assessing law's contribution to them, Realist scholars were naturally inclined to give serious attention to procedure as a subject in its own right.¹⁷⁷

For these purposes—though not for others—Roscoe Pound deserves to be classified with the Realists. In his call for a new kind of legal scholarship, Roscoe Pound asserted that law “must be judged by the results it achieves, not by the niceties of its internal structure,”¹⁷⁸ and that “[t]he life of the law is in its enforcement.”¹⁷⁹

¹⁷⁶ BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* ch. 4 (2006). The phrase “law as a means to an end” derives from the work of the enormously significant nineteenth-century German scholar Rudolf von Ihering. See RUDOLF VON IHERING, *DER ZWECK IM RECHT* (1877); RUDOLF VON IHERING, *LAW AS A MEANS TO AN END* (Isaac Husik trans., Augustus M. Kelley Publishers 1968) (1913).

¹⁷⁷ There is an element of paradox in the fact that Bentham, the archetypal instrumentalist, is responsible in large part for the nineteenth-century rise of substance. The answer to this paradox, I think, is that Bentham was reacting to the particularly insufferable body of procedural practices that characterized the late-eighteenth-century common law.

¹⁷⁸ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908) (“Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure . . .”).

Pound, a brilliantly insightful observer of trends in legal thought, diagnosed the new hegemony of substantive law categories in the minds of American legal scholars.¹⁸⁰ Unsurprisingly, given his commitment to understanding the social effects of legal rules and institutions, Pound decried this trend, and called for scholars to pay more attention to procedure. As Jay Tidmarsh has shown, Pound “understood that procedure was *about* something important. It was a critical dimension of his larger theory of law, and was a central component of his program for systematic legal reform.”¹⁸¹ In a famous speech to the American Bar Association,¹⁸² Pound reignited the movement for procedural reform,¹⁸³ which eventually culminated in the promulgation of the new Federal Rules three decades later.

In this respect, Pound’s intellectual commitment to civil procedure unites him with later, unambiguous members of the Legal Realist “movement.” Karl Llewellyn named as one of the movement’s emergent achievements that “[s]tudy has been attempted of ‘substantive rules’ in the particular light of the available remedial procedure.”¹⁸⁴ “Everything that you know of procedure,” Karl Llewellyn advised beginning law students, “you must carry into *every* substantive course. You must read each substantive course, so to speak, through the spectacles of that procedure. For what substantive law says should be means nothing except in terms of what procedure says that you can make real.”¹⁸⁵

¹⁷⁹ *Id.* at 619 (“The life of the law is in its enforcement.”).

¹⁸⁰ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 514 (1912) (claiming that the “study of the means of making legal rules effective . . . has been neglected almost entirely in the past”).

¹⁸¹ Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 574 (2006).

¹⁸² Roscoe Pound, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, 29 REP. A.B.A. 395 (1906), *reprinted in* 35 F.R.D. 273 (1964).

¹⁸³ See Carrington, *supra* note 162, 321-27. As Carrington suggests, “[t]he teaching of civil procedure received a powerful impulse from the Progressive era.” *Id.* at 321.

¹⁸⁴ Karl N. Llewellyn, *Some Realism About Realism – Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1244 (1930).

¹⁸⁵ KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 17-18 (1951).

Like Pound, the Legal Realists characteristically viewed law as achieving social ends or solving social problems. On this conception of the function of law, legal scholars would need to think systematically about procedure to assess the law's actual contributions to those ends, or solving those problems. The more radical forms of Realism—in particular, Jerome Frank's skepticism about the very process of fact-finding¹⁸⁶—challenged head-on the basic assumption that procedure could possibly be the servant of substantive law.

