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THE PAST AND FUTURE OF PROCEDURE SCHOLARSHIP

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*Written for a symposium honoring Steve Burbank's contributions to procedure scholarship, this Essay takes Geoff Hazard's monograph, *Research in Civil Procedure*, as its point of departure. Hazard was remarkably prescient in forecasting our modern predicament, posing timeless questions about the role of history and doctrine, the emphasis on normative claims and law reform, the centrality of legal theory, and the rise of empirical and other discipline-based scholarship. After surveying the challenges facing legal scholars, procedural and otherwise, the Essay concludes with a note of appreciation for Burbank's ability to couple a command of doctrinal nuance with sophisticated empirics in crafting a powerful account of the variegated institutions of procedural law reform.*

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## INTRODUCTION

Ever since law found a home in the nineteenth-century university, law professors have struggled to make scholarly contributions to knowledge from inside the discursive tradition of legal practice. Dean Langdell, under pressure to deliver a form of legal science to match the other sciences on offer in Harvard yard, eventually landed on the case as the unit of analysis.<sup>1</sup> Today, the case method remains alive as a pedagogical device, but legal realism has widened the gap between the academic profession and daily practice of law. Chief Justice John Roberts could hardly contain his dismay at the suggestion that the Court should consider political science data (“sociological gobbledygook”) in the course of deciding whether one political party had gone too far in gerrymandering Wisconsin’s voting districts.<sup>2</sup>

The Chief Justice’s dismissal of academic law represents only the latest in a series of laments from bench and bar about the declining relevance of legal scholarship. Inspired by somewhat the same dismay, Judge Harry Edwards (a former law professor) published a much-discussed criticism of academic law that touched a nerve in the 1990s.<sup>3</sup> Some years earlier, Thomas Bergin had chronicled the professional challenges facing law professors who were obliged both to train future lawyers and contribute to legal knowledge.<sup>4</sup> Other lapsed academics, too, have recognized the growing gap between legal scholarship and legal doctrine. Judge Richard Posner described the decline of law as an autonomous discipline, imagining a future in which more law professors

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<sup>1</sup> Christopher Columbus Langdell, Dean of Harvard Law School from 1870 to 1895, wrote a casebook on contract law, the first edition of which contained only cases, albeit cases carefully selected and arranged. Later editions included some narrative material. For Langdell’s famous claim that the library served as the laboratory for law students and practitioners, see Christopher Langdell, *Harvard Celebration Speeches*, 3 *LAW Q. REV.* 123, 124 (1887). For a reflection on Langdell’s scientific approach to law and the reaction of Holmes, see Patrick J. Kelley, *Holmes, Langdell and Formalism*, 15 *RATIO JURIS* 26 (2002).

<sup>2</sup> See Transcript of Oral Argument at 40, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-11161) (reflecting the remarks of Chief Justice Roberts).

<sup>3</sup> See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34 (1992) (arguing that the disjunction between legal education and legal practice “calls into question our status as an honorable profession.”).

<sup>4</sup> See Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 *VA. L. REV.* 637, 638 (1968) (lamenting the intellectual schizophrenia entailed by the law professor’s obligation to train lawyers in doctrine and to contribute to legal knowledge).

would operate from within such academic disciplines as economics and political science.<sup>5</sup>

Just before the law-and-economics revolution that Posner helped to initiate, Geoffrey Hazard wrote a piercing monograph on scholarship in the field of procedure.<sup>6</sup> In it, Hazard set the terms of debate over what counts as valuable in the scholarship of adjective law, cataloging a variety of different approaches and commenting trenchantly on their contributions and shortcomings.<sup>7</sup> Hazard wrote from inside the law school and understood the impact of the profession's workways on the production of serious scholarship.<sup>8</sup> He worried, even then, that law professors concerned themselves with having written something rather than having said something.<sup>9</sup>

Writing in the hope of saying something in honor of consummate proceduralist Stephen Burbank, I'm delighted to take this opportunity to reflect on the past and future of procedure scholarship. As Hazard observed, and as Burbank has modeled in a storied career that one can only hope will continue for years to come, procedural scholarship begins with a complete command of the subject. Such command often requires an understanding of the historical origin and current operation of legal doctrines: Hazard journeyed deeply into the past to uncover what it means to be a party to litigation just as Burbank has spent countless hours in the archives, uncovering federal procedure's origin story.<sup>10</sup> But the best such scholarship must also speak to the problems we face today. It must, in Hazard's words, be "[t]ruthful, aesthetically pleasing, . . . responsible and open with normative and policy judgments" and it must make a "contribution to the literature."<sup>11</sup> Some might say that scholarship must sing.

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<sup>5</sup> See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 778–80 (1987) (outlining several implications of the increasingly interdisciplinary nature of the legal academy).

<sup>6</sup> See GEOFFREY C. HAZARD, JR., *RESEARCH IN CIVIL PROCEDURE* (1963) (copy on file with author).

<sup>7</sup> *Id.*

<sup>8</sup> See *id.* at 59–60 (describing law schools as too small to allow faculty members to discharge their teaching duties and devote time to serious scholarship). Faculty size has grown considerably since Hazard wrote and teaching loads have declined. Today, Northwestern has over 100 full-time law faculty, as compared to the 30 we employed in 1960. See AALS DIRECTORY OF LAW TEACHERS 41 (1960) (listing 30 full-time faculty members).

<sup>9</sup> See HAZARD, *supra* note 6, at 56 ("With respect to faculty work, I think frankly that many of those who have published are more concerned with having written something than having said something.")

<sup>10</sup> See Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

<sup>11</sup> See HAZARD, *supra* note 6, at 7.

How to make that contribution remains the central question for procedure scholars, especially those writing in the shadow of such figures as Hazard and Burbank. Hazard identifies four problems that scholars in procedure should consider: the uses of history, the tendency toward an emphasis on legal reform, the role of empirical research, and the contributions of procedural theory.<sup>12</sup> That list of considerations will inform, and help to organize, my approach here. I will begin as I often do with a page of history, one offered to illuminate both the value of deep learning in procedure and the possibility that the best scholarship can make normative arguments that improve the law. Then I will tackle the important and growing divide between doctrinal and empirical scholarship and its impact on law school hiring priorities and research outcomes. Theory may help explain why doctrine continues to play so important a role in public law. The essay concludes with a reflection on the possibility of a future in which procedure scholars combine the legal and normative sophistication of the law professor with the empirical tools of a social scientist. Much the way Steve Burbank has been doing right along.

## I. SCHOLARSHIP AND LAW REFORM

Few legal scholars can claim to have left a decisive mark on the evolution of the law. Edwin Borchard left four such marks: on international law, on the problem of wrongful convictions, on government suability in tort, and, most central to this account, on the declaratory judgment.<sup>13</sup> Indeed, it's perhaps not too much to say that we owe the modern recognition and acceptance of the declaratory judgment to Borchard's tireless work on behalf of the remedy.<sup>14</sup> He wrote a series of articles and books on the topic, drafted both a

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<sup>12</sup> *Id.*

<sup>13</sup> Edwin Borchard was remembered in a volume of the Yale Law Journal, where his colleague and friend Charles Clark (head of the first federal civil rules committee and later a judge on the Second Circuit) wrote a tribute. See Charles E. Clark, *Edwin Borchard*, 60 YALE L.J. 1071-72 (1951). See also Herbert W. Briggs, *In Memoriam: Edwin M. Borchard, 1884-1951*, 45 AM. J. INT'L L. 708-09 (1951). Borchard contributed to a wide range of subjects, including the legality of declaratory judgments, Edwin M. Borchard, *The Next Step beyond Equity: The Declaratory Action*, 13 U. CHI. L. REV. 145 (1946); Edwin M. Borchard, *The Constitutionality of Declaratory Judgments*, 31 COLUM. L. REV. 561 (1931); government liability in tort, Edwin M. Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 129, 229 (1925); criminal justice reform, EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (Yale Univ. Press 1932); and international law, Edwin M. Borchard, *Treaty-Making Power as Support for Federal Legislation*, 29 YALE L.J. 445 (1920); Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944). Borchard served on the ACLU's national committee, and publicly joined an amicus brief in *Korematsu v. United States*, 323 U.S. 214 (1944). Marvin Zalman, *Edwin Borchard's Innocence Project: The Origin and Legacy of His Wrongful Conviction Scholarship*, 1 WRONGFUL CONVICTION L. REV. 124, 132 (2020).

<sup>14</sup> Numerous state and federal courts have dubbed Borchard the "father of the declaratory judgment in the United States." See, e.g., *United States Fid. & Guar. Co. v. Koch*, 102 F.2d 288, 290

uniform law for state adoption and the federal declaratory judgment act statute, and defended the constitutionality of the proceeding against challenges based on a restrictive conception of the Article III case-or-controversy requirement.<sup>15</sup> One can only nod in agreement with sentiments expressed by his colleague at Yale Law School, Charles Clark. Clark described Borchard's work on the declaratory judgment as "the greatest one-man job of legal reform to occur in this country."<sup>16</sup>

Born in 1884, Borchard was educated in New York City just as the nineteenth century was giving way to the twentieth and waves of populism and progressivism were rolling across the nation. Instinctively liberal, in a left-of-center sense, Borchard graduated from New York Law School in 1905, and then completed his BA and Ph.D at Columbia. After stints in Washington, D.C. as the librarian of Congress and a solicitor in the Department of State, Borchard returned briefly to New York as a bank lawyer before accepting a professorship at Yale in 1917. Borchard would remain in that position for thirty-three years, retiring just before his death in 1951.

Borchard's work on the declaratory judgment reflected deep learning in civil law.<sup>17</sup> The civilians had long since recognized the value of a declaratory proceeding, one that allows the parties to secure a definite statement of their legal relations as a way to order their affairs.<sup>18</sup> But as Borchard recognized, the common law tradition tended to emphasize the "wrong" as a central element of the events that gave rise to a right to pursue a claim in the courts.<sup>19</sup> Declaratory judgments in their most important sense operated to allow suit to proceed in the absence of any consummated wrong:

The distinctive feature of this second group [of declaratory proceedings] is that no "injury" or "wrong" need have been actually committed or threatened

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(3d Cir. 1939); *Panama Process, S.A. v. Cities Serv. Co.*, 362 F. Supp. 735, 738 (S.D.N.Y. 1973); *Mayor of El Dorado v. El Dorado Broad. Co.*, 260 Ark. 821, 837, 544 S.W.2d 206 (1964).