The arch-Realist Thurman Arnold, in his 1932 article *The Role of Substantive Law and Procedure in the Legal Process*, made explicit the way Realists thought about procedure.¹⁸⁷ Arnold's article is probably the clearest attack on the Langdellian legal academy's privileging of substance over procedure. By that time, Arnold could refer to "our modern skepticism about substantive law"¹⁸⁸—the possessive here referring to Legal Realists—even though the idea of substantive law was itself of recent vintage. Arnold recognized that judges, in order to maintain their power, were obligated to "talk of substantive law as a scientific body of principles which govern society."¹⁸⁹ He argued that a "shift of emphasis from doctrines to courts needs to be made if we are either to understand, reform, or restate any part of our judicial system."¹⁹⁰

Arnold identified fundamental differences between the ways that the preceding generation of scholars and lawyers had thought about substantive law, on the one hand, and procedure, on the other. Substantive law, for Langdell and those who shared his assumptions, was "sacred and fundamental"; procedure was simply a matter of detail.¹⁹¹ Substantive law, on the view Arnold criticized, might be "restated," but it never needed reform because

¹⁸⁶ JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

¹⁸⁷ See Arnold, *supra* note 12.

¹⁸⁸ *Id.* at 618.

¹⁸⁹ *Id.* (claiming that the construction of a "science of substantive law" was a method for avoiding the implication that judicial decisions were grounded in personal and arbitrary elements, and for maintaining the power and prestige of an independent judiciary).

¹⁹⁰ *Id.* at 619.

¹⁹¹ *Id.* at 643 (discussing how substantive law and procedural law are treated differently, even though one could label some laws as either substantive law or as procedural).

“its fundamental verities can always be discovered by logical analysis.”¹⁹² By contrast, on the orthodox view, procedural reform could be accomplished by looking to the “problem involved.” But for Arnold, the substance-procedure distinction was only a matter of attitude, and entirely manipulable. “Substantive law is canonized procedure. Procedure is unfrocked substantive law.”¹⁹³ Arnold called on his fellow Realists to recast substantive legal rules as procedural problems to support the effort to reform them.

Tellingly for the purposes of this Article, Arnold chose the work of Arthur Goodhart—a New Yorker in origin but a decidedly *English* legal scholar—as an exemplar of those who divided substantive law and procedure into fundamentally different categories.¹⁹⁴ Goodhart approached “substantive law”—such notions as contracts and torts—in a manner completely different from procedural questions like the assessment of attorney’s fees under the “loser pays” rule. On Goodhart’s account, substantive law was fundamental, part of the “science of law.”¹⁹⁵ The assessment of attorney’s fees, by contrast, was “treated [by Goodhart] as a practical problem to which no methodology of the discovery of principles scientifically arrived at is necessary.”¹⁹⁶

Arnold’s efforts to problematize the procedure-substance distinction were in the service of grand goals: to depart from traditional “formalist” ways of thought and convince judges to tolerate the New Deal’s coming embrace of bureaucratic forms of governance. Other Realists explored the fluid substance-procedure boundary in more conventional doctrinal terms. One obvious context was the conflict of laws, a staple law school course in

¹⁹² *Id.* at 643.

¹⁹³ *Id.* at 645.

¹⁹⁴ After an undergraduate degree at Yale, Goodhart studied law at Cambridge University, and then “spent nearly all his working life” in Britain. See Tony Honoré, *Goodhart, Arthur Lehman*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (rev. 2004) (chronicling Goodhart’s legal studies and relationship with Cambridge University).

¹⁹⁵ For Goodhart’s views on substantive law, Arnold refers to Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930), reprinted in ARTHUR L. GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* (1931).

¹⁹⁶ Arnold, *supra* note 12 at 635 (differentiating between applying rules with attitude induced by the science of law and applying rules with the attitude of an administrative official). Here, Arnold appears to be referring to Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849 (1929), reprinted in GOODHART, *ESSAYS*, *supra* note 195.

multi-jurisdictional America. An axiom of the field as developed by “vested rights” theorists like Joseph Beale was that the forum should apply its own procedural rules, leaving substantive law as the domain for conflicts doctrine.¹⁹⁷ But the courts drew criticism from formalist scholars for their lack of consistency in distinguishing between rules of substantive law and procedural rules.¹⁹⁸ A particular rule—a rule allocating the burden of proof, a limitations period, a rule for calculating damages—might be deemed substantive in one doctrinal context yet procedural in another.