<sup>15</sup> See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* 571 n. 4 (1983) ("Professor Borchard wrote a continuous succession of other articles on the subject and was one of the draftsmen of the Uniform Declaratory Judgment Act and of the Federal Declaratory Judgment Act. He also wrote the definitive treatise.").

<sup>16</sup> See Clark, *supra* note 13, at 1072.

<sup>17</sup> Footnotes in his treatise canvas French and German legal sources and often range more widely. See EDWIN BORCHARD, *DECLARATORY JUDGMENTS* (2d ed. 1941) [hereinafter *DECLARATORY JUDGMENTS*].

<sup>18</sup> For an account of the civil law origins of the Scottish declarator action, see James E. Pfander, *Standing to Sue: Lessons from Scotland's Actio Popularis*, 66 *DUKE L.J.* 1493 (2017). Borchard described the declaratory judgment as having been a part of Scots law for 400 years. See *DECLARATORY JUDGMENTS*, *supra* note 17, at 1045.

<sup>19</sup> See *DECLARATORY JUDGMENTS*, *supra* note 17, at 5-7.

in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy . . . .<sup>20</sup>

Rejecting the idea that a right of action arose only as a form of redress for completed wrongs, Borchard saw a role for courts in providing a definitive statement of legal relations after a cloud had been cast upon one party's perceived legal entitlements.

Under Borchard's influence, state legislatures and courts came to accept the declaratory judgment as an indispensable form of relief. For example, Borchard wrote critically of an early Michigan court decision that had characterized declaratory relief as inconsistent with the judicial role and then applauded later decisions in which the same court reversed course.<sup>21</sup> After several years of state experience, the federal statute was signed into law in 1934, under Borchard's tutelage, and was promptly incorporated into federal practice in the Federal Rules of Civil Procedure.<sup>22</sup> Rule 57 set forth general guidelines for practice in applications for declaratory relief, clarifying that the right to trial by jury would govern in appropriate circumstances.<sup>23</sup> The accompanying committee note made extensive references to declaratory practice in the state courts and went so far as to suggest that Borchard's own Uniform Declaratory Judgment Act was to provide a "guide to the scope and function of the federal act."<sup>24</sup>

Yet Borchard still had to defend the declaratory judgment from the argument that it entailed an unconstitutional exercise of judicial power. Applying what had come to be known as the case-or-controversy requirement, federal courts had come increasingly to insist that their role was limited to the resolution of concrete disputes between adverse parties.<sup>25</sup> An influential summary of these emerging doctrines, many of them rooted in claims about the nature of the judicial power, appeared in Justice Brandeis's well-known opinion in *Ashwander v. Tennessee Valley Authority*.<sup>26</sup> Brandeis included on his

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<sup>20</sup> *Id.* at 27.

<sup>21</sup> See Edwin M. Borchard, *The Declaratory Judgment as an Exclusive or Alternative Remedy*, 31 MICH. L. REV. 180 (1932) (criticizing *Miller v. Siden*, 259 Mich. 19 (1932)).

<sup>22</sup> See Act of June 14, 1934, ch. 512, 48 Stat. 955 (current version at 28 U.S.C. §§ 2201–2202 (1982)); FED. R. CIV. P. 57.

<sup>23</sup> FED. R. CIV. P. 57 ("These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. section 2201. Rules 38 and 39 govern a demand for a jury trial.").

<sup>24</sup> See DECLARATORY JUDGMENTS, *supra* note 17, at app. (setting forth the legislative history of the federal declaratory judgment act and the original language of Rule 57 of the Federal Rules of Civil Procedure).

<sup>25</sup> See, e.g., *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 76 (1927) (dismissing a claim brought under the Kentucky declaratory judgment act because the state had not threatened to enforce the allegedly unconstitutional law, making the claim too abstract for adjudication).

<sup>26</sup> *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936).

list of concerns both the standing doctrine and the prohibition against the adjudication of collusive or non-adversarial suits:

The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.<sup>27</sup>

In emphasizing the need for a vital contest, Brandeis sought to ward off collusive challenges to the constitutionality of federal law. But the emphasis on concrete disputes between adversaries would pose a threat to declaratory proceedings as well, which seek to facilitate an adjudication before the parties change positions in ways that produce a concrete injury.<sup>28</sup>

A related question arose as to the advisory character of the declaratory judgment. On this view, the judicial power entailed the issuance of decrees of a coercive nature.<sup>29</sup> A judgment for money was subject to execution through the award of process to authorize seizure and sale of the debtor's assets.<sup>30</sup> A decree granting injunctive relief directed the defendant to take (or refrain from taking) specified action on pain of contempt.<sup>31</sup> By contrast, a declaratory judgment was understood to specify the respective rights of the parties without issuance of process to secure money damages or a coercive injunctive decree.<sup>32</sup> Some jurists viewed the issuance of coercive relief (an award of damages or an injunctive decree) as a defining feature of adjudication; lacking this element of coercion, declaratory judgments were sometimes viewed as a prohibited form of advisory opinion.<sup>33</sup>

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<sup>27</sup> *Id.* at 346 (Brandeis, J., concurring) (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. at 345).

<sup>28</sup> See *Willing v. Chi. Auditorium Ass'n*, 277 U.S. 274, 290 (1928) (Brandeis, J.) (noting that a resort to equity when no case or controversy existed was "a proceeding which was unknown to . . . English . . . courts"). For background on *Willing*, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 128-32 (2000).

<sup>29</sup> The term "coercive relief" is often used by courts to distinguish injunctive and monetary remedies from a declaratory judgment. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 517 (1969); *Baker v. Carr*, 369 U.S. 186, 328 (1962).

<sup>30</sup> See DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 864-81 (5th ed. 2019) (providing an overview of the collection of money judgments).

<sup>31</sup> See *id.* at 787-803 (cataloging forms of contempt to enforce injunctions).

<sup>32</sup> On the nature of declaratory relief, see Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 *DUKE L.J.* 1091 (2014).

<sup>33</sup> See, e.g., *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74 (1927) (noting how jurisdiction of federal courts is limited to "protection and enforcement of rights, or the prevention, redress, or punishment of wrongs" when necessary to carry "into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court"). The coercive force of a judgment for damages, by providing a

In a strikingly prescient 1936 article, Borchard traced the case-or-controversy problems that threatened declaratory judgment proceedings to the Court's *Muskrat* decision:

This unfortunate case started a train of thought in the court directed toward great conservatism in adjudicating cases, and resulted in a narrow construction of the terms "cases" or "controversies." This was an incident of the increasing reluctance of the court to pass on constitutional questions . . . . The strict rules evolved in the court for the adjudication of constitutional questions were imperceptibly deemed to apply to all legal issues and have been so applied by state courts, thus narrowing unduly the judicial function as compared with the practice in other countries. Moreover, the various objections to adjudication, such as prematurity or mootness, inadequacy of party interest or inconclusiveness of the judgment were all read into the words "cases" or "controversies," thus overburdening those words with a bulging content making them ever more technical without necessarily dissipating their ambiguity. Most of the tests of justiciability were thus largely identified with the phrase "cases and controversies" so that the broad definitions of [the nineteenth century] are now almost unrecognizable. Apart from the traditional grounds for refusing to review administrative findings, to pass on political questions, or decide abstract, hypothetical, fictitious, non-adversary or moot cases, cases have in recent years been dismissed on the ground that the plaintiff's interest was inadequate or that the issue was not sufficiently concrete to justify adjudication.<sup>34</sup>

Borchard thus identified two problems: the perception that the case-or-controversy language of Article III had been assigned "a bulging content" and the view that doctrines, developed as tools to manage constitutional litigation, had evolved into across-the-board restrictions that unduly narrow the judicial function in less fraught matters.<sup>35</sup>

These threats to the declaratory judgment were put to rest in the 1930s. In *Nashville, Chattanooga Railway v. Wallace*, the Supreme Court rejected the argument that the non-coercive nature of declaratory relief deprived the federal courts of power to adjudicate in such matters.<sup>36</sup> Citing such varying

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lawful basis for a sheriff's sale of the debtor's property, explains why parties might settle in the wake of a judgment. But the settlement does not deprive the judgment of its coercive threat.

<sup>34</sup> Edwin Borchard, *Justiciability*, 4 U. CHI. L. REV. 1, 4-5 (1936).

<sup>35</sup> Much the same thing has occurred with the use of case-or-controversy language to question the viability of forms of non-contentious or uncontested adjudication in the federal courts. See generally JAMES E. PFANDER, *CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS* (2021).

<sup>36</sup> See *Chattanooga, N. & St. Louis Ry. v. Wallace*, 288 U.S. 249, 263 (1933) (noting that "[w]hile the ordinary course of judicial procedure results in a judgment requiring an award of process

exercises of judicial power as the decree settling borders between states, the issuance of a naturalization decree, and the quiet title action, the Court recognized that adjudication did not invariably require coercion.<sup>37</sup> Similarly, in *Aetna Life v. Haworth*, the Court confirmed the constitutionality of the federal Declaratory Judgment Act, reversing a lower court opinion that had viewed such proceedings as incompatible with Article III.<sup>38</sup> Borchard had a hand in both cases, submitting with Charles Clark an amicus brief in *Wallace* and publishing a law review article in defense of the act's constitutionality as the *Haworth* case worked its way up to the Supreme Court.<sup>39</sup>

In fending off constitutional challenges to the declaratory judgment proceeding, Borchard was working within the doctrinal and rhetorical framework of the law. Much of his work was directed to legislatures, as he lobbied for the adoption of enabling acts that would authorize state and federal courts to entertain declaratory judgment proceedings.<sup>40</sup> But much was also directed to the courts themselves, as he patiently showed how the declaratory judgment action fit within the tradition of Anglo-American adjudication.<sup>41</sup> Many recognized the power of Borchard's intellect and learning and remarked on the impact it had on the evolution of the law.<sup>42</sup> His 1941 treatise on the declaratory judgment stands as a monument to the power of legal scholarship to create and then organize a new field of law.