Writing the year after Arnold, Walter Wheeler Cook set his sights on the “the tacit assumption that the supposed ‘line’ between the two categories [of ‘substantive law’ and ‘procedural’ law] has some kind of objective existence.”¹⁹⁹ In a characteristic Realist move, Cook contended that the boundary between substance and procedure varied legitimately depending on the *purpose* for which the courts were drawing the distinction. Identifying eight such purposes,²⁰⁰ Cook invited lawyers to abandon the forlorn search for a single conceptual truth about the procedure-substance distinction, and instead examine the different value judgments at stake in each instance.

By the time *Erie* brought the substance-procedure distinction to prominence, then, American lawyers were already beginning to develop a more mature understanding of procedural questions. In the same year that the Supreme Court decided *Erie*, the new Federal Rules of Civil Procedure ushered in a new era, finally reforming the federal courts, freeing them from many ancient technicalities. The primary drafter of the Federal Rules was Charles E. Clark, a self-identified Legal Realist.²⁰¹ The flexible,

¹⁹⁷ See, e.g., HERBERT FUNK GOODRICH, *CONFLICT OF LAWS* 159 (1927) (“Matters of remedy, or procedure, then, are determined by the law of the forum. The general statement is not disputed; the difficulty comes in determining, on a concrete set of facts, into which class the case involved falls.”).

¹⁹⁸ See LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATION AND FUTURE DIRECTIONS* (2d ed. 1995).

¹⁹⁹ Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 *YALE L.J.* 333, 335–36 (1933) (describing difficulties with determining which side of the line many rules fall).

²⁰⁰ *Id.* at 341–43.

²⁰¹ See 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, 80

discretionary approach the drafters brought to procedural design rested on Realist premises. Under Clark's philosophy, procedural rules were instruments for achieving social functions.²⁰² As David Marcus has recently argued, "[m]any of the Federal Rules, as well as the procedural architecture they provide civil litigation, quite neatly match the sort of reforms Clark championed in a corpus of scholarship that outlined a realist vision for procedure."²⁰³ Procedural rules, for Clark, were the handmaid of *justice*,²⁰⁴ not the handmaid of a body of black-letter substantive law.

Legal Realism transformed American legal thought, even for those who purported to reject it. The post-war Legal Process school was in part a response to Legal Realism, but it also accepted a key Realist tenet: the importance of procedure.²⁰⁵ "[P]roceduralism became the favored response to what some considered the 'nihilism' of legal realism."²⁰⁶ Legal Process scholars sought to divert attention from substantive rules to the allocation of decision-making power; among Hart and Sacks' key tenets was that procedural understandings, including the allocations of decision-making authority, were "more fundamental than . . . substantive arrangements."²⁰⁷ For Legal Process theorists,

(1989) ("[Clark was] perhaps the single most important figure in the drafting of the 1938 Federal Rules of Civil Procedure.").

²⁰² David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433 (2010) (analyzing the influence of Legal Realism on the Federal Rules of Civil Procedure, and in particular the work of Charles E. Clark).

²⁰³ *Id.* at 441 (noting Clark's belief in harmony between Realist jurisprudence and the Federal Rules' procedural reforms).

²⁰⁴ Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938). The title of the article derives from the statement of a senior English judge, who said that "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress." *Re Coles and Ravenshear*, [1907] 1 K.B. 1, 4 (Collins, M.R.).

²⁰⁵ See Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993) (stressing continuities between Legal Realism and Legal Process thought).

²⁰⁶ Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 170-71 (2006) (noting that both proceduralism and legal realism raise controversial questions of morality and policy).

²⁰⁷ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also Richard H. Fallon, Jr., *Reflections on the Hart*

“[t]he study of procedure is central to understanding law, because rational procedures facilitate the ability of positive law to be implemented in a way consistent with reason and natural law.”²⁰⁸ Hart and Wechsler, who designed the Federal Courts class that continues to draw the most ambitious law students, were archetypal Legal Process thinkers.