## II. THE EMPIRICAL TURN IN LEGAL SCHOLARSHIP

Hazard recognized the value of historically-informed procedure scholarship and understood that it would often support law reform efforts (as

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or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function.”).

<sup>37</sup> *Id.* at 263-64.

<sup>38</sup> *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240 (1937). Brandeis silently concurred in *Haworth*, despite the fact that the decision effectively overturned his attempt to invalidate the declaratory judgment in *Willing*.

<sup>39</sup> See *Nashville, C. & St. Louis Ry. v. Wallace*, 288 U.S. 249, 258 (1933) (identifying amici); Borchard, *supra* note 34, at 4-5 (noting how “[t]he growing policy of the Supreme Court—evolved out of its own consciousness under the leadership of certain judges—designed to keep cases out of the court, synchronizes with and perhaps explains the narrowness of view evidenced in creating and developing the criteria of justiciability.”).

<sup>40</sup> On Borchard's authorship of the uniform state law and the federal declaratory judgment act, see *supra* note 15.

<sup>41</sup> On Borchard's advocacy for the constitutionality of the declaratory judgment, both through articles and amicus briefs, see *supra* note 39; see also DECLARATORY JUDGMENTS, *supra* note 17, at 150-203, for an examination of the constitutional arguments for and against declaratory judgments as they informed both state and federal decisional law.

<sup>42</sup> William O. Douglas, Borchard's colleague at Yale, described Borchard as a “one-man lobby” in support of the federal Declaratory Judgment Act of 1934. WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 167 (1974).

it had in Borchard's case). But Hazard also identified forms of empirical scholarship, which he defined as scholarship focused on the behavior of those concerned with the law (other than on the formulation and criticism of legal rules).<sup>43</sup> Hazard saw real value in the work of sociologists, keen as that profession has been on the use of field work to better understand law in action.<sup>44</sup> Hazard also saw value in the work of historians and economists,<sup>45</sup> although he did not necessarily anticipate the law-and-economics boom of the 1960s and 1970s. He had little use for the work of experimental psychologists, viewing their methods as too ill-formed to contribute reliable insights into human behavior.<sup>46</sup>

Hazard also recognized that empirical or at least non-doctrinal work was often fueled by a post-realist perspective on legal doctrine.<sup>47</sup> In contrast to the formalists that preceded them, realists held that legal doctrine was the product of judicial lawmaking and, lacking any independent or determinate content, was better adapted to justifying a result than to explaining the factors that informed the decision.<sup>48</sup> Hazard described the implications of realism for the project of legal scholarship this way:

To overstate the case for the purposes of emphasis, I think university legal researchers may have abandoned the exercise of the skills in doctrinal research in which they have been trained and at which they are expert in favor of adventures in non-technical methods, such as philosophical or psychological reflection, at which they are in varying degrees amateurs. I think this may be attributable to an uncritical adoption of the premises of "legal realism" without adoption also of the obligation to be "realistic" in a systematic and disciplined sense.<sup>49</sup>

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<sup>43</sup> See HAZARD, *supra* note 6, at 98 (discussing how "[e]mpirical research" is therefore used here in a loose sense, to refer to inquiries directed largely or primarily at the behavior, including intellectual behavior, of people concerned with law other than the formulation, analysis and criticism of legal rules as such.").

<sup>44</sup> See *id.* at 101-02 (noting how "sociologists would be able to contribute much to empirical study of the adjudicative process.").

<sup>45</sup> See *id.* at 105-06 (observing that "[t]he place for economists of this type in the study of the adjudicative process . . . is a limited but fundamental one.").

<sup>46</sup> See *id.* at 103-05 (discussing how "at the present time the experimental psychologists cannot make significant contributions to the study of the adjudicative process.").

<sup>47</sup> See *id.* at 57 (describing the post-realist flight from legal doctrine).

<sup>48</sup> For an account of realism, emphasizing the indeterminacy thesis and the distinction between the nominal and real rules that govern disputes, see Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2013).

<sup>49</sup> HAZARD, *supra* note 6, at 57. For something similar, see Posner, *supra* note 5, at 777 (noting how "many legal scholars who today are breathing the heady fumes of deconstruction, structuralism, moral philosophy, and the theory of the second best would be better employed studying the origins of the Enelow-Ettelson doctrine or synthesizing the law of insurance.").

Three ideas animate Hazard's comment: that law professors tend to enjoy a comparative advantage in doctrinal work; that legal realism has led them to distrust doctrine as a subject of inquiry; and that they have often turned, as amateurs, to other disciplines for insights into law. These ideas were tested at Northwestern Law School under the leadership of David Van Zandt.

#### A. *Empirics at Northwestern*

Hazard's view that realism might discourage doctrinal work provides an ideal introduction to the disciplinary turn taken at Northwestern Law School during Van Zandt's deanship. Serving as Dean from 1995–2011, one of the longest tenures at a major law school in recent decades, Van Zandt sought to encourage discipline-based, peer-reviewed scholarship on the part of the research faculty.<sup>50</sup> Van Zandt himself had a Ph.D in sociology based on field work with a religious group, the Children of God. But he was also trained as a lawyer, clerked with Supreme Court Justice Harry Blackmun, and practiced corporate law before joining the Northwestern faculty.<sup>51</sup> Van Zandt was skeptical of doctrinal scholarship and of the wisdom of hiring traditional legal scholars.<sup>52</sup> Instead, Van Zandt prioritized the hiring of faculty members with PhDs, often those trained to conduct statistical analyses of one kind or another. Glossing Hazard, Van Zandt held that law faculty should conduct rigorous discipline-based, rather than amateurship, empirical work, outside the tradition of doctrinal scholarship.<sup>53</sup> He based this approach on an assessment of comparative advantage.<sup>54</sup> The practicing bar could produce the law books and treatises that were once the province of law school doctrinalists and other university departments could deploy social scientific tools, but only legal scholars could deploy those tools to solve problems in the law.<sup>55</sup>

In addition to hiring practices, Van Zandt took other steps to encourage discipline-based research in law. Van Zandt pegged the teaching obligations of the research faculty at eight student contact hours per year, one of the lowest in the country.<sup>56</sup> Van Zandt's idea was to shift teaching duties to non-

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<sup>50</sup> See, e.g., David E. Van Zandt, *The Northwestern Law Approach to Strategic Planning*, 31 U. TOL. L. REV. 761, 768 (2000) (describing the Northwestern plan to emphasize interdisciplinary and empirical research).

<sup>51</sup> For this summary of Van Zandt's career, see AALS DIRECTORY 1994–95 at 904.

<sup>52</sup> For a statement of his thinking, see David E. Van Zandt, *Discipline-Based Faculty*, 53 J. LEGAL EDUC. 332 (2003).

<sup>53</sup> See *id.* at 335 (discussing discipline-based law faculty).

<sup>54</sup> See *id.* at 332–34 (highlighting the comparative advantage of law faculty “over both practicing lawyers and academics in other departments”).

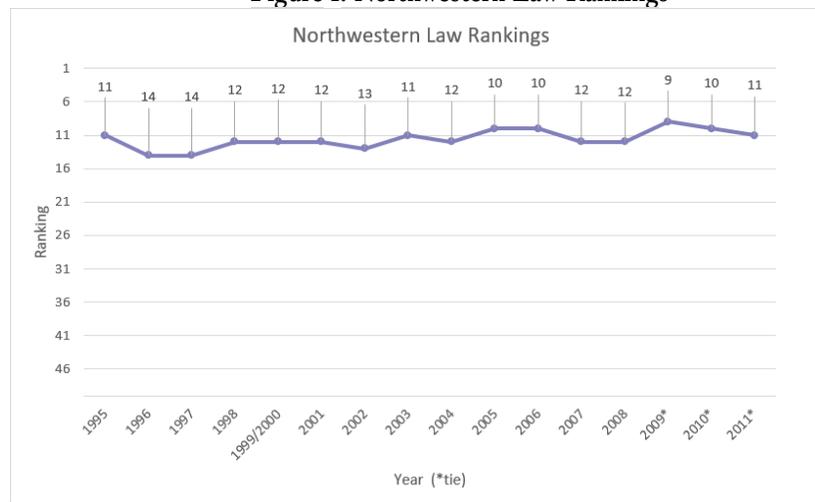
<sup>55</sup> See *id.* at 333.

<sup>56</sup> In contrast to the eight-hour expectation at Northwestern, faculty at Harvard Law typically teach ten hours per year.

tenured professors of practice, reserving time for the tenured faculty to write.<sup>57</sup> He had little use for such traditional forms of legal scholarship as treatises and casebooks, preferring instead to encourage the publication of monographs through academic presses.<sup>58</sup> He encouraged members of the research faculty to compile citation counts as part of their annual reports on their productivity.<sup>59</sup> He cultivated close ties to the American Bar Foundation, which has long been housed in the Rubloff building on the law school's Chicago campus. Curiously, he came to view law libraries as dispensable and saw no reason to hire trained professionals to run the library. Van Zandt saw these moves as disruptive in a good, Silicon Valley sort of way.<sup>60</sup>

Van Zandt was quite keen to improve the national standing of the school and attended with some care to the annual U.S. News rankings. According to a compilation prepared by the law library at Stanford, these rankings placed Northwestern in the so-called T14 throughout Van Zandt's tenure but did not reflect much movement.<sup>61</sup>

Figure 1: Northwestern Law Rankings



<sup>57</sup> See *id.* at 335 (discussing the role of “research faculty of the future law school”).

<sup>58</sup> See *id.* at 332, 333, 339 (advocating “university press monographs” and noting how the world has changed such that the legal treatise is no longer the “ultimate product”).

<sup>59</sup> Based on recollection of the author, as a member of Northwestern law faculty.

<sup>60</sup> Van Zandt presided over the departure of leading figures in fields dominated by doctrinal scholarship. A partial list would include Tom Merrill (public law to Columbia), Rob Sitkoff (trusts and estates to Harvard), and Henry Smith (equity and property to Harvard).