In her recent article on the United States Supreme Court’s response to “war-on-terror” litigation, Jenny Martinez has stressed the importance of Legal Process thought to contemporary American legal culture. As Martinez notes, in the American legal academy—more than elsewhere—“there is enduring (and not entirely unwarranted) appeal in the promise that if we can just figure out a good process for making decisions, the hard policy questions of the time will be resolved correctly.”²⁰⁹ I would add, however, that the roots of Legal Process lay in the Legal Realist challenge to the autonomy of legal reasoning about substantive rights and duties.²¹⁰ But it is not just that Legal Realism provoked Legal Process; Legal Realists themselves were proceduralists, at least in the broad sense of the word as I have used it. As more conservative elements in the legal academy adopted procedural responses to a movement that demanded attention to procedure, the importance of procedure to America became firmly entrenched.²¹¹

and Wechsler Paradigm, 47 VAND. L. REV. 953, 964 (1994) (“[Q]uestions of how decision-making authority should be allocated are of foremost importance.”).

²⁰⁸ Eskridge, *supra* note 53, at 964 (identifying the importance of rational procedure as the focus of the Hart and Sacks tradition).

²⁰⁹ Martinez, *supra* note 2, at 1064.

²¹⁰ See, e.g., TAMANAHA, *supra* note 176, at 102-07; Fallon, *supra* note 207, at 970 (“[Legal Process methodology] substantially addressed the threat of judicial subjectivity introduced by Legal Realism, but without relying on the metaphysical pretenses that had brought moral and political philosophy into bad repute.”).

²¹¹ My linking of proceduralism and Realism may strike some readers as paradoxical: aren’t “proceduralism” and “realism” opposed to one another? See Balkin & Levinson, *supra* note 206, at 169-72 (“Realism and proceduralism are the two great legacies bequeathed by American jurisprudence, and each responds to the other in a great spiraling dialectic.”). The two are opposed only if one defines proceduralism more narrowly than I do in this Article. In the broader sense of proceduralism used here, one can easily be a proceduralist and a realist simultaneously.

While Legal-Process-style ideas continue to exert a fairly strong influence in American legal academia,²¹² it would be a mistake to conclude any sketch of the intellectual history of American procedural thought with the state of affairs in the 1950s. Subsequent developments confirm both the significance of procedural thinking and the influence of Legal Realism. I will limit the story to what, for these specific purposes, seem to me the most important “sects” of American legal theory:²¹³ the law-and-economics movement, and the “metaproceduralism” emanating from Yale Law School in the 1970s.

Lawyer-economists generally take procedure quite seriously, in their own way. This, I suggest, follows from the fact that law-and-economics is—despite Judge Posner’s protestations²¹⁴—a descendant of the instrumentalist strain in Legal Realist thinking. Here is an example from the early days of economic analysis of law: Guido Calabresi’s efficiency calculus for the costs of accidents included “tertiary costs”—the costs of administering different accident systems.²¹⁵ An otherwise inferior accident system might be better from the point of view of overall efficiency once one

²¹² See Robert G. Bone, *Lon Fuller’s Theory Of Adjudication and The False Dichotomy Between Dispute Resolution And Public Law Models Of Litigation*, 75 B.U. L. REV. 1273 (1995) (studying the influence of American procedure on academia and public policy). In addition to Legal Process’s continued influence in the civil procedure and federal court fields, much influential public law scholarship continues to be shaped by arguments of institutional competence, as exemplified in the work of scholars such as Cass Sunstein, William Eskridge, Richard Fallon, and Adrian Vermeule. For a longer list of “New Legal Process” scholars in public law, see Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1424 n.2 (2011).

²¹³ Duncan Kennedy explains that legal theory became “sectarianized” in the second half of the twentieth century. See Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1032 (2004) (describing Critical Legal Studies as “one of the sects of modern legal theory”).

²¹⁴ See RICHARD A. POSNER, *OVERCOMING LAW* 3 (1995) (“The law and economics movement owes little to legal realism . . .”). Brian Leiter provides a more convincing account of the relationship between Legal Realism and economic analysis of law. See Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L.J. 865, 871–75 (2012) (“Whatever the chain of influence, it seems clear that economic analysis of law, like Legal Realism, is predicated on a thoroughgoing skepticism about the adequacy of existing legal categories and the need for an alternative explanation of the actual course of decisions.”).

²¹⁵ GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 28 (1970) (considering the economic and legal costs involved in accident law and procedure).

considers the cost of administering the alternatives. So a strict liability rule could be preferable to a negligence liability rule, even if the strict liability rule would otherwise be less likely to induce efficient behavior, because (arguably) a strict liability rule is easier and cheaper for courts to administer.²¹⁶ Economists distinguish between the error costs of legal procedure (costs resulting from the erroneous decision of a sanction) and the actual costs of litigating disputes.²¹⁷ Moreover, the fact that bringing a lawsuit is costly to plaintiffs affects their incentives to bring suit, and must therefore be incorporated into any analysis of the deterrent effect of the proposed legal rule—and so on. Lawyer-economists, it is true, have tended to focus heavily on the costs of legal procedures,²¹⁸ while perhaps underestimating their benefits.²¹⁹ All the same, there is a world of difference between law-and-economics approaches and the nineteenth-century canonization of substantive law. To restate the point: lawyer-economists must attend to procedural realities if they are to remain true to their consequentialist foundations.

“Metaproceduralists,” of course, give the study of procedure pride of place. They, too, derive inspiration from Legal-Realist

²¹⁶ The literature on the choice of strict liability versus negligence liability rules is large, and much of it addresses administrative costs. On the issue mentioned in the text, aggregate administrative costs could in fact be *higher* under strict liability if it results in a higher volume of cases than under a fault-based regime. See, e.g., Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 *FORDHAM L. REV.* 1857, 1916 (2004) (“Strict liability is probably more expensive to administer than negligence because strict liability requires cranking up the liability system for nonnegligent accidents as well as for negligent ones, with all the administrative costs that this entails.”).

²¹⁷ See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 *J. LEGAL STUD.* 399, 399 (1973) (arguing from an economic perspective “that the processes of legal dispute resolution in America are dangerously overloaded”).

²¹⁸ The tendency to stress the costs of legal adjudication is particularly pronounced in scholarship stressing the relative efficiency of social (rather than legal) norms. On the rise of “social norms” in the economic analysis of law, see Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 *J. LEGAL STUD.* 537 (1998). See also ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

²¹⁹ For a powerful argument that economic analyses of tort law fail sufficiently to consider the collateral consequences of legal procedures, see Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 *STAN. L. REV.* 67, 68 (2010) (making the same charge against corrective justice accounts of tort law).

premises,²²⁰ with a greater emphasis on the skeptical aspects of Realist thought. The Cover-Fiss-Resnik casebook, an emblem of metaproceduralism,²²¹ is full of doubts about the capacity for existing legal procedures to produce the right answers to social and legal problems. The authors diverged on the implications of Realist skepticism and functionalism.²²² Robert Cover doubted the ability of courts to advance the good life. Owen Fiss has more faith in the ability of legal procedures—in the hands of the right judges—to identify, advance, and enforce public values; Judith Resnik is more ambivalent about the power and possibilities of judicial processes. What all share, however, is a fierce intellectual engagement with questions of procedure.

5.4. *The Continued Dominance of Substantive Law in England*

English law, by contrast, has never had a Realist revolution. “[W]hile the instrumentalist revolution in legal thought was taking place across the Atlantic, English legal theory hardly moved at all.”²²³ This part of the story is necessarily short—there was no fundamental change in the character of English legal thought, and no significant advances for procedure from the secondary position to which it was relegated at the end of the nineteenth century. I suggest a link between these two non-events; the continued “formalism” of English legal thought accounts, in large part, for the continued focus on substantive law to the exclusion of procedure.

The emergence of American Legal Realism marks the point of departure. Arnold’s article on substance and procedure contains a

²²⁰ See Mullenix, *supra* note 80, at 1140 (stating that the Cover-Fiss-Resnik casebook, *PROCEDURE*, *supra* note 53, was “distantly rooted in Dean Roscoe Pound’s sociological jurisprudence and the Realist movement of the 1920s and 1930s”).