<sup>61</sup> See Paul Lomio, Erika V. Wayne, & George D. Wilson, *Ranking of Top Law Schools 1987 - 2009 US News & World Report*, Robert Crown Law Library Research Paper No. 20 (April 2008).

As the chart reflects, Van Zandt began and ended his career as dean of a school ranked 11 in U.S. News. Some movement up and down occurred over the intervening years, but nothing dramatic or sustained.

In assessing Van Zandt's strategic embrace of interdisciplinary and especially quantitative empirical legal scholarship,<sup>62</sup> one might ask how effective he was in hiring new scholars with disciplinary training. According to a recent summary of faculty hiring during the relevant period compiled by Northwestern's (now newly professionalized) library staff, fifteen of the twenty-one new research faculty members added during Van Zandt's deanship would hold Ph.Ds (either at the time of hiring or sometime thereafter).<sup>63</sup> Three of these fifteen new discipline-based scholars had *only* Ph.Ds, having never earned a juris doctorate or equivalent degree from a law school in the United States or elsewhere.<sup>64</sup>

Law school rankings will almost surely continue to emphasize citation counts as one measure of faculty excellence and reputation.<sup>65</sup> Brian Leiter's rankings, also citation based, have been updated by Greg Sisk and others.<sup>66</sup> These rankings evaluate the strength of the school by ignoring many U.S. News factors, such as student quality, and concentrating on citations as a measure of faculty quality.<sup>67</sup> Many debate the validity of citation counts, and I harbor serious doubts about their use.<sup>68</sup> One might nonetheless ask, given his emphasis on citation counts in evaluating the strength of current

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<sup>62</sup> Here, it may be useful to distinguish quantitative and qualitative empirical work. A variety of law professors conduct qualitative empirical work, understood as work that rests on observation or experience, rather than theory or logic. Law progresses when it identifies better ways to test the validity and reliability of empirical conclusions that may have once depended entirely on qualitative or experiential observations. For progress in the field of evidence after *Daubert's* insistence on greater scientific rigor, see Michael J. Saks & David L. Faigman, *Expert Evidence After Daubert*, 1 ANN. REV. L. SOC. SCI. 105 (2005). DNA exonerations teach us that eyewitness testimony has been notoriously problematic.

<sup>63</sup> See Faculty Hiring During the Van Zandt Years (compiled by the Pritzker Legal Research Center) (December 2020) (copy on file with author).

<sup>64</sup> See *id.*

<sup>65</sup> It has been reported that U.S. News & World Report will begin publishing a scholarly impact ranking. Paul Caron, U.S. News to Publish Law Faculty Scholarly Impact Ranking in 2021 (Nov. 9, 2020), [https://taxprof.typepad.com/taxprof\\_blog/2020/11/us-news-to-publish-law-faculty-scholarly-impact-ranking-in-2021.html](https://taxprof.typepad.com/taxprof_blog/2020/11/us-news-to-publish-law-faculty-scholarly-impact-ranking-in-2021.html). But other reports indicate that U.S. News has decided that no reliable faculty citation count yet exists.

<sup>66</sup> Gregory Sisk, Nicole Catlin, Katherine Veenis & Nicole Zeman, *Scholarly Impact of Law School Faculties in 2018: Updating the Leiter Score Ranking for the Top Third*, 15 ST. THOMAS L.J. 95 (2018).

<sup>67</sup> *Id.* at 95 (discussing law school rankings based only upon "scholarly impact of law faculties").

<sup>68</sup> See Joshua B. Fischman, *Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship*, 162 U. PA. L. REV. 117, 121-22 (2013) (explaining the problems with citation-based assessments of quality). Justice Kennedy's decision in *Iqbal*, for all its citations by lower court judges and scholars, stands as an exercise in willful mediocrity. One might nonetheless defend citation counts as a rough measure of scholarly impact that serve to counter idiosyncratic assessments of quality in the hiring, promotion, and tenure processes.

and prospective faculty members, whether Van Zandt's hiring of a discipline-based faculty bore fruit in terms of his own preferred metric of citation counts.

Sisk's methodology, following Leiter, ranks schools by looking at the citation counts of the average and median members of a faculty.<sup>69</sup> Sisk also identifies the most cited members of the faculty. For Northwestern in 2018, the year of the most recent survey, Sisk identified eleven members.<sup>70</sup> Of those faculty members, six work primarily in public law applying traditional legal methods, including one member who has a Ph.D. in political science.<sup>71</sup> Of the remaining five, one does a good deal of empirical work in the allied health area (albeit without formal disciplinary training in the field), one conducts some empirical research in patent law (again, without disciplinary training), one works primarily in environmental and property law, and one works primarily within the disciplinary framework of psychology. Neither of the two most highly cited faculty members has a Ph.D.<sup>72</sup>

Another citation-based measure of recognition appears in Leiter's specialty rankings, which attempt to identify the most highly cited scholars across a range of legal subjects.<sup>73</sup> In the most recent such compilation, drawing on Sisk's data from 2018, Leiter compiled specialty rankings in fourteen separate fields for the period 2013-17.<sup>74</sup> Northwestern placed scholars on the list of top scholars in three fields: constitutional law,<sup>75</sup> corporate law,<sup>76</sup>

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<sup>69</sup> For an account of the methodology, see Sisk, *supra* note 66, at 108-09. For an assessment of citation counts more generally, see Gary M. Lucas, Jr., *Measuring Scholarly Impact: A Guide for Law School Administrators and Scholars*, 165 U. PA. L. REV. ONLINE 165, 170 (2017).

<sup>70</sup> See Sisk et al., *supra* note 66, at 119 (identifying Allen, Black, Calabresi, Dana, Diamond, Koppelman, McGinnis, Pfander, Redish, Rodriguez, and Schwartz).

<sup>71</sup> Curriculum vitae of all eleven professors can be accessed through the Northwestern faculty web page. *Faculty & Research*, NW. PRITZKER SCH. OF L., <https://www.law.northwestern.edu/faculty/research>.

<sup>72</sup> Both were, though, relatively senior with many publications to which other scholars might cite.

<sup>73</sup> Brian Leiter, *Ten Most-Cited Law Faculty in the United States for the period 2013-2017* (Aug. 14, 2018), <https://leiterlawschool.typepad.com/leiter/2018/08/ten-most-cited-law-faculty-in-the-united-states-for-the-period-2013-2017.html>. This ranking is based on the data compiled by Sisk et al., *supra* note 66.

<sup>74</sup> For a summary of Leiter's results, see *id.* The fields include the following: constitutional law, corporate and securities law, public law, criminal law and procedure, commercial law, law and economics, law and social science, legal history, tax, law and philosophy, intellectual property, international law, and tort/insurance law. Northwestern had ranked scholars in three of these fields, corporate law, constitutional law, and civil procedure.

<sup>75</sup> Brian Leiter, *20 Most-Cited Constitutional Law Scholars in the U.S. for the Period 2013-2017* (Aug. 21, 2018), <https://leiterlawschool.typepad.com/leiter/2018/08/20-most-cited-constitutional-law-scholars-in-the-us-for-the-period-2013-2017.html>.

<sup>76</sup> Brian Leiter, *20 Most-Cited Corporate Law and Securities Regulation Scholars in the U.S. for the Period 2013-2017* (Aug. 15, 2018), <https://leiterlawschool.typepad.com/leiter/2018/08/20-most-cited-corporate-law-and-securities-regulation-scholars-in-the-us-for-the-period-2013-2017.html>.

and civil procedure.<sup>77</sup> None of the ranked scholars has a Ph.D. in a relevant field, although one works primarily with statistical methods.<sup>78</sup> Notably, Northwestern had no ranked scholars in the fields in which one finds that Ph.Ds perform particularly well—law and economics, law and social science, and legal history.

The citation counts of discipline-based scholars may reflect their relative youth and the tendency of law review citation counts to slight their peer-reviewed work.<sup>79</sup> Citations counts may also reflect the possibility that scholars conducting some forms of quantitative empirical research pay too little attention to the need for a research design that will yield results with relevant normative implications. Professor Joshua Fischman put his finger on this problem in an engaging reflection on the failure of much empirical work to adopt a normatively interesting research design:

When standards for research questions are left unarticulated, it is all too tempting to allow the availability of data to define the research question. Without some criterion of importance, one can start with a data set, apply a preferred statistical technique, and then rationalize a research question that is answered by the resulting estimate.<sup>80</sup>

Pre-commitment can address the problem of p-trolling<sup>81</sup> but will not ensure that researchers pose normatively useful questions. Some scholars may view

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<sup>77</sup> Brian Leiter, *10 Most-Cited Civil Procedure Faculty in the U.S. for the Period 2013–2017* (Sept. 4, 2018), <https://leiterlawschool.typepad.com/leiter/2018/09/10-most-cited-civil-procedure-faculty-in-the-us-for-the-period-2013-2017.html>.

<sup>78</sup> See e.g., Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990).

<sup>79</sup> One might speculate that law professors often conduct scholarly research in the most readily available source, Westlaw. If so, then citations will skew toward journals that appear in Westlaw's collection. But Westlaw excludes many social science journals, thereby failing to make them readily available to professors looking for scholarship on a particular topic. Thanks to Greg Sisk for suggesting this explanation. One might test the impact of reliance on Westlaw by comparing citation counts in Google Scholar, which does include many social science journals. See Lucas, *supra* note 69, at 172 (noting that Google Scholar includes citation in social science journals).

<sup>80</sup> Fischman, *supra* note 68 at 160. Christopher Columbus Langdell opposed the suggested linkage between doctrinal work and normative considerations and sought to focus entirely on doctrine. See Patrick J. Kelly, *Holmes, Langdell, and Formalism*, 15 *RATIO JURIS* 26, 36 (2002) (quoting letter from Langdell to Theodore Dwight Woolsey of Yale, drawing a line between the study of law as it is and the study of law as it ought to be and concluding that lawyers and law professors ought to study only the law as it is.).