²²¹ *Id.*

²²² See Eskridge, *supra* note 53, at 962–73 (“Unlike traditional theory, normativism is pessimistic that just results will necessarily flow from good procedures, and understands that justice involves a broader social transformation, perhaps of the sort where state activity is not appropriate (Cover) or sufficient (Fisk and Resnik).”). Cover, Fiss, and Resnik are, of course, proceduralists under my definition. Note that Eskridge defines “proceduralism” more narrowly as the “the notion that good procedures are presumptive evidence of good results.” *Id.* at 964. See Section 2, *supra*.

²²³ ATIYAH & SUMMERS, *supra* note 89, at 257; see generally RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* (1996).

fascinating insight into the difference between England and America as the Legal Realist movement took hold in America. Casting his eye across the Atlantic to the English legal system, Arnold saw “no skeptics undermining its prestige.”²²⁴ Indeed, American lawyers of the time seemed unanimous in heralding the superiority of English judges over their American cousins. For Arnold, this was not because the English judges were actually superior, but because English judges had created and maintained a purer body of substantive law. Arnold contended that, since the Judicature Acts, English judges had “insulat[ed] . . . the science of substantive law from the practical problem of litigation.”²²⁵

Arnold argued that the English judges had maintained the appearance of a pristine domain of substantive law by excluding procedural questions from that domain. English law referred many procedural matters to a master, thereby removing them from the science of law as administered by judges. Moreover, the “loser-pays” rule reduced the number of appellate decisions by discouraging appeals. And only a small number of decisions were selected for inclusion in the law reports, thereby protecting English law from inconvenient decisions that might threaten its logical coherence. The prestige of English judges rested on their ability “to keep an ideal from too close contact with reality.”²²⁶

English legal thought was remarkably indifferent to the work of the Legal Realists, and instrumental legal theory made relatively little ground in the twentieth-century legal academy. Again, it is important to avoid stereotypes when discussing an entire legal culture. English legal scholarship is not entirely devoid of instrumentalism or other critical perspectives on law. A minority of legal scholars engage in economic analysis, critical legal studies, or literary theory. But English legal scholars are decidedly *not* “all realists now.”²²⁷ Writing in 1996, American legal scholar Robert

²²⁴ Arnold, *supra* note 187, at 637.

²²⁵ *Id.* at 638.

²²⁶ *Id.* at 640.

²²⁷ Cf. Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633, 640 n.50 (2011) (noting “the famous, almost cliché saying, ‘we are all realists now.’”). The earliest instance of the saying that I have found is in a review of Llewellyn’s book on appellate decision-making. See Beryl Harold Levy, *Book Review*, 109 U. PA. L. REV. 1045, 1047 (1961) (reviewing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960)) (“we are all Realists now, my friend Gellhorn insists, and if it is so, let us bow and bow low to our author”).

Gordon noted that “[o]ur most distinctive legal-intellectual achievement, legal realism, is classified in British jurisprudence texts as an odd minor school of chaps who rather curiously supposed law was just what judges do, and do according to passing psychological whims, political fancies, or hunches.”²²⁸ As a general matter, scholarly work in England remains committed to an internal perspective on legal doctrine.²²⁹ That is particularly true in the fields of law to which civil procedure is considered “handmaid” – essentially, private law and administrative law.

The failure of legal instrumentalism to take hold is illustrated partly by the the relative rule-formalism of the English lawyer. To a greater extent than Americans, English legal scholars in the twentieth century believed, and still believe, that most of what judges do is to simply apply settled law to facts. The sophisticated English lawyer will accept that in relatively rare cases the law runs out and so the judge is required to fill the gap and make new law. H.L.A. Hart expressed the typically English view that American legal theory oscillated between the “noble dream” of believing that judges had no discretion (Dworkinian or, now, originalist constitutional theories) and the “nightmare” of extreme Legal Realism.²³⁰ To American observers, the English take their judges too seriously, and seem naive about the real forces that determine the outcomes of cases.

We need not adjudicate between these contrasting views on the forces that actually shape judicial decisions; nor need we investigate how much actual differences between American judges and English judges account for these differing pictures of adjudication. Our focus here is on the distinction between

²²⁸ See Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 GEO. L.J. 2215, 2215 (1996) (reviewing NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995)). For an account of the post-Realist divergence in Anglo-American legal history scholarship, see Michael Lobban, *The Varieties of Legal History*, 5 CLIO@THÉMIS 11 (2012).

²²⁹ See Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295 (2008) (“[In England] as a whole, scholarly work based upon black-letter law continues to predominate as it does on the European continent.”); Neil Duxbury, *When Trying is Failing: Holmes’s “Englishness,”* 63 BROOK. L. REV. 145, 146 (1997) (explaining the “different academic personae” of American and English law professors); ATIYAH, *PRAGMATISM*, *supra* note 89, at 166 (noting the “general aversion to theory” across the English legal system).

²³⁰ H.L.A. Hart, *The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977), reprinted in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 123–44 (1983).

instrumental visions of law and perspectives that, instead, view law as an autonomous discipline. The English rejection of the idea that law should be analyzed in terms of the instrumental goals it serves is particularly pronounced in the field of private law. The parallels between the legal thought of Langdell and Peter Birks, the most influential private law scholar of recent years, are striking.²³¹ For a surprising number of scholars—particularly at the elite university law schools—the only consideration relevant to a judge resolving a private law dispute is the need to provide corrective justice between the parties to the lawsuit. Questions of “policy” are quite simply irrelevant: “the class of arguments which a judge can use to resolve a case are restricted and exclude public policy concerns.”²³² To the extent that English scholars of private law seek an interdisciplinary perspective on law, they often look to the least instrumentally-inclined source imaginable—Kantian moral philosophy. Legal scholars who adhere to a backward-looking, bipolar model of legal disputes naturally profess little interest in understanding the effect of legal rules on *ex ante* incentives. They will be relatively unconcerned with the aggregate effects of legal rules across a broad range of cases. And they will understandably be less interested in procedure—the body of rules, doctrines, and practices that translates substantive law into reality.

I have suggested that instrumental legal thought leads one to give greater prominence to procedure, but the causation may also run in the other direction, in a kind of vicious—or virtuous—circle. Studying procedure exposes one to the practical imperfections of the legal system, to how the realities of practical application fall short of the ideal. In the United States, students and scholars are comfortable with the idea that the outcome of a case depends on

²³¹ For a perceptive account of Birksian English private law scholarship from an American perspective, see generally Chaim Saiman, *Restitution in America: Why the U.S. Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99 (2008). Saiman contends elsewhere that “Birks, a leading figure of Anglo-Continental private law thought in the late-twentieth century, would have had difficulty securing tenure at even a third-tier American law school.” Chaim Saiman, *Public Law, Private, and Legal Science*, 56 AM. J. COMP. L. 691, 696 (2008).

²³² See, e.g., ROBERT STEVENS, *TORT AND RIGHTS* 308 (2007). Perhaps the most extreme statement of the anti-instrumental viewpoint in the Anglo-Commonwealth world is Allan Beaver & Charles Rickett, *Interpretive Legal Theory and the Academic Lawyer*, 68 MOD. L. REV. 320, 328 (2005) (“Interpretive legal theory is nothing more (nor less) than the attempt to understand legal concepts in terms of their meaning.”). For Beaver and Rickett, legal scholarship that explains legal concepts in policy terms is simply not legal scholarship. *Id.* at 335–37.

the identity of the decision-maker. Avoiding procedural questions allows English scholars of substantive law to push these troublesome questions to one side. In addition, the institutional structure of English legal education helps to keep civil procedure off the map for legal scholars; the professions maintain control over “vocational” training, removing the need for university law schools to teach procedural subjects.²³³

English legal scholars, in keeping with their more formal vision of law, continue to see procedure simply as the “handmaid” of substantive law.²³⁴ On this view, the fundamental aim of procedure is, to the extent consistent with other goals, to apply the law to the facts and produce the correct result dictated. Even England’s most urbane civil procedure scholar, Adrian Zuckerman, whose work shows deep familiarity with American procedural scholarship, feels able to conceptualize the relationship between procedure and substantive law in fairly straightforward terms:

Law enforcement in the context of civil litigation means deciding cases by establishing the true facts and correctly applying the law to them. Put differently, the court must give the parties what is due to them under the law. In a system governed by the rule of law, the law maker lays down the law and the court applies it.²³⁵

American legal scholars necessarily exhibit more complex views about the relationship between procedure and substance. Post-Realist American theorists have attended to procedural justice as a distinct form of justice,²³⁶ the site of its own distinct conflicts

²³³ See *supra* notes 89–94 and accompanying text.