<sup>81</sup> To reduce the likelihood of data manipulation, scholars have called for a pre-commitment to specific research questions in advance of any data collection and regression analysis. Otherwise, researchers may find it too tempting to ask the questions that a regression on available data happens to answer, leading to replicability problems. See Robert MacCoun & Saul Perlmutter, *Hide Results to Seek the Truth*, 526 *NATURE* 187, 188 (2015) (calling attention to the replicability crisis and the need for blind research methods); Robert J. MacCoun, *The Epistemic Contract: Fostering an*

the exploration of causal relationships as a worthwhile research project, declining to heed Fischman's call for research designs that might help improve the normative bite of quantitative work.

What then accounts for Van Zandt's emphasis on discipline-based scholarship? Gains in citation counts and school prestige proven elusive. As one thoughtful reader observed, Van Zandt could have scored more citations by doing more hiring in the fields of public law and public health, fields that tend to attract a good deal of citation attention.<sup>82</sup> Rather than citation-chasing, Van Zandt's practice of hiring empirical Ph.Ds appears to have been driven by a distinctive view of what constitutes good legal scholarship.<sup>83</sup> All of which leads us back to the account with which we began: deeply skeptical realists distrust legal doctrine, even in the hands of such luminaries as Edwin Borchard.

### B. *Empirics and Procedure*

For many years, scholarship in the field of procedure has focused on internal forms of argument, much like those Edwin Borchard made in defense of the declaratory judgment within the discursive tradition of legal argument.<sup>84</sup> One can see the dominance of traditional legal methods among proceduralists in a variety of sources. Hazard praised the Hart and Wechsler casebook, *Federal Courts and the Federal System*, as a truly innovative and high-quality example of legal scholarship in procedure.<sup>85</sup> Although the book first appeared in 1953, a few years before Hazard wrote, Hart and Wechsler has retained its hold on legal academia and continues to influence scholarship and law reform efforts in the subjects it tackles.<sup>86</sup> The book tends to anchor historically-inflected doctrinally-focused writing that frustrates scholars with a more explicitly policy-based or critical approach to legal

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*Appropriate Level of Trust in Experts* 28 (Working Paper, No. 2524585, 2014) (discussing the push for transparent research as a way to build an appropriate level of public trust in experts).

<sup>82</sup> For an interesting compilation and analysis of which law review articles garner the most cites, see Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483 (2012) (updating lists on the most cited law review articles and analyzing trends in legal thought).

<sup>83</sup> Notably, even so adept a social scientist as Richard Posner repeatedly called for greater attention to legal doctrine and lamented the failure of law professors to conduct such analysis at a suitably high level. Posner, *supra* note 5, at 777.

<sup>84</sup> See generally DECLARATORY JUDGMENTS, *supra* note 17.

<sup>85</sup> See HAZARD, *supra* note 6, at 1277 n. 121 (discussing HENRY M. HART JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953)).

<sup>86</sup> As one author put it, "[n]o law book has enjoyed greater acclaim from distinguished commentators over a sustained period than has Hart & Wechsler's *The Federal Courts and the Federal System*. Indeed, the praise seems to escalate from one edition to the next." Michael Wells, *Who's Afraid of Henry Hart?*, 14 CONST. COMMENT. 175, 175 (1997).

scholarship.<sup>87</sup> Mark Tushnet, for example, expressed frustration after attending a junior scholars' conference that work in federal jurisdiction remained too narrowly doctrinal and historical.<sup>88</sup>

Several factors have tended to encourage traditional doctrinal scholarship among proceduralists. For starters, many of the new faculty hired to teach and write in procedure have had some experience in law practice.<sup>89</sup> In addition, procedure scholars tend to teach first-year classes in which a focus on doctrine comes naturally. The practice background and instructional obligations of procedure scholars may help explain why, as Hazard observed, their scholarly work often resembles law office memoranda.<sup>90</sup> Perhaps equally important, courts and practitioners may tend to view questions of procedure as more clearly based on the rules that emerge from standard legal analysis than those in fields where normative considerations play a more substantial role. Justice Elena Kagan seemingly had this distinction in mind when, as a part of public comments to a faculty group, she described the Supreme Court's deliberative process.<sup>91</sup> On the most divisive questions of constitutional law, on which the Justices have well developed views, deliberations do not help.<sup>92</sup> But as to what one might consider the more lawyerly questions, particularly on issues of jurisdiction, Justice Kagan described a vigorous and helpful deliberative process as the Justices strove for right lawyerly answers.<sup>93</sup>

Justice Kagan's account of the deliberative process nicely maps onto the results of an interesting study of the comparative power of two competing models for predicting Supreme Court outcomes. In a contest between the "machine" (predictions based on Martin-Quinn scores that ignore doctrine and measure the ideology of the Justices and array them along a spectrum) and the "experts" (a group of academics and appellate practitioners with knowledge of the Court's doctrine and workways), the machine generally won.<sup>94</sup> But the experts "substantially outperformed the model in predicting

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<sup>87</sup> See generally *id.* at 176. (criticizing Hart & Wexler for failing to consider a policy-based approach).

<sup>88</sup> Mark Tushnet, *The Federal Courts Junior Scholars Workshop* (Oct. 2014), [https://jotwell.com/wp-content/uploads/2014/07/ConLaw\\_Fed-Courts-Scholars-Workshop\\_Oct2014.pdf](https://jotwell.com/wp-content/uploads/2014/07/ConLaw_Fed-Courts-Scholars-Workshop_Oct2014.pdf).

<sup>89</sup> See e.g., Faculty Hiring, *supra* note 63.

<sup>90</sup> See HAZARD, *supra* note 6, at 58 (describing much legal scholarship as law office on academic letterhead).

<sup>91</sup> For an account of Justice Kagan's remarks, see John O. McGinnis, *Our Two Supreme Courts* (May 2015), <https://lawliberty.org/our-two-supreme-courts> (recounting Justice Kagan's speech at Northwestern Law School).

<sup>92</sup> See *id.* (arguing that further deliberation is unhelpful where there is a lack of "common legal language" or even "shared preferences" on the Court.).

<sup>93</sup> *Id.*

<sup>94</sup> See Theodore C. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court*

both case outcomes and votes in the judicial power cases.”<sup>95</sup> The cases in this category presented “technical issues of procedure in which the rule of decision was unlikely to directly implicate broad policy debates outside the legal system.”<sup>96</sup> In such situations, the authors found, legal experts may have a “comparative advantage over the machine.”<sup>97</sup> Put simply, legal doctrine may have greater predictive and holding power in procedure cases than in the more ideologically-charged issues of constitutional law that come before the federal courts.

Theory may have something to say about why doctrine plays a more substantial role in matters of procedure, and perhaps in public law, than in other more evidently policy-laden fields. Procedure and some aspects of public law ultimately center on the idea that an impersonal rule of law provides the framework within which parties resolve their disputes. Rule-of-law values—notice, an opportunity to be heard, equality of arms in litigation, an unbiased judge—have long informed our understanding of the role that an independent judiciary should play in our scheme of government.<sup>98</sup> Arguments about how to reconfigure the balance of power, between plaintiffs and defendants or between state and federal tribunals, may yield more readily to the discursive tradition of law than to the more utilitarian policy analysis that informs choices in, say, corporate law. Even in fields adjacent to public law, like the partisan gerrymandering case that spawned Chief Justice Roberts’ critique of social scientific data, the strong pull of the rule of law may tend to crowd out the contributions of empiricists.<sup>99</sup> One might predict,

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*Decisionmaking*, 104 COLUM. L. REV. 1150 (2004) (finding that a statistical model better forecasted the Supreme Court’s decisions as compared to predictions made by legal experts).

<sup>95</sup> *Id.* at 1182.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> On the importance of impartial administration of justice, see JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) (“Without justice being freely, fully, and impartially administered, neither our persons, nor our rights, nor our property, can be protected. And if these, or either of them, are regulated by no certain laws, and are subject to no certain principles, and are held by no certain tenure, and are redressed, when violated, by no certain remedies, society fails of all its value; and men may as well return to a state of savage and barbarous independence.”). For a classic definition of due process, see Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1975) (identifying as elements of due process: an unbiased tribunal; notice of the proposed action and the grounds asserted for it; opportunity to present reasons why the proposed action should not be taken; the right to present evidence, including the right to call witnesses; the right to know opposing evidence; the right to cross-examine adverse witnesses; a decision based exclusively on the evidence presented; opportunity to be represented by counsel; requirement that the tribunal prepare a record of the evidence presented; requirement that the tribunal prepare written findings of fact and reasons for its decision; public attendance; and judicial review).

<sup>99</sup> See *Gill v. Whitford* 138 S. Ct. 1916, 1933 (2018) (criticizing data on partisan gerrymandering for failing to account for the practical effect of such gerrymandering on individuals’ rights.).

then, that law-and-economics and other social scientific learning will contribute more to policy debates about the perfection of market-based transactions than to arguments about what it means to have a just system of adjudication or a good society.

If the impersonal rule-of-law underpinning of procedure makes doctrine more salient than in other fields of law—where policy debates, partisan perspectives, and motivated reasoning may shape judicial decisions<sup>100</sup>—then empirical scholarship in procedure might best be grounded in a strong command of doctrine, and the distinctive normative issues it presents. That, indeed, was part of the message Professor Fischman conveyed in reflecting on the failure of much empirical work to grapple effectively with normative issues.<sup>101</sup> And, sure enough, the best of the new empirical procedural scholarship, very much including Steve Burbank's work with Sean Farhang, tackles procedural problems from a perspective informed by an exceptional command of doctrinal nuance and institutional role.<sup>102</sup> As a model for the future, Burbank and Farhang, and a host of younger scholars, have much to teach us about how we might use more sophisticated empirics to shed light on the complex normative issues that procedural doctrine generates.

### III. THE FUTURE OF EMPIRICAL PROCEDURE SCHOLARSHIP

In the work of Burbank and Farhang, we find some of the most promising empirically minded contributions to our understanding of the institutions that make and alter the adjective law of the federal courts.<sup>103</sup> Burbank has, of course, long been our most penetrating observer of the rule-making process, recognizing in a classic paper that limits on procedural encroachments on substantive law were meant to protect federal legislative primacy in that sphere.<sup>104</sup> More recent papers continue to explore the institutional role of

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<sup>100</sup> On the role of motivated reasoning, see Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011) (“Motivated reasoning refers to the tendency of people to unconsciously process information—including empirical data, oral and written arguments, and even their own brute sensory perceptions—to promote goals or interests extrinsic to the decisionmaking task at hand.”).