²³⁴ ATIYAH & SUMMERS, *supra* note 89, at 186 (“In the more formal vision of law it is simply taken for granted that, other things being equal, the more compliance there is with the dictates of formal legal reasoning, the better.”).

²³⁵ Adrian Zuckerman, *The Challenge of Civil Justice Reform: Effective Court Management of Litigation*, 1 CITY U. H.K. L. REV. 49, 53 (2009). I do not mean to suggest that Zuckerman’s own views of the nature of civil procedure are undeveloped. For example, Zuckerman explains that the extent to which the legal system should pursue its fundamental objective—getting at the truth—is constrained by the limitations of expense and the need to render a speedy decision. *Id.* at 54–55.

²³⁶ See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (“[P]rocedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms.”).

and special choices, rather than as (just) an instrument for the enforcement of substantive law. As an illustration of the degree to which Americans intellectualize procedure, Jenny Martinez outlines five distinct ways that procedure and substance interrelate.²³⁷ Another, in an echo of Thurman Arnold, contends that “procedure is substantive, and that substance is procedural.”²³⁸ At the level of legal theory, as well as in the curriculum, a stark difference persists between England and America.

A narrowing of the divergence is far from inconceivable. To some extent, the vision of English legal scholarship I have may already be outdated; the English legal academy has been undergoing rapid change, and “black-letter” scholarship on matters of substantive law appears to be declining in prestige. In addition to this trend towards wider perspectives on law, institutional and political change may in the future drive English legal scholars to think more about procedure. England may “do more” with private litigation, particularly if European plans to develop harmonized rules for collective redress—a European form of class action—come to fruition.²³⁹ If procedure is important mainly because of how it allocates power among different actors in the civil justice system, then European integration (if the United Kingdom participates in it) is likely to increase procedure’s cultural prominence. The process of European integration has already had a radical effect on procedure in public law; the ultimate content of fundamental rights is now set, at least formally, by a court outside the English system—the European Court of Human Rights. The development of federalism within the European Union is likely to have an even more disruptive effect on the traditionally unitary English civil justice system.

But systematic thinking about civil procedure is unlikely to become widespread until curricular changes allow a critical mass of English legal scholars to make it their daily business to write about procedural questions and teach them to the next generations of lawyers. The structure of legal education in England may serve as an agent of path-dependence; for civil procedure to gain

²³⁷ Martinez, *supra* note 2, at 1031.

²³⁸ Main, *supra* note 27.

²³⁹ See generally Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures – European Debates*, 58 INT’L & COMP. L.Q. 379 (2009).

prominence in England—a prominence the subject surely deserves—England will need a change in university legal education. I suggest, however, that such change is unlikely, unless we see a deeper change in the way English scholars think about the law.

6. CONCLUSION

The comparative example of England illuminates American proceduralism in civil justice and beyond. During their training, American lawyers learn that procedure is just as worthy of intellectual attention as substantive law. Their English equivalents learn the opposite lesson; for them, civil procedure is a body of technical rules, not fit for scholarly reflection. To some extent, structural differences in the respective legal systems account for this cultural disparity. More than England, America uses civil litigation as an engine of regulation. Procedure necessarily plays a more important role in America because it allocates power to the many authorities among whom it is divided. But the divergence between these two common-law countries is even more fundamental than that. The cultural prominence of civil procedure reflects a distinctly American urge to transcend the conceptual structure of substantive legal doctrine, to understand the purposes and effects of law and legal institutions. If consequences matter, so does procedure.