<sup>101</sup> See Fischman, *supra* note 68 at 156-58 (writing that an “essential feature of law . . . is its normativity” and explaining that the importance of empirical research on the law must be assessed in terms of the values it references and promotes.).

<sup>102</sup> See e.g., Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification in the U.S. Court of Appeals*, 119 MICH. L. REV. 231 (2020) (analyzing how characteristics of appellate judges influence class certification under Rule 23 of the Federal Rules of Civil Procedure).

<sup>103</sup> See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1544 (2014) (detailing how the courts through their control of procedure affect private enforcement of individual rights.).

<sup>104</sup> See Burbank, *supra* note 10. Apart from his scholarship, Burbank has devoted no small amount of time to the unsung work of painstaking law reform. Burbank led a Third Circuit Task Force on the subject of Rule 11 sanctions and contributed his findings to a growing body of empirical

courts and legislative bodies, combining the deep understanding that one gains from a patient lifetime of study with the use of more muscular empirical tools to test intuitions about the partisan character of procedural innovation.<sup>105</sup> If as Burbank and Farhang explain, “[e]mpirical study is a threat to ignorance and thus to claims of neutrality,”<sup>106</sup> then the empirics on display in this work powerfully reveal partisan politics at work in the nominally neutral precincts of procedural reform.

#### A. *Burbank and Farhang on the Political Economy of Procedure*

Burbank and Farhang work at several levels at once. For starters, they offer an empirical account of legislative efforts to alter access to court for plaintiffs seeking to vindicate their rights under federal statutes, many of which include provisions for the payment of attorneys’ fees.<sup>107</sup> Beginning with the Reagan era, many of these proposals sought to curtail fee payments or impose other restrictions in response to a supposed litigation “explosion.”<sup>108</sup> But these proposals failed to gain traction, in part due to the multiple veto points in the legislative process and in part due to the absence of broad-based popular support.<sup>109</sup> Then, Burbank and Farhang chart a more successful gambit as reformers shifted their attention away from legislative reform and in the direction of reform through the process of amending and interpreting procedural rules.<sup>110</sup> Early efforts at reform by rule change (such as the 1983 version of Rule 11) triggered popular opposition and led to the creation of a more transparent rule-making process, culminating in the 1988 amendments to the Enabling Act.<sup>111</sup>

But reform was more successful in the Supreme Court, where the Justices have the capacity to make significant changes, as in the rules that govern

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work that questioned the wisdom of the 1983 amendments to the Rule. In addition, Burbank led a group of procedure scholars in a careful evaluation of the proposed restyling of the Federal Rules, coordinating efforts to comb carefully through the draft in search of mis-steps.

<sup>105</sup> A repository of Burbank’s published works can be accessed through the Penn Law Legal Scholarship Repository. *Stephen Burbank*, PENN L. LEGAL SCHOLARSHIP REPOSITORY, [https://scholarship.law.upenn.edu/do/search/?q=author\\_lname%3A%22Burbank%22%20AND%20author\\_fname%3A%22Stephen%22&start=0&context=3571832&sort=date\\_desc&facet=](https://scholarship.law.upenn.edu/do/search/?q=author_lname%3A%22Burbank%22%20AND%20author_fname%3A%22Stephen%22&start=0&context=3571832&sort=date_desc&facet=)

<sup>106</sup> Burbank & Farhang, *supra* note 103, at 1597.

<sup>107</sup> *Id.* at 1555-56.

<sup>108</sup> Burbank & Farhang at 1556.

<sup>109</sup> *Id.* at 1564-65.

<sup>110</sup> *See id.* at 1587 (“[E]ffective control of procedure ensures that means are available for a judiciary that is ideologically distant or driven by institutional self-interest to frustrate legislative preferences by constricting access to court.”).

<sup>111</sup> The Rules Enabling Act of 1934 authorizes the Supreme court to promulgate rules of procedure, the 1988 amendments formalized the committee procedure through which the rules are researched and proposed. *See* 28 U.S.C. § 2071-2077 (highlighting the Supreme Court’s authorization to promulgate rules of procedure).

notice pleading, by simple majority vote.<sup>112</sup> Burbank and Farhang show that similar changes have occurred in the interpretation of Rule 23 and in the restrictive interpretation of fee-shifting statutes.<sup>113</sup> They couple this account with an assessment of the ideology of the Justices who voted for and against narrowed access to justice.<sup>114</sup> Perhaps unsurprisingly, the more ideologically conservative Justices were those most likely to support narrowed access to the federal courts along a range of issues.<sup>115</sup>

Like the politics of rule amendments, the empirics on display work at several levels. First, the authors nicely debunk the empirical evidence marshaled to support access-narrowing amendments to the rules of procedure.<sup>116</sup> Down a long list of issues, from pleading to discovery to baseless or frivolous litigation, careful study of the actual practice of civil litigation reveals little empirical support for changes proposed to narrow access to court.<sup>117</sup> Second, the authors draw on impressive large N studies of the voting behavior of the Justices to cement the claim that ideology informs the Court's approach to what they describe as a form of procedural lawmaking through the interpretive process.<sup>118</sup> But they stop short of over-claiming, recognizing at several points along the way that other factors aside from ideology undoubtedly inform the Justices' votes.<sup>119</sup>

To summarize, Burbank and Farhang combine the insights of the "machine" and the "experts" in a magisterial account of the political economy of procedural law reform.<sup>120</sup> The piece would not have been possible without a deep knowledge of the field and a close reading of the interaction of Supreme Court decisional law and the rule-making process. Nor would the work have conveyed so powerful a message had it relied only on a narrative account of the law and politics of procedural lawmaking. Other senior scholars have made the arresting, if largely intuitive or casually empirical,

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<sup>112</sup> See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (making a widely-remarked change from notice to plausibility pleading by a narrow 5-4 vote).

<sup>113</sup> See Burbank & Farhang, *supra* note 103, at 1604 (discussing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), as a decision that stretched interpretation of Rule 23 to the breaking point).

<sup>114</sup> *Id.* at 1607.

<sup>115</sup> The justices least likely to vote for greater access were Powell, Thomas, and Scalia. The justices most likely to vote for expanded access were Kagan, Sotomayor, and Brennan. *Id.* at 1607.

<sup>116</sup> *Id.* at 1558-59.

<sup>117</sup> *Id.*

<sup>118</sup> Burbank & Farhang, *supra* note 103, at 1572-73.

<sup>119</sup> For example, the authors theorize that a decreased threat of legislative override may have played a role in judicial decision making post-1994. *Id.* at 1577.

<sup>120</sup> See Ruger, et al., *supra* note 94 (summarizing Burbank and Farhang's contributions).

claim that the Supreme Court has been captured by the Chamber of Commerce;<sup>121</sup> Burbank and Farhang provide compelling proof.

### B. *The New Procedural Empiricism*

One measure of the success of the new procedural empiricism has been the extent to which it has encouraged a broad group of younger scholars to take up the empirical study of procedure, particularly with an eye on the regulatory role of private civil litigation and the politics of the rulemaking process. Brooke Coleman has looked critically at the membership of the rules advisory committees, questioning its lack of diversity.<sup>122</sup> Zach Clopton has compiled a remarkable collection of data on the rulemaking process in the state systems, providing an exhaustive and long overdue account of their form and function.<sup>123</sup> Others, including Diego Zambrano, have adopted less distinctively empirical strategies, following Burbank and Farhang to reckon the benefits of private civil discovery as a substitute for more expensive forms of agency investigation and enforcement.<sup>124</sup>

The best such procedural scholarship also follows Burbank and Farhang in combining quantitative and qualitative empirical analysis within a framework informed by a clear-eyed set of normative questions. Marin Levy's work with Adam Chilton on random panel assignments provides a kind of one-two empirical punch. The first paper examines the fact of the matter, compiling a dataset of circuit court panel assignments and questioning the widespread assumption that such assignments had been randomly made.<sup>125</sup> The second paper explores the practice of assignment through painstaking interviews with circuit judges and senior court administrators, confirming its non-random character.<sup>126</sup> Such work, informed by knowledge of the

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<sup>121</sup> See Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 636 (2011) (expressing agreement with Arthur Miller that the Court's opinion in *J. McIntire Machinery Ltd. v. Nicastro*, 546 U.S. 873 (2011), reflects its capture by the Chamber of Commerce).

<sup>122</sup> See Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 407 (2018) (reporting that 116 out of 136 members appointed to the rules committee over its history have been white males); cf. Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015) (tracing the politics that inform selection of members on the rule-making committees of the Judicial Conference).

<sup>123</sup> See Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 (2018) (compiling data on the rule making process).

<sup>124</sup> See Diego Zambrano, *Discovery as Regulation*, 118 MICH. L. REV. 71 (2020) (arguing, via a less empirical method, the case for private discovery).

<sup>125</sup> See Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015) (compiling evidence of nonrandom panel assignment in federal appellate courts).

<sup>126</sup> See Marin K. Levy, *Panel Assignments in the Federal Courts of Appeals*, 103 CORNELL L. REV. 105 (2017) (confirming through interviews a set of non-random assignment practices).

institutions of circuit court adjudication, calls for reconsideration of a large body of quantitative empirical work that takes random assignment as a given.

While some of these empirical pieces have been written without the benefit of disciplinary training in statistics, much of the best recent empirical procedural scholarship displays a nice statistical sophistication. Consider the work of Jonah Gelbach, who wrestles productively with the changes to procedure wrought by the Supreme Court's decisions in *Twombly* and *Iqbal*.<sup>127</sup> Gelbach sets out to help us better understand the impact of the two decisions on pleading, motions to dismiss, discovery, and adjudication on the merits. In doing so, he recognizes that the design of empirical scholarship must be driven by a sound understanding of normative questions and account for the complexity of human behavior.<sup>128</sup> Thinking hard about selection effects, Gelbach effectively criticizes much of the no-big-deal empiricism that emerged post-*Twiqbal*.<sup>129</sup>

One might well predict that the procedure scholars of the future will increasingly enter the job market with advanced degrees in other disciplines. My colleague at Northwestern, Sarah Lawsky, maintains a database of all new hires at AALS member schools.<sup>130</sup> According to Lawsky, who cautions that the information she collects depends on self-reporting and may not be complete, procedure scholars increasingly come to the market with advanced degrees but not at the rate of the general hiring pool.<sup>131</sup> Consider the following table, collecting data from 2011-2020 and comparing the background of all newly hired professors with those new hires who list civil procedure as one of their two top fields of endeavor.

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<sup>127</sup> See Jonah B. Gelbach, *Locking the Doors of Discovery?* 121 YALE L.J. 2270 (2012); Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?* 2 STAN. J. COMPLEX LIT. 223 (2014).

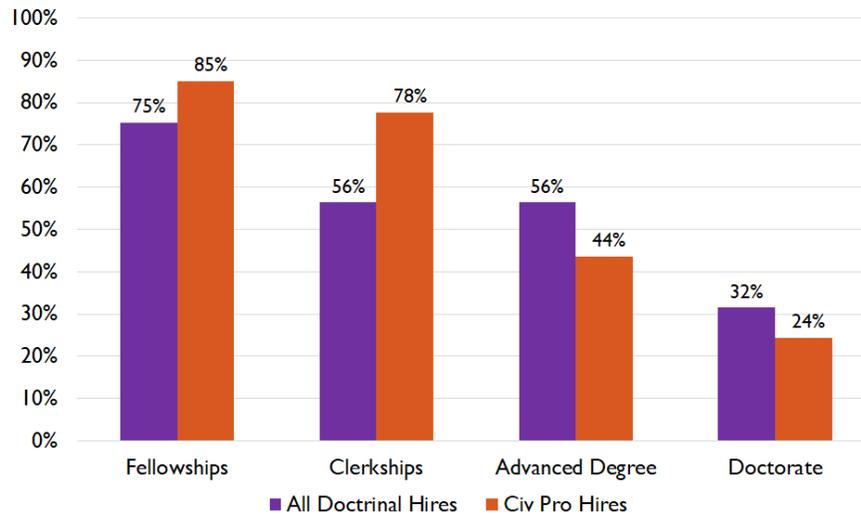
<sup>128</sup> See Gelbach, *Dark Arts* *supra* note 127, at 292-93 (emphasizing normative bite and human agency as complicating factors in quantitative empirical analysis).

<sup>129</sup> *Id.* at 234 (criticizing Hubbard's failure to take account of defendant-focused selection effects).

<sup>130</sup> Sarah Lawsky, *Entry Level Hiring Report*, PRAWFSBLAWG (May 11, 2021), <https://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report>. Lawsky prepared the tabular comparison at the author's request. Note that hires in civil procedure are identified not by willingness to teach as expressed in the registry forms submitted to AALS but by self-reports of fields of primary scholarly interest as submitted to Lawsky. Note further that new hires in civil procedure are included in the data for "all doctrinal hires," thus muddying the comparison to some extent.

<sup>131</sup> *Id.*

Figure 2: Credentials of Faculty Hired by AALS Member Schools 2011–2020



The data reveal that civil procedure scholars, as one might expect, are more likely to have clerkship experience and less likely to have advanced degrees, including Ph.Ds than newly hired scholars as a group.<sup>132</sup> Yet one supposes that new hires in procedure over the past decade were substantially more likely to have advanced degrees and doctorates at the time they were hired than the incumbent procedure professors they joined or replaced.

I view the disciplinary background of those recently hired in procedure, coupled with their practice, fellowship, and clerkship experience, as a particularly hopeful sign of what lies ahead for procedure scholarship. Command of legal doctrine remains a key element of procedure scholarship, providing the framework that helps define what counts as important in the field. Indeed, a continuing concern with getting the doctrine right helps to explain the popularity of the listserv in civil procedure, where scholars from around the country pose and parse procedure puzzles. Legal rules and the rich normative debates they engender will continue to anchor the best procedure scholarship. Only by understanding the normative discourse of the law can procedure scholars ask the research questions and design the studies needed to provide useful answers.

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<sup>132</sup> One might suppose, as Zach Clopton has suggested, that the trend revealed in the table reflects the advice of senior faculty that job applicants with a background in law practice and no disciplinary training might best seek their academic fortune as proceduralists.

### C. *Integrating Law and Discipline-Based Scholarship*

What's true for scholarship in procedure may well be true for the rest of the law school. Some versions of a discipline-based model may lead to a law faculty made up of breakout rooms, where the public lawyers talk to one another in spaces set off from those occupied by the economists and historians and political scientists. The multiplicity of discipline-based workshops at the modern law school provides some evidence of disciplinary fragmentation.<sup>133</sup> Only the most ardent faculty member can attend and contribute to all of the sessions on offer; most faculty members focus on those that seem most relevant to their work. One might begin to worry when the economists at a law school prefer to talk shop with the university's other economists (those housed in the business school and the college of arts and sciences) than with their law school colleagues.

Such fragmentation threatens the coherence of law as a discourse around which the law faculty can organize its intellectual life. That life has many elements: members of a law faculty work together to produce new legal scholarship, they collectively contribute to the improvement of work presented to them at workshops, they evaluate the scholarship of prospective new members of the faculty at both hiring and tenure time, they define what counts as good in legal scholarship by performing peer reviews at the request of the growing number of law journals that have made such review a part of the article selection process, they make judgments about quality in awarding prizes, chairs, and other recognition. Those assessments of quality have real consequences, both for the sort of scholarship that makes its way into the nation's top law reviews and for the kind of work aspiring scholars will produce as they apply for teaching jobs. Obviously, law faculties can and should make room for a wide range of disciplinary approaches to legal problems. But normative discourse about the law continues to provide the most coherent framework for integrating the many methods that legal scholars bring to bear on today's problems.<sup>134</sup>

The centrality of normative legal discourse challenges the assumptions of some discipline-based scholarship, much of which prizes positive accounts

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<sup>133</sup> Workshops on legal methods, such as the law-and-economics workshops that have cropped up here and there, promise one interesting advantage: by bringing together scholarship from a variety of different substantive fields, they may encourage a return to generalist and cross-cutting analysis of substantive doctrine.

<sup>134</sup> On the normative character of legal scholarship, see Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L. J. 1205 (1981); see also Edward Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 522 (1997) (outlining the prescriptive element of legal scholarship); Edward Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1848 (1988) (identifying a "prescriptive voice distinguishes legal scholarship from most other academic fields").

over normative accounts. But many of the disciplinary scholars who come to legal scholarship find its openly normative character newly invigorating. Legal scholarship can make a significant contribution to the reform and improvement of the law, as Borchard's example underscores. Many departments in the university look for ways to contribute to society, perhaps through technology transfer to the private sector. Scholarship in law, especially where it provides insights into suggested adjustments in legal doctrine or advocates for legislative change, often leads to a comparable form of technology transfer. Law professors submit amicus briefs, they testify before legislative assemblies, and they work with law reform groups such as the American Law Institute and the National Commission on Uniform State Laws, all with a view towards influencing the future direction of law.

Empirical scholarship in procedure can make substantial contributions to the project of keeping the rules of procedure, state and federal, up to date. Indeed, rule-makers at the federal level have shown a growing appetite for empirical assessments of various kinds. Empirics underlay the amendments to Rule 11, establishing a safe harbor in 1993;<sup>135</sup> empirics informed the evaluation of changes to the practice of class actions; and empirics followed in the wake of *Twiqbal* as rule-makers weighed the import of those decisions.<sup>136</sup> A host of new studies seek to bring empirical learning to bear on the allocational decisions that abound in the fields of procedure and jurisdiction.<sup>137</sup>

#### D. *The Market for Legal Scholarship*

Reflections on the value of legal scholarship lead naturally to some consideration of the market for legal scholarship. Market-based thinking leads in turn to questions about what value legal scholarship confers on society, what justifies the high tuitions that many law students pay to underwrite the time law professors devote to their scholarship, and who ultimately pays for legal scholarship. Market-based thinking played a role in Dean Van Zandt's preference for faculty scholarship devoted to the production of monographs rather than treatises.<sup>138</sup> Van Zandt apparently

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<sup>135</sup> The advisory committee notes accompanying the 1993 amendment opens with a collection of the empirical work that had been published, examining experience under the 1983 version of Rule 11. See Advisory Comm. Notes (citing, among other works, the Third Circuit Task Force Report, prepared under the leadership of Steve Burbank).

<sup>136</sup> On the use of empirical studies in connection with the rule-making process, see Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010).

<sup>137</sup> See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013) (reviewing the explosion of empirical studies following *Twiqbal*).

<sup>138</sup> See Van Zandt, *supra* note 50 at 333 (asserting that practitioners have a "substantial market interest" in conducting doctrinal research in specialized areas of law).

believed that the willingness of the practicing bar to purchase treatises and other doctrinal material in the market lessened the need for law schools to support research to produce such materials.<sup>139</sup> From Van Zandt's perspective, faculty salary increases and research bonuses were unnecessary to bring treatises to market and the doctrine explored in such works was, in any case, unworthy of extended scholarly treatment and study.<sup>140</sup>

Recognizing that faculty members can exploit side markets for their expertise suggests the need to consider one additional problem. Private consulting promises a potentially significant source of additional income to law professors with established reputations in their fields.<sup>141</sup> Over time, the financial allure of private consulting might dampen the enthusiasm of tenured faculty for the production of new scholarship. I am unaware of any good study of the number of hours that tenured law professors devote to consulting work, but universities typically impose caps, taking the view that such projects may conflict with the faculty's professorial duties.<sup>142</sup> The market for consulting work might lead some deans to prefer discipline-based scholars on the theory that their work might attract fewer distracting opportunities to consult, at least with law firms.

Market substitutes and opportunity cost provided the basis for Judge Posner's speculation that the law faculties of the future would comprise a set of highly-paid doctrinalists and a set of more moderately compensated discipline-based scholars.<sup>143</sup> Posner reasoned that the doctrinalists could leave academia to secure employment at high-paying law firms.<sup>144</sup> So far as I can tell, however, this two-tier system of compensation has yet to take hold in legal academia. Especially at the entry-level, law schools in my experience tend to make equally valued offers to all new hires on the tenure track, without regard to the extent of the candidates' disciplinary training or their

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<sup>139</sup> *Id.*

<sup>140</sup> Had the law school captured the value created by the faculty's production of casebooks and treatises as works for hire, one might suppose that Van Zandt would have provided greater support for such scholarship. See Matthew T. Bodie, *Funding Legal Scholarship*, 4 J. L. PERIODICAL LAB'Y OF LEGAL SCHOLARSHIP 107, 113-14 (2014) (noting that though law schools fund the production of textbooks and treatises through a professor's salary, the profits from those publications flows directly to the author rather than the institution).

<sup>141</sup> See generally, Rory K Little, *Law Professors as Lawyers: Consultants, of Counsel, and the Ethics of Self-Flagellation*, 42 S. TEX. L. REV. 345 (2001) (discussing issues surrounding practicing law professors).

<sup>142</sup> See *Id.* at 369 (discussing the informal "twenty-percent" rule for outside work).

<sup>143</sup> See Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1129 (1981) (calling for a substantial increase in the salary paid to doctrinalists).

<sup>144</sup> *Id.* at 1116-17 (noting that despite the similarity in practice of doctrinal academics and practicing lawyers, law teacher salaries have remained stagnant while law firm compensation has shot up).

ability to secure alternative employment in a law firm.<sup>145</sup> But the market for consulting income, often paid by private law firms, may offer subtle support for Posner's thesis, giving rise to the income gap that Posner predicted.

Leaving aside outside income and focusing on the cost of legal scholarship and the benefits it confers on society, one might question the devotion of top law schools to the production of legal knowledge. Law professors devote a significant portion of their time to scholarship; indeed, when one considers the compensation paid to law professors, it surely includes the psychic value gained from the publication of scholarly ideas. Students underwrite the time spent on scholarship through the payment of tuition increases (made possible in turn by the market for new lawyers) that show no sign of abating.<sup>146</sup> After all, if professors taught more, law schools could get by with fewer faculty members and could offer legal education at a more affordable rate. Students might understandably wonder about their obligation to underwrite an enterprise that offers them little by way of apparent benefits. While we university insiders continue to repeat the old adage about the way good scholarship complements good teaching, evidence to support such claims is anything but abundant.<sup>147</sup> The world of legal academia is full of much beloved law teachers who contribute little by way of scholarly output.

Yet a number of factors complicate the case for reducing scholarly output to facilitate increased teaching loads and lessen the cost of legal education. Law schools compete for scholarly talent in a market. Although teaching quality plays a role in the assessment of outside talent, most hiring committees pay more attention to the quality of a candidate's scholarship.<sup>148</sup> Schools compete for talent, in turn, to improve their academic stature.<sup>149</sup> If they succeed, they will improve the value of student degrees and attract more

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<sup>145</sup> To be sure, schools may occasionally hire entry level professors into the rank of associate professor, justifying a salary increment over those hired as assistant professors. But I do not understand such practices to reflect disciplinary training. Of course, in some fields of law, such as antitrust and the calculation of damages, quantitative skills can be especially helpful, as the consulting experience of the economists associated with Compass Lexicon tends to confirm.

<sup>146</sup> Accounting for inflation, it now costs 2.76 times as much to attend a private law school, and 5.92 times as much to attend a public law school as it did in 1985. LST DATA DASHBOARD, <https://data.lawschooltransparency.com/costs/tuition>.

<sup>147</sup> See Deborah Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 809 (1998) (finding no significant relationship between teaching excellence and scholarly distinction).

<sup>148</sup> See Daniel Gordon, *Hiring Law Professors: Breaking the Back of an American Plutocratic Oligarchy*, 19 WIDENER L.J. 137 (2009) (describing the hiring process of law professors as one that is comically ill suited to identifying the most effective teachers).

<sup>149</sup> A significant portion of the U.S. News and World rankings is based on a peer assessment score which will invariably reflect the quality of scholarship produced by faculty. See Robert Morse et al., *Methodology: 2021 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 16, 2020) <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>.

talented students to future classes, confirming a change in institutional quality. While individual faculty members profit from the competition for academic talent, the market remains at least somewhat impersonal; faculty do not simply vote themselves raises in the same breath that they approve tuition increases. Instead, deans typically make both these decisions.

In an engaging study of who pays for and benefits from legal scholarship, Ed Rubin pointed out that students do not bear the cost of legal scholarship, at least in the final analysis.<sup>150</sup> Most students borrow money to finance their legal education and repay their loans either through federal loan forgiveness (assuming they take public interest jobs) or through law firm salaries.<sup>151</sup> Graduates of more prestigious national law schools draw relatively generous salaries, at least initially.<sup>152</sup> Law school prestige, in turn, both helps to ensure and may to some extent depend on the quality of a law faculty's scholarship.<sup>153</sup> Scholarship can confer benefits on students and graduates by maintaining or improving the perceived prestige of their alma mater and the value of their degrees. (Hence the understandable concern of alums with changes and especially declines in a school's ranking.) But the ultimate cost of legal scholarship may be underwritten by employers of new legal talent, including law firms, who pay the salary premiums that allow schools to raise tuition and support faculty scholarship. The ultimate incidence of educational costs (and scholarship costs) may fall on law firm clients and others who benefit from the work of new lawyers. Rubin concluded that, in this somewhat indirect way, the consumers of legal services tend to pay for the production of legal scholarship.<sup>154</sup>

In any case, law schools can probably best be seen as more broadly responsible for the production and dissemination of knowledge, rather than more narrowly focused on the production of recent law graduates. So understood, the law school mission naturally privileges scholarly engagement. Students at national schools benefit from their exposure to leading scholars in their respective fields; such exposure better prepares them for the nuanced and highly complex problems they will likely confront in practice. In that sense, the scholarly and pedagogical missions of elite schools complement one another far better than a tuition-based critique of legal scholarship might

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<sup>150</sup> Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139 (2008).

<sup>151</sup> Nearly three-quarters (74.1%) of law students graduate in debt, with an average graduating debt of \$160,000. Mel Hanson, *Average Law School Debt*, EDUCATIONDATA.ORG (Aug. 9, 2020), <https://educationdata.org/average-law-school-debt>.

<sup>152</sup> Typical graduates of T14 schools earn between \$105,000 and \$180,300 in their first year of employment. Mike Stetz, *What Law Grads Earn*, 29 NAT'L JURIST, Spring 2020 at 16.

<sup>153</sup> See Morse, *supra* note 149.

<sup>154</sup> See Rubin, *supra* note 150, at 151-53 (concluding that cost of legal scholarship properly falls on those who provide legal services and pay tuitions of recent law graduates).

allow. One might ask whether all law schools should provide the teaching relief that would enable their faculty to conduct research in the same proportions as their colleagues at national schools, but one cannot really doubt the centrality of legal scholarship.

If we see a disruption of the established model of teaching and scholarship in the modern law school, it will likely come from outside the ranks of the current T14. But post-pandemic upstarts, offering souped up versions of the zoom classes that many law schools rolled out in March 2020, might provide just such a challenge. It seems quite possible to imagine a low-cost, on-line alternative to traditional legal education that would connect proven law teachers with those willing to take law schools classes through computer screens, forgoing in exchange for reduced tuition the in-person experiences that many have seen as crucial to the past century's conception of legal education. Yet to secure accreditation and acceptance by employers, such a school would necessarily work to attract highly visible legal educators – sending a signal of quality that would attract high quality students and allay concerns with the academic rigor of the on-line program. (The University of California—Irvine adopted such a strategy when it entered the market for legal education.) Such marquee professors would presumably demand fairly generous salary and benefits (or perhaps stock options to buy shares in a for-profit start-up) as well as opportunities to research and publish. The new on-line school might economize on the costs of bricks, mortar, campus upkeep, and library books, but would still confront significant personnel costs.

#### CONCLUSION

Legal scholarship in general, like that in procedure, comes in many shapes and sizes. As Hazard explained, scholars use history, philosophy, legal theory, and empirical tools of various kinds to inform their work. One can approach legal problems from the inside, through the doctrinal and law-reform lenses of an Edwin Borchard, and from the outside, by using empirical tools to consider the impact of law in action. The best scholarship will do both, combining doctrinal sophistication with a recognition that doctrine frames but does not answer most of the questions that matter today. Burbank and Farhang demonstrate the power of interdisciplinary work that begins with a consummate command of legal doctrine and the normative issues it presents and then interrogates those issues with patient and well-constructed empirics.

Legal scholarship will grow more empirically sophisticated over time, as disciplinary training provides an entry point for criticism of slipshod methods. I suspect that the best such scholarship will combine the doctrinal nuance on display in Burbank and Farhang with an increasingly powerful set

of empirical tools (not all quantitative). One might predict that some of the best such work may take place in the field of procedure, where the scholarly community continues to reward a strong command of the law's technical language and doctrinal wrinkles. By demanding such doctrinal command as the price of doing business in the field, procedure may tend to discourage empiricists from entering the field to conduct the unthinking regression analyses that Fischman rightly criticized. Only scholars who have a strong command of the language and nuance of the law, in books and in courtrooms, will be drawn to and make headway in the field. Doctrinal sophistication cannot alone ensure that scholars will pose interesting normative questions, but an insistent demand for prescriptive implications may help.

In the end, then, one might predict that the future will bring a normative empiricism that fuses the legal scholar's prescriptive instinct for the way law changes with a set of powerful empirical tools. One of those tools, using big data to interrogate relationships, will surely play a more substantial role.<sup>155</sup> But computational technology is not the only empirical tool available to scholars. And, if the comments of Chief Justice Roberts are any indication, it may take a few more years for the legal profession to grow into the quantitative sophistication needed to make proper use of the insights of leading statisticians. For a profession in transition, the work of scholars like Edwin Borchard will remain especially powerful. Using a set of traditional empirical tools that combined the lessons of history and comparative law, Borchard's normative case for the declaratory judgment made a lasting contribution to law and scholarship. Burbank and Farhang show that, although the empirical tools may evolve, the crucial spark of normative insight continues to anchor the best procedure scholarship.

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<sup>155</sup> See Adam R. Pah, et al., *How to build a more open justice system*, 369 SCIENCE 134-36 (2020).

